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

CHRISTOPHER M. COMINS,

Appellate Case No. 5D11-2754

Appellant,

vs.

MATTHEW FREDERICK VANVOORHIS,

Appellee.

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

APPELLANT'S INITIAL BRIEF

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PREFACE

In this Brief, the following are labeled accordingly:

Christopher M. Comins is referred to as Comins, or Appellant. Matthew F. VanVoorhis is referred to as VanVoorhis, or Appellee. References to the record will be designated as "R." followed by the appropriate page numbers (and deposition line numbers, where applicable) in parentheses on which the information can be found.

ISSUES ON APPEAL

1) Whether a private individual posting under a pseudonym on the Internet while actively trying to remain anonymous qualifies as a "media defendant," thereby entitling him to pre-suit notice of a defamation action under section 770.01, *Florida Statutes*.

2) If the Court determines Appellee was entitled to statutory pre-suit notice, whether Appellee waived the requirement or excused the performance of Appellant by virtue of his actions in actively trying to remain anonymous while avoiding identification and detection.

3) Whether Appellant's written correspondence to Appellee's pseudonym, care of his school, and WordPress constituted sufficient notice under the circumstances, in that Appellee waived or excused strict compliance with the statute by virtue of his actions in actively trying to remain anonymous while avoiding identification and detection.

STATEMENT OF THE CASE AND THE FACTS

This is an appeal of a Partial Final Judgment entered as to all counts of Appellant's Second Amended Complaint by the trial court on November 10, 2011. (R. 1601-1602). The Partial Final Judgment was entered pursuant to the trial court's Order Granting Defendant's Motion for Summary Judgment, dated June 28, 2011 (the "June 28, 2011 Order"), in which the trial court found that Appellant was required to provide pre-suit notice of his defamation action to Appellee pursuant to section 770.01, *Florida Statutes*, and that Appellant failed to fully comply with that requirement. (R. 1243-1246). The rendition of the June 28, 2011 Order was postponed by the timely filing of a Motion for Rehearing and Clarification. (R. 1249-1260). The trial court entered its Order Denying Plaintiff's Motion for Rehearing and Clarification on July 28, 2011. (R. 1312-1313). The trial court's decision was crucial in that Appellee would most likely argue that the statute of limitations has now expired on Appellant's defamation claims, resulting in the dismissal of all of Appellant's causes of action for a non-prejudicial technicality.

On May 19, 2008, Appellant, CHRISTOPHER M. COMINS ("Appellant") was involved in an incident in Orange County where he was forced into the position of having to shoot two dogs that had been circling and preying upon a group of cattle and their calves for more than three hours. (Appellant's Deposition,

R. 1085, line 3-R. 1086, line 15; R. 1088, line 7-R. 1090, line 8). Witnesses, who initially thought the dogs were wolves, described them aggressively charging at the cows in a predatory manner as they attempted to separate a calf from the rest of the group. (Appellant's Deposition, R. 1082, line 13-R. 1083, line 2; Deposition of Laura Retherford, R. 1657, line 13-R. 1658, line 4). Those on the scene with experience with livestock and dogs believed the dogs would eventually seriously injure, if not kill, the cows. (Appellant's Deposition, R. 1082, line 13-R. 1083, line 2; Deposition of Laura Retherford, R. 1657, line 13-R. 1658, line 4). The property owner and the cattle owner both reached out to Appellant, who was at the scene, and asked him to shoot the dogs. (Appellant's Deposition, R. 1085, line 3-R. 1086, line 15; R. 1088, line 7-R. 1090, line 8; Deposition of Laura Retherford, R. 1657, line 13-R. 1658, line 4). Reluctantly, Appellant drove to his home to retrieve a gun, because he did not have one in his possession. (Appellant's Deposition, R. 1088, line 7-R. 1090, line 8).

After watching a You Tube video of the shooting incident on the Internet, Appellee, MATTHEW FREDERICK VANVOORHIS ("Appellee"), a student at a Florida university, posted two separate blog entries about Appellant and the incident. (Appellee's Deposition, R. 558, lines 12-14; R. 560, lines 10-14). Appellee published the first blog entry, "Christopher Comins: Barbarian Hillbilly Dog-Assassin (w/ Friends in High Places)" (the "June 6 Blog Entry"), on June 6,

2008 under the alias M. Frederick Voorhees. (R. 974-978). The June 6 Blog Entry was attached as an exhibit to Appellee's deposition of April 15, 2011. Appellee published his second blog entry, "Christopher Comins Husky-Shooter Update: Chris Comins May Face Charges" (the "August 17 Blog Entry"), on August 17, 2008, also under the alias M. Frederick Voorhees. (R. 1007-1008). The August 17 Blog Entry was attached as an exhibit to Appellee's deposition of April 15, 2011. Each entry had a message board below it where individuals, including Appellee, could write comments. (R. 979-1006; R. 1008-1015). In the blog entries and the message board posts below them, Appellee misstates the facts of the incident and distorts the timeline while falsely portraying Appellant as a bloodthirsty monster who shot the dogs without justification. (*See, e.g.*, Appellee's Deposition, R. 621, line 19-R. 622, line 10; R. 623, line 11-R. 624, line 21; R. 681, line 23-R. 682, line 7; R. 683, lines 7-14; R. 712, lines 16-21).[1] The false portrayal of Appellant and the shooting incident in the blog entries generated death threats and other threats of violence against Appellant in the message boards below the entries, coupled with the posting of Appellant's address. (R. 979-1006; R. 1008-1015; *see also* Appendix to Response in Opposition to Motion for Summary Judgment, R. 972-973).

