

5.1

Synopsis of Georgia Cases

SECTION 5 GEORGIA'S ANTI-SLAPP STATUTE

5.1 SYNOPSIS OF CASES REGARDING GEORGIA'S ANTI-SLAPP STATUTE, O.C.G.A. § 9-11-11.1

- 1997 *Providence Constr. Co. v. Bauer*, 229 Ga. App. 679 (1997) (Beasley, J.):
- * Upholding dismissal under O.C.G.A. § 9-11-11.1 of action for injunction, breach of contract and tortious interference with contractual relations by developer against residents who actively opposed rezoning proposals.
- 2000 *Davis v. Emmis Publ'g Corp.*, 244 Ga. App. 795 (2000) (Blackburn, J.):
- * Plaintiff sued publisher for libel, false light invasion of privacy and tortious interference with business relations in connection with a magazine article. Defendants raised in their answer the defense that Plaintiff failed to verify his complaint, pursuant to the anti-SLAPP statute.
 - * Assuming the anti-SLAPP statute applied to the case, the Court held that the plaintiff was required to verify his complaint within 10 days of being notified of the verification omission and his failure to do so was not amendable defect and, thus, his complaint should have been stricken.
 - * In his concurrence, Judge Eldridge wrote that the anti-SLAPP statute did not apply to the case and the statute was not intended to protect the media from tort liability.
- 2001 *Hawks v. Hinely*, 252 Ga. App. 510 (2001) (Blackburn, J.):
- * Holding that failure to comply with verification requirements of O.C.G.A. 9-11-1.1 was a non amendable defect that should result in a dismissal with prejudice.
- 2002 *Denton v. Browns Mill Dev. Co., Inc.*, 275 Ga. 2 (2002) (Hines, J.):
- * Developers filed action for trespass, libel, slander, and intentional interference with business operations against Appellant, a resident who opposed the development of natural areas.
 - * The Court affirmed the dismissal of the libel, slander and intentional interference with business operations claims because the Developers' complaint was not properly verified, pursuant to the anti-SLAPP statute. However, the Court affirmed the Court of Appeals' holding that the anti-SLAPP statute did not apply to the trespass claim and, therefore, that claim should not be dismissed.
- 2003 *Metzler v. Rowell*, 248 Ga. App. 596 (2003) (Smith, J.):
- * Landowner brought suit against residents who were vocal opponents of his plan to redevelop his property . The causes of action were tortious interferences with business relations, trespass, and interference with right of quite enjoyment of property.
 - * The Court affirmed dismissal, holding that the statements of the concerned residents were privileged and, therefore, O.C.G.A. 9-11-11.1 applied. The

court held that plaintiff's framing of his claims as tortious interference with contract or business relations does not render the assertion of privilege inapplicable.

2003

Chatham Orthopaedic Surgery Ctr., LLC v. Ga. Alliance of Cmty. Hosps., Inc., 262 Ga. App. 353 (2003) (Phipps, J.), *overruled by Berryhill v. Ga. Cmty. Support & Solutions*, No. S06G0038 (Ga. Nov. 28, 2006) (Carley, J):

- * Recognizing that, unlike other state anti-SLAPP statutes, "Georgia's is not limited to actions brought by or against particular classes of parties."
- * Noting that both the party asserting the claim and the party's attorney of record must properly verify the complaint and holding that the failure to file a timely verification is a nonamendable defect.

2003

Buckley v. DIRECTV, Inc., 276 F. Supp. 1271 (N.D. Ga. 2003) (Shoob, J.):

- * Defendant, DIRECTV, Inc., sent letters to thousands of individuals, including plaintiffs, who were identified as owners of devices used to unscramble DIRECTV's satellite signals without authorization. The letters informed plaintiffs of the illegality of their conduct, and it notified them that they would face legal action unless they agreed to a settlement. After receiving this information, plaintiffs sued DIRECTV. DIRECTV moved to dismiss the complaint pursuant to Georgia's anti-SLAPP statute. Plaintiffs argued that the statute did not apply because DIRECTV's demand letters did not involve an issue of public interest or concern.
- * Court disagrees with plaintiffs and dismisses their complaint, explaining that a letter in preparation of legal proceedings is an act in furtherance of free speech or the right to petition the government for redress of grievances, and fact that the demand letters were sent to thousands of people regarding an issue affecting millions renders plaintiffs' claims as touching on matters of public concern.

