IN THE DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA
FIFTH DISTRICT

Appellate Case No. 5D11-2754

CHRISTOPHER M. COMINS,

Appellant/Cross-Appellee

vs.

MATTHEW FREDERICK VAN VOORHIS,

Appellee/Cross-Appellant.

On Appeal From the Circuit Court of the Ninth Judicial Circuit
In and For Orange County, Florida
Case No. 2009-CA-15047
The Honorable Judge John Marshall Kest

APPELLEE'S ANSWER BRIEF AND CROSS-APPEAL BRIEF

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1. Whether a web log, or "blog," qualifies as a "medium" under Florida Statutes § 770.01 and entitles a defendant to pre-suit notice before the commencement of any action for defamation.
2. Whether the Appellee/Cross-Appellant, Matthew Van Voorhis, qualifies as a "media defendant" under Florida law for creating and administering a news-and-opinion publication through his blog, and is entitled to the protections of Florida Statutes § 770.01.
3. Whether the Circuit Court properly granted Van Voorhis summary judgment on all of Comins' defamation-based claims against him due to Comins' failure to provide pre-suit notice under Florida Statutes § 770.01 prior to commencing his action.
4. Even if all of the above are answered in the negative, whether the trial court's judgment is supported on independent legal grounds, namely, the record supports summary judgment in favor of the Appellee on the merits of the case.

ISSUES ON CROSS-APPEAL

1. Whether the trial court abused its discretion in denying Defendant's motion for sanctions, where (I) Plaintiff made a material misrepresentation to the court, which the court relied upon in granting the Plaintiff leave to amend the complaint, (II) Plaintiff's counsel refused to correct the record after that material misrepresentation was raised by letter to Plaintiff's counsel, (III) subsequent summary judgment was ultimately granted in favor of Defendant on the same basis as the motion to dismiss, (IV) Plaintiff's counsel has not demonstrated good-faith in failing to correct the material misrepresentation, and (V) nearly one year of attorneys' fees and litigation expenses could have been avoided had Plaintiff corrected the material misrepresentation.

STATEMENT OF THE CASE AND THE FACTS

A. Introduction

On May 19, 2008, Christopher Comins shot two Siberian Huskies in front of a crowd of onlookers. (R 1238-1240) Comins initially made a police report claiming that he did so as an act of self-defense. (R 1016-1018) However, a few days later, an eyewitness posted a first-hand video of the attack on YouTube, which told a dramatically different story. (R 119; 1238-1240) The video shows Comins in no danger at all. It does, however, clearly show Comins opening fire on two dogs, while a horrified crowd watches, and while another man (later revealed to be the dogs' owner) runs into the field, frantically waving his arms. (R 1238-1240) The video went "viral" and millions viewed it. Once Mr. Comins' true actions fell under public scrutiny, worldwide public opinion condemned his actions. (R 283-285)

The media and the public seized upon the story, investigating Comins' actions and prior criminal acts, and published numerous stories about the incident beginning on May 23, 2008. (R 128-132; 135-168) Orlando-area local affiliates of Fox and NBC, as well as local stations WKMG Local 6, CF News 13, and WFTV, issued scathing criticisms of Comins' actions. (R 135-168) The Orlando Sentinel covered this event (R 135-136), as did users

of CNN's "iReport" service. (R 137-139) The National Enquirer called Comins a "callous creep" for shooting "innocent dogs." (R 207-209)

After the initial wave of primary media reports, additional media coverage ensued. Blogs, small websites, and message boards joined the international chorus of condemnation. (R 120-123) One of the bloggers was Defendant Matthew Van Voorhis, the publisher of the blog *Public Intellectual*. *Public Intellectual* began publication in February 2007 and is published on the Internet at <publicintellectual.wordpress.com>.[1] *Public Intellectual* first covered the Comins story on June 6, 2008, almost two full weeks after the incident went internationally viral. (*see, e.g.*, R135-168)

Given that Comins is wealthy and politically well-connected, many observers feared that his money and influence would permit him to evade prosecution. (R 122) However, the widespread protest did not relent until the State Attorney finally charged Comins with felony animal cruelty. (R 122) *Public Intellectual* participated in the international media outcry, publishing two articles about the incident, citing throughout to primary sources. (R 425-431; 432-433) True and correct copies of the articles, titled "Christopher Comins: Barbarian Hillbilly Dog-Assassin (w/ Friends in High

[1] *Public Intellectual* won the Thinking Blogger Award. (R 794)

Places)" and "Christopher Comins Husky-Shooter Update: Chris Comins May Face Charges," are of Record. (R 425-431; 432-433).[2]

On May 13, 2009, Comins filed this classic SLAPP suit,[3] alleging three counts of defamation and one count of tortious interference with business relations. Defendant twice moved to dismiss this case, once on June 7, 2010, due to Comins' efforts to delay the proceedings until his pending criminal trial was concluded, and again on August 25, 2010, due to Comins' failure to give Van Voorhis pre-suit notice required by Florida Statute § 770.01. The Court granted the August 25 motion, because it found that Comins failed to adhere to Section 770.01. However, it did so without prejudice, giving Comins the ability to amend.

At the hearing, Comins did not argue that 770.01 should not apply, nor did he argue that Van Voorhis waived his right to notice. (R 1376-1400) In fact, the only argument presented against dismissal was when Comins' counsel, Christopher Harne, represented to the court, ore tenus, that Comins

[2] While the articles represent a piece of commentary expressing Van Voorhis' opinion and interpretation of the highly publicized event and YouTube video, this commentary was based upon the various news reports that he had read or watched. Each article is replete with hyperlinks, which direct readers to the original sources from which he obtained the factual assertions made in the article.

[3] SLAPP stands for "strategic lawsuit against public participation" and is a lawsuit that is intended to censor, intimidate, and silence critics by burdening them with the cost of a legal defense until they abandon their criticism or opposition.

did, indeed, provide the 770.01 notice, but that Comins merely failed to plead such compliance in his complaint. (R 1383:2-10) The record clearly reflects that this was a material misrepresentation. (R 1383:2-10)[4] Based upon this misrepresentation, the trial court gave Comins leave to amend, which he did. (R 1384:21-24) After the hearing, Van Voorhis' counsel brought this misrepresentation to Harne's attention in order to give Mr. Harne an opportunity to correct his misstatement, but Harne refused to do so. (R 1324-1327) Van Voorhis then presented Comins' counsel with a draft motion for sanctions under Florida Statutes § 57.105. (R 1324-1327) Harne still refused to correct his statements with the court, and the litigation dragged on.

B. Van Voorhis' Successful Motion for Summary Judgment

After discovery, Van Voorhis moved for summary judgment on the following grounds: (1) Comins' claims were barred due to his failure to comply with 770.01; (2) Van Voorhis did not defame Comins; and (3) Van Voorhis did not tortiously interfere with any of Comins' business relationships – to the extent his tortious interference claim was proper at all,

[4] Harne's representation was, at best, disingenuous, as Comins argues on appeal that the notice did not need to strictly comply, or that Van Voorhis waived the notice. These arguments cut against any assertion that the pre-suit communications were intended to be a 770.01 notice and are merely post-hoc attempts to rehabilitate the prior errors, omissions, and material misrepresentations.

and not an impermissible re-casting of his underlying defamation claim. The Circuit Court granted Summary Judgment to Van Voorhis on the first ground only, declining to examine the additional grounds. (R 1243-1246)

The Court found that *Public Intellectual* constituted an "other medium" under Fla. Stat. § 770.01. Comins' refusal to serve Van Voorhis with the proper pre-suit notice therefore barred his claims. On that basis, the court entered judgment. Although Van Voorhis raised and briefed substantive First Amendment defenses, the Circuit Court determined that there was no need to delve into them, since summary judgment was already mandated by the failure to adhere to § 770.01. (R 1246)

C. Van Voorhis' Motion for Sanctions

From the start, Plaintiff Comins' case was frivolous and void of factual or legal support. Sanctions are appropriate for a multitude of reasons. But the most compelling justification for sanctions for this is the fact that Comins and his counsel unnecessarily prolonged the case due to their refusal to comply with Section 770.01[5] and their refusal to correct the

[5] Had they complied with 770.01, they would have had to confront the fact that none of Van Voorhis' statements were legally defamatory.

their material misrepresentation to the court with regards to the notice.[6] We may never know why Mr. Harne made his material misrepresentation, but when alerted to the problem, he refused to correct the record. (R 1315) As a result, this litigation continued for nearly an additional year. At the hearing on sanctions, the trial court relied on extrajudicial facts, namely representations by a partner in Harne's law firm about the firm's reputation in the Orlando community.[7] (R 1484:21-1485:2) Despite the presentation of clear and convincing evidence of the material misrepresentation, the trial court abused its discretion and denied Mr. Van Voorhis' request for sanctions. The fact that Harne's material misrepresentation, and refusal to cure it, translated into tens of thousands of dollars in defense costs for Mr. Van Voorhis mandates sanctions under Fla. Stat. § 57.105.

SUMMARY OF ARGUMENT

The circuit court properly entered summary judgment in Van Voorhis' favor. Fla. Stat. § 770.01 required Comins to provide pre-suit notice before bringing his defamation action. Since Comins failed to do so, his claims

[6] On February 17, 2010, Marc J. Randazza notified Comins' counsel that he had failed to comply with Section 770.01. (R 1332) Therefore any argument that Mr. Harne was merely mistaken at the dismissal hearing is without merit. Thereafter, when Harne made the misrepresentation in open court, Mr. Randazza gave Mr. Harne a chance to correct the record. (R 1324-1327)

[7] There was no discussion of Mr. Harne's reputation, just that of the Killgore firm in general. (R 1480-1506)

were barred as a matter of law. The record reflects that no such notice was provided, and as a pure legal issue, summary judgment was appropriate.

Even if the court erred in entering summary judgment for Mr. Van Voorhis based on Section 770.01, numerous other legal bases support summary judgment. On the merits of Comins' case, Van Voorhis was entitled to summary judgment on First Amendment grounds. Van Voorhis' statements about Comins were rhetorical hyperbole and protected opinion. Comins, as a public figure, did not and could not produce evidence that Van Voorhis made his statements with actual malice – i.e., knowledge of their falsity, or reckless disregard for their truth. To the extent Van Voorhis' statements about Comins were factual, rather than opinions, Van Voorhis' statements were substantially (if not entirely) true, and supported by video evidence made available to all readers. As a matter of law, Van Voorhis is entitled to summary judgment, on the merits as well as on the procedural issue.

Comins' claim for tortious interference is similarly defeated by Van Voorhis' First Amendment protections. As Van Voorhis' conduct was not tortious, it cannot be the basis for a tortious interference claim. Additionally, Comins is incapable of proving that Van Voorhis' protected speech was the causal source of any damages he suffered, the existence of

which he is also unable to prove. This claim is an improper duplication of Comins' defamation claim, and should not survive.

Finally, the circuit court abused its discretion by denying Van Voorhis' motion for sanctions against Comins and his counsel under Fla. Stat. § 57.105. During the circuit court's hearing on Van Voorhis' motion to dismiss, Comins' counsel, Chris Harne, materially misrepresented that Comins provided Van Voorhis with presuit notice under Section 770.01. Van Voorhis' counsel immediately notified Harne of this error, which he refused to correct, unnecessarily prolonging the litigation.

Van Voorhis moved for sanctions against Comins and his counsel based on this costly misrepresentation. However, based on Harne's supervisor's unsworn post-hoc representation and emotional appeals, the court denied Van Voorhis' motion for sanctions. (R 1504:4-19) Comins' apparent legal theory – that he misrepresented providing presuit notice to Van Voorhis because it was a dispositive issue, while maintaining that 770.01 did not apply – is incompatible with any finding of good faith. The circuit court erred by not requiring Comins and Harne to demonstrate a good faith basis in order to avoid sanctions. The circuit court abused its discretion by denying Van Voorhis' motion for sanctions under Section 57.105, and should be reversed.

ARGUMENT

Standard of Review

The standard of review for summary judgment is *de novo*. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). The standard of review on the cross-motion is abuse of discretion. *Dept. of Transportation v. Kisinger Campo & Assoc.*, 661 So. 2d 58, 59 (Fla. 2d DCA 1995).

A. The Court's Interpretation of Fla. Stat. § 770.01 Was Correct

i. Comins' Failure to Provide Van Voorhis with Pre-Suit Notice Under § 770.01 Bars His Claims

Florida law has a strict statutory requirement in defamation actions; under Fla. Stat. § 770.01, a defamation plaintiff must provide at least five days' pre-suit notice to all defendants. Compliance with Section 770.01 is mandatory, and *Orlando Sports Stadium* and *Gannett* specify that the notice must specifically identify the false or defamatory statements at issue. *Orlando Sports Stadium, Inc. v. Sentinel Star Co.*, 316 So. 2d 607, 610 (Fla. 4th DCA 1975); *Gannett Florida Corporation v. Montesanto*, 308 So. 2d 599, 599-600 (Fla. 1st DCA 1975). This provision, which is intended to permit corrections or retractions by the publisher of an allegedly defamatory statement and foster settlements in lieu of legal action, applies to all civil

litigants, both public and private, in defamation actions. *See Wagner, Nugent, et. al. v. Flanagan*, 629 So.2d 113, 115 (Fla. 1993) (affirming that Chapter 770 applies to all defendants).

