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IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

NORTHWEST FLORIDA BLACK BUSINESS INVESTMENT CORPORATION, INC., a Florida Not-For-Profit Corporation; RONNIE ADAMS, an individual and Northwest Florida Black Investment Corporation Board Member, KEITH BOWERS, an individual and Northwest Florida Black Investment Corporation Board Member; KEITHEN MATHIS, an individual and Northwest Florida Black Investment Corporation Board Member, HAROLD M. KNOWLES, an individual and Northwest Florida Black Investment Corporation Board Member, SHERWOOD L. BROWN, SR., an individual and Northwest Florida Black Investment Corporation Officer and Former Board Member,

Case No. 1D2023-3166

L.T. Case No. 2020-CA-367

Appellants,

v.

THE JEFFERSON FIRM, PLLC, a Florida Limited Liability Company; NEHEMIAH JEFFERSON, an individual, DARRELL WILLS, an individual, and HILLARD GOLDSMITH, an individual,

Appellees.

ON APPEAL FROM THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE
HILLARD GOLDSMITH

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PRELIMINARY STATEMENT

Collectively, the Plaintiffs/Appellants are referred to as "BBIC." When it is necessary to describe them individually:

Plaintiff/Appellant, Northwest Florida Black Business Investment Corporation, Inc., is referred as "NWFLBBIC."

Plaintiff/Appellant, Ronnie Adams, is referred to as "Mr. Adams."

Plaintiff/Appellant, Keith Bowers, is referred to as "Mr. Bowers."

Plaintiff/Appellant, Keithen Mathis, is referred to as "Mr. Mathis."

Plaintiff/Appellant Harold M. Knowles, is referred to as "Mr. Knowles."

Plaintiff/Appellant Sherwood L. Brown, Sr., is referred to as "Mr. Brown."

Co-Defendants/Appellees, The Jefferson Firm, PLLC and Nehemiah Jefferson, are referred to as "the Jefferson Law Firm."

Co-Defendant/Appellee, Darrell Wills, is referred to as "Mr. Wills."

Defendant/Appellee, Hillard Goldsmith, is referred to as "Mr. Goldsmith."

The Amended Initial Brief is cited as (Amend. IB. **). The record is cited as (R. **). An appendix is provided with this brief and is cited as (A. **).

NATURE OF THE CASE

This is an appeal from a final summary judgment in favor of Mr. Goldsmith in an action filed by BBIC that accused him of defamation. This case arises from alleged financial misdealing that led to Mr. Goldsmith's retention of the Jefferson Law Firm.

While Mr. Goldsmith was a client, the Jefferson Law Firm put out a Media Release about the controversy. This Media Release was posted on Facebook. Mr. Goldsmith reposted the Media Release on his personal Facebook page. Over the next few months, Mr. Goldsmith also reposted other posts and articles about the controversy.

The trial court correctly determined that the Facebook reposts were not "published" for the purpose of a defamation action and that the Media Release contained statements of pure opinion. These two issues are dispositive. The other issues that Plaintiffs/Appellants raise are either waived, unpreserved, or do not demonstrate that the trial court committed reversible error.

STATEMENT OF THE CASE AND FACTS

The Plaintiff/Appellant, BBIC, is a non-profit civic league and social welfare organization. (R. 390–391). It facilitates the financing of development projects by minority-owned businesses. (R. 391). BBIC primarily provides loans to these businesses. (R. 391).

The Plaintiffs/Appellants, Mr. Adams, Mr. Bowers, Mr. Mathis, and Mr. Knowles are current board members, and Mr. Brown is the current president and a former board member. (R. 387). Board members are selected based on "their financial knowledge and expertise, legal background, and demonstrated community involvement," and are heavily involved with the local community in various corporate, non-profit, municipal, and educational capacities. (R. 396–402, 2534).

This Defendant/Appellee, Mr. Goldsmith, and Defendant/Appellee, Mr. Wills owned a company, External Office Systems-1, Inc. ("EOS1"). (R. 3267–3269). In the early 1990's, Mr. Goldsmith and Mr. Wills befriended the then-president of BBIC, Julien Brown Williams. (R. 703, 708, 2483, 2842, 2844, 3070, 3073, 3478, 3505). At the time, Mr. Williams was a pastor and religious advisor to Mr. Goldsmith and Mr. Wills. (R. 499, 708, 2483, 3071, 3296). Together with his pastoral duties, Mr. Williams presented himself as an entrepreneur and, over time, he began offering business advice to Mr.

Goldsmith and Mr. Wills for EOS1 among other things. (R. 703, 708, 500, 2483–2485, 3109–3110, 3376).

Based on this "advice," Mr. Goldsmith and Mr. Wills eventually allowed Mr. Williams to use their signatures to submit payroll checks and pay bills on behalf of EOS1, and they also allowed Mr. Williams to transfer money to their retirement account. (R. 703, 709). In the years following, Mr. Williams suggested that EOS1 operate administratively out of the BBIC office in Tallahassee at no charge. (R. 704, 3106–3107, 3376). And in 2005, Mr. Williams changed the mailing address of EOS1 to BBIC's address. (R. 704).

