IN THE SUPREME COURT OF GEORGIA

ANTHONY S. TRICOLI,

Plaintiff,

vs.

ROB WATTS; RON CARRUTH; JIM RASMUS; MARK GERSPACHER; SHELETHA CHAMPION; HENRY HUCKABY; JOHN FUCHKO; STEVE WRIGLEY; BEN TARBUTTON; THE BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA; SAM OLENS, THE ATTORNEY GENERAL OF GEORGIA; and ROBIN JENKINS

Defendants.

APPEALS NO. A15A2256

CIVIL ACTION NO. 14-CV-4911

JURY TRIAL DEMANDED

APPELLANT'S PETITION FOR CERTIORARI

May 4, 2016

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Comes now Plaintiff-Appellant Dr. Anthony Tricoli, petitions this honorable Court for certiorari from the Court of Appeals opinion upholding the trial court order dismissing the action (Exhibit 1, Opinion, attached), reconsideration denied April 14, 2016 (Exhibit 2, Order, attached), and asserts his rights to appeal as follows:

The lone dissenter on the Court of Appeals, emphasizing that it was an issue of first impression, could not have laid it any barer in assessing the majority opinion upholding sovereign immunity for state officials who knowingly and systematically falsify state agency reports to hide the theft of taxpayer funds. It is now up to this honorable Court to say whether the majority did, in fact, dive down the proverbial rabbit hole to reach what the sole dissenter called a "nonsensical result." (Opinion, p. 3, Miller, PJ, dissenting).[1] It is a result that contradicts the controlling statutes and case law precedents, and conflicts with the Georgia Constitution's sovereign immunity provisions—none of which were ever analyzed in the majority opinion.

Moreover, the majority's conversion of the Attorney General's 12(b)(1) motion to dismiss into a summary judgment motion—in conflict

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[1] With apologies to Lewis Carroll, the dissent was alluding to a more straightforward source, this Court's opinion in *Colon v. Fulton County*, 294 Ga. 93, 751 S.E.2d 307, 310 (Ga. 2013).

with the controlling statutes[2] and the arguments of all parties[3]—was fundamentally unfair and arrived at distorted results by passing straight through the looking glass to decide issues that were never raised and argued in the trial court. Instead of resolving issues presented below, the majority actually created new causes of action, for violation of fundamental Constitutional due process rights of notice and an opportunity to respond.

That is extremely unfortunate because the novel questions raised by the scheme that targeted Anthony Tricoli, and nearly destroyed an entire state institution offering access to higher education, are the most important this Court could entertain, reaching the most basic precepts of the accountability of the government to the governed. According to the Attorney General, the trial court, and the Court of Appeals majority—the citizens of Georgia have absolutely no recourse against even the most sinister, self-serving, and destructive schemes hatched by state officials using the machinery of state government, that is supposed to serve the public, to

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[2] OCGA 9-11-12(b) allows conversion to summary judgment only for motions filed under Rule 12(b)(6), not 12(b)(1). OCGA 9-11-56 requires notice and a hearing for a summary judgment motion.

[3] Appellees argued at length that presenting evidence on sovereign immunity did not allow the courts to convert the 12(b)(1) motion to dismiss to a summary judgment. R150-51. This belies the assertion that Tricoli "requested" summary judgment or "waived the notice requirement." Opinion, p. 2. If anything, Tricoli was operating under assurances that the trial court would not convert the motion, and it did not, as noted by the dissent. Opinion, p. 1 (Miller, PJ, dissenting) ("Dissent").

accomplish their own illicit ends, instead. The malice aforethought and the seriousness of the harm to the individual supposedly do not matter. Nor does the harm to the State itself, as envisioned by the legislature in OCGA 16-14-2, and as seen in practice at Georgia Perimeter College (GPC) where the scheme to hide the misuse of state and federal taxpayer dollars had devastating consequences: a $16 million budget deficit at GPC, the loss of 282 jobs, and drop in enrollment by more than 10,000 students per semester, and the premeditated destruction of the career of one of the University System's most successful and dynamic leaders, former President Anthony Tricoli. R28-29, 37, 45, 458-60.

