

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ORLANDO DAVIS and BEASLEY MEDIA GROUP, LLC,
Petitioners,

v.

ERIK MISHIYEV,
Respondent.

No. 2D21-1726

May 11, 2022

Petition for Writ of Certiorari to the Circuit Court for Hillsborough County; Caroline Tesche Arkin, Judge.

Rachel E. Fugate, Allison S. Lovelady, and Minch Minchin of Shullman Fugate PLLC, Tampa, for Petitioners.

Erik Mishiyev, pro se.

MORRIS, Chief Judge.

Orlando Davis and Beasley Media Group, LLC, seek a writ of certiorari to quash the trial court's order denying their motion to dismiss Erik Mishiyev's suit for defamation and intentional interference with a business relationship. The underlying suit was

based on alleged defamatory statements made by Davis, as an employee and representative of Beasley, about Mishiyev.¹ We conclude that the trial court departed from the essential requirements of law by applying an incorrect motion-to-dismiss standard rather than the standard applied to motions to dismiss filed pursuant to Florida's Anti-SLAPP statute, section 768.295, Florida Statutes (2020).² We therefore grant the petition.

BACKGROUND

Davis is a program director for Beasley's radio station WiLD 94.1. Mishiyev is a rival entertainment personality whose professional name is "DJ Short-E."

In the portion of his complaint alleging defamation, Mishiyev alleged generally that Davis and Beasley published defamatory statements between 2004 and 2020 and that Davis made untrue statements about him. Mishiyev referred to one specific incident,

¹ Mishiyev brought his action against Davis "in his capacity as [a] Radio Personality for" Beasley as well as against Davis individually. Mishiyev alleged that his damages were caused by Davis on behalf of Beasley. We therefore refer to Davis and Beasley jointly when referring to the alleged wrongful conduct.

² "SLAPP" stands for Strategic Lawsuits Against Public Participation.

occurring on or about April 17, 2020, where he claimed that Davis uploaded a video to Instagram wherein he promoted his radio show and then claimed he was the reason DJ Short-E "ain't made it." Mishiyev also alleged that in 2017, a Facebook video related to Davis's show accused Mishiyev of abusing drugs. He asserted that Davis used social media "to falsely claim, orally and in writing, that [Mishiyev] abused drugs and other slanderous statements," but Mishiyev did not provide the dates of these statements nor did he provide any additional details relating to those statements or the "other slanderous statements" referenced. Mishiyev also did not provide dates or further details about other specific incidences of alleged defamatory conduct. Mishiyev did assert, however, that Davis continuously disrespected him which resulted in a lack of opportunities for Mishiyev in the music industry. He further argued that his success as a DJ was "hindered greatly" by Davis and Beasley's conduct, including Mishiyev's YouTube channels being terminated and his being denied the opportunity to play in local venues. He contended that Davis gained attention by defaming Mishiyev and continuing to slander him on and off air. He asserted

that the defamatory statements were intentionally published and distributed among "dozens of associates in the [m]usic industry."

In his claim for intentional interference with a business relationship, Mishiyev essentially relied on his allegations from the defamation claim and asserted that he had a business relationship "with the Defendants." He then argued that Davis's actions in defaming him constituted interference with the business relationship.

Attached to the complaint were screenshots of Davis's Facebook page wherein he mentioned Mishiyev and stated in relevant part that "[i]t's DJ Short-E Job Fair Day, the day where I get to listen to how I'm crazy and a hater for NOT offering this guy a job, or guess [sic] spot or moral support." The date of that post was February 13, 2017. Another attached screenshot of what appears to be comments made by third parties on a Facebook post contains a circled post that says simply, "Orlando dropped the 'Cocaine-yyy' and 'Booger Sugar' Oh lawd." It is not clear whether those comments were from the original Facebook post as the screenshot indicates it was taken on February 16, 2017. Other attached screenshots of what appear to be comments from another social

media platform briefly mention Mishiyev, but there is no indication what Mishiyev found problematic in those comments.

Davis and Beasley moved to dismiss Mishiyev's complaint pursuant to section 768.295, arguing that Mishiyev's complaint was a SLAPP suit.³ In their motion, Davis and Beasley argued that it was apparent on the face of the complaint that the challenged speech was made on Beasley's radio broadcasts or in connection with such broadcasts and that the speech thus constituted free speech in connection with a public issue which was protected under the statute. Davis and Beasley also raised other arguments

³ A SLAPP suit is defined in relevant part as "any lawsuit, cause of action, claim, cross-claim, or counterclaim against another person or entity without merit and primarily because such person or entity has exercised the constitutional right of free speech in connection with a public issue." § 768.295(3). The statute defines "free speech in connection with public issues" as any written or oral statement that is protected under applicable law and is made before a governmental entity in connection with an issue under consideration or review by a governmental entity, or is made in or in connection with a play, movie, television program, radio broadcast, audiovisual work, book, magazine article, musical work, news report, or other similar work. § 768.295(2)(a).

attacking the merit of Mishiyev's claims, but due to our disposition, those arguments need not be discussed.

