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IN THE SUPREME COURT FOR THE STATE OF FLORIDA

Michael T. Flynn,

Petitioner,

v. Case No. SC2025-0065

Rick Wilson,

Respondent.

APPENDIX TO PETITIONER'S JURISDICTIONAL BRIEF

IN THE TWELFTH JUDICIAL CIRCUIT COURT
IN AND FOR SARASOTA COUNTY, FLORIDA

MICHAEL T FLYNN,
Plaintiff,

v.

CASE NO. 2023 CA 004264 NC
DIVISION C CIRCUIT

JIM STEWARTSON,
RICK WILSON,
MEIDASTOUCH LLC,
Defendant.

ORDER
(1) GRANTING FINAL SUMMARY JUDGMENT IN FAVOR OF DEFENDANT RICK WILSON;
(2) GRANTING IN PART AND DENYING IN PART DEFENDANT STEWARTSON'S MOTION TO DISMISS; AND
(3) DIRECTING DEFENDANT STEWARTSON TO ANSWER THE REMAINING ALLEGATIONS OF THE SECOND AMENDED COMPLAINT NOT DISMISSED OR STRICKENED

BEFORE THE COURT are (1) Defendant Wilson's Motion to Dismiss or in the Alternative Motion for Summary Judgment Pursuant to Section 786.265, Florida Statutes [DIN 63]; and (2) Defendant Jim Stewartson's Motion to Dismiss Plaintiff's Second Amended Complaint [DIN 62]. Plaintiff responded in opposition [DINs 69, 68, respectively]. The third defendant, Defendant MeidaTouch, has not been served. This Order does not adjudicate any matter with respect to that defendant.

The Court first discusses the Complaint and general law. The Court will then address each of the two individual Defendant's motions separately.

The Second Amended Complaint

The Second Amended Complaint purports to allege: (1) defamation and defamation per se against all three defendants in Count 1; and (2) injurious falsehood against all three defendants in Count 2 [DIN 59]. The Plaintiff identifies many separate allegations of defamation and then includes those allegations within a single defamation count and a single injurious falsehood count. The description below comes exclusively from the allegations of the Second Amended Complaint.

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Plaintiff is Lieutenant General Michael T. Flynn, retired ("General Flynn") [DIN 59, p.1, ¶1]. He formerly served as the Director of the United States' Defense Intelligence Agency [DIN 59, p. 4, ¶18].

Defendant Jim Stewartson is a media and technology professional with thousands of followers across several social media platforms, host of his own podcast with paid subscriptions, and creator of "The Thinkin Project," a purported anti-disinformation chat group ("Mr. Stewartson") [DIN 59, pp. 1-2, 6 ¶¶1-4, 29]. According to General Flynn, Mr. Stewartson regularly defames General Flynn and other prominent conservative activists to Mr. Stewartson's listeners and followers as a means for Mr. Stewartson to make a living for himself [DIN 59, pp. 1-2, ¶¶1-5]. General Flynn contends Mr. Stewartson has made many defamatory statements concerning him, generally grouped into 14 separate categories [DIN 59, p. 8, ¶46]. General Flynn then enumerates multiple specific instances of defamation, which he contends is "non-comprehensive" [DIN 59, pp. 9-41, ¶¶49-96].

On October 22, 2023, Mr. Stewartson joined Defendant MeidaTouch Network, which hosts and republishes Mr. Stewartson's shows and content [DIN 59, p. 2, ¶7]. Founded in May 2010 by the Meiselas family, MeidaTouch operates a YouTube channel with 1.74 million subscribed and hosts fourteen left-wing political commentators [DIN 59, p. 7, ¶¶38-43]. General Flynn alleges that MediaTouch broadcast Mr. Stewartson's defamatory comments. [DIN 59, pp. 39-41, ¶¶92-96].

Defendant Rick Wilson is the founder of The Lincoln Project, which General Flynn characterizes as an anti-Republican group that spreads lies against conservative figures associated with former President Donald Trump [DIN 59, p. 2, ¶8]. General Flynn contends that Mr. Wilson defamed General Flynn in two regards: by calling him a "Putin employee" and calling him "Q." [DIN 59, p. 3, ¶9].

Defendant MeidaTouch apparently has not yet been served.

ANALYSIS

Defendants Messrs. Stewartson and Wilson both have invoked section 768.295, Florida Statutes to dismiss the case under Florida's anti-SLAPP statute, and, alternatively they seek to dismiss the case under Florida's normal "four-corners" standard. Defendant Wilson further alternatively requests summary judgment in his favor. Defendant Stewartson did not move for summary judgment.

The Court first identifies the elements of the causes of action. The Court then addresses the application of Florida's anti-SLAPP statute. Finally, the Court applies the governing law to each Defendant's claims separately.

1.
The Elements

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In Florida, a defamation claim by a public figure has 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." Kieffer v. Atheists of Florida, Inc., 269 So. 3d 656, 659 (Fla. 2d DCA 2019), *quoting*Jews For Jesus, Inc. v. Rapp, 997 So. 2d 1098, 1106 (Fla. 2008).

Plaintiff also asserts a claim for injurious falsehood, which has five elements: "(1) A falsehood (2) has been published, or communicated to a third person (3) when the defendant-publisher knows or reasonably should know that it will likely result in inducing others not to deal with the plaintiff and (4) in fact, the falsehood does play a material and substantial part in inducing others not to deal with the plaintiff; and (5) special damages are proximately caused as a result of the published falsehood." Bothmann v. Harrington, 458 So. 2d 1163, 1168 (Fla. 3d DCA 1984).

"The gist of the tort of injurious falsehood is the intentional interference with another's economic relations." Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A., 742 So. 2d 381, 386 (Fla. 4th DCA 1999). Injurious falsehood is a group of torts interchangeably called slander of title, disparagement of property, or trade libel. Each defense available to a defamation claim is equally available in an injurious falsehood claim. Sailboat Key, Inc. v. Gardner, 378 So. 2d 47, 49 (Fla. 3d DCA 1979) *quoting* W. Prosser, Law of Torts (4th Ed. 1971, s 114 at 777-778) (This tort "never has been greatly favored by the law," and is subject to "to all privileges recognized both in cases of personal defamation and in those of other types of interference with economic advantage."); seeCollier County Pub. Co., Inc. v. Chapman, 318 So. 2d 492, 494 (Fla. 2d DCA 1975) (citing Prosser for injurious falsehood).

Overlaying both defamation and injurious falsehood is the requirement for actual malice. General Flynn candidly concedes that he is a "public figure" for defamation analysis [DIN 68, p. 10; DIN 69 p. 8]. There can be no dispute that the United States Supreme Court in New York Times v. Sullivan, 376 U.S. 254 (1964), directed that a public figure defamation plaintiff must demonstrate actual malice to overcome the protections of the First Amendment. Mastandrea v. Snow, 333 So. 3d 326, 328 (Fla. 1st DCA 2022). 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). Actual malice must be shown by clear and convincing evidence. Dockery v. Florida Democratic Party, 799 So. 2d 291, 294 (Fla. 2d DCA 2001).

The Court is aware there is criticism of this "almost impossible" burden as being a judicial policy decision instead of an appropriate application of constitutional law. E.g., Mastandrea, 333 So. 3d at 328-334 (B.L. Thomas, J., concurring). The Court need not wade into that discussion, though, as New York Times remains good law and the Court is required to follow it.

