

IN THE COURT OF APPEALS  
STATE OF GEORGIA

BARBARA L. HARKINS,	)	
	)	
Appellant,	)	
	)	
vs.	)	Case No.:
	)	
ATLANTA HUMANE SOCIETY and	)	
Society for Prevention of	)	
Cruelty to Animals, Inc.	)	
and	)	
BILL GARRETT,	)	
	)	
Appellees.	)	

**MS. HARKINS' APPLICATION FOR INTERLOCUTORY APPEAL**

**This case will help establish the scope of the anti-SLAPP statute and its companion defamation privilege and define the circumstances where an improperly verified claim shall be dismissed.**

COMES NOW Appellant Barbara L. Harkins ("Ms. Harkins") and pursuant to O.C.G.A. § 5-6-34(b) and Court of Appeals Rule 30, files this her Application for Interlocutory Appeal concerning the superior court's denial of her anti-SLAPP (strategic lawsuit against public participation) motion. Per Rule 30, attached as exhibits "A1" and "B1" are stamped filed copies of the Court's August 23, 2002 order to be appealed and a copy of the August 28, 2002 certificate of immediate review signed by Judge G. Conley

Ingram.

As Judge Ingram explained “the established of precedent is desirable in this case” because “the statute at issue in this application for leave to appeal has been interpreted in only five cases.” *See* **EX.B1**: Certificate. Moreover, at the July 15, 2002 motion hearing on the issue, Judge Ingram queried counsel as to whether “ ... a new substantive right of protection is afforded statutorily in Georgia [pursuant to the new § O.C.G.A. 9-11-11.1] that prior to that time did not exist... “ **EX. B1 exhibit**: Transcript of motion hearing, 07/15/02, at 59. For this reason, Ms. Harkins’ respectfully asks this Court to grant her application for interlocutory appeal.

#### **A. Introduction**

This case, which in the court below garnered affidavits from former and current State Senators who both authored and sponsored the anti-SLAPP statute, as well as an amicus brief from WSB-TV, addresses the very essence of whether the anti-SLAPP statute and its companion privilege create substantive protections for citizens who speak out on issues "of public interest or concern."

This Court has only once addressed the scope of the anti-SLAPP statute's second stage -- where a Complaint has been verified but the defendant claims a substantive flaw in the verification. Under the anti-SLAPP statute, 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 requirements—"the court, 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. This Court has affirmed that it is "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." *Hawks v. Hinely*, 252 Ga. App. 510, 515 (2001).

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 v. Rowell*, 248 Ga. App. 596, 598 (2001).

While this Court has established that an improper verification is insufficient under the anti-SLAPP statute, this case will help establish the scope of the anti-SLAPP statute and its companion defamation privilege and define the circumstances where an improperly verified claim shall be dismissed.

#### **B. Jurisdictional Statement**

This case is properly before this Court because the "Court of Appeals shall be a court of review and shall exercise appellate and certiorari jurisdiction in all cases not reserved to the Supreme Court or conferred on other courts by law." Georgia Constitution Art. 6, § 5, Para. 3. This case is not one exclusively reserved to the Supreme Court. Therefore, pursuant to O.C.G.A. 5-6-34(b), Judge G. Conley Ingram signed a Certificate of Immediate Review on August 28, 2002 regarding his earlier August 23, 2002 Order. See **EX. A1, B1**. This application is timely filed within the

statutory ten day period after such certificate is granted. O.C.G.A. 5-6-34(b)

**C. Succinct and Accurate Statement of Proceedings Below**

**Substantive Facts.** Barbara Harkins is a long-time volunteer of the Atlanta Humane Society and other similar groups who voiced her concerns about serious problems regarding animal cruelty and financial waste. Now, she is sued for speaking out.

Barbara Harkins has been a resident of Georgia for twenty-five years. **EX. F**<sup>1</sup>: Harkins Affidavit para. 2. A former high powered corporate salesperson for several national companies, Ms. Harkins volunteered for most of her adult life with humane societies working on behalf of animals. **EX. F**: Harkins Affidavit para. 2. She started volunteering for the Birmingham Humane Society in the 1970s during her summers off from college at Auburn University, and during her corporate career, she continued to volunteer tirelessly at similar animal rescue groups in Mississippi and elsewhere. **EX. F**: Harkins Affidavit para. 2.