It is documented and alleged that all this havoc was created by state officials who, as the dissent pointed out, did not merely breach a common law tort duty to Anthony Tricoli, but who committed a pattern of related criminal predicate acts (Dissent, p. 4), by abusing the power they held by virtue of their positions within a "governmental entity"—as explicitly prohibited by the Georgia RICO statute (OCGA 16-14-3(3 & 4) & 16-14-4). The Georgia RICO statute, as the dissent also points out, creates a civil cause of action for these criminal violations with remedies ranging from injunctive relief to treble damages and estoppel of a civil defense in the case of a criminal conviction. OCGA 16-14-6(a-e). The issue of whether these

government agencies and officials have no accountability whatsoever, as found by the trial court and the appeals court majority in conflict with these statutory provisions, could not be of greater importance, gravity, and concern to the public who may be further targeted and harmed, individually and collectively, by such patterns of criminal behavior. This case is also extremely important to determine whether any citizen so aggrieved can receive a fair adjudication, consistent with fundamental notions of due process, against the entrenched power, at the highest levels, of the State itself.

Factual Background Supporting Supreme Court Review

In August of 2006, Appellant Anthony Tricoli was hired as president of Georgia Perimeter College (GPC) pursuant to a written contract with the Board of Regents that specifically incorporated Regents' (BOR) policies. R485-86, 498. Tricoli took over from interim president Rob Watts, who moved to the University System of Georgia (USG) central office to become Tricoli's supervisor as Chief Operating Officer and Two-Year College Section Head. R9. Immediately upon his arrival at GPC, Tricoli faced a $30 million budget shortfall and a directive from Watts to lay off 300 employees. R26. Instead, Tricoli targeted local demographic needs, doubled the

enrollment and revenues of GPC, resolved the budget shortfall without laying off any employees, and directed the creation of an approximately $20 million reserve fund by 2009, at a time when most USG institutions were in severe financial straits. R27-28.

Because of the difficult financial conditions at the time, Watts changed USG policy to allow system institutions to spend reserve funds to meet immediate needs without prior USG approval. R31. GPC budget director Ron Carruth, who had been hired by Watts prior to Tricoi's arrival, immediately began withdrawing GPC reserve funds, including millions of dollars later found to be "gone without explanation," while at the same time reporting to Tricoli and the rest of GPC management that GPC was still running millions in the black. R10-11, 31-32, 265. Carruth's clandestine spending spree included up to $1.5 million a year, payments that did not appear in the GPC budget, to an outside consultant, of whom President Tricoli had never heard during his six years as president, and who did not perform the consulting functions supposedly assigned by Carruth and Watts, before Tricoli's arrival and without Tricoli's knowledge during his presidency. R43-444, 639. When Tricoli first discovered that over a million dollars a year was being paid to an outside consultant for no visible return, in February of 2012, he ordered Carruth to terminate the payments. R43.

Within six weeks of that directive, Tricoli himself was gone—terminated with extreme prejudice. R651.

This budget charade collapsed in April of 2012 when the USG announced a $16 million deficit at GPC and demanded Tricoli's resignation, only ten days after Carruth had reported another multi-million dollar surplus. R29-30, 50. Later investigation showed that GPC and USG budget officials had been exchanging emails for months about an impending budget crisis while Carruth continued to report large surpluses to Tricoli and the rest of GPC management, and Watts and new Chancellor Hank Huckaby remained silent in the budget reviews and annual performance evaluations and identification of goals required by Regents' policy (BOR Policy 2.3). R31-32, 47, 264-68, 361-75. On March 26, 2012, a month before the public announcement of the deficit, GPC budget officials sent to the USG a financial report showing GPC at least $12.8 million in the red—a report that was never shared, at any time, with Tricoli, whom Appellees waited to ambush a month later.[4] R 264. Knowing misrepresentations, by commission or omission, of the budget of a state agency are felonies and RICO predicate

[4] This failure to inform Tricoli of the March 26 report violated an affirmative duty to inform the president of any threat to the solvency of the school under GPC Policy 302. R34.

acts. OCGA 16-14-3(5)(A)(xxii) & 16-10-20. Of the $16 million in overspending at GPC, over $9 million has never been accounted for. R356.

