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

Appellate Case: 20-2350

DAVID COLEN
Defendant / Appellant

vs.

MUSTAFA SALEH
Plaintiff / Appellee

On Appeal From The Circuit Court Of The Seventeenth Judicial Circuit
In And For Broward County, Florida
Case No. CACE-15-009338
The Hon. Judge Marina Garcia-Wood / The Hon. Judge William Haury /
The Hon. Judge David Haimes

APPELLANT'S INITIAL APPEAL BRIEF

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2. Whether the trial court erred in denying Colen's Motion for Summary Judgment on Counts I-III (Libel, Libel Per Se, and Permanent Injunction) because of the disclosure of the facts upon which the challenged statements were based, thereby giving rise to those statements as First Amendment-protected "pure opinion."

3. Whether the trial court erred in denying Colen's Motion for a Directed Verdict at trial and then his Post-Verdict Motion in light of: a) the disclosure of the facts upon which the challenged statements were based; b) the hyperbolic and inflammatory nature of the challenged statements; c) Saleh's failure to produce any objective evidence of a false statement.

4. Whether the trial court erred in allowing the jury to consider as defamatory any challenged statements that neither were attached to the Complaint, in violation of Fla. R. Civ. P. 1.130 (a), nor appeared in Saleh's Cease-and-Desist letter, in violation of Fla. Stat. § 770.01.

5. Whether the trial court erred in denying Colen's Motion for Summary Judgment based on Saleh's failure to aver compliance with all conditions precedent in accordance with Fla. R. Civ. P. 1.120 (c).

6. Whether Saleh's failure to prove Colen acted negligently constitutes a fundamental error sufficient to reverse the jury's verdict as to whether Colen defamed Saleh.

7. If this Court determines the answer to all of the aforementioned questions is "no," then was the jury's verdict sufficiently contrary to the manifest weight of the evidence to grant Colen a new trial against Saleh.

STATEMENT OF THE CASE AND THE FACTS

A. Introduction

This appeal seeks to reverse the trial court's Final Judgment entered against appellant David Colen, reflecting the jury's determination that Colen defamed appellee Mustafa Saleh. The appellant will be referred to as "Colen" and the appellee will be referred to as "Saleh." Citations to the Record on Appeal are denoted by an "R" and citations to the Trial Transcript are denoted by a "T," both followed by the respective page number(s).

B. Colen Is Overbilled By Saleh

On October 30, 2014, Colen had his seven-month-old puppy neutered by Saleh. (T. 144). The neutering took place at Vetfield Animal Hospital, which Saleh owns (T. 192) and operates. (R. 331). Despite an agreement between the parties for $77, the puppy was not returned to Colen until Colen paid $132. (R. 585, 602) (T. 136). Colen's efforts to have the bill fixed, both at the time of the neutering, and again five days later on the telephone with Saleh, were unsuccessful. (T. 167).

On November 12, 2014, without having received a refund, Colen filed a fraud claim with the issuer of his credit card, BB&T. (R. 764-766). The bank conducted an independent investigation of the facts surrounding the incident and

ruled in favor of Colen. *Id.* BB&T's Centralized Fraud Claims Department sent Colen a letter indicating it had issued a permanent credit of $55 back to his Visa account. *Id.*

C. Disclosure On The Internet Of The Overbilling

On November 12, 2014, Jonathan Black, a computer programmer who spent time at Colen's office looking for freelance work, but was never hired by Colen or the LLC for any projects, took it upon himself to publish an article about the overbilling. (R. 166; 348-350). Black made scathing statements about Saleh, calling him, among other things, "sneaky, deceptive, immoral, greedy, a flat-out thug, and the scum of the Earth." (R. 343). The domain name Black registered to post his article was: <vetfieldanimalhospital.com>. (R. 333).

D. The Cease-And-Desist Letter

On February 15, 2015, Saleh hired his middle son, a local real estate and immigration attorney, to send a Cease-and-Desist letter regarding the article to Black, Colen, and Colen's company, G.O.A.L. Web Design, LLC ("the LLC"). (R. 333). The letter was received only by an employee of the LLC, Roger Sterling (R. 333) and cited seven sets of statements alleged to be defamatory, including that Saleh was "sneaky, deceptive, immoral, greedy, a flat-out thug, and the scum of the Earth." (R. 355-356). Sterling replied to the attorney to acknowledge receipt

of the letter and to inform him there were no files on the company's webserver that had anything to do with the article, with dogs, or with veterinarians. (R. 357).

E. The Filing Of The Lawsuit

On May 28, 2015, a lawsuit was filed by Saleh, individually, and his animal clinic, Veterinary & Human Partners International d/b/a Vetfield Animal Hospital ("Vetfield") (R. 1-23). The lawsuit alleged Libel and Libel Per Se, and sought a permanent injunction, against Colen, Black, and the LLC. *Id.*

F. More Articles About The Overbilling

Black and Sterling took it upon themselves to register two additional domain names to display more articles about the overbilling. The second article was published on <vetfield-animal-hospital.com>, on June 6, 2015 (R. 334), and the third article was published on <vetfield-animal-hospital-sunrise-fl.com>, on June 10, 2015. (R. 335).

G. The Trial Court's First Temporary Injunction

On June 29, 2015, Saleh and Vetfield (collectively "the Plaintiffs") filed a Motion for temporary injunctive relief, seeking to enjoin publication of all three articles. (R. 27-62). At the time, the Complaint had not been amended to include any defamation claims based on the second or third articles. With no pending allegations against content in the second or third articles, Judge Garcia-Wood

issued an ex-parte temporary injunction, enjoining publication of all three articles. (R. 98-100).

H. Service On Colen Of The Complaint

On July 29, 2015, Saleh's attorney sent Colen an e-mail to alert him of the court Order. Colen replied by asking "Who are you?" and "Why are you suing my company and me?" (R. 285, 441, 775-777) (T. 214-215). Colen arranged to meet Saleh's process server and he retained counsel. (R. 134-135).

I. The First Amended Complaint

On August 19, 2015, the Plaintiffs filed a First Amended Complaint to include in their libel claims statements appearing in the second and third articles. (R. 101-133). That marked a span of three weeks during which speech against which there were no pending claims of violations of Florida law was enjoined by court Order.

J. The Trial Court's Second Temporary Injunction

On October 12, 2015, the Plaintiffs petitioned the trial court to amend its temporary injunction to include the entirety of five more articles. (R. 136-151). No version of the Complaint included any challenged statements from any of those five articles. (R. 1-23; 101-133; 212-243; 331-364). No copies of the five articles

were attached to any version of the Complaint. *Id.* Nonetheless, the Motion to Amend was granted. (R. 152-154).

K. Colen's First MSJ Is Denied

On April 4, 2016, Colen filed his first Motion for Summary Judgment, which sought a judgment in his favor on "all counts" (Counts I-III) based on the factual foundation having been provided alongside the challenged statements, giving rise to those statements as "pure expressions of opinion," as explained in *Stembridge v. Mintz*, 652 So. 2d 444 (Fla. 3d DCA 1995) and *From v. Tallahassee Democrat, Inc.*, 400 So. 2d 52 (Fla. 1st DCA 1981). (R. 172-178).

On August 4, 2016, the trial court denied the MSJ, writing that discovery was "ongoing and incomplete." (R. 192-194).