2.
The Anti-SLAPP Statute

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The Florida Legislature, as a matter of public policy, prohibits what it calls "Strategic Lawsuits Against Public Participation," or "SLAPP." § 768.295, Fla. Stat. That statute explains state policy in relevant part as follows:

> It is the intent of the Legislature 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 United States Constitution and s. 5, Art. I of the State Constitution. It is the public policy of this state that a person or governmental entity not engage in SLAPP suits because such actions are inconsistent with the right of persons to exercise such constitutional rights of free speech in connection with public issues. Therefore, the Legislature finds and declares that prohibiting such lawsuits as herein described will preserve this fundamental state policy [and] preserve the constitutional rights of persons in Florida . . . . It is the intent of the Legislature that such lawsuits be expeditiously disposed of by the courts.

§ 768.295(1), Fla. Stat.

In addition to stating public policy, the Legislature specifically prohibited SLAPP suits:

> A person or governmental entity in this state may not file or cause to be filed, through its employees or agents, any lawsuit, cause of action, claim, cross-claim, or counterclaim against another person or entity without merit and primarily because such person or entity has exercised the constitutional right of free speech in connection with a public issue, or right to peacefully assemble, to instruct representatives of government, or to petition for redress of grievances before the various governmental entities of this state, as protected by the First Amendment to the United States Constitution and s. 5, Art. I of the State Constitution.

§ 768.295(3), Fla. Stat.

The Legislature directed an "expeditious resolution" of a claimed SLAPP suit "at the earliest possible time" with specific procedures identified in the statute. § 768.295(4), Fla. Stat.

"Free speech in connection with public issues" is a legislatively defined expression and it "means any written or oral statement that is protected under applicable law and is made before a governmental entity in connection with an issue under consideration or review by a governmental entity, or is made in or in connection with a play, movie, television program, radio broadcast, audiovisual work, book, magazine article, musical work, news report, or other similar work." § 768.295(2)(a), Fla. Stat.

The Second District has made clear that a trial court can consider a claimed violation of the anti-SLAPP statute under alternate theories of a motion to dismiss or summary judgment brought in a single motion. Gundel v. AV Homes, Inc., 264 So. 3d 304 (Fla. 2019).

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The Gundel court explained the statutory procedure places the "initial burden on the SLAPP defendant to set forth a prima facie case that the Anti-SLAPP statute applies" and, once done, the burden shifts "to the claimant to demonstrate that the claims are not 'primarily' based on First Amendment rights in connection with a public issue and not 'without merit[.]" Gundel, 264 So. 3d at 314. As Gundel made clear, and reiterated in Baird v. Mason Classical Academy, Inc., 317 So. 3d 264, 268 (Fla. 2d DCA 2021); and Davis v. Mishiyev, 339 So. 3d 449, 452-453 (Fla. 2d DCA 2022), the trial court must apply the statutory test to motion to dismiss, not the "normal" motion to dismiss four-corners' standard. In fact, the trial court errs if it applies the traditional four-corners review to determine if the complaint states a cause of action. Gundel, 264 So. 3d at 314; Baird, 371 So. 3d at 268; and Davis, 339 So. 3d at 453.

The Court understands other Florida district courts disagree with the Second District's approach. Lam v. Univision Communications, Inc., 329 So. 3d 2021 (Fla. 3d DCA 2021) (certified conflict with Gundel on appropriateness of heightened burden); Johnson v. Fischer, 369 So. 3d 354 (Fla. 5th DCA 2023) (certified conflict with Gundel on appropriateness of certiorari review); and WPB Residents for Integrity in Government, Inc. v. Materio, 284 So. 3d 555 (Fla. 4th DCA 2019) (certified conflict with Gundel on the same basis as Materio). And the Court observes that General Flynn correctly acknowledged Gundel but then argued Gundel did not obviate the regular motion to dismiss standard and the statements in Gundel are dicta [DIN 68, pp. 2-6; DIN 69, pp. 3-6]. The Court declines General Flynn's invitation to view the holdings in Gundel, Baird, and Davis as dicta. The Court is within the Second District's territorial boundary, and the Court will apply the Second District's precedent. Pardo v. State, 596 So. 2d 665, 666-667 (Fla. 1992) (where there is interdistrict conflict, trial court must apply its district court's holding).

Finally, with respect to the anti-SLAPP statute, the Court is mindful of the Second District's remarks concerning jumbling the analysis of motions to dismiss and summary judgments in the context of anti-SLAPP claims. McQueen v. Baskin, 2023 WL 7929535, *4 (Fla. 2d DCA Nov. 17, 2023) (identifying concern of a "unitary motion that asserted both rules without delineating which arguments were for dismissal and which were for summary judgment). The Court will (attempt to) be clear as to what and how it considered the arguments and on what basis or bases the Court rules.

3.
Mr. Wilson's Motion

Mr. Wilson filed a motion to dismiss and alternative motion for summary judgment. The Court resolves Mr. Wilson's motion on the basis of his alternative summary judgment motion.

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 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]. General Flynn did not provide any rebuttal evidence.

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General Flynn's two isolated complaints with Mr. Wilson in the Second Amended Complaint pale in comparison to the myriad of complaints General Flynn raised concerning Mr. Stewartson's numerous comments. And the Court is aware of Mr. Stewartson's concern that Mr. Wilson was improperly joined to defeat federal court jurisdiction. The Court does not concern itself with the Plaintiff's decision in the original complaint (but not included in subsequent complaints) to voluntarily limit damages or in Plaintiff's choice of Defendants. The Court is competent to address the merits of this case just like a federal court sitting in diversity. Whether a Defendant removes a case to federal court or not is outside this Court's province. The Court will adjudicate the case before it for however long the Court has jurisdiction to do so.

Had Mr. Wilson remained a party to this lawsuit, though, the Court would have strongly considered severing General Flynn's claims against Mr. Wilson from those of Mr. Stewartson given the substantial disparity in breadth and number of allegations. SeeAlanco v. Brystrom, 544 So. 2d 217, 218 (Fla. 3d DCA 1989) (under Florida Rule of Civil Procedure 1.250(a), misjoinder is not a ground for dismissal; rather, severance would be appropriate). Because the Court is terminating Mr. Wilson's involvement in this lawsuit, the Court need not determine, finally, the question of severance.

The two statements General Flynn points to in his Second Amended Complaint made by Mr. Wilson are: (1) a post calling General Flynn a Putin employee; and (2) a retweet that General Flynn is Q. The Court addresses each.

First, General Flynn complains about a February 24, 2022, post by Mr. Wilson that reads in its entirety: "Putin employee Mike Flynn[.]" [DIN 59, p. 22, ¶67]. The Russian Federation invaded Ukraine on February 22, 2022. [DIN 63, p. 50, Mr. Wilson Aff. p. 2, ¶9].

As General Flynn set forth in his Second Amended Complaint, Mr. Wilson's "Putin employee Mike Flynn" comment was to another person's comment that commented on General Flynn's publicly posted letter dated February 24, 2022. General Flynn in his original letter—which is included in the Second Amended Complaint—publicly denounced Russia's invasion into Ukraine but suggested there were policy failures by the President of the United States and his Administration's foreign policy that encouraged Russia's aggression. General Flynn observed "we continue to demonize Russia" and explained "President Putin calculated this strategic, historic, and geographic play and made the decision to move, and he did."

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.

Second, General Flynn points to Mr. Wilson's May 14, 2023, retweet by Mr. Stewartson, which original tweet included the statement: "Also, FYI, Mike Flynn is 'Q'." [DIN 59, p. 37, ¶87]. Mr. Stewartson's original tweet included either a screenshot of, or link to, Mr. Wilson's appearance on an MSNBC show that seemingly included a reference to General Flynn, although the TV show's context is not clear from Mr. Stewartson's post. Mr. Stewartson identified a story

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Mr. Stewartson ran concerning General Flynn. Mr. Stewartson then included the purported defamatory comment: "FYI, Mike Flynn is 'Q'."

