

IN THE STATE COURT OF FULTON COUNTY  
STATE OF GEORGIA

OMAR ALI, 1800 JONESBORO RD LLC,  
AND UMMAH HOLDINGS LLC,

*Plaintiffs,*

v.

HEATHER M. GRAYBILL, ZACHARY  
MURRAY, PAULA KUPERSMITH, AND  
ANTONIO F. GLASS,

*Defendants.*

CIVIL ACTION CASE NO.:  
24EV003341

**DEFENDANTS' REPLY IN FURTHER SUPPORT OF MOTION TO STRIKE  
PURSUANT TO O.C.G.A. § 9-11-11.1 AND TO DISMISS FOR FAILURE TO STATE A  
CLAIM & OPPOSITION TO PLAINTIFFS' MOTION FOR DISCOVERY**

Defendants Heather Graybill, Zachary Murray, Paula Kupersmith, and Antonio Glass (collectively “Defendants”) file this consolidated Reply in further support of their Motion to Strike/Motion to Dismiss Plaintiffs’ Amended Complaint and in Opposition to Plaintiffs’ Motion for Discovery. Scrambling to salvage their meritless action, Plaintiffs Omar Ali and his corporate entities (collectively “Ali”) tell a different story at every turn. Ali’s initial complaint *identified not a single alleged defamatory statement by any particular Defendant* but rather globally attacked Defendants’ public participation on matters of public concern – namely, whether Atlanta Public Schools (“APS”) should sell or retain the historic Lakewood Heights Elementary School (“Lakewood Elementary” or “the School”), how and by whom it should be redeveloped, and what the public-engagement process should be for making those decisions. *See generally* Complaint. Realizing the futility of that approach since all of the foregoing speech is clearly protected and not defamatory, *see* Motion to Strike at 8-11, 13-21, Ali hurriedly filed an Amended Complaint that shifted to accusing Defendants of expressing negative opinions about

him in private conversations about the future of Lakewood Elementary and Ali's suitability for acquiring or redeveloping the School. *See* Amend. Compl. (adding ¶¶ 29-41). Defendants' Motion to Strike debunked the notion that those private conversations provide any basis for liability. *See* Motion to Strike at 17-21 (citing myriad cases which hold that expressing a negative opinion, hyperbole, or conjecture about a party, including that which relates to the party's profession or trade, are not actionable statements of facts). Now, in a true "hail Mary," Ali's attaches to his Opposition an Affidavit -- nowhere referenced in his pleadings -- from a Kim Brooks, who purports to recount statements by Defendants Murray and Kupersmith that were allegedly made in private, "closed door" conversations with her relating to Ali's inserting himself into and trying to control the outcome of the public debate over the future of the Lakewood Heights neighborhood generally, and Lakewood Elementary in particular.

#### **Brooks' Affidavit Does Not Advance Ali's Cause**

Brooks' Affidavit does not advance Ali's cause. First, her Affidavit is not part of Ali's pleadings and is therefore not properly before this Court for purposes of Defendants' Motion to Dismiss. *See Love v. Fulton Cnty. Bd. of Tax Assessors*, 348 Ga. App. 309, 315 (2018) ("consideration of a motion to dismiss for failure to state a claim is limited to the four corners of the complaint and any exhibits attached thereto"; trial court appropriately refused to consider exhibits "submitted by the plaintiffs in response to the motion to dismiss"). In other words, Brooks' Affidavit should not be considered in deciding whether Ali's Amended Complaint sufficiently alleges the essential elements of his claims -- which it does not. *See* Appendix A hereto (chart summarizing grounds for Motion to Dismiss, independent of anti-SLAPP analysis).

Second, Brooks' Affidavit purports to recount only statements of non-actionable opinion, hyperbole, and conjecture. *See* Appendix B hereto (replicating and addressing Ali's chart of 30 alleged defamatory statements, including Nos. 2, 3, 7, 10, 13, 16, 25-30 sourced to Brooks' Affidavit). Thus, Brooks' affidavit, even if it were to be incorporated into Ali's pleadings, fails to state a claim for defamation or libel per se, and fails to demonstrate that Ali has a probability of prevailing on either of those claims.

