IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT
CASE NO. 3D23-461
L.T. NO. 22-12584

STEFAN E. BRODIE AND ELIZABETH BRODIE,

Plaintiffs-Appellants,

vs.

BAYSIDE VILLAGE EAST CONDOMINIUM ASSOCIATION INC., *et al.*,

Defendants-Appellees.

On Appeal from Final Judgment
of the Circuit Court for the Eleventh Judicial Circuit
of Florida in and for Miami-Dade County

APPELLANTS' REPLY BRIEF

Joel S. Perwin
JOEL S. PERWIN, P.A.
1680 Michigan Ave., Suite 700
Miami Beach, FL 33139
Tel.: (305) 779-6090

Jonathan E. Minsker
MINSKER LAW PLLC
1100 Biscayne Blvd.,
Suite 3701
Miami, FL 33132
Tel.: (786) 988-1020

Steven F. Molo (*pro hac vice*)
Mark W. Kelley (*pro hac vice*)
Alex C. Eynon (*pro hac vice*)
MOLOLAMKEN LLP
430 Park Ave., 6th Floor
New York, NY 10022
Tel.: (212) 607-8160
smolo@mololamken.com

Megan Cunniff Church
(*pro hac vice*)
MOLOLAMKEN LLP
300 N. LaSalle St., Suite 5350
Chicago, IL 60654
Tel.: (312) 450-6716

Counsel for Appellants Stefan E. Brodie and Elizabeth Brodie

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INTRODUCTION

Florida's Supreme Court has held for over a century that it is a trial court's "duty" to send a defamation claim to trial if "there is ***any*** evidence" that could support an inference of malice. *Myers v. Hodges*, 44 So. 357, 364 (Fla. 1907) (emphasis added). That well-settled rule requires reversal here.

Defendants do not deny that their language was abusive or that there is a long history of animosity between them and the Brodies. Instead, Defendants suggest that courts may not infer malice or consider context in cases involving qualified privilege. A long, unbroken line of precedent says otherwise. *See, e.g.*, *Myers*, 44 So. at 364; *Coogler v. Rhodes*, 21 So. 109, 112 (Fla. 1897).

Defendants argue there can be no inference of malice because their primary purpose was to respond to the Brodies' allegations that Defendants had misled the building's residents. But Defendants' email was ***not*** responsive. It invented and responded to a set of claims the Brodies never made. A jury considering those non-responses could find that Defendants tried to discredit the Brodies precisely because they had no answer to the Brodies' allegations. At a minimum, Defendants' argument turns on disputed facts, con-

firming that dismissal was improper. *See Hartley & Parker v. Copeland*, 51 So. 2d 789, 790 (Fla. 1951) (reversing for this reason).

Finally, Defendants argue that the Brodies forfeited the argument that Defendants' statements were not privileged. But the Brodies never made that argument. Rather, the Brodies have argued consistently that Defendants ***lost*** their privilege by acting with malice—not that there was no privilege to begin with. *See, e.g.*, *Arison Shipping Co. v. Smith*, 311 So. 2d 739, 741 (Fla. 3d DCA 1975).

The decision below should be reversed.

ARGUMENT

I. THE TRIAL COURT WAS DUTY BOUND TO PUT THE QUESTION OF DEFENDANTS' MOTIVES TO A JURY

Defendants do not dispute that the words they used to attack Stefan and Elizabeth Brodie were "utterly beyond and disproportionate to the facts." *Merriman v. Lewis*, 194 So. 349, 349 (Fla. 1940). Nor do they dispute the parties' years-long feud. Instead, Defendants contend that the language and circumstances of their statements are irrelevant. Defendants are mistaken.

A. Defendants Misstate the Law of Malice

Defendants claim that malice "*may not* be implied" in cases where a privilege applies. Br. 33. That is misleading. The require-

ment to show "express," rather than "implied" malice just means the jury must find malice was ***in fact*** the speaker's motivation. *See Lewis v. Evans*, 406 So. 2d 489, 492 (Fla. 2d DCA 1981) (explaining the distinction between "implied malice" and "express malice"). It does not mean that the jury is forbidden from ***inferring*** that malice was the speaker's motivation from the statement's language and surrounding circumstances.

