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ORDER OF THE SUPREME COURT OF GEORGIA DENYING MOTION TO VACATE (JULY 15, 2020)

SUPREME COURT OF GEORGIA

ANNE RICHARDS ET AL.,

v.

SAM OLENS ET AL.

Case No. S20C0106

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

Upon consideration of the Motion to Vacate filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Peterson, Warren, and McMillian, J.J., not participating.

Thèrèse S. Barnes
Clerk

ORDER OF THE SUPREME COURT OF GEORGIA DENYING MOTION FOR RECONSIDERATION (JULY 15, 2020)

SUPREME COURT OF GEORGIA

ANNE RICHARDS ET AL.,

v.

SAM OLENS ET AL.

Case No. S20C0106

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Peterson, Warren, and McMillian, J.J., not participating.

Thèrèse S. Barnes
Clerk

ORDER OF THE SUPREME COURT OF GEORGIA DENYING PETITION FOR CERTIORARI (MARCH 26, 2020)

SUPREME COURT OF GEORGIA

ANNE RICHARDS ET AL.,

v.

SAM OLENS ET AL.

Case No. S20C0106

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

The Supreme Court today denied the petition for certiorari in this case.

Melton, C.J., Nahmias, P.J., and Blackwell, Boggs, Bethel and Ellington, JJ., concur. Peterson, J., not participating. Warren, J., disqualified.

Thèrèse S. Barnes
Clerk

ORDER OF THE COURT OF APPEALS FOR THE STATE OF GEORGIA (JULY 26, 2019)

COURT OF APPEALS OF THE
STATE OF GEORGIA

ANNE RICHARDS ET AL.,

v.

SAM OLENS ET AL.

Case No. A19A2010

The Court of Appeals hereby passes the following order

Upon consideration of the APPELLANT'S motion TO SUPPLEMENT THE RECORD in the above styled case, it is ordered that the motion is hereby DENIED.

Stephen E Castlen
Clerk

ORDER OF THE COURT OF APPEALS FOR THE STATE OF GEORGIA (JULY 26, 2019)

COURT OF APPEALS OF THE
STATE OF GEORGIA

ANNE RICHARDS ET AL.,

v.

SAM OLENS ET AL.

Case No. A19A2010

The Court of Appeals hereby passes the following order:

In November 2016, the trial court dismissed the complaint filed by Anne Richards and several others (hereinafter the "plaintiffs"), attempting to undo the election of Sam Olens as president of Kennesaw State University. The plaintiffs filed a motion to strike an affidavit and motion to set aside the trial court's judgment based on fraud and mistake. The trial court denied the motion, and the plaintiffs filed this direct appeal. We, however, lack jurisdiction.

Under OCGA § 9-11-60 (d), a judgment may be set aside based on (1) lack of jurisdiction, (2) fraud, accident, or mistake by the adverse party, or (3) a nonamendable defect on the face of the record of pleadings. Although the motion filed by the plaintiffs does not include a reference to OCGA § 9-11-60 (d),

the substance of a pleading controls over its nomenclature. *See Kuriatnyk v. Kuriatnyk*, 286 Ga. 589, 590 (690 S.E.2d 397) (2010) (in construing pleadings, substance controls over nomenclature). An appeal from an order denying a motion to set aside a judgment under OCGA § 9-11-60 (d) must be made by application for discretionary review. OCGA § 5-6-35 (a) (8). The plaintiffs properly filed a discretionary application, which we denied. *See* Case No. A18D0324, denied February 27, 2018. Because that June 12, 2019 denial was an adjudication on the merits, the doctrine of res judicata bars this direct appeal. *See Northwest Social & Civic Club, Inc. v. Franklin*, 276 Ga. 859, 860 (583 S.E.2d 858) (2003); *Hook v. Bergen*, 286 Ga. App. 258, 260- 261 (1) (649 S.E.2d 313) (2007). Accordingly, this appeal is hereby DISMISSED.

Stephen E Castlen
Clerk

ORDER OF THE COURT OF APPEALS FOR THE STATE OF GEORGIA (JUNE 12, 2019)

COURT OF APPEALS OF THE
STATE OF GEORGIA

ANNE RICHARDS ET AL.,

v.

SAM OLENS ET AL.

Case No. A19A2010

The Court of Appeals hereby passes the following order:

Appellants in the above-referenced case have moved for the record in a separate appeal, Case No. A19A1071, to be included in the record in this appeal. However, it does not appear that the record in Case No. A19A1071, which was transmitted to this Court by the Clerk of the Superior Court of DeKalb County, was filed in the Superior Court of Fulton County, where the above-referenced appeal originated, or, if it was, why such was not transmitted to this Court by the Clerk of the Superior Court of Fulton County with the rest of the record. Accordingly, appellant's motion to consolidate the record is DENIED.

Stephen E Castlen
Clerk

ORDER OF THE COURT OF APPEALS GRANTING APPELLANT'S MOTION FOR AN EXTENSION OF TIME (MAY 17, 2019)

COURT OF APPEALS OF THE
STATE OF GEORGIA

ANNE RICHARDS ET AL.,

v.

SAM OLENS ET AL.

Case No. A19A2010

The Court of Appeals hereby passes the following order:

The APPELLANT'S motion for AN EXTENSION OF TIME in which to file an enumeration of errors and brief in the above-styled case is hereby GRANTED until 06/12/2019.

The appellee's brief shall be filed within 20 days after the filing of the appellant's brief.

Stephen E Castlen
Clerk

ORDER OF THE COURT OF APPEALS FOR THE STATE OF GEORGIA (FEBRUARY 27, 2018)

COURT OF APPEALS OF THE
STATE OF GEORGIA

LEONARD WITT ET AL.,

v.

SAM OLENS ET AL.

Case No. A18D0324

LC Numbers: 2016CV282020

The Court of Appeals hereby passes the following order:

Upon consideration of the Application for Discretionary Appeal, it is ordered that it be hereby DENIED.

Stephen E Castlen
Clerk

FINAL ORDER OF THE SUPERIOR COURT OF FULTON COUNTY GEORGIA (NOVEMBER 14, 2016)

IN THE SUPERIOR COURT OF
FULTON COUNTY GEORGIA

LEONARD WITT, ET AL.,

Plaintiffs,

v.

SAM OLENS, ET AL.,

Defendants.

Civil Action No. 2016-CV-282020

Before: Hon. Tom CAMPBELL,
Superior Court Judge.

This matter is before the Court on Plaintiffs' request to undo the election of Sam Olens, formerly the Attorney General for the State of Georgia, by the Board of Regents ("BOR") of the University System of Georgia ("USG") as President of Kennesaw State University ("KSU"), a unit of USG. *See* BOR Policy 2.1 ("Election of Presidents by the Board"), available at www.usg.edulpolicymanual/section2/C306, last accessed November 10, 2016.

Plaintiffs initially sought to enjoin Olens from assuming the office of President of KSU on November

1, 2016, but failed to obtain an order preventing Olens from taking office prior to the first day of his term as President. This Court granted a *rule nisi* to Plaintiffs, setting a hearing for November 7, 2016, to hear arguments on whether injunctive relief should issue against Olens, the Chancellor and the Executive Vice-Chancellor of the University System, the former interim President of KSU, BOR, and the Governor of Georgia. A hearing was held on November 7, 2016, where the parties presented argument on whether Plaintiffs' action was barred under the doctrine of sovereign immunity.[1] For the reasons set forth below, this Court finds that Plaintiffs' claims against the named state officials are BARRED by sovereign immunity, and this case is DISMISSED.

Here, Plaintiffs have sued various state agencies and officials involved with the election of Olens as President of KSU, seeking both to undo past official actions as well as to enjoin them permanently from carrying out those acts which resulted in Olens' election to, and assumption of, the office of President of KSU. Plaintiffs have sought temporary and permanent injunctive relief preventing Olens from vacating his position as Attorney General and assuming the presidency of KSU pursuant to his election by BOR, preventing BOR from electing Olens as President of

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[1] Plaintiffs had attempted to subpoena a member of the BOR and current and former employees of USG to the hearing on November 7, 2016. The witnesses did not reside in Fulton County, however, and the subpoenas were invalid due to Plaintiffs' failure to comply with the provisions of O.C.G.A. § 24-13-25. Plaintiffs moved to continue the entirety of the hearing; instead, the Court heard argument on whether Plaintiffs' claims were barred by sovereign immunity which would negate the need to schedule a second evidentiary hearing on Plaintiffs' claims.

KSU, requiring Governor Deal to appoint a special attorney general to investigate financial wrongdoing at KSU predating Olens' election as President of KSU,[2] preventing the Chancellor and the chair of BOR from exercising their discretion under Board policy to institute a national search for a President of KSU,[3] an award of attorneys' fees and costs under the RICO Act, and an award of damages, including treble and punitive damages, under the RICO Act.