2004

Land v. Boone, 265 Ga. App. 551 (2004) (Eldridge, J.):

- * Stating in dicta that dismissal for failure to verify is without prejudice and the suit may be refiled.

2004

Walden v. Shelton, 270 Ga. App. 239 (2004) (Eldridge, J.):

- * Recognizing that expenses and attorney fees are available under O.C.G.A. 9-11-11.1 when a complaint is verified in violation of the statute; however, such an award is not mandatory.

2004

Harkins v. Atlanta Humane Soc'y, 278 Ga. 451 (2004) (Carley, J.):

- * Former employee of the AHS and another woman publicly criticized the AHS and its executive director on television and internet message boards alleging problems with operations at the AHS. The AHS and its executive director brought defamation actions against the women but failed to verify their complaints. The trial court denied the women's motions to dismiss

under the anti-SLAPP statute because the complaints were later amended to provide verifications.

- * The Supreme Court recognized that O.C.G.A. 9-11-11.1 allows dismissal if a claim is falsely verified; however, it held that “dismissal cannot be based solely on evidence that the claim involves statements in furtherance of the right of free speech or the right to petition the government, in connection with an issue under consideration or review by a governmental body.” The Court held that once such a determination is made, the claim cannot be dismissed unless the trial court determines that : “(a) the claimant or his attorney did not reasonably believe that the claim was well grounded in fact and that it was warranted by existing law or a good faith argument for the modification of existing law, (b) the claim was interposed for an improper purpose, or (c) the defendant's statements were privileged pursuant to O.C.G.A. 51-5-7.”
- * The Court remanded the cases to the Court of Appeals where they remain pending.

2004

Blissitt v. Doctors for Medical Liab. Reform, No. 2004CV90693, 2004 WL 5219364 (Ga. Super. Ct., Fulton County Dec 16, 2004) (Barnes, J.):

- * Plaintiff filed suit for invasion of privacy, commercial misappropriation and publication of private facts after hospital film crew filmed her and broadcast her image without consent. Court held that anti-SLAPP did not apply as a matter of law.
- * Court found question of fact as to whether tortious misconduct in the form of invasion of plaintiff's right to privacy was committed in gathering the information used in the speech. If such a tort was committed, defendants would not have protection by the anti-SLAPP statute. Anti-SLAPP statute does not safeguard extrajudicial action, which constitutes tortious misconduct to gather information for use in free speech or petition.

2006

Berryhill v. Ga. Cmty. Support & Solutions, 281 Ga. 439 (2006) (Carley, J):

- * Court affirms lower court's decision holding that the anti-SLAPP statute does not encompass all statements that touch upon matters of public concern but is limited to those statements that fall within the definition of O.C.G.A. § 9-11-11.1(c).
- * Court holds that list of acts following “includes” in O.C.G.A. § 9-11-11.1(c) is exhaustive, and it rejects plaintiff's argument that the term should be interpreted broadly as one of enlargement or illustration.
- * Court overrules *Chatham v. Orthopaedic Surgery Ctr. v. Ga. Alliance of Cmty. Hosps.*, 262 Ga. App. 353 (2003), because it erroneously interpreted “includes” as “includes,” but “is not limited to.”

2006

Chatham Orthopaedic Surgery Ctr., LLC v. White, 283 Ga. App. 10 (2006) (Barnes, J.):

- * Appellants filed a malpractice action against attorney claiming that he breached the standard of care by failing to file a verified complaint in

accordance with O.C.G.A. § 9-11-11.1(b), and by failing to cure the defect by amending the complaint within ten days.

- * Court finds that lower court properly granted summary judgment in favor of attorney on appellants' claim that attorney breached duty by failing to verify the complaint within the ten-day period because "at the time of the original lawsuit, Georgia law was unsettled as to the effect of a dismissal in cases where written verifications had not been filed within the ten-day period."
- * Court finds that lower court erroneously granted summary judgment in favor of attorney on appellants' claim that attorney breached duty by failing to advise them about the potential *risks* associated with not verifying the complaint within the ten-day period, given the conflicting case law on the matter.

