IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR FLAGLER COUNTY, FLORIDA

SUNBELT LAND MANAGEMENT, LLC., and
SUNBELT HOLDINGS FLORIDA I, LLC.,

CASE NO: 2020 CA 000072

Plaintiff,

v.

JOSEPH K. BRYAN A/K/A KEN BRYAN, and
MARY SARA ARNOFF A/K/A SALLEE ARNOFF,

Defendants.
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ORDER GRANTING FINAL SUMMARY JUDGMENT

THIS CASE is before the Court on the respective Motions for Summary Judgment filed by Defendant, Joseph K. Bryan ("Bryan"), filed on July 12, 2024 (Docket Entry No. 244) and Defendant, Mary Sara Arnoff ("Arnoff"), filed on April 19, 2024 (Docket Entry No. 237). The Court has received and considered competing proposed orders from the parties, reviewed the extensive notes taken during the hearing, and reviewed the record. The Court, also having considered the Defendants' Motions for Summary Judgment and the Plaintiffs' Responses in Opposition, heard the argument of counsel on September 20, 2024, reviewed the Court file, and being otherwise fully advised, for the reasons explained below, grants Defendants' Motions for Summary Judgment and enters Final Judgment in favor of Defendants, Arnoff and Bryan.

I. INTRODUCTION

This case arises from statements made by Defendants at a meeting held by an organization called Preserve Flagler Beach and Bulow Creek, Inc. (hereinafter "Preserve" or "PFBB") on November 7, 2019 to discuss a proposed development in Flagler County. On February 4, 2020, Plaintiffs filed a three-count Complaint against Defendant, Bryan and Defendant, "Jane Doe" for "slander *per se*" and "conspiracy to commit slander," seeking monetary damages based upon

Defendants' statements. On August 5, 2022, Plaintiffs filed an Amended Complaint, naming Defendant, Arnoff in place of Defendant "Jane Doe." Defendants filed Motions for Summary Judgment. For the reasons discussed herein, the Court concludes that Defendants are entitled to final summary judgment in their favor.

II. UNDISPUTED FACTUAL BACKGROUND

Plaintiff, Sunbelt Holdings Florida I, LLC owns a parcel of land on Gun Club Road, St. Johns County Florida and Plaintiff, Sunbelt Land Management LLC, is a parent company of Sunbelt Holdings Florida I, LLC. Amended Compl., ¶¶ 4, 9. Plaintiffs filed the original complaint against Bryan and "Jane Doe," alleging that both Defendants slandered Plaintiffs, and but claiming the identify of "Jane Doe" was unknown. *See generally*, Amended Compl. "Jane Doe" was later identified by Plaintiffs as Arnoff in July of 2022, after Florida's two-year statute of limitations on defamation claims had expired in November of 2021.

The alleged defamatory statements attributed by the Plaintiffs to Arnoff and Bryan were published on November 7, 2019 at a public meeting in Flagler Beach, Florida ("the meeting" or "meeting") held to discuss concerns regarding a proposed housing development in Flagler County, commonly known as the Gardens (hereinafter "the Gardens"). Amended Compl., ¶¶12, 32.

Ken Belshe, an authorized representative of Sunbelt Holdings I, LLC, Sunbelt Land Management, LLC, and Palm Coast Intracoastal, LLC, had hosted a prior meeting on July 1, 2019 to discuss the Gardens project, where he represented to approximately three hundred attendees that he represents "Sunbelt," thereby associating the Gardens project with "Sunbelt."[1] Through Mr. Belshe's statements to the public and media entities, and as reflected in media reports concerning

[1] *See* Dep. Tr. Ken Bryan 20:3-11, 129:5-130:1, August 30, 2024; Dep. Tr. Mary Sara Arnoff 143:20-22, August 30, 2024.

Sunbelt Holdings Florida I, LLC's property on Gun Club Road ("Gun Club Road Property"), the developers of the Gun Club Road Property, Sunbelt Land Management, LLC, and the Gardens project, Plaintiffs were commonly known to the public as "Sunbelt."

The entire alleged defamatory statement attributed to Arnoff was "**And Sunbelt, their mode of operation is to go in and clear-cut all of the land.**" Amended Compl., ¶¶12, 32.

The entire alleged defamatory statement attributed to Bryan was:

> **This particular company, Sunbelt, last month – I'm originally from Maryland. I – I lived in St. Johns County in St. Augustine for 13 years prior to moving here. About three or four weeks ago, I got a call from one of my friends in St. Augustine. This particular company went to a particular piece of property that they own near the airport on Old Gun House Road I believe it is … They moved their equipment in on a Friday and they started clearing land right after all the county employees had left. And they continued to clear land until Sunday night when they were finished. By the time the county found out what had happened, they had clear-cut this entire property. So you say, "Well, what's going to happen?" Well, they got fined. They got fined a boat load, a total of $7,000.00. That's just the cost of doing business**.

Amended Compl., ¶¶12, 20.

Prior to the November 7, 2019 meeting, Defendant, Arnoff believed that all information she presented to the public at the subject meeting was accurate, based upon media articles and other documents or information in the public record that she observed and reviewed, as well as personal observations. Def. Arnoff's MSJ, Ex. L – Arnoff Affidavit, ¶¶ 18, 19, 21, 23, 24, 26, 51. Prior to the November 7, 2019 meeting, Defendant Bryan believed the statements he presented to the public at the subject meeting were accurate, as the statements were based upon media articles and other documents or information in the public record he observed and reviewed, as well as personal observations. Def. Bryan's MSJ Exhibit A – Bryan Affidavit ¶¶ 13 -17, 19, 20 - 23, 34.

Arnoff's interest in Plaintiffs' and "Sunbelt's" activities exclusively concerns the impacts of their development and land clearing activities on her community, and the purpose of her statements at the meeting was to share relevant information with other community members who share the same concerns and might be impacted by "Sunbelt's" development plans and practices. Def. Arnoff's MSJ, Ex. L – Arnoff Affidavit ¶¶ 16 – 19, 21, 50-51; Transcript of Nov. 7, 2019 Community Meeting, p. 4:19-7:21, 19:19-20:17, 27:25-29:9; *see also* Recording of Nov. 7, 2019 Community Meeting 5:05-5:15, 34:59-35:21. Bryan's interest in "Sunbelt's" activities exclusively concerns the impacts of their development and land clearing activities on his community, and the purpose of the statements he made was to share relevant information with other members of the community who might be impacted by "Sunbelt's" development plans, practices, and who share the same concerns. The purpose of the statements was also to encourage "Sunbelt" to engage in sustainable development practices. Def. Bryan MSJ, Ex. A – Bryan Affidavit ¶¶ 25-33; Transcript of Nov. 7, 2019 Community Meeting, p. 2:11-17, p. 4:19-5:6.

The November 7, 2019 meeting was held by Preserve Flagler Beach & Bulow Creek, Inc. ("the Preserve") and "open to the public…promoted and advertised on social media and the press, among others, to solicit and encourage wide, diverse public attendance" and "[a]ccording to media reports, approximately 100 people attended the meeting…." Amend. Compl. ¶¶11-14. The Preserve is a non-profit group, dedicated to preservation and protection of the Flagler Beach area, by bringing awareness to the community of Flagler Beach and Flagler County regarding proposed development in its area. Transcript of Nov. 7, 2019, Community Meeting, p. 4:19-7:21.

The meeting started with Bryan, who introduced himself as well as all members of the Preserve by name, and was the initial speaker, identifying Arnoff and a second woman, Ms. Robin Polletta ("Polletta"), as the next two speakers. Two women then spoke. *See* Audio Recording of

the November 7, 2019, Subject "Meeting," 0:00-12:20; *see also* Transcript of the November 7, 2019, Subject "Meeting," p. 9:11-14, 12:15-16. The alleged defamatory statement was made by the second of the two initial female speakers, identified to the public by Bryan as Arnoff and Polletta. *Id.*

At the time of filing its original complaint, "Sunbelt" knew that the alleged defamatory statement was made by a female, and that there was a total of eight (8) females, out of a possibility of fourteen (14) Preserve Flagler and Bulow Creek members, who were introduced by Bryan at the November 7, 2019 meeting. Amended Compl. ¶15; Initial Compl. ¶¶ 15, 32. On February 4, 2020, at the time of filing the initial Complaint, Plaintiffs possessed the means to identity Arnoff as the speaker of the alleged defamatory statement, from the recording of the meeting, which identifies Arnoff as the speaker. *See generally*, Transcript of Nov. 7, 2019 Community Meeting, p. 28:6-12, 17:7-15; 35:22- 35:25, 32:10 -32:23. Almost three years prior to filing the Amended Complaint, Plaintiffs had in their possession the audio recording, within which Arnoff could be identified as the speaker at the November 7, 2019 "meeting." *Id.*

Prior to the meeting, media reports published to the general public detailed the circumstances of Plaintiffs' actions at the Gun Club Road property and included statements that "Sunbelt" conducted "illegal land clearing" and "illegal activity" at the Gun Club Road Property. Media reports also stated that "Sunbelt" cleared "acres and acres" of trees without permits and suffered a penalty for the illegal clearing of land.[2] Prior to the meeting, published media reports explicitly used the term "clear cutting" to describe the activities of "Sunbelt" at the Gun Club Road

[2] https://www.firstcoastnews.com/article/tech/science/environment/st-johns-county-commissioners-call-for-stricter-penalties-for-illegal-land-clearing/77-2acbb0ba-e97e-4c2f-a6f8-364dd83ea08e

Property.[3] These media reports also discuss the penalty received by "Sunbelt" for clearing land without a permit.[4]

Media reports published to the public prior to the meeting attributed the illegal Gun Club Road clearing to simply "Sunbelt" and the Gardens project to both "Sunbelt" and "Sunbelt Land Management," furthering the public perception of these controversies being attributed to Plaintiffs, also known as simply "Sunbelt."[5]

Clear-cutting as a land development activity is permissible by the St. Johns County Code of Ordinances and not illegal, unless done without a permit,[6] as stated by St. Johns County Environmental Supervisor, Ryan Mauch, publicly.[7]

III. SUMMARY JUDGMENT STANDARD

Florida has adopted the Federal summary judgment standard. *See In re Amends. to Fla, Rule of Civ. Proc. 1.510*, 317 So. 3d 72, 74 (Fla. 2021); Fla. R. Civ. P. 1.510(a) ("The summary judgment standard provided for in this rule shall be construed and applied in accordance with the federal summary judgment standard."). Under revised Rule 1.510, "[t]he court shall grant

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[3] https://www.staugustine.com/story/news/local/2019/10/04/crew-clears-land-cuts-trees-in-st-johns-county-without-approval/2606028007/.

[4] *Id.*

[5] https://www.news-journalonline.com/story/news/local/flagler/2019/07/01/smart-growth-assault-nature-flagler-developers-plans-home-community-rile-neighbors-flagler-county/4792010007/; https://www.news-journalonline.com/story/news/local/flagler/2019/07/02/300-pack-flagler-meeting-to-hear-about-massive-gardens-development-plans/4785609007/; https://www.firstcoastnews.com/article/tech/science/environment/st-johns-county-commissioners-call-for-stricter-penalties-for-illegal-land-clearing/77-2acbb0ba-e97e-4c2f-a6f8-364dd83ea08e.

