Filing # 195242742 E-Filed 04/01/2024 11:10:03 PM

IN THE SUPREME COURT
FOR THE STATE OF FLORIDA

Case No. SC2024-0168
Dist. Case No.: 2D22-1482
Circuit Case No. 292020CA006289A001HC

CAROLE BASKIN,

Petitioner,

v.

ANNE MCQUEEN,

Respondent.

RESPONDENT'S JURISDICTIONAL ANSWER BRIEF

PHILLIPS HUNT & WALKER

John M. Phillips, Esquire
Florida Bar No. 0477575
jmp@floridajustice.com
212 N. Laura Street
Jacksonville, Florida 32202
Telephone: (904) 444-4444
Facsimile: (904) 508-0683
Counsel for Respondent

BITMAN, O'BRIEN & MORAT, PLLC

Ronnie Bitman, Esquire
Florida Bar No. : 774891
rbitman@bitman-law.com
Allison Morat, Esquire
Florida Bar No.: 0099453
amorat@bitman-law.com
615 Crescent Exec. Ct., Ste 212
Lake Mary, Florida 32746
Telephone: (407) 815-3110
Facsimile: (407) 815-3110
Co-Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Florida Constitution

Statutes

Rules

STATEMENT OF THE ISSUES

Respondent does not intend to raise affirmative issues relating to the district court's decision. If this Court accepts jurisdiction, Respondent intends to raise defensive arguments, including the following:

I. The district court properly concluded that McQueen alleged an actionable defamation claim against Baskin.

II. The district court properly acknowledged Baskin's written apology as part of its defamation analysis; the apology supports a finding of actual malice.

III. The district court properly concluded that Baskin's website and vlog are not "other medium" within the meaning of section 770.01, Florida Statutes.

IV. The district court properly reversed on all grounds.

STATEMENT OF CASE AND FACTS

This is a fact-specific appeal. Anne McQueen sued Carole Baskin for defamation. Baskin was formerly married to Don Lewis. McQueen was Lewis' personal assistant in the 1990s. *See McQueen v. Baskin*, 377 So. 3d 170 (Fla. 2d DCA 2023).

In anticipation of the release of *Tiger King* on Netflix in 2020, Baskin began publishing online her rendition of events that took place long ago. On her vlog, "she read aloud a number of entries from her personal diary, some of which were decades old." *Id.* at 172. For example, Baskin stated,

> "Turns out he [Mr. Lewis] had already had Anne McQueen forge my name on the closing documents and then she notarized it."
>
> "Ms. McQueen was 'spiriting documents away' to attempt to hide 'all of the stuff that was going on with Anne putting stuff into her name and Wendell's name and housekeeper's names and all kinds of stuff.'"
>
> "Part of the embezzlement I discovered was that Anne would take money from our checking account to buy those tax certificates in her maiden name so that she could control if the properties were sold to pay her lien."

Id. at 173.

Baskin made similar statements about McQueen in the 1990s resulting in a prior defamation action. Ms. Baskin later issued a written statement recanting the veracity of her statements. *Id.* at 172. The apology states, in pertinent part: "I, Carole Lewis, apologize to Anne McQueen for all the allegations that I have made about Anne McQueen. … I have found that the allegations made were without full knowledge of the facts, which I now know are unfounded." *Id.*

After McQueen sued Baskin for defamation in this lawsuit, Baskin filed a hybrid motion to dismiss/motion for summary judgment under Florida's Anti-SLAPP statute. Baskin argued, in part, that McQueen's lawsuit is without merit and that her statements are nondefamatory as a matter of law. Baskin further opined that her website and vlogs are "other medium" under section 770.01, and she was entitled to presuit notice. Baskin argued that McQueen was not entitled to cure compliance with section 770.01, after filing her complaint, on the purported the basis that the notice requirement is jurisdictional.

The circuit court ruled in Baskin's favor. The Second District reversed. Notably, the district court held that Baskin's statements, if proven, are quintessential defamation—and, that it could not ignore Baskin's written apology from 20 years ago. *Id*. at 177-178.

Additionally, on the section 770.01 issue, the district court explained, "[i]f a movie and a nonfiction book about an alleged drug cartel insider do not constitute 'other medium' under section 770.01, it is difficult to imagine how Ms. Baskin reading her diary entries on a vlog about a former secretary whom she repeatedly accuses of embezzlement could." *McQueen*, 377 So. 3d at 180 (citing *Mazur v. Ospina*).