After Harkins returned to the Atlanta area in the late 1980s as a salesperson for Pepsi, she began volunteering for the Plaintiff Atlanta Humane Society (“AHS”). **EX. F**: Harkins Affidavit para. 3. In fact, she volunteered her services for Plaintiff AHS on and off over the next ten fifteen years. **EX. F**: Harkins Affidavit para. 3.

When Harkins resigned from Pepsi in 1998 to raise her daughter, she joined the paid staff of AHS. **EX. F**: Harkins Affidavit para. 4. Ms. Harkins served as an adoption

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Exhibit letters refer to exhibits attached to Ms. Harkins’ Second SLAPP motion filed on \_\_\_ and identified in the record as R-\_\_\_).

counselor, taking animals to PetSmart for adoptions by the store's clientele and coordinating adoptions by private clientele at AHS. **EX. F:** Harkins Affidavit para. 4. In her full time job at AHS, she also briefly worked in the AHS clinic, and regularly consulted and met with animals and owners. **EX. F:** Harkins Affidavit para. 4.

During Harkins first year at AHS, she began to notice significant problems: the lack of animal cruelty investigations, the problematic spay/neuter policy, the animal adoption statistical problem. **EX F:** Harkins Affidavit para. 5. In 1999, she met with Plaintiff Bill Garrett to discuss those concerns. **EX F:** Harkins Affidavit para. 5. However, Plaintiff Garrett indicated to Ms. Harkins that he did not want to make any changes, and even if he did, the AHS board made all changes. **EX F:** Harkins Affidavit para. 5. Plaintiff Garrett instructed Harkins not to contact the AHS board. **EX F:** Harkins Affidavit para. 5. But after Garrett fired a promising new assistant executive director, Harkins wrote to the AHS board outlining her concerns. **EX. A:** 06/02/01 letter; **EX. F:** Harkins Affidavit paras. 5, 6.

In the letter, she explained why she believed the animals were suffering, and suggested policy changes that could alleviate some of the suffering. **EX. A:** 06/02/01 letter; **EX F:** Harkins Affidavit para. 6. The AHS board never responded. **EX F:** Harkins Affidavit para. 6.

Plaintiff Garrett met with Harkins later that month but only repeated his refusal to address serious problems at AHS. **EX F:** Harkins Affidavit para. 6. Ms. Harkins then advised AHS of her intent to resign. Despite Plaintiff Garrett's explicit request that she

stay, Ms. Harkins resigned on September 12, 2001. **EX F:** Harkins Affidavit para. 6.

Atlanta's WSB-TV Channel 2 initiated an investigation of Plaintiff AHS during the summer of 2001. **EX F:** Harkins affidavit para. 10. Ms. Harkins was one of many individuals interviewed by WSB-TV Channel 2 during its investigation, and one of several individuals featured in WSB-TV's spotlight series which ran on November 1, 2, and 9, 2001. **EX. G:** Murphy Affidavit para. 7; **EX. F:** Harkins Affidavit para. 10; **EX. H:** Liles Affidavit para. 6; **EX. I:** Harley Affidavit para. 4; **EX. D:** Feingold Affidavit para. 4.

The Fulton County Commission provides over \$281,000 in taxpayer funds to AHS for animal control pursuant to a contract; the City of Atlanta's portion towards AHS for animal control is \$472,000; other municipalities contribute towards the AHS animal control budget as well. **EX. B:** February 3, 1982 contract; **EX. C:** Certified 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. **EX. D:** Feingold Affidavit para. 4.

At the November 21, 2001 meeting of the Fulton County Commission, the Commissioners requested a report regarding the claims and charges made against the Fulton County Animal Control Board. **EX E:** Andrews affidavit para. 4. According to Dr. James Fason – the liaison between Fulton County Animal Control and the Fulton County Commission – the Commissioners requested that staff give a report on animal control problems:

“[A] request was made from staff to give a report on animal control. There was a number of e-mails and phone calls and what we did was kind

of separate out the questions and in the report that we gave you and it kind of asks what services does animal control serve to Fulton.”

