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IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR SEMINOLE COUNTY

GEORGE ZIMMERMAN **Plaintiff,** **v.** **NBC UNIVERSAL MEDIA, LLC, et al.** **Defendants.**	**CIVIL TRIAL DIVISION** **NO. 2012-CA-006178**

PLAINTIFF'S ANSWER AND MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

ARGUMENT

I. PLAINTIFF'S RESPONSE TO NUMBERED PARAGRAPHS (THE MOTION)

1. Admitted in part, denied in part. It is admitted that plaintiff George Zimmerman commenced this civil action for defamation and intentional infliction of emotional distress on December 6, 2012 against defendants NBC Universal Media, LLC and three of its then-employees. It is denied that defendants have accurately summarized the Complaint. By way of further answer hereto, the plaintiff alleges as follows: the plaintiff has alleged that defendants defamed him by falsely and maliciously editing the audio recording of the 911 call he made on February 26, 2012, to take plaintiff's statements out of context and make it appear that he was guilty of racially profiling Martin and that this was a cause of the tragedy that ensued. The plaintiff has further alleged that, to support the false implications of their broadcasts, defendants also manufactured a false quotation which they attributed to the plaintiff, charging that he used a racial epithet ("coons") during the call.

As more fully explained in the Argument sections below, defendants' motion is improper, premature and meritless. Defendants concede that the demand notice plaintiff's counsel sent on

September 24, 2012, over two and a half (2½) months before the Complaint was filed, was sufficient to put them on notice that they had defamed the plaintiff by their March 20, 22, and 27, 2012 broadcasts, by selectively editing the recording of plaintiff's 911 call to make it appear the plaintiff was guilty of racially profiling Martin and by falsely accusing the plaintiff of using a racial slur during that call, and that they should issue a retraction, which they chose not to do. The edited recording they broadcast on March 19, 2012 was very similar to and carried the same defamatory message as those they played in their subsequent broadcasts and did not retract. In addition, the demand notice asked defendants to preserve the record relating to their termination of defendant Burnside, who had been involved only with the March 19th broadcast. The demand notice was thus sufficient to convey the essence of that defamation, like the others, and fulfill the purpose of the retraction statute.

Moreover, Florida allows a libel plaintiff to amend his demand notice and Complaint at least once. It would be reversible error to dismiss the Complaint, without allowing the plaintiff to do so.

Defendants also advance arguments that rely on disputed issues of material fact and cannot be considered now, before the plaintiff has even had the opportunity to conduct discovery: that a) the plaintiff will not be adduce evidence proving that their broadcasts were false; b) the evidence will show that plaintiff was a public figure for the limited purpose of their broadcasts; c) the plaintiff will not be able to adduce sufficient evidence of actual malice; and d) the evidence will show that defendants were not responsible for the plaintiff's damages. On a motion to dismiss, the only question is whether the plaintiff has alleged the elements of his claims. Defendants do not deny that Mr. Zimmerman has done so.

He has alleged that defendants deliberately took the plaintiff's words out of context to falsely imply he racially profiled Martin and this was the cause of the ensuing tragedy. He has further alleged that they also fabricated a quotation which they falsely attributed to him and which implied an assertion he did not make (that he uttered a racial epithet) and a negative personal attitude he did not hold. The United States Supreme Court has held that such conduct is actionable in defamation. Defendants' contention that their accusations were true is contrary to the allegations of the Complaint, which the Court must accept as true, and raises disputed issues of material fact which must be resolved by a jury.

Their contention that, before they aired their broadcasts, there was already a public controversy over whether the plaintiff was guilty of racially profiling Martin is also contrary to the allegations of the Complaint and cannot be considered. The same is true of their argument that they did not broadcast the falsely edited recordings with actual malice. Moreover, actual malice is a fact-sensitive inquiry which must involve the opportunity to take depositions and examine the thoughts and editorial processes of the alleged defamers, as well as other evidence regarding their states of mind.

The plaintiff has properly alleged the damages he has sustained as a result of the defamatory broadcasts, and defendants so concede. Whether his damages were in fact caused by the defendants is an issue of fact for the jury.

The Complaint alleges a claim for intentional infliction of emotional distress, including outrageous conduct. Plaintiff has alleged that defendants falsely made it appear that he was guilty of racially profiling Martin and falsely accused him of using a racial epithet, with the certain knowledge this would cause not just severe emotional distress, but threats to his life. Such oppressive behavior is intolerable in a civilized society.

2. Admitted.

3. Denied. As more fully explained below, there are many disputed issues of material fact which preclude summary judgment and defendants' motion, coming before the plaintiff has even had the opportunity to take discovery on his claims, is premature and improper. The plaintiff has alleged cognizable claims. The defendants' motion to dismiss should be denied and their motion for summary judgment should be stricken or continued.

II. SUMMARY OF THE ALLEGATIONS IN THE COMPLAINT, WHICH MUST BE TAKEN AS TRUE

Allegations to Which Review Is Limited

"It is well settled that when a trial court considers a motion to dismiss, it is limited to the four corners of the complaint and the allegations in the complaint must be taken as true without regard to the pleader's ability to prove them." Anson v. Paxson Communications Corp., 736 So.2d 1209, 1210 (Fla. 4th DCA 1999). *Accord* Greene v. Times Publishing Co., 130 So.3d 724 (Fla. 3d DCA 2014). All reasonable inferences must be drawn in favor of the pleader. Regis Ins. Co., 902 So.2d p. 968. The trial court "is not authorized to consider any other facts, including … the sufficiency of the evidence the plaintiff is likely to produce at trial or other claimed facts asserted by defense counsel…" Lewis v. Barnett Bank, 604 So.2d 937, 938 (Fla. 3d DCA 1992).

The defendants cannot evade this limited scope of review, by framing their motion in the alternative as a request for summary judgment, before the plaintiff has even had the opportunity to take discovery. It is an abuse of discretion and reversible error for a trial court to grant summary judgment where, as here, the opposing party has not had an opportunity to conduct and complete discovery. Crowell v. Kaufmann, 845 So.2d 325, 327 (Fla. 2d DCA 2003). *Accord* Harvey Covington & Thomas, LLC v. W M C Mortgage Corp., 85 So.3d 558 (Fla. 1st DCA 2012); Lubarsky v. Sweden House Properties of Boca Raton, Inc., 673 S.2d 975 (Fla. 4th DCA

1996). "Summary judgment should not be granted until the material facts have been sufficiently developed for the court to be reasonably certain that no genuine issue of material fact exists." Harvey Covington, 85 So.3d at 559. *Accord* Dickey v. Kitroser, 53 So.3d 1182 (Fla. 4th DCA 2011) (reversing summary judgment because trial court should not have ruled on motion for summary judgment until completion of discovery); Epstein v. Guidance Corp., Inc., 736 So.2d 137, 138 (Fla. 4th DCA 1999) (same). The trial court should continue any hearing on the summary judgment motion until the plaintiff has had the opportunity to complete discovery and the material facts have been sufficiently developed for the court to be reasonably certain that no genuine issue of material fact exists. Crowell, 845 So.2d p. 327.

Applying the foregoing standards, the court is confined to the allegations of the Complaint, which are summarized below and must be taken as true, and cannot consider any additional so-called "undisputed" facts alleged by the defendants. The defendants' alleged "facts" are outside the four corners of the Complaint and concern matters in dispute. They also rely on news stories, which are inadmissible hearsay. Terry Dollar v. State of Florida, 685 So.2d 901, 903 (Fla. 5th DCA 1996), review den., 695 So.2d 701 (Fla. 1997) ("[a] newspaper article, introduced to rove the truth of out of court statements contained therein, constitutes inadmissible hearsay"). Indeed, the stories purport to relate information and statements by others and are thus inadmissible hearsay within inadmissible hearsay.

The 911 Call

Before and during February of 2012, plaintiff George Zimmerman lived in a community known as The Retreat at Twin Lakes in Sanford, Florida (Complaint, ¶45). There had been a rash of burglaries in this community, including a home invasion in which a mother of a 9-month-old child was robbed, and the mother was forced to lock herself and the baby in an upstairs closet

while their home was being ransacked (Complaint, ¶44). In response, the plaintiff and others in the community created a neighborhood watch program (Complaint, ¶45).

On February 26, 2012 at approximately 7:00 p.m., the plaintiff was on his way to the Target store, when he saw an unfamiliar person, later identified as 17-year-old Trayvon Martin, walking around homes and through backyards in the neighborhood in the rain (Complaint, ¶46). As there had been a rash of burglaries and it was dark, cold and rainy, the plaintiff was concerned about a stranger walking between the houses at night and made a non-emergency 911 call to report this (Complaint, ¶47).

The plaintiff told the dispatcher that "we've had some break-ins in my neighborhood" and gave the address where he and the stranger were: "[I]t is Tree View Circle[;] the best address I can give you is 111 Tree View Circle" (Complaint, ¶48). He also told the dispatcher the reasons for his call:

> This guy looks like he is up to no good or he is on drugs or something. It's raining and he's just walking around looking about.

