FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-3713

ROLAND MASTANDREA,

Appellant,

v.

SHERRI SNOW,

Appellee.

On appeal from the Circuit Court for Clay County.
Don H. Lester, Judge.

February 2, 2022

PER CURIAM.

The appellant, a city councilman, challenges the trial court's dismissal of his defamation lawsuit against the appellee, a resident of the city he represented. On appeal, the councilman argues that the trial court erred because it granted the resident's motion for summary judgment and applied section 768.295, Florida Statutes (2020), which is also known as the anti-SLAPP statute. We find the trial court correctly granted the resident's motion for summary judgment and dismissed the councilman's petition.

The resident filed her motion for summary judgment shortly after the complaint was filed. Her motion for summary judgment was based on two theories. First, she was entitled to summary

judgment because the anti-SLAPP statute applied. Second, even if the anti-SLAPP statute did not apply, she was entitled to summary judgment because there was no proof that she made her statements with actual malice.

In order for the anti-SLAPP statute to apply, the resident was required to prove, in addition to other things, that the councilman filed a meritless lawsuit. § 768.295(3), Fla. Stat. (2020). The resident was also required to prove the lawsuit was meritless if the anti-SLAPP statute did not apply. To determine whether the councilman's lawsuit had merit, the trial court first had to determine whether the councilman was a public figure because a different standard applies to public figures. If the plaintiff is a public figure, he must show that the defendant made the statements with actual malice, which has been defined as knowing the statements were false at the time they were made or making the statements with a reckless disregard of the truth. *Mile Marker, Inc. v. Petersen Publ'g, L.L.C.*, 811 So. 2d 841, 845 (Fla. 4th DCA 2002). If the plaintiff is not a public figure, he must show the defendant made the statements negligently. *Id.*

The actual malice standard became the national standard for public figures suing for defamation in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Until that time, some states had held that an actual malice standard applied, and others had not. *Id.* at 280. After examining the reasons for and against applying the actual malice standard, the United States Supreme Court decided that the First Amendment demanded the application of the higher actual malice standard. *Id.* at 268–84. The court reasoned that without this standard, people were more likely to curtail their criticism of the government. *Id.* at 283–84.

During oral argument, the councilman conceded he was a public figure. As a result, the actual malice standard applies. In addition to the presence of actual malice, the trial court had to review the summary judgment evidence to determine if the following additional elements were present: (1) publication of the statement; (2) falsity of the statement; (3) actual damages; and (4) the statement was defamatory. *Jews For Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1105–06 (Fla. 2008). After hearing argument of counsel and reviewing the evidence filed in support of and opposing

the resident's motion for summary judgment, the trial court determined that there was no evidence that the resident knew her statements were false or that the statements were made with a reckless disregard for the truth. On appeal, the councilman has argued that the trial court erred when it made that determination. Since that element is necessary for this Court to determine whether summary judgment was proper under either of the resident's theories, we begin our review there.

After reviewing the entire record on appeal, we find the trial court correctly determined there was no evidence of actual malice. As such, the trial court correctly determined that the resident was entitled to summary judgment and dismissal of the councilman's complaint. Having found the trial court correctly granted the resident's motion for summary judgment, we do not need to examine the other elements necessary to sustain the trial court's determination that the anti-SLAPP statute applied.

AFFIRMED.

ROBERTS and M.K. THOMAS, JJ., concur; B.L. THOMAS, J., concurs with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

B.L. THOMAS, J., concurring with opinion.

I concur because I am bound by the decision of *New York Times v. Sullivan*. 376 U.S. 254 (1964).

But I agree with Justice Clarence Thomas, Justice Neil Gorsuch, Judge Lawrence Silberman, and others, that *New York Times* was wrongfully decided and was not grounded in the history or text of the First Amendment. Appellant and other public-figure defamation plaintiffs should not have to prove that the alleged defamation was made with the knowledge that it was false or with

reckless disregard of the truth, as this is an "almost impossible" burden:

> . . . Under this Court's First Amendment precedents, public figures are barred from recovering damages for defamation unless they can show that the statement at issue was made with " 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, *supra*, at 280, 84 S. Ct. 710. Like many plaintiffs *subject to this "almost impossible" standard*, McKee was unable to make that showing. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 771, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985) (White, J., concurring in judgment).
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> . . . *New York Times* and the Court's decisions extending it were policy-driven decisions *masquerading as constitutional law*. Instead of simply applying the First Amendment as it was understood by the people who ratified it, the Court fashioned its own " 'federal rule[s]' " by balancing the "competing values at stake in defamation suits." *Gertz*, *supra*, at 334, 348, 94 S. Ct. 2997 (quoting *New York Times*, *supra*, at 279, 84 S. Ct. 710).
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> We should not continue to reflexively apply this policy-driven approach to the Constitution. Instead, we should carefully examine the original meaning of the First and Fourteenth Amendments. If the Constitution does not require public figures to satisfy an actual-malice standard in state-law defamation suits, then neither should we.

McKee v. Cosby, 139 S. Ct. 675, 675–76, 203 L. Ed. 2d 247 (2019) (Thomas, J., concurring) (mem.) (emphasis added).

New York Times has inflicted real injury on society:

> The lack of historical support for this Court's actual-malice requirement is reason enough to take a second look at the Court's doctrine. Our reconsideration is all the more needed because of the doctrine's real-world effects. Public figure or private, lies impose real harm. Take, for instance, the shooting at a pizza shop rumored to be "the home of a Satanic child sex abuse ring involving top Democrats such as Hillary Clinton," Kennedy, 'Pizzagate' Gunman Sentenced to 4 Years in Prison, NPR (June 22, 2017), www.npr.org/section/thetwo-way/2017/06/22/533941689/pizzagate-gunman-sentenced-to-4-years-in-prison. Or consider how online posts falsely labeling someone as "a thief, a fraudster, and a pedophile" can spark the need to set up a home-security system. Hill, A Vast Web of Vengeance, N. Y. Times (Jan. 30, 2021), www.nytimes.com/2021/01/30/technology/change-my-google-results.html. Or think of those who have had job opportunities withdrawn over false accusations of racism or anti-Semitism. *See*, *e.g.,* Wemple, Bloomberg Law Tried To Suppress Its Erroneous Labor Dept. Story, Washington Post (Sept. 6, 2019), www.washingtonpost.com/opinions/2019/09/06/bloomberg-law-tried-suppress-its-erroneous-labor-dept-story. Or read about Kathrine McKee—surely this Court should not remove a woman's right to defend her reputation in court simply because she accuses a powerful man of rape. *See McKee*, 586 U. S., at ——— – ———, 139 S. Ct. at 675–676 (opinion of THOMAS, J.).
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> *The proliferation of falsehoods is, and always has been, a serious matter*. Instead of continuing to insulate those who perpetrate lies from traditional remedies like libel suits, we should give them only the protection the First Amendment requires.

Berisha v. Lawson, 141 S. Ct. 2424, 2425, 210 L. Ed. 2d 991 (2021) (Thomas, J., dissenting) (mem.) (emphasis added).

As Justice Gorsuch recognized, public-figure plaintiffs essentially have no legal recourse under *New York Times*. And

many people injured by "grievous defamation" are not office holders or other famous people, but innocent victims caught by this definition, leaving no judicial remedy for the harm inflicted on them by the media and other defendants. Very few can hope to prevail under the immunity granted defamation defendants by *New York Times,* as reflected in the extremely low number of defamation suits:

> . . . But over time the actual malice standard has evolved from a high bar to recovery into an effective *immunity from liability*. Statistics show that the number of trials involving defamation, privacy, and related claims based on media publications has declined dramatically over the past few decades: In the 1980s there were on average 27 per year; in 2017 there were 3. Logan 808–810 (surveying data from the Media Law Resource Center). For those rare plaintiffs able to secure a favorable jury verdict, nearly one out of five today will have their awards eliminated in post-trial motions practice. *Id.,* at 809. And any verdict that manages to make it past all that is still likely to be reversed on appeal. Perhaps in part because this Court's jurisprudence has been understood to invite appellate courts to engage in the unusual practice of revisiting a jury's factual determinations *de novo*, it appears just 1 of every 3 jury awards now survives appeal. *Id.,* at 809–810.
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> The bottom line? It seems that publishing *without* investigation, fact-checking, or editing has become the optimal legal strategy. See *id.,* at 778–779. Under the actual malice regime as it has evolved, "ignorance is bliss." *Id.*, at 778. . . . As *Sullivan*'s actual malice standard has come to apply in our new world, it's hard not to ask whether it now even "cut[s] against the very values underlying the decision." Kagan, A Libel Story: *Sullivan* Then and Now, 18 L. & SOC. INQUIRY 197, 207 (1993) (reviewing A. LEWIS, MAKE NO LAW: THE *SULLIVAN* CASE AND THE FIRST AMENDMENT (1991)). If ensuring an informed democratic debate is the goal, how well do we serve that interest with rules that no longer