The Georgia Constitution expressly preserves the state's sovereign immunity and makes clear that it "can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is waived and the extent of such waiver." GA. CONST. Art. I, Sec. II, Par. IX. When the state or its officials raise as a defense that an action is barred by the doctrine of sovereign immunity, the court must inquire into that matter as the existence of sovereign immunity deprives a court of subject matter jurisdiction over

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[2] Plaintiffs prayed for [a]n injunction requiring Governor Nathan Deal to observe the authority of OCGA 45-1-8 and appoint a politically objective special attorney general to conduct an independent investigation of financial wrongdoing at KSU." Plaintiffs Complaint at unnumbered paragraph on p.26. Setting aside that there is no code section O.C.G.A. § 45-1-8, Plaintiffs' prayer for an injunction against the Governor, even if it were based on an actual code provision, is barred by sovereign immunity absent a specific showing by Plaintiffs that the General Assembly has waived sovereign immunity as to that action against the Governor. As Plaintiffs have failed to establish any such waiver for their non-existent statutory remedy, Plaintiffs' claims against the Governor are barred by sovereign immunity.

[3] *See* BOR Policy 2.2 ("Procedure for Selection of a President for USG Institutions"), available at www.usg.edu/policymanual/section2/C307, last accessed November 10, 2016.

the claims at issue. *Coosa Valley Tech. College v. West,* 299 Ga. App. 171, 174 (2009). Waiver of sovereign immunity "must be established by the party seeking to benefit from that waiver." *Id.* Accordingly, Plaintiffs must establish affirmatively that the state has waived sovereign immunity for their case to remain viable. *Dep't of Transp. v. Smith,* 314 Ga.App. 412, 413 (2012).

The Supreme Court has set out that the sovereign immunity language contained within Article I, Section II, Paragraph IX of the Georgia Constitution is not limited to actions for monetary damages. The constitutional reservation of the state's sovereign immunity serves as a bar to actions for injunctive relief against the state or its officials. *See Dept of Natural Resources v. Ctr. for a Sustainable Coast, Inc.,* 294 Ga. 593, 603 (2014). The Constitution reserves the authority to waive sovereign immunity to the General Assembly. *Id.* at 598. The waiver of that sovereign immunity must be clear and specific; it is not enough to find that the General Assembly has enacted a statutory remedy that could theoretically be applied against both state and private actors. *See generally Ctr. for a Sustainable Coast, Inc.,* 294 Ga. 593 (neither general provision authorizing courts to grant injunctive relief in Chapter 5 of Title 9 nor O.C.G.A. § 12-5-245 allowing injunctions against public nuisances authorized injunctive relief against the state or its officials); *Olvera v. University System of Georgia's Board of Regents,* 298 Ga. 425 (2016) (general provision authorizing courts to grant declaratory relief in Chapter 4 of Title 9 did not permit a declaratory judgment action to proceed against BOR). In the absence of plain language within a statute that waives governmental immunity,

that action will be barred by sovereign immunity. *Ctr. for a Sustainable Coast, Inc.,* 294 Ga. at 603.

Plaintiffs' pleadings set out that the injunctive relief that they seek "is expressly authorized by the Georgia RICO Act OCGA § 16-14-1 *et seq*." Plaintiffs' Complaint at ¶ 57. The argument that the Georgia RICO Act, O.C.G.A. §§ 16-14-1 through 16-14-12, ("RICO Act") serves as a waiver of sovereign immunity, however, has been soundly rejected by a seven judge decision of the Court of Appeals. *See Tricoli v. Watts,* 336 Ga. App. 837 (2016), *cert. denied* November 7, 2016, in S16C1469.

In the *Tricoli* case, the former President of Georgia Perimeter College sued BOR, individual members of the BOR, Georgia Perimeter College, and the then-Attorney General for fraud, breach of contract, and violations of the RICO Act. *Id.* Plaintiffs claimed that the provisions of the RICO Act operated as a waiver of sovereign immunity. *Id.* at 840. While the Court of Appeals found that to be an "imaginative theory," the Court rejected the argument as precisely that—"imagination." *Id.* The Court of Appeals found that nothing in the RICO Act contained any expression of a waiver of sovereign immunity. *Id.* As such, Plaintiffs' claims for relief under the various remedies set out within the RICO Act were barred by sovereign immunity. *Id.*

This Court is bound by the Court of Appeals analysis in the *Tricoli* case. Even absent the clear language in the *Tricoli* case that the RICO Act contains no waiver of sovereign immunity, it is clear on examining the statutory language of the RICO Act that there is no language therein sufficient to meet the constitutional threshold for finding a waiver of

sovereign immunity "which specifically provides that sovereign immunity is thereby waived and the extent of such waiver." GA. CONST. Art. I, Sec. II, Par. IX(e); *Johnson v. Dep't of Human Resources,* 278 Ga. 714, 715 (2004). As such, Plaintiffs have failed to meet their threshold burden of establishing that there has been a waiver of sovereign immunity that would permit the continuation of their litigation under the RICO Act to undo a set of already completed acts, including the election of Olens as President of KSU, and to collect damages and fees.

Plaintiffs' claims are BARRED by sovereign immunity. This action is therefore DISMISSED.

SO ORDERED this 14th day of November, 2016.

/s/ Tom Campbell
Judge Superior Court of
Fulton County
Atlanta Judicial Circuit

ORDER DENYING MOTION TO STRIKE AND SET ASIDE JUDGMENT AND RENEWED RULE 60 MOTION TO SET ASIDE JUDGMENT FOR FRAUD AND ABSENCE OF JURISDICTION (JANUARY 12, 2018)

IN THE SUPERIOR COURT OF
FULTON COUNTY GEORGIA

LEONARD WITT, SUSAN RAINES, ANNE RICHARDS, SCOTT RITCHEY, NICKI AYON, VIRGINIA BELLEW, ERIN ANN EXUM, LANE HUNTER, AMANDA HARRELL, BRIAN LAWLER, JESSICA BOUDREAUX, TIFFANY GRIFF'M, VALERIE DRIBBLE JOSHUA GOODWIN, SARAH LARKIN, ELIZABETH GORDON, DR. BEN WILLIAMS, AND THE COBB CHAPTER LEADERSHIP CONFERENCE OF THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE,

Plaintiffs,

v.

SAM OLENS, THE ATTORNEY GENERAL OF GEORGIA, JOHN DOES, HANK HUCKABY STEVE WRIGLEY, HOUSTON DAVIS, JOHN FUCHKO, THE BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, AND GOVERNOR NATHAN DEAL,

Defendants.

Civil Action No. 2016-CV-282020

Before: Hon. Tom CAMPBELL,
Superior Court Judge.

This matter is before the Court on Plaintiffs Motion to Strike and Set Aside Judgment and Renewed Rule 60 Motion to Set Aside Judgment for Fraud and Absence of Jurisdiction. Having considered the Motion, Renewed Motion and Supplement to Rule 60 Motion to Set Aside Judgment for Fraud and the entire record and applicable authority, the Court hereby denies the motions.

SO ORDERED this 12th day of January, 2018.

/s/ Tom Campbell
Judge Superior Court of
Fulton County
Atlanta Judicial Circuit

ORDER OF THE SUPREME COURT OF GEORGIA (NOVEMBER 7, 2016)

SUPREME COURT OF GEORGIA

ANTHONY S. TRICOLI,

v.

ROB WATTS ET AL.

Case No. S16C1469

Court of Appeals Case No. A15A2256

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

The Supreme Court today denied the petition for certiorari in this case. All the Justices concur.

Thèrèse S. Barnes
Clerk

OPINION OF THE COURT OF APPEALS FOR THE STATE OF GEORGIA (MARCH 30, 2016)

COURT OF APPEALS OF THE STATE OF GEORGIA

TRICOLI,

v.

WATTS ET AL.

Case No. A15A2256

Before: BARNES, P.J., ELLINGTON, P.J., DILLARD, McFADDEN, and BRANCH, JJ.

ANDREWS, Presiding Judge.

Anthony Tricoli served as President of Georgia Perimeter College (GPC) for six years until he was blamed for a $16 million budget shortfall and resigned. He subsequently sued numerous individuals affiliated with GPC, the Board of Regents of the University System of Georgia, Board of Regents members, and the Georgia Attorney General for fraud, breach of contract, and violations of the Georgia Racketeer Influenced and Corrupt Organizations Act (RICO). The trial court granted the defendants' motion to dismiss, and this appeal followed.

