IN THE COURT OF APPEALS OF GEORGIA

NO. A15A2256

ANTHONY TRICOLI,

Appellant

v.

ROB WATTS, et al.,

Appellees

MOTION FOR RECONSIDERATION

April 9, 2016

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Like Appellant Anthony Tricoli, most citizens of Georgia would be quite surprised to learn that they are completely vulnerable to any and every criminal scheme machinated at the highest levels of their government. It does not matter how malicious the scheme, or how grossly power entrusted by the people is abused. Georgians would be even more surprised to learn they run that risk of being targeted with total impunity, as Tricoli was, because any state official who engages in such a systematic criminal campaign against them is *immune* from any legal recourse whatsoever. Yet that is exactly the view stated by the Court of Appeals majority opinion upholding, with one dissenter, the trial court's dismissal of Tricoli's claims against state officials who knowingly falsified state agency reports in order to hide the misuse of millions of dollars in state and federal funds, destroying Tricoli's career as President of Georgia Perimeter College (GPC), as well as the College itself, in the process.

Not so surprisingly, the Court of Appeals majority did not adopt the arguments or authorities advanced by the Attorney General in support of that proposition that state officials are immune for their crimes. Instead, the Court of Appeals majority fashioned its own arguments and came up with its own authorities to uphold the trial court's dismissal--on grounds of sovereign immunity--of claims against state officials for criminal

wrongdoing. However, in constructing its own rationales from scratch, the majority boldly went where no court had gone before, deciding issues far beyond the question of sovereign immunity raised by the Attorney General's Rule 12(b)(1) motion to dismiss, issues that were never even presented in the trial court, much less fully briefed or argued by the parties. A lone dissenter objected to this expansion of the appeals court's review, an expansion that has no germane legal justification to support it.

More importantly for purposes of reconsideration, the appeals court majority also overlooked, bypassed or misconstrued no less than 13 controlling statutory or case law authorities, including Georgia Supreme Court precedents, that would have required a different result.[1] These thirteen controlling authorities dictate that Tricoli did have a valid written contract and that state officials are not immune for knowingly falsifying state agency reports over a period of years in order to conceal the theft, misuse, and

[1] Georgia Court of Appeals Rule 37(e): **(e) Basis for Granting.**
A reconsideration will be granted on motion of the requesting party, only when it appears that the Court overlooked a material fact in the record, a statute or a decision which is controlling as authority and which would require a different judgment from that rendered, or has erroneously construed or misapplied a provision of law or a controlling authority.
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misappropriation of state and federal funds, as alleged in Anthony Tricoli's Complaint.

Though the evidence is not yet an issue at this stage of the litigation, neither the Board of Regents nor the Attorney General can even begin to dispute, for example, that Appellee Ron Carruth, former Executive Vice President for Finance at GPC, falsified and misrepresented the budget reports of GPC, as extensively documented in the official records of both GPC and the University System of Georgia (USG). R264-66. Such knowing falsification is not "tortious conduct" as argued by the majority. It is a criminal felony, based on the elements of the criminal offense as enacted by the Legislature in the Criminal Code of Georgia, not "on the same conduct that predicated [Tricoli's] tort claims."[2] OCGA § 16-10-20.[3] Appellant's counsel did not merely imagine, moreover, that the Georgia RICO Act

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[2] Majority Opinion at p. 7. The majority offers no support whatsoever for this purely conclusory statement that entirely overlooks the provisions of the Georgia Criminal Code as well as the Georgia RICO Act. An element by element comparison of the tort claims and felony RICO predicate acts does not bear out the majority's unexplained assumption.

[3] A person who knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact; makes a false, fictitious, or fraudulent statement or representation; or makes or uses any false writing or document, knowing the same to contain any false, fictitious, or fraudulent statement or entry, *in any matter within the jurisdiction of any department or Agency of state government* or of the government of any county, city, or other political subdivision of this state shall, upon conviction thereof, be punished by a fine of not more than $1,000.00 or by imprisonment for not less than one nor more than five years, or both. (emphasis added)

authorizes a civil suit against the perpetrators of this pattern of criminal violations.[4] Rather, the authorization is found in the language of the Georgia RICO statute itself, which is nowhere mentioned, much less analyzed, anywhere in the majority opinion.[5]

The trial court below, in dismissing Tricoli's action, constructed its own set of arguments to circumvent this great weight of authority, holding that state officials are immune for knowingly falsifying state financial records to hide the misuse of funds under their "financial oversight activities." R669-74. That is a definition of financial oversight that the majority was careful *not* to adopt. So how did the majority reach its ultimate conclusion that state officials may falsify the financial reports of a state institution in order to divert funds to their confederates and blame it on Anthony Tricoli, when even the Board of Regents and Attorney General both admit that Appellee Carruth systematically supplied Tricoli with false information? R256-57.