Eventually the relationship between Mr. Williams, Mr. Wills, and Mr. Goldsmith soured. (R. 502–547, 704, 2483–2485, 3509–3511). In 2016, Mr. Wills and Mr. Goldsmith attempted to remove Mr. Williams' access to the EOS1 bank account. (R. 704, 708). During that time, Mr. Wills and Mr. Goldsmith discovered unauthorized transactions that were authorized by Mr. Williams dating back many years.[1] (R. 704, 708, 5951–6022). The

[1] The record mentions criminal charges filed against Mr. Williams. (R. 700–714). The record does not contain court records related to these charges, which were charges for bank fraud, grand theft, and two counts of criminal use of personal identification. It is doubtful this information is necessary for this appeal, but the court records for the Second Circuit in Leon County confirm the filing of these charges, three of which (one count of bank fraud and two counts of possession of personal identification information without authorization) Mr. Williams was found guilty of on May 1, 2024. *State of Florida v. Julien Bobbie Williams*, Case No. 2018–CF–003715 (Second

unauthorized transactions totaled a significant amount of money—an estimated $103,000, over seventeen years. (R. 2484, 2507–2508, 5951–6022). Mr. Williams purportedly placed some of the stolen funds into the accounts of BBIC. (R. 502, 2484, 3509–3511, 5951–6022). BBIC took the position that this money was used for "rent" payments for operating out of BBIC's office location. (R. 2544, 2618).

Mr. Goldsmith and Mr. Wills retained counsel to help recoup some of the stolen money. They filed suit in the Second Judicial Circuit in and for Leon County, Florida against Mr. Williams, BBIC as a corporation, and the various individual board members. (R. 493–547, 2485, 3158). The comprehensive verified complaint alleged causes of action for conversion, breaches of fiduciary duties, negligent misrepresentation, unjust enrichment, negligent retention, supervision, director liability, and a violation of section 627.4137, Florida Statutes, which requires disclosure of certain insurance information. (R. 493–547). Because of the expense of the litigation, the suit was eventually dismissed without prejudice. (R. 551, 3158).

Circuit Leon County, Florida). Those records are publicly available at https://cvweb.leonclerk.com/public/online_services/search_courts/search_by_name.asp (last visited May 30, 2024). This conviction is likely to be appealed to this Court. If it is, Mr. Goldsmith with notify the Court of the related case. In any event, Mr. Goldsmith would ask this Court to take judicial notice of those records if the Court determines they are necessary for this appeal. *See* § 90.202(2)(6), Fla. Stat.

Mr. Goldsmith and Mr. Wills eventually retained the Jefferson Law Firm in reference to the grievances against Mr. Williams. (R. 2806–2807, 2810). On September 10, 2018, the Jefferson Law Firm issued a lengthy press release about the whole ordeal, which involved victims in addition to Mr. Goldsmith and Mr. Wills ("Media Release"). (R. 460–466) (A. 5–10).

The Media Release details Mr. Goldsmith and Mr. Wills' efforts to inform BBIC of Mr. Williams' wrongdoings. (R. 460–466) (A. 5–10). It also discusses checks that Mr. Williams drew from the EOS1 bank account, Mr. Goldsmith and Mr. Wills' reports to BBIC of Mr. Williams' actions, and concerns about Mr. Williams' continued involvement with BBIC. It discusses other individuals who were harmed by Mr. Williams, and growing concerns that many people and organizations were "instruments of fraud" by Mr. Williams. (R. 460–466) (A. 5–10). In addition, the Media Release states that the Jefferson Firm intended to explore every avenue of justice on behalf of its clients. (R. 466) (A. 10).

The Media Release is six pages long and Mr. Goldsmith encourages the Court to read the Media Release in full. (R. 460–466) (A. 5–10).

The Media Release was vetted by the Jefferson Law Firm. (R. 2732–2733, 2738–2741, 2781, 6418, 6422). The Jefferson Law Firm explained:

> [The Media Release] was vetted either through a document and/or a conversation with those grieved or harmed. So some

> sentences may be inferences to something that [Mr. Jefferson] read, reviewed. Others may be in reference to a conversation.

(R. 2738–2739). After the Media Release was issued the Jefferson Law Firm held a press conference. (R. 403). Mr. Goldsmith attended the press conference but did not speak. (R. 403, 3558, 4090, 6359).

In the months following the Media Release, Mr. Goldsmith used his own personal Facebook page to raise awareness of the ongoing issues with BBIC and Mr. Williams. On his own Facebook page, he reposted Facebook posts written by others, live stream video feeds of Mr. Wills speaking, and other articles relating to BBIC and Mr. Williams. (R. 391–395, 467–474, 479–481, 483, 485) (A. 11–23).