On appeal, Tricoli contends the trial court erred by: (1) finding there was no enforceable written employment contract between Tricoli and the Board of Regents;

(2) concluding that the Georgia Tort Claims Act (GTCA), OCGA § 50-21-20 *et seq.*, barred his RICO claims; (3) rejecting his claims for fraud, extortion, and intentional infliction of emotional distress; (4) failing to consider his claims under the Open Records Act; (5) ignoring his abusive litigation claim; and (6) ignoring his motion for preliminary injunction. We find the trial court thoroughly addressed all the issues in this case and correctly concluded that Tricoli's claims failed under the Georgia Tort Claims Act (GTCA) and the doctrine of sovereign immunity.

1. Initially, we note that the standard of review applicable in this appeal is the one for review of a decision on a motion for summary judgment. Although the appeal is from the grant of a motion to dismiss, Tricoli's submission of documentary evidence in response to the motion to dismiss constituted, in effect, a request to convert the motion into one for summary judgment and waived the notice requirement for such a conversion. *See Gaddis v. Chatsworth Health Care Center*, 282 Ga.App. 615, 617 (639 S.E.2d 399) (2006); *Bd. of Regents of the Univ. System of Ga. v. Barnes*, 322 Ga.App. 47, 49(1) (743 S.E.2d 609) (2013). (Exhibits attached to the pleadings would not operate to convert a motion to dismiss into a motion for summary judgment, *Gaddis, supra*, but because a motion to dismiss is not a pleading under OCGA § 9-11-7(a), any documents submitted in conjunction with such a motion are outside the pleadings.)

Where a defendant, who would not bear the burden of proof at trial, moves for summary judgment and shows an absence of evidence to support any essential element of the plaintiff's case, "the nonmoving party cannot rest on its pleadings, but rather must

point to specific evidence giving rise to a triable issue." *Cowart v. Widener*, 287 Ga. 622, 623(1) (697 S.E.2d 779) (2010). But when we review a grant or denial of summary judgment, we must construe the evidence in the light most favorable to the nonmovant. *Home Builders Assn. of Savannah v. Chatham County*, 276 Ga. 243, 245(1) (577 S.E.2d 564) (2003).

2. "[T]he defense of sovereign immunity is waived as to any action ex contract for the breach of any written contract entered into by the state or its departments and agencies." (Punctuation and footnote omitted.) *Bd. of Regents of the Univ. System of Ga. v. Barnes*, 322 Ga.App. 47, 49(2) (743 S.E.2d 609) (2013). Tricoli contends the trial court erred in concluding there was no valid written employment contract that effectuated a waiver of sovereign immunity.

However, in moving to dismiss the action, the defendants originally showed the absence of a written contract of employment, which was critical to Tricoli's ability to show a waiver of sovereign immunity. The trial court held a hearing on the motion on September 22, 2014. Subsequently, on October 10, 2014, Tricoli submitted an August 7, 2006 letter from the Chancellor of the Board of Regents offering him the GPC presidency, which he claimed constituted a written employment contract. That letter stated:

> It is my pleasure to offer you an appointment to the presidency of Georgia Perimeter College, subject to the policy and terms of the Board of Regents and the approval of the Board of Regents of the University System of Georgia at its regular meeting on August 9, 2006. The appointment would be effective on October 1, 2006. The total

> annualized compensation for the position is $190,000 . . . . To accept the position, please return this letter with your signature.

The defendants objected to the consideration of that letter on the grounds Tricoli had not properly notified them of the submission, and also on the grounds the letter did not constitute a valid contract of employment. On November 21, 2014, "[a]fter consideration of the evidence, counsel's argument, and applicable statutory and case law," the trial court granted the motion to dismiss.

Assuming arguendo the letter created a contract of employment under this Court's ruling in *Bd. of Regents of the Univ. System of Ga. v. Doe*, 278 Ga. App. 878, 881(1) (630 S.E.2d 85) (2006), it still didn't save Tricoli's breach of contract claim. The letter, which only specifies a salary and a starting date subject to the approval and policies of the Board of Regents, hardly supports a breach of contract claim. "An employment contract containing no definite term of employment is terminable at the will of either party, and will not support a cause of action against the employer for wrongful termination." *Burton v. John Thurmond Constr. Co.*, 201 Ga.App. 10 (410 S.E.2d 137) (1991).

Tricoli contends his alleged written contract was subject to the Board of Regent's written policies and that the relevant policy, as provided by the Board in its answer to a request for admission, supplied sufficient terms to supplement the letter and form an enforceable employment contract. The text of that policy statement relied upon by Tricoli stated as follows:

> If the Board declines to re-appoint a president,

> it shall notify the president, through the Chancellor, of such decision immediately following the Board's regularly scheduled April [later amended to May] meeting. A decision by the Board not to re-appoint a president is not subject to appeal.

The quoted policy does not provide a definite term for the contract, a promise of employment, a specific deadline for providing the notice, or a provision that Tricoli's employment would be automatically extended for a year or some other period in the event the Board failed to provide notice of re-appointment within a certain time. As such, the policy in no way converts the August 2006 letter into an employment contract that is not terminable at will.

Further, Tricoli himself terminated any employment contract he may have had when he resigned his position as president of GPC. There was no demonstrable breach of contract by any of the defendants, and Tricoli's contention that the defendants forced him to resign asserted a tort, not a contract breach. Lastly, the Board of Regents' failure to renew Tricoli's contract or offer him a contract for a different position provided no basis for avoiding the application of sovereign immunity. *See, e.g., Liberty County School Dist. v. Halliburton*, 328 Ga.App. 422 (762 S.E.2d 138) (2014).

As Tricoli failed to show an enforceable employment contract, there was no waiver of sovereign immunity on the basis of a written contract.

3. All of Tricoli's tort claims were barred by the Georgia Tort Claims Act. OCGA § 50-21-25(a) provides that the GTCA "constitutes the exclusive remedy for any tort committed by a state officer or employee . . .

while acting within the scope of his or her official duties or employment." . . . OCGA § 50-21-23 waives sovereign immunity for torts of state officers and employees, but that waiver is subject to the exceptions set forth in OCGA § 50-21-24. Virtually all of the tortious conduct Tricoli complains of falls within those listed exceptions, and so his claims based on that conduct are barred.

4. Tricoli also asserted a claim under the Georgia RICO Act, OCGA § 16-14-1 *et seq.*, based on the same conduct that predicated his tort claims. It is an imaginative theory of recovery to assert against the State itself, but that is about all it is—imagination. The Georgia RICO Act does not express any waiver of sovereign immunity. As noted above, OCGA § 50-21-25(a) clearly states that the GTCA is the exclusive remedy for any torts committed by state officers and employees. Because the GTCA is the exclusive remedy, the Georgia RICO Act cannot be invoked as an alternate remedy or waiver of sovereign immunity for tortious conduct of state officers and employees.

Colon v. Fulton County, 294 Ga. 93, 95(1) (751 S.E.2d 307) (2013), relied upon by Tricoli, does not support finding otherwise. Colon only involved the Georgia whistleblower statute, OCGA § 45-1-4, which more clearly contained a waiver of sovereign immunity, and did not involve any other statute that was designated as the exclusive remedy where sovereign immunity is at issue.

In conclusion, because Tricoli failed to establish a written enforceable employment contract that would avoid sovereign immunity, and because Tricoli's tort claims were exclusively governed and barred by the

GTCA, the trial court properly granted the defendants' motion.

Judgment affirmed.

BARNES, P.J., ELLINGTON, P.J., DILLARD, McFADDEN, and BRANCH, JJ., concur.

MILLER, Presiding Judge, dissenting.

I respectfully dissent from the majority's conclusion that the trial court properly granted the defendants' motion to dismiss because the trial court did not convert the motion to dismiss into a motion for summary judgment, and the Georgia Tort Claims Act is not the exclusive remedy where the RICO statute created a separate waiver of sovereign immunity.

1. The majority concludes that the trial court converted the motion to dismiss into a motion for summary judgment. The trial court, however, could not do so without providing Tricoli with notice. *Bonner v. Fox*, 204 Ga.App. 666, 667 (420 S.E.2d 1992). Instead, the trial court granted the defendant's motion to dismiss, and this Court should review the trial court's order consistent with that standard of review.[1]

2. The issue of whether the Georgia RICO statute provides a waiver of immunity is a question of statutory interpretation and a matter of first impression.

> [a] statute draws it[s] meaning, of course, from its text. When we read the statutory text, we must presume that the General Assembly meant what it said and said what it meant, and so, we must read the statutory text in its most natural and reasonable way, as an ordinary speaker of the English language would. The common and customary

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[1] We review de novo a trial court's decision to grant a motion to dismiss. *Liberty County School Dist. v. Halliburton*, 328 Ga.App. 422, 423 (762 S.E.2d 138) (2014). In doing so, we construe the pleadings in the light most favorable to the appellant, and we resolve any doubts in the appellant's favor. *Ewing v. City of Atlanta*, 281 Ga. 652, 653(2) (642 S.E.2d 100) (2007).