**EX. C:** 12/05/01 minutes at 241, 240; *see also* **EX. E:** Andrews affidavit para. 5.

The following week, Harkins and others met with a large contingent of the staff of the Fulton County Commission to discuss the award of the Fulton County Animal Control contract to Plaintiff AHS. **EX. D:** Feingold Affidavit para. 4; **EX. F:** Harkins Affidavit para. 16; **EX. H:** Liles Affidavit para. 6; **EX. I:** Harley Affidavit para. 4. This led into the December 5, 2001 meeting of the County Commission, where Dr. Fason reported on the issues of concern including adoption policies and cruelty<sup>2</sup> cases. **EX. C:** Certified 12/05/01 minutes at 241-243. The Commission was extremely interested in these issues.<sup>3</sup> **EX C:** Certified 12/05/01 minutes at 244; **EX. E:** Andrews affidavit paras. 7, 8. 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?**” **EX. C:** Certified 12/05/01 minutes at 244 (emphasis added).

On December 11, 2001, Dr. Fason’s office sent a letter to the Fulton County Manager’s office suggesting changes to the animal control with respect to cruelty and

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In 2000, the Georgia General Assembly passed the “Animal Protection Act of 2000” to address animal abuse and abandonment. **EX. M.** The Court may remember the publicity surrounding the passage of this bill, which was signed into law by the Governor on April 27, 2000.

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Several other cities across the United States recently were successful in improving their animal control systems. (**EX. N:** Los Angeles; **EX. O:** Indianapolis).

adoption procedures. Animal control policy/procedures recommendations were included.

**EX. J:** 12/11/01 Inter-office memorandum from Steven R. Cover to Thomas C. Andrews; **EX. E:** Andrews Affidavit para. 8.

On December 19, 2001, the Fulton County Commission again heard further public comment about these issues, and whether or not Plaintiff AHS should continue to receive the animal control contract. **EX C:** certified 12/19/01 minutes at 73-78. In fact, prior to that meeting, Plaintiff Garrett wrote a letter to the Commission expressing his thoughts on why Plaintiff AHS should remain the recipient of the county's animal control contract. **EX. K:** 12/17/01 letter from Plaintiff Garrett to Fulton County Commission Chairman calling "public/ partnership" between AHS and Fulton County "one of benefit to the people as well as the animals of Fulton County" and "vital services."

**Procedural Facts.** Two days later, as the Fulton Commission considered the termination of its contract with AHS, Plaintiffs filed suit against Harkins.<sup>4</sup> Plaintiffs also filed a similar SLAPP suit against Ms. Kathi Mills containing similar allegations on December 21, 2001. **EX. L:** Certified copy of Complaint: *Atlanta Humane Society et al. v. Mills*, Superior Court of Gwinnett County, Civil Action File No. 01A132691.

Ms. Harkins moved to dismiss the Plaintiff's Complaint on January 25, 2002, pursuant to O.C.G.A. § 9-11-11.1, Georgia's anti-SLAPP statute. On the day of the hearing, January 31, 2002, Plaintiffs verified their Complaint in accordance with

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Discussion of the issues continued into the 2002 year and additional public comment was heard at the January 16, 2002 Fulton County Commission meeting. **EX. P:** Certified copies 01/16/02 Fulton County Commission meeting at 50-55.

O.C.G.A. § 9-11-11.1. As a result, this Court denied Ms. Harkins' motion, holding: "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." Order, 02/01/02.

Ms. Harkins subsequently sought a ruling on the merits under the anti-SLAPP statute, and therefore filed her Second SLAPP motion, the subject of this appeal. Judge G. Conley Ingram heard evidence and argument on July 15, 2002. He denied the motion on July \_\_\_, 2002, and Ms. Harkins moved for reconsideration. Judge Ingram denied the motion for reconsideration on August 23, 2002, and certified it for interlocutory appeal on August 28, 2002 in order to allow the Court of Appeals to decide whether "... a new substantive right of protection is afforded statutorily in Georgia [pursuant to the new § O.C.G.A. 9-11-11.1] that prior to that time did not exist..." **EX. B1 exhibit:** Transcript of motion hearing, 07/15/02, at 59. For this reason, Ms. Harkins' respectfully asks this Court to grant her application for interlocutory appeal

**D. Argument and Citation of Authority**

O.C.G.A. § 9-11-11.1 was designed 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, 547 S.E.2d 311 (2001). The Georgia General Assembly enacted the anti-SLAPP statute, O.C.G.A. § 9-11-11.1, in 1996 in order to prevent "SLAPPs" (strategic lawsuits against public participation). *Providence Construction Company v. Bauer*, 229 Ga. App. 679, 679, 494 S.E.2d 527, 528 (1997). As the Georgia Supreme Court

recently has stated, “the intent of the statute is to encourage the exercise of free speech and afford a procedural protection to acts of communication on public issues.” *Denton et al. v. Browns Mill Development Co.*, S01G0515 (March 27, 2002).