Florida's Supreme Court has held time and again that "malice ***may be inferred*** from the language" of a defamatory statement even where the statement is subject to a qualified privilege. *Coogler*, 21 So. at 112 (emphasis added); *see Nodar v. Galbreath*, 462 So. 2d 803, 810 (Fla. 1984) (same); *Abram v. Odham*, 89 So. 2d 334, 336 (Fla. 1956) (same); *Myers*, 44 So. at 363 (same). To be sure, malice cannot be inferred "from the mere fact that the statements are untrue." *Abram*, 44 So. at 336. But Defendants' statements were not merely false—they used the kind of vitriolic and abusive language courts have held supports an inference of malice. *See, e.g.*, *Nodar*, 462 So. 2d at 812 (citing statements that "plaintiff was guilty of evil conduct, was of low moral character, was a disgrace, a troublemaker, was not respectable").

Defendants suggest that courts are barred from considering "extrinsic facts and circumstances" in libel cases. Br. 33. Wrong again. Florida law is crystal clear that malice "***may be proven by extrinsic circumstances.***" *Coogler*, 21 So. at 112 (emphasis added); *see Nodar*, 462 So. 2d at 810 (same). If there is anything "in the circumstances" of a statement's publication that could support an inference of malice, the question must go to a jury. *Myers*, 44 So. at 364; *see Axelrod v. Califano*, 357 So. 2d 1048, 1052 (Fla. 1st DCA 1978) (reversing grant of summary judgment for this reason).[1]

B. Defendants' Choice of Words Supports an Inference of Express Malice

Defendants gloss over the abusive terms in which they attacked the Brodies, arguing that the "majority" of their email was directed at the Brodies' allegations that the Board had misled residents and mismanaged the building. Br. 36. That is irrelevant.

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[1] The rule Defendants purport to invoke—that courts may not consider the surrounding circumstances—has nothing to do with the issues before this Court. It governs how courts decide whether a statement is actionable *per se—i.e.*, without proof of damages or malice. *See Budd v. J. Y. Gooch Co.*, 27 So. 2d 72, 75 (Fla. 1946). The trial court did not address that question and this appeal does not present it.

The question is not whether Defendants spent more words defaming the Brodies than discussing the building's condition. The question is whether a jury could "reasonably infer"—from the choice of words and the surrounding circumstances—that Defendants were "***motivated*** by ill will and a desire to harm" the Brodies. *Lewis v. Evans*, 406 So. 2d 489, 493 (Fla. 2d DCA1981) (emphasis added); *see Arko Plumbing Corp. v. Rudd*, 230 So. 3d 520, 528 (Fla. 3d DCA 2017). The answer is "yes." A reasonable person reading Defendants' email, which accused the Brodies of "thriv[ing] on misinformation, acrimony and hateful speech," R83, and intending to cause the Association—and by implication their own neighbors—"financial harm," R80, could conclude that Defendants bore the Brodies ill will.

Citing *Nodar*, Defendants argue (at 31, 35, and 38) that the "incidental gratification" of personal animosity is not enough to overcome the privilege if the defendant's "primary" motive is legitimate. 462 So.2d at 812. But *Nodar* recognizes that some language is "so extreme as to intrinsically show express malice" and defeat the privilege. *Id.* The examples *Nodar* cites—including statements that a plaintiff "was of low moral character, was a

disgrace, a troublemaker, [and] was not respectable"—are no different from Defendants' language here. *Id.*

Defendants fault the Brodies (at 36) for picking out "a few sentences" from what they claim was an otherwise reasonable email. But Defendants' email is shot through with vicious attacks. It opens by warning the Brodies' neighbors to "be very skeptical as to the veracity of any allegations that [the Brodies] have been promoting." R80. It dismisses the Brodies (legitimate) concerns as "patently frivolous." R80. It calls the Brodies' (accurate) comments "repulsive" and "appalling." R81. It repeatedly impugns the Brodies' motives, accusing them of trying to "embarrass and/or cause this Association financial harm," R80, and "disrupt the [building's] democratic paradigm," R82. And it brands the Brodies as people who "thrive on misinformation, acrimony, and hateful speech." R83.

