

**IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA**

CASE NO. 1D2025-2442

Lower Tribunal Case No. 25-CA-352

ZACHARY YOUNG and NEMEX ENTERPRISES, INC.,

Appellants,

vs.

THE ASSOCIATED PRESS,

Appellee.

On Appeal from the Circuit Court
Of the Fourteenth Judicial Circuit
In and for Bay County, Florida

APPELLANTS' INITIAL BRIEF

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PREFACE

Appellant (Plaintiff below) Zachary Young will be referred to herein as “Appellant” or “Young”.

Appellant (Plaintiff below) Nemex Enterprises, Inc. will be referred to herein as “Appellant” or “Nemex”.

Appellee (Defendant below) The Associated Press will be referred to herein as “Appellee” or the “AP”.

Citations to the Record on Appeal will be in the following format: R/[page number]. For example, a citation to page 14 of the Record on Appeal will read “R/14”.

STATEMENT OF CASE AND FACTS

Appellants (Plaintiffs below), Zachary Young (“Young”), a U.S. Navy veteran and security consultant, and his company Nemex Enterprises, Inc. (“Nemex”), sued Appellee (Defendant below), the Associated Press (“AP”), for defamation after AP falsely reported Appellants engaged in human smuggling. R/16-30. AP brazenly accused Appellants of human smuggling in an article that reported on Young’s favorable multi-million-dollar verdict against CNN, where Young was cleared of CNN’s similar false accusation of running a “black market” scheme to charge desperate Afghans exorbitant fees to evacuate the unstable country following the chaotic U.S. withdrawal and rise of the Taliban. R/16-30.

In an order that inappropriately compares the criminal accusation of human smuggling to sneaking candy into a movie theater and flippantly refers to the lawsuit as a bad sequel that never should have been made, the court incorrectly determined AP’s accusation that “Young’s business helped smuggle people out of Afghanistan” was not defamatory, the article was not “of or concerning” Nemex, and the article was protected by the fair report privilege. R/1716-32. Appellants timely appeal the dismissal with

prejudice and summary judgment on the Complaint, the fee award, and the denial of their motion for leave to seek punitive damages. R/1735-53.

A. Young undertook dangerous efforts to legally evacuate Afghans in peril.

In August 2021, after Kabul fell to the Taliban, Young undertook dangerous efforts to evacuate Afghan allies and civilians who were in peril. R/20. Working through Nemex, Young coordinated extractions for dozens of at-risk individuals. R/20. Young never charged evacuees for these rescues; instead, Young secured funding from outside sponsors. R/20. Young's evacuation activities were legal: he operated with the knowledge of relevant authorities, used legitimate travel documents, crossed borders at government checkpoints, and was simply helping people escape a life-threatening situation. R/20, 744-57, 776-83, 1818-19.

B. Young won a multi-million-dollar defamation lawsuit after CNN falsely accused him of profiteering.

On November 11, 2021, CNN broadcast a segment (on The Lead with Jake Tapper) that painted private evacuation efforts in Afghanistan as a "black market." R/20. CNN spotlighted Young and falsely insinuated he was "profiting" off the desperation of Afghans,

suggesting his firm was charging “hefty fees” to evacuate people. R/20. These assertions falsely accused Young of unethical and illegal conduct and severely damaged his reputation and Nemex’s business prospects. R/20.

In 2022, Young and Nemex filed a defamation lawsuit against CNN. R/20. Over the next two years, the evidence proved CNN’s statements were false and Young was not running any “black market” or illegal scheme. R/20-21. Young’s unchallenged trial testimony, along with two decisions on summary judgment, determined Young had not committed any crimes. R/21-22, 640-81. In January 2025, following a two-week-long trial, the jury found CNN liable for defamation and awarded Young \$5 million in compensatory damages. R/20-21. CNN avoided a punitive damages phase by reaching a last-minute settlement after the verdict. R/21.

C. AP’s coverage of Young’s court victory created new libel.

On or about January 17, 2025, AP published a news article on the outcome of the CNN trial that, despite the verdict, explicitly accused Young of human smuggling:

Young’s business helped smuggle people out of Afghanistan, but he said he worked exclusively with

deep-pocketed outside sponsors like Bloomberg and Audible. CNN showed his face in a story that primarily raised questions about contractors who were charging Afghans themselves fees as much as \$10,000 to get out.

R/21, 85-89. The takeaway is the evacuation work was an illegal human smuggling operation bankrolled by wealthy sponsors. R/21. The falsity of any illegal human smuggling notion was well-documented, yet AP published the “smuggle people” accusation anyway. R/22.

D. Young and Nemex sued AP for defamation.

On March 27, 2025, Young and Nemex, through counsel, sent AP a pre-suit notice demanding retraction of the defamatory falsehood and compensatory damages. R/71-72. When AP stood by the veracity of its article, R/694-96, Young and Nemex initiated the underlying lawsuit on April 11, 2025 for defamation *per se* (Count I by Young), defamation by implication (Count II by Young), and trade libel (Count III by Nemex). R/16-30. This lawsuit was assigned to the same judge who presided over the CNN case. R/1716-32.

As required for media defendants, Young and Nemex alleged AP published the defamatory statement with actual malice. R/22-23. As a leading news organization, AP was fully aware of the

outcome of the CNN case, yet nevertheless created the impression it was a fact that “Young’s business helped smuggle people.” R/22. AP is sophisticated in the use of language and consistently uses “smuggle people/humans” to describe illegal activity. R/22. AP’s word choice was not rooted in ignorance or benign intent—it was a knowing or reckless libel. R/22-23.

This defamation directly and proximately caused severe harm to Young and Nemex, who suffered personal and professional consequences from outrageously being labeled human smugglers, exacerbating the damage CNN’s reporting already inflicted. R/23. The article was disseminated worldwide via AP’s wire service and website, reaching approximately 4 billion people per day. R/23, 530.

E. Young and Nemex requested leave to seek punitive damages.

Young and Nemex moved to amend the Complaint to assert a claim for punitive damages, proffering voluminous record evidence to support their burden of making a reasonable showing that AP published the article with actual (and, although unnecessary,

express) malice.¹ R/48-119(original motion and proffer), 142-230(additional proffer), 286-320(additional proffer), 455-696(amended motion and proffer), 1525-44(response), 1545-1628(reply), 1637-1715(supplemental reply). Young and Nemex proffered:

(1) AP's post-publication conduct provides powerful evidence AP defamed Young and Nemex with actual (and express) malice. R/459-60. Despite receiving the pre-suit demand letter and the compelling evidence of falsity it contained, AP refused to retract the claim of human smuggling. R/459-60, 475-78, 513-16, 693-96. By contrast, U.S. News & World Report, which had republished the article, retracted same. R/475, 615-17. AP conducted a media blitz, calling the ensuing lawsuit "frivolous". R/476, 565. In its Initial Disclosures, AP claimed the article is true or substantially true. R/1629-33.

(2) AP had knowledge of the criminal meaning of "smuggle people" and knew its use of same would falsely ascribe criminal conduct to Young and Nemex. R/460-64. AP's Stylebook defines

¹ Young and Nemex argued they only needed to show actual malice, but they also showed express malice. R/469-71.

“human smuggling” or “people smuggling” as “transporting people across an international border illegally, and with their consent, in exchange for a fee.” R/461-64, 479-80, 526-60, 618-36. AP’s reporting consistently uses “smuggle humans/people” to describe criminal conduct. R/460-64, 517-25. Public comments on news articles regarding the underlying lawsuit evidence some readers believed Young and Nemex criminally “smuggled people.” R/464, 575-80, 688-92.

(3) The way the reporter discusses Young and Nemex in a pre-verdict article dated January 8, 2025, as compared to the way the same reporter discusses them in the defamatory January 17, 2025 article, strongly evidences AP used “smuggle people” with precision and malice. R/581-84(January 8 article), 585-91(January 17 article). R/464-66. In the January 8 article, AP accurately describes Young’s and Nemex’s activities using words such as “extraction” and “evacuation.” R/583. AP acknowledged Young “did nothing illegal” and reported CNN denied accusing Young of “nefarious acts.” R/583. In the January 17 article, however, AP abandoned accuracy, explicitly accusing Young and Nemex of the criminal act

of “smuggl[ing] people” in direct contradiction to the adjudicated facts, undermining Young’s vindication in the CNN trial. R/589.

The proffer constituted a reasonable showing that AP published the article with actual (and express) malice and supported a punitive damages claim.

F. AP moved to dismiss the Complaint or, alternatively, for summary judgment.

Under the Anti-SLAPP Statute (§768.295), which protects free speech by prohibiting Strategic Lawsuits Against Public Participation, AP moved to dismiss the Complaint with prejudice or, alternatively, for summary judgment, arguing the article is not defamatory, the lawsuit is not “of or concerning” Nemex, and the lawsuit is barred by the fair report privilege. R/374-434(motion), 697-854(response), 1478-91(reply).

