IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

ROLAND MASTANDREA,

Appellant,

v.

Case No.: 1D20-3713
L.T. No.: 2020-CA-433

SHERRI SNOW,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT,
FOURTH JUDICIAL CIRCUIT, IN AND FOR
CLAY COUNTY, FLORIDA

AMENDED INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND OF THE FACTS

Roland Mastandrea appeals a final judgment rejecting his claims of defamation in the form of slander and libel against Sherri Snow, arising out of a series of knowingly false targeted publications calculated to diminish the reputation of Roland Mastandrea within his immediate community. Mastandrea challenges the trial court's conclusions that he filed the lawsuit against Sherri Snow in violation of Florida's Anti-SLAPP statute, and that the court ruled contrary to record evidence on the standard of Actual Malice or Reckless Disregard of the veracity of the publications that were calculated to diminish Mastandrea's reputation. The trial court's decision is based on its conclusion that the lawsuit against Snow was filed in violation of Florida's Anti-SLAPP statute while acknowledging the presence of sufficient evidence for a claim for defamation between private citizens to have been viable. (R: 499). The trial court's decision about the element of Actual Malice or Reckless Disregard is then in contradiction to record evidence that the record does not reflect any evidence of defamation, stating that "nothing… demonstrates… that Snow knew her statements were false or that she entertained serious doubts as to the truthfulness of her statements." (R: 500)

Mastandrea's operative complaint alleged that Snow orally and in written reproduceable format defamed Mastandrea and that she did so with knowledge or with reckless disregard as to the falsity of the publications. Snow's publications included false statements of the commission of crime, implied crime, misfeasance and malfeasance. The operative complaint further alleges that Snow had multiple opportunities to learn the veracity of facts prior to making the false statements, but chose not to, and admits that she would not retract them if found to be false by a jury.

Snow's libel was published via email, social media platforms, and telephonic text messages. The publications impute to Mastandrea's behavior or characteristics that are incompatible with the proper conduct of his business, profession, and office. Snow admitted to knowing the falsity of her publications prior to having made them, and unwillingness to retract them even if a jury were to have found her liable.

The Anti-SLAPP statute required Snow to prove Mastandrea had commenced the action "primarily…" for the purpose of limiting Snow's Constitutional right to free speech in connection with a public issue. (R:456) Snow never proffered evidence that could demonstrate Mastandrea's primary intent in commencing the action had been for that purpose. The law is clear in that it allows a public person to commence an action for

defamation because there is no public interest served by a publication made with “knowing or reckless falsity,” and therefore there is no constitutional protection in such a case. (R: 453, 454)

Mastandrea commenced the action given statements that had been given to him by various individuals in the community who had received Snow’s publications directly and via sources unknown to Mastandrea. (R:458, 459). Snow’s testimony when taken as a whole is nothing less than evasive to clear questions, giving rise to impeachment due to credibility and veracity, and at times showing reckless disregard for the false publications made against the character of Mastandrea. (R: 459).

Snow had opportunity to communicate with individuals that could have provided her with the truth but resolved herself in not doing so. (R: 460). Snow further testified that if it is ultimately determined that her statements were not true, it would not matter to her that she published them. (R:460). Snow further testified that it would not matter to her whether her statements had been true or not in reference to statements whereby Mastandrea had violated law. (R: 460). Additional testimony demonstrating reckless disregard for the veracity of her statements involved admission that she had received correspondence from the developer assuring her that Mastandrea did not have a financial relationship to the development, but

that even having received such communication was insufficient for Snow to cease false publications about Mastandrea having financial involvement in the development. (R:461).

Later, Snow continued to claim Mastandrea's financial involvement after having testified to the opposite. (R: 462). Snow sought to qualify her testimony as "opinion" in a manner that can only be seen as a calculated attempt to qualify her defamatory statements as opposed to statements of fact. (R:465). In a thirty (30) page letter to the Governor of the State of Florida, Snow's writing is in a manner calculated to defame Mastandrea accusing him of misfeasance and malfeasance, doing so only hours after having been served at the commencement of the action for the purpose of retaliation. (R:371, 465, 466). Snow then demonstrates reckless disregard for the truth by testifying that she would send another letter to the Governor of Florida regardless of whether her allegations were true. (R: 466).