Id. The dispatcher then asked the plaintiff: "Okay and this guy is he white, black or Hispanic?" *Id.* The plaintiff could not be certain, in the dark and from a distance, and replied equivocally: "He looks black." *Id.*

The dispatcher next asked the plaintiff: "Did you see what he was wearing?" *Id.* The plaintiff could not be certain whether the stranger was wearing jeans or sweat pants and responded: "Yeah, a dark hoodie like a gray hoodie and either jeans or sweat pants and white tennis shoes." *Id.* Returning to his concern about break-ins and a stranger who was walking around the houses in the dark, the plaintiff added: "He's here now and he is just staring and looking at all the houses." *Id.*

The dispatcher asked in response: "He is just walking around the area?" *Id.* The plaintiff replied: "Now he is just staring at me." *Id.*

Next, the dispatcher confirmed the location: "Okay it is 1111 Retreat View or 111?" *Id.* The plaintiff answered: "That's the Clubhouse." *Id.* The dispatcher echoed: "That's the Clubhouse" and asked: "Do you know what the … He's near the Clubhouse right now?" *Id.* The plaintiff answered: "Yeah" and added: "[N]ow he is coming towards me." *Id.* The dispatcher merely said: "Okay." *Id.*

As the stranger drew closer, the plaintiff was able to confirm his earlier uncertain answer to the dispatcher's question about the stranger's race and add other details: that the stranger was wearing a button on his shirt and he could not see one of the stranger's hands and know whether the stranger was armed. After advising the dispatcher that "he is coming towards me," the plaintiff said: "He's got his hand in his waistband. And he is a Black male. He has a button on his shirt." *Id.*

Recognizing that the plaintiff could now provide more detail, the dispatcher asked: "How old would you say he looks?" *Id.* The plaintiff replied: "Late teens." *Id.* The dispatcher echoed: "Late teens? Okay." *Id.*

As the stranger continued to advance toward him, the plaintiff told the dispatcher that the stranger was "coming to check me out" and had something in his hands: "Something is wrong with him. Yup, he is coming to check me out. He's got something in his hands. I don't know what his deal is." *Id.* The dispatcher replied: "Okay, just let me know if he does anything." *Id.* The plaintiff begged: "Just get an officer over here." *Id.* The dispatcher reassured him: "Yeah we got them on the way. Just let me know if this guy does anything else." *Id.*

The plaintiff voiced his frustration that suspects seemed to get away and gave directions to the dispatcher, which the latter attempted to confirm. *See id*. The plaintiff then told the dispatcher "he's running," and they discussed the direction in which the stranger was heading. *Id.* The dispatcher asked: "Are you following him?" and the plaintiff answered "Yeah." *Id.* The dispatcher told him "we don't need you to do that." *Id.* The plaintiff replied: "Ok." *Id.*

The dispatcher then asked for the plaintiff's name and phone number and told him: "[W]e do have them on their way" and asked: "Do [you] want to meet with the officer when they get out there?" *Id.* The plaintiff replied: "Yeah," so the dispatcher asked: "[W]here are you going to meet them?" *Id.* The plaintiff told him where his truck was parked. *Id.*

Before the police arrived, there was a struggle, during which the plaintiff fatally shot Martin (Complaint, ¶86).

Defendants Ignite a Media Arson

NBC saw Martin's death as an opportunity to increase ratings and set about to create the myth that the plaintiff was a racist and predatory villain (Complaint, ¶1). To do so, NBC deliberately manipulated the plaintiff's own words to the dispatcher, by splicing together disparate parts of the recording, to create the illusion that the plaintiff's actions were motivated by racial stereotypes, rather than by concern for his safety and the safety of his neighbors (Complaint, ¶¶3 and 4). NBC manufactured a false charge that the plaintiff "used a racial epithet" while describing Martin during the call to the dispatcher and falsely implied, by taking statements from the 911 call out of context, that the plaintiff had told the dispatcher he suspected Martin was engaged in suspicious activity because "he looks black" and "he's a black male" (Complaint, ¶¶3 and 16). To emphasize the point, NBC also highlighted Martin's minority

status, while disregarding that of the plaintiff, a Hispanic American, and choosing old photos to identify the appearance of each (Complaint, ¶6).

Defendants knew that these lies were certain to cause not only emotional distress to the plaintiff and damage to his reputation, but threats to his life and calls for his criminal prosecution (Complaint, ¶19). In fact, the broadcasts resulted in death threats, a bounty placed on the plaintiff's head, threats of capture and a constant, genuine fear for his life, resulting in his need to go into hiding and wear a bullet proof vest (Complaint, ¶23).

The defendants' malicious lies were eventually exposed by other media outlets, forcing NBC to terminate the employment of some of those responsible for this yellow journalism (Complaint, ¶¶20, 31 and 35). However, defendants never apologized to the plaintiff for deliberately portraying him in their broadcasts as a hostile racist who had targeted Martin due to his race (Complaint, ¶21).

The Defendants' First Malicious Editing of the 911 Recording: March 19, 2012

On March 19, 2012, defendants NBC, through WJTV (serving the greater Miami area) and Jeff Burnside, broadcast a falsely edited version of the 911 call which made it appear that the plaintiff said Martin was "a real suspicious guy" because "he looks black." To create this blatant lie, they deliberately deleted the plaintiff's explanation for his concern: "we've had some break-ins in my neighborhood" and "[t]his guy looks like he is up to no good or he is on drugs or something": "It's raining and he's just walking around looking about."

They also deleted the dispatcher's inquiry about the stranger's race: "[This guy is he white, black or Hispanic?" and only played the plaintiff's answer: "He looks black." As a result of these deliberate edits, listeners heard the plaintiff **volunteer** that the stranger "looks black" as

his **explanation** for why he thought the stranger "looks like he is up to no good or on drugs or something," rather than in answer to the dispatcher's direct inquiry about the stranger's race:

Edited audio portion (3/19/12 broadcast):	**Actual audio portion (2/26/12 911 call):**
Zimmerman: There is a real suspicious guy. Ah, this guy looks like he is up to no good or he is or drugs or something. He looks black.	**Dispatcher**: *Sanford Center Police Department this line is being recorded my name is Sean.* **Zimmerman**: *Hey we've had some break-ins in my neighborhood and* **there is a real suspicious guy. Ah,** *it is Tree View Circle the best address I can give you is 111 Tree View Circle.* **This guy looks like he is up to no good or he is or drugs or something.** *It's raining and he's just walking around looking about.* **Dispatcher***: Okay and this guy is he white, black or Hispanic?* **Zimmerman: He looks black.**

The defendants next excised the question and answer about the stranger's apparel and the plaintiff's comments about the stranger's conduct; *e.g.*, "he is just staring and looking at all the houses"; "[n]ow he is just staring at me." They also deleted the plaintiff's comments about the stranger approaching him: "now he is coming towards me"; "he is coming to check me out." They also deleted the plaintiff's concerns about his inability to see what the stranger had in his hands: "He's got his hand in his waistband"; "He's got something in his hands." They played the dispatcher's question about whether the plaintiff was following the stranger, but omitted the plaintiff's agreement not to do that ("okay"):

Edited audio portion (3/19/12 broadcast):
Dispatcher: Are you following him? **Zimmerman:** Yeah. **Dispatcher:** Ok we don't need you to do that.

The intended result was that it appeared the plaintiff admitted he had stalked Martin because Martin "looks black" and disregarded the dispatcher's instruction that he did not need to follow Martin, while Martin himself had done nothing to justify anyone following him and had taken no aggressive action whatsoever. Thus, the intentional deletions made it appear that the plaintiff was a racist stalker whose own stated reason for being suspicious of Martin was that Martin "looks black," and this was the cause of the tragedy that ensued (Complaint, ¶49).

The March 20, 2012 TODAY Show Broadcast

The March 19th smears had been broadcast on WJTV in the greater Miami area. The following morning, March 20, 2012, defendants NBC and Lila Luciano took the smear campaign to the national level through another false and defamatory version of the plaintiff's 911 call. They intentionally and maliciously removing intervening dialogue between the plaintiff and the dispatcher, to create the false impression that plaintiff had stalked Martin because "he's a black male" and Martin himself had done nothing to raise suspicion or take aggressive action. The listener would never have known from the broadcast that the dispatcher had **asked** the plaintiff about the stranger's race ("is he white, black or Hispanic?"), and the plaintiff had first given an uncertain reply ("he looks black"), followed by a more definitive reply and additional details about the stranger, after the stranger came toward him ("now he's coming towards me"; "[h]e's got his hand in his waistband. And he is a black male. He has a button on his shirt"). To reinforce the notion that the plaintiff was the aggressor, defendants deleted the plaintiff's comments about the stranger "coming towards me" and played the dispatcher's question "are you following him?" and advice that "we don't need you to do that," but deleted the plaintiff's agreement ("okay").

A side-by-side comparison between the actual audio and the edited version created by defendants is telling:

Edited audio portion (3/20/12 broadcast):

Zimmerman: This guy looks like he's up to no good or on drugs or something. He's got his hand in his waistband. And he's a black male.
Dispatcher: Are you following him?
Zimmerman: Yeah.
Dispatcher: Ok we don't need you to do that.

Actual audio portion (2/26/12 911 call):

Dispatcher: *Sanford Center Police Department this line is being recorded my name is Sean.*
Zimmerman: *Hey we've had some break-ins in my neighborhood and there is a real suspicious guy. Ah, it is Tree View Circle the best address I can give you is 111 Tree View Circle.* This guy looks like he is up to no good or he is or drugs or something. *It's raining and he's just walking around looking about.*
Dispatcher: *Okay and this guy is he white, black or Hispanic?*
Zimmerman: *He looks black.*
Dispatcher: *Did you see what he was wearing?*
Zimmerman: *Yeah, a dark hoodie like a gray hoodie and either jeans or sweat pants and white tennis shoes. He's here now and he is just staring and looking at all the houses.*
Dispatcher: *He is just walking around the area?*
Zimmerman: *Now he is just staring at me.*
Dispatcher: *Okay it is 1111 Retreat View or 111?*
Zimmerman: *That's the Clubhouse.*
Dispatcher: *That's the Clubhouse. Do you know what the. He's near the clubhouse right now?*
Zimmerman: *Yeah, now he is coming towards me.*
Dispatcher: *Okay.*
Zimmerman: He's got his hand in his waistband. And he is a black male. *He has a button on his shirt.*
Dispatcher: Are you following him?
Zimmerman: Yeah.
Dispatcher: Ok we don't need you to do that.
Zimmerman: *Okay.*

The March 20, 2012 Nightly News Broadcast: Defendants Falsely Accuse Plaintiff of Using a Highly Offensive Racial Epithet During the 911 Call

NBC continued to build on the sensation it had created. That evening, within hours of the Today Show broadcast featuring the falsely edited 911 call, defendants NBC and Ron Allen added the unfounded accusation that the plaintiff had used a "racial epithet" during the 911 call:

> Sanford Police say that Zimmerman shot and killed Trayvon Martin in self-defense, a shooting without racial overtones, no hate crime. But when Zimmerman was calling the police the night Trayvon Martin was killed, he described the victim using a racial epithet.