G. The court erroneously granted the Anti-SLAPP motion and denied punitive damages.

On July 3, 2025, the court held a hearing on the Anti-SLAPP and punitive damages motions. R/1762-1923. On August 29, 2025, the court entered an omnibus order granting the Anti-SLAPP motion and denying punitive damages. R/1716-32.

The court wove a theme throughout the order that this case was a bad “sequel” to the CNN case that “should not have been made,” a “money grab,” and the “smuggling people” charge as innocuous as sneaking “candy” “into a movie theater.” R/1716-32. The court’s irreverence and lack of judicial decorum reveal bias.

Turning to the legal ruling, the court determined AP was entitled to dismissal or summary judgment based on the fair report privilege because, in context, although “smuggle humans/people” does not appear in the CNN record, the statement was an accurate summary of Young’s trial testimony. R/1720-21, 1783. Although “smuggle people” denotes criminal behavior, in context, it described Young’s work to “rescue” endangered Afghans and is not defamatory. R/1721-24. Although Nemex sufficiently pled trade libel, the court dismissed the claim based on fair report privilege and lack of defamatory meaning and granted summary judgment because “Plaintiffs have not come forward with any evidence that any reader of the Article believed Nemex was implicated to create an issue of fact.” R/1725.

The court denied the punitive damages motion, finding the article and AP’s knowledge of the CNN record were not evidence of

malice because the article was not defamatory, Young and Nemex did not proffer sufficient evidence to impute the reporter's statements to AP, and AP's failure to retract standing alone is insufficient to constitute actual or express malice. R/1726-29.

Pursuant to the Anti-SLAPP statute's fee-shifting provision, the court assessed fees against Young and Nemex. R/1725-26. This appeal timely follows. R/1735-53.

STANDARD OF REVIEW

An order dismissing a complaint or granting summary judgment pursuant to the Anti-SLAPP statute presents a pure question of law and is reviewed *de novo*. *Mishivye v. Davis*, 402 So.3d 443, 448 (Fla. 2d DCA 2025); *Flynn v. Wilson*, 398 So.3d 1103, 1110 (Fla. 2d DCA 2024); *Lam v. Univision Communications, Inc.*, 329 So.3d 190, 197 (Fla. 3d DCA 2021).

An order denying a motion to amend a complaint to state a claim for punitive damages pursuant to §768.72 is reviewed *de novo*. *Grove Isle Assoc., Inc. v. Lindzon*, 350 So.3d 826, 830 (Fla. 3d DCA 2022); *Estate of Despain v. Avante Group, Inc.*, 900 So.2d 637, 644 (Fla. 5th DCA 2005).

A court's interpretation of a statute is reviewed *de novo*. *Lam*, 329 So.3d at 194.

Where entitlement to attorney fees depends on the interpretation of a statute or contract, a court's ruling on a motion for attorney fees is reviewed *de novo*. *Lee v. Animal Aid, Inc.*, 388 So.3d 25, 28 (Fla. 4th DCA 2024).

SUMMARY OF ARGUMENT

“Society has a pervasive and strong interest in preventing and redressing attacks upon reputation.” *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966). “The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.” *Id.* at 92-93. The court erroneously dismissed with prejudice and entered summary judgment on Appellants’ Complaint and denied them leave to seek punitive damages, improperly preventing Appellants from “protect[ing their] own good name.” *Id.* at 92.

Procedurally, the court:

(1) improperly relied on the declaration of AP’s attorney who, contrary to Rule 1.510(c)(4), lacked personal knowledge, did not set out facts that would be admissible in evidence, and was not competent to testify on the matters stated;

(2) jumbled the three distinct and sequential stages of the defamation analysis (defamatory meaning, then privilege, then intent) by first determining application of the fair report privilege,

then improperly using privilege-based analysis to retroactively determine lack of defamatory meaning, and then relying on this tainted threshold determination to declare there could be no express or actual malice;

(3) improperly granted the Anti-SLAPP motion without determining whether Appellants' "primary" motivation for filing the suit was "because [AP] exercised the constitutional right to free speech in connection with a public issue."

(4) improperly applied the fair report privilege based on the judge's own summary of Young's testimony rather than reference to the actual CNN record; and

(5) incorrectly required proof of express malice to amend the Complaint to state a claim for punitive damages when actual malice is the correct standard.

Substantively, the court erroneously determined: Appellants had not demonstrated defamatory meaning; the lawsuit was not "of or concerning" Nemex; the fair report privilege barred the lawsuit; and the proffered evidence was insufficient to meet the threshold for punitive damages.

AP's statement that "Young's business helped smuggle people out of Afghanistan" expressly accused Appellants of the crime of human smuggling and is classic defamation *per se*. AP further defamed Young by implication by creating the false impression that regardless of who funded Young's rescue operations, Young was engaged in human smuggling. To the extent AP argued a different interpretation, defamatory meaning became an issue of fact for the jury.

Appellants proffered evidence sufficient to withstand summary judgment that a reasonable reader would believe the article was "of and concerning" Nemex, where: the article referred to Young's "business"; Nemex was Young's only business involved in the evacuations; and Nemex was publicly and prominently identified as Young's company and co-plaintiff during the 2+ year litigation.

AP's use of "smuggle people," which has a specific criminal definition, in the context of describing how Young (through Nemex) moved Afghans across the border, cannot, as a matter of law, constitute a fair and accurate summary of a lawsuit that vindicated Young and established his activity was lawful. The fair report privilege does not bar the lawsuit.

Appellants proffered evidence that, with actual malice, AP falsely accused Appellants of human smuggling. The proffered evidence included: the article itself accusing Appellants of “smuggl[ing] people”; AP Stylebook definition of “human/people smuggling” as criminal conduct; the Washington, D.C. lawsuit where AP asserts its right to choose its verbiage per its Stylebook; portions of the CNN record demonstrating Appellants did not engage in illegal activity; and AP’s post-publication actions, including its refusal to retract, the media blitz calling the lawsuit frivolous, and Initial Disclosures claiming the defamatory statement is true. Viewed in the light most favorable to Appellants, the court should have granted Appellants leave to assert a claim for punitive damages.

On remand, Appellants respectfully request reassignment of this case to a new judge. Judge Henry’s irreverence (money grab accusation, bad sequel and candy bar analogies) demonstrates his disdain for the case and bias against Appellants. Reassignment is warranted to ensure a fair proceeding and maintain the appearance of justice.

ARGUMENT

I. The court erroneously granted the Anti-SLAPP motion.

Under the motion to dismiss and summary judgment standards, both of which required the court to view the allegations in the Complaint and the summary judgment evidence in the light most favorable to Appellants as the non-moving parties, the court erroneously determined as a matter of law that the article is incapable of defamatory meaning, the article is not “of or concerning” Nemex, and the fair report privilege bars the lawsuit. AP did not meet its burden to show this lawsuit should be dismissed with prejudice or summarily disposed. Appellants request this Court to reverse and remand for further proceedings.

The Anti-SLAPP statute prohibits the filing of Strategic Lawsuits Against Public Participation (“SLAPP”): lawsuits “without merit and [brought] primarily because [the defendant] has exercised the constitutional right of free speech in connection with a public issue....” §768.295(3), Fla.Stat. (2025). “Free speech in connection with public issues” means “any written or oral statement that is protected under applicable law and...is made in or in connection with a[n]...article...[or] news report....” §768.295(2)(a), Fla.Stat.

(2025). “[D]efamation is not constitutionally protected speech” and thus is not “free speech in connection with a public issue.” *Mishiyeu*, 402 So.3d at 449-50; accord *Fox v. Hamptons at Metrowest Condo. Ass’n*, 223 So.3d 453, 457 (Fla. 5th DCA 2017).

The Anti-SLAPP statute entitles a defendant to “expeditious resolution of a claim that the suit is in violation of this section” via a motion to dismiss and/or motion for summary judgment and provides for prevailing party attorney fees. §768.295(4), Fla.Stat. (2025). “At bottom, Florida’s [Anti-SLAPP] statute is a garden variety fee shifting provision, which the Florida legislature enacted to accomplish a fundamental state policy—deterring SLAPP suits.” *Lam*, 329 So.3d at 197. The Anti-SLAPP statute does not alter the well-established rubric for evaluating motions to dismiss and for summary judgment. *Id.* at 195; *Flynn*, 398 So.3d at 1115.

In reviewing a motion to dismiss, the “allegations of the complaint are assumed to be true and all reasonable inferences arising therefrom are allowed in favor of the plaintiff.” *Ralph v. City of Daytona Beach*, 471 So.2d 1, 2 (Fla. 1983). The “purpose of a motion to dismiss” is not to evaluate factual disputes, but is solely “to test the legal sufficiency of a complaint.” *Bilbrey v. Myers*, 91

So.3d 887, 890 (Fla. 5th DCA 2012). The court “must *not* speculate what the true facts may be or what will be ultimately proved” at trial, *Hitt v. N. Broward Hosp. Distr.*, 387 So.2d 482, 483 (Fla. 4th DCA 1980), nor may the court review matters outside the complaint to justify grant of the motion. *Mellish Enters., Inc. v. Weatherford Int’l, Inc.*, 678 So.2d 913 (Fla. 4th DCA 1996). A motion to dismiss “should be granted only when the party seeking dismissal has conclusively demonstrated that plaintiff could prove no set of facts whatsoever in support of the cause of action.” *Almarante v. Art Institute of Fort Lauderdale, Inc.*, 921 So.2d 703, 705 (Fla. 4th DCA 2006).

