IN THE CIRCUIT COURT OF THE CITY OF SAINT LOUIS
STATE OF MISSOURI

Ruby Freeman and Wandrea Moss, Plaintiff(s), v. James Hoft, Joseph Hoft, and TGP Communications LLC d/b/a *The Gateway Pundit,* Defendant(s).	Case No. 2122-CC09815

OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE DEFENDANTS' ANTI-SLAPP MOTION MADE UNDER GA CODE § 9-11-11.1

Defendants oppose Plaintiffs Ruby Freeman and Wandrea Moss's Motion to Strike Defendants' Anti-SLAPP Motion Made Under GA Code § 9-11-11.1. The Anti-SLAPP motion was properly brought as a summary judgment motion based on the immunity from suit Georgia law affords when Georgia defamation plaintiffs wrongly, as here, file suit. Suing in Missouri does not permit Plaintiffs to escape the obligations imposed on them by their own legislature.

1.0 INTRODUCTION AND BACKGROUND

Plaintiffs' Motion to Strike is little more than an unnecessarily vituperative motion for additional discovery under Mo. R. Civ. P. 74.04(f). It is premised on the unfounded assertion that the filing of Defendants' Anti-SLAPP Motion automatically stays discovery, but that is neither the purpose nor the effect of the motion. Plaintiffs' agonizing over alleged delays in discovery has nothing to do with the Anti-SLAPP Motion. When Plaintiffs actually address the motion itself, they take issue with its substantive arguments, which is categorically improper for a motion to strike. The Court already determined they will have an opportunity to separately file an opposition to the Anti-SLAPP motion. Plaintiffs' motion should be denied.

2.0 ARGUMENT

Plaintiffs' Motion to Strike is premised on two arguments: (1) Defendants' Anti-SLAPP Motion is procedurally improper and an attempt to delay discovery; and (2) the Anti-SLAPP Motion has so little merit that it should be stricken. Neither argument has any basis, and in fact Plaintiffs' Motion to Strike is the only procedurally improper thing here.

2.1 Plaintiffs' Motion to Strike is Procedurally Improper

Plaintiffs' motion is itself procedurally improper. It claims that Missouri case law authorizes a motion to strike in lieu of an opposition to a motion for summary judgment, claiming that "[a] motion to strike is often regarded as a 'catch-all' motion with the ability to reach defects in a pleading or motion and dispose of them before requiring a substantive response" (Memo at 7), citing *Jungmeyer v. City of Eldon*, 472 S.W.3d 202, 205 (Mo. Ct. App. 2015) and *Wedemeir v. Gregory*, 872 S.W.2d 625, 627 (Mo. Ct. App. 1994). Plaintiffs, however, mischaracterize the cases on which they rely.

The court in *Jungmeyer* did not hold that a motion to strike was a proper means of disposing of a summary judgment motion. Rather, it noted that '"the parties may bring defects in the **affidavits** . . . **or other supporting materials** to the trial court's attention by *motion to strike* or objection."' 472 S.W.3d at 205 (bolding added, emphasis in original). The case dealt with a party responding to a motion for summary judgment by filing a motion to strike that noted a failure to comply with the mandatory requirements of Mo. R. Civ. P. 70.04, and did not substantively respond to the motion. *Id*. The court did not rule that this was a proper means of disposing of the summary judgment motion, but simply that filing the motion to strike constituted a "response" under Rule 74.04, such that it was error for the trial court to grant the summary judgment motion as unopposed. Plaintiffs do not even suggest that Defendants' Anti-SLAPP Motion, which is a

summary judgment motion invoking a Georgia substantive immunity from suit as the primary basis, failed to comply with these requirements.

The other case cited, *Wedemeier,* dealt with a motion to strike a *pleading*, rather than a motion. Thus, that case, too, is inapposite.