merely tolerate but encourage falsehoods in quantities no one could have envisioned almost 60 years ago?

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. . . Now, private citizens can become "public figures" on social media overnight. Individuals can be deemed "famous" because of their notoriety in certain channels of our now-highly segmented media even as they remain unknown in most. *See*, *e.g., Hibdon v. Grabowski*, 195 S.W.3d 48, 59, 62 (Tenn. App. 2005) (holding that an individual was a limited-purpose public figure in part because he "entered into the jet ski business and voluntarily advertised on the news group *rec.sport.jetski*, an Internet site that is accessible worldwide"). Lower courts have even said that an individual can become a limited purpose public figure simply by *defending* himself from a defamatory statement. *See Berisha v. Lawson*, 973 F.3d 1304, 1311 (CA11 2020). Other persons, such as victims of sexual assault seeking to confront their assailants, might choose to enter the public square only reluctantly and yet wind up treated as limited purpose public figures too. *See McKee v. Cosby*, 586 U. S. ——, —— —, 139 S. Ct. 675, 675, 203 L. Ed. 2d 247 (2019) (THOMAS, J., concurring in denial of certiorari). In many ways, it seems we have arrived in a world that dissenters proposed but majorities rejected in the *Sullivan* line of cases—one in which, "voluntarily or not, we are all public [figures] to some degree." *Gertz*, 418 U.S. at 364, 94 S. Ct. 2997 (Brennan, J., dissenting) (brackets and internal quotation marks omitted).

. . . And the very categories and tests this Court invented and instructed lower courts to use in this area—"pervasively famous," "limited purpose public figure"—seem increasingly malleable and even archaic when almost anyone can attract some degree of public notoriety in some media segment. *Rules intended to ensure a robust debate over actions taken by high public officials carrying out the public's business increasingly seem to leave even*

> *ordinary Americans without recourse for grievous defamation. . . .*

Berisha v. Lawson, 141 S. Ct. 2424, 2428–29, 210 L. Ed. 2d 991 (2021) (Gorsuch, J., dissenting) (mem.) (final emphasis added).

This judicial immunity conferred by *New York Times* on public-figure defendants was created out of whole cloth and deprived many injured persons of any redress, who would not be considered by the general public to be a "public figure":

> . . . The Court took it upon itself "to define the proper accommodation between" two competing interests—"the law of defamation and the freedoms of speech and press protected by the First Amendment." *Gertz*, 418 U.S., at 325, 94 S. Ct. 2997 (majority opinion). It consulted a variety of materials to assist it in its analysis: "general proposition[s]" about the value of free speech and the inevitability of false statements, *New York Times*, 376 U.S., at 269–272, and n. 13, 84 S. Ct. 710; judicial decisions involving criminal contempt and official immunity, *id.*, at 272–273, 282–283, 84 S. Ct. 710; public responses to the Sedition Act of 1798, *id.*, at 273–277, 84 S. Ct. 710; comparisons of civil libel damages to criminal fines, *id.*, at 277–278, 84 S. Ct. 710; policy arguments against "self-censorship," *id.*, at 278–279, 84 S. Ct. 710; the "consensus of scholarly opinion," *id.*, at 280, n. 20, 84 S. Ct. 710; and state defamation laws, *id.*, at 280–282, 84 S. Ct. 710. These materials led the Court to promulgate a "federal rule" that "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 279–280, 84 S. Ct. 710. Although the Court held that its newly minted actual-malice rule was "required by the First and Fourteenth Amendments," *id.*, at 283, 84 S. Ct. 710, *it made no attempt to base that rule on the original understanding of those provisions*.
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> *New York Times* was "the first major step in what proved to be a seemingly irreversible process of constitutionalizing the entire law of libel and slander." *Dun & Bradstreet*, 472 U.S., at 766, 105 S.Ct. 2939 (White, J., concurring in judgment). The Court promptly expanded the actual-malice rule to all defamed " 'public figures,' " *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 134, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967), which it defined to include private persons who "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved," *Gertz*, *supra*, at 345, 94 S. Ct. 2997. The Court also extended the actual-malice rule to criminal libel prosecutions, *Garrison v. Louisiana*, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964), and even restricted the situations *in which private figures* could recover for defamation against media defendants, *Gertz*, *supra*, at 347, 349, 94 S.Ct. 2997; *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986).
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> *None of these decisions made a sustained effort to ground their holdings in the Constitution's original meaning*. . . .
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> The constitutional libel rules adopted by this Court in New York Times and its progeny broke sharply from the common law of libel, and there are sound reasons to question whether the First and Fourteenth Amendments displaced this body of common law.

