

No. S-02-G-0361

IN THE SUPREME COURT OF THE STATE OF GEORGIA

BRUCE MATHIS,
a.k.a. “duelly41”,

Plaintiff-Appellee,

v.

THOMAS C. CANNON,

Defendant-Appellant.

On Appeal from the
Court of Appeals of Georgia

BRIEF OF AMICUS CURIAE
GEORGIA FIRST AMENDMENT FOUNDATION

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ENUMERATION OF ERRORS

1. Whether the Superior Court and Court of Appeals erred in declining to rule as a matter of law that Defendant's use of rhetorical hyperbole is fully protected under the First Amendment and Georgia law.

2. Whether the Superior Court and Court of Appeals committed legal error in failing to review Defendant's challenged statements about a politically controversial public works contractor in the full context in which they were made.

3. Whether the Superior Court and Court of Appeals erred in refusing to require that Plaintiff show "actual malice" i.e., knowing falsity or reckless disregard for the truth before permitting the recovery of punitive damages.

STATEMENT OF THE CASE

Statement of Interest

The Georgia First Amendment Foundation (“GFAF”) is a Georgia non-profit corporation organized in 1994 to inform and educate the public on government access and First Amendment issues and to provide legal support in cases in which the public’s access to public institutions is threatened. In this case, the fundamental right of freedom of speech under the First Amendment is threatened, particularly in connection with comment on important public issues.

Preliminary Statement

Amicus curiae GFAF, by its undersigned attorneys, submits this Brief in support of the appeal from the Order of the Court of Appeals granting Plaintiff Thomas Cannon (“Cannon”) summary judgment.

This defamation action arises out of certain inflammatory statements made by Defendant Bruce Mathis in an Internet “chat room” regarding Plaintiff Thomas Cannon, an officer and director of Trans Waste Services, Inc. (“TransWaste”), a public works contractor performing waste management services for and under contract with the governmental authority of Crisp County, Georgia. The controversy arises out of a controversial and highly debated policy adopted by the Crisp County authorities to enter into a contract with a private company to locate a state-wide dumping facility in Crisp County. The Solid Waste Management Authority of Crisp County entered into a contract with TransWaste to provide pick-up and delivery services to the site. Cannon, as an officer and director of TransWaste’s parent company, was centrally involved in these activities for TransWaste in its dealings with the Crisp County Authority, having been present at meetings regarding the dumping policy and having participated in discussions regarding the issues raised by the new policy.

In a public internet chat room dedicated to comments about TransWaste, Defendant Mathis vehemently objected to Crisp County's new waste management policies and to TransWaste's involvement in creating a state-wide dump under the authority of the Crisp County. Using the screen name "duelly41" Mathis posted written notes expressing his anger and displeasure directly about Cannon, an officer and director of TransWaste, characterizing Cannon's actions in the county as those of a "thief" or a "crook." These heated and highly rhetorical comments were brought to Cannon's attention, who sued Mathis for the libel.

The Trial Court and the Court of Appeals have failed in this case to apply well-established Georgia law protecting freedom of speech and vigorous debate about important public matters which recognizes that rhetorical statements and epithets cannot be the basis for liability for libel. In addition, the lower courts failed to recognize that due to plaintiff's central involvement in a public function (waste management) under contract with the Crisp County public authority, Cannon has become a "public figure" as relates to this contract and must prove "actual malice" (knowing falsity or reckless disregard of the truth) in order to recover punitive damages for allegedly libelous comments relating to this contract.

The GFAF wishes to make the limited point that the lower courts' refusal to dismiss Cannon's defamation claims as a matter of law conflicts directly with important speech protections under the First Amendment and Georgia law. At issue here is the constitutional right of a citizen to express his/her opinions using figurative language and rhetorical hyperbole in the context of a debate on a subject of vital public importance and interest. Because no finder of fact could reasonably reach a sustainable finding that in the context of this debate Mathis was literally accusing Cannon of a crime, Cannon's defamation claim should have been dismissed.