In response to the argument that the Anti-SLAPP statute applied, Mishiyev did not offer any evidence relating to his claims beyond what was alleged in the complaint. He admitted that the challenged statements were made on Beasley's radio broadcasts or in connection therewith, but he contended that the statute did not apply because Beasley did not file any affidavits and because the statements were not made before a governmental entity and were not related to an issue under review by a governmental entity.

The trial court conducted a hearing on Davis and Beasley's motion but did not make any oral rulings. Thereafter, the trial court entered an order denying the motion. The order contained no findings or reasoning.

ANALYSIS

In order to obtain certiorari relief based on the denial of a motion to dismiss, a petitioner must establish a departure from the essential requirements of the law that results in a material injury that cannot be corrected on postjudgment appeal. *See Sabra Health Care Holdings III, LLC v. Est. of DeSantis ex rel. DeSantis,*

331 So. 3d 1258, 1259-60 (Fla. 2d DCA 2022). This court has recognized that certiorari review may be utilized "to determine whether [a party] was afforded the proper process through procedural compliance with the statutory requirements." *Gundel v. AV Homes, Inc.*, 264 So. 3d 304, 310 (Fla. 2d DCA 2019) (alteration in original) (quoting *Williams v. Oken*, 62 So. 3d 1129, 1134 (Fla. 2011)). "Moreover, certiorari review is appropriate where an 'order implicates a violation of the parties' constitutional rights which cannot be remedied on plenary review.'" *Id.* (quoting *Rodriguez ex rel. Posso-Rodriguez v. Feinstein*, 734 So. 2d 1162, 1163 (Fla. 3d DCA 1999)).

Gundel squarely addressed whether certiorari review was appropriate to review an order denying a motion to dismiss a SLAPP suit. We recognized that section 768.295 was enacted because the legislature acknowledged the inconsistency between SLAPP suits and the constitutional right to free speech in connection with public issues and, therefore, that the statute was intended to assist in expeditiously disposing of such suits. *Gundel*, 264 So. 3d at 310; *see also* § 768.295(1). We explained that "the very filing and continuation of" such suits had a "chilling effect on constitutional

rights" and that "the harm that results from the court's improper denial of a motion to dismiss . . . is precisely the harm that the Anti-SLAPP statute seeks to prevent—unnecessary litigation." *Gundel*, 264 So. 3d at 310-11. We further explained that the protection afforded by section 768.295 could not be restored once it was lost through litigation and that without the availability of certiorari review, "the substantive right created by the Anti-SLAPP statute 'is illusory,' " the policy underlying the creation of the statute is frustrated, and the protection afforded by the statute is rendered meaningless for defendants. *Id.* at 311 (quoting *Keck v. Eminisor*, 104 So. 3d 359, 365 (Fla. 2012)). We also explained that the availability of a mechanism for correcting an error in a postjudgment appeal is not dispositive of this court's certiorari jurisdiction and that in order for this court to conclude that there is no irreparable harm, "the remedy must alleviate *the harm that results from the error.*" *Id.* (quoting *Gawker Media, LLC v. Bollea*, 170 So. 3d 125, 132 (Fla. 2d DCA 2015)); accord *Baird v. Mason Classical Acad., Inc.*, 317 So. 3d 264, 267-68 (Fla. 2d DCA 2021) (quoting *Fountainbleau, LLC v. Hire Us, Inc.*, 273 So. 3d 1152, 1155 (Fla. 2d DCA 2019)). But because a postjudgment appeal cannot

remedy the very harm that the Anti-SLAPP statute seeks to prevent—unnecessary litigation—a petitioner clearly establishes irreparable harm when seeking review of an order denying a motion to dismiss under the Anti-SLAPP statute. *Baird*, 317 So. 3d at 267-68; *Gundel*, 264 So. 3d at 311.

We acknowledge that one Florida court expressly disagrees with this court as to whether a petitioner can establish irreparable harm from an order denying a motion to dismiss a SLAPP suit for purposes of obtaining certiorari review. *See WPB Residents for Integrity in Gov't, Inc. v. Materio*, 284 So. 3d 555, 559-61 (Fla. 4th DCA 2019) (certifying conflict with *Gundel*). Thus we certify conflict with *Materio* as to this issue only.

