IN THE DISTRICT COURT OF APPEAL
FOR THE SECOND DISTRICT OF FLORIDA

Case No.: 2D12-186
L.T. No.: 11-2840-CA

MARIO SÁNCHEZ,

Appellant,

v.

ARNON RONY JOEL,

Appellee.

On Appeal from the Circuit Court
of the Twentieth Judicial Circuit
in and for Collier County, Florida

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

The Appellant, Dr. Mario Sánchez, shall be referred to herein as "Dr. Sánchez." Dr. Sánchez's online newspaper located at http://marcoislandblog.blogspot.com shall be referred to as the "Online Newspaper." References to Dr. Sánchez's prior-submitted Appendix shall be indicated as "[App. _____]" with further reference to specific tabs or pages within the Appendix as appropriate.

REPLY BRIEF OF APPELLANT

This Reply Brief addresses three specific issues raised by the substance of Appellee's Answer Brief. First, Appellee has erroneously asserted that *Fla. Stat.* § 770.05 only applies to "media defendants" – despite the fact that no such limitation appears in the language of the statute, nor has such a limitation ever appeared in any case law interpreting that section. Second, Appellee's asserted argument fails to establish venue based upon where Dr. Sánchez may own an interest in property, but does not reside. Finally, Appellee misconstrues the rule against hearsay, its exceptions, and the effect of judicially noticeable facts upon a proper determination of where venue should lie.

A. Section 770.05 applies to all defendants, including Dr. Sánchez.

Appellee has taken the position that *Fla. Stat.* § 770.05 does not dictate the proper venue for the action underlying this appeal because he believes that Dr. Sánchez is not a "media defendant." While Dr. Sánchez disputes Appellee's

position that he is not a "media defendant," this Court need not rule upon that question to find that Section 770.05 does indeed apply to this and every other defamation dispute in Florida, no matter who or what the defendant may be.

In attempting to establish that Section 770.05 only applies to "media defendants," Appellee cites – out of context – this Court's opinion in *Bridges v. Williamson*, 449 So.2d 400 (Fla. 2d DCA 1984). In *Bridges*, a group of defendants sought dismissal of a defamation complaint against them, asserting that *Fla. Stat.* § 770.01 required notice be given as a prerequisite to the plaintiffs' action. *Bridges*, 449 So.2d at 400. This Court held that Section 770.01 did not apply because the defendants in that case were not "media defendants." *Bridges*, 449 So.2d at 401. Despite the fact that no other section of Chapter 770 was applied or discussed in the *Bridges* opinion, the broad statement was made that the entirety of Chapter 770 should not be applied to "nonmedia defendants." *Bridges*, 449 So.2d at 401. Later decisions by the Florida Supreme Court, however, have confirmed that all of Chapter 770 applies to all defendants. *See Wagner, Nugent, Johnson, Roth, Romano, Erikson & Kuper, P.A. v. Flanagan*, 629 So.2d 113, 115 (Fla. 1993)

(holding that *Fla. Stat.* § 770.07 applies to all defendants, but stating that Chapter 770, without any limitation stated, applies to all civil litigants).[1]

A comparison of the language of Section 770.01 and Section 770.05 clearly demonstrates the latter's broader applicability. As a qualifier to types of publications and broadcasts where Section 770.01 applies, the Florida Legislature has mandated that such publications and broadcasts must be found in particular media:[2]

> **770.01 Notice condition precedent to action or prosecution for libel or slander. –** Before any civil action is brought for publication or broadcast, *in a newspaper, periodical, or other medium*, of a libel or slander, the plaintiff shall, at least 5 days before instituting such action, serve notice in writing on the defendant, specifying the article or broadcast and the statements therein which he or she alleges to be false and defamatory.

