

**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' REPLY 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”.

Citations to the Answer Brief will be in the following format: AB/[page number]. For example, a citation to page 14 of the Answer Brief will read “AB/14”.

ARGUMENT

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

A. The court erroneously chose between competing reasonable interpretations.

This appeal presents a narrow question of judicial role. The Article states: “Young’s business helped smuggle people out of Afghanistan.” The operative language is not “smuggle” in isolation. The full statement denotes cross-border transportation of persons and carries an established criminal meaning under federal/international law and AP’s Stylebook. Nevertheless, the court accepted AP’s interpretation that the statement was a benign synonym for “rescue”/”extract” and concluded, as a matter of law, no reasonable reader could interpret the statement as describing criminal conduct. At the dismissal/summary judgment stage, the court’s job was not to pick a preferred reading. Its task was to determine whether defamatory interpretation is reasonably possible. It is.

The question at this stage is not whether the statement is defamatory as a matter of fact or whether AP will ultimately prevail. The court should have denied dismissal/summary judgment and

submitted the parties' competing reasonable interpretations to the jury. *Miami Herald Pub. Co. v. Ane*, 423 So.2d 376, 389 (Fla. 3d DCA 1982).

AP relies on *Smith v. Cuban American National Foundation*, 731 So.2d 702 (Fla. 3d DCA 1999) to emphasize the role of context, but that case is inapposite. *Smith* corrected the trial court's error of excluding the entire docuseries from evidence and only admitting the few minutes of footage containing the alleged defamatory statement and the remainder of defendant's interview. *Id.* at 705-06. By excluding the entire docuseries from evidence, it was impossible for the jury to determine *the ultimate question* of whether defendant's statement was defamatory because the jury was prevented from considering the statement in the context of the entire publication. *Id.* Further, *Smith* confirms capability is a threshold question, and that if a statement is susceptible to more than one reasonable meaning, the *ultimate* question of whether it was understood as defamatory goes to the jury. *Id.* at 705.

AP erroneously argues references to "rescue"/"extraction" eliminate criminal meaning. First, rescue/extraction and illegality are not mutually exclusive. Individuals fleeing persecution or

violence may still be illegally transported across an international border. Humanitarian language does not negate the statement's criminal denotation as a matter of law. At minimum, it creates ambiguity, which belongs to the jury.

Second, the Article does not describe a purely charitable effort. The Article references a market for extracting desperate Afghans and reports Appellants' work was conducted with "deep-pocketed outside sponsors." This describes an organized, funded, cross-border operation and labels it "smuggling." Far from neutralizing criminal meaning, that pairing reinforces it.

AP contends the Article's tone was favorable because it reported Young prevailed against CNN. The Article, however, failed to inform readers the CNN court adjudicated Young's Afghanistan work lawful. Readers are left with the criminally loaded statement unqualified by the dispositive exoneration that drove the CNN case. A reasonable reader could understand the Article as reporting the verdict while simultaneously reintroducing an accusation of unlawful conduct.

This case is similar to *Trump v. ABC, Inc.*, 742 F.Supp.3d 1168 (S.D. Fla. 2024) because, in both cases, the media defendants reported the exact opposite of the outcome of court cases. In *Trump*,

the defamation case was permitted to proceed based on allegations that ABC's George Stephanopoulos falsely stated on air that President Trump was found liable for "rape." Denying a motion to dismiss, the Southern District ruled the statement was capable of defamatory meaning, and the action was not precluded by the affirmative defenses of substantial truth or fair report privilege, where: (1) the jury had determined Trump was not liable for rape as defined under New York Penal Law (limited to penile penetration) but was liable for sexual abuse (implicitly finding digital penetration) and defamation; and (2) the judge upheld the \$2 million verdict because "the definition of rape in the New York Penal Law is far narrower than the meaning of 'rape' in common modern parlance, its definition in some dictionaries, in some federal and state criminal statutes, and elsewhere." *Id.* at 1173, 1179-84 (citing *Carroll v. Trump*, 683 F.Supp.3d 302 (S.D.N.Y. 2023)).

The facts in the instant case are much clearer cut than *Trump*, supporting reversal. In *Trump*, the statement reporting Trump liable for "rape" was deemed capable of defamatory meaning even though he was found liable for "sexual abuse." Here, it is undisputed that the CNN case determined Appellants' humanitarian rescue

operations were completely legal—which is wholly incompatible with AP’s statement denoting the crime of human smuggling. In *Trump*, the fact that “rape” had many dictionary and criminal definitions and varying usage under modern parlance, some of which encompass the acts of “sexual abuse” for which Trump was found liable, did not prevent the statement from being deemed capable of defamatory meaning. Likewise, here, even if AP were correct that a vernacular usage of the term “smuggle people” exists that does not imply criminality, such usage would not prevent AP’s statement from being deemed capable of defamatory meaning.