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[4] Majority Opinion at p. 7. "It is an imaginative theory of recovery to assert Against the State itself, but that is about all it is—imagination."

[5] OCGA § 16-14-6(c) (civil suit authorized for criminal RICO predicate acts); OCGA § 16-14-3(5)(A)(xii) (knowingly false statements regarding state Agency business listed as criminal RICO predicate acts); OCGA § 16-9-90 et seq. (state officials' use of state computer network to conduct a fraud is a felony RICO violation for which a civil action is authorized); OCGA § 16-14-4 (participation in a RICO enterprise is a criminal violation); OCGA § 16-14-3(6) (RICO enterprise defined to include "governmental entities").

As the dissent points out, the majority began their logical process by converting the standard of review. Opinion, p. 1 (P.J. Miller dissenting). While the words sound harmless, this change in mid-stream had far-reaching effects. The question before the courts was a motion to dismiss for lack of subject matter jurisdiction, claiming that even if the Defendants committed all the criminal acts Anthony Tricoli alleged, they could not be held liable because they enjoy sovereign immunity from any lawsuit.

For Tricoli's breach of contract claims, for example, that meant the sole question before the trial court was whether or not Anthony Tricoli had a written contract with the Board of Regents, which would waive the State's defense of sovereign immunity. By its own precedents the Court of Appeals assumed the document produced by Tricoli did constitute such a written contract, which should have ended the inquiry. Opinion, p. 4. But by converting the standard of review from the standard for a motion to dismiss to the standard for summary judgment, the majority was able to decide additional questions, such as whether the Board of Regents breached Tricoli's written contract—that were never presented or argued in the trial court below. *Id*.

Likewise, the Court of Appeals found Tricoli's tort claims for fraud barred by exceptions under the Georgia Tort Claims Act (GTCA), even

though that statute does not contain a specific exception for fraud. The Court merely stated that most of Tricoli's tort claims were barred under the exceptions (conceding that some of the claims are not barred). The Court of Appeals did not say which tort claims were barred by which exceptions—so it is impossible to tell whether the Court of Appeals is tacitly agreeing with the trial court that cooking the books to hide the theft of state taxpayer funds meets the definition of "financial oversight." The majority should address such important matters more clearly so the taxpayers may know if their funds may indeed be stolen with impunity by state officials who are prime position to falsify the financial records to conceal it—especially where, as here, it is documented and undisputed that over $9 million in GPC spending cannot be accounted for in any fashion in the wake of the admitted falsifications. R256-57.

As part of the Court of Appeals categorical statement that civil RICO claims cannot be brought against state agencies and officials, the Court implicitly held[6] that injunctions against "governmental entities" that are specifically authorized by the RICO statute were barred by the GTCA. OCGA § 16-14-6(a). But the GTCA makes no mention of injunctive relief

[6] While the majority mocked the notion of the RICO statute authorizing any relief against the State, the majority did not specifically deal with Tricoli's claims for injunctive relief against the Board of Regents, expressly authorized under the statute, which are nowhere mentioned in the opinion.

against the government, one way or the other—so is this an imaginary limitation? The majority made no mention of the express language of the Georgia RICO statute that *does* explicitly authorize injunctive relief against a governmental entity conducted as a RICO enterprise OCGA §§ 16-14-3(6) & 6(a).

Now that we have outlined the basic logic of the majority opinion, let us examine the controlling authorities that somehow escaped their attention:

A. **Controlling Authorities Requiring a Different Result**

1) OCGA § 16-14-6(a)(3)

The Court of Appeals made a gross misstatement of fact right out of the gate when it said that the trial court judge had thoroughly addressed all issues. Opinion, p. 2. In fact, the trial court completely ignored Tricoli's motion for a preliminary injunction, under the Georgia RICO Act, for reorganization of the leadership at GPC. The same day Tricoli filed the motion, the trial judge hand-dated an order dismissing the entire case—without addressing the motion for injunctive relief filed earlier the same day. R669-75, 715. That allowed the trial court to ignore the clear expression of the RICO statute authorizing claims for injunctive relief against RICO enterprises, defined to include "government entities," where a pattern of criminal predicate acts has

been committed. The Court of Appeals majority followed suit, and also ignored Tricoli's request for the injunctive relief explicitly afforded against state agencies under the RICO statute—which is nowhere mentioned in the majority opinion.