L. The Second Amended Complaint

On October 31, 2016, the Plaintiffs were granted leave to amend their First Amended Complaint. (R. 267).

The Second Amended Complaint added three additional counts – Tortious Interference with an Advantageous Business Relationship (R. 222), Intentional Infliction of Emotional Distress ("IIED") (R. 222-223), and Public Disclosure of Private Facts (R. 223-224).

Copies of the second and third articles were not attached as an Exhibit to the Second Amended Complaint. (R. 214-243).

M. Colen's MTD Second Amended Complaint Is Denied

On November 2, 2016, Colen filed a Motion to Dismiss the Second Amended Complaint. (R. 268-288). In support of his argument that Counts I-II (Libel and Libel Per Se) should have been dismissed for failure of the Plaintiffs to serve him pre-suit notice, Colen cited, among other cases, *Comins v. Vanvoorhis*, 135 So. 3d 545 (Fla. 5th DCA 2014). (R. 274-275).

On December 14, 2016, the trial court denied the MTD without written opinion. (R. 289).

N. Colen Wins MSJ (Public Disclosure Of Private Facts And IIED)

The Second Amended Complaint sought relief for IIED on behalf of Vetfield. (R. 222-223). There is no relief available to corporations for such an allegation. The trial court granted the Plaintiffs leave to correct that error. (R. 329). The trial court also permitted them to remove the claim that publication of Saleh's date-of-birth constituted Public Disclosure of a Private Fact. (R. 329).

The Plaintiffs amended their Complaint but captioned it "Second Amended Complaint" again instead of "Third Amended Complaint," an error the Court never ordered to be corrected. (R. 331-364).

The new Second Amended Complaint became the operative Complaint and will hereafter be referred to as "the Complaint."

The Complaint failed to fix either aforementioned error (R. 340-341) and Colen subsequently won a Motion for Summary Judgment, on August 21, 2017, on both Count V (IIED) and Count VI (Public Disclosure of Private Facts). (R. 411).

The Complaint again failed to attach a copy of the second or third article. (R. 331-364).

No record activity by the Plaintiffs ensued until a Lack of Prosecution Notice (R. 412-413) compelled them to file discovery requests on December 11, 2018. (R. 414-416).

O. Colen's Final MSJ Is Denied

On April 30, 2019, Colen filed a Motion for Summary Judgment on Counts I-II (Libel and Libel Per Se) based on the Plaintiffs' failure to serve him pre-suit notice in accordance with Fla. Stat. § 770.01 or to aver compliance with all conditions precedent, as required by Fla. R. Civ. P. 1.120 (c). (R. 438-441). Colen supplemented his Motion with a signed, sworn, and notarized affidavit to attest under penalty of perjury that he only saw the Plaintiffs' C&D letter months after the original Complaint was filed. (R. 442-444).

On May 23, 2019, Judge Haury denied the MSJ without written opinion. (R. 445).

P. Colen's Motion To Dissolve Is Granted

On July 18, 2019, Judge Haury ruled the Plaintiffs violated § 770.01 by failing to include in their C&D letter any challenged statements from the second or third articles, and he granted Colen's Motion to Dissolve the temporary injunction enjoining publication of those two articles. (R. 446-448). Judge Haury, however, failed to dismiss the libel allegations altogether. Instead, he verbally decreed that no statements from the second or third articles would be in play at trial. Judge Haury never put that directive in his Order. (R. 451).

Q. The Trial

On July 24, 2019, the Plaintiffs voluntarily dismissed their Tortious Interference claims minutes before the trial began. Also, before the trial began, Judge Haimes[1] granted default Orders against Black and the LLC. (R. 452). The defaults were granted despite the Plaintiffs having dropped Black as a Defendant (R. 331-332) and neither Black nor the LLC's attorney or registered agent being

[1] On July 23, 2019, Judge Haury e-mailed the parties directly to instruct them to report the following day to Judge Haimes's courtroom as the trial could not be reached on Judge Haury's calendar.

on the Complaint's Service List. (R. 342).

On July 26, 2019, the jury cleared Colen of Vetfield's libel claims but found in favor of Saleh on his libel claims and awarded him $12,000. (R. 468-469).

R. Colen's Motions To Dissolve / Modify Remaining Injunctions Are Granted

On June 19, 2020, Judge Haury granted Colen's Motion to Dissolve the temporary injunction enjoining publication of the five articles that contained no challenged statements. (R. 494-495). That marked a span of 1,702 days during which speech against which there were no pending claims of violations of Florida law was enjoined by court Order.

On July 16, 2020, Judge Haury granted Colen's Motion to Modify the court's temporary injunction enjoining publication of the first article, allowing republication of every statement therein, except those contained in ¶ 25, (d), (e), and (f) of the Complaint. (R. 505-506).

S. Colen's Post-Verdict Motion Is Denied

On September 16, 2020, Judge Haimes denied Colen's Post-Verdict Motion For A Directed Verdict (mistakenly captioned a Motion to Amend). (R. 470-479). The Order denying the Motion was filed on October 13, 2020. (R. 534-535). This timely appeal followed.

SUMMARY OF ARGUMENT

Even if the trial court did not err in failing to grant Colen's Motion to Dismiss and Motions for Summary Judgment on Saleh's libel claims, numerous other legal bases support a ruling in Colen's favor.

On the merits of Saleh's case, Colen was entitled to a judgment in his favor on First Amendment grounds. The statements about Saleh, with the exception of two that are specified in the next three paragraphs, all were non-actionable as either expressions of rhetorical hyperbole, vigorous epithets, insults, at least substantially true, or First Amendment-protected pure opinion.

Within the 16 sets of challenged statements that appeared in the three articles (R. 334-335), only two statements were statements of provably falsity about Saleh. It is worth restating the jury determined none of the statements about Vetfield were defamatory (R. 468-469) and Vetfield did not file an appeal.

The first was "Dr. Saleh said there was nothing he could do about a billing dispute" (R. 334) and this statement was proven true by Saleh's own testimony (T. 166-168) and corroborated by the letter Colen received from BB&T indicating it was the bank's fraud department, and not Saleh, that returned the overbilled money. (R. 764-766).

The second statement capable of provable falsity was "Dr. Saleh would not confirm he is the owner of this duplicitous operation" (R. 334) and this statement

was not only proven true by Saleh's own testimony (T. 185-186), but it does not expose him to hatred, ridicule, mistrust, or contempt as required to state a cause of action for defamation. Please see Standard Jury Instructions 795 So. 2d 51, 55 (Fla. 2001). So what if Saleh would not confirm he is the owner of the animal clinic? There are millions of potential reasons Saleh would not confirm he owns Vetfield, and neither the Complaint nor the trial offered any context or explanation as to why this statement is defamatory.

Not only did Saleh fail to present the jury with any physical evidence of the falsity of these two statements (R. 560-757), but no witnesses came forward to testify that either of these two statements are false. (T. 1-294).

As a matter of law, Colen was entitled to a judgment in his favor on the merits as well as on the procedural issues in this case.

