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 VANVOORHIS,

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 CROSS-APPEAL REPLY

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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 failed to demonstrate good faith in refusing to correct the material misrepresentation; and

(V) Several months of attorneys' fees and litigation expenses could have been avoided had Plaintiff corrected the material misrepresentation.

SUMMARY OF CROSS-APPEAL ARGUMENT

Comins' counsel, Christopher Harne, made a material misrepresentation to the circuit court. Specifically, Harne told the court that Van Voorhis had been served with pre-suit notice under Section 770.01. This was not true. He refused to correct that misrepresentation. To try and rationalize it, instead of correcting it, he then persisted in a line of defense that was found to lack *both* factual and legal support. (R 1246) This conduct resulted in months of unnecessary litigation and costs for Van Voorhis. The trial court abused its discretion by placing the resulting financial burden upon Van Voorhis' shoulders, effectively rewarding the misconduct and penalizing its victim.

The circuit court abused its discretion by failing to impose sanctions. The ultimate issue before this Court is whether there should be repercussions for misrepresenting facts to a circuit court and failing to correct them, or if the costs of such improper conduct should fall on the innocent party. This Court's decision will either A) incentivize candor or B) reinforce the trial court's message that misconduct and dishonesty before Florida's circuit courts carries no consequences. This court's decision can do only one.

CROSS-APPEAL ARGUMENT

A. The Trial Court Abused its Discretion by Denying Van Voorhis' Motion for Sanctions.

The circuit court should have imposed sanctions under Section 57.105. Comins' counsel made a material misrepresentation and then refused to correct it. This resulted in the litigation continuing for an additional 11 months, and even through today. (R 1376-1400; 1249-1260) See *Fla. Stat*. § 57.105(1)(a) and 57.105(2). To try and evade consequences for the misrepresentation, Comins and his counsel adopted a baseless position within the litigation and maintained it until the case's conclusion. (R 1246) The circuit court declined to impose sanctions on Comins and his counsel despite 57.105's mandates and a failure to make a finding of a good faith basis for Comins' counsel's actions. This was an abuse of discretion and should be reversed. See *South Bay Lakes Homeowners Association, Inc. v. Wells Fargo Bank, N.A*., 53 So. 3d 1239 (Fla. 2d DCA 2011) (reversing a denial of 57.105 sanctions).

1. Harne's Lack of Candor Mandates Sanctions.

A lawyer is prohibited from knowingly making a false statement to a tribunal, or failing to correct the same. "A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Fla. Rule of Prof'l Conduct 4-3.3. The record clearly reflects that Attorney Harne violated this rule,

yet Mr. Van Voorhis is the one who had to pay the financial price for the violation. The misbehaving party should pay this price, not the innocent one. C.f. *Fla. Bar v. Kassier*, 730 So. 2d 1273, 1276 (Fla. 1998) ("Where the choice is between imposing costs on a bar member who has misbehaved and imposing them on the rest of the members who have not misbehaved, it is only fair to tax the costs against the misbehaving member").

The trial court found that Attorney Harne acted with a lack of candor. (R 1486; 1501-1502) The court was "troubled" by their conduct and representations. (R 1486:11-16; 1486:14-1487:9; 1501:6-1502:12) The Court's comments made it clear that this was no mere "harmless error." In the Cross Appeal Answer at 20-22, the Cross-Appellee argues that "Comins' counsel did not make a material misrepresentation to the court" and that "[the court] granted leave to amend without dictating what the contents of the amended pleading should be." However, the transcript of the proceedings makes it clear that Judge Kest interpreted Harne's statements literally and felt that the court had been misled.

> When I was told that "Your Honor, we did serve pre-suit notice," that suggested to the Court that notice was, in fact, given and it was served. And service means on the appropriate party, either through a designated agent. The places where you sent the notice would not be sufficient for service of process, and "serve" is a legal word. (R 1501:8-15)

The Court continued:

> Courts traditionally, especially ones of myself who have practiced for 40 years, I take an attorney by their word, and I don't question it at all. I don't have any doubt in my mind; and when you make statements that you have given notice and served it, I take that to mean in a legal sense, and you need to clarify. And things happen, I understand. In a hearing room, in a trial room, they happen. But when you get that and get a notice of this nature, or if you had never received Mr. Randazza's letter and you're thinking to yourself, maybe I was a bit strong about the way I represented, you need to notify counsel and the Court on that. (R 1501:25-1502:12)

The circuit court knew that Harne had made a material misrepresentation, but administered no greater sanctions than a simple caution. "*I'm not going to sanction under the 57.105 rule, but I'll caution Mr. Harne for future that this is a very, very close call for this Court and you have to be extremely careful.*" (R 1501, emphasis added) Despite the fact that Van Voorhis had shown that sanctions were appropriate, and none of the safe harbors under § 57.105(3) applied, the trial court improperly refused to grant monetary sanctions.