> usages of the words are important, but so is their context. For context, we may look to the other provisions of the same statute, the structure and history of the whole statute, and the other law—constitutional, statutory, and common law alike—that forms the legal background of the statutory provision in question.

(Citations and punctuation omitted.) *Tibbles v. Teachers Retirement System of Ga.*, 297 Ga. 557, 558(1) (775 S.E.2d 527) (2015).

The RICO Act makes it unlawful for "any person employed by or associated with any enterprise to conduct or participate in, directly or indirectly, such enterprise through a pattern of racketeering activity." OCGA § 16-14-4(b). The definition of "enterprise" includes governmental entities. OCGA § 16-14-3(3). Moreover, the statute specifically provides that "[a]ny aggrieved person" may initiate a civil action for treble damages and/or injunctive relief. OCGA § 16-14-6(b), (c).

Importantly, nothing requires the Legislature to "use specific 'magic words' such as 'sovereign immunity is hereby waived' in order to create a specific statutory waiver of sovereign immunity." *Colon v. Fulton County*, 294 Ga. 93, 95(1) (751 S.E.2d 307) (2013). In drafting the RICO Act, the legislature made its intent clear:

> It is the intent of the General Assembly that [the RICO statute] apply to an interrelated pattern of criminal activity motivated by or the effect of which is pecuniary gain or economic or physical threat or injury. This chapter shall be liberally construed to

> effectuate the remedial purposes embodied in its operative provisions.

OCGA § 16-14-2(b).

The RICO statute includes government entities in its definition of enterprise, and it specifically provides a private individual with a civil remedy for RICO Act violations. These provisions, when viewed together, create a waiver of sovereign immunity.[2] To read the RICO Act as the trial court and the majority do would result in a violation of statutory interpretation and led to a nonsensical result. *See Colon, supra*, 294 Ga. at 96(1).

The majority argues that the Georgia Tort Claims Act is the exclusive remedy for Tricoli's claims and decides the case on this basis. *See* OCGA § 51-21-25(a). I beg to differ, however, with the trial court's and majority's conclusion that Tricoli cannot overcome the bar of sovereign immunity because the language of the RICO statute itself indicates otherwise. Imaginative[3] or not, it is irrelevant whether Tricoli will prevail ultimately on the merits of his RICO allegations. The only issue before this Court now is whether

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[2] Moreover, in other contexts, the Georgia Supreme Court has found language similar to that found in the RICO Act sufficient to waive immunity. *See Colon, supra*, 294 Ga.App. at 95–96(1). Specifically, in Colon, the Supreme Court concluded that the whistleblower statute, OCGA § 45-1-4, waived sovereign immunity with language that "[a] public employee may institute a civil action[.]" As the Supreme Court explained, "in order for the statute to have any meaning at all here, it can only be interpreted as creating a waiver of sovereign immunity." (Citation omitted.) *Id.*

[3] *See* majority op. at 7(4).

he has pled claims that can overcome sovereign immunity at this stage of the litigation. Tricoli has certainly done so.

If Tricoli had alleged only isolated instances of tortious conduct, the Georgia Tort Claims Act would have barred his claims because the General Assembly, in drafting the RICO Act, did not intend to cover "isolated incidents of misdemeanor conduct." OCGA § 16-14-2(b) (emphasis supplied). Unlike the Georgia Tort Claims Act, however, the RICO Act is designed to prohibit (1) a pattern of activity, (2) intended to threaten or cause economic harm, even where that pattern involves tortious actions. *See id.* This is exactly what Tricoli has alleged in his RICO claim—a pattern of tortious and criminal acts designed to threaten him with and inflict economic harm upon him. This Court cannot overlook a remedy the legislature, in its wisdom, saw fit to create. Therefore, I conclude that the Georgia Tort Claims Act is not the exclusive remedy where, as in this case, the legislature intended for the RICO Act to provide a separate waiver of sovereign immunity. Accordingly, I dissent from the majority's opinion.

RELEVANT STATUTORY PROVISION INVOLVED

O.C.G.A. § 5-6-34
Appeal and Error

(a) Appeals may be taken to the Supreme Court and the Court of Appeals from the following judgments and rulings of the superior courts, the Georgia State-wide Business Court, the constitutional city courts, and such other courts or tribunals from which appeals are authorized by the Constitution and laws of this state:

(1) All final judgments, that is to say, where the case is no longer pending in the court below, except as provided in Code Section 5-6-35;

(2) All judgments involving applications for discharge in bail trover and contempt cases;

(3) All judgments or orders directing that an accounting be had;

(4) All judgments or orders granting or refusing applications for receivers or for interlocutory or final injunctions;

(5) All judgments or orders granting or refusing applications for attachment against fraudulent debtors;

(6) Any ruling on a motion which would be dispositive if granted with respect to a defense that the action is barred by Code Section 16-11-173;

(7) All judgments or orders granting or refusing to grant mandamus or any other extraordi-

nary remedy, except with respect to temporary restraining orders;

(8) All judgments or orders refusing applications for dissolution of corporations created by the superior courts;

(9) All judgments or orders sustaining motions to dismiss a caveat to the probate of a will;

(10) All judgments or orders entered pursuant to subsection (c) of Code Section 17-10-6.2;

(11) All judgments or orders in child custody cases awarding, refusing to change, or modifying child custody or holding or declining to hold persons in contempt of such child custody judgment or orders;

(12) All judgments or orders entered pursuant to Code Section 35-3-37; and

(13) All judgments or orders entered pursuant to Code Section 9-11-11.1.

(b) Where the trial judge in rendering an order, decision, or judgment, not otherwise subject to direct appeal, including but not limited to the denial of a defendant's motion to recuse in a criminal case, certifies within ten days of entry thereof that the order, decision, or judgment is of such importance to the case that immediate review should be had, the Supreme Court or the Court of Appeals may thereupon, in their respective discretions, permit an appeal to be taken from the order, decision, or judgment if application is made thereto within ten days after such certificate is granted. The application shall be in the nature of a petition and shall set forth

the need for such an appeal and the issue or issues involved therein. The applicant may, at his or her election, include copies of such parts of the record as he or she deems appropriate, but no certification of such copies by the clerk of the trial court shall be necessary. The application shall be filed with the clerk of the Supreme Court or the Court of Appeals and a copy of the application, together with a list of those parts of the record included with the application, shall be served upon the opposing party or parties in the case in the manner prescribed by Code Section 5-6-32, except that such service shall be perfected at or before the filing of the application. The opposing party or parties shall have ten days from the date on which the application is filed in which to file a response. The response may be accompanied by copies of the record in the same manner as is allowed with the application. The Supreme Court or the Court of Appeals shall issue an order granting or denying such an appeal within 45 days of the date on which the application was filed. Within ten days after an order is issued granting the appeal, the applicant, to secure a review of the issues, may file a notice of appeal as provided in Code Section 5-6-37. The notice of appeal shall act as a supersedeas as provided in Code Section 5-6-46 and the procedure thereafter shall be the same as in an appeal from a final judgment.

(c) In criminal cases involving a capital offense for which the death penalty is sought, a hearing shall be held as provided in Code Section 17-10-35.2 to determine if there shall be a review of

pretrial proceedings by the Supreme Court prior to a trial before a jury. Review of pretrial proceedings, if ordered by the trial court, shall be exclusively as provided by Code Section 17-10-35.1 and no certificate of immediate review shall be necessary.

(d) Where an appeal is taken under any provision of subsection (a), (b), or (c) of this Code section, all judgments, rulings, or orders rendered in the case which are raised on appeal and which may affect the proceedings below shall be reviewed and determined by the appellate court, without regard to the appealability of the judgment, ruling, or order standing alone and without regard to whether the judgment, ruling, or order appealed from was final or was appealable by some other express provision of law contained in this Code section, or elsewhere. For purposes of review by the appellate court, one or more judgments, rulings, or orders by the trial court held to be erroneous on appeal shall not be deemed to have rendered all subsequent proceedings nugatory; but the appellate court shall in all cases review all judgments, rulings, or orders raised on appeal which may affect the proceedings below and which were rendered subsequent to the first judgment, ruling, or order held erroneous. Nothing in this subsection shall require the appellate court to pass upon questions which are rendered moot.

(e) Where an appeal is taken pursuant to this Code section for a judgment or order granting nonmonetary relief in a child custody case, such judgment or order shall stand until reversed or

modified by the reviewing court unless the trial court states otherwise in its judgment or order.