However, if this Court determines that Colen is not entitled to a reversal of the Final Judgment, then he would respectfully ask for a new trial in consideration of the jury's verdict being so diametrically contrary to the manifest weight of the evidence presented at trial, as explained in *Krolick v. Monroe ex, rel. Monroe*, 909 So. 2d 910, 914 (Fla. 2d DCA 2005); *Ford v. Robinson*, 403 So. 2d 1379, 1382 (Fla. 4th DCA 1981); *Cloud v. Fallis*, 110 So. 2d 669, 673 (Fla. 1959); and *Baptist Memorial Hosp., Inc. v. Bell*, 384 So. 2d 145, 146 (Fla. 1980).

ARGUMENT

Standard of Review

The standard of review for Summary Judgment is *de novo*. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000).

The standard of review upon a Motion to Dismiss is *de novo*. *Crocker v. Marks* 856 So. 2d 1123 (Fla. 4th DCA 2003).

A. Mustafa Saleh's Failure To Provide Colen With Pre-Suit Notice Under Fla. Stat. § 770.01 Bars His Claims

Florida has a strict statutory requirement in defamation torts. Under Fla. Stat. § 770.01, a defamation plaintiff must provide at least five days' pre-suit notice to all defendants. Compliance with § 770.01 is mandatory, and *Orlando Sports Stadium* and *Gannett* specify notice must specifically identify the false and defamatory statements at issue. See *Orlando Sports Stadium, Inc. v. Sentinel Star Co.*, 316 So. 2d 607, 610 (Fla. 4th DCA 1975); *Gannett Florida Corporation v. Montesanto*, 308 So. 2d 599, 599-600 (Fla. 1st DCA 1975).

This provision, which is intended to permit corrections and retractions by the publisher of an allegedly defamatory statement and foster settlements instead of legal action, applies to all civil litigants, both public and private, in defamation actions. See *Wagner, Nugent, et. al. v. Flanagan*, 629 So. 2d 113, 115 (Fla. 1993) (affirming that § 770 applies to all defendants).

"The denial of a motion to dismiss for failure to provide the presuit notice required by section 770.01 is a proper subject for certiorari review." See *Mancini v. Personalized Air Conditioning Heating, Inc.*, 702 So.2d 1376 (Fla. 4th DCA 1997).

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

In the case of § 770.01, the words used are a model of clarity and simplicity: "Before any civil action is brought for publication or broadcast, in a newspaper, periodical, or other medium, of a libel or slander, the plaintiff shall, at least 5 days before instituting such action, serve notice in writing on the defendant, specifying the article or broadcast and the statements therein which he or she alleges to be false and defamatory."

This case involves 1) a civil action, which was 2) brought for publication, 3) in [an] "other medium," for 4) libel and libel per se. Pre-suit notice absolutely applies in this case, a fact that was affirmed by Judge Haury when he granted Colen's Motion to Dissolve the temporary injunction enjoining publication of the

second and third articles (R. 446-448) for failure of the Plaintiffs to cite in their C&D letter any statements therein. (R. 451).

Saleh tried to evade the statute's requirements by asserting service of his C&D letter on Sterling constitutes compliance with § 770.01. It does not. Not only was Colen never served the C&D letter (R. 333), but the letter fails in every conceivable way to qualify as proper pre-suit notice. Saleh's attorney was warned repeatedly that this would mandate dismissal and he refused to correct his failure, despite amending his original Complaint four times (Judge Garcia-Wood verbally denied his final Motion For Leave To Amend; she never put that decree in an Order).

Accordingly, Saleh's failure to comply with § 770.01 compels dismissal of Counts I-III (Libel, Libel Per Se, and Permanent Injunction). See *Comins v. Vanvoorhis*, 135 So. 3d 545 (Fla. 5th DCA 2014)*; Mancini*, 702 So. 2d at 1377, citing *Gifford v. Bruckner*, 565 So. 2d 887 (Fla. 2d DCA 1990); *Cummings v. Dawson*, 444 So. 2d 565 (Fla. 1st DCA 1984).

B. Media / Non-Media Defendant Controversy Settled In *Comins*

Any ambiguity regarding whether non-media defendants are entitled to pre-suit notice was settled in *Comins*, which held that: "The trial court properly determined that VanVoorhis was entitled to pre-suit notice under Section 770.01.

The pre-suit notice requirement of Section 770.01 applies to allegedly defamatory statements made in such a public medium the purpose of which is the free dissemination of news or analytical comment on matters of public concern, as suggested in *Ross*." Articles written to alert the public to overbilling practices at a local animal clinic clearly represent matters of public concern, as Judge Haury correctly concluded.

Even without *Comins*, by holding Colen accountable for Black's articles, Saleh would have been required to serve Colen pre-suit notice because he was a media defendant. At the time Black published his articles, Colen, who holds a degree from the College of Journalism at the University of Maryland (R. 271) and completed internships during his undergraduate studies at ESPN, NBC, and FOX (R. 271), was the managing director of a media company, G.O.A.L. Web Design, LLC (R. 332), whose primary work entailed writing, editing, and publishing blogs on behalf of its clients. Colen testified he has been working in the "mass media for 30 years." (T. 200).

Comins established that publishers of blogs must be served Section 770.01 notices: "Many blogs and bloggers will fall within the broad reach of "media," and, if accused of defamatory statements, will qualify as a "media defendant" for purposes of Florida's defamation law as discussed above." *Id.*

C. Fla. Stat. § 770.01 Is Strict And Unforgiving

The pre-suit notice requirement in Florida defamation actions is not a forgiving standard. A defamation plaintiff must provide pre-suit notice that states, with particularity, all of the statements believed to be defamatory. See Fla. Stat. § 770.01; *Orlando Sports Stadium*, 316 So. 2d 607. In *Orlando Sports Stadium*, this Court held that it does not suffice to merely identify the article; it must identify the precise false and defamatory statements contained therein. The 1st DCA reached a similar conclusion in *Gannett Florida Corporation*, where the plaintiff gave the following pre-suit notice:

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

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

D. Only A Section § 770.01 Notice Is A Section § 770.01 Notice

The only pre-suit letter in this case was sent on February 15, 2015, and it was received by Roger Sterling ten days later. (R. 333). By Saleh's own admission, it was not received by Colen. This admission alone compels dismissal of Counts I-III (Libel, Libel Per Se, and Permanent Injunction).

The letter failed to specify a single article in which any challenged statements appeared (R. 354-355). It failed to explicitly warn of an imminent lawsuit; rather, it indicated Saleh would pursue "legal remedies" in the event of noncompliance with his demands. (R. 355). There was no five-day warning regarding his intention to seek those "legal remedies." (R. 355). Rather, his use of a 10-day timeline pertained only to when he self-determined he would be "entitled to seek monetary damages and equitable relief." (R. 355). Most fatally, the letter included less than half of the challenged statements (R. 354-355) that appeared in the Complaint. (R. 334-335).

The letter, which Saleh always referred to as a "Cease-and-Desist" letter rather than a Section 770.01 notice (R. 333), is reproduced here [all emphasis in original]:

> Dear Mr. Colen and Mr. Black
>
> This law firm represents Vetfield Animal Hospital and Dr. Mustafa Saleh in the above referenced matter. If you are represented by legal counsel, please

direct this letter to your attorney immediately and have your attorney notify us of such representation.