Regents' policy governing Tricoli's employment contract also called for Tricoli's name to be presented to the Regents for renewal at their regular April Board meeting (BOR Policy 2.1). If his annual contract were not renewed, Regents' policy governing Tricoli's employment contract required Tricoli to be notified immediately following the Regents' April meeting (BOR Policy 2.4.2). If Tricoli were terminated outside of this annual renewal procedure he was entitled by Regents' policy to a statement of charges and a hearing (BOR Policy 2.4.3). In addition, Tricoli was eligible upon separation for two year's pay as a president serving more than five years (BOR Policy 2.4.4). In April of 2012, while his annual contract was still in effect, none of these Regents' policies were followed with respect to Tricoli.[5]

Instead, at the same time Huckaby demanded Tricoli's resignation upon threat of being fired, the USG was sending information to the media, and Huckaby was appearing on the radio, saying that Tricoli had personally directed the depletion of the GPC reserves that had been misrepresented to

[5] These Regents' policies governing the contract were not fully expounded in the trial court because the only issue before the court was whether Tricoli had a written contract to waive sovereign immunity. Thus Tricoli never had any notice or opportunity to respond to a full and final adjudication of whether or not that written contract contract was breached.

Tricoli by Carruth, Watts, Huckaby, and others. R35. When Tricoli refused to resign in the face of the budget deficit, Huckaby offered Tricoli another position in the USG central office if Tricoli would resign from GPC quietly, a promise that was also repeated over the airwaves. R53, 476. When Tricoli, faced with these threats and promises, resigned as GPC president and accepted the USG position in writing, Huckaby reneged on the job Tricoli resigned to take. R54-55. Instead, Huckaby wrote Tricoli on May 10 to inform him that the Board had not renewed his annual contract—though the deadline under Regents' policy 2.4.2 for that notification had already come and gone and Tricoli was never presented to the Board for approval in violation of BOR 2.1—and that his employment would end when his annual contract expired on June 30.[6] R55. Tricoli twice requested the hearing he was entitled to if terminated outside the annual renewal procedure and Huckaby twice refused. R56, 70, 191, 643, 660.

With Tricoli ousted in this highly unusual fashion, Watts returned to GPC to replace Tricoli as interim president at GPC, where one of Watts' first acts was to order the deletion of management-level emails sent during the Tricoli administration. R65, 172. After Tricoli filed suit, the Regents altered all the policies they had previously violated to conform, after the

[6] Thus Tricoli could show, with proper notice, that his contract was breached while it was still in effect.

fact, with their actions towards Tricoli. R488-89. Prior to any investigation of how GPC had gone from a $20 million reserve ordered by Tricoli in 2009 to a $16 million deficit in 2012, while Carruth was reporting surpluses up to $38 million to Tricoli and the rest of GPC management, Regents' Chairman Ben also went on the airwaves to announce that, while the USG supposedly had only just learned of GPC's financial troubles, "the important thing is that [Tricoli] is no longer president." R36.

On May 7, 2014, Appellant filed a Complaint in DeKalb Superior Court making claims for criminal violations of the Georgia RICO Act (R71-78), intentional torts with malice and intent to cause harm (R79-82), breach of a written contract (R82), and injunctive relief (R86, 637 et seq.). The Attorney General filed a Motion to Dismiss on behalf of his fellow Appellees on sovereign immunity grounds as to all claims under OCGA 9-11-12(b)(1). (R120, 172). In that motion, the Attorney General argued at great length, citing the statute and case law, that sovereign immunity was a matter in abatement regarding the court's jurisdiction, and that presenting evidence with respect to the contract and other questions did not convert the motion to dismiss into a motion for summary judgment. (R150-51). With respect to the ex contractu waiver of sovereign immunity, for example, the

one and only issue was whether there was a written contract that waived sovereign immunity.

A hearing was held on that motion on September 22, 2014, at which the Attorney General argued for dismissal on exclusively Constitutional grounds. In part, the Attorney General argued that Tricoli did not have a written contract with the Board of Regents on which to bring a suit pursuant to the Constitutional waiver of sovereign immunity. Tricoli had alleged he did have a written contract that was in the Attorney General's possession. R270. Plaintiff subsequently filed Notice of Evidence of Written Contract, submitting documentation that was already in the Attorney General's possession that Tricoli did have a written contract incorporating Board of Regents policies. (R485 et seq.)

On November 19, 2014, Tricoli filed a Motion for Interlocutory Injunction, based on admissions that USG policies governing his contract had been violated and that Tricoli had been ousted pursuant to admitted criminal RICO predicate acts. (R637). Tricoli filed for injunctive relief under OCGA 16-14-6(c) and 16-14-3(3)—which specifically authorize reorganization of a state governmental entity engaged in a pattern of criminal RICO violations. (R657-58).