A. BBIC sues Mr. Goldsmith, Mr. Wills, and the Jefferson Law Firm.

BBIC sued Mr. Goldsmith, Mr. Wills, and the Jefferson Law Firm. The operative Amended Complaint was filed on November 3, 2020. (R. 387–571). BBIC alleged causes of action for defamation per se and defamation against Mr. Goldsmith. (R. 429–433, 446–451). In addition, BBIC also brought a single civil conspiracy count against each Appellee. (R. 451–456).

The Amended Complaint incorporates the Media Release, and the various Facebook posts Mr. Goldsmith reposted that BBIC alleges were defamatory. (R. 391–395, 460–466, 467–474, 479–481, 483, 485) (A. 11–

23). All but one of the Facebook posts were reposts without any commentary from Mr. Goldsmith. (R. 391–395, 460–466, 467–474, 479–481, 483, 485) (A. 11–23). The only repost that contained any commentary from Mr. Goldsmith is one from Mr. Wills' page with the caption "Don't mess with my Brother!" (R. 473) (A. 17).

The Amended Complaint seeks to hold Mr. Goldsmith liable for: (1) condoning the media release and providing information to the Jefferson Appellees for the drafting of the release; and (2) for his reposts on Facebook.

B. Mr. Goldsmith, the Jefferson Law Firm, and Mr. Wills move for summary judgment.

After years of litigation, Mr. Goldsmith and the Jefferson Law Firm moved for summary judgment. (R. 2482–2503, 2504–2529). Mr. Wills joined the motions. (R. 2530). In his motion for summary judgment, Mr. Goldsmith argued that the Media Release, to the extent it contained any statements made by him, was not defamatory because it contained statements of pure opinion. (R. 2487).

Mr. Goldsmith argued that the Facebook repostings were not defamatory because they were not "published" for the purpose of a defamation action. (R. 2492–2494). Because Mr. Goldsmith was merely "hyperlinking" or reposting an article or a video on his Facebook page, this could not rise to the level of publication needed to state a cause of action for

defamation. (R. 2493). Nor was there any record evidence that Mr. Goldsmith published any self-authored defamatory statements on Facebook aside from the repost where Mr. Goldsmith expressed his support for Mr. Wills. (R. 2494). This statement is not defamatory. (R. 2494).

Mr. Goldsmith further argued that even though BBIC contends that some statements in the Media Release were "unsubstantiated," that was not evidence that they were false. BBIC presented no evidence the "unsubstantiated" statements were false. (R. 2488). The statements in the Media Release were also vetted by counsel—the Jefferson Law Firm—and there was no testimony that the documents the Jefferson Law Firm relied on in preparing the media release were false. (R. 2488).

Moreover, Mr. Goldsmith maintained that the Plaintiffs were all public figures in reference to the controversies surrounding the activities of BBIC's president and because BBIC is funded by an authority receiving funding from the Legislature. (R. 2498). Because of BBIC and the individual Plaintiffs' status as public figures, Mr. Goldsmith argued that they had to prove he made the statements knowing they were false and with reckless disregard for the truth or actual malice. (R. 2497–2498, 2501). The record contains no such evidence.

Mr. Goldsmith also raised the alternative arguments that any report made to law enforcement, or similar agencies, was constitutionally protected speech and was protected under the Florida Whistleblower Act because he was merely reporting possible criminal activity. (R. 2495, 2497–2499).

C. BBIC's responds to Mr. Goldsmith's motion for summary judgment.

BBIC responded to Mr. Goldsmith's motion for summary judgment. (R. 3043–3046). The response contained little argument on the merits and instead asserted the conclusory allegations that Mr. Goldsmith made multiple false and untrue statements, and published these statements with knowledge or reckless disregard for the truth. (R. 3043–3044). BBIC's position appeared to be that because Mr. Williams changed the address of EOS1 to BBIC's address, the money that was taken out of the EOS1 account and put in BBIC's account were actually rent payments. (R. 3045).

BBIC stated that the legal issues of the "rent," "whether Plaintiffs [were] public figures," and whether the statements in the Media Release were vetted by the Jefferson Law Firm did "not require examination by the [c]ourt." (R. 3044). Further, BBIC argued that because some documents between Mr. Goldsmith and the Jefferson Law Firm were shielded by the attorney-client privilege, the trial court and BBIC were not in a "position to fully evaluate the issues in this case." (R. 3046).

Together with the written response, BBIC filed lengthy exhibits in support. (R. 2531–3474). BBIC did not explain the relevance of the filings or how they negated Mr. Goldsmith's arguments.

D. The trial court's order granting summary judgment.

The trial court held a hearing on all three Appellees' motions for summary judgment on September 19, 2023. (R. 6412). BBIC did not file the transcript of the summary judgment hearing below so it is not part of the record on appeal. *See* Fla. R. App. P. 9.200(a)(1).

