IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 502023CA009436XXXXMB
DIVISION:AJ

MARK D. FEINSTEIN,
Plaintiff,

vs.

SEAN METHLEY CURRIE,
Defendant.

_____/

ORDER ON DEFENDANT'S AMENDED MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE came on for consideration before this Court, upon Defendant's Amended Motion for Final Summary Judgment and the Court having reviewed Plaintiff's response, the Court file, heard argument of counsel, and otherwise being fully advised of the premises,

Facts & Procedural Background

This is a libel action arising from two statements Defendant Sean Currie made about Plaintiff Mark Feinstein in September 2022 on the Town of Ocean Ridge's Facebook page, which is open to the public for comment and accessible by third parties who reside and work in the same community as Plaintiff. At the time of the statements, the Plaintiff was the President of the Turtle Beach of Ocean Ridge Condominium Association Inc. ("Turtle Beach"), and the Defendant resided in a separate property adjacent to Turtle Beach.

In January 2022, prior to the statements at issue, the Defendant admitted he was arrested for stealing "no trespassing" signs from the beach on Turtle Beach's property. As the Defendant testified, his animosity toward Plaintiff or his behavior stems from this property dispute, and the Defendant believes that Plaintiff is "polluting the beach and harassing his neighbors" in Ocean Ridge.

Notably, the Defendant admitted that he posted both of the subject statements on Facebook in September 2022. In one of the posts, the Defendant accused Plaintiff of "felching," writing in part:

> Hi yes, I'm wondering if wondering if Mayor Susan Hurlburt and her felching cronie [sic] Mark Feinstein are still being allowed to pollute our beautiful ocean with hazardous refuse?

The Defendant later published a second post that again accused Plaintiff of "felching," as shown below:

> Hey let me just go down to the beach in front of Susan Hurlburt and her felching cronie [sic] Mark Feinstein's house at Turtle Beach and get myself cut up on the signage they're trying to keep held in place by jagged metal footing.

As the Defendant admitted in his deposition, "felching" is defined as sucking or eating semen out of the anus of another individual. The Defendant further admitted that he was aware of the preceding definition of felching at the time he made the subject Facebook posts.

When the Defendant was asked what "factual basis" he had to believe that Plaintiff engaged in felching, he acknowledged he had no "factual evidence" to accuse Plaintiff of felching. Although the Defendant claimed his accusation of felching was in reference to Plaintiff's alleged corrupt relationship with the Mayor of Ocean Ridge, and to alleged issues with sign placement and zoning in the town, the Defendant admitted that felching had "nothing" to do with these issues. The Defendant also admitted there was no "factual evidence" to believe Plaintiff had a sexual relationship with the mayor.

After Plaintiff was alerted to the publication of the foregoing statements, Plaintiff's counsel served Defendant with a notice letter identifying the libelous statements and demanding their retraction, pursuant to section 770.01, Florida Statutes. When the Defendant failed to respond, Plaintiff filed a one-count complaint against Defendant alleging libel per se. Among other things, Plaintiff alleged that the Defendant's Facebook posts, which were published to third parties, contained a false statement of fact about Plaintiff, namely, by stating Plaintiff engages in felching in an attempt

to paint him as a sexual deviant or someone who engages in heinous and despicable acts, and to harm his reputation or cause him shame, embarrassment, and humiliation. Plaintiff further alleged that Defendant made the subject statements (a) knowing they were false or made them with reckless disregard for the truth, (b) without reasonable grounds to believe they were true, and (c) with evil intent to defame and injure Plaintiff.

The Defendant has now filed an amended motion for summary judgment raising four arguments: (1) his statements were insulting or rhetorical hyperbole—not actionable defamation, (2) his statements, when read in context, were not intended to be interpreted literally, (3) his statements are entitled to greater protection because the Plaintiff is a limited public figure, and (4) Plaintiff cannot show he made the statements with actual malice, which is required when the claimant is a limited public figure. In response, Plaintiff argued that a reasonable jury could find that the Defendant published defamatory statements of fact—not an insult or pure opinion—when he accused the Plaintiff of "felching," a depraved sexual act. In addition, Plaintiff argued that he was not a limited public figure as a matter of law, or even if Plaintiff were a limited public figure, then a reasonable jury could find the Defendant made the defamatory statements at issue with actual malice.