The cardinal rule of statutory construction requires that the words in a statute are to be given their plain and ordinary meaning, unless the words are otherwise defined in the statute or by the clear intent of the legislature. See, e.g., *Green v. State*, 604 So. 2d 471, 473 (Fla. 1992); *Southeastern Fisheries Association, Inc. v. Department of Natural Resources*, 453 So. 2d 1351 (Fla.1984); *Pandya v. Israel*, 761 So. 2d 454 (Fla. 4th DCA 2000).

In the case of 770.01, the words used are a model of clarity and simplicity:

> Before any civil action is brought for publication or broadcast, in a newspaper, periodical, or other medium, of a libel or slander, the plaintiff shall, at least 5 days before instituting such action, serve notice in writing on the defendant, specifying the article or broadcast and the statements therein which he or she alleges to be false and defamatory.

This case involves 1) a civil action, which was 2) brought for publication, 3) in an "other medium," for 4) libel. It clearly applies to this case.

The only debate between the parties has been whether "other medium" applies to a publication that exists only online. It does, and there

is no support for a contrary conclusion. The appellant failed to provide pre-suit notice. The appellant was warned that this would mandate dismissal. (R 1332) The appellant refused to correct his failure.

The Appellant now tries to evade the statute's requirements by claiming that the defendant is not entitled to notice. He is. See, e.g., *Mancini v. Personalized Air Conditioning & Heating, Inc.*, 702 So.2d 1376, 1378 (Fla. 4th DCA 1997). The appellant rests upon outdated case law, interpreting older versions of the statutes, in order to avoid the consequences of failure. The pre-1976 version of the statute only applied to newspapers and periodicals.[8] However, the legislature amended the statute in 1976 to broaden the class of defendants who would enjoy its protections, and in

[8] In *Ross v. Gore*, 48 So.2d 412 (Fla. 1950), the question presented to the Florida Supreme Court was whether a differential standard rendered 770.01 unconstitutional. The Florida Supreme Court held that it did not. However, nothing in *Ross v. Gore* limits 770.01's applicability to any particular class of defendants. In that case, a defendant successfully invoked the prior version of 770.01. The plaintiff, in trying to revive his case, argued that since the statute gave special privileges to newspapers and periodicals, it was unconstitutional under the equal protection clause. The court held, (based upon equal protection jurisprudence of the day), that such a limitation did not render the statute unconstitutional. However, any reading of *Ross v. Gore* as limiting the applicability of 770.01 to a specific class of defendants is an erroneous reading of the case. Further, even if *Ross v.* Gore did do so, when the legislature enacted the democratizing 1976 amendment, it would have rendered any such interpretation as legislatively overruled. Since 1976, the law applies to all media without limitation. Further, if *Ross v. Gore* were decided today, it would be decided with more than a half century of common law expansion of the equal protection clause, and it is unclear that it would be able to reach the same conclusion.

1993, the Florida Supreme Court clarified that the provisions of Chapter 770 applied to "all civil litigants" in defamation cases, removing doubt that compliance is mandatory in all defamation cases. *Wagner, Nugent* at 115.[9] Accordingly, Plaintiff's failure to comply with § 770.01 compels dismissal. *Mancini*, 702 So. 2d at 1377, *citing Gifford v. Bruckner*, 565 So. 2d 887 (Fla. 2d DCA 1990); *Davies v. Brossert*, 449 So. 2d 418 (Fla. 3d DCA 1984); *Cummings v. Dawson*, 444 So. 2d 565 (Fla. 1st DCA 1984).

The fact that the allegedly defamatory publication is digital, rather than made of paper, is irrelevant. In 1976, the legislature saw that technology could out-pace the law and amended 770.01 to broaden it beyond newspapers and magazines to include television, radio, and "any other medium." The statute's "other medium" language has been correctly held to apply to the Internet. *Alvi Armani Medical, Inc. v. Hennessy*, 629 F. Supp. 2d 1302, 1307 (S.D. Fla. 2008) *citing Canonico v. Calloway*, 35 Med. L. Rptr. 1549 (Fla. Cir. Ct. Feb. 22, 2007); see also *Holt v. Tampa Bay Television, Incorporated*, 34 Med. L. Rptr. 1540, 1542 (Fla. Cir. Ct. March 17, 2005) *aff'd* 976 So. 2d 1106 (Fla. 2d DCA 2007). There is no

[9] *Wagner, Nugent* specifically dealt with Fla. Stat. § 770.07. However, the Florida Supreme Court could have limited its statement to merely that one subsection, if that was its intent. Presumably, the Florida Supreme Court's Justices (the decision was per curiam) were intelligent enough to understand the distinction between stating that "Chapter 770" applies to everyone and "770.07 applies to everyone."

justification for excluding a publisher from the statute's protections because he publishes solely on the Internet. This digital medium "has become a recognized medium for communication to the masses." 34 Med. L. Rptr. at 1542.

Seemingly, Mr. Comins believes that since Mr. Van Voorhis did not publish his comments in the Orlando Sentinel, that he is exempt from compliance with the clear language of the statute and the clear mandate of the Florida Supreme Court. "Although chapter 770 primarily addresses media defendants, we note the chapter is broadly titled Civil Actions for Libel. We hold the above statute applicable to all civil litigants, both public and private, in defamation actions." *Wagner, Nugent*, 629 So.2d at 115 (emphasis added). *Wagner, Nugent's* language removed any distinction between "media defendants" and other classes of defendants when it comes to the application of the whole of Chapter 770. However, Comins insists on interpreting the statute without regard to *Wagner, Nugent* and without regard to the 1976 amendment. Nevertheless, even in the absence of *Wagner, Nugent*, Section 770.01 would still apply to this defendant, since he is clearly a "media defendant."

Public Intellectual, the publication in which the allegedly defamatory articles appeared, regularly distributes news and information to the public.

Further, it was no single-issue upstart. *Public Intellectual* was founded in 2007. (R 592:25-593:1) It received multiple awards for its contributions to public discourse, and it is published continuously on matters of public concern. (R 794) Van Voorhis, as the author of the articles, is as entitled to Section 770.01 notice as the publication itself. *Mancini*, 702 So.2d at 1380. We can debate whether the Appellee is a "media defendant," and realize that he is, or we can recognize that the post-1976 language of Section 770.01 renders Van Voorhis' status legally irrelevant. Either way, the answer is the same. Regardless of whether Mr. Van Voorhis and *Public Intellectual* qualify as a "media defendant," all of Chapter 770 protects them, and Comins' refusal to comply with 770.01 was fatal to his claim.

Comins' briefing heavily relies upon pre-Internet decisions – a transgression that could have been forgiven when the Internet was in its infancy. However, with the Internet fully matured and completely pervasive as a dominant medium, such notions of the Internet as a "new phenomenon" are outdated. Comins relies upon a single case that acknowledges the existence of the Internet: *Zelinka v. Americare Healthscan, Inc.*, 763 So. 2d 1173, 1175 (Fla. 4th DCA 2000). Yet Comins' reliance upon this case is inapt. The defendant in *Zelinka* posted a comment on a message board

published by another party.[10] The facts in that case have no analogue to this case. Blogs did not even exist in 2000, and the *Zelinka* court's language reflects that. Nevertheless, the 4th DCA foreshadowed this case by making this statement:

> It may well be that someone who maintains a web site and regularly publishes internet "magazines" on that site might be considered a "media defendant" who would be entitled to notice. *Zelinka* does not fall into that category; he is a private individual who merely made statements on a web site owned and maintained by someone else. *Id*.

The 4th DCA was somewhat prophetic in anticipating that traditional print media would give way to the Internet and publication of those materials on the Internet would be commonplace. Online publications like *Public Intellectual* fit squarely within the predictions made by Judge Stevenson. While nobody calls a blog an "internet magazine," that is clearly what a blog, like *Public Intellectual*, is.[11] Blogs stepped into the void left by

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[10] Specifically, the defendant in *Zelinka* published on a Yahoo! Message board. The poster was as removed from ownership and publication of the Yahoo! Website as a letter to the editor's author is from a major newspaper.

[11] Farhad Manjoo, "This Is Not a Blog Post: Blogs and Magazines Are Looking More and More Alike. What's the Difference?," Slate (Oct. 15, 2010), http://www.slate.com/articles/technology/technology/2010/10/this_is_not_a_blog_post.html (last accessed Oct. 30, 2012) (observing that the convergence of content, purpose, practices and design of traditional media and blogs are "collapsing all distinctions between 'blog posts' and 'articles'").

a shrinking print industry[12], and perform the same important function – delivering news, information, and commentary to the masses. According Pew Research Center, 12% of Americans get their daily news primarily from blogs.[13] Blogs are an important source of information about matters of public concern for a substantial composite of the American public.[14]

As an example, the blog *FiveThirtyEight*, written by Nathan Silver, launched in March of 2008.[15] Mr. Silver's blog became wildly popular as a primary source of information about American electoral politics and predictions. In the 2012 election, Silver's blog proved to be the most accurate source of polling predictions.[16] Yet, if Comins' logic holds, *FiveThirtyEight* would not qualify for protection under Section 770.01, since

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[12] Comins argues that since some of Van Voorhis' statements were made in comments to his own articles, that this creates a "Zelinka exception." If this Court invents such an exception, then, logically, a newspaper would be protected by § 770.01 for its articles, but not if it responded to a letter to the editor. See *Mancini*, 702 So.2d at 1380. Such a new exception has no basis in logic or law, and this court should decline to invent one.

[13] "Trends in News Consumption: 1991-2012, In Changing Landscape, Even Television is Vulnerable," The Pew Research Center (Sept. 27, 2012), available at: http://www.people-press.org/files/legacy-pdf/2012%20News%20Consumption%20Report.pdf.

[14] *Id.*

[15] New York Times, About FiveThirtyEight, available at: http://fivethirtyeight.blogs.nytimes.com/about-fivethirtyeight/

[16] Salant, Johnathan D. and Laura Curtis, "Nate Silver-Led Statistics Men Crush Pundits in Election," Bloomberg Businessweek (Nov. 7, 2012), available at: http://www.businessweek.com/news/2012-11-07/nate-silver-led-statistics-men-crush-pundits-in-election

it is on the Internet, published on servers that Mr. Silver does not own, Mr. Silver did not attend journalism school, and he once wrote under a pseudonym.[17]

Comins argues that although Van Voorhis publishes an award-winning blog, Van Voorhis' educational qualifications and personal background deprive him of a clear right that the legislature granted to him. This position lacks support. The fact that Mr. Van Voorhis did not attend journalism school, or his blog does not earn money, are irrelevant. Many popular (and currently profitable) blogs started this way, published by people with this status. For example, Arianna Huffington[18], Matthew Drudge[19], Harvey Levin[20], Nick Denton[21], and the aforementioned Nate Silver, are not "traditional media." The online blogs that made them famous would not fit Comins' definition of "media," yet nobody could seriously argue that they are not covered by Chapter 770.

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[17] Silver wrote under the name "poblano" during the 2008 election at the Daily Kos. Archives of his posts are available at: http://www.dailykos.com/search?story_type=&search_type=search_stories&text_type=any&text_expand=contains&text=&usernames=Poblano&tags=%28tags%29&time_type=time_published&time_begin=10%2F30%2F2007&time_end=now&submit=Search

[18] Of the Huffington Post, located at: http://www.huffingtonpost.com/

[19] Of Drudge Report, located at: http://www.drudgereport.com/

[20] Of TMZ, located at: http://www.tmz.com/

[21] Of Gawker, located at: http://www.gawker.com

Comins relies upon a single case from the United States District Court for the District of Oregon to support his claim that a blog is not "media." *Obsidian Finance Group LLC v. Cox*, Case No. 3:11-cv-57-HZ *2011 WL 5999334* at *1 (D. Ore. Nov. 30, 2011). However, not only is that a misrepresentation of the case, Comins ignores the fact that the judge in that case amended his own order, and that new order eviscerates Comins' position.[22] *Obsidian Finance Group v. Cox ("Cox II")*, Case No. 3:11-cv-57-HZ, 2012 WL 1065485 at *13 (D. Ore. Mar. 27, 2012). In that case, the defendant ran an extortion racket, in which she would defame her subjects, and then offer to sell "reputation management services" to them to undo the damage. Comins' reliance on this case demonstrates the frailty of his

[22] Judge Hernandez clarified his position as follows: "I also did not state that to be considered 'media,' one had to possess all or most of the characteristics I recited. Rather, I confined my conclusion to the record defendant created in this case and noted that defendant had presented no evidence as to any single one of the characteristics which would tend to establish oneself as a member of the 'media.' In addition, the uncontroverted evidence at trial was that after receiving a demand to stop posting what plaintiffs believed to be false and defamatory material on several websites, including allegations that Padrick had committed tax fraud, defendant offered 'PR,' 'search engine management,' and online reputation repair services to Obsidian Finance, for a price of $2,500 per month. Ex. 33. The suggestion was that defendant offered to repair the very damage she caused for a small but tasteful monthly fee. This feature, along with the absence of other media features, led me to conclude that defendant was not media." *Obsidian Finance Group v. Cox ("Cox II")*, Case No. 3:11-cv-57-HZ, 2012 WL 1065485 at *13 (D. Ore. Mar. 27, 2012).

position. The only thing that the *Obsidian* case stands for is that clear extortion does not equal journalism.