After the hearing, BBIC submitted several proposed orders—none of which were signed by the trial court. (R. 5686–5723, 5724–5761, 5762–6029).

The last proposed order that was submitted contained seven points: (1) Mr. Goldsmith failed to raise his whistleblower protection as an affirmative defense and the statute of limitations for such a claim had run, (2) there was outstanding discovery that needed to be undertaken, (3) they did not need to prove actual malice because there was no "qualified privilege," (4) the defamatory statements were, at best, mixed opinion statements, (5) they were not public figures, (6) the statements were published, and (7) the statements were made with wantonness, gross negligence, and malice in

furtherance of the Appellees' purported conspiracy to extort BBIC. (R. 5762–6029).

On November 15, 2023, the trial court entered an order granting Mr. Goldsmith's motion for summary judgment. (R. 6412–6422). There, the trial court concluded that Mr. Goldsmith's Facebook posts did not meet the elements for a defamation claim because there was no record evidence Mr. Goldsmith published any self-authored defamatory statements nor did he re-post statements of others without identifying the original writer. (R. 6415–6417). Thus, these repostings were not "publications" for the purposes of common law defamation. (R. 6415–6416).

The trial court likewise concluded that the Media Release contained statements of pure opinion. (R. 6419). Nor was there any record evidence that the statements in the Media Release were false. (R. 6419). BBIC does not appear to challenge these conclusions in its Amended Initial Brief.

The trial court also determined that BBIC and the individual Plaintiffs were public figures. (R. 6421). Thus, BBIC had to prove that Mr. Goldsmith acted with actual malice in making the purportedly defamatory statements. (R. 6421). And there was no record evidence that Mr. Goldsmith thought his statements were false. (R. 6422). The trial court likewise determined that for BBIC to prove that Mr. Goldsmith defamed them, they would have to

prove that Mr. Goldsmith knew the statements he made were false and defaming but made them regardless. (R. 6418). But there was no evidence that he did so, especially because the statements in the Media Release were vetted by his counsel. (R. 6418). Finally, the trial court found that Mr. Goldsmith's reports to various law enforcement agencies were protected speech under Florida's Whistleblower Act and that BBIC is a state agency. (R. 6414–6415, 6418).

In reaching these conclusions, the trial court reviewed and considered all filings until November 6, 2023. (R. 6425). The trial court entered final judgment in Mr. Goldsmith's favor on November 15, 2023. (R. 6426–6427). BBIC timely appealed that judgment. (R. 6428–6480).

SUMMARY OF THE ARGUMENT

The trial court made two dispositive conclusions in its order. First, Mr. Goldsmith's Facebook reposts were not publications for purposes of common law defamation. Second, the statements in the Media Release were statements of pure opinion and therefore could not be defamatory. Because BBIC does not properly challenge either of these conclusions in the Amended Initial Brief, the issues are waived. As a result, this Court can and should affirm on these bases alone.

In the event the Court does not agree with Mr. Goldsmith's contention that these two determinations are dispositive and BBIC waived any arguments for these issues, BBIC cannot demonstrate that the trial court erred in granting summary judgment in Mr. Goldsmith's favor. The arguments BBIC makes in its Amended Initial Brief are either waived, unpreserved, or do not demonstrate error. Thus, this Court should affirm the trial court's order.

ARGUMENT

Standard of review: "A trial court's order granting final summary judgment is reviewed de novo." *Fla. Dep't of Rev. v. Verizon Comm'ns, Inc.*, 380 So. 3d 541, 543 (Fla. 1st DCA 2024) (quoting *Crapo v. Univ. Cove Partners, Ltd.*, 298 So. 3d 697, 700 (Fla. 1st DCA 2020)) (quotations omitted). Under Florida Rule of Civil Procedure 1.510(a), the trial court should grant summary judgment only "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."

I. The trial court correctly made two dispositive determinations that BBIC fails to properly challenge on appeal.

The trial court made two dispositive determinations in its order. First, it determined that Mr. Goldsmith's Facebook reposts were not published. (R. 6415–6417). Second, it determined that the Media Release contained statements of pure opinion. (R. 6419). Both determinations are dispositive and BBIC does not substantively challenge either conclusion. In any event, the trial court reached the correct conclusion on each issue. This Court should affirm.

a. The Facebook reposts were not published.

As stated above, the trial court determined that Mr. Goldsmith's Facebook reposts were not published for purposes of a defamation action. (R. 6415–6417). The trial court stated that "there is no record evidence . . . Mr. Goldsmith published any self-authored defamatory statements on Facebook nor did he repost the statements without identifying the original writer." (R. 6417).