“[W]hen considered alone without innuendo,” the statement is capable of accusing Appellants of criminal conduct. *Richard v. Gray*, 62 So.2d 597, 598 (Fla. 1953). Even considering context, the court was required to determine whether a defamatory interpretation remained reasonably available. Context cannot be used to rewrite the challenged words or to transform an express criminal accusation into a neutral description—which is exactly what the court did when it erroneously treated “rescue”/“extract” as synonymous with “smuggle people out of Afghanistan” and ruled as a matter of law that these words and the article’s tone eliminated criminal meaning. Where, as

here, the statement both “alone without innuendo” and in “context” supports competing reasonable inferences, the court does not get to pick one. Florida law reserves the choice between them, and the ultimate question of defamatory meaning, for the jury.

B. The fair report privilege cannot be resolved as a matter of law.

Fair report privilege is a qualified privilege. *Leonard v. Wilson*, 8 So.2d 12, 14 (Fla. 1942). Qualified privilege is examined under the assumption the statement is capable of defamatory meaning. *Cape Publications, Inc. v. Reakes*, 840 So.2d 277, 280 (Fla. 5th DCA 2003). This comports with the fact that qualified privilege is an affirmative defense. *Schreidell v. Shoter*, 500 So.2d 228, 231 (Fla. 3d DCA 1986). Affirmative defenses “assume[] the complaint or charges to be correct.” *State v. Cohen*, 568 So.2d 49, 51-52 (Fla. 1990).

In analyzing fair report privilege, the court was required to presume the statement capable of defamatory meaning. Nevertheless, the court erroneously determined lack of defamatory meaning, rather than privileged protection of a statement capable of defamatory meaning. The court ruled: “And even though Plaintiffs claim that Defendant inserted an accusation of ‘smuggling’ to

compound the wrong committed by CNN, the use of such word in the context of the story was not defamatory such that the fair reporting privilege still bars their claims.” R/1721. This ruling erroneously states the fair report privilege only bars defamation claims where the statement is incapable of defamatory meaning. This is the exact opposite of the legal standard, which excuses otherwise defamatory statements based on privilege. In exculpating AP, the court erroneously ruled the statement incapable of defamatory meaning based on the mistaken belief the fair report privilege only applied if the statement was incapable of defamatory meaning.

AP characterizes the statement as a condensed summary of testimony describing clandestine evacuations. The fairness and accuracy of a condensed report “must in general be determined by the jury.” *Shiell v. Metropolis Co.*, 136 So. 537, 541 (Fla. 1931). The court erred by determining as a matter of law that AP’s summary was fair and accurate, especially where: (1) the court impermissibly compared the statement to its own paraphrase of testimony rather than the transcript; and (2) whether “smuggle people out of Afghanistan” fairly condenses a proceeding that determined Appellants did not engage in illegal activity is contestable.

C. Evidence of malice prevents resolution of privilege as a matter of law.

Florida Supreme Court precedent establishes the fair report privilege can be defeated by malice. *Shiell*, 136 So. at 540-41. Thus, Appellants' evidence supporting malice should have precluded summary judgment.

AP relies on *Jamason v. Palm Beach Newspapers, Inc.*, 450 So.2d 1130, 1133 (Fla. 4th DCA 1984), which stated: "Frankly, we fail to see how actual malice is pertinent to an accurate report of a judicial proceeding." The Fourth District, which did not cite *Shiell*, cannot overrule the Florida Supreme Court's binding precedent. To the extent *Jamason* purports to rely on SCOTUS precedent in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), nothing in *Sullivan* supersedes Florida law permitting the fair report qualified privilege to be negated by a showing of actual malice. *Sullivan* held a public official plaintiff must prove actual malice to prevail on a defamation claim. *Id.* at 283-84. *Sullivan* emphasized: "The power to create presumptions is not a means of escape from constitutional restrictions; the showing of malice required for the forfeiture of the privilege is not presumed but is a matter for proof by the plaintiff."

Id. at 284. Thus, Florida law permitting actual malice to defeat fair report privilege complies with the constitutional requirements and protections for free speech set forth in *Sullivan*.