Van Voorhis' *Public Intellectual* was not an extortion racket. It is is by any measure, an "Internet magazine," as foreshadowed by the *Zelinka* court. He periodically published articles at the same web address. (R 404-405) He reported on numerous, varied items concurrent with the traditional media's treatment of those subjects. (R 404-405) He used it to communicate current events and commentary to a wide audience, and used it to do so rapidly so that his opinions might be part of the public discourse on matters of public concern. Comins' myopic focus on Van Voorhis' academic credentials as a journalist misses the broader issue of how the media operates. *Public Intellectual* is a part of the media, irrespective of whether Van Voorhis received a journalism degree, whether he earns money from the blog, or whether he wrote the blog under a pseudonym.[23] There is no exception to Section 770.01 for pseudonymously published works, works written by sociology majors, or works that are unprofitable, nor has there ever been one, nor should there be one.

Comins' failure to provide proper notice compelled the lower court to enter judgment in Mr. Van Voorhis' favor. *See Mancini*, 702 So. 2d at 1377.

[23] There is little question that § 770.01 would apply to the Federalist Papers, a famous example of anonymously authored and published media.

See also *Gifford*, 565 So. 2d 887; *Davies*, 449 So. 2d 418; *Cummings*, 444 So. 2d 565.

The pre-suit notice requirement is not a forgiving standard. A defamation plaintiff must provide pre-suit notice that states, *with particularity*, the statements believed to be defamatory. See Fla. Stat. § 770.01; *Orlando Sports Stadium*, 316 So. 2d 607. In *Orlando Sports Stadium*, the Fourth DCA held that it does not suffice to merely identify the article; it must identify the precise false and defamatory statements contained therein. The First DCA reached a similar conclusion in *Gannett Florida Corporation v. Montesanto*, where the plaintiff gave the following pre-suit notice:

> Pursuant to Florida Statute 770.01, you are hereby notified that a civil action for libel will be brought against The Gannett Florida Corporation in the Circuit Court of Volusia County Florida, after five days from the service of this notice for the publication in the newspaper "Today" on or about May 10, 1970, of the attached article which was false and defamatory in that it imputed a crime to my client, Mr. Carmen Montesano. 308 So. 2d 599 (Fla. 1st DCA 1975).

The court found that this notice lacked the required specificity. *Gannett*, 308 So. 2d at 599-600. *Id*. Consequently, the court reversed a defamation judgment against the defendant based on this technical noncompliance. *Id*.

The only pre-suit correspondence from Comins' counsel, Frank H. Killgore, was sent on March 23, 2009. (R 1275-1276). It fails to specify a *single allegedly false statement*. In fact, it fails to even identify a particular article, or to even to discuss defamation. (R 1275-1276). The only content that Comins' attorney requested to be removed was Comins' name, phone number, and any threatening comments against him made by third parties. (R 1276) The letter is reproduced, below:

> Please be advised that our firm is legal counsel for Custom Fab, Inc. and Christopher Comins. This correspondence serves as a cease and desist demand to protect the physical well-being of both Mr. Comins and the employees of Custom Fab. While we appreciate the freedom of expression and freedom of the press, these freedoms still come with responsibilities; and, the recent postings on your blogging site involving Mr. Comins has violated these freedoms and is tantamount to reckless endangerment of another's well being.
>
> Specifically, your blog site includes a recent entry on March 3, 2009, that lists the work address of Mr. Comins, and then encourages others to seek out Mr. Comins and kill him. This blog entry is followed on March 11, 2009 with an entry from someone who states, "I just have to kill this man." It is our position that your participation in creating this forum, and thereafter allowing others to use your forum as a vehicle for encouraging others to locate and seek out to kill someone, makes you potentially liable for any harm which may befall either Mr. Comins or the employees of Custom Fab from these individuals.
>
> For the safety of all those involved, we request that you delete this blog site in its entirety. At the very least, we strongly encourage you and formally demand that you

> remove all references to our client's home and business addresses and telephone numbers.
>
> It is our desire to work with you to resolve this issue and ensure the safety of our client and his employees without seeking court intervention, as this is in the best interests of all parties. However, if we do not hear anything from you confirming the removal of our client's personal contact information, and all threatening comments thereto, you will leave us with no choice but to institute legal proceedings.
>
> Again, we cannot emphasize how vital it is for you to **IMMEDIATELY** remove our client's personal and business contact information, and all threatening comments thereto. These postings continue to encourage death threats against our client, and should not propagated by you.
>
> We are willing to assist you in any way, and only desire to preserve the well-being of our client. Please contact our firm immediately upon receipt of this letter. (R 1275-1276)

Falling far short of *Gannett* and *Orlando Sports Stadium*, Comins did not merely fail to identify specific false and defamatory statements – he did not even say that defamation was an issue. The insufficiency of Comins' March 23, 2009 correspondence is clear. The only thing that Mr. Killgore's letter demanded was that Mr. Van Voorhis cease publication of *Public Intellectual* entirely. ("[W]e request that you delete this blog site in its entirety") This is not a 770.01 notice. This is not even close to one.[24]

[24] The demand that Van Voorhis cease publication entirely did not even warrant serious consideration.

Comins argues that the letter his counsel wrote was "close enough" and thus complied with 770.01. (R 276). However, this is neither horseshoes nor hand grenades. This is a matter of fundamental importance in a self-governing society, and "close enough" does not suffice. On their face, Comins' letters fail to meet the standard. They only address comments by third parties, which Van Voorhis did not write, and who Comins did not sue. Without variation, all cases interpreting the statute require strict compliance, and this Court should not break new ground by being the first court to hold otherwise.

In *Gannett Florida Corporation v. Montesanto*, the First District Court of Appeals considered a notice that came far closer to complying with the statute than that provided by Comins. In that case, the plaintiff at least wrote that the defendants' publication contained defamatory content. However, because the notice failed to specify which specific statements were defamatory, it fell short of the stringent requirements of Section 770.01. *Gannett,* 308 So. 2d 599-600 (Fla. 1st DCA 1975). *See also Canonico v. Callaway*, 26 So. 3d 53, 55 (Fla. 2d DCA 2010) (strictly construing § 770.01). Despite being insufficient under Florida law, this is the kind of vague, censorious and non-specific warning Comins provided to Van Voorhis – contending that Van Voorhis' entire blog posts, even when

completely factually correct, should come down. (R 434-435) No reasonable interpretation of Section 770.01 could conclude that Comins satisfied its requirements. Considering Comins' pre- and post-filing correspondence with Van Voorhis, seen in Record 434-435; 441-443, there is no factual dispute as to the insufficiency of Comins' notice.

It is worth noting that this Section 770.01 deficiency was not an issue that Van Voorhis sprang upon Mr. Comins as an eleventh hour trap. As early as February 17, 2010, Marc Randazza, counsel for Van Voorhis, raised this issue with counsel for Mr. Comins, Christopher Harne. (R 1332) At that point, being fully educated on the subject, a prudent party would have dismissed the case without prejudice, issued the Section 770 notice, and then re-filed. (R 1332) Comins' counsel, instead, dug in his heels.

Comins made a choice to double down on whether Section 770.01 applies, and now, as a post-hoc position, he makes legally unsupportable argument that his "notice" was sufficient. Comins could have dismissed and re-filed within the statute of limitations, with no prejudice to himself. Instead, he hangs his frivolous case on even more frivolous arguments that the court should invent new exceptions to the statute. Why he chose to dig in rather than engage in the simple and inexpensive exercise of providing proper notice may never be known, but the conduct of the litigation sheds

some light on it: This is a SLAPP suit, and Comins cannot identify any defamatory statements published in *Public Intellectual* because there are none. Thus, Comins is incapable of providing the necessary notice. (R 1275-1276; 1110:15-1111:23; 1113:13-114:9; 1115:4-1116:21; 1174:13-1175:7) The purpose of a case like this one is to punish the publisher with litigation; the result is secondary.

ii. Comins'Additional Arguments Seeking Reversal of the Circuit Court's Ruling are Erroneous

1. Van Voorhis' Anonymity is Irrelevant With Regards to Fla. Stat. § 770.01's Protections

Comins argues that Van Voorhis' anonymity prevented "performance of a condition precedent," thereby creating a "waiver" of a right to pre-suit notice. (Appellant Opening Brief at 27) Comins raised this unsupportable "waiver" argument with the trial court, which correctly held that the argument was "without factual or legal basis."[25] (R 1246) In reality, Comins identified Van Voorhis sufficiently to serve him with the Complaint.

[25] It is worth noting that this is a textbook example of a claim that is sanctionable under Fla. Stat. § 57.105, which requires a losing party and its attorney to pay a prevailing party's reasonable attorneys' fees for bringing claims the losing party's attorney knew or should have known were: "not supported by the material facts necessary to establish the claim or defense" or "would not be supported by the application of then-existing law to [the case's] material facts." The trial court should have, on that basis alone, imposed sanctions.

Therefore, any argument that Mr. Van Voorhis' use of pseudonym is an excuse for failing to adhere to 770.01 is nonsensical. Any claim that Comins was unable to identify and locate Van Voorhis should invite sanctions, not reversal.

2. Only a Section 770.01 Notice is a 770.01 Notice

Comins tries to shoehorn other inapplicable communications into 770.01. For example, through counsel, Comins contacted the University of Florida Police Department ("UFPD") to discover Van Voorhis' identity. (R 1277-1280) This telephone communication with the UFPD was not, and did not translate into, a written notice of defamatory or false statements on Van Voorhis' blog. (R 1277-1280). Comins' counsel convinced the UFPD to turn over Van Voorhis' address. Despite having this information, Comins' counsel did not use it to send a 770.01 notice, and now claim that they did not have that information, thus they could not serve the notice.

Belying his argument that he could not find Mr. Van Voorhis to send him notice, Comins' attorney sent a letter to Van Voorhis on May 26, 2009. (R 441) Given a second chance, it fails again: The letter fails to identify a single defamatory statement. (R 441) Further disqualifying this correspondence from complying with Section 770.01, it was sent almost two (2) full weeks *after* Comins filed suit against Van Voorhis on May 13, 2009.

(*See* R 441; 1-7) Post-hoc 770.01 notices are invalid. In fact, even notices sent *four* days before filing suit are invalid. *Canonico*, 26 So. 3d at 55. Substantively and temporally, this letter is not a 770.01 notice.

3. Public Policy Favors Extending Fla. Stat. § 770.01's Protections to Blogs.

Comins argues that public policy disfavors providing pre-suit notice to bloggers. The opposite is true. The purpose of 770.01 is to protect the public's interest in the free dissemination of information about matters of public concern. *See Mancini*, 702 So. 2d at 1378. Depriving online publications of the benefits of the pre-suit notice is void of a legal or logical support, and would create a chilling effect through this increasingly important medium, at the same time that print media are on the decline. That doesn't make any sense from a legal perspective, nor does it make sense from a policy perspective.

Long before the Internet, the Supreme Court recognized that the definition of "press" is fluid, and does not depend on the particular medium through which publishers transmit information to the masses. In *Lovell v. City of Griffin*, the court held, "[t]he liberty of the press is not confined to newspapers and periodicals. ... The press in its historic connotation comprehends every sort of publication which affords a vehicle of

information and opinion." 303 U.S. 444, 452 (1938). Indeed, many courts and legal scholars recognize the virtual impossibility of drawing the type of line that Comins requests this court to draw today.[26]

The U.S. Court of Appeals for the First Circuit confronted a case where a party asked for the court to recognize a differential level of protection for traditional media. That court rejected the notion, as this one should. *Cusmano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998):

> [T]he medium an individual uses to provide his investigative reporting to the public does not make a dispositive difference in the degree of protection accorded to his work. ... Whether the creator of the materials is a member of the media or of the academy, the courts will make a measure of protection available to him as long as he intended "at the inception of the newsgathering process" to use the fruits of his research "to disseminate information to the public."

Id. at 714 (quoting *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987)). The rationale was that their intent had been to "compile,

[26] *See, e.g., Dun & Bradstreet*, 472 U.S. 749, 782 (1985) (Brennan, J., dissenting); Thomas D. Brooks, *Catching Jellyfish in the Internet: The Public-Figure Doctrine and Defamation on Computer Bulletin Boards*, 21 Rutgers Computer & Tech. L.J. 461, 479 (1995) (stating that reliance on whether defendant belongs to media "would confront the Court with the slippery-slope task of defining 'the media"'); Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. Rev. 915, 935 (1978) (stating that affording less First Amendment protection to nonmedia defendants "would require difficult determinations as to which communications would and would not merit the label 'press' or 'media"').

analyze, and report their findings," *Id*. at 715, just like Mr. Van Voorhis and other bloggers and online publishers.