Defendants claim that the Brodies' criticisms "demanded such a response." Br. 37. That is wrong as a matter of law and common sense. *First*, there is no "eye-for-an-eye" exception to defamation. The case Defendants cite for support, *Rubinson v. Rubinson*, 474 F. Supp. 3d 1270 (S.D. Fla. 2020) (applying Florida law), does not endorse "responding in kind," as they claim. Br. 37; *see* R520. The

court in *Rubinson* simply observed that a person cannot claim to be defamed by the disclosure of something they have publicly ***admitted***. 474 F. Supp. 3d at 1276. That is nothing like this case.[2]

Second, responding to an accusation of wrongdoing by attacking the accuser's character hardly suggests good faith. To the contrary, it suggests a desire to draw attention away from the substance of the accusation. A reasonable jury could find that is what happened here.

C. Defendants' Long-Running Feud with the Brodies Further Supports the Inference of Malice

Defendants likewise brush off the long history of animosity between them and the Brodies, arguing again that courts may not consider "context outside of the alleged defamatory statement." Br. 39. Again, that is simply not correct. *See* Part I.A, *supra*. It is well established that express malice "***may be proven by extrinsic***

[2] The case involved a suit by a son against his father, over emails the father wrote to colleagues explaining that he needed money to help the son support a child. 474 F. Supp. 3d at 1273. The son claimed that this defamed him by suggesting he could not support the child without assistance. *Id.* at 1275. But the son's public pleadings admitted that he had asked his father for money for exactly that reason. *Id.* at 1275-76.

circumstances." *Coogler*, 21 So. at 112 (emphasis added); *see Myers*, 44 So. at 365 (same); *Nodar*, 462 So. 2d at 810 (same).[3]

Defendants assert (at 40-41) there is no "link" between this feud and the defamatory statements because Defendants' email stated they were "pleased" with the "amicable" settlement of the Brodies' lawsuit. But that ***is*** the link. It was Defendants' attempt to save face by spinning their capitulation as some sort of win that led the Brodies to correct the record, precipitating Defendants' defamatory response.

II. DEFENDANTS' RESPONSES TO THE BRODIES' ALLEGATIONS RAISE FACTUAL DISPUTES, CONFIRMING THAT DISMISSAL WAS IMPROPER

Defendants insist that their email cannot raise an inference of malice because it was "directly responsive" to the Brodies' own email. Br. 41. But content and context can still show that a response was made with actual malice. *See infra* pp. 14-15. And Defendants' email was not "responsive" here. In fact, it carefully avoided the Brodies' allegations, attacking a series of straw men without disputing what the Brodies actually said. Opening Br. 7-8, 21-24. Defendants' brief (at 26-32) is more of the same.

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[3] To the extent Defendants mean the inquiry is confined to the pleadings, that cannot save them here because the parties' years-long conflict is detailed in the complaint. R20-27.

A jury considering these non-responses could find that Defendants had no basis for calling the Brodies liars and that their true purpose was to discredit the Brodies, blame them for the exorbitant expense of the roof replacement project, and distract from the real failures the Brodies had called out. At a minimum, that is an entirely plausible inference, and one which the Brodies should be entitled to prove at trial. *See Arko Plumbing*, 230 So. 3d at 528 (reversing grant of summary judgment for this reason).

A. Defendants Do Not Dispute the Brodies' Description of the Circumstances Under Which They Hired the Firm Responsible for Overseeing the Repairs

Defendants claim they disproved "the Brodies' contention that the settlement was the *sole* catalyst for retaining Trinity," the firm that oversaw repairs to the building's roof. Br. 27. But the Brodies said the ***opposite***. They argued that it took far more than just their lawsuit to spur the Board to action. As the Brodies explained, the Board "retained Trinity as an express condition" of the settlement only after (1) the County issued a "'repair or demolish' order," (2) the Brodies moved for appointment of a receiver, and (3) the Board's engineer testified that the roof needed immediate replacement that

the Board finally agreed to hire Trinity as a condition of the settlement. R44. That is indisputable.