You are hereby directed to

CEASE AND DESIST ALL DEFAMATION OF CHARACTER AND REPUTATION OF VETFIELD ANIMAL HOSPITAL, DR. MUSTAFA SALEH AND ALL PERSONS EMPLOYED BY VETFIELD ANIMAL HOSPITAL.

Dr. Saleh is an educated, respected professional in the community. He has spent nearly four decades serving the community in his profession and building a positive reputation. Dr. Saleh has learned that you have engaged in spreading false, destructive, and defamatory rumors about him, his practice and Vetfield Animal Hospital's employees.

Under Florida law, it is unlawful to engage in defamation of another's character and reputation. Defamation consists of:
(1) A published false statement by a defendant;
(2) about the plaintiff;
(3) to a third party; and
(4) the falsity of the statement caused injury to the plaintiff.

Your defamatory statements involved publishing onto the world wide web a site (vetfieldanimalhospital.com) falsely claiming that my client is a **"deceptive, sneaky, immoral, greedy veterinarian, a flat-out thug"**; that my client **"said there was nothing he could do about**" an accounting dispute; that my client is a "**conman**", and that Vetfield Animal Hospital is **"run by a dirty old crook"** who "**will lie to [and] steal from you"**.

Your website continues to disparage my client's reputation by falsely claiming that Vetfield Animal Hospital is a "**straight-up con**;" that the business is "**sham"** with promotions made with the intent of **"whacking you for a ton more money than the special price**." The website falsely states that my client is a **"sham veterinarian who deserves prison**"; that **"he is the scum of the Earth**"; that **"he is a sleazy thief"**; and that "**he would not confirm he is the owner of this duplicitous operation."**

> Finally, your published website falsely claims that you were "**stonewalled**" by my client's employees, who you also disparage in your published website.
>
> Accordingly, we demand that you immediately cease and desist your unlawful defamation of Vetfield Animal Hospital, Dr. Saleh and all Vetfield employees. If you do not comply with this cease and desist demand within 10 days of receipt of this letter, my client is entitled to seek monetary damages and equitable relief for your defamation against David Colen, Jonathan Black, and G.O.A.L. Web Design, LLC, collectively. In the event that you fail to meet this demand, please be advised that my client has asked me to communicate to you that he will pursue all available legal remedies, including seeking monetary damages, injunctive relief, and an order that you pay court costs and attorney's fees. Your liability and exposure under such legal action could be considerable.
>
> I recommend that you consult with an attorney regarding this matter. If you or an attorney have any questions, please contact me directly.
>
> Please govern yourselves accordingly.

This correspondence is not a Section 770.01 notice. It is not even close to one. The insufficiency of the letter is clear. Whereas Saleh cited only an overall publication, <vetfieldanimalhospital.com> (R. 354), he did not mention any articles therein. (R. 354-355). Merriam-Webster defines an article as "a nonfictional prose composition usually forming an independent part of a publication." As the article plainly shows, there is a headline, a sub-header, 31 properly punctuated sentences contained within multiple paragraphs set off by accompanying artwork, and a copyright notice in the footer. (R. 343-347).

Whereas Saleh said he will "pursue legal remedies," he did not explicitly mention a lawsuit was going to be filed. (R. 355). His use of the phrase, "If you do not comply with this cease and desist demand" (R. 355) leaves open the opportunity for avoidance of litigation. That is not the stated requirement of § 770.01.

Proper pre-suit notice must explicitly warn of an imminent lawsuit. Quoting from *Rolle v. Cold Stone Creamery* 212 So. 3d 1073 (Fla. 3d DCA 2017): "The Letter did not explicitly threaten litigation against CNBC or Rolle … The Letter did not warn CNBC that a lawsuit was imminent, and thus, on its face, the Letter cannot be said to provide notice of an impending lawsuit. Instead, the Letter can better be described as a demand that CNBC cease and desist rebroadcasting the documentary."

The Complaint contains nine sets of challenged statements that were not in the C&D letter.

Those statements appear in ¶ 29 thusly (R. 344):

(a) **Vetfield Lies … [and] … steals;**
(b) Clients are **scammed**;
(c) Dr. Saleh **stole a grand total of $55 from [one or more Defendants'] friend's friend;**
(d) Mustafa Saleh steals
(e) Plaintiffs engage in "**double-billing**"
(f) Implications that Plaintiffs **"ripped off, conned, deceived, or [stole]"** from clients **"all in the name of a fast dollar"**

And in ¶ 36 thusly (R. 345):

(a) Pets **"are held hostage when you go to pick them up at Vetfield Animal Hospital in Sunrise, Florida"**
(b) "**Invoices … often include double and triple billing**"
(c) Vetfield and staff are **"dirty, greedy, thieving bastards who stick a bogus bill in your face"**

* [All emphasis in original].

Without variation, all cases interpreting § 770.01 require strict compliance. In *Gannett Florida Corporation*, the 1st DCA considered a notice that came far closer to complying with the statute than that provided by Saleh. However, because the *Gannett Florida Corporation* notice failed to specify which statements were defamatory, it fell short of the stringent requirements of § 770.01. See *Gannett*, 308 So. 2d 599-600 (Fla. 1st DCA 1975). See also *Canonico v. Callaway*, 26 So. 3d 53, 55 (Fla. 2d DCA 2010) (strictly construing Fla. § 770.01).

Despite being woefully insufficient, this is the kind of vague, censorious, and non-specific warning Saleh's attorney sent on behalf of his clients, one of whom was his own father, a fact that should have motivated him to act with more, rather than less, prudence.

No reasonable interpretation of § 770.01 could conclude that Saleh satisfied his requirements. In a case that dragged on for more than four years and was one

in which Colen raised this issue innumerable times as an affirmative defense and in MTDs and MSJs, it is worth noting this deficiency could have been easily cured.

Any cautious attorney would have dismissed his case without prejudice, mailed Colen a proper § 770.01 notice, and re-filed. Saleh's counsel did not, choosing instead to proceed on course. The reasons he chose to dig in rather than undertake the quick, simple, and inexpensive task of providing proper pre-suit notice may never be fully known. Perhaps he did not want to learn from a non-attorney.

But the overall conduct of the litigation sheds some light on it. This case is a quintessential SLAPP[2] and the reason Saleh did not present the jury with any objective evidence of a false statement of fact is simple – because none ever existed.

In a signed, sworn, and notarized response to Saleh's First Set of Interrogatories filed with the trial court on January 20, 2016, Colen stated under penalty of perjury: "A cease and desist letter from the Plaintiff's son was scanned by Roger Sterling and sent to me via e-mail; it was addressed to multiple others and subsequently arrived in my SPAM folder after this lawsuit was filed,

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

thereby eliminating any chance I had to contact Jonathan Black." (R. 168).

Suppression of valid speech is the only purpose of a case like this. Its sole intention is to punish a speaker with litigation. The intent of § 770.01 is to protect the public's interest in the free dissemination of information about matters of public concern. See *Mancini*, 702 So. 2d at 1378. Depriving online publishers of the benefits of pre-suit notice is void of legal or logical support and would create a chilling effect throughout this predominant medium.

Long before the Internet, the U.S. Supreme Court recognized the definition of the "press" is fluid, and it does not depend on the particular medium through which publishers transmit information to the public. In *Lovell v. City of Griffin*, the court held that the "liberty of the press is not confined to newspapers and periodicals ... The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." 303 U.S. 444, 452 (1938).