Preservation. BBIC does not challenge this finding anywhere in its Amended Initial Brief. "An appellant who presents no argument as to why a trial court's ruling is incorrect on an issue has abandoned the issue." *Doe v. Baptist Primary Care, Inc.*, 177 So. 3d 669, 673 (Fla. 1st DCA 2015); *Rosier v. State*, 276 So. 3d 403, 406 (Fla. 1st DCA 2019) (en banc) ("For an appellant to raise an issue properly on appeal, he must raise it in the initial brief. Otherwise, issues not raised in the initial brief are considered waived or abandoned."). Thus, this issue is waived.

Even if BBIC had challenged this finding, this issue is not preserved for appeal. In its response to Mr. Goldsmith's motion for summary judgment, it merely stated that he "made multiple false and untrue statements and published these false and untrue statements with knowledge or reckless disregard for the truth[.]" (R. 3043–3044). This conclusory argument does

not preserve the issue for appeal. *See Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982) (noting that "for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below"). Because this issue is waived and unpreserved, this Court should affirm. *See Klayman v. City Pages*, 650 F. App'x 744, 751 (11th Cir. 2016) ("The district court entered summary judgment in favor of the defendants after finding that . . . [the defendant] was not liable for statements in the . . . article because linking to content that is already publicly available on the internet does not constitute republication. [The plaintiff] does not challenge these rulings on appeal. . . . Consequently, we will not consider them, and we affirm these rulings by the district court.").

Merits. But even if BBIC did properly challenge this determination, the trial court was correct.

"Defamation has the following five elements: (1) publication; (2) falsity; (3) actor must act with knowledge or reckless disregard as to the falsity on a matter concerning a public official, or at least negligently on a matter concerning a private person; (4) actual damages; and (5) statement must be defamatory." *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1105–06 (Fla. 2008). The publication element must be proven in a defamation action. *See*

White v. Discovery Commc'ns, LLC, 365 So. 3d 379, 387 (Fla. 1st DCA 2023) (citing *Lowery v. McBee*, 322 So. 3d 110, 114 (Fla. 4th DCA 2021)).

The issue of whether a mere reposting of a link that is otherwise available on the internet, without any added commentary, is a matter of first impression in Florida. *See Klayman v. City Pages*, No. 5:13–cv–143–Oc–22PRL, 2015 WL 1546173, at *12 (M.D. Fla. Apr. 3, 2015) ("[T]he court researched the issue . . . and could not find any Florida authority for the proposition that providing links to statements already published, without more, republishes those statements."). As detailed by the trial court here, other courts across the nation have determined that reposts, without more, do not constitute publication for a defamation action. (R. 6415–6416); *see also Klayman*, 2015 WL 1546173, at *12 n.13 (noting that at least three other courts had, at the time, rejected the plaintiff's contention that re-posting constituted publication).

For example, the United States Court of Appeals for the Third Circuit held that "a link and reference" to an allegedly defamatory article "may bring readers' attention to the existence of an article," but that alone does "not republish the article." *In re Phila. Newspapers, LLC*, 690 F. 3d 161, 175 (3d Cir. 2012). Thus, "under traditional principles of republication, a mere reference to an article . . . [which] does not restate the defamatory material[]

does not republish the material." *Id.* In reaching this conclusion, the court examined cases from other jurisdictions that "considered whether linking to previously published material is republication." *Id.* at 174. And the court found: "To date, they all hold that it is not based on a determination that a link is akin to the release of an additional copy of the same edition of a publication [as discussed in the Restatement (Second) of Torts] because it does not alter the substance of the original publication." *Id.* (first citing *Sundance Image Tech., Inc. v. Cone Eds. Press, Ltd.*, No. 02–02258, 2007 WL 935703 (S.D. Cal. Mar. 7, 2007), and then citing *Churchill v. State of New Jersey*, 876 A.2d 311 (N.J. 2005)).

Similarly, in *Salyer v. Southern Poverty Law Center, Inc.*, 701 F. Supp. 2d 912, 918 (W.D. Ky. 2009), the district court stated that "finding republication by hyperlink would undermine the purposes of applying the single publication rule to the internet." Moreover, the re-posts in that case "while adding a new method of access," to the purportedly defamatory article "did not restate the allegedly defamatory statements and did not alter the substance of that article in any manner." *Id.*; *see also In re Mineral Res. Int'l, Inc.*, 565 B.R. 684, 701 (Bankr. Utah 2017) ("A third party's posting of a defamatory statement elsewhere on the Internet does not constitute republication."). This is because republication requires an "affirmative act."

Clark v. Viacom Int'l, Inc., 617 F. App'x 495, 505 (6th Cir. 2015) (collecting cases); *compare Salyer*, 701 F. Supp. 2d at 918, and *In re Phila. Newspapers*, 690 F.3d at 175, with *League of United Latin Am. Citizens-Richmond Region Council 4614 v. Pub. Interest Legal Found.*, No. 1:18–cv–423, 2018 WL 3848404, at *1, *7 (E.D. Va. Aug. 13, 2018) (finding that the defendant's later statements were a republication where the later statements included allegedly defamatory content and were not mere references to portions of their initial statement).

