

**IN THE SUPREME COURT FOR THE STATE OF FLORIDA**

CASE NO. SC2025-0065

Second DCA Case No. 2D24-0278

Michael T. Flynn,

*Petitioner,*

v.

Rick Wilson,

*Respondent.*

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**PETITIONER'S JURISDICTIONAL BRIEF**

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## **STATEMENT OF THE ISSUES**

The trial court dismissed Petitioner's, Michael T. Flynn, Second Amended Complaint, finding that General Flynn violated Florida's anti-SLAPP statute, § 768.295, Fla. Stat. Specifically, the trial court found, pursuant to a burden-shifting framework under the anti-SLAPP, as imposed by the Second District Court of Appeal, the burden shifted to General Flynn to show that his Second Amended Complaint was not without merit and was not primarily motivated to chill Respondent's freedom of speech. The Second District Court of Appeal affirmed this decision. The Third, Fourth, and Fifth District Courts of Appeal have explicitly found that Florida's anti-SLAPP statute does not contain a burden-shifting framework. Accordingly, General Flynn brings this appeal to challenge whether Florida's anti-SLAPP statute contains a burden-shifting framework, and whether General Flynn violated Florida's anti-SLAPP statute.

Pursuant to Fla. R. App. Rule 9.210(f), this appeal will also turn on whether the trial court properly dismissed General Flynn's claim of defamation per se against Respondent. Specifically, whether Respondent acted with actual malice, and whether Respondent's subject statements were substantially true and/or rhetorical hyperbole.

## STATEMENT OF THE CASE AND FACTS

On January 30, 2024, the trial court found Respondent had the initial burden of demonstrating a prima facie case that the statute applies. Appendix000007. The trial court then found Respondent did so, and, therefore, the burden shifted to General Flynn “to demonstrate that the claims are not ‘primarily’ based on First Amendment rights in connection with a public issue and not ‘without merit.’” *Id.* (quoting *Gundel v. AV Homes, Inc.*, 264 So. 3d 304 (Fla. 2d DCA 2019)). Ultimately, the trial court concluded General Flynn did not satisfy this burden and, therefore, violated Florida’s anti-SLAPP statute. *Id.* at 8. Accordingly, the trial court dismissed General Flynn’s second amended complaint against Respondent “both under the anti-SLAPP procedure established by section 786.265 as well as the ‘normal’ summary judgment procedure under rule 1.510.” *Id.* at 11.

General Flynn appealed this dismissal and finding that General Flynn violated Florida’s anti-SLAPP statute, including whether Florida’s anti-SLAPP statute contains a burden-shifting framework imposed based on Second District Court of Appeal precedent. On December 11, 2024, the Second District Court of Appeal affirmed the trial court’s Order. The Third, Fourth, and Fifth District Courts of Appeal have explicitly found that Florida’s anti-SLAPP statute does not contain a burden-shifting framework. Accordingly, General Flynn seeks to invoke this Court’s

discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of a district court of appeal or the supreme court on the same point of law. Art. V §3(b)(3), Fla. Const.; Fla. R. App. 9.030(a)(2)(A)(iv).

## ARGUMENT

### **I. The Second DCA’s Decision in *Gundel* Directly Conflicts with Other Florida Appellate Courts.**

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The trial court found Respondent had the initial burden of demonstrating a *prima facie* case that the anti-SLAPP statute applies, and once he did, the burden shifted to General Flynn “to demonstrate that the claims are not ‘primarily’ based on First Amendment rights in connection with a public issue and not ‘without merit.’” Appendix000007 (quoting *Gundel v. AV Homes, Inc.*, 264 So. 3d 304 (Fla. 2d DCA 2019)). The trial court concluded General Flynn did not satisfy this burden and, therefore, violated Florida’s anti-SLAPP statute. Accordingly, it dismissed General Flynn’s second amended complaint against Respondent “both under the anti-SLAPP procedure established by section 786.265 as well as the ‘normal’ summary judgment procedure under rule 1.510.” *Id.* at 8, 11.