1. **This case involves a strategic lawsuit against public participation (SLAPP).**
  - a. **Ms. Harkins communications constituted the speech contemplated by the anti-SLAPP statute.**

“[A]ct 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” includes:

[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, v. Rowell*, 248 Ga. App. 596, 547 S.E.2d 311 (2001).

The anti-SLAPP statute 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).” As established by these interlocking Code sections, the law includes two examples of protected statements:

2. Any statement made to any ‘official proceeding authorized by law;’ or
3. Any statement made in connection with an issue under consideration by any official proceeding.

*Metzler v. Rowell*, 248 Ga. App. 596, 547 S.E.2d 311 (2001).

- b. **Defendant’s free speech and petition referenced matters of public concern.**

As discussed above, the Plaintiffs' lawsuit constitutes the classic example of a SLAPP suit that § 9-11-11.1 was specifically designed to prohibit. *See* Daniel A. Kent & Douglas M Isenberg, *Georgia's New Anti-SLAPP Statute: Protecting the Right of Free Speech Against Meritless Claims*, Ga. Bar. J. (June 1997), at 26 (explaining that "[t]he type of lawsuit usually described as a paradigmatic SLAPP involves a developer who sues opponents of his rezoning plan... claiming that his opponents have libeled him by writing letters, circulating petitions and otherwise voicing opposition to the rezoning. While the developer's lawsuit may be meritless, it nevertheless silences his opponents, who cannot afford to defend themselves). The Plaintiffs' lawsuit is just such a SLAPP suit by an organization attempting to silence concerned citizens<sup>3</sup> who Plaintiffs apparently assumed would not be able to afford to defend themselves adequately.

c. **Ms. Harkins' speech was made in connection with an issue of public concern and before an official proceeding.**

The anti-SLAPP statute includes statements made prior to an existing official

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<sup>3</sup>The Plaintiffs have filed a similar SLAPP suit against Ms. Kathi Mills containing similar allegations on December 21, 2001 (Superior Court of Gwinnett County, Civil Action File No. 01A132691). The Plaintiffs recently have indicated that they plan to file up to sixty similar lawsuits in total. Ex. K.

proceeding. See *Hawks et al. v. Hinely et al.*, 2001 WL 1453928 (Nov. 16, 2001). Recently, the Georgia’s Court of Appeals considered what constituted an official proceeding, and instructed that a “myopic construction” of the speech covered by the anti-SLAPP statute would produce “undesirable and illogical results and consequences.” *Hawks et al. v. Hinely et al.*, 2001 WL 1453928 (Nov. 16, 2001) (affirming dismissal of complaint for failure to verify). In *Hawks*, the Plaintiffs argued that the anti-SLAPP statute encompassed only statement made to an existing ‘proceeding.’” *Id.* **The Court explicitly held that the anti-SLAPP statute encompassed statements made prior to any existing proceedings.** *Id.* (emphasis added).

In *Hawks*, the speech at issue was a petition for the recall of some elected officials. Firmly dismissing the officials’ claim that the SLAPP statute did not apply – because the statements in the recall applications were made prior to the initiation of a “proceeding” – the **Hawks** court stated that “[e]xcluding the petition itself that initiates a ‘proceeding to address matters of public concern from the reach of the anti-SLAPP statute would defeat a central purpose of the state - to protect the right to petition government.” *Id.*

Ms. Harkins statements, as discussed above, have been and are the subject of multiple Fulton County Commission meetings. Ex. \_\_\_\_\_. Similarly, Fulton County Animal Control now is scheduling meetings to address the matters which were the subject of Ms. Harkins’ speech. Ex. \_

**d. Plaintiff=s Claims Should Be Dismissed Pursuant to O.C.G.A. ' 9-11-11.1 (b) Because They Are Not Well Grounded in Fact or Warranted by Existing Law.**

Additionally, because Harkins statements are privileged under Georgia law, and

the Plaintiffs have failed to prove any malice that would to evaporate such privilege(s), Georgia=s anti-SLAPP statute mandates dismissal because claims are not well grounded in fact or warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. O.C.G.A. ' 9-11-11.1(b).