As discussed below, the Court agrees with the Plaintiff and finds the Defendant's portrayal of the facts does not establish undisputed facts. The Defendant views the evidence in the light most favorable to him, which is contrary to the standard applicable to a motion for summary judgment. In addition, the Court declines to consider any arguments regarding the issues of publication and damages, which was not raised by Defendant in the amended motion, but instead was raised by Defendant for the first time at the hearing on the summary judgment motion. *See* Fla. R. Civ. P. 1.510(a), (b) (requiring the party seeking summary judgment to file a motion "identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought" 40 days before the hearing on the motion).

Analysis

The Court notes that under rule 1.510, as amended by the Florida Supreme Court in 2021, the initial burden remains on the Defendant, as the moving party, to show the absence of a genuine issue of material fact. *In re Amends. to Fla. Rule of Civ. Proc. 1.510*, 317 So. 3d 72, 75 (Fla. 2021) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)); *see* Fla. R. Civ. P. 1.510(a) ("The court shall grant summary judgment 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"). "[T]he correct test for the existence of a genuine factual dispute is whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *In re Amends. Fla. Rule of Civ. Proc. 1.510*, 317 So. 3d at 75 (citation omitted).

In determining whether summary judgment is appropriate, a court "must view all evidence and make all reasonable inferences in favor of the party opposing summary judgment." *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir. 1995). Moreover, the Florida Supreme Court has "reaffirm[ed] the bedrock principle that summary judgment is not a substitute for the trial of disputed fact issues." *In re Amends. Fla. Rule of Civ. Proc. 1.510*, 309 So. 3d 192, 194 (Fla. 2020). The supreme court further explained that "the summary judgment rule must be implemented 'with due regard . . . for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury.'" *Id.* (citation omitted). Accordingly, a trial court should not grant summary judgment unless it is clear that a trial is unnecessary. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

As a preliminary matter, the Court notes that defamation is not constitutionally protected speech. *McQueen v. Baskin*, 377 So. 3d 170, 176 (Fla. 2d DCA 2023); *see Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72, (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any

Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words ...." (footnote omitted)); *Internet Sols. Corp. v. Marshall*, 39 So. 3d 1201, 1215 (Fla. 2010) ("As explained by the U.S. Supreme Court, 'the potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits.'"). Thus, "[f]reedom of speech does not extend to obscenity, defamation, fraud, incitement, true threats, and speech integral to criminal conduct." *Fox v. Hamptons at Metrowest Condo. Ass'n*, 223 So. 3d 453, 457 (Fla. 5th DCA 2017).

Regarding the Defendant's first argument, the Court concludes that a reasonable jury could find the Defendant's statements that accused Plaintiff of "felching" were defamatory—not merely an insult or hyperbole when read in context. By minimizing his statements and painting them in the best possible light, the Defendant is improperly asking the Court to view the evidence in the light most favorable to him. Although a jury may ultimately agree with the Defendant's position at trial, the Court finds "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *In re Amends. to Fla. Rule of Civ. Proc. 1.510*, 317 So. 3d at 75.

Florida courts have found similar statements to rise to the level of actionable defamation. *See Bilbrey v. Myers*, 91 So. 3d 887, 891 (Fla. 5th DCA 2012) (reversing dismissal of defamation claims "based on a series of statements made by [church pastor], who expressly or implicitly inferred that Bilbrey was a homosexual and asserted that Bilbrey's upcoming marriage was a sham to hide his homosexuality"); *House of God Which is the Church of the Living God, the Pillar & Ground of the Truth Without Controversy, Inc. v. White*, 792 So.2d 491, 495 (Fla. 4th DCA 2001) (recognizing claim for defamation against pastor who allegedly called plaintiff a "slut" while standing at church altar in front of other clergy and parishioners); *Hoch v. Rissman, Weisberg, Barrett*, 742 So. 2d 451, 457, 460 (Fla. 5th DCA 1999) (rejecting defendant's argument that saying judge liked "men in tight shorts"

was pure opinion and finding statement amounted to slander per se); *see also Chiavarelli v. Williams,* 256 A.D.2d 111, 681 N.Y.S.2d 276 (1998) (finding allegation that hospital official would misuse his supervisory powers to obtain sexual favors stated a claim for defamation per se); *Rejent v. Liberation Publications, Inc*., 197 A.D.2d 240, 611 N.Y.S.2d 866 (1994) (holding that unauthorized publication of male model's photograph in a magazine advocating homosexuality sufficient to state a cause of action for defamation per se). Accordingly, the Court denies the Defendant's amended motion for summary judgment on this point.

