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

CHRISTOPHER M. COMINS,

Appellate Case No. 5D11-2754

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

APPELLANT'S REPLY BRIEF AND ANSWER BRIEF TO CROSS-APPEAL

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PREFACE

In this Brief, the following are labeled accordingly:

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

ISSUES ON INITIAL 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.

ISSUE ON CROSS APPEAL

1) Whether the trial court abused its discretion in denying VanVoorhis' Motion for Sanctions based on an alleged misrepresentation by Comins' counsel.

SUMMARY OF ARGUMENT

> **. . . 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.**

(VanVoorhis' Deposition, R. 774, lines 20-24, in reference to warning message board posters about thinking they can remain anonymous).

A private individual posting under a pseudonym on the Internet and intentionally trying to remain anonymous is not a media defendant entitled to pre-suit notice of a defamation action under § 770.01, *Florida Statutes,* even if the Internet is a medium under the statute. The trial court also erred by entering an order that was overbroad and did not take into account VanVoorhis' defamatory statements made in Internet message board comments. VanVoorhis waived or excused strict compliance with any condition precedent of notice by virtue of his actions in trying to remain anonymous.

Finally, the "tipsy coachman" doctrine should not be applied to affirm the trial court's result. VanVoorhis' defamatory statements were more than mere hyperbole or opinion, and at best constituted mixed fact and opinion, which is actionable under Florida law. Although Comins was not a public figure, even if the trial court or this Court finds he was, Comins can satisfy a higher standard by showing that VanVoorhis acted with reckless disregarding for the truth.

REPLY BRIEF – ARGUMENT ON INITIAL APPEAL

I. VANVOORHIS 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. VanVoorhis Was Actively Avoiding Identification and Detection While Posting Anonymously on a WordPress Public Blog Site

The issue in this case is not whether Internet bloggers can be media defendants, as VanVoorhis attempts to frame the question in his Answer Brief. The issue is whether Matthew Frederick VanVoorhis qualifies as a media defendant protected by the Notice Provision under these circumstances. While VanVoorhis would like to steer this Court away from the actual evidence that was presented to the trial court,[1] the issues presented in this case must be decided based upon the specific facts below. Those facts establish that VanVoorhis was a private individual posting on a free, public blog site (WordPress) while hoping to remain anonymous.

> A: ...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.

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

> Q: So at this point were you praising the fact that WordPress wouldn't divulge your real name?

[1] VanVoorhis' Answer Brief contains relatively few record cites in comparison to the numerous online articles it cites touting the value of the Internet.

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.**

(VanVoorhis' Deposition, R. 780, lines 5-12, emphasis added). By his own words, VanVoorhis was an anonymous person, and he wanted to remain that way. He wanted to write whatever he felt like without getting "found." These material facts were undisputed.

VanVoorhis posted his statements under a fake name on a public forum, and by his own admission did not want anyone to know who he was. (VanVoorhis' Deposition, R. 488, line 18-489, line 7; R. 490, lines 1-10; R. 544, line 17-545, line 23; R. 491, line 13-492, line 10). VanVoorhis described himself as just "a normal person who's dumb enough to give your name to the authorities." (VanVoorhis' Deposition, R. 783, lines 6-14; R. 784, lines 3-6). And yet, VanVoorhis is now asking this Court to treat him as it would a member of the media. The only way he can convince this Court of this is if the Court agrees with his sweeping generalizations and holds that all Internet bloggers, regardless of the facts and circumstances, are media defendants. Anything less will not suffice, because VanVoorhis, even on the spectrum of bloggers, is stationed remotely at the end bearing no resemblance to news media.

B. *Wagner, Nugent* Does Not Hold That the 770.01 Notice Provision Applies to All Defendants

In his Answer Brief, VanVoorhis begins his argument by incorrectly asserting that the 770.01 Notice Provision applies to *all* defendants, even non-media defendants. VanVoorhis seems to cite the Florida Supreme Court decision in *Wagner, Nugent et al. v. Flanagan*, 629 So. 2d 113 (Fla. 1993) in support of this proposition. However, VanVoorhis is misconstruing and overextending the *Wagner* decision, which involved the interpretation of section 770.07, not 770.01. *Id.* at 115. Section 770.07 codifies the time of accrual of a defamation cause of action, and does not contain the limiting language of 770.01. *Id.* Section 770.01 applies only to actions "for publication or broadcast, in a newspaper, periodical, or other medium." Fla. Stat. § 770.01. To hold that section 770.01 applies to all defendants would give the language of that section no meaning.

Careful reading of the Florida Supreme Court's decision in *Wagner* informs the reader that the Court is holding "the above statute" applicable to all civil litigants, both public and private. *Id.* Immediately above its holding in the text of the opinion, the Court quotes section 770.07. *Id.* Therefore, the Court is saying that 770.01 is the "above statute" to which its holding refers. The only reference to *all* of Chapter 770 is that the court notes its title in deciding that even though most of the chapter addresses media defendants, the language of this particular statute, section 770.07, indicates it applies to all defendants. In footnote 9 of his Answer

Brief, VanVoorhis misquotes the *Wagner* decision: the Court does not say that "Chapter 770" applies to everyone. It says "the above statute" applies to all litigants, referencing 770.07, and says that Chapter 770 is "broadly titled civil actions for libel" in support of its decision. *Id.* These are two decidedly different things.