The trial court erred, on December 14, 2016, by denying Colen's Motion to Dismiss Counts I-III (R. 268-288) for failure of Saleh to serve Colen pre-suit notice. (R. 289). Not only did Saleh fail to serve his C&D letter on Colen, but the C&D letter does not comply with the strict requirements of § 770.01.

E. Saleh's Failure To Prove The Falsity Of Any Challenged Statement Compels A Judgment for Colen

"Proof of a false statement of fact is the *sine qua non* for recovery in a defamation action." See *Byrd v. Hustler Magazine Inc.*, 433 So. 2d 593 (Fla. 4th DCA 1983). "A false statement of fact is absolutely necessary if there is to be recovery in a defamation action." See *Zorc v. Jordan*, 765 So. 2d 768 (Fla. 4th DCA 2000). Because Saleh failed to enter into the record a single piece of objective evidence to prove the falsity of any challenged statements (R. 560-757) (T. 1-294), the trial court erred in denying Colen's request for a Directed Verdict (T. 288) and Post-Verdict Motion For a Directed Verdict. (R. 545-546).

Upon the close of evidence presented by both sides at the trial, Colen asked for a Directed Verdict, at which time Judge Haimes ruled the request was "untimely." (T. 288). Whereas Judge Haimes may have been correct that Colen should have asked for a Directed Verdict immediately upon the close of Saleh's evidence (T. 288), Colen was entitled to procedural latitude as a self-represented party. (T. 2). "Pro se litigants should be afforded "procedural latitude," though still subject to applicable procedural rules." See *Hanna–Mack v. Bank of Am., N.A.*, 218 So. 3d 971, 973 (Fla. 3d DCA 2017).

F. Expressions Of Pure Opinion Are Non-Actionable

Only statements of fact – not opinions – are defamatory under Florida law. The U.S. Supreme Court has held there "is no such thing as a false idea," ensuring that individual opinions are protected by the U.S. Constitution. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974).

Courts, rather than juries, determine whether a statement is one of opinion or fact as a matter of law. See *Morse v. Ripken,* 707 So. 2d at 922; *Zambrano v. Devanesan*, 484 So. 2d 603, 606 (Fla. 4th DCA 1986). **"The determination of whether a statement is fact or opinion is a question of law for the court, which an appellate court may determine on review."** *Id.*

With the exception of the two statements of fact regarding Saleh saying he could not fix a billing dispute (R. 334) and not confirming he owns Vetfield (R. 334), every challenged statement was either a non-actionable expression of rhetorical hyperbole, a vigorous epithet, at least substantially true, an insult, or First Amendment-protected "pure opinion."

Neither any physical evidence (R. 560-757) nor any witnesses at trial (T. 1-294) corroborated the falsity of the statements regarding Saleh saying he could not fix a billing dispute or refusing to admit he owns the animal clinic. Neither any physical evidence (R. 560-757) nor any witnesses at trial (T. 1-294) corroborated the falsity of any of the challenged statements.

Both of the Plaintiffs' witnesses corroborated the truthfulness of Saleh saying he was unable to fix a billing dispute. The corporate representative, Russell Knutson, said: "Dr. Saleh doesn't deal with billing" (T. 132) and Saleh himself said: "There are staff members for … billing. I'm not one of those." (T. 189).

Saleh was questioned on the witness stand by Colen: "When I asked you who owns VetField, you said 'I really have to go. They're calling me.' Is that true?" and Saleh replied: "To make you at peace with yourself, yes." (T. 185-186). As a follow-up question, Saleh was asked if his response constitutes proper conduct for a medical professional and he replied, "No, no, no." (T. 188).

It would be impossible for a reasonable reader to interpret any of the bombastic insults leveled at Saleh, in context, as expressions of fact. See *Dockery*, 799 So. 2d at 296-97 (Fla. 2d DCA 2001); *From*, 400 So. 2d 52, 58 (Fla. 1st DCA 1981). Florida's appellate courts repeatedly have found commentary similar, if not nearly identical, to Black's to constitute First Amendment-protected opinion.

In *Dockery*, the defendant claimed that a successful businessman owed more than $500,000 in back-taxes and was under federal investigation. 799 So. 2d at 296-97. Although disputed, the statements in *Dockery* were found to be non-actionable and that they were based upon the position of the IRS.

Likewise, a newspaper's allegations of a tennis instructor's poor playing skills and inability to enhance students' playing abilities were determined to be

non-defamatory, as they constituted the author's opinions regarding the instructor's fitness for his profession. *From*, 400 So. 2d at 58.

In both cases, the courts determined that no reasonable person would interpret the speakers' statements as statements of fact. See *From*, 400 So. 2d at 57; *Dockery*, 799 So. 2d at 295.

When an author provides the facts underlying his opinion, alongside his subjective impressions, the author's statement is a "pure expression of opinion" protected by the First Amendment and Florida Law. See *Morse*, 707 So. 2d 921; *Zambrano*, 484 So. 2d 603, 606; *Hay*, 450 So. 2d 293.

Hay involved a letter to the editor of a newspaper, discussing the state attorney's office's decision to not seek prosecution of certain individuals. *Id*. The letter stated, "This makes me sick! Catch a crook, pat him on the head and let him go free." *Id*. Mr. Hay filed suit, which was dismissed as a matter of law because the court found the article to be opinion, and it shared the facts upon which it was based.

In *Morse*, this Court affirmed the lower court's dismissal of defamation claims against Mrs. Ripken, who said Mrs. Morse intended to spend the night with her husband, Cal Ripken. This Court agreed that Mrs. Ripken's statement was "pure opinion" because a factual basis was provided for her statement.

This Court concluded the statements that formed a sufficient-enough foundation for Mrs. Ripken's opinion were that "fans mob Cal wherever he goes" and "they want to kiss him" and that Mrs. Morse had not vacated the Fort Lauderdale home she agreed to rent to Mr. Ripken for Spring Training when Mr. Ripken arrived at the residence. Those three statements were enough to satisfy this Court. There was no mention that Mrs. Morse wore sexually suggestive attire or that she made any provocative comments to Mr. Ripken.

In the present case, Black presented a far more specific factual foundation in his first article. In it, these facts were included: a) Saleh owns and operates Vetfield (R. 343); b) Colen received a flyer advertising Vetfield's services and the flyer contained a breakdown of the correct price Colen should have been charged (R. 346); c) The parties agreed to $77 for the neutering of Colen's puppy (R. 346); d) Colen was ultimately billed $132 (R. 346 with price redacted by Broward Clerk; please see unredacted version at R. 229 and R. 647); and e) Colen's money was never refunded (R. 346-347).

The article even included a dollar-for-dollar breakdown of the agreed-upon price as well as the inflated price Colen was forced to pay. (R. 346). These facts were never challenged in any version of the Complaint (R. 1-23; 101-133; 212-243; 331-364), in Saleh's Response to Colen's first MSJ (R. 179-185) or in his Response to Colen's Post-Verdict Motion (R. 480-489), or at trial. (T. 1-294).

Knutson admitted under oath that Colen was overbilled. Colen, again acting as his own attorney, asked Knutson: "How much was I billed when I came into your office for my puppy's neutering?" and Knutson replied: "$132.00 and some change." (T. 136). Colen then asked Knutson: "How much was I supposed to pay?" and Knutson replied: "$77.00." (T. 136).