The trial court based this decision on the Second DCA’s decision in *Gundel v. AV Homes, Inc.* In *Gundel*, the Second DCA found that Florida’s anti-SLAPP, §

768.295, Fla. Stat., contains a burden-shifting framework. *Gundel*, 264 So. 3d at 314. Specifically, the court described the burden-shifting framework as follows: “the initial burden on the SLAPP defendant to set forth a prima facie case that the Anti-SLAPP statute applies and then shifting the burden 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’”. *Id.*

General Flynn appealed this Order, and the Second DCA affirmed the Order. Appendix000031. In doing so it stated that affirming the trial court did not require the Second DCA to rely on *Gundel* because “the trial court ultimately disposed of Flynn's claims against him on summary judgment.” Appendix000029-30. This is contrary to the trial court’s Order, which dismissed General Flynn’s Second Amended Complaint “primarily” based on the anti-SLAPP framework. Appendix000008. Therefore, a question did remain as to whether General Flynn violated Florida’s anti-SLAPP. That ruling is also contrary to the Second DCA’s own Order, finding that the anti-SLAPP applied because General Flynn did not submit a counter affidavit, so he must have brought this case primarily to chill Appellee’s freedom of speech. Appendix000029. In coming to this holding, the Second DCA seemingly relied on *Gundel*, shifting the burden to General Flynn to produce evidence proving his suit was not primarily to chill Respondent’s freedom

of speech. Thus, because *Gundel's* holding is pertinent to whether General Flynn violated Florida's anti-SLAPP, General Flynn asks this Court to address the holding in *Gundel* because it directly contradicts the rulings of other District Court of Appeals and it resulted in the ruling in his case, forming the basis of this appeal.

Since the Second DCA's ruling in *Gundel*, the Third DCA decided *Lam* holding that there is no higher burden placed on a plaintiff in a motion based on the anti-SLAPP statute. *Lam v. Univision Comm., Inc.*, 329 So. 3d 190, 194-95 (Fla. 3d DCA 2021). As enacted, Florida's anti-SLAPP statute is silent regarding whether there is a heightened burden on the plaintiff. *Id.* *Lam* explained the anti-SLAPP statute in Florida is materially different than the one in Maine upon which *Gundel* relied as a comparator to the Florida statute.

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. *Id.* at 195. The *Lam* court found that many states with anti-SLAPP statutes that shift the burden adopted those statutes before Florida adopted its anti-SLAPP provision. If Florida intended to shift the burden, the legislature would have included such a provision in Florida's statute. *Id.* at 196.

Furthermore, the court acknowledged federal courts have interpreted the Florida anti-SLAPP statute as a garden-variety fee-shifting statute, and nothing

more. *Id.* at 197. The Third, Fourth, and Fifth District Courts of Appeals have certified a conflict with this Court’s findings in *Gundel* and subsequent anti-SLAPP determinations. *Vericker v. Powell*, 343 So. 3d 1278, 1281 (Fla. 3d DCA 2022); *Holness v. Cherfilus-McCormick*, 355 So. 3d 939 (Mem), 940 (Fla. 4th DCA 2023); *Johnston v. Fischer*, 369 So. 3d 354, 356 (Fla. 5th DCA 2023). Accordingly, *Gundel*, which influenced the trial court’s finding, and the Second DCA’s affirmation of that finding, that General Flynn violated Florida’s anti-SLAPP, is in conflict with other District Courts of Appeal.

## CONCLUSION

For the foregoing reasons, General Flynn respectfully requests that this Court invoke its discretionary jurisdiction to determine whether Florida’s anti-SLAPP, § 768.295, Fla. Stat., contains a burden-shifting provision, in addition to those issues identified in General Flynn’s “Statement of the Issues”.

Dated: January 20, 2025

Respectfully submitted,

/s/ Jared J. Roberts

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## CERTIFICATE OF SERVICE

I certify that on January 20, 2025, a copy of the foregoing was filed with the Clerk of the Court using the Florida Courts E-Filing Portal, which will send a copy to all counsel of record.

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## CERTIFICATE OF FONT COMPLIANCE

I hereby certify that this brief complies with the requirements as set forth in Florida Rule of Appellate Procedure 9.210(a).

*/s/ Jared J. Roberts* \_\_\_\_\_  
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