IN THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 2D24-0278

MICHAEL FLYNN,

Appellant,

v.

RICK WILSON,

Appellee.

On Appeal from the Circuit Court of the
Twelfth Judicial Circuit in *and* for Sarasota County, Florida

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ANSWER BRIEF OF RICK WILSON

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PRELIMINARY STATEMENT

Appellee, Rick Wilson files this answer brief and respectfully asks this Court to affirm the Final Order Granting Summary Judgment issued by Circuit Court Judge Hunter W. Carroll pursuant to Florida's Anti-SLAPP statute, Section 768.295, Fla. Stat.

References to the Record on Appeal are designated by "R. [page no(s), ¶ [any paragraph no(s)] or: [line(s)]]". References to the Initial Brief of Appellant Michael Flynn are designated by "IB. [page no(s)]".

STATEMENT OF THE CASE AND THE FACTS

Statement of the Case

1. Introduction.

The trial court granted summary judgment for Appellee Rick Wilson pursuant to Section 768.295 Florida Statutes (Florida's Anti-SLAPP law). It did so because the Appellant General Michael Flynn could not meet his burden to prove essential elements of his defamation and injurious falsehood claims (specifically, falsity and/or that defendant acted with knowledge or reckless disregard as to the falsity on a matter concerning a public official) ***and*** because Appellee Wilson met his burden under Florida's Anti-SLAPP law establishing a prima facie case that Flynn's claims were "primarily" based on curtailing Wilson's First Amendment rights in connection with a public issue and was "without merit".

2. The parties.

Appellant Flynn is a public figure. He is known (among many other things) for having served as the National Security Advisor to President Trump for 22 days, resigning and subsequently being indicted for making false statements to the FBI, entering into a plea agreement with the government then recanting his plea. Ultimately Flynn was pardoned by President Trump.

Appellee Wilson is a political consultant who wrote New York Times bestselling books and who co-founded a political action committee known as the Lincoln Project.

3. The lawsuit.

On May 3, 2023, Appellant Flynn filed his Complaint against Jim Stewartson alleging defamation and injurious falsehood. (R. 15-57). On July 13, 2023, Appellant filed his amended complaint, adding claims against Appellee Wilson to the claims originally asserted against Stewartson. (R. 108-161). On November 3, 2023, Appellant moved for Leave to Amend the Amended Complaint now to add claims against MeidasTouch LLC (in addition to the claims asserted against Mr. Stewartson and Appellee Wilson). (R. 622-625). On December 19, 2023, the Trial Court granted Appellant's Motion for Leave to Amend the Amended Complaint adding MeidasTouch LLC as a party (See, R. 933-936). On December 26, 2023, Appellant Flynn filed his Second Amended Complaint. (R. 933-997).

Plaintiff Flynn's Second Amended Complaint alleges that he sued Defendant Wilson because on February 24, 2022, (in response to Flynn's tweet[1]), Defendant wrote on twitter, "Putin employee Mike Flynn". (R. 933-

[1] The Plaintiff's tweet on February 22, 2022 coincided with the day of the Russian invasion of Ukraine, and thus the Defendant's tweet was in

997). Additionally, on May 14, 2023, Defendant retweeted Stewartson's tweet which stated (in part) "Flynn is Q". The lawsuit sought fifty million dollars ($50,000,000.00) in damages. (R. 933-997).

On January 3, 2024, Appellee Wilson filed his Motion to Dismiss or in the Alternative Motion for Summary Judgment (hereinafter "the Motion") (R. 1255-1615). Wilson filed a lengthy affidavit, attached supporting documentation and filed a request for judicial notice in support of his Motion pursuant to Florida Statute 768.295. (R. 1284-1297; R. 1312-1615).

On January 16, 2024, Appellant Flynn filed his Opposition in response to Wilson's Motion to Dismiss/for Summary Judgment (R. 1052-1072). Flynn submitted **no** summary judgment evidence.

4. Summary Judgment Order in this Case.

The trial court issued its Order Granting Final Summary Judgment in Favor of Rick Wilson on January 30, 2024. (R. 1108-1120). Mr. Wilson's Motion was considered as a Motion for Summary Judgment and resolved the case on that basis only. (R. 1112). The court found that,

> Mr. Wilson executed an affidavit as well as sought judicial notice of numerous articles, editorials, court opinions, court filings, General Flynn's presidential pardon, wire reports, declassified intelligence assessments, and various social media posts [DINs 63, 64]. The Court accepts judicial notice of the existence of, and

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response to Appellant's own statement tacitly supporting the Russian government's action and blaming the Biden administration.

> contents of, the items requested by Mr. Wilson. The Court also notes General Flynn waived the 40-day requirement for summary judgment evidence [DINs 73, 74][2]. **General Flynn did not provide any rebuttal evidence.**
> (R. 1112). (e.s.).

The Court addressed the "Putin employee Mike Flynn" tweet, stating:

> Mr. Wilson in his materials pointed to news accounts that in December 2015, the Russian Federation's state sponsored television network RT paid General Flynn $45,000 plus expenses for General Flynn to speak at RT's 10th anniversary gala in Moscow. A photo from that event depicts General Flynn seated next to Russian President Vladimir Putin. Thirteen months later, President Trump appointed General Flynn as the U.S. National Security Advisor.
> (R. 1113).

With regard to the "Flynn is Q" tweet, the trial court found that, Mr. Wilson pointed to several articles concerning QAnon, generally, and General Flynn's potential association with it, specifically. (R. 1114).

The trial court found that Mr. Wilson made a *prima facie* case that the Anti-SLAPP statute applies, finding, "Mr. Wilson easily demonstrated substantial national discussion concerning the Russian Federation, Vladmir Putin, QAnon, and General Flynn's interactions or presumed interactions with them. These are public issues of the highest order that

[2] See R. 1085-1107, and argument at hearing R. 1128: 10-24 and R.1191:10-25. Appellant did not raise this issue in his initial brief. Accordingly, the issue is waived and will not be addressed in this filing.

the First Amendment is designed to protect, and ***the dialogue back-and-forth implicates free speech***." (e.s.) (R. 1114).

The Court granted summary judgment to Mr. Wilson finding that:

> Mr. Wilson came forward with evidence demonstrating a factual basis from which he made the "Putin employee" and "Q" comments. Perhaps General Flynn does not receive a w2 from Vladmir Putin, but he did receive payment from a Russian Federation-controlled entity. The "gist" and "sting" of the comment is not substantially untrue. Kieffer, 369 So. 3d at 659. Perhaps General Flynn is not the mysterious "Q", but numerous news articles tie a close link between he and the QAnon movement. Mr. Wilson's retweet of Mr. Stewartson's original tweet, at least as it relates to the comment, "FYI, Mike Flynn is 'Q'." is unactionable rhetorical hyperbole. (R. 1116).
>
> ***
>
> At bottom, Mr. Wilson demonstrated that **both** *the falsity element* **and** ***the acting on the falsity element*** cannot be met by General Flynn at trial. Having done so, General Flynn was required to come forward with evidence to dispute those elements. Mr. Wilson's comments may not have been polite or fair. The First Amendment, though, does not require either politeness or fairness. Pullum v. Johnson, 647 So. 2d 254, 258 (Fla. 1st DCA 1994). (e.s.). (R. 1116).

Two days later, Appellant filed his Notice of Appeal (R. 1236-1237). Appellant never sought rehearing. The trial court's Order Granting Final Summary Judgment in Favor of Defendant Rick Wilson is the subject of this appeal.