Finally, Snow provides testimony that rises of Actual Malice in that she knew her statements were false when she made them and occurred in the thirty (30) page letter sent to the Governor of the State of Florida accusing Mastandrea of malfeasance and misfeasance amongst other statements calculated to diminish his reputation. (466, 467).

Based on the misapplication of Actual Malice or Reckless Disregard, the trial court entered final judgment in favor of Snow. (R: 501)

SUMMARY ARGUMENT

The final judgment should be reversed and remanded because the trial court erred by denying as moot Mastandrea's motion for summary judgment and granting Snow's amended motion for summary judgment. The trial court's errors stem from its conclusion that the primary reason Mastandrea commenced the action was for the purpose of violating Snow's Constitutional right to free speech in connection to a public issue. Defendant did not proffer any evidence to Mastandrea's intent that could be directed toward a violation of Florida's Anti-SLAPP statute. Further, the trial court after clearly stating there was sufficient evidence to have supported a claim for defamation had both parties been private citizens, disregarded that acknowledged basis for the commencement of the action and granted Snow's amended motion for summary judgment on the basis of the action having been commenced in violation of Florida's Anti-SLAPP statute. It simply cannot be both.

The trial court's second error in its ruling is that the record is replete with Snow's admissions to having made defamatory statements with the knowledge of their falsity, with reckless disregard for the veracity of her

statements, and with the admission that the thirty (30) page letter accusing Mastandrea of malfeasance and misfeasance amongst many other defamatory facts was made not only knowing of the falsehood of its content but also that it was published for the sake of retaliation.

The court failed to recognize the objective nature of language in the admissions to false statements of fact, and to those statements having been made knowing of their falsity. The court also failed to recognize the case law that was provided, and that the testimony in corroboration to all the libelous publications by Snow addressed every element necessary to prove defamation against a public official. The court ultimately utilized erroneously the burden of proof by deciding subjectively that the evidence did not rise to satisfy the standard of convincing clarity. What the court misapplied in its application of the burden of proof is that admissions cannot be anything less than absolute to the facts they apply to, and therefore cannot be anything less than proof at a superior standard than the minimum standard to satisfy the burden of convincing clarity. Multiple admissions to publication of false statements of fact calculated to diminish Mastandrea's reputation with accusations of malfeasance, misfeasance, violations of sunshine law, and implications of corruption cannot be less than the burden sought to be proven by the convincing clarity standard of

proof. The objectivity of language and the admission of intent to retaliate against Mastandrea by sending a thirty (30) page defamatory letter to the Governor of the State of Florida cannot be less than clear and convincing evidence to prove actual malice or reckless disregard.

At very least the admissions and evidence in the record should have caused the trial court to have found a genuine issue of material fact that require a jury to determine whether actual malice or reckless disregard is met.

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THE ANTI-SLAPP STATUTE APPLIES AND DETERMINATION THAT ACTUAL MALICE OR RECKLESS DISREGARD WAS NOT PRESENT

A. The Florida Anti-SLAPP Statute Does Not Apply

Standard of Review. Orders granting summary judgment are reviewed de novo. *Depriest v. Greeson,* 213 So.3d 1022, 1025 (Fla. 1st DCA 2017).

The trial court erred when it granted Snow's amended motion for summary judgment partially on the basis that the action had been commenced in violation of section 768.295.

Florida's Statute section 768.295(2)(a) provides in pertinent part for the protection of "Free speech in connection with public issues," and is to mean,"… any… statement that is protected under applicable law and is made before a governmental entity in connection with an issue under consideration… by a governmental entity…"

Florida Statute section 768.295 does not protect anyone from the limitations on free speech as set forth by the Supreme Court of the United States throughout the literature. Even at the highest level of protection to a private citizen, a public figure, a person who has achieved pervasive fame or notoriety also has the right to file a lawsuit in defense of reputation against defamatory publications. *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964); *Gertz v. Welch,* 418 U.S. 323, (1986).