Plaintiffs boldly assert but never attempt to justify claims of actual malice. In fact, Plaintiffs= Complaint, briefs and evidence only make conclusory claims of malice. Compl. at 2 (A[t]he Defendant [made statements] falsely and maliciously or with careless or reckless disregard for the truth and facts); See Pls.= Br. in Resp. and Opp=n to Def.=s (Second) SLAPP Mot. at 1 (Plaintiffs contend that statements made by Defendant were knowingly false, defamatory and damaging).

Actually, the only evidence in record directly supports Harkins= good faith.<sup>1</sup> Harkins= lifelong passion for animal welfare, fifteen years of direct involvement with the Atlanta Humane Society as a volunteer and employee, and the sworn testimonies of numerous witnesses indicate a complete lack of malice on her part. **EX. F:** Aff. of Harkins. As explained below, Plaintiffs= failure to provide factual predicate for allegations of actual malice in the face of overwhelming evidence to the contrary mandates dismissal under Georgia=s anti-SLAPP statute

- e. This case should be dismissed under Georgia=s anti-SLAPP statute because the communications at issue were privileged.

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<sup>1</sup> In Shehan v. Keen, 26 Ga. App. 339, 339 (1921), the Court of Appeals found that when a defendant asserts privilege and such evidence stands uncontradicted and undisputed, the defendant's plea of privilege [is] sustained, and a verdict in his favor [is] demanded by the evidence.

- (1) The statements complained of are privileged as statements made in connection with an issue of public interest or concern. O.C.G.A. § 9-11-11.1(b); O.C.G.A. § 51-5-7(4) (Georgia anti-SLAPP privilege is an independent basis for dismissal under Georgia anti-SLAPP law). *See* R-\_\_: Defendant's Reply Brief in Support of Second Motion to Dismiss SLAPP Suit at 4.
- (2) The statements complained of are privileged under Georgia law for several independent reasons: first, because made in the performance of a private moral duty, O.C.G.A. § 51-5-7(2); second, because made with bona fide intent to protect her own interest, O.C.G.A. § 51-5-7(3); third, because made upon the acts of public persons in their public capacities, O.C.G.A. § 51-5-7(9). *See* R-\_\_: Defendant's Reply Brief at 7-9. Moreover, the statements are privileged under the United States Constitution because Plaintiffs are public figures. *Id.* at 9.
- (3) The Respondents have utterly failed to establish by clear and convincing evidence any factual predicate for malice.<sup>2</sup> *Id.* at 11-13.
- (4) Certain statements complained of are protected opinions. *Id.* at 14.

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<sup>2</sup> In Respondent Garrett's fourth and most recent affidavit, he again fails to provide any factual predicate for malice and even fails to use the buzzword "malice" anywhere. R-\_\_: Garrett Aff., July 10, 2002.

(5) Certain statements complained of are substantially true based upon the undisputed evidence and Plaintiffs' own statements. *Id.* at 16.

**f. Plaintiffs' lawsuit is interposed for improper purpose.**

The anti-SLAPP statute seeks to discourage cavalier and unfounded lawsuits against someone exercising his free speech and petition rights. *Hawks*. With the anti-SLAPP statute, the General Assembly sought to prevent the chilling effect that abusive lawsuits would have on the valid exercise of these rights. O.C.G.A. 9-11-11.1(a); *Hawks*. In defiance of the General Assembly's mandate, Plaintiffs have filed suit against Ms. Harkins, Plaintiffs have filed suit against Ms. Mills, and Plaintiffs have threatened to file suit against at least 58 other defendants. Ex. L. These facts show that Plaintiffs' claims are "interposed for improper purpose" and that their claim is neither well grounded in law nor fact, as the statute requires. Because Plaintiffs' lawsuit is a SLAPP, this Court must dismiss their Complaint.

**2. The anti-SLAPP statute and its companion privilege create substantive protections for citizens who speak out on issues 'of public interest or concern.'**

**a. Georgia's Anti-SLAPP statute and anti-SLAPP privilege create special protections for persons speaking on issues of public interest or concern.**

The anti-SLAPP statute and corollary anti-SLAPP privilege were not passed unanimously in both bodies of the General Assembly to be redundant code sections duplicating either the motion to dismiss for failure to state a claim or motion for summary judgment. Rather, the statutes were designed to address a need to create special protections for citizens who should not be chilled through abuse of the judicial process.

simply for expressing their concerns. *Accord Hawks*, 252 Ga. App. at 515-16 (In order to achieve this purpose the anti-SLAPP statute employs verification requirements to discourage cavalier and unfounded lawsuits filed against someone exercising their right to petition). As the affidavit of Mary Margaret Oliver, the original sponsor of the anti-SLAPP statute in the Georgia Senate, makes clear, A[t]he anti-SLAPP statute was intended to provide additional remedies, above and beyond those available from the summary judgment and motion to dismiss mechanisms, and is a unique vehicle [which] intends to achieve a new substantive right. R-\_\_: Oliver Aff. at 2 (emphasis added). See also R-\_\_: Haines Aff. at 2 (AThe anti-SLAPP statuteY[is] intended to provide additional substantive grounds for dismissal).