ARGUMENT AND CITATION OF AUTHORITIES

I. DEFENDANT MATHIS' STATEMENTS ARE PROTECTED UNDER GEORGIA LAW AND THE FIRST AMENDMENT AS "RHETORICAL HYPERBOLE"

The freedom of speech under the Georgia Constitution and the First Amendment to the United States Constitution is one of the most basic tenets upon which our nation was founded. Specifically, it represents the “‘profound national commitment’ to the principle that ‘debate on public issues should be uninhibited, robust, and wide-open.’” State v. Miller, 260 Ga. 669, 671, 398 S.E.2d 547, 549 (1990) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)). It is this commitment that serves as the root of the protections that apply to defamation claims, which is critically important when the speech relates to matters of public concern. See Diamond v. American Fam. Corp., 186 Ga. App. 681, 682-82, 368 S.E.2d 350, 352 (1988). Thus, protections have arisen for speech that is properly characterized as either rhetorical hyperbole or opinion, if defamatory facts are not implied.

A. This Court Should Not Discourage Discourse On Public Issues By Characterizing Rhetorical Hyperbole As Defamatory

Under Georgia law, a person “‘cannot be sued for simply expressing his opinion of another person, however unreasonable the opinion or vituperative the expressing of it may be. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.’” Kendrick v. Jaeger, 210 Ga. App. 376, 377, 436 S.E.2d 92, 93-94 (1993) (quoting Bergen v. Martindale-Hubbell, 176 Ga. App. 745, 747, 337 S.E.2d 770, 772 (1985) (citations and punctuation omitted)); see also Georgia Const., art. I, sec. I, Para. V (“Every person may speak, write, and publish sentiments on all subjects □ .”). As the Georgia Court of Appeals recently held in Jaillett v. Georgia Television Co.:

The requirement that, to be actionable, a statement of opinion must imply an assertion of objective facts about the plaintiff “unquestionably excludes from defamation liability not only statements of rhetorical hyperbole ... but also statements clearly recognizable as pure opinion because their factual premises are revealed Both types of assertions have an identical impact on readers – neither reasonably appearing factual – and hence are protected equally under the principles espoused in Milkovich.”

238 Ga. App. 885, 890, 520 S.E.2d 721, 726 (1999) (quoting Phantom Touring v. Affiliated Publications, 953 F.2d 724, 731 n. 13 (1st Cir. 1992)). Similarly, the First Amendment “provides protection for statements that cannot ‘reasonably [be] interpreted as stating actual facts’ about an individual. (citation omitted). This provides assurance that public debate will not suffer for lack of ‘imaginative expression’ or the ‘rhetorical hyperbole’ which has traditionally added much to the discourse of our Nation.” See Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990).

In encouraging discourse on public issues, both federal and state courts have repeatedly rejected defamation claims that challenge a speaker’s use of “rhetorical hyperbole,” namely, the sort of “loose, figurative language that no reasonable person would believe presented facts.” Levinsky’s, Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122, 128 (1st Cir. 1997) (competitor’s statement in magazine article that plaintiff’s store was “trashy” not actionable); see also Letter Carriers v. Austin, 418 U.S. 264, 284-86 (1974) (First Amendment protected hyperbolic statement that plaintiff was a “traitor” as it was made “in a loose, figurative sense” and was nothing more than “lusty and imaginative expression”); Greenbelt Coop. Publ’g Ass’n v. Bresler, 398 U.S. 6, 13-14 (1970) (newspaper’s description of developer’s conduct as “blackmail” not actionable); United States Steel v. Tieceo, Inc., 261 F.3d 1275, 1293-94 (11th Cir. 2001) (under Alabama law, statement analogizing party’s conduct to that of “Jeffrey Dahmer” could not