A motion for summary judgment, which is evaluated in accordance with the federal standard, may be granted 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.” Fla.R.Civ.P. 1.510(a); *In re Amendments to Fla.R.Civ.P. 1.510*, 317 So.3d 72 (Fla. 2021). A party seeking summary judgment “always bears the initial responsibility” of demonstrating “the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). “[T]he inferences to be drawn from the underlying

facts...must be viewed in the light most favorable to the party opposing the motion.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). A genuine factual dispute exists “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The court “treat[ed] the [Anti-SLAPP motion] more as a motion for summary judgment.” R/1719. Nevertheless, because the court ruled on both the dismissal and summary judgment, the analysis addresses both standards.

A. AP’s declaration did not comply with Rule 1.510(c)(4).

The movant must meet its summary judgment burden by proffering evidence, including a declaration. Fla.R.Civ.P. 1.510(c)(1).

Affidavits or Declarations. An affidavit or declaration used to support or oppose a motion **must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.**

Fla.R.Civ.P. 1.510(c)(4).

If an affidavit fails to satisfy any of the requirements of Rule 1.510(c)(4), **“the affidavit should be found legally insufficient to**

support the entry of summary judgment in favor of the moving party.” *Gromann v. Avatar Prop. & Cas. Ins. Co.*, 345 So.3d 298, 300 (Fla. 4th DCA 2022); accord *Passariello v. Bank of N.Y. Mellon*, 347 So.3d 446, 447-48 (Fla. 3d DCA 2022). “[T]he personal knowledge requirement...is meant to prevent the trial court from relying on hearsay when deciding a motion for summary judgment.” *Gromann*, 345 So.3d at 300-01; accord *Perez v. Citizens Prop. Ins. Corp.*, 343 So.3d 140, 143 (Fla. 3d DCA 2022).

AP submitted the declaration of its attorney, Charles Tobin, as the only evidence in support of summary judgment. R/395-434. Appellants argued the court should not accept the declaration. R/1839. Tobin made no averments indicating he had personal knowledge or was competent to testify on the matters stated. Nor did Tobin set out facts that would be admissible in evidence. In a bare-bones declaration, Tobin averred he was AP’s attorney and was “submit[ting] this declaration to annex documents relevant to the AP’s [Anti-SLAPP motion]”: six different AP articles; excerpts from the CNN trial transcript; and correspondence Tobin sent to Appellants’ attorney regarding judicial notice of the foregoing. R/395-434.

Tobin did not declare he is AP's corporate representative or the author of any of the articles. Even if Tobin were AP's corporate representative, he still would be held to the standard enunciated in Rule 1.510(c)(4), including the personal knowledge requirement. *Savoy v. Am. Platinum Prop. & Cas. Ins.*, 363 So.3d 1102, 1106 (Fla. 4th DCA 2023). The letter regarding judicial notice is mere correspondence between attorneys and lacks evidentiary value. *Frantin v. MVS Media Group, LLC*, 390 So.3d 75, 78 (Fla. 3d DCA 2023)(“MVS’s attorney’s declaration asserts no personal knowledge, only inadmissible hearsay[, and] improperly sought to establish argument of counsel as factual evidence.”).

The motion for summary judgment is defective because it is supported by a faulty affidavit that fails to meet *any* of the requirements of Rule 1.510(c)(4). *Gromann*, 345 So.3d at 301 (“Avatar’s affidavit fails to satisfy any prong of rule 1.510(c)(4).... [T]he affidavit cannot be used to support a summary judgment motion. ... [T]he trial court erred in granting summary judgment for Avatar predicated on a **fatally deficient affidavit**....”). Because Tobin’s declaration meets none of the requirements of Rule 1.510(c)(4), the court “should have disregarded the [declaration] and

attached documents.” *Savoy*, 363 So.3d at 1107. Tobin’s fatally deficient declaration prevented AP from meeting its summary judgment burden.

B. The court applied the incorrect legal framework.

The court erred by jumbling the three distinct and sequential stages of the defamation analysis. Step one asks whether the challenged statement is capable of defamatory meaning; step two asks whether, even if the words are defamatory, defendant is nonetheless excused from liability by a privilege; and step three asks whether any asserted privilege is lost because the statement was made with express or actual malice. *Cape Publications, Inc. v. Reakes*, 840 So.2d 277, 279-81 (Fla. 5th DCA 2003); *Richard v. Gray*, 62 So.2d 597, 599 (Fla. 1953); *Curtis Pub. Co. v. Butts*, 388 U.S. 130, n.18 (1967).

The court improperly began its analysis with step two—the affirmative defense of the fair report privilege. The court concluded not only that the privilege applied to bar Appellants’ lawsuit, but also improperly used privilege-based reasoning to retroactively determine AP’s statement was incapable of defamatory meaning. The court first should have evaluated the statement “alone without

innuendo” to determine defamatory meaning and should not have jumped ahead to privilege analysis. *Richard*, 62 So.2d at 598. Having improperly used privilege analysis to determine the statement was incapable of defamatory meaning, the court then relied on this tainted threshold conclusion to declare there could be no express or actual malice.

This reasoning is backwards. Privilege cannot negate defamatory meaning, and a court cannot avoid the required malice inquiry by backwardly declaring the statement non-defamatory based on privilege. When a court determines as a matter of law whether a privilege applies, the court must presume the statement to be defamatory. *Trump v. ABC, Inc.*, 742 F.Supp.3d 1168, 1183 (S.D. Fla. 2024). This is the opposite of what occurred here, where the court used privilege-based reasoning to determine defamatory meaning. This collapse of meaning, privilege, and malice into a single step is harmful and reversible error.

The court also failed to determine whether Appellants filed the lawsuit “primarily because [AP] exercised the constitutional right to free speech in connection with a public issue.” §768.295(3), Fla.Stat. (2025). AP presented no evidence as to Appellants’

“primary” motivation for filing the lawsuit. As such, granting the Anti-SLAPP motion was error.

C. The court erred by determining the article was not defamatory.

A defamation claim has five elements: (1) publication, (2) of a false statement, (3) with knowledge or reckless disregard as to the falsity (for public figures) or negligence (for private figures), (4) which causes actual damages, and (5) is defamatory. *Jews for Jesus, Inc. v. Rapp*, 997 So.2d 1098, 1106 (Fla. 2008). A “communication is ‘defamatory’ if it tends to harm the reputation of another as to lower him or her in estimation of community or deter third persons from associating or dealing with the defamed party.” *Mile Marker, Inc. v. Petersen Publ’g, L.L.C.*, 811 So.2d 841, 845 (Fla. 4th DCA 2002).

The court erroneously determined, as a matter of law, Appellants had not met the fifth element of showing the statement was defamatory. “[W]here a publication is susceptible of two reasonable interpretations, one of which is defamatory, the issue of whether the publication was defamatory becomes one of fact and must be submitted to a jury...for a fact-finding determination.”

Miami Herald Pub. Co. v. Ane, 423 So.2d 376, 389 (Fla. 3d DCA 1982); accord *Cousins v. Post-Newsweek Stations Fla., Inc.*, 275 So.3d 674, 681 (Fla. 3d DCA 2019); *Daniels v. Patterson*, 751 So.2d 678, 679 (Fla. 1st DCA 2000); *Belli v. Orlando Daily Newspapers, Inc.*, 389 F.2d 579, 585 (5th Cir. 1968).

Appellants pled facts sufficient to demonstrate the statement was defamatory, and a genuine issue of material fact existed regarding defamatory meaning.

i. Defamation Per Se

A statement is defamatory *per se* if, when considered alone without innuendo, it, *inter alia*, charges someone with committing a crime or tends to injure someone in his business, trade, or profession. *Adams v. News-Journal Corp.*, 84 So.2d 549, 551 (Fla. 1955); *Blake v. Giustibelli*, 182 So.3d 881, 884 (Fla. 4th DCA 2016); *Shafran v. Parrish*, 787 So.2d 177, 179 (Fla. 2d DCA 2001); *Glynn v. City of Kissimmee*, 383 So.2d 774, 775-76 (Fla. 5th DCA 1980).

AP's statement that "Young's business helped smuggle people out of Afghanistan" expressly accused Appellants of human smuggling: a grave felony under U.S. law (8 U.S.C. §1324), and a serious crime under international law (U.N. Protocol Against the

Smuggling of Migrants). Appellants alleged, and AP did not dispute, the CNN record cleared Young of any illegal conduct in connection with his rescue efforts. This is the epitome of defamation *per se*.