McKee, 139 S. Ct. at 677–78, 203 L. Ed. 2d 247 (2019) (emphasis added).

Justice Thomas explained why libel and slander were *never* thought to be insulated from legal accountability before 1964, and the sound reasons the law protected a person's right to defend his or her reputation from defamation:

These common-law protections for the "core private righ[t]" of a person's " 'uninterrupted enjoyment of . . . his reputation' " formed the backdrop against which the First and Fourteenth Amendments were ratified. Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 567 (2007) (quoting 1 Blackstone *129). Before our decision in *New York Times*, we consistently recognized that the First Amendment did not displace the common law of libel. As Justice Story explained,

> "The liberty of speech, or of the press, has nothing to do with this subject. They are not endangered by the punishment of libellous publications. The liberty of speech and the liberty of the press do not authorize malicious and injurious defamation." *Dexter v. Spear*, 7 F. Cas. 624 (No. 3,867) (C.C. R.I. 1825).

The Court consistently listed libel among the "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–572, 62 S. Ct. 766, 86 L. Ed. 1031 (1942); see, *e.g.*, *Beauharnais*, *supra*, at 254–256, and nn. 4–5, 266, 72 S.Ct. 725 (libelous utterances are "not . . . within the area of constitutionally protected speech"); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 715, 51 S. Ct. 625, 75 L. Ed. 1357 (1931) ("[T]he common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions").

New York Times marked a fundamental change in the relationship between the First Amendment and state libel law.

McKee, 139 S. Ct. at 679–80, 203 L. Ed. 2d 247 (2019).

And once a person's public reputation is destroyed, there is little opportunity for rehabilitation. It is a rare day indeed when a media outlet or a private actor publishes a front-page or lead story about how their false statements destroyed a person's reputation. And far too often, the defamed would-be plaintiffs do not have the financial resources to even attempt to overcome the "actual malice" standard created by the court in *New York Times*.

Even those decisions not critical of *New York Times* rightfully concede that the burden of persuasion imposed on public-figure defamation plaintiffs is "daunting":

> The actual malice standard is famously "daunting." *McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1308 (D.C. Cir. 1996). A plaintiff must prove by "clear and convincing evidence" that the speaker made the statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *Jankovic III*, 822 F.3d at 589–90 (second part quoting *New York Times Co.*, 376 U.S. at 279–80, 84 S.Ct. 710). "[A]lthough the concept of reckless disregard cannot be fully encompassed in one infallible definition," the Supreme Court has "made clear that the defendant must have made the false publication with a *high degree of awareness of probable falsity," or "must have entertained serious doubts as to the truth of his publication*." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667, 109 S.Ct. 2678, 105 L. Ed. 2d 562 (1989) (alteration omitted) (internal quotation marks omitted); *see also id.* at 688, 109 S. Ct. 2678 (using these formulations interchangeably). *The speaker's failure to meet an objective standard of reasonableness is insufficient*; *rather the speaker must have actually "harbored subjective doubt*." *Jankovic III*, 822 F.3d at 589.
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> . . . In any event, *even an "extreme departure from professional standards" is insufficient* to prove actual malice on its own. *Harte-Hanks*, 491 U.S. at 665, 109 S. Ct. 2678.