Here, because Mr. Goldsmith merely reposted others' Facebook posts or "shared" articles published by other entities, he did not publish any defamatory material; he did not restate the purportedly defamatory language. He simply included a link to previously published posts and articles. So the trial court properly determined that Mr. Goldsmith's posts were not published for the purpose of common law defamation.

Because the trial court did not err in reaching this conclusion, this Court should affirm.

b. The Media Release contained statements of pure opinion.

The trial court also determined that "the statements made in the Media Release are pure opinion and not actionable as defamatory." (R. 6419). BBIC does not properly challenge this conclusion on appeal. And even if

BBIC did, the trial court correctly determined that the statements were pure opinion.

Preservation. The Amended Initial Brief references the word "opinion" three times. (Amend. IB. 11, 14, 25). The first reference is a conclusory assertion that BBIC challenges the trial court's determination that the defamatory statements were pure opinion. (Amend. IB. 11). The second reference is to a judicial opinion. (Amend. IB. 14). The last reference is another conclusory statement that "Appellees knew that the defamatory statements . . . were not statements of opinion; rather they were defamatory." (Amend. IB. 25).

These conclusory references are not enough to preserve the issue for appeal. So this argument is waived. "The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived." *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990); *see also Coolen v. State*, 696 So. 2d 738, 744 n.2 (Fla. 1997) (holding that the appellant's failure to fully brief and argue certain points on appeal waived the claims). Because BBIC has failed to fully brief this issue on appeal, this Court should affirm the trial court's grant of summary judgment in Mr. Goldsmith's favor.

<u>Merits.</u> Regardless of the waiver issue, the trial court properly determined that the statements in the Media Release were statements of pure opinion and not actionable as defamation.

Statements of pure opinion cannot constitute actionable defamation. *Nowik v. Mazda Motors of Am. (E.) Inc.*, 523 So. 2d 769, 770 (Fla. 1st DCA 1988). "Pure opinion occurs when the defendant makes a comment or opinion based on facts which are set forth in the article or which are otherwise known or available to the reader or listener as a member of the public." *From v. Tallahassee Democrat, Inc.*, 400 So. 2d 52, 57 (Fla. 1st DCA 1981); *see also Ozyesilpinar v. Reach PLC*, 365 So. 3d 453, 460 (Fla. 3d DCA 2023) ("Thus, 'commentary or opinion based on facts that are set forth in the subject publication or which are otherwise known or available to the reader or listener do not constitute libel.' " (quoting *Scott v. Busch*, 907 So. 2d 662, 667–68 (Fla. 5th DCA 2005)).

Because the interpretation of stated facts is not objectively provable or disprovable, "[c]ommentary or opinion based on facts that are set forth in the article or which are otherwise known or available to the reader or listener are not the stuff of libel." *Rasmussen v. Collier Cnty. Publ'g Co.*, 946 So. 2d 567, 571 (Fla. 2d DCA 2006). This is true "no matter how unjustified and unreasonable the opinion may be or how derogatory it is." Restatement

(Second) of Torts § 566 cmt. c. For the same reason, statements consisting of loose, figurative, or hyperbolic language" are not actionable. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990).

As the trial court determined, the Media Release identifies the facts on which the opinions are based. (R. 6419, 461–466). For example, the Media Release references various checks that raised suspicions about Mr. Williams' handling of funds, emails from various individuals, publicly available information and public records, and a list of other individuals who were harmed by Mr. Williams. (R. 461–466) (A. 5–10).

And there is unequivocal testimony that the facts referenced in the Media Release were researched and vetted by Mr. Goldsmith's then-counsel. (R. 2738–2741, 2781, 6418, 6422). Accordingly, under Florida law, the statements in the Media Release cannot support a defamation action.

Because the purportedly defamatory material (the Facebook reposts and the Media Release) that form the basis of BBIC's claims cannot support a defamation action, the trial court properly granted summary judgment in Mr. Goldsmith's favor.

II. BBIC's other arguments are unpreserved, waived, or do not warrant reversal.

The Court need not address any other arguments raised by BBIC because the two previously discussed issues are dispositive. In any event,

the remaining arguments BBIC raises are either unpreserved, waived, or do not warrant reversal. *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979) ("In appellate proceedings the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error."). Mr. Goldsmith will attempt to address each argument.

<u>The Summary Judgment Standard.</u> BBIC contends that the trial court erred in applying the amended summary judgment standard. (Amend. IB. 13–15). This is a meritless argument. In amending the Rule, the Supreme Court of Florida stated: "New rule 1.510 takes effect on May 1, 2021. This means that the new rule **must** govern the adjudication of **any** summary judgment motion decided **on or after** that date, **including in pending cases**." *In re Amends. to Fla. R. of Civ. Pro. 1.510*, 317 So. 3d 72, 77 (Fla. 2021) (emphases added). The trial court applied the correct standard.