5. This appeal.

On appeal, Appellant argues that the Court should not have granted Summary Judgment on Count I of the Second Amended Complaint

(defamation). The Initial Brief does not argue on Count II of the Second Amended Complaint (injurious falsehood). The term is only mentioned once in the initial brief (IB. 1). Accordingly, this claim is abandoned on appeal and will not be addressed further.

Appellant argues that the "defense of truth" was not raised at the trial level. Appellant argues that the trial court applied a burden-shifting mechanism (even though this motion was considered on summary judgment) in violation of the statute. Additionally, Appellant argues the trial court failed to engage in, "the required analysis to properly determine if the anti-SLAPP applies." Finally, Appellant argues that the trial court improperly took judicial notice of documents and relied on those documents in making determinations.

As is discussed below, Appellant mischaracterizes the trial court's findings and plaintiff's arguments. The trial court's ruling is based on competent substantial evidence and should not be disturbed.

Statement of the Facts

In light of the material omissions and erroneous statements by Appellant Flynn, Appellee Wilson provides the following Statement of Facts:

I. Appellant Flynn engaged in political speech on Twitter the day Russia invaded Ukraine and Appellee Wilson responded.

On February 24, 2022, the day Russia invaded Ukraine, Appellee reposted a tweet that summarized Appellant's tweet and stated:

> "Retired Lt. Gen. Michael Flynn just issued a statement blaming Biden because he "ignored and laughed at Putin's legitimate security concerns, and legitimate ethnic problems in Ukraine," while continuing to demonize Russia."

See, R. 959 for Appellant's entire statement. In direct response to Appellant Flynn's statement, on Twitter, Appellee Wilson stated, "Putin employee Mike Flynn". (R. 959).

II. Appellee retweeted a follower who included a photograph of Appellee and a number of statements including, "Flynn is 'Q'".

On May 14, 2023, Mr. Wilson retweeted Jim Stewartson's tweet, which includes a photograph of Mr. Wilson on MSNBC from earlier that evening (depicted in the photograph, the chyron below Mr. Wilson states, "2024 GOP Primary Race Takes Shape"). (R. 974). Mr. Stewartson commented on Mr. Wilson's television appearance, stating "Thanks for dropping Mike Flynn's name problem we have with America. ICYMI, he's suing @thejusticedepartment, @FBI and me personally. I covered his christofascist radicalization psyop at TFG's golf course. Also, FYI, Mike Flynn is "Q" #arrestmikeflynn". (R. 974).

III. General Flynn files suit.

On May 3, 2023, Appellant Flynn filed his Complaint against Jim Stewartson alleging defamation and injurious falsehood. (R. 15-57). On July

13, 2023, Appellant filed his amended complaint, adding claims against Appellee, Rick Wilson to the claims originally asserted against Mr. Stewartson. (R. 108-161). On December 26, 2023, Appellant Flynn filed his Second Amended Complaint adding claims against Mr. Stewartson and Mr. Wilson to a claim against MeidasTouch LLC. (R. 933-997).

According to the operative complaint, Appellant Michael Flynn is a retired General, was the Director of National Intelligence and he advocates for his values and began a social welfare organization called the America Project. (R. 941). The Second Amended Complaint sought damages from Appellee because he founded "an organization dedicated to opposing Republicans" (R. 943); it alleges Mr. Wilson "switched political beliefs overnight" (R. 943); "began working with far-left publications" (R. 943); "spreads lies about Conservative figures associated with Donald Trump." (R. 939). The lawsuit seeks to enjoin Mr. Wilson's speech. (R. 995).

IV. Mr. Wilson Moves to Dismiss or in the Alternative for Summary Judgment pursuant to Florida's Anti SLAPP law.

On January 3, 2024, Appellee Wilson filed his Motion to Dismiss or in the Alternative Motion for Summary Judgment pursuant to Section 768.295(4), Florida Statues. (R. 1255-1615). The Motion contained a "Statement of Undisputed Material Facts", (29 specific claims are asserted). (R. 1258-1264).

Incorporated into the Motion was Exhibit 5, Mr. Wilson's executed affidavit. (R. 1302-1310). Mr. Wilson's affidavit stated (in part),

> "I consume a substantial amount of media daily, I read newspapers and obtain information from a wide array of sources. I was aware of and relied upon the following editorials, newspaper articles and court filings when I made the statements that are the subject of this lawsuit." (R. 1303).

Appellee attached and incorporated exhibits[3] to that affidavit that support the two statements that are the subject of this dispute into the Motion[4]. The statements of undisputed facts were not and cannot be disputed. They provide support for Mr. Wilson's statements.

At the same time Mr. Wilson submitted a request for judicial notice. (R. 1616-1619; with attachments (the same items attached to the request for judicial notice as the items attached to the Wilson affidavit), R. 1621-2018).

a. General Flynn is a public figure.

With regard to General Flynn being a public figure Mr. Wilson's affidavit establishes that Mr. Wilson relied on his own knowledge and trustworthy news sources. Appellant served as National Security Advisor to the President of the United States and resigned after only 22 days. Ex. 2 (R.

[3] Each exhibit referenced is attached to the Motion and is also incorporated into Mr. Wilson's affidavit. For ease of reference are referred to in this Answer Brief in the same was they are referenced in the Motion and Affidavit (Ex. _).

[4] *See,* Exhibits 1-4 (R. 1284-1297) and Exhibits 6-29 (R. 1312-1615).

1287-1290). Appellant's appointment and resignation were major national controversies. See also, Ex. 1[5]; Ex. 2[6]; Ex. 3[7]. Appellant admitted that he committed crimes against the United States and that he served as a foreign agent and did not disclose the same as required by law[8]. Appellee himself stated, "…I am, in fact, guilty of the crime charged." under penalty of perjury[9]. Then Appellant recanted his plea and the government attempted to drop his case[10]. Ultimately, President Trump issued an Executive Grant of Clemency and the case against Appellant was dismissed[11].

b. Factual support for Putin tweet.

Appellee Wilson's affidavit in support of the Motion also provides factual support for his statement on twitter, "Putin employee Mike Flynn", and Wilson's exhibits show that he relied upon statements from newspaper articles that appeared in the *New York Times*, the *Washington Post*, *Reuters*

[5] "Michael Flynn: An Alarming Pick for National Security Advisor", November 18, 2016, The New York Times Editorial Board; (R. 1284-1285).
[6] Michael Flynn Resigns as national security advisor, The New York Times, Feb. 13, 2017. (R. 1287-1290).
[7] Statement of the Offense in the United States of America v. Michael T. Flynn. (R. 1292-1297).
[8] Ex. 3. (R. 1292-1297).
[9] Ex. 3. (R. 1297).
[10] Ex. 11. U.S. Drops Michael Flynn Case, in Move Backed by Trump. The New York Times. May 7, 2020. (R. 1432).
[11] Ex. 13 (R. 1452-1454) (with attachment including Presidential pardon of Appellant). (R. 1455)

and official reports of the United States, Office of Director of National Intelligence.

Flynn was the subject of national controversy due to his service as national security advisor and his resignation because (according to Plaintiff), he briefed the vice president-elect and others with incomplete information regarding phone calls with the Russian ambassador to the United States[12]. According to a sworn statement from Plaintiff himself, he admitted to making "material false statements and omissions", which impeded what was then an FBI counterintelligence investigation into the Government of Russia's efforts to interfere in the 2016 presidential election[13].