[6] Clear-cutting pursuant to an approved Development Plan shall require the planting of replacement Trees as indicated in the detailed landscape plan accompanying the Construction Permit application. St. Johns County Land Development Code, Sec. 3.06.10 Landscape Criteria (C)(3).

[7] https://www.staugustine.com/story/news/local/2019/10/04/crew-clears-land-cuts-trees-in-st-johns-county-without-approval/2606028007/.

summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a). The party moving for summary judgment has the initial burden to prove the nonexistence of any genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant satisfies this initial burden, the nonmoving party must present evidence sufficient to reveal a genuine issue. It is not enough for the nonmoving party merely to assert that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586- 87 (1986). Rather, the nonmoving party must go beyond the pleadings and show that there is a genuine disputed issue of material fact for trial. *See* Fla. R. Civ. P. 1.510(c)(1). "For factual issues to be considered genuine, they must have a real basis in the record." *Mann v. Taser Int'l, Inc.*, 588 F.3d 1291, 1303 (11th Cir. 2009). "In Florida it will no longer be plausible to maintain that the existence of any competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the slightest doubt is raised." *In re Amendments to Fla. R. of Civ. P. 1.510*, 317 So. 3d at 75.

A dispute of a material fact, for purposes of a summary judgment motion, must concern "facts that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[T]he substantive law will identify which facts are material," and "[f]actual disputes that are irrelevant or unnecessary will not be counted." *Id* "[t]he mere existence of some factual dispute will not defeat summary judgment unless that factual dispute is material to an issue affecting the outcome of the case." *Chapman v. Al Transport*, 229 F.3d 1012, 1023 (11th Cir. 2000). Thus, "[a] court need not permit a case to go to a jury. . . when the inferences that are drawn from the evidence, or upon which the non- movant relies, are 'implausible.'" *Mize v. Jefferson City Bd. of Educ.*, 92 F.3d 739, 743 (11th Cir. 1996); *see also*

Scott v. Harris, 550 U.S. 372, 380 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."); *Matsushita Elec. Indus. Co.*, 475 U.S. at 587 ([W]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial."). To withstand summary judgment, it is not enough for the opposing party to conjure up insubstantial paper issues. *Lufthansa German Airlines Corp. v. Mellon*, 444 So.2d 1066 (Fla. 3rd DCA 1984). Argument, rhetoric, speculation, and theories of counsel for the non-moving party is insufficient to prevent entry of summary judgment. *Seaboard Systems R.R., Inc. v. Goforth*, 545 So.2d 482 (Fla. 5th DCA 1989). The moving party need not exclude "every possible inference" from other evidence that may have been available to shift the burden to the nonmoving party. *Stepp v. State Farm Fire & Cas. Co.*, 656 So.2d 494,496 (Fla. 1st DCA), rev. denied 663 So.2d 632 (Fla. 1995).

Summary Judgment in Defamation Cases

The trial court plays a "prominent function" in defamation cases by determining as a matter of law at an early stage in the litigation, such as on a motion for summary judgment, if the complained of statement is reasonably capable of defamatory meaning or is privileged. *Byrd v. Hustler Magazine, Inc.*, 433 So. 2d 593, 595 (Fla. 4th DCA 1983), review denied, 443 So. 2d 979 (Fla. 1984) (*citing Wolfson v. Kirk*, 273 So. 2d 774, 778 (Fla. 4th DCA 1972), cert. denied, 279 So. 2d 32 (Fla. 1973); *see also Smith v. Cuban Amer. Nat'l Found.*, 731 So. 2d 702, 704 (Fla. 3d DCA 1999) (holding that "if a statement is not capable of defamatory meaning, it should not be submitted to the jury"). Pretrial disposition is especially appropriate in defamation cases because of the "chilling effect" these cases have on First Amendment rights. *Karp v. Miami Herald Publ'g*

Co., 359 So. 2d 580, 581 (Fla. 3d DCA 1978); see *also Stewart v. Sun-Sentinel Co.*, 695 So. 2d 360, 363 (Fla. 4th DCA 1997).[8] "Our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of 'breathing space' so that protected speech is not discouraged." *Harte–Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 686, (1989). "Whatever is added to the field of libel is taken from the field of free debate." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 272, (1964), *see also Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1110 (Fla. 2008).

For this reason, a First Amendment privilege applies to statements regarding matters of public policy. *NY Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The United States Supreme Court has warned of constitutional harm inherent in allowing such suits to proceed to be heard by judges and juries who might "impose liability on the basis of [their] tastes or views, or perhaps on the basis of their dislike of a particular expression." *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 55 (1988); *see also Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 486, 505 (1984) ("danger that decisions by triers of fact may inhibit the expression of protected ideas"). *Kassel* v. *Gannett Co.*, 875 F.2d 935, 949 (1st Cir. 1989) (Holding that the First Amendment "requires that unbounded speculation by juries be discouraged, lest other speakers be chilled").

A defamation claimant who is a public, or limited public, figure that is significantly intertwined in the public controversy in question, must prove actual malice. *Mile Marker, Inc. v. Petersen Publ'g, L.L.C.*, 811 So. 2d 841, 846-47 (Fla. 4th DCA 2002); *Friedgood v. Peters Pub.*

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[8] The court must make an initial determination as to whether the Plaintiff's proffered defamatory meaning is reasonable in light of the entire context of the challenged publication. *See Byrd*, 433 So. 2d at 595 (citation omitted). The trial court must evaluate an allegedly defamatory publication not by "extremes, but as the common mind would naturally understand it." *McCormick v. Miami Herald Publ'g Co.*, 139 So. 2d 197, 200 (Fla. 2d DCA 1962); *Cooper v. Miami Herald Publ'g Co.*, 31 So. 2d 382, 384 (Fla. 1947). "The statement should be considered in its natural sense without a forced or strained construction." *Byrd*, 433 So. 2d at 595.

Co., 521 So. 2d 236, 242 (Fla. 4th DCA 1988). Such a plaintiff bears the heavy burden of proving by clear and convincing evidence that the Defendant's statements were false, defamatory, and published with actual malice. *See Mile Marker, Inc.*, 811 So. 2d at 845; *Friedgood*, 521 So. 2d at 239.

The determination of whether the Plaintiff is a public or private figure is an issue of law for the Court's determination. *Turner v. Wells*, 879 F.3d 1254, 1271-72 (11th Cir. 2018) (citing *Saro Corp. v. Waterman Broad Corp.*, 595 So.2d 87, 89 (Fla. 2d DCA 1992).

Summary judgment is proper against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In such a case, there is no genuine issue of material fact "since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Id.* If the claimant cannot prove actual malice, a genuine issue to be tried, summary judgment in favor of the moving party is proper. *Id.*

"Where the circumstances surrounding defamatory communication are undisputed, or are so clear under the evidence as to be unquestionable, then the question of whether the occasion upon which they were spoke was privileged is a question of law to be decided by the court." *Nodar v. Galbreath*, 462 So. 2d 803, 810 (Fla. 1985).[9] In the case now before the Court, even if the challenged statements were defamatory, which they are not, the general presumption of malice would not apply because the Defendants "have a qualified privilege to make the statements."

[9] "The determination that a defendant's statements are qualifiedly privileged eliminates the presumption of malice .... The privilege instead raises a presumption of good faith and places upon the plaintiff the burden of proving express malice-that is, malice in fact as defined by the common-law doctrine of qualified privilege." *Nodar*, 462 So. 2d, at 810.

Lefrock v. Walgreens Co., 77 F. Supp. 3d 1199, 1201 (M.D. Fla. 2014). Thus, even if Plaintiffs' claims were for slander *per se*, they must still prove malice to survive summary judgment. The Defendants have established that the allegedly defamatory statements are qualifiedly privileged and are entitled to summary judgment because the Plaintiffs cannot rebut the good faith presumption with admissible evidence of express malice. *See Shaw v. R.J. Reynolds Tobacco Co.*, 818 F. Supp. 1539, 1543 (M.D. Fla. 1993).

IV. SUMMARY JUDGMENT IS WARRANTED

A. *The Alleged Defamatory Statements in Count I and II are Constitutionally Privileged as They Were Made Without Actual Malice and Plaintiffs are Limited Public Figures*

1. Plaintiffs are Limited Public Figures

Plaintiff, Sunbelt Holdings I, LLC concedes it is a limited public figure with respect to the Gun Club Road property,[10] and as a result, impliedly concedes the subject controversy is a public controversy. Based on the undisputed facts, the Court finds as a matter of law that both Plaintiffs are limited public figures, significantly intertwined within the public controversy in question, and thus bear the heavy burden of proving by clear and convincing evidence that the Defendants' statements were false, defamatory, and published with actual malice. *Mile Marker, Inc. v. Petersen Publ'g, L.L.C.*, 811 So. 2d 841, 846-47 (Fla. 4th DCA 2002); *Turner v. Wells*, 879 F.3d 1254, 1271-72 (11th Cir. 2018).

Plaintiffs are limited public figures under the three-part test explained in *Della-Donna v. Gore Newspapers Co.*, 489 So. 2d 72, 76 (Fla. 4th DCA 1986) because (1) the case involves a public controversy; (2) the plaintiffs played a sufficiently central role in that controversy; and (3) the alleged defamation was germane to the plaintiff's involvement in the controversy." Plaintiffs

[10] Pl. Response in Opposition to Def. Arnoff MSJ, p. 85; Pl. Response in Opposition to Def. Bryan MSJ, p. 37.

"voluntarily engaged in a course that was bound to invite attention and comment."' *Silvester v. Am. Broad. Cos.*, 839 F.2d 1491, 1496 (11th Cir. 1988). Plaintiffs often and voluntarily engaged with the media on the issue of their development of the Gun Club Road and Gardens properties, and engaged in a course of conduct, including through illegally clearing land for development, that invites attention and comment. *Id.*; *Accord*, *Mattel, Inc. v. MCA Recs., Inc.*, 28 F. Supp. 2d 1120, 1162–63 (C.D. Cal. 1998), aff'd, 296 F.3d 894 (9th Cir. 2002) (holding that a company was a public figure as a result of promoting itself and its products for many years, with such efforts increasing at the time of the litigation when it began sending statements to numerous press outlets); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974) ("an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues."); *Silvester v. Am. Broad. Companies, Inc.*, 650 F. Supp. 766, 776 (S.D. Fla. 1986), aff'd, 839 F.2d 1491 (11th Cir. 1988) (Finding "regular and continuing access to the media that is one of the accouterments of having become a public figure.")

2. The Overlapping Topics of Rapid Development and Land Clearing Constitute an Undeniable Public Controversy as a Matter of Law

This matter arises out of land development activities in St. Johns and Flagler counties, at the Gun Club Road and Gardens property, respectively. These activities have the potential to result in significant impacts to the local community - as demonstrated by the large community, media, and governmental interest in such development, including the clearing of land.[11] These activities and practices, widely attributed by the community and regional media to "Sunbelt," are of public importance to the impacted communities. This suit arises out of alleged statement regarding

[11] https://www.news-journalonline.com/story/news/local/flagler/2019/07/01/smart-growth-assault-nature-flagler-developers-plans-home-community-rile-neighbors-flagler-county/4792010007/.

