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No. SC2025-0065

In the Supreme Court of Florida

MICHAEL T. FLYNN,

Petitioner,

v.

RICK WILSON,

Respondent.

On Petition for Discretionary Review
From a Decision of the Second District Court of Appeals
L.T. Case No. 2D24-0278

RESPONDENT'S BRIEF ON JURISDICTION

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PREFACE

Petitioner, General Michael T. Flynn will be referred to as "Petitioner" or "Flynn." Respondent, Rick Wilson, will be referred to as "Respondent" or "Wilson."

STATEMENT OF THE ISSUES

I. DOES THE SECOND DISTRICT'S DECISION IN THE INSTANT CASE EXPRESSLY OR DIRECTLY CONFLICT WITH THE THIRD DISTRICT IN *LAM* OR *VERICKER*, THE FOURTH DISTRICT IN *HOLNESS* OR THE FIFTH DISTRICT IN *JOHNSON*? (*It does not).*

STATEMENT OF THE CASE AND FACTS

The case and facts are summarized in the first eight pages of the Second District's opinion in this case, which is found in the Appendix, ("Appx") to Petitioner's Brief on Jurisdiction (Appx 000001-000008). These are the only facts relevant to a determination on discretionary conflict jurisdiction. *See, Reaves v. State*, 485 So. 2d 829, 830 n. 3 (Fla. 1986) ("The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict.")

Nonetheless, the Petitioner's Brief on Jurisdiction contains several pointless and improper record citations and makes factual and procedural assertions beyond the four corners of the Second District decision. Most egregiously, Petitioner repeatedly and erroneously claims that the Circuit Court "dismissed" his case and that the Second District affirmed the

dismissal. The record establishes: 1.) Wilson moved for summary judgment pursuant to Section 768.295(4), Florida Statutes (See, Appx 000001); 2.) Wilson submitted summary judgment evidence in support of the motion (See, Appx. 000002-000008); 3.) Flynn did not introduce any record evidence in response to Wilson's summary judgment motion (Appx 000002); 4.) summary judgment was granted to Wilson who established that Flynn's claim lacked merit and that it was primarily brought because of Wilson's exercise of his First Amendment Rights (See, Appx. 000016-000017); 5.) a final judgment on Wilson's summary judgment motion was issued by the Circuit Court (See, Appx. 000017); and 6.) the Circuit Court's judgment was affirmed by the Second District on appeal. (See, Appx. 000017). Instead of addressing the record before this Court, Petitioner incorrectly claims that the Second District misstated the trial court's order and that the trial court's order was primarily based on the anti-SLAPP framework on a motion to dismiss. (Petitioner's Brief at 4). Petitioner's extra-record claims are incorrect and should be ignored.

SUMMARY OF ARGUMENT

This case was decided on summary judgment. Flynn argues that the trial court "dismissed" his case improperly, and somehow erred in applying the burden shifting framework of Florida's Anti-SLAPP statute. Flynn also argues that the Second District's decision conflicts with decisions in the Third, Fourth and Fifth Districts. But, the trial court found that Wilson met his burden – again, on summary judgment – showing Flynn's lawsuit against Wilson lacked merit and that it was brought primarily because of Wilson's exercise of his First Amendment rights. To reach that final judgment, the trial court also found that Flynn failed to submit summary judgment evidence in response, thus there was no dispute of material fact. On appeal, the Second District found that the summary judgment record supported the trial court's findings.

Flynn's arguments fail to deal with the reality of the record before this Court. Flynn claims that the Second District relied on *Gundel v. AV Homes, Inc.*, 264 So. 3d 304 (Fla. 2nd DCA 2019), to reach its decision. This argument cannot be reconciled with the plain text of the Second District's opinion, which explicitly states, "Thus, affirming the trial court here does not require us to rely on *Gundel*." (Appx. 000017).