[1] For a summary of defamatory statements and implications made by Appellee in the blog entries and on the message boards, see Appellant's Response in Opposition to Motion for Summary Judgment. (R. 966-969).

Appellee published the subject blog entries by uploading them to the Internet from either his apartment, or possibly the graduate student office at his school. (Appellee's Deposition, R. 544, line 17-R. 545, line 23). Appellee posted the entries under pseudonyms so that no one would know who he was. (Appellee's Deposition, R. 488, line 18-R. 489, line 7; R. 490, lines 1-10). Appellee does not have a degree in journalism. (Appellee's Deposition, R. 579, lines 16-21). At no time has Appellee had a job where one of his responsibilities was to write and publish articles or blogs. (Appellee's Deposition, R. 544, lines 6-12).

Appellee did not personally witness the shooting that is the subject of his writings. (Appellee's Deposition, R. 553, lines 12-13). Appellee first learned about the incident through a Facebook group. (Appellee's Deposition, R. 553, lines 16-18). Appellee wrote the June 6 Blog Entry after viewing the You Tube video of the incident and reading a few Internet articles linked from the Facebook group. (Appellee's Deposition, R. 558, lines 12-14; R. 560, lines 10-14). Appellee did not speak to anyone involved with the incident prior to writing the June 6 Blog Entry, and did not "interview" a single witness. (Appellee's Deposition, R. 558, lines 18-20; R. 559, line 17-R. 560, line 14). Appellee relied primarily upon an article in The Orlando Sentinel to write the June 6 Blog Entry. (Appellee's Deposition, R. 561, lines 21-24). Appellee did not do any journalistic investigation

of any kind prior to writing the blog entries. (Appellee's Deposition, R. 579, line 22-R. 580, line 22).

Prior to filing suit, Appellant attempted to identify and locate Appellee. (Appellee's Deposition, R. 774-781; Exhibit 6 to Appellee's Deposition). Appellant discovered that Appellee was posting from a local university, but still did not know his name, so on March 23, 2009, Appellant sent a letter to Appellee's pseudonym, care of the university, asking him to take down the June 6 blog entry. (Pre-suit correspondence from Appellant attached as Composite Exhibit "F" to Plaintiff's Response in Opposition to Motion for Summary Judgment, R. 1050-1065; March 23, 2009 letter, R. 1054-1055). On March 30, 2009, Appellant sent a letter to the university, explaining that the blog entries were generating threats of violence against Appellant and requesting the removal of his personal and business information, as well as the death threats. (R. 1056-1057). On May 5, 2009, Appellant sent another letter to WordPress, Appellee's blog host, asking WordPress to remove the defamatory blog postings. (R. 1050-1051).

During the course of Appellant's pre-suit investigation, a detective from the university where Appellee was studying located and contacted Appellee regarding the blog entries and threatening comments people were making in response to the blog entries. (Appellee's Deposition, R. 778-781). Appellee subsequently warned the message board posters that their anonymity could be compromised:

> . . . I wanted to dissuade them from doing that by bringing up the fact that I was an anonymous person and they found out who I was, so don't assume that just because you're anonymous you can write whatever you want about him and not get found.

(Appellee's Deposition, R. 774, lines 20-24). Appellee went on to testify that the university detective had to threaten to subpoena his phone records before he would even give the detective his name. (Appellee's Deposition, R. 774, lines 1-11). Appellee had even gone so far as to give his blog host, WordPress, a "throw-away" e-mail address, and WordPress refused to give the detective Appellee's real name, respecting his "right to anonymity." (Appellee's Deposition, R. 779, line 23-R. 780, line 8). Finally, Appellee described himself as just "a normal person who's dumb enough to give your name to the authorities," a normal person who wrote something and then was forced to give up his anonymity. (Appellee's Deposition, R. 783, lines 6-14; R. 784, lines 3-6).

Appellant eventually discovered Appellee's name and sued Appellee for defamation in a multi-count complaint. At the beginning of the lawsuit, Appellee deleted several items he had written and published on the Internet because his "blog alias" had been compromised. (Appellee's Deposition, R. 491 16, line 13-R. 492, line 10).

SUMMARY OF ARGUMENT

A private individual posting under a pseudonym on the Internet and intentionally trying to remain anonymous is not entitled to pre-suit notice of a defamation action under § 770.01, *Florida Statutes*. Florida case law has made it explicitly clear that the notice provision of 770.01 only applies to "media defendants."

In its Order granting Defendant's Motion for Summary Judgment, the trial court made a specific finding that the Internet qualifies as an "other medium" as contemplated by the notice statute. However, the trial court did not make the necessary finding that Appellee is a media defendant. Even if the trial court found that the Internet is an "other medium" within the meaning of the statute, that does not mean private individuals who post defamatory statements on the Internet are media defendants entitled to the protections of the notice statute. By way of example, although both parties to this action would agree that television is a medium under the statute, not every private individual who makes a defamatory statement on television would qualify as a media defendant entitled to pre-suit notice under the statute.

The concept of distinguishing between a media defendant and one who merely uses a medium to publish a defamatory statement has previously been applied by Florida courts in a case involving Internet defamation. In *Zelinka v.*

Americare Healthscan, Inc., 763 So. 2d 1173, 1175 (Fla. 4th DCA 2000), the Fourth DCA passed on the question of whether the Internet qualifies as an "other medium" under the notice statute, in a case involving an allegedly defamatory statement made on an Internet message board. The Court reasoned that even if the Internet is a medium within the meaning of the statute, "no precedent would allow this court to extend the statutory notice requirement to a private individual who merely posts a message on [an Internet message] board." *Id.* *Zelinka* essentially requires a two-pronged analysis for the question before this Court: 1) is the Internet a medium as contemplated by the notice statute; and 2) if so, is the defendant a media defendant entitled to statutory protection. *Id.* The trial court erred by only considering one prong of this test in granting Appellee's Motion for Summary Judgment. Like the court in *Zelinka*, this Court need not determine whether the Internet is a medium under the statute – because even if it were, no precedent would support this Court extending the statutory notice requirement to a private individual posting under a fake name in an Internet blog while intentionally trying to maintain his anonymity.