See Complaint, ¶53. "In particular, the defendants falsely claimed that Zimmerman said "f_____ coons" during the February 26, 2012 call, knowing that claim would incite outrage throughout the Nation" (Complaint, ¶57). "The truth, as known to the defendants, was that Zimmerman said "f_____ punks" and there was no evidence, or reason to believe, that Zimmerman uttered a racial epithet during the call; indeed, as made clear from the full transcript, Zimmerman only ever mentioned Martin's race when prompted to describe Martin's race by the dispatcher" (Complaint, ¶58).

The March 22, 2012 TODAY Show Broadcast

Having laid the racist groundwork during the March 19 and 20, 2012 broadcasts, NBC and its employee Luciano broadcast via NBC's *Today Show* another edited audio which further emphasized the notion that the plaintiff had stalked and shot Martin because he was a black teenager in a hoodie. They prefaced the broadcast with the following statement: "[T]he teen gunned down last month as he walked through the gated community wearing a hoodie" (Complaint, ¶60).

That statement was utterly false. Martin was not "gunned down … as he walked"; Martin on top of the plaintiff, slamming the plaintiff's into the sidewalk, when the plaintiff shot him in self-defense.

As before, they created a falsely edited recording from which they had deliberately excised the plaintiff's stated reasons for concern and the dispatcher's direct question about the suspect's race. They also edited the plaintiff's description of Martin's apparel to emphasize the notion of stereotyping. Most of the items the plaintiff had mentioned, "either jeans or sweat pants and white tennis shoes," are widely worn and demonstrated the neutrality of the plaintiff's response. Defendants excised them to leave a single item, they had also emphasized in their introduction: the hoodie. Again a side-by-side comparison is revealing:

Edited audio portion (3/22 broadcast):
Zimmerman: He looks like he's up to no good. He looks black.
Dispatcher: Did you see what he was wearing?
Zimmerman: Yeah, a dark hoodie.

Actual audio (italicized section was removed by defendants prior to broadcast):
Dispatcher: *Sanford Center Police Department this line is being recorded my name is Sean.*
Zimmerman: *Hey we've had some break-ins in my neighborhood and there is a real suspicious guy. Ah, it is Tree View Circle the best address I can give you is 111 Tree View Circle.* This guy looks like he is up to no good *or he is on drugs or something. It's raining and he's just walking around looking about.*
Dispatcher: *Okay and this guy is he white, black or Hispanic?*
Zimmerman: He looks black.
Dispatcher: Did you see what he was wearing?
Zimmerman: Yeah, a dark hoodie *like a gray hoodie and either jeans or sweat pants and white tennis shoes.*
He's here now and he is just staring and looking at all the houses.

They also repeated the segment in which the plaintiff and the dispatcher discussed whether the plaintiff was following Martin. As before, they excised the plaintiff's agreement to stop doing that ("okay").

> **Dispatcher:** Are you following him?
> **Zimmerman:** Yeah.
> **Dispatcher:** Ok we don't need you to do that.

Plainly, they sought to create the false impression that the plaintiff had stalked and shot Martin because Martin was a black teenager in a hoodie, while Martin had done nothing in response.

The March 27, 2012 TODAY Show Broadcast

The response to these broadcasts was overwhelming. Playing up the false notion that the plaintiff had stalked and shot Martin because Martin was a black teenager in a hoodie, on March 27, 2012 broadcasts, defendants NBC and Ron Allen rebroadcast this intentionally manipulated version of the February 26, 2012 audio between Zimmerman and the dispatcher, reinforcing their false claims, inferences and innuendoes (Complaint, ¶67):

Edited audio portion (3/22 broadcast):	**Actual audio (italicized section was removed by defendants prior to broadcast):**
Zimmerman: This guy looks like he's up to no good. He looks black. **Dispatcher**: Did you see what he was wearing? **Zimmerman**: Yeah, a dark hoodie.	**Dispatcher**: *Sanford Center Police Department this line is being recorded my name is Sean.* **Zimmerman**: *Hey we've had some break-ins in my neighborhood and there is a real suspicious guy. Ah, it is Tree View Circle the best address I can give you is 111 Tree View Circle.* This guy looks like he is up to no good *or he is on drugs or something. It's raining and he's just walking around looking about.* ***Dispatcher:*** *Okay and this guy is he white, black or Hispanic?* **Zimmerman:** He looks black. **Dispatcher:** Did you see what he was wearing? **Zimmerman:** Yeah, a dark hoodie *like a gray hoodie and either jeans or sweat pants and white tennis shoes.* *He's here now and he is just staring and looking at all the houses.*

They also again repeated the segment in which the plaintiff and the dispatcher discussed whether the plaintiff was following Martin and excised the plaintiff's agreement to stop doing that ("okay").

> **Dispatcher:** Are you following him?
> **Zimmerman:** Yeah.
> **Dispatcher:** Ok we don't need you to do that.

Plainly, they sought to create the false impression that the plaintiff stalked and shot Martin because "he look[ed] black."

III. CONTROLLING LEGAL STANDARDS

A. Motion to Dismiss

"A motion to dismiss tests whether the plaintiff has stated a cause of action." Regis Ins. Co. v. Residences of Sawgrass Mills Community Ass'n., Inc., 902 So.2d 966, 968 (Fla. 4th DCA 2005). "It is well settled that when a trial court considers a motion to dismiss, it is limited to the four corners of the complaint and the allegations in the complaint must be taken as true without regard to the pleader's ability to prove them." Anson v. Paxson Communications Corp., 736 So.2d 1209, 1210 (Fla. 4th DCA 1999). *Accord* Greene v. Times Publishing Co., 130 So.3d 724 (Fla. 3d DCA 2014). All reasonable inferences must be drawn in favor of the pleader. Regis Ins. Co., 902 So.2d p. 968. The trial court "is not authorized to consider any other facts, including … the sufficiency of the evidence the plaintiff is likely to produce at trial or other claimed facts asserted by defense counsel…" Lewis v. Barnett Bank, 604 So.2d 937, 938 (Fla. 3d DCA 1992).

Where a libel complaint outlines or states the words used and alleges that they were false and made about the plaintiff with malice to damage him, resulting in injury, it is sufficient to withstand a motion to dismiss. Diaz v. Abate, 598 So.2d 197 (Fla. 3d DCA 1992).

B. Summary Judgment

It is an abuse of discretion and reversible error for a trial court to grant summary judgment where, as here, the opposing party has not had an opportunity to conduct and complete discovery. Crowell v. Kaufmann, 845 So.2d 325, 327 (Fla. 2d DCA 2003). *Accord* Harvey Covington & Thomas, LLC v. W M C Mortgage Corp., 85 So.3d 558 (Fla. 1st DCA 2012); Lubarsky v. Sweden House Properties of Boca Raton, Inc., 673 S.2d 975 (Fla. 4th DCA 1996). "Summary judgment should not be granted until the material facts have been sufficiently developed for the court to be reasonably certain that no genuine issue of material fact exists." Harvey Covington, 85 So.3d at 559. *Accord* Dickey v. Kitroser, 53 So.3d 1182 (Fla. 4th DCA 2011) (reversing summary judgment because trial court should not have ruled on motion for summary judgment until completion of discovery); Epstein v. Guidance Corp., Inc., 736 So.2d 137, 138 (Fla. 4th DCA 1999) (same).

The trial court should continue any hearing on the summary judgment motion until the party opposing summary judgment (here, the plaintiff) has had the opportunity to complete discovery and the material facts have been sufficiently developed for the court to be reasonably certain that no genuine issue of material fact exists. Crowell, 845 So.2d p. 327. Accordingly, in addition to the present response, the plaintiff has also filed a motion to continue or strike the alternative motion for summary judgment as premature and improper.

Even where, unlike here, discovery has been completed, a movant is not entitled to summary judgment unless "the pleadings, depositions, answers to interrogatories, admissions, affidavits and other materials as would be admissible in evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Estate of Bithens ex rel. Seamon v. Bon Secours-Maria Manor Nursing Care Ctr., Inc.,

928 So.2d 1272, 1274 (Fla. 2d DCA 2006). The trial court may not weigh the credibility of witnesses or resolve disputed issues of fact. Jones v. Stoutenburgh, 91 So.2d 299, 302 (Fla. 1957); Arce v. Haas, 51 So.3d 530 (Fla. 2d DCA 2010). Summary judgment should be granted sparingly, so as not to infringe on the constitutional right to a jury trial. Axelrod v. Califano, 357 So.2d 1048, 1051 (Fla. 1st DCA 1978).

Thus, where the evidence creates a fact issue as to whether the challenged statements were false and defamatory, these questions are properly submitted to the jury. Lipsig v. Ramlawi, 760 So. 2d 170, 183 (Fla. 3rd DCA 2000), review den. sub nom. Miami Columbus, Inc. v. Ramlawi, 786 So.2d 579 (Fla. 2001). *Accord* Glickman v. Potamkin, 454 So.2d 612, 613 (Fla. 3d DCA 1984), review den., 461 S.2d 115 (Fla. 1985) (summary judgment not proper where there are disputed issues of fact regarding truth or falsity of defamatory statement). Issues regarding malice also preclude summary judgment. American Ideal Mgmt., Inc. v. Gauvreau, 567 S.2d 497, 500 (Fla. 4th DCA 1990).