General Flynn suggests by calling him "Q" is the same as saying that he is the leader of QAnon, which General Flynn implies that it is designed to subject him to ridicule. The Court will accept for this motion the construction that "Q" denotes leadership in the QAnon movement, and it has a negative connotation. The Court, therefore, for this motion will not consider "Q" to mean something like "Q" the Quartermaster from the James Bond movie franchise, or like "Q" from *Star Trek: The Next Generation*, who was a nearly omnipotent person (and species) capable of altering time, space, and reality. In his materials, Mr. Wilson pointed to several articles concerning QAnon, generally, and General Flynn's potential association with it, specifically.

Under the anti-SLAPP statute, Mr. Wilson had the initial burden of demonstrating a prima facie case that the statute applies. And he did. 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 the First Amendment is designed to protect, and the dialogue back-and-forth implicates free speech. Because Mr. Wilson made his required initial showing, it became incumbent on General Flynn to "to demonstrate that the claims are not 'primarily' based on First Amendment rights in connection with a public issue and not 'without merit.'" Gundel, 264 So. 3d at 314.

General Flynn has not done so with respect to Mr. Wilson.

General Flynn contends that the primary purpose of his lawsuit against Mr. Wilson "is to seek compensation for Defendant's harmful and malicious lies about General Flynn, an American hero who served this country for 33 years." [DIN 69, p. 7]. There was no affidavit supporting the attorney's assertion, as would be permitted by both section 768.295(4) ("The claimant . . . shall thereafter shall file a response and any supplemental affidavits."), and rule 1.510(c)(4). An attorney's assertion is not evidence. E.g.Hitt v. Homes & Land Brokers, Inc., 993 So. 2d 1162, 1166 (Fla. 2d DCA 2008) (attorney's unsworn statements do not establish facts in the absence of stipulation, and trial judges cannot rely on them for the basis of factual determinations). This basis alone is sufficient to conclude General Flynn did not meet his burden.

Additionally, the Court notes that the Second Amended Complaint seeks both damages and injunctive relief [DIN 59, p. 58]. Seeking to restrain speech at its core is antithetical to the First Amendment. And it undercuts a claim that the primary purpose is to seek damages; it suggests the purpose is to silence speech.

Further, General Flynn did nothing to establish that Mr. Wilson's speech was "not without merit" or otherwise not entitled to protection. General Flynn in his Second Amended Complaint contended that Mr. Wilson's four-word post and one retweet was designed "to drive viewers and donations to his political groups, such as The Lincoln Project" that raised over $87 million through donations. [DIN 59, p. 42, ¶¶106-107]. While that conclusion does not reasonably follow from the two isolated posts, even if it did, the absence of any proof is fatal to General Flynn's burden under the anti-SLAPP statute. The Court would have assumed General

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Flynn would explain or deny the content of the numerous media stories from which Mr. Wilson was able to make the statements he did. But he did not.

Mr. Wilson is entitled to summary judgment under the anti-SLAPP statute. And the Court resolves Mr. Wilson's motion primarily on that basis.

Even in the absence of the anti-SLAPP statute, though, Mr. Wilson would still be entitled to summary judgement under the traditional standard because Mr. Wilson demonstrated an entitlement to summary judgment and General Flynn failed to demonstrate the existence of a disputed material issue of fact. Florida has a new summary judgment statement, and in moving towards the federal summary judgment standard, the Florida Supreme Court made three overarching points:

> First, those applying new rule 1.510 must recognize the fundamental similarity between the summary judgment standard and the directed verdict standard. Both standards focus on whether the evidence presents a sufficient disagreement to require submission to a jury. And under both standards the substantive evidentiary burden of proof that the respective parties must meet at trial is the only touchstone that accurately measures whether a genuine issue of material fact exists to be tried.
>
> Second, those applying new rule 1.510 must recognize that a moving party that does not bear the burden of persuasion at trial can obtain summary judgment without disproving the nonmovant's case. Under Celotex [Corp. v Catrett, 477 U.S. 317 (1986)] and therefore the new rule, such a movant can satisfy its initial burden of production in either of two ways: If the nonmoving party must prove X to prevail at trial, the moving party at summary judgment can either produce evidence that X is not so or point out that the nonmoving party lacks the evidence to prove X. A movant for summary judgment need not set forth evidence when the nonmovant bears the burden of persuasion at trial.
>
> And third, those applying new rule 1.510 must recognize that the correct test for the existence of a genuine factual dispute is whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Under our new rule, when 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.

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In re Amendments to Florida Rule of Civil Procedure 1.510, 317 So. 3d 72, 75–76 (Fla. 2021) (internal citations, parentheticals, and quotations omitted).

Here, 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 w-2 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.

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).

Alternatively, Mr. Wilson is entitled to final summary judgment without resort to the anti-SLAPP statute.

4.
Mr. Stewartson's Motion

Mr. Stewartson filed a motion to dismiss. He included numerous news accounts, opinions pieces, an Eventbrite invitation, several of General Flynn's tweets, as well as General Flynn's March 10, 2022, deposition taken by a congressional committee. Mr. Flynn did not add any materials beyond those contained in his Second Amended Complaint.

The Court acknowledges that the Court could not grant the motion to dismiss as to Count 1 (defamation) by applying the traditional "four-corners" motion to dismiss standard. Count 2 (injurious falsehood), is a different story, as Plaintiff did not allege any special damages proximately caused by the published falsehood. That omission is fatal to Count 2.

Mr. Stewartson's motion to dismiss is not judged under the normal four-corners construct. The Court must apply the statutory anti-SLAPP test as outlined in Gundel. As explained above, the Court must do more than simply evaluate the four corners of the Second Amended Complaint.

General Flynn at paragraph 46 of his Second Amended Complaint outlines 14 categories that are allegedly defamatory. He then in paragraphs 50-66, 68-89, 92-96, catalogue the specific statements. The Court has gone through the allegations as well as Mr. Stewartson's motion and cited materials.

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Based on that review, the Court concludes that Defendant Stewartson made the required initial showing under the anti-SLAPP statute as construed by Gundel with respect to most, but not all, of the allegations. General Flynn did not present any counterevidence, and he otherwise failed to meet his burden. Thus, the following allegations must be dismissed and stricken from General Flynn's claim against Defendant Stewartson: 46a, 46b, 46c, 46d, 46e, 46f, 46g, 46h, 46k, 46m, 50, 51, 52, 53, 54, 55, 56, 57, 59, 60, 61, 62, 63, 64, 66, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 85, 87, 88, 89, 92, 93, 94, 95, and 96.

There were four allegations, though, that Mr. Stewartson failed to make a prima facie showing that his comments constitute "free speech in connection with public issues." Without making that initial showing, the burden outlined in Gundel never shifted to General Flynn. As such, those four allegations remain in General Flynn's defamation Count 1 against Mr. Stewartson:

- 46i – General Flynn is a "Nazi" (¶58);
- 46j – General Flynn "wants a second Holocaust" (¶65);
- 46l – General Flynn "torture[d] prisoners" (¶83); and
- 46n – General Flynn "literally tried to murder Mike Pence" (¶84).

"The character of these statements, if they are false, would be quintessentially defamatory." McQueen v. Baskin, 2023 WL 7929535 (Fla. 2d DCA Nov. 17, 2023) *citing*Richard v. Gray, 62 So. 2d 597, 598 (Fla. 1953) (describing situations where a publication is defamatory per se). The first two statements tend to subject General Flynn to disgrace. The third and fourth tend to state General Flynn committed an infamous crime.