Additionally, the trial court erred by entering an order that was overbroad and did not take into account all of Appellee's alleged defamatory statements. Several of Appellee's defamatory statements were made in the message board comments beneath the blog entries. Under *Zelinka*, even if the trial court had

determined Appellee was entitled to notice regarding the defamatory nature of his blog entries, under no circumstances would he be entitled to notice for the defamatory statements made on the message board. *Id.* In fact, some of Appellee's most egregious statements were made while merely posting comments on the message board, an act that explicitly *does not* trigger the statutory notice requirements under Florida law. *Id.*

Further, the trial court erred in failing to acknowledge record evidence cited by Appellant in support of his argument that Appellee waived or excused strict compliance with any condition precedent of notice by virtue of his actions in trying to remain anonymous. Appellant's Response in Opposition to Motion for Summary Judgment contains numerous cites to Appellee's deposition, wherein Appellee describes his efforts to remain anonymous and avoid detection even after he knew Appellant was attempting to locate and contact him prior to filing suit. Under a theory of waiver or excuse, even if this Court believes private individuals posting on the Internet can be media defendants entitled to statutory notice, Appellee in the instant action would not be protected by the statute because of his efforts to avoid detection. Further, Appellant did attempt to contact Appellee in writing before suit was filed, asking him and WordPress to remove the posts, but at that point Appellant only knew Appellee's fake name. Under the circumstances,

Appellant's efforts should be deemed sufficient by virtue of Appellee's waiver of strict compliance with the statute.

Finally, public policy does not favor extending the statutory notice requirement to Appellee. Florida courts have made it abundantly clear that section 770.01 is designed to protect "media defendants." The only types of defendants who have ever been protected by this statute are individuals or companies who are actually in the news business. This is because the statute is designed to support the public interest in the quick dissemination of news. This policy does not apply to Appellee, who by his own admission was not in the business of disseminating news, and made no effort to verify whether anything he was writing was even true. Far from evoking principles of media integrity, this case is yet another unfortunate example of the dangerous rising tide of Internet vigilantism by private individuals. Because they can remain anonymous, these individuals feel empowered to bully others and engage in character assassination without any fear of accountability, and are wholly undeserving of the extension of statutory protection.

ARGUMENT

I. APPELLEE IS NOT A "MEDIA DEFENDANT" AND THEREFORE IS NOT ENTITLED TO PRE-SUIT NOTICE OF A DEFAMATION ACTION UNDER SECTION 770.01, FLORIDA STATUTES.

A. Standard of Review

When reviewing the granting of a motion for summary judgment, the standard of review is de novo. *Bldg. Educ. Corp. v. Ocean Bank*, 982 So. 2d 37, 40 (Fla. 3d DCA 2008). The appellate court must view the facts in the light most favorable to the non-moving party below. *Harvey Bldg., Inc. v. Haley*, 175 So. 2d 780, 782 (Fla. 1965). If the slightest doubt exists as to whether there are genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law, summary judgment must be reversed. *Nomo Research, Inc. v. CCL Plastic Packaging, Inc.*, 862 So. 2d 785, 787 (Fla. 3d DCA 2003).

B. The Notice Provision of 770.01 Only Applies to Media Defendants

Under Florida law, a plaintiff in a defamation action against a media defendant must provide written pre-suit notice of the action, identifying the article and statements alleged to be false and defamatory:

> **Notice condition precedent to action or prosecution for libel or slander.** -- 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.

§ 770.01, Fla. Stat. (2009). Florida courts interpreting section 770.01 (the "Notice Provision") have consistently held that it does not apply when an action is brought against a non-media defendant. *Ross v. Gore*, 48 So. 2d 412 (Fla. 1950) (holding that the distinction between media and non-media defendants is based upon the public's interest in receiving news quickly); *Bridges v. Williamson*, 449 So. 2d 400, 401 (Fla. 2d DCA 1984) (holding that the Notice Provision does not apply to non-media defendants even when the alleged defamatory statements are republished by the media); *Gifford v. Bruckner*, 565 So. 2d 887, 888-89 (Fla. 2d DCA 1990) (holding that the Notice Provision does not apply to non-media defendants such as an aerial advertising firm with respect to a banner towed overhead by airplane). Although the notice provision originally applied solely to defendants in the newspaper and periodical business, the statute was amended in 1976 to include television and radio (adding the words "broadcast" and "other medium"). *See Davies v. Bossert*, 449 So. 2d 418, 420 (Fla. 3d DCA 1984). The Court in *Bridges* made it clear that the Notice Provision does not apply to private individuals. 449 So. 2d at 401 ("Nowhere does the statute contain the words 'nonmedia' or 'private individuals'").

In a case whose facts are analogous to the present action, *Davies v. Bossert*, the Third District Court of Appeals held that a private citizen making statements over a citizen's band radio was not entitled to pre-suit notice of a defamation

action under the Notice Provision. 449 So. 2d at 419. The Court held that the statute had no applicability to non-media defendants, recognizing that the "unambiguous language of the statutory condition precedent applies only to media defendants." *Id.* at 420, citing *Ross*, 48 So. 2d at 412. "All of the Florida state court cases which interpret the notice requirement of Section 770.01 involve newspapers, periodicals or broadcasting companies (either radio or television)." *Davies*, 449 So. 2d at 421.