<u>Limited public figures.</u> BBIC contends that the trial court erred in determining they are public figures. But this argument ignores the trial court's ultimate determination: "Plaintiff is a non-profit corporation funded by public tax money which appoints or elects members of its Board. In this regard, the individual Plaintiffs are public officials. Further, plaintiff is a non-profit corporation funded by public tax money which purports to work for the public good by offering aid to black/minority-owned small businesses in the

Tallahassee area." (R. 6421). Because BBIC makes no argument demonstrating that the trial court was incorrect, this argument is waived. *See Tillery v. Fla. Dep't of Juv. Just.*, 104 So. 3d 1253, 1255–56 (Fla. 1st DCA 2013) ("[A]n argument not raised in an initial brief is waived" and "not before [the Court] on appeal.").

Regardless of the fact that this argument is waived, the trial court was correct in determining that Plaintiffs are public figures. There are two classes of public figures. *Mile Marker, Inc. v. Petersen Publ'g, LLC*, 811 So. 2d 841, 845 (Fla. 4th DCA 2002) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)). The first are general public figures "of requisite fame or notoriety in a community who are always considered public figures." *Id.* The second are limited public figures "who have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.*

In determining whether a plaintiff is a limited public figure, Florida courts employ a two-step process. *Id.* "First, the court must determine whether there is a 'public controversy.' " *Id.* Second, "the court must . . . determine whether the plaintiff played a sufficiently central role in the instant controversy to be considered a public figure for purposes of that controversy." *Id.* at 846.

Plaintiffs are clearly limited public figures. First, the record shows that there was a public controversy: there were many news articles published, a Media Release made by Mr. Goldsmith's then-counsel, several Facebook posts, and even a criminal prosecution of the former president of the organization. Second, BBIC is at the center of this controversy and intimately involved; BBIC's role in and its response to Mr. Williams' criminal scheme was crucial. *See Silvester v. Am. Broadcasting Cos., Inc.*, 839 F.2d 1491, 1496 (11th Cir. 1988) ("In general, public figures voluntarily put themselves into a position to influence the outcome of the controversy. However, occasionally, someone is caught up in the controversy involuntarily and, against his will, assumes a prominent position in its outcome. Unless he rejects any role in the debate, he too has invited comment relating to the issue at hand.") (cleaned up).

And as described by the trial court, BBIC is publicly funded and elects members of the board. (R. 6421). In the operative complaint BBIC alleged that board members are selected based on "their financial knowledge and expertise, legal background, and demonstrated community involvement," and are heavily involved with the local community in various corporate, non-profit, municipal, and educational capacities. (R. 396–402, 2534). As such, the trial court properly determined that Plaintiffs are public figures.

<u>Actual Malice.</u> On page 15 of their Amended Initial Brief, BBIC states that the trial court "applied the incorrect used the [sic] actual malice standard . . . Appellants do not need to prove actual malice; they need only show that Appellees acted negligently." As discussed above, merely mentioning a point on appeal without fully briefing the issue waives the issue. *Duest*, 555 So. 2d at 852; *see also Coolen*, 696 So. 2d at 744 n.2. BBIC also did not raise this issue in response to Mr. Goldsmith's motion for summary judgment. (R. 3043–3046). This issue is therefore unpreserved. S*ee Duest*, 555 So. 2d at 852; *Steinhorst*, 412 So. 2d at 338.

Even if this issue were preserved, this Court has made clear that when "the plaintiff is a public figure, he must show that the defendant made the statements with actual malice, which has been defined as knowing the statements were false at the time they were made or making the statements with a reckless disregard of the truth." *Mastandrea v. Snow*, 333 So. 3d 326, 327–28 (Fla. 1st DCA 2022). As demonstrated, Plaintiffs are public figures. Therefore, the actual malice standard applies. BBIC cannot show that Mr. Goldsmith knowingly made false statements or made statements with a reckless disregard of the truth. The record lacks such evidence. Accordingly, the trial court correctly applied the actual malice standard.

Falsity. BBIC cherry-picks “lies” purportedly contained in the Media Release and relies on statements made in the suit Mr. Goldsmith and Mr. Wills filed against BBIC to show that Mr. Goldsmith acted with the requisite knowledge of falsity. (Amend. IB. 26–30). The record reflects that these specific arguments were never presented to the trial court.

The trial court determined that Mr. Goldsmith’s counsel vetted the information in the media release. (R. 6418, 6422). BBIC has no response to this determination. *See B.T. v. Dep’t of Child. & Fams.*, 300 So. 3d 1273, 1279 (Fla. 1st DCA 2020) (holding that by failing to make an argument in an initial brief, the issues is abandoned and waived). But, as discussed above, the fact that Mr. Goldsmith’s counsel vetted the information in the Media Release necessarily defeats any arguments that the statements in the Media Release were “lies.” BBIC therefore does not make any arguments showing that the trial court erred. *See Applegate*, 377 So. 2d at 1152.