Although the court acknowledged the dictionary definition of “smuggl[ing] people” is criminal, the court nevertheless erroneously found as a matter of law the statement was not defamatory *per se* based on the context of the article. To look to the context of the article in step one of determining whether the statement is capable of defamatory meaning is erroneous. Context is only relevant in step two when determining whether privilege bars the suit. *Trump*, 742 F.Supp.3d at 1179-84. The court may have confused these two steps because, in determining whether AP accurately reported on the CNN proceedings, the court had to determine whether AP accused Appellants of the criminal conduct that is the essence of the defamatory statement. The difference is, in step one, the court evaluates the statement “alone without innuendo” to determine whether it is capable of defamatory meaning, whereas in step two, the court looks at the context of the article to determine application of privilege. A statement that is capable of defamatory meaning “alone without innuendo” can still be determined to be barred by

privilege given its context. But the context does not invade the initial determination of defamatory meaning. The court erred by concentrating on context.

In erroneously focusing step one defamatory meaning analysis on context, the court failed to truly evaluate the statement AP actually published. AP did not write Young “smuggled” something vague or harmless; it wrote “Young’s business helped smuggle people out of Afghanistan”—a felony-level accusation. By isolating “smuggle” and substituting an analogy about sneaking candy into a movie theater, the court impermissibly reframed the challenged statement before analyzing it. Defamatory capability must be judged from the words as published, not from a judicially rewritten straw-man version. *See Milkovich v. Lorain Journal*, 497 U.S. 1, 21 (1990)(accusation must be evaluated as written, not in an abstracted form).

In improperly finding the statement was not defamatory based on context, the court relied on numerous cases in which the use of words denoting criminality were deemed not to be defamatory *per se* and instead construed to be rhetorical hyperbole, vigorous epithet, exaggeration, or figurative use of terminology for dramatic effect.

That, however, is not what happened here.

There was nothing hyperbolic, exaggerated, or figurative about AP's matter-of-fact explanatory statement in its hard news article that "Young's business helped smuggle people out of Afghanistan." *Milkovich*, 497 U.S. at 21 ("This is not the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression.").

Although the results of the CNN trial were newsworthy and the article reached large audiences, the article does not involve a hot button publicly debated issue such that the reader would expect rhetorical devices to be implemented for emphasis. *Horsley v. Rivera*, 292 F.3d 695, 702 (11th Cir. 2002)("exaggeration and non-literal commentary have become an integral part of social discourse"); *Forston v. Colangelo*, 434 F.Supp.2d 1369, 1381 (S.D. Fla. 2006)("Where an issue is controversial, evoking strongly held views, statements relating thereto are more likely to be deemed rhetorical hyperbole.").

Nor is this an opinion piece where a reader would expect to see

hyperbole and invective. *Forston*, 434 F.Supp.2d 1369, 1380-81 (S.D. Fla. 2006)(“Because the challenged statements were made through a medium that fosters debate on basketball issues and that routinely uses figurative or hyperbolic language, a reasonable reader is more likely to regard its content as opinion and/or rhetorical hyperbole.”).

Rather, this was a straight news article, such that readers would expect the statements therein to be facially factual and not embellished by exaggerated, figurative, or hyperbolic language or other rhetorical devices. See *Rolling v. State*, 695 So.2d 278, 284 (Fla. 1997)(“straight news stories” relate “cold, hard facts”); *Provenzano v. State*, 497 So.2d 1177, 1182 (Fla. 1986)(“straight news stories of a factual nature” are “not inflammatory”).

By contrast, the cases the court cited are distinguishable because: (1) the statements denoting criminal conduct were made about people who had engaged in or had legal matters regarding criminal conduct; (2) the statements were presented in the context of public debate regarding an important issue, such that readers would understand rhetorical devices were being implemented for emphasis; or (3) the statements were made in an opinion column or

other medium where use of rhetorical devices is expected.

Evaluating the context of a publication vis-à-vis an alleged defamatory statement is fact intensive. Despite what might have seemed outwardly analogous to the court, delving into the facts reveals legally significant differences that render those rulings inapplicable here.²

The court cited *Hay v. Independent Newspapers, Inc.*, 450 So.2d 293, 295 (Fla. 2d DCA 1984), which determined statements referring to appellant as “a crook and a criminal” were not defamatory where “criminal charges had been filed against the appellant” and the letter to the editor “was directed not toward appellant, but toward the judicial system.” By contrast, it is undisputed the CNN record reflected Appellants’ rescue efforts were legal, rendering the criminal accusation of smuggling people

² These rulings determine application of a privilege or other affirmative defense, but are addressed here based on the court’s jumbling of the legal standard. “Some of the most common libel defenses are the fair report privilege, opinion, rhetorical hyperbole, defamatory meaning, the ‘of and concerning’ requirement, and substantial truth.” Jon M. Garon, *An AI’s Picture Paints A Thousand Lies: Designating Responsibility for Visual Libel*, 3 J. Free Speech L. 425, n.57 (2023).

defamatory.

The court cited *Greenbelt Co-op. Pub. Ass'n v. Bressler*, 398 U.S. 6 (1970), which determined a newspaper did not defame prominent developer Bressler by accurately reporting that, at a city council meeting, Bressler's opponents referred to his negotiating position as "blackmail." By contrast, it is undisputed "smuggle people" does not appear in the CNN record; nor is it a fair and accurate summary of Young's testimony.

The court cited *Forston v. Colangelo*, which determined an NBA team's CEO's courtside heated remarks regarding basketball player Forston's flagrant foul that broke another player's wrist ("thug") and a sports commentator's opinion piece denouncing Forston's feckless punishment ("thug," "mugging," "attempted murder") were not defamatory; they constituted opinion and rhetorical hyperbole, were made in the heat of the moment (CEO), and addressed the ongoing controversial public issue regarding the inadequacy of the NBA's response to violent fouls (commentator). 434 F.Supp.2d at 1376-81.

The facts of *Forston* stand in stark contrast to this case. AP did not make a heat-of-the-moment accusation of ambiguous

criminality about conduct that was clearly wrongful and caused injury and outrage. AP did not offer an opinion piece about a controversial issue. Rather, following a two-year court proceeding and a two-week trial that AP closely followed, AP falsely reported as fact the exact opposite of what the CNN case determined. Although the court observed “smuggle” can be used figuratively, AP’s matter-of-fact reporting style and straight news character of the article did not invoke figurative language. Instead, it literally and clinically described Appellants’ actions as “smuggling people out of Afghanistan.” This is in direct contrast to the figurative use of “thug” in comportment with the way it “is frequently used in the basketball community to refer to those players who try to intimidate people by acting tough.” *Id.* at 1380. There is no evidence that those in the dangerous business of rescuing people from failed states through lawful channels colloquially refer to their actions as “smuggling people.”

The court cited *Horsley v. Rivera*, which determined talk show host Geraldo Rivera did not defame anti-abortion activist Neal Horsley by calling him “an accomplice to [the] homicide” of an obstetrician. 292 F.3d at 702. “A reasonable viewer would have

understood Rivera’s comments merely as expressing his belief that,” by maintaining a hit list of doxed doctors and crossing off the names of those who had been murdered, Horsley was encouraging assassination and therefore “shared in the moral culpability for Dr. Slepian’s death.” *Id.*

Horsley is nothing like the instant case. *Horlsey* involved a nationally televised heated talk show debate about an emotionally charged issue of public importance where both host and guest spoke figuratively surrounding the moral culpability for an assassination. By contrast, AP published a straight news article about the results of a defamation trial—but falsely reported as fact that Appellants “smuggled people,” despite the court record having established the opposite. In *Horsley*, both host and guest understood their repartee to be figurative. Here, not only did Appellants understand “smuggle people” literally, but public comments reveal some readers did too.

The court cited *McDougal v. Fox News Network, LLC*, 489 F.Supp.3d 174, 183-84 (S.D.N.Y. 2020), which determined Tucker Carlson’s on-air statement that McDougal “extorted” President Trump was not defamatory because it was rhetorical hyperbole and

opinion commentary on a matter of public importance (that Trump could be impeached due to campaign finance violations stemming from payments to McDougal). Moreover, Carlson disclaimed that he doubted the veracity of what Trump's former lawyer Michael Cohen alleged against McDougal before stating Cohen's allegations "sound like...extortion." *Id.* By contrast, AP published a hard news article expressly stating, without disclaimer, that Appellants "smuggled people."

Finally, the court cited *Pullum v. Johnson*, 647 So.2d 254, 254-55 (Fla. 1st DCA 1994), which determined pastor and radio personality Johnson did not defame prominent citizen Pullum by calling him a "drug pusher" because it was rhetorical hyperbole "directed at the public political debate surrounding the upcoming vote on the proposed ordinance amendments" that would have allowed the sale of liquor, which Johnson characterized as a drug. By contrast, AP's article was hard news about the results of the CNN trial which, although newsworthy, was not a matter of public importance.

The court erroneously reasoned that because the article presents Young in a positive light, "smuggle people" does not

literally accuse Appellants of a crime. Although the article reported on the favorable verdict, it did not present Appellants positively.