Plaintiffs also cite *Reddick v. Spring Lake Ests. Homeowner's Ass'n*, 648 S.W.3d 765, 773 (Mo. Ct. App. 2022) in support of their procedural mechanism, again misrepresenting the holding. *Reddick* dealt with a party who filed a motion to strike a statement of additional material facts in support of a summary judgment motion, not the summary judgment motion itself. The court merely held that such a motion "is an adequate response in place of an admission or denial under Rule 74.04(c)." *Id*. Again, Plaintiffs do not argue there is anything improper about Defendants' statement of uncontroverted facts or that there is any other kind of non-compliance with Rule 74.04; their arguments are purely substantive and should be made in an opposition to the Anti-SLAPP Motion.

Instead, Plaintiffs argue that Georgia's Anti-SLAPP law is a procedural law that has no application here. This is merely a different flavor of choice-of-law argument that responds to the substantive arguments made in the Anti-SLAPP Motion that Georgia's law applies. *See* Plaintiffs' Memo at 9-12. As explained below, Georgia's law, and many other similar Anti-SLAPP laws, create a substantive immunity from suit that follows their citizens, even when they try to forum shop to try to evade their home state's Anti-SLAPP law. Debating the applicability of the law is a *substantive* matter that is not properly disposed of on a motion to strike.

2.2 The Anti-SLAPP Motion is a Proper Summary Judgment Motion

Plaintiffs' argument that the Anti-SLAPP Motion is procedurally improper rests partly on the unfounded assumption that Defendants claim the filing of it automatically stays discovery

under GA Code § 9-11-11.1(d). Defendants do not make this contention, and they are well aware of GA Code § 9-11-11.1(b)(2), which allows public figure plaintiffs to take discovery on the issue of actual malice. Defendants filed a Motion to Stay Discovery in which Defendants take the position that the Georgia Anti-SLAPP law's procedural automatic stay of discovery does not apply here. That is why the Motion to Stay Discovery asks the Court to exercise its discretion and stay discovery on account of the substantive immunity from suit afforded by the statute.. The motion to strike further demonstrates why a stay is necessary—Plaintiffs are using the process as punishment, the hallmark of a SLAPP suit, filing an unnecessary motion that serves no purpose but to increase the costs of defense.

Plaintiffs' arguments about the filing of the Anti-SLAPP Motion being an effort to delay this case (and, consequently, the entirety of the procedural background in their memo in support) are inapplicable; the only thing dilatory is the interposition of the motion to strike, delaying adjudication of the Anti-SLAPP summary judgment motion. In fact, Plaintiffs' argument should draw sanctions, given the fact that Defendants already conceded that the procedural stop on discovery does not apply. *See* Memorandum in Support of Motion to Stay at 3. There is no need to burden the Court here with a point-by-point breakdown of discovery proceedings.

More importantly, Georgia's law grants **substantive** protections. The current version of Georgia's Anti-SLAPP law is modeled after California's Anti-SLAPP statute, Cal. Code Civ. Proc. § 425.16, and Georgia courts look to the vast body of California Anti-SLAPP case law in interpreting their own statute. *Wilkes & McHugh, P.A. v. LTC Consulting, L.P.*, 830 S.E.2d 119, 124-126 (Ga. 2019). California's Anti-SLAPP statute creates a substantive immunity from suit, and *is not merely a procedural rule* for early dismissal of defamation claims. *Batzel v. Smith*, 333 F.3d 1018, 1025-26 (9th Cir. 2003) (superseded by statute on unrelated grounds, as explained in

Breazeale v. Victim Servs., 878 F.3d 759, 766-67 (9th Cir. 2017)); *Moser v. Encore Capital Group, Inc.*, No. 04CV2085-LAB (WMc), 2007 U.S. Dist. LEXIS 22970, *7 (S.D. Cal. Mar. 27, 2007).