Unlike either summary judgment or a motion to dismiss for failure to state a claim, the anti-SLAPP statute requires no motion from a party<sup>3</sup> and has independent and distinct triggers<sup>4</sup> not used in either the dismissal or summary judgment setting. Georgia appellate courts have found that the motion to dismiss for failure to state a claim is analogous in many ways but that Athe verification process under O.C.G.A. ' 9-11-11.1(b) insures that the claims it covers are substantively proper. *Hawks*, 252 Ga. App. at 517. Therefore, Harkins submits that this Court should feel Abound 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.* at 515.

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<sup>3</sup> The court may rule Aupon its own motion. O.C.G.A. ' 9-11-11.1(b).

<sup>4</sup> O.C.G.A. ' 9-11-11.1(b) requires dismissal and sanctions due to any of four conditions. See Defendant=s Reply Brief in Support of Second Motion to Dismiss at 4. Failure on any ground means that the Complaint Ashall be stricken. *Hawks*, 252 Ga. App. at 515-16. (A>Shall= ordinarily denotes command and not permission).

Finally, the anti-SLAPP legislation also contemporaneously created a new privilege that is specifically referenced in O.C.G.A. § 9-11-11.1(b) as an independent basis for dismissing a SLAPP case:

The following communications are deemed privileged: (4) 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 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. § 51-5-7.

These interlocking Code sections incorporate [the same] free speech and petition definition. *Metzler*, 248 Ga. App. at 598; *see also* 13 Ga. St. U.L. Rev. at 28. If a statement is privileged under the new anti-SLAPP privilege or any other defamation privilege, libel claims shall be stricken. *See Metzler*, 248 Ga. App. at 599 (finding lawsuit to be SLAPP suit both under anti-SLAPP defamation privilege and good faith statements privilege).

The decisions arising out of Georgia's anti-SLAPP statute and its new privilege confirm and give life to the special protection for speakers on issues of public interest or concern. Every defamation or similar claim raised in a SLAPP suit has been rejected by Georgia's appellate courts, who have given the statute an expansive definition. *Denton*, 247 Ga. App. 232; *Metzler*, 248 Ga. App. at 596; *Hawks*, 252 Ga. App. at 510; *Providence Construction Co. v. Bauer*, 229 Ga. App. 679 (1997); *Davis v. Enemis Publishing Corp.*, 244 Ga. App. 795 (2000).

- b. **An anti-SLAPP motion to strike may be based on pleadings and evidence.**

**I. An Anti-SLAPP Motion to Strike May Be Based on Pleadings and Evidence.**  
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The parties agree that an anti-SLAPP motion is properly treated as a motion to dismiss or strike, even when partially based on evidence beyond the pleadings. *See* R-\_\_ (Plaintiffs= AWhat is SLAPP?@ Brief at 2, n.4.) This Court=s concern over the proper procedural treatment of such a motion is directly addressed in *Metzler*, the only appellate SLAPP decision dealing with a verification in violation of the statute (as opposed to a failure to file a verification at all). The court in *Metzler* explicitly rejected Metzler=s claim that the SLAPP issue must be considered at summary judgment. Rather, the court held, Athe General Assembly has established a mechanism by which the threshold question of compliance with the anti-SLAPP statute is decided on motion to dismiss or motion to strike.@<sup>5</sup> *Metzler*, 248 Ga. App. at 315. *See also* 13 Ga. St. U.L. Rev. 23 (noting, in a description of the act creating the SLAPP statute, AIf a plaintiff falsely verifies a claim, the Act allows the defendant to file a motion to strike or to dismiss the claim and to ask the court to impose sanctions@).