IV. THE DEMAND NOTICE WAS SUFFICIENT TO NOTIFY DEFENDANTS THAT THEY HAD FALSELY MANIPULATED THE AUDIO RECORDING OF PLAINTIFF'S 911 CALL THEY BROADCAST ON MARCH 19, 2012 AND SHOULD ISSUE A RETRACTION; MOREOVER, A PLAINTIFF IS ENTITLED TO AMEND HIS NOTICE AND COMPLAINT

It is undisputed that on September 24, 2012, over two and a half (2½) months before this action was filed, plaintiff's counsel sent a letter to Mr. Capus (NBC President), Mr. Longo (WESH News Director), Mr. Allen and Ms. Luciano in accordance with the Florida notice statute, setting forth the deliberately false and defamatory ways in which the defendants had edited George Zimmerman's 911 call for their broadcasts and falsely accused the plaintiff of using a racial epithet to describe Trayvon Martin, to make it appear plaintiff was guilty of racially profiling Martin. *See* Def.s' Ex. "25." Plaintiff's counsel also noted that while some of

the broadcasters responsible for these maliciously deceptive broadcasts (Ms. Luciano and Mr. Burnside) had been terminated, defendants had failed to retract or correct the defamatory falsehoods or even remove them from their website, and the letter was being sent in accordance with the Florida notice statute. *Id*. The letter also included a request to preserve all documents "in any way related to your reporting on the February 26, 2012 Zimmerman/Martin altercation, as well as all documents related to the termination of Ms. Luciano, Mr. Burnside, and anyone else who was fired because of anything … related to the Zimmerman/Martin reporting." *Id.*

However, defendants NBC Universal Media, et al. ("NBC") still failed to broadcast a retraction or correction, and plaintiff brought this action two and a half (2½) months later. As plaintiff alleged in his Complaint: "While NBC terminated defendants Luciano and Burnside for the reckless audio manipulation described in this Complaint, it failed to broadcast an earnest and legitimate apology, retraction or correction" (¶70). "To this day, the defendants have never apologized to Zimmerman for deliberately portraying him as a hostile racist who targeted Martin due to his race" (¶21) and, "[e]ven to this day, when the defendants know that Zimmerman did not say a racial epithet, they have never apologized for this false presentation of Zimmerman or attempted to correct this false perception" (¶59).

Defendants NBC, Allen and Luciano evidently concede, as they must, that the demand notice satisfied the Florida notice statute as to the March 20, 22, and 27, 2012 broadcasts. They and defendant Burnside[1] contend only that there was non-compliance as to the broadcast of March 19, 2012, for which they had manipulated the plaintiff's 911 call to the **same** end and in a manner **very** similar to that used in the broadcasts identified by date in the demand notice. *See* Def.s' Mot., p. 23 and broadcast quotations below.

[1] The claims against Burnside relate only to the March 19, 2012 broadcast report. *See* Complaint, ¶¶7 and 34-36.

For multiple reasons, their demand for dismissal of the claims based on the March 19, 2012 broadcast lacks merit and should be denied. To begin with, where, as here, the defamation claims are based upon oral statements, "it is sufficient that the plaintiff set out the substance of the spoken words" with sufficient specificity to allow the broadcaster to retract them; they need not be set out verbatim. Edward L. Nezelek, Inc. v. Sunbeam Television Corp., 413 So.2d 51, 55 (Fla. 3d DCA 1982), review den., 424 S.2d 763 (Fla. 1982).[2] It is only necessary to "state the **essence** of what the alleged defamer said." Scott v. Busch, 907 So.2d 662, 667 (Fla. 5th DCA 2005). (Emphasis supplied.)

That is consistent with "[t]he recognized purpose" of the statute, which is to allow the broadcaster the opportunity "to retract any allegedly false statements in order to mitigate the harm caused by those statements." Cook v. Pompano Shopper, Inc., 582 So.2d 37, 39 (Fla. 1st DCA 1991). Indeed, the very case law upon which defendants purport to rely so attests:

> The statute is designed to allow a defendant the opportunity to be put on notice **so as to take necessary steps to mitigate the potential damages and perhaps avoid precisely the type of litigation now before the Court.**

Nelson, 667 F. Supp. at 1475 (cited by defendants on p. 23 of their Motion).

The broadcasts were all similar in substance and in the manner in which they falsely edited the recording to imply defamatory falsehoods about Mr. Zimmerman, and the demand notice sent by Mr. Zimmerman's attorney clearly stated the "essence" or "substance" of them. Plaintiff's counsel notified defendants that they had "selected a portion" of his 911 call "and

[2] The cases relied upon by defendants are readily distinguished, because they all involved **written** statements. *See* Orlando Sports Stadium, Inc. v. Sentinel Star Co., 316 So.2d 607 (Fla. 4th DCA 1975) (defamation claim based upon newspaper articles); Gannett Fla. Corp. v. Montesano, 308 So.2d 599 (Fla. 1st DCA 1975) (defamation claim based upon newspaper article); Nelson v. Associated Press, Inc., 667 F. Supp. 1468 (S.D. Fla. 1987) (defamation claim based upon magazine article). In addition, both Florida cases preceded Nezelek.

juxtaposed it with an entirely unrelated comment" made later in the call "to make it appear that Zimmerman was a racist, and that he was racially profiling Trayvon Martin" and "that was the reason Mr. Martin was shot." This description of their March 20, 22, and 27, 2012 broadcasts – as to which they admit the demand notice was sufficient -- was equally true of the March 19, 2012 broadcast. Indeed, the selectively edited statements they broadcast on March 19 were **very** similar to those they broadcast on March 20, 22 and 27, 2012:

March 19:

> Zimmerman: There is a real suspicious guy. Ah, **this guy looks like he is up to no good or he is on drugs or something. He looks black.**

March 20:

> Zimmerman: **This guy looks like he's up to no good or on drugs of something**. He's got his hand in his waistband. And **he's a black male.**

March 22:

> Zimmerman: **He looks like he's up to no good. He looks black**.

March 27:

> Zimmerman: **This guy looks like he's up to no good. He looks black.**

In addition, the demand notice included a specific request that the defendants "preserve … all documents related to the termination of Ms. Luciano, **Mr. Burnside**, and anyone else who was fired because of anything remotely related to the Zimmerman/Martin reporting." The **only** Zimmerman/Martin reporting in which **Mr. Burnside** was involved – and for which he was terminated -- was the March 19, 2012 broadcast. The demand notice thus clearly conveyed that his conduct and this broadcast are at issue.

It is undisputed that the demand notice gave the defendants the opportunity to retract the false implication they had deliberately created that plaintiff had said that "he looks black," in explanation of why Martin "looks like he is up to no good," rather than in response to the dispatcher's query regarding Martin's race. Thus, the letter was sufficient to convey "the essence" of the defamation they broadcast on March 19, 2012 and fulfill the purpose of the statute. Nezelek. Defendants themselves do not deny that they knew the plaintiff's complaints regarding their subsequent broadcasts and had ample opportunity to broadcast a retraction or correction before this action was filed.

Florida does not require the statements in the notice letter to be identical to those of the Complaint. Id. The Court held in Nezelek:

> If the complaint either presently states, or upon amendment is likely to state a cause of action for defamation, then **it is error to dismiss with prejudice those statements in an original complaint which constitute the defamation simply because the statements are not identical to the statements in the demand notice.**

Nezelek, 413 So.2d p. 56. (Emphases supplied.) This conclusion applies with even greater force here: the statements identified as defamatory in the demand notice letter were very similar to those they broadcast on March 19th. Applying Nezelek, it would be reversible error to dismiss the claims arising from the March 19th broadcast, merely because they may not have been identical.

This is especially so because, despite being put on notice of the false and defamatory message they conveyed through the broadcasts, defendants chose not to retract or correct them and mitigate the harm to Mr. Zimmerman. *See* Complaint, ¶¶21, 59, 70 and 71. As the falsely edited version of the 911 call they broadcast on March 19 broadcast did not differ in meaning or substance from the succeeding broadcasts they chose not to retract, it is evident that they would

not have retracted or corrected that one either. To dismiss the claims based upon the March 19th broadcast would be to elevate form over substance, which Florida law abjures. *See, e.g.,* Nezelek; Keshbro, Inc. v. City of Miami, 801 So.2d 864, 873 (Fla. 2001); May v. Illinois Nat'l. Ins. Co. , 771 So.2d 1143, 1149 (Fla. 2000); State v. S.R., 1 So.3d 221, 222 (Fla. 3d DCA 2008). It would merely serve to punish the plaintiff for not performing a futile act, which also runs counter to Florida jurisprudence.[3] *See, e.g.,* State ex. rel. Ashby by Haddock, 149 So.2d 552, 553 n.6 (Fla. 1963).

It would also be erroneous, because Florida permits a plaintiff to **amend** a demand notice and a complaint to include all grounds for the cause of action. As stated in Nezelek, it is reversible error to dismiss a cause of action with respect to statements not contained in a demand notice, without giving the plaintiff an opportunity to amend the demand notice and his complaint:

> Applying the principal of liberality of pleadings, [citations omitted], and acknowledging our duty to protect the right of an individual to seek redress in the court for defamation, [citations omitted], a plaintiff who appears to have a cause of action for defamation **should be permitted at least one opportunity to amend his complaint and demand notice to include, if he can, all alleged grounds for the cause of action**….We recede,

[3] The foregoing points as to futility and form over substance should also be persuasive here for an additional reason: a further technicality Defendants seek — fortuitously, and inequitably — to exploit. The broadcasts at issue occurred in March, 2012. Plaintiff commenced this action in December of that same year. However, as defendants themselves note, "[b]y Order dated March 19, 2013, this action was stayed pending the conclusion of all proceedings in the criminal case brought against Zimmerman arising from Martin's death" — a "stay" which had been requested by **defendants** (Def.s' Mot., p. 20), and which "has now been lifted," occasioning their filing of the instant Motion. Id. at p. 2. Thus, but for that stay, defendants would have had to file their Motion to Dismiss the Complaint — presumably this same Motion — early in 2013. This would have been well within the two-year Florida statute of limitations for defamation actions (Fla. Stat. § 95.11(4)(g)); indeed, a full *year*, at minimum, before the statute ran. In response, plaintiff could have simply sent a new § 770.01 notice referencing the March 19 broadcast by date and addressed to Burnside as well, and then commenced a new action within the statute.

> therefore, from this court's holding in *Hulander v. Sunbeam Television Corp., 364 So.2d 856 (Fla. 3d DCA 1978), cert. denied, 373 So.2d 459 (Fla. 1979),* to the extent that *Hulander, supra,* may bar a single amendment of a demand for retraction made pursuant to *Section 770.01* after the filing of complaint. **It was error to dismiss the cause of action with prejudice as to those statements not contained in the August 9, 1979 letter.**

Nezelek, 413 So.2d pp. 56-57. (Emphases supplied.)