The record evidence includes newspaper accounts and government documents that show: **1.)** Appellant Flynn accepted forty-five thousand dollars ($45,000.00) plus expenses payment from RT (R. 1457-1459); **2.)** Russia's RT was forced to register as 'foreign agent' in the United States. (R. 1461); **3.)** U.S. intelligence officials issued a report that described RT as, "Russia's state-run propaganda machine." (R. 1461); **4.)** Flynn did not report this payment from RT as required. (R. 1288); **5.)** Appellant Flynn was photographed with Vladimir Putin himself at a celebration in honor of RT. (R.

[12] Ex. 2 (R. 1287-1290).
[13] R. 1292-1297, See Appellant Flynn's signed "Defendant's acceptance" at R. 1297.

1457); **6.)** The Office of the Director of National Intelligence issued a report on January 6, 2017 that "RT… contributed to the influence campaign by serving as a platform for Kremlin messaging to Russian and international audiences." (R. 1485).

It is undisputed that Mr. Wilson was aware of these editorials, newspaper articles and court filings when he made the statement "Putin employee Mike Flynn" in response to General Flynn's statement tacitly supporting Putin and Russia on the night of the invasion of Ukraine. (R. 959).

c. Factual Support for Q retweet.

Appellee Wilson's affidavit in support of the Motion (R. 1302-1310) further provides factual support for his retweet of Mr. Stewartson's tweet that included the statement, "FYI, Mike Flynn is 'Q'" (R. 974), because Mr. Wilson was aware of and relied upon news articles from CNN.com, the Daily Mail, the New York Times, Politico, and Appellant's own website[14].

Wilson relied on an article in the Daily Mail stating, "**Believers in the QAnon conspiracy theory have floated that Flynn could be 'Q,'** the 'deep

[14] See, Ex. 18 (R. 1511-1517); Ex. 19, (R. 1521-1523); Ex. 21, (R. 1529-1538); Ex. 21(a) (R. 1541-1547); Ex. 24 (R. 1569-1574).

state' insider who leaves online clues to expose the pedophilia ring of Satan worshippers who are out to get Trump."[15] (e.s.).

Additionally, on February 6, 2021, the New York Times reported, "This past summer, Mr. Flynn posted a video of himself taking QAnon's 'digital soldier' oath. To many of the movement's followers, Mr. Flynn ranks just below Mr. Trump. **Some have speculated that he is the mysterious figure known as 'Q,' the purported government insider with a high-level security clearance who began posting cryptic messages in 2017 about the deep state trying to destroy the president."**[16] (e.s.).

Appellant sells merchandise on his *own* website with slogans referencing himself and the QAnon movement. Ex. 21 (R. 1538); *See*, Ex. 21(a) photographs and links to merchandise that Appellee sells with his

[15] Ex. 21 (the December 30, 2020 Daily Mail article entitled, "Mike Flynn endorses the selling of QAnon merchandise that pays into his legal defense fund with supporters saying buying t-shirts and hats helps pardoned ex-national security adviser 'in the fight against fake news"; (R. 1529 and R. 1532 for quote cited above)).

[16] Ex. 24 ("Pushing QAnon and Stolen Election Lies, Flynn Re-emerges: Recast by President Trump's most ardent supporters as a MAGA martyr, Michael T. Flynn has embraced his role as the man who spent four years unjustly ensnared in the Russia investigation" *The New York Times*, February 6, 2020. (R. 1569, R. 1573 for quote cited above)).

name and the slogan "WWG1WWGA"[17] (Accessed on 12/29/23) (R. 1541-1547, see also, R. 1529). *See also*, Ex. 23[18].

d. Appellee Wilson is a prominent thought leader in the United States.

Appellee Wilson is a political strategist, media consultant and author. (R. 1302). He has authored two New York Times bestselling books and frequently appears on national news networks, MSNBC, CNN, and international outlets. (R. 1303). In 2020, Mr. Wilson co-founded the Lincoln Project. (R. 1303).

Appellee Wilson published a New York Times Bestseller entitled, "Everything Trump Touches Dies: A Republican Strategist Gets Real About the Worst President Ever" At page 163 of the book, Defendant describes Plaintiff as follows:

> Capo of *l'afaire russe* MAGA Crew Mike Flynn, a disgraced former army general was so outrageously in bed with the Russians that even Trump was forced to fire him. A predecessor to Flynn as the Defense Intelligence Agency Director told me once that the Russophilic anti-Muslim general was "the most dangerous asshole ever to head a three letter." (R. 1314).

[17] Courts have described WWG1WWGA or "Where We Go One, We Go All" as "a slogan used by adherents of the QAnon conspiracy theory." *U.S. v. Languerand*, 2021 WL 3674731, at *3 (DDC Aug. 19, 2021).

[18] "Twitter bans Michael Flynn, Sidney Powell and other QAnon accounts," CNBC January 8, 2021 (R. 1562-1564).

On June 9, 2021, the Lincoln Project ran advertisements critical of Appellant Flynn. (R. 1585).

The Second Amended Complaint in no uncertain terms sets out the retaliatory nature of this lawsuit alleging that Mr. Wilson founded "an organization dedicated to opposing Republicans" (R. 943); it alleges Mr. Wilson "switched political beliefs overnight" (R. 943); "began working with far-left publications" (R. 943); "spreads lies about Conservative figures associated with Donald Trump." (R. 939). The lawsuit seeks to enjoin Mr. Wilson's speech. (R. 995).

V. Appellant Flynn files his response to the Appellee Wilson's Motion to Dismiss or in the alternative, Motion for Summary Judgment.

Appellant Flynn filed his Opposition in response to Wilson's Motion to Dismiss/for Summary Judgment on January 16, 2024. (R. 1052-1072). No summary judgment evidence was presented at all. Flynn's response fails to address Wilson's statement of undisputed facts and did not specifically refute any statement of undisputed material fact(s). (R. 1051-1071).

The filing does not specifically discuss the exhibits attached to Wilson's Motion. Although they are generally referenced. See, R. 1062-1063. The filing, (like the instant initial brief), completely ignores Mr. Wilson's affidavit.

The brief *does* contain factual assertions by counsel that are not summary judgment evidence[19].

STANDARD OF REVIEW

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Rule 1.510, Fla. R. Civ. P. This standard "shall be construed and applied in accordance with the federal summary judgment standard" and the "Court Notes" that accompany the Florida Rules of Civil Procedure further explain that this standard refers to the principles announced in a trilogy of federal cases. *Id.*; *see also, In Re: Amendments to Florida Rule of Civil Procedure 1.510*, No. SC20-1490 (April 29, 2021) at note 3. One of those cases, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), involved a defamation dispute, where the defendant reporters sought summary judgment. In that case, the U.S. Supreme Court held that "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position

[19] See, R. 1057. "Even if there were First Amendment concerns, the purpose of this lawsuit is not to chill Defendant's freedom of speech. Rather, the purpose is to seek compensation for Defendant's harmful and malicious lies about General Flynn, an American hero who served this country for 33 years. Defendant's lies continue to harm General Flynn in his everyday life and professional endeavors, and this lawsuit seeks to rectify and end that harm." See also, R. 1058. "Each of these accusations subject General Flynn to hatred, distrust, ridicule, contempt or disgrace, or injures General Flynn in his business relations."

will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252. On appeal, "[a] ruling on a motion for summary judgment is subject to *de novo* review." *Fla. Bar v. Greene*, 926 So. 2d 1195, 1200 (Fla. 2006).