Mr. Comins seeks to draw artificial lines upon a surface that resists the very ink in his pen. For another example, in *Mortgage-Specialists, Inc. v. Implode-Explode Heavy Industries, Inc.*, the New Hampshire Supreme Court rejected an argument that a website publisher was ineligible for the journalist privilege because it was neither an established media entity nor engaged in investigative reporting. 999 A.2d 184, 189 (N.H. 2010). Nevertheless, the court recognized that because the website "serve[d] an informative function and contribute[d] to the flow of information to the public ... [it was] a reporter for purposes of the newsgathering privilege." *Id*.

It is the author's *function* that determines whether he or she is fairly classified as a member of the "media" and therefore entitled to some protections and privileges afforded to the Orlando Sentinel. Indeed, nontraditional publishers have filled voids and made significant contributions to public discourse. Non-traditional media sits alongside its more storied counterparts as an equal in terms of its importance to the free flow of ideas and information. *See* Leon Harris, *Upton Sinclair: American Rebel* 85-90 (1975); Carl Jensen, *Stories That Changed America: Muckrakers of the 20th Century* 78-81 (2000).

This is not to discount the receiving end of the information flow. Millions rely upon Internet news sources as a supplement to newspapers, magazines, television, and radio. Within an accelerating news cycle, bloggers often have immediate, early access to information that it may take older forms of media days or weeks to obtain and investigate.[27] If this court blows a cold wind down the "Information Superhighway," the public will find that as print wanes, with special privileges intact, online media will by necessity need to shirk from its responsibility to fill the gap. Ultimately, we all would lose, if that were the result.

In 2012, the Pew Research Center found that forty-six percent of Americans receive their news online, with twelve percent relying on blogs as their primary source of news information.[28] In fact, in 2010, the Associated

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[27] *Id.*; Jay Rosen, *What I think I Know About Journalism*, PressThink (Apr. 26, 2011), http://pressthink.org/2011/04/what-i-think-i-know-about-journalism/ (*last accessed* Nov. 4, 2012) ("[journalism] benefits from participation […] if sources won't participate, there often is no story"); Mathew Ingram, *Journalism Gets Better the More People Who Do It*, Gigaom (Apr. 27, 2011), http://gigaom.com/2011/04/27/journalism-gets-better-the-more-people-that-do-it/ (last accessed Nov. 4, 2012) (commenting on the expanded participation of citizens in the media "over and over, with photos and videos and reporting of everything from a plane landing in the Hudson River to earthquakes, and more recently, uprisings and revolution in Tunisia, Egypt and Libya").

[28] "Trends in News Consumption: 1991-2012, In Changing Landscape, Even Television is Vulnerable," The Pew Research Center (Sept. 27, 2012), available at: http://www.people-press.org/files/legacy-pdf/2012%20News%20Consumption%20Report.pdf.

Press ("AP") formally recognized bloggers as news sources, and that they should be cited as such by AP journalists.[29] Other commentators note that bloggers have risen to provide facts, research and information where "the legacy media dropped the ball."[30] While traditional media declines, online media (including blogs) rises to take its place:

> Over the past decade, online news and non-traditional media have both accelerated the decline of traditional media and served consumers' informational needs. By 2009, 60% of Americans received their news from an online source, and 75% of Internet users reportedly obtained news forwarded via email or networking sites. But online media has not only gained substantial market share recognition, the format has also assumed many functions in modern journalism. John J. Dougherty, *Obsidian Financial Group, LLC v. Cox and Reformulating Shield Laws to Protect Digital Journalism in an Evolving Media World*, 13 N.C.J.L. & Tech. On. 287, 294-95 (2012)

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[29] SimplyZesty, *Associated Press Recognise Bloggers As a News Source* (Sept. 7, 2010), http://www.simplyzesty.com/technology/news/bloggers-recognised-news-source/ (last accessed Oct. 29, 2012).

[30] Hal Espen, *How I Enabled The Cult of Lance Armstrong*, The Atlantic (Nov. 2, 2012), http://www.theatlantic.com/entertainment/archive/2012/11/how-i-enabled-the-cult-of-lance-armstrong/264430/?google_editors_picks=true (last accessed Nov. 4, 2012); Mathew Ingram, *Lance Armstrong Shows Why the Disruption in Journalism Matters*, Gigaom (Oct. 29, 2012) http://gigaom.com/2012/10/29/lance-armstrong-shows-why-the-disruption-in-journalism-matters/ (last accessed Nov. 4, 2012) ("blogs and Twitter picked up the journalistic slack" where there was insufficient formal reporting on Lance Armstrong's blood enhancement scandal).

Legal academia acknowledges this fundamental shift: "Blogs are becoming more popular, and more people visit blogs as news sources. The more popular blog hosts already attract more unique hits than many established media sources." Joseph S. Alonzo, *Restoring The Ideal Marketplace: How Recognizing Bloggers as Journalists Can Save the Press*, 9 N.Y.U. Journal Legis. and Pub. Pol'y, 751, 777 (2006). "Americans are ignoring traditional news sources, such as network news or the morning paper, and instead are reading blogs on the Internet." Sunny Woan, *The Blogosophere: Past, Present, and Future*, 44 Cal. W. L. Rev. 477, 484-85 (2008). Blogs increasingly assume the role previously filled by legacy media, serving as "valuable checks on mainstream press, compris[ing] alternatives to government-restricted media outlets or have gained mainstream institutional recognition." Anne Flanagan, *Blogging: A Journal Need Not a Journalist Make*, 16 Fordham Intell. Prop. Media & Ent. L.J. 395, 398 (2006). "Illustrative here are the issuance of White House press credentials to a blogger, the recent citation by the United States Supreme

Court to a law blog (or 'blawg') and the numerous notations of the growing role of 'citizen journalists' as news sources." *Id*.[31]

An additional policy argument in favor of a broad application of 770.01 is its tendency to relieve courts of the burden of at least some frivolous litigation. The statute requires a defamation plaintiff to focus his attention on what, precisely, he finds to be defamatory and to articulate his concerns in writing. Theoretically, we must presume that such an exercise generates at least some self-reflection by parties and attorneys who might otherwise file unsupportable SLAPP suits. Given that this state has a strong public policy against SLAPP suits, this is a desirable end. See Fla. Stat. §§ 720.304(4) and 768.295. Meanwhile, Comins argues that public policy would be greater served by removing an impediment to SLAPP suits. When we compare Comins' arguments to Florida's legislatively stated public policy, Comins' public policy position becomes legally unappetizing.

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[31] *See* Katherine Seelye, "White House Approves Press Pass for Blogger," NY TIMES, Mar. 7, 2005, at C5 (noting the credentialing of FishbowlDC published by Mediabistro.com); see also *United States. v. Booker*, 125 S. Ct. 738, 775 n.4 (2005) (Stevens, J. dissent) (citing unpublished memorandum by Christopher A Wray, Assistant Attorney General, U.S. Department of Justice, *Guidance Regarding The Application Of Blakely v. Washington*, 2004 WL 1402697 (June 24, 2004) *To All Pending Cases*, available at Sentencing Law and Policy: A Member of the Law Professor Blogs Network, http://sentencing.typepad.com/sentencing_law_and_policy/files/chris_wray_doj_memo.pdf).

Further, this state is no stranger to pre-suit statutory requirements intended to weed out frivolous claims. Florida law recognizes that haphazard medical malpractice claims had a negative impact upon the marketplace for medical services and thus requires pre-suit procedures before a medical malpractice claim may be brought. See Fla. Stat. § 766.106. Section 770.01 serves a similar "weeding out" function in order to protect the marketplace of ideas, which is certainly of greater constitutional importance than the marketplace of lower malpractice premiums. When a defamation plaintiff makes an indefinite demand and cannot, himself, even point out what in a publication is defamatory, then how can an author do so? Section 770.01 acts to stave off at least part of the chilling effect wrought by unsupportable defamation litigation.

SLAPP suits are an epidemic in Florida.[32] The least that Florida should require of a defamation plaintiff should be the simple exercise of writing a letter, which precisely articulates what he feels is false and defamatory before burdening publishers and the courts alike.

In this case, not only did Comins fail to bring that proper focus before filing suit, but he refused to bring such focus even throughout the litigation. His refusal continues to this day. Even in his deposition, Comins refused to identify a single defamatory statement *anywhere*, preferring to simply say "all of it" was defamatory. According to Comins, every news account of his actions was defamatory. (R 1275-1276; 1110:15-1111:23; 1113:13-114:9; 1115:4-1116:21; 1174:13-1175:7). Had Comins (or his counsel) engaged in the activity that Fla. Stat. § 770.01 requires, he or his counsel would have

[32] As far back as 1993, Florida Attorney General Robert Butterworth recognized that "the ability of many Floridians to speak out on issues that affect them is threatened by the growing use of a legal tactic called a Strategic Lawsuit Against Public Participation, or SLAPP. A SLAPP lawsuit is filed against citizens in order to silence them. [A] citizen who speaks out [...] is sued for thousands of dollars for alleged interference, conspiracy, slander or libel will cease speaking out. And, as demonstrated in a report prepared by [the Attorney General's] office on SLAPPs in 1993, the tactic is successful." Virginia Sherlock, "What Is A SLAPP Suit?," Caloosahachee River News at 3, http://news.caloosahatchee.org/docs/SLAPP_2.pdf (last accessed Nov. 13, 2012). Since Attorney General Butterworth's report, "SLAPP suits in Florida are more prevalent than ever," with their victims facing "astronomical legal fees and costs for defending their right to speak." *Id*. at 4.

been hard pressed to identify anything in any of Mr. Van Voorhis' publications that is legally actionable as defamation or otherwise. The statute would have done its job – and years of frivolous and expensive litigation would have failed to materialize.

B. Even if the Circuit Court's Entry of Summary Judgment in Van Voorhis' Favor Were Incorrect, It Should Not be Overturned As There Are Merits-Based Reasons for Summary Judgment.

Had the trial court examined all of Van Voorhis' Motion for Summary Judgment, it would have found that Van Voorhis was entitled to summary judgment on independent grounds. Therefore, even if this Court believes that the trial court's decision was in error, the trial court's entry of summary judgment in favor of Mr. Van Voorhis must stand.

Florida calls this the "tipsy coachman" doctrine, under which an appellate court affirms an order if the lower court "reaches the right result, but for the wrong reasons." *Shands Teaching Hosp. & Clinics v. Mercury Ins. Co*., 37 Fla. L. Weekly S407 (Fla. June 7, 2012) (quoting *Robertson v. State*, 829 So. 2d 901, 906-07 (Fla. 2002)); *see also Mount v. State*, 37 Fla. L. Weekly D 2218 (Fla. 5th DCA Sept 14, 2012) (applying the "tipsy coachman" doctrine). If the trial court's decision was erroneous, but the record nevertheless supports the same result, then the trial court's judgment

should remain intact. *Shands*, 37 Fla. L. Weekly S407, citing *Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999).

Van Voorhis' statements did not constitute actionable defamation. The First Amendment bars Comins' claims, and Comins' tortious interference claim fails as a matter of law. Van Voorhis' statements were true or substantially true, and thus could not form the basis for a defamation action. To the extent that they were not provably true, they were statements of opinion, which equally cannot form the basis of a defamation claim.

Importantly, Comins was a public figure, and could only sustain a defamation claim if he could prove with clear and convincing evidence that Van Voorhis acted with actual malice – that is, he knew that his statements were false statements of fact, or that he harbored serious doubts as to their veracity, yet proceeded with reckless disregard for whether they were true.

Because the record on appeal supports the trial court's entry of summary judgment on Van Voorhis' substantive defenses, the Court should either affirm the trial court's order as entered, or the trial court's order should be placed in the background for the appeals court to consider Van Voorhis' entitlement to summary judgment on the merits of the Comins' claims. The issues presented are pure legal issues. There is not a genuine issue of any of

the material facts that were contained in the record for purposes of summary judgment.

C. Van Voorhis Was Entitled to Summary Judgment on All Claims

i. Van Voorhis' Statements Do Not Constitute Defamation

Under Florida law, a defamatory statement is: 1) published, 2) false, 3) made with reckless disregard for the truth or knowledge of its falsity when concerning a public official, or negligently when concerning a private person, 4) responsible for actual damages, and 5) defamatory (harmful to the target's character) in nature. *Internet Solutions Corp. v. Marshall*, 39 So. 3d 1201, 1214 n. 8 (Fla. 2010). "[S]ummary judgments are to be liberally granted where the constitutional requirement of actual malice applies." *Cronley v. Pensacola News-Journal, Inc.*, 561 So.2d 402, 405 (Fla. 1st DCA 1990). *See also Dockery v. Fla. Democratic Party*, 799 So. 2d 291, 294 (Fla. 2d DCA 2001) ("summary judgments are to be more liberally granted"); *Newton v. Florida Freedom Newspapers, Inc.*, 447 So. 2d 906, 907 (Fla. 1st DCA 1984) ("summary judgment should be more liberally granted where, as in this case, the constitutional requirement of 'actual malice' applies"). The liberal granting of summary judgments in defamation cases flows from the fact that the court is required to consider whether there

is a "genuine issue of material fact" not in the usual manner, but in light of the burden of proof as elevated by the *New York Times* standard. "A public-figure plaintiff … must present record evidence sufficient to satisfy the court that a genuine issue of material fact exists which would allow a jury to find by clear and convincing evidence the existence of actual malice on the part of the defendant." *Dockery*, 799 So. 2d at 294, *quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252-258 (1986). The record reflects that under this standard, Comins' claims fail as a matter of law.