Although the United States Supreme Court has not defined the term "public official," there are protections even for them, and the determination whether Plaintiff in this case falls within the category of "public official" for purposes of this case remains to be determined given the term does not encompass all public employees. *Hutchinson v. Proxmire,* 443 U.S. 111, note 8 (1979).

Even when the highest level of right to sue is the standard for bringing an action, the United States Supreme Court has labeled that

standard to be a false statement made with “actual malice” i.e., knowledge of the falsity of the defamatory statement or reckless disregard for its truth. *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964).

The public policy behind protecting even the right of a public person to protect their reputations is that there is no public interest served by a publication made with “knowing or reckless falsity,” and therefore there is no constitutional protection in such a case. *Garrison v. Louisiana,* 379 U.S. 64 (1964).

Moreover, a defendant may be found to have acted with “actual malice” where its source’s credibility is seriously questioned by others, and where the defendant declined to interview a particular witness who could have verified the story, and where an earlier publication by the defendant showed that it had already committed itself to attacking the plaintiff. *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657 (1989).

As such, statements made with “knowing or reckless falsity” have no constitutional protection against a defamation action, and therefore even if Mastandrea were to be found to be burdened with being required to meet the standard of “actual malice or reckless falsity” and subject to the protections afforded to private citizens by section 768.925, Mastandrea, given the publications by Snow, still has the right to protect his reputation in

having commenced the action. *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964).

In Anti-SLAPP suits, a plaintiff does not seek damages, but rather has a primary motivation to intimidate the defendant into silence by sheer burden and expense of having to defend the suit. *See, e.g.* The Florida Senate Committee on Judiciary, Issue Brief 2009-332, *Strategic Lawsuits Against Public participation* 1 (Oct. 2008), *available at* https://archive.flsenate.gov/data/Publications/2009/Senate/reports/interim_reports/pdf/2009-332ju.pdf.

The idea behind an Anti-SLAPP violating action is that if the defendant is silenced because of the action, the plaintiff "wins" by having attached the defendant's First Amendment rights and the consequence is a limited or warped debate on an issue of public concern.[1] The action however, was filed as a result of false statements about Mastandrea that were personal to him, relate to him as a business person, and to his role as member of the Town Council of Orange Park.[2]

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[1] The issue of public concern Snow raises is her objection to a development that ultimately passed unanimously by Town Council known as Orange Park Plaza.

[2] It must be noted at this time that Mastandrea was not re-elected as a member of Town Council and it is believed the result of that election is due to the defamation subject to this case.

Snow, to have prevailed on her affirmative defense that the action had been filed in violation of section 768.925, must prove Mastandrea filed suit "… primarily" to violate her right to free speech "… in connection with a public issue…". Snow did not proffer any relevant evidence, and certainly did not proffer evidence in a manner that the existence of genuine issue of material fact had been eliminated. (R: affidavit of Mastandrea)

In interpreting Section 768.925, the Court is obligated to give clear statutory language its plain meaning. *Lamont v. State,* 610 So.2d 435 (Fla. 1992) ("Even where a court is convinced that the legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity.") *Lamont quoting St. Petersburg Bank & Trust Co. v. Hamm,* 414 So.2d 1071, 1073 (Fla. 1982) (quoting *Van Pelt v. Hilliard,* 78 So. 693, 694 (1918)). Court will construe only unclear or conflicting language in a way that gives effect to the "polestar" of legislative intent, with the caveat that there must be "hopeless inconsistency" before rules of construction can "defeat the plain language" of the statute. See *State v. J.M.,* 824 So.2d 105, 109 (Fla. 2002); *Agency for Health Care Admin. v. Estate of Johnson,* 743 So.2d 83, 87 (Fla. 2d DCA 1999); *Knowles v. Beverly Enterprises-Florida, Inc.,* 898 So.2d 1 (Fla. 2004).