Fla. Stat. § 770.01 (2011) (emphasis added). By its own plain terms, Section 770.01 is not to be applied to every allegedly defamatory statement – but only

[1] In an attempt to limit the applicability of *Wagner*, Appellee has cited the opinion in *Tobkin v. Jarboe*, 695 So.2d 1257 (Fla. 4th DCA 1997), claiming that the Forth District came to the conclusion, based on *Wagner*, that only Section 770.07 should be applied to nonmedia defendants. This is not an accurate summary of the holding in *Tobkin*, which again only opined upon the applicability of Section 770.01 – not the entire remainder of Chapter 770. *See Tobkin*, 695 So.2d at 1258. Moreover, Appellee's citation to the Florida Supreme Court review of *Tobkin* as "approving" such limitation is similarly disingenuous, where the cited opinion only dealt with the issue of qualified immunity for individuals filing complaints against members of the Florida Bar. *See Tobkin v. Jarboe*, 710 So. 2d 975, 978 (1998).

[2] It bears again mentioning separately that the limitation in Section 770.01 is to the publication medium, not the publisher.

those that appear in a newspaper, periodical, or other medium.[3] In contrast, Section 770.05 does not contain any limitation to its applicability.

Instead of providing language that limited the applicability of Section 770.05, the Florida Legislature has indicated that it applies to "any" allegedly defamatory statement:

> **770.05 Limitation of choice of venue.** – No person shall have more than one choice of venue for damages for libel or slander, invasion of privacy, or any other tort founded upon *any single publication, exhibition, or utterance*, such as any one edition of a newspaper, book, or magazine, any one presentation to an audience, any one broadcast over radio or television, or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

Fla. Stat. § 770.05 (2011) (emphasis added). Instead of limiting the applicability of Section 770.05, an illustrative, non-exhaustive and non-exclusive list of "such as" examples has been provided to define a single actionable instance of alleged defamation. Where Section 770.01 contains clearly limiting language, Section 770.05 demonstrably does not.

Even if it were not clear from the plain language of Section 770.05 that this section should be applied to all defamation defendants, where the Florida Supreme Court has expressly held that Section 770.07 does apply to all defamation

[3] Despite Appellee's assertions to the contrary, other Florida courts have held that blogs fall into Section 770.01's catch-all category of "other medium." This point is further developed in Section B *infra*.

defendants, *see Wagner*, 629 So.2d at 115, it is wholly illogical to conclude that Section 770.05 would not apply – especially since it is *specifically referenced* in Section 770.07. *See Fla. Stat.* § 770.07 (2011) ("The cause of action for damages founded upon a single publication or exhibition or utterance, *as described in s. 770.05*, shall be deemed to have accrued at the time of the first publication or exhibition or utterance thereof in this state." (emphasis added)).

Accordingly, Appellee's position – that Section 770.05 should not be applied to his lower court claims – is incorrect. As seen in the Florida Supreme Court's precedent and the statute's plain language, Section 770.05 applies to every defamation action in this state.

B. Notwithstanding the broad applicability of Section 770.05, Dr. Sánchez's status as a "media defendant" is unquestionable.

As demonstrated herein, while some sections of Chatper 770 may turn on the type of publication, the applicability of Chapter 770 as a whole does not depend on the type of defendant in a civil action for defamation. Rather, the sections of this Chapter apply to defamation actions generally. Even if this were not true, and further assuming that Appellee's theory is correct – *i.e.*, that Dr. Sánchez must be a "media defendant" before Chapter 770 applies – Appellee's corollary position that Dr. Sánchez is not a "media defendant" is incorrect.