Van Voorhis criticized Comins only after traditional media outlets reported on Comins' dog shooting, thus making Van Voorhis' statements about a public figure and affording them a higher degree of constitutional protection. *Mile Marker Inc. v. Peterson Publishing, LLC*, 881 So. 2d 841, 845 (Fla. 4th DCA 2002).

ii. Van Voorhis' Statements Were Matters of Opinion

Only statements of fact – not opinions – are defamatory under Florida law. The United States Supreme Court has held that there "is no such thing as a false idea," ensuring that individual opinions are protected by the U.S. Constitution. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974). Van Voorhis' Constitutionally protected statements of opinion were made based on information known or available to the speaker as a member of the public.

Town of Sewall's Point v. Rhodes, 852 So. 2d 949, 951 (Fla. DCA 4th 2003); *Morse v. Ripken*, 707 So. 2d 921, 922 (Fla. 4th DCA 1998). Courts, rather than juries, determine whether a statement is one of opinion or fact as a matter of law. *Morse*, 707 So. 2d at 922; *Zambrano v. Devanesan*, 484 So. 2d 603, 606 (Fla. 4th DCA 1986).

Rather than being statements of provable falsity, Van Voorhis' blog posts were statements of opinion, and characterizations of Comins' actions that, in context, no reasonable person would interpret as statements of fact. See *Dockery*, 799 So. 2d at 296-97 (Fla. 2d DCA 2001); *From v. Tallahassee Democrat*, 400 So. 2d 52, 58 (Fla. 1st DCA 1981).

Van Voorhis' commentary on this internationally famous incident relied heavily on a first-hand eye-witness video and numerous mainstream media reports from respected news outlets. (*See* R 128-132; 135-168) Van Voorhis did not add statements of fact in his reports, nor did he insinuate that he possessed any non-public information about the incident; in fact, Van Voorhis included the primary source – the video of Comins' attack – so that readers could see and judge Comins' actions for themselves. (R 425-433) Van Voorhis' coverage of this event was secondary reporting and a matter of pure opinion. (R 425-433)

Florida's courts have found commentary similar to Van Voorhis' to constitute First Amendment protected opinion. In *Dockery*, the defendant claimed that a prominent businessman owed more than $500,000 in taxes and was under investigation by the federal government. 799 So. 2d at 296-97. Although disputed, the statements in *Dockery* were found to be non-actionable, and based upon the IRS' position and determination that the plaintiff owed back taxes in excess of $500,000. Similarly, a newspaper's allegations of a country club tennis pro's poor playing skills and inability to enhance members' tennis abilities were not defamatory, as they constituted the author's opinions regarding the tennis pro's abilities and performance. *From*, 400 So. 2d at 58. In both cases, the courts determined that no reasonable person would interpret the speakers' statements as statements of fact. *From*, 400 So. 2d at 57; *Dockery,* 799 So. 2d at 295.

Comins seems to take great offense at being called a "redneck hillbilly." Nevertheless, even if a bit impolite, this very type of epithet is a protected opinion. *Town of Sewall's*, 852 So. 2d 949. In that case, the Second DCA held that describing an individual's property as a "Hillbilly Hellhole" was a statement of opinion, and not fact.

Reversing a jury verdict of $50,000, the 2d DCA found that whether the defendant's description of the plaintiff's land as a "Hillbilly Hellhole"

was a legal, not a factual, issue. Allowing the issue to go to a jury was improper. *Id*. at 951. Like Van Voorhis, the defendant in *Rhodes* provided commentary to a photograph of the plaintiff's back yard, so that "anyone viewing the photograph can […] draw his or her own conclusion" concerning the description's accuracy. *Id*.

When an author provides the facts underlying his opinion alongside his subjective impressions, the author's statement is a "pure expression of opinion" protected by the First Amendment and Florida Law. *Hay v. Independent Newspapers, Inc*., 450 So. 2d 293 (Fla. 2d DCA 1984). *Hay* involved a letter to the editor of a newspaper, discussing the state attorney's office's announcement to not seek prosecution of certain individuals. *Id*. The letter stated, "This makes me sick! Catch a crook, pat him on the head and let him go free." *Id*. Hay filed suit, which was dismissed as a matter of law because the court found the article to be opinion, and it shared the facts upon which it was based.

Van Voorhis' statements should receive similar treatment. Van Voorhis provided the primary materials and sources he relied upon for his blog posts to his readers, and added his own editorial opinion. A reasonable person, having immediate access to the discussed video, would not interpret Van Voorhis' descriptions of Comins as statements of fact, but rather what

they were – commentary and opinion about the facts in the video and other primary sources.

The vituperative language used by Van Voorhis does not affect his statements' status as matters of opinion. See *Town of Sewall's*, 852 So. 2d 949. Even when a speaker uses inflammatory language, the words are Constitutionally protected as rhetorical hyperbole. In fact, they receive greater First Amendment protection, since no objective recipient would interpret the statements as statements of fact. *Greenbelt Coop. Pub. Ass'n v. Bresler*, 893 U.S. 6, 14 (1970); see also *Gardner v. Martino* 563 F.3d 981, 987 (9th Cir. 2009) ("[A] threshold question after *Milkovich* in a defamation claim is whether a reasonable fact finder could conclude that the contested statement implies an assertion of objective fact. If the answer is no, the claim is foreclosed by the First Amendment."); *Unelko v. Rooney*, 912 F.2d 1049, 1053 (9th Cir. 1990).

In *Seropian v. Forman*, the defendant sent a letter to 400 people, accusing plaintiff of being an "influence peddler" and receiving unlawful bribes. 652 So. 2d 490, 492-93, 496, 498 (Fla. 4th DCA 1995). The Fourth DCA found that language to be rhetorical hyperbole. The indefinite nature of defining "influence peddler" renders it incapable of a court determining that it is a false statement of fact. *Id.* Even descriptions of a plaintiff as

"nuts" and "crazy" are protected as a "pure expression of opinion." *DeMoya v. Walsh*, 441 So.2d 1120 (Fla. 3d DCA 1983). The First Amendment demands breathing room sufficient for a bit of passion in the mind of an author, and does not protect thin-skins on public figures.

Comins' annoyance does not justify this Court ignoring Van Voorhis' First Amendment rights. Indeed, to establish his claims for defamation, Comins must meet the burden of proving that Van Voorhis' statements were of fact, and provably false. *Zorc v. Jordan*, 765 So. 2d 768, 772 (Fla. 4th DCA 2000). Van Voorhis' choice of language – such as "salivating," "devouring" and "whizzing," which provide clear notices of Van Voorhis' editorial license – would leave a reasonable reader with no doubt that they are not reading a purely factual account (R 425-433), but rather a hyperbolic account of the presented video.

1. Van Voorhis' Statements Do Not Meet the "Actual Malice" Standard Needed to Defame Comins, a Vortex Public Figure

As a public figure, Comins is held to a heightened standard in pursuing a defamation action. A public figure must show that the false information was published with actual malice – knowledge that the statement was false or with a reckless disregard for the truth. *N.Y. Times Co. v. Sullivan, 376 U.S. 254* (1964). Florida has adopted a heightened variant

of this standard, which "is satisfied only if there is sufficient evidence to permit the conclusion that the Defendant in fact entertained *serious doubts* as to the truth of his publication." *Newton v. Fla. Freedom Newspapers, Inc.*, 447 So. 2d 906, 907 (Fla. 1st DCA 1984) (emphasis added). Failing to do so subjects the public figure to sanctions. See *Demby v. English*, 667 So. 2d 350 (Fla. 1st DCA 1995).

The United States Supreme Court has noted the significant difference between "mere proof of falsity" and actual malice. *Bose Corp. v. Consumers Union of the U.S., Inc.*, 466 U.S. 485 (1984). To prove defamation, Comins must show that Van Voorhis actually realized his statements were false, or that he "subjectively entertained *serious doubts* as to the truth of his statement." *Gibson v. Maloney*, 263 So. 2d 632 (Fla. 1st DCA 1972) (emphasis added). This standard is not measured merely by whether a reasonably prudent person would have published the statements or further investigated their veracity before publication. *Demby*, 667 So. 2d 350. Instead, Comins must show that Van Voorhis in fact knew his publications to be false, or had serious doubts as to his statement's truth. *Id.*; *accord Coleman v. Collins*, 384 So. 2d 229 (Fla. 5th DCA 1980). Nothing in the record supports such a conclusion. In fact, the opposite is true. (R 607-608; 610:4-11; 652-653)

The actual malice standard is a high bar that Comins cannot satisfy:

> Actual malice in a libel action is more than a mere negligent error. **The plaintiff must prove that the publication involved was deliberately falsified or published recklessly despite the publisher's awareness or probable falsity**. Investigatory failures alone were held insufficient to satisfy this standard.

Gibson, 263 So. 2d at 637 (emphasis added). Where there is no evidence that allegedly defamatory statements are actually false, or made with reckless disregard for the truth, the plaintiff's claim must fail as a matter of law. *Times Publishing Co v. Huffstetler*, 409 So. 2d 112 (Fla. 5th DCA 1982).

In Florida, courts use a three-part test to identify public figures. *Della-Donna v. Gore Newspapers Co.*, 480 So. 2d 72, 77 (Fla. 4th DCA 1986). "Under this test the court must determine that there is a public controversy; ascertain that the plaintiff played a sufficiently central role in that controversy; and find that the alleged defamation was germane to the plaintiff's involvement in the controversy." *Id.* (quoting *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 741 (D.C. Cir. 1985)).

It is possible, in fact frequent, for a person to become an "involuntary public figure." *Gertz*, 418 U.S. at 345; *Dameron*, 779 F.2d at 742 (plaintiff became embroiled, through no desire of his own, in an ensuing controversy,

becoming well known to the public in this one very limited connection.), *accord Della-Donna,* 489 So. 2d at 77.

For the purposes of the dog-shooting incident, a demonstrably public event, Comins is a public figure. (R 1238-1240; 1082-1082). The international media seized upon the story. (R 128-132; 135-168) An army of citizens, unprompted, formed anti-Comins groups on Facebook, calling even more attention to this event and to Comins himself (R 184-189). Scores of unknown individuals left comments on Van Voorhis' blog posts, expressing outrage over the YouTube video of Comins shooting the dogs. (R 425-433. ¶¶ 17-18.) These comments were identical to those left on message boards, comment sections, and all across the Internet. (R 191-199) The dog-shooting was unquestionably a "public event." See *Mile Marker* 881 So. 2d at 845.

The international media attention clearly shows that Comins became a public figure. Whether Comins sought that status is irrelevant; the attention, as a matter of law, makes him one. *See Gertz*, 418 U.S. at 342*; Ortega v. Post-Newsweek Stations, Fla., Inc.,* 510 So.2d 972, 975 (3rd DCA 1987)*; Della-Donna,* 489 So. 2d at 77. See also *Mile Marker*, 881 So. 2d at 845-46.

Given his public figure status, Comins must show actual malice in order to prevail. *Mile Marker*, 881 So. 2d at 846-47; *From*, 400 So. 2d at

58. The record establishes that he could never do so, and thus, as a matter of law, summary judgment is mandated. (R 607-608; 610; 652-653). The evidence in the record shows that Van Voorhis could not have acted with knowing falsity or a reckless disregard for the truth. Van Voorhis merely offered commentary on the facts of what occurred, while providing a corroborating video of the incident for any reader who wished to fact-check. (R 425-433; 1238-1240).

Even Comins admits that Van Voorhis engaged in protected "fair comment," as he relied primarily upon the reports of the incident from an established news source. (R 955). The Orlando Sentinel is an award-winning publication and the paper of record for Central Florida. Relying on such an established paper of record per se eliminates a finding of "reckless disregard." Van Voorhis had a right to rely upon this well-respected paper's recitation of the facts under the fair comment doctrine.

Van Voorhis merely added protected opinion to this fair comment. Every person is privileged to "express to other persons his fair comment and criticism on any public, governmental, political, social, or cultural matters." *Nodar v. Galbreath*, 462 So. 2d 803, 810 n. 5 (1984), citing *Gibson*, 231 So.2d 823; *White v. Fletcher*, 90 So.2d 129 (Fla.1956); *Abram v. Odham*, 89 So.2d 334 (Fla.1956); *McClellan v. L'Engle*, 74 Fla. 581, 77 So. 270 (1917).

State laws recognize "privileges to publish [allegedly] defamatory materials, including the privilege of fair comment." *Gertz*, 418 U.S. at 375. This principle affords "legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact." *Milkovich v. Lorain Journal Co*., 497 U.S. 1, 13 (1991), citing 1 F. Harper & F. James, Law of Torts § 5.28, p. 456 (1956).

Comins could never meet the burden of showing Van Voorhis acted with knowing falsity or reckless disregard for the truth. Nothing in the record supports such an argument, but the record amply supports the opposite conclusion.