"Sunbelt's" land development activities, uttered at a **meeting, "open to the public…promoted and advertised on social media and the press, among others, to solicit and encourage wide, diverse public attendance**", at which **"**[a]ccording to media reports, approximately **100 people attended the meeting**…" Amend. Compl. ¶¶11-14. The significant public media coverage of these land development activities demonstrates as a matter of law, that the alleged defamation arose out of a matter of public concern that impacted members of the community, beyond the immediate participants to the dispute. The same is true as reflected by the admissions in Plaintiffs' Amended Complaint, alleging that the November 7, 2019 meeting was hosted and open to the "public to discuss … concerns regarding the development of a parcel of land… The Gardens." Amended Complaint ¶11.

The subject matter of the alleged defamatory statements in this case is a public controversy under the *Della-Donna* decision. *Della-Donna,* 489 So. 2d at 76-77. Specifically, this dispute with organizations[12] known by the community as "Sunbelt",[13] who are and were developing land in this community, is a public controversy. As such, Plaintiffs are at least limited public figures. Plaintiffs

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[12] Though filed as different entities with the state of Florida, Plaintiffs, its affiliated companies and development projects, including the Gardens project (also known as "Veranda Bay") are represented as "Sunbelt" through their own representatives in media engagements, public engagements, as well as marketing themselves as "Sunbelt Land Management & Affiliates" upon its own website upon which they list the Gardens project (Veranda Bay).

[13] *See generally* Transcript of Nov. 7, 2019 Community Meeting; Recording of Nov. 7, 2019 Community Meeting; *see also* https://www.firstcoastnews.com/article/tech/science/environment/st-johns-county-commissioners-call-for-stricter-penalties-for-illegal-land-clearing/77-2acbb0ba-e97e-4c2f-a6f8-364dd83ea08e; https://www.news-journalonline.com/story/opinion/columns/guest/2019/07/06/developer-of-controversial-high-density-gardens-project-near-flagler-beach-were-not-going-away/4752209007/; https://www.staugustine.com/story/news/local/2019/10/04/crew-clears-land-cuts-trees-in-st-johns-county-without-approval/2606028007/; https://www.firstcoastnews.com/article/news/local/st-johns-county-issues-cease-and-desist-order-to-stop-illegal-land-clearing/77-6e16b754-b974-4aca-8875-9e5daf10ed8a.

and their affiliated entities develop land throughout the local area, and the manner in which they do so, including whether they do so by legal means, is a "public controversy", rendering this controversy one in which sizeable segments of the community have different, strongly held views,[14] "Sunbelt" itself acknowledged this through its representative, Ken Belshe who stated they "knew many locals would be 'passionate' in their concerns over the potential environmental and traffic impacts posed by his company's proposed high-density 'smart growth' project in Flagler County."[15]

Plaintiff, Sunbelt Holdings Florida I, LLC's discovery admissions concede that during its regular course of business in "developing", at least as it relates to the Gun Club Road property, it has engaged with local governments, and thus public officials, to apply for various development approvals that require public tax dollars and require public hearings, where the general public has the right to make comment on such proposed authorizations.[16] Plaintiffs also admit that public opposition was voiced with respect to Sunbelt Holdings Florida I LLC's development authorizations sought from St. Johns County, covered by local news media.[17]

Plaintiffs, "Sunbelt's" development and clearing of land in St. Johns County and Flagler County attracted so much public attention that they caused St Johns County to enact new legislation to deter such practices as part of a developer's mode of operation.[18] Local media stories,

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[14] *See Della-Donna,* 489 So. 2d at 76.

[15] https://www.news-journalonline.com/story/opinion/columns/guest/2019/07/06/developer-of-controversial-high-density-gardens-project-near-flagler-beach-were-not-going-away/4752209007/; *See Della-Donna,* 489 So. 2d at 76.

[16] *See* 02.05.24 - Plaintiff, Sunbelt Holdings Florida I Amended Responses to Defendant, Arnoff's Requests for Admission No.s 1 and 2.

[17] *See* 02.05.24 - Plaintiff, Sunbelt Holdings Florida I Amended Responses to Defendant, Arnoff's Requests for Admission No.s 3 and 14.

[18] https://www.firstcoastnews.com/article/tech/science/environment/st-johns-county-commissioners-call-for-stricter-penalties-for-illegal-land-clearing/77-2acbb0ba-e97e-4c2f-a6f8-364dd83ea08e; https://www.staugustine.com/story/special/2020/05/23/st-johns-county-updates-

which describe Plaintiffs commonly known as "Sunbelt" and their practices as "illegal land clearing" were broadcast on local media and television prior to the November 7, 2019 meeting and the alleged defamation, including:

- An October 18, 2019 Article and televised media story from Frist Coast News, titled *"St. Johns County commissioners call for stricter penalties for illegal land clearing"* https://www.firstcoastnews.com/article/tech/science/environment/st-johns-county-commissioners-call-for-stricter-penalties-for-illegal-land-clearing/77-2acbb0ba-e97e-4c2f-a6f8-364dd83ea08e.

- A July 6, 2019 Article, titled Flagler developer: "*'We're not going away' The Gardens project calls for nearly 4,000 homes, apartments, condos, townhouses on 825 acres*" https://www.news-journalonline.com/story/opinion/columns/guest/2019/07/06/developer-of-controversial-high-density-gardens-project-near-flagler-beach-were-not-going-away/4752209007/.

- An October 4, 2019 article in the St. Augustine Record, titled "*County Stops Land Clearing, Crew Clears Land, Tree Without Approval"* https://www.staugustine.com/story/news/local/2019/10/04/crew-clears-land-cuts-trees-in-st-johns-county-without-approval/2606028007/.

- A September 24, 2019 article from First Coast News, titled "*The St. Johns County Growth Management Office issued a cease-and-desist order to a developer who was clearing trees illegally"* https://www.firstcoastnews.com/article/news/local/st-johns-county-issues-cease-and-desist-order-to-stop-illegal-land-clearing/77-6e16b754-b974-4aca-8875-9e5daf10ed8a.

- A May 23, 2020 article from the St. Augustine Record, titled *"St. Johns County Updates Tree-Cutting Laws"* https://www.staugustine.com/story/special/2020/05/23/st-johns-county-updates-tree-cutting-laws/1159957007/.

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tree-cutting-laws/1159957007/. (A May 23, 2020, article from the St. Augustine Record, titled "St. Johns County Updates Tree-Cutting Laws" reported that "in response to public pressure that the regulations didn't go far enough, commissioners voted 5-0 … to amend the Land Development Code to add more teeth to current ordinances."); *See* St. Johns County Incident and Investigation Form No. 1906265; *see also* 09.23.19 St. Johns County – Stop Work Order Notice, Exhibit K to Defendnat, Arnoff's Motion for Summary Judgment.

Other articles demonstrate that the issue of development was a matter of heightened public interest and concern in St. Johns and Flagler Counties during the time period when the Plaintiffs' application was pending, including:

- A July 1, 2019 article published by The Daytona Beach News-Journal, titled *"Flagler Development Calls for 4,000 Homes, Nearly 8,000 Sign Petition Opposing Project; Public Meeting Monday Night"* quotes "**Ken Belshe, a project manager for SunBelt's the Gardens project**" who publicly stated "We want their [area residents'] input and suggestions. We truly do…It needs to be a community discussion." https://www.news-journalonline.com/story/news/local/flagler/2019/07/01/smart-growth-assault-nature-flagler-developers-plans-home-community-rile-neighbors-flagler-county/4792010007/. (Emphasis added).

- A November 8, 2021 article entitled "*Growing Pains: The connection between clear cutting and population growth*" https://www.firstcoastnews.com/article/news/special-reports/growing-pains-connection-between-clear-cutting-population-growth/77-16f9a415-9743-409f-905f-c642bfcef9e2;

- A January 8, 2022 article, entitled *"Do something:" Residents voice concerns about rapid development in St. Johns County"* https://www.firstcoastnews.com/article/news/local/do-something-residents-voice-concerns-about-rapid-development-in-st-johns-county/77-0fb745a4-d118-4e3b-9972-659584dce4fe;

- A January 25, 2022 article, entitled *"St. Johns residents voice concerns over county's rapid growth"* https://www.actionnewsjax.com/news/local/st-johns-residents-voice-concerns-over-countys-rapid-growth/J3FIET5BYVC2JET2JQHQUMPZOU/;

- A February 10, 2020 article, entitled *"One Side Says Defamation. The Other Says Intimidation. The Gardens Development Spins-Off a Lawsuit"* https://flaglerlive.com/sunbelt-v-bryan/;

- A November 8, 2019 article, entitled "*Update on Gardens project draws crowd to Flagler Beach Church"* (Referring to the subject meeting on November 7, 2019). https://www.news-journalonline.com/story/news/local/flagler/2019/11/08/update-on-gardens-project-draws-crowd-to-flagler-beach-church/1729737007/

Plaintiffs' development activities by nature, and their impact on the local community (as demonstrated by the attendance at the "meeting" and various local new media publications on

these issues and regarding this very lawsuit) are indisputably felt by and are of concern to those beyond the parties in this case, and this the subject of public controversy. *See Mile Marker, Inc. v. Petersen Publ'g, L.L.C.*, 811 So. 2d 841, 845 (Fla. 4th DCA 2002)("In determining whether a matter is a 'public controversy,' the court should ask whether a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution."). As a matter of law, "**[i]f issue was being debated publicly and if it had foreseeable and substantial ramifications for non-participants, it was a public controversy**." *Della-Donna*, 489 So. 2d at 77. (emphasis added). A reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution. *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1297 (D.C. Cir. 1980).

Any possible claim by the Plaintiffs that their development and their practices were a not a public controversy is refuted by the admission of Plaintiffs' representative, Ken Belshe, reported on July 1, 2019, by The Daytona Beach News-Journal, that "**We want their input and suggestions. We truly do,' said Ken Belshe, project manager for SunBelt's The Gardens project. 'It needs to be a community discussion**.'"[19] This article also quotes Arnoff, and former County Commissioner Barbara Revels, as citing adverse effects to local traffic stemming from the proposed development.[20]

Based upon the public nature of the subject and as evidenced by the community discussion and debate of the topic of illegal clearing of land and rapid development and how to properly mitigate it, this matter is a public controversy as a matter of law. Further, for purposes of this

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[19] https://www.news-journalonline.com/story/news/local/flagler/2019/07/01/smart-growth-assault-nature-flagler-developers-plans-home-community-rile-neighbors-flagler-county/4792010007/. (Emphasis added).

[20] *Id.*

analysis, both Plaintiffs, though filed as different entities with the state of Florida, along with the Gardens project (also known as "Veranda Bay") are collectively known as, and affiliated with the name, "Sunbelt" due to Plaintiffs' own representations to media and the public, as well as marketing themselves as "Sunbelt Land Management & Affiliates" upon their own website where they claim the Gardens project (Veranda Bay) as their own.