Unhappy with the outcome, Baskin seeks this Court's discretionary review. She filed her amended jurisdictional brief on February 22, 2024. McQueen disagrees with Baskin's representation of the facts therein. For example, Baskin wrongly opines, in her "Introduction," that the district court receded from the actual malice requirement that attaches to public figures in defamation claims. (Amended Jurisdictional Brief or "AJB," p. 2).

Moreover, McQueen disagrees with Baskin's representation that McQueen is indisputably a public figure. McQueen disputed her status as a public figure in this lawsuit. And Baskin is wrong in her contention that the district court, upon its de novo review, did not hold there are disputed facts on all elements of the defamation claim. *McQueen*, 377 So. 3d at 177, n.10. Baskin's contentions are belied by the written opinion.

ARGUMENT

I. The District Court Did Not Expressly Construe a Provision of the U.S. Constitution

Baskin argues that the Second District's decision expressly construes a provision of the U.S. Constitution. In support, she contends that the district court receded from the actual malice requirement that attaches to defamatory speech about public figures. Not so.

First, Baskin misunderstands the scope of this Court's discretionary jurisdiction under Article V, section 3(b)(3),[1] and misunderstands the nature of the district court's analysis.

[1] *See also* Fla. R. App. P. 9.030(a)(2)(A)(ii).

As her primary constitutional argument, Baskin contends it is impossible to analyze a defamation claim without construing the First Amendment. (AJB, p. 8). She is wrong. There is a difference between expressly construing a constitutional provision and applying the facts to an existing provision or law. Discretionary review is limited to district court decisions that "expressly construe" the language and terms of a constitutional provision, not that inherently review a constitutional provision.

The mere application of constitutional principles does not convey jurisdiction. *Page v. State*, 113 So. 2d 557, 557 (Fla. 1959) ("the application of the facts in a case to a recognized clearcut provision of the Constitution does not amount to a decision upon which this Court could entertain a direct appeal."); *c.f., State ex rel. Sentinel Star Co. v. Lambeth*, 192 So. 2d 518, 522 (Fla. 4th DCA 1966) (distinguishing between construction and application).

Here, the district court applied the facts to existing law and principles. And the points raised on appeal "relate to matters within the ordinary appellate jurisdiction of the district courts." *Miami Herald Pub. Co. v. Brautigam*, 121 So. 2d 431, 432 (Fla. 1960).

Indeed, the district court looked at the nature of Baskin's defamatory statements to conclude that the statements are not matters of opinion. *McQueen*, 377 So. 3d at 177 (stating, "[i]n its judgment, the circuit court viewed all the statements, collectively, as 'mental impressions, opinions or commentary' . . . We cannot agree with that assessment.").

Second, Baskin is wrong her suggestion that the district court receded from the actual malice requirement for public figures. The district court expressly recognized the standard for public figures and private figures and held that "[i]t cannot be said that there were no genuine issues of material fact in dispute such that Ms. Baskin was entitled to judgment as a matter of law[.]." *Id.* at 176-177. Additionally, within its analysis of actionable defamation, the district court expressly stated that it could not ignore Baskin's written apology to McQueen. *Id.* at 178.

It necessarily follows that the written apology is sufficient to allege actual malice if McQueen is a limited public figure, and the existence of the written apology required denial of the hybrid motion to dismiss/motion for summary judgment. Baskin's continued

insistence that the McQueen's complaint failed to allege actual malice is at odds with the express language of the written opinion.

II. There is No Express and Direct Conflict

There is no credible basis for express and direct conflict.[2] Instead, Baskin inaccurately represents the substance of the district court's decision. Indeed, the district court did not hold that a complaint filed by a limited public figure does not have to allege actual malice. The district did not hold that actual malice allegations cannot be challenged by a motion to dismiss. And it did not hold that discovery is necessary to resolve a motion to dismiss.

Instead, the district court held that McQueen alleged actionable defamation and that it could not overlook Baskin's written apology. Stated differently, the court—in its analysis of whether Baskin's published statements could support an actionable defamation claim, and after properly reciting the defamation standard for public and private figures—expressly concluded that Baskin's statements, if

[2] To establish conflict jurisdiction, a petitioner is limited to the four corners of the lower court's decision. *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986).

proven, are quintessential defamation and that it could not ignore Baskin's written apology.

It is telling that Baskin entirely avoids what the Second District could not overlook in analyzing the defamation claim—the existence of Baskin's written apology to McQueen. There is no credible basis for conflict on an issue of law as to actual malice.