2) OCGA § 9-11-12(b)

The Court of Appeals relaxed the standard of review by converting the motion to dismiss on grounds of sovereign immunity filed by the Attorney General into a motion for summary judgment—a conversion the appeals court used to decide, under a less stringent standard, many issues not raised by the motion to dismiss and thus never fully briefed or argued by the parties. To do that, the majority ignored extensive authority argued by the Attorney General that considering material outside the pleadings did not convert a motion to dismiss on grounds of sovereign immunity, under OCGA § 9-11-12(b)(1), into a motion for summary judgment, a conversion which only applies to motions filed under OCGA § 12(b)(6), as explicitly stated in the statute. See Brief in Support of Motion to Dismiss, pp. 3-4 (R150-51).

3) *Univ. System of Ga. v. Doe*, 278 Ga. App. 878, 881 (630 SE2d 85) (2006)

This precedent makes it clear that a Board of Regents offer and acceptance letter identical to the one in Tricoli's case, mutually signed by the parties,

and including terms such as starting date and salary, is a written contract under Georgia law. Since the sole question raised by the Attorney General's 12(b)(1) motion with respect to the contract claims was whether Tricoli had a written contract to waive the State's sovereign immunity, that should have ended the inquiry. That is where the summary judgment conversion came into play, with the Court of Appeals deciding issues such as whether the contract was breached that were never fully briefed or argued by the parties at the trial court level, or the appellate level, and were not properly before the appeals court.

4) Ga. Const., Art. I, Sec. II, Par. IX (c)

By circumventing its own holding in *Doe*, the appeals court also circumvented the statutory and constitutional provisions waiving the state's sovereign immunity in the case of a written contract with a state agency such as the Board of Regents. See also OCGA § 50-21-20.

5) OCGA § 13-3-1

This statute lays out the minimum requirements of a contract—"parties able to contract, a consideration moving to the contract, the assent of the parties to the terms of the contract, and a subject matter upon which the contract can operate"--which the offer and acceptance letter produced by Tricoli easily satisfies. Thus the majority's arguments about whether additional specifics

should be included or which of the Board of Regents' policies are incorporated are irrelevant to the sole question before the Court: was there a written contract? According to this controlling statute, there was.

6) OCGA § 13-3-3

This statute makes it clear that a contract may be formed by a signed letter sent by one party making an offer with the other party returning a signed acceptance. That is exactly what happened in the instant case, as admitted by the Board of Regents and the Attorney General. Therefore, any argument that signed letters of offer and acceptance are insufficient to form a contract is in direct conflict with this statute.

7) OCGA § 16-14-3(6)

The Georgia Legislature defined a criminal enterprise to include "governmental…entities." Thus state agencies can be criminal enterprises against which the statute explicitly authorizes injunctive relief. See OCGA § 16-14-6(a). In other words, OCGA § 16-14-3(6), in conjunction with OCGA § 16-14-6(a), authorizes a civil action for an injunction against a state agency. This could not be a more explicit waiver of the State's sovereign immunity. This explicit controlling authority was bypassed by the trial court (in a dismissal order that passed the motion for a preliminary injunction in the night) with the majority's blessing. R669-75. The same explicit

controlling authority was subsequently ignored by the majority--over the protest of the dissent.

8) OCGA § 16-14-6(c)

The RICO Act further authorizes a civil action by anyone harmed by a pattern of criminal predicate acts. The legislature has specifically listed numerous criminal predicate acts specifically subject to commission by state employees. Those include OCGA §16-10-20 (falsification of a state agency report) and OCGA § 16-9-90 et seq,, Georgia Computer Systems Protection Act (GCSPA) (authorizing criminal prosecution and civil action for use of state computer network to commit a fraud). Since the RICO Act authorizes a civil action where there is a pattern of violations of these predicate acts, why would the legislature explicitly include criminal predicate acts committed by state employees if it did not intend for them to be liable for civil claims authorized by both the Georgia RICO Act and the GCSPA?