Third, Ali cannot show that Defendants' purported statements to Brooks damaged his reputation in her eyes. *See Air Wisc. Airlines Corp. v. Hoeper*, 571 U.S. 237, 252 (2014) ("In defamation law, the reputational harm caused by a false statement *is* its effect on a reader's or listener's mind.") (original emphasis). From the time Brooks first initiated contact with Defendants, and continuing throughout her interactions with them, she independently espoused a very negative view of Ali. For instance, she reported to Defendants that Ali was calling Kupersmith a racist, was telling people that Graybill has family ties to the Ku Klux Klan (true defamation), was tearing down Murray as someone who cannot appreciate Black excellence, and was keeping files on all four Defendants. Brooks further criticized Ali for not being a successful businessman in his own right. She repeatedly asserted that Ali was spoiled and un-deserving of his father's legacy or of her respect. And Brooks commented that Allie bullies his tenants and described how he had tried to bully her.<sup>1</sup> Given Brooks' pre-existing and persistently low opinion of Ali as both a person and a businessman, he suffered no reputational harm by dent of Defendants Murray and Kupersmith's purported statements to Brooks.

**Defendants' Speech is Protected by Georgia's Anti-SLAPP Statute**

Defendants' public and private speech described in Ali's Amended Complaint and its attachments relates to APS's retention or disposition of Lakewood Elementary, whether and how the School should be redeveloped, Ali's aspirational role as either a purchaser or redeveloper of the School, and the public-engagement process for decision-making about all of the foregoing issues. These topics are all matters of public concern currently pending before APS and the Atlanta Board of Education ("ABOE").<sup>2</sup> Defendants' speech is therefore protected under the

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<sup>1</sup> *See* Defts Ex. G (August 31, 2024 Kupersmith Affidavit) at ¶¶ 4, 7-10; Defts Ex. H (Brooks text messages dated March 11, 2024; March 20, 2024; March 22, 2024); Defts Ex. J (Brooks group text message dated April 11, 2024); and Defts Ex. K (August 31, 2024 Glass Affidavit) at ¶¶ 4-8.

<sup>2</sup> *See, e.g.*, Defts Ex. F at pp. 1, 7 & 8 (April & May 2022 emails from Ali pressuring APS/ABOE officials to speed up their decision-making process about Lakewood Elementary, and May 2002 email from Defendant Murray calling for APS's process to be respected); Exhibit 8 at ¶ 31 (link to public comments made by Defendants and Ali during January 2023 ABOE

relatively broad anti-SLAPP provision codified at O.C.G.A. § 9-11-11.1(c)(2) (protecting speech “made in connection with an issue under consideration or review by a legislative, executive, or judicial body or any other official proceeding authorized by law”). *See* Motion to Strike at 9-10.<sup>3</sup>

Equally applicable to Defendants’ speech is the catch-all, anti-SLAPP provision O.C.G.A. § 9-11-11.1(c)(4) which protects “[a]ny other conduct in furtherance of the exercise of the constitutional right of petition or free speech in connection with a public issue or an issue of public concern.” This covers Defendants’ public and private speech in connection with Lakewood Elementary as well as regarding Ali’s more global efforts to influence the general direction and development of the Lakewood Heights community where Defendants are all home owners. The following evidence reflects that Ali’s presence and influence in Lakewood Heights is a matter of public concern, including but not limited to as relates to his interest in Lakewood Elementary: media coverage and neighborhood propaganda materials, public comment at government meetings, communications with APS/ABOE officials, differing opinions on whether neighborhood association groups should support Ali, and Ali’s efforts to control leadership in the Lakewood Heights Community Association and influence the outcome of neighborhood

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meeting about disposition of APS surplus properties, including Lakewood Elementary); Defts Ex. 2 (February 2023 emails between APS/ABOE officials and Neighborhood Planning Unit-Y [NPU-Y] chairperson about endorsing Ali as redeveloper for the School and APS superintendent responding that such community input is “premature”); Defts Ex. 10 at ¶ 22 (link to July 2023 WABE broadcast with Rose Scott where Ali and Defendant Murray shared their different views on the future direction of the Lakewood Heights neighborhood, including the School); Ali Exs. 1 & 2 to Amend. Compl. (Oct. 2023 & Nov. 2023 *SaportaReport* articles reporting different perspectives from Defendant Murray and Ali about the future of Lakewood Elementary and the process for public input regarding same).