Defendants claim their email "refuted" the suggestion that the building was "subject to a court-ordered receiver's oversight (as the Brodies had alleged in their email)." Br. 27. But the Brodies alleged no such thing. The Brodies explained that Trinity was hired "to manage and have final decision-making authority with respect to every aspect of the project." R45. "In ***this*** regard," the Brodies argued, "Trinity is ***effectively*** acting as a Receiver under the Settlement Agreement, and the Court has expressly retained the authority to ensure compliance with the agreement." R45 (emphasis added). Every part of that is true, and no reasonable reader would think it meant that Trinity was, in fact, a "court-ordered receiver."

B. Defendants Do Not Dispute that the County Issued a Repair-or-Demolish Order

Defendants claim the Brodies made "alarming allegations" about the building's condition, including that it "could be 'demolished' if not 'immediately' repaired." Br. 27-28. Again, the Brodies alleged nothing of the kind—they ***quoted*** what the ***County*** said. *Compare* R44, *with* R18; *see* Miami-Dade County Ordinances,

Ch. 8, Article I, §8-5(a)(4) (buildings deemed unsafe must be "repaired" or "demolished"). Defendants' email argued that the County's repair-or-demolish order did not mean what it said and that the Building's engineers disagreed with the County's assessment. But Defendants did not and could not dispute what the Brodies had written ***because it was true***.

C. Defendants Do Not Dispute They Withheld and Misrepresented Engineering Reports

Defendants do not defend the trial court's decision, which wrongly stated that the Brodies claimed the building was "unsafe." R239; *see* Opening Br. 21-23. Instead, Defendants argue that "[t]he Brodies['] allegations—when construed as a whole—made it ***appear*** that the residents were in danger" and that the Board had misrepresented one engineering report and concealed another "to keep that danger from the unit owners." Br. 29 (emphasis added). Defendants choose their words carefully because the Brodies never said that residents were in danger.

What the Brodies actually said was that Defendants had "falsely described" a report from EC Consulting (an engineering firm retained by Defendants) "as concluding that the roof was 'well-maintained'"

and that Defendants had "not provided" a report from Pistorino & Alam (another engineering firm retained by Defendants) to unit owners. R44. ***Every part of that was true.*** Defendants nowhere deny they falsely represented the EC Consulting report as stating that the roof was well-maintained. The engineers' letters Defendants cited confirm "substantial structural damage" requiring "immediate repairs." R84. Nor do Defendants deny that they withheld the Pistorino report from residents. Instead, Defendants say that neither report found an "immediate" threat to "life safety." Br. 29. The Brodies never suggested otherwise.

D. Defendants Do Not Dispute that Eddy Cocina Testified the Contractor They Hired Was the "Worst"

Finally, Defendants assert that they disproved the "Brodies' claim" that EC Consulting's principal, Eddy Cocina, thought the contractor Defendants hired was the worst of the four to bid for the repair work. Br. 30. Here again, though, Defendants do not dispute what the Brodies said. Defendants' email argued that EC Consulting had not singled out the contractor they hired as "the worst." R82. The Brodies never said that. What the Brodies said was that Eddy Cocina had ***testified*** at a recent deposition that the contractor had

the worst bid. R44-45. Defendants never mention that testimony because, as discovery will show, that is what Cocina said.

E. Defendants' Non-Responses Show, at Best, Fact Disputes That Preclude Dismissal

Express malice is a "fact intensive inquiry," *Johnston v. Borders*, No. 15 Civ. 936, 2018 WL 8244336, at *5 (M.D. Fla. June 19, 2018) (applying Florida law), that "is almost never appropriate" to decide on the pleadings, *Stucchio v. Huffstetler*, 720 So. 2d 288, 289-90 (Fla. 5th DCA 1998) (Sharp, J., concurring specially).