The language is clear and unambiguous in section 768.925. The legislature requires Snow to prove Mastandrea commenced the action "primarily" for the purpose of violating her right to free speech in connection to a public issue. The fact of the matter is that Mastandrea was told by persons in the community that Snow had been defaming him. He was disturbed sufficiently to file suit for the purpose of protecting his reputation as a member of council, and a businessperson in the Town of Orange Park. The public issue Snow claims is the primary purpose the case was commenced passed unanimously in Town Council during open session. Mastandrea did not have to and never imagined that he would have to file a lawsuit against Snow or any other private citizen for the purpose of having a development pass in Town Council.[3]

Furthermore, for the court to have not been in error, Snow would have had to prove that her violated speech had been made "before a governmental entity in connection with an issue under consideration…" There is no protection to Snow for statements not made "before a

[3] As pointed out before, the development is an estimated $72,000,000.00 project known as Orange Park Plaza and passed unanimously. The unanimity of the vote should serve as evidence that Mastandrea did not need to seek to violate Snow's right to free speech in connection to the development for it to pass.

governmental entity…". Id. As such, purely extra-judicial statements by Snow would not be covered under F.S. §768.925.

Finally, under F.S. §768.925 Snow must also show that Mastandrea filed suit that is "without merit," she must show there was "absence of sufficient facts to make a good claim or to state a cause of action." *Ellison v. Ft. Lauderdale,* 175 So.2d 198, 200 (Fla. 1965). Clearly the case had sufficient facts to make a good claim and to state a cause of action.

Mastandrea proffered a sworn affidavit executed by Michael J. Wallwork proffering Snow had made statements within the context of defamation and implied corruption. (R: 97, 458). That affidavit also provides for evidence that the defamatory statements were not made before a governmental entity, and Snow herself admits during deposition to the truthfulness of the statements in the affidavit of Michael J. Wallwork. Id.

Mastandrea also proffered the affidavit of Angela Wester. (R: 474) In her affidavit, Wester states that Snow did make defamatory statements outside city hall, not "before a governmental entity." Wester's affidavit also states Snow's defamatory statements implied public corruption. Snow also admitted during deposition that she did in fact speak with Wester outside town hall in January 2020, and not before a governmental entity. (R: 459)

As such, Mastandrea commenced a meritorious claim for Slander per se that due to the discovery process gave rise to a second meritorious count for Libel per se and therefore the court erred in granting Snow's amended motion for summary judgment on the basis Mastandrea had violated section 768.925.

B. Actual Malice or Reckless Disregard is in Evidence

The trial court also erred in granting Snow's amended motion for summary judgment because the undisputed facts establish Snow defamed Mastandrea in the form of Slander per se and Libel per se and did so with Actual Malice or Reckless Disregard of the veracity of her publications, and at very least, there was an issue of fact for the jury.

Summary Judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions filed together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 1.510, Fla. R. Civ. Pro. The purpose of a Motion for Summary Judgment is to determine whether any underlying issues of material fact exist which need to be resolved by a trier of fact. *Moore v. Morris,* 475 So.2d 666 (Fla. 1985). A material fact is one which is "essential to the resolution of the legal questions raised," while disputed nonmaterial facts

are irrelevant to summary judgment. *Continental Concrete, Inc. v. Lakes at La Paz III Ltd. Partnership,* 758 So.2d 1214, 1217 (Fla. 4th DCA 2000).

The element of "actual malice or reckless disregard" must be met by a plaintiff who is a public figure and requires proof that defendant's defamatory publications were not only false but were known to be false at the time made or were made with reckless disregard. *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964); *Gertz v. Welch,* 418 U.S. 323, (1986).

In *Harte-Hanks Communications, Inc. v. Connaughton*, *491 U.S. 657 (1989),* the United States Supreme Court found that "actual malice" may be found where the defendant did not listen to taped conversations provided by the plaintiff to disprove defendant's projected story; where the defendant declined to interview a particular witness, who could have verified the story, and where an earlier article by the defendant showed that it had already committed itself to attacking the plaintiff.