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<sup>5</sup>As the court in *Metzler* noted, even prior to the anti-SLAPP law, certain types of motions to dismiss could encompass evidence outside the pleadings. Under O.C.G.A. 9-11-12(b), only motions to dismiss *for failure to state a*

In *Metzler*, the defendant's motion relied on evidence *outside the pleadings*; nevertheless, the court held that in light of the discovery and evidentiary standards of O.C.G.A. § 9-11-11.1 *Metzler* was not entitled to stand on general and conclusory allegations of his complaint in the face of direct testimony to the contrary. Looking to the limited discovery provision of the anti-SLAPP statute, the court found that:

The statutory scheme provides for limited discovery in conjunction with the filing of a motion to dismiss or strike, [and] the introduction of evidence produced by that discovery *should not convert the motion to one for summary judgment*. *Metzler*, 248 Ga. App. at 315 (emphasis added). *Accord Browns Mill Development Co., Inc., v. Denton*, 247 Ga. App. 232, 237 (2000) (If on an evidentiary motion there is a showing that the verification was made in violation of the Code section, then the trial court shall impose appropriate sanctions).

This is consistent with the approach taken by other states in applying their anti-SLAPP legislation. *See, e.g., Morse Bros., Inc. v. Webster*, 772 A.2d 842 (Me. 2001) (court must consider both pleading and affidavits when evaluating defendant's special motion to dismiss under Maine anti-SLAPP law); *Thomas v. L.A. Times Communications*, 189 F.Supp.2d 1005 (C.D. Cal. 2002) (California anti-SLAPP law sets up a special motion to strike that is akin to a Rule 12(b)(6) motion to dismiss); *Wilcox v. Superior Court*, 27 Cal. App. 4<sup>th</sup> 809, 828 (1994) (court must consider both pleading and

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*claim* or motions for judgment on the pleadings can be converted into summary judgment motions. Other motions to dismiss (for example, for insufficiency of process or lack of jurisdiction) are not converted to summary judgment motions even when outside evidence is considered. *See Terrell v. Porter*, 189 Ga. App. 778, 779-780 (1989).

affidavits when evaluating defendant=s motion to strike under anti-SLAPP law).

Thus, this Court should review both the pleadings and evidence in considering Harkins= Motion to Strike. *See Denton v. Browns Mill Development Co., Inc.*, 275 Ga. 2, 7 (Awhile any verification dispute is pending ... the court can ultimately reject the verification to the plaintiff=s expense@).

The Respondents have sued Harkins and other whistleblowers simply for expressing their legitimate concerns about the treatment of animals. They have threatened to sue as many as 60 other persons (including defense counsel on this case).<sup>6</sup> In their effort to block the truth, they have evaded Georgia=s Open Records Act and now misuse defamation laws to achieve their ends.<sup>7</sup>

If this Court reviews the claims and evidence in this case against the backdrop of Georgia=s anti-SLAPP law and its statutory and constitutional protections for free speech, the Respondents= claims simply fail to measure up. Rhetoric<sup>8</sup> does not replace

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<sup>6</sup> See Letter from James V. Zito to Hollie Manheimer et al., February 1, 2002 (attached to Defendant=s Notice of Response to Plaintiffs= SLAPP Threat) (AWe consider Defendant=s >S.L.A.P.P.= claim, as well as Mr. Weber=s purported >comments=Yabusive, frivolous, and outrageous [and] defamatory@).

<sup>7</sup> See Letter from Kathryn Allen, Senior Assistant Attorney General, to Bill Garrett, January 9, 2002 (Exhibit A to WSB-TV=s Brief of Amicus Curiae in Support of Motion to Dismiss)

<sup>8</sup> The rhetoric reaches its height in Plaintiffs= AWhat is SLAPP?@ Brief at 3 (AWSB has understandable concern to shield what appears as WSB bungling, bumbling and lazy >reporting= and to keep WSB idiots hidden from view in their idiot box@; WSB personnel Ademonstrate adherence for deaf, dumb and blind slothfulness with the

evidence or the law. Harkins asks this Court to grant her application for interlocutory appeal because this case will help establish the scope of the anti-SLAPP statute and its companion defamation privilege and define the circumstances where an improperly verified claim shall be dismissed

**E. Conclusion**

For all the foregoing reasons, Ms. Harkins respectfully asks this Court to grant her Application for Interlocutory Appeal.

Respectfully submitted,

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inquisitiveness and observant powers of a cumulus cloud; ADo they believe the [injured] animals take MARTA trains?@)

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