The headline and first sentence neutrally/favorably describe the results of the lawsuit and describe Young as a “U.S. Navy Veteran who helped rescue endangered Afghans.” R/85. The second sentence, however, calls the ruling “unusual” and misleadingly ties Young’s vindication against CNN’s defamatory reporting to President Trump’s war on the media: “The unusual ruling against a media outlet following a jury defamation trial was a blow to both struggling CNN and news outlets in general on the eve of a new term as president by Donal Trump, who has whipped up anger against journalists among his supporters.” R/86. Young’s successful efforts to clear his name have nothing to do with the “war on the media,” which refers to President Trump’s attacks against American media for left-wing bias and corruption. By implying a connection between Young’s verdict against CNN and President Trump’s war on the media, AP called into doubt the legitimacy of the verdict, suggesting Young was waging his own war on the media.

The article neutrally reported: “Young blamed CNN for

destroying his business through a 2021 story on Jake Tapper's broadcast about a 'black market' of extracting desperate Afghans following the Taliban takeover." R/86. The court stated this sentence would make it "obvious to an average reader that CNN was found to be wrong for using the term 'black market,' essentially accusing [Young] of criminal or illegal behavior." R/1723. AP's reporting that the jury found CNN liable for defamation was never in question, though; the issue is whether AP nevertheless accused Appellants of criminally "smuggl[ing] people."

About halfway through the article, AP reports as straight fact: **"Young's business helped smuggle people out of Afghanistan,** but he said he worked exclusively with deep-pocketed outside sponsors like Bloomberg and Audible. CNN showed his face in a story that primarily raised questions about contractors who were charging Afghans themselves fees as much as \$10,000 to get out." R/88. The court found this "is not and cannot be construed to connote defamation per se" because "'Smuggle' was used to describe Young's work to 'rescue' endangered and desperate Afghans—the antithesis of accusing him of a crime. ... [W]hen read in context, it describes the benefit he provided and why he sued CNN." R/1723.

Despite AP's previous description of Young as a "U.S. Navy Veteran who helped rescue endangered Afghans," "smuggle people" cannot reasonably be construed as a laudatory statement, let alone the antithesis of a crime. The word expressly accused "Young's business" of the crime of "smuggling people." This is made more apparent by the remainder of the passage, in which AP slyly expressed its dissatisfaction with the jury's verdict, essentially stating that, regardless of who paid for the extractions, Appellants' actions nevertheless constituted illegal activity. Having previously invoked the war on the media and linked it to Young's case, the "smuggle people" accusation was the logical next step in casting doubt on the jury's verdict.

AP reported: "At a trial located in a conservative part of the country, Young's lawyers urged jurors to send a message to the media." R/89. While these facts are true, AP juxtaposed them in a way to further falsely link the war on the media to Young's case. By pointing out the conservative base from which the jury was drawn, AP essentially states Young only prevailed because his lawyers capitalized on conservatives who have been convinced by President Trump that the media is biased and corrupt. AP closed by

recounting two other recent defamation suits, one of which was part of the “war on the media” (ABC’s \$15 million settlement with President Trump), and the other of which related to President Trump’s claims of the 2020 election being rigged (Fox News’s \$787 million settlement with Dominion Voting Systems).

The article’s tone (whether positive, neutral, or negative) does not negate that AP reported the “smuggle people” charge in a hard news article (not an opinion piece) where readers expect straight facts and do not expect to encounter rhetorical devices. The article does not indicate “smuggle people” was used figuratively or hyperbolically, and some readers made public comments indicating they believed the “smuggle people” charge. The court incorrectly determined the article only painted Appellants in such a laudatory light that “smuggle people” took on the “antithesis” of criminal meaning.

Appellants sufficiently pled the legal and factual elements to support a claim of defamation *per se*. The statement, evaluated “alone without innuendo,” is defamatory *per se*. Even if the court’s premature context analysis were considered, the most that could be said is the statement is susceptible of more than one reasonable

interpretation, which would require submission to a jury and cannot be resolved on dismissal or summary judgment. *Ane*, 423 So.2d at 389.

ii. Defamation by Implication

“Literally true statements can be defamatory where they create a false impression.” *Jews for Jesus, Inc.*, 997 So.2d at 1106. “Defamation by implication arises not from what is stated, but from what is implied when a defendant (1) juxtaposes a series of facts so as to imply a defamatory connection between them, or (2) creates a defamatory implication by omitting facts.” *Id.* Whether a statement conveys a defamatory implication is generally a question for the jury. *See Smith v. Cuban Am. Nat’l Found.*, 731 So.2d 702, 704-05 (Fla. 3d DCA 1999). Defamation *per se* can be committed by implication. *Zimmerman v. Buttigeig*, 521 F.Supp.3d 1197, 1213-14 (M.D. Fla. 2021); *Boyles v. Mid-Fla. Television Corp.*, 431 So.2d 627 (Fla. 5th DCA 1983).

AP defamed Young by implication both by juxtaposing “smuggling people” with text regarding the payment aspect of his defense (that he was funded by outside sponsors and did not charge Afghans), and by omitting details from his testimony that would

have clarified his operations were lawful (done with valid travel documents, through government checkpoints, with government knowledge and approval). The juxtaposition and omission together created the false impression that the jury got it wrong: that regardless of who funded Young's rescue operations, Young was engaged in the criminal activity of "smuggling people"; that he was, as CNN reported, a villain "black market" profiteer guilty of wrongdoing, despite his claims to the contrary.

The court relied upon its erroneous analysis of the article's context to find the passage at issue does not create defamation by implication, stating: "If anything, the overall gist of the Article was that the reputation of a Navy veteran who rescued and saved Afghans from the Taliban was vindicated after CNN defamed him." R/1724. The context of the article is not solely positive; it reports some facts neutrally or positively, but also negatively links the CNN case to the war on the media, implying Young only won the case because he duped gullible conservative jurors who believe the media is biased and corrupt, and that Young engaged in illegal human smuggling regardless of his payment defense or the jury's verdict.

The court's observation that "the Article includes a quote from Young's attorney, demonstrating his relief and appreciation in the outcome of the CNN Case, and a quote from Young's trial testimony about how devastating CNN's black market implication was," R/1724, does not override AP's defamatory implication that, regardless of the outcome of the CNN trial, Young's defense that he never took payment from Afghans themselves does not absolve him of criminal conduct. Reporting the impact of the defamation and relief at the verdict does not negate AP's implication that the verdict was wrong and Young is a criminal.

Analysis of context at this stage is premature but, regardless, is not dispositive of defamation by implication. As demonstrated by Appellants' reasonable interpretation of the article's words and implications (permissible step one analysis) as well as the context of the article (which should only be examined in step two), there is a genuine issue of material fact regarding whether the article is defamatory by implication. Given Appellants' reasonable defamatory interpretation, the court should not have determined the article was not defamatory as a matter of law. *Ane*, 423 So.2d at 389.

Appellants sufficiently pled the legal and factual elements to

support a claim for defamation by implication, and a genuine issue of fact remains regarding whether the article constituted defamation by implication.

D. The article was “of or concerning” Nemex.

Under trade libel, a corporation “may recover damages for injuries suffered because of written or oral publication of false defamatory matter which tends to be prejudicial in the conduct of a trade or business or to deter third persons from dealing in business with him.” *Kilgore Ace Hardware, Inc. v. Newsome*, 352 So.2d 918, 920 (Fla. 2d DCA 1977). In order to prevail, the corporation must establish the defamatory statements were made “of and concerning” the corporation. *McIver v. Tallahassee Democrat, Inc.*, 489 So.2d 793, 794 (Fla. 1st DCA 1986)(quoting *New York Times v. Sullivan*, 376 U.S. 254 (1964)).

“The defamed person need not be named in the defamatory words if the communication as a whole contains sufficient facts or references from which the injured person may be determined by the persons receiving the communication.” *Wolfson v. Kirk*, 273 So.2d 774, 779 (Fla. 4th DCA 1973)(citing *O’Neal v. Tribune Co.*, 176 So.2d 535, 548 (Fla. 2d DCA 1965)). The relevant inquiry is whether

“the average person upon reading [the] statements could reasonably have concluded that the plaintiff [] was implicated[.]” *Ane*, 423 So. at 389.

The court correctly determined that, on a motion to dismiss posture, Appellants had sufficiently pled the defamatory statements were of and concerning Nemex. Nevertheless, the court dismissed the trade libel claim based on lack of defamatory meaning and application of the fair report privilege. The defamation and fair report determinations were erroneous, and Count III for trade libel should have survived the motion to dismiss.

As to summary judgment, the court erroneously determined the article was not “of or concerning” Nemex as a matter of law because “Plaintiffs have not come forward with any evidence that any reader of the Article believed Nemex was implicated to create an issue of fact.” R/1725. The court cites no case law for the proposition that Appellants were required to provide evidence of a specific reader’s belief that the article implicated Nemex to survive summary judgment. The court garbled the relevant inquiry into an improperly heightened summary judgment standard.