3. Plaintiffs Both Played a Central Role in the Public Controversy, the Subject of the Alleged Defamatory Statement, Which Followed the Publication of Media Reports Documenting Sunbelt as Clearing Illegally.

Plaintiffs played a central role in the public controversy, by injecting themselves into the public debate about their development applications and practices. Plaintiffs are part of a network of affiliated organizations, with overlapping ownership and management, that boasts "over 46 years of experience… 40,000 acres of land transformed into over 150 residential communities…valued at over 1.5 billion dollars" developing throughout the "sunbelt" and in the local community, in fact their website specifically lists itself as "Sunbelt Land Management & **Affiliates**." *See* Plaintiffs' website http://sunbeltlandmgmt.com. (Emphasis added).[21] Plaintiffs admit they have developed over a billion dollars' worth of land, 150 residential communities across 40,000 acres, and thus are clearly limited public figures, whether they desire to be or not, in the areas in which they develop land, especially in areas where they have been found violating the law as part of their development. *See* http://sunbeltlandmgmt.com/ (Plaintiffs are self-described as

[21] By the very nature and scale of their land development activities, Plaintiffs are limited public figures in the areas in which they develop, **as they are required to go before local governments for comprehensive plan amendment changes, zoning changes, and site plan approvals for each of these projects before a public body, where the members of the public provide comment upon projects where their elected officials vote to approve or disprove, as they admit** *See* Defendant, Arnoff MSJ Ex. J - 02.05.24 - Plaintiff, Sunbelt Holdings Florida I Amended Responses to Defendant, Arnoff's Requests for Admission, No.s 1, 2.

"**Sunbelt Land Management & Affiliates**" and list "Veranda Bay" formerly known as the "Gardens" property as one of "Sunbelt Land Management & Affiliates'" "communities.")(emphasis added); *see also* St. Johns County Incident and Investigation Form **finding Plaintiff, Sunbelt Holdings Florida I, LLC "clearing [land] without a permit".** (emphasis added).

Plaintiffs' argument that Plaintiff, Sunbelt Land Management, LLC is unrelated to the public controversy is unconvincing. Whether or not Sunbelt Land Management, LLC directly owns or develops either the Gun Club Road or Gardens property does not invalidate the actions of both Plaintiffs, in associating themselves with the aforementioned development and public controversy, as reflected in both Plaintiffs being referred to by name in the media. **Ken Belshe**, "Authorized Representative - Acquisitions, Entitlements and Development" for both Plaintiffs[22], Palm Coast Intercoastal, LLC, and "Sunbelt Land Management & Affiliates,"[23] thrust Plaintiffs into the center of the controversy regarding their development practices in Defendants' local community by engaging with local media on these very issues.[24]

Plaintiff, Sunbelt Land Management cannot plausibly claim to not be a limited public figure, regarding a matter of public concern for purposes of this lawsuit, given the public statements of its self-proclaimed agent, Mr. Belshe, on July 1, 2019, that Plaintiffs' proposed

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[22] 02.09.2024 – Plaintiff, Sunbelt Holdings Florida I Amended Answers to Defendant, Arnoff's Interrogatories; 02.09.2024 – Plaintiff, Sunbelt Land Management Amended Answers to Defendant, Arnoff's Interrogatories, No.s 1. (Exhibits M & N to Defendant, Arnoff's Motion for Summary Judgment).

[23] *See* Composite Ex. B to Defendant, Arnoff's Motion for Summary Judgment.

[24] *See* https://www.news-journalonline.com/story/opinion/columns/guest/2019/07/06/developer-of-controversial-high-density-gardens-project-near-flagler-beach-were-not-going-away/4752209007/ (emphasis added).

"Gardens" development "**needs to be a community discussion**".[25] Plaintiffs, "Sunbelt's" engagement of the media on these issues,[26] and its conduct in the public sphere, including at public meetings, demonstrates that the Plaintiffs knowingly and affirmatively thrust themselves into, and played a central role in, a public controversy. Plaintiffs' self-created perception has been succinctly reflected by local media stating: **"[t]o the general public, SunBelt may be Sunbelt**..." As a matter of law, Plaintiffs are both limited public figures.

4. Plaintiffs Failed to Demonstrate any Actual Malice and Defendants' Statements are Constitutionally Protected

Public figure defamation[27] plaintiffs are held to a heightened burden[28] and cannot prevail in a defamation claim unless they prove that the statement was made with **"actual malice,"** that is, **with knowledge of its falsity or with reckless disregard for the truth** by "**clear and convincing evidence"**. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *see also Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1239 (11th Cir.1999); *Mid.-Fla. Telev. Corp. v. Boyles*, 467 So.2d 282, 283 (Fla. 1985). In *Klayman v. Judicial Watch, Inc.*, the Southern District of Florida held a public figure plaintiff must prove a defamation defendant "**either knew the alleged defamatory statements were false, or published them with**

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[25] *See* https://www.news-journalonline.com/story/news/local/flagler/2019/07/01/smart-growth-assault-nature-flagler-developers-plans-home-community-rile-neighbors-flagler-county/4792010007/. (Emphasis added).

[26] *See Mile Marker, Inc.*, 811 So.2d at 846. ("the level of media access enjoyed by a particular claimant should be considered as part of the public figure calculus. *See Gertz,* 418 U.S. at 344, 94 S.Ct. 2997") (noting the state's interest in protecting public figures is less acute than its interest in protecting private individuals since public figures have assumed the risk of injury by voluntarily entering the public arena and they are less vulnerable to injury from defamatory falsehoods due to greater access to the channels of communication").

[27] "Defamation (libel and slander) may generally be defined as the unprivileged publication of false statements which naturally and proximately result in injury to another." *Byrd v. Hustler Magazine, Inc.*, 433 So.2d 593, 595 (Fla. 4th DCA 1983).

[28] *See New York Times v. Sullivan*, 376 U.S. 254, 280-282 (1964); *Silvester v. Am. Broad. Cos.*, 650 F. Supp. 766, 770 (S.D. Fla. 1986).

reckless disregard despite awareness of their probable falsity." *Klayman v. Judicial Watch, Inc.*, 22 F. Supp. 3d 1240 (S.D. Fla. 2014), *judgment aff'd*, (Feb. 17, 2015) (applying Florida law) (Emphasis added). Similarly, in *Mile Marker, Inc.*, 811 So. 2d at 845 (Fla. 4th DCA 2002). The Fourth District held that, where public figures are concerned:

> [T]he state's interest in protecting the defamed subject's reputation is lessened, and as such, **public plaintiffs must allege a higher level of mens rea on behalf of defendant publishers, in order to balance the attendant First Amendment concerns bound up with defamation and public speech**.

Actual malice is an **"overwhelming"** standard. *Demby v. English*, 667 So. 2d 350, 354 (Fla. 1st DCA 1995) (emphasis added). Findings of actual malice are typically limited to those cases where "online publications 'were **fabricated, wholly imaginary, based on an unverified anonymous phone call, inherently improbable, or obviously worthy of doubt**.'" *Lam v. Univision Commc'ns, Inc.*, 329 So. 3d 190, 198 (Fla. 3d DCA 2021) (emphasis added). A public figure defamation plaintiff must prove that the defendant had **actual knowledge the statement was false** or a "**high degree of awareness of ... probable falsity**." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). (emphasis added). Even a failure to investigate existing facts before publishing (even when a reasonably prudent person would have done so), is not sufficient to establish reckless disregard. *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 688 (1989). For this reason, here, the Plaintiffs' insistence that the Defendants should have gone beyond the matters reported in the media and further researched the name of the actual corporate entity that owned the land where the tree clearing occurred and the exact extent of the clearing does not create a disputed material fact or constitute potential proof of malice.

The Plaintiffs cannot meet their burden of proving that the Defendants made the allegedly slanderous statements with **"actual malice,"** that is, **with knowledge of its falsity or with reckless disregard for the truth**, by "**clear and convincing evidence.**" On summary judgment,

once established as limited public figures, the **Plaintiffs bear the burden to present record evidence sufficient to satisfy this Court that a genuine issue of material fact exists which would allow a jury to find by clear and convincing evidence the existence of actual malice on the part of the Defendants**, which they have not. *See Mile Marker, Inc.*, 811 So. 2d at 846–47. (emphasis added); *see also Dockery v. Fla. Democratic Party*, 799 So.2d 291 (Fla. 2d DCA 2001)(noting that, under the actual malice standard , motions for summary judgment by a defendant against a public-figure plaintiff are to be more liberally granted).

Plaintiffs have failed to provide any evidence that could constitute actual malice, let alone sufficient evidence to satisfy this Court, that a genuine issue of material fact exists which would allow a jury to find actual malice **by clear and convincing evidence**. The evidence proffered by Plaintiffs categorically fails to show either Defendant had actual knowledge the statement was materially false, "high degree of awareness of … probable falsity," or that the "gist" of the statements were materially false. Garrison, 379 U.S. at 74.

To the contrary, the only evidence in the record as to whether or not the alleged statements are false, demonstrates that Plaintiffs did in fact clear cut trees. First, Plaintiffs admit that it is common for land developers to clear land in order to build upon it.[29] Second, Plaintiff, Sunbelt Land Management, LLC was **cited for clearing land without required County approval**[30] and aerial photographs of the "Gardens" property show massive clearing.[31]

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[29] 02.05.24 - Plaintiff, Sunbelt Holdings Florida I Amended Responses to Defendant, Arnoff's Requests for Admission, No. 25.

[30] *See* St. Johns County Incident and Investigation Form No. 1906265 ("Clearing, Significant Natural Communities Habitat impacts, and upland buffer impacts.").

[31] *See* images of the Gardens clearing (Veranda Bay). (Attached to Defendant, Arnoff's Motion for Summary Judgment as Ex. D.)

Further, the alleged defamatory statement, which is the focus of the Plaintiffs' Amended Complaint, was first published by the local media months prior to the November 7, 2019 meeting. Multiple local media agencies reported stories broadcasted and published written stories expressly and specifically characterizing "Sunbelt's" development operations at the Gun Club Road property as "illegal land clearing" and "illegal activity," and that and such practices are "not uncommon."[32]

The media reports chronicled St. John's County's citation of "Sunbelt" for "clearing without permit" and "clearing, significant natural communities habitat impacts, and upland buffer impact" and issuing a stop work order as a result.[33] In an article titled *"St. Johns County Commissioners Call for Stricter Penalties for Illegal Land Clearing"* First Coast News reported that:

> County Records show that **a developer cut down acres and acres of trees near the St. Augustine airport and the developer, Sunbelt did not have a permit to cut down those trees**....[34]

The Gun Club Property, the subject of the statement in question, and Gardens property, the subject of the "meeting" were both cleared, at least partially, and the former without the approval

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[32] *See* St. Johns County commissioners call for stricter penalties for illegal land clearing, October, 18, 2019, https://www.firstcoastnews.com/article/tech/science/environment/st-johns-county-commissioners-call-for-stricter-penalties-for-illegal-land-clearing/77-2acbb0ba-e97e-4c2f-a6f8-364dd83ea08e; County stops land clearing - Crew clears land, trees without approval, October 4, 2019, https://www.staugustine.com/story/news/local/2019/10/04/crew-clears-land-cuts-trees-in-st-johns-county-without-approval/2606028007/; "The St. Johns County Growth Management Office issued a cease-and-desist order to a developer who was clearing trees illegally," September 24, 2019, https://www.firstcoastnews.com/article/news/local/st-johns-county-issues-cease-and-desist-order-to-stop-illegal-land-clearing/77-6e16b754-b974-4aca-8875-9e5daf10ed8a.

