

IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR MIAMI-
DADE COUNTY, FLORIDA

Case No. 2016-025611-CA-01

PATRICK LEE QUERCIOLI
and DUSTIN W. THRASHER,

Plaintiffs,

v.

MIAMI HERALD MEDIA COMPANY d/b/a
The Miami Herald et al.,

Defendants.

**OPINION AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
UNDER FLORIDA'S ANTI-SLAPP LAW**

THIS CAUSE came before the Court on Defendants' Motion for Summary Judgment under Florida's Anti-SLAPP law ("Motion"). The Motion was filed on April 11, 2017, and renewed on June 5, 2018, by Defendants Miami Herald Media Company d/b/a the *Miami Herald* ("MHMC"), The Bradenton Herald, Inc. ("TBH"), and Julie K. Brown ("Brown") (collectively, "Defendants"). On August 16, 2018, the Court held a hearing on the Motion, and heard arguments of counsel from both Defendants and Plaintiffs Patrick Lee Quercioli ("Quercioli") and Dustin W. Thrasher ("Thrasher"). The Court has considered all the filings and memorandums, the summary-judgment evidence filed with the Court, argument of Counsel, and the applicable law. For the reasons set forth below, the Motion is **GRANTED**, and Defendants are awarded their reasonable attorney's fees and costs incurred in this action pursuant to Florida Statutes section 768.295(4).

I. BACKGROUND

The following facts are derived from the pleadings, memorandums, and summary-judgment evidence on file. The Court has considered them, as it must, in the light most favorable to Plaintiffs as the non-moving party. *See Moradiellos v. Gerelco Traffic Controls, Inc.*, 176 So. 3d 329, 334–35 (Fla. 3d DCA 2015).

A. The Parties

Until late 2014, Quercioli and Thrasher were correctional officers employed by the Florida Department of Corrections (“DOC”) responsible for supervising the prison-inmate-housing unit known as Charlie Dorm located at the Lowell Correctional Institution (“LCI”) in Ocala, Florida. *See* Compl. ¶¶ 4–5. Both were “approved for hiring by DOC as certified correctional officers and assigned to the LCI,” which “remains a state prison for female offenders.” Compl. ¶ 9.

MHMC and TBH publish The Miami Herald and The Bradenton Herald, respectively. *See* Compl. ¶¶ 6–7. Brown is an experienced, award-winning reporter employed by MHMC. *See* Exhibit A to Defs.’ Mot. Summ. J.: Decl. Julie K. Brown (“Brown Decl.”) ¶¶ 2–3. At no time relevant to this action was Brown employed by TBH. *See* Exhibit B to Defs.’ Mot. Summ. J.: Decl. Joan Krauter (“Krauter Decl.”) ¶ 6.

Latandra Tynese Ellington (“Ellington”) was a female inmate serving a prison sentence at LCI. *See* Compl. ¶ 11. In September 2014, Ellington sent a letter to her aunt expressing concern for her safety and claiming that a correctional officer “was threatening to kill her.” Compl. ¶ 11. On October 1, 2014, Ellington “died of natural causes while housed in the LCI.” Compl. ¶ 12.

On October 1, 2014, the Florida Department of Law Enforcement (“FDLE”) initiated an investigation into Ellington’s death. Compl. ¶ 17. On January 21, 2015, FDLE closed its investigation after concluding that Ellington died of natural causes. Compl. ¶ 17.

B. The Articles

Brown authored, and Defendants published, a series of articles about the circumstances surrounding Ellington’s death. As alleged in the complaint and identified in their pre-suit notices served under section 770.01 of the Florida statutes, Plaintiffs allege the articles contain false and defamatory statements.¹ A summary of the articles, the allegedly false and defamatory statements, and Brown’s reporting, is set forth below.

1. Article 1.

On October 8, 2014, MHMC published an article authored by Brown entitled *After Inmate’s death, sergeant to be questioned* (“Article 1”).² Compl. ¶ 18 & Ex. 1. Article 1 is largely about FDLE’s investigation into the circumstances of Ellington’s death. In the complaint, Quercioli alleges that statements in Article 1 “falsely treat as if [it is] a ‘fact’ that Quercioli did commit fraud and did possess steroids.” Compl. ¶ 19. This statement will be referred to as **Statement 1**.

Statement 1 is a report of what is in publicly available records. Brown learned from FDLE criminal-history records that Quercioli was arrested once for defrauding an innkeeper on November 4, 1986, and once for possession of anabolic steroids on January 29, 1994. *See* Brown Decl. ¶ 6. These facts are undisputed.

¹ In his deposition, Quercioli confirmed that the complaint contains all the allegedly false and defamatory statements about which he is suing. *See* Quercioli Dep. 7:8–11, Feb. 23, 2018 (“Q. Does the Complaint include all of the false statements that Julie Brown made about you in the articles she wrote? A. Yes.”); *id.* 29:14–17 (“Q. And as of the time you last read [the Complaint], it identifies all the false statements made about you by Julie Brown? A. Yes.”).

² The Complaint does not allege that anything in Article 1 defamed Thrasher.

Quercioli also alleges as false the statement that his “arrests ... were not reported to FDLE’s Criminal Justice Standards and Training Commission.” Compl. ¶ 20. This statement will be referred to as **Statement 2**.

In reporting that Quercioli’s arrest records were not reported, Brown relied on information received from the government. *See* Brown Decl. ¶ 7. An FDLE representative informed Brown that Quercioli’s arrests were not reported to FDLE. *See* Brown Decl. ¶ 7. This fact is undisputed.