On the same day Tricoli filed his Motion for injunctive relief, the trial court affixed a hand-written date and signature to an Order dismissing Tricoli's entire action, barring all his claims of every kind on sovereign immunity grounds. (R675). This Order with the handwritten date of November 19 did not so much as mention the Motion for injunctive relief filed the same day, November 19, though the Order was not entered by the Clerk and legally effective until two days later, November 21. (R669 et seq). Tricoli filed a Motion for Stay (R690), requesting the trial court to address the Motion for injunctive relief ignored in the Order of dismissal. The trial court denied the Motion for Stay without discussion. (R715).

While acknowledging that Tricoli did have a written contract with the Board of Regents—which would waive sovereign immunity, the sole question raised by the motion to dismiss--the trial court dismissed the contract claims, anyway. The trial court did that, without citing authority, on the basis of Tricoli's later resignation, a point that had not even been argued by the Appellees. R671.

The trial court's dismissal order further found that Tricoli's claims under the RICO statute for a pattern of criminal predicate acts, including the knowing falsification of GPC budget reports to hide the misallocation of state taxpayer funds, were pre-empted by the Georgia Tort Claims Act

OCGA 50-2120 et seq, (GTCA)) exception to waiver of sovereign immunity for "financial oversight activities." R672. All other claims were dismissed, without specific explanation, under a catch-all for "administrative functions"—including, presumably, his claims for extortion from the coercion to resign via threats that he would be fired, along with the fraudulent inducement, also transmitted over the airwaves in violation of the federal wire fraud and Georgia RICO statutes, of an alternate job in the USG central office if he would resign at GPC. R672-74.

On appeal, the Court of Appeals upheld the trial court order in its entirety. The appeals court, like the trial court, completely ignored Tricoli's claims for injunctive relief under the RICO statute. While acknowledging that Tricoli had a written contract, the only issue raised by Appellee's motion, the appeals court converted the motion to dismiss on grounds of sovereign immunity into a motion for summary judgment, placing a burden on Tricoli to present evidence to prove his claims—oddly enough, at the level of appellate review. Opinion, pp 2-3. The appeals court then decided against Tricoli on issues that had never been raised and fully argued in the trial court below, such as whether Tricoli could show a breach of his contract. The appeals court also found that Tricoli had no contract claim because he was an at-will employee, contrary to the Regents' policies--

giving Tricoli a right to an appeal, for example--that had never been raised and argued in the trial court, since the only issue was whether Tricoli had a written contract. *Id.*

Right to Direct Appeal

In addition to the petition for certiorari of these grave and important questions, Tricoli maintains his right to direct appeal to the Supreme Court of Georgia. See December 2014 Notice of Appeal, R1-2. This Court transferred the appeal to the Georgia Court of Appeals by Order of July 6, 2015 in Case No. S15A1466.

This case was originally appealed directly to this Court on the basis of the sovereign immunity clauses of the Georgia Constitution that are implicated (GA. Const. Art. 6, Sec. 6, Par. II(1)), in addition to the denial of injunctive relief (OCGA 5-6-34(a)(4))—which, in fact, was never considered by either court below, despite the explicit authority under the Georgia RICO statute for an injunction against a governmental agency usurped for the purpose of committing a pattern of related criminal predicate acts. OCGA 16-14-6(a&b) (injunctions vs. RICO enterprises); cf. OCGA 16-14-3(6) (RICO enterprise defined to include "governmental entities"). See Motion for Reconsideration filed in the Georgia Supreme Court on July 14, 2015.

In addition, the Georgia summary judgment statute, invoked for the first time on appeal, provides for appeal by any party against whom summary judgment is granted. In the novel circumstances of this case, since the trial court did not convert the motion to dismiss into a motion for summary judgment—which occurred, contrary to the governing statutes, without notice or opportunity to respond, for the first time in the Court of Appeals—the appeal mandated by OCGA 9-11-56(h) can only be had before this honorable Court, absent a remand to require the appeals court to observe the governing statutes and fundamental principles of due process.

QUESTIONS FOR CERTIORARI

1. Whether the Court of Appeals erred, violating Appellant's due process rights, by converting the motion to dismiss into a motion for summary judgment, contrary to the governing statute, with no notice and opportunity to respond;

a) in particular, by deciding issues not raised in the trial court beyond whether Appellant had a written contract to waive the State's sovereign immunity.