9) *Caldwell v. State*, 321 SE 2d 704, 707, 253 Ga. 400 (1984)

In this case the Georgia Supreme Court analyzed OCGA §§ 16-14-3(6) & 16-14-6(c) to determine that the RICO statute did authorize a civil action as well as a criminal prosecution against state officials. Georgia Labor Commissioner Sam Caldwell claimed he was immune from a civil RICO action as an elected state official. The Georgia Supreme Court rejected that

claim of immunity—the same one urged by the majority on behalf of Appellees. The Supreme Court did that by examining the RICO statute, which defines a criminal RICO enterprise to include governmental entities, and authorizes a civil action against anyone who participates in or exercises control over a RICO enterprise (including governmental entities) to commit a pattern of criminal predicate acts. Unlike the Georgia Supreme Court in this binding precedent, the majority never examined the Georgia RICO statute, and never mentioned the *Caldwell* case, in its opinion holding that state agencies and officials were immune from Tricoli's RICO claims. Thus the majority contradicts *Caldwell*, and the plain language of the Georgia RICO statute, without the slightest explanation—other than to dismiss these controlling authorities as mere imagination. If the majority saw some way around this directly on-point precedent, it did not share its reasoning, as *Caldwell* is not so much as mentioned in the majority opinion.

10) OCGA § 50-21-22(3)

The Georgia Tort Claims Act, which the Court of Appeals, without any analysis or explanation, says trumps the Georgia RICO Act where these criminal predicate acts are concerned, is specifically limited in this section to losses caused by "negligence." Obviously, the "negligence" addressed by the GTCA differs from the *mens rea*, or state of mind necessary to commit a

criminal RICO predicate act, and first-year law students would confuse the two only at the risk of flunking both their Criminal Law and Torts exams.

In addition, as the dissent points out, the RICO statute is further differentiated by its limitation to patterns of related criminal offenses. Opinion, Miller dissenting, p.2.

11) OCGA § 50-21-24

As to the torts alleged in Tricoli's complaint, the appeals court admits that not all of them are addressed by GTCA exceptions. Without specifying which exceptions apply to which tort claims, the majority says that "virtually all" of them are addressed by GTCA exceptions. Opinion, p. 6. For those torts that are not subject to the exceptions, there must be a valid claim against the state. The main tort claims brought by Tricoli are fraud and intentional infliction of emotional distress. The GTCA contains exceptions for neither. Or is the majority saying that tricking Tricoli into resigning with a false job offer—a false job offer that was falsely reported to the media in violation of the federal wire fraud statute--is an "administrative function" of the USG Chancellor, for which he is immune? R595-98. 669-75.

12) Ga. Const., Art. I, Sec. II, Paragraph IX(d)

The limitation of the GTCA to negligence claims is consistent with the Constitutional provision that specifically allows state employees to be

individually liable to lawsuits (thus lacking sovereign immunity) where they commit acts with actual malice and actual intent to cause harm. This only makes good sense, consistent with the notion that if Ron Carruth made a bookkeeping error in the good faith performance of his duties, he would not be liable. But if Ron Carruth knowingly falsifies budget reports in felony violation of OCGA § 16-10-20, leading GPC down a path to ruin with a $16 million deficit and the ouster of its president, he enjoys no immunity for such "financial oversight activities." The negligent mistake is addressed by the GTCA. The criminal conspiracy falls under the jurisdiction of the Georgia RICO statute, consistent with the Constitutional distinction.

13) *Colon v. Fulton County*, 294 Ga. 93, 95 (1) (751 SE2d 307) (2013)

Contrary to the majority's mantra, the GTCA is not the sole means of waiving the state's sovereign immunity, and it does not override other statutes that state such waivers. The GTCA did not override the Georgia Whistleblower Act, OCGA § 45-1-4, with respect to wrongdoing by state officials, even though the whistleblower statute made no mention of sovereign immunity. 294 Ga. at 95. The GTCA did not override the Georgia Taxpayer Protection and False Claims Act, OCGA § 23-3-120 et seq, with respect to wrongdoing by state officials, either. *Fuciarelli v. McKinney*, Case No. A15A0223 (Ga. App., July 16, 2015). The GTCA did not override the

Fair Employment Practices Act, OCGA § 45-19-20 et seq, with respect to wrongdoing by state officials. *Hughes v. Ga. Dept. of Corrections*, 600 SE2d 383, 385-86, 267 Ga. App. 440, 442-45 (Ga. App. 2004). Likewise, the GTCA does not override the Georgia RICO Act with respect to criminal predicate acts enumerated in the statute, committed by state officials within a governmental entity, where the statute expressly provides for a civil action for damages and injunctive relief. OCGA §§ 16-14-3(6) & 16-14-6(a-c).