Article 1 reported that “Quercioli did not return phone messages left by the Herald.” Compl. ¶ 18 & Ex. 1. Before Article 1 was published, Brown declares that she called Quercioli multiple times asking him to call her about a story she was writing for the *Miami Herald*. *See* Brown Decl. ¶ 8. Brown also declared that she called Quercioli’s wife, who confirmed that she would relay the message that Brown needed to talk with Quercioli about a story that would mention him by name the following day. *See* Brown Decl. ¶ 8. But, according to Brown, Quercioli never called Brown. *See* Brown Decl. ¶ 8.

Regarding Brown’s attempts to contact Quercioli, Quercioli’s ex-wife, and Quercioli’s lawyer before publishing Article 1 (and the other articles), Quercioli’s deposition testimony does not materially contradict Brown’s declaration. *See* Quercioli Dep. 20:4–21:16, Feb. 23, 2018 (“Q. Did Julie Brown make any attempt to reach you before she wrote any of the articles? A. Yes.... Q. When she attempted to reach you, how did you learn of that? A. I spoke with Julie Brown one time, never received any messages from Julie Brown. She called me ... in the morning and I said—I told her I couldn’t comment because I knew that FDLE was doing an investigation.... And she tried to reach my ex-wife.... Q. Do you know if she ever wrote your lawyer, Mr. Bisbee, trying to get a comment? A. I believe she contacted him.”); *id.* 31:2–7 (“Q.

In this declaration Ms. Brown said she called you before anything was published each time. And she says she called your cell phone and left messages. Do you recall any of that? A. No, I don't. I recall speaking to Julie Brown one time.”).

Brown had no reason to believe that any of these statements was false. *See* Brown Decl. ¶ 9.

2. Article 2.

On October 8, 2014, a materially similar article authored by Brown entitled *After Ocala Inmate's Death, "Sgt. Q." to be questioned* (“Article 2”) was published by TBH. *See* Compl. ¶ 21 & Ex. 2. Article 2 was researched, written, and edited solely by MHMC. *See* Krauter Decl. ¶¶ 3–5. Before TBH published Article 2, TBH did not believe—or have any reason to believe—that any statement made in or meaning conveyed by Article 2 was false. *See* Krauter Decl. ¶ 7. Quercioli alleges that Article 2 is false and defamatory for the same reasons as he alleges Article 1 is defamatory. *See* Compl. ¶¶ 22–23.

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3. Article 3.

On December 16, 2015, MHMC published an article authored by Brown entitled *FDC offers some details of “ongoing” Lowell investigations* (“Article 3”).⁴ Compl. ¶ 24 & Ex. 3. According to Article 3, the FDLE discovered that before Ellington’s death she claimed that she saw Quercioli “having sex with an inmate.” Compl. ¶ 24 & Ex. 3. Quercioli alleges that Article 3 “further[ed] the false implication that Quercioli was involved in criminal activity.” Compl. ¶ 24. This alleged false implication will be referred to as **Statement 3**.

³ The Complaint does not allege that anything in Article 2 defamed Thrasher.

⁴ The Complaint does not allege that anything in Article 3 defamed Thrasher.

The complaint does not allege which statements in Article 3 give rise to the alleged false implication of Statement 3.

The report that Ellington claimed that she saw Quercioli “having sex with an inmate” is derived directly from reports of information provided by the FDLE. *See* Brown Decl. ¶¶ 10–11. Moreover, Brown spoke to the inmate, Samantha Cook, who confirmed that she was the inmate who was having sex with Quercioli at the time of the Ellington incident. *See* Brown Decl. ¶ 20. Cook told Brown that she filed the complaint with a sergeant at LCI, Berend Bergner, who, in turn, confirmed that to Brown. *See* Brown Decl. ¶ 20. These facts are undisputed.

The Court notes that Article 3 does not state *as fact* that Quercioli had sex with an inmate; instead, Article 3 reports only that *it was alleged* that Quercioli had sex with an inmate. *See* Compl. ¶ 24 & Ex. 3.⁵

Article 3 states that Quercioli, “who was fired by the department, has not responded to requests for comment from the Herald.” Compl. ¶ 24 & Ex. 3. According to Brown, Quercioli, as he did with Articles 1 and 2, chose not to talk to the *Miami Herald* to explain his position for Article 3, even though Brown wrote a letter to Quercioli’s lawyer seeking comment on these statements and called him for comment, too. *See* Brown Decl. ¶¶ 12, 21. As stated, regarding Brown’s attempts to contact Quercioli, Quercioli’s ex-wife, and Quercioli’s lawyer before publishing the articles, Quercioli’s deposition testimony is largely consistent with, and does not

⁵ If Quercioli did have sex with an inmate, then he would have committed the crime of sexual battery. *See* Fla. Stat. § 951.221(1). Quercioli testified that he agreed Brown article repeated an allegation that, if true, would constitute a felony. *See* Quercioli Dep. 37:3–10, Feb. 23, 2018 (“Q. And it says that Ellington claimed that you were having sex with an inmate. And if that’s true, that would be a felony? A. Right. Q. So what is the article is doing is repeating her allegation of conduct by you, that if it were true, would be a felony? A. Right.”).

materially contradict, Brown’s declaration. *See* Quercioli Dep. 20:4–21:16, 31:2–7, Feb. 23, 2018.

As with Articles 1–2, Brown had no reason to believe that any of these statements was false. *See* Brown Decl. ¶ 13.

4. Article 4.

On December 16, 2015, MHMC published an article authored by Brown entitled *At Lowell, sex, death and a probe riddled with questions* (“Article 4”). Compl. ¶ 25 & Ex. 4. Quercioli alleges that “statements in the context of [Article 4] as a whole falsely accused Quercioli of engaging in sex with an inmate and having involvement in the inmate’s death.” Compl. ¶ 25.⁶ This alleged false accusation will be referred to as **Statement 4**.

Quercioli further alleges that the following statements in Article 4 are false: that Quercioli had been arrested for “dealing steroids” (**Statement 5**); that he was arrested “on charges of beating a motorist in a fit of road rage” (**Statement 6**); and that he “managed to persuade the [DOC] to hire him in 2004” (**Statement 7**). *See* Compl. ¶ 27.