After *Wagner*, Florida courts have continued to hold that the 770.01 Notice provision applies only to media defendants, based upon the plain language of the statute and long-standing public policy. *Mancini v. Personalized Air Conditioning & Heating, Inc.*, 702 So. 2d 1376, 1380 (Fla. 4th DCA 1997); *Zelinka v. Americare Healthscan, Inc.*, 763 So. 2d 1173, 1175 (Fla. 4th DCA 2000). Likewise, although VanVoorhis argues that the Notice Provision was meant to apply to all defendants ever since the statute was amended in 1976, Florida courts interpreting the post-amendment statute have explicitly declined to apply it to all defendants. *Davies v. Bossert*, 449 So. 2d 418, 420 (Fla. 3d DCA 1984) ("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))." *Bridges v. Williamson*, 449 So. 2d 400, 401 (Fla. 2d DCA 1984); *Mancini*, 702 So. 2d at 1380; *Zelinka*, 763 So. 2d at 1175 ("Every Florida court that has considered the question has concluded that the presuit notice requirement" does not apply to private individuals.)

C. *Obsidian Finance Group, LLC v. Cox* Still Provides a Useful Framework for Analyzing VanVoorhis' Status

Even with the Court's clarification of its order in *Obsidian Finance Group, LLC v. Cox*, 2011 WL 5999334 (D. Oregon 2011), the factors identified by the Court provide a useful framework for analyzing VanVoorhis' status in this case. The Court in *Obsidian* cited a lack of evidence of several factors, listed in the initial brief, in deciding the defendant was not a media defendant. *Id.* The only clarification made by the Court was that it emphasized it did not necessarily mean that a defendant must meet all the above criteria to qualify for media protection. However, like the defendant in *Obsidian*, VanVoorhis meets none of the criteria.

It is crucial to note that although VanVoorhis was the moving party below and raised section 770.01 as a defense, he brought *no* evidence before the trial court to prove he was entitled to the statute's protection as a media defendant.[2] By contrast, Comins submitted substantial evidence showing that factors such as those listed by the Court in *Obsidian* were not present in this case, and that VanVoorhis could not qualify as a media defendant under any definition. (Discussed in greater detail in Section D, below).

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[2] In his Answer Brief, VanVoorhis cites the argument section of his own Motion for Summary Judgment while describing the nature of his "blog" to this Court. The Motion does not qualify as evidence.

D. Anyone Can Have a Blog

VanVoorhis cites articles from online publications to support his argument that, because of the decline of print media, blogs have replaced newspapers and magazines and should qualify as a "medium" under the notice statute. He then makes the giant leap to claim that he is therefore a media defendant. VanVoorhis seems to be arguing that anyone who has a "blog" qualifies as a media defendant, notwithstanding the fact that anyone, regardless of age or qualification, can go online, create a username, and have their very own blog for free through Google (BlogSpot) or Yahoo (WordPress). And this is exactly what VanVoorhis did. [3] (VanVoorhis' Deposition, R. 544, line 17-545, line 23; R. 592, lines 8-23; R. 591, lines 18-20). In fact, this Court can log in to WordPress while reading this brief and will have its own blog up and running well before finishing. Acquiring a library card is more rigorous than starting a "blog." Consequently, this Court must draw the line between actual media defendants, and people who are doing little more than writing things on a wall.

VanVoorhis argues that it is too difficult to draw these types of lines, and that the courts can't determine who is media and who isn't. Yet, both briefs filed

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[3] **In his Answer Brief, VanVoorhis compares himself to Arianna Huffington of the Huffington Post, Matthew Drudge of the Drudge Report, and Harvey Levin of TMZ. However, these names are familiar to the public because they are not simply "normal people" trying to remain anonymous and not get caught while writing whatever they want. (VanVoorhis' Deposition, R. 783, lines 6-14; R. 784, lines 3-6).**

in this matter are replete with cases where Florida courts have done just that. The alternative is untenable – under VanVoorhis' sweeping definition, this Court would have to do away with the difficult task of defining media defendants, and provide statutory protection under the Notice Provision to anyone updating their Facebook status. This is because the Internet is different – not everyone can have their own television show or newspaper column, but anyone, *anyone*, can have a blog.

In his Answer Brief, VanVoorhis argues that he should receive media protection because of the value of "citizens in the media" reporting on plane landings and earthquakes and uprisings as they are happening in real time. But VanVoorhis is nothing of the sort. He uploaded his first post 18 days after the shooting event, relying primarily on two sources – a You Tube video and an Orlando Sentinel article. (VanVoorhis' Deposition, R. 561, lines 21-24). Not only did he not personally witness the shooting, he did not speak to anyone who personally witnessed the shooting, nor did he make an effort to speak with anyone. (VanVoorhis' Deposition, R. 553, lines 12-13; R. 558, lines 18-20; R. 559, line 17-560, line 14). He learned about the incident through a Facebook group, and did no journalistic investigation of any kind prior to writing the blog entries. (VanVoorhis' Deposition, R. 553, lines 16-18; R. 558, lines 12-14; R. 560, lines 10-14; R. 579, line 22-580, line 22). Without question, cases and articles cited by VanVoorhis that refer to the "news gathering process" and "research" and

"investigation" and the "reporting of findings" in support of the importance of his role have no applicability to the actual facts of this case. (R. 558, lines 18-20; R. 559, line 17-560, line 14; R. 579, line 22-580, line 22; R. 623, line 11-624, line 21; R. 680, line 13-683, line 14; R. 691, lines 14-16).