B. **Rebutting the Majority's Alternate Authority**

1. Standard of Review

The Court of Appeal's conversion of the Attorney General's Rule 12(b)(1) motion to dismiss into a Rule 56 summary judgment clearly contradicted the controlling law.[7] This legally-unsupportable conversion was also fundamentally unfair. Not only did Appellant have no notice of such a

[7] To quote the Attorney General on the issue: "By the express terms of the Georgia Civil Practice Act, a 12 (b)(1) jurisdictional motion *is not converted into a summary judgment motion when evidence is submitted in connection with the motion*. Rather, the only motion to dismiss that is converted into a summary judgment motion when matters outside the pleadings are presented is a 12 (b)(6) motion for failure to state a claim upon which relief can be granted. *See O.C.G.A.* § 9-11-12 *(b)*. Motions to dismiss under sub-parts (1), (2), (3), (4), (5), and (7) of O.C.G.A. § 9-11-12 (b) can have evidence presented in support thereof without being converted into summary judgment motions. *See International Indemnity Company* v. *Blakey,* 161 *Ga. App.* 99, *100-01* (1982) *(reflecting that all of the sub-parts except the* 12 *(b)(6) failure to state a claim provision are matters in abatement that are not within the scope of the summary judgment procedure)." R151.*

conversion from the trial court, as the dissent points out. Tricoli was actually baited into producing evidence on the contract issue, with his adversary asserting the position that it would not result in a summary judgment conversion. R150-51. The trial court did not convert it. But then the matter was converted to a summary judgment on appeal to change the standard of review, allowing the appeals court to decide issues on which Tricoli has never had notice and an opportunity to fully present his case.

This fundamentally unfair conversion, contrary to the controlling statute, was also outcome-determinative. On the contract issue, for example, the only issue before the court was whether Tricoli had a written contract with the Board of Regents. After the conversion, however, the Court of Appeals decided a range of issues on which there was no record developed.

The Court of Appeals also seems to adopt the notion that Tricoli had a burden to produce the document that Tricoli alleged to be in the Attorney General's possession—but then says, completely contrary to the Attorney General's position and the governing statute, that by producing the written contract to establish a waiver of sovereign immunity, Tricoli has "consented" to convert the motion to one for summary judgment. *Contra*, *Bonner v. Fox*, 204 Ga. App. 666, 667 (420 SE2d 1992) (summary judgment cannot be awarded without notice and opportunity to respond).

The case law supplied by the majority on behalf of the Board of Regents to support the summary judgment conversion—actually contradicting the law argued by the Attorney General—cannot and does not override the mandate of the controlling statute. OCGA § 9-11-12(b). *Gaddis v. Chatsworth Health Care Center*, 282 Ga. App. 615, 617 (639 SE2d 399) (2006) had nothing to do with a 12(b)(1) motion. Unlike the Tricoli case, defendants in *Gaddis* filed a 12(b)(6) motion which, according to the statute, can be converted to a Rule 56 summary judgment if the court consider matters outside the pleadings. OCGA § 9-11-12(b).

In *Barnes*, the Court of Appeals, as in this case, wrongly held that a motion to dismiss based on sovereign immunity, for lack of a written contract, could be converted to a summary judgment motion upon presentation of evidence of a contract. *Univ. System of Ga. v. Barnes*, 322 Ga. App. 47, 49 (1) (743 SE2d 609) (2013). But even in *Barnes*, the Court of Appeals held that there was a strict notice requirement, so that the party defending against the motion would have the chance to present all the evidence and arguments possible to defeat it. 322 Ga.App. 48. In this case, there was no notice, and Tricoli never had any opportunity to oppose a summary judgment motion, much less to fully argue issues beyond the scope of whether he had a written contact of employment—the sole issue before

the court on the Board of Regents' 12(b)(1) motion, as admitted and argued extensively by the Attorney General himself. R150-51.