But having concluded in accordance with this district's case law that irreparable harm has been established where a trial court denies a motion to dismiss under section 768.295, we must focus on the issue of whether the denial was a departure from the essential requirements of the law.

In *Gundel*, the petitioners argued in part that the trial court departed from the essential requirements of the law because it applied an incorrect standard: the standard for dismissal applied to

motions to dismiss based on failure to state a cause of action. 264 So. 3d at 313-14.⁴ The petitioners argued that the motion to dismiss was not based on a failure to state a cause of action because the Anti-SLAPP statute "focuses not on whether a cause of action has been sufficiently alleged but on whether the activity that is alleged to have given rise to the cause of action is protected activity." *Id.* at 314. We agreed that "a motion to dismiss based on the Anti-SLAPP statute requires the trial court do more than accept as true the factual allegations in the four corners of the complaint and draw all reasonable inferences therefrom in favor of the claimant." *Id.*

⁴ Section 768.295(4) permits a SLAPP defendant to file a motion to dismiss, a motion for final judgment entered in favor of the SLAPP defendant, or a motion for summary judgment. And in *Gundel*, the SLAPP defendants filed their motion in the alternative as a motion to dismiss, motion for summary judgment, and motion for judgment on the pleadings. 264 So. 3d at 313. We granted the petition primarily based on the trial court's failure to alternatively consider the motion to dismiss as a motion for summary judgment, but as explained herein, we agreed with the SLAPP defendants that in construing their motion exclusively as a motion to dismiss, the trial court erred by applying the burden of proving the application of the Anti-SLAPP statute solely on them. *Id.* at 314.

We explained that the statute places the initial burden on a "SLAPP defendant to set forth a prima facie case that the Anti-SLAPP statute applies" and that once that burden is met, the burden is shifted to the SLAPP plaintiff "to demonstrate that the claims are not 'primarily' based on First Amendment rights in connection with a public issue and not 'without merit.'" *Id.* Applying the statute in this manner "serves the purpose of the statute and conforms with the procedures employed in considering other statutorily-based motions to dismiss." *Id.* Otherwise, if the burden was placed exclusively on the SLAPP defendant based solely on the plaintiff's allegations, the plaintiff could avoid dismissal "by being intentionally vague, thus thwarting the purpose of the statute." *Id.*

This court found it problematic that the trial court solely applied the burden to the SLAPP defendants and failed to consider one of the SLAPP defendants' affidavits; we also took issue with the trial court's conclusion that the SLAPP defendants failed to show that their conduct was protected activity under the Anti-SLAPP statute and that they failed to establish their conduct was made "in connection with" an existing judicial proceeding. *Id.* at 309, 314.

We explained in relevant part that the vagueness of the SLAPP counterplaintiff's allegations as to the dates of specific conduct and as to the conduct itself prevented the trial court from determining from the face of the counterclaim that the SLAPP defendants' actions constituted "free speech in connection with public issues." *Id.* at 315. Consequently, the trial court could not determine that the counterclaims were primarily based on protected activities. *Id.*

Here too the vagueness of Mishiyev's allegations regarding the dates of the alleged defamatory statements as well as the conduct itself necessarily prevented the trial court from determining whether Davis and Beasley's conduct constituted "free speech in connection with public issues" and from determining whether Mishiyev's complaint was based primarily on protected conduct.

We note that our review was somewhat hampered by the lack of findings—such as those made in *Gundel*—either orally at the hearing or in the trial court's written order denying Davis and Beasley's motion. The trial court simply denied the motion without explanation. But due to the vagueness of Mishiyev's allegations, it appears that the trial court did not analyze the Anti-SLAPP statute when ruling on the motion to dismiss because, as already

explained, the trial court could not have made the necessary determinations under the statute. Rather, the unelaborated order of dismissal suggests that the trial court denied the motion utilizing an incorrect motion-to-dismiss standard.⁵ We therefore conclude that Davis and Beasley established a departure from the essential requirements of law, and we grant the petition. In accordance with *Gundel*, we note that the trial court must review the merits of Davis and Beasley's motion under the appropriate standard for motions to dismiss filed pursuant to the Anti-SLAPP statute.

Petition granted; conflict certified.

LaROSE and BLACK, JJ., Concur.

Opinion subject to revision prior to official publication.

⁵ We note that Davis and Beasley raised additional arguments such as Mishiyev's claims being barred by the expiration of the statute of limitations and that the statements constituted pure opinion. Clearly, due to the trial court's denial of their motion, it rejected those claims. We need not address the merits of those arguments given our holding that the petition should be granted for other reasons.