D. “Average reader” does not mean “every reader.”

AP takes issue with Appellants’ statement that “it is sufficient that readers familiar with the litigation or the relevant industry would recognize the statement as referring to Nemex,” arguing this is too narrow to encompass the “average reader” standard required for the Article to be “of or concerning” Nemex. This is wrong.

Florida law does not require Nemex to be recognizable by *every* average reader, and permits claims to proceed where a plaintiff is recognized by a narrower stratum of readers. *Doe v. Finkleman*, 2025 WL 3466498, *6 (Fla. 4th DCA Dec. 3, 2025)(“[I]t is sufficient if **those who know the plaintiff** can make out that he is the person meant.”). Because “a communication is defamatory if it prejudices the plaintiff in the eyes of a substantial and respectable minority of the community,” a statement is “of and concerning” a plaintiff if that “substantial and respectable minority of the community” can identify plaintiff as the subject of the defamation. *Id.* at *5. Here, that “substantial and respectable minority” is those familiar with the CNN

litigation or Appellants' industry. This was sufficient to permit Nemex's claim to proceed.

AP's argument that Appellants failed to produce specific reader testimony ignores the procedural posture. AP sought dismissal/summary judgment under the Anti-SLAPP statute at the outset of the case, before discovery occurred. At that stage, the burden remained on AP to demonstrate the absence of any genuine issue of material fact, and all reasonable inferences were required to be drawn in Appellants' favor. The absence of developed discovery cannot be used to convert a fact question into a legal one. Where the Article refers to "Young's business" and Nemex was publicly identified as the business through which the evacuations were conducted, whether a substantial and respectable segment of readers understood the reference to be Nemex is a factual issue not properly resolved on summary judgment.

E. The Anti-SLAPP statute required the court to determine whether Appellants filed the lawsuit "primarily" because AP exercised the constitutional right to free speech.

Appellants argued the court erred by granting the Anti-SLAPP motion without determining 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). Misleadingly, AP states that courts applying the Anti-SLAPP statute have “uniformly held” that the “primarily” language is part of the definition of a lawsuit arising from protected speech and does not refer to the plaintiff’s motivation for filing the lawsuit. However, the citation string contains only “*see*” and “*see also*” signals, confirming AP’s knowledge that the cases cited contain no such holdings; those cases do not even address the meaning of “primarily.” *See* cases cited at AB/43-44.

Section 768.295(3) prohibits actions filed “without merit and primarily because” a defendant exercised protected speech. The statute uses conjunctive language. Even assuming the speech element is satisfied, the court was still required to determine whether the action was “without merit.” The court merged this determination into its analysis of capability and never addressed the statute as written. The clear unambiguous language of the statute required the court to consider Appellants’ primary motivation in filing the lawsuit. The court erred by failing to do so.

F. Application of the correct legal framework requires reversal.

AP claims Appellants invented the three-step legal framework for defamation analysis, yet these steps are embedded in and evident from an examination of Florida defamation law. For example, in *Cape Publications*, the Fifth District:

1. First, analyzed defamatory meaning: whether the plaintiff proved the “required element of defamation” that defendants made a “false statement about [plaintiff].” 840 So.2d at 279-80. (Because *Cape Publications* was appealed after trial, the Fifth District analyzed whether plaintiff had *proven* defamatory meaning rather than established the statement was *capable* of defamatory meaning.)

2. Next, analyzed qualified privilege: “Even if one assumes that the statements made by [defendants] were [defamatory/capable of defamatory meaning], no liability would attach for the statements if they were protected by a qualified privilege and were made without...malice.” *Id.* at 280.

3. Lastly, analyzed malice: “Once it is determined that a qualified privilege exists, a further examination is necessary to determine whether the speaker lost the privilege because of express

malice.” *Id.* at 281. Privilege can also be lost because of actual malice. *Axelrod v. Califano*, 357 So.2d 1048, 1050 (Fla. 1st DCA 1978).

The court’s out-of-order analysis and application of the incorrect legal standard contributed to its erroneous legal conclusions and constituted harmful error.

G. Rule 1.510(c)(4) should be strictly construed to prevent consideration of AP’s deficient declaration.

AP sidesteps the deficiency of its declaration, stating the attachments were proper for the court’s consideration. But procedural rules protect the integrity of the process. Rule 1.510(c)(4) prevents a merits ruling based on an attorney declaration that supplies no competent testimony and invites the court to resolve disputed inferences against the non-movant. A deficient declaration by an attorney without personal knowledge is not the proper way to place summary judgment evidence before the court, and it does not demonstrate that the substance of what is offered for the court’s consideration constitutes evidence that would be admissible at trial.