O.C.G.A. § 5-6-35
Cases requiring application for appeal; contents, filing, and service of application; exhibits; response by opposing party; issuance of appellate court order regarding appeal; procedure; supersedeas; jurisdiction of appeal

(a) Appeals in the following cases shall be taken as provided in this Code section:

(1) Appeals from decisions of the superior courts reviewing decisions of the State Board of Workers' Compensation, the State Board of Education, auditors, state and local administrative agencies, and lower courts by certiorari or de novo proceedings; provided, however, that this provision shall not apply to decisions of the Public Service Commission and probate courts and to cases involving ad valorem taxes and condemnations;

(2) Appeals from judgments or orders in divorce, alimony, and other domestic relations cases including, but not limited to, granting or refusing a divorce or temporary or permanent alimony or holding or declining to hold persons in contempt of such alimony judgment or orders;

(3) Appeals from cases involving distress or dispossessory warrants in which the only issue to be resolved is the amount of rent due and such amount is $2,500.00 or less;

(4) Appeals from cases involving garnishment or attachment, except as provided in paragraph (5) of subsection (a) of Code Section 5-6-34;

(5) Appeals from orders revoking probation;

(5.1) Appeals from decisions of superior courts reviewing decisions of the Sexual Offender Registration Review Board;

(5.2) Appeals from decisions of superior courts granting or denying petitions for release pursuant to Code Section 42-1-19;

(6) Appeals in all actions for damages in which the judgment is $10,000.00 or less;

(7) Appeals, when separate from an original appeal, from the denial of an extraordinary motion for new trial;

(8) Appeals from orders under subsection (d) of Code Section 9-11-60 denying a motion to set aside a judgment or under subsection (e) of Code Section 9-11-60 denying relief upon a complaint in equity to set aside a judgment;

(9) Appeals from orders granting or denying temporary restraining orders;

(10) Appeals from awards of attorney's fees or expenses of litigation under Code Section 9-15-14;

(11) Appeals from decisions of the state courts reviewing decisions of the magistrate courts by de novo proceedings so long as the subject

matter is not otherwise subject to a right of direct appeal; and

(12) Appeals from orders terminating parental rights.

(b) All appeals taken in cases specified in subsection (a) of this Code section shall be by application in the nature of a petition enumerating the errors to be urged on appeal and stating why the appellate court has jurisdiction. The application shall specify the order or judgment being appealed and, if the order or judgment is interlocutory, the application shall set forth, in addition to the enumeration of errors to be urged, the need for interlocutory appellate review.

(c) The applicant shall include as exhibits to the petition a copy of the order or judgment being appealed and should include a copy of the petition or motion which led directly to the order or judgment being appealed and a copy of any responses to the petition or motion. An applicant may include copies of such other parts of the record or transcript as he deems appropriate. No certification of such copies by the clerk of the trial court shall be necessary in conjunction with the application.

(d) The application shall be filed with the clerk of the Supreme Court or the Court of Appeals within 30 days of the entry of the order, decision, or judgment complained of and a copy of the application, together with a list of those parts of the record included with the application, shall be served upon the opposing party or parties as provided by law, except that the service shall be

perfected at or before the filing of the application. When a motion for new trial, a motion in arrest of judgment, or a motion for judgment notwithstanding the verdict has been filed, the application shall be filed within 30 days after the entry of the order granting, overruling, or otherwise finally disposing of the motion.

(e) The opposing party or parties shall have ten days from the date on which the application is filed in which to file a response. The response may be accompanied by copies of the record in the same manner as is allowed with the application. The response may point out that the decision of the trial court was not error, or that the enumeration of error cannot be considered on appeal for lack of a transcript of evidence or for other reasons.

(f) The Supreme Court or the Court of Appeals shall issue an order granting or denying such an appeal within 30 days of the date on which the application was filed.

(g) Within ten days after an order is issued granting the appeal, the applicant, to secure a review of the issues, shall file a notice of appeal as provided by law. The procedure thereafter shall be the same as in other appeals.

(h) The filing of an application for appeal shall act as a supersedeas to the extent that a notice of appeal acts as supersedeas.

(i) This Code section shall not affect Code Section 9-14-52, relating to practice as to appeals in certain habeas corpus cases.

(j) When an appeal in a case enumerated in subsection (a) of Code Section 5-6-34, but not in subsection (a) of this Code section, is initiated by filing an otherwise timely application for permission to appeal pursuant to subsection (b) of this Code section without also filing a timely notice of appeal, the appellate court shall have jurisdiction to decide the case and shall grant the application. Thereafter the appeal shall proceed as provided in subsection (g) of this Code section.

O.C.G.A. § 9-11-60
Relief from judgments

(a) Collateral attack. A judgment void on its face may be attacked in any court by any person. In all other instances, judgments shall be subject to attack only by a direct proceeding brought for that purpose in one of the methods prescribed in this Code section.

(b) Methods of direct attack. A judgment may be attacked by motion for a new trial or motion to set aside. Judgments may be attacked by motion only in the court of rendition.

(c) Motion for new trial. A motion for new trial must be predicated upon some intrinsic defect which does not appear upon the face of the record or pleadings.

(d) Motion to set aside. A motion to set aside may be brought to set aside a judgment based upon:

(1) Lack of jurisdiction over the person or the subject matter;

(2) Fraud, accident, or mistake or the acts of the adverse party unmixed with the negligence or fault of the movant; or

(3) A nonamendable defect which appears upon the face of the record or pleadings. Under this paragraph, it is not sufficient that the complaint or other pleading fails to state a claim upon which relief can be granted, but the pleadings must affirmatively show no claim in fact existed.

(e) Complaint in equity. The use of a complaint in equity to set aside a judgment is prohibited.

(f) Procedure; time of relief. Reasonable notice shall be afforded the parties on all motions. Motions to set aside judgments may be served by any means by which an original complaint may be legally served if it cannot be legally served as any other motion. A judgment void because of lack of jurisdiction of the person or subject matter may be attacked at any time. Motions for new trial must be brought within the time prescribed by law. In all other instances, all motions to set aside judgments shall be brought within three years from entry of the judgment complained of.

(g) Clerical mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

(h) Law of the case rule. The law of the case rule is abolished; but generally judgments and orders shall not be set aside or modified without just

cause and, in setting aside or otherwise modifying judgments and orders, the court shall consider whether rights have vested thereunder and whether or not innocent parties would be injured thereby; provided, however, that any ruling by the Supreme Court or the Court of Appeals in a case shall be binding in all subsequent proceedings in that case in the lower court and in the Supreme Court or the Court of Appeals as the case may be.

O.C.G.A. § 16-14-6(c)
Available Civil Remedies

(c) Any person who is injured by reason of any violation of Code Section 16-14-4 shall have a cause of action for three times the actual damages sustained and, where appropriate, punitive damages. Such person shall also recover attorneys' fees in the trial and appellate courts and costs of investigation and litigation reasonably incurred. The defendant or any injured person may demand a trial by jury in any civil action brought pursuant to this Code section.

O.C.G.A. § 45-15-18
Governor may direct Attorney General to conduct investigations of departments, state officials or employees or entities dealing with state; filing and prosecution of actions; appointment of special attorney general

The Governor may at any time direct the Attorney General to conduct an investigation into the affairs of any department of the state or into the official conduct of any state official or employee

or into the affairs of any person, firm, or corporation dealing with the state. The Governor may at any time direct the Attorney General to file and prosecute criminal actions and civil recovery actions in the name of the state against any official, person, firm, or corporation which violates any criminal or civil statute while dealing with or for the state, which violation results in loss, damage, or injury to the state. In the event the Attorney General refuses to take or file such action within a reasonable time after having been directed by the Governor to do so, the Governor is authorized to appoint a special attorney general to carry out the requirements of law provided in this Code section.

PLAINTIFF'S PROPOSED ORDER FOR THE SUPERIOR COURT OF FULTON COUNTY GEORGIA

IN THE SUPERIOR COURT OF
FULTON COUNTY GEORGIA

LEONARD WITT, SUSAN RAINES, ANNE RICHARDS, SCOTT RITCHEY, NICKI AYON, VIRGINIA BELLEW, ERIN ANN EXUM, LANE HUNTER, AMANDA HARRELL, BRIAN LAWLER, JESSICA BOUDREAUX, TIFFANY GRIFF'M, VALERIE DRIBBLE JOSHUA GOODWIN, SARAH LARKIN, ELIZABETH GORDON, DR. BEN WILLIAMS, AND THE COBB CHAPTER LEADERSHIP CONFERENCE OF THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE,

Plaintiffs,

v.

SAM OLENS, THE ATTORNEY GENERAL OF GEORGIA, JOHN DOES, HANK HUCKABY STEVE WRIGLEY, HOUSTON DAVIS, JOHN FUCHKO, THE BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, AND GOVERNOR NATHAN DEAL,

Defendants.

Civil Action No. 2016-CV-282020

Jury Trial Demanded

Before: Hon. Tom CAMPBELL,
Superior Court Judge.