2006

EarthResources, LLC v. Morgan County, 281 Ga. 396 (2006) (Benham, J.):

- * Plaintiff moved to dismiss defendant's motion for attorney's fees, arguing that Georgia's anti-SLAPP statute prevented a fee award, but trial court denied plaintiff's motion.
- * Supreme Court finds that anti-SLAPP statute does not apply to defendant's claim for attorney's fees. Plaintiff had a full, public consideration of its grievance, and it lost case on the merits. The anti-SLAPP statute was not intended to immunize from the consequences of abusive litigation a party who has asserted a claim lacking any justiciable issues of law or fact. Anti-SLAPP statute does not protect those who abuse the judicial process.

2007

Hagemann v. City of Marietta, 287 Ga. App. 1 (2007) (Phipps, J.):

- * Counterclaims violate anti-SLAPP statute because verifications were false; court reverses lower court decision finding otherwise.
- * Plaintiff's declaratory judgment challenging rezoning constitutes petition to judiciary for redress of grievances in connection with issue of public interest or concern and thus falls within anti-SLAPP statute.
- * Because city's counterclaims were filed in response to this action, they also fall within statute's ambit.
- * City filed verifications for counterclaims, but mere filing is insufficient where it is shown that verifications are false. Allegations contained in counterclaims reveal with certainty that city would not be entitled to relief under any set of facts.
- * Because record shows that neither city's attorney nor its mayor could have reasonably believed counterclaims were warranted, verifications to the contrary violated anti-SLAPP statute.

2007

Smith v. Wal-Mart Stores, Inc., 475 F. Supp. 2d 1318 (N.D. Ga. 2007) (Batten, J.):

- * Anti-SLAPP statute does not apply.
- * For anti-SLAPP statute to apply, statements from which alleged SLAPP litigation arises must be made in relation to some official proceeding.

- * Court rejects claim that allegedly infringing statements comparing Wal-Mart to Al Qaeda constitute statements made in connection with an issue under consideration in an official proceeding and thus fall within anti-SLAPP statute.

2007

Adventure Outdoors, Inc. v. Bloomberg, 519 F. Supp. 2d 1258 (N.D. Ga. 2007) (Forrester, S.J.), reversed on other grounds, 552 F.3d 1290 (11th Cir. 2008):

- * Defendants, New York City officials, sued plaintiffs (and others) in New York district court for participating in illegal gun sales. Defendants commented on this ongoing litigation in an accompanying press conference and press release. Plaintiffs sued defendants in Northern District of Georgia for libel and slander for this speech.
- * Defendants argue that because this speech includes statements before a judicial proceeding, plaintiffs' causes of action against those statements must be verified in accordance with anti-SLAPP statute.
- * Court performs *Erie* analysis and concludes anti-SLAPP statute does not apply because it directly conflicts with Federal Rule of Civil Procedure 8(a) because 8(a) requires only a short, plain statement of claim showing pleader is entitled to relief, but anti-SLAPP statute would impose heightened pleading requirement by also requiring verification.
- * However, court recognizes that aspects of anti-SLAPP statute regarding what communications are privileged under O.C.G.A. § 51-5-7 can be considered "substantive" rather than "procedural" and are thus applicable in federal court.

2008

Hagemann v. Berkman Wynhaven Assocs., L.P., 290 Ga. App. 677 (2008) (Bernes, J.):

- * In prior action, individual property owner filed suit against City of Marietta in effort to block rezoning of neighboring property in connection with potential sale of that property by Berkman Wynhaven to a developer. After deal to sell property fell apart, in part because of litigation, Berkman Wynhaven filed instant action against property owner asserting claims of tortious interference with business relations and contractual relations, conspiracy to tortiously interfere with business and contractual relationships and to commit fraud, and defamation. Defendant moved to dismiss based on anti-SLAPP statute. Prior to decision on motion, plaintiff voluntarily dismissed suit without prejudice. Defendant filed motion for attorney's fees and expenses under O.C.G.A. § 9-11-11.1(f), which the trial denied. Defendant appealed.
- * Court of Appeals found that trial court erred in not awarding defendant attorney's fees and remanded to the trial court for a determination of the proper amount.
- * O.C.G.A. § 9-11-11.1(b) provides that court "shall" impose sanctions upon finding that a party has falsely verified a complaint.
- * Court made required threshold finding that anti-SLAPP statute applied to plaintiff's claims. Plaintiff's allegations of tortious behavior were covered

by anti-SLAPP statute because the tortious behavior complained about was the filing of the prior suit.