2. Whether the courts below erred, violating Appellant's due process rights, by blanket dismissal of claims without specifying the legal basis for dismissal of each claim;

a) in particular, by dismissing Appellant's claims against the state for injunctive relief specifically authorized by the Georgia RICO statute, without ever mentioning or addressing those claims;

b) by blanket dismissal of tort claims without ever matching them to a specific exception to the waiver of sovereign immunity; and

c) by dismissing RICO claims, by reference to the Georgia Tort Claims Act, without ever matching the elements of the RICO claims to any tort claim governed by the GTCA.

3. Whether the Georgia RICO statute states its own separate waiver of sovereign immunity;

a) in particular, whether the GTCA is the sole waiver of sovereign immunity for wrongdoing by state officials;

b) whether the specific language of the Georgia RICO statute enacted by the legislature—such as the provisions protecting the State from harm, defining a RICO enterprise to include governmental entities, including criminal predicate acts such as knowing falsification of a state agency report that can only be committed by state employees, and authorizing a civil action for damages and injunctive relief—can be given any meaning absent a waiver of sovereign immunity.

c) whether the Georgia RICO statute gives effect to the Constitutional provision waiving sovereign immunity for state employees committing acts with actual malice and intent to cause harm.

1. <u>The Court of Appeals erred, violating Tricoli's due process rights, by granting summary judgment with no notice or opportunity to respond</u>

This Court must rectify a fundamental wrong committed by the Court of Appeals that allowed it to dismiss Tricoli's claims, in violation of the governing statutes, and without giving Tricoli notice and an opportunity to respond. The motion before the courts was one for dismissal under OCGA 9-11-12(b)(1), which the Attorney General himself argued at great length was not amenable to conversion to summary judgment by the presentation of

evidence, according to the statute. OCGA 9-11-12(b) (only motions filed under Rule 12(b)(6) may be converted to summary judgment).

This improper conversion severely prejudiced Tricoli. It fundamentally changed the posture of the case, converting the standard of review from construing every inference in Tricoli's favor to requiring him to present evidence satisfying the elements of all his claims to stave off summary judgment—before any discovery was conducted in the case and without giving him any notice he had to meet that altered burden. Opinion, p. 3. To throw out Tricoli's case by saying he "requested" a summary judgment conversion of the 12(b)(1) motion, against the protests of the Attorney General and in violation of OCGA 9-11-12(b), is an injustice so fundamental it epitomizes the deprivation of due process of law. U.S. Const, Am. XIV.

Furthermore, the summary judgment statute, OCGA 9-11-56(h) requires that Tricoli be given an opportunity to appeal the grant of summary judgment against his entire complaint. That improper grant of summary judgment on all of Tricoli's claims—at the level of appellate review, without notice and an opportunity to respond--nullifies the entire Court of Appeals opinion. At the very least, the action should be remanded to the trial court for proper consideration of these issues.

a) The improper grant of summary judgment especially prejudiced Tricoli's contract claims

Both the trial court and appeals court conceded that the mutually signed offer and acceptance letter stating the essential terms of employment constituted a valid written contract under the controlling precedent. *Board of Regents of the Univ. Sys. v. Doe*, 630 S.E.2d 85, 278 Ga. App. 878, 880-81 (Ga. App., 2006) ("because [the Board of Regents' mutually signed offer and acceptance letter stating a "specific salary, benefits, and starting date"] was a valid, written contract between the parties as a matter of law, the doctrine of sovereign immunity did not bar Doe's breach of contract suit"). That should have ended the inquiry, since the only issue placed before the courts was whether there was a written contract to waive sovereign immunity.

The trial court proceeded beyond that question, however, positing a resignation exception that was not even argued by the Attorney General, and therefore not addressed in the trial court by Tricoli.

The Court of Appeals went even further, addressing a range of issues, well beyond the scope of whether there was a written contract, that had never been raised and argued at any stage of the litigation. That included whether Tricoli could show a breach, without reference to all the Regents' policies that applied to Tricoli's contract. It included egregious error, such as

the conclusion that Tricoli had no claim because his contract was terminable at will, again mindless of the applicable Regents' policies such as Tricoli's right to a hearing, which he was denied.

Thus the case is a textbook example of why such issues are not raised for the first time and decided by an appeals court without a thorough sifting of the issues below. It also represents an egregious violation of Tricoli's right to notice and an opportunity to respond before summary judgment is entered against him.