Other Florida courts have reviewed the question of whether "other medium," as used in Section 770.01, includes the Internet and internet discussion forums, and

held that they do. *See Comins v. Van Voorhis*, No. 2009-CA-015047-O (Fla. Cir. Ct. Jun. 28, 2011) (order granting summary judgment in favor of defendant);[4] *Alvi Armani Med., Inc. v. Hennessey*, 629 F. Supp. 1302 (S.D. Fla. 2008) (*citing Canonico v. Calloway*, 35 Med. L. Rptr. 1549 (Fla. Cir. Ct. Feb. 22, 2007) (involving story posted on an internet website)). Even this Court has acknowledged that "other medium" as used in Section 770.01 includes the Internet. *Holt v. Tampa Bay Television, Inc.*, 976 So.2d 1106 (Fla. 2d DCA 2007), *affirming* 24 Med. L. Rptr. 1540 (Fla. Cir. Ct. Mar. 17, 2005). The courts of other states have already accepted the blogging community as an integral part of the Fourth Estate. *See* 1:19, Rules of the Mass. Supreme Judicial Court (effective July 1, 2012) (permitting citizen journalists to bring electronic devices into the courtroom for blogging).

In support of his argument that Dr. Sánchez is not a "media defendant," Appellee attempts to rely on *Zelinka v. Am. Healthscan, Inc.*, 763 So.2d 1173 (Fla. 4th DCA 2000). In *Zelinka*, the defendant was an individual, with no connection to any publication, who posted something on an internet bulletin board. *Zelinka*, 763 So.2d at 1174. Moreover, the defendant in *Zelinka* was the poster of a *comment* – a one-off statement that could have been left on any website that allows

[4] The full text of the *Comins* opinion has been included in Dr. Sánchez's prior-submitted Appendix. [App. pp. 49-52.]

for third parties to leave comments. *Zelinka*, 763 So.2d at 1174. However, as blogging was not even in existence in 2000, the 4th District Court of Appeals demonstrated foresight that borders on prescience by making this statement:

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

Zelinka, 763 So.2d at 1175. Appellee has asked this Court to accept the myopic position that a blog is the same as a message board – contrary to the *Zelinka* court's caution against doing so – despite the fact that, unlike the defendant in *Zelinka*, Dr. Sánchez has full editorial control to publish news and information on his Online Newspaper.

As established by record evidence, Dr. Sánchez's Online Newspaper is a news and opinion publication with nationwide readership and three-times-weekly dissemination. [App. p. 61.] The fact that Google, Inc., provides the web distribution platform on which the Online Newspaper is published does not magically change its character into a message board, where any number of random persons may add their two cents. Rush Limbaugh does not own the radio stations that broadcast him. Still, there is no serious question that Rush is a part of the "media." Carl Hiaasen is part of the media even if he does not own the Miami Herald. Greta Van Susteren does not own Fox News. A Huffington Post blogger

does not need to own the Huffington Post, or AOL, or Time-Warner to be a media defendant. Even on-camera assistants on Wolf Blitzer's show, who do not have full editorial control over the content, and surely do not own CNN, fall within what constitutes the "media," and it would defy logic if they did not.

Dr. Sánchez's blog seems to fit squarely within the predictions made by Judge Stevenson. While nobody calls a blog an "internet magazine," that is what a blog is. In contrast, a bulletin board clearly is not a blog, nor a publication of any kind, and thus is distinguishable. Dr. Sánchez writes and publishes his own blog. He was not posting on somebody else's bulletin board, or even on somebody else's blog. He was the blogger, not the private citizen, and worthy of protection under Chapter 770. The fact that Dr. Sánchez does not own the Internet, or some part of it, is irrelevant to the applicability of Chapter 770 in his case.

C. Even if Section 47.011 is applied to determine venue, Appellee has not shown that Dr. Sánchez resides in Collier County.

In addition to misinterpreting Chapter 770, Appellee contends that Florida's general venue statute, *Fla. Stat.* § 47.011, should be used to determine the proper venue for his claims, rather than the standard set forth by the Florida Supreme Court in *Perdue v. Miami Herald Publishing Co.*, 291 So.2d 604 (Fla. 1974). Dr. Sánchez disputes Appellee's position, asserting that his Online Newspaper is entitled to the same treatment as any other news publication. Yet Appellee's asserted position, even if correct, would not support venue in Collier County.