2. Even if Van Voorhis' Statements Are Construed As Statements of Fact, They Are Not Defamatory

Even if this Court interprets Van Voorhis' commentary as "statements of fact," they still would not be defamatory. Van Voorhis' statements were, by all accounts, proven true by the evidence in the record. (R 425-433; 1238-1240; 1016-1045) Even if Comins can point to isolated inconsistencies, they would not render Van Voorhis' articles defamatory. Minor factual inconsistencies and embellishments do not convert a statement that's "substance or gist conveys essentially the same meaning [as the truth]" into defamation. *Smith v. Cuban Am. Nat'l Found.,* 731 So. 2d 702, 705-06,

(Fla. 3d DCA 1999), *rev. denied*, 753 So. 2d 563 (Fla. 2000). In *Cuban Am. Nat'l Found.*, the court held that it must consider "all the words used," and not merely a particular sentence or phrase. 731 So. 2d at 705.

There can be no argument that without a false statement of fact about another, any claim for defamation must fail. See, e.g., *Linafelt v. Beverly Enterprises-Florida, Inc.*, 745 So. 2d 386, 388 (Fla. 1st DCA 1999); *Cuban Am. Nat'l Found*., 731 So. 2d at 705; *Valencia v. Citibank Int'l*, 728 So. 2d 330 (Fla. 3d DCA 1999). Accordingly, if Mr. Van Voorhis' statements are true, they are not actionable. See *Linafelt*, 745 So. 2d at 389 ("However, the statement was true. Accordingly, appellant's claim for defamation must fail.")

Further, even if Van Voorhis' statements were merely **substantially true**, then Comins' claims still fail, as isolated and cherry-picked errors do not transform an otherwise protected report into a defamatory one. *Cuban Am. Nat'l Found*., 731 So. 2d at 705-06 (falsity only exists if the publication is *substantially* and *materially* false, not just if isolated facts are *technically* false). A "statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'" *Cuban Am. Nat'l Found.* citing *McCormick v. Miami Herald Publ'g Co*., 139 So. 2d 197, 200 (Fla. 2d DCA 1962). *See also*

Early v. Palm Beach Newspapers, 354 So. 2d 351, 352 (Fla. 1977); *Woodard v. Sunbeam Television Corp.*, 616 So. 2d 501, 503 (Fla. 3d DCA 1993); *Bishop v. Wometco Enters., Inc*., 235 So. 2d 759 (Fla. 3d DCA 1970); *Hill v. Lakeland Ledger Publ'g Corp*., 231 So. 2d 254, 256 (Fla. 2d DCA 1970); *Hammond v. Times Publ'g Co*., 162 So. 2d 681, 682 (Fla. 2d DCA 1964).

Although Comins does not truly ever focus on or identify what he believes to be factually false, if we engage in that exercise for him, we find that any statements of fact in Van Voorhis' articles are true, or substantially true. On his blog, Van Voorhis repeated facts that were already adduced and reported by several mainstream media sources. (*See* R 425-433) Numerous articles reported that Comins continued shooting the dogs after they were down and the dog owner began screaming pleas for Comins to stop shooting. (R 128-132; 135-168) The video available on Van Voorhis' blog supports these accounts. (R 1238-1240) These outlets also reported that the dogs were visibly wearing collars – a sign of domestication, belying Comins' claims that he was shooting at "wolves" in central Florida. (R 128-132; 135-168) Again, the audio portion of the video supports this, as onlookers, who were much farther away than Comins, audibly recognized that the dogs were domestic pets. (R 1238-1240)

Detectives who participated in Comins' criminal investigation and trial later confirmed these media reports. (R 1016-1045). According to Orange County Sheriff's Department reports by Deputy Sheriff Edward White and Deputy Norma Waterman, people watching the dog-shooting spectacle were enraged, even talking about killing Comins, before Van Voorhis even heard of the event (let alone wrote about it). (R 1019, 1024)

To add fuel to the fire, once the authorities arrived, they were forced to disperse an "irate and belligerent" crowd that gathered as a reaction to Comins' depraved and dangerous actions. (R 1024; 128-132; 135-168) Witnesses testified that the dogs never attacked the cattle. (R 1016-1045; 128-132; 135-168) Nonetheless, the record is clear that Comins shot them, repeatedly, even after the dogs' owner approached him and the dogs were incapacitated. (R 128-132; 135-168; 1238-1240)

Orange County Sheriff's Department Detective Richard Broxton, assigned to investigate the case, corroborated both the media and Van Voorhis' account of events. (R 1044) After interviewing witnesses and reviewing the incident's video, Broxton affirmed that Christopher Butler approached Comins and appeared to be the owner of the dogs. (R 1044) Broxton further noted that Comins continued to fire after Butler arrived on scene and began holding the first dog.

> [Comins] had turned his back on the second dog, placed his gun into his right back pocket and walked eleven steps away from the dog. [Comins] then turns around, pulls his gun and fires the seventh (7) shot when the dog attempts to stand up. … Turning around to shoot the second dog … was unnecessary per Florida State Statute 828.12 – Cruelty to Animals. R 1044

The Orange County Sheriff's Department Incident Report supports Van Voorhis' version of the facts and Van Voorhis' opinions as consistent with the official report. (R 1016-1045) The report shows that Comins, rather than going home for a weapon, simply got out of his car with a handgun and immediately began shooting at the dogs. (R 1017) Even if this is untrue, Mr. Van Voorhis was under no obligation to go beyond the official police report, the mainstream media coverage, and the video of the incident before editorializing on the event. *Woodard*, 616 So.2d at 502.

Van Voorhis' statements enjoy immunity as a fair report of public proceedings. Even if all of these primary factual sources were wrong, Van Voorhis has a privilege to rely upon them under the fair comment doctrine. *Woodard*, 616 So.2d at 502 ("if a report of a public official is accurate or a fair abridgement, an action cannot constitutionally be maintained … for defamation."). A fair and accurate report of public proceedings – including legal proceedings – are privileged, and cannot serve as the basis for a defamation action. *Huszar v. Gross*, 468 So. 2d 512, 516 (Fla. 1st DCA

1985) (affirming dismissal of complaint alleging defamation based on fair and accurate report of official proceedings). With respect to police reports regarding Comins' attack on the dogs, this Court has recognized that official records fall within the ambit of Florida's fair report privilege. *Carson v. news-Journal Corp*., 790 So. 2d 1120, 1121 (Fla. 5th DCA 2001). Like the present case, the plaintiff/appellant in *Carson* claimed the defendant/appellee's statements were not fair and accurate reports of public records. *Id*. Affirming the circuit court's successive dismissal of Carson's complaints, however, the appellate court held that the News-Journal fairly and accurately reported on official records relating to Carson's termination, despite Carson's claims of defamation arising from the paper's reporting on only selections from his employment files. *Id*. at 1122. The Court held that the paper made a fair and accurate report. *Id*.

So long as a report of an official proceeding or report is accurate, the speaker's report is privileged against liability for defamation. This is the case even if the underlying report or proceeding contains factual inaccuracies or is even defamatory itself. *See Ortega v. Post-Newsweek Stations, Florida Inc*., 519 So. 2d 972, 975 (Fla. 3d DCA 1987), *citing* Restatement (Second) of Torts § 611 (1976). So long as the contents of such records are published truthfully and correctly, an author has a right to

publish the information. *Shiell v. Metropolis Co*., 102 Fla. 794, 806 (Fla. 1931), citing *Abraham et al. v. Baldwin*, 52 Fla. 151, 154 (Fla. 1906).

Van Voorhis' statements are neither untrue nor manufactured, but a reiteration of the narrative that began with the observations of eyewitnesses and law enforcement, continued in the media, and are further supported by an eyewitness video. (R 1238-1240) Van Voorhis' statements are supported by official records and first-hand accounts, the public record, police reports, and other news stories. In light of the evidence available, the veracity of Van Voorhis' statements cannot be questioned, even when considering his Constitutionally protected editorializing. All of Comins' claims for defamation must fail.

3. Comins Has Produced No Evidence of Any Damages Proximately Caused by Van Voorhis' Defamation. In Fact, He Produced the Opposite.

Although Comins claimed to suffer harm due to Van Voorhis' statements in *Public Intellectual*, he failed to produce any evidence of damages arising from the statements. In fact, the evidence Comins produced tended to indicate that, if any harm did occur, it was from an alternate source who Comins also sued for defamation (R 1203-1213), thus precluding Comins from prevailing against Van Voorhis. Even at his deposition,

Comins was unable to even claim a shred of damage once placed under oath. (R 1144; 1151) He testified that the articles changed nobody's opinion of him. (R 1149:21-1151:11; 1169:23-1170:8; 1178:25-1182:4) This alone mandates judgment as a matter of law. See *Cuban Am. Nat'l Found*., 731 So. 2d at 705.

4. Comins' Refused to Mitigate Any Damages

Part of the purpose of 770.01 is to help mitigate damages. Despite Comins' refusal to comply with 770.01, Van Voorhis tried to give him the opportunity to mitigate nonetheless. When this case was first filed in May of 2009, Van Voorhis offered to let Comins edit his publication as Comins saw fit, and to delete any portions of the article that Comins found objectionable. (R 442) With that goal in mind, on June 3, 2008 the parties agreed to stay the proceedings with the understanding that Comins would communicate to Van Voorhis which sections of the article he would like removed. (R 442) More than seven months passed, during which time Comins failed to take advantage of the opportunity to identify "defamatory" passages and request their removal. Then, in January of 2010, Comins unilaterally decided that he would insist upon pressing the case forward. While this could not have excused Comins' failure to adhere to 770.01, it likely would have rendered it unnecessary to litigate the entire case. But,

this is a SLAPP suit. Thus, such a mitigated resolution is counter to its goals. Comins' refusal to mitigate should tend to show that his refusal to send a 770.01 notice was no accident; it was by design. Accordingly, even if he had shown a shred of evidence of damage, this shows that any such damage was largely, if not entirely self-inflicted.

iii. Van Voorhis' Statements Did Not Tortiously Interfere with Comins' Business Relationships

Van Voorhis' exercise of his free speech rights did not interfere with Comins' business relationships, much less tortiously do so. To prevail on a tortious interference claim, Comins must prove four elements: 1) existence of a business relationship; 2) Van Voorhis' knowledge of the relationship; 3) intentional and unjustified interference with that relationship by Defendant, and; 4) damages as a result of that relationship's breach. *Tamiami Trail Tours, Inc. v. Cotton*, 463 So. 2d 1126, 1127 (Fla. 1995); *Linafelt*, 745 So. 2d at 389.

1. Comins Cannot Masquerade His Defamation Claim As One for Tortious Interference

Florida law does not accommodate multiple causes of action arising from a single wrongful act, and accordingly is hostile to Comins' disguising of a tortious interference claim from unmeritorious defamation causes of

action. In cases addressing the scenario presented in this case – a plaintiff claiming defamation and basing a claim of tortious interference with business relations upon that supposed defamation – Florida precludes a plaintiff from seeking relief on the tortious interference claim. *Orlando Sports Stadium*, 316 So.2d at 609; *see Easton v. Weir*, 167 So.2d 245 (Fla. 2d DCA 1964) (holding that a single wrongful act gives rise to only a single cause of action). The single action rule applies to tortious interference claims like the one in this case.

In *Orlando Sports Stadium*, for example, the plaintiff filed suit against a newspaper for defamation and tortious interference, alleging that the articles concerning the plaintiff were defamatory. 316 So. 2d at 608. The appellate court found that the defamation and tortious interference claims were essentially the same because they were based on the same articles and because the "thrust" of the complaint was that these articles were injurious to the plaintiff. *Id*. at 609. The extraneous tortious interference claim was "nothing more than separate elements of damage flowing from the alleged wrongful publications." *Id*. They were, in fact, simply restated defamation claims. Accordingly, the court dismissed the tortious interference claim because the plaintiff failed to comply with the pre-suit notice requirements applicable to defamation claims. See Fla. Stat. § 770.01. The court

explained that a "[a] contrary result might very well enable plaintiffs in libel to circumvent the notice requirements ... by the simple expedient of redescribing the libel action to fit a different category of intentional wrong." *Orlando Sports Stadium*, 316 So. 2d at 609. (internal quotation marks omitted).

Comins must establish an additional, distinct action that is not embodied within the defamation causes of action to bring a tortious interference claim. Florida courts anticipated that plaintiffs would recast their defamation claims as tortious interference in order to avoid the pre-suit notice requirements of Fla. Stat. § 770.01 and have interpreted the single publication rule to prevent such gamesmanship. *Orlando Sports Stadium*, 316 So.2d at 609.

The trial court's disposition of the underlying defamation claim is not required to preclude the tortious interference claim from being based upon it. *Ovadia v. Bloom*, 756 So. 2d 137, 141 (Fla. 3d DCA 2000); *Orlando Sports Stadium*, 316 So.2d at 609. Even when a court does not dispose of a defamation claim, the single publication rule prohibits multiple instances of liability arising from the same instance of speech. *Trujillo v. Banco Central del Ecuador*, 17 F. Supp. 2d 1334, 1339 (S.D. Fla. 1998); *accord Callaway Land & Cattle Co., Inc. v. Banyon Lakes C. Corp.*, 831 So.2d 204, 208 (Fla.