A. APPLICABLE LEGAL FRAMEWORK.

1. Defamation.

A claim of defamation requires "the following five elements: (1) publication; (2) falsity; (3) actor must act with knowledge or reckless disregard as to the falsity on a matter concerning a public official, or at least negligently on a matter concerning a private person; (4) actual damages; and (5) statement must be defamatory." See, *Kieffer v. Atheists of Florida, Inc*., 269 So. 3d 656 (Fla. 2d DCA 2019), quoting *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008).

A public figure defamation plaintiff must demonstrate actual malice to overcome the protections of the First Amendment. *New York Times v. Sullivan*, 376 U.S. 254 (1964); See also, *Mastandrea v. Snow*, 333 So. 3d 326, 328 (Fla. 1st DCA 2022). The "actual malice" standard presents an "overwhelming burden" to defamation claims by public-figure plaintiffs. See *Demby v. English*, 667 So. 2d 350, 354 (Fla 1st DCA 1995). To state a claim under that rigorous standard, Plaintiff must aver facts tending to show, by

"clear and convincing evidence," that Defendant subjectively "entertained serious doubts as to the truth" of the statements at issue. See *Don King Prods., Inc. v. Walt Disney Co*., 40 So. 3d 40, 43 (Fla. 4th DCA 2010).

Actual malice is defined as "as knowing the statements were false at the time they were made or making the statements with a reckless disregard of the truth. *Id*. at 327-328; *Readon v. WPLG, LLC*, 317 So. 3d 1229, 1235 (Fla. 3d DCA 2021). The standard is not satisfied "merely through a showing of ill will or 'malice' in the ordinary sense of the term." *Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 657 666 (1989).

Whether the challenged statement is "reasonably capable of a defamatory interpretation" is a question of law. *Keller v. Miami Herald Publ'g Co*., 778 F. 2d 711, 714-715 (11th Cir. 1985). In construing meaning, courts are to consider "all of the circumstances surrounding the statement," *Sanchez v. Cellco P'ship*, 2006 WL 8432732, at *2 (S.D. Fla. Sept. 26, 2006). Falsity "is the *sine qua non* for recovery in a defamation action." *Byrd v. Hustler Magazine, Inc*., 433 So. 2d 593 (Fla. 4th DCA 1983).

A publisher's reliance on "trustworthy sources demonstrates his lack of subjective belief that the [allegedly defamatory] articles [in suit] contained false statements." *Edward Lewis Tobinick MD v. Novella,* 848 F. 3d 935 (11th Cir. 2017). (no subjective awareness of probable falsity where "the

publisher's allegations are supported by a multitude of prior reports upon which the publisher reasonably relied").

A "statement is substantially true if its substance or gist conveys essentially the same meaning that the truth would have conveyed." *Jews for Jesus v. Rapp,* 997 So. 2d 1107-1108 (Fla. 2008); *Levan v. Cap. Cities/ABC, Inc.,* 190 F. 3d 1230, 1240 (11th Cir. 1999) (if "gist" or "sting" of challenged statement is substantially true, statement is not defamatory). Courts must "consider the context" of the statement and "disregard any minor inaccuracies that do not affect the substance of the statement." See *Wentz v. Project Veritas*, 2019 WL 1716024 at *5 (M.D. Fla. Apr. 16, 2019). (granting summary judgment on truth where several allegedly defamatory statements were merely "recitations of [plaintiffs] own admitted actions and statements").

2. Florida's Anti-SLAPP Law.

A party may move to dismiss or in the alternative for summary judgment under Section 768.295(4) Fla. Stat. *Gundel v. AV Homes, Inc.,* 264 So. 3d 314 (Fla. 2d DCA 2019).

Statements made on Twitter are encompassed by the definitions set out in 768.295(2)(a), Fla. Stat. See also *WPB Residents for Integrity in Gov't*

Inc. v. Materio, 284 So. 3d 555, 562 (Fla. 4th DCA 2019) (widely disseminated modes are protected First Amendment speech).

SUMMARY OF THE ARGUMENT

Substantial evidence supports Appellee's statements and Appellant submitted no summary judgment evidence in response. Accordingly, Appellant Flynn cannot maintain a claim for defamation and the trial court correctly granted summary judgment.

The trial court correctly found that **both** *the falsity element* **and** ***the acting on the falsity element*** cannot be met by Appellant at trial. Accordingly, based on the record evidence a fair-minded jury could not return a verdict for the plaintiff on the evidence presented and summary judgment was correctly granted.

Appellant does not even argue that Appellee acted with knowledge or reckless disregard for the truth or that the evidence incorporated into Mr. Wilson's affidavit was improperly relied upon. Accordingly, Appellant cannot win this appeal as Appellant must be able to prove this element of a defamation claim.

Once Wilson established that this lawsuit was without merit and primarily filed because he exercised his right to free speech in connection with a public issue, Flynn was required to come forward with support for his

claims under Section 768.295(4), Florida Statutes. But here, he did not even attempt to do so.

Appellee argued truthfulness in his motion and in oral argument, Appellant did as well and the trial court's findings in this regard should not be disturbed.

Judicial notice was properly taken.

Finally, Appellant's arguments misstate and misapply the law and should be rejected. Counsel's arguments that this Court depart from its precedent relative to the Anti-SLAPP statute should not be well taken.

ARGUMENT

I. THE COURT PROPERLY GRANTED SUMMARY JUDGMENT TO DEFENDANT WILSON, AS A PROCEDURAL MATTER BASED ON BINDING PRECEDENT AND ABSENT ANY COMPETING EVIDENCE.

Florida's summary judgment rule mirrors the federal standard: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Rule 1.510, Fla. R. Civ. P. When that rule was amended in 2021, the Florida Supreme Court explicitly relied upon and referred to the United States Supreme Court precedent, including *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). See, Rule 1.510, Fla. R. Civ. P., Court Notes (citing *Anderson*); See also, *In Re: Amendments to Florida Rule of*

Civil Procedure 1.510, No. SC20-1490 (April 29, 2021)(discussing *Anderson*). Based upon *Anderson,* which like this case involved unsupported accusations of defamation, the trial court properly awarded summary judgment.

In *Anderson,* the defendants, including reporter Jack Anderson and the *New York Times*, moved for summary judgment in response to a lawsuit filed by Liberty Lobby and its affiliates. *Anderson*, 477 U.S. at 244. The plaintiffs alleged defamation based upon a series of articles portraying them as "neo-Nazi, anti-Semitic, racist, and Fascist." *Id.* at 245. In response to the suit, the defendants provided an affidavit and appendix explaining the content and sources for the articles and moved for summary judgment. *Id.* Plaintiffs opposed the motion, "asserting that there were numerous inaccuracies in the articles and claiming that an issue of actual malice was presented". *Id.* at 246. The trial court held that respondents were limited-purpose public figures, found no malice, and granted summary judgment. The dispute eventually reached the U.S. Supreme Court which upheld the trial court explaining that "when a properly supported motion for summary judgment is made, the adverse party 'must set forth specific facts showing that there is a genuine issue for trial.'" *Id.* at 250.