To the extent Appellee in the instant action will attempt to argue that the Notice Provision applies to all defendants, both media and non-media, that proposition has been expressly disapproved by Florida courts. *See Davies*, 449 So. 2d at 419 (holding that the distinction drawn by *Ross v. Gore*, 48 So. 2d 412 (Fla. 1950), is still applicable), disapproving *Laney v. Knight-Ridder Newspapers, Inc.*, 532 F. Supp. 910 (S.D. Fla. 1982); *see also Bridges*, 449 So. 2d at 401 (asserting that the "rules of stare decisis do not require this court to follow federal court decisions that construe Florida's substantive law," in declining to follow *Laney*).

The Florida Supreme Court has not extended the requirements of the Notice Provision to the Internet under the term "other medium." However, even if the Internet qualifies as an "other medium," the Notice Provision would not apply to a private citizen posting on the Internet who is not a "media defendant." *Davies*, 449 So. 2d at 421 (clarifying that media defendant means "*news* media" defendant)

(emphasis added). "Every Florida court that has considered the question has concluded that the presuit notice requirement applies only to 'media defendants,' not private individuals." *Zelinka v. Americare Healthscan, Inc.*, 763 So. 2d 1173, 1175 (Fla. 4th DCA 2000) (holding that "**no precedent would allow this court to extend the statutory notice requirement to a private individual who merely posts a message on [an Internet message] board.**") (Emphasis added); *see also Mancini v. Personalized Air Conditioning & Heating, Inc.*, 702 So. 2d 1376, 1380 (Fla. 4th DCA 1997) (confirming that the Notice Provision does not apply to non-media defendants, but only to defendants involved in dissemination of the news).

Although in a slightly different context, other jurisdictions have analyzed the distinction between media and non-media defendants in cases involving Internet defamation. In *Obsidian Finance Group, LLC v. Cox*, 2011 WL 5999334 (D. Oregon 2011), the United States District Court for the District of Oregon analyzed whether a self-proclaimed "investigative blogger" was a media defendant for the purpose of determining whether to apply a negligence standard of proof in a defamation claim. The Court declined to conclude the defendant was a media defendant, citing a lack of evidence of the following: 1) any education in journalism; 2) any credentials or proof of any affiliation with any recognized news entity; 3) proof of adherence to journalistic standards such as editing, fact-checking, or disclosures of conflicts of interest; 4) keeping notes of conversations

and interviews conducted; 5) mutual understanding or agreement of confidentiality between the defendant and his/her sources; 6) creation of an independent product rather than assembling writings and postings of others; or 7) contacting "the other side" to get both sides of a story. *Id.*

C. Appellee is a Non-Media Defendant and Therefore is Not Entitled to Notice

In the present case, Appellee is clearly not a member of the media entitled to the protections of the Notice Provision. *Ross v. Gore*, 48 So. 2d 412 (Fla. 1950); *Bridges v. Williamson*, 449 So. 2d 400, 401 (Fla. 2d DCA 1984); *Gifford v. Bruckner*, 565 So. 2d 887, 888-89 (Fla. 2d DCA 1990); *Davies v. Bossert*, 449 So. 2d 418, 420 (Fla. 3d DCA 1984); *Zelinka v. Americare Healthscan, Inc.*, 763 So. 2d 1173, 1175 (Fla. 4th DCA 2000). Appellee is a college student who does not have a degree in, nor does he currently study, journalism. (Appellee's Deposition, R. 579, lines 16-21). At no time has Appellee had a job where one of his responsibilities was to write or publish articles or blogs. (Appellee's Deposition, R. 544, lines 6-12). By his own admission, Appellee did not consider his writing to be journalistic in nature. (Appellee's Deposition, R. 607, lines 7-19). Appellee is a private individual who simply decided to write about something that he heard about on Facebook and saw in a You Tube video, while conducting no investigation, no interviews, and little or no research, and adhering to no standards of journalistic ethics or integrity. (Appellee's Deposition, R. 558, lines 18-20; R.

559, line 17-R. 560, line 14; R. 579, line 22-R. 580, line 22). *See Obsidian Finance Group, LLC v. Cox*, 2011 WL 5999334 (D. Oregon 2011) (concluding an Internet blogger was not a media defendant after applying a factors test and determining the blogger did not meet any of the criteria). Appellee did not fact-check, made little effort to create an independent product, and made no effort to get both sides of the story, instead writing with a reckless disregard for the truth while cherry-picking items that he felt suited his agenda of painting Appellant in the worst light possible. (R. 623, line 11-R. 624, line 21; R. 680, line 13-R. 683, line 14; R. 691, lines 14-16).

Most importantly, Appellee posted his statements under a fake name, and by his own admission did not want anyone to know who he was. (Appellee's Deposition, R. 488, line 18-R. 489, line 7; R. 490, lines 1-10). Appellee published the subject blog entries by uploading them to the Internet from either his apartment or his school, using WordPress, an open web hosting forum. (Appellee's Deposition, R. 544, line 17-R. 545, line 23). In his deposition, Appellee described himself as just "a normal person who's dumb enough to give your name to the authorities," and a normal person who wrote something and then was forced to give up his anonymity. (Appellee's Deposition, R. 783, lines 6-14; R. 784, lines 3-6). Appellee further admitted that he deleted several items he had written and published on the Internet because his "blog alias" had been compromised,

behaving more like someone erasing his trail than a member of the media. (Appellee's Deposition, R. 491, line 13-R. 492, line 10).