E. Comins Contacted the University of Florida and WordPress in an Effort to Have the "Barbarian Hillbilly" Content Removed

VanVoorhis focuses his argument regarding the notice sent by Comins pre-suit primarily on the March 23, 2009 letter. However, Comins made numerous efforts to locate and contact VanVoorhis prior to filing suit, including sending three different letters. (R. 1050-1065). While the March 23 letter references removal of the "blog site," it identifies the blog site as "Hillbilly Barbarian," meaning the letter is actually referring to that "blog entry". (R. 1054-1055). Comins' letter to WordPress identified the blog entries as defamatory and requested they be removed. (R. 1050-1051). Because the entire Barbarian Hillbilly Blog Entry was defamatory by implication, as argued in greater detail in the Cross Appeal, request for removal of the entire blog entry was proper.

F. VanVoorhis Does Not Address the Applicability of the Trial Court's Order to Comments He Made on an Internet Message Board

In his Answer Brief, VanVoorhis does not address Comins' argument that the trial court's order was overbroad, and VanVoorhis would not have been entitled to notice regarding the defamatory statements he made on an Internet

message board, even if he is entitled to notice for the blog entries themselves. *Zelinka*, 763 So. 2d at 1175. Message board comments will never trigger the statutory notice requirements of § 770.01 under Florida law, and the comments by VanVoorhis are no exception. *Id.* Some of these statements are discussed in greater detail in Section G, below.[4]

G. This Court Should Not Affirm the Trial Court's Ruling Based Upon Issues Not Even Considered in the Order Being Appealed

Citing the "tipsy coachman" doctrine, VanVoorhis argues that this Court should affirm the trial court's ruling on the pre-suit notice issue even if it believes that decision was in error because of other merits-based reasons. However, the trial court did not rule on VanVoorhis' substantive arguments, and indicated at the hearing that fact issues remained as to these arguments, implying it would deny the motion as to the substantive defenses. (R. 1473-1476). The trial court then stated it was going to focus on the 770.01 notice issue. (R. 1473-1476). Therefore, it would be improper for this Court to affirm the trial court's order based on the tipsy coachman doctrine.

Nonetheless, VanVoorhis' statements went well beyond mere opinion, and were at best mixed fact and opinion, which is actionable under Florida defamation law. *Hoch v. Rissman, Weisberg et al.*, 742 So. 2d 451, 459-60 (Fla. 5th DCA

[4] Comins' Response in Opposition to Motion for Summary Judgment identifies defamatory statements and delineates which defamatory statements were made as message board posts rather than in the blog entries. (R. 966-969).

1999) (in determining whether statement is one of pure or mixed opinion, court must examine statement in its totality and context in which it was published); *LRX, Inc. v. Horizon Associates Joint Venture*, 842 So. 2d 881 (Fla. 4th DCA 2003) (confirming that incorrect or incomplete facts which form the basis of claimed opinions can imply false assertions of fact supporting defamation action. Merely labeling the statements as opinions does not dispel implication). In *LRX*, the Court held that the issue of whether the implication that plaintiff was a loathsome, dishonest character who could not be trusted was actionable, was for jury. *Id.* at 887. *See also Anson v. Paxson Communications Corp.*, 736 So. 2d 1209, 1211 (Fla. 4th DCA 1999); *Chiavarelli v. Williams*, 256 A.D.2d 111 (N.Y. 1998).

Comins' arguments as to VanVoorhis' defenses to defamation and summaries of VanVoorhis' defamatory statements and the facts are included in the record below. (R. 949-973; R. 966-969; R. 1603-1616). Comins highlights a few of those statements here:

1. From VanVoorhis' June 6, 2008 article, "Christopher Comins: Barbarian Hillbilly Dog-Assassin (w/ Friends in High Places)"

VanVoorhis wrote: "Comins apparently just drives around with his gun waiting for excuses." (R. 974). However, record evidence shows that the property owner and the cattle owner asked Comins to shoot the dogs while he was at the pasture, and Comins reluctantly went to his home to retrieve a firearm because he

did not have one in his car. (Comins' Deposition, R. 1085, line 3-1086, line 15; R. 1088, line 7-1090, line 8).

VanVoorhis also wrote: ". . . none of [the witnesses] saw the wolves threaten the livestock in any way." (R. 974). This is an easily disprovable misstatement, and potentially the most damaging, supporting his agenda of portraying Comins as a renegade acting alone and without justification. The truth is that *multiple* witnesses reported that the dogs were attacking the cows and that they thought the cows were in danger. (Sheriff's Office and Florida Fish & Wildlife records, R. 1016-1049; Deposition of Laura Retherford, cattle owner, R. 1656, line 13-1657, line 4, describing how upset people were as the dogs tried to separate a calf from its mother).

