In the Florida Supreme Court

CAROLE BASKIN,

Petitioner,

vs. **Fla. S. Ct. Case No. SC2024-0168**

ANNE McQUEEN, Fla. 2d DCA Case No. 2D22-1482

Respondent.

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DISCRETIONARY REVIEW OF A DECISION OF THE FLORIDA SECOND DISTRICT COURT OF APPEAL

PETITIONER'S AMENDED INITIAL BRIEF ON JURISDICTION

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STATEMENT OF THE ISSUES

If this Honorable Court accepts jurisdiction, the Petitioner, Carole Baskin, intends to raise the following issues:

I. WHETHER THE SECOND DISTRICT'S HOLDING THAT ALLEGEDLY LIBELOUS SPEECH ABOUT A "PUBLIC FIGURE" WAS "NOT PROTECTED SPEECH" IS ERRONEOUS AND CONFLICTS WITH THE FIRST AMENDMENT'S REQUIREMENT THAT EVEN FALSE AND DEFAMATORY STATEMENTS ABOUT A "PUBLIC FIGURE" ARE STILL PROTECTED UNLESS "ACTUAL MALICE" IS ALLEGED AND PROVEN?

II. WHETHER THE SECOND DISTRICT ERRONOUSLY REVERSED THE TRIAL COURT'S DETERMINATION THAT THE PLAINTIFF FAILED TO COMPLY WITH THE PRESUIT NOTICE REQUIREMENTS OF SECTION 770.01, FLORIDA STATUTES?

III. WHETHER THE SECOND DISTRICT ERRONEOUSLY DETERMINED THAT THE TRIAL COURT IMPROPERLY CURTAILED DISCOVERY BEFORE DECIDING THE DEFENDANT'S MOTION FOR DISMISSAL OR SUMMARY JUDGMENT UNDER FLORIDA'S ANTI-SLAPP STATUTE, SECTION 768.295, FLORIDA STATUTES?

IV. WHETHER THE SECOND DISTRICT ERRONEOUSLY REVERSED WITHOUT PROPERLY ADDRESSING THE TRIAL COURT'S MULTIPLE ALTERNATIVE DISPOSITIVE DETERMINATIONS WHICH INDEPENDENTLY ESTABLISHED THE DEFENDANT WAS ENTITLED TO DISMISSAL OR SUMMARY JUDGMENT AS A MATTER OF LAW?

INTRODUCTION

This case presents constitutional questions of whether free speech about public figures must receive the same level of protection in Florida as in every other state, and whether Florida has receded from the "actual malice" standard established in *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) and applied to public figures in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). *See Jews for Jesus, Inc. v. Rapp*, 997 So.2d 1098, 1112 (Fla. 2008)("First Amendment demands that the law of libel carve out an area of 'breathing space' so that protected speech is not discouraged"); *Nodar v. Galbreath*, 462 So.2d 803, 806 (Fla. 1984)("constitutionally protected right to discuss, comment upon, criticize, and debate, indeed, the freedom to speak on any and all matters is extended not only to the organized media but to all persons").

Sullivan controls and absent "actual malice," Floridians have the First Amendment right to speak freely about "public figures." *Della-Donna v. Gore Newspapers Co.*, 489 So.2d 72, 74-75 (Fla. 4th DCA 1986)(discussing "actual malice" requirement under Florida law based on *Sullivan*). The Second District's decision below

overlooks the higher level of fault mandated by the First Amendment, thus chilling free speech and infringing upon right to hear it in Florida.

The trial court ruled this is a "Strategic Lawsuit Against Public Participation" ("**SLAPP**") because the asserted defamation claims were based on protected speech about public issues and public figures and are "without merit" under §768.295, Florida Statutes. Among other reasons, the trial court ruled "actual malice" was insufficiently alleged and could never be established, and presuit notice required by §770.01, Florida Statutes, was not provided.

The Second District reversed, and despite the lack of "actual malice" allegations, held that if speech about a "public figure" is potentially false and defamatory, it has no First Amendment protection. This holding overlooks *Sullivan*'s pronouncement that even false and defamatory speech about a "public figure" must be published with "actual malice" to lose First Amendment protection, and conflicts with precedent of this Court and every other Florida appellate court. The Second District's interpretation of §770.01 is equally erroneous and conflicting.

STATEMENT OF CASE AND FACTS

This case arose after Petitioner, Carole Baskin, published information online to address a false storyline in the "*Tiger King*" Netflix series, which suggested she killed her former husband, Don Lewis, in 1997 (A 4-8).