2d DCA 2002) (finding that in Florida, a single publication gives rise to a single cause of action).

The single publication rule bars Comins' tortious interference claim as a matter of law, as it is based on nothing more than Van Voorhis' statements – the center of Comins' defamation claims. Comins never alleged nor introduced a single additional fact, beyond those duplicative of his defamation claims, to support a claim for tortious interference. Just as numerous Florida courts have held before, this is impermissible under the single publication rule, and the cause of action should be resolved in Van Voorhis' favor as a matter of law. *Orlando Sports Stadium*, 316 at 609; *see Easton*, 167 So.2d 245.

2. Van Voorhis' Conduct Was Neither Intentional Nor Unjustified

When analyzing whether a defendant's conduct is an intentional interference with a plaintiff's business relationship, courts consider the following factors:

> 1) the nature of the actor's conduct;
> 2) the actor's motive;
> 3) the interests of the other with which the actor's conduct interferes;
> 4) the interests sought to be advanced by the actor;
> 5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other;
> 6) the proximity or remoteness of the actor's conduct to the

interference; and
7) the relations between the parties.

Seminole Tribe v. Times Publ'g Co., 780 So. 2d 310, 315 (Fla. DCA 2001); *Smith v. Emery Air Freight Corp.*, 512 So. 2d 229, 230 (Fla. 3d DCA 1987); *McCurdy v. Collis*, 508 So. 2d 380, 383 (Fla. 1st DCA 1987). Central to this determination is whether the alleged interference is improper or not under the circumstances of the case. *Seminole Tribe*, 780 So. 2d at 315.

In *Seminole Tribe*, the court found that a critical newspaper's statements did not improperly and unjustifiably interfere with the tribe's business relationships. *Id*. at 318. That court balanced the business, social, and political concerns represented by the plaintiff's and defendant's respective activities. *Id*. at 316-17. Similarly, in *Smith*, the court held that the defendant's motion for directed verdict should have been granted as a matter of law. 512 So. 2d at 230. The defendant's exclusion of the plaintiff from the defendant's workplace was justified under the circumstances and served the purpose of preventing workplace altercations, rather than depriving the plaintiff of a business advantage. *Id*.

The circuit court would have properly reached the same conclusion as its appellate parents in this case. Van Voorhis' conduct was premised on

passing on news and opinion to readers of his blog, rather than instigating or leading a letter-writing campaign or other conduct intended to harass those with whom Comins had a business relationship. Van Voorhis' motive was to raise awareness of Comins' activities, as reported by various news outlets and seen on YouTube. (*See* R 128-132; 135-168) Van Voorhis advanced the compelling interests of freedom of speech and distribution of information, allowing others to see and discuss Comins' newsworthy shooting incident, and furthered the interests of society as a whole in debating current events (R 425-433)

Comins' business interests are unrelated to this incident. Neither of Van Voorhis' June 2008 blog posts refer to Comins' business relationships. (R 425-433) Van Voorhis' blog addressed politics and current events, and bore no relation to Comins' professional livelihood. Prior to Comins suing Van Voorhis, the parties had no relationship. (R 123) Van Voorhis was aware of Comins only through Internet news reports of Comins' dog-shooting, which Van Voorhis discussed on his blog. Comins has not produced any evidence of business disruption. In fact, he produced the opposite. (R 1144; 1149:21-1151:11; 1169:23-1170:8; 1178:25-1182:4)

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3. Van Voorhis' Statements Do Not Directly and Intentionally Interfere with Comins' Business Relationships

Van Voorhis' conduct lacks a direct relationship with any harm Comins' business may have hypothetically suffered, and thus cannot constitute tortious interference. In addition to being intentional and unjustified, tortious interference with business relationships must be direct – a causal source of business harm – and intentional. *Lawler v. Eugene Wuesthoff Mem. Hospital Ass'n*., 497 So. 2d 1261, 1263 (Fla. 5th DCA 1986); *Ethyl Corp. v. Balter*, 386 So. 2d 1220, 1224 (Fla. 3d DCA 1980).

As seen in *Lawler*, *indirect* business harm does not constitute the *direct* interference needed to sustain a tortious interference claim. 497 So. 2d at 1263. In *Lawler*, the defendant's termination of Lawler's staff privileges caused Lawler's business to suffer, as he could no longer offer the same level of service to his patients. *Id*. As seen in Record 425-433, Van Voorhis did not call for a boycott of Comins or seek any interference with his commercial relationships. Instead, Van Voorhis simply noted the simple existence of Comins' business connections. Comins has no evidence, nor even argument, that Van Voorhis took steps to harm his business relationships, such as making calls to his business associates or; instructing, cajoling, or inducing others to do so. Even if others did so, Comins failed to

produce any evidence of Van Voorhis' involvement in or connection to such activities, or any direct relationship between Van Voorhis' actions and Comins' alleged harm.

The 3d DCA's language in *Balter* summarizes Van Voorhis' situation neatly: "There is no such thing as a cause of action for [tortious] interference which is only negligently or consequentially effected." 386 So. 2d at 1224. Even if Van Voorhis' reporting on Comins were *correlated* with others' interference in Comins' business relations or the natural degradation of those relationships, Van Voorhis bears no direct responsibility for the actions of third parties or Comins' business associates, just as the hospital in *Lawler* bore no liability for a loss of business arising from ending Lawler's staff privileges. 497 So. 2d at 1263. Under Comins' logic, every unfavorable online review of a restaurant or business service that would lead current or potential customers to view it unfavorably would be a basis for a tortious interference claim. Similarly, under Comins' view, third parties such as Van Voorhis could be held liable for unrelated business losses. The law finds such a result intolerable.

Nothing in the record shows that *Public Intellectual* ever affected Comins' business relationships. On the contrary, Comins provides testimony that nobody who did business with him changed their impression

of him as a result of the articles. (R 1144; 1149:21-1151:11; 1169:23-1170:8; 1178:25-1182:4) If there was no interference, then how could there be *tortious* interference? As a matter of law, Van Voorhis' statements cannot constitute a tortious interference, and the circuit court would have properly extended summary judgment in Van Voorhis' favor on this ground.

4. Comins Did Not, and Cannot, Submit Evidence Showing a Proximate Cause Between Van Voorhis' First Amendment-Protected Speech and Comins' Alleged Damages

Comins argues that Van Voorhis' statements harmed his business relationships but made no specific allegations as to which relationships or interests were impaired. Moreover, Comins' opposition to Van Voorhis' motion for summary judgment (R 949-973) failed to establish any facts supporting a finding that Van Voorhis' speech is damaged his business relationships. Comins claimed that Van Voorhis injured his business relationships with NASA and Disney through his blog, but then later admitted that he had no such business relationships with either of those companies. (R 1137:12-1138:2) Van Voorhis neither knew of nor identified Comins' relationship with the contractors with whom Comins did do business. (R 123; 425-433) Further, nobody changed their view of Comins as a result. (R 1144; 1149:21-1151:11; 1169:23-1170:8; 1178:25-

1182:4) Thus, Van Voorhis' statements could not have interfered with those relationships. Moreover, Comins freely admitted that Van Voorhis' statements did not affect the way his friends, family members, and colleagues perceived him. (R 1149:21-1151:11; 1169:23-1170:8; 1178:25-1182:4)

The problems with Comins' theory of harm do not end there. Comins could not identify a single client that ceased doing business with him based on the entire dog-shooting incident, including its subsequent criminal trial, let alone from Van Voorhis' statements or their after-effects (R 1144:23-1148:21) Comins was not even aware of Van Voorhis' statements until a competitor, Fast Fab, sent a hyperlink to Van Voorhis' commentary to Comins' customers. (R 1098:22-1100:19) To the extent any harm existed, Comins cannot offer proof that it arose from Van Voorhis' statements, or he would have done so.

Around this time, Christopher Butler, the owner of the dogs, allegedly waged an online campaign targeting Comins' known clients and encouraging them to stop doing business with Comins. (R 1132:17-1133:22) Although Comins does not know exactly when this alleged interference occurred, it led him to pursue Butler in *Comins v. Butler*, Case Number 2008-CA-025248-O, a civil action similar to this one. (R 1203-1213) The

fact that Comins believed Butler's specific and direct actions caused his business harm during the timeframe in which Comins accuses Van Voorhis of doing the same makes it impossible for Comins to show Van Voorhis was responsible for the alleged harm. Further complicating matters, Comins could not articulate the form of this harm in any way. (R 1144:23-1148:21; 1149:21-1151:11; 1169:23-1170:8; 1178:25-1182:4)

More than Comins' suspicion or mere allegation of harm to his business is needed for his tortious interference claim to prevail. The Florida Supreme Court has previously held that:

> As a general rule, an action for tortious interference with a business relationship requires a business relationship evidenced by an actual and identifiable understanding or agreement which in all probability would have been completed if the defendant had not interfered.

Ethan Allen, Inc. v. Georgetown Manor, Inc., 647 So.2d 812, 815 (Fla. 1995); *Bortell v. White Mountains Ins. Group Ltd.*, 2 So.3d 1041 (Fla. 4th DCA 2009) (finding that plaintiff failed to allege a business relationship that, in all likelihood, would have been completed but for the defendants' conduct).

Thus, the inquiry as to whether a business relationship existed is not a factual one, as Comins claims, but a legal one. Based on the record evidence, summary judgment for Van Voorhis is appropriate on this claim.

Comins failed to show or identify any specific business relationships that were impaired by Van Voorhis' statements, and how they were damaged. Instead, Comins testified to facts that make it impossible, as a matter of law, for Van Voorhis to have committed it. (R 1144; 1149:21-1151:11; 1169:23-1170:8; 1178:25-1182:4)

CROSS-APPEAL ARGUMENT

The basis for this Cross-Appeal is the denial by the trial court of Defendant's Motion for Sanctions Pursuant to Fla. Stat. § 57.105 for Comins' counsel's misrepresentation to the trial court, which should have been corrected. The trial court also found that Comins' argument pertaining to an alleged waiver of Van Voorhis' Section 770.01 rights was found to be "without factual or legal basis." (R 1246) Given 57.105's purpose, this creates an independent basis for a fee award under the statute. However, the material misrepresentation, coupled by a refusal to correct the record, is the most egregious justification for sanctions.[33]

On August 25, 2010, Mr. Van Voorhis brought a Motion to Dismiss in this action, on the grounds that Plaintiff failed to provide pre-suit notice. At the hearing, the Court acknowledged that pre-suit notice was required. (R 1376-1400) Most specifically, the court inquired, "**Mr. Harne, how do you get around the *Mancini* case**?" (R 1382:25-1383:1)

[33] The First DCA tends to support the view that 57.105 sanctions are particularly appropriate when a litigant uses abusive tactics in order to suppress free speech. See *Demby,* 667 So. 2d 350, *Daniels v. Patterson,* 751 So. 2d 678 (Fla. 1st DCA 2000). The Fifth DCA should take this opportunity to align itself with the First DCA, and place a stronger firewall between frivolous and abusive SLAPP suits and free expression in this state.

In the face of the Court's clear understanding that pre-suit notice was required, Plaintiff's counsel claimed that he had merely forgotten to allege pre-suit notice, and that proper notice had been "served." (R 1383:2-14)

> MR. HARNE: Well, Your Honor, we did serve presuit notice, so there might be a little bit of confusion here as to whether the conditions preceding were actually complied with.
>
> We served Mr. Van Voorhis with notice on March 23rd, 2009. Now, that may not have been properly pled, but to the extent it wasn't, we would request leave to amend to allege that we have complied with all conditions precedent.
>
> We did have communications with Mr. Van Voorhis' counsel as well, several months back wherein we confirmed with him that we did serve this notice on him March of 2009, prior to filing suit.

(R 1383:2-14)

This assertion was and is verifiably false. While a letter was sent in March, it did not even mention defamation. (R 1275-1276) Noting the deficiency, counsel for the defendant pointed this out to Mr. Harne. (R 1332) Nevertheless, Comins refused to focus his claims as required.

Since the court was unaware of Mr. Harne's material misrepresentation, though, and took him at his word as a member of the bar, the court gave Plaintiff leave to amend his complaint for the purposes of alleging proper pre-suit notice. Comins amended the Complaint, and the parties engaged in nearly 10 months of further litigation – all of which

would have been avoided had Mr. Harne not falsely lead the court to believe that a notice in compliance with 770.01 had, in fact, been served on Van Voorhis.

It is unknowable with certainty whether Harne intended to mislead the Court or merely misspoke. This representation by counsel may have been a misstatement under the pressure of oral argument, or it may have been a tactical maneuver. In either case, the outcome was the same, as Mr. Van Voorhis suffered under the delayed resolution of the case, on the same exact grounds it would have ended but for the misrepresentation. Van Voorhis incurred nearly a year's worth of additional attorney's fees until the truth of Harne's representation could be tested on summary judgment. In any event, on October 13, 2010, Van Voorhis' attorneys sent a letter to Plaintiff's counsel, explaining Mr. Harne's error, as well as his ethical obligation to correct it. (R 1324-1327) At that point, knowing that he had likely misled the court, Harne had an obligation to correct the record. He refused to do so.