> Q: When you wrote your article and said, "None of them saw the wolves threaten the livestock in any way," you knew that was not a true statement; didn't you?
> A: I don't recall.
> Q: You do recall reading The Orlando Sentinel article, right?
> A: Yes. And I know that it has that quote in there from that witness.

(VanVoorhis' Deposition, R. 681, line 23-682, line 7; *see also* R. 683, lines 7-14, where VanVoorhis admits that he knew David Tindall reported the wolves were attacking the cows; *see also* Comins' Deposition, R. 1082, line 13-1083, line 2).

VanVoorhis also wrote that Comins ruthlessly shot five more times after seeing the dogs' owner and realizing they were his pets. (R. 975). The only record

evidence shows Comins neither saw nor heard the dog owner before the final shot was fired. (Comins' Deposition, R. 1093, lines 2-9).

2. From VanVoorhis' Internet message board posts

VanVoorhis wrote in an Internet message board post: "And just an FYI to the individual who seems eager to start a Chris Comins Fan Club in celebration dog-shooting & child abusing . . ." (R. 985, post dated July 31, 2008). Comins has never been convicted, charged or accused of child abuse, and VanVoorhis brought forth no evidence that he has. This statement by VanVoorhis constitutes defamation per se, and VanVoorhis admitted in his deposition that he had no reasonable basis for making it. (VanVoorhis' Deposition, R. 712, line 16-715, line 5; R. 770, lines 8-23).

In another message board post, VanVoorhis wrote: "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." (R. 980, post dated June 9, 2008). This is obviously a defamatory statement, not even remotely based in fact according to VanVoorhis' own admissions in his deposition.

VanVoorhis also made various statements on the message board asserting that Comins fired a gun into a crowd of people, depicting him as recklessly endangering the lives of human beings. (R. 982, post dated June 14, 2008; R. 993, post dated November 2, 2008; R. 995, post dated November 9, 2008). No record

evidence exists showing any shots were fired at or near the crowd during the incident.

VanVoorhis claims that Comins is a public figure, but offers little or no record evidence to support this assertion beyond mere argument. Comins is not a public figure, because a private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention. *Bair v. Clark*, 397 So. 2d 926, 927 (Fla. DCA 1981). General participation in a controversial activity will not transform a previously obscure private individual into a public figure absent the individual voluntarily thrusting himself into the public forum. *Id.* Further, VanVoorhis must show more than mere newsworthiness to justify application of the public figure requirements. *Id.*

However, even if Comins is deemed to be a public figure, VanVoorhis' conduct, as outlined above, easily satisfies the malice standard by showing a reckless disregard for the truth. *Id.* In many cases, VanVoorhis conceded that he wrote things that he knew were not true, and in all cases he acted with a reckless disregard for the truth with an agenda of painting the worst picture possible of Comins in to spark public outcry and damage his reputation. (VanVoorhis' Deposition, R. 623, line 11-624, line 21; R. 680, line 13-683, line 14).

Q: Was it ever a goal of yours to have people boycott Mr. Comins' business?
A: I suppose you could put it that way.

(VanVoorhis' Deposition, R. 691, lines 14-16; R. 692, lines 9-23; R. 707, lines 1-6, where VanVoorhis agrees with another poster who says, "Let's destroy his business"). VanVoorhis' own testimony makes it quite apparent that truth was of little consequence in his quest to smear Comins because of an event he knew little about. (VanVoorhis' Deposition, R. 680, line 13-683, line 14; R. 623, line 11-624, line 21).

> Q: And then it says: And just an FYI to the individual who seems eager to start a Chris Comins' fan club in celebration of dog shooting and child abusing. Did you have any factual evidence at all to make the statement that Mr. Comins is a child abuser?
> A: No.

(VanVoorhis Deposition, R. 712, lines 16-21).

Therefore, even if Comins is required to prove actual malice, sufficient record evidence exists to satisfy that standard.

REPLY BRIEF - CONCLUSION

As an anonymous private individual and non-media defendant, VanVoorhis was not entitled to pre-suit notice of a defamation action under section 770.01. Even if he were entitled to such notice, the notice provided by Comins should satisfy the requirement, particularly when VanVoorhis excused strict compliance by virtue of his conduct. Finally, VanVoorhis' defenses fail, and Comins has an actionable claim for defamation against VanVoorhis for both the Barbarian Hillbilly blog entry and the comments he made on the Internet message board.

CROSS APPEAL ANSWER BRIEF

CROSS APPEAL STATEMENT OF FACTS

VanVoorhis published the first blog entry, "Christopher Comins: Barbarian Hillbilly Dog-Assassin (w/ Friends in High Places)" (the "Barbarian Hillbilly Blog Entry"), on June 6, 2008 under the alias M. Frederick Voorhees. (R. 974-978). The Barbarian Hillbilly Blog Entry was attached as an exhibit to VanVoorhis' deposition of April 15, 2011. The Barbarian Hillbilly Blog Entry had a message board below it where individuals, including VanVoorhis, could write comments. (R. 979-1006). In the blog entry and the message board post below it, VanVoorhis misstates the facts of the incident and distorts the timeline while falsely portraying Comins as a bloodthirsty monster who shot two dogs without justification. (*See, e.g.*, VanVoorhis' 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).[5] The false portrayal of Comins and the shooting incident in the blog entry generated death threats and other threats of violence against Comins in the message board below the entry, coupled with the posting of Comins' address. (R. 979-1006; *see also* Appendix to Response in Opposition to Motion for Summary Judgment, R. 972-973).