reasonably be interpreted as likening party to a convicted mass murderer); Dunn v. Air Line Pilots Ass'n, 193 F.3d 1185, 1191-95 & n.6 (11th Cir. 1999) (defendant's placement of plaintiff's name on list of "scabs" not defamatory as matter of law); Keller v. Miami Herald Publ'g Co., 778 F.2d 711, 717 (11th Cir. 1985) (cartoon depicting nursing home operators as gangsters and likening nursing home to "haunted house" not actionable); Rosenauer v. Scherer, 88 Cal. App. 4th 260, 105 Cal. Rptr. 2d 674 (Cal. App. 2001) (local candidate's statement that commercial landowner was "thief" and "liar" protected by First Amendment); Webster v. Wilkins, 217 Ga. App. 194, 456 S.E.2d 699, 700 (1995) (assertion that plaintiff mother was "unfit to have a kid" not actionable). Most recently, the Eleventh Circuit recognized this protection in holding the statements of a news commentator on a talk show that an anti-abortion activist was an "accomplice to murder" protected as rhetorical hyperbole under the First Amendment and Georgia law. See Horsley v. Rivera, -- F.3d --, No. 01-15821 (11th Cir. May 28, 2002).

In Keller v. Miami Herald Publishing Co., the Eleventh Circuit held that in determining whether a statement is entitled to protection as rhetorical hyperbole, the court must consider both "the circumstances" and "the medium through which the statement is expressed." 778 F.2d at 715-16. In holding a political cartoon's depiction of nursing home owners as gangsters not actionable, the Court rejected plaintiff's "strictly literal interpretation" because "it would have been unreasonable to interpret the cartoonist as alleging that [plaintiff] was involved in specific criminal activity or was a member of organized crime merely because the three men in the cartoon were dressed like gangsters." Id. at 716.

Several post-Keller decisions in the Georgia Court of Appeals illustrate the proscription against “strictly literal interpretation” of hyperbolic statements that — out of context — might appear to assert legal conclusions concerning the status or conduct of the plaintiff. In Webster v. Wilkins, a mother sued the father of her child for saying that she was “unfit to have a kid” in a newspaper interview. 217 Ga. App. at 194, 456 S.E.2d at 700. The Georgia Court of Appeals reviewed defendant’s statement in the context of the entire article and concluded:

It is apparent from the context of the article that [defendant] did not use the phrase . . . in its legal sense or as a legal conclusion, but used it only to express his subjective opinion criticizing [plaintiff’s] parental abilities. More importantly, the average reader would not have construed [defendant’s] statement to be his legal conclusion that pursuant to [Georgia law plaintiff] is an unfit parent.

Id. at 700-01. In affirming summary judgment for the defendants, the court held that “the average reader, construing the statement in the context of the entire article, would have taken the statement for what it was, a subjective, hyperbolic opinion that cannot be proved to be true or false and that concerns a matter on which reasonable people might differ.” Id. at 701. The court concluded that “[b]ecause [the] statement was a wholly subjective opinion not capable of proof or disproof, the statement cannot support this defamation action.” Id.; see also Bird v. Weis Broad. Corp., 193 Ga. App. 657, 657, 388 S.E.2d 710, 711 (1989) (finding song lyrics which mentioned plaintiff’s towing service by name, and included the lyrics: “it’s like havin’ a license to rob,” protected as rhetorical hyperbole and expression of opinion); Jaillett v. Georgia Television Co., 238 Ga. App. 885, 890-91, 520 S.E.2d 721, 725-26 (1999) (finding “rip-off” merely rhetorical hyperbole when used in consumer report about an air conditioner repair business).

As the First Circuit explained in Levinsky’s (127 F.3d at 129-30):

The First Amendment's shielding of figurative language reflects the reality that exaggeration and non-literal commentary have become an integral part of social discourse. For better or worse, our society has long since passed the stage at which the word "bastard" would occasion an investigation of the target's lineage or the cry "you pig" would prompt a probe for a porcine pedigree. Hyperbole is very much the coin of the modern realm. In extending full constitutional protection to this category of speech, the Milkovich Court recognized the need to segregate casually used words, no matter how tastelessly couched, from fact based accusations.