With respect to the first two, Mr. Stewartson purportedly stated that General Flynn "is a Nazi" (¶58) and that he "wants a second Holocaust. Truly." (¶65) The Court is aware of Judge Singhal's decision in Trump v. Cable News Network, Inc., 2023 WL 4845589 (S.D. Fla. Jul. 28, 2023), in which the court dismissed a defamation claim involving statements made on CNN by a CNN commentator about President Trump's purported "Big Lie" concerning election interference. In that case, President Trump contended references to "Big Lie" suggested that President Trump was like the Third Reich's Joseph Goebbels, who professed the sentiment: "If you tell a lie big enough and keep repeating it, people will eventually come to believe it." President Trump argued that this means that voters would think of President Trump as "Hitler-like in any future political role." In dismissing the lawsuit, the court concluded the Big Lie statements in the context made on the CNN show were statements of opinion, not fact, which is not actionable.

In the current case, Mr. Stewartson is not using an analogy like the CNN employees did in Trump. Instead, Mr. Stewartson appears to be stating a fact—that General Flynn is a Nazi and that he wants to systematically eradicate an entire race of people based on their religious beliefs. Without further context, Mr. Stewartson's two comments cannot be conclusively determined to be statements of opinions (including rhetorical hyperbole) instead of statements of fact. If the

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former, a defamation claim cannot lie. If the later, however, the Court can potentially see a construction of these statements that could support a finding that they were made with actual malice.

Mr. Stewartson had the initial burden under Gundel to show that application of the anti-SLAPP statute. At present, he has not demonstrated these comments qualify as free speech in connection with a public issue or is otherwise protected speech. Thus, the character of these two comments cannot be resolved on the motion to dismiss.

Two last two comments suggest General Flynn committed infamous crimes. The first one was "Mike Flynn employed Jack Posobiec to torture prisoners in Guantanamo while Flynn was head of @Defenseintel." (¶83). The Court did not find any information in Mr. Stewartson's motion to dismiss that provided any context for this comment. As it was Mr. Stewartson's initial burden, the failure to present any information results in the conclusion that he failed to make his initial showing as to the applicability of the anti-SLAPP statute to this defamation claim.

The second comment was "Mike Flynn literally tried to murder Mike Pence with Qanon." (¶84). Effectively, this comment states General Flynn attempted to commit first degree murder by attempting to assassinate the sitting Vice President of the United States. The Court cannot understand how that is rhetorical hyperbole and not a statement of fact. The Court is aware from the materials Mr. Stewartson supplied that General Flynn took the Fifth Amendment on several questions asked by the Select Committee concerning the January 6, 2021, events at the Capitol. At this stage of the litigation, the Court concludes that the submitted materials—while discussing January 6 generally—are insufficient to demonstrate a prima facia basis that the anti-SLAPP statute applies to a claim of defamation that General Flynn literally tried to murder the Vice President.

IT IS THEREFORE ORDERED AND ADJUDGED:

1. Defendant Wilson's Motion to Dismiss or in the Alternative Motion for Summary Judgment Pursuant to Section 786.265, Florida Statutes [DIN 63] is granted. The Court grants Mr. Wilson's motion both under the anti-SLAPP procedure established by section 786.265 as well as the "normal" summary judgment procedure under rule 1.510.

2. Plaintiff Michael T. Flynn shall take nothing by his action against Defendant RICK WILSON. Defendant RICK WILSON shall go hence without day. The Court reserves jurisdiction to award attorney fees or costs or both, if any, upon a timely motion.

3. Defendant Jim Stewartson's Motion to Dismiss Plaintiff's Second Amended Complaint [DIN 62] is granted in part and denied in part.

4. The Court dismisses Count 2 of the Second Amended Complaint in its entirety based on General Flynn's failure to allege special damages. This dismissal is

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under the normal four-corners analysis. As injurious falsehood seeks damages for damage to property, the Court concludes that allowing amendment would be futile as the allegations here are more traditionally considered defamation. For that reason, the Count 2 dismissal is with prejudice with no leave to amend.

5. The Court dismisses that portion of Count 1 of the Second Amended Complaint based on, and otherwise strikes, the following allegations: 46a, 46b, 46c, 46d, 46e, 46f, 46g, 46h, 46k, 46m, 50, 51, 52, 53, 54, 55, 56, 57, 59, 60, 61, 62, 63, 64, 66, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 85, 87, 88, 89, 92, 93, 94, 95, and 96. The dismissal and striking of these allegations is required by the anti-SLAPP statute as construed by Gundel and its progeny.

6. The Court denies that portion of Count 1 of the Second Amended Complaint based on the following allegations: 46i, 46j, 46l, 46n, 58, 65, 83, and 84.

7. Defendant Stewartson shall answer the remaining allegations of the Second Amended Complaint within 20 days of the date of this Order.

8. Nothing in this ruling impacts the status of Defendant MeidasTouch, LLC.

DONE AND ORDERED in Sarasota, Sarasota County, Florida, on January 30, 2024.

e-Signed 1/30/2024 8:39 AM 2023 CA 004264 NC

HUNTER W CARROLL
Circuit Judge

SERVICE CERTIFICATE

On January 30, 2024, the Court caused the foregoing document to be served via the Clerk of Court's case management system, which served the following individuals via email (where indicated). On the same date, the Court also served a copy of the foregoing document via First Class U.S. Mail on the individuals who do not have an email address on file with the Clerk of Court.

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Filed 01/30/2024 08:39 AM - Karen E. Rushing, Clerk of the Circuit Court, Sarasota County, FL

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

MICHAEL T. FLYNN,

Appellant,

v.

RICK WILSON; JIM STEWARTSON; and
MEIDASTOUCH LLC,

Appellees.

No. 2D2024-0278

December 11, 2024

Appeal from the Circuit Court for Sarasota County; Hunter W. Carroll, Judge.

Stephen B. French and Jared J. Roberts of Binnall Law Group, PLLC, Alexandria, Virginia, for Appellant.

Leonard M. Collins of GrayRobinson, P.A., Tallahassee, for Appellee Rick Wilson.

No appearance for Appellees Jim Stewartson and Meidastouch LLC.

ROTHSTEIN-YOUAKIM, Judge.

Retired lieutenant general Michael Flynn sued Rick Wilson for defamation after Wilson referred to Flynn in a tweet as "Putin employee Mike Flynn" and retweeted "FYI, Mike Flynn is Q." Flynn seeks $50 million in damages and a permanent injunction ordering Wilson to stop defaming him. Wilson moved for summary judgment, contending that both of his tweets were opinion or rhetorical hyperbole protected by the First Amendment that "by their nature cannot be proven true or false"

and that Flynn could not show that Wilson made the statements with "actual malice." The trial court granted Wilson's motion and entered judgment in his favor. We affirm.[1]

Flynn is a quintessential public figure. As a lieutenant general in the United States Army, he played a key leadership role in the Afghanistan and Iraq wars. He is a former head of the Defense Intelligence Agency and a former National Security Adviser to President Donald Trump. Flynn has continued to maintain a high public profile, including in the aftermath of the 2020 presidential election and in the public debate surrounding Russia's 2022 invasion of Ukraine.

Wilson is a political strategist, author, and cofounding member of the Lincoln Project, which Flynn alleges is an "organization dedicated to opposing Republicans." Wilson has written two New York Times bestsellers highly critical of President Trump and many of those who served in his administration, including Flynn. In one of those books, titled *Everything Trump Touches Dies: A Republican Strategist Gets Real About the Worst President Ever*, Wilson wrote about Flynn:

> Capo of *l'affaire 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.