[5] For a summary of defamatory statements and implications made by VanVoorhis in the blog entry and on the message board, see Comins' Response in Opposition to Motion for Summary Judgment. (R. 966-969).

Prior to filing suit, Comins attempted to identify and locate VanVoorhis. (VanVoorhis' Deposition, R. 774-781; Exhibit 6 to VanVoorhis' Deposition). Comins discovered that VanVoorhis was posting from a local university, but still did not know his name, so on March 23, 2009, Comins sent a letter to VanVoorhis' pseudonym, care of the university, asking him to take down the Barbarian Hillbilly Blog Entry. (All pre-suit correspondence from Comins 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, Comins sent a letter to the university, explaining that the blog entries were generating threats of violence against Comins and requesting the removal of his personal and business information, as well as the death threats. (R. 1056-1057). On May 5, 2009, Comins sent another letter to WordPress, VanVoorhis' blog host, identifying the content as defamatory and asking WordPress to remove the defamatory blog postings. (R. 1050-1051).

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

compromised and acknowledged that Comins' attorneys had requested he remove the blog entries:

> Alright everyone, please stop with the death threats to Mr. Comins. I was just contacted by a criminal detective in the city where I used to live when I wrote for this blog. Mr. Comins' attorneys want these blog entries deleted, apparently because of the death threats.

(VanVoorhis message board post, beginning R. 892, post dated April 22, 2009). VanVoorhis 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. (VanVoorhis' Deposition, R. 774, lines 1-11). VanVoorhis 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 VanVoorhis' real name, respecting his "right to anonymity." (VanVoorhis' Deposition, R. 779, line 23-R. 780, line 8). Finally, VanVoorhis 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. (VanVoorhis' Deposition, R. 783, lines 6-14; R. 784, lines 3-6).

Comins eventually discovered VanVoorhis' name and sued VanVoorhis for defamation. At a hearing on VanVoorhis' Motion to Dismiss, where VanVoorhis argued Comins had not pled satisfaction of the condition precedent of pre-suit notice under Fla. Stat. 770.01, Comins' counsel indicated that VanVoorhis had been given pre-suit notice and requested leave to amend to plead the notice issue.

(R. 1376-1400). At the same hearing, VanVoorhis' counsel indicated that VanVoorhis did not believe notice given was sufficient, and the trial court told the parties that that issue would be for another day. (R. 1376-1400).

On November 3, 2010, Comins' counsel sent a letter to VanVoorhis' counsel, responding to his October 13, 2010 correspondence. A true and accurate copy of the November 3, 2010 letter from Comins' counsel was filed with the trial court and sworn to by an affidavit from Comins' counsel, and a substantial portion of it was read into the record at the hearing on VanVoorhis' Motion for Sanctions. (R. 1361-1375).

CROSS APPEAL ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING VANVOORHIS' MOTION FOR SANCTIONS

A. Standard of Review

The standard of review on VanVoorhis' Cross Appeal is abuse of discretion. *Dept. of Transportation v. Kisinger Campo & Assoc.*, 661 So. 2d 58, 59 (Fla. 2d DCA 1995). VanVoorhis attempts to argue that a higher standard should be applied because this is a libel case "dealing with a matter of public interest." However, the cases cited by VanVoorhis address motions for fees in cases that ended with findings that the plaintiff's case was "baseless." No such finding was made in this case, where summary judgment was granted due to a procedural defect. In fact, the trial court noted at the summary judgment hearing that it

believed there were facts issues as to many of VanVoorhis' arguments on his substantive defenses.

B. Comins' Counsel Did Not Make a Material Misrepresentation to the Court

Comins' counsel did not make a material misrepresentation to the trial court. He represented that notice was sent to VanVoorhis before suit was filed, referring specifically to a letter sent on March 23, 2009 to "M. Frederick Voorhees," and generally to multiple presuit communications. (Letters to WordPress, the University of Florida and M. Frederick Voorhees, R. 1050-1065). VanVoorhis' argument that the notice was not sufficient does not mean Comins' counsel made a material misrepresentation.

VanVoorhis' Motion for Sanctions and Memorandum of Law in Support of Sanctions references an October 13, 2010 letter from VanVoorhis' counsel to Comins' counsel, but does not indicate that Comins or his counsel responded. However, on November 3, 2010, Comins' counsel sent a lengthy letter to VanVoorhis' counsel, responding to the October 13, 2010 correspondence. A true and accurate copy of the November 3, 2010 letter from Comins' counsel was filed with the trial court and sworn to by an affidavit from Comins' counsel, and a substantial portion of it was read into the record at the hearing on VanVoorhis' Motion for Sanctions. (R. 1361-1375; R. 1480-1506). The purpose of the letter was to explain and clarify Comins' position on the notice issue and attempt to

resolve the disagreement between the parties, and exhibited good faith to the trial court. (R. 1361-1375). The letter also informed VanVoorhis of Comins' intention to file an amended pleading that would more accurately allege his position as to the notice issue, and Comins filed his Second Amended Complaint. (R. 348-355). The Second Amended Complaint is the operative pleading for the Motion for Summary Judgment that resulted in this appeal. (R. 348-355).