The only statement that Thrasher is suing over is contained in Article 4: the assertion that he “was on duty during [that time].” Compl. ¶¶ 27–30. This statement will be referred to as the **Thrasher Statement**.

As with Articles 1–3, Brown relied on official documents in authoring Article 4. In reporting on Quercioli’s arrest for allegedly “dealing” and “selling” steroids (**Statement 5**), Brown obtained and relied on a letter from the Sherriff’s Office of Martin County stating that Quercioli “was arrested and convicted of a Felony in this State for the sale and possession of a controlled substance.” Brown Decl. ¶ 16. Brown also relied on official documents—a detailed

⁶ The Complaint does not allege which statements make up the “false[] accus[ation].”

police report, among other things—in reporting on Quercioli’s road-rage incident (**Statement 6**). Brown Decl. ¶ 17. Regarding **Statement 7**—that Quercioli “managed to persuade the [DOC] to hire him in 2004”—Brown relied on a letter written by Quercioli himself. In the letter, Quercioli stated that he was “providing this letter as further explanation of circumstances surrounding two incidents that occurred during my tenure as a State of Florida certified Corrections Officer. These issues have been remedied. It is my sincere interest to pursue my chosen career.” Brown Decl. ¶ 18. In that letter, Quercioli also admits to and explains his arrests for possession of steroids and admits being arrested for a road-rage incident. Brown Decl. ¶ 18. These facts are undisputed.

As with Articles 1–3, Article 4 states that the “Herald reached out to Quercioli’s and Thrasher’s attorney, H. Richard Bisbee, for this story, but there was no response to a request for comment.” Compl. ¶ 25 (attaching Article 4). Specifically, Brown wrote a letter to Quercioli’s lawyer seeking comment on these statements and called him for comment, too. *See* Brown Decl. ¶¶ 12, 21. Quercioli’s deposition testimony on this point does not materially contradict Brown’s declaration. *See* Quercioli Dep. 20:4–21:16, 31:2–7, Feb. 23, 2018.

For the Thrasher Statement, Brown relied on an e-mail that she received from the DOC spokesperson. *See* Brown Decl. ¶ 19.

As with Articles 1–3, Brown had no reason to believe that any of these statements was false. *See* Brown Decl. ¶ 22.

C. 770 notices

On November 20, 2015, Quercioli, through his lawyer, served, pursuant to section 770.01 of the Florida Statutes, a retraction letter on MHMC and a retraction letter on TBH. *See* Exhibit C to Defs.’ Mot. Summ. J.: Letter from H. Richard Bisbee to MHMC (Nov. 20, 2015); Exhibit D

to Defs.’ Mot. Summ. J.: Letter from H. Richard Bisbee to TBH (Nov. 20, 2015) (collectively, the “First 770 Notice”). On December 1, 2015, Defendants, through their lawyer, responded by, among other things, requesting information to back up the assertions in the First 770 Notice. *See* Exhibit E to Defs.’ Mot. Summ. J.: Letter from Sanford L. Bohrer to H. Richard Bisbee (Dec. 1, 2015). Neither Quercioli nor Quercioli’s counsel responded.

On September 22, 2016, Plaintiffs, through their counsel, served a supplemental notice. *See* Exhibit F to Defs.’ Mot. Summ. J.: Letter from H. Richard Bisbee to MHMC (Sept. 22, 2016); Exhibit G to Defs.’ Mot. Summ. J.: Letter from H. Richard Bisbee to TBH (Sept. 22, 2016) (collectively, the “Second 770 Notice”). On September 29, 2016, Defendants, through their counsel, again requested information to back up the assertions in the Second 770 Notice. *See* Exhibit H to Defs.’ Mot. Summ. J.: Letter from Sanford L. Bohrer to H. Richard Bisbee (Sept. 29, 2016). Neither Quercioli nor Quercioli’s counsel responded.

D. Procedural History

On September 30, 2016, Plaintiffs filed the complaint, which asserts nine causes of action for defamation and defamation by implication. On December 19, 2016, Defendants filed a Motion to Dismiss Complaint and Lawsuit with Prejudice under Florida’s Anti-SLAPP Law, Which Prohibits Meritless Lawsuits Against Anyone Exercising First Amendment Rights Regarding Public Issues (the “Motion to Dismiss”). The Court held a hearing on the Motion to Dismiss and—although it “agree[d] with Defendants that Plaintiffs are ‘Public Officials’ under Florida law”—denied the Motion to Dismiss on the ground that it could not “consider any affidavits and documentation outside the four corners of the Complaint.” Exhibit I to Defs.’ Mot. Summ. J.: Order on Mot. to Dismiss (Mar. 10, 2017).

On April 11, 2017, Defendants filed the Motion. On June 26, 2017, Plaintiffs filed a Memorandum of Law in Opposition to the Motion. On June 28, 2017, the Court held a hearing on the Motion. On October 19, 2017, the Court entered an order denying the Motion “without [p]rejudice to refile a [m]otion for [s]ummary [j]udgment after completion of discovery.”

As contemplated by the Court’s October 19, 2017 Order, the parties engaged in discovery, and three depositions were taken. On February 23, 2018, Defendants deposed Quercioli. On April 24, 2018, and again on June 19, 2018, Plaintiffs deposed nonparty Berend Bergner, who, like Plaintiffs, is a former DOC correctional officer who worked at LCI. And on June 28, 2019, Plaintiffs deposed Brown. Each of the deposition transcripts of Quercioli, Bergner, and Brown has been filed and is part of the summary-judgment evidence before the Court.