In support of their argument that the Georgia Anti-SLAPP statute does not provide a substantive immunity from suit, Plaintiffs cite to *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345 (11th Cir. 2018). *Carbone* is not a Georgia decision; it is a non-binding 11th Circuit decision misinterpreting Georgia law. In *Carbone*, CNN did not argue that the Georgia statute provided a substantive immunity from suit. While it pointed to *Adelson v. Harris*, 774 F.3d 803, 809 (2d Cir. 2014), in its briefs, quoting the portions that note that the substantive immunity from suit and fee shifting of the Nevada Anti-SLAPP law apply in federal court, CNN failed to argue that the Georgia statute provided these substantive rights. Thus, the question of whether Georgia law provided a substantive immunity from suit was not a question *sub judice* in *Carbone*, stripping it from having any persuasive effect here.[1]

An important indicator of this substantive immunity is the right to an immediate interlocutory appeal of an order denying an Anti-SLAPP motion. The existence of this immunity from suit is why courts have recognized and permitted interlocutory appeal. *See DC Comics v. Pac. Pictures Corp.*, 706 F.3d 1009, 1015-16 (9th Cir. 2013) (affirming that California's Anti-SLAPP statute creates a substantive immunity from suit, and that "[i]t would be difficult to find a value of 'high[er] order than the constitutionally-protected rights to free speech and petition that

[1] Notably, even in the wake of Carbone, district courts in the 11th Circuit nonetheless saw fit to apply the Florida Anti-SLAPP law's fee shifting provision (the only provision at issue in those cases) because they deemed such, like in Adelson, to not conflict with Federal procedural rules. *See Anderson v. Best Buy Stores L.P.*, No. 5:20-cv-41-Oc-30, 2020 U.S. Dist. LEXIS 157642, 2020 WL 5122781 (M.D. Fla. July 28, 2020) adopted in full by *Anderson v. Coupons in the News*, No. 5:20-cv-41-Oc-30, 2020 U.S. Dist. LEXIS 157199 (M.D. Fla. Aug. 31, 2020); *Ener v. Duckenfield,* No. 20-cv-22886,2020 U.S. Dist. LEXIS 181407 (S.D. Fla. Sep. 28, 2020); *Bongino v. Daily Beast Co., LLC*, 477 F. Supp. 3d 1310, 1322-24 (S.D. Fla. 2020). A substantive immunity from suit in an Anti-SLAPP law is no different.

are at the heart of California's anti-SLAPP statute"). Georgia's statute also contains this right to an immediate interlocutory appeal. *See* O.C.G.A. § 9-11-11.1(e). As does Nevada's statute (Nev. Rev. Stat. § 41.670(4)), which also observes that a person who makes a communication proteced by the statute "is immune from any civil action for claims based upon the communication." *Id*. at § 41.650.[2] That Anti-SLAPP statutes provide an immunity from suit is the general consensus among jurisdictions that have applied Anti-SLAPP statutes in federal court. *See, e.g., Franchini v. Investor's Business Daily, Inc.*, 981 F.3d 1, 7, 8 n.6 (1st Cir. 2020) (considering Maine Anti-SLAPP law); *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d 659, 666-67 (10th Cir. 2018) (considering New Mexico Anti-SLAPP law); *Schwern v. Plunkett*, 845 F.3d 1241, 1244-1245 (9th Cir. 2017) (considering Oregon Anti-SLAPP law).

It is thus apparent, looking at the language of Georgia's statute and similar Anti-SLAPP statutes, that Georgia's law, modeled after immunity-conferring statutes, also creates a substantive immunity from suit. A defendant entitled to immunity is not required to undergo an entire trial before appealing a ruling denying its protection. *State ex rel. Bd. of Trs. of N. Kansas City Mem'l Hosp. v. Russell*, 843 S.W.2d 353, 355 (Mo. banc 1992). Summary judgment is a proper vehicle for invoking the Georgia Anti-SLAPP law. *See Annamalai v. Capital One Fin. Corp*., 319 Ga. App. 831 (2013). Although Plaintiffs cite to *Rogers v. Dupree*, 349 Ga.App. 77 (2019), which reaffirms (and for which there is no dispute), that the Georgia statue provides some procedural protections, they ignore that very same case reaffirmed the "'substantive' nature of the anti-SLAPP statute". 349 Ga. App. 777, 778 n.1 (2019) (quoting *Atlanta Humane Society v. Harkins*, 278 Ga.

[2] A Missouri court has found that an Anti-SLAPP motion under Missouri's statute is not immediately appealable, but it came to this conclusion solely because Missouri's law did not contain specific language about this right. *Cedar Green Land Acquisition, L.L.C. v. Baker*, 212 S.W.3d 225, 227 (Mo. App. 2007). This is distinguishable, as Georgia's law explicitly confers such a right.