In this case, like the defendants in *Anderson*, Appellee Wilson provided an affidavit and exhibits explaining the facts, sources and reasonable basis for his published political statements. Based upon these materials, Wilson sought summary judgment. When considering any motion for summary judgment, the question considered by the court is whether, based on the facts provided by the non-movant, there is any need for a trial:

> the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other, but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Anderson, 477 U.S. at 252.

In this case, these is not even a scintilla of evidence to support Flynn. On the merits in the trial court proceedings, Flynn filed nothing in response to the affidavit and exhibits provided by Wilson. (R. 1112). (“General Flynn did not provide any rebuttal evidence.”).

A. Putin employee tweet.

Based upon the record, Wilson characterized Flynn as a “Putin employee Mike Flynn” as part of a published statement and online political debate. (R. 959). Wilson relied on documents and newspaper articles that support his position. (See, pages 12-13 above). Significantly, Flynn’s connections with the Russians led to criminal justice proceedings. The

record shows that when Wilson said that Flynn would be going to jail (in statements that are outside of the statute of limitations), Wilson relied on statements of a U.S. District Judge and evidence of those proceedings against Flynn (prior to the point where President Trump pardoned Flynn). (R. 1333-1337; R. 1339-1430).

On February 24, 2022, Appellant Flynn took to twitter, on the day of the Russian invasion of Ukraine, and issued a statement of tacit support to the Russian government. The first amendment gives license to Mr. Wilson to state in response "Putin employee Mike Flynn". (R. 959). See, *Edward Lewis Tobinick MD v. Novella,* 848 F. 3d 935 (11th Cir. 2017). (no subjective awareness of probable falsity where "the publisher's allegations are supported by a multitude of prior reports upon which the publisher reasonably relied"); *See also,* A "statement is substantially true if its substance or gist conveys essentially the same meaning that the truth would have conveyed." *Jews for Jesus v. Rapp,* 997 So. 2d 1107-1108 (Fla. 2008); *Levan v. Cap. Cities/ABC, Inc.,* 190 F. 3d 1230, 1240 (11th Cir. 1999) (if "gist" or "sting" of challenged statement is substantially true, statement is not defamatory).

B. "Flynn is Q" retweet.

Similarly, the record shows that when Wilson retweeted Mr. Stewartson's statement that characterized Flynn as "Q", (R. 974), Wilson relied on documents in the record. (See, pages 13-15 above). It is particularly notable that both the New York Times and the Daily Mail published articles that suggested that Appellant Flynn is "Q". Ex. 21 and Ex. 24 (R. 1529-1539 (R. 1532 for direct quote in the Daily Mail); R. 1569-1574, (R. 1573 for direct quote)). Flynn argues in his appellate brief that, there is no evidence for the assertion that "Flynn is Q"[20], (IB 31), even though this issue *was explicitly* addressed in major publications cited by Wilson (R. 1532, 1573).

C. Arguments of counsel are not Summary Judgment evidence.

Appellee's affidavit made on personal knowledge is admissible summary judgment evidence sufficient to support claimed nonexistence of a

[20] The brief claims that being called "Q" is somehow defamatory, despite Wilson's evidence that Flynn took the "Q" oath and sells "Q" merchandise. IB. 19-33. Flynn's opposition to being called "Q" is particularly incoherent, because the record suggests that Flynn took the "Q" oath, and sells its merchandise, including T-shirts emblazoned with the organization motto of WWG1WGA or "Where we go one we go all" (which projects a unified image between all leaders and followers). Flynn has provided no explanation in the record to refute this logical point, or to otherwise overcome Wilson's defense that no defamation has occurred Flynn cannot overcome either the falsity element or the acting on the falsity element, but he must overcome both. *Kieffer v. Atheists of Florida, Inc*., 269 So. 3d 656 (Fla. 2d DCA 2019).

material issue. See, *Progressive Express Ins. Co. v. Camillo*, 80 So. 2d 394, 399-400 (Fla. 4th DCA 2012). (holding that the trial court could not reject an affidavit as "self-serving" where it was based on personal knowledge and was not framed solely in terms of conclusions of law).

If the moving party presents evidence sufficient to support the claimed nonexistence of a material issue, the opposing party must come forward with counter-evidence sufficient to reveal a genuine issue of material fact. *Landers v. Milton,* 370 So. 2d 368, 370 (Fla. 1979), see also *Harvey Bldg., Inc. v. Haley*, 175 So. 2d 780 (Fla. 1965); *Lindsey v. Cadence Bank N.A.* (Fla. 1st DCA 2014). "It is not enough for the opposing party merely to assert that an issue does exist." *Landers*, 370 So. 2d at 370. If the opposing party fails to come forward with competent counter-evidence, the moving party is entitled to summary judgment. *Haley*, 175 So. 2d at 783. See also, *S. Developers & Earthmoving, Inc., v. Caterpillar Fin. Servs. Corp.*, 56 So. 3d 56, 62 (Fla. 2d DCA 2011). (holding that summary judgment evidence, consisting of a letter from an auctioneer, was properly excluded because it was not sworn to or otherwise authenticated so as to make it admissible in evidence).

Nevertheless, the Initial Brief spends significant time addressing what it claims are, "properly pled allegations" (IB. 17, 18, 26). Flynn now argues

"At a minimum, General Flynn can testify as to whether or not he is Q, which would provide a manner of proving the allegation true or false." (IB. 30). But he was required to submit an affidavit in support of his opposition to Summary Judgment and he *did not*.

In the oral argument on the Motion, counsel for Mr. Wilson argued:

> Today, is the day to show that there are disputed material facts and to have evidence to back that up. It's the day to bring an affidavit from General Flynn. It's the day to produce their evidence, to show what they have, because under the Anti-SLAPP law, the defendants are entitled to an expedited process. And so if there is evidence that they have, it should have been here today and it's not… (R. 1191).

D. Based on the applicable rules of procedure, the undisputed record evidence cannot be overcome on appeal.

Mr. Wilson's affidavit is entirely admissible to prove his defenses. Flynn did not object to the affidavit or even mention it in his argument either at the trial court or on appeal. In fact, given this abundance of evidence supporting Wilson's position in the record, and Flynn's complete failure to respond, the characterization of Wilson's statements as "defamation" --- and the continuation of this appeal --- is utterly frivolous. As a constitutional matter, to prevail in this case, Flynn must somehow prove that Wilson acted with actual malice and reckless disregard for the truth. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) at 332, *citing St. Amant v. Thompson*, 390 U.S. 727, 390 U.S. 731 (1968).

But to the contrary, given the evidence in the record provided by Wilson, and the complete absence of any competing evidence from the Flynn, the only possible conclusion that can be reached by any court, and any jury, is that that the Wilson did not engage in defamation. The record shows – and the trial court held – that Wilson's statements were lawful, not defamatory.

Appellant Flynn apparently disagrees with how Appellee Wilson characterized Flynn's conduct, affiliations, payments, oaths and sales. But in response to Wilson's motion for summary judgment and the supporting affidavit and exhibits, the burden shifted; Flynn, as the non-movant, needed to provide sufficient evidence to suggest that a genuine dispute existed as to a material fact.

By providing no evidence at all, Flynn wholly failed to meet his burden, and his mere protests and objections about the defendant's version of the facts are insufficient. When the Florida Supreme Court amended Rule 1.150 of the Florida Rules of Civil Procedure, it explained its process for record-based review, noting that summary judgment cannot be denied when the record blatantly contradicts the non-movant's version of the facts:

> Under our new rule, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for

> summary judgment." … In Florida it will no longer be plausible to maintain that "the existence of any competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the 'slightest doubt' is raised."