As for the Defendant's second argument, the Court concludes that a reasonable jury could interpret the Defendant's statements literally as opposed to an expression of pure opinion. The parties here agree on the law. "Whether a published statement is a protected expression of pure opinion versus an actionable expression of fact or mixed opinion and fact poses a question of law." *McQueen*, 377 So. 3d at 177. "It is the court's function to determine from the context 'whether an expression of opinion is capable of bearing a defamatory meaning because it may reasonably be understood to imply the assertion of undisclosed facts that justify the expressed opinion about the plaintiff or his conduct.'" *Eastern Airlines, Inc. v. Gellert*, 438 So.2d 923, 927 (Fla. 3d DCA 1983), *disapproved on other grounds by Ter Keurst v. Miami Elevator Co*., 486 So. 2d 547, 550 (Fla. 1986) (quoting Restatement (Second) of Torts § 566 cmt. C). Thus, the relevant standard is whether a statement "may reasonably be understood" to be defamatory. If a statement is capable of such an interpretation, then entry of summary judgment is inappropriate.

Here, the character of the Defendant's statements, when read in context, may reasonably be understood to be defamatory because they tend to subject Plaintiff to hatred, distrust, ridicule, contempt, or disgrace. *See, e.g., Blake v. Giustibelli*, 182 So. 3d 881, 884 (Fla. 4th DCA 2016). The Court notes that a statement appearing to be in the form of an opinion is still actionable as defamation if it "implies the allegation of undisclosed defamatory facts as the basis for the opinion." *Gellert*, 438

So.2d at 927. The Defendant's statements, which accuse Plaintiff of felching, do just that; they imply the allegation of undisclosed defamatory facts that Plaintiff is a sexual deviant. Accordingly, the Court denies the Defendant's amended motion for summary judgment on this point. *See McQueen*, 377 So. 3d at 177-78 (rejecting argument that published statement was protected pure opinion); *Hoch*, 742 So. 2d at 460 (rejecting defendant's argument that saying judge liked "men in tight shorts" was pure opinion and finding statement amounted to slander per se).

Regarding the Defendant's third argument, the Court concludes that Defendant has failed to establish that Plaintiff is a limited public figure as a matter of law. The Court notes that the Defendant cites no admissible evidence to support his conclusory assertion; he simply relies on online newspaper printouts to assert that Plaintiff's status as a limited public figure is "plain" or "undeniable." *See Dollar v. State*, 685 So. 2d 901, 903 (Fla. 5th DCA 1996) (explaining that an "argument that the contents of a newspaper article are admissible because a newspaper is self-authenticating misses the mark. Authentication relates to the genuineness vel non of a document. . . . Authentication, however, does not mean that the article is insulated from other rules of evidence governing admissibility.").

"Under U.S. constitutional defamation law there are two classes of 'public figures': 'general public figures' of requisite fame or notoriety in a community who are always considered public figures, and 'limited public figures' who have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Mile Marker, Inc. v. Petersen Publ'g, L.L.C.*, 811 So. 2d 841, 845 (Fla. 4th DCA 2002) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)); *see Young v. Kopchak*, 368 So. 3d 1001, 1005 (Fla. 4th DCA 2023). The Defendant contends that Plaintiff is in the latter category, a limited public figure, because he purportedly inserted himself into a controversy about beach signs in the Town of Ocean Ridge, and because Plaintiff is the president of the Turtle Beach condo association. The Defendant fails to establish either point as a matter of law.

"In determining whether a controversy is public, a court 'should ask whether a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution. If the issue was being debated publicly and if it had foreseeable and substantial ramifications for non-participants, it was a public controversy.'" *Young*, 368 So. 3d at 1006 (quoting *Della-Donna v. Gore Newspapers Co*., 489 So. 2d 72, 76 (Fla. 4th DCA 1986)). Even if this Court finds "the existence of a public controversy is established, the court must apply a two-part test to determine if a specific individual is a limited public figure for the purpose of that controversy. First, the court must determine whether the individual played a central role in the controversy. Second, it must determine whether the alleged defamation was germane to the individual's role in the controversy." *Saro Corp. v. Waterman Broad. Corp*., 595 So. 2d 87, 89 (Fla. 2d DCA 1992).