On June 5, 2018, Defendants renewed their Motion by scheduling it for a hearing for August 16, 2018. On July 18, 2018, Defendants filed a Reply in Support of their Motion. On July 24, 2018, Defendants filed a Supplement/Amendment to the Motion. On August 15, 2018, Plaintiffs filed a Memorandum of Law in Opposition to Defendants’ Supplement/Amendment to the Motion. And, as stated, on August 16, 2018, the Court held a hearing on the Motion and heard argument from counsel for both Defendants and Plaintiffs.

II. LEGAL STANDARDS

Defendants move for summary judgment under section 768.295 of the Florida statutes, which is entitled Strategic Lawsuits Against Public Participation (the “anti-SLAPP law”). The anti-SLAPP law forbids lawsuits that are brought “without merit and primarily because” a “person or entity has exercised the constitutional right of free speech in connection with a public issue ... as protected by the First Amendment to the United States Constitution and s. 5, Art. 1 of the State Constitution.” Fla. Stat. § 768.295(3).

The anti-SLAPP law sets forth procedures for resolution. As relevant here, a person or entity sued in violation of the anti-SLAPP law “has a right to an expeditious resolution of a claim that the suit” violates the law. *Id.* § 768.295(4). The “person or entity may file a motion for summary judgment, together with supplemental affidavits, seeking a determination that the claimant’s ... lawsuit has been brought in violation of” the law. *Id.* The claimant “shall thereafter file a response and any supplemental affidavits.” *Id.* “As soon as practicable, the court shall set a hearing on the motion, which shall be held at the earliest possible time after the filing of the claimant’s ... response and any supplemental affidavits.” *Id.* “The court shall award the prevailing party reasonable attorney fees and costs incurred in connection with a claim that an action was filed in violation of this section.” *Id.*

Defendants, which contend they have been sued in violation of the anti-SLAPP law, have filed a motion for summary judgment. Summary judgment must be rendered “if the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fla. R. Civ. P. 1.510(c). Where, as here, “a motion for summary judgment is brought by a defendant against a

public-figure [or public-official] plaintiff,⁷ and thus the actual malice standard applies, summary judgments are to be more liberally granted.” *Mile Marker, Inc. v. Petersen Publ’g, L.L.C.*, 811 So. 2d 841, 847 (Fla. 4th DCA 2002); *accord Dockery v. Fla. Democratic Party*, 799 So. 2d 291, 294 (Fla. 2d DCA 2001) (same); *Newton v. Fla. Freedom Newspapers, Inc.*, 447 So. 2d 906, 907 (Fla. 1st DCA 1984) (same); *Menendez v. Key West Newspaper Corp.*, 293 So. 2d 751, 752 (Fla. 3d DCA 1974) (same).

III. ANALYSIS

Taking “all evidence and inferences from the evidence ... in the light most favorable to [Plaintiffs],” *Moradiellos*, 176 So. 3d at 334–35, the Court concludes that this action is both “without merit” and brought “primarily because” Defendants exercised their constitutional right of free speech in connection with a public issue, *see* Fla. Stat. § 768.295(3). The Court will address each of these elements of the anti-SLAPP law in turn.

A. This Action is “Without Merit”

Plaintiffs’ nine causes of action are “without merit” for three principal reasons. First, Plaintiffs have largely failed to comply with a statutory condition precedent to maintaining a defamation lawsuit against the media. *See* Defs.’ Mot. Summ. J. at 10. Second, Plaintiffs—who, as this Court has already held, are public officials as a matter of law—cannot prove by clear-and-convincing evidence that Defendants authored or published any of the articles with “actual

⁷ Although Plaintiffs may not be public figures, they are public officials. Even though the two terms are not synonymous, “[i]n defamation cases, public-figure status has the same legal ramifications as public-official status.” *Mandel v. Boston Phoenix, Inc.*, 456 F.3d 198, 202 (1st Cir. 2006). In *Menendez*, a case involving a public official, the Third District Court of Appeal observed that “in cases of this nature, which involve the First Amendment area and where the issue is recklessness employed in the publication of alleged false and libelous information, [] summary judgments should be more liberally granted.” 293 So. 2d at 752.

malice.” *See id.* at 10–14. Last, Defendants’ reporting is protected by the fair-report privilege. *See id.* at 14–15.

1. Plaintiffs’ 770 notices.

Under section 770.01, entitled “Notice condition precedent to action or prosecution for libel or slander,” plaintiffs seeking to sue a media defendant must first “serve notice in writing on the defendant specifying the article ... and the statements therein which he or she alleges to be false and defamatory.” Fla. Stat. § 770.01. Strict compliance with section 770 is required; “the statute requires the best possible notice.” *Nelson v. Associated Press, Inc.*, 667 F. Supp. 1468, 1474 (S.D. Fla. 1987). The “[f]ailure to comply with the notice provision of section 770.01 requires dismissal of the complaint for failure to state a cause of action.” *Mancini v. Personalized Air Conditioning & Heating, Inc.*, 702 So. 2d 1376, 1377 (Fla. 4th DCA 1997); *accord Nelson*, 667 F. Supp. at 1474–75 (“Having failed to comply with § 770.01, Plaintiff’s claim against AP must fail, since the statute is a condition precedent to her maintaining the suit.”).

Plaintiffs have largely failed to comply with section 770.01. Neither the First 770 Notice nor the Second 770 Notice specifies, mentions, or refers to any of the following: (1) Article 3 (Statement 3); (2) the allegation that Quercioli had sex with a female inmate (Statement 3, which is contained in Article 3); or (3) any claim of defamation by implication (Statement 4 and Counts V, VI, and IX). After careful review of each of the 770 notices, the Court agrees.