<sup>3</sup> Some of Defendants’ speech also falls within the narrower anti-SLAPP protected categories of O.C.G.A. § 9-11-11.1(c)(1) and (c)(3). *See* Motion to Strike at 8-9 & 10-11. The Georgia Supreme Court endorses looking to California anti-SLAPP cases for guidance in applying Georgia’s own anti-SLAPP statute. *See ACLU v. Zeh*, 312 Ga. 647, 653, n.6 (2021) (“In *Wilkes*, [306 Ga. 252, 257-258,] this Court explained that when interpreting OCGA § 9-11-11.1 as it was amended in 2016 to substantially track California’s anti-SLAPP procedure as set out in California Code of Civil Procedure § 425.16, we may look for guidance to California’s more extensive case law interpreting similar provisions of that state’s anti-SLAPP code.”).

association votes.<sup>4</sup> Defendants’ speech on any of these topics is therefore protected under O.C.G.A. § 9-11-11.1(c)(4).

Defendants have shown that all of Defendants’ speech at issue in this litigation is covered by one or more subsections of O.C.G.A. § 9-11-11.1(c). However, Georgia courts are less granular in their analysis, holding that speech is protected so long as at least one subsection of O.C.G.A. § 9-11-11.1(c) feasibly applies, without need of specifically identifying which one. *See, e.g., Morgan v. Mainstreet Newspapers, Inc.*, 368 Ga. App. 111, 117 (2023) (defendant’s conduct “could reasonably be construed” as “fitting within one of the categories spelled out in O.C.G.A. § 9-11-11.1(c)” where either (c)(2) or (c)(4) could apply); *Equity Prime Mortg. v. Greene for Cong., Inc.*, 366 Ga. App. 207, 214 (2022) (statements supporting step-mother of officer who shot and killed Rayshard Brooks “could reasonably be construed as fitting within one of the categories spelled out in O.C.G.A. § 9-11-11.1(c),” without specifying which one). Defendants’ speech readily meets this standard and is therefore protected.

*Smith v. Wal-Mart Stores, Inc.*, 475 F. Supp. 2d 1318 (N.D. Ga. 2007) -- the sole case Ali cites to argue the contrary -- is inapposite. A 2007 copyright infringement case, *Smith* pre-dates by nearly a decade the 2016 amendment of Georgia’s anti-SLAPP statute that extended protection to any speech on matters of public concern, not just speech relating to issues “under consideration or review” in an official proceeding as the pre-2016 version of the anti-SLAPP statute decreed. Were *Smith* to be decided under Georgia’s current, more expansive anti-SLAPP law, his speech would likely have been deemed protected. Moreover, in *Smith*, there was no official proceeding of any sort to which Smith’s speech related, leading the court to find it was unprotected under the former, narrower version of the statute. Here, in contrast, Defendants’ speech clearly relates to matters under consideration in official proceedings by APS/ABOE. In sum, *Smith* has no instructive value on either the facts or the law.

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<sup>4</sup> *See* footnote 2 above. *See also* Ali Exs. 3, 4, 6, 9, 10 to Amend. Compl.; Defts Exs. 1 & 7-11 to Motion to Strike; Defts Reply Ex. A at ¶¶ 9-11, Ex. G at ¶¶ 4-5, Ex. I at ¶¶ 6-9, Ex. K at ¶ 4, and Ex. L at ¶¶ 5-11.