The lower court's findings in this case are contrary to the case law established in analogous cases such as Keller and Webster and in the First Amendment arena. Here, the lower court found that Mathis' statements that Cannon was a "thief" amounts to a false accusation of a felony punishable under Georgia law. However, when the statement is examined -- as it must be -- in the full context of the comments made and the medium in which it was expressed -- an Internet chat room -- no reasonable person could conclude that Mathis was *literally* contending that Cannon could be criminally charged under Georgia law as a thief. It is clear in the context that Mathis was using the term "thief" as a pungent and figurative means of expressing his belief that the waste management services provided by Cannon's employer, TransWaste, were taking away the value of Crisp County by turning the county into the "dumping grounds" of the South. In this context, Mathis was not making a technical legal charge, but an assertion that Cannon shared in the moral responsibility for such unwarranted reduction in the value of the Crisp County property. Mathis' statements in reference to Cannon as a "crook" are similarly protected.

B. Mathis' Statements Concerning Cannon's Employment History Must Be Evaluated In The Whole Context In Which The Statements Were Made

The Court must consider the context in which the statements were made -- in an Internet chat room -- in which the use of colorful language is the norm and heated debate is fueled by the participants' anonymity. To find liability based on the use of such colorful language would discourage participation in such forums and dampen robust debate on public issues, in contravention of the First Amendment and Georgia law.

It is clear from the statements in this case, taken as a whole and in the context made in this internet chat room, that Mathis was voicing his emotionally-charged views concerning issues of great public importance. He used hyperbolic, figurative and graphic language in conveying his views. It was Mathis' right, both under the First Amendment and Georgia common law, to employ such language without fear that liability in tort would be later be imposed based on a *post hoc*, clinical dissection of his expression outside the context in which it occurred. Accordingly, plaintiff's defamation claims should have been dismissed as a matter of law.

The lower court's affirmation of summary judgment for Cannon regarding Mathis' statements questioning why Cannon was fired from his previous job, when in fact Cannon has asserted that he was not fired, goes beyond the Court's authority to interpret such statements. If an allegedly defamatory statement is "not ambiguous and can reasonably have but one interpretation, the question is one of law for the judge." Thomason v. Times-Journal, Inc., 190 Ga. App. 601, 601, 379 S.E.2d 551, 552 (1989); Willis v. United Family Life Ins., 226 Ga. App. 661, 662, 487 S.E.2d 376, 379 (1997). The Court of Appeals found that Mathis' statements regarding Cannon's prior employment "clearly imply that he was terminated for dishonest behavior" and thus, constitute libel per se. To the contrary, the Court must "read and construe the [statements] as a whole," taking into consideration the context in which the statements were

made. Thomason, 190 Ga. App. at 601, 379 S.E.2d at 552. Any statement “claimed to be defamatory must be read and construed in the sense in which the [viewers] to whom it is addressed would ordinarily understand it.” Southern Co. v. Hamburg, 220 Ga. App. 834, 838, 470 S.E.2d 467, 471 (1996).

Mathis’ statements were made in connection with his figurative discourse regarding the County’s waste management services. A reasonable person reading Mathis’ statements in the Internet chat room would not necessarily read Mathis’ statements as implying defamatory facts about Cannon – but could simply perceive the statements as they were – highly charged statements in the context of expressing his concerns about an important matter public policy in Crisp County. Thus, to unequivocally proclaim that the statements have but one interpretation goes too far and the Court should evaluate the entire context in which the statements were made.

II. CANNON MUST SHOW ACTUAL MALICE BEFORE RECOVERING PUNITIVE DAMAGES

The Court should require Cannon to prove actual malice before permitting any recovery of punitive damages.

First of all, it is well-established under Georgia law that proof of actual malice is required in order to recover punitive damages for defamatory statements. See, e.g. John D. Robinson Corp. v. Southern Marine & Indus. Supply Co., 196 Ga. App. 402, 406, 395 S.E.2d 837, 841 (1990); Pugh v. McCarty, 40 Ga. 444 (1869); Rosanova v. Playboy Enterp., Inc., 411 F. Supp. 440, 445 (S.D. Ga. 1976); see also O.C.G.A. § 51-12-5.1. To allow recovery of punitive damages without a showing of actual malice would render the protections of free speech established in New York Times Co. v. Sullivan and Gertz v. Welch meaningless.