Wilson frequently expresses his opinions on MSNBC and CNN, among other networks, and on social media, including on the networking service formerly known as Twitter through his handle @TheRickWilson.

"Putin employee Mike Flynn"

Wilson's two tweets in this case did not emerge from a vacuum.

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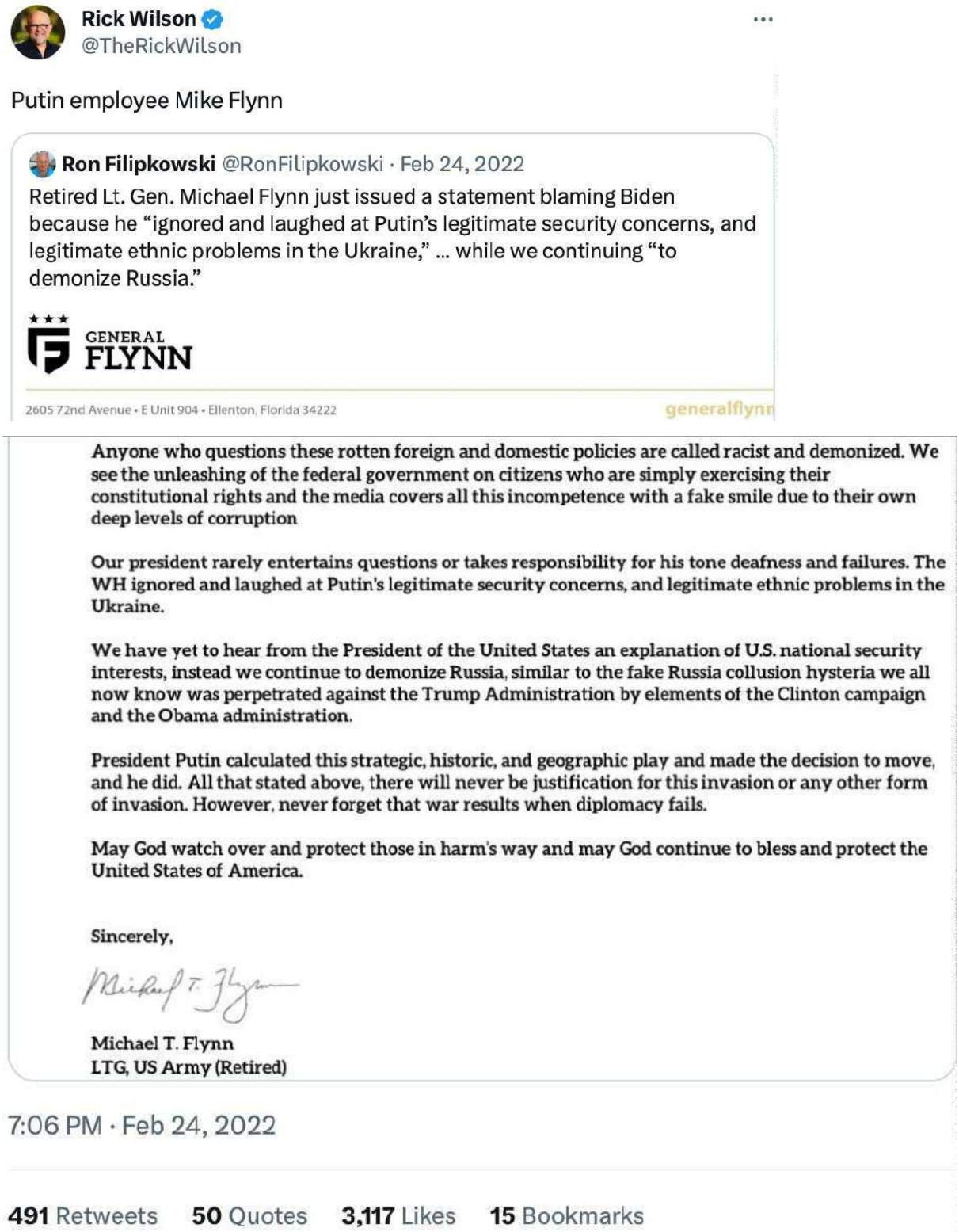
[1] The background facts in this opinion come either from the allegations in Flynn's operative complaint or from Wilson's statement of undisputed facts. As the trial court noted, Flynn did not file an affidavit or introduce any record evidence in response to Wilson's summary judgment motion.

Wilson's "Putin employee" tweet was an immediate and direct response to a letter Flynn published to the world on February 24, 2022—the day Russia invaded Ukraine:



Rick Wilson @TheRickWilson

Putin employee Mike Flynn

Ron Filipkowski @RonFilipkowski · Feb 24, 2022

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 the Ukraine," ... while we continuing "to demonize Russia."

GENERAL FLYNN

2605 72nd Avenue • E Unit 904 • Ellenton, Florida 34222 generalflynn

Anyone who questions these rotten foreign and domestic policies are called racist and demonized. We see the unleashing of the federal government on citizens who are simply exercising their constitutional rights and the media covers all this incompetence with a fake smile due to their own deep levels of corruption

Our president rarely entertains questions or takes responsibility for his tone deafness and failures. The WH ignored and laughed at Putin's legitimate security concerns, and legitimate ethnic problems in the Ukraine.

We have yet to hear from the President of the United States an explanation of U.S. national security interests, instead we continue to demonize Russia, similar to the fake Russia collusion hysteria we all now know was perpetrated against the Trump Administration by elements of the Clinton campaign and the Obama administration.

President Putin calculated this strategic, historic, and geographic play and made the decision to move, and he did. All that stated above, there will never be justification for this invasion or any other form of invasion. However, never forget that war results when diplomacy fails.

May God watch over and protect those in harm's way and may God continue to bless and protect the United States of America.

Sincerely,

Michael T. Flynn
LTG, US Army (Retired)

7:06 PM · Feb 24, 2022

491 Retweets **50** Quotes **3,117** Likes **15** Bookmarks

Flynn's letter was hardly the first time that Flynn and Russia were connected in a news story. Flynn gained national notoriety in early 2017 when he was terminated from his post as Trump's National Security Adviser after serving only twenty-two days. He admitted to having misled Vice President Michael Pence on whether he had discussed with the Russian ambassador—before Trump took office—the Obama Administration's recently imposed sanctions against Russia. President Trump tweeted, "I had to fire General Flynn because he lied to the Vice President and the FBI."[2] Shortly after his dismissal, several newspapers then began reporting that Flynn had received $45,000 from RT, formerly known as Russia Today, for a speaking engagement in Moscow in 2015. Photos from that trip show Flynn sitting at Putin's elbow at an RT dinner. RT ultimately registered as a "foreign agent" with the United States government. No one here disputes that RT is financed by the Kremlin.

"FYI, Mike Flynn is Q"

Prior to Wilson's retweet of "FYI, Mike Flynn is Q," Wilson had read two articles in which the authors expressed suspicion *on the part of believers in the QAnon conspiracy*[3] that Flynn could indeed be the mysterious "Q." The article in the New York Times stated:

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[2] It is undisputed that Flynn was ultimately indicted for, among other things, lying to the Federal Bureau of Investigation. He pled guilty and expressly admitted his offense. Flynn later sought to rescind that guilty plea and admission and was eventually pardoned by President Trump.

[3] One article that Wilson attached to his affidavit describes QAnon as a "movement centered on the claim that Mr. Trump, secretly aided by the military, was elected to smash a cabal of Democrats, international financiers and deep-state bureaucrats who worship Satan and abuse children."

> 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.