Where, as here, "the essential facts and circumstances are not conceded, the existence or nonexistence of the privilege should be determined by the jury from all the facts and circumstances of the case." *Copeland*, 51 So. 2d at 790; *see Shafran v. Parrish*, 787 So. 2d 177, 180 (Fla. 2d DCA 2001) (reversing grant of summary judgment where the circumstances of a purportedly privileged statement were not "undisputed" or "so clear as to be unquestionable."); *Riggs v. Cain*, 406 So. 2d 1202, 1204 (Fla. 4th DCA 1981) (similar).

Not one of Defendants' supposedly contrary authorities (at 45) supports dismissing defamation claims on grounds of qualified

privilege. Just the opposite. The only case Defendants cite that even involved qualified privilege ***reversed*** dismissal, explaining that qualified privilege "presents a fact intensive issue that should ordinarily not be resolved by a motion to dismiss." *Fariello v. Gavin*, 873 So. 2d 1243, 1245 (Fla. 5th DCA 2004). Just so here.[4]

III. DEFENDANTS' QUALIFIED PRIVILEGE WAS NOT A LICENSE TO DEFAME THE BRODIES WITH IMPUNITY

Finally, Defendants suggest (at 23-25) that they had a "privileged purpose" for calling the Brodies liars because the Brodies' own email charged Defendants with dishonesty. But even if responding to those allegations was a privileged purpose, that "does not end the inquiry." *Randolph v. Beer*, 695 So. 2d 401, 404 (Fla. 4th DCA 1997). Where, as here, the evidence suggests the privilege "may have been exceeded or abused," only a jury can decide whether the privilege survives. *Axelrod*, 357 So. 2d at 1052.

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[4] *Blake v. City of Port Saint Lucie*, 73 So. 3d 905 (Fla. 4th DCA 2011), and *Fariello*, 873 So. 2d at 1245, affirmed dismissals based on ***absolute*** privilege, which ***no*** facts could overcome. Neither *Smith v. Cuban American National Foundation*, 731 So. 2d 702 (Fla. 3d DCA 1999), nor *Owner's Adjustment Bureau, Inc. v. Ott*, 402 So. 2d 466, 468 (Fla. 3d DCA 1981), involved claims of privilege at all. And neither were dismissed at the pleading stage—*Smith* went to trial and *Ott* was decided on summary judgment.

A. Defendants' Defamatory Statements Went Far Beyond Responding to the Brodies' Allegations

Qualified privilege protects only those statements which are "fairly warranted" by the duty compelling them. *Arison Shipping Co. v. Smith*, 311 So. 2d 739, 741 (Fla. 3d DCA 1975) (quoting *Abraham v. Baldwin*, 52 Fla. 151, 155 (1906)). Statements made to "un-necessarily or unduly injure another, or to show express malice" are not covered. *Id.*

Defendants note (at 31-32) that privileged statements do not lose protection just because the speaker has mixed motives. But the evidence and allegations here go far beyond the "incidental" gratification of Defendants' obvious enmity. *Nodar*, 462 So. 2d at 812. The content and context of Defendants' screed strongly suggest that malice was the driving force behind the email. *See* Part I, *supra.* And Defendants' inability to offer a direct answer to any of the Brodies' specific allegations, *see* Part II *supra*, strongly suggests that Defendants meant to discredit the Brodies rather than respond to their legitimate complaints. And what the evidence strongly suggests creates an issue of fact precluding dismissal on the pleadings.

B. Defendants' Waiver Argument Misses the Point

Defendants complain (at 22) the Brodies waived the argument that Defendants' email went beyond the "scope" of the privileged subject. But that is not the Brodies' argument. The Brodies' argument is that "the trial court erred by holding the defamatory statements were a legitimate response to the Brodies' concerns." Opening Br. 19 (in heading). That is the same argument the Brodies made below.

As the trial court explained, the Brodies' argued that Defendants forfeited the privilege by acting in "bad faith." R519. The trial court rejected that argument, holding that Defendants' email could not support an inference of malice because it was "necessitated" by the Brodies' "accusations," "was limited to the scope of said accusations, and provided evidence contradicting the Brodies' grave representations." R521.