Accordingly, should this Court determine that the demand notice was somehow insufficient with regard to the March 19th broadcast, the plaintiff must be given the opportunity to amend his demand notice and Complaint to include it. Id. Defendants themselves do not and cannot argue otherwise; rather, they avoid any mention of the plaintiff's right to amend.

The foregoing disposes of Mr. Burnside's assertion that he should be dismissed as a defendant due to the alleged insufficiency of the demand notice regarding the March 19 broadcast. The demand notice to NBC was sufficient to put its employees on notice of the plaintiff's complaints with respect to the falsely manipulated audio recording of the 911 call The notice also specifically asked defendants to preserve all records related to **Mr. Burnside's** termination. As Mr. Burnside was **only** involved in the March 19, 2012 broadcast, that request, coupled with the close similarity of this broadcast to those which followed and were identified by date and content in the demand notice, was sufficient to give them the opportunity to retract the defamatory message common to these broadcasts.

Moreover, to the extent there is any deficiency, the plaintiff is entitled to rectify it by amending his letter and Complaint. Nezelek. *See also* Bayliss v. Cox Radio, Inc., 2010 U.S. Dist. LEXIS 111758 at *11 (M.D. Fla. 2010) (acknowledging that there are no Florida cases holding notice to an employer is insufficient to act as notice to its employees who, acting within the course and scope of their employment, produced the defamatory publication or broadcast,

and Florida courts would likely permit a plaintiff to cure any defect and thereafter file an amended complaint). It would be reversible error to dismiss the claim based upon the March 19 broadcast, without giving Mr. Zimmerman the opportunity to do so. Nezelek.

Defendants' assertion that notice to a corporate employer is insufficient to provide notice to the corporation's employees is not supported by any Florida cases. The plaintiff has alleged that Mr. Burnside was employed as a reporter for NBC and was acting within the course and scope of his employment with his notified employer (Complaint, ¶34), and indeed, the **same** attorneys represent **all** the defendants.

Nothing in the statute requires that a complainant be able to identify all the employees of a corporate defendant who collaborated to produce a defamatory publication or broadcast and serve each with a notice letter, as a prerequisite to bringing suit. The purpose of the statute is simply to allow the publisher of a defamatory falsehood an opportunity to retract it, not to create unnecessary roadblocks to recovery. As the Court of Appeals has stated: "The recognized purpose of the requirement of statutory notice to the publisher is to enable him to retract any false statements, or statements contended by the party to be false." Cook, 582 So.2d p. 39. (Emphasis supplied.)

The demand notice undeniably gave NBC this opportunity. The plaintiff was not required to identify and separately notify each employee who contributed to each broadcast.

The sole decision relied upon by defendants, Mancini v. Personalized Air Conditioning & Heating, Inc., 702 So.2d 1376 (Fla. 4th DCA 1997) is not to the contrary. That was a libel action against "a **full-time assistant state attorney**" who "also wr]o]te[] a regular weekly column on consumer matters" for a local newspaper. Mancini, 702 So.2d p. 1377-78. Thus, unlike here,

the individual responsible for the defamatory piece was employed by a **third party** (the State Attorney).

Even more importantly, there was **no** contention that the plaintiff had given notice to the **newspaper**, let alone an argument that such notice to the newspaper was insufficient to satisfy the statute as to its employees. Instead, the plaintiff attempted to **avoid** the statute by suing **only** the assistant state attorney, and not the newspaper. Instead of arguing that it had satisfied the statute by providing notice to the newspaper (which it apparently did not do), the plaintiff argued that its election not to sue the newspaper rendered the statute **inapplicable**.

The Court of Appeals rejected this argument. The Court observed that if a plaintiff were able to avoid the statute entirely through the expedient of not naming the publisher as a defendant, the statute would effectively be eviscerated:

> Taken to its logical extreme, the interpretation urged by plaintiff would effectively circumvent the notice provisions of *section 770.01* and eviscerate the intent of chapter 770 by allowing a plaintiff to sue newspaper reporters and columnists for libel and slander without naming the newspaper publisher.

Mancini, 702 So.2d p. 1380.

Disregarding the fact that the plaintiff in Mancini did **not** claim to have given notice to **the newspaper**, defendants contend that the Court held that notice under § 770.01 must be provided to **both** the employer and the employee of a news media entity, "not **just** her employer" (Def.s' Mot. pp. 24-25) (emphasis supplied). That is incorrect. The Court did not find that the assistant state attorney was an "employee" of the newspaper and did **not consider** whether notice to a news media employer would have been sufficient to satisfy the statute as to its employees. There was **no** claim that the plaintiff had provided notice to **the newspaper** in the first instance. Moreover, Florida allows a plaintiff to correct any deficiency by sending an amended notice and

filing an amended Complaint. Nezelek. *See also* Bayliss. Defendants' motion must therefore be denied and, should the court find there is a deficiency, the plaintiff must be given the opportunity to amend the demand notice and file an Amended Complaint.

V. IT IS UNDISPUTED AND INDISPUTABLE THAT THE DEFENDANTS' BROADCASTS ARE REASONABLY SUSCEPTIBLE OF THE DEFAMATORY MEANING ALLEGED BY THE PLAINTIFF

A broadcast is defamatory where the "gist" or "sting" of it is defamatory. Greene v. Times Publishing Co., 130 So.3d 724, 729-30 (Fla. 3d DCA 2014). In determining the "sting" or "gist," an allegedly defamatory broadcast "should be construed as the common mind would understand it." Loeb v. Geronemus, 66 So.2d 241, 245 (Fla. 1953). This means "that the words should be given a reasonable construction in view of the thought intended to be conveyed and that which would be a reasonable construction of the language by those who heard same." Wolfson v. Kirk, 273 So.2d 774, 778 (Fla. 4th DCA 1973) cert. den. sub nom. Kirk v. Wolfson, 279 So.2d 32 (Fla. 1973).

Where a communication is reasonably susceptible of the defamatory meaning attributed to it by the plaintiff, "it is for the **trier of fact** to determine the meaning understood by the average" listener. Greene, 130 So.3d p. 730. (Emphases supplied.) *Accord* Wolfson, 273 So.2d p. 779. It is only where a statement could not possibly have a defamatory effect that a court is justified in dismissing the complaint for failure to state a cause of action. Greene, 130 S.3d p. 730.

Plaintiff has alleged that the "gist" or "sting" of the defamatory broadcasts was that "he told the dispatcher that he suspected Martin was engaged in criminal activity **because** 'he's a **black** male'" (Complaint ¶3); *i.e.*, that, as "maliciously edited" by defendants, the broadcasts falsely conveyed that plaintiff was guilty of "**racially profiling** Trayvon Martin" (Complaint,

¶9), "**target[ing]** Martin due to his **race**" (Complaint, 21), "**stalking** Martin because 'he **looks black**'" (Complaint, ¶22) and using "'a racial epithet' while describing Martin during the call to the dispatcher on that fateful night" (Complaint, ¶3). Plaintiff further alleged that the broadcasts falsely implied that he "shot Trayvon Martin because the young man was **African American**" (Complaint, ¶86) and, to further encourage the public to so believe, "highlighted Martin's minority status while not mentioning Zimmerman's, who is a Hispanic American" (Complaint, ¶6).

Additionally, plaintiff has further alleged that defendants falsely accused him of using "a racial epithet" ("coons") during the 911 call (Complaint, ¶¶3 and 57). He has further alleged that "[t]he truth, as known to the defendants, was that Zimmerman said 'f_____ **punks**' and there was no evidence, or reason to believe, that Zimmerman uttered a racial epithet during the call" (Complaint, ¶58). (Emphasis supplied.)

As a result of the defamatory broadcasts, he has alleged, the public believed the plaintiff stalked and shot Martin because of his race and the plaintiff was "transformed into one of the most hated men in America" (Complaint, ¶75). Not only were there "calls for his criminal prosecution" (Complaint, ¶19), but there were also "death threats" (Complaint, ¶¶23, 72 and 90) and even "a bounty placed on his head" (Complaint, ¶¶ 23 and 90; *see also* Complaint, ¶ 72).

Defendants do not deny that these false accusations were defamatory and the jury can so find. Instead, they deliberately **disregard** the plaintiff's averments and pretend that "the defamatory implication he attributes to [their] broadcasts" has nothing to do with the **conduct** and **admissions** they falsely attributed to him and, instead, is one of **subjective belief**: "that he is a 'racist'" (Def.s' Mot., p. 40 n. 19). *See also* Def.s' Mot. p. 43 n. 20 (stating that the plaintiff's "proffered implication" of their broadcasts is "that he is a 'racist'").

That is utterly false. It is belied by the plain averments of the Complaint, and defendants evidently know it. They are careful to put these absurd claims in footnotes and refrain from any open challenge to the sufficiency of the plaintiff's averments regarding defamatory meaning.

A fair reading of the Complaint demonstrates that Mr. Zimmerman did not merely allege that defendants charged him with harboring objectionable racial beliefs. He has alleged that the "gist" or "sting" of the broadcasts is that he was guilty of **stalking and fatally shooting** Trayvon Martin and offered Martin's race as the reason.

These implications are defamatory and actionable; indeed, defendants do not even try to argue otherwise. Florida courts have consistently held that communications which falsely accuse the plaintiff of criminal misconduct are defamatory and actionable. *See, e.g.,* DelMonico v. Traynor, 116 So.3d 1205 (Fla. 2013) (claim that defense attorney, during the course of investigating claims against his client, falsely stated to third-party witnesses that plaintiff was being **prosecuted for supplying prostitutes to get business** was actionable); Greene, 130 So.3d p. 730 (communication which portrayed plaintiff "as a participant in **criminal** real estate and mortgage **fraud**, who needed to be investigated by the Federal Bureau of Investigation," was defamatory). Indeed, published accusations of less culpable, but still disreputable, conduct have been held to be defamatory and actionable. Walsh v. Miami Herald Publishing Co., 80 So.2d 669 (Fla. 1955) (article charging that police officer "offered testimony exactly opposite his own report on an accident," cited as an example of Miami Beach police who "make laughingstocks of themselves when they testify in court" and "do everything possible to disprove their own reports" was defamatory *per se* and actionable); Barnes v. Horan, 841 So.2d 472 (Fla. 3d DCA 2002) (libel action based on letter stating that attorney had earned "somewhat unanimous disdain from most of the Monroe County attorneys and nearly all of our Judges" was defamatory and

actionable); Wolfson v. Kirk, 273 So.2d 774 (Fla. 4th DCA 1973) (statement that defendant, while running a stock brokerage house, had "invited [plaintiff, a financier and business consultant] out of the office" implied "that the plaintiff was a person with whom commercial relations were undesirable" and thus was "reasonably susceptible of a meaning which is defamatory," and "it is for the trier of fact to decide whether or not the communication was understood in the defamatory sense"); Hevey v. News-Journal Corp., 148 So.2d 543 (Fla. 1st DCA 1963), cert. den. sub nom. News-Journal Corp. v Hevey, 155 So.2d 1963 (Fla. 1963) (article charging that Civil Service chair abused had hired incompetents for city jobs was actionable *per se*).