Our record here suggests that Flynn has a complicated relationship with the QAnon movement. On the one hand, Flynn insisted before the trial court—and now before this court—that QAnon is a terrorist organization and that his reputation has been damaged by those like Wilson who link him with that movement (although he introduced nothing into the record on either point). And on the other hand, Flynn admits that he posted a video showing him and his family members using a slogan that many associate with the QAnon movement ("Where we go one, we go all!"), complete with a hashtag likewise associated with QAnon.[4] Nor does Flynn dispute that he has authorized the sale of Flynn-themed t-shirts, hats, and other merchandise affixed with highly specific slogans commonly associated with QAnon, such as WWG1WGA.

Here is Wilson's retweet of "FYI, Mike Flynn is Q," in context:

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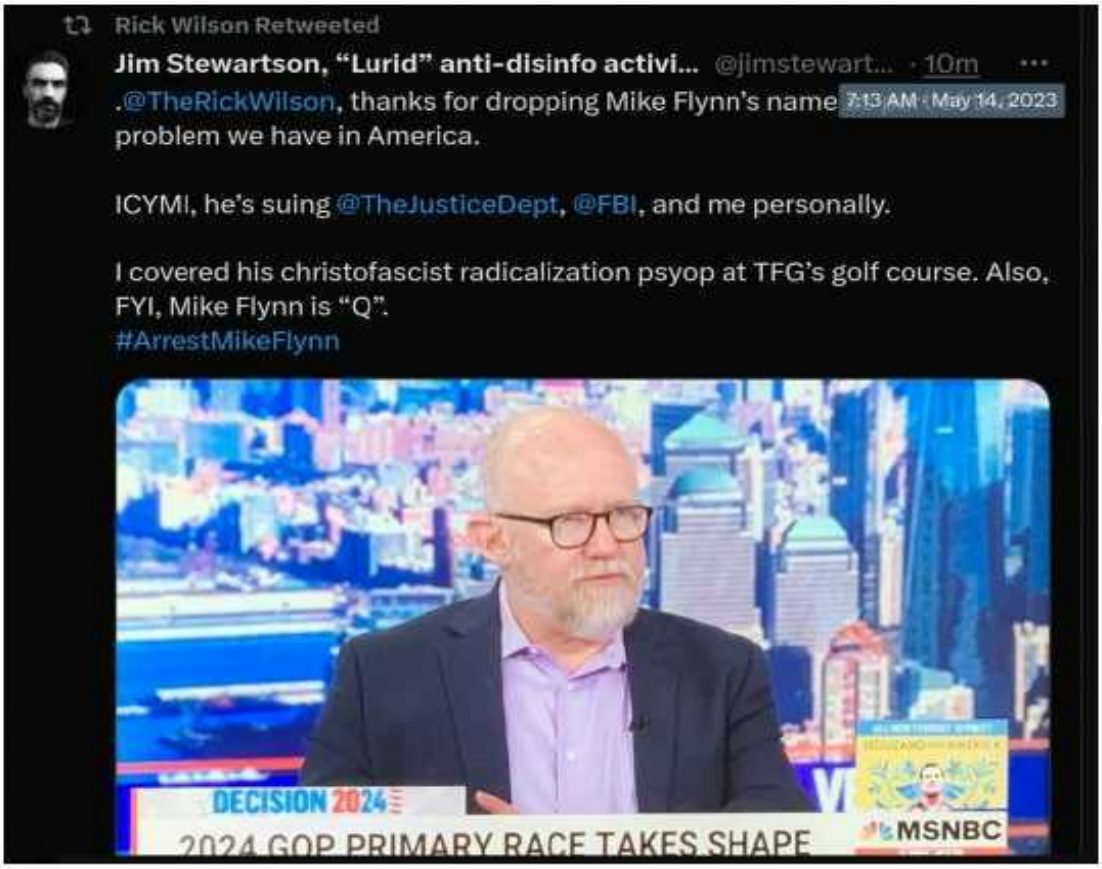
[4] Flynn does not dispute here that "Where we go one, we go all," is a slogan associated with QAnon. *See also Flynn v. Cable News Network, Inc.*, No. 21-CV-2587, 2024 WL 1765566, at *11 (S.D.N.Y. Apr. 24, 2024) (linking "where we go one, we go all" with the QAnon movement), *appeal withdrawn*, No. 24-1448, 2024 WL 3963564 (2d Cir. June 5, 2024).



Thus, that challenged language is part of a longer message that Wilson retweeted.[5]

Wilson's motion and the trial court's ruling

Wilson moved to dismiss or alternatively for summary judgment, invoking Florida's "anti-SLAPP statute," section 768.295, Florida Statutes (2023). As noted, he argued that the tweets were protected opinion or rhetorical hyperbole and that if he had nevertheless made a false statement of fact, he lacked the requisite "actual malice." In support of his motion, Wilson submitted an affidavit that attached the news articles that he had read and that were in general circulation at the time of his

[5] Wilson is the person in the video screenshot embedded in the underlying tweet. The record does not tell us what Wilson may have said on MSNBC that day, although the tag line in the screenshot suggests that the subject may have been the 2024 GOP primary.

statements, which articles Wilson averred informed his tweets. Wilson then relied on the affidavit and the articles principally to support his contention that he did not act with "actual malice" when he published the tweets.

In his response to Wilson's motion, Flynn did not separately address Wilson's detailed factual recitation. Nor did he submit any counteraffidavits or other record materials in opposition. Although Flynn's counsel stated at the summary judgment hearing that discovery could reveal additional material facts, he did not identify what those might be, nor did he submit an affidavit or declaration with the trial court under Florida Rule of Civil Procedure 1.510(d) identifying additional discovery that needed to be conducted before the court could rule on Wilson's summary judgment motion.

The court ultimately disposed of the purportedly defamatory statements as follows:

> Here, 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 w-2 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. . . . 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.
>
> At bottom, Mr. Wilson demonstrated that both the falsity element and the acting on the falsity element[6] cannot be met

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[6] The "acting on the falsity" element is the same thing as the "actual malice" element. *See Kieffer v. Atheists of Fla., Inc.*, 269 So. 3d 656, 659 (Fla. 2d DCA 2019) (explaining that in a defamation action brought by a public figure plaintiff, the "actor [i.e., the defendant] must act with knowledge or reckless disregard as to the falsity [of the statement]"

by General Flynn at trial. Having done so, General Flynn was required to come forward with evidence to dispute those elements.

Flynn argues that the trial court improperly concluded that the "Putin employee" statement was "substantially true"—and therefore inactionable—because Wilson's written motion never contends that the statement is true. Further, Flynn argues that there is nothing in the record establishing that he was a Putin employee and that even the news articles on which Wilson supposedly had relied say no such thing. Flynn insists that a jury should decide whether receiving money for a speaking engagement at an RT event is substantially the same thing as being a Putin employee. And as to the "Q" statement, Flynn insists that there is a *factual* difference between *being* "Q" and simply repeating and marketing products bearing slogans associated with QAnon.

Discussion

This court reviews de novo a trial court's grant of summary judgment. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). A movant is entitled to summary judgment if no reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Significantly, the First Amendment requires that Flynn's claim be considered "against the background of a profound national commitment" to the freedom of speech and especially of political speech, which is "essential to the security of the Republic." *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269–70 (1964). Flynn does not dispute that he is a general

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(quoting *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008))).

public figure under *Sullivan* and its progeny.[7] Thus, he must prove that Wilson published the two tweets with "actual malice." *See Dockery v. Fla. Democratic Party*, 799 So. 2d 291, 294 (Fla. 2d DCA 2001). Specifically, to prevail on a defamation claim, a public-figure plaintiff must prove (1) publication by the defendant, (2) of a false statement, (3) with knowledge or reckless disregard as to the falsity (i.e., "actual malice"), (4) which causes actual damages, and (5) is defamatory. *McQueen v. Baskin*, 377 So. 3d 170, 176 (Fla. 2d DCA 2023) (citing *Kieffer v. Atheists of Fla., Inc.*, 269 So. 3d 656, 659 (Fla. 2d DCA 2019)); *see also Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008) (reciting elements of a claim for defamation).