**Ali has not sufficiently plead his claims, nor can he show probability of prevailing**

Defendants having shown that their speech is protected under one or more subsections of O.C.G.A. § 9-11-11.1(c), the burden shifts to Ali to show probability of prevailing on his claims. To the extent Ali has failed to adequately even plead his claims (see Appendix A), he obviously fails to show probability of prevailing. But even if this Court were to extend Ali the unwarranted grace of not dismissing his Amended Complaint for its facial shortcomings, he fails to show probability of any eventual success. With respect to tortious interference (Counts II & III), Ali offers only conclusory allegations, but no facts or evidence, to show the existence of any actual or mutually-contemplated contract between himself and APS, or any quantifiable monetary damage resulting from any alleged breach proximately caused by Defendants. *See* Opp. at 22-24 (devoid of facts or evidence on tortious interference). Ali's failure is inexcusable given that evidence of a contract and specific financial damage would already be in his possession if it existed. Ali is further incapable of proving that Defendants' conduct proximately caused him financial harm since, even absent Defendants' speech, it is not guaranteed that APS would have put Lakewood Elementary up for sale, let alone sold it to Ali. And Ali remains free to bid for a lease-and-redevelopment contract for the School once APS begins that process. *See* Motion to Strike at 4-6, 24; *Tribeca Homes, LLC v. Marathon Inv. Corp.*, 322 Ga. App. 596, 599 (2013) ("any damage claimed to have been suffered by a plaintiff does not proximately result from the defendants' alleged misconduct, if the damage would have occurred notwithstanding their misconduct"). Ali's tortious interference claims are therefore doomed.

Ali also fails to show probability of prevailing on defamation or libel per se (Counts IV & V). Crucially, he has not alleged any actionable statement of fact, let alone any that he can likely prove to be false. As Appendix B makes clear, each of Ali's 30 alleged defamatory statements are all protected opinion, hyperbole, or conjecture; and/or are absolutely privileged statements made in court filings in this litigation; and/or else are time-barred by the one-year statute of limitations

for defamation/libel<sup>5</sup> and not attributable to Defendants.<sup>6</sup> See Appendix B; Motion to Strike at 13-22. Ali therefore fails to even state a claim. Further, even if any of the alleged statements were erroneously deemed to be one of fact that is not absolutely privileged or time-barred, Ali has not shown probability of proving any of the statements to be false. See Appendix B.<sup>7</sup>

**Actual malice applies, but is not relevant to deciding Defendants' Motion**

For the reasons explained above, Ali has no probability of success on his claims and so the Court has no need to reach the issue of Defendants' state of mind in order to dispose of this case. But were it to reach this issue, the applicable degree of fault Ali would have to prove by clear and convincing evidence in order to prevail in this case is actual malice. This is because Defendants' statements are conditionally privileged under O.C.G.A. § 51-5-7(4), see Motion to Strike at 11-13, and because Ali is a limited purpose public figure ("LPPF"). See *Gettner v. Fitzgerald*, 297 Ga. App. 258, 262-63 (2009) (LPPF plaintiff "must prove by clear and convincing evidence that the defendant acted with actual malice").

Georgia courts use a three-part test to determine if a defamation plaintiff is a LPPF, which is a question of law for the Court to decide: (1) "isolate the public controversy," (2) "examine the plaintiff's involvement in the controversy" and (3) "determine whether the alleged defamation was germane to the plaintiff's participation in the controversy." *Atlanta J.-Const. v. Jewell*, 251

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<sup>5</sup> "Georgia courts have not extended the continuing tort doctrine to slander claims." *Yancey v. Clark Atlanta Univ.*, 431 F. App'x 816, 818 (11th Cir. 2011) (citing cases).

<sup>6</sup> Notably, none of the alleged defamatory statements involve Defendant Heather Graybill as the alleged speaker. All claims against Graybill should promptly be dismissed and stricken.