451, 454 (2004)). Thus, the Court may thus apply the law to Plaintiffs' claims, and there is no basis to strike the Anti-SLAPP summary judgment motion.

Plaintiffs also argue that summary judgment is outright precluded here due to GA Code § 9-11-11.1(b)(2), which provides that the nonmoving party "shall be entitled" to discovery on actual malice. Plaintiffs claim they still need to take this discovery; they cannot defeat the Anti-SLAPP summary judgment motion by making this claim. It is bitterly ironic that Plaintiffs purported to claim the benefit of Georgia's procedural elements of its Anti-SLAPP law in an attempt to avoid the substantive immunity from suit. Defendants moved for a stay of discovery, but discovery is ongoing, and if Plaintiffs actually require more discovery on the question of actual malice, despite having been provide over 140,000 pages of material, then they can seek relief under Rule 74.04(f), like when opposing any other motion for summary judgment.

2.3 There is No Legal Basis for Striking the Anti-SLAPP Motion as Unmeritorious

Plaintiffs argue that Defendants' Anti-SLAPP Motion is so unmeritorious that it should be stricken without requiring them to file a proper opposition. This argument is premised primarily, again, on the assertions that discovery has not yet been completed and the false assertion they require discovery on the issue of actual malice. This argument has nothing to do with the merits of the Anti-SLAPP Motion. Even if the Georgia substantive immunity were not to apply, summary judgment nevertheless remains appropriate. Defendants do not contest that, in the face of a plaintiff's circumstantial claim of actual malice,[3] a defendant's declaration to the contrary is insufficient for a court to award summary judgment to the defendant. This is not a special rule for

[3] Defendants do, however, disagree with Plaintiffs' contention that a defamation defendant testifying as to their lack of actual malice somehow cannot, as a matter of law, show such a lack of actual malice. *See* Motion at 11. As with any other issue at summary judgment, Plaintiffs must show there is a genuine issue of material fact in dispute by presenting evidence that Defendants published with actual malice.

defamation cases, but rather speaks to whether a nonmovant can demonstrate the existence of a genuine dispute of material fact that will preclude summary judgment in any case.

For summary judgment motions, "[t]he facts contained in affidavits or otherwise in support of a party's motion are accepted as true unless contradicted by the non-moving party's response to the summary judgment motion." *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 452-53 (Mo. 2011) (cleaned up). Defendants seek summary judgment.[4] They provided documentary evidence and declarations demonstrating a lack of actual malice. In their opposition to that motion, Plaintiffs may attempt to provide what evidence they purport to have that they would argue creates a genuine dispute of material fact as to actual malice. They have not done so, here or elsewhere, instead falsely complaining that they have not yet had the opportunity to obtain such evidence.[5]

This not a new situation; Mo. R. Civ. P. 74.04(f) exists to address it. This rule allows a court to refuse to decide, or to continue, a summary judgment motion where it "appear[s] from the affidavits of a party opposing the motion that for reasons stated in the affidavits facts essential to justify opposition to the motion cannot be presented in the affidavits." But they have not sought relief under this rule. If they wish for such relief, they may file a motion for it and provide briefing as to why the Court should not rule on the Anti-SLAPP summary judgment motion yet, while specifying what discovery they believe will create a genuine issue of material fact. Plaintiffs have

[4] Plaintiffs feign confusion as to the nature of the Anti-SLAPP Motion, arguing it is a type of motion entirely distinct from summary judgment. However, as the Motion makes clear, Defendants filed the Motion under Mo. R. Civ. P. 74.04, based on the substantive immunity from suit afforded under Georgia's Anti-SLAPP statute. Missouri's summary judgment standard applies.

[5] Again, this is the hallmark of a SLAPP suit – lengthen the process and increase the costs, because that is, itself a "win" for a SLAPP plaintiff. Unfortunately for the Plaintiffs, they forgot that the Georgia legislature chose to rein in Georgia plaintiffs from doing so – and these Georgians cannot run away from their own Georgia law.

foregone this routine procedure, however, instead electing, without any support, to request that the Court strike the Anti-SLAPP Motion.