Appellee bears no resemblance to media defendants such as The New York Times or Fox News, to whom a defamation plaintiff could simply send a letter requesting the removal or retraction of defamatory statements. Appellee was just a "normal person" who intentionally hid behind a cloak of anonymity up to and including the point where the local authorities contacted him regarding death threats posted in the comments below his blog entries. Even WordPress, the open, public forum where Appellee uploaded his posts, apparently did not feel compelled to provide the name of a private individual posting in its forum:

> Q: So at this point were you praising the fact that WordPress wouldn't divulge your real name?
>
> A. I was praising the fact that they respected my right to anonymity.
>
> Q. And you thought at the time you wrote this Barbarian Hillbilly that you had the right to remain anonymous?
>
> A. Yes.

(Appellee's Deposition, R. 780, lines 5-12). After succumbing to what he characterized as "threats" by local authorities and providing his real name, Appellee warned other posters about the danger of losing their anonymity.

> ...I wanted to dissuade them from doing that by bringing up the fact that I was an anonymous person and they found out who I was, so don't assume

that just because you're anonymous you can write whatever you want about him and not get found.

(Appellee's Deposition, R. 744, lines 20-24).

Under no circumstances have Florida courts extended the protections of the Notice Provision to a non-media defendant such as this, and the lower court erred by holding that pre-suit notice was required for Appellee. Therefore, this Court should reverse the decision of the trial court and hold that as a matter of law Appellee is a non-media defendant not entitled to notice under the Notice Provision.

D. The Lower Court Erred by Only Considering Whether the Internet is a "Medium" under the Notice Provision without Considering Whether Appellee is a "Media Defendant"

In its June 28, 2011 Order granting Defendant's Motion for Summary Judgment, the trial court made a specific finding that the Internet qualifies as an "other medium" as contemplated by the Notice Provision. (R. 1243-1246). However, the trial court erred by failing to make the necessary finding that Appellee is a media defendant. (R. 1243-1246). As Appellant argued at the June 10, 2011 hearing and raised again in his Motion for Rehearing and Clarification, even if the trial court found that the Internet is an "other medium" within the meaning of the statute, that does not mean private individuals who post defamatory statements on the Internet are media defendants entitled to the protections of the notice statute, particularly when they do so anonymously. (R. 1249-1260). By

way of example, although both parties to this action would agree that television is a medium under the statute, not every private individual who makes a defamatory statement on television would qualify as a media defendant entitled to pre-suit notice under the statute.

The concept of distinguishing between a media defendant and one who merely uses a medium to publish a defamatory statement has previously been applied by Florida courts in a case involving Internet defamation. In *Zelinka v. Americare Healthscan, Inc.*, 763 So. 2d 1173, 1175 (Fla. 4th DCA 2000), a plaintiff filed a libel action based on the posting of allegedly defamatory statements on an Internet message board. *Id.* The defendant moved to dismiss the suit, arguing that the Internet is an "other medium" within the meaning of the statute, and the plaintiff had failed to provide him with pre-suit notice. The Fourth District Court of Appeals concluded it did not need to decide whether the Internet is a medium within the meaning of § 770.01, because:

> **[e]ven if an internet bulletin board was a "medium" within the scope of the statute, no precedent would allow this court to extend the statutory notice requirement to a private individual who merely posts a message on the board.**

Id. at 1175 (emphasis added).

Zelinka essentially requires a two-pronged analysis for the question before this Court: 1) is the Internet a medium as contemplated by the notice statute; and 2) if so, is the defendant a media defendant entitled to statutory protection. *Id.* The

trial court erred by only considering one prong of this test in granting Appellee's Motion for Summary Judgment. In its June 28, 2011 Order, the trial court focused solely on the question of whether the Internet is a medium within the meaning of the Notice Provision, without considering whether Appellee qualifies as a media defendant. (R. 1243-1246). In so doing the trial court overlooked, or at the very least underemphasized, a critical part of the required analysis. The Notice Provision applies to media defendants, not private individuals, even if those private individuals broadcast their statements through the media.

> [W]e conclude that the notice requirement does not apply to a private individual who posts a message on a computer service that is owned and operated by someone else. The petitioner in this case is in the same position as that of the private individuals in the *Davies*, *Bridges* and *Gifford* cases, whose statements were "broadcast" to the public, but who themselves were not members of "the media."

Id. The Court in *Zelinka* goes on to state that:

> [i]t 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. Although Appellee describes his postings as a "blog," he confirmed in his deposition that he posted these entries on a website hosted and controlled by WordPress, a public web-hosting forum. (Appellee's Deposition, R. 592, lines 8-23; R. 591, lines 18-20). WordPress sells its own advertising on the site, and a private individual like Appellee has no control over it. (Appellee's Deposition, R.

592, lines 8-23; R. 591, lines 18-20). Other people design the format or layout of the site for WordPress, which Appellee chose because it was the most "user friendly." (Appellee's Deposition, R. 592, line 24-R. 593, line 4). In other words, like every other private individual in the world, Appellee was able to post things on WordPress and call it a blog.