2. The courts below may not dismiss an action in its entirety without addressing each and every cause of action alleged

The courts below dismissed claims without identifying or matching any specific grounds for dismissal with the claims dismissed, without examining the elements of the claims, and in some case without addressing the claims at all. In the confusion, for example, the Court of Appeals never said whether it agreed with the trial court that the knowing falsification of state agency reports in violation of OCGA 16-10-20 met the definition of "financial oversight activities" under which the trial court granted immunity for these criminal predicate acts.

a) The courts below never so much as mentioned Tricoli's right to injunctive relief against the state specifically authorized by the Georgia RICO statute

The trial court dismissed Tricoli's case the same day Tricoli filed a motion for preliminary injunctive relief, without ever mentioning that claim under the Georgia RICO statute. The Court of Appeals affirmed, granting summary judgment as to all claims, also without so much as mentioning Tricoli's claims for injunctive relief.

This would indeed be difficult to explain, since the original basis of the motion to dismiss was sovereign immunity, and the Georgia RICO statute states a crystal clear waiver of sovereign immunity to injunctive relief against a RICO enterprise (OCGA 16-14-6(a&b), and a RICO enterprise is specifically defined to include governmental entities. It is difficult to imagine how a waiver for injunctive relief could be more explicitly stated, yet the courts below make no mention either of the claim for injunctive relief under the Georgia RICO Act or the governing statutory language.

b) No clear basis is stated for dismissal of Tricoli's tort claims

Tricoli's tort claims such as intentional fraud and intentional infliction of emotional distress are nowhere mentioned in either opinion below. Again, this violates the principle governing motions to dismiss that every inference must be construed in favor of finding a valid claim. *Ewing v. City of Atlanta*, 281 Ga. 652, 653 (2) (642 SE2d 100) (2007).

This broad net approach by the courts below, addressing some claims and dragging others along, provides an excellent example and opportunity for this Court to establish a rule, consistent with the standard for dismissal, that each claim must be addressed with specificity.

c) If a complaint satisfies the elements of the RICO statute, no court may merely assume another statute, such as the GTCA controls

This arbitrary substitution of one statute for the the one under which the claims are brought is just the sort of unjustified assumption, without so much as comparing the elements of the claims, that would cause a first year law student to fail his or her Torts exam. No adversary or court below has ever argued that Tricoli did not satisfy the elements necessary to state a claim under the Georgia RICO statute. Yet they all assume that criminal RICO predicate acts and torts governed by the GTCA are based on the same conduct, and that the GTCA controls. Opinion, p. 7; R673-74. This conflation of claims for criminal predicate acts brought under the RICO statute and tort actions governed by the GTCA is contradicted by the statutory self-limitation of the GTCA's scope to losses caused by "negligence." OCGA 50-21-22(3).

That ignores some important differences in those elements. As the dissent correctly points out, those differences start with the RICO requirement of a pattern of related criminal predicate acts. It ignores the

basic distinction between torts and crimes. *Avery* v. *Chrysler Motors Corp.*, *448* S.E.2d 737, 738 214 Ga.App. 602 (Ga. App., 1994) (tort breach of duty and criminal violations not equivalent). It ignores the fact, back to first year law school, that torts depend on the breach of a common law duty, while RICO predicate acts depend on a determination by the legislature that a pattern of certain specifically enumerated crimes harm the State itself. OCGA 16-14-2 & 16-14-3(5).

What for example, are the elements of the most common criminal predicate act in Tricoli's case, the knowing falsification of state agency reports? To what tort claim with identical elements, exactly, do those criminal predicate acts correspond? And by what authority does the GTCA control a violation of OCGA 16-10-20? The courts below do not begin to address these questions that are essential to giving the words of the statutes effect. Until that happens, the Tort Claims Act cannot be substituted for the RICO Act without so much as comparing the elements of the claims.