Respondent, Anne McQueen, was Lewis's assistant and nominated to be the conservator of his property during contentious litigation filed after he disappeared (A 4-6). McQueen voluntarily appeared in *Tiger King* and other media to discuss Lewis's disappearance (A 5). She is indisputably a "limited purpose public figure." *Gertz*, 418 U.S. at 342; *Mile Marker, Inc. v. Peterson Publ'g, L.L.C.*, 811 S0.2d 841, 845-46 (Fla. 4th DCA 2002).

Anticipating the "enormous public discussion" and "vicious online attacks" *Tiger King* would generate, Baskin decided to provide the public with information about what transpired in 1997 by reading excerpts from her diary on her YouTube "vlog" and publishing articles on the "Big Cat Rescue" website (A 6-8). Baskin told viewers she was reading decades old diary entries and cautioned that her recollections might "be a little skewed on some of

the things that I remember" (A 6).

McQueen contended Baskin's statements—some of which are quoted in the Second District's decision—are false and defamatory, and sued Baskin (A 5-8). Baskin filed a verified motion under §768.295, asserting McQueen's suit is a prohibited SLAPP suit (A 8). Baskin's motion sought dismissal or summary judgment and was required to be "expeditiously" decided. *See* §768.295(1) and (4); *Gundel v. AV Homes, Inc.*, 264 So.3d 305, 312-313 (Fla. 2d DCA 2019)(§768.295 allows SLAPP defendant to file a "motion seeking dismissal or summary judgment" and requires court "to hear such motions expeditiously"). Among other things, Baskin argued McQueen failed to allege and could never prove "actual malice," sued over non-actionable and privileged statements, and failed to provide presuit notice under §770.01 (A 8-10).

Faced with Baskin's motion, the trial court stayed discovery (A 10). Courts have a duty to protect First Amendment rights in defamation cases because the litigation itself, particularly discovery, chills free speech. *Herbert v. Lando,* 441 U.S. 153, 179–180 (1979); *Gundel,* 264 So.3d at 310-311; *WPB Residents for Integrity in*

Government, Inc. v. Materio, 284 So.3d 555, 560-561 (Fla. 4th DCA 2019); *Stewart v. Sun Sentinel Co.*, 695 So.2d 360, 363 (Fla. 4th DCA 1997); *Michelle v. NYP Holdings, Inc.,* 816 F.3d 686, 702 (11th Cir. 2016). Staying discovery also serves the purpose of Florida's anti-SLAPP statute, which was enacted to protect SLAPP targets from the expense of the litigation itself, including discovery. *Materio,* at 560-561.

The trial court granted Baskin's motion based on McQueen's failure to allege and inability to prove nearly every element of her claim, including actual malice, falsity, and causation, as well as her failure to comply with §770.01 (A 13-14). The Second District reversed but focused on the trial court's conclusions that McQueen violated §770.01 and that Baskin's statements were constitutionally protected opinion or hyperbole (A 14-22).

According to the Second District, Baskin's challenged speech was not "constitutionally protected" because it included "statements of fact" which "if proven, could be defamatory as a matter of law" (A 17). However, the Second District did not specifically reverse concerning the other missing elements of McQueen's defamation

claim (A 10, n. 9). Rather, the Second District stated the "second [falsity], third [actual malice], and fourth [causation and damages] elements" of McQueen's claim "often pose factual questions...the parties could not explore in depth due to the...discovery stay," and made a double-negative statement that it "cannot be said...there were no genuine issues of material fact...on any of these elements..." (A 13, n. 10), without holding that there are disputed facts on all elements.

The Second District held §770.01 does not apply based on its erroneous finding that Baskin's vlog and website postings[1] "fall short" of being the "kind of content newspapers, broadcasters, and periodicals publish," and do not qualify as "other medium" under that statute (A 16-19). This conclusion is based on the "content" of Baskin's statements, rather than the "other medium" in which they were published.

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[1] Baskin disagrees with the Second District's characterization of the publications and of Baskin's statements on the Big Cat Rescue website as "posts." The record will show the vlog and website existed long before *Tiger King* and covered many topics related to big cats and their conservation. The "posts" are statements plucked from full articles on the website discussing *Tiger King*, not just McQueen.

SUMMARY OF THE ARGUMENT

The Second District's decision expressly construes a provision of the U.S. Constitution, and expressly conflicts with decisions of this Court and other District Courts of Appeal. Because the Second District's erroneous decision chills free speech and impairs the fundamental constitutional rights of all Floridians, this Court should accept jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(2)(ii) and/or (iv).

ARGUMENT

I. THE SECOND DISTRICT'S DECISION EXPRESSLY CONSTRUES A PROVISION OF THE U.S. CONSTITUTION

The Second District's decision expressly references and construes the First Amendment of the U.S. Constitution (A 11-17). Indeed, it is impossible to properly analyze a defamation claim without doing so. *Sullivan,* 376 U.S. at 269 (libel claims "must be measured by standards that satisfy the First Amendment").