[33] *See* St. Johns County Incident and Investigation Form, Incident No. 1906265; 09.23.19 - St. Johns County - Stop Work Order Notice (Attached as Ex. K to Defendant, Anroff's Motion for Summary Judgment.

[34] *St. Johns County commissioners call for stricter penalties for illegal land clearing*, October, 18, 2019, https://www.firstcoastnews.com/article/tech/science/environment/st-johns-county-commissioners-call-for-stricter-penalties-for-illegal-land-clearing/77-2acbb0ba-e97e-4c2f-a6f8-364dd83ea08e.

required by County ordinances. These facts support Defendants' statements precluding Plaintiffs' claim of actual malice. Plaintiffs have not demonstrated, nor can they, that Defendants possessed the subjective belief anything they said was false or probably false.

While the Plaintiffs dispute characterizations of the extent of the clearing by the media and St. Johns County representatives, that factual dispute is irrelevant. Likewise irrelevant is Plaintiffs' contention that Defendants knew the Gardens was owned by Palm Coast Intracoastal, LLC, not "Sunbelt", as they simply parroted the same representation made by Mr. Belshe on behalf of "Sunbelt" a few months prior, and finally, such distinction is not material to the statements actually alleged to be slanderous within the operative Amended Complaint.

Whatever the actual extent of the clearing, the existence of and reliance by the Defendants upon these statements in the public realm, alone requires the entry of summary judgment in favor of the Defendants under the "actual malice" standard, which these limited public figure Plaintiffs have the burden to overcome. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *see also Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1239 (11th Cir.1999); *Mid.-Fla. Telev. Corp. v. Boyles*, 467 So.2d 282, 283 (Fla. 1985).

The record evidence reveals the absence of any genuine dispute, the subject statements, attributed to Defendants, were made without actual malice, and Plaintiffs have likewise failed to meet their burden on Defendants' motions for final summary judgment. Accordingly final summary judgment in favor of Defendants is proper.

B. *The Allegedly Defamatory Statements Attributed to Arnoff in Count II are Substantially True*

Under the substantial truth doctrine, "a statement does not have to be perfectly accurate if the 'gist' or the 'sting' of the statement is true." *Masson v. New Yorker Magazine*, 501 U.S. 496, 517, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991); *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227

(7th Cir.1993); *Nelson v. Associated Press, Inc.*, 667 F. Supp. 1468, 1477 (S.D.Fla.1987); *Woodard v. Sunbeam Television Corp.*, 616 So.2d 501, 503 (Fla. 3d DCA 1993).

In *Smith v. Cuban Am. Nat. Found.*, 731 So. 2d 702 (Fla. 3d DCA 1999), the Court held that "falsity only exists if [the statement] is **substantially and materially false**, not just if it is **technically** false." *Id* at 707. (emphasis added) "According to **U.S. Supreme Court and Florida case law, falsity exists only if the publication is substantially and materially false, not just if it is technically false.**" *Ozyesilpinar v. The Misfits Media Co. Pty, Ltd.*, 2022 WL 20485027, (Fla. 11th Cir. Ct.) *quoting Smith*, 731 So. 2d at 707. A defamation claim was rejected in *Vanmoor v. Fox News Network, LLC*, 34 Media L. Rep. 2022 (Fla. 17th Jud. Cir. May 26, 2006) because, since "Vanmoor has in fact **been a party to at least two dozen lawsuits** … the … **statement that Vanmoor has been a party to 29 lawsuits is substantially true**."

a. Plaintiffs, "Sunbelt" Commonly Clear Land and was Cited by St. Johns County for Doing so Illegally, Rendering the Alleged Slanderous Statement Substantially True

On September 23, 2019, six weeks prior to publication of the "clear-cut" statement, St. Johns County cited the Plaintiff, Sunbelt Holdings Florida I LLC. for clearing trees "without a permit," in violation of County ordinance.[35] A subsequent email from a St. Johns County employee, Jan Brewer reported that "the clearing was large areas that included clearing some of the area identified as Significant Natural Communities Habitat and the upland buffer to the wetlands."[36] Also, both the Gun Club Road property, which was the subject Ms. Arnoff's

[35] *See* St. Johns County Incident and Investigation Form, Incident No. 1906265; 09.23.19 - St. Johns County - Stop Work Order Notice (Attached as Ex. K to Defendant, Arnoff's Motion for Summary Judgment.

[36] *See* Deposition Exhibit 4 to the Deposition of Jan Brewer, attached and submitted as Exhibit H to Plaintiffs' Notice of filing Exhibits in Support of Response in Opposition to Defendants' Motions for Summary Judgment (Part Two of Two).

statement, and the Gardens property, which was the subject the meeting where the statement was published, were both almost entirely cleared of vegetation, at least one of which, was done illegally.[37]

Given the *substantial truth* doctrine, particularly when considered in light of the need for the Plaintiffs to prove by clear and convincing evidence that the Defendants' statement was made with a high degree of awareness of its probably falsity, these are not disputed material issues of fact that could change the outcome of the case. This Court has evaluated the allegedly defamatory publication not by "extremes, but as the common mind would naturally understand it." *McCormick v. Miami Herald Publ'g Co.*, 139 So. 2d 197, 200 (Fla. 2d DCA 1962); *Cooper v. Miami Herald Publ'g Co.*, 31 So. 2d 382, 384 (Fla. 1947). "The statement should be considered in its natural sense without a forced or strained construction." *Byrd*, 433 So. 2d at 595. *See also Mile Marker, Inc.*, 811 So. 2d at 847, cit*ing Dockery v. Fla. Democratic Party*, 799 So.2d 291, 295 (Fla. 2d DCA 2001) (noting publications that are in question in defamation actions are not to be dissected and judged word for word or phrase by phrase, but rather the entire publication must be examined).

Here, the natural sense of the allegedly defamatory statement is that a developer engages in the practice of cutting down a significant number of trees. The strained construction urged by the Plaintiffs, that the statement alleged illegal activity and was untrue because every tree on the entire property was not removed – cannot support its claim of defamation *per se*. The average recipient of the statement, however, would most likely not resort to the dictionary definition of the term "clear-cut," and if they did, the statement would still be true given that the Plaintiffs did cut down all trees in an "area" of the parcel being developed.

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[37] *See* images of the Gardens clearing (Veranda Bay). (Attached to Defendant, Arnoff's Motion for Summary Judgment as Exhibit D; and Affidavit of Mary "Sallee" Arnoff.

The statement that "Sunbelt, their mode of operation is to go in and clear-cut all of the land" is at least substantially true, as the gist of the statement, that "Sunbelt" regularly clear cuts land, is true, as documented in the public record and media reports, including a statement from County Staff categorizing such clearing activities as "not uncommon," resulting in St. Johns County issuing a violation notice to "Sunbelt" and strengthening its land development code regarding vegetation removal.[38] This fact alone insulates the statement from defamation liability given that it renders the statement substantially true and negates any possibility that the Plaintiffs can prove – which they must – that the statement regarding clear-cutting was made with a "high degree of awareness of … probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

In this defamation case, the Defendants cannot be held liable for stating that "Sunbelt" clear-cuts land, when Plaintiff Sunbelt Holdings I, LLC was indeed cited for clearing trees without a legally required permit. While, Plaintiff, Sunbelt Land Management, LLC was not specifically identified in the statement, it inserted itself into this case as a plaintiff suggesting that it was defamed by the Defendants' statements. If Plaintiff, Sunbelt Land Management, LLC's claim is based on the assumption that a person hearing or reading the statement would associate it with Plaintiff, Sunbelt Land Management, LLC, it is also true that the public, including Defendants, conflated these entities by following the lead of Plaintiffs' own public representations and portrayal in the media.

Summary judgment is appropriate, as Arnoff's statement is substantially true.

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[38] *See Masson v. New Yorker Magazine*, 501 U.S. 496, 517, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991); *see also* Def. Arnoff MSJ, Ex. A, St. Johns County Incident and Investigation Form; Plaintiffs' Amended Complaint ¶32; St. Johns County commissioners call for stricter penalties for illegal land clearing, October 18, 2019, https://www.firstcoastnews.com/article/tech/science/environment/st-johns-county-commissioners-call-for-stricter-penalties-for-illegal-land-clearing/77-2acbb0ba-e97e-4c2f-a6f8-364dd83ea08e; *McCormick v. Miami Herald Publ'g Co.*, 139 So. 2d 197, 200 (Fla. 2d DCA 1962).

C. *The Allegedly Defamatory Statements Attributed to Bryan in Count I are Substantially True*

The substantial truth doctrine does not require a statement to be perfectly accurate if the 'gist' or the 'sting' of the statement is true. *Readon v. WPLG, LLC*, 317 So. 3d 1229, 1234 (Fla. 3d DCA 2021). Here, Bryan's statements are likewise substantially true. There is no genuine issue of material fact to suggest that the 'gist' or 'sting' of Bryan's statement was not true: the Plaintiffs illegally cleared land and they were penalized for it. The record reflects that Plaintiff, Sunbelt Holdings I, LLC was cited for clearing trees without a permit, which was a legal requirement. Plaintiff, Sunbelt Land Management I, LLC, filed the instant action purporting to be defamed by the statement made by Defendant Bryan. It appears that Plaintiffs attempt to convince this Court that Defendants' statement regarding "Sunbelt" defamed two separate entities without mentioning them specifically, while also maintaining a position that Defendants' use of the term "Sunbelt" cannot have more than one subject meaning in the eyes of the community. This position is untenable.

Florida law also provides for the acknowledgement of the difference between statements presented as fact and statement presented as an opinion or rhetorical hyperbole. *Byrd v. Hustler Mag. Inc.*, 433 So. 2d 593, 595 (Fla. 4th DCA 1983). Bryan's use of the term "clear-cut" is a rhetorical hyperbole and would not have had a different effect on the minds of the listeners at the subject meeting. The litmus test is to determine whether or not the reported material would have had a different effect on the mind of the viewer by affecting the "gist" of the story. *Woodard v. Sunbeam Television Corp.*, 616 So. 2d 501, 503 (Fla. 3d DCA 1993). The overall communication by Bryan did not convey a false impression to the receiver of the information by the use of the term "clear-cut."

Applying the *substantial truth* doctrine, there are not disputed material issues of fact that could change the outcome of this case. Especially giving consideration to the fact that Plaintiffs are required to prove by clear and convincing evidence that the Defendants' statements were made with a high degree of awareness for its probably falsity. This Court has evaluated the allegedly defamatory publication in its natural sense without a "forced or strained construction." *Byrd*, 433 So. 2d at 595. The natural sense of the allegedly defamatory statement is that a developer engages in the practice of cutting down a significant number of trees.