"The purpose of section 57.105 is to discourage baseless claims, . . . and sham appeals in civil litigation by placing a price tag through attorney's fees awards on losing parties who engage in these activities." *Whitten v. Progressive Cas. Ins. Co.*, 410 So.2d 501, 505 (Fla. 1982). There can be no better example of a case justifying sanctions under Section 57.105 than this

one – a case in which an attorney misled the court about a dispositive and threshold issue, resulting in nearly a year of extra litigation and attorneys' fees. If this case does not warrant sanctions under Section 57.105, then the statute may as well not exist.

After finding that a misrepresentation (intentional or otherwise) had in fact been made by Comins' counsel (R 1243-1246), the trial court abused its discretion by not requiring an affirmative showing of good faith by Mr. Harne before ruling that Van Voorhis should bear the financial burden of that misrepresentation, not Harne and Comins. *See Horticultural Enterprises v. Plantas Decorativas, LTDA,* 623 So. 2d 821, 822 (Fla. 5th DCA 1993) ("Fees must be assessed against counsel as provided by statute unless the attorney can show good faith. This places the burden where it should be."). Instead, the court ostensibly relied on statements made at the sanctions motion hearing, concerning Mr. Killgore's years of practice in Central Florida, and the Judge's personal opinion (without any stated basis) that he did not believe that Mr. Harne *intentionally* misled the court – none of which constitutes evidence of good faith. What it demonstrates is that justice was set aside in favor of what appears to be a judge's discomfort with offending a long-time member of the local bar – to Mr. Van Voorhis' economic detriment.

A. Standard of Review

The standard of review from an Order denying a Motion for Attorneys' Fees and Costs is abuse of discretion. *Dept. of Transportation v. Kisinger Campo & Assoc.*, 661 So. 2d 58, 59 (Fla. 2d DCA 1995). However, Florida courts tend to support a lighter standard under 57.105(1) in a libel case dealing with a matter of public interest. In *Demby*, 667 So. 2d 350 and *Daniels*, 751 So. 2d 678, the First DCA reversed trial court decisions denying recovery of attorney's fees under section 57.105(1). Those two cases, like this one, were appeals from orders denying a recovery of attorney's fees at the conclusion of libel suits by public figures in matters of public interest when the plaintiff's case was found to be baseless.

B. Section 57.105 Mandates a Fee Award For Misrepresentations to the Court

Under Florida Statute § 57.105, a party is required to disclose or withdraw a claim or defense, which is not supported by material facts:

> (1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:
>
> (a) Was not supported by the material facts necessary to establish the claim or defense; or
>
> (b) Would not be supported by the application of then-existing law to those material facts.

In the present case, Comins' representation to the court that Van Voorhis had been "served" with pre-suit notice, which the court relied upon, was clearly inaccurate. After Van Voorhis' counsel brought this deficiency to Mr. Harne's attention, Comins and his counsel continued to refuse to disclose to the court that Comins did not, in fact, serve Van Voorhis with pre-suit notice. Even if Comins believed that the March 23, 2009 letter sent to the University of Florida was sufficient in terms of content[34], it was not served on Van Voorhis. Mr. Harne's misrepresentation was provably inaccurate. This error should have been corrected after it was brought to Harne's attention by the October 13, 2010 letter. (R 1324-1327) The refusal

[34] Given the content of the letter found at R 1275-1276, no credible argument can be made that he held such a belief.

to do so mandates sanctions, even if the ultimate frivolity of the underlying suit does not.

A trial court abuses its discretion when it fails to grant Section 57.105 sanctions where the opposing party's position is meritless and causes the movant to incur unnecessary fees. *See, e.g., Forfeiture of: 1997 Jeep Cherokee v. City of St. Petersburg*, 898 So. 2d 223 (Fla. 2d DCA 2005). In *Jeep Cherokee*, the City of St. Petersburg seized the vehicle of a resident after pulling her over for an expired tag. *Id.* The arresting officer determined that the vehicle's driver had been twice convicted for driving while her license was suspended. *Id.*

The City filed a complaint for forfeiture, which alleged that the Jeep was seized because it was used in the commission of a felony. The defendant filed her answer to the forfeiture complaint and asserted a claim for attorney's fees under Section 57.105. She pointed out that she had not been previously convicted of a misdemeanor, or criminal offense, of driving with a suspended license, so the predicate for seizing the vehicle was not met. This was supported by certified documents relating to the driver's records.

The vehicle owner moved for summary judgment, and before the hearing the City dismissed its forfeiture complaint. The plaintiff moved for

her fees under Section 57.105, and the trial court denied the motion. The Second Circuit Court of Appeals reversed, holding that had the City simply done a simple traffic records search before filing the complaint, or at any time after that, it would have revealed that the driver had not been, in fact, arrested for driving while her license was suspended, and therefore attorneys' fees should have been granted:

> Section 57.105(1) allowed the court to award a reasonable attorney's fee when the losing party knew or should have known that a claim was not supported by the material facts necessary to establish the claim. A showing of bad faith is not required for an award of attorney's fees under that statute.
>
> Here, the City failed to verify that the predicate misdemeanor convictions existed to support the felony offense. If the City had simply reviewed Pinellas County traffic records before filing its complaint, it would have known that its claim against Allen was unsupported by the material facts. Accordingly, because the City should have known that the material facts did not support its forfeiture action, we hold that Allen is entitled to an award of attorney's fees under section 57.105(1).

Forfeiture of: 1997 Jeep Cherokee, 225; *see also Andzulis v. Montgomery Road Acquisitions, Inc.*, 831 So. 2d 237 (Fla. 5th DCA 2002) (attorneys' fee award was proper after finding no justiciable issue raised by the complaint"); *Horticultural Enter.,* 623 So. 2d 821 (same).

Similarly, in *Gahn v. Holiday Property Bond, Ltd.*, 826 So. 2d 423 (Fla. 2d DCA 2002), the court held that a trial court abused its discretion in

refusing to grant Section 57.105 sanctions where facts disclosed during discovery made clear that the defendant's defense was completely unmeritorious, so that it should have withdrawn its Motion to Dismiss rather than pursue it.

In *Gahn*, the plaintiffs brought an action claiming that a timeshare development violated city and zoning codes. The timeshare company moved to dismiss the complaint, arguing that there was no jurisdiction. After discovery proceeded, it became clear that there was, in fact, jurisdiction.

The plaintiffs brought the facts to the defendant's attention and invited the defendant to withdraw its motion to dismiss, but the defendant delayed doing so for a significant period, so that the plaintiffs were forced to incur additional discovery, fees, and costs. The plaintiffs moved for attorney's fees and costs based upon the defendant's unmeritorious position and refusal to withdraw the motion.

The trial court in *Gahn* denied the motion for attorneys' fees, and the Second Circuit Court of Appeal reversed, holding that when it became clear that there was no jurisdiction, the defendant should have withdrawn the Motion to Dismiss and the failure to do so warranted the imposition of sanctions:

> In view of these facts, we find that Appellees' motion to dismiss was not supported by material facts or the application of existing law to these material facts, particularly after these facts, and others, were disclosed during discovery. While lack of personal jurisdiction may have initially appeared to be a meritorious defense, facts disclosed during discovery made Appellees' jurisdictional challenge completely untenable. Nevertheless, Appellees maintained their position and rebutted an invitation to withdraw the motion to dismiss before Appellants sought attorney's fees and costs related to the motion. Section 57.105 now permits the merit of claims and defenses to be measured when the claim or defense is asserted, or anytime prior to trial. § 57.105(1); *Weatherby Assoc. v. Ballack*, 783 So.2d 1138, 1142 (Fla. 4th DCA 2001)("Although a claim may not have been frivolous when initially filed, failure to discharge a party when it becomes evident that there no longer is a justiciable claim or defense may subject a losing party to the penalties of section 57.105.").

Gahn, 429.

In the present case, Comins' counsel made a material misrepresentation to the trial court that he served Van Voorhis with pre-suit notice pursuant to Section 770.01. (R 1383:2-14) The trial court relied upon this representation and denied Van Voorhis' motion to dismiss. (R 1385:10-20) The ultimate basis of Van Voorhis' successful motion for summary judgment and the court's order granting the motion was that Comnis did not serve Van Voorhis with pre-suit notice. There can be no doubt from the considerable discovery and motion practice that occurred between denying the motion to dismiss and entering summary judgment that Van Voorhis was

forced to incur unnecessary expense and delay as a result of Comins unmeritorious and false position. Compounding this harm, the inaccuracy of Harne's misrepresentation was brought to his attention, in writing. (R 1324-1327; 1332) Regardless, Harne did nothing to correct that error with the court, when doing so would have prevented months of litigation and unnecessary expense.

C. Comins' Counsel Has Not Met His Burden.

Once the court found that Mr. Harne's statements to the court were inaccurate, which it did, Section 57.105 required that a reasonable attorney's fee must be awarded to Van Voorhis, since Harne's position was found to be "without factual or legal basis." (R. 1243-1246)

Plaintiff's counsel had the burden of showing his good faith in refusing to correct the record after misleading the trial court. *Andzulis*, 831 So.2d at 239; *Horticultural Enterprises*, 623 So.2d at 822. No evidence of good faith is of record. The only thing even close to an evidentiary showing presented by Mr. Harne – which is not an actual showing of "good faith" in this instance – was an unsworn statement by Mr. Harne's supervisor, Frank Killgore, during the sanctions motion hearing. The substance of Comins' showing of good faith was Mr. Killgore asserting his firm's 23-year reputation as attorneys and his purported reverence for the obligations of an

officer of the court. (R 1484:21-1485:5) Thereafter, Mr. Killgore proceeded to read into the record a written response to Defendant's letter of October 13, 2010, rehashing all of the substantive arguments that the trial court had already held to be without merit. (R 1488:24-1494:13)

The trial court expressly recognized that none of Mr. Killgore's statements addressed the issue at bar: whether Mr. Harne's material misrepresentation to the court that Defendant had been served with pre-suit notice was violative of Section 57.105. Nevertheless, the court did not require any evidentiary showing of affirmative good faith on the part of Plaintiff's counsel. Instead, the court substituted a standard of "intentional[] misleading" and found that Mr. Harne had not satisfied that invented standard. (R 1504:4-19)

Whether or not the statement was intentionally or negligently misleading, the fact of the matter is that Comins' counsel never provided a notice that complied with, or was intended to comply with, 770.01. Comins is here on appeal claiming that the statute does not even apply, that Van Voorhis waived the notice, or that the pre-suit correspondence was substantially in compliance with 770.01. These arguments support Van Voorhis' position that Comins' counsel knew that there was no 770.01 pre-suit notice. These are post-hoc arguments intended to avoid the harsh result

that occurred when Comins' counsel failed to acknowledge that strict compliance with 770.01 is required. It is at best disingenuous for Comins' counsel to argue that he had a reasonable belief at the time he made the representation to the court that a 770.01 pre-suit notice had been provided. He knew, or should have known, that the law required strict compliance with 770.01, and he was educated on that fact. (R 1324-1327; 1332) The suggestion that the March 2009 correspondence meets this standard is belied by the case law. Counsel was, or should have been, aware of this, and when viewed in this light, his representation to the Court is precisely the kind of vexatious litigation tactic that demands that the cost of litigation waste be borne by the responsible party. By not requiring a showing of good faith before denying Van Voorhis' motion for sanction, the trial court abused its discretion.

Accordingly, the trial court's order denying sanctions should be vacated. This matter must be further remanded with instructions to assess Mr. Van Voorhis' costs and fees incurred as a result of Mr. Harne's material misrepresentation.

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CONCLUSION

Comins dragged Mr. Van Voorhis through an unmeritorious and facially defective SLAPP suit for nearly four years. Comins has pursued this frivolous suit with unmeritorious tactics and failed to comply with the clear provisions of Section 770.01. Even if he had complied with the statute, his case would be without merit as a matter of fundamental defamation and First Amendment law.

Furthermore, Mr. Comins and his counsel's actions in pursuing this action were sanctionable. The trial court abused its discretion by placing the cost of their frivolous conduct on Mr. Van Voorhis instead of upon the properly responsible party. For this, and the above-stated reasons, summary judgment in favor of Mr. Van Voorhis should stand, the lower court's denial of sanctions under Fla. Stat. § 57.105 should be reversed, and the lower court should be required to impose the requested sanctions upon Mr. Harne and Mr. Comins.

Respectfully submitted this 14th day of November, 2012.

/s/ Marc J. Randazza

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 14, 2012, I electronically filed the foregoing with the Florida Fifth District Court of Appeal's online eDCA service. I have furnished a copy to the following via U.S. Mail:

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CERTIFICATE OF COMPLIANCE WITH FLA. R. APP. P. 9.210

I HEREBY CERTIFY that this brief complies in full with the font and formatting requirements of Fla. R. App. P. 9.210(a)(2). This brief has been rendered in Times New Roman at 14-point font.

/s/ Marc J. Randazza

Marc J. Randazza