In its June 28, 2011 Order, the trial court indicated it found *Alvi Armani Medical, Inc. v. Hennessey*, 629 F. Supp. 2d 1302 (S.D. Fla. 2008) persuasive on the issue of whether the Internet is a medium within the meaning of the statute. (R. 1243-1246). However, the court in *Alvi Armani* distinguished *Zelinka*, because the *Alvi Armani* defendant was a "company that allegedly owns, hosts and publishes the offending website." *Id.* at 1308. For the exact same reason, *Alvi Armani*, the case on which the trial court seemed to rely, is distinguishable from the instant case – this case and *Zelinka* deal with private individuals posting statements on a website owned and hosted by someone else. Additionally, *Alvi Armani* is a federal district court case, and Florida's appellate courts have previously declined to follow rulings from the Southern District interpreting the Notice Provision. *See Davies v. Bossert*, 449 So. 2d 418, 419 (Fla. 3d DCA 1984) (holding that the distinction drawn by *Ross v. Gore*, 48 So. 2d 412 (Fla. 1950), is still applicable), disapproving *Laney v. Knight-Ridder Newspapers, Inc.*, 532 F. Supp. 910 (S.D. Fla. 1982); *see also Bridges v. Williamson*, 449 So. 2d 400, 401 (Fla. 2d DCA

1984) (asserting that the "rules of stare decisis do not require this court to follow federal court decisions that construe Florida's substantive law," in declining to follow *Laney*).

In the present action, Appellee is clearly a private individual who posted material on the Internet on a website owned and hosted by someone else. He is not in the business of disseminating news and does not qualify as a media defendant as that term has been developed under Florida case law.[2] Even Appellee acknowledged as much in his deposition:

> Q: That you felt like you were a normal person who wrote something, and now you're being forced to give up your anonymity.
>
> A: Yes.

(Appellee's Deposition, R. 784, lines 3-6).

As the Fourth DCA noted when it decided *Zelinka*, no appellate court in the state of Florida at that time had expressly expanded the scope of the Notice Provision to the Internet. However, like the court in *Zelinka*, this Court need not determine whether the Internet is a medium under the statute – because even if it were, no precedent would support this Court extending the statutory notice requirement to a private individual posting under a fake name while intentionally

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[2] *See Obsidian Finance Group, LLC v. Cox*, 2011 WL 5999334 (D. Oregon 2011). Applying the factors enumerated in *Obsidian*, Appellee could not be considered a media defendant.

trying to maintain his anonymity. *Zelinka*, 763 So. 2d at 1175; *Bridges*, 449 So. 2d at 401 ("[n]owhere does the statute contain the words 'nonmedia' or 'private individuals'"). Because the trial court failed to analyze the status of Appellee, rather than just the issue of whether the Internet is a medium within the meaning of the statute, and because it denied Appellant's Motion for Rehearing and Clarification on this issue, this Court should reverse the ruling of the trial court and hold that as a matter of law Appellee was not a media defendant.

E. The Trial Court's Order is Overbroad Because it Extends to Comments Made by Appellee on an Internet Message Board

Under *Zelinka*, even if the trial court decided that Appellee was entitled to notice regarding the defamatory nature of his blog entries, Appellant would not have been required to provide notice regarding the defamatory statements made by Appellee in the message board comments below his blog entries. 763 So. 2d at 1175. In fact, some of Appellee's most egregious statements were made while merely posting comments on the message board under a fake name, an act that explicitly *does not* trigger the statutory notice requirements of § 770.01 under Florida law. *Id.* "Christopher Comins has shown multiple times now that he is a dangerous, abusive individual, and a huge proponent of unprovoked violence and cruelty to animals." (Message board post dated June 9, 2008, R. 980). "And just an FYI to the individual who seems eager to start a Chris Comins Fan Club in celebration dog-shooting & child abusing . . ." (Message board post dated July 31,

2008, R. 985). "It is BECAUSE of them that Comins is in a position to ruthlessly open fire in a crowd and face NO retribution." (Message board post dated June 14, 2008, R. 982). "Did Comins know that the dogs were domestic pets, and not wolves, when he fired at them? And the answer is resoundingly YES, when he fired the final few shots . . ." (Message board post dated November 2, 2008, R. 993).[3] Appellee is literally just chatting on an Internet message board when he is making these statements.

Appellant moved for rehearing and clarification on this and other issues before the trial court, but the trial court denied the motion. It is Appellant's position that Appellee was not entitled to pre-suit notice for any of his defamatory postings. However, at the very least, the trial court erred by issuing an Order that was overbroad in that it found that Appellant was required to give notice for Appellee's statements made in the comments of a message board.

F. Public Policy does not Favor Application of Notice Provision to Appellee

The purpose for distinguishing between media and non-media defendants in Section 770.01, *Florida Statutes*, was to protect the public's interest in rapid dissemination of the news, given the reasonable likelihood of occasional error as a

[3] Appellant's Response in Opposition to Motion for Summary Judgment delineates which defamatory statements were made as message board posts rather than contained within Appellee's blog entries. (R. 966-969).

result of the tremendous pressure under which journalists operate to deliver the information quickly. *Ross v. Gore*, 48 So. 2d 412, 415 (Fla. 1950).

> This court judicially knows that it frequently takes a legal tribunal months of diligent searching to determine the facts of a controversial situation. When it is recalled that a reporter is expected to determine such facts in a matter of hours or minutes, it is only reasonable to expect that occasional errors will be made. Yet, since the preservation of our American democracy depends upon the public's receiving information speedily – particularly upon getting news of pending matters while there still is time for public opinion to form and be felt – it is vital that no unreasonable restraints be placed upon the working news reporter or the editorial writer.

Id. at 415. *See also Davies v. Bossert*, 449 So. 2d 418, 420 (Fla. 3d DCA 1984). This public policy continues to drive the analysis of Florida courts as they decline to extend the requirements of the Notice Provision to non-media defendants.

The rationale behind Florida's law is no different than that behind notice statutes in other jurisdictions -- the more time a defendant has to ascertain the truth of his accusations before publishing them, the less deserving he is of notice and an opportunity for retraction. *See Alioto v. Cowles Communications, Inc.*, 519 F.2d 777 (9th Cir. 1975); *see also Field Research Corp. v. Superior Court*, 453 P.2d 747 (Cal. 1969) (statute requiring notice to libel defendants does not apply to non-media defendants who are not under the time pressures imposed by publication or broadcast deadlines).