The relevant inquiry is whether the average person upon

reading the statement could reasonably have concluded plaintiff was implicated. *Ane*, 423 So.2d at 389. It does not require plaintiff to identify any actual readers who believed plaintiff was implicated. Although this might be probative evidence of what a reasonable reader would believe, it is not the *only* way to establish this.

Nemex provided evidence of what a reasonable reader would believe sufficient to withstand summary judgment. Although Nemex was not mentioned by name in the article, it was referred to twice as being “Young’s business.” R/85-88. Young had one business involved in those evacuations: Nemex, which he founded and operated. Referring to “Young’s business” plainly refers to Nemex, particularly in the context of a news report following litigation where Nemex and Young were co-plaintiffs. Nemex was publicly and prominently identified as Young’s company and co-plaintiff during the two-year CNN case. That case received broad national and international media coverage. Numerous outlets, including Court TV, BBC News, and NPR, published reports identifying Nemex as the entity through which Young organized the evacuation efforts. In that context, readers of the AP article would have understood “Young’s business” as referring to Nemex.

Florida law does not require Nemex to have been specifically named in the article; it is sufficient that readers familiar with the litigation or the relevant industry would recognize the statement as referring to Nemex. At minimum, this was a factual question that was not ripe for summary judgment.

E. The fair report privilege does not bar this lawsuit.

The court erroneously found, as a matter of law, that the fair report privilege bars this lawsuit. In viewing the Complaint and the summary judgment evidence in the light most favorable to Appellants, fair report privilege does not apply as a matter of law because the Complaint sufficiently pled that the article does not present a substantially accurate account of the CNN record, and there is a genuine issue of material fact regarding same.

“In Florida, the fair report privilege grants journalists and news media a qualified privilege to report on information received from government officials or to publish the contents of official documents, as long as the account is ‘reasonably accurate and fair.’ To qualify as ‘reasonably accurate and fair,’ the publication must be a substantially correct account of information contained in public records or derived from a governmental source.” *Deligdish v.*

Bender, 2023 WL 5016547, *3 (M.D. Fla. Aug. 7, 2023). Reporting on a lawsuit falls within the category of official action to which the fair reporting privilege applies. *Huszar v. Gross*, 468 So.2d 512, 516 (Fla. 1st DCA 1985). “[T]here is a qualified privilege to make reports of judicial and quasi-judicial proceedings as long as they are accurate, fair and impartial.” *Id.* The issue of whether the fair report privilege has been established is a question of law. *Id.*

Here, it was erroneous for the court to have determined as a matter of law that the article’s report on the CNN lawsuit was reasonably fair and accurate. Appellants pled, and it is undisputed that: “smuggle people” did not appear in the record in the CNN case; the CNN case determined Young did not engage in criminal activity in connection with his efforts to rescue Afghans; and Young prevailed in the CNN case, vindicating himself from CNN’s defamatory reporting that Young had engaged in profiteering by running an illegal “black market” operation to extract desperate Afghans in exchange for exorbitant fees.

Despite “smuggle people” not appearing in the CNN record and the judicial determination that Young did not engage in criminal activity, AP nevertheless falsely reported “Young’s business helped

smuggle people out of Afghanistan”—expressly denoting the federal and international crime of human smuggling. The Department of Homeland Security describes the “crime” of “human smuggling” as the “provision of a service—typically, transportation or fraudulent documents—to an individual who voluntarily seeks to gain illegal entry into a foreign country.” R/786-87.

Given its irrefutable criminality, AP defines “human smuggling” or “people smuggling” in its Stylebook as “transporting people across an international border illegally, with their consent, in exchange for a fee.” R/784. Consistent with its own definition as well as criminal laws across the globe, AP routinely uses “human/people smuggling” to describe criminal conduct. R/517-25 (lists 40 recent examples of AP stories, including “UK: Interpol seeks gang members behind migrant smuggling,” “Smugglers arrested in Panama while moving Chinese migrants,” and “Man indicted for smuggling deaths near Minnesota-Canada border”).

As justification for applying the fair report privilege, the court reasoned the statement was an accurate summation of Young’s testimony describing lawful rescue procedures. R/1720-21. Rather than referencing the actual transcript of testimony as required,

Huszar, 468 So.2d at 516; *Woodard v. Sunbeam Television Corp.*, 616 So.2d 501, 503 (Fla. 3d DCA 1993), the judge drafted a summary of his own recollection from the CNN trial, then compared it to AP's statement. This is not a permissible reference point from which to apply the fair report privilege.

Based on the actual record from the CNN trial (and even based on the court's improper summary), it cannot be said as a matter of law that "smuggle people" is a fair and accurate account of Young's testimony regarding lawful evacuation efforts when "smuggle people" specifically denotes criminality—especially since at issue was that CNN had wrongly portrayed Young's actions as criminal. It is Appellants' position that AP's decision to use "smuggle people" was no accident: it was a way for AP to express its dissatisfaction with the jury's verdict, essentially stating that, regardless of who paid for the extractions, Appellants' actions nevertheless constituted illegal activity. At minimum, it was a reckless disregard for the truth and painted the false impression that Appellants engaged in illegal activity.

AP, a worldwide news organization that sets journalistic standards through its Stylebook and whose articles reach

approximately 4 billion people per day, knows how to choose and use words. AP recently sought relief in a Washington, D.C. court regarding its right to dictate its own terminology through its Stylebook, which “is used by many as a standard for writing and editing” and “advises journalists, scholars and classrooms around our country.” R/532. The article’s author even reported in another article that “AP’s decisions on what terminology to use are followed by journalists and other writers around the world through its influential stylebook,” confirming AP’s definitions carry weight well beyond its own newsroom. R/220.

An entire dictionary of alternative words was available to AP—including “evacuate,” “extract,” and “rescue,” which accurately describe Appellants’ activities and do not denote criminality. To choose the loaded phrase “smuggle people,” which has a specific criminal definition, in the context of describing how Young (through Nemex) moved Afghans across the border, cannot, as a matter of law, constitute a fair and accurate summary of a lawsuit that vindicated Young and established his activity was lawful.

In both the motion to dismiss and summary judgment posture, AP’s choice to use the incendiary, criminally charged

phrase “smuggle people” when reporting on the results of a lawsuit that found Young’s activities to be lawful exceeds the scope of the fair report privilege under Florida law, which only protects substantially accurate summaries of court proceedings. *Dershowitz v. CNN*, 541 F.Supp.3d 1354, 1365 (S.D. Fla. 2021)(rejecting fair report privilege where CNN’s edited broadcast omitted a crucial qualification in Dershowitz’s statement, resulting in a distorted and defamatory portrayal of his position). Just as CNN could not shield itself from liability for materially altering the meaning of Dershowitz’s testimony, AP cannot rely on the fair report privilege after inserting a false criminal accusation that materially misrepresents Young’s testimony and is not a fair and accurate summary of the CNN case.

Contrary to the court’s analysis, this case is not like *Rasmussen v. Collier County Pub. Co.*, 946 So.2d 567 (Fla. 2d DCA 2006). In *Rasmussen*, the plaintiff was criminally charged in two separate cases stemming from a building project, and in exchange for his plea in the first case and his promise to cooperate in the second case, some of the charges in the second case were dropped. *Id.* at 570-71. The fair report privilege applied to the statement that

plaintiff pleaded to “related charges,” despite plaintiff’s argument that the reporting created the impression that he pleaded guilty to the charges that were dropped. *Id.* In *Rasmussen*, it was undisputed that plaintiff was charged with criminal conduct. By contrast, AP’s defamatory reporting accused Appellants of criminal conduct despite the undisputed fact that Appellants were absolved of same in the CNN case.

Reviewing the Complaint and the summary judgment evidence in the light most favorable to Appellants, “smuggle people” was not a fair and accurate report of the CNN proceedings. The court erred by determining as a matter of law that the fair report privilege barred this suit.

Even if the fair report privilege applied, the dismissal still fails because actual or express malice defeats every form of qualified privilege. *Curtis*, 388 U.S. at n.18; *Nodar v. Galbreath*, 462 So.2d 803, 811 (Fla. 1984). Appellants proffered overwhelming evidence of actual and express malice. By holding privilege eliminated defamatory meaning and precluded malice as a matter of law, the court inverted the required analysis and effectively made privilege absolute—a result foreclosed by Florida precedent.

II. The court erroneously denied the motion for leave to amend the complaint to assert a claim for punitive damages.

“To plead a claim for punitive damages, a party must comply with section 768.72, Florida Statutes.” *Wayne Frier Home Center of Pensacola, Inc. v. Cadlerock Joint Venture, L.P.*, 16 So.3d 1006, 1008 (Fla. 1st DCA 2009). Section 768.72 provides in pertinent part:

§768.72. Pleadings in civil actions; claim for punitive damages.

(1) In any civil action, no claim for punitive damages shall be permitted unless there is a **reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages.** ...