An analogous fact pattern occurred in *Opella v. Bayview Loan Servicing, LLC*, 48 So. 3d 185, 188 (Fla. 3d DCA 2010). In that case, an attorney made a material misrepresentation regarding service of process. The court rejected that position and referred the matter to the Florida Bar for discipline. In this case, while such a referral *may* be appropriate,[1] that outcome will not make Mr. Van Voorhis whole – only monetary sanctions will.

[1] Van Voorhis takes no position on this at this time.

In another similar case, an attorney was determined to have breached his duty of candor under Rule 4-3.3 when the attorney failed to advise a trial judge of a material issue upon it becoming that the judge was acting under a material misimpression. In that case, 57.105 sanctions were appropriate. *Forum v. Boca Burger, Inc*., 788 So. 2d 1055 (Fla. 4th DCA 2001), *reversed in part by* 912 So. 2d 561 (Fla. 2005). In this case, it was clear that the judge denied dismissal on the mistaken impression that notice was given. Harne refused to correct the misimpression that he created. Sanctions are appropriate, and they are appropriate against counsel. See *Andzulis v. Montgomery Road Acquisitions, Inc*., 831 So. 2d 237 (Fla. 5th DCA 2002) (attorney must act in good faith to avoid sanctions).

The circuit court made no findings required under Fla. Stat. § 57.015(3). The only evidence the Court considered in making its decision to waive sanctions was the unsworn testimony of Harne's supervisor, Frank Killgore. (R 1484-1485) His testimony was limited to *post hoc* rationalizations and an emotional appeal to the judge based on his putative standing within the local legal community. (R 1484-1485) This was apropos of nothing, but the political and emotional appeal was all the circuit court's denial of sanctions was based upon.

Given the circuit court's findings, it seems obvious that political considerations outweighed justice and equity. Comins failed to so much as *attempt* to adhere to Section 770.01, thus mandating dismissal of this case. Nevertheless,

Attorney Harne misrepresented to the circuit court that Comins had done so in a clear attempt to prolong the case, and the court knew it.

2. Comins' Defense to Sanctions Relies on Outdated Case Law, Rendering it Meritless.

Comins relies upon *Dep't of Transp. v. Kisinger Camp & Assocs.,* 661 So. 2d 58, 59 (Fla. 2d DCA 1995), to argue that meritless conduct is not automatically sanctionable. Appellant's Answer Brief to Cross-Appeal (hereinafter "Cross-Appeal Answer") at 32-33. *Kisinger* analyzed the 1991 version of Section 57.105. The statute has been materially revised since then. *Kisinger* is therefore inapplicable to the current version of 57.105. Comins' reliance on this case is misplaced. See *Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 570 (Fla. 2005) (explaining the scope of the 1999 revisions to 57.105).

The differences between the version of Section 57.105 analyzed in *Kisinger* and the current statute before the Court are striking. The 1991 version of Section 57.105 allowed for an award of attorneys' fees upon the court finding that "there was a *complete absence* of a justiciable issue of either law or fact raised by the complaint" (emphasis added). In contrast, the current, broader version of Section 57.105(1) requires that a court "shall" award reasonable attorneys' fees upon finding that the losing party or the party's attorney "knew or should have known that a claim" "was 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 those material facts." Similarly, Section 57.105(2) mandates fees when actions are taken for the purpose of unreasonable delay.

The current incarnation of Section 57.105 makes sanctions mandatory. "If in the circumstances of this case the rule of candor cannot be unflinchingly enforced under this 21st century version of section 57.105, then this freshly cast legislation is a vessel as empty as its predecessor was." *Forum v. Boca Burger, Inc.*, 788 So. 2d at 1062.

3. Comins Acknowledges That "Baseless" Cases, Such As the One He Presented to the Circuit Court, Are Sanctionable.

Comins' "baseless" positions are a proper basis for sanctions. *See* Cross-Appeal Answer at 19. Contradicting the circuit court's order, Comins states "no such finding [of baselessness] was made in this case." *Id.* This is demonstrably false. The circuit court rejected Comins' argument that Van Voorhis waived his right to notice under Section 770.01 "as without factual or legal basis" in its order granting Van Voorhis' motion for summary judgment. (R 1246) Despite this finding, Comins refuses to drop this position. The circuit court's characterization of Comins' theory meets the standard of baselessness warranting an award of attorneys' fees. Sanctions under Section 57.105 are appropriate on this independent ground as well.