If the Appellees wish to file a summary judgment motion at a later date on some other issue, such as whether the contract was breached or what remedy is available, Tricoli will address those issues with proper notice and an opportunity to respond.

2. Ex Contractu Waiver

As explained in the preceding section, Tricoli had a written contract with the Board of Regents, under the authority of OCGA § 13-3-1, which lays out the minimum term requirements and OCGA § 13-3-3 which specifically recognizes the formation of a contract by the exchange of signed offer and acceptance letters. Both of these principles are embodied with great specificity, in facts directly on point with Tricoli's offer and acceptance letter from the Board of Regents, in *Doe*.

Bd. of Regents of the Univ. System of Ga. v. Barnes, 322 Ga. App. 47, 49 (2) (743 SE2d 609) (2013) does not support the majority position on the contract question. In that case, the writings alleged to constitute a written contract were not signed by both parties. That was the determining factor, and the offer and acceptance letter in Tricoli's case was signed by both

parties to be bound, making it a valid written contract for purposes of waiving sovereign immunity.

Wearing its summary judgment hat, the majority argued, in a rare alignment with the Attorney General, that Tricoli's offer and acceptance letter did not contain enough terms to form a contract. There is no support for that, and it is contradicted both by OCGA § 13-3-1 and *Doe*. The majority, in short, instead of construing every inference in favor of the non-moving party, as it is required to do in the case of a motion to dismiss, took advantage of the summary judgment conversion to turn facts and issues in favor of the Board of Regents and Attorney General, contrary to the controlling authorities.

It is the next step, though, that shows the fundamental unfairness of this maneuver. Assuming, arguendo, that the signed offer and acceptance letter is a written contract, under *Doe*, that should settle the sovereign immunity raised by the Attorney General's 12(b)(1) motion. Converting to summary judgment, however, the appeals court goes on to opine that Tricoli can show no breach, or that he was an at-will employee regardless of the Board of Regents' policies expressly incorporated in his contract (which would have provided him a hearing if he had been terminated before the expiration of his contract)—issues that were never before the trial court,

never before the appeals court, and were never fully briefed or argued by the parties. It is understandable that an appeals court would not be able to correctly decide issues that have not been fully developed on the record below—such as the provisions of Regents' policy that gave Tricoli more rights than an at-will employee. That is why the issue should be argued and decided with proper notice, and not raised for the first time by an appellate court on review of proceedings below that never addressed that issue.

But the majority went even farther beyond the only question raised by the Attorney General motion—did Tricoli have a written contract to waive sovereign immunity? It then goes and wallows deep in factual mire to say Tricoli had no contract claim because he resigned, adopting the trial court's rationale for wishing away Tricoli's written contract waiving sovereign immunity under *Doe*. That conclusion, once again based on facts and law that were never argued prior to the trial court's ruling, sets aside the question of whether Tricoli had valid contract that was breached before he resigned. It also opens a giant can of worms given that Tricoli's resignation itself was enveloped in duress, coercion, and fraud. Given its summary judgment license, the majority had a way to address that, too, saying the fraud and extortion gave rise to a tort claim, not a contract claim. Like Tricoli's other tort claims, the majority did not identify any exception to the waiver of

sovereign immunity in the GTCA that applied to the torts under which Tricoli was forced to resign under duress.

But again, the only issue raised by the Attorney General's motion was whether Tricoli had a written contract to waive sovereign immunity. According to *Doe* and OCGA § 13-3-1 & 3, Tricoli did and his contract claims proceed for further litigation, accordingly. End of story.

3. Unexcepted Tort Claims

There are two common law torts alleged in Tricoli's complaint, fraud and intentional infliction of emotional distress. No one has ever argued that the allegations do not satisfy the elements of those claims. Rather, the trial court and the appeals court allege that these torts are barred by exceptions to the waiver of sovereign immunity in the Georgia Tort Claims Act (GTCA). Yet neither court has matched a GTCA exception to either tort.

The trail court below attempted to match some exceptions of the GTCA to RICO violations that are alleged and documented in the Appellee's own records, such as the intentional falsification of GPC financial information, but did not match any exceptions to the tort claims. R669-75.