This cause comes before the Court on Plaintiffs' motion for injunctive relief and the Attorney General's contention, as threshold matter, that Plaintiffs' claims are barred by sovereign immunity. For the reasons stated herein, the Court finds that sovereign immunity does not bar the relief requested by Plaintiffs because, in the Georgia RICO Act, OCGA 16-14-1 *et seq.* ("the Act"), the legislature expressly waived sovereign immunity for injunctive relief. The statute, which is not ambiguous, is the controlling authority and may not be ignored or altered by any court. *Colon v. Fulton County*, 294 Ga. 93, 751 S.E.2d 307, 313 (Ga., 2013) ("under our system of separation of powers[, courts do] not have the authority to rewrite statutes"). Accordingly, we set a hearing on the requested temporary injunctive relief on the 18th day of November, 2016.

Waiver under the Constitution

Article I, Section II, Paragraph IX (e) of the Georgia Constitution provides that "[t]he sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver." *Colon*, 751 S.E.2d at 310. "This does not mean, however, that the Legislature must use specific "magic words" such as "sovereign immunity is hereby waived" in order to create a specific statutory waiver of sovereign immunity." *Id.* "Because the General Assembly is presumed to intend something by passage

of [an] act, we must construe its provisions so as not to render it meaningless." *Id.*

Reading the RICO Act

This is case of first impression, in that no court has read and analyzed the RICO Act to determine whether its express provisions on injunctive relief, found at OCGA 16-14-6(a&b), can be given meaning absent a waiver of sovereign immunity. 751 S.E.2d at 310.

It is well-settled, rather, that the legislature may waive, and in fact has waived sovereign immunity through other statutory provisions. 751 S.E.2d at 310.

The question to be addressed, then, is does the language of the Georgia RICO Act, OCGA 16-14-1 *et seq.*, specifically state such a waiver consistent with Ga Const. Ga. Const. Art. I, Sec. II, Par. IX (e). Within these constitutional parameters, it is the statute that controls, since no court at any level has the power to re-write the statutes in which the legislature has expressed its clear intent, or to write the controlling statutory language out of existence. *Colon* at 311-313.

Plaintiffs have advanced provisions of the RICO Act, with great specificity and particularity, to show how the Act expressly waives sovereign immunity. The Attorney General has failed spectacularly to address those specific provisions enacted by the Legislature. Rather, the Attorney General has sought to avoid them, while offering no statutory authority, from the RICO statute or any other source, to counter the specific provisions cited by Plaintiffs.

The test set forth in Colon follows established rules of statutory construction in that all provisions of a statute are assumed to have a meaning, and none

of the provisions to be mere "surplusage." *Colon* at 311. The RICO Act, furthermore, clarifies that its remedial scheme is not based on a private tort duty to any individual, but is predicated on "harm to the state and its citizens." OCGA 16-14-2(a). Moreover, it requires that this scheme be "liberally construed" to effect its remedial purposes, not narrowly restricted as urged by the Attorney General. OCGA 16-14-2(b).

The key inquiry, for purposes of determining a waiver of sovereign immunity, was set forth in *Caldwell v. State*, 321 S.E.2d 704, 707, 253 Ga. 400 (1984) (rejecting state official's sovereign immunity defense to civil RICO action). In the Georgia Supreme Court's Caldwell test, since RICO enterprises are specifically defined to include "governmental entities," at OCGA 16-14-3(3), the phrase "governmental entity" must be substituted each time the statute references a RICO enterprise.

Specific Authorization of Injunctive Relief

Under the Caldwell test, the Georgia RICO statute states a crystal clear waiver of sovereign immunity for injunctive relief against a RICO enterprise (OCGA 16-14-6(a&b)), and a RICO enterprise is specifically defined to include governmental entities. OCGA 16-14-3(3). It is difficult to imagine how a waiver for injunctive relief could be more explicitly stated. By the express terms of the statute, injunctive relief is authorized against governmental entities.

That includes injunctive relief to rescind any approval granted by a state agency, such as the Board of Regent's political quid pro quo appointment of former Attorney General Sam Olens that Plaintiffs seek to rescind. OCGA 16-14-6(a)(4). The statute also specif-

ically authorizes the reorganization of a governmental entity, such as the double switch in which Governor Deal replaced the Attorney General and the Regents replaced the former president of Kennesaw State with the former Attorney General. OCGA 16-14-6(a)(3).

These express provisions, that provide for injunctive relief against the Board of Regents, also authorize injunctive relief against the Governor. This relief is available at OCGA 45-15-18.[1]

Tricoli is not controlling

The *Tricoli* opinion, contrary to the Attorney General's claims that it represents the final solution on sovereign immunity, forever barring all claims against the state, does not even address the issue of sovereign immunity with respect to the injunctive relief under the RICO Act sought by Plaintiffs. The opinion does not examinee the statute at all. It merely assumed, wrongly, that there is no waiver of the state's sovereign immunity possible outside of the Georgia Tort Claims Act, OCGA 51-50-20 *et seq*. *Tricoli v. Watts*, 336 Ga. App. 837, 840, 783 S.E.2d 475, 477 (2016). Since the injunctive relief sought by Plaintiffs is explicitly authorized by statute, it cannot be assumed

[1] Though a typographical error in the pleadings mis-cites this code section, authorizing the Governor to appoint a special attorney general to conduct an independent investigation where the Attorney General can not or will not do so, as OCGA 45-1-8, the Attorney General clearly has notice from the five letters addressed to the Governor, to which the Attorney General responded refusing to investigate in the Atlanta Journal Constitution, of the correct citation and the contents of this code section. These letters constitute Plaintiffs' Exhibits 1-5 submitted in support of the injunctive relief. Attorney General Sam Olens' response to Exhibit 5 is included in Plaintiffs' Exhibit 7.

away on some other grounds that do not apply to the instant case. OCGA 16-14-3(3) & 16-14-6(a&b). Where a statute is clear in its terms, the courts are prohibited from re-writing the provisions enacted by the legislature. *Colon* at 310 "[w]here the language of a statute is plain and unambiguous, judicial construction is not only unnecessary but forbidden." Moreover, this action does not contain any discernable tort claims and thus does not implicate the GTCA in any conceivable way, making case law decided under the GTCA, including *Tricoli v. Watts*,[2] holding that a RICO claim could not be used as an alternative to a tort claim, inapposite. 335 Ga. App. at 340. Moreover, since *Tricoli* does not address the issue of injunctive relief, much less analyze the RICO statute for authority for injunctive relief against the state, it cannot overcome the clear language of the statute, which courts have no power to alter or ignore. And because *Tricoli* does not even address the relief clearly authorized by statute that Plaintiffs seek in this case, it is not binding on this Court.

Under these parameters, the Court finds, based on the authority stated above, that the Georgia RICO Act states an express waiver of sovereign immunity for the injunctive relief Plaintiffs are requesting from this Court. That is true, despite the absence of any

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[2] 336 Ga.App. 837, 783 S.E.2d 475 (2016), *cert denied* November 7, 2016. The Court does take judicial notice that the Supreme Court came out of adjournment early Monday morning, November 7, 2016, to issue an order denying certiorari in the Tricoli case at 8:42, a.m., prior to the hearing scheduled in this cause at 9:30 a.m. the same morning and that the Attorney General's office was ready with the order in hand to present it to this Court less than an hour after it was entered.

explicit reference to sovereign immunity, both because many provisions of the Act make no sense absent a waiver of sovereign immunity and because provisions of the Act quite explicitly authorize injunctive relief against the State and State officials.

As Plaintiffs' claims are not barred by sovereign immunity, this cause shall be set for hearing on the 18th day of November, 2016.

So ordered, this _____ the day of_____, 2016.

/s/ Tom Campbell
Judge Superior Court
Atlanta Judicial Circuit

LETTER FROM STEPHEN HUMPHREYS TO GEORGIA GOVERNOR BRIAN KEMP (NOVEMBER 30, 2020)

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November 30, 2020

The Honorable Brian Kemp
Office of the Governor
Suite 203, State Capitol
Atlanta, GA 30334
http://gov.georgia.gov/

Dear Governor Kemp:

I am writing to follow up my previous unanswered letters to you—dated June 3[1] and July 13,[2] 2019, and most recently on September 1, 2020[3]—concerning my request that you exercise your authority under OCGA § 45-15-18 to appoint a special investi-

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[1] For ease of reference, the letter is included at the following link: https://drive.google.com/file/d/12eMnSL6cxmEYH8FLfpgr7uRf7Y3shexV/view?usp=sharing

[2] For ease of reference the letter is included at the following link: https://drive.google.com/file/d/1Z4OP-AqsBJToxcEYU70td-PrsNiOnBsi/view

[3] For ease of reference, the letter is included at the following link: https://drive.google.com/file/d/1LZJI2JtYAdXKoQf83McnjqzUmECrmviB/view

gator to look into documentation from state records of a pervasive fraud scheme in the University System of Georgia (USG), in which state officials have defrauded the federal government of billions of dollars and obstructed investigation of the fraud, through knowingly false statements and by intimidation and retaliation, extortion and bribery.