Applying Florida law, defendants' false implications that plaintiff gunned down Trayvon Martin as Martin walked through the plaintiff's gated community because Martin "look[ed] black"/was "a black male" are defamatory and actionable. Should defendants attempt to contest the implications of their broadcasts at trial, it will be for the trier of fact to decide whether the broadcasts were so understood by their intended audiences.

VI. THE PLAINTIFF HAS ALLEGED THE FALSITY OF THE DEFAMATORY BROADCASTS, AND HIS ABILITY TO PROVE HIS CLAIMS –WHICH IS CLEAR -- SHOULD NOT BE DECIDED BEFORE PRETRIAL DISCOVERY

The validity of a contention that a challenged broadcast or publication is not demonstrably false must await the completion of pretrial discovery. As explained by the Court of Appeals, in declining to reach such contentions **prior to discovery**:

> The actionable and provable false and defamatory statements, if any, will winnow out via pretrial discovery and motions for summary judgment. We express no opinion regarding the accuracy of Greene's allegations and his ability to prove them. We simply hold that, at the preliminary point of assessing the legal sufficiency of the complaint and attachments, Greene has adequately detailed a cause of action for libel as to each article and each defendant.

Greene, 130 So.3d p. 730. *Accord* Victor v. News & Sun Sentinel Co., 467 So.2d 499 (Fla. 4th DCA 1985) ("the trial court acted **prematurely** in considering matters that should properly be raised as affirmative defenses" to a libel action). (Emphasis supplied.) Thus, any determination of falsity would be entirely premature at this stage, when the plaintiff has not even had the opportunity to take discovery.

In addition, the United States Supreme Court has explicitly recognized that claims a speaker's words were taken out of context or a defendant fabricated or altered a quotation in a manner that falsely attributed to the speaker an assertion he did not make or a negative personal trait or attitude he did not hold may indeed be demonstrably false and actionable. Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991). The Court explained that a purported "quotation" which fails to reproduce what was said verbatim and in context may support a defamation claim, where the resulting product either attributes an untrue factual assertion to the speaker or falsely implies a negative personal trait or attitude the speaker does not possess:

> A fabricated quotation may injure reputation in at least two senses, either giving rise to a conceivable claim of defamation. First, the quotation might injure because it attributes an untrue factual assertion to the speaker….
>
> Secondly, regardless of the truth or falsity of the factual matters asserted within the quoted statement, the attribution may result in injury to reputation because the manner of expression or even the fact that the statement was made indicates a negative personal trait or attitude the speaker does not hold.

Masson, 501 U.S. p. 511.

The Court also noted that a purported quotation which takes the speaker's words out of context, "may distort a speaker's meaning" and thus be demonstrably false. As stated by the Court: "[A]n exact quotation out of context can distort meaning, although the speaker did use

each reported word." Masson, 501 U.S. p. 515. In addition, the Court observed that because the words appear to be the speaker's own, the defamatory effect may be especially profound:

> A self-condemnatory quotation may carry more force than criticism by another. It is against self-interest to admit one's own criminal liability, arrogance, or lack of integrity, and so all the more easy to credit when it happens.

Masson, 501 U.S. p. 512.

By the same token, the Florida Supreme Court has held that Florida recognizes defamation by implication, and such an implication may arise "where literally true statements are conveyed in such a way as to create a false impression." Jews for Jesus, Inc. v. Rapp, 997 So.2d 1098, 1108 (Fla. 2008). The Court quoted with approval

> W. Page Keeton, et al, *Prosser and Keeton on the Law of Torts* § 116, at 117 (5th ed. Supp. 1998), which stated … "if **the defendant juxtaposes a series of facts so as to imply a defamatory connection between them**, or **creates a defamatory implication by omitting facts**, he may be **held liable** for the defamatory implication, … even though the particular facts are correct."

Id.

That is exactly what defendants did here. They juxtaposed a series of statements the plaintiff had made and omitted others, to imply a false and defamatory connection between those which remained: that the plaintiff had targeted and stalked Martin because of Martin's race. They may be held liable for the defamatory implications they created and cannot evade liability merely by showing that the snippets they spliced together were derived from statements the plaintiff had made. Id.

While Florida courts have not had the opportunity to apply these standards to false implications of racist conduct, courts which have agree that such implications are actionable. Where, as here, a defendant manufactured or altered a statement or took a quotation out of

context so as to suggest that the plaintiff made a racist statement or committed racist acts, the courts have refused to dismiss the plaintiff's defamation claims.

In MacElree v. Philadelphia Newspapers, Inc., 544 Pa. 117, 121, 674 A.2d 1050, 1052 (1996), the Pennsylvania Supreme Court found that where it was alleged the defendant had **manufactured** a quotation which implied the plaintiff was guilty of racist misconduct, the plaintiff was entitled to demonstrate that the alleged source of the quotation "had **not made** the … remark, but the [newspaper] nonetheless printed it and attributed it to" him. (Emphases supplied.) The Court held that such **conduct** was subject to proof and, thus, differed from "merely **labeling** [the plaintiff] a racist." MacElree at p. 125, 674 A.2d p. 1054. (Emphasis supplied.) *Accord* Como v. Riley, 287 A.D.2d 416, 731 N.Y.S.2d 731 (App. Div. 2001) (statement in e-mail, published under heading "Racism," that there was a statute of a black man hanging from a white noose in plaintiff's office, was "not immune from redress for defamation").

By the same token, in Puchalski v. School Dist. of Springfield, 161 F. Supp. 2d 395 (E.D. Pa. 2001), the Court held that statements charging the plaintiff **made a racist statement** were actionable, and the plaintiff was entitled to prove that he had not made the statement attributed to him. As in MacElree, the Court distinguished this from the situation in which a defendant is accused of mere name-calling; *i.e.,* "**characterizing**" the plaintiff as a "racist." (Emphasis supplied.)

As will be discussed below, the three cases cited by defendants are distinguishable on this very basis. They were limited to mere **name-calling**: the defendant had termed the plaintiff a racist. **None** of them involved a defendant charged with provably false **conduct**, such as manufacturing or altering a quotation, taking another's words out of context, or claiming the plaintiff had made a racist statement.

The present case involves allegations of intentional **conduct** by the defendants. They deliberately and deceptively spliced together statements from the audio-recording of his 911 call and manufactured the false accusation that he used a racial epithet during that call, to create the false impression that his own statements showed he was guilty of racially profiling Trayvon Martin. This **conduct** and the implications they created are **capable of being proved false** and, thus, actionable, by the **very recordings they maliciously edited**. Masson.

Specifically, plaintiff alleged that, during that recorded conversation, **he provided the reasons** for his belief that Martin appeared to be "a real suspicious guy" and "looks like he is up to no good or he is on drugs or something," but defendants deliberately deleted them because Martin's race was **not** among them. The product they created and broadcast used different statements, misleadingly spliced together, to falsely imply that he had given Martin's **race** as his reason for believing Martin looked suspicious.

Plaintiff told the dispatcher "**we've had some break-ins in my neighborhood**," and "[i]t's **raining** and he's **just walking around looking about.**" *See* Complaint, ¶¶48, 50 and 60, quoting actual recording. Thus, the reasons he gave did **not** include Martin's race. There was **no** reference to Martin's race, **until the dispatcher specifically asked plaintiff:** "Okay, and this guy is **white, black or Hispanic**?" *See* Complaint, ¶¶48, 50 and 60. Martin was still some distance away and the plaintiff was unable to provide a definitive answer. He could only answer, uncertainly: "He looks black." (Emphases supplied.)

To create a sensation for their March 19th broadcast, defendants **excised** plaintiff's explanation that "we've had some break-ins in my neighborhood" and "[it's raining and he's just walking around looking about," as well as the dispatcher's query whether "this guy is white, black or Hispanic?" *See* Complaint, ¶48. With these calculated omissions, the plaintiff appeared

to **volunteer** that Martin "looks black," as his **explanation** for believing that Martin was "a real suspicious guy" and "looks like he is up to no good or he is on drugs or something" – rather than simply attempting to answer a direct question by the dispatcher regarding Martin's race. *See id*. The product they created clearly effected a material change in the meaning of plaintiff's actual statements, and a jury has the right to so find. The false impression resulting from defendants' manipulation of the audio recording was all the more damning, because defendants used plaintiff's own words, in his own voice.

The following day, March 20, defendants similarly manipulated the recording to again create the false and defamatory implication that plaintiff's own words showed he was guilty of **racially profiling** Martin – the very thing the original, **unedited** recording refutes. After asking Mr. Zimmerman whether "this guy is white, black or Hispanic," the dispatcher had asked Mr. Zimmerman: "Did you see what he was wearing?" *See* Complaint, ¶¶48, 50 and 60. Prompted by the dispatcher's question, Mr. Zimmerman gave a description of Martin's apparel: "Yeah, a dark hoodie like a gray hoodie and either jeans or sweat pants and white tennis shoes." He added: "He's here now and he is just staring and looking at all the houses."

After a further exchange about Martin's conduct ("he's just staring and looking at all the houses"; "[n]ow he is just staring at me") and their location, plaintiff told the dispatcher "now he is coming towards me." As Martin approached, plaintiff was able to add details, such as "[he[has a button on his shirt," and verify his earlier uncertain response about Martin's race: "He's got his hand in his waistband. And he is a Black male. He has a button on his shirt."