Second, this matter involves a matter of public concern which raises the level of protection to which speech surrounding it is afforded. “It is speech on “matters of public

concern” that is ‘at the heart of the First Amendment’s protection.’” Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759 (1985). “Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the “highest rung of the hierarchy of First Amendment values,” and is entitled to special protection.” Id. (citations omitted).

Thus, when speech involves a matter of public concern, a showing of actual malice is required in order to recover punitive damages. Id. at 756-57, Gertz v. Welch, 418 U.S. 323, 348 (1974). “Whether ... speech addresses a matter of public concern must be determined by [the expression's] content, form, and context ... as revealed by the whole record.” Dun, 472 U.S. at 761 (citation omitted). Here it is clear that Mathis was concerned with waste management in Crisp County.

The issue of the deposit of statewide waste in Crisp County is a matter of high public and political interest on which there is spirited debate. In such circumstances, the fact that someone has engaged in private contracting for the waste disposal is no shield to the public’s right to access information regarding such services. Just as private entities hired to carry out the functions of public agencies are subject to public inspection and scrutiny through the Open Records Act, O.C.G.A. § 50-18-70, and the Open Meetings Act, O.C.G.A. § 50-14-1, et. seq. (see, e.g., Red & Black Publ’g Co. v. Board of Regents, 262 Ga. 848, 852, 427 S.E.2d 257 (1993) (holding student organization delegated to perform duties of state university subject to Open Records Act and Open Meetings Act); Northwest Ga. Health Sys., Inc. v. Times-Journal, Inc., 218 Ga. App. 336, 461 S.E.2d 297, 300 (1995) (finding hospital corporation hired to operate public hospital system subject to Open Records Act); Hackworth v. Bd. of Educ. for the City of Atlanta, 214 Ga. App. 17, 447 S.E.2d 78 (1994) (finding that private school bus company personnel records were public records of the school district)), private entities hired to carry out

the functions of public agencies should be subject to public criticism. Here, TransWaste, although a private company, is performing a public service in providing waste management services for Crisp County. As such, TransWaste and its officers and directors should be subject to the same level of public scrutiny as if the County itself was performing the services.

Similarly, the fact that one is drawn into a public debate by virtue of their efforts to obtain private benefit from public contracts is no shield from the exposure to the heated debate about the actions in which the private contractor is engaged. Accordingly, the protections afforded speech in New York Times v. Sullivan should attach to comments about someone carrying out the role of a public official under a private contract where the comments relate to the performance of those public duties. Speech concerning public officials in their public capacity are privileged under Georgia law and require a showing of actual malice in order to recover. See O.C.G.A. § 51-5-5, et. seq.; Smith v. Turner, 764 F. Sup. 632, 641 (N.D. Ga. 1991); see also New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 283 (1964) (requiring a showing of actual malice under the First Amendment). This requirement should extend to comments directed both at an official's role in a public controversy and the official himself:

The New York Times rule is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed. The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character.

Garrison v. Louisiana, 379 U.S. 64, 76 (1964).

As the officer of a company providing public services in Crisp County, Cannon should be subject to this higher level of scrutiny. The fact that the scrutiny extends beyond the public controversy itself should not limit the application of the actual malice rule. To hold otherwise

would discourage public discourse on public policies and the individuals selected to implement them.

Accordingly, the Court should find that Cannon must show actual malice before punitive damages may be recovered.

CONCLUSION

For the reasons stated above, GFAF respectfully requests that the Court recognize the protections afforded rhetorical hyperbole and the application of the actual malice rule to this action.

Dated: July ____, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing Brief of Amicus Curiae Georgia First Amendment Foundation upon the parties to this action, by causing a true and correct copy thereof to be delivered to their counsel of record by U.S. Mail, postage prepaid as follows:

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This _____ day of July, 2002.

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