Accordingly, Black's statements should receive similar treatment as those attributed to both Mrs. Ripken and Independent Newspapers, as Black provided the foundation upon which he relied for his article and added his own editorial opinion. "Pure opinion is based upon facts that the communicator sets forth in a publication, or that are otherwise known or available to the reader or the listener as a member of the public." See *Hay.*

Once the facts regarding the overbilled money were published in the first article, they became available to readers of the second and third articles. Also, neither the second nor the third article was attached to the Complaint (R. 331-364), in violation of Fla. R. Civ. P. 1.130 (a), or referenced in the C&D letter, in violation of § 770.01 (R. 354-355); accordingly, no content from the second or third article could give rise to any claims of defamation.

No reasonable person would interpret Black's descriptions of Saleh as statements of actual fact. To exclaim that Saleh is a "dirty old crook" or a "sleazy thief" or that he is "deceptive" or "greedy" or "immoral," alongside such a

complete factual foundation on which those insults were based, is non-actionable under Florida law.

The immutable truth is that it would have required approximately one minute's time for Saleh to mail Colen a check for the money that was overbilled. But he chose not to. It also is immutably true that it would have required even less time for Saleh to instruct one of his subordinates to refund Colen's credit card and for Saleh to follow-up to ensure his order was carried out. But, again, Saleh chose not to. Knutson testified Saleh was aware an act of overbilling was carried out at Saleh's animal clinic and that Saleh failed to return Colen's money. Colen asked Knutson: "Did you know that I asked Dr. Saleh for a refund?" and Knutson replied: "I was aware. He did bring it to my attention." (T. 136-137).

Someone who holds himself out as the "President" of a very small local business (R. 331) is not immune under Florida law to criticism for such indifference. Knutson testified that Vetfield has less than a dozen employees, and only four, including Saleh, were on duty at the time Colen's puppy was neutered. (T. 144). Knutson further testified that Saleh spends upwards of 30 hours every week at the animal clinic (T. 126), which would debunk any theory that Saleh works at Vetfield as a side job or that he was an uninterested party to the business.

The trial court erred by denying Colen's MSJ (R. 172-178) regarding the First Amended Complaint (R. 101-133). In her written opinion filed on August 4,

2016, Judge Garcia-Wood based her denial on the fact that discovery was "ongoing and incomplete." (R. 192-194). This constitutes an error.

The fact that Saleh owns and operates the animal clinic was disclosed. (R. 110, 226, 644). So were the facts that the parties agreed to $77 for the neutering (R. 114, 229, 647), that Colen was billed $132 (R. 114, 229, 647), and Colen's money was never returned (R. 113-114, 229-230, 647-648). None of these facts were disputed in the First Amended Complaint (R. 101-133) (**or in any version of the Complaint**) or in Saleh's response to Colen's MSJ. (R. 179-185).

Rather, Saleh's response to the MSJ focused on his suspicion that Colen wrote the articles using Black's name (R. 181), which is immaterial to the legal argument at issue. Regardless of who wrote the articles, the complete factual foundation on which the challenged statements were based was still disclosed. No matter what would be learned during discovery over the coming years, the factual foundation was still there.

Likewise, the trial court erred by denying Colen's Motion for a Directed Verdict at trial (T. 288) as well as his Post-Verdict Motion (R. 470-479) in light of the full disclosure of the factual foundation on which the challenged statements were based. (R. 545-546).

G. The Trial Judge Erred By Allowing The Jury To Consider As Defamatory Statements From The Second And Third Articles

Judge Haimes allowed the jury to consider as defamatory all of the challenged statements, regardless as to whether they were in Saleh's C&D letter or attached to the Complaint. (T. 260). Colen preserved this error with an objection. (T. 260-263).

If this Court decides not to reverse the Final Judgment entered against Colen, then Colen would respectfully ask for a new trial, one in which the jury is permitted to consider statements contained only in the first article.

A new trial is necessary when the party who engaged in the improper tactics cannot meet his burden of showing that "there is no reasonable possibility that the error contributed to the verdict." See *R.J. Reynolds Tobacco Co. v. Calloway*, 201 So. 3d 753, 761 (Fla. 4th DCA 2016); *R.J. Reynolds Tobacco Co. v. Gafney*, 188 So. 3d 53, 60 (Fla. 4th DCA 2016).

H. Expressions of Rhetorical Hyperbole Are Constitutionally Protected

The vituperative language used in the subject articles does not affect their status as non-actionable matters of opinion. See *Town of Sewall's Point v. Rhodes*, 852 So. 2d 949, 951 (Fla. 4th DCA 2003). Even when a speaker uses highly inflammatory language, the words are Constitutionally protected as rhetorical hyperbole. See *Milkovich v. Lorain Journal Co.,* 497 U.S. 1 (1991).

In fact, they receive greater First Amendment protection because no objective reader would interpret the statements as statements of fact. See *Greenbelt Pub. Ass'n v. Bresler*, 893 U.S. 6, 14 (1970); see also *Gardner v. Martino* 563 F. 3d 981, 987 (9th Cir. 2009). "[A] threshold question after *Milkovich* in a defamation claim is whether a reasonable fact-finder could conclude a challenged statement implies an assertion of objective fact. If the answer is no, the claim is foreclosed by the First Amendment." See *Unelko v. Rooney*, 912 F. 2d 1049, 1053 (9th Cir. 1990).

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

Even descriptions of a plaintiff as "nuts" and "crazy" are protected as "pure expressions of opinion." See *DeMoya v. Walsh*, 441 So. 2d 1120 (Fla. 3d DCA 1983). The First Amendment demands breathing room sufficient for a bit of passion in the mind of an author and it does not protect thin-skins of people like Saleh.

Saleh's unhappiness with a harsh online article does not justify the trial court ignoring Black's (or Colen's) First Amendment rights. To establish his claims for

defamation, Saleh was required to meet his burden of proving that the challenged statements were of fact, and provably false. See *Zorc v. Jordan*, 765 So. 2d 768, 772 (Fla. 4th DCA 2000). **Saleh did not enter into the record a single piece of objective evidence that could even attempt to prove the falsity of any challenged statements.** (R. 560-757).

Black's use of vulgar and offensive language such as "scum" (R. 344), "douchebag" (R. 346), and "punk guttersnipe" (R. 346), which provide clear notice of his editorial license, would leave a reasonable reader with no doubt they are not reading a purely factual article.

Even if the trial court interpreted Black's caustic statements as "statements of fact," they still would not be defamatory. Black's commentary was proven at least substantially true by evidence entered into the record. The written agreement for $77 was shown to the jury and entered into the record. (R. 583, 601). Same for the final bill for $132 (R. 585, 602), the letter from BB&T indicating its Centralized Fraud Claims Department concluded an act of fraud occurred (R. 764-766), and the flyer upon which the $77 price was based. (R. 600, 761-763). No one, at any stage of this lawsuit, including and especially the trial (T. 1-294), disputed the veracity of the information within, or the authenticity of, these documents.