Under Appellee's theory of the law, where Dr. Sánchez resides is central to the question of whether venue in Collier County is proper. A party's residence is established in the county where such party is domiciled. *See Minick v. Minick*, 149 So. 483, 488 (Fla. 1933). Domicile is established by considering two facts: (i) where the party is located; and (ii) whether the party intends to remain in that location. *See, generally, District of Columbia v. Murphy*, 314 U.S. 441 (1941); *Wetherstein v. Wetherstein*, 111 So. 2d 292, 293 (Fla. 2d DCA 1959) ("The two essential elements to the acquisition of a new domicil or domicil by choice, as distinguished from domicil of origin, are (1) residence in a new locality, (2) coupled with an intention to make it one's home, that is to say, an intention to permanently remain there and not return to the old locality.") (quoting 11 Fla. Jur. Domicil and Residence § 11); *Warren v. Warren*, 75 So. 35 (Fla. 1917); *Chaves v. Chaves*, 84 So. 672 (Fla. 1920); *and Wade v. Wade*, 113 So. 374 (Fla. 1927).

Dr. Sánchez has established by record evidence that he resided in Miami-Dade County at all times relevant to Appellee's claims, and has no intention to relocate. [*See* App. pp. 12, 59-60.] Appellee has not produced any evidence to contradict this conclusion. Instead, Appellee attempts to rely on Dr. Sánchez's

ownership of an interest in residential property in Collier County to erroneously establish his residence.[5]

Florida's constitutional homestead exemptions are available to a property owner who resides on the property that he or she owns. *See Fla. Stat.* § 196.031(1)(a) (2011). In the case of a property solely owned by one individual, the owning individual satisfies the residence requirement by personally residing on the property. *Id.* If the property is owned jointly, however, the residence requirement for the homestead exemption is satisfied by residence of any one of the joint owners in the subject property. *See id.* ("If only one of the owners of an estate held by the entireties or held jointly with the right of survivorship resides on the property, that owner is allowed an exemption of up to the assessed valuation of $25,000 on the residence and contiguous real property.").

As such, Appellee's reliance upon homestead tax records for a jointly owned property cannot be relied upon to establish Dr. Sánchez's residence. The only fact established by Appellee's proffered homestead record is that Dr. Sánchez has an ownership interest in the subject property. This lone fact is insufficient to establish Dr. Sánchez's actual residence or domicile on that property. The remaining

[5] Appellee also attempts to rely on the fact that Dr. Sánchez chose not to dispute the adequacy of Appellee's service as somehow establishing his residence at the place of service. A defendant's strategic financial choice to forego an objection to service does not – contrary to Appellee's belief – establish any fact at all.

uncontroverted record evidence establishes that Dr. Sánchez resides in Miami-Dade County. Accordingly, it would be clearly erroneous for the lower court to determine that Dr. Sánchez resides in Collier County, Florida.

D. *Appellee's hearsay objections are overcome by evidence properly admitted to the record and judicially noticeable facts.*

Finally, in attempting to refute where his cause of action accrued, Appellee has erroneously asserted Florida's rule against hearsay in an effort to discredit valid proof entered into the record by Dr. Sánchez. In presenting his position, Appellee has stated, without any justification or clarification, that the internet protocol ("IP") addresses of Dr. Sánchez's readers are hearsay, and that records kept of those IP addresses are double hearsay. Appellee has made an inexplicable leap in logic to arrive at these conclusions, which are demonstrably incorrect. A full analysis of whether a particular piece of evidence is hearsay properly includes consideration of the truth for which the evidence has been offered – a step that Appellee has missed. *See Fla. Stat.* § 90.801(1)(c) (2011); *see also Jackson v. State*, 25 So.3d 518, 530 (Fla. 2009) (observing that questions of hearsay turn on whether the matter asserted in the statement is the matter for which such statements are offered as proof).