In Re: Amendments to Florida Rule of Civil Procedure 1.510, No. SC20-1490 (April 29, 2021) *quoting Scott v. Harris*, 550 U.S. 372, 380 (2007) and *citing* Bruce J. Berman & Peter D. Webster, Berman's Florida Civil Procedure § 1.510:5 (2020 ed.).

In this case, the record blatantly contradicts Flynn's defamation claims. Flynn cannot prove either the falsity element or the acting on falsity element. See *Kieffer v. Atheists of Florida, Inc*., 269 So. 2d 656 (Fla. 2d DCA 2019). As the trial judge wryly observed, Flynn apparently wants a jury trial to consider absurd trivialities such as whether defamation of a public figure has occurred based upon the nuances of W-2s and employment law, and whether it is defamation to call a public figure "Q" instead of merely a member of "Q".[21] None of these arguments were made in the Flynn's response to the

[21] As the trial court held: "Perhaps General Flynn does not receive a W-2 from Vladmir [sic] Putin, but he did receive payment from a Russian Federation-controlled entity. The "gist" and "sting" of the comment is not substantially untrue." And as it further explained: "Perhaps General Flynn is not the mysterious "Q", but numerous news articles tie a close link between he and the QAnon movement. Mr. Wilson's retweet of Mr. Stewartson's original tweet, at least as it relates to the comment, "FYI, Mike Flynn is 'Q'." is unactionable rhetorical hyperbole." (R.1116).

Motion, but even if all inferences are now given to the non-movant, Flynn's protestations do not meet his burden to prove actual malice. Instead, Flynn's baseless arguments are precisely what the Florida Supreme Court intended to prohibit when it amended its summary judgment rules.

Just like the plaintiffs in the United States Supreme Court's historic *Anderson* case, Flynn here argues that Wilson's statements contain inaccuracies and that an issue of actual malice was presented. Flynn's defamation suit here should end with a similar defeat for failing to adhere to that binding precedent. "[W]hen a properly supported motion for summary judgment is made, the adverse party 'must set forth specific facts showing that there is a genuine issue for trial.'" *Anderson,* 477 U.S. 242 (1986) at 246. Wilson properly sought summary judgment, supported by evidence. Flynn did not – and cannot – meet his burden of proving defamation, actual malice, or reckless disregard of the truth, because, as *Anderson* explained: "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient." *Id.* at 252. Indeed, Plaintiff Flynn offered no counter evidence whatsoever, whereas the record abundantly supports Wilson's statements.

II. FLYNN CANNOT MEET THE REQUIRED ELEMENT OF DEFAMATION THAT WILSON ACTED WITH KNOWLEDGE OF OR RECKLESS DISREGARD FOR THE TRUTH.

Mr. Wilson argued, "trustworthy sources demonstrates his lack of subjective belief that the [allegedly defamatory] articles [in suit] contained false statements." *Edward Lewis Tobinick MD v. Novella,* 848 F. 3d 935 (11th Cir. 2017). (no subjective awareness of probable falsity where "the publisher's allegations are supported by a multitude of prior reports upon which the publisher reasonably relied"). Here the record supports Mr. Wilson's statement such that any claim against him for defamation cannot stand. (R. 1273).

Flynn's response to the Motion did not challenge or even address Mr. Wilson's reliance on trustworthy sources. The trial court's final order found: At bottom, Mr. Wilson demonstrated that **both** the falsity element ***and*** ***the acting on the falsity element*** cannot be met by General Flynn at trial. (e.s.) (R. 1246). But Flynn's Initial Brief repeatedly makes the incorrect claim that the trial court's order only granted judgment based on the falsity element[22],

[22] See, "… the trial court dismissed this statement on the ground that it is not substantially untrue." (IB 6); *See also*, "As discussed, the trial court solely dismissed Appellee's statement that General Flynn is a "Putin employee" on the grounds that it was "not substantially untrue." (IB. 20); "While this was the only element on which the trial court dismissed the "Putin employee statement, General Flynn did satisfy each element." (IB. 25).

when in fact the trial granted judgment based on **both** the falsity element and the *acting on the falsity element*.

Not only does the initial brief ignore Mr. Wilson's affidavit, but also the element of proof concerning Mr. Wilson's reliance on trustworthy news sources. There is no record evidence and no argument that Mr. Wilson's reliance on these sources is unreasonable. This is fatal to Flynn's appeal.

Flynn may argue that the trial court did not cite facts to support this legal conclusion. First, that is not so, the Order goes to great lengths to establish how and why the Court ruled the way it did. Second, even if true, Appellant waived this argument because Flynn never sought rehearing.

> To preserve for appeal a challenge to the failure of the trial court to make required findings of fact, a party must raise that issue in a motion for rehearing under this rule.

In Re Amendments to Florida Rule of Civil Procedure 1.530, No. SC2022-0756, 2023 WL 3104357 at 1 (Fla. Apr. 27, 2023), See also, *Tucker v. LNV Corporation*, 363 So. 3d 1095 (Fla. 4th DCA 2023) (finding party must alert the court of the error via motion for rehearing or some other appropriate motion in order to preserve the issue for appeal).

Reliance on numerous trustworthy news sources was supported by Mr. Wilson's affidavit, argued in the motion and was a basis of the trial court's decision that is unchallenged here. Flynn submitted no counter evidence to

create a dispute of fact. Flynn does not even argue that the news sources are unreliable. The absence of any factual support, legal argument or any other legal basis to overcome this finding by the Court appeal. Flynn's entire appeal can be rejected on this basis alone.

III. ONCE WILSON ESTABLISHED THAT THIS LAWSUIT WAS WITHOUT MERIT AND PRIMARILY FILED BECAUSE HE EXCERCISED THE RIGHT TO FREE SPEECH IN CONNECTION WITH A PUBLIC ISSUE, FLYNN WAS REQUIRED TO COME FORWARD WITH SUPPORT FOR HIS CLAIMS UNDER SECTION 768.295(4), FLORIDA STATUTES.

This action for defamation is for two statements on twitter "Putin employee Mike Flynn" and "Flynn is Q" are plainly statements made in connection with public issues. Mr. Wilson argued that Second Amended Complaint claims was filed because Mr. Wilson exercises his first amendment rights *generally* in ways that Plaintiff does not like. The evidence establishes that the Lincoln Project ran negative advertising about General Flynn and that Mr. Wilson spoke of Mr. Flynn in harsh terms in his book prior to the tweets that are the subject of this lawsuit. As the trial court noted, "the dialogue back-and-forth implicates free speech" (R. 1114).

The WHEREFORE clause of the second amended complaint exposes the real motivation of this lawsuit, seeking:

> An award of compensatory, special, and punitive damages, as well as disgorgement of any and all income Defendants have made off of their lies about General Flynn, in the amount of fifty million dollars ($50,000,000.00).

This damages award does not concern damages related to being called “Q” or a “Putin employee”, instead it seeks damages concerning Mr. Wilson founding “an organization dedicated to opposing Republicans”; because Mr. Wilson “switched political beliefs overnight”; “began working with far-left publications”; “spreads lies about Conservative figures associated with Donald Trump.” Plaintiff takes the position that Mr. Wilson uses “defamatory and outrageous comments” (seemingly other speech that is not the subject of this action) to have raised $87,404,908 through the Lincoln Project (which is not a party to this action). (See, page 9 above). The claim plainly stated is an attempt to punish Mr. Wilson for speech other than the speech that is the subject of the Second Amended Complaint.