<sup>7</sup> Ali is deemed to have abandoned claims based on any statements referenced in Plaintiffs' Amended Complaint or its attachments that were addressed in Defendants' Motion to Strike/Dismiss as being non-actionable as a matter of law, that Ali then elected not to include in his chart of 30 alleged defamatory statements. See *Perry v. Don Park USA Ltd. P'ship*, No. 120CV03070JPBRGV, 2021 WL 3399822, at \*9 (N.D. Ga. Apr. 28, 2021) ("[f]ailure to respond to an opposing party's argument constitutes abandonment of that claim and warrants its dismissal") (internal quotation omitted); *Bute v. Schuller Int'l, Inc.*, 998 F. Supp. 1473, 1477 (N.D. Ga. 1998) ("Because plaintiff has failed to respond to this argument or otherwise address this claim, the Court deems it abandoned."). At the very least, Ali cannot show probability of prevailing on such claims.

Ga. App. 808, 816-17 (2001). Ali readily satisfies this LPPF test. First, there was clearly a public controversy affecting the Lakewood Heights community about what APS/ABOE should decide to do with Lakewood Elementary, if not a larger controversy about Ali's presence and influence in Lakewood Heights generally. *See* footnotes 2 & 4 above. *See Mathis v. Cannon*, 276 Ga. 16, 24 (2002) (a public controversy is defined by "whether the issue generates discussion, debate, and dissent in the relevant community"). Second, Ali participated in this controversy by "purposefully tr[ying] to influence [its] outcome" via, without limitation, his statements in the media about the direction of Lakewood Heights generally and his plans for the School specifically, his communications to APS/ABOE officials pressuring them to move faster on decisions about the School, his comment at ABOE public meetings, his solicitation of letters of support from community groups, and his efforts to control leadership in the Lakewood Heights Community Association. *See* footnotes 2 & 4 above.<sup>8</sup> *Jewell*, 251 Ga. App. at 817 ("A plaintiff in a libel case must be deemed a public figure if he purposefully tries to influence the outcome of a public controversy or, because of his position in the controversy, could realistically be expected to have an impact on its resolution."). Third, all of the alleged public and private defamatory statements about Ali, both as a person and as a developer/businessman (see Appendix B), are germane to Ali's participation in the controversy – whether it is defined as just about the School, or as about Ali's presence and influence in Lakewood Heights globally -- because such statements, if said, "might help the public decide how much credence should be given to [Ali]" *Jewell*, 251 Ga. App. at 819-20. *See Krass v. Obstacle Racing Media, LLC*, 667 F. Supp. 3d 1177, 1210 (N.D. Ga. 2023) (noting that the third prong of Georgia's LPPF test "is a low bar" and "[a]nything which might touch on the controversy is relevant").

Ali is clearly a LPPF under the foregoing 3-prong test. This means that if this Court were to find Ali had sufficiently plead his claims (he has not), had identified actionable statements of fact (he has not), and could show a probability of proving any such statements of fact to be false

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<sup>8</sup> *See also* Defts' Ex. 7 (Tamara Jones Affidavit) at ¶¶ 6, 8, 10, 13, 16 (former ABOE member describing Ali's efforts to influence outcome of controversy over the School).

(he cannot), then – and only then – would the Court need to consider whether Ali has shown a probability of proving by clear and convincing evidence that Defendants made false statements of fact “not merely [with] spite or ill will, or even outright hatred; [but with] actual knowledge that [the] statement[s were] false or a reckless disregard as to [their] truth or falsity.” *Atlanta Humane Soc’y v. Mills*, 274 Ga. App. 159, 165 (2005). In other words, Ali would have to show that, for each false statement of fact, the publishing “defendant in fact entertained serious doubts as to [its] truth.” *Davis v. Shavers*, 225 Ga. App. 497, 501 (1997). This Ali cannot do because every defamatory statement he alleges is clearly not a fact capable of even being proven false, and is also a statement of opinion for which there is some factual support for its truth – meaning Ali cannot show that Defendants subjectively knew the statement to be false or acted with reckless disregard to falsity. *See* Appendix B. In sum, there are multiple junctures in the proof scheme at which Ali fails to show probability of prevailing on his defamation/libel claims. His inability to prove actual malice is only the last in this long chain of fails. The Court thus has ample grounds to dismiss or strike this action unrelated to the issue of actual malice, making discovery under O.C.G.A. § 9-11-11.1(b)(2) inapplicable.<sup>9</sup>