And it is for this court to decide, as a matter of law, whether Wilson's tweets are actionable expressions of fact or nonactionable expressions of rhetorical hyperbole or pure opinion. *See Hay v. Indep. Newspapers, Inc.*, 450 So. 2d 293, 295 (Fla. 2d DCA 1984) ("Whether a statement is one of fact or one of opinion is a question of law."); *Fortson v. Colangelo*, 434 F. Supp. 2d 1369, 1379 (S.D. Fla. 2006) ("It is for the Court to decide, as a matter of law, whether the complained of words are actionable expressions of fact or non-actionable expressions of pure opinion and/or rhetorical hyperbole.").

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[7] As we explained in *Saro Corp. v. Waterman Broadcast Corp.*, 595 So. 2d 87, 89 (Fla. 2d DCA 1992):

> There are two classes of public figures, "general" and "limited." General public figures are individuals who, by reason of fame or notoriety in a community, will in all cases be required to prove actual malice. Limited public figures, on the other hand, are individuals who have thrust themselves forward in a particular public controversy and are therefore required to prove actual malice only in regard to certain issues. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

"[W]hen a motion for summary judgment is brought by a defendant against a public-figure plaintiff, such as [Flynn], in a defamation action in which the actual malice test applies, summary judgments are to be more liberally granted." *Dockery*, 799 So. 2d at 294. In this matter with important First Amendment issues at stake, we are tasked with conducting our own independent review of the evidence and reaching our own legal conclusions as necessary. *Seropian v. Forman*, 652 So. 2d 490, 494 (Fla. 4th DCA 1995) (noting that in libel and slander actions subject to *Sullivan*, "the scope of review on appeal is highly unusual and essentially does away with the notion that the appellate court will defer to the factfinder's application of law to facts" (citing *Harte–Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989))).

"Putin employee Mike Flynn"

Because Wilson never argued in his motion for summary judgment that the statement "Putin employee Mike Flynn" was true or substantially true, the trial court erred in granting Wilson summary judgment on that basis.[8] *See* Fla. R. Civ. Proc. 1.510 (requiring that a summary judgment motion be in writing and specify its grounds so that the nonmovant can properly respond). Nevertheless, Wilson did argue in his motion that the statement is rhetorical hyperbole or opinion protected by the First Amendment. We agree and conclude that the "Putin employee" statement is nonactionable rhetorical hyperbole or opinion. *See Dade Cnty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999)

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[8] Wilson did argue *at the summary judgment hearing* that if the "Putin employee" statement is not rhetorical hyperbole or opinion, it is alternatively "substantially true." But rule 1.510, based on the analogous federal rule, requires us to focus on Wilson's written motion, not on his counsel's argument at the hearing. *See Nat'l Fire Ins. v. Bartolazo*, 27 F.3d 518, 520 (11th Cir. 1994) (noting that oral motions for summary judgment are impermissible).

("[I]f a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record.").

The First Amendment protects "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual." *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 20 (1990) (quoting *Hustler Mag. v. Falwell*, 485 U.S. 46, 50 (1988)); *see also Fortson*, 434 F. Supp. 2d at 1378–79 (noting that protected rhetorical hyperbole may "at first blush appear to be factual" (quoting *Standing Comm. on Discipline of U.S. Dist. Ct. for Cent. Dist. of Cal. v. Yagman*, 55 F.3d 1430, 1438 (9th Cir. 1995))). Courts have extended First Amendment protection to such statements in recognition of "the reality that exaggeration and non-literal commentary have become an integral part of social discourse." *Levinsky's, Inc. v. Wal–Mart Stores, Inc.*, 127 F.3d 122, 128 (1st Cir. 1997). By protecting speakers of such statements, courts "provide[ ] assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." *Milkovich*, 497 U.S. at 20 (citing *Falwell*, 485 U.S. at 53–55).

In conducting our analysis, we must

> construe the statement in its totality, examining not merely a particular phrase or sentence, but all of the words used in the publication. The court must consider the context in which the statement was published . . . . All of the circumstances surrounding the publication must be considered, including the medium by which it was disseminated and the audience to which it was published.

Hay, 450 So. 2d at 295 (citing *Info. Control Corp. v. Genesis One Comput. Corp.*, 611 F.2d 781, 784 (9th Cir. 1980)).

Wilson's tweet, after all, appears *together* with Flynn's letter, which says, among other things: "The WH [White House] ignored and laughed at Putin's *legitimate security concerns and legitimate ethnic problems* in

Ukraine. We have yet to hear from the President of the United States an explanation of U.S. national security interests, *instead we continue to demonize Russia* . . . ." (Emphasis added.)

Flynn wants us to isolate Wilson's statement from its context and focus instead on what it typically means to be an "employee." And stripped from the rest of the tweet, Wilson's statement may indeed appear to be making a factual claim about Flynn's economic relationship with Putin. But that is not what a reasonable reader of Wilson's Twitter feed would think Wilson was trying to communicate. Rather, whether Flynn gets a regular paycheck from the Russian Federation—like Putin's secretary perhaps—just isn't Wilson's point. A reasonable reader of Wilson's response to Flynn's letter would instead understand Wilson to be expressing essentially the same thing he wrote in his book, namely, what else would you expect from someone "in bed with the Russians"? As with Flynn's actual intimate relationships, his actual economic relationship with Putin (if any) is immaterial. *See Knievel v. ESPN*, 393 F.3d 1068, 1078 (9th Cir. 2005) ("[T]aken in isolation and given a literal interpretation, ESPN's suggestion that Evel is a pimp is 'sufficiently factual to be susceptible of being proved true or false.' But we assess the meaning of the word in the context in which it was used. Because [pimp] cannot reasonably be interpreted literally in this context, the fact that its literal interpretation could be proven true or false is immaterial.").

The opinion in *Herring Networks, Inc. v. Maddow*, 8 F.4th 1148 (9th Cir. 2021), is an instructive example of similar "rhetorical hyperbole" protected by the First Amendment. In that case—decided on a motion to dismiss—*Herring Networks*, the operator of One America News (OAN), sued Rachel Maddow for defamation based on certain comments she had made during a TV broadcast. Among other things, she had stated, "In

this case, the most obsequiously pro-Trump right wing news outlet in America [OAN] really literally is paid Russian propaganda." *Id.* at 1153 (emphasis omitted). Except that OAN really literally wasn't. Rather, as Maddow also disclosed to her listeners, one of OAN's employees also freelanced for Sputnik News, a Russian state-financed news organization, and was paid for that freelance work. *Id.* at 1152. And, Herring Networks had further alleged that employee's work was separate and distinct from his work for OAN. *Id.* The court nevertheless dismissed Herring Network's complaint with prejudice, concluding: "[T]he challenged statement was an obvious exaggeration, cushioned within an undisputed news story. The statement could not reasonably be understood to imply an assertion of objective fact, and therefore, does not amount to defamation." *Id.* at 1151.[9]

So too here. Wilson's tweet appears *together* with the text of Flynn's letter. *See Herring Networks*, 8 F.4th at 1159 ("Because Maddow discloses all relevant facts and employs colorful, hyperbolic language, we conclude that the specific context of the statement does not render it an assertion of fact."). A reasonable reader would understand that Wilson was simply reacting imaginatively to Flynn's fully disclosed letter. That reasonable reader encountering Wilson's tweet would also have had at their mental disposal the prior widely publicized news stories about Flynn's purported connections with Russia—stories that indeed would