The Defendant cannot establish either factor. Although the Defendant seeks to establish the first factor by relying on online newspaper printouts, the Defendant fails to provide any admissible evidence upon which this Court can rely to enter summary judgment. *See* Fla. R. Civ. P. 1.510(c)(2) ("A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence."). With respect to the second factor, the Defendant admitted in his deposition that sign placement and zoning had "nothing" to do with felching. This necessarily means that the Defendant's statements that accuse Plaintiff of felching cannot be "germane" to Plaintiff's role in an alleged controversy if the statements have "nothing" to do with the controversy.

Finally, the Court notes that no Florida appellate court case has ruled on whether a community association board member is a limited purpose public figure as a matter of law. However, the U.S. Supreme Court has addressed the status of a claimant similar to Plaintiff in *Gertz v. Robert Welch, Inc*., 418 U.S. 323 (1974). In *Gertz*, the U.S. Supreme Court held that an

attorney—like Plaintiff—who had briefly served on a committee appointed by the mayor and had appeared at a coroner's inquest into the death of a murder victim but had never held a governmental position was not a public official or public figure for First Amendment purposes. *Id.* at 351. *Gertz* is expressly clear that a private claimant is not transformed into a public figure merely because he has "long been active in the community," has "served as an officer of local civic groups and of various professional organizations," or has been referred to by name in a news publication. *Id.* at 325-26, 351-52. Accordingly, the Court is compelled to reject Defendant's argument on this point and to find that Plaintiff is not a limited public figure as a matter of law, based on *Gertz*.

As for the Defendant's last argument, the Court concludes that Plaintiff is not required to present evidence of actual malice in light of its ruling that Defendant has failed to establish he a limited public figure. However, even assuming that Plaintiff was a limited public figure, the Court finds that Plaintiff has presented sufficient evidence of actual malice. Under the actual malice test laid out by the U.S. Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), a limited public figure plaintiff must establish that the disseminator of the information either knew the alleged defamatory statements were false, or published them with reckless disregard despite awareness of their probable falsity.

In this case, Plaintiff has presented evidence showing that the Defendant published two statements accusing Plaintiff of felching while the Defendant admitted he knew there was no factual basis for such an accusation. Moreover, the Defendant openly admitted he was aware of the sexualized definition of "felching" when he made the statements at issue. Finally, the Defendant acknowledged that his felching accusations against Plaintiff had no logical relation to his complaints about "no trespassing" signs and zoning issues in Ocean Ridge. By themselves, the Defendant's admissions in his deposition testimony are fatal to his case, and they compel the denial of his amended motion for summary judgment.

Although the Defendant has suggested that he meant to refer to another meaning of the term "felching," and that he did not make the statements with intent to harm Plaintiff, this Court is not required to accept the Defendant's self-serving and conclusory assertions as it would fail to view the evidence in the light most favorable to Plaintiff, as required by Florida law. The nature of the Defendant's comments and the Defendant's own admissions provide sufficient evidence that he made the statements at issue knowing them to be false or with reckless disregard as to their falsity. *See Mile Marker, Inc.*, 811 So. 2d at 845.

ORDERED AND ADJUDGED that:

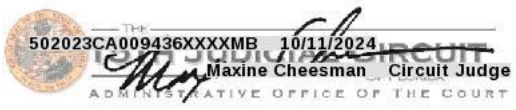
A. In this case, the Court finds there are genuine factual disputes that preclude summary judgment and require this case to proceed to trial.

B. The Defendant's amended motion for summary judgment is **DENIED**.

C. The Court concludes that a reasonable jury could find that the Defendant published two defamatory statements of fact when he accused the Plaintiff of "felching," a depraved sexual act.

D. In addition, a reasonable jury could also find, based on the evidence, that Plaintiff is not a limited public figure, or even if Plaintiff is a limited public figure, then the Defendant made the defamatory statements with reckless disregard as to the falsity of the statement.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida.



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Maxine Cheesman
Circuit Judge

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