Once Mr. Wilson came forward with evidence to establish that this lawsuit was filed without merit and primarily because he has exercised the constitutional right to free speech in connection with public issues, Flynn was required to come forward with evidence that created a factual issue for the finder of fact to resolve.” See, 768.295(4) Fla. Stat.; see also *Gundel* 264 So.

3d 314. This is no different than any run of the mill Motion for Summary Judgment on any number of legal disputes.

Flynn submitted no evidence in opposition to Mr. Wilson's evidence. There is ample evidence from which to conclude that Flynn's Second Amended Complaint was an effort to curtail and inhibit Mr. Wilson's speech for political purposes.

Nevertheless, counsel for Appellant argues that, the primary purpose of this suit is not to chill speech. However, counsel's argument is no substitute for summary judgment evidence---which the Appellant never submitted. See, *Haley*, 175 So. 2d at 783. These arguments of counsel have no evidentiary weight and should not be considered.

IV. APPELLEE ARGUED TRUTHFULNESS IN HIS MOTION AND IN ORAL ARGUMENT, THE TRIAL COURT'S FINDINGS SHOULD NOT BE DISTURBED.

The "Legal Analysis" section of Mr. Wilson's Motion to Dismiss or in the Alternative Motion for Summary Judgment states as follows:

> Plaintiff admits he is a public figure but fails to acknowledge the nature and extent of his notoriety. In fact, his own statements -- and the facts recounted in the Second Amended Complaint -- defeat any allegation of defamation, because they facially *establish the Defendants' defenses* **of either truthfulness** *or* **well-founded opinion**. All comments made by the Defendant concerning the Plaintiff, as alleged, are protected under the First Amendment. (e.s.) (R. 1264).

Appellee argued that Appellant could not meet the falsity element. See, R. 1273. In response, Appellant argued the truth defense in his Motion. See, R. 1062, R. 1063.

Nevertheless, Appellant now argues, "General Flynn could not have reasonably anticipated that the trial court would dismiss Appellee's statement that he is a "Putin employee" based on a truth defense because Appellee never raised that defense for this particular statement." IB at 9. That argument is simply not supported by the record.

Appellant Flynn opens his argument on this issue by citing to rules applicable to Motions to Dismiss, even though the Court granted Summary Judgment and not dismissal. The rules and case law cited are not applicable to a Motion for Summary Judgment. Accordingly, Appellant's first argument (IB. 7-8) should be rejected as wholly inapplicable to the trial court's order.

Then Appellant cites to *Shechter v. R.V. Sales of Broward, Inc.*, 328 So. 3d 1053, 1056 (Fla. 3d DCA 2021) and *Hotel 71 Mezz Lender, LLC v. Tutt*, 66 So. 3d 1051, 1054 (Fla. 3d DCA 2011), suggesting he was unprepared for hearing on summary judgment[23]. But those cases do not support the argument

[23] The Court held that "General Flynn waived the 40-day requirement for summary judgment evidence," R. 1112, and the record shows Flynn agreed to waive the 40 day rule and to proceed forward to hearing as provided in Florida's Anti-SLAPP statute. See, R. 1085-1107 and argument at hearing R. 1128: 10-24 and R.1191:10-25.

asserted here. *Shechter* involved a court granting summary judgment *sua sponte*, without a Motion on its own volition*. In Hotel 71 Mezz Lender,* the trial court granted summary judgment in Tutt's favor, but Tutt never moved for summary judgment. The 3rd DCA found that, "The entry of summary judgment in Tutt's favor deprived Hotel 71 of the opportunity to respond to a motion for summary judgment and to prepare for the hearing." *Id.* at 1053.

Appellant argues that it, "is reversible error to grant a motion based on a ground the nonmoving party could not have reasonably anticipated." *First Union Nat. Bank of Florida v. Maurer*, 597 So. 2d 429, 430 (Fla. 2d DCA 1992). But in that case, the Court granted summary judgment to the non-moving party because an issue of fact remained. Here, there can be no factual issue because the Court fully ruled in Mr. Wilson's favor. And once again, Appellant never moved for rehearing or otherwise indicated that he was not prepared for hearing and he did not make that argument in the Initial Brief.

It appears that Appellant takes issue with the headers in the Motion to Dismiss or in the Alternative Motion for Summary Judgment to somehow argue that the law as it applies to the statement "Flynn is Q" is different or not cited when applied to the "Putin employee Mike Flynn" statement. But there is no showing of any difference between the analysis of these

statements in Appellant's brief response to the Motion. Additionally, the documents attached to the Motion all support the proposition that the statements were based on well founded belief and truth or substantial truth and Flynn cannot seriously argue that he did not understand that a response was necessary.

Flynn also argues that truth is an affirmative defense that was not pled. It appears that Flynn is attempting to argue that Florida's Anti-SLAPP law is unconstitutional without explicitly making such argument, but any such argument has been waived. Even if he were making this argument (explicitly) he is incorrect. While, Flynn cites to a litany of cases, in non-Anti-SLAPP context, arguing that truth is an affirmative defense. But that is not *always* the case. See, *In Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986).

Under the substantial truth doctrine applicable to defamation cases, a statement does not have to be perfectly accurate if the gist or the sting of the statement is true. *Readon v. WPLG, LLC*, 317 So. 2d 1229 (Fla. 3rd DCA 2021). There must be some showing that the defendant purposely avoided further investigation with the intent to avoid the truth. *Id.* at 1235. Again, that is not present in the instant matter.

V. JUDICIAL NOTICE WAS PROPERLY TAKEN.

In Flynn's reply to the Motion, Flynn conceded that the court, "may take judicial notice of the existence of certain news articles, but it cannot take judicial notice of the truth of any alleged facts within those articles." (R. 1053). Counsel for Appellant Flynn argued the following before the trial court, "So if the only point is to show that these things exist, the Court could take notice, I suppose, of the fact that these kinds of materials exist." (R. 1174:3-6). Counsel for Appellant went on to say, "These sources get things wrong all the time." (R. 1174:13). During oral argument on the Motion, the trial court asked counsel for Mr. Wilson,

> So for the purposes of this Motion to dismiss, even under Anti-SLAPP, am I having to make a finding that CNN is a reliable source by taking judicial notice? (R. 1186:25-1187:3).

Counsel for Wilson responded:

> No. By taking judicial notice, the only thing the Court is doing is saying that these are articles that ran online and accepting that as true because there is no counter evidence...The Court doesn't have to find that the content of the material is true, but it does have to find that Mr. Wilson thought it was, and that is in fact the evidence before the Court. (R. 1187:4-23).

On appeal, Flynn objects to the trial court's acceptance of documents as part of a motion for judicial notice, claiming they cannot be accepted as facts. (IB at 33-35). But Flynn then misstates the Court's finding on the issue. The trial court found, "The Court accepts judicial notice of the existence of and the contents of the items requested by Mr. Wilson." (R. 1112). The Court

did not accept the truth of the contents of those materials on the basis of the Request for Judicial Notice. Instead, the Court accepted Mr. Wilson's affidavit and took note of the lack of response to Summary Judgement evidence by Appellant. There is nothing improper of the Court accepting judicial notice of the newspaper articles in question, and then, in the absence of competing information, accepting the information as sufficient to meet the burden of proof on summary judgment.