The majority is even more vague as to how any GTCA exceptions apply. In its far-ranging fact finding, it determined that Chancellor Hank

Huckaby's false promises to Tricoli to induce his resignation, which are nowhere controverted, did not give rise to a contract claim, but to a tort claim embodying all the classic elements of fraud. Opinion, p. 6.The majority does not match any GTCA exception with these or any other allegations.

This legal potluck stew, with everything thrown in together helter-skelter, cannot be the basis for dismissing claims and denying a litigant of his right to a day in court before he has even presented his facts in evidence and argued his case. Even the summary judgment conversion catch-all cannot save this failure to match a specific claim with a specific reason Tricoli is legally barred from bringing it. That is particularly true under the standard of review for a motion to dismiss, that owes no deference to the trial court and requires that every doubt be decided in favor of the party trying to bring his claims to vindicate his rights in a court of law. *Ewing v. City of Atlanta*, 281 Ga. 652, 653 (2) (642 SE2d 100) (2007); *Fuciarelli v. McKinney* (Ga. App. 2015).

4. RICO Damages Claims

The lion's share of the offenses alleged in Tricoli's complaint involve the knowing falsification and misrepresentation of GPC financial information by Appellee Ron Carruth and others. This offense is not a tort

that depends on a common law duty to Anthony Tricoli. It is a felony, as prescribed in OCGA § 16-10-20 by the Legislature, which has also authorized a civil action for these crimes as part of a pattern of related criminal offenses, also enumerated by the Legislature as RICO predicate acts. OCGA §§ 16-14-3(5)(A) & 16-14-6(c).[8] The Act contains no limitation for civil servants committing these crimes. Rather, the statute states that its provisions are to be broadly construed to *protect the state* itself from harm. OCGA § 16-14-2. These words enacted into statute by the Legislature must be given effect, and not some other notions that match prevailing preconceptions or predelictions that may influence a decision maker away from faithful adherence to the words of the statute. *Tibbles v. Teachers Retirement System of Ga*., 297 Ga. 557, 558 (1) (775 SE2d 527) (2015).

. Thus it makes sense that before concluding that the Georgia RICO waives sovereign immunity only in counsel's imagination, the majority should closely examine the words of the statute, which are nowhere mentioned in the opinion. Given the admonitions of *Tribble* and *Colon* that the words enacted by the Legislature must be given effect and not rendered

[8] The offense also does not depend on whether any other person had a duty, or could have undertaken measures to uncover the deceit. Once a state official knowingly falsified a series of official state agency reports, the crime was complete. That is also why the Attorney General should be prosecuting Ron Carruth and others, not defending them in a civil action.

meaningless or nonsensical, the majority should ask what the cited provisions of the Georgia RICO statute mean if they do not mean that civil actions are authorized against state officials.

What does it mean that a RICO enterprise is defined to specifically include "governmental entities?" OCGA § 16-14-3(6). What does it mean that the RICO Act clearly authorizes criminal prosecutions of public officials, such as Sheriff Sidney Dorsey and Labor Commissioner Sam Caldwell, and the statute gives equivalent authorization for a civil action based on the same offenses, going so far as to say that a criminal conviction estops the defense of a civil action based on the same conduct? Dorsey v State, 615 SE2d 512, 518-19, 279 Ga 534 (Ga 2005) (criminal prosecution of public official for OCGA § 16-10-20 violations); OCGA §16-14-6(e). If Appellee Ron Carruth were prosecuted and convicted for falsifying state Agency reports under OCGA § 16-10-20, would the majority still say that the civil action explicitly authorized for this criminal conduct would be barred by sovereign immunity? How does the majority reconcile that with the contrary holding in *Caldwell v. State*? And, if state officials are immune from claims brought under the Georgia RICO act, why does the RICO Act list predicate acts based on criminal statutes that target state employees' falsification of state agency reports (OCGA § 16-14-3(5)(A)(xix)), as well as

fraud in the use of state computer networks--and also explicitly authorize a civil action against any violator, as in the Georgia Computer Systems Protection Act? OCGA § 16-14-3(5)(A)(xxii).

