

**IN THE DISTRICT COURT OF APPEAL  
SECOND DISTRICT  
State Of Florida**

Michael T. Flynn,

*Appellant,*

v.

Rick Wilson, et al.,

*Appellee.*

Case No. 2D24-0278

L.T. No.: 2023-CA-004264 NC

**APPELLANT'S MOTION FOR REHEARING**

Pursuant to Fla. R. App. P. 9.330(2)(A), Appellant, Lt. General Michael T. Flynn ("General Flynn"), respectfully moves this Court for rehearing of its December 11, 2024 Opinion. Rehearing is necessary because the Court assumed facts not in evidence. It is also necessary because the Court's ruling on rhetorical hyperbole renders the defense overly broad, thus, excusing or preventing the finder of fact to interpret the statements in context as well as consuming all future potential defamation claims. Further, it is necessary because the Court failed to engage with General Flynn's actual malice arguments. Finally, rehearing is necessary because even if Appellee, Rick Wilson, was entitled to dismissal, there is no evidence on the record that would make Florida's anti-SLAPP statute applicable.

## Issues for Rehearing

- a. The Court assumed facts not in the record.

The Court assumed facts that were not part of the record. In making its rhetorical hyperbole determination, the Court stated that whether General Flynn actually received a paycheck from Vladimir Putin “just isn’t Wilson’s point.” Op. at 12. The record, however, is devoid of any evidence indicating what “Wilson’s point” was. Appellee did not include in his affidavit the purpose of his statement, nor did he present any other evidence indicating the statement’s purpose. Similarly, the record lacks any evidence or indication of what readers interpreted Appellee’s statement to mean. Instead, the record merely displays that in response to General Flynn criticizing President Biden’s handling of Russia, Appellee called General Flynn an actual employee of Russian President Vladimir Putin. Whether Appellee meant General Flynn is an actual employee of Putin is not part of the record, and all inferences must be viewed in favor of General Flynn at the initial stage of litigation. Accordingly, the Court incorrectly assumed facts that were not part of the record.

- b. The Court placed too much emphasis on *Herring*.

In the Opinion, the Court emphasized the Ninth Circuit ruling in *Herring Networks, Inc. v. Maddow*, without recognizing the clear distinguishing facts

with respect to Appellee's statement that General Flynn is a "Putin employee." Op. at 12-14. In *Herring*, that Court emphasized the defendant's gleeful tone, making it so it was unquestionably clear that the defendant was not actually breaking new news. *Herring Networks, Inc. v. Maddow*, 8 F.4th 1148, 1157-58 (9th Cir. 2021). Here, there was no such gleeful tone indicated in or discernible from the record. Instead, Appellee issued a one sentence response to a letter that General Flynn wrote that was critical of President Biden, but in no means an endorsement of Vladimir Putin, stating, in no uncertain terms, that General Flynn is a "Putin employee." While the Court is correct that it must consider this statement even with undisclosed facts that are well known, Op. at 14, this added context of (false) alleged connections between General Flynn and Russia only bolster's General Flynn's point that others, who knew of these alleged connections, would consider Appellee's statement to be a statement of fact.

c. The Court overlooked General Flynn's actual malice arguments.

The Court chided General Flynn for not providing evidence of Appellee's actual malice in response to Wilson's Motion for Summary Judgment below. Op. at 15. In doing so, however, the Court ignored General Flynn's well-briefed argument that Appellee's statements were defamatory per se, something that Appellee did not challenge. As precedent notes,

“statements defamatory per se are presumed harmful as a matter of law, making it unnecessary to prove actual malice.” *Levy v. Steven A. Lerman & Assocs., Inc.*, No. 10-22916-CIV, 2011 WL 5515518, at \*3 (S.D. Fla. Jul. 21, 2011). Thus, where Appellee failed to challenge General Flynn’s assertion of defamation per se, actual malice should have been presumed.

In addition, ill will may be used to establish actual malice. *Don King Prods., Inc. v. Walt Disney Co.*, 40 So. 3d 40, 44 (Fla. 4th DCA 2010). As the Court acknowledged, Appellee has written highly critical statements of General Flynn in the past. Op. at 2. Further, as argued, given General Flynn’s status as a three-star general, each of Appellee’s assertions are “highly improbable,” supporting a finding of actual malice. See *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 691 (1989). And Appellee did not present a single credible source indicating General Flynn is “Q.” See *Bentley v. Bunton*, 94 S.W. 3d 561, 596 (Tex. 2002) (holding that reliance on “dubious” sources may be grounds for finding actual malice). The combination of these factors was overlooked. Instead, the Court appears to have hoped for an affidavit from General Flynn asserting that Appellee knew his statements were false. Such a he said/she said argument, however, would be fruitless, especially considering the abundance of evidence the Court possessed regarding Appellee’s actual malice.

d. The Court did not conduct a complete anti-SLAPP analysis.

Finally, the Court concluded that because General Flynn did not submit a counter affidavit, he must have brought this case *primarily* to chill Appellee's freedom of speech. Again, it is unclear what help an affidavit would have had other than turning it once again into a he said/she said debate. This appears to go hand-in-hand with the Court's decision in *Gundel*, putting the burden on General Flynn to show the anti-SLAPP statute did not apply. Thus, it would have been proper for the Court to revisit *Gundel* here, instead of declining to do so. Op. at 17. Instead, had the burden not shifted, it becomes clear, by virtue of the fact that General Flynn's Complaint illustrates the immense harm Appellee's statements caused him and the absence of any evidence from Appellee to the contrary of General Flynn's stated purpose of the lawsuit, that the *primary* purpose was not to chill Appellee's freedom of speech. Thus, it was an error to find that General Flynn did not meet his burden on showing the anti-SLAPP statute did not apply without revisiting *Gundel*. See *Gundel v. AV Homes, Inc.*, 264 So. 3d 304 (Fla. 2d DCA 2019) ("Placing the initial burden on the SLAPP defendant to set forth a prima facie case that the Anti-SLAPP statute applies and *then shifting the burden to the claimant to demonstrate that the claims are not "primarily" based on First Amendment rights* in connection with a public issue

and not “without merit” serves the purpose of the statute and conforms with the procedures employed in considering other statutorily-based motions to dismiss.”) (emphasis added).

### **Conclusion**

Based on the foregoing, General Flynn respectfully requests that this Court grant his motion for rehearing.

Dated: December 18, 2024

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I certify that on December 18, 2024, a copy of the foregoing was filed with the Clerk of the Court using the Florida Courts E-Filing Portal, which will send a copy to all counsel of record.

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## **CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that this brief complies in full with the font and formatting requirements of Fla. R. App. P. 9.045(e). This brief has been rendered in Arial at 14-point font and contains 1,078 words.

/s/ Stephen B. French  
Stephen B. French

*Counsel for Appellant*