The strained interpretation of the statement made, as insisted upon by the Plaintiffs that the statement alleged illegal activity and was untrue because every tree on the entire property was not removed – cannot support its claim of slander *per se*. Plaintiffs cannot avoid the fact that the company received a citation for clearing land without a permit. Further, Plaintiffs cannot argue against the fact that "Sunbelt" received a penalty for illegally clearing the land. Bryan's research on this topic did not end at the review of the St. Johns County Incident and Investigation Form.[39] Defendant Bryan reviewed media materials, available to the public, that supported the basis for the statement. Bryan's statement, in its entirety, was the "gist" of what he had learned from his review of the sources of information available to him. The average listener to the statement would most likely not utilize the Webster's dictionary, as requested by Plaintiffs, to find the exact definition the term "clear-cut." If the listeners at the meeting did utilize the dictionary, the statement that "Sunbelt" engaged in clear-cutting would still be true due to the fact that Plaintiffs did cut down trees in an entire area of the Gun Club Road Property. This fact is undisputed from

[39] *See* St. Johns County Incident and Investigation Form, Incident No. 1906265; 09.23.19 - St. Johns County - Stop Work Order Notice (Attached as Ex. D to Defendant, Bryan's Motion for Summary Judgment.

the Record and further substantiated by documents provided by Plaintiffs in opposing the Defendants' Motions for Summary Judgment.[40]

Summary judgment is appropriate as Bryan's statements are substantially true.

D. *The Allegedly Defamatory Statements Attributed to Bryan in Count I are Privileged Expressions of Pure Opinion*

Summary judgment in Bryan's favor is warranted as to Count I, as the statements are privileged expressions of pure opinion. The alleged slanderous statement cannot constitute a basis for slander *per se* as the comments made are "pure opinion" and are privileged expressions under the First Amendment. *De Moya v. Walsh*, 441 So. 2d 1120 (Fla. 3d DCA 1983). Privileged expressions of pure opinion are "comments based on facts which are set forth in the article *or which are otherwise known or available to the public."* (emphasis added). *Sepmeier v. Tallahassee Democrat, Inc.*, 461 So. 2d 193 (Fla 1st DCA 1984).

The record before this Court is replete with articles upon which Bryan relied to form the basis of the statement alleged by Plaintiffs to constitute slander *per se*.[41] The Record also supports that the news coverage regarding the clearing of Gun Club Road as well as the Gardens project was extensive. Further, the statements made were based upon facts available to the attendees of the meeting. *Rasmussen v. Collier Cty. Publ'g Co.*, 946 So. 2d 567, 571. The sources relied upon by Bryan were available to the public well in advance of the subject meeting on November 7, 2019. These articles provided that "Sunbelt": (i) engaged in clearing land without a permit; (ii) "Sunbelt" was penalized for clearing without approval; (iii) "Sunbelt" cleared "acres and acres" of trees without a permit; and (iv) sitting County Commissioners in St. Johns County took issue with the

[40] *See* Ex. 4 to the Deposition of Jan Brewer, attached and submitted as Ex. H to "Plaintiffs' Notice of filing Exhibits in Support of Response in Opposition to Defendants' Motions for Summary Judgment (Part Two of Two)."
[41] *See* Ex. A - Defendant, Bryan's Affidavit in Support of Motion for Summary Judgment.

existing penalties, as being insufficient to constitute a significant deterrence to prevent such actions in the future.

Bryan believed the statements he was making were true, as they were based upon sources that he reasonably believed to be true. *See* Ex. A – Defendant, Bryan's Affidavit ¶¶ 13-23. Pursuant to Federal and Florida law on slander *per* se, Plaintiffs are required to prove that the remarks were made with Bryan's knowledge that the statements were "false or with a reckless disregard for the truth and without reasonable grounds for the Defendant to believe that they were true" and with the intent to defame the Plaintiffs. *Hood v. Conners,* 419 So.2d 742, 743-44 (Fla. 5th DCA 1982). Plaintiffs fail to satisfy this obligation and present no record evidence that satisfies the burden of showing, by clear and convincing evidence, Defendant acted with actual malice.

E. Count I Against Bryan Violates Florida's Anti-SLAPP Statute

In addition to summary judgment being warranted, as set forth above, this Court agrees that Count I violates Florida law prohibiting Strategic Lawsuits Against Public Participation ("SLAPP") as set forth in § 768.295, Fla. Stat. Bryan did not waive the ability to raise arguments relating to SLAPP due to the failure to include reference to SLAPP as part of his Answer and Affirmative Defenses *See* Docket No. 141 (Defendant, Bryan's Answer and Affirmative Defenses to Plaintiffs' Amended Complaint).

The plain language of the statute provides the following:

> A person or entity sued by a governmental entity or another person in violation of this section has a right to an expeditious resolution of a claim that the suit is in violation of this section. A person or entity **may move the court for an order** dismissing the action or **granting final judgment in favor of that person or entity**. The person or entity **may file a motion for summary judgment, together with supplemental affidavits, seeking a determination that the claimant's or governmental entity's lawsuit has been brought in violation of this section.**

This is exactly what Bryan has done. Bryan filed his motion for summary judgement requesting this Court grant final judgment in his favor and determine that the lawsuit filed by Plaintiffs has been brought in violation of § 768.295, Florida Statutes. The statute requires that the Plaintiffs submit a response and any supplemental affidavits regarding the Anti-SLAPP issue. § 768.295(4), Fla. Stat.

Plaintiffs' lawsuit is the type of litigation that Florida's Anti-SLAPP statute sought to prohibit. A lawsuit filed by a developer of land that is unhappy with the constitutionally protected activism by members of the community that seek to oppose that developer's intended plan(s). *Florida Fern Growers Ass'n v. Concerned Citizens of Putnam County*, 616 So. 2d 562 (Fla. 5th DCA 1993) ("A SLAPP suit has been described as one 'filed by developers, unhappy with the public protest over a proposed development, filed against leading critics in order so silence criticism of the proposed development'") (*quoting Westfield Partners, Ltd. v. Hogan*, 740 F. Supp. 523, 525 (N.D. Ill. 1990)).

Plaintiffs sought to silence Bryan for publicly speaking out on a matter of public concern: "Sunbelt's" Gardens project, and the actions of "Sunbelt" as it related to clearing large portions of land without the proper permitting from the County. In granting Bryan's motion for summary judgment, the Court finds that the underlying lawsuit is without merit and Plaintiffs' Amended Complaint attempts to make actionable, statements that are protected under the First Amendment to the United States Constitution and § 5, Art. I of the Constitution of the State of Florida. As set forth *supra*, the statements were made in connection with a public issue – the proposed development occurring in Flagler County. Additionally, Defendants have established that Plaintiffs have failed to establish a cause of action for slander *per se*, rendering Plaintiffs' arguments in opposition to Bryan's Anti-SLAPP arguments moot.

F. *Count II – Slander per se and Damages Against Arnoff*

Arnoff is entitled to summary judgment as to Count II. The alleged slanderous statement cannot constitute a basis for slander *per se,* as clear-cutting is not *per se* illegal, illegal, or incompatible with developing land. Also, that Plaintiffs cannot demonstrate damages, required to be pled and proven under slander *per qoud.* The statements upon which Count II are based do not constitute slander *per se*, as they do not impute to Plaintiffs with conduct, characteristics, or conditions incompatible with the proper exercise of land development business.[42]

A statement qualifies as defamation *per se* only if it is injurious on its face and does not require the aid of extrinsic proof. *Carroll v. TheStreet.com, Inc.*, 2014 WL 5474061 USDC, S.D. Fla, (2014) *16; *Aflalo v. Weiner*, 17-61923-CIV, 2018 WL 3235529, at *2 (S.D. Fla. July 2, 2018) (When context is considered and extrinsic facts and innuendo are needed to prove the defamatory nature of the words, it is not defamation *per se*) (internal citations omitted). A statement is not defamatory *per se* if it requires additional explanation of the words used to show that they have a defamatory meaning or that the person defamed is the plaintiff. *Hoch v. Rissman, et al*, 742 So.2d 457 (Fla. 5d DCA 1999); *Hood v. Connors,* 419 So.2d 742 (Fla. 5d DCA 1982). Defamation *per se* must be apparent within the "four corners" of the publication. *Trujillo v. Banco Cent. Del. Ecuador*, 17 F. Supp. 2d 1334, 1339 (S.D. Fla. 1998). A statement should not be interpreted in the extreme, but as the "'common mind' would normally understand it." *Id.*

[42] Notwithstanding this assertion, Plaintiffs submitted to this Court, Exhibit B, the sworn Affidavit of Kenneth Belshe, as Authorized Representative of Sunbelt Land Management, LLC, in support of Plaintiffs' Responses in Opposition, wherein Mr. Belshe states: "Sunbelt Land Management, LLC does not conduct land development activities itself nor does it provide land development-related services, supervision and/or training to other entities." Further, Plaintiffs allege in the operative Amended Complaint that "Sunbelt Land Management, LLC, is a real estate management and development company that is a parent company of [Plaintiff] Sunbelt Holdings Florida I, LLC."

It is undisputed that alleged defamatory statement "[a]nd Sunbelt, their mode of operation is to go in and clear-cut all of the land," contains no assertion that such conduct is illegal, within the statement itself, rather, the material contentions focus on the phrase "clear-cut." Amended Compl., ¶¶12, 32. This Court rejects Plaintiffs' argument that there is a "circumstantial imputation of illegality to Defendant Arnoff's slanderous statement" and that such alleged imputation renders the statement "actionable on its face since it plainly accuses Plaintiffs of a routine business practice of illegal land development activities…"[43]

First, Plaintiff, Sunbelt Land Management, LLC, through its authorized representative Kenneth Belshe's affidavit, contends that it does not conduct land development activities. As such, Count II cannot constitute slander *per se*, but rather *per qoud* at best as it pertains to Plaintiff, Sunbelt Land Management, LLC, as the alleged defamatory statement concerning land development activities is not incompatible with its trade and profession, if it does not engage in land development activities, and that is conceded as not its profession.

Second, Plaintiffs' contention that the context of the statement, along with extrinsic facts that clear-cutting without a permit, could be a misdemeanor under St. Johns County's Code, removes it from the category of *per se* defamation. *See Aflalo v. Weiner*, 17-61923-CIV, 2018 WL 3235529, at *2 (S.D. Fla. July 2, 2018) (When context is considered and extrinsic facts and innuendo are needed to prove the defamatory nature of the words, it is not defamation *per se*) (internal citations omitted). A statement is not defamatory *per se* if it requires additional explanation of the words used to show that they have a defamatory. *Hoch v. Rissman, et al*, 742 So.2d 457 (Fla. 5d DCA 1999); *Hood v. Connors,* 419 So.2d 742 (Fla. 5d DCA 1982). As a matter of law, the alleged defamatory statement itself cannot constitute slander *per se*, irrespective of the

[43] Pls.' Response in Opposition to Arnoff's Motion for Summary Judgment, p. 80.

Plaintiff, and as such Plaintiffs' reliance on Florida's common law cause of action for *per se* to presume malice and damages is extinguished.