In the letter, Comins' counsel assured VanVoorhis' counsel that he did not intentionally provide false or misleading information to the trial court at the hearing on September 10, 2010. (R. 1361-1375). Comins argued at the time, and continues to argue, that he provided VanVoorhis with pre-suit notice of Comins' request that he remove the Hillbilly Barbarian blog entry. (R. 1361-1375). In fact, the argument that Comins had given VanVoorhis sufficient pre-suit notice was expressed to VanVoorhis' counsel both before and after the hearing. At no point, however, did Comins' counsel argue that Comins intended to give VanVoorhis pre-suit notice under section 770.01, nor did Comins' counsel concede that VanVoorhis was entitled to notice. The argument was, and continues to be, that the notice given should satisfy the statute under the circumstances.

The trial court's ruling on September 10 was based upon the fact that Comins had pled nothing with regard to the 770.01 notice issue, and it granted leave to amend accordingly without dictating what the contents of the amended

pleading should be. (R. 1376-1400). The trial court ruled with the knowledge that VanVoorhis would be arguing, at some point in the future, that any alleged notice was deficient. (R. 1376-1400).[6]

During the hearing the trial court cited the *Mancini* case, which clarifies the long-standing rule that the 770.01 notice provision does not apply to non-media defendants. This includes, for example, private citizens who make defamatory statements on a citizen's band radio. *Mancini v. Personalized Air Conditioning & Heating, Inc.*, 702 So. 2d 1376, 1380 (Fla. 4th DCA 1997) (citing *Davies v. Bossert*, 449 So. 2d 418 (Fla. 3d DCA 1984)). In fact, "[e]very 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").

Comins' Second Amended Complaint alleges that VanVoorhis was not entitled to pre-suit notice. (R. 348-355). It goes on to allege that even if the trial court finds VanVoorhis was entitled to pre-suit notice, Comins either complied with that condition ***or*** strict compliance was waived or excused by VanVoorhis' conduct. (R. 348-355).

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[6] The trial court's statements regarding VanVoorhis' argument on the sufficiency of the notice are discussed in greater detail in Section D, below.

On March 23, 2009, Comins' counsel mailed written notice to an anonymous blogger, care of the University of Florida, wherein counsel requested that "M. Frederick Voorhees" remove the blogging site "Hillbilly Barbarian." Given the circumstances -- that VanVoorhis was posting his blog entries as an anonymous blogger under a fake name on a website which he neither hosted nor owned – service of notice on VanVoorhis should not be held to the same standard as service of notice on a media outlet such as a newspaper or televisions station.

The March 23, 2009 letter was the first, but not the only, good faith attempt to contact VanVoorhis and ask him to remove the article without resorting to litigation. (Letters to WordPress, the University of Florida and M. Frederick Voorhees, R. 1050-1065). Comins' letter to WordPress, the blog hosting forum that hosted VanVoorhis' blog, identifies the defamatory blog entry "Hillbilly Barbarian" and asks that it be removed. (R. 1050-1065). Comins' counsel also communicated with the university police, and in response, VanVoorhis apparently communicated to the police department that he would only remove death threats and personal information from the message board but would not take down "Hillbilly Barbarian." (R. 1361-1375).

VanVoorhis knew Comins' counsel was trying to contact him and had requested that he remove the Barbarian Hillbilly Blog Entry.

> Stop posting Christopher Comins' address & phone #s. Stop with the death threats. I was contacted today by a criminal investigations

> detective in my former town of residence. If they found me they can just as easily find you. More on this later.

(VanVoorhis' deposition exhibits, beginning R. 892, message board post dated April 22, 2009).

> Alright everyone, please stop with the death threats to Mr. Comins. I was just contacted by a criminal detective in the city where I used to live when I wrote for this blog. Mr. Comins' attorneys want these blog entries deleted, apparently because of the death threats.

(VanVoorhis deposition exhibits, beginning R. 892, message board post dated April 22, 2009). There is no record evidence to show whether VanVoorhis received the pre-suit letters from Comins' counsel to M. Frederick Voorhees and WordPress or not. However, the above quotes from VanVoorhis show that he knew Comins' counsel was trying to contact him, and that they had requested that he remove the defamatory blog entry.

C. Comins' Request for the Removal of the Entire Blog Entry Should Satisfy the 770.01 Notice Requirement

By virtue of the combination of two letters, one to M. Frederick Voorhees care of his university, the other to WordPress, Comins requested that the Barbarian Hillbilly Blog Entry be removed. (R. 1050-1065). The WordPress letter specifically referenced the defamatory content of the Barbarian Hillbilly Blog Entry, and the March 23, 2009 letter indicated the content of the Barbarian Hillbilly Blog Entry was leading to death threats against Comins. Naturally, given the nature of the threats against him, Comins was focusing on the threats in his

letters and phone calls with police. However, the effect of the letters, which identify the blog entry as defamatory and request that it be removed, should satisfy the 770.01 notice requirement. Comins is not saying, nor did his counsel say at the hearing, that he intended to serve 770.01 notice by virtue of these letters. Comins did not and does not believe VanVoorhis is entitled to such notice. However, given the circumstances, Comins' counsel argued that Comins had complied with the statute by sending letters to the anonymous blogger at two different places – his school and his web hosting company – both requesting that the Barbarian Hillbilly Blog Entry be removed.