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[9] *See also Pullum v. Johnson*, 647 So. 2d 254, 258 (Fla. 1st DCA 1994) ("Examining Reverend Johnson's broadcast . . . the challenged 'drug pusher' statement cannot reasonably be interpreted as stating 'actual facts' about Pullum's illegal association with drugs. Johnson's broadcast addressed a matter of obvious public concern in Santa Rosa County and invoked exaggerated hyperbolic language to emphasize his objection to the proposed ordinance amendments that would make Santa Rosa a 'wet' county.").

have been familiar to essentially anyone who followed the news during the first years of the Trump presidency. *See Hay*, 450 So. 2d at 295 ("Pure opinion is based upon facts that the communicator sets forth in a publication, *or that are otherwise known or available to the reader or the listener as a member of the public*." (emphasis added)). A reasonable reader of Wilson's tweet simply would not think that Wilson was responding to Flynn's letter about the invasion of Ukraine by purporting to make a literally true, factual claim about Flynn's employment status.

Finally, "[t]he medium through which the contested statement was made [here, Wilson's Twitter feed] supports [Wilson's] argument that a reasonable viewer would not conclude the statement implies an assertion of fact." *See Herring Networks*, 8 F.4th at 1157. Flynn emphasizes how deeply partisan Wilson has become, alleging at one point in his complaint that "[d]ue to several policy disagreements with President Donald Trump's Administration, Wilson seemingly switched his political beliefs overnight, and began working with far-left publications." But Wilson's political orientation simply underscores that reasonable readers of Wilson's Twitter feed will expect Wilson to be hyperbolic and highly subjective. *See id.* ("We agree with the district court's conclusion that the broad context of Maddow's show makes it more likely that her audiences will 'expect her to use subjective language that comports with her political opinions.' " (quoting *Herring Networks, Inc. v. Maddow*, 445 F. Supp. 3d 1042, 1050 (S.D. Cal. 2020))).

"FYI, Mike Flynn is Q"

We agree with the trial court that no reasonable jury could find that Wilson defamed Flynn through the retweet of "FYI, Mike Flynn is Q." Flynn introduced no record evidence demonstrating that Wilson retweeted that phrase with actual malice, and Flynn failed in the first

instance to demonstrate that the statement was even capable of being proven true or false.

"A public-figure plaintiff . . . must present record evidence sufficient to satisfy the court that a genuine issue of material fact exists which would allow a jury to find by clear and convincing evidence the existence of actual malice on the part of the defendant." *Dockery*, 799 So. 2d at 294 (first citing *Lampkin–Asam v. Mia. Daily News, Inc.*, 408 So. 2d 666, 668–69 (Fla. 3d DCA 1981); and then citing *Friedgood v. Peters Publ'g Co.*, 521 So. 2d 236, 243 (Fla. 4th DCA 1988)). And as the Supreme Court explained in *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968):

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

Here, the onus was on Flynn to prove by clear and convincing evidence that Wilson entertained "serious doubts" about the accuracy of the articles stating that at least some believers in the QAnon conspiracy think that Flynn is Q. But Flynn did not submit an affidavit or other record evidence demonstrating Wilson's "actual malice."

Moreover, although the record persuades us that most QAnon adherents believe that there is at least one Q (and maybe more), we cannot discern much else about that person or persons, whether inadvertently or by design. Nevertheless, this ambiguity does not create a genuine issue of material fact for the jury to resolve. If Flynn is not Q (or one of the Qs), then it presumably would not have been hard for him to have filed an affidavit with the trial court to that effect. After all, in this case governed by *Sullivan* and its progeny, Flynn has the burden of proving falsity. *See Dockery*, 799 So. 2d at 294 (recognizing that under

Sullivan, a public figure plaintiff must prove falsity); *see also Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776–77 (1986) (noting the inapplicability of the common law presumption that defamatory speech is false even in the context of a defamation suit brought by a *private figure plaintiff* against a media defendant where the issue involved matters of public concern). But if, as the record suggests, the identity of "Q" poses an intractable proof problem—due perhaps to the very nature of QAnon—that is Flynn's problem and not Wilson's. *See Skupin v. Hemisphere Media Grp., Inc.*, 314 So. 3d 353, 356–57 (Fla. 3d DCA 2020) (recognizing that a defamation claim must be "capable of being proved true or false on a core of objective evidence"); *see also Hepps*, 475 U.S. at 778 ("[R]equiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so."). Thus, we agree with the trial court that the statement "FYI, Mike Flynn is Q" is nonactionable rhetorical hyperbole or opinion.

Indeed, on this record, "Flynn is Q" becomes just another example of generally nonactionable name calling that lacks a verifiable factual core. *See Cheng v. Neumann*, 51 F.4th 438, 446 (1st Cir. 2022) ("right wing," "far-right," and "conspiracy theorist"); *Buckley v. Littell*, 539 F.2d 882, 893 (2d Cir. 1976) ("fascist"); *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284–86 (1974) ("scab"); *Hotchner v. Castillo-Puche*, 551 F.2d 910, 912–13 (2d Cir. 1977) ("toady"). We are thus compelled to affirm the judgment as to the retweet.

Gundel and the anti-SLAPP statute

Flynn also argues that this court should reverse because it misinterpreted the anti-SLAPP statute in *Gundel v. AV Homes, Inc.*, 264 So. 3d 304, 314 (Fla. 2d DCA 2019), when it determined that a "burden-shifting" scheme applies to motions to dismiss under that statute. But

Wilson did not just move to dismiss; he also moved for summary judgment, and the trial court ultimately disposed of Flynn's claims against him on summary judgment. Thus, affirming the trial court here does not require us to rely on *Gundel*.

Flynn further insists that he was under the impression below that Wilson's motion for summary judgment was a truncated one somehow governed by the anti-SLAPP statute rather than by Florida Rule of Civil Procedure 1.510. But the plain language of section 768.295(4) supports no such impression: that section does not provide an alternative summary judgment procedure to that set forth in rule 1.510; rather, it simply anticipates that in cases implicating First Amendment concerns, summary judgment motions may be filed early in the case. *Id.* ("As soon as practicable, the court shall set a hearing on the motion [to dismiss or for summary judgment], which shall be held at the earliest possible time after the filing of the claimant's . . . response."). Flynn's position is also belied by the record evidence showing his express agreement with Wilson to adjust certain time frames set forth in rule 1.510(b). Regardless, if Flynn had truly been surprised at the summary judgment hearing that Wilson and the trial court were treating Wilson's motion as one governed by rule 1.510, we would have expected Flynn's counsel to have moved for a continuance of the hearing or to have at least asked for the opportunity to supplement the record. But he did neither.

Finally, on this summary judgment record (with Flynn submitting no counteraffidavits), we find no error in the trial court's determinations that Flynn's lawsuit against Wilson lacked merit and that it was brought "primarily" because of Wilson's exercise of his First Amendment rights. *See* § 768.295(3).

Conclusion

We have the privilege of living in a country with a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks." *Sullivan*, 376 U.S. at 270. Like it or not, such attacks are a characteristic feature of our democracy—regardless of the political persuasion of the speaker and regardless of the political persuasion of the public figure on the receiving end of that speech. As the trial court noted, Wilson's tweets may not have been polite, and they may not have been fair. But the First Amendment required neither, and so we affirm.

Affirmed.

CASANUEVA and SILBERMAN, JJ., Concur.

Opinion subject to revision prior to official publication.