4. Harne's *Post Hoc* Rationalizations Do Not Excuse His Conduct.

Harne tries to evade sanctions by claiming that Van Voorhis is not entitled to notice under 770.01. In large part, whether he is or not is irrelevant to the sanctions issue. Had Harne made that argument at the September 10, 2010, that legal issue could have been argued and decided at that time, the parties and court might still have litigated the appeal in chief – but without the burden of another 11 months of litigation, caused entirely by Harne's material misrepresentation. Harne did not deny that Van Voorhis was not entitled to notice at the September 10 hearing. (R 1376-1400) Instead, he conceded that Van Voorhis deserved notice, as he represented that Van Voorhis had been served with it.

Comins claims that his current position with regard to 770.01 has been consistent all along. "*The argument was, and continues to be, that the notice given should satisfy the statute under the circumstances*." Cross-Appeal Answer at 21 (emphasis added). However, this is not the case. If it were, Harne would have raised this theory at the September 10 hearing, instead of stating that the notice had been given. If he had, the case would have been dismissed on September 10. The court asked, "*Mr. Harne, how do you get around the Mancini case?*" (R 1382:25-1383:1) Had Harne been honest and said "we did not provide notice, but we feel

that we did not have to," the case would have ended immediately.[2] Instead, Harne misrepresented that notice was sent, and prolonged the litigation for nearly another year. The fact that Attorney Harne represented that Comins **had given notice** rather than arguing their current position – that Defendant's rights to pre-suit notice had been waived – demonstrates that they did not devise their current strategy until faced with the potential of paying sanctions to Van Voorhis.

Attorney Harne failed to articulate any position on the statute's coverage of Van Voorhis aside from claiming flatly that 770.01 notice was provided. (R 1383:2-10) As shown above, the court took him at his word. (R 1501-1502) This new argument did not appear in Comins' First Amended Complaint. (R 273-280) While the First Amended Complaint inserted new text in Paragraph 21 recounting communications with third parties (R 276-277), it did not include any tenets of their current stance (that defamation by implication makes 770.01 impossible, and anonymity triggers a waiver of 770.01 rights). Their current strategy emerged only after they received Van Voorhis' 57.105 letter. (R 1324-1327) Under threat of sanctions, Comins then filed a Second Amended Complaint, where this new rationalization made its first appearance. (R 351)

Trapped in his spiral of misstatements, Comins continues to invent new arguments as to why he did not wish to comply with Section 770.01. None of

[2] The circuit court held Comins' argument that Van Voorhis' entitlement to notice was "waived" to be without factual or legal merit. (R 1246)

them are availing. Comins' failure to comply with 770.01 compelled dismissal. *Mancini v. Personalized Air Conditioning & Hearing, Inc.*, 702 So. 2d 1376, 1377 (Fla. 4th DCA 1997), *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). Attorney Harne knew this and made a material misrepresentation, which he refused to correct. If the cost of his misrepresentation lies on Van Voorhis' shoulders, Section 57.105 may as well be deemed judicially repealed.

B. The Arguments Against Sanctions Based on the Appeal in Chief are Unavailing.

Cross-Appellee attempts to rehash the appeal in chief in an attempt to misdirect the cross-appeal. In an attempt to evade sanctions, Comins' counsel misrepresents not only the service of a Section 770.01 notice on Van Voorhis, but the content of the correspondence and the statute's requirements.

1. The Communications Claimed to be 770.01 Notices Do Not Even Partially Resemble Such Notices.

The letters Comins' counsel sent to WordPress and the University of Florida do not mention defamation or cite to Section 770.01. R 1050-1065. Comins' communications made much issue of his safety:

- "a misinformed mob mentality is fomenting that presents **a clear and present danger** to our clients";

- "It is our desire to work with the University and to ensure the **safety of our client** and his employees";
- "While we appreciate the freedom of expression and freedom of the press, […] a Student is publishing a forum and thereafter allowing others to use the forum **as a vehicle for encouraging others to seek out and kill someone**"; and
- "[w]e cannot overemphasize the importance of the **IMMEDIATE** removal of our client's personal and business contact information, as well as any threatening comments, from this blog."