VanVoorhis argues that Comins' counsel's use of the term "blog site" in paragraph 3 of the March 23, 2009 letter makes it sound like Comins was asking VanVoorhis to take down the entire Public Intellectual blog. However, in the subject line of the March 23 letter to M. Frederick Voorhees, Comins' counsel identifies VanVoorhis' "blogging site" as the article *Hillbilly Barbarian.* (Full title: *Christopher Comins: Barbarian Hillbilly Dog-Assassin (w/ Friends in High Places)*). Therefore, in context, it is clear that Comins was asking him to take down *that* entry, not his entire blog and all unrelated material. In fact, the March 23 letter makes no reference to Public Intellectual or to any entry other than the Barbarian Hillbilly Blog Entry. If there was an inaccuracy in the use of technical

Internet jargon, the request could be readily understood in the context of the letter and the identification of "blogging site" in the letter's subject line.

VanVoorhis contends that Comins' correspondence was not specific enough to satisfy the 770.01 notice requirement because it requests removal of the entire Barbarian Hillbilly blog entry. Comins alleges, however, that the entire entry is defamatory by implication, and is riddled with so many factual inaccuracies and exaggerations that it cannot simply be edited to remove the overall damaging implications. (Second Amended Complaint, R. 348-355). Comins' Answers to Defendant's First Interrogatories, Interrogatory #1, provides a list of factual misstatements contained in the Barbarian Hillbilly Blog Entry. Comins' Answers to Interrogatories were filed with the Clerk of Court on June 8, 2011, but do not appear to be listed in the record on appeal. Comins also identifies VanVoorhis' multiple factual misstatements in his Response in Opposition to Motion for Summary Judgment, and Response in Opposition to Motion to Amend Counterclaim, both part of the record below. (R. 966-969; R. 1603-1616). As this Court will see, it is the combination of multiple factual inaccuracies which lead to an overall defamatory portrayal of Comins as a monster who wanted to shoot the dogs. (R. 974-978). Therefore, the entire blog entry should have been removed, as the letters request.

The cases cited by VanVoorhis for the proposition that strict compliance with the Notice Provision is required involve media defendants publishing daily in a volume that comports with the policy underlying the notice statute. These cases do not consider what type of notice, if any, is required for anonymous Internet bloggers who publish infrequently and irregularly and attempt to avoid "getting caught." VanVoorhis' cases also deal with a defamatory statement or statements, and not an entire article that is defamatory by implication.

The entire Barbarian Hillbilly Blog Entry of June 6, 2008, is defamatory under a theory of "defamation by implication." (R. 348-355). This theory 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.* (Emphasis added). 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.*

Much of the defamatory implication of the Barbarian Hillbilly Blog Entry arises from crucial facts *omitted* or a series of facts juxtaposed to imply a defamatory connection between them. (R. 974-978; R. 966-969; R. 1603-1616). By way of example, omitting the fact that concerned witnesses reported the dogs attacking the cows and trying to kill a calf adds to the defamatory implication that Comins acted without justification because he is trigger-happy. (R. 974-978; R. 966-969; R. 1603-1616). Leaving out the fact that Comins had to drive home to retrieve a gun adds to the defamatory implication that Comins is a gun-toting "barbarian hillbilly" who enjoys shooting other people's dogs. (R. 974-978; R. 966-969; R. 1603-1616). The very theme of the article, that Comins is a bloodthirsty monster who shot the dogs completely without justification merely because he enjoyed it, is inextricably intertwined with a fictional version of events that threads throughout the entire narrative. Therefore, the entire Barbarian Hillbilly Blog Entry should have been removed, as the letters requested.

D. The Court knew Vanvoorhis would be challenging the sufficiency of the Notice sent by Comins.

The trial court did not assume the notice issue, once pled, would be cut and dry. To the contrary, the trial court was well aware of the issue of adequacy of the alleged notice prior to making its ruling:

> **MR. PETRO:** I think, once we - - you know, they're claiming the presuit notice was given. Once we see the - - what presuit notice was given, we may have arguments as to the adequacy of it.
>
> **THE COURT:** That's a separate matter, sure.
>
> **MR. PETRO:** Sure, a separate matter.

(R. 1386, lines 16-21).

The trial court addressed the issue again later in the hearing:

> **THE COURT:** All right. With regard to the Motion or Amended Motion to dismiss, are there any other matters that we need to deal with?
>
> **MR. PETRO:** Your Honor, I guess, if they're going to then plead that they did give proper presuit notice –
>
> **THE COURT:** Well, we don't know what they're going to plead.
>
> **MR. PETRO:** Well – so they're granted leave to amend, and we assume that since our motion was that they failed to give presuit notice, that they're going to allege that presuit notice.
>
> **THE COURT:** I don't know. We'll find out when that comes.