Snow not only committed herself to attacking Mastandrea but reaffirmed herself to do so even after receiving and reading the letter from the developer whereby the developer provided her with the assurance Mastandrea did not have financial interest in the Orange Park Plaza. (R: 461)

In *St. Amant v. Thompson,* 390 U.S. 727 (1968), the United States Supreme Court resolved that a showing of actual malice on the basis of reckless disregard required more than mere violation of the reasonable person standard but must rather be accomplished by the showing that defendant in fact (subjectively) entertained serious doubts as to the truthfulness of the publications. Snow testified that she had entertained serious doubts as to the veracity of her statements but continued to make them. (R:463). Moreover, in *Milkovich v. Lorain Journal Co.,* 497 U.S. 1 (1990), the United States Supreme Court made clear that a statement generally characterized as an "opinion" may be defamatory if it can be reasonably interpreted by the recipients as implying underlying defamatory facts.

Snow qualified her statements by employing the language "it was perceived" repeatedly, and when Snow's testimony is read in its entirety, the use of the word "perceived" or the phrase "it was perceived" can only be interpreted as a calculated attempt to qualify her defamatory statements as "opinion" statements as opposed to statements of fact. (R: 465).

In the most obvious example of actual malice, Snow sent a letter to the Governor of the State of Florida requesting in red bold underlined

language for the immediate suspension from office of Mastandrea as a result of violations of Florida Statute 112.51(1):

"By executive order stating the grounds for the suspension and filed with the Secretary of State, the Governor may suspend from office any elected or appointed municipal official for malfeasance, misfeasance, neglect of duty, habitual drunkenness, incompetence, or permanent inability to perform official duties."

Snow then admits that the basis for her choice in the section 112.51 was misfeasance and malfeasance, and that she had written this letter with accompanying documents hours after having been served with the initial complaint. (R: 466). Snow then doubled down in giving testimony by stating she feels justified and would send another letter to the Governor's office… regardless of whether her allegations are true. Id.

Further evidence of actual malice in the sense that she knew her statements were false when she made them but made them anyway occurred in a document Snow attached to the packet sent alongside to the Governor of the State of Florida. Id. (R: 467). The actual malice involved an email Snow attached to the letter to the Governor as an exhibit she titled as having been threatened, yet after review of each line during her deposition, Snow testified that there was no threat. Id.

Later in Snow's testimony she admits she knew she did not have a basis within the entire thirty (30) page documents she sent to the Governor's office to justify her request Mastandrea's suspension from office on the basis of Malfeasance and Misfeasance. Id.

Finally, in *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 257 (1986), the court stated that in framing its mind state, "the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in its favor." Here the trial court erred in that it did not believe the admissions of Snow in her own testimonial deposition transcript with reference to the numerous times defamatory statements were made while knowing them to be false, or having made them while having had the opportunity to learn the truth of the matter, but committed herself to defame Mastandrea anyway. (R: page 10; paragraphs 20-25 of transcript of hearing on defendant's amended motion for summary judgment).[4]

CONCLUSION

For the foregoing reasons, this Court should reverse the final judgment and remand with instructions for the trial court to deny Snow's amended motion for summary judgment and either grant Mastandrea's

[4] Please note this document pertaining to the record is a second document filed that does not include record page numbers for purposes of citation.

motion or, alternatively if the Court finds an issue of fact, submit the issue to the jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that the foregoing document has been furnished to Robert Aguilar, Esquire located at 1045 North Orange Avenue, Suite 3 Green Cove Springs, Florida 32043 and at Robert@aguilarsieron, and Rachel@agularsieron.com by email on April 26, 2021:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Arial 14-point font and complies with the font requirements of Florida Rule of Appellate Procedure Rule 9.045, and contains 4,403 and in compliance with Rule 9.210, also in compliance with Rule 9.420, and Rules of Judicial Administration Rules 2.515, 2.516.

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