With no evidence of damages within the record, summary judgment is warranted in Arnoff's favor as to Count II. Actual damage is an essential element of a defamation action, and in order to recover for defamation, the alleged damages must be proximately caused by the defamatory statements. *Anheuser Busch, Inc. v. Philpot*, 317 F.3d 1264, 54 Fed. R. Serv. 3d 709 (11th Cir. 2003) (construing Florida law); *Edelstein v. WFTV, Inc.*, 798 So. 2d 797 (Fla. 4th DCA 2001); *Cape Publications, Inc. v. Reakes*, 840 So. 2d 277 (Fla. 5th DCA 2003). A company is not entitled to bring a defamation claim where there is no evidence damage was suffered. *Robobar, Inc. v. Hilton Intern. Co.*, 870 So. 2d 864 (Fla. 3d DCA 2004).

G. *Qualified Common Law Privilege*

Arnoff further contends that the alleged defamatory statement is privileged under Florida common law, which has been broadly defined as:

> "A communication made in good faith on any subject matter by one having an interest therein, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, even though it contains matter which would otherwise be actionable, and though the duty is not a legal one but only a moral or social obligation."

Harris v. Plapp, 386 So. 3d 185, 189 (Fla. 1st DCA 2022) (*citing Nodar v. Galbreath*, 462 So. 2d 803, 809 (Fla. 1984)). The Court ruled that:

> The privilege exists at common law in recognition of the need to balance two interests: 'the right of the individual, on one hand, to enjoy a reputation unimpaired by defamatory attacks, and, on the other hand, the necessity, in the public interest, of a free and full disclosure of facts.' *Fridovich v. Fridovich*, 598 So. 2d 65, 68 (Fla. 1992) (citation omitted); *see also Leonard v. Wilson*, 150 Fla. 503, 8 So. 2d 12, 13 (1942) (explaining qualified privilege "cannot be restricted to the utterances or writings of any particular class or group, but, on the contrary, may be invoked by all persons who publish defamatory matter without malice and in furtherance of the welfare of society, generally, or of the legitimate interests of particular groups or individuals")

Id. The Florida Supreme Court has ruled that even a communication containing a "criminating matter, is privileged, when made in good faith upon any subject in which the party communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest, right, or duty, and made upon an occasion to properly serve such right, interest, or duty, and in a manner and under circumstances fairly warranted by the occasion and the duty, right, or interest, and not so made as to unnecessarily or unduly injure another, or to show express malice."[44] If the statement is made in good faith, in furtherance of an interest to be upheld, limited in its scope to this purpose, on a proper occasion, and made proper manner[45] then the question of defamation and damages are not submitted to the jury. The Florida Supreme Court long ago set out the elements of defamation under Florida law:

> A party injured by a publication **cannot recover damages therefor if the publication is true and is made in good faith in such a manner and under such circumstances as to properly serve the rights of others by and to whom the publication was made**. Such a publication is privileged because it is **properly made to serve the rights of others**. The damage to the injured party, if not needlessly done, is not wrongful, and **gives no right of action.**
>
> *Briggs v. Brown*, 46 So. 325 (Fla. 1908) (emphasis added).

In the case of slander *per se*, meaning "[f]alse statements which suggest that someone has committed a dishonest or illegal act," malice is generally presumed. *Shaw v. R.J. Reynolds Tobacco Co.*, 818 F. Supp. 1539, 1541-42 (M.D. Fla. 1993). But this "presumption 'ceases to exist where the Defendant has a qualified privilege to make the statements.'" *Lefrock*, 77 F. Supp. 3d at 1201 (*quoting Shaw*, 818 F. Supp. at 1541-42). Consequently, even if Plaintiffs claims were for slander *per se*, they must still prove malice to survive summary judgment.

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[44] *Abraham v. Baldwin*, 52 Fla. 151, 42 So. 591 (Fla. 1906). (emphasis added).
[45] *See Lundquist v. Alewine*, 397 So. 2d 1148 (Fla. 5th DCA 1981) (citing *Abraham v. Baldwin*, 52 Fla. 151, 42 So. 591 (1906); *Leonard v. Wilson*, 150 Fla. 503, 8 So. 2d 12 (1942)).

> Where the circumstances surrounding defamatory communication are undisputed, or are so clear under the evidence as to be unquestionable, then the question of whether the occasion upon which they were spoke was privileged is a question of law to be decided by the court.

Nodar v. Galbreath, 462 So. 2d 803, 810 (Fla. 1985); *Lundquist*, 397 So. 2d at 1150 (*quoting Abraham v. Baldwin*, 42 So. 2d 591, 592 (Fla. 1906)); *Shaw*, 818 F. Supp. at 1142.[46] Once a moving party establishes that an allegedly slanderous statement is qualifiedly privileged, the plaintiff cannot survive summary judgment unless he can rebut the good faith presumption by producing admissible evidence of express malice. *See Shaw*, 818 F. Supp. at 1543.

As explained in *Thomas v. Tampa Bay Downs, Inc.*:

> [T]he essential elements of the qualified privilege are: (1) **good faith**; (2) an **interest in the subject by the speaker or a subject in which the speaker has a duty to speak**; (3) a **corresponding interest or duty in the listener** or reader; (4) **a proper occasion**; and (5) **publication in a proper manner**.

761 So. 2d 401 (Fla. 2d DCA 2000).

Here, the undisputed facts are that subject matter of the "meeting," purpose, and interest for which both the presenters and attendees, including Arnoff were present and spoke, was to help the community stay engaged, to get relevant information, preserve and conserve their local community and area, and advocate for smart growth.[47] The presenters, including Arnoff, discussed their good faith concerns regarding the Gardens proposed development such as "[o]verdevelopment of environmentally sensitive lands…" leading "to flooding during hurricanes or major rain events,"[48] out of sense of duty to preserve the integrity and safety of their

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[46] "The determination that a defendant's statements are qualifiedly privileged eliminates the presumption of malice attaching to defamatory statements by law. The privilege instead raises a presumption of good faith and places upon the plaintiff the burden of proving express malice-that is, malice in fact as defined by the common-law doctrine of qualified privilege." *Nodar*, 462 So. 2d, at 810.

[47] Transcript of Nov. 7, 2019, Community Meeting, p. 4:19-7:21.

[48] Transcript of Nov. 7, 2019, Community Meeting, p. 11:6-25.

community.[49] The alleged defamatory statement itself was made in furtherance of discussing the common interest of preventing flooding in the presenters' and attendees' community, immediately adjacent to co-Defendant, Bryan's home:

> And SunBelt, their mode of operation is to go in and clear-cut all of the land… So that would be 330 acres, the whole thing that you see, would be clear-cut, and then **they would fill it to the surge -- the high water surge**. And we figured it could be **anywhere from seven to nine feet of fill that they would bring in. And when they bring the fill in, that then eliminates the natural ability of that land to absorb that water…and spill over to the north and to the south**….

Transcript of Nov. 7, 2019, Community Meeting, p. 19:19-20:17. (emphasis added). As such, the undisputed record evidence demonstrates that the alleged defamatory statement was made in good faith, and in furtherance the welfare of the community and concerning the legitimate interests of that particular community.

The operative Amended Complaint concedes that the "meeting" was held for the purpose of discussing this development with the community, and that it was published to encourage attendance to discuss those issues. As such the community members who attended clearly had a corresponding interest, as evidenced by their applause and support in furtherance of their presentations and concerns raised.[50] Finally, the alleged defamatory statement was not published to the world, but rather only to those who attended a meeting that was unequivocally held to discuss the Gardens development and its potential adverse effects on the community, and thus published in on the proper occasion and in the proper manner. *See Nodar*, 462 So.2d at 810. The material facts and circumstances surrounding the alleged defamatory communication are undisputed, clear under the evidence as to be unquestionable and as such the statement is privileged and Plaintiffs

[49] Transcript of Nov. 7, 2019, Community Meeting, p. 4:19-7:21.
[50] Transcript of Nov. 7, 2019, Community Meeting, p. 17:7-25.

are required to rebut the good faith presumption by producing admissible evidence of express malice. *Id*; *see also Shaw*, 818 F. Supp. at 1543.

Plaintiffs' argument that it is plausible that those who attended this meeting, undisputedly **held to discuss the Gardens development in that community**, may have been there to network or for an unrelated reason - without record evidence to substantiate it – is pure speculation that ignores the surrounding facts and context and is summarily rejected. This Court cannot draw inferences from that suggestion of plausibility alone, without any contrary evidence, to deny summary judgment. *See Matsushita Elec. Indus. Co.*, 475 U.S. at 587; *Lufthansa German Airlines Corp. v. Mellon*, 444 So.2d, at 1066; *Seaboard Systems R.R., Inc. v. Goforth*, 545 So.2d at 482.

Further, Plaintiffs have failed to provide evidence of Arnoff's **ill will, hostility and evil intention to defame and injure in publishing the alleged defamatory statement** and thus have not met their burden to demonstrate a genuine dispute as to express malice. The Florida Supreme Court has made clear:

> If the occasion of the communication is privileged because of a proper interest to be protected, and the defamer is motivated by a desire to protect that interest, he does not forfeit the privilege merely because he also in fact feels hostility or ill will toward the plaintiff. The incidental gratification of personal feelings of indignation is not sufficient to defeat the privilege where the primary motivation is within the scope of the privilege.

Nodar, 462 So. 2d at 811-812 (internal citations omitted)(emphasis added); *see also, Boehm v. American Bankers Ins. Group*, 557 So. 2d 91, 94 (Fla. 3d DCA 1990) (Holding that "[t]he Supreme Court has unequivocally established that all of the three elements [ill will, hostility and evil intention to defame and injure] and more must be shown.").

Plaintiffs contend that allegedly related emails from Arnoff to a media entity and St. Johns County, that "Sunbelt" should follow the law and be held accountable if they do not, demonstrate

ill will and hostility[51], however the primary motivation is undisputedly in good faith, to prevent illegal land clearing and as such, there is no evidence to show that Arnoff harbored the required intent for "express malice" sufficient to overcome her qualified privilege and summary judgment is warranted against Plaintiffs as to Count II.

H. Plaintiffs' Count II Against Arnoff Violates Florida's Two-Year of Statute of Limitations

It is undisputed that Plaintiffs' Amended Complaint, adding Arnoff as a defendant, was deemed filed on August 5, 2022, close to three years after the alleged defamation on November 7, 2019, and nine months after Florida's two-year statute of limitations for defamation claims expired. *See* § 95.11(4)(g), Fla. Stat. The statute begins to run at the time of publication, not discovery of the statement. § 770.07, Fla. Stat.; *Wagner, Nugent, Johnson, Roth, Romano, Erikson & Kupfer, P.A. v. Flanagan*, 629 So. 2d 113 (Fla. 1993) (cause of action for defamation accrues on publication, rather than discovery, even where defamation is private); *Holt v. Tampa Bay Television, Inc.*, Case No. 03-11189, 2006 WL 5063132, ¶ 20 (Fla. Cir. Ct. Mar. 17, 2006) (citations omitted), affirmed, 976 So. 2d 1106 (Fla. 2d DCA 2007).