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> . . .[And] evidence of ill will "is insufficient by itself [in this court] to support a finding of actual malice." *Tavoulareas v. Piro*, 817 F.2d 762, 795 (D.C. Cir. 1987) (en banc); *see also Harte-Hanks*, 491 U.S. at 665, 109 S. Ct. 2678 ("Petitioner is plainly correct in recognizing . . . that a newspaper's motive in publishing a story . . . cannot provide a sufficient basis for finding actual malice.").

Tah v. Glob. Witness Publ'g, Inc., 991 F.3d 231, 240–43 (D.C. Cir. 2021) (Silberman, J., dissenting), *cert. denied,* 142 S. Ct. 427 (2021) (emphasis added).

Judge Silberman, dissenting in *Tah,* later cited by Justice Thomas in *Berisha*, observed the particularly destructive power of the media given the special protections under *New York Times*:

> . . . I am prompted to urge the overruling of *New York Times v. Sullivan*. Justice Thomas has already persuasively demonstrated that *New York Times* was a policy-driven decision masquerading as constitutional law. *See McKee v. Cosby*, —— U.S. ——, 139 S. Ct. 675, 203 L.Ed.2d 247 (2019) (Thomas, J., concurring in denial of certiorari). The holding has *no relation* to the text, history, or structure of the Constitution, and it baldly constitutionalized an area of law refined over centuries of common law adjudication. *See also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 380–88, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) (White, J., dissenting). As with the rest of the opinion, the actual malice requirement was simply cut from whole cloth. *New York Times* should be overruled on these grounds alone.
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> Nevertheless, I recognize how difficult it will be to persuade the Supreme Court to overrule such a "landmark" decision. After all, doing so would incur the wrath of press and media. *See* Martin Tolchin, *Press is Condemned by a Federal Judge for Court Coverage*, New

> York Times A13 (June 15, 1992) (discussing the "Greenhouse effect"). But new considerations have arisen over the last 50 years that make the *New York Times* decision (which I believe I have faithfully applied in my dissent) a threat to American Democracy. It must go.
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> . . . There can be no doubt that the *New York Times* case has increased the power of the media. Although the institutional press, it could be argued, needed that protection to cover the civil rights movement, that power is now abused. In light of today's very different challenges, I doubt the Court would invent the same rule.
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> As the case has subsequently been interpreted, it allows the press to cast false aspersions on public figures with near impunity.

Tah, 991 F.3d at 251, 254–56. (Silberman, J., dissenting) (emphasis added) (footnotes omitted).

The decisions in *New York Times* and its progeny have established an environment in which anyone who might enter the public arena knows that they may be injured by defamation for which there is effectively no legal recourse. In addition, it has led to the destruction of reputations of many who never consented to becoming a so-called "public figure." No doubt this state of affairs since 1964 has diminished the public good from civic-minded citizens who understandably decline to offer their insights, energy, and wisdom to their fellow citizens, given this legal environment.

Such is the grave injury inflicted on the body politic and on innocent people who cannot now rightfully and legally defend their honor and character from the devastating injuries inflicted by defamation. A person's reputation is integral to their dignity as a human being. *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J. concurring) ("The right of a [person] to the protection of his [or her] own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the *essential dignity and*

worth of every human being—a concept at the root of any decent system of ordered liberty." (emphasis added)).

When the media or a private actor defames a victim, the culpable party in essence "steals the reputation" of the victim through character assassination. When a court decision deprives the defamation victim of their legal ability to recover any damages for the theft, that decision is unjust, as it deprives the victim of what is rightfully owed to them.

This is both a violation of the original understanding of the United States Constitution and natural justice:

> In this case the right of the plaintiff which defendant is alleged to have infringed was the right to the security of his reputation. 'The security of his [or her] reputation or good name from the arts of detraction and slander,' Blackstone says, '*are rights to which every [person] is entitled by reason and natural justice*; since without these, *it is impossible to have the perfect enjoyment of any other advantage or right*.' Blackstone's Com. vol. 1, p. 134.

New York Evening Post Co. v. Chaloner, 265 F. 204, 210 (2d Cir. 1920) (emphasis added). I agree.

But as I am bound by *New York Times*, I concur.

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