

IN THE COURT OF APPEALS

STATE OF GEORGIA

BARBARA L. HARKINS,

APPELLANT,

VS.

ATLANTA HUMANE SOCIETY and
SOCIETY FOR THE PREVENTION OF
CRUELTY TO ANIMALS, INC. and
BILL GARRETT,

APPELLEES.

AMICUS BRIEF IN SUPPORT OF APPELLANT

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QUESTION PRESENTED

Whether a new substantive right of protection is afforded statutorily in Georgia pursuant to the new O.G.C.A. § 9-11-11.1 that prior to this time did not exist?

TABLE OF AUTHORITIES

Case Law

Erie Railroad v. Tompkins, 304 U.S. 64 (1938)

Guaranty Trust Co. v. New York, 326 U.S. 99 (1954)

Klaxon Co. v. Stentor Electric Manufacturing Co.,
313 U.S. 487 (1941)

Hawks v. Hinely, 252 Ga. App. 510 (2001)

Metzler v. Rowell, 248 Ga. App. 596 (2001)

Browns Mills Development Co. v. Denton,
247 Ga. App. 232 (2000)

Statutes

O.C.G.A. § 9-11-11.1

O.C.G.A. § 51-5-7

STATEMENT OF FACTS

See Appellant's brief for a recitation of the facts that were relied on for this brief.

INTRODUCTION

Amicus In Defense of Animals (“IDA”) is a national animal protection organization headquartered in Mill Valley, California. IDA works to prevent abuse and neglect of animals wherever it happens. IDA relies to a great extent on information received from people who speak out regarding conditions inside government and quasi-governmental facilities regarding the treatment of animals within such facilities. Indeed, such people provide the only way the public, government agencies and animal protection groups can find out about conditions inside these facilities. It is critical that employees, former employees and whistle-blowers are protected from SLAPP suits when exercising their First Amendment rights. IDA has on occasion found itself the target of such suits. It is the peril faced by such persons that has prompted many states, including Georgia, to draft anti-SLAPP legislation.

IDA now urges the court to use the present case as an opportunity to breathe significant life into Georgia's anti-SLAPP statute.

ARGUMENT

POINT 1

The Court should rule that the Anti-SLAPP Statute and the Anti-SLAPP Privilege create substantive protections.

The court should find that the new O.G.C.A. § 9-11-11.1 (the anti-SLAPP statute) and its companion defamation privilege O.G.C.A. § 51-5-7 (the anti-SLAPP privilege) create new substantive protections. The anti-SLAPP statute and the anti-SLAPP privilege serve to complement and protect the substantive protections afforded by the First Amendment to persons who exercise their right of free speech. Counsel for appellant have provided affidavits from the authors of this legislation which demonstrate that it was drafted and enacted to provide substantive protections for citizens who speak out on matters of public concern. See Brief of appellant at 15. The Court should rule that the anti-SLAPP statute and privilege create new substantive protections for the First Amendment rights enjoyed by all citizens. A contrary ruling will frustrate the purpose of these statutes.

Amicus IDA endorses the arguments set forth by counsel for defendant Harkins that the anti-SLAPP statute and its corresponding privilege are substantive and that they differ significantly from a motion to dismiss and a motion for summary judgment. It is the position of amicus IDA that ruling that these protections are procedural would lead to inconsistent results in federal and state litigation. A federal court, exercising its diversity jurisdiction, is required to apply the substantive laws, but not the procedural laws, of the jurisdiction in which it sits. Erie Railroad v. Tompkins, 304 U.S. 64 (1938); Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487 (1941). A federal court will apply state procedural law, however, if the law would be “outcome determinative.” Guaranty Trust Co. v. New York, 326 U.S. 99 (1954). The Court should not allow federal court litigants to avoid the important protections of the SLAPP statute simply by declaring it to be “procedural.” To rule otherwise would be to open a Pandora’s box of questions regarding whether the anti-SLAPP statute and its corresponding privilege are “outcome determinative” in a particular instance.

A ruling that the anti-SLAPP statute and its corresponding privilege are substantive is consistent with the intent of the drafters of this legislation. Such a ruling will protect the First Amendment freedoms of Georgia’s citizens and avoid inconsistent results in state and federal litigation.

POINT II

The Court should give a robust interpretation to the Verification requirement of O.C.G.A. 9-11-11.1(b)

Defendant Harkins has filed a motion to dismiss plaintiffs' suit on the ground that it was not properly verified as required by Georgia's Anti-SLAPP law. O.C.G.A. § 9-11-11.1(b) requires both plaintiffs and their counsel to "file, contemporaneously with the pleading containing the claim, a written verification under oath . . ." This verification "shall certify that the party and his or her attorney of record, if any, have read the claim; that to the best of their knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or in good faith bargaining for the extension, modification, or reversal of existing law; that the act forming the basis for the claim is not the privileged communication under paragraph (4) of Code Section 51-5-7; and the claim is not interposed for any improper purpose such as to suppress a person's or entity's right of free speech or right to petition government, or to harass, or to cause unnecessary delay or needless increase in cost of litigation." *Id.* The statute further provides that the court "shall impose upon the persons who signed the verification . . . an appropriate sanction which may include dismissal of the claim and an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, including

a reasonable attorney's fee" if such verification is improper. Id. The goal of the verification requirement is "to discourage cavalier and unfounded lawsuits filed against someone exercising his right to petition government." Hawks v. Hinely et al., 252 Ga. App. 510, 516 (2001). IDA supports the position advanced by the defendant that the plaintiffs in this action did not properly verify their complaint. IDA urges the court to look at the factual basis for the statements made by defendant Mills and beyond plaintiffs pro forma verifications. Specifically, IDA urges the court to rule that such verifications will be subject to judicial scrutiny and that, by themselves, will not be able to frustrate the intent of the anti-SLAPP statute.