Baskin makes an equally strange choice in alleging conflict on discovery issues. She oddly contends that the district court per se concluded discovery was necessary to resolve a motion to dismiss; no such conclusion appears in the district court's decision. And notably, Baskin overlooks that she not only moved to dismiss, but she also moved for summary judgment.[3] While SLAPP suits are intended to be resolved expeditiously, the injection of a public figure defense adds another layer to the analysis[4] and warrants discovery especially where the complaint sufficiently alleges and infers the existence of actual malice—as it does here.

---

[3] While motions filed in the alternative are permissible, a motion for summary judgment and motion to dismiss serve different purposes. *Gundel v. AV Homes, Inc.*, 264 So. 3d 304, 313 (Fla. 2d DCA 2019).

[4] Not all SLAPP suits involve public figure plaintiffs or the requirement to plead and prove actual malice.

McQueen also notes that Baskin is wrong in suggesting that the district court does not understand Florida's amended summary judgment rule. Instead, it is Baskin that puts forth too draconian a standard. A trial court may not grant summary judgment solely on a nonmovant's failure to timely respond where the record does not otherwise show the movant is entitled to summary judgment. *C.f.*, *Fuentes v. Luxury Outdoor Design, Inc.*, 361 So. 3d 385, 386 (Fla. 4th DCA 2023) ("the amended summary judgment rule, which applies here, does not provide that summary judgment may be granted based solely on the nonmovant's failure to respond.").

To that end, Baskin is wrong in contending that McQueen did not establish a factual basis for the actionability of Baskin's statements or actual malice, or any other factual basis concerning the disputed issues. Baskin's argument on this point exceeds the four corners of the district court's decision and is at odds with the record. The district court expressly acknowledged that McQueen filed a memorandum prior to the summary judgment hearing.

Because Baskin is wrong in her representation of the substance of the district court's decision, this Court should not labor long on the jurisdictional issue. Notably, Baskin cites, *without analysis*,

several factually distinguishable decisions.[5] The express language of the district court's decision reveals the plain distinctions between this case and others, or conversely the harmony that exists in the law.[6]

For example, *Hoch v. Rissman* supports McQueen's position, not Baskin's. 742 So. 2d 451 (Fla. 5th DCA 1999). There, the "defendants themselves acknowledged that the statement was disparaging and false and that they never believed such a statement about Hoch. This establishes that the Rissman defendants knew the statement was false and is a sufficient showing on the issue of actual malice." *Id. at* 460.

And there is no conflict with *Miami Herald Publ'g. Co. v.* Ane, 458 So. 2d 239 (Fla. 1984). There, the Court answered in the negative

---

[5] Baskin should not be permitted to inundate the Court and Respondent with unelaborated case law. And she improperly includes decisions from the Second District, and the Eleventh Circuit Court of Appeal. Purported intradistrict conflict does not support conflict jurisdiction. *State v. Walker*, 593 So. 2d 1049, 1050 (Fla. 1992). Decisions from courts outside of the Florida appellate jurisdictional system do not give rise to conflict jurisdiction. *Kyle v. Kyle*, 139 So. 2d 885, 887 (Fla. 1962).

[6] Where alleged conflict cases are distinguishable, no conflict jurisdiction exists. *Walt Disney World Co. v. Goode*, 520 So. 2d 270 (Fla. 1988).

the question of whether a private person is required to establish as an element of its cause of action that the defendant published the defamatory statements with actual malice. There is no express or direct conflict with *Ane*.

Likewise, there is no express and direct conflict with *Readon v. WPLG, LLC*, 317 So. 3d 1229, 1234 (Fla. 3d DCA 2021). Here, there is an obvious reason to doubt the veracity of Baskin's statements; this is more than a departure from reasonable journalistic standards.

Additionally, there is no conflict on section 770.01. The district court applied existing statutory construction to the facts of the case and its holding aligns with precedent. *McQueen v. Baskin*, 377 So. 3d at 179 ("We explained the construction of 'other medium' at some length in *Mazur v. Ospina* . . . our focus remains on the content of the digital publication . . . ."). There is no direct conflict with *Comins v. Vanvoorhis*, 135 So.3d 545 (Fla. 5th DCA 2014); *Plant Food Systems, Inc. v. Irey*, 165 So. 3d 859 (Fla. 5th DCA 2015), or *Gripwr, LLC v. Rodriguez*, 2023 WL 5666203 (N.D. Fla. Aug. 25, 2023). *Comins*, for example, did not hold that <u>all</u> blogs and bloggers qualify as news media. 135 So. 3d at 559 ("We are not prepared to say that all blogs and all bloggers would qualify for the protection of section

770.01, Florida Statutes[.]"). And *Plant Food* (involving an "internet publisher of various purportedly scientific, technical, and medical journals and information") is not substantively the same as Carole Baskin.