The trial court erred in denying both Colen's Motion for Directed Verdict at trial and then Colen's Post-Verdict Motion. At the hearing for the Post-Verdict Motion, Judge Haimes asked Saleh's counsel what evidence he entered into the record to prove the falsity of any challenged statement. (R. 516). The attorney's only response was that he "presented evidence" at trial that Saleh was never "charged with or convicted of a crime." (R. 516).

Not only is Saleh's counsel's response categorically false – he did not present any such evidence at trial, as his Trial Exhibits illustrate (R. 560-757) – but the statement "Mustafa Saleh was charged with or convicted of a crime" neither was listed as a challenged statement in the Complaint (R. 331-364) nor included in any of the three subject articles. (R. 569-586).

Whereas Saleh testified that he had never been "charged with or convicted of a crime," (T. 193) his first-person words do not constitute objective evidence. **Whether a statement is true or false is determined by what is proven by a "core of objective evidence," as explained in *Milkovich*.**

Accordingly, to prove he had never been charged with or convicted of a crime, Saleh would have been required to enter into the record a piece of objective evidence such as a background report from the Florida Department of Law Enforcement or the FBI. But he did not. (R. 560-757). Alternatively, for example, Saleh could have subpoenaed a law enforcement professional who was

familiar with his criminal background record to provide objective testimony. But he did not. (T. 1-294).

In *Pullum v. Johnson*, 647 So. 2d 254 (Fla. 1st DCA 1994), the 1st DCA opined: "Examining [a] broadcast in its entirety, we conclude the challenged "drug pusher" statement cannot reasonably be interpreted as stating "actual facts" about Pullum's illegal association with drugs. Johnson … invoked exaggerated hyperbolic language to emphasize his objection to proposed ordinance amendments. His use of this "rhetorical hyperbole" negates the impression Johnson was making a factual statement that Pullum was pushing illegal drugs. It is obvious from both the context of his statement and the language used that Reverend Johnson was not stating facts about William Pullum, but was expressing a point of view using imaginative and inflammatory expression ... Considering the complete statement … it is not possible for a reasonable person to understand his use of the term 'drug pusher' as charging the plaintiff with the commission of a crime."

Pullum addresses with surgical precision the matter at issue with regard to Saleh's disapproval with Black's commentary. It also refutes Saleh's counsel's assertion at the Post-Verdict Hearing that the statements "sleazy thief" and "dirty old crook" were intended to convey actual facts about Saleh. (R. 516).

As reinforced in *Greenbelt Pub. Ass'n*, it would be "impossible" to believe that a reasonable reader of Black's articles could have thought the challenged

statements were charging Saleh with the "commission of a criminal offense." On the contrary, even "the most careless reader" would have perceived Black's words were "no more than rhetorical hyperbole, vigorous epithets."

There is a distinct difference between a statement such as "Mustafa Saleh stole $55 from the cash register at the 7-Eleven at 123 Main Street in downtown Fort Lauderdale at 11:13 a.m. ET on Thursday, October 30, 2014," and, in the context of a scathing online review, "Mustafa Saleh is a dirty old crook." The former statement is an assertion of actual facts that can be proven true or false with fingerprints, DNA samples, third-party witnesses, and surveillance video; the latter statement obviously is not meant to convey actual facts about Saleh but rather a mean-spirited and vitriolic insult. "The First Amendment requires neither politeness nor fairness." See *Pullum.*

Pullum and *Greenbelt Pub. Ass'n* make clear that not even the most careless reader of Black's articles would conclude that any challenged statement was charging Saleh with the commission of a crime. Saleh's counsel's argument at the Post-Verdict Hearing, therefore, is without merit.

Saleh's argument in his Response to Colen's Post-Verdict Motion that the "jury decided the statements in their totality were defamatory" (R. 483) is a public admission that the trial court erred in denying the Motion. At the same time, the argument represents Saleh's counsel's misunderstanding of Florida

defamation law. There is no statute or case law that decrees that multiple unfavorable statements can arbitrarily amount to defamation. As such, the attorney failed to substantiate this fatuous position with any case law or statute.

I. The Gist Of The Challenged Statements Would Not Alter The Effect Of The Pleaded Truth

Minor factual inconsistencies and embellishments do not convert a statement whose "substance or gist conveys essentially the same meaning [as the truth]" into defamation. See *Smith v. Cuban Am. Nat'l Found.,* 731 So. 2d 702, 705-06, 50 (Fla. 3d DCA 1999), *rev. denied*, 753 So. 2d 563 (Fla. 2000).

In *Cuban Am. Nat'l Found.*, the court held that it must consider "all the words used," and not merely a particular sentence or phrase. 731 So. 2d at 705. A "statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'" See *Cuban Am. Nat'l Found.* citing *McCormick v. Miami Herald Publ'g Co*., 139 So. 2d 197, 200 (Fla. 2d DCA 1962).

Black's words do not change the fact that Saleh owns and operates an animal clinic that took money that was not rightfully its to take and he never issued a refund. The challenged statements would not cause a reasonable reader to believe that Saleh is a rapist, a mass-murderer, an arsonist, or a terrorist. Any reasonable reader of Black's articles would conclude only that Saleh owns and operates an

animal clinic that took money that was not rightfully its to take and he did not issue a refund.

As explained in *Morse*, Black should be free to criticize Saleh for his failure to return the money his animal clinic inappropriately took from Colen. Saleh, likewise, should be able to assert the taking of that money was an honest mistake, even though that money was never returned and Saleh acknowledged Colen brought the matter of the overbilling to his attention during a telephone conversation. (T. 168). Saleh's assertion certainly will seem wildly implausible, but this is what the *Morse* court labeled the "competition of ideas."

"However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas." *Id.*

J. Private Figures In Defamation Suits Must Prove Negligence

As shown by the Jury Instructions (R. 457-467), the jurors never were directed to consider whether Saleh proved negligence on the part of Colen. Both Saleh's trial Exhibits (R. 560-757) and the trial transcript (T. 1-294) reveal that Saleh never even attempted to prove negligence. The words "negligence" or "negligent" or anything synonymous with the same were never spoken by anyone at trial. (T. 1-294).

Nothing entered into the record even proves Colen published the articles Saleh disliked. (R. 1-801).

After conducting discovery for more than four years, and after cross-examining Colen, Saleh's attorney still could not reference a single piece of physical evidence or testimony to prove Colen authored the subject articles. The attorney was completely incapable of saying to the jury in his summation: "Colen is lying and here is the proof." The attorney could only muster, "It's our position that he's lying." (T. 277).

Saleh tried during discovery to ascertain the name of the account-holder of the IP address[3] from which the first article was published and he failed**.**

The response he received from BellSouth was entered into the record (R. 785-787) and Knutson testified it did not contain Colen's name or any of his contact information. (T. 155). Saleh was required to prove Colen acted with negligence and he failed to so much as prove that Colen acted.

Accordingly, Saleh did not state a cause of action for defamation. A claim of defamation requires the following five elements: (1) publication; (2) falsity; (3) actor must act … at least negligently on a matter concerning a private person; (4) actual damages; and (5) statement must be defamatory." See *Jews For Jesus, Inc. v. Rapp*, 997 So.2d 1098, 1106 (Fla. 2008).

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[3] An IP address is a string of unique numerals assigned to each device connected to the World Wide Web that identifies the owner of the Internet service being used (e.g., from a provider such as BellSouth, Comcast, Verizon, etc.).