While the plaintiffs did submit verification, simply signing one's name to the language set forth in the statute cannot be considered to be tantamount to verification. Such verification cannot end the court's inquiry into whether such verification complies with the spirit of O.C.G.A. § 9-11-11.1(b). A "mechanical filing of [] 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 statute." Metzler v. Rowell, 248 Ga. App. 596, 598 (2001).

Perhaps the greatest mechanism for bringing about social change is the right of free speech as set forth in the First Amendment and applied to the states through the 14th Amendment. Without a robust verification

requirement, the anti-SLAPP statute and the anti-SLAPP privilege, O.C.G.A. § 51-5-7, risk becoming merely symbolic legislation.

As this Court stated in Hawks, “[t]he legislative intent behind the Anti-SLAPP statute is to protect the public’s right to petition the government for the redress of grievances on matters of public concern.” Hawks at 513. Clearly the Court intended the anti-SLAPP statute to have an expansive meaning and cover statements of public concern. In Browns Mills Development Company, Inc. v. Denton, 275 Ga. 2, plaintiffs did not submit verification and saw their suit dismissed as a consequence. In this case, plaintiffs did not initially submit verification. Thereafter, verification was submitted, albeit in a pro forma fashion. It is the position of amicus IDA that pro forma verification is insufficient and should not be allowed to thwart the important rights protected by this legislation.

The facts of this case make it clear that Ms. Harkins comments are well within the boundaries of protection offered by Georgia’s anti-SLAPP legislation. Ms. Harkins made comments on an issue of public concern and in connection with an issue under consideration or review by a legislative . . . proceeding” as required by O.C.G.A. § 9-11-11.1(c) insofar as her comments related to the functioning of the Fulton County Animal Control, the Atlanta Humane Society, and its Executive Director, Bill Garrett. The verification requirement of O.C.G.A. § 9-11-11.1(b) is an important initial requirement

designed to deter specious and vindictive litigation. Failure to satisfy this initial requirement leads to costs being placed on the plaintiff for initiating suit and dismissal of the action. O.C.G.A. § 9-11-11.1(b). The verification requirement serves to protect persons who speak out on issues concerning the public insofar as they provide a mechanism for reimbursing persons for the costs incurred by litigation. Id. The fact that a plaintiff is willing to incur these costs, as plaintiffs have shown in the present instance, should not influence the court's belief regarding the validity of plaintiffs' claims. The court is now presented with an important opportunity to set the course of anti-SLAPP litigation for years to come. Key elements of this case can guide cases in the future. First, the court should continue the reasoning of Hawks v Hinley et al., 252 Ga. App. 510 (2001) to the present case. In Hawks, the court showed a willingness to embrace a vision of the anti-SLAPP statute that effectuated what was envisioned by the legislature. In Hawks, the court ruled that the anti-SLAPP statute encompassed both statements made at official proceedings *and* statements which were made to initiate such proceedings. Hawks at 513. Ms. Harkins statements should be protected because they were made out of a desire to correct abuses at a county-funded facility. The fact that they were made before any official proceeding has begun should not be any moment to the court insofar as they were made "in connection with" a legislative proceeding.

Second, claims of improper verification by defendants facing SLAPP suits are likely to become more common as time passes. A ruling from the court that gives the verification requirement a robust interpretation will breathe significant life into a statute designed to protect those who speak out on public issues and reduce the number of unfounded lawsuits filed. Important factors to be considered are present in this action. Here, plaintiff AHS receives public funding and thus is a fair topic of public discussion for which First Amendment protections apply. Plaintiff Garrett is clearly a public figure, insofar as he is the president of an organization that receives public funding. Lastly, all of defendant Harkins comments related to AHS and Mr. Garrett in their professional capacities. No comment was aimed at Mr. Garrett personally. Thus, the Court should find that when these elements are present plaintiffs' claims should be dismissed and that plaintiffs should pay costs to the defendant.

Conclusion

Georgia's anti-SLAPP legislation needs to be given expansive interpretation if it is to fulfill the role it was meant to have when it was enacted by the legislature. A ruling that the anti-SLAPP statute is substantive is just in light of the intentions of the drafters of the legislation and the importance of avoiding inconsistent results in federal and state courts. This court must make clear to plaintiffs that a pro forma statement

of verification will not protect them from the remedies the statute grants to defendants who are the targets of SLAPP suits.

This 28th day of October, 2002

Respectfully Submitted,

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