Here, Appellee, writing from his apartment under a pseudonym in between studying for his classes, was under no pressure whatsoever to deliver any

information at all, much less to deliver it quickly. Appellee was adding nothing in the form of news, doing little more than regurgitating bits and pieces of information he read in other articles while knowingly distorting the truth to intentionally hurt Appellant. He did not interview witnesses, conduct research, cite sources or attempt to verify facts. Had he wished to do any of those things, he had all the time in the world, operating under no deadline. Nor did Appellee consider himself accountable to anyone for the information he disseminated, such as it was, given his intentional efforts to preserve his anonymity.

Despite hiding behind a cloak of anonymity, Appellee now asks the courts of Florida to label him a member of the media. This Court should be extremely skeptical of such a self-serving claim, and apply strict scrutiny to a self-appointed media member with no journalistic track record and no analogous connection to traditional media. Should this Court determine that Appellee is a media defendant entitled to notice, it will open the floodgates for millions of bloggers who could potentially hide behind the Notice Provision every time they anonymously post defamatory comments about someone from their home computer or an Internet cafe. For that matter, anyone with a Facebook account could claim they are a media defendant if private individuals posting anonymously qualify for protection under the statute. This is clearly not what the legislature had in mind when it enacted this statute, and falls far outside the scope interpreted by Florida's courts.

II. EVEN IFAPPELLEE WERE ENTITLED TO PRE-SUIT NOTICE, APPELLEE WAIVED THAT RIGHT BY VIRTUE OF HIS EFFORTS TO REMAIN ANONYMOUS AND AVOID CONTACT OR DETECTION.

A. Standard of Review

When reviewing the granting of a motion for summary judgment, the standard of review is de novo. *Bldg. Educ. Corp. v. Ocean Bank*, 982 So. 2d 37, 40 (Fla. 3d DCA 2008). The appellate court must view the facts in the light most favorable to the non-moving party below. *Harvey Bldg., Inc. v. Haley*, 175 So. 2d 780, 782 (Fla. 1965). If the slightest doubt exists as to whether there are genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law, summary judgment must be reversed. *Nomo Research, Inc. v. CCL Plastic Packaging, Inc.*, 862 So. 2d 785, 787 (Fla. 3d DCA 2003).

B. Performance of a Condition Precedent may be Excused by Acts to Prevent the Performance

A party may be excused from performance of a condition precedent if another party prevents the performance, or if the performance is made impossible. *Paparone v. Lake Placid Holding Co.*, 438 So. 2d 155 (Fla. 2d DCA 1983) (if one prevents or renders impossible performance or occurrence of a condition precedent, upon which his liability is contingent, he cannot avail himself of its nonperformance); *see also Sinnes v. Pereno*, 629 So. 2d 995 (Fla. 3d DCA 1993); *Wooster School Corp. v. Hammerer*, 410 So. 2d 524 (Fla. 4th DCA 1982).

C. To the Extent Pre-Suit Notice Was Required, Appellee Waived the Requirement or Excused Compliance by Appellant by Virtue of his Actions

Appellee in the present action is a non-media defendant and therefore was not entitled to pre-suit notice of a defamation action under the Notice Provision. However, even if this Court determines Appellee was a media defendant entitled to notice under the statute, Appellee waived his right to notice and excused Appellant's performance by virtue of his efforts to remain anonymous and evade detection by both Appellant and local authorities.

Appellant made numerous efforts to locate and contact Appellee prior to filing suit, despite the fact that Appellee published his defamatory statements anonymously under various pseudonyms. (*See* various pre-suit letters to WordPress, the University of Florida and M. Frederick Voorhees, R. 1050-1065). At some point Appellant learned that Appellee had some affiliation with the University of Florida, and mailed written notice to Appellee under his pseudonym care of the university, identifying the blog site "Hillbilly Barbarian" and requesting that Appellee delete the blog site. (R. 1054-1055). That letter is evidence that Appellant was attempting, unsuccessfully, to locate and contact Appellee regarding his blog entries prior to filing suit. Appellant also communicated with the University of Florida Police Department prior to filing suit to advise them that that posts beneath Appellee's entries contained death threats. (R. 774-781). According

to Appellee, a detective managed to find him and contacted him regarding the posts. (R. 774-781). Only after the detective "threatened" him did Appellee finally provide his real name. (R. 774-781). Appellant also sent written notice to WordPress, the public blog host that hosted Appellee's entries, advising WordPress that an individual posting under an alias had published defamatory articles that were inciting violent threats, and requesting they be removed. (R. 1050-1051).

The record contains numerous facts supporting Appellant's argument that Appellee waived his right to pre-suit notice or excused performance by Appellant. Appellee used pseudonyms to publish his blog entries so that no one would know who he was. (Appellee's Deposition, R. 488, line 18-R. 489, line 7; R. 490, lines 1-10). At the beginning of this lawsuit, Appellee deleted several items he had written and published on the Internet because his "blog alias" had been compromised. (Appellee's Deposition, R. 491, line 13-R. 492, line 10). Even when confronted by local authorities regarding death threats posted in response to his blog entries, Appellee continued to try to remain anonymous. (Appellee's Deposition, R. 773, line 9-R. 775, line 14).

> Q: So at this point were you praising the fact that WordPress wouldn't divulge your real name?
>
> A. I was praising the fact that they respected my right to anonymity.

