IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
SECOND DISTRICT

CASE NO. 2D24-0278
Lower Tribunal Case No. 2023CA-004264NC

MICHAEL T. FLYNN

APPELLANT,

vs.

RICK WILSON, ET AL.

APPELLEE.

On Appeal from Final Judgment
of the Circuit Court for the Twelfth Judicial Circuit
of Florida in and for Sarasota County

APPELLANT'S REPLY BRIEF

Stephen B. French
Jared J. Roberts
Binnall Law Group, PLLC
717 King Street, Suite 300
Alexandria, Virginia 22314
(703) 888-1943

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Appellee Rick Wilson's argument rests upon the premise that he produced a series of plainly irrelevant articles that automatically entitle him to summary judgment to which Appellant did not respond. This argument fails. Appellee's articles did not show that there are no genuine issues of material fact in dispute. Rather, his cited articles require the opposite conclusion. Accordingly, the burden on summary judgment never shifted to General Flynn to produce any materials when the record established disputed issues of material fact.

The trial court's decision to apply the Anti-SLAPP statute and take judicial notice of certain facts within articles was erroneous. Furthermore, the court dismissed General Flynn's Second Amended Complaint on a defense that Appellee failed to properly raise in his underlying motions. Therefore, General Flynn respectfully urges this Court to reverse the trial court's Order, dismissing his claims against Appellee, and remand the case for further proceedings.

ARGUMENT

I. Appellee Wilson Did Not Meet His Burden on Summary Judgment.

The applicable summary judgment standard requires that the moving party presents evidence showing "that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." *Pirate's Treasure, Inc. v. City of Dunedin*,

277 So. 3d 1124, 1128 (Fla. 2d DCA 2019). If the movant satisfies this requirement, then the burden shifts to the nonmoving party "to present evidence showing that a genuine issue of material fact remains to be tried." *Id.* On summary judgment, the moving party "must *conclusively* show the absence of any genuine issue of material fact." *McDonald v. Florida Dept. of Transp.*, 655 So. 2d 1164, 1167 (Fla. 4th DCA 1995) (emphasis added). "If the evidence raises any issues of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by the jury." *Id.* at 1168.

In this instance, Appellee cited a number of irrelevant or inapposite materials, none of which established that he was entitled to summary judgment. Appellee did not "properly" support his motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 246 (1986). Thus, the burden outlined above did not shift to General Flynn, and the motion should have been denied.

a. The Putin Employee Statement.

According to Appellee's Answer Brief, there are six pieces of evidence in the record to support his conclusion that General Flynn is a "Putin employee." Answer Br. at 12-13. All six of these pieces of "evidence" stem from the same *2015* event in which a Russian television network paid General Flynn to give a speech. Notably,

as Appellee's Answer Brief helpfully points out, the evidence does not show that Russian President Vladimir Putin paid General Flynn, nor does it show General Flynn accepted any money after 2015 from a Russian television network or any like entity. Appellee does not dispute these facts. This is all that the record contains with regard to the Putin employee statement. Simply put, Appellee did not meet his burden.

The evidence on the record permits different reasonable inferences, thus prohibiting summary judgment. This is especially true when viewing all reasonable inferences in favor of General Flynn. A reasonable juror could find that payment from nearly a decade ago, not even from Vladimir Putin, does not provide Appellee with cover to unequivocally state that General Flynn *is* a "Putin employee." A jury could also find that the fact that Appellee supposedly performed all of this research– he consumes a *substantial* amount of media daily– and still could not find any payments from later than 2015, shows that he knew General Flynn was not being paid by Putin, nor is he an "employee" of Putin. Answer Br. at 10.

Merely because Appellee said that he relied on certain sources after conducting research does not take away the fact that he ignored contradictory evidence and that the sources he supposedly relied on do not come anywhere close to supporting his lies about

General Flynn. Simply put, his mere concocting of an affidavit does not provide him with a shield against liability.

This is not a case of simple disagreements about characterization, as Appellee attempts to argue. Answer Br. at 29. Appellee is free to criticize General Flynn. What Appellee is not free to do, however, is blatantly lie about General Flynn.

With no evidence General Flynn received any payments from anyone or any entity affiliated with Russia since 2015 and with the knowledge that General Flynn is a three-star general who served the United States for 30-plus years, Appellee's assertion nearly a decade later that General Flynn is a "Putin employee" is "highly improbable," supporting a finding of actual malice. *See Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 691 (1989). This, combined with Appellee's general predisposition against General Flynn, which Appellee does not deny and seemingly relishes, and the overall presumption of malice under Florida law due to the statement being defamatory per se, is sufficient to find actual malice.

In light of the record before the lower court, including Appellee's complete research, he knew that there was nothing to indicate that General Flynn was a "Putin employee." Indeed, all he could find was a payment from nearly a decade ago. Appellee ignored the facts, however, blatantly distorting any kernel of truth about

General Flynn. And for that, he should be held accountable. At the very least, a jury should make this determination.

b. The QAnon Statement.