Courts “construe rules of civil procedure according to their plain meaning” and “strictly construe provisions to create rules that are clear-cut and easy to apply.” *Stowe v. Universal Prop. & Cas. Ins. Co.*,

937 So.2d 156, 158 (Fla. 4th DCA 2006). AP's declaration did not meet the requirements of Rule 1.540(c)(4). The court should not have considered the documents attached to the deficient declaration or granted summary judgment based thereon.

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

A. The court may consider post-publication conduct in holding AP liable for punitive damages.

AP argues Appellants failed to demonstrate AP's corporate liability because AP's post-publication actions are irrelevant to whether AP "knowingly condoned, ratified, or consented" to Bauder's penning the "smuggle people out of Afghanistan" accusation. §768.72(3)(b). This directly contradicts precedent acknowledging the probative value of media defendants' post-publication actions. *Brown v. Fawcett Pubs., Inc.*, 196 So.2d 465, 473 (Fla. 2d DCA 1967)(finding malice where a media defendant "**deliberately spurned the request to retract and apologize**, which would have immunized it from exemplary damages, and **chose instead to figuratively thumb its nose** at not only the unfortunate victim of its journalistic accusation but also the world at large"); see *Asinmaz v. Semrau*, 42 So.3d 955, 958 (Fla. 4th DCA 2010)("Her later recantation becomes part of the

totality of circumstances from which a jury may determine that she did not act with malice.”).

AP relies on *Cleveland Clinic Florida Health System Nonprofit Corporation v. Oriolo*, 357 So.3d 703, 707 (Fla. 4th DCA 2023) for the proposition that “actions taken after the happening of a tortious act are not admissible on the issue of punitive damages, nor can those subsequent actions form the basis for bringing such a damage claim.” *Cleveland Clinic* is inapposite. First, *Cleveland Clinic* dealt with a wrongful death action, whereas *Brown* specifically authorized consideration of post-publication actions in the defamation context.

Second, the Fourth District’s reasoning in *Cleveland Clinic* does not need to be followed. The reasoning is faulty because it relies wholly on *Jones v. Alayon*, 162 So.3d 360 (Fla. 4th DCA 2015), which did not involve punitive damages. In *Jones*, a wrongful death case involving a car accident and a trial on damages where defendant had already admitted negligence, the Fourth District affirmed the trial court’s decision to exclude, as more prejudicial than probative, evidence that defendant was a police officer who left the scene of the accident, which the plaintiff wanted admitted on the basis that it increased her pain and suffering resulting from the accident: “**Such**

evidence of the defendant’s post-accident bad acts could have inflamed the jury and caused them to award plaintiff damages in a desire to punish the defendant, even though no punitive damages were sought.” *Jones*, 162 So.3d at 365-66.

The very reason the court excluded the evidence in this trial on damages where no punitive damages were sought is the exact reason post-accident/publication acts would be admissible in the punitive damages context: conduct is so outrageous that it evidences malice, warranting defendant’s punishment via pecuniary damages commensurate with defendant’s net worth.

B. AP was not required to confess its malicious defamation to be liable for punitive damages.

AP claims Appellants offered no evidence of malice because Appellants “did not proffer any facts relating to the research, drafting, or editing of the Article[,],...who chose the word ‘smuggle,’ why they did so, what they intended or understood that word to mean, or what they knew at the time about the word’s truth or falsity.” AB/54. AP’s argument improperly holds Appellants to an inflated legal standard that would require proof of AP admitting its malicious defamation.

If malice necessary to warrant exemplary damages had to be Express, such as ‘I hate you’, or ‘I’m going to ruin your

character even if I have to lie about you to do it', it would reduce the law of punitive damages in libel actions to a farce and a mockery. **People just don't advertise their libels in advance.**

Brown, 196 So.2d at 473. As such, “[e]vidence of malice may be either intrinsic, that is, inferable from the very nature of the defamatory language itself, or extrinsic.” *Abraham v. Odham*, 89 So.2d 334, 336 (Fla. 1956).

In a failed attempt to distance itself from its own word choice, AP disingenuously claims the Article’s “smuggle people” accusation is not encompassed within the auspices of its Stylebook’s definition of “people/human smuggling.” Clearly, “smuggle people” (the verb) is the act of “people smuggling” (the noun). It means exactly what its Stylebook states: “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. And it was used exactly as its Stylebook provides: “Young’s business helped smuggle people out of Afghanistan,” *i.e.*, Young’s business helped transport people across Afghanistan’s border illegally, and with their consent, in exchange for a fee.