Q. And you thought at the time you wrote this Barbarian Hillbilly that you had the right to remain anonymous?

A. Yes.

(Appellee's Deposition, R. 780, lines 5-12).

> ...I wanted to dissuade them from doing that by bringing up the fact that I was an anonymous person and they found out who I was, so don't assume that just because you're anonymous you can write whatever you want about him and not get found.

(Appellee's Deposition, R. 774, lines 20-24).

Appellee's actions operated to prevent performance of a condition precedent, to the extent one existed. It is critical that even when confronted by local authorities regarding death threats posted in response to his blog entries, Appellee continued to try to remain anonymous. (Appellee's Deposition, R. 773, line 9-R. 775, line 14). When Appellee's "blog alias" was finally compromised, he deleted several blog entries out of fear of detection. A defendant cannot act to make a performance difficult if not impossible, and then claim failure of that performance as a defense. Even if this Court determines Appellee did not excuse non-performance of a condition precedent, it should hold that he waived any entitlement to the protections of the statute by virtue of his action in trying to remain anonymous and avoid identification and detection.

Nonetheless, an anonymous blogger has never been afforded the same protections under the Notice Provision as traditional members of the media, such

as newspapers, periodicals, television or radio. These media institutions are afforded statutory protections for public policy reasons, discussed above, and should notice of a potential defamation action become necessary, a prospective plaintiff would not have to play a month-long shell game to determine where or to whom to send the notice. *Ross v. Gore*, 48 So. 2d 412, 415 (Fla. 1950). Consequently, if Appellee were the type of defendant entitled to notice under this statute, he waived his rights and excused Appellant's non-performance by virtue of his actions. Therefore, the trial court erred in granting Appellee's Motion for Summary Judgment, and this Court should reverse.

D. The Notice Appellant Gave or Attempted to Give was Sufficient under the Circumstances, because Appellee Waived Strict Compliance with the Notice Provision by Virtue of his Actions

For the reasons set forth in Section II. C, *supra*, Appellee waived strict compliance with the Notice Provision by virtue of his actions in attempting to remain anonymous and avoid identification or detection. Therefore, the notice Appellant gave or attempted to give – the letters to WordPress and M. Frederick Voorhees care of the University of Florida – should be sufficient to satisfy the requirements of the statute under the circumstances. In those letters, Appellant requested the removal of the blog entries, and if Appellee failed to receive the letters, it was the result of his own efforts to evade identification. (R. 1050-1055).

While Appellee may argue that these letters are not specific enough to satisfy the requirements of the Notice Provision, Appellant contends that the entire June 6 Blog Entry is defamatory under a theory of defamation by implication, and therefore a demand for removal of the blog entry is sufficient. Defamation by implication is actionable under Florida law and derives from the former cause of action for false light invasion of privacy. The Florida Supreme Court describes this theory and its applicability in detail in *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008). This cause of action recognizes that literally true statements can be defamatory where they create a false impression. Defamation by implication can arise not from what is stated, but from what is implied when a defendant juxtaposes a series of facts so as to imply a defamatory connection between them, or creates a defamatory implication by omitting facts. *Id.* The defamatory language must not only be reasonably read to impart the false innuendo, but it must also affirmatively suggest that the author intends or endorses the inference. *Id.* Defamation by implication is premised not on direct statements but on false suggestions, impressions and implications arising from otherwise truthful statements. *Id.* In this sense, defamation can arise where a statement of opinion *reasonably implies* false and defamatory facts. *Id.* Because of the defamatory implication of the entire narrative thread of the June 6 Blog Entry, it would have been unnecessarily futile to parse the individual statements,

particularly when much of the defamatory implication arises from crucial facts omitted or sets of facts juxtaposed to imply a defamatory connection between them.

Even if this Court determines Appellee was entitled to pre-suit notice, Appellant's pre-suit letters demanding removal of the blog entries, under the circumstances and given Appelle's attempts to evade identification and detection, should qualify as sufficient notice under the Notice Provision. Therefore, the trial court erred in finding that Appellee did not excuse strict compliance with the Notice Provision, and this Court should reverse the ruling of the trial court and hold that the notice attempted, whether received or not, was sufficient under the circumstances.

CONCLUSION

The trial court erred in granting Appellee's Motion for Summary Judgment. As a private individual and non-media defendant, Appellee was not entitled to pre-suit notice of a defamation action under § 770.01, Florida Statutes. Even if he were entitled to such notice, Appellee waived his right to protection under the statute and excused performance by Appellant by virtue of his actions in attempting to remain anonymous and avoid identification and detection. Public policy does not favor extending the statutory notice requirement to Appellee,

because he is a private individual posting defamatory statements on the Internet while intentionally striving to remain anonymous.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished to Richard A. Sherman, Esq., Law Offices of Richard A. Sherman, P.A., 1777 South Andrews Avenue, Ste. 302, Fort Lauderdale, FL 33316; C. Richard Fulmer, Jr., Esq., Fulmer Leroy, 2866 East Oakland Park Boulevard, Fort Lauderdale, FL 33306; Paul S. Jones, Esq. and Douglas Petro, Esq., Luks Santaniello, 255 S. Orange Avenue, Suite 750, Orlando, FL 32801; and Marc J. Randazza, Esq., Randazza Legal Group, 2 S. Biscayne Blvd., Ste. 2600, Miami, Florida 33131; by U.S. Mail this 2 day of August, 2012.

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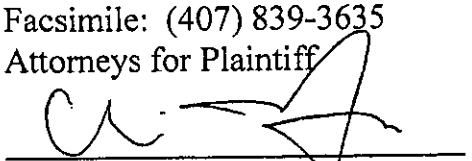

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I hereby certify that this brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

Christopher M. Harne