(2) A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence finds that the **defendant was personally guilty of intentional misconduct or gross negligence.** As used in this section, the term:

(a) **“Intentional misconduct”** means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage.

(b) **“Gross negligence”** means that the defendant’s conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.

(3) In the case of an employer, principal, corporation, or other legal entity, **punitive damages may be imposed for the conduct of an employee or agent** only if the conduct of the employee or agent meets the criteria specified in subsection (2) and:

(a) The employer, principal, corporation, or other legal entity **actively and knowingly participated** in such conduct;

(b) The officers, directors, or managers of the employer, principal, corporation, or other legal entity **knowingly condoned, ratified, or consented** to such conduct; **or**

(c) The employer, principal, corporation, or other legal entity **engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury** suffered by the claimant.

§768.72, Fla.Stat. (2025).

“[F]or the purpose of reviewing whether a reasonable basis exists for punitive damages,” the appellate court “views the record evidence and the proffered evidence in the light most favorable to the plaintiff and accepts said evidence as true.” *Cook v. Fla. Peninsula Ins. Co.*, 371 So.3d 958, 961 (Fla. 5th DCA 2023).

In determining whether a plaintiff has made the required showing for recovering punitive damages, the court makes a legal determination that is “similar to the standard that is applied to

determine whether a complaint states a cause of action.” *Werner Enterprises, Inc. v. Mendez*, 362 So.3d 278, 281-82 (Fla. 5th DCA 2023). Proffered evidence need not be admissible at trial, its “underlying veracity” should not be adjudicated, and the court should not “evaluate and weigh” the evidence. *Estate of Despain*, 900 So.2d at 644; *Cook*, 371 So.3d at 963. If “there are reasonable inferences and sufficient circumstances, then the issue of intent typically becomes a question of fact for the jury, not the trial court.” *Cook*, 371 So.3d at 963; accord *Royal Marco Point I Condo. Ass’n, Inc. v. QBE Ins. Corp.*, No. 3:07-CV-16, 2010 WL 2609367, at *1-2 (M.D. Fla. June 30, 2010).

Regarding a defendant’s intent, a plaintiff seeking leave to amend a complaint to assert a claim for punitive damages need only make a “reasonable showing” that a reasonable jury could find “intentional misconduct or gross negligence.” §768.72, Fla.Stat. (2025). The statute’s definitions of “intentional misconduct” and “gross negligence,” quoted above, track the definition of “actual malice” that SCOTUS requires before punitive damages may be recovered against a media defendant. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334 (1974). “Actual malice” means “knowledge that

the statement was false or...reckless disregard of whether it was false or not.” *Id.*; accord *Mile Marker*, 811 So.2d at 845.

Contrary to the court’s conclusion, Florida’s punitive damages statute does not require a finding of express malice—specific intent to harm—for a plaintiff to recover. Any express malice requirement in the common law is inconsistent with statutory requirements, and thus is superseded by it. *Bric McMann Indus. Inc. v. Regatta Beach Club Condo. Ass’n, Inc.*, 378 So.3d 652, 655 (Fla. 2d DCA 2023)(“This argument [for a heightened standard for punitive damages] is misplaced because it overlooks the fact that in 1999 the Florida Legislature revised section 768.72.”)(explaining §768.72 displaced common law standards for punitive damages to the extent they are inconsistent); see also *CNN v. Black*, 374 So.3d 811, 816-17 & n.3 (Fla. 4th DCA 2023)(“to proceed with his punitive damages claim, [plaintiff] had to proffer a reasonable evidentiary basis to establish actual malice”)(stating the common law requirement of proving express malice, then describing that, pursuant to SCOTUS precedent, recovery of punitive damages is only permissible upon a showing of actual malice)(citing *Sullivan*, 376 U.S. 254 & *Gertz*, 418 U.S. 323).

A pleading of punitive damages is accordingly sufficient even without allegations of express malice. See *Sirer v. Aksoy*, No. 21-CV-22280, 2021 WL 4952610, at *5 (S.D. Fla. Oct. 25, 2021). This particularly makes sense for claims of defamation *per se*, where the nature of the statement is such that it “mak[es] it unnecessary to prove express malice” by evidence beyond the statement itself. See *Lawnwood Med. Ctr. v. Sadow*, 43 So.3d 710, 727 (Fla. 4th DCA 2010); *Zimmerman*, 521 F.Supp.3d at 1211.

In viewing the proffered evidence in a light favorable to Appellants, they have met their burden to establish a reasonable basis for recovery of punitive damages, as the proffered evidence constitutes a reasonable showing of actual (and, although not required, express) malice.

The author of the article, David Bauder, is a seasoned reporter and AP’s national media writer based at AP’s headquarters in New York. He had been following the CNN case and had access to the court record and trial testimony. As late as January 8, 2025, during the pendency of the trial, Bauder reported on the case accurately: he described Appellants’ activities with nuance and accuracy using words such as “extraction” and “evacuation,” and he demonstrated

his knowledge of the court record by reporting Young “did nothing illegal” and CNN denied accusing Young of “nefarious acts.” R/583.

Yet after the jury returned a verdict for Young, Bauder penned the January 17, 2025 article, in which he abandoned accuracy, explicitly accusing Appellants of the criminal act of “smuggl[ing] people” in direct contradiction to the adjudicated facts, undermining Young’s vindication in the CNN case. The stark difference between the way Bauder characterizes Appellants in the pre-verdict and post-verdict articles strongly evidences AP used “smuggle people” with precision and actual (and express) malice. The words used and the context of the article make clear “smuggle people” was selected to convey AP’s disagreement with the jury’s verdict, and to communicate that, regardless of who financed the extractions, it still constituted criminal conduct.

“Smuggle people” are not words wielded lightly in the newsroom. In conformance with national and international criminal laws that condemn human smuggling as a grave crime, AP Stylebook defines “human smuggling” or “people smuggling” as a crime, and AP’s reporting consistently uses “human/people

smuggling” to describe criminal conduct. R/517-25 (lists 40 recent examples of AP stories about “human smuggling”).

AP stands by its right to dictate its own terminology through its Stylebook, having recently brought a federal case in Washington, D.C. regarding its decision to use “Gulf of Mexico” as per its Stylebook rather than President Trump’s preferred “Gulf of America.” In that lawsuit, AP stated the Stylebook “is used by many as a standard for writing and editing” and “advises journalists, scholars and classrooms around our country.” R/532. Bauder reported in another article dated April 18, 2025 that “AP’s decisions on what terminology to use are followed by journalists and other writers around the world through its influential stylebook.” R/220. The Washington, D.C. lawsuit and Bauder’s April 18 article confirm AP’s definitions carry weight well beyond its own newsroom, as well as confirm both Bauder and AP understand the significance of the Stylebook’s definitions.

As evidenced by public comments on news articles regarding the underlying lawsuit, the public understood exactly what Bauder conveyed when he wrote “Young’s business helps smuggle people out of Afghanistan.” For example:

Jason!!!

Frivolous. No way that dude lost \$18 million in economic loss. I hope Navy can do better next time.

Edward

If this suit is going against the word “smuggle”, this guy will lose. To smuggle means to go around laws. Since his people went in to “extract” people without Government knowledge, that is textbook smuggling. CNN lost because it said he “profited” from the smuggling.

Michael

Such damages demand a reputation worthy of the damages. Never heard of this guy. And if he was getting people out of Afghanistan in any manner other than totally legal, then he was smuggling regardless of his intentions.

R/575-80. This proffered evidence provides a reasonable basis to conclude AP had knowledge of the criminal meaning of “smuggle people” and knew its use of “smuggle people” would falsely ascribe criminal conduct to Appellants. AP’s statement that Appellants “smuggled people” is itself evidence AP intended to say Appellants are criminals.

When Appellants rightfully requested that AP retract the defamatory content, AP refused to do so, and the false article remains publicly available, continuing to mislead readers and tarnish Appellants’ name. AP proceeded to conduct a media blitz, calling Appellants’ ensuing lawsuit “frivolous”. R/476, 565. By

contrast, U.S. News & World Report, which subscribes to AP and had republished the article, retracted same upon receiving pre-suit demand, stating it “had no intention to suggest that Mr. Young’s actions were unlawful.” R/475, 615-17. Further, AP claimed in its Initial Disclosures that the article is true or substantially true. The proffered evidence shows that post-publication, AP doubled down on its defamatory content, establishing AP’s actual (and express) malice in publishing “smuggle people.”

In erroneously denying the punitive damages motion, the court referred to its defamatory meaning and fair report privilege analysis, and noted Appellants’ arguments regarding the amount of information available to AP prior to publication, AP’s word choice, the tenor of the article, and AP’s reaction to the pre-suit notice were all “protected editorial choices”. R/1728. It was incorrect for the court to have determined as a matter of law that the article was not defamatory and the fair report privilege barred the suit. Thus, the court’s reasoning that Appellants’ proffered evidence reflects only “protected editorial choices” collapses.