As for Appellee's statement that General Flynn is "Q," the record illustrates that General Flynn sold merchandise with slogans that others may affiliate with QAnon and that some QAnon followers and certain undisclosed persons "floated" the idea and "speculated" that General Flynn could be behind QAnon. Notably, none of this evidence even suggests General Flynn is actually the mastermind behind QAnon.

The fact that some QAnon followers, the very people who follow a deranged conspiracy group, might have speculated that General Flynn could be behind QAnon is incredible evidence that General Flynn is "Q," as Appellee stated. The articles do not even state any credible source that suggested General Flynn could be "Q," nor do the articles even name a single person with this belief. *See Bentley v. Bunton*, 94 S.W. 3d 561, 596 (Tex. 2002) (holding that reliance on "dubious" sources may be grounds for finding actual malice).

As Appellee's own Answer Brief declares, Appellee is a "prominent thought leader in the United States." Answer Br. at 15. Given Appellee's self-appointed title as a "thought leader," he would be in a better position than most to know none of the articles

he cites actually or plausibly suggests General Flynn *is* "Q". A thought leader should know an article saying "some" sources indicate General Flynn might be "Q" does not actually mean General Flynn *is* "Q."

On their face, these articles present different reasonable inferences, and at this juncture in the case, all such inferences must be viewed in favor of General Flynn. And given the supposed amount of research Appellee boasted to have performed, he would have known there was nothing pointing to General Flynn *being* "Q." Even if Appellee argues that he concluded his research after ingesting these vague cited sources, a "deliberate effort to avoid the truth" may be grounds for a finding of actual malice. *Harte-Hanks Communications*, 491 U.S. at 685. Accordingly, Appellee did not meet his burden to support summary judgment, and it was improper to take this case away from a jury.

Finally, Appellee argues that General Flynn did not present any evidence that being called "Q" is defamatory. This argument, however, ignores General Flynn's well-pleaded allegations and argument that this statement was defamatory per se, i.e., defamatory on its face. Appellee brazenly argues General Flynn did not plead defamation per se. Answer Br. at 45. This is simply incorrect.

Count I of the Second Amended Complaint is for defamation *and* defamation per se. General Flynn specifically pled:

> The defamatory statements constitute defamation per se because they tended to injure General Flynn in his trade, business, or profession, and directly accused General Flynn of committing serious crimes, including treason—punishable by death.

R.938-997 at ¶ 142. Then, in his opposition to Appellee's motion, General Flynn highlighted that Appellee did not contest that the statements were defamatory per se. R.1051-1072 at Pg. 1. And at the hearing, General Flynn's counsel explicitly argued throughout that the statements were defamatory per se, and Appellee did not once address or rebut that point. R.1121-1230 at Pg. 53.

Importantly, General Flynn was not required to raise this issue on a rehearing. This blatant disregard for Florida law constituted a fundamental error. An exception to the rehearing rule is when an issue is a fundamental error. *Security Mut. Cas. Co. v. Bleemer*, 327 So. 2d 885, 887 (Fla. 3d DCA 1976); *Watson v. Schultz*, 760 So. 2d 203, 204 (Fla. 2d DCA 2000).

A fundamental error is an "error which goes to the foundation of the case or goes to the merits of the cause of action." *Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970). This Court has previously found that things such as failure to abide by procedural rules is a fundamental error. *Withers v. Blomberg*, 41 So. 3d 398, 401 (Fla. 2d DCA 2010). Here, the trial court's ignoring of well-pleaded allegations of defamation per se, something Appellee did not challenge, goes directly to the foundation of this case and the merits of the cause of action. The court would be completely

unable to address the merits of General Flynn's claim without going through this defamation per se analysis. Accordingly, the error was fundamental and is ripe for review.

II. Florida's Anti-SLAPP Does Not Apply.

Appellee argues that the Anti-SLAPP applies because of "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." Answer Br. at 36. Tellingly, however, Appellee did not provide any evidence for that assertion. This is because none exists. Again, the only "evidence" Appellee presented were sources that did not support Appellee's lies about General Flynn, indicating Appellee spun these lies from whole cloth.

Appellee's entire argument is premised on General Flynn seeking relief to disgorge any income that Appellee received from these two lies: (1)that General Flynn is a "Putin employee" and (2)that he is "Q." Appellee is free to give his opinion on General Flynn, no matter how distasteful it is to General Flynn and others. He is not free, however, to blatantly lie about General Flynn, causing him damage.

To survive this appeal, Appellee appears to argue that General Flynn's allegations supporting the essential elements of ill-will and actual malice to prove his claims constitute an effort or improper purpose to curtail speech. Acceptance of such an

interpretation of those allegations would result in an unintended and twisted Catch-22 for any plaintiff seeking redress for defamation under the law.

This suit seeks to hold Appellee accountable for his lies, not any other form of protected speech. General Flynn never argued that political statements are not protected, whereas defamatory statements are subject to redress. Answer Br. at 45.

Moreover, a finding that Appellee satisfied his burden on summary judgment does not, *ipso facto*, include a finding as to the applicability of the Anti-SLAPP statute. There is nothing to suggest that General Flynn's Complaint was meritless, as the Anti-SLAPP statute requires, nor that chilling the First Amendment was the *primary* purpose of the case. Appellee spent much of his brief discussing the production of evidence yet provided no such evidence that would make this statute applicable.