- * Court held that verifications that claims were well grounded in fact and warranted by law filed in support of complaint were false because, as a matter of law, claim for tortious interference with contractual relations cannot be predicated upon alleged improper filing of lawsuit.
- * Court held that by use of word "shall," General Assembly required courts to impose a sanction upon finding a false verification (expressly disapproving *Walden v. Shelton*, 270 Ga. App. 239 (2004), to the extent it gives trial court discretion regarding whether to impose sanction).
- * Voluntary dismissal of lawsuit did not constitute a sanction.
- * Smith, J. (concurring) emphasized that appropriate sanction could include one of all of the following: fine, public reprimand, litigation costs, or attorney's fees.
- * Blackburn, J. (dissenting) stating that anti-SLAPP statute intends to grant trial discretion as to form of sanction and that dismissal of case was appropriate sanction.

2008 *Boxcar Dev. Corp. v. New World Communications of Atlanta, Inc.*, No. 08CV2248-10, 2008 WL 1943313 (Ga. Super. Ct., DeKalb County May 1, 2008) (Wood, J.):

- * Business brought claims for defamation, invasion of privacy, fraudulent misrepresentation, and intentional infliction of emotional distress against local news station for investigative report questioning plaintiff's business practices. Court dismissed suit with prejudice due to plaintiff's failure to comply with anti-SLAPP statute verification requirements.
- * Generic verifications that allegations in complaint were true and accurate did not meet requirements of O.C.G.A. § 9-11-11.1(b).
- * A defendant who comments upon potential illegal or wrongful conduct made in connection with issue under consideration or review by government has engaged in an "act" under Georgia's anti-SLAPP statute. Even defendant's statement made prior to initiation of government investigation qualifies as an "act" of free speech under anti-SLAPP statute.
- * By its very nature, investigative news report is medium that seeks to influence the public or government.

2008 *Jenkins v. Anderson*, No. A08A1832, 2008 WL 5248987 (Ga. Ct. App. Dec. 18, 2008) (Andrews, J.):

- * Member of City Council sued individual defendant alleged that defendant made defamatory statements about him in numerous letters and e-mails.
- * Pursuant to anti-SLAPP statute, trial court may dismiss claim where it makes substantive, evidentiary determination that the verification is false because the claim infringes on the rights of free speech or petition as defined by the statute.
- * After a hearing, the trial court made a substantive, evidentiary determination that the verification that was filed was partially false

because the statements in question were privileged pursuant to O.C.G.A. § 51-5-7(4).

- * Appellate court was unable to address plaintiff's claim on appeal that the trial court's determination was erroneous because the alleged statements in the letter were not part of the record on appeal. Although the trial court considered the letter, neither the letter nor the substance of the statements was included in the record on appeal. Plaintiff bears the burden of showing affirmatively that the trial court erroneously found the statements privileged and could not carry that burden on the record before the court. Appellate court therefore must assume that trial court's ruling was proper.
- * Appellate court reversed trial court's order to the extent it dismissed defamation claims that were not based on the particular letter at issue.

2009

Lovett v. Capital Principles, LLC, 300 Ga. App. 799 (2009) (Andrews, P.J.):

- * Holding that anti-SLAPP statute applied in an action by the former manager of school system's technology department, who alleged that school board employees, who were hired to make recommendations regarding implementation of a computer software program, slandered her and interfered with her business relationship with the school system.
- * Boards consideration of the issue of how to implement the computer program in the school system was an "official proceeding authorized by law" within the meaning of the anti-SLAPP statute, and the defendants' oral statements to the board in connection with the issue under review in the instant case "could reasonably be construed as [acts] in furtherance of the right of free speech ... in connection with an issue of public interest or concern." OCGA § 9-11-11.1(b).
- * Noting that the fact that defendants' acted while engaged in a commercial transaction did not render the verification requirements of the anti-SLAPP statute inapplicable. The fact that the speech at issue was motivated by a commercial consideration did not lessen the constitutional protection to which the speech was entitled.
- * Affirming dismissal of former manager's complaint. As anti-SLAPP statute applied to the action, the former manager was required to comply with the provisions of O.C.G.A. § 9-11-11.1(b) and timely file a verification of her complaint at the time of filing the complaint, or within ten days after the omission was brought to her attention. Plaintiff had failed to verify her complaint either at the time of filing, or subsequently when the omission was brought to her attention.