In their supplemental opposition,⁸ Plaintiffs devote six paragraphs in arguing that their 770 notices complied with the statute. *See* Pls.’ Supp. Opp’n ¶¶ 40–45. They state broadly that

⁸ Plaintiffs make only a passing reference to this argument in their initial June 27, 2017, opposition to the Motion. *See* Pls.’ Mem. Law Opp’n to Defs.’ Mot. Summ. J. ¶¶ 16–17. In it, Plaintiffs state only generally that “[a] fair reading of the Plaintiffs’ notices ... clearly placed Defendants on notice of the Defendants’

“any reasonable consideration of the contents of the Plaintiffs’ notices read *in toto* make it abundantly clear that Plaintiffs provided sufficient notice of the Defendants’ statements that Plaintiffs contend are false and defamatory.” *Id.* ¶ 42. But the law requires more than just reading the contents of the notices “*in toto*.” Section 770.01 requires “specifying *the article* ... and *the statements* therein ... allege[d] to be false and defamatory,” Fla. Stat. § 770.01 (emphasis added). Defendants correctly note that Plaintiffs do not, either in the First 770 Notice or the Second 770 Notice, mention the allegation that Quercioli had sex with a female inmate (Statement 3, which is contained in Article 3).

Regarding defamation by implication, Plaintiffs state that the Second 770 Notice “clearly informed Defendants that they intended to pursue a defamation claim by incorporating by reference their [First 770 Notice] which ‘identified [sic] quoted at length a news article published ... on October 8, 2014 defaming or libeling by implication’ Plaintiffs. *See* Pls.’ Supp. Opp’n ¶ 44. But again, the statute requires specifying “*the statements* [in the articles] ... allege[d] to be false and defamatory.” Fla. Stat. § 770.01 (emphasis added). The statute’s requirements apply just the same to defamation by implication, “which applies in circumstances where *literally true statements* are conveyed in such a way as to create a false impression.” *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1108 (Fla. 2008) (emphasis added). Nowhere in their opposition—and nowhere in the First 770 Notice or in the Second 770 Notice—do Plaintiffs specify the “literally true statements” that Plaintiffs allege are “conveyed in such a way as to create a false impression.”

defamatory statements, including the Defendants’ defamation ... by implication.” *Id.* ¶ 17. The Court has considered each of Plaintiffs’ oppositions, and the arguments therein.

In short, although Section 770.01 “requires the best possible notice,” *Nelson*, 667 F. Supp. at 1474, neither of Plaintiffs’ 770 notices comes close to meeting that standard. Therefore, any claim based on the allegation that Quercioli had sex with a female inmate (Statement 3, which is contained in Article 3) must fail, as well as any claim of defamation by implication (Statement 4 and Counts V, VI, and IX).

2. Actual malice.

Even if either the First 770 Notice or the Second 770 Notice had complied with section 770.01, the Court would still grant summary judgment to Defendants for a second, independent reason: Plaintiffs, who are each public officials, have created no genuine issue of material fact that Defendants acted with “actual malice.” *See* Defs.’ Mot. Summ. J. at 10–14.

A cause of action for defamation contains five elements: “(1) publication; (2) falsity; (3) actor must act with knowledge or reckless disregard as to the falsity on a matter concerning a public official ... ; (4) actual damages; and (5) statement must be defamatory.” *Jews for Jesus*, 997 So. 2d at 1106.⁹ The third element—which is present, in cases like this one, where plaintiffs are public officials—is referred to as “actual malice.” *See Hunt v. Liberty Lobby*, 720 F.2d 631, 642 (11th Cir. 1983) (“[P]ublic figures and public officials are governed by the same actual malice standard.”) (citing, *inter alia*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)); *Don King Prod., Inc. v. Walt Disney Co.*, 40 So. 3d 40, 43 (Fla. 4th DCA 2010) (“A public figure bringing a defamation action must prove more than mere negligence on the part of the publisher; he must prove that the publisher acted with actual malice.” (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964))). “Defamation of a public figure by implication also

⁹ Although Defendants assert that Plaintiffs cannot meet the second, fourth, and fifth elements, this Court focuses only on the third element: actual malice.

requires proof of actual malice because it ‘is subsumed within the tort of defamation ... [so] all of the protections of defamation law ... [are] extended to the tort of defamation by implication.’” *Klayman v. City Pages*, 650 F. App’x 744, 749 (11th Cir. 2016) (alterations in original) (quoting *Jews for Jesus*, 997 So. 2d at 1107).

In affirming a lower court’s dismissal of a defamation action, the Fourth District Court of Appeal held that correctional officers are “public officials”:

Corrections officers perform a function with inmates similar to that performed by police officers with the public, and these officers also come into contact with members of the general public who find themselves in a correction facility for one reason or another. The trial court was therefore correct in considering them to be public officials.

Stewart v. Sun Sentinel Co., 695 So. 2d 360, 361 (Fla. 4th DCA 1997). This Court’s predecessor, too, already ruled that Plaintiffs are public officials as a matter of Florida law. Plaintiffs have provided no reason to disturb that ruling.

“The burden of proving ‘actual malice’ requires the plaintiff to demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement.” *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 511 n.30 (1984); accord *Mile Marker, Inc. v. Petersen Publ’g, L.L.C.*, 811 So. 2d 841, 847 (Fla. 4th DCA 2002) (“Under the actual malice test a 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.”). The Supreme Court has also defined actual malice as “a high degree of awareness of probable falsity.” *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

To defeat summary judgment, therefore, a public-figure or public-official plaintiff must come forward with “record evidence sufficient to satisfy the Court that a jury could find, by clear

and convincing evidence, that [the defendant] acted with actual malice.” *Don King Prod.*, 40 So. 3d at 43. Despite viewing the evidence and all inferences in the light most favorable to Plaintiffs, it is obvious that Plaintiffs have not come forward with record evidence sufficient to satisfy the Court that a jury could find, by clear-and-convincing evidence, that Defendants acted with actual malice.