While Appellee attempts to argue that the Court need not decide the issue of burden-shifting because it is inapplicable to summary judgment, this is incorrect. The trial court determined that the burden shifted to General Flynn to provide evidence that his claims were not without merit and not primarily based on First Amendment rights after Appellee presented that this was an issue of public concern. R.1108-1120 at Pg. 7. But for the trial court imposing an improper burden shifting framework, it is inconceivable that it would have found the Anti-SLAPP applicable.

Thus, this analysis, as described in the Initial Brief, cannot simply be ignored, as Appellee suggests.

III. Appellee Wilson Waived His Truthfulness Defense.

In Appellee's motion to dismiss, he noted in his summary of the argument that he has the defense of truth. He only employed that defense as to the QAnon statement, not the Putin statement. Insofar as the Putin statement is concerned, Appellee explicitly noted it is a "statement of opinion" that is not actionable because it "*cannot be proven true or false*." R.1255-1615 at Pgs. 2, 17, 18. Nowhere else did he attempt to argue that it was a true statement.

General Flynn explicitly pointed out this failure to raise the argument and that incongruency should have been raised in his opposition. R.1051-1072 at Pg. 8. Accordingly, General Flynn focused his argument on the statement not being opinion, as opposed to truth. Thus, it was error for the trial court to dismiss the "Putin employee" statement based on substantial truth.

While Appellee argues the trial court also dismissed the statement on actual malice grounds, this contradicts a plain reading of the Order. Appellee focuses on the trial court's statement that "Mr. Wilson demonstrated that both the falsity element and the acting on the falsity element cannot be met by General Flynn." R.1108-1120 at Pg. 9. A natural reading of the

Order, however, suggests that the trial court only made a finding on truth and then found that because it was substantially true, there can be no finding of acting on falsity.

The Order briefly discusses actual malice in its overview of the law, but when discussing the individual statements pertaining to Appellee, an actual malice analysis was nowhere to be found. Instead, the trial court discussed that the burden shifted to General Flynn to demonstrate that the claims were not without merit and that General Flynn could not meet this burden because of the supposed factual basis behind Appellee's statements. R.1108-1120 at Pg. 9.

The trial court did perform the actual malice analysis in the Stewartson statements, indicating a purposeful intent to leave this analysis out of the Wilson statements. Accordingly, because it appears that the trial court merely dismissed the "Putin employee" statement on the grounds that it was "not substantially untrue," an argument Appellee never raised, this was a reversible error.

Further, this was a fundamental error. *See Maddox v. Maddox*, 357 So. 3d 270, 274 (Fla. 2d DCA 2023) (holding that "[t]he denial of due process rights, including the opportunity to be heard, to testify, and to present evidence, is fundamental error.") (quoting *Weiser v. Weiser*, 132 So. 3d 309, 311 (Fla. 4th DCA 2014)); *Hall v. Marion Cnty. Bd. of Cnty. Commissioners*, 236 So. 3d 1147, 1153

(Fla. 5th DCA 2015) ("Adequate notice is a fundamental element of the right to due process.") (quoting *Hooters of Am., Inc. v. Carolina Wings, Inc.*, 655 So. 2d 1231, 1235 (Fla. 1st DCA 1995)); *Withers*, 41 So. 3d at 401 (holding that failure to abide by procedural rules is a fundamental error).

Even if the trial court dismissed General Flynn's Second Amended Complaint on actual malice grounds, such was improper based upon the reasons above and those stated in the Initial Brief.

IV. Judicial Notice was Improper.

Appellee asserts that the trial court "did not accept the truth of the contents" of the articles he provided. Answer Br. at 41. This, however, is belied by the fact that, in erroneously finding that Appellee's statements were "not substantially untrue," the trial court expressly held that General Flynn "did receive payment from a Russian Federation-controlled entity." R.1108-1120 at Pg. 9. The trial court would be unable to come to this conclusion without accepting the truth of the contents of the articles. As illustrated in the Initial Brief, this was plainly improper.

CONCLUSION

For the reasons stated above, General Flynn respectfully requests that this Court reverse the trial court's Order dismissing

General Flynn's claims against Appellee and remand this case for continued proceedings based on this Court's Order.

Dated: June 4, 2024

Respectfully submitted,

/s/ Stephen B. French

Stephen B. French
(Fl. Bar No. 0078761)
Jared J. Roberts
(Fl. Bar No. 1036550)
BINNALL LAW GROUP, PLLC
717 King Street, Suite 200
Alexandria, Virginia 22314
Phone: (703) 888-1943
Fax: (703) 888-1930
Email: stephen@binnall.com
jared@binnall.com

Counsel for Appellant

CERTIFICATE OF SERVICE

I certify that on June 4, 2024, 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.

/s/ Stephen B. French
Stephen B. French

Counsel for Appellant

CERTIFICATE OF FONT COMPLIANCE

I certify that the foregoing comports with the font and spacing requirements of Fla. R. App. P. 9.210.

/s/ Stephen B. French
Stephen B. French

Counsel for Appellant