3. The Georgia RICO Act states its own waiver of sovereign immunity

As the dissent correctly points out, according to the precedents of this Court, a statute does not have to specifically address the question of sovereign immunity to state a waiver. The combined provisions of the Georgia RICO Act, which was passed well before the current version of the

Georgia Constitution, nonetheless cannot be given any meaning without reading them to waive sovereign immunity. These terms state an independent waiver that does not depend on any other statute for its validity or justification.

a) The Tort Claims Act as the Sole Waiver of Sovereign Immunity is a long-repudiated fallacy that needs to be definitively put to rest

The Court of Appeals assumed that any waiver of sovereign immunity for criminal RICO predicate acts had to pass through the Georgia Tort Claims Act (Opinion, p. 7), though it is well settled that other statutes may independently waive sovereign immunity for other claims of wrongdoing by state officials. *Tuttle v. Bd. of Regents* (Ga. App. 2014) ("the right of action provided in the Georgia Whistleblower Act is a waiver of Georgia's sovereign immunity that is separate and independent of the waiver in the Georgia Tort Claims Act"); *Pattee v. Georgia Ports Authority*, 477 F.Supp.2d 1253, 1269 (S.D. Ga. 2006). Similarly, the Fair Employment Practices Act (FEPA),[7] also unrelated to the GTCA, nonetheless waives sovereign immunity. *Hughes v. Ga. Dept. of Corrections*, 600 SE2d 383, 385-86, 267 Ga. App. 440, 442-43 (Ga. App. 2004). Thus the confusion in the courts below, which refer to the GTCA to decide whether sovereign immunity is waived for RICO claims, without so much as referring to the

[7] OCGA § 45-19-20 et seq.

language of the Georgia RICO Act itself, stands in great need of definitive correction.

b) The Courts Below Cannot Say what the provisions of the RICO Act mean if they do not express a waiver of sovereign immunity

Since the language of a statute must be given effect and not rendered meaningless (*Colon*, supra, 294 Ga. at 96), courts must be required to examine the RICO statute itself to determine whether it waives sovereign immunity—something the courts below have not done.

For example, what does the statute mean when it states the protection of the State itself as one of its controlling purposes, and calls for the statute to liberally construed to serve its purposes? OCGA 16-14-2. What does it mean when it defines a RICO enterprise to include "governmental entities." The courts below say that language is meaningless. Yet this court construed it to mean that the civil actions authorized by the statute, on equal footing with criminal prosecutions, authorized a civil action against state officials. *Caldwell v. State*, 321 SE 2d 704, 707, 253 Ga. 400 (1984). The statute specifically makes it "unlawful for any person employed by or associated with any [such governmental entity] enterprise to conduct or participate in, directly or indirectly, such enterprise through a pattern of racketeering activity," such as the admitted OCGA § 16-10-20 and 18 USC § 1343

violations. OCGA 16-14-4(b). Who would be "employed by" a "governmental entity" other than a government employee?

Similarly, the statute quite explicitly authorizes injunctive relief against a governmental entity operated as a RICO enterprise to commit a pattern of related criminal predicate acts, such as those alleged by Tricoli at GPC and the Board of Regents. OCGA 16-14-6(a&b) & 16-14-3. Why did the legislature include predicate acts, such as the issuance of a falsified government report that can only be committed by state employees? OCGA 16-10-20 & 16-14-3(5)(xxii). And why did the legislature add to the list of predicate offenses a criminal statute that also authorizes a civil action against state employees (Georgia Computer Systems Protection Act, OCGA 16-9-90 et seq.), for the purpose of addressing a "growing problem in state government" (OCGA 16-9-91) if it did not intend for the Georgia RICO Act to waive sovereign immunity?; OCGA 16-14-3(5)(A)(xix); *Fulton County v. Colon*, 730 SE2d 599, 601 (Ga. App. 2012) ("waiver of the state's sovereign immunity to the extent of the right of action"); Ga. Const., Art. I, Sec. II, Par IX(e).

Those questions cry out to be answered in a way that makes sense of the words of the legislature, but have found no takers in the courts below.

That is why it is critical for the Georgia Supreme Court to decide, so that the citizens of Georgia may know if their government officials are immune for targeting them with schemes to steal their taxpayer dollars or destroy their careers, as they are documented and alleged to have done in the instant case.

c) RICO waiver is consistent with the Constitutional provision for acts committed with actual malice and intent to cause harm

The Georgia Constitution contains a clear waiver of sovereign immunity for state employees who commit wrongs with actual malice and intent to cause harm. Ga. Const., Art. I, Sec. II, Par IX(d). This provision has been all but read out of the Constitution in deference to the GTCA. *Ridley v. Johns*, 552 S.E.2d 853, 274 Ga. 241 (Ga., 2001).