Finally, *Gripwr* is a federal trial court opinion—not an opinion from another district court of appeal or the supreme court—and cannot form the basis of direct conflict. Regardless, it does not mandate a different outcome here. There, the federal court found that the defendant's YouTube channel is operated for the disinterested purpose of editorializing on a matter of public interest by providing commentary on the MLM industry (multi-level marketing). Unlike here, there was no indication that the defendant editorializes on the matter for a pecuniary, self-serving interest, *e.g.*, on behalf of a client. Here, Baskin is a self-promotor that reads her diary entries on YouTube. Additionally, *Gripwr* contains a footnote explaining that the defendant disseminated *timely* information. Here, Baskin reads aloud historical diary entries, undermining any finding of speedy real-time reporting. *Mazur*, 275 So. 3d at 818 ("The Petitioners/Defendants do not speedily disseminate fact reporting or editorial content to the public.").

And, as another federal court recently noted, "[t]he fact that § 770.01, *F.S.* only applies to media defendants is well-settled in Florida law." *San Juan Products, Inc. v. River Pools & Spas, Inc.*, No. 8:21-CV-2469-TPB-JSS, 2023 WL 1994087, at *2 (M.D. Fla. Feb. 14, 2023) (citing *Ross v. Gore*, 48 So. 2d 412 (Fla. 1950)).

CONCLUSION

This Court should decline the Petitioner's request to invoke discretionary jurisdiction.

BITMAN O'BRIEN & MORAT PLLC

/s/ Allison Morat
Ronnie Bitman, Esquire
Florida Bar No.: 744891
rbitman@bitman-law.com
Allison Morat, Esquire
Florida Bar No.: 0099453
amorat@bitman-law.com
615 Crescent Executive Ct., Ste 212
Lake Mary, Florida 32746
Telephone: (407) 815-3110

PHILLIPS HUNT & WALKER
John M. Phillips, Esquire
Florida Bar No. 0477575
jmp@floridajustice.com
212 N. Laura Street
Jacksonville, Florida 32202
Telephone: (904) 444-4444
Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof was served upon the following parties/counsel on this day, April 1, 2024 by □ hand delivery, □ email transmission, ☒ electronic filing, □ completed facsimile transmission, □ overnight delivery (Federal Express), and/or □ U.S. Mail.

David M. Caldevilla, Esquire
de la Parte, Gilbert, McNamara
& Caldevilla, P.A.
P.O. Box 2350
Tampa, FL 33601
dcaldevilla@dgfirm.com
serviceclerk@dgfirm.com

Kenneth G. Turkel, Esquire
Shane B. Vogt, Esquire
David A. Hayes, Esquire
Turkel Cuva Barrios, P.A.
100 N. Tampa Street, Suite 1900
Tampa, FL 33602
kturkel@tcb-law.com
svogt@tcb-law.com
dhayes@ tcb-law.com

Craig E. Rothburd, Esquire
Craig E. Rothburd, P.A.
320 W. Kennedy Blvd, #700
Tampa, FL 33606
craig@rothburdpa.com

Charles M. Harris, Esquire
Bradley A. Muhs, Esquire
Trenam Law
200 Central Avenue, #1600
St. Petersburg, FL 33701
charris@trenam.com
bmuhs@trenam.com

BITMAN O'BRIEN & MORAT, PLLC

/s/ Allison Morat, Esquire
Allison Morat, Esquire
Florida Bar No.: 99453
amorat@bitman-law.com
krahberg@bitman-law.com
615 Crescent Executive Ct., Ste 212
Lake Mary, Florida 32746
Telephone: (407) 815-3110
Counsel for Respondent

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font and word count requirements of Rules 9.045 and 9.210.

BITMAN O'BRIEN & MORAT, PLLC

/s/ Allison Morat, Esquire
Allison Morat, Esquire
Florida Bar No.: 99453
amorat@bitman-law.com
krahberg@bitman-law.com
615 Crescent Executive Ct., Ste 212
Lake Mary, Florida 32746
Telephone: (407) 815-3110
Counsel for Respondent