Flynn then further claims that the Second District's opinion in *Gundel* conflicts with *Lam v. Univision Comm., Inc*., 329 So. 3d 190, 194-95 (Fla. 3rd DCA 2021). While it is true that these two cases present a degree of controversy between the Second and Third Districts over burden shifting in a motion to dismiss (*Lam v. Gundel)*, that debate is irrelevant to this summary judgment case. The concept of burden shifting in the context of a summary judgment case is well settled law. (See, *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

Compounding these errors, Flynn also claims conflict with the decisions in *Vericker v. Powell*, 343 So. 3d 1278, 1281 (Fla. 3rd DCA), *Holness v. Cherfilus-McCormick*, 355 So. 3d 939 (Fla. 4th DCA 2023) and *Johnson v. Fischer,* 369 So. 3d 354, 356 (Fla. 5th DCA 2023). These decisions concern *interlocutory* appellate rights for a party who *unsuccessfully* pursues an anti-SLAPP motion and then seeks immediate interlocutory appellate review.

This Court does not have conflict jurisdiction.

ARGUMENT

I. THERE IS NO EXPRESS OR DIRECT CONFLICT.

A. The trial court granted Summary Judgment (not a motion to dismiss) and the Second District affirmed that finding (without relying upon *Gundel*).

This appeal is premised upon a complete misstatement of the record and the facts in this case. Specifically, Petitioner repeatedly and incorrectly asserts this his Complaint was dismissed. The record establishes that the Court granted summary judgment, (Appx. 000002), and the Second District affirmed such decision (Appx. 000018).

Petitioner then attempts to create conflict jurisdiction, claiming that the Second District relied on *Gundel v. AV Homes, Inc.*, 264 So. 3d 304 (Fla. 2nd DCA 2019) to dismiss his claims. That is plainly not so. The Second DCA squarely confronted and rejected this argument in its opinion, finding:

> 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 (Fla. 2nd 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.* (e.s.) (Appx. 000016-000017).

Again, the Second District could not have been more clear: this case does not rely on *Gundel.* And it explained its reasoning, because unlike *Gundel*,

(which was decided on a motion to dismiss), this case was decided on summary judgment. The Second District found:

> Finally, on this summary judgment record (with Flynn submitting no counter affidavits), 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. § 768.295(3). (Appx 000017).

There is an extensive record that the trial court relied upon to support his findings of fact, which was subsequently affirmed by the Second District. Petitioner's brief does not even attempt to address this critical procedural difference. Instead, Petitioner claims that *Gundel* directly conflicts with holdings in other districts, which is true but of no consequence here.

B. The Third District's decision in *Lam* concerned a Motion to Dismiss and not a Motion for Summary Judgment.

Compounding the procedural errors, Petitioner alleges that this court has conflict jurisdiction because of conflicts between the instant case, *Gundel,* and the 3rd DCA's decision in *Lam v. Univision Comm., Inc.*, 329 So. 3d 190, 194-95 (Fla. 3rd DCA 2021). But *Gundel* and *Lam* were decided on a Motion to Dismiss. *See, Lam* at 193.Whatever the controversy between *Gundel* and *Lam*, the analysis for a summary judgment case is significantly different. Thus, the Petitioner conflates the dispute in burden shifting

between the Second and Third Districts in *Lam* and *Gundel* with the burden shift that occurs when any court analyzes a Motion for Summary Judgment.

In the context of a motion for summary judgment, it is well settled that "[T]he moving party bears the initial burden of identifying those portions of the record demonstrating the lack of a genuinely disputed issue of material fact." *Brevard County v. Waters Mark Dev. Enters*., 350 So. 3d 395, 398 (Fla. 5th DCA 2022) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "If the movant does so, then the burden shifts to the [nonmoving] party to demonstrate that there are genuine factual disputes that preclude judgment as a matter of law." *Id.*

Here, the circuit court found that Wilson met his summary judgment burden and that Flynn failed to submit counter evidence such that there was no dispute of material facts. (Appx. 000007-000008). The Second District affirmed. (Appx. 000016-000017). There is no conflict.