BBIC’s other arguments. BBIC also argues that the trial court improperly applied Florida’s Whistleblower Act and that BBIC does not fit within that Act’s definition of a state agency. (Amend. IB. 16–25). To be clear, this is not a case where adverse action was taken against a state employee for whistleblowing. The issue was whether Mr. Goldsmith was protected when reporting suspected wrongdoing by the executive director of

BBIC. But these arguments were not raised before the trial court. (R. 3043–3046).

BBIC discussed the application of the Whistleblower Act in its third-amended proposed order—not in its response to the motion. (R. 5763–5769). And there is no transcript of the summary judgment hearing in the record to reflect what was argued there. Nevertheless, including a response to an argument raised by the opposing party's motion does not preserve the argument for appeal. "The preservation requirement has been strictly construed to require that the 'specific legal argument or ground to be argued on appeal must be part of that presentation [below] if it is to be considered preserved.' " *Pisano v. Mayo Clinic of Fla.*, 333 So. 3d 782, 788 (Fla. 1st DCA 2022) (quoting *Archer v. State*, 613 So. 2d 446, 448 (Fla. 1993)); *Keech v. Yousef*, 815 So. 2d 718, 719 (Fla. 5th DCA 2002) ("A legal argument must be raised initially in the trial court by the presentation of a specific motion or objection at an appropriate stage of the proceedings."); *cf. Adley Dasilva, P.A. v. Dep't of Health*, No. 4D2023–0856, 2024 WL 1644799, at *7 (Fla. 4th DCA Apr. 17, 2024) ("Here, although Dasilva raised this argument in his proposed recommended order, he failed to raise any challenge to Counts V and VI in his exceptions to the ALJ's recommended order.").

As the Supreme Court of Florida has explained: “Florida courts have traditionally held that questions not timely raised and ruled upon in the trial court will not be considered on appeal. This policy . . . is intended to give trial judges an opportunity to address objections made by counsel in trial proceedings and to correct errors accordingly.” *State v. Jefferson*, 758 So. 2d 661, 665 (Fla. 2000).

Here, BBIC could have responded to this argument as it was part of Mr. Goldsmith’s argument in his motion for summary judgment. (R. 2494–2497). But BBIC did not even include any rebuttal argument in response to the motion. *See* (R. 3043–3046). Simply including a responsive argument in a proposed order does not give the trial judge an opportunity to rule on the issue. These arguments are therefore waived.

BBIC also argues that a conclusory, self-serving affidavit was sufficient to create genuine issues of material fact and it suffered actual damages. (Amend. IB. 11, 30–32). Neither argument warrants reversal.

First, the statements in the affidavit are not “genuine” disputes of “material” fact. “Something is ‘material’ if it relates to the substantive law.” *Whitlow v. Tallahassee Mem’l Healthcare, Inc.*, 48 Fla. L. Weekly D1647 (Fla. 1st DCA Aug. 16, 2023). And “[a] material fact dispute is ‘genuine’ ‘if the

evidence is such that a reasonable jury could return a verdict for the nonmoving party.' " *Id.*

The affidavit BBIC highlights provides: (1) an independent auditor audited BBIC's finances, and the audits were "clean," (2) the Department of Economic Opportunity has not inquired into BBIC, (3) a conclusory allegation that "Defendants" published false statements of fact, (4) statements that BBIC's board members are volunteers and selected because of their backgrounds, and (5) an assertion that any wrongdoings would expose board members to personal liability. (Amend. IB. 30–31) (R. 2534). Points 1, 2, 4, and 5 have nothing to do with this defamation action; they are collateral matters that have no bearing on the outcome of this case.

The third point is merely a conclusory, incorrect statement—an issue that the trial court determined was not correct. *Ramsey v. Home Depot USA, Inc.*, 124 So. 3d 415, 418 (Fla. 1st DCA 2013) ("Conclusory, general assertions do not create factual disputes necessary to avoid summary judgment."); *accord Kawsar v. Alhamdi Grp.*, 369 So. 3d 1227, 1228 (Fla. 5th DCA 2023) (holding that a conclusory affidavit cannot be the basis for summary judgment). As a result, this argument does not warrant reversal.

Finally, the issue of actual damages was not discussed in the trial court's order and is only mentioned in the Amended Initial Brief in the "Issues

on Appeal" section. Any argument on this issue is not pertinent to this appeal, and even if it were, the trial court did not make any sort of determination. And so this argument is not properly before this Court.

CONCLUSION

The trial court made two dispositive determinations that BBIC fails to preserve for appeal. The other arguments BBIC raises are either unpreserved, waived, or do not demonstrate error. Even so, the trial court properly granted final summary judgment in Mr. Goldsmith's favor. This Court should affirm.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed and served via the state of Florida's E-filing Portal on the 31st day of May, 2024, to:

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CERTIFICATE OF COMPLIANCE

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