Dr. Sánchez has presented the business records of his Online Newspaper to demonstrate the location of his readers on July 8, 2011 – *i.e.*, the date of publication for the article Appellee claims is defamatory. [App. tab 11.] These

records inform the Court of the unique identifier for each device to which the Online Newspaper was transmitted at the times indicated. [*See* App. pp. 68-69.] While the previously recorded IP address records may be considered hearsay if offered to show the locations where the Online Newspaper was sent, the IP address records' submission falls squarely within the business records exception to Florida's rule against hearsay. *See Fla. Stat.* § 90.803(6) (2011) (indicating that records of regularly conducted business activity may be admitted over a hearsay objection). Appellee cannot manufacture a level of hearsay by simply moving the goalposts and changing the matter to be proved.

These business records are no different than the shipping records of a mail order product company, which would unquestionably be admissible upon certification by a custodian of those records. *See, e.g., Lewis v. State*, 833 So.2d 812, 815 (Fla. 4th DCA 2002) (certified shipping records establish a rebuttable presumption that shipment occurred); *see also Brake v. Florida Unemployment Appeals Com.*, 473 So.2d 774, 774 (Fla. 3d DCA 1985) ("a letter properly addressed, stamped and mailed is presumed to have been received by the addressee"; "Proof of mailing is generally satisfied by proof of general office practices.") (*citing Brown v. Griffen Industries, Inc.*, 281 So.2d 897 (Fla. 1973) (on rehearing); *Home Insurance Co. v. C & G Sporting Goods, Inc.*, 453 So.2d 121 (Fla. 1st DCA 1984); *and Berwick v. Prudential Property & Casualty Assurance*

Co., 436 So.2d 239 (Fla. 3d DCA 1983)). These IP address records identify the "addresses" where Dr. Sánchez's Online Newspaper was delivered. One need not rely on the out-of-court statement of the ordering customer to know the destination of a shipped item. A different out-of-court statement (*i.e.*, the shipping record) can be offered to properly show the truth of where a particular product was shipped, so long as the requirements of the hearsay exception have been honored.

Dr. Sánchez has provided and certified the "shipping" records for his Online Newspaper, in the form of IP address records, in full compliance with the applicable hearsay exception, thereby proving to where the Online Newspaper was sent on the date in question. The geographic location associated with each IP address is judicially noticeable as a fact capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned. *See Fla. Stat.* § 90.202 (2011). The lower court is required to take notice of such facts upon request by any party. *Fla. Stat.* § 90.203 (2011). Dr. Sánchez submitted such a request, and thereby established the geographic location of one IP address in particular – the one used by the first reader of the article that Appellee claims is defamatory. [App. tab 7.] Accordingly, Appellee has failed to dispute Dr. Sánchez's proof of where Appellee's cause of action accrued.

CONCLUSION

For all of the reasons set forth above and in Appellant's Initial Brief, this Court should reverse the lower tribunal's Order stating that venue is proper in Collier County and remand this action with instructions to either dismiss Appellee's Complaint or transfer to a county that satisfies the requirements imposed by Florida's defamation statutes.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail, postage prepaid, on this 8th day of March, 2012, to:

Christopher D. Donovan
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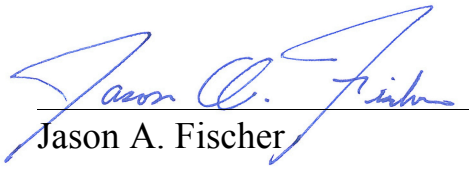

Jason A. Fischer

CERTIFICATE OF COMPLIANCE

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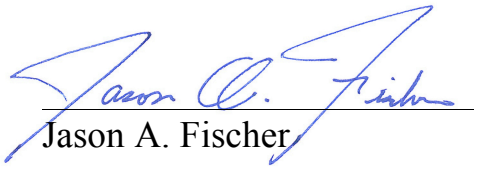

Jason A. Fischer