(R 1056-57) (emphasis added). These letters, however, said nothing about any statement on the site being *false*. Comins' letters to third parties fail to specify a *single allegedly false statement*. (R 1050-65; 1275-76) Comins' letters completely fail to discuss what he contended was defamatory. (R 1050-65; 1275-1276) Comins sought only to remove his name, phone number, and third parties' threats, from Van Voorhis' blog. (R 1275-1276)

Comins did not merely fail to identify specific false and defamatory statements – he did not even say that defamation was an issue. Comins' notice falls far short of the specificity required by *Gannett Florida Corporation v. Montesano*, 308 So. 2d 599, 600 (Fla. 1st DCA 1975) (finding vague pre-suit notice that did not specify statements contended to be false and defamatory did not satisfy the requirements of 770.01), and *Orlando Sports Stadium*, *Inc. v. Sentinel Star Co.*, 316 So. 2d 607 (Fla. 4th DCA 1975) (requiring precise identification of allegedly false and defamatory statements within a publication for notice to comply with 770.01), to constitute proper pre-suit notice under Section 770.01. 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") Failing to identify defamation as the reason for seeking the entire blog's removal, and refusing to identify a single statement of fact he contended was false, Comins' "notice" provided no notice at all.[3]

Comins argues that his notice was misunderstood as to the scope of the "blogging site" he identified, and that this arose from confusion over "Internet jargon." Cross-Appeal Answer at 25-26. Even if the letter did not call for the whole site to come down, it did, by Comins' own admission, call for the entire *article* to come down. Cross-Appeal Answer at 27-28. Comins now claims that every single word in the blog posts at issue was defamatory. (R 1275-1276; 1110:15-1111:23; 1113:13-1114:9; 1115:4-1116:21; 1174:13-1175:7) *See also* Cross-Appeal Answer at 27-28. This simply is not credible.

2. Defamation by Implication Is Inapplicable and Irrelevant to Comins' Failure to Serve Van Voorhis Under 770.01.

In his effort to distract the Court from Attorney Harne's unjustified and uncorrected false statement to the circuit court, Comins argues that Van Voorhis' writings, even if true, defame him *by implication*. Cross-Appeal Answer at 27. His position seems to be that since Van Voorhis *implied* a defamatory fact, his

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

attorney's uncorrected misrepresentation to the court about failing to serve Van Voorhis should be overlooked or excused. Defamation by implication is not a license to simply fail to understand defamation or the notice requirements of Section 770.01. Nor does defamation by implication render an opinion defamatory simply because it is unflattering. *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008). As with a normal case of defamation, the defamatory implication must still imply a false statement of *fact*. *Id*.[4]

In lieu of addressing Van Voorhis' sanctions motion, Comins seeks a ruling that a juxtaposition of innuendo and omission of Comins proven lies leads to an implication that Comins is "trigger happy" or "bloodthirsty"; clear statements of opinion. From his original notices (R.-1050-65, 1275-76) to today, it is telling that Comins has never identified even one false statement of fact in this action, and refuses to do so. Instead, he bases his case on the "implications" of indefinite statements of opinion. Cross-Appeal Answer at 27-28. Nevertheless, this is irrelevant to Harne's uncorrected misrepresentation to the circuit court and maintenance of arguments that the court clearly found were without any factual or legal basis. (R 1243-1246), but helps to demonstrate the frivolous nature of the entire case.

[4] Defamation by implication still requires a factual implication arrived at through the presentation of other facts, rather than opinions. See 50 Am. Jur. 2d Libel and Slander § 158 (explaining that defamation by implication exists when the defendant juxtaposes facts to imply a defamatory connection between them.)

CONCLUSION

Trial courts must be able to be able to trust without hesitation that what's being stated is true and accurate, or else the system of justice loses its integrity. Attorney Harne made a material misrepresentation to the circuit court. As a consequence, Van Voorhis suffered months of additional litigation and tens of thousands of dollars in attorneys' fees. Harne refused to correct his misrepresentation. Instead, he doubled down with frivolous arguments that the trial court held were without factual or legal support.

This Court has the opportunity to send a message that attorneys should tell the truth, or pay a price. Alternatively, the Court can send the opposite message – dishonesty will be rewarded, or at least swept under the rug. There is no middle ground – the Court is presented with an opportunity to incentivize either dishonesty or candor. Its decision on this cross-appeal will do one or the other.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been provided to the following by electronic mail on this 11 day of March 2013.

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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), as it has been rendered in Times New Roman at 14 point font.

*s/Marc J. Randazza*

Marc J. Randazza