(R. 1387, line 18-1388, line 6).

Based upon the foregoing, it does not appear the trial court's decision to grant Comins leave to amend relied upon the trial court's belief that pre-suit notice was given and that the notice was indisputably legally sufficient under the statute. To the contrary, the trial court stated the exact opposite. The court acknowledged that VanVoorhis would have an argument as to the adequacy of the notice and that it was a separate matter for another day. The Court also made it clear that it was granting leave to amend with regard to the notice issue, but in no way did the trial court indicate it was tying Comins' hands as to what he could or could not plead based upon arguments made at the hearing. The trial court specifically granted, "Leave to Amend to allow you to do what you need to do" with regard to pleading something (compliance, waiver, excuse, non-applicability) addressing 770.01 notice. (R. 1383, lines 23-24).

E. The Trial Court Did Not Abuse Its Discretion in Denying VanVoorhis' Motion for Sanctions

The trial court did not abuse its discretion in denying VanVoorhis' Motion for Sanctions. For a trial court to impose sanctions against an attorney for bad faith conduct, it requires a finding of bad faith that must be predicated on a high degree of specificity in the factual findings. *Moakley v. Smallwood*, 826 So. 2d 221, 226-27 (Fla. 2002) (concluding that the trial court's exercise of authority to assess attorneys' fees against an attorney must be based upon **an express finding**

of bad faith conduct and must be supported by detailed factual findings describing the specific acts of bad faith conduct that resulted in the unnecessary incurrence of attorneys' fees) (emphasis added); *State Farm Mut. Auto. Ins. Co. v. Swindoll*, 54 So. 3d 548, 552 (Fla. 3d DCA 2011) (finding sanctions against attorney not warranted absent specific finding of bad faith). Cases in Florida where such sanctions have been upheld involve intentional, willful, bad faith conduct, and the trial court in this case found that Comins' counsel did not act in bad faith.

Comins' counsel made a showing of good faith through the correspondence and affidavit filed with the trial court, and the trial court had broad discretion to determine whether sanctions were appropriate.

> In reviewing a true discretionary act, the appellate court must fully recognize the superior vantage point of the trial judge and should apply the 'reasonableness' test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness.

Kirkland's Stores, Inc. v. Felicetty, 931 So. 2d 1013, 1015-16 (Fla. 4th DCA 2006), quoting *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla.1980). *See also J P Morgan Chase Bank v. Combee*, 883 So. 2d 330, 331 (Fla. 1st DCA 2004) (a trial court's findings and judgment come to a reviewing court with a presumption of correctness, and cannot be disturbed absent a record demonstrating reversible

error), citing *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla.1979). The burden is on the appellant to demonstrate reversible error and present an adequate record for review. *Id.* In this case, VanVoorhis has not met his burden, and the trial court acted reasonably and within its sound discretion.

Additionally, the trial court did not abuse its discretion in failing to enter sanctions against Comins or his counsel for raising unsupported claims or defenses. Simply because a court finds against a party on a particular issue does not mean the other party is entitled to section 57.105 fees. *Peyton v. Horner*, 920 So. 2d 180, 183-84 (Fla. 2d DCA 2006); *Siegel v. Rowe*, 71 So. 3d 205, 211 (Fla. 2d DCA 2011). The issue of whether a private individual posting anonymously on the Internet while trying to avoid detection is entitled to section 770.01 notice of a defamation action, and if so whether the same standards apply, is a novel one in the courts of this state. The trial court even noted during the hearing on VanVoorhis' Motion for Summary Judgment that this appeared to be a case of first impression in the state of Florida. Likewise, there is not abundant case law on the issue of whether a pre-suit defamation notice is sufficient if it requests removal of an entire article when the plaintiff alleges the entire article is defamatory by implication. Finally, even a trial court's finding that a claim or defense is "without merit" does not mean it is frivolous, thereby entitling the other party to attorney's fees. *Dept. of Transportation v. Kisinger Campo & Assoc.*, 661 So. 2d 58, 59 (Fla. 2d DCA

1995). In this case, the trial court did not abuse its discretion in failing to enter sanctions against Comins or his counsel for unsupported claims or defenses.

CROSS APPEAL - CONCLUSION

The trial court did not abuse its discretion in denying VanVoorhis' Motion for Sanctions. Comins' counsel did not make a material misrepresentation, and was not obligated to clarify the record beyond filing an amended pleading. Comins' counsel merely argued, and continues to argue, that the pre-suit notice Comins sent should satisfy the 770.01 notice requirement, although Comins does not concede that VanVoorhis is entitled to such notice. Comins' counsel offered evidence of good faith by virtue of his affidavit and letter to VanVoorhis' counsel explaining their position. The letter and affidavit were filed with the trial court and read into the record at the hearing on the Motion for Sanctions. Comins also amended his pleading to clarify his allegations regarding the notice issue. Finally, the trial court did not rely on any statements made at the hearing in assuming what would be pled. The trial court knew VanVoorhis would be challenging the sufficiency of the notice to which Comins' counsel referred, and advised the parties at that time that those arguments would be for another day.

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 18 day of January, 2013.

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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