That definition is not theoretical. The articles in Appellants’

proffer show AP consistently uses “people/human smuggling” to describe illegal cross-border movement prosecuted under federal and international law. AP does not use that terminology to describe lawful humanitarian evacuation. When AP reports a business “helped smuggle people out of Afghanistan,” it employs the same terminology it uses in covering indictments and criminal networks. AP’s own usage confirms a criminal interpretation is reasonable and evidences malice.

AP’s remaining arguments attempting to diminish Appellants’ proffered evidence of malice go to the weight eventually to be accorded the evidence. However, at the §768.72 stage, courts act as gatekeepers and may not weigh evidence or evaluate credibility. See *Roque v. Swezy*, 51 Fla.L.Weekly D146 (Fla. 3d DCA Jan. 21, 2026). The proffer must be viewed in the light most favorable to the movant. *Id.* By discounting Appellants’ evidence and accepting AP’s alternative characterizations of intent and meaning, the court exceeded its limited role under §768.72.

C. Actual malice is the standard for punitive damages.

Section 768.72 established the actual malice standard for punitive damages and overrode any previous requirement in the

common law of establishing express malice. *Bric McMann Indus. Inc. v. Regatta Beach Club Condo. Ass'n, Inc.*, 378 So.3d 652, 655 (Fla. 2d DCA 2023); *CNN v. Black*, 374 So.3d 811, 816-17 & n.3 (Fla. 4th DCA 2023).

AP claims Appellants should know they need to establish express malice because this Court in *CNN v. Young*, 390 So.3d 1241, 1245 (Fla. 1st DCA 2024) stated: “Young sufficiently proffered evidence of actual malice, express malice, and a level of conduct outrageous enough to open the door for him to seek punitive damages.” It appears that sentence may have been restating with approval the trial court’s findings on actual and express malice, the applicability of which was also debated in the CNN case. The portion of this Court’s opinion reciting the applicable law only referred to actual malice:

To recover punitive damages in a defamation claim against a media defendant, a plaintiff must show actual malice. So Young had to proffer evidence providing a reasonable basis that CNN published with **actual malice**, that is with knowledge of the falsity of its reporting or with reckless disregard for its probable falsity.

Id. at 1244.

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

AP argues Appellants failed to preserve this issue for review by failing to move to disqualify Judge Henry in the lower court within 20 days of entry of the final order on appeal. Fla.R.Jud.Admin. 2.330. No such waiver occurred.

The cases cited in the Initial Brief setting forth an appellate court's authority to order reassignment to a new judge on remand are cases where a court, sitting in its appellate jurisdiction, reviewed the record and determined that, on remand, reassignment was warranted. *Spivey v. State*, 512 So.2d 322, 324 (Fla. 3d DCA 1987); & others cited at IB/63-64, 67-68. These cases do not emanate from denials of Rule 2.330 motions, which are only reviewed by petition for writ of prohibition under the court's original jurisdiction. *Dade Medics & Rehab Ctrs. LLC v. Progressive Am. Ins. Co.*, 414 So.3d 442, n.1 (Fla. 3d DCA 2025).

Typically, Rule 2.330 motions are used during a case to disqualify a judge who is perceived to be biased. Here, Appellants only learned of the bias once the court entered the final order that is now on appeal. Although it would be possible to have filed a Rule 2.330 motion and at the same time pursued this plenary appeal, this

cumbersome procedure is not required. Regardless of whether a litigant has pursued a Rule 2.330 motion, a court sitting in its appellate jurisdiction is authorized to order reassignment to a different judge on remand. *Spivey*, 512 So.2d at 324.

AP argues Appellants have not demonstrated a reason to disqualify Judge Henry because he ruled in Appellants' favor in the CNN case. One has nothing to do with the other. As Judge Henry himself said, after presiding over Appellants' successful case against CNN, he was put off by this second lawsuit. His characterizations of this action as a "money grab" and a "sequel that should not have been made" go beyond legal analysis and reflect prejudgment of motive. Reassignment would promote confidence in the fairness of the process. On remand, a new judge should be assigned to the case.¹

¹ The motion to strike referenced in the Answer Brief is not on appeal and had no bearing on the Anti-SLAPP ruling.

CONCLUSION

WHEREFORE, Appellants respectfully request this Court to reverse and remand for further proceedings before a new judge and grant any other relief this Court deems just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing was filed on **February 26, 2026** via the Florida Court's E-Filing Portal, which furnished copies via electronic mail 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 4,000 words, which does not exceed the 13,000-word limit for initial and answer briefs or the 4,000-word limit for reply briefs.

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