Because proof of negligence is a requirement in defamation torts, Colen would respectfully ask this Court to consider whether Saleh's failure to prove such negligence constitutes a fundamental error, as explained in *Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970): "A fundamental error is one that "goes to the foundation of the case or goes to the merits of the cause of action."

K. Failure To Plead Performance Of Conditions Precedent Compels Dismissal

Litigants in civil controversies must state their legal positions within a particular document, a pleading, so that the parties and the court are absolutely clear what the issues to be adjudicated are. See *Bank of Am., Nat'l Ass'n v. Asbury* 165 So. 3d 808 (Fla. 2d DCA 2015).

As the Florida Supreme Court explained in *Hart Properties, Inc. v. Slack*, 159 So.2d 236, 239 (Fla.1963): [I]ssues in a cause are made solely by the pleadings ... "[The purpose of pleadings] is to present, define and narrow the issues, and to form the foundation of, and to limit, the proof to be submitted on the trial. The objective sought in the present rules is to reach issues of law and fact in one affirmative and one defensive pleading."

Fla. R. Civ. P. 1.120 (c) establishes a special pleading rule in regard to conditions precedent: "In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been

performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity." Under this rule, a plaintiff is allowed to allege in a generalized fashion that all conditions precedent to a cause of action have either occurred or been performed. A defendant, as the responding party, shoulders the responsibility of identifying a specific, unfulfilled condition precedent should it wish to deny that general averment.

Whereas Saleh was required to generally aver compliance with § 770.01, he did nothing of the sort. No version of the Complaint mentioned presuit notice, compliance with any "condition precedent," or Section 770.01. (R. 1-23; 101-133; 212-243; 331-364).

Accordingly, the trial court erred, on May 23, 2019, in denying Colen's Motion for Summary Judgment (R. 438-441) for failure of Saleh to comply with Fla. R. Civ. P. 1.120 (c). (R. 445). See *Scullock v. Gee* 161 So. 3d 421, 423 (Fla. 2d DCA 2014) citing *Commercial Carrier Corp. v. Indian River Cty*., 371 So. 2d 1010 (Fla. 1979).

L. The Jury's Verdict Is Diametrically Contrary To The Manifest Weight Of The Evidence Presented At Trial

Saleh presented zero evidence, either in the form of testimony (T. 1-294) or Exhibits (R. 560-757), that proved the falsity of a single challenged statement.

There would not be enough space in a 50-page Initial Brief to describe the failings of each of Saleh's Exhibits, so here are just a half-dozen: 1) A redacted police arrest booking photograph of Saleh's counsel's former girlfriend, someone who never was a party to this lawsuit (R. 593); 2) A list of Saleh's counsel's Facebook friends, none of whom was a party to this lawsuit (R. 589); 3) A copy of an online petition endeavoring to disbar Saleh's counsel from practicing law (R. 608-613); 4) A copy of a website unrelated to this lawsuit ridiculing Saleh's counsel as "Miami's Worst Attorney" (R. 592); 5) A printout from the docket of an entirely different lawsuit filed by entirely different Plaintiffs against Colen *nearly* a decade ago (R. 681-687) that Colen got dismissed at the very first hearing (R. 684); and 6) A printout from the docket of an entirely different lawsuit filed by entirely different Plaintiffs against Colen *more* than a decade ago (R. 688-692), a case that resulted in a Confidential Settlement between the parties.

None of these Exhibits, which are just a sampling of two dozen in total entered into evidence by Saleh (R. 560-757), proves the falsity of a single challenged statement. None has anything whatsoever to do with the present case.

In the absence of any meaningful or relevant evidence that could prove the falsity of the challenged statements, Saleh's strategy was to seek sympathy from the jurors for the teasing that was endured by his counsel from people unconnected to this case. See, e.g., Jessica Davis. (R. 610). Despite all of the attention that

Saleh's counsel sought for himself, it is important to note that Saleh's counsel never was a Plaintiff in this lawsuit.

Contemporaneously, Saleh attempted to attack the credibility of Colen by digging up two old libel cases filed against him, one from 2010 and the other from 2011. In doing so, all that Saleh proved was that in three decades of publishing for the mass media (T. 200), Colen was sued only twice for defamation (R. 681-687, 688-692) and both Plaintiffs failed miserably. *Id.*

Saleh's strategy succeeded with this jury. It cannot be any other way. Not with the mountain of Exhibits entered into evidence showing that Saleh took money that did not belong to him (R. 585, 602), that Saleh was made abundantly aware Colen deserved a refund of the overbilled money (T. 185-186), and that Saleh failed to return that money. (R. 764-766).

The agreement between Saleh and Colen for $77 was entered into evidence. (R. 583, 601). The final invoice for $132 that Colen was forced to pay at Saleh's animal clinic was entered into evidence. (R. 585, 602). BB&T's letter indicating an act of fraud occurred was entered into evidence. (R. 764-766). The flyer on which the $77 was based was entered into evidence. (R. 600, 761-763).

Saleh alleged in his Complaint it was false that he would not confirm he owns Vetfield and then he testified when asked who owns Vetfield he said: "I really have to go. They're calling me." (T. 185-186). Saleh alleged in his

Complaint it was false that he said there was nothing he could do about a billing dispute and then he testified: "There are staff members for … billing. I'm not one of those." (T. 189). These were the only two statements of provable falsity regarding Saleh in the Complaint and Saleh was exposed under oath for lying by asserting in the Complaint these two statements are false.

If this Court decides that Colen is not entitled to a reversal of the Final Judgment on any of the preceding issues, then he would respectfully ask for a new trial in light of the verdict being so contrary to the manifest weight of the evidence presented at trial, as explained in *Krolick v. Monroe ex, rel. Monroe*, 909 So. 2d 910, 914 (Fla. 2d DCA 2005); *Ford v. Robinson*, 403 So. 2d 1379, 1382 (Fla. 4th DCA 1981); *Cloud v. Fallis*, 110 So. 2d 669, 673 (Fla. 1959); and *Baptist Memorial Hosp., Inc. v. Bell*, 384 So. 2d 145, 146 (Fla. 1980).

CONCLUSION

Saleh dragged Colen through a facially defective SLAPP for four years. He pursued his frivolous suit with one unmeritorious tactic after another, failing to comply with both Fla. R. Civ. P. 1.130 (a) and 1.120 (c), and Fla. Stat. § 770.01.

Even if he had complied with all of those requirements, his case would be without merit as a matter of fundamental defamation and First Amendment law.

Saleh proved nothing at trial. He produced neither any physical evidence of the falsity of any challenged statements nor any witnesses to corroborate such falsity. Worse yet, he failed to so much as prove Colen published any of the articles in which the challenged statements appeared.

For this, and all of the above-stated reasons, a reversal of the trial court's Final Judgment is respectfully requested.

Respectfully submitted this 30th day of December, 2020.

/s/ David Colen

Appellant (Pro Se)

Prepared with the assistance of counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 30, 2020, I electronically filed this Initial Brief with the Florida Courts E-filing Portal which furnished an electronic copy to:

OMAR SALEH, ESQ.
9000 NW 44th Street
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Dated: Dec. 30, 2020

/s/ David Colen

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

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

/s/ David Colen 

David Colen