For their broadcast, defendants again excised plaintiff's explanation that "we've had some break-ins in my neighborhood" and "[it's raining and he's just walking around looking about," as well as the dispatcher's query whether "this guy is white, black or Hispanic?" and

plaintiff's uncertain reply that "he looks black." They also excised the dispatcher's question "[d]id you see what he was wearing?" and the description the plaintiff had given in response. Finally, they excised plaintiff's statement that "now he is coming toward me," which explained his ability to amplify upon his earlier responses to the question about appearance and verify his earlier uncertain answer about Martin's race. *See* Complaint, ¶50.

As edited by defendants, the audio recording had the plaintiff's statement that "[t]his guy looks like he's up to no good or on drugs or something" followed by: "He's got his hand in his waistband. And he's a black male." This created the false impression that plaintiff had said Martin was "up to no good or on drugs or something" and stalked and shot Martin because Martin was a black male with his hand in his waistband. *See id.* A jury is entitled to find that this was a material change in the meaning of plaintiff's statements; indeed, an utter falsification of his actual conversation with the dispatcher. Masson; Jews for Jesus. It injured the plaintiff by both attributing an untrue factual assertion to him and falsely implying racist conduct and statements of which he was not guilty, arising from racist attitudes he did not hold. Masson.

The manipulated recordings carried particular force, because they used the plaintiff's own voice. He appeared to condemn himself of racial profiling and racist attitudes. Masson.

To reinforce their false accusation that plaintiff had admitted to **racially profiling** Martin, defendants also falsely claimed – *in spite of what the Sanford Police had concluded* – that plaintiff used a "racial epithet" to describe Martin during the 911 call. *See* Complaint, ¶53. They "falsely claimed that Zimmerman said 'f_____ **coons**' during the February 26, 2012 [911] call, when he actually said "f_____ **punks**' and knowing that claim would incite widespread outrage throughout the Nation." *See* Complaint, ¶57. Defendants do not even try to deny that

this constituted a manufactured quotation and effected a material change in meaning and is thus actionable under Masson.

Two days later, on March 22, 2012, defendants sought to build on the national furor they had sparked, by broadcasting another falsely edited version of the recording. As before, they **excised** plaintiff's explanation **on the recording** that "we've had some break-ins in my neighborhood" and "[it's raining and he's just walking around looking about," as well as the dispatcher's query whether "this guy is white, black or Hispanic?" *See* Complaint, ¶60. As they had on March 19th, they played plaintiff's reply that "he looks black," without the dispatcher's query to which he was responding, and immediately after they played his statement that "he looks like he is up to no good or he is on drugs or something." The obvious intent was to deliberately create the false impression plaintiff had **volunteered** "he looks black" as his **explanation** for believing that Martin "looks like he is up to no good or he is on drugs or something."

To further falsify plaintiff's statements and play up the notion of stereotyping, defendants began their broadcast by describing Trayvon Martin as "the teen gunned down last month as he walked through the gated community wearing a hoodie" (Complaint, ¶60). Defendants knew that statement was untrue; Martin was not "gunned down … as he walked"; he was shot when he was on top of the plaintiff, smashing plaintiff's head into the sidewalk. They also knew that most of the items plaintiff had described were widely worn and would be perceived as neutral ("either jeans or sweat pants and white tennis shoes"), so they edited those out and left a single item: "a dark hoodie."

The net effect of these misleading edits was to create the false impression that the plaintiff had targeted and "gunned down" Martin "as he walked" because Martin was a black teenager. Once again, defendants utterly changed the meaning of plaintiff's statements.

Evidently enjoying the national sensation they had created, they rebroadcast another edited version on March 27, 2012. *See* Complaint, ¶68. This time they even excised plaintiff's statement that Martin looked like "he is on drugs of something." *See id*. The March 27th broadcast had plaintiff stating that Martin "looks black" as his explanation for believing that Martin "looks like he is up to no good": "This guy looks like he's up to no good. He looks black." *See id*. As before, the meaning of plaintiff's statements was completely altered.

The plaintiffs' averments of defendants' conduct in deliberately creating these false and defamatory implications were more than sufficient to state a cause of action for defamation. Masson; Jews for Jesus. Plaintiff is entitled to take discovery on his claims and have a jury assess the falsity of the defendants' broadcasts.

The cases cited by defendants do not support, let alone mandate, a contrary conclusion. None of them involved **provably false conduct;** *i.e.,* a defendant who **altered or took out of context** statements by the plaintiff or a third party, to create the false impression that the plaintiff was guilty of **racial profiling.** Instead, they all were limited to **name-calling**: a defendant who called the plaintiff a racist.

Stevens v. Tillman, 855 F.2d 394, 400 (7th Cir. 1998), upon which defendants purport to rely, actually supports the **plaintiff's** position. In Stevens, the president of a parent-teacher association had publicly accused an elementary school principal of racism, stating, *inter alia*:

> Our principal is very insensitive to the needs of our community which happens to be totally black. She made very racist statements during the boycott. She is a racist….

The principal sued the parent-teacher association president for defamation. Thus, unlike the present case, this was not an action by the alleged **speaker** for **falsely manipulating the speaker's words**, by taking them out of context, to alter their meaning.

The Court found that whether the principal had **made such statements** was a question of **fact** which should properly be submitted to a jury.[4] However, the plaintiff had failed to pursue the argument that the district court had erred in dismissing claims based on this assertion (that "she made very racist statements"), a failing the Court found "curious":

> [The plaintiff] either did or did not make repugnant statements; [the defendant] said that she had, yet offered no examples. One is entitled to wonder how such an assertion can be "opinion"….
>
> Curiously, [the plaintiff] does not contend that the jury should have been allowed to consider whether [defendant's] oratory implied to listeners that [plaintiff[had made the kind of statements that all ears find repellant.

Stevens, 855 F.2d p. 401.

Instead of attempting to argue that the falsity of the defendant's charge that the plaintiff had **made racist statements** was an issue for the jury, the plaintiff **limited** herself to a contention "that the epithet 'racist' is **itself** actionable" under Illinois law. Id. (Emphasis

[4] Thereafter, the author of the Stevens decision held that **both** an accusation that an individual "is a racist" and an accusation that the individual is guilty of racist **conduct** are actionable. In Taylor v. Carmouche, 214 F.3d 788 (7th Cir. 2000), cert. den., 531 U.S. 1073 (2001), Judge Easterbrook stated:

> [W]hether a given supervisor is a racist, or practices racial discrimination in the workplace, is a mundane issue of **fact,** litigated every day in federal court. "Felton is a racist" is defamatory, and a person who makes an unsupported defamatory statement may be penalized without offending the first amendment. Whether that penalty is delivered in a slander action, in a perjury prosecution, in an award of attorneys' fees for making unsubstantiated allegations, or in the workplace by a suspension, is immaterial to the Constitution.

supplied.) The Court found that, **unlike** a charge that the plaintiff had **made racist statements** – alleged **conduct** that was **capable** of being proved false – an accusation of "name-calling" was not in and of itself actionable. *Accord* Ward v. Zelikovsky, 136 N.J. 516, 539, 643 A.2d 972, 983 (1994) (observing that "not all claims of bigotry are non-defamatory" and that whether an accusation of bigotry is actionable depends on whether it involves "facts that are **capable of objective proof of truth or falsity**" and citing as an example an accusation that the plaintiff committed "specific **acts** such as **making racist statements**") (emphases supplied); City of Brownsville v. Pena, 716 S.W. 2d 677 (Tx. Ct. App. 1986) (upholding verdict for plaintiff on defamation claim based upon false charge that plaintiff constantly used the derogatory word "mojado (wetback)," when the evidence was that the defendant and his supporters had "initiated these rumors and then organized the legal residents to complain").

The other decisions relied upon by defendants can readily be distinguished on the same basis. Citing Stevens, a district court in Illinois held that a "description of [the plaintiff] as a racist" was not factual and therefore not actionable. Martin v. Brock, 2007 U.S. Dist. LEXIS 57207 (N.D. Ill. July 19, 2007). Smith v. School Dist. of Phila., 112 F. Supp.2d 417, 429 (E.D. Pa. 2000) arose out of similar "statements that plaintiff is racist and anti-Semitic." The Court found that these statements were not actionable because they were "non-fact based" (id.).

Those decisions have nothing to do with the present case, which is based upon **provably false conduct**. The plaintiff can show, as a matter of **fact**, that the defendants **created** a false recording, by **taking the plaintiff's words out of context** and **splicing them together** in a way which altered their meaning and created the false implication that the plaintiff had targeted and shot Martin because he "looks black." As with the altered quotations in Masson and MacElree, as well as the accusations in Stevens and Puchalski that the plaintiff had made racist statements,

the alterations to the audio recording are **factual** matters which are **capable of being proven** and, therefore actionable.

For the same reasons, defendants are subject to liability for falsely **manufacturing** a quotation which they attributed to the plaintiff: that the plaintiff used a racial epithet ("coons") to describe Trayvon Martin. Masson. A claim that the defendant **manufactured** a quotation and attributed it to the plaintiff, so that he would appear to be guilty of a repellant and socially opprobrious statement, is actionable. Id. As the Court found in Barnes v. Horan, 841 So.2d 472 (Fla. 3d DCA 2002), "the falsity of this statement can be verified by receiving sworn testimony." In this case, such testimony can be provided by the plaintiff, the dispatcher and others, including the investigators who attested in a sworn affidavit filed with the Court in the criminal proceedings against Mr. Zimmerman that he did not use a racial slur, but instead said "f_____ punks." In addition, the audio-recording itself is available.

Where, as here, defendant's contention relies upon a disputed question of fact, the question can only be resolved by a jury. Lipsig, 760 So. 2d p. 183. *Accord* Glickman, 454 So.2d p. 613 (summary judgment not proper where there are disputed issues of fact regarding truth or falsity of defamatory statement). The plaintiff has alleged that defendants deceptively manipulated the audio recording to imply that plaintiff had told the dispatcher that he suspected Martin was engaged in criminal activity because of Martin's race.