Plaintiffs appear to suggest there is a categorical rule that summary judgment motions in defamation cases must be denied before the completion of discovery, but they provide no authority for this proposition. In fact, the overwhelming weight of authority says that early resolution is the favored result in defamation cases. "To preserve First Amendment freedoms and give reporters, commentators, bloggers, and tweeters (among others) the breathing room they need to pursue the truth, the Supreme Court has directed courts to expeditiously weed out unmeritorious defamation suits." *Kahl v. Bureau of Nat'l Affairs, Inc*., 856 F.3d 106, 109 (D.C. Cir. 2017)(Kavanaugh, J.) (citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242 (1986); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)); *accord Michel v. NYP Holdings, Inc*., 816 F.3d 686, 702 (11th Cir. 2016) ("In [defamation] cases, there is a powerful interest in ensuring that free speech is not unduly burdened by the necessity of defending against expensive yet groundless litigation."); Biro v. Condé Nast, 883 F. Supp. 2d 441, 457 (S.D.N.Y. Aug. 9, 2012) ("There is 'particular value' in resolving defamation claims at the pleading stage, 'so as not to protract litigation through discovery and trial and thereby chill the exercise of constitutionally protected freedoms.'" *Quoting Armstrong v. Simon & Schuster, Inc.*, 649 N.E.2d 825, 828 (N.Y. 1995)); *Mark v. Seattle Times*, 96 Wn.2d 473, 484-85, 635 P.2d 1081 (1981) (noting, in reaffirming the value of summary judgment, that "[s]erious problems regarding the exercise of free speech and free press guaranteed by the First Amendment are raised if unwarranted lawsuits are allowed to proceed to trial.") Here, too, the Court must take the opportunity to adjudicate the summary judgment motion as to Plaintiffs' claims of defamation, vindicating the First Amendment, rather than allow Plaintiffs to weaponize litigation and chill free speech.

2.4 There is No Basis for Imposing Sanctions

Plaintiffs claim that they should be awarded sanctions for Defendants' filing their Anti-SLAPP summary judgment motion because they wrongly assert it is an attempt to delay discovery (despite the fact that Defendants have produced over 140,000 pages of discovery) and because they claim it is meritless (despite failing to address the merits of whether summary judgment is proper). As explained above, these arguments are groundless. The only basis for imposing sanctions Plaintiffs cite is Mo. R. Civ. P. 74.04(g), which provides that "[s]hould it appear to the satisfaction of the court at any time that any affidavit presented pursuant to Rule 74.04 is presented in bad faith or solely for the purpose of delay," the court may impose sanctions. There appears to be no Missouri case law on when a court may find an affidavit was provided in bad faith or solely for the purpose of delay, and Plaintiffs cite none. Plaintiffs also provide no evidence for their assertion that Defendants' declarations fall into either category. These declarations state unequivocally that Defendants believed the statements at issue were true and that Defendants had no reason to doubt their veracity. This is sufficient for the Court to fine a lack of actual malice. If Plaintiffs have evidence to rebut these assertions, they may present it in an opposition to the motion.

And, as explained above, the Anti-SLAPP Motion does not delay discovery, meaning Defendants' declarations were not submitted to delay this case. It appears Plaintiffs want to be awarded fees simply because the purpose of a SLAPP suit is to impose costs on defendants, but there is no legal basis for their desired outcome.

3.0 CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion to Strike.[6]

Dated: July 11, 2023

Respectfully Submitted,

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[6] Although the Court has largely addressed the issue in adjudicating Plaintiffs' motion for clarification, Defendants preserve their objections to Plaintiffs' request for leave to file a substantive response to the Anti-SLAPP Motion; they had time after filing the instant motion to file such a response, and they chose not to. To the extent Plaintiffs' motion contains a request for an extension of time to file an opposition, this request is unsupported and Defendants do not consent to it.

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2023 the foregoing document was served on all parties or their counsel of record through this Court's e-filing system as follows:

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