Other statutes, like the RICO Act, can give effect to the Constitutional provision, and avoid a parade of horribles unleashed by confining the inquiry regarding acts committed with actual malice to the GTCA. This parade of horribles includes a 13-month campaign, consisting of a pattern of at least 36 separate acts of sexual harassment, including a state agency supervisor threatening a female subordinate with retaliation for reporting his conduct by killing the subordinate's dog and stuffing it in her mailbox. *Johns v. Ridley*, 245 Ga. App. 710, 715, 537 S.E.2d 746, 751 (Ga. App., 2000). These heinous actions were immunized under the GTCA, but the

Supreme Court has not addressed the issue whether the Constitutional principles of actual malice and intent to cause harm are justiciable factors in actions that are not brought under the GTCA. *Ridley v. Johns*, 552 S.E.2d at 855, 274 Ga. 241 at 243 (action for alleged sexual harassment brought under GTCA).

It is not arguable that the state supervisor would have been immune if, for example, Johns' claims for the 13-month campaign of sexual harassment had been brought under an alternate theory such as federal sex discrimination law. Likewise, *Ridley v. Johns* does not foreclose claims brought under the state or federal RICO statutes. It simply does not address claims for acts committed with actual malice and intent to harm that fall outside the GTCA.

The case of Anthony Tricoli provides a critical opportunity for this Court to decide whether Watts, Carruth, Tarbutton, Huckaby et al. are immune to claims for a pattern of criminal predicate acts brought under the Georgia RICO statute. That includes claims for a malicious campaign intended to destroy Anthony Tricoli's livelihood and career, in retaliation for interfering with the illegal use of state funds, by knowingly falsifying state agency reports, broadcasting false claims about state business over the

airwaves, and otherwise making knowing misrepresentations of matters under the jurisdiction of the state in felony violation of OCGA 16-10-20.

It should not be forgotten that it was a pattern of RICO predicate acts that wrecked Georgia Perimeter College, as well.

Conclusion

This is a case of great gravity and concern to determine whether state officials may be held accountable, in any way, by members of the public, under the law, for criminal conspiracies that, according to the legislature, harm the State. That is especially true in a case, like this one, where the Attorney General the public might count on to deter such criminal conduct, through criminal prosecution, is instead defending the alleged wrongdoers and arguing that they are immune even if they are guilty of the crimes. That makes sovereign immunity a *carte blanche* for criminal impunity in the halls of state government. The Georgia RICO Act can provide a remedy that is consistent with our values, as embodied in the very words of our Constitution, that no government official, no matter how powerful, stands beyond accountability to the people under the law, when acting with deliberate intent to harm another. That will not result in a flood of lawsuits against bookkeepers who make an honest mistake. It does not, on the other hand, protect a budget official who knowingly falsifies the financials of a

state agency to hide the theft of funds. It allows us to guard against a King or Queen of Hearts who can run about shouting "off with their heads," completely uncontested, as happened, in fact, to Anthony Tricoli.

Respectfully submitted this 4th Day of May, 2016.

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that Defendants' counsel in this action have been served this Petition for Certiorari via US Mail, this 4th day of May, 2016, as follows:

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Exhibit 1

WHOLE COURT

NOTICE: Motions for reconsideration must be *physically received* in our clerk's office within ten days of the date of decision to be deemed timely filed.
http://www.gaappeals.us/rules

March 30, 2016

In the Court of Appeals of Georgia

A15A2256. TRICOLI v. WATTS et al.

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 SE2d 399) (2006); *Bd. of Regents of the Univ. System of Ga. v. Barnes*, 322 Ga. App. 47, 49 (1) (743 SE2d 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 SE2d 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 SE2d 564) (2003).

2. "[T]he defense of sovereign immunity is waived as to any action ex contractu 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 SE2d 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 SE2d 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 SE2d 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 SE2d 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 SE2d 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, P. J., dissents.

A15A2256. TRICOLI v. WATTS et al.

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 SE2d 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.

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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 SE2d 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 SE2d 100) (2007).

> [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 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 SE2d 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 SE2d 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).

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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.

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 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

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

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.

Court of Appeals
of the State of Georgia

ATLANTA, April 14, 2016

The Court of Appeals hereby passes the following order

A15A2256. ANTHONY S. TRICOLI v. ROBB WATTS et al..

Upon consideration of the APPELLANT'S Motion for Reconsideration in the above styled case, it is ordered that the motion is hereby DENIED.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta, April 14, 2016.

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Stephen E. Castlen, *Clerk.*