To give these provisions any meaning, the Legislature's words must be read to waive sovereign immunity. This also makes the Georgia RICO statute consistent with the Constitutional provision authorizing liability for state officials who act with actual malice and intent to cause harm. Ga. Const., Art. I, Sec. II, Paragraph IX(d). That does not conflict with the GTCA, which by its own words is limited to negligence claims. OCGA § 50-21-22(3). It is also consistent with plain old Georgia common sense that exceptions to tort liability for public servants faithfully attempting to do their duty, but who make a bookkeeping error, do not equally protect that state employee who connives to falsify state agency financial information, to deceive the leadership of a state college, in order to divert state and federal funds for improper and illegal purposes. It does not protect Board of Regents officials who--knowing that Ron Carruth knowingly falsified the financial reports, as voluminously documented in GPC and USG documents--ignore the criminal deception in their haste to divert responsibility from themselves and blame Tricoli for GPC's financial meltdown, before any investigation was conducted. If there were a summary judgment motion before the courts,

Tricoli could prove that these crimes giving rise to liability under the RICO Act were committed.

So while it is understandable that the majority considers this an outrageous scenario, it is real. It is real in the language of the statutes, and it is real in the documentation that show that these outlandish crimes were actually committed right under the nose of the Attorney General, who has done nothing about it except put off any investigation of the crimes and the state officials who committed them. The Georgia RICO Act does, however, authorize Anthony Tricoli to hold them accountable.

5. Other Claims the Courts Ignored

Perhaps the clearest waiver of sovereign immunity relief requested by Anthony Tricoli is stated in the Georgia RICO Act's authorization of injunctive relief against "governmental entities" for a leadership "reorganization." OCGA § 16-14-6(a)(3). This authorization could not be more explicitly stated in the express language of the statute. Yet the trial court ignored the issue, in fact ignored Tricoli's very motion for a preliminary injunction, when dismissing the action on grounds of sovereign immunity. The majority claims that the waiver of sovereign immunity against the "governmental entities" explicitly named in the statute is a mere

product of counsel's imagination. Yet the dissent correctly points out that the words of the statute say otherwise.

The majority also ignores Tricoli's assertion that during the progress of the case, as the Attorney General challenged Tricoli to produce evidence, such as the written contract, in the Appellee's possession and control, that the Appellees have failed to produce documents that are known to exist and described with particularity in response to Open Records requests. This issue was not developed fully because of the trial court's premature dismissal of the case to cut off consideration of these Open Records issues as well as the motion for preliminary injunction.

Finally, some of the most serious claims in the action are for extortion. Neither the trial court nor the appeals court point to any exception in the GTCA that bars claims for extortion. In fact, as they did with the issue of the injunctive relief authorized against the government in the Georgia RICO statute, neither one of them even mention the extortion claims—some of the most serious felony criminal offenses alleged in the RICO action. Needless to say, then, no basis has been identified for dismissing these claims for threatening the present and future livelihood of Anthony Tricoli if he did not surrender his rights in his contract, which would have included an

appeal rights if he had been fired by the Board of Regents, rights he was denied after he was tricked into resigning by fraudulent false promises.

It should be a steadfast rule that no case can be dismissed, completely foreclosing an aggrieved individual's right to relief, where all of the claims have not received even cursory consideration by the courts.

C. **Conclusion**

Georgia RICO claims cannot be dismissed by imagining that the statute does not waive sovereign immunity, without reading the statute, examining its provisions, and giving the words their meaningful effect. Tort claims may not be dismissed by a wave of the hand that does not point to any specific exception to the waiver of sovereign immunity in the GTCA. And contract claims--for which Tricoli admittedly, under the precedent in *Doe*, has a valid written contract that waives the state's sovereign immunity—by saying sovereign immunity applies, anyway. Nor can explicit statutory law be ignored to convert the motion to dismiss into a summary judgment, to dismiss the contract claims on a finding that there was no breach of the contract, a question that has never been argued by the parties because they never had any notice that it was an issue under consideration by any court.

The law provides the court with ample support for the practical and moral considerations that there is no benefit to the State of Georgia in having fraud and misrepresentation pervade the operation of its government. Following the law may hurt powerful individuals, but the state will overwhelmingly benefit from a clear statement that these sorts of half-baked, Keystone Cops criminal conspiracies will not be tolerated from our so-called public servants.

Wherefore, premises considered, Tricoli respectfully asks the Court to reconsider its opinion, taking into consideration the controlling authorities that somehow got lost in the confusion of a complex and troubling case of corruption at the highest levels of state government, and reverse its judgment so that Tricoli may present the evidence of the crimes that targeted him to a trier of fact and hear the judgment pronounced by a jury of his peers.

Respectfully submitted, this 9th day of April, 2016.

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