The First Amendment requires "public figure" defamation plaintiffs to allege and prove "actual malice." *Della-Donna,* 489 So.2d at 74-75; *Miami Herald Publ'g. Co. v. Anne,* 458 So.2d 239, 241 (Fla. 1984); *Readon v. WPLG, LLC,* 317 So.3d 1229, 1235 (Fla.

3d DCA 2021); *Don King Prods., Inc. v. Walt Disney Co.*, 40 So.3d 40, 43-44 (Fla. 4th DCA 2010).

The Second District's holding that allegedly false and defamatory statements are "not protected speech" (A 17) is overbroad and conflicts with the First Amendment's requirement that even false and defamatory statements about a "public figure" are still protected unless "actual malice" is alleged and proven. *Sullivan*, 376 U.S. at 271-273 and 279-280 ("neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct [and] the combination of the two elements is no less inadequate").

The Second District also misplaced its reliance on *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), for the proposition that "[a]ctionable defamation...is not constitutionally protected" (A 12). In *Sullivan*, the U.S. Supreme Court rejected the notion that "the constitution does not protect libelous publications," and rejected reliance on *Chaplinsky* for this proposition. *Sullivan*, 376 U.S. at 268-269 and n.6.

In addition to curtailing "protected" speech in Florida, the

Second District's attempt to side-step McQueen's failure to allege and prove "actual malice" violated the court's duty under the First Amendment "to 'make an independent examination of the whole record'...to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Florida Medical Center, Inc. v. N.Y. Post Co., Inc.*, 568 So.2d 454, 458 (Fla. 4th DCA 1990)(citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 (1990)).

II. THE SECOND DISTRICT'S DECISION EXPRESSLY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL ON THE SAME QUESTIONS OF LAW

Consistent with §768.295(4) and the Second District's own precedent (*Gundel*, 264 So.3d at 313), Baskin filed a motion seeking dismissal or summary judgment. The motion's dismissal component is governed by rule 1.140, and its summary judgment component is governed by the new version of rule 1.510.

On the rule 1.140 portion, the Second District erroneously rejected the trial court's determination that Baskin's speech is protected because McQueen failed to allege actual malice. This expressly conflicts with decisions of every state and federal appellate court in Florida. *Anne*, 458 So.2d at 241; *Nodar*, 462

So.2d at 806; *Mastandrea v. Snow*, 333 So.3d 326, 327-328 (Fla. 1st DCA 2022); *From v. Tallahassee Democrat, Inc.*, 400 So.2d 52, 55-58 (Fla. 1st DCA 1981); *Dockery v. Florida Democratic Party*, 799 So.2d 291, 294 (Fla. 2d DCA 2001); *Readon*, 317 So.3d at 1234; *Don King*, 40 So.3d at 43; *Greene v. Times Publ'g, Co.*, 130 So.3d 724, 728-729 (Fla. 3d DCA 2014); *Mile Marker*, 811 So.2d at 846-847; *Hoch v. Rissman, Weisberg, Barrett*, 742 So.2d 451, 460 (Fla. 5th DCA 1999); *Sullivan*, 376 U.S. at 279-280; *Gertz*, 418 U.S. at 346-349; *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 162-165 (1967); *Turner v. Wells*, 879 F.3d 1254, 1273-74 (11th Cir. 2018); *Michelle*, 816 F.3d at 701-702.

The Second District's conclusion that actual malice cannot be challenged by motion to dismiss because it "often pose[s] factual questions" which could not be "explore[d] in depth due to the...discovery stay" (A 13) conflicts with precedent requiring "public figure" plaintiffs to allege "actual malice" at the outset of litigation and mandating dismissal for failing to do so. *Readon*, 317 So.3d at 1234-1235. *See also, Michelle*, 816 F.3d at 702; *Turner*, 879 F.3d at 1274. Indeed, the legal sufficiency of a defamation

claim filed by a public figure is subject to "more rigorous" testing than other types of claims, particularly as it relates to the "actual malice" requirement. *Greene*, 130 So.3d at 728-729.

The Second District's conclusion that discovery was necessary to resolve a motion to dismiss is also in conflict with *Alfino v. Dept. of HRS*, 676 So.2d 447, 449 (Fla. 5th DCA 1996)("[I]t is not relevant whether discovery has been completed at the time [a motion to dismiss] is heard."). *See also, DJ Lincoln Enterprises, Inc. v. Google, Inc.*, 2022 WL 2754182, *2 (S.D. Fla. 2022). This error is significant because it also violates §768.295(4), which required "expeditious resolution" of Baskin's anti-SLAPP motion, and it thereby eliminates Baskin's First Amendment protections against the burdens of a "public figure" defamation lawsuit. Indeed, the Second District itself previously held §768.295 is akin to a statute "providing for immunity from suit" because its "protection cannot be adequately restored once it is lost through litigation and trial." *Gundel*, 264 So.3d at 311. Baskin has been deprived of that protection.