C. The decisions *in Vericker, Holness* and *Johnson* concern the right to an interlocutory appeal and are completely inapplicable to the instant circumstance.

Petitioner also claims that this Court should find conflict jurisdiction based on Anti-SLAPP cases that are totally different than the instant case. There is a line of cases where Anti-SLAPP Defendants moved for Summary

Judgment (like here), but unlike here their Motions were unsuccessful and appellate review was sought on an interlocutory basis.

Vericker v. Powell, 343 So.3d 1278, 1281 (Fla. 3rd DCA) concerns the ability to review a non-final order denying summary judgment under the Anti-SLAPP statute. Similarly, *Holness v. Cherfilus-McCormick*, 355 So. 3d 939, (Fla. 4th DCA 2023) concerns non-final appellate review of an order denying summary judgment. The 5th DCA's decision in *Johnson v. Fischer,* 369 So. 3d 354, 356 (Fla. 5th DCA 2023), concerns review by certiorari of the denial of a motion for final judgment under the Anti-SLAPP statute. The decisions in *Vericker, Holness* and *Johnson* concern the right to an interlocutory appeal for an unsuccessful Defendant under § 768.295.

Here, Mr. Wilson won summary judgment at the circuit court under § 768.295. (See, Appx. 000017). In this case, based on a complete record, a final judgment was issued by the trial court. (See, Appx. 000017). Respondent, the Plaintiff who brought the action deemed to lack merit and to have been brought primarily because Wilson engaged in protected speech then appealed (unlike the Appellants in *Vericker, Holness* and *Johnson).*

In this case, the appellate court took jurisdiction, reviewed the lower court's decision, the summary judgment record and affirmed the decision. Unlike *Vericker*, *Holness* and *Johnson*, the complete record shows that

Wilson, met his burden of proof in the trial court proceedings, and Flynn submitted no counter affidavits whatsoever. (Appx 000017). The anti-SLAPP cases related to interlocutory review are inapposite.

D. There is no conflict jurisdiction.

Conflict jurisdiction does not exist here. Conflict jurisdiction is created only when decisions "expressly and directly conflict[] . . . on the same question of law." Art. V, § 3(b)(3), Fla. Const. This Court recently reaffirmed the strictness of the standard:

> Express and direct conflict is a strict standard that requires either the announcement of a conflicting rule of law or the application of a rule of law in a manner that results in a conflicting outcome despite substantially the same controlling facts. Because the facts in the second situation are of the upmost importance, there can be no conflict on this basis when the cases are easily distinguishable. We have long stressed that there must be a real, live and vital conflict before our jurisdiction may be invoked.

Askew v. Fla. Dep't of Children & Families, 385 So. 3d 1034, 1037 (Fla. 2024) (internal quotation marks and citations omitted).

The record supports the finding that this lawsuit lacked merit and that it was brought primarily because of Mr. Wilson's exercise of his First Amendment Rights. (Appx 000017). There is no basis for this appeal.

CONCLUSION

The Second District did not rely on *Gundel* to reach its decision in this case. The U.S. Supreme Court's decision in *Celotex* is well settled law. Wilson moved for summary judgment, submitted substantial record evidence and Flynn failed to respond at all. *Gundel* and *Lam* are inapplicable. *Vericker, Holness* and *Johnson* are just other Anti-SLAPP cases that are not impacted in any way by the decision here. The decision in this case does not create conflicting precedent. There is no basis for the invocation of discretionary conflict jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on January 29, 2025, the foregoing document was furnished by email on all individuals identified on the service list that follows.

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CERTIFICATE OF COMPLIANCE

I certify that this brief is filed in Arial 14-point font and contains 1,957 words, as determined by the word-processing system used to prepare this document, 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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