At a minimum, the materials considered through judicial notice properly establish Appellant Wilson's defense because a publisher's reliance on "trustworthy sources demonstrates his lack of subjective belief that the [allegedly defamatory] articles [in suit] contained false statements." *Edward Lewis Tobinick MD v. Novella,* 848 F. 3d 935 (11th Cir. 2017). There is no subjective awareness of probable falsity where "the publisher's allegations are supported by a multitude of prior reports upon which the publisher reasonably relied" *Id.* And when construing meaning, courts are to consider "all of the circumstances surrounding the statement," *Sanchez v. Cellco P'ship*, 2006 WL 8432732, at *2 (S.D. Fla. Sept. 26, 2006). Falsity "is the *sine qua non* for recovery in a defamation action." *Byrd v. Hustler Magazine, Inc*., 433 So. 2d 593 (Fla. 4th DCA 1983). Here, the context includes a critical

point made by the trial Court: “General Flynn did not provide any rebuttal evidence.” (R. 1112). (e.s.).

VI. APPELLANT MISAPPLIES THE PLAIN LANGUAGE OF THE ANTI SLAPP STATUTE IN THE CONTEXT OF A MOTION FOR SUMMARY JUDGMENT.

Appellant argues, “The *Lam* court determined that Maine’s anti-SLAPP statute explicitly calls for a special motion to dismiss standard and burden-shifting. Florida’s does not.” IB. 12. But here, the Court granted summary judgment, not dismissal.

Flynn argues at length issues that apply to Motions to Dismiss under Anti-SLAPP when the Court ruled on a Motion for Summary Judgment. Accordingly, the Court should disregard Appellant when he analyzes *Gundel v. AV Homes, Inc*., 264 So. 3d 304 (Fla. 2d DCA 2019) and *Baird v. Mason Classical Acad., Inc*., 317 So. 3d 264 (Fla. 2d DCA 2021), compares them to the 3rd DCA decision in *Lam v. Univision Communications, Inc.*, 329 So. 3d 190 (Fla. 3rd DCA 2021), encouraging this court to abandon its *own* precedent and to follow *Lam*. See IB 11-14. The cases cited therein and their findings are not applicable to a Motion for Summary Judgment.

Whatever arguments or concerns that Appellant has with regard to a Motion to Dismiss under *Gundel, Baird* or *Lam*, here the burden shift was not in the posture of a motion to dismiss but that of a motion for summary

judgment. There are **no** cases anywhere that support Flynn's failure to submit summary judgment evidence for the court's consideration.

VII. THIS LAWSUIT HAS NO MERIT, WAS INTENDED TO HARASS A POLITICAL OPPONENT OVER SPEECH THAT IS PLAINLY PROTECTED UNDER THE FIRST AMENDMENT, ACCORDINGLY ANTI SLAPP STATUTE APPLIES.

Flynn concedes that the express purpose of Florida's anti-SLAPP statute is "to protect the right in Florida to exercise the rights of free speech in connection with public issues . . . as protected by the First Amendment to the [U.S.] Constitution . . ." Fla. Stat. § 768.295(1). IB 15. This case is precisely what the Florida legislature had in mind when it sought to outlaw "SLAPP" cases. Here, a notorious public figure sues a writer and a political consultant for engaging in free speech. Repeatedly, courts have protected the right to engage in political commentary. *See*, as *Comins v. Van Voorhis*, 135 So. 3d 545, 557 (Fla. 5th DCA 2014). (acknowledging "fair comment" or "analytical criticism.") See also, *Herring Networks, Inc. v. Maddow*, 8 F.4th 1148, 1159-60 (9th Cir. 2021) (cable host's description of news network as "paid Russian propaganda" is rhetorical hyperbole in context of other available information); *Pullum v. Johnson*, 647 So. 2d 254, 258 (Fla. 1st DCA 1994) (religious broadcaster's reference to proponent of an ordinance allowing liquor sales as a "drug pusher" was rhetorical hyperbole not actionable as defamation), cited with approval by *Logue v. Book*, 297 So. 2d

605, 614 (Fla. 4th DCA 2020); *McCafferty v. Newsweek Media Grp., Ltd.,* No. 18-cv-1276, 2019 WL 1078355, at *4 (E.D. Pa. Mar. 7, 2019), affd, 955 F.3d 352 (3d Cir. 2020) (holding that characterizations of a plaintiff as "alt-right" were not actionable, because "these implications... are merely characterizations of [plaintiff's] political view.").

"Actual malice" standard presents an "overwhelming burden" to defamation claims by public-figure plaintiffs. See *Demby v. English*, 667 So. 2d 350, 354 (Fla 1st DCA 1995). To state a claim under that rigorous standard, Plaintiff must aver facts tending to show, by "clear and convincing evidence," that Defendant subjectively "entertained serious doubts as to the truth" of the statements at issue. See *Don King Prods., Inc. v. Walt Disney Co*., 40 So. 3d 40, 43 (Fla. 4th DCA 2010).

The trial court found, "These are public issues of the highest order that the First Amendment is designed to protect, and the dialogue back-and-forth implicates free speech." (R. 1114). The Anti-SLAPP statute protects parties when they exercise "the rights of free speech in connection with public issues." § 768.295(1), Fla. Stat. Here, Mr. Wilson used Twitter as the medium to speak on political matters of public importance.

Flynn argues that somehow these statements are defamation *per se*. But the Second Amended Complaint is a two-count complaint for defamation

and injurious falsehood. Defamation *per se* was not pled. It also was not ruled upon. Appellant did not seek rehearing and accordingly, that is waived as an issue on appeal.

Flynn argues that Wilson's political statements are not protected by the first amendment. (IB. 16). But Flynn cites to cases that have nothing to do with the protections afforded to political speech. Instead, Flynn cites irrelevant to cross burning cases and the notion that the government may regulate hate speech, like *State v. T.B.D.*, 656 So. 2d 479 (Fla. 1995). Flynn also cites to the U.S. Supreme Court in *R.A.V. v. City of St. Paul,* 505 U.S. 377, 383 (1992), a case concerns restrictions on hate speech--- this is not a hate speech case. For some unknown reason Appellant cites to *Allen v. District of Columbia*, 187 A.2d 888, 890 (D.C. 1963). *Allen* concerned a Defendant's who counterpicketed by carrying a sign demanding more police brutality for "Reds". The Court found the sign to be within protection of First Amendment and did not constitute disorderly conduct. While Flynn cites to these cases, they have nothing to do with the instant case.

Flynn cites to *Beauharnais v. Illinois*, 343 U.S. 250 (1952)---a 1952 case that is not applicable. Again, it has nothing to do with the instant case. Flynn's desperate citations to inapplicable case law further demonstrates why this

appeal should not be well taken and why the trial court's order finding this to be a prohibited SLAPP suit should be upheld.

CONCLUSION

This is a frivolous appeal that stems from a frivolous lawsuit. It is the embodiment of a "Strategic Lawsuit Against Public Participation", brought to harass and punish a political adversary for engaging in protected First Amendment speech. In the end, this Court should affirm the trial court's decision to grant summary judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is filed in Arial 14-point font and contains 10,067 words, and therefore complies with the applicable font and word-count limit requirements in Florida Rules of Appellate Procedure 9.045(b) and 9.210(a)(2)(B).

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