First, in her declaration, Brown sets forth the official sources that she relied on for every challenged statement, and attaches copies of each of the official documents on which she relied. *See, supra*, Part I.B. This strongly cuts against, if not conclusively defeats, the allegation that Brown acted with “actual malice,” both because she relied on official reports or sources, *see Church of Scientology Int’l v. Behar*, 238 F.3d 168, 175 (2d Cir. 2001) (no actual malice where author relied on sources, including a police report); *Peter Scalamandre & Sons, Inc. v. Kaufman*, 113 F.3d 556, 562–63 (5th Cir. 1997) (no actual malice as a matter of law where arson allegations were based on a police report), and because “[e]vidence that an article contains information that readers can use to verify its content tends to undermine claims of actual malice,” *Klayman*, 650 F. App’x at 751.

Second, Brown repeatedly tried to reach Plaintiffs directly and through their lawyer, but that they all declined to, or otherwise did not, talk to her. *See, supra*, Part I.B. This, too, strongly refutes any assertion of actual malice. *See Don King Prods.*, 40 So. 3d at 46 (no actual malice where “ESPN also tried to interview King, to no avail”); *see also Compuware Corp. v. Moody’s Inv’rs Servs., Inc.*, 499 F.3d 520, 527 (6th Cir. 2007) (no actual malice where defendant “provided [plaintiff] with a unique opportunity unavailable to most alleged victims of defamation: a chance to assist in the defendant’s prepublication investigation to ensure that it was adequate and complete,” but plaintiff “squandered the opportunity”); *Thompson v. Nat’l*

Catholic Reporter Publ'g Co., 4 F. Supp. 2d 833, 841 (E.D. Wisc. 1998) (no actual malice where “the defendants repeatedly attempted to get [plaintiff’s] comments on the story,” but plaintiff “refused [the reporter’s] requests,” and did not “respond to the newspaper’s requests for news releases or any other information about [plaintiff’s] company’s perspective on the controversy”).

Third, Defendants, through their lawyer, responded to each of Plaintiffs’ 770 notices for information to back up the assertions made in them. *See supra* Part I.C. Yet neither Plaintiffs nor their lawyer responded. *See Sullivan*, 376 U.S. at 286 (no actual malice where defendant “asked for an explanation on [a] point” raised in plaintiff’s retraction demand—“a request that [plaintiff] chose to ignore”).

Fourth, Brown declares that based on the official sources and lack of cooperation from Plaintiffs, she believed everything she wrote was true at the time of publication. *See supra* Part I.B. No summary-judgment evidence disputes Brown’s belief.

Each of these four undisputed facts—individually or together—demonstrates that there is insufficient summary-judgment evidence “to satisfy the Court that a jury could find, by clear and convincing evidence, that [Defendants] acted with actual malice.” *Don King Prod.*, 40 So. 3d at 43.

In their supplemental opposition, Plaintiffs do not address any of this. Instead, Plaintiffs devote only two paragraphs to addressing actual malice, stating “[f]or brevity’s sake, with respect to the specifics contained in Defendants’ MSJ relating to [actual malice], the Plaintiff[s] will reserve their arguments in opposition to the Defendants’ position at oral argument.” Pls.’ Supp. Opp’n ¶ 47. At the hearing, Plaintiffs’ counsel advanced two main arguments on actual malice. The first was essentially that Brown, in Plaintiffs’ view, had some kind of inherent animosity toward Plaintiffs that drove Brown to write the articles. The second was that Brown

could or should have done more in investigating and in authoring the articles, although it was not entirely clear what more Plaintiffs would have had Brown do. After careful review, the Court concludes that neither reason suffices to create a genuine issue of material fact about actual malice.

First, Plaintiffs identified no summary-judgment evidence suggesting that Brown had any such animosity toward Plaintiffs. *See* Quercioli Dep. 39:7–10, Feb. 23, 2018 (“Q. Do you know whether [Brown’s] intent was to hurt you or her intent was something else? A. I don’t have no idea. I don’t know Julie Brown.”). For this reason alone, Plaintiffs’ argument fails.

But even if Plaintiffs had provided any such evidence, Plaintiffs’ understanding of “actual malice” is mistaken. As explained by the Supreme Court, “[a]ctual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will.” *Masson v. N.Y. Mag., Inc.*, 501 U.S. 496, 510–11 (1991); *accord Klayman v. City Pages*, 2015 WL 1546173, at *13 (M.D. Fla. Apr. 3, 2015) (“Despite its name, the actual malice standard does not measure malice in the sense of ill will or animosity, but instead the speaker’s subjective doubts about the truth of the publication.” (alteration omitted) (internal quotation marks omitted)); *Palm Beach Newspapers, Inc. v. Early*, 334 So. 2d 50, 52 (Fla. 4th DCA 1976) (“Malice in the traditional common law sense of sinister or corrupt motive such as hatred, ill will, spite, enmity or a wanton desire to injure has been distinguished from actual malice as employed in the *New York Times* standard relating to a public official—knowledge of falsity or reckless disregard of the truth.”). Thus, even if Brown had any animosity toward Plaintiffs (and, again, there is no summary-judgment evidence suggesting that she had), Brown’s alleged animosity would have no bearing on the question of actual malice.

Second, although Plaintiffs fault Brown in her reporting, Plaintiffs have not made clear what more Brown should have done in the way of fact-checking, investigating, or research. At most, Plaintiffs fault Brown for being “under a deadline to publish [Article 1] by Thursday” and that she “did not have time to obtain Quercioli’s ‘personnel records, etc.’ to confirm her statements about Quercioli.” Pls.’ Supp. Opp’n ¶ 10. But Plaintiffs chose not to include those personnel records as part of the summary-judgment evidence in this case. Nor do Plaintiffs explain what those personnel records contained that would have contradicted what Brown had already obtained through governmental sources and documents.