Summary judgment is warranted on this basis. Plaintiffs' Amended Complaint does not "relate back" and the two-year statute of limitations was not tolled under the theories of fraudulent concealment or equitable estoppel. Plaintiffs cannot prove that Arnoff's identity, as the speaker of the allegedly defamatory statement, was fraudulently concealed by Arnoff or the Preserve's attorney, John Tanner[52]. It is also undisputed that none of these contentions are alleged in the

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[51] This contention is inconsistent with Plaintiffs' discovery answers and responses conceding Plaintiffs' lack of knowledge of ill will and hostility.

[52] The record title owner and developer of the Garden's property, Palm Coast Intracoastal, LLC ("PCI") was found by this Court to have violated Florida's anti-SLAPP statute in filing related lawsuit for malicious prosecution against the Preserve and John Tanner for their seeking of certiorari review of the Flagler County Board of County Commissioners' decision to approve a development part of the same Veranda Bay / Gardens project. In doing so this Court found PCI's

Amended Complaint, though required to be alleged, by Florida law. This Court is limited to the issues raised in the pleadings. *Spatz v. Embassy Home Care, Inc.*, 9 So. 3d 697, 698 (Fla. 4th DCA 2009). A plaintiff who wishes to assert that the statute of limitations was tolled must sufficiently allege the basis of the tolling. *Bryant v. Adventist Health Systems Sunbelt, Inc.*, 869 So. 2d 681, 19 A.L.R.6th 875 (Fla. 5th DCA 2004). Plaintiffs failed to plead fraudulent concealment, equitable estoppel, "relation back," and any other contention that Florida's two-year statute of limitations on defamation should be tolled, within their Amended Complaint.[53] Thus, Plaintiffs' Amended Complaint adding Arnoff violates Florida's two-year statute of limitations for defamation. Summary judgment is appropriate in Arnoff's favor.

Notwithstanding, Plaintiffs' invocation of the rarely - invoked legal theories also fail substantively. Fraudulent concealment[54] or equitable estoppel, must be based on the representations and conduct of the defendant that constitute affirmative fraudulent concealment. *See Riverwood Nursing Center, LLC v. Gilroy*, 219 So. 3d 996, 998-999 (Fla. 1st DCA 2017).[55]

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action to be without merit as a matter of law and filed primarily because Defendants exercised their protected constitutional right to engage in free speech. *See* Order Granting Final Summary Judgment against PCI, dated September 20, 2024, Palm Coast Intracoastal, LLC v. Preserve Flagler Beach & Bulow Creek, Inc., Stephen Noble, and John Tanner, Case No. 23-CA-000093.

[53] This Court likewise rejects Plaintiffs' assertion that Arnoff "impliedly consented" to these issues in light of Plaintiffs' failure to plead. The record reflects, including through the Arnoff's motion for summary judgment, that Arnoff sought disposal of these arguments on the basis they were unpled, and as such, cannot constitute implied consent.

[54] Florida law provides that those who fraudulently conceal material facts preventing suit within the statutory period are equitably estopped from raising such defense and both fraudulent concealment and equitable estoppel are used interchangeably in terms of seeking to avoid the statute of limitations. "The *Rubio* court rejected alleged fraudulent concealment as a means to circumvent the statute of limitation. It held that equitable estoppel does not apply in this case because Rubio has not alleged any facts indicating the Archdiocese caused or induced him to refrain from filing suit within the limitations period." *Doe v. Salesians of Don Bosco*, 2017 WL 6452184 (Fla. 13th Cir. Ct., 2017) (*quoting Rubio v. Archdiocese of Miami, Inc.*, 114 So. 3d 279 (Fla. 3d DCA 2013)).

[55] "The doctrine of equitable estoppel acts as a bar to a statute of limitations defense. … The party relying on the doctrine of equitable estoppel must show that (1) the opposing party represented a

See also, *Spadaro v. City of Miramar*, 855 F. Supp. 2d 1317, R.I.C.O. Bus. Disp. Guide (CCH) P 12189 (S.D. Fla. 2012) (applying Florida law). A party seeking to establish fraudulent concealment to toll a statute of limitations must allege and prove: (1) successful concealment of cause of action, (2) fraudulent means to achieve that concealment, and (3) that it exercised reasonable care and diligence in seeking to discover facts that form basis of its claim. *American Home Assur. Co. v. Weaver Aggregate Transport, Inc.*, 990 F. Supp. 2d 1254 (M.D. Fla. 2013) (applying Florida law); *Accord, West Brook Isles Partner's 1, LLC v. Com. Land Title Ins. Co.*, 163 So.3d 635, 639 (Fla. 2d DCA 2015).

In *Doe v. Cutter Biological*, 813 F. Supp. 1547, 1555-56 (USDC, M.D. Fl. (1993), the court found a lawsuit to be time – barred by the statute of limitations, ruling that a Plaintiff claiming fraudulent concealment has the burden to prove that the defendant successfully concealed the cause of action, and employed fraudulent means to achieve that concealment. *Id* at 1555-56.

In *West Brook Isles Partner's 1, LLC v. Com. Land Title Ins. Co.*, 163 So.3d 635 (Fla. 2d DCA 2015) the court held that fraudulent concealment "focuses on **subsequent actions to keep the improper conduct shrouded from sight**." *Id* at 639. (emphasis added). The Court ruled:

> **Where there was no active concealment and a party with the exercise of due diligence could have discovered the facts**, the statute of limitations is **not tolled**.

Id, at 639. (emphasis added). In *Williams v. Dept. of Corrections*, 156 So.3d 563 (Fla. 5th DCA 2015), the Court ruled:

> Generally, the tolling doctrine has been applied when the plaintiff has been mislead or lulled into inaction, **has in some extraordinary way been prevented from asserting his rights**, or has timely asserted his rights mistakenly in the wrong forum.

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material fact contrary to its later position, (2) the party asserting the doctrine relied on the opposing party's earlier representation, and (3) the party asserting the doctrine changed its position to its detriment due to the opposing party's representation and its reliance thereon." *Id*, at 998-999.

156 So.3d at 563. (citation omitted)

Here, the undisputed record evidence establishes that neither Arnoff, nor anyone on her behalf attempted to conceal her identity, successfully, fraudulently, or otherwise, as her unrebutted deposition testimony revealed she was not aware she could be the "Jane Doe" nor listened to the audio recording of the "meeting" until after served with the Amended Complaint. Further, Plaintiffs failed to exercise reasonable care and diligence in seeking to discover Arnoff's identity. Plaintiffs do not dispute that the audio recording of the meeting, and subsequent transcription, was in their possession in early 2020. Plaintiffs contend that they discovered Arnoff's identity, as the speaker of the alleged defamatory statement during another member of the Preserve, Carol Bycel's deposition in June of 2022, seven months after the expiration of the statute of limitations, by playing the audio recording for Ms. Bycel during the deposition and asking her to identify the speaker, to which she identified Arnoff. However, it is also undisputed that Plaintiffs knew the speaker was a woman, that Defendant, Bryan introduced Arnoff by name, along with seven other female members of the Preserve at the beginning of the "meeting," and further, that Bryan then turned it over to Arnoff and another female presenter, one of which states the alleged defamatory statement. The audio recording conclusively narrows the identity down to two female members of the Preserve, one of which was Arnoff, though Plaintiffs failed to so much as attempt to depose Arnoff or serve her any discovery whatsoever, until after naming her as a Defendant. Further, Plaintiffs likewise failed to seek the deposition of Bryan until August 30, 2024. Plaintiffs failed to depose Bryan, who introduced the speakers by name, nor play the recording for him in an effort to discovery "Jane Does" identity until almost five years after the "meeting." These failures to exercise due diligence in order to identify Arnoff all occurred **while Plaintiffs had already**

included Arnoff by name, as one of eight (8) female representatives of the Preserve who attended the meeting, upon the face of their very own initial complaint.

As such, Plaintiffs' contention of fraudulent concealment likewise fails as Plaintiffs' exercise of due diligence could have discovered her identity. *See West Brook Isles Partner's 1, LLC* 163 So.3d at 639. Plaintiffs failed to demonstrate any genuine dispute of facts that could constitute affirmative fraudulent concealment by Arnoff, upon her showing that no such dispute exists. *See Riverwood Nursing Center, LLC v. Gilroy*, 219 So. 3d 996, 998-999 (Fla. 1st DCA 2017); *see also Lee v. Simon* 885 So.2d 939, 944 (Fla. 4th DCA, 2004)

Additionally, Florida law requires that equitable estoppel must be applied "with great caution" and proved by the claimant by clear and convincing evidence. *See Goodwin v. Blu Murray Ins. Agency, Inc.*, 939 So.2d 1098, 1103 (Fla. 5th DCA 2006). The record is devoid of any evidence of Arnoff making some material representation to Plaintiffs that they relied upon to their detriment.

Instead, Plaintiffs contend, contrary to the evidence in the record, that Arnoff knew enough about the instant litigation that she should have known she that was "Jane Doe," however, as stated by the Second District Court of Appeal in *Gray v. Executive Drywall, Inc.*, in rejecting the same argument, "[t]here was no obligation to advise plaintiff who to sue." 520 So. 2d 619, 621 (Fla. 2d DCA 1988). Accordingly, summary judgment in Arnoff's favor is proper.

I. Count III Conspiracy to Defame, Against Both Defendants, Fails

Finally, Plaintiffs' Count III for Conspiracy to Commit Slander against both Defendants necessarily fails upon the entry of summary judgment against the Plaintiffs on their claims for Slander *per se* against each Defendant, respectively. "Conspiracy to defame claim cannot stand where, as here, the defamation action fails. There being no defamation, the gist of the defamation conspiracy, there can be no conspiracy claim." *Ovadia v. Bloom*, 756 So. 2d 137, 140 (Fla. 3rd

DCA 2000). Conspiracy to defame cannot stand where the defamation action fails. *Hoon v. Pate Const. Co.*, 607 So. 2d 423 (Fla. 4d DCA 1992). Accordingly, summary judgment is warranted in Defendants' favor as to Count III as well.

V. CONCLUSION

In sum, for the reasons for the reasons set forth above, the Court concludes that there are no genuine issues of material fact, and that the Defendants are entitled to entry of final summary judgment in their favor as a matter of law on Count I, II, and III of the Plaintiffs' Amended Complaint.

Accordingly, it is ORDERED and ADJUDGED that:

A. Defendants' prayer for summary judgment is granted as stated in Bryan and Arnoff's respective Motions for Summary Judgment.

B. Final Summary Judgment is hereby entered in favor of Defendants Bryan and Arnoff on Counts I, II, and III of the Plaintiffs' Amended Complaint, and the Plaintiffs shall take nothing by this action and the Defendants shall go hence without day; and

C. The Court reserves jurisdiction to consider a motion for the award of attorneys' fees and costs to Defendants as the prevailing parties.

DONE and ORDERED in Chambers in Bunnell, Flagler County, Florida on this _ day of October, 2024.

10/23/2024 10:18 AM 2020 CA 000072

e-Signed 10/23/2024 10:18 AM 2020 CA 000072

HONORABLE CHRISTOPHER A. FRANCE
CIRCUIT COURT JUDGE