In the previous letters, we addressed evidence of multi-billion-dollar fraud on the federal government by state officials in the University System of Georgia, the Department of Audits and Accounts (DOAA), and most disturbingly, in the office of the Attorney General. In particular, correspondence from the Attorney General's office documents efforts to obstruct any hearing or investigation in order to conceal the fraud.[4] The regional accreditation agency, the Southern Association of Colleges and Schools (SACS), also appears to have been complicit.

That is, in part, why faculty at Kennesaw State University (KSU) filed an action in October 2016 to block the USG Board of Regents from appointing former Attorney General Sam Olens-to step down from his post as Attorney General to take a USG position

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[4] We wrote two additional letters to you, requesting an independent investigation of the USG based on additional evidence of criminal fraud, obstruction of justice, and retaliation by Attorney General against Denise Caldon Sorkness and Professor Dezso Benedek, for which the USG and Attorney General claimed sovereign immunity protection from any civil action based on the documented and largely admitted RICO felonies. Instead of investigating the evidence that state officials engaged in a pattern of criminal conduct, the Attorney General has consistently defended criminal enterprises in state government.

as president of KSU—in violation of the Regents' own policies on presidential appointments.

The KSU faculty plaintiffs further alleged an illegal quid pro quo: Attorney General Olens blocked a criminal investigation of the USG; the USG then appointed Olens to a $500,000 a year job, as the sole candidate considered, with no input from the affected school, despite widespread public opposition at KSU. Olens' main qualification, at the time, appeared to be the obstruction of any criminal investigation into $10 million "gone with no explanation" at Georgia Perimeter College (GPC)-$10 million that has never been accounted for to this day, despite a special review by the USG. We have since discovered that this was part of a larger, systemic scheme of USG accreditation fraud totaling billions of dollars in fedeal programs—despite obstruction and knowing misrepresentations, including knowing misrepresentations to the courts in felony violation of OCGA § 16-10-20.1, both by USG officials and the Attorney General.[5]

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[5] The USG financial fraud at GPC is documented at the following links: fraudulent report to conceal misappropriation of $10 million https://drive.google.com/file/d/16sfe2IG-zWDlj7ldMK6NAJbFUCWgnNpI/view?usp=sharing; Annotation of the fraud in the report https://drive.google.com/file/d/13KflAmaxl-tGv2lTvFnE-n9o4Lsrh8hu/view?usp=sharing. The Attorney General's obstruction is documented, in part, at the following links: letter documenting knowing misrepresentations to Tricoli's counsel for the purposes of depriving Tricoli of representation: https://drive.google.com/file/d/1Q7q07YHq5F-JcpFVkUMxMXeIFewgllnJ/view?usp=sharing. Analysis of Attorney General's knowing misrepresentations to obstruct hearing and criminal investigation: https://drive.google.com/file/d/1tBR4DzXVb6jOht1YSKPi-QKbiwjNShNs/view?usp=sharing

In addition to obstruction of the investigation of this massive and systematic fraud, the USG's appointment of Olens required the removal of the longtime sitting KSU president, Dr. Daniel Papp. The evidence shows, as alleged in the KSU action, that Dr. Papp's removal was procured by fraud and extortion, including another knowingly misleading report by the USG,[6] in which the USG's own evasion of governing law and Regents' policy on presidential compensation[7] was blamed on Dr. Papp, who at all times followed USG direction. The USG misrepresentations about Dr. Papp were falsely reported as fact by the Atlanta *Journal-Constitution*. This destroyed Dr. Papp's public reputation, and intimidation against Dr. Papp continues to ensure that he does not mount any public challenge. To cover the tracks of USG officials committing illegal acts, the Board of Regents subsequently changed the policies violated by the USG.[8]

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[6]https://drive.google.com/file/d/1KCkY3M-LqjVuh6gtzMOdCwF8JgW2WivH/view?usp=sharing

[7] https://drive.google.com/file/d/1xsL6uxh4L_ZchyymJDamHUcpTm_QS3UO/view?usp=sharing

[8] The Regents made after-the-fact amendments to BOR Policy 2.1 regarding the presidential reappointment process, which was used to threaten Dr. Papp: https://drive.google.com/file/d/116UUEiuGkEEDnf5t4VkbT-QlGZH4bXfa/view?usp=sharing

After the fact changes were also made to BOR Policy 2.8, which the USG violated by systematically transferring responsibility for paying Dr. Papp's salary and benefits to the KSU Foundation despite the prior legal prohibition. https://drive.google.com/file/d/1ebQldHzt5weTfzIO212YDGXX0NprLlum/view?usp=sharing

These violations of the policy in place at the time were confirmed in the USG report that purportedly places blame on Dr. Papp. It remains to be determined whether the Atlanta Journal-Con-

Dr. Papp was threatened with retaliation if he tried to block his termination-to prevent him from seeking the statement of charges and hearing to which he was entitled under BOR policy 2.4.3.[9] In particular, USG Vice Chancellor John Fuchko threatened Dr. Papp, five days before the Regents' scheduled meeting, that if Dr. Papp did not agree to retire early, the Board of Regents would simply not reappoint him at its May 2016 meeting.

This raises the question how USG staff could speak with such confidence about such a future decision to terminate Dr. Papp, despite the absence of any actual wrongdoing the USG was willing to charge at a hearing. The Board of Regents members are appointed by the Governor, purportedly as independent decision-makers who are not answerable or dictated to by the USG staff. This coercive pressure was part of a scheme to deprive Dr. Papp of the hearing to which he was entitled in such an involuntary separation, a hearing that might delve into the misconduct of the USG and Attorney General.[10]

These documented claims in the KSU action were laid out in successive pleadings over the course of more than a year. The Attorney General appointed to replace Olens, Chris Carr, never responded to the KSU action, including these allegations of criminal obstruction, evidence tampering, bribery and extortion

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stitution failed to read that intentionally misleading USG report carefully, and was duped by it, or was knowingly complicit in the misrepresentations.

9 This policy has since been renumbered and is now BOR 2.5.3.

10 https://creativeloafing.com/content-470581-outlandish-conspiracy-theories-timeline-of-the-phantom-case-at

—the same as Carr never filed a responsive pleading to the motion to set aside the judgment in the Tricoli action when it was discovered what Olens' obstruction was concealing, the multi-billion-dollar accreditation fraud on the federal government.[11]

Though the Attorney General never responded to the documented KSU allegations, trial judge Tom Campbell also failed to respond, for more than a year, to repeated motions for default and pleadings introducing additional evidence of fraud by the USG and obstruction by the Attorney General. Finally, at the time growing controversy forced Olens to leave KSU, a year after the action to block his illegal appointment was filed, Campbell denied relief in the uncontested action, in a one-sentence order with no explanation.

The Georgia Court of Appeals and Supreme Court both denied any review of Carr and Campbell's actions, or rather inaction. In particular, the Georgia Supreme Court denied review of the KSU action, ignoring the fact that at least five of the nine justices should have been disqualified by conflicts of interest,[12] as admitted in the related Tricoli action.[13]

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[11] Chris Carr has never filed any response to the pleading in the Tricoli alleging and documenting the USG's systematic fraud scheme on the federal government—though it was filed on April 1, 2019. The KSU action was first filed on October 31, 2016, and Chris Carr has yet to file a responsive pleading, over four years later.

[12] Fulton County Daily Report, June 24, 2020: https://drive.google.com/file/d/1Hl7XQj5aMqkBJQ_lXvZqTRfZmnUumvsL/view?usp=sharing

[13] This raises a serious separate issue, as one of the conflicted

Why so much effort to conceal the wrongdoing in the USG, and to place Olens illegally at the head of KSU? Concealing billions in USG fraud is sufficient reason. In light of recent claims of election fraud, we will separately address the destruction of evidence of election interference that occurred at KSU during Olen's brief, illegal appointment.

If the USG and Attorney General continue to hide behind claims of sovereign immunity protection for bribery, extortion, and other racketeering offenses in state government, including destruction of evidence of election fraud—as were documented at KSU, but to which AG Chris Carr never responded. That is all the more reason to conduct an independent investigation of the evidence filed with the KSU complaint.

Thank you for your time and attention to these important matters.