The Brodies' opening brief in this Court argued that the trial court's holding was legally and factually wrong. As a legal matter, defamatory statements that "unnecessarily or unduly injure" raise an inference of malice that requires a trial, even if a contrary inference of good faith is possible. Opening Br. 20 (quoting *Arison Shipping*,

311 So. 2d at 741); *see Arko Plumbing*, 230 So. 3d at 529 ("competing inferences about [defendant's] motive" preclude summary judgment on the "question of express malice").

As a factual matter, the evidence of "good faith" the trial court cited did not add up. Defendants did not "contradict[]" the Brodies' accusations. R521. They contradicted only those statements they put into the Brodies' mouths. *See* Part II, *supra*. And Defendants' statements went far beyond the privileged purpose the trial court identified. Calling the Brodies malicious, contemptuous neighbors told the building's residents nothing about "the safety and cost of maintaining the common areas of the Condominium." R519.

Defendants' attempt to recharacterize this straightforward argument about their motive as an argument about the applicability of the privilege in the first place fails. *See Wainwright v. State*, 896 So. 2d 695, 702 (Fla. 2004) (rejecting effort to "re-characterize[]" argument made below in effort to claim it was not preserved).

CONCLUSION

The Court should reverse the trial court and remand this case for further proceedings.

December 4, 2023

Respectfully submitted,

/s/ *Steven F. Molo*

Steven F. Molo (*pro hac vice*)
Mark W. Kelley (*pro hac vice*)
Alex C. Eynon (*pro hac vice*)
MOLOLAMKEN LLP
430 Park Ave., 6th Floor
New York, NY 10022
Tel.: (212) 607-8160
smolo@mololamken.com

Megan Cunniff Church
(*pro hac vice*)
MOLOLAMKEN LLP
300 N. LaSalle St., Suite 5350
Chicago, IL 60654
Tel.: (312) 450-6716

Joel S. Perwin
JOEL S. PERWIN, P.A.
1680 Michigan Ave., Suite 700
Miami Beach, FL 33139
Tel.: (305) 779-6090

Jonathan E. Minsker
MINSKER LAW PLLC
1100 Biscayne Blvd.,
Suite 3701
Miami, FL 33132
Tel.: (786) 988-1020

Counsel for Appellants Stefan E. Brodie and Elizabeth Brodie

CERTIFICATE OF COMPLIANCE

Pursuant to the applicable Florida Rules of Appellate Procedure, I hereby certify that this brief is submitted in Bookman Old Style 14-point font and contains 3,361 words.

/s/ *Steven F. Molo*
Steven F. Molo

CERTIFICATE OF SERVICE

I certify that on December 4, 2023, a true and correct copy of this brief was filed electronically through the Florida Courts E-Filing Portal, which will serve all counsel on the attached Service List.

/s/ *Steven F. Molo*
Steven F. Molo

SERVICE LIST

Jason B. Giller, Esq.
Hilary A. Schein, Esq.
Jason B. Giller, P.A.
1111 Brickell Avenue
Ste. 1550
Miami, Florida 33131
jason@gillerpa.com
hilary@gillerpa.com
Counsel for Bayside Village East Condominium Ass'n, Inc.; Melnick; and Danz

Hugo V. Alvarez, Esq.
Steven L. Ehrlich, Esq.
Cole, Scott & Kissane, P.A.
9150 South Dadeland Blvd.
Suite 1400
Miami, Florida 33256
hugo.alvarez@csklegal.com
steven.ehrlich@csklegal.com
Counsel for Appellees Bayside Village East Condominium Ass'n, Inc.; Melnick; Stone; and Roodner; Marquis Association Management, LLC; and Danz

Glen H. Waldman, Esq.
Eleanor T. Barnett, Esq.
Armstrong Teasdale LLP
3250 Mary Street, Ste. 102
Coconut Grove, Florida 33133
miamiefiling@atllp.com
gwaldman@atllp.com
ebarnett@atllp.com
Counsel for Appellees Bayside Village East Condominium Ass'n, Inc.; Melnick; Stone; Roodner; Marquis Association Management, LLC; and Danz