Moreover, because Appellants’ Complaint stated a cause of action for defamation, the court was required to accept the well-

pleaded allegations as true in connection with determining whether the proffered evidence established a reasonable basis for asserting a claim for punitive damages. *Estate of Despain*, 900 So.2d at 644 (“[T]he legal sufficiency of the punitive damage pleading is also in issue in the section 768.72 setting.”). Section 768.72 requires only a “reasonable showing” that, if the jury ultimately finds liability, it could also find intentional misconduct or gross negligence. The court may not, as it erroneously did here, collapse the punitive inquiry into the merits of liability or deny punitive leave on the ground that it believes the underlying tort was not committed.

The court’s faulty reasoning that Appellants’ proffered evidence reflects only “protected editorial choices” also negates the court’s determination that Appellants proffered “zero evidence” to support imputing Bauder’s conduct to AP. R/1728. The proffered evidence demonstrates Bauder weaponized the article by intentionally selecting the criminally charged term “smuggle people” to express dissatisfaction with the jury’s verdict and falsely convey that, regardless of who financed the extractions, Appellants engaged in criminal conduct. This constitutes the intentional misconduct required under §768.72(3)(a).

AP's decision not to retract the article or change "smuggle people" to "extract," "evacuate," or "rescue" people, and instead to go on the offensive with a media blitz calling the lawsuit frivolous and Initial Disclosures claiming the article was true or substantially true, constitute AP's condoning, ratification, and consent to Bauder's conduct in publishing the "smuggle people" accusation. §768.72(3)(b), Fla.Stat. (2025). The failure to retract can be considered as evidence of AP's malice. *Brown v. Fawcett Publications, Inc.*, 196 So.2d 465, 473 (Fla. 2d DCA 1967); *see also* §770.02(1), Fla.Stat. (2025)(providing a limitation to only actual damages if a retraction is made, along with other conditions). The court incorrectly claimed the failure to retract was the only evidence Appellants proffered to show AP's malice.

Appellants' robust proffer, viewed in a light favorable to Appellants, constituted a reasonable showing that AP published the article with actual (and express) malice and thus supported amending the Complaint to assert a claim for punitive damages.

III. On remand, this case should be reassigned to a new judge.

Because of the inappropriate way Judge Henry composed the Order, Appellants reasonably fear, on remand, they would not

receive fair treatment, and respectfully request that on remand, this case be reassigned to a new judge. Judge Henry demonstrated bias toward Appellants by inappropriately invoking the analogy that this case was a bad sequel to the CNN case that never should have been made. Rather than recognizing the great lengths Appellants are going to clear their names of the continued false and damaging criminal accusations, Judge Henry unfoundedly accused them of bringing this suit as a money grab. Judge Henry's candy bar smuggling analogy reveals he discounted the severity of the human smuggling accusation leveled against Appellants. Judge Henry's irreverent treatment of this case and lack of judicial decorum in crafting the Order reveals his bias against Appellants, calls into question whether his legal analysis was influenced by such bias, casts doubt upon his ability to be impartial in this case, and creates an appearance of impropriety.

Appellate courts are authorized to reassign a case to a different judge on remand. *Spivey v. State*, 512 So.2d 322, 324 (Fla. 3d DCA 1987)(citing *United States v. Robin*, 553 F.2d 8, 10 (2d Cir. 1977)); *Gillespie v. State*, 392 So.3d 239 (Fla. 5th DCA 2024); *Carrington Mtg. Servs., LLC v. Nicolas*, 343 So.3d 605, 611-12 & n.3

(Fla. 3d DCA 2021); *Betty v. State*, 233 So.3d 1149, 1153 (Fla. 4th DCA 2017); *Heath v. State*, 450 So.2d 588 (Fla. 3d DCA 1984); see §35.08, Fla.Stat. (2025); cf. *Stargel v. SunTrust Banks, Inc.*, 791 F.3d 1309, 1311-12 (11th Cir. 2015); *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1373 (11th Cir. 1997)(citing 28 U.S.C. §2106); *United States v. Remillong*, 55 F.3d 572, 577 (11th Cir. 1995).

The propriety of reassignment of a case on remand is informed by three factors: “(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.” *Spivey*, 512 So.2d at 324.

All three factors weigh in favor of reassigning this case to a new judge on remand. The Order begins not as a formal ruling, but rather as a creative writing exercise at Appellants’ expense, oozing with disdain at what Judge Henry perceives as a greedy attempt to

cash in:

It is said that for some movies or television shows, sequels, spinoffs or reboots should not be made. Often times, the story line is forced, new characters are not properly developed, inconsistencies arise between the original plot and the sequel's or the writers and producers are just lazy trying to cash in on a previously successful idea. **These same things can be said of this case.**

....
...[U]pon parsing what Plaintiffs allege was defamatory, **this story line is forced.** Relative to their motion to amend, there is no substance to it. And at the end of the day, **this lawsuit appears to be an attempt to repackage the CNN lawsuit to cash in again.**

R/1716-17 (footnote omitted).

Sticking with his movie theme, Judge Henry inaptly invokes sneaking a candy bar into a movie theater to demonstrate how “context matters”:

A simple analogous use of the word “smuggle” can easily demonstrate how context matters. If one simply accused John of smuggling, he could claim that he was defamed. However, if it is explained that John **“smuggled” a candy bar into the movie theater** by secreting it in his backpack instead of buying candy from the concession stand, no reasonable reader would believe that John committed a crime. **The same is true from the context of how “smuggle” is used in the Article** to summarily describe Young's rescue efforts, which is the furthest thing from “human smuggling” as Plaintiffs posit in this case.

R/1723-24. This stretch of an analogy reveals Judge Henry's bias:

smuggling candy in violation of movie theater rules could never be capable of a defamatory meaning, whereas “smuggling people” literally constitutes a felony and is the precise wrongdoing of which he was cleared in the CNN case. Although a discussion about context was appropriate, Judge Henry’s use of this particular analogy treats the grave accusation of human smuggling as a joke, seriously placing into doubt Judge Henry’s ability to treat Appellants fairly on remand.

Judge Henry concluded the Order with his movie critic theme, further evidencing his bias against and disdain for Appellants:

This brings us back to the beginning. **This case was a second sequel that should not have been made.** Unlike the CNN Case, this case has a **forced plot without any character development.** Under applicable law, there is **no villain.** Rather, this is an attempt to **repackage the CNN storyline** against a different opponent. **After screening this production, the Court determines that this sequel should not be released because, under the facts, this third installment does not work.**

...[N]o attempt to try to re-spin Defendant’s words will magically transform them into actionable defamation. Accordingly, the dismissal in this case would be with prejudice. In addition, Defendant would be entitled to summary judgment on Plaintiffs’ claims, thereby **closing the curtain on this case as well.**

R/1730-31.

Judicial ethics and decorum counsel against engaging in this type of creative writing exercise in what is supposed to be a serious court order. Here, it has created legitimate fear in Appellants that they did not receive fair treatment below and would not receive fair treatment on remand. At minimum, it created an appearance of impropriety which can only be ameliorated on remand by reassignment to a new judge.

If this case is reversed and remanded for further proceedings, it appears Judge Henry would have substantial difficulty in putting out of his mind his views that this case is a bad sequel that never should have been made and a money grab. Those views would likely taint his ability to fairly preside over this case or, at minimum, cast an appearance of impropriety. Reassignment is necessary to preserve the appearance of justice. Because Judge Henry presided over the CNN case, he has detailed knowledge regarding same. Nevertheless, any waste or duplication in getting a new judge up to speed pales in comparison to the gain achieved in preserving the appearance and achievement of fairness.

In a case where, similar to here, the judge announced his disdain for the case, reassignment on remand was deemed

necessary where the judge impugned the merits of the case and the prosecution's motives. *U.S. v. Torkington*, 874 F.2d 1441, 1447 (11th Cir. 1989)(judge stated the prosecution was "silly," a "waste of taxpayer money," and a "vendetta"). The appearance of impropriety alone is sufficient to require reassignment on remand. *Id.*; *Carrington*, 343 So.3d at 611-12 n.3; *Osteen v. State*, 12 So.3d 927, 929 (Fla. 2d DCA 2009).

Reassignment to a new judge on remand is necessary to ensure the parties receive a fair proceeding and to maintain the appearance of justice.

CONCLUSION

WHEREFORE, Appellants respectfully request this Court to reverse the dismissal with prejudice, reverse the summary judgment, determine Appellants may assert a claim for punitive damages, reverse the Anti-SLAPP fee award, remand for further proceedings, require the case be assigned to a new judge, and grant any other and further relief this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed on **November 27, 2025** via the Florida Court's E-Filing Portal, which furnished copies via electronic mail to to all parties or counsel of record, including those identified on the Service List below.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.045(b) and the word count requirements of Florida Rule of Appellate Procedure 9.210(a)(2). Specifically, this Brief is written in 14-point Bookman Old Style font and is 12,677 words, which does not exceed the 13,000-word limit for initial and answer briefs or the 6,000-word limit for reply briefs.

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