#### **Plaintiffs’ Motion for Discovery Should Be Denied**

Ali contends he is entitled to either limited discovery on the issue of actual malice or full discovery under O.C.G.A. § 9-11-11.1(d). Neither is correct. In applying the anti-SLAPP statute, Georgia courts look to decisions interpreting California’s similar anti-SLAPP statute. *See* footnote 3 above.<sup>10</sup> California courts find no good cause for “unnecessary, expensive and burdensome discovery proceedings” as to actual malice where, as here, the defendant has “raised a meritorious challenge to the pleadings, contending the complaint failed to state a cause of action for libel,” and

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<sup>9</sup> O.C.G.A. § 9-11-11.1(b)(2) authorizes actual-malice discovery prior to decision on an anti-SLAPP motion to strike only if actual malice is relevant to determining the motion.

<sup>10</sup> Like O.C.G.A. § 9-11-11.1(d), California’s statute stays discovery while an anti-SLAPP motion to strike is pending absent motion and good cause shown. *See* Cal. Civ. Proc. Code § 425.16(g).

“there are serious questions about the falsity of the statements [the defendant] is alleged to have made.” See, e.g., *The Garment Workers Ctr. v. Superior Ct.*, 117 Cal. App. 4th 1156, 1162-63 (2004). Similarly, in *Paterno v. Superior Court*, the court denied discovery on actual malice while the anti-SLAPP motion was pending where, as here, the plaintiff could not show “sufficient evidence to establish a prima facie case of falsity or unprivileged statements.” 163 Cal. App. 4th 1342, 1349-51 (2008). See also *John Doe 2 v. Superior Court*, 1 Cal. App. 5<sup>th</sup> 1300, 1305 (2016) (reversing trial court’s grant of discovery during pending of anti-SLAPP motion where plaintiff failed to show defendant’s statements “are provably false and defamatory statements of fact”).

Further, Ali’s request to conduct a dragnet fishing expedition to search (futilely) for evidence to save his floundering, meritless action must be denied. The entire purpose of Georgia’s anti-SLAPP statute is to end such a suit “quickly, summarily, and at minimal expense.” *Geer v. Phoebe Putney Health Sys., Inc.*, 310 Ga. 279, 282 (2020). Allowing full discovery when Ali has not even sufficiently pled his claims, let alone shown probability of prevailing, flies in the face of the legislature’s intent in drafting the anti-SLAPP statute. See O.C.G.A. 9-11-11.1(a) (“The General Assembly of Georgia further finds and declares that the valid exercise of the constitutional rights of petition and freedom of speech should not be chilled through abuse of the judicial process.”).

Defendants urge this Court to recognize this action for what it is -- harassment and intimidation to deter their public participation – just as APS is beginning its community input process on Lakewood Elementary. See Defendants Exhibit M at pp. 2 & 10 of PDF (APS documents slating community engagement process for September-December 2024). The timing of this litigation could not make it any more obvious that this is a targeted SLAPP action, which is most explicitly directed at Defendants but which is also serving to chill many Lakewood Heights residents who fear they will be sued next if they dare to express an opinion contrary to Ali’s – be it about the School or anything else concerning Lakewood Heights. Such abuse of the judicial system should not be tolerated. Enough is enough.

Respectfully submitted this 3rd day of September, 2024.

/s/ Clare R. Norins

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the within and foregoing **DEFENDANTS' REPLY IN FURTHER SUPPORT OF MOTION TO STRIKE PURSUANT TO O.C.G.A. § 9-11-11.1 AND TO DISMISS FOR FAILURE TO STATE A CLAIM & OPPOSITION TO PLAINTIFFS' MOTION FOR DISCOVERY** was electronically filed with the Court using the Odyssey eFileGA filing system which caused Plaintiffs to be served via email.

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This 3rd day of September, 2024.

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