On the summary judgment portion of Baskin's motion, the Second District erroneously relied on obsolete case law construing

the prior version of rule 1.510 (A 13-14, citing *Kimball v. Publix Super Mkts., Inc.*, 901 So.2d 293, 295 (Fla. 2d DCA 2005), *Colby v. Ellis*, 562 So.2d 356 (Fla. 2d DCA 1990), and *Abbate v. Publix Super Mkts., Inc.*, 632 So.2d 1141 (Fla. 4th DCA 1994)).

The current version of rule 1.510(c)(5) and (d) required McQueen to file a response with factual record citations at least 20 days before the hearing, or file an "affidavit or declaration" explaining why she couldn't, but she failed to do either. Although discovery was stayed, McQueen didn't need--and didn't file an "affidavit or declaration" establishing a need for--discovery to establish some factual basis concerning her own public figure status, causation, the fair report privilege, the actionability of Baskin's statements, and even actual malice.

The Second District's decision to reverse despite its acknowledgement of McQueen's violation of rule 1.510(c)(5) and the trial court's determination that McQueen could not prove numerous elements of her claim (A 10, n. 9) was erroneous, based on obsolete case law, and expressly conflicts with several District Court of Appeal decisions holding that summary judgment should be

granted when the nonmoving party fails to comply with the requirements of amended rule 1.510(c)(5) and (d). *White v. Discovery Communications, LLC,* 365 So.3d 379, 388 (Fla. 1st DCA 2023); *State Farm Mut. Auto. Ins. Co. v. Advanced X-Ray Analysis, Inc.,* 368 So.3d 1049, 1051 (Fla. 3d DCA 2023); *De Los Angeles v. Winn-Dixie Stores, Inc.*, 326 So.3d 811 (Fla. 3d DCA 2021); *Lloyd S. Meisels, P.A., v. Dobrofsky*, 341 So.3d 1131, 1134-36 (Fla. 4th DCA 2022).

The Second District's conclusion that Baskin's YouTube vlog and the website do not qualify as "other medium" under §770.01 expressly conflicts with *Comins v. Vanvoorhis*, 135 So.3d 545, 557 (Fla. 5th DCA 2014) and *Plant Food Systems, Inc. v. Irey*, 165 So.3d 849, 859 (Fla. 5th DCA 2015). This conclusion is also contrary to the plain text of §770.01 and conflicts with decisions in which this Court and District Courts of Appeal have adopted and applied the "supremacy-of-text" doctrine, such as *Ham v. Portfolio Recovery Assocs.,* 308 So.3d 942, 946 (Fla. 2020); *Boyle v. Samotin*, 337 So.3d 313, 317 (Fla. 2022); *Hollywood Park Apartments, LLC v. City of Hollywood*, 361 So.3d 356, 361 (Fla. 4th DCA 2023); *Richman v. Calzaretta*, 338 So.3d 1081, 1082 (Fla. 5th DCA 2022); *Klein v.*

Manville, 363 So.3d 1163, 1169 (Fla. 6th DCA 2023). Instead of applying the plain text of the "other medium" provision already imposed by §770.01, the Second District stated it "is a matter for the Florida Legislature to decide" whether "other medium" includes internet publications and broadcasts (A 22). In *Grlpwr, LLC v. Rodriguez*, 2023 WL 5666203, *2-3 and n.3 (N.D. Fla. Aug. 25, 2023), the court found a YouTube vlog was "other medium" under the existing text of §770.01 without legislative clarification.

CONCLUSION

WHEREFORE, this Court should accept jurisdiction pursuant to rule 9.030(a)(2)(ii) and/or (iv).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof was electronically filed on the Clerk of the Court, and electronically served on John M. Phillips, Esq., (Email: jmp@floridajustice.com; william@floridajustice.com; melissa@floridajustice.com), and Amy M. Hanna, Esquire (Email: amy@floridajustice.com), Phillips & Hunt, 212 N. Laura St., Jacksonville, FL 32202; and Ronnie Bitman, Esq. (Email: rbitman@bitman-law.com) and Allison Morat, Esq. (Email: amorat@bitman-law.com), Bitman, O'Brien & Morat,

PLLC, 615 Crescent Exec. Ct., Suite 212, Lake Mary, FL 32746; on this 22nd day of February, 2024.

CERTIFICATE OF COMPLIANCE

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Respectfully submitted,

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