At any rate, even if Plaintiffs would have had Brown “confirm her statements” by obtaining the “personnel records,” that “failure” does not constitute actual malice as a matter of law. The “law is well established that the failure to investigate, without more, does not constitute actual malice.” *Don King Prod.*, 40 So. 3d at 46. Even “highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers” does not rise to the level of actual malice. *See Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 666 (1989). That Brown may not have “confirmed her statements” through “personnel records” is immaterial given that Brown relied on official sources and statements and given that Brown repeatedly tried to contact for comment Quercioli, Quercioli’s wife, and Quercioli’s lawyer—facts that Plaintiffs do not dispute. Plaintiffs have not identified any summary-judgment evidence that would suggest that Brown “either knew the alleged defamatory statements were false, or published them with reckless disregard despite awareness of their probable falsity.” *Mile Marker*, 811 So. 2d at 847.

As against TBH, Plaintiffs cannot prove actual malice for an additional reason—TBH did not employ Brown. Under well-established defamation law, a person’s actual malice may be

imputed to a publisher under the doctrine of respondeat superior. *See, e.g., Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245, 253–54 (1974) (concluding that “there was sufficient evidence ... to find that [a reporter’s] writing of the [alleged defamatory] feature was within the scope of his employment at [the newspaper] and that [the publisher] was therefore liable under traditional doctrines of *respondeat superior*”); *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1140 (7th Cir. 1985) (“The doctrine of respondent superior is fully applicable to suits for defamation”). Under the doctrine of respondeat superior, “[a]n employer is subject to liability for torts committed by employees while acting within the scope of their employment.” Restatement (Third) Agency § 2.04; *see id.* cmt. b (“The doctrine establishes a principle of employer liability for the costs that work-related torts impose on third parties. Its scope is limited to the employment relationship and to conduct falling within the scope of that relationship because an employer has the right to control how work is done.”).

The only vicarious-liability doctrine by which actual malice may be imputed to a publisher consistent with the First Amendment is respondeat superior. *See McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1302–03 (D.C. Cir. 1996) (considering “the question whether the malice of a non-employee agent can be imputed to the principal under *New York Times v. Sullivan*” and concluding “that under *New York Times*[,] actual malice may not be attributed outside *respondeat superior*,” which is limited to employees); *Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1446 (8th Cir. 1989) (“*Cantrell* permits reckless disregard to be imputed only on a theory of respondeat superior.”); *Secord v. Cockburn*, 747 F. Supp. 779, 787 (D.D.C. 1990) (“Actual malice must be proved separately with respect to each defendant, and cannot be imputed from one defendant to another absent an employer–employee relationship giving rise to *respondeat superior*.” (citations omitted)). Stated another way, “[v]icarious liability does not

apply where no employer–employee relation exists.” David Elder, *Defamation: A Lawyer’s Guide* § 7:9 (2013). Courts have therefore refused to impute a person’s actual malice to a publisher where the person was not the publisher’s employee. *See, e.g., Hunt*, 720 F.2d at 649 (concluding that “it was error to include [an independent contractor] in an instruction on vicarious liability”); Elder, *supra*, § 7:9 (“Traditional agency rules deny vicarious liability generally in cases involving independent contractors and the constitutional actual malice decisions generally follow this rule.” (footnote omitted)).

Here, because it is undisputed that Brown was employed only by MHMC, any alleged actual malice could not, as a matter of law, be imputed to TBH.

3. The fair-report privilege.

Defendants assert one final reason for why Plaintiffs’ action is “without merit”—that Defendants’ reporting is almost entirely protected by the fair-report privilege. *See* Defs.’ Mot. Summ. J. at 14–15. Plaintiffs do not respond to this argument in any of their oppositions to the Motion.

Under Florida law, the “news media has been given a qualified privilege to accurately report on the information they receive from government officials. This privilege includes the broadcast of the contents of an official document, as long as their account is reasonably accurate and fair, even if the official documents contain erroneous information.” *Woodard v. Sunbeam Television Corp.*, 616 So. 2d 501, 502 (Fla. 3d DCA 1993) (internal quotation marks omitted) (citations omitted); *accord Alan v. Palm Beach Newspapers, Inc.*, 973 So. 2d 1177, 1180 (Fla. 4th DCA 2008) (same).

The Court agrees with Defendants that many, if not all, of the challenged statements are protected by the fair-report privilege:

- For Statements 1 and 2, Brown relied on FDLE criminal-history records and information relayed by a governmental official. *See supra* Part I.B.1.–2.
- For Statements 3 and 4, Brown relied on an FDLE investigation report. *See supra* Part I.B.3.–4.
- For Statements 5 through 7, Brown relied on official documents, including a police report, a letter from the Sheriff’s Office of Martin County stating that Quercioli had been arrested (and convicted) of the sale and possession of a controlled substance, and Quercioli’s own letter in which he persuaded DOC to hire him. *See supra* Part I.B.4.
- For the Thrasher Statement, Brown relied on an e-mail received from the DOC. *See id.*

For this reason, too, Plaintiffs’ action is “without merit.”

* * *

In sum, the Court concludes that Plaintiffs’ action is “without merit” for three independent reasons: (1) Plaintiffs largely failed to comply with section 770.01; (2) Plaintiffs, as public officials, have not created a genuine issue by clear-and-convincing evidence that Defendants authored or published any of the articles with “actual malice”; and (3) Defendants’ reporting is protected by the fair-report privilege. Thus, the first part of the anti-SLAPP law is satisfied.