Sincerely,

Stephen F. Humphreys

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justices who illegally participated in the KSU denial has now left the bench, leaving a vacant seat for which you cancelled the election and stand poised to name another state supreme court justice, though the Georgia Constitution calls for the justices to be elected by popular vote. https://creativeloafing.com/content-470370-OUTLANDISH-CONSPIRACY-THEORIES-The-paradox-of-conservative-judicial-activism

MEMORANDUM TO THE GEORGIA BAR REGARDING FIRST AMENDMENT RETALIATION (AUGUST 1, 2018)

To: Ken Hodges, President, Georgia Bar Association

From: Stephen Humphreys

Date: August 1, 2018

re: Government Retaliation in Violation of the First Amendment

Ken, as we discussed, there is no more serious First Amendment issue in the country today than the one raised by government retaliation, in the form of legal action against an attorney bringing legal action against the government for corruption.

In fact, the US Supreme Court just issued a decision that the First Amendment trumps all other legal considerations to prohibit such government retaliation. *Lozman v. Riviera Beach*, 568 US 115 (June 18, 2018).

There is surely no more pressing issue facing attorneys as a group than whether government can take punitive action against them for attempting to hold government accountable. The Crown would have surely loved to slap Jefferson and Adams down in the same manner.

Background of the Retaliation

As you are also aware from our 2015 meeting, I have filed a series of fraud and RICO actions against the University System of Georgia (USG) and Attorney General (AG). The initial action arose from a failed attempt to revoke the tenure of a UGA

professor in which we caught the Attorney General red-handed, as documented in the hearing record, trying to conceal exculpatory evidence and knowingly putting witnesses on the stand to testify to manufactured evidence.

Subsequent cases make claims for knowing falsification and misrepresentation of USG finances to conceal theft of millions in taxpayer dollars, obstruction of criminal investigations and evidence tampering by the Attorney General (again).[22]

As a result, I have been engaged in a years-long legal dispute with the state—with the state contending that state officials enjoy sovereign immunity against RICO claims for *criminal* acts. So far, the AG and the courts have evaded and ignored the contrary legal authority I have presented, in the fight against government corruption, that the RICO statute expressly authorizes a civil action against state officials and state agencies.[23] The only court to ever address the question, the Georgia Supreme Court in 1984, decided the issue in my favor, holding that the statute expressly authorized a civil RICO

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[22] Evidence shows that this obstruction, particularly attempts to conceal evidence and fail to produce documents in response to Open Records requests, continues up to the present under AG Chris Carr, who brought the motion for sanctions.

[23] *E.g.*, OCGA 16-14-3(3) (RICO enterprise defined to include "governmental entities"); OCGA 16-14-6(a&b) (injunctive relief authorized against government, including to rescind state agency actions); OCGA 16-14-4(b) (statute can be violated by employees of "governmental entities"); OCGA 16-14-6(c) (damages authorized against violators of the statute); OCGA 16-14-2 (RICO statute protects the state from harm, not just individual plaintiffs).

claim against State Labor Commissioner Sam Caldwell.[24] The AG and the courts have also ignored this precedent, which has never been mentioned in any legal brief or court decision upholding sovereign immunity.

I am now being subjected to sanctions because I refused to sit down and shut up and go along with substituting Georgia politics for the rule of law. For that, the state is attacking the messenger.

The motion for sanctions the Attorney General brought against me—for continuing to argue that the law as written does not afford sovereign immunity protection to state officials committing criminal RICO predicate acts-should be extremely troubling to the entire legal profession. It is also illegal, unconstitutional, and even potentially criminal on several levels:

Violation of the Sanctions Statute

At the most obvious level, the order requiring me to pay the state's legal fees violates the very sanctions statute under which it was ordered. The statute invoked by the AG to impose sanctions contains a safe harbor provision that specifically protects me as the first private attorney seeking to bring a civil RICO action against state officials. OCGA 9-15-14(c).

The statute, in relevant part, expressly states: "No attorney . . . shall be assessed attorney's fees as to any claim . . . asserted by said attorney . . . in a good faith attempt to establish a new theory of law in Georgia if such new theory of law is based on some recognized precedential or persuasive authority."

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[24] Caldwell v. State, 253 Ga. 400 (1984).

The claims I asserted in *Tricoli v. Watts* are supported by the express language of the RICO statute (which no court has reviewed, as yet) and the controlling Georgia Supreme Court precedent in *Caldwell* (the Georgia Supreme Court declined to hear the *Tricoli* case and compare its own *Caldwell* decision).

Though I argued its protection, the AG and the court both merely ignored the safe harbor provision of OCGA 9-15-14(c)—in violation of constitutional due process.

Violation of the Anti-SLAPP Statute

In response to the AG's motion for sanctions,[25] I filed a motion to strike or dismiss the motion for sanctions—as specifically authorized by the Georgia Anti-SLAPP statute, which expressly protects the First Amendment right to petition the courts and bring attention to issues of public importance. OCGA 9-11-11.1(a).

When a motion for protection from retaliation is filed under this statute, the court is required to address the First Amendment retaliation issue within 30 days—and the court is explicitly prohibited from taking any further action until the matter is considered and a final resolution is reached. OCGA 9-11-11.1(d).

By contrast, Judge Coursey ignored the anti-SLAPP motion and went ahead and entered a sanctions

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[25] The motion for sanctions was based on my action to set aside a prior judgment based on due process violations and new evidence of fraud by defendants affecting the judgment, as expressly authorized by statute. OCGA 9-11-60(a & d).

order 15 days after the anti-SLAPP motion was filed. As with the sanctions statute, all the procedural and substantive provisions of the anti-SLAPP statute were simply ignored—again, in violation of constitutional due process.

Evasion of the First Amendment

The evasion of anti-SLAPP statute is an evasion of the First Amendment values the statute embodies —as mandated by the US Supreme Court in *Lozman v. Riviera Beach*.

The AG, however, has actually tried to claim that the anti-SLAPP statute, and by implication the First Amendment, does not apply to the AG taking punitive action against an attorney raising issues of public importance in a court proceeding and demanding that the controlling statutes, constitutional provisions, and case law precedents be considered by the courts (which have evaded them, instead).

The Georgia Court of Appeals refused to hear an appeal of the sanctions order, despite the clear statutory violations, and despite the alleged infringement of First Amendment rights that *Lozman v Riviera Beach* prohibited.

Suppression of Related Evidence

At the same time that I am being sanctioned for supposedly bringing an action without evidentiary support, evidence of the wrongdoing underlying the legal action is being suppressed.

The same judge who entered the sanctions order also quashed evidentiary subpoenas without legal authority and barred witness testimony at the sanc-

tions hearing. At the same time, the USG and AG have failed to produce relevant documents in response to Open Records requests.

The seriousness of this matter goes well beyond the illegality of the sanctions order. It also implicates serious violations of rules of legal ethics and canons of judicial conduct. Far worse than that, the continuing efforts to suppress and conceal evidence have potential criminal implications under the Open Records, evidence tampering, and knowingly false representations statutes.[26]

Retaliation and Intimidation

All these blatant evasions of the governing law are indicia of the retaliatory motive and intent to intimidate.

Moreover, this sanctions order is not the first state government attempt to retaliate against me for pursuing claims against the state government.

The state first tried to bring claims for damages against me, for filing a mandamus petition, under OCGA 9-15-15. As a reading of the statute clearly shows, it clearly prohibits bringing claims in the context of a mandamus action.[27]

After that state effort at intimidation failed for clear illegality, then-AG Sam Olens sought a federal

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[26] OCGA 50-18-74, 16-10-94 & 16-10-20.

[27] OCGA 9-15-15(a) When any civil action is brought against a judicial officer, *other than an action for . . . mandamus*, . . .

court order to bar me from bringing claims against the AG in the state and federal courts of Georgia, supposedly for defying court orders. The orders in question had been reversed and vacated.

I have publicly criticized the judiciary for relying on absurd originalist interpretations of English Common law, and even Confederate law, to expand sovereign immunity to shield the state from any accountability.

The state government is now retaliating against me with an illegal sanctions order for exercising that First Amendment right.

Conclusion

Concerted government punitive action against any attorney adverse to the state should give great pause to the entire legal profession. When the Attorney General advocates, and the courts allow, the protections enacted by the legislature to be bypassed, that is unseemly at best. The prospect is even worse where it may involve concealing evidence of criminal conduct by state officials.

But it is not only attorneys who are placed at risk when the alleged retaliation enforces the contention that state officials enjoy sovereign immunity and cannot be held accountable for criminal conduct that harms the state itself.[28] This is a fundamental threat to the rights and well-being of all citizens. If this

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[28] The RICO statute addresses "the increasing extent to which the state and its citizens are harmed as a result of the activities of these [increasingly sophisticated criminal] elements. OCGA 16-14-2(a).

pernicious doctrine is allowed to take root in Georgia, it is a threat to the republic.

This is a serious matter that cries out for the State Bar of Georgia to review and take a position.

Stephen F. Humphreys