B. Plaintiffs Filed this Action “Primarily Because” of Defendants’ Exercise of “Constitutional Free Speech” About a “Public Issue”

Defendants assert that this action has been filed “primarily because” Defendants have “exercised the constitutional right of free speech in connection with a public issue,” Fla. Stat. § 768.295(3)—namely, reporting on the circumstances of a female inmate’s death. *See* Defs.’ Mot. Summ. J. 15. Plaintiffs do not address this “primarily because” part of the anti-SLAPP law in any of their oppositions to the Motion, and thus any argument to the contrary is waived. *See Eads v. Allstate Indem. Co.*, 2016 WL 3944072, at *11 (S.D., Fla. Jan. 26, 2016) (“Plaintiff appears to concede as much when he fails to address this argument anywhere in his Response brief.” (alterations omitted) (internal quotation marks omitted)); *Grant v. Miami-Dade Cnty.*,

2014 WL 7928394, at *9 (S.D. Fla. Dec. 11, 2014) (“Where a plaintiff fails to respond to an argument in a motion for summary judgment, he waives the argument.”). Further, based on all the summary-judgment evidence, the Court is satisfied that Plaintiffs brought this action “primarily because” Defendants “exercised the constitutional right of free speech in connection with a public issue.” Fla. Stat. § 768.295(3).

Plaintiffs do assert that “[d]efamatory statements, such as those Plaintiffs attribute to the Defendants, are obviously not considered a form of constitutionally protected speech.” Pls.’ Supp. Opp’n ¶ 32. But this assertion is meritless under the plain language of the anti-SLAPP law, which defines “[f]ree speech in connection with public issues” to mean “any written or oral statement that is protected under applicable law and ... is made in or in connection with a ... news report.” Fla. Stat. § 768.295(2)(a). As stated, the Court has held that the alleged false and defamatory statements at issue in this action are protected by the U.S. and Florida constitutions, and they were made in news reports.

C. Plaintiffs’ Remaining Arguments on the anti-SLAPP Law

Plaintiffs advance two additional arguments regarding the anti-SLAPP law. First, Plaintiffs assert that the anti-SLAPP law, which was materially amended in July 2015, does not apply retroactively to any of Defendants’ alleged false and defamatory statements published before the amendment. *See* Pls.’ Supp. Opp’n ¶¶ 34–37. Second, Plaintiffs assert that the anti-SLAPP law is unconstitutional. *See id.* ¶¶ 38–39. Neither of these arguments has merit.

First, regarding retroactivity, Plaintiffs misunderstand the function of the anti-SLAPP law. The anti-SLAPP law is forward-looking: it prohibits *the filing of certain kinds of* lawsuits brought to discourage the exercise of rights of free speech on public issues. *See* Fla. Stat. § 768.295(1) (“[T]he Legislature finds and declares that prohibiting such lawsuits ... will preserve

[free speech on public issues] It is the intent of the Legislature that such lawsuits be expeditiously disposed of by the courts.”); *id.* § 768.295(3) (“A person ... may not file or cause to be filed ... any lawsuit”). Here, Plaintiffs filed their lawsuit on September 30, 2016, well after the anti-SLAPP law, as amended, was in effect. And, as stated, it is *the filing of* Plaintiffs’ lawsuit that the anti-SLAPP law prohibits. There is thus no need to apply the anti-SLAPP law retroactively. Plaintiffs’ first argument fails.

Second, the Court is mindful, as Plaintiffs point out, *see* Pls.’ Supp. Opp’n ¶ 38, that “[t]he Courts shall be open to every person for redress of any injury,” Fla. Const. art. I, § 21. But Plaintiffs have articulated no reason that the anti-SLAPP law would violate access to the courts. In sole support of their argument, Plaintiffs cite *Davis v. Cox*, which struck down *part* of Washington state’s anti-SLAPP statute on the ground that “the statute’s evidentiary burden fails to strike the balance that the Washington Constitution requires.” 351 P.3d 862, 864 (Wash. 2015). By contrast, Florida’s anti-SLAPP statute has no such feature altering traditional evidentiary burdens.

At any rate, Plaintiffs mount a “facial challenge” to the anti-SLAPP law, and therefore have a particularly high burden of demonstrating its unconstitutionality. “A facial challenge to a legislative Act is ... the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exist under which the Act would be valid.” *Fla. Dep’t of Revenue v. DirectTV, Inc.*, 215 So. 3d 46, 50 (Fla. 2017) (internal quotation marks omitted). Here, Plaintiffs have not established that there are no set of circumstances under which the anti-SLAPP law would be valid, and any attempt to do so would fail. This case has been pending for nearly two years; an opportunity for full discovery has been provided to both Plaintiffs and Defendants, and both Plaintiffs and Defendants have engaged in discovery, including

depositions; and the parties have fully briefed and engaged in the issues. Simply put: Plaintiffs have not been denied access to the courts.

IV. CONCLUSION

For all the above reasons, the Court concludes that Plaintiffs' action is both "without merit" and brought "primarily because" Defendants exercised their constitutional right of free speech in connection with a public issue. *See* Fla. Stat. § 768.295(3).¹⁰ Therefore, it is ORDERED and ADJUDGED as follows:

1. The Motion is **GRANTED**.
2. Defendants, in accordance with the requirement of section 768.295(4) ("The court shall award the prevailing party reasonable attorney fees and costs incurred in connection with a claim that an action was filed in violation of this section."), are awarded their reasonable fees and costs incurred in obtaining the summary judgment.
3. After resolution of Defendants' request for reasonable fees and costs, the Court will enter a separate final judgment for Defendants.
4. All other pending motions are **DENIED** as moot.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 10/19/18.


MIGUEL M. DE LA O
CIRCUIT JUDGE

**No Further Judicial Action Required on THIS
MOTION**

¹⁰ Even if the anti-SLAPP statute were not applicable to this action, the Court would still grant summary judgment for Defendants on all Plaintiff's causes of action.

**CLERK TO RECLOSE CASE IF POST
JUDGMENT**

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed original order sent electronically to the Clerk of Courts for filing in the Court file.