In an effort to dispute this allegation, defendants assert the recording shows that "Zimmerman **volunteered**, for **no apparent reason related to the dispatcher's inquiry**, both that the man had 'his hand in his waistband' and that he was 'a black male'" (Def.s' Mot., p. 41). (Emphases supplied.) That is untrue. As has already been shown, the dispatcher had asked whether Martin was "white, black or Hispanic?" and the plaintiff had been uncertain, answering

only: "He **looks** black." Later, plaintiff stated "now he is coming towards me" and Martin's proximity enable plaintiff to give a definitive answer to the inquiry: "he is a Black male." Thus, contrary to defendant's contention, the latter statement was directly related to the dispatcher's inquiry.

Similarly, when the dispatcher had asked for a description of Martin's apparel, the plaintiff responded, somewhat vaguely, that Martin was wearing "a dark hoodie like a gray hoodie and either jeans or sweat pants and white tennis shoes." When Martin drew nearer, the plaintiff was able not only to confirm Martin's race, but add (in a sentence defendants are careful not to quote) that "[h]e has a button on his shirt." This statement, too, was directly related to an early inquiry by the dispatcher (in this instance, regarding what Martin was wearing).

Not only is defendants' factual assertion wrong, but it seeks to have this Court decide a factual dispute which can only be resolved by the jury. It serves to demonstrate, once again, that there are **disputed issues of fact** which **preclude summary judgment**.

There are also **disputed issues of fact** regarding the defendant's false charge that plaintiff used a racial epithet ("coons") in his 911 call. The plaintiff has alleged that defendants "had no evidence, or reason to believe, that Zimmerman uttered a racial epithet" (Complaint, ¶58). The plaintiff will proffer his own sworn testimony and that of other witnesses regarding that, and defendants may offer such evidence (if any) as they are able to garner to demonstrate otherwise. It will be for **a jury** to decide whether defendants had a factual basis for their defamatory falsehood.

In the face of these factual disputes, it would be improper to determine the sufficiency of the plaintiff's evidence at this early stage of the proceedings, before the plaintiff has even had the opportunity to take pretrial discovery. A movant is not entitled to summary judgment unless "the

pleadings, depositions, answers to interrogatories, admissions, affidavits and other materials as would be admissible in evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Estate of Bithens, 928 So.2d p. 1274. The trial court may not weigh the credibility of witnesses or resolve disputed issues of fact, as defendants are asking it to do. Jones, 91 So.2d p. 302; Arce.

The only question, at this early stage of the proceedings, is whether the plaintiff has alleged a cause of action for libel against the defendants. Id. Claims based upon manufactured or altered quotations which defame the plaintiff, such as those alleged by Mr. Zimmerman here, are actionable. Masson; Stevens; Puchalski; MacElree. They can be verified by receiving sworn testimony and other means. Barnes. Accordingly, defendants' motion to dismiss or for summary judgment must be denied.

VII. THE PLAINTIFF HAS ALLEGED ACTUAL MALICE, WHICH CERTAINLY IS PROVABLE HERE, AND DEFENDANTS' CONTENTION REGARDING HIS ABILITY TO PROVE THIS CANNOT BE DECIDED BEFORE THE PLAINTIFF HAS HAD THE OPPORTUNITY TO TAKE PRETRIAL DISCOVERY

A. The Only Issue At This Stage Is Whether the Complaint States a Cause of Action, Which It Indisputably Does

At this early stage of the proceedings, the only issue is whether the Complaint states a claim for defamation. It would be premature for a court to determine, prior to the completion of discovery, whether the evidence is sufficient to substantiate the claims and allow them to be decided by a jury. Greene, 130 So.3d p. 730 (only issue at motion to dismiss stage is whether the plaintiff has alleged the elements of a libel claim; prior to completion of discovery, it would be premature to determine whether statements are in fact false and actionable); Barnes, 841 So.2d p. 476 (reversing dismissal of libel action because plaintiff "has alleged a sufficient factual basis to proceed" and is entitled to attempt to prove his claims by, *inter alia*, "receiving sworn

testimony" of witnesses); Diaz v. Abate, 598 So.2d 197, 198 (reversing dismissal of action where plaintiff's "third amended complaint, if less than artfully drafted, nonetheless contained sufficient allegations of false factual statements, made about appellant with malice, and resulting in injury, to state a cause of action for defamation"); Victor, 467 So.2d p. 500 (reversing dismissal of action where "the amended complaint … contained sufficient allegations of false factual statements made about appellants with malice and resulting in injury to state a cause of action for libel"; "the trial court acted prematurely in considering matters that should properly be raised as affirmative defenses").

The present Complaint sets forth a cause of action for defamation, and defendants themselves do not contend otherwise. The plaintiff has alleged that defendants knowingly and deliberately manipulated his own words, by splicing together disparate parts of the recording of his 911 call, to create the illusion that plaintiff targeted Martin because Martin looked Black and that Martin's death was the result of heinous racial profiling. Complaint, ¶¶1-17, 48-68, 78-80 and 84-86. The plaintiff further alleged that this "was specifically done to imply that Zimmerman had a racist motive" (Complaint, ¶10); "[t]he defendants knew when they created, broadcast, and rebroadcast the manipulated audio and the false statements about the recordings' contents that the entire basis of their reporting was manifestly improper" (Complaint, ¶19); "[t]he defendants intentionally and manipulatively deleted critical intervening dialogue, to portray Zimmerman as a hostile racist" (Complaint, ¶62); "[i]n spite of being well aware that this tragedy was not racially motivated, the defendants, for their own material greed and to incite a national uproar, manipulated the audio recordings and lied about Zimmerman uttering a racial epithet" (Complaint, ¶79); "[d]efendants had knowledge of, or acted in reckless disregard as to, the falsity of the matters they publicized" (Complaint, ¶82); and "[d]efendants knew (or recklessly

disregarded that) their statements were false, but nonetheless intentionally and maliciously portrayed Zimmerman as a hostile 'racist' to undermine his position and reputation in the minds of the defendants' viewers, the nation and potential jurors" (Complaint, ¶84). The plaintiff further alleged that "[t]he defendants knew that Zimmerman did not use a 'racial epithet' to describe Martin, yet they maliciously and conclusively stated that he did, for the purpose of portraying Zimmerman as a hostile racist" (Complaint, ¶12); "this claim was made "without any legitimate basis – *and in spite of what the Sanford Police had concluded*" (Complaint, ¶53); and "[t]he truth, as known to defendants, was that Zimmerman said 'f_____ punks' and there was no evidence, or reason to believe, that Zimmerman uttered a racial epithet during the call" (Complaint, ¶58).

It would be an abuse of discretion to require the plaintiff to present all the evidence in support of his claims now, before he has even had the opportunity to complete discovery -- a process he has not even had the opportunity to **begin**. Crowell, 845 So.2d p. 327. *Accord* Harvey Covington & Thomas; Lubarsky. "Summary judgment should not be granted until the material facts have been sufficiently developed for the court to be reasonably certain that no genuine issue of material fact exists." Harvey Covington, 85 So.3d at 559. *Accord* Dickey (reversing grant of summary judgment because trial court should not have ruled on motion for summary judgment until completion of discovery); Epstein, 736 So.2d p. 138 (same).

B. Defendants' Contention That the Plaintiff Was a Limited Purpose Public Figure Is Contrary to the Allegations of the Complaint, Which Must Be Taken As True, and Depends on Information Outside the Four Corners of the Complaint, Which The Court Cannot Consider

1. Florida Follows Federal Law Which Recognizes Two Types of Public Figures, All-Purpose and Limited Purpose

Florida follows federal law in recognizing **two** types of public figures: "general" (or all-purpose) and "limited" purpose[5]. The latter is restricted to those individuals who have voluntarily "**thrust themselves forward in a particular public controversy."** As stated in Saro Corp. v. Waterman Broadcasting Corp., 595 So.2d 87, 89 (Fla. 2nd DCA 1992):

> There are **two** classes of public figures, "general" and "limited." General public figures are individuals who, by reason of fame or notoriety in a community, will in all cases be required to prove actual malice. Limited public figures, on the other hand, are individuals who have **thrust themselves forward in a particular public controversy** and are therefore required to prove actual

[5] The concept of an involuntary public figure, put forward by defendants, has its origin in a single sentence from Gertz: "Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare." 418 U.S. at 348. The courts have heeded this warning. So rarely has an individual been determined to be an involuntary public figure, that learned commentators have questioned whether this is a viable concept. *See, e.g.*, Rodney A. Smolla, *Law of Defamation* §2.14 (1998). While the case cited by defendants (Def.'s Mot. p. 25), Dameron v. Wash. Magazine, Inc., 779 F.2d 736, 742 (D.C. Cir. 1985), appeared to recognize an involuntary public figure, it is not a Florida decision and the court emphasized the limited scope of its holding, noting that "the circumstances in which an involuntary public figure is created will … continue to be few and far between." It is telling that at each post-Gertz opportunity the Supreme Court has had to declare a plaintiff an involuntary public figure, it has declined to do so. *See, e.g.*, Hutchinson v. Proxmire, 443 U.S. 111 (1979) (noting that "those charged with defamation cannot, by their own conduct, create their own defense by making claimant a public figure"); Wolston v. Reader's Digest Ass'n., Inc., 443 U.S. 157 (1979) (noting that one is not made into a public figure just by being "dragged unwillingly into [a public] controversy … [or] just by becoming involved in or associated with a matter that attracts public attention"); Time, Inc. v. Firestone, 424 U.S. 448 (1976) (socialite involved in "cause celebre" divorce case was not a public figure merely because the salacious details of the two parties' sexual exploits captivated the public).

It is also telling that defendants do not cite a single **Florida** case recognizing an involuntary public figure. It appears that Florida, like most courts, has concluded that Dameron is inconsistent with the Supreme Court's rejection in Gertz of the notion that private persons become public figures whenever the allegedly defamatory statements about them involve matters of public interest. Mile Marker; Saro. *See, e.g.*, Lerman v. Flynt Distributing Co., Inc., 745 F.2d 123, 136-37 (2nd Cir. 1984) (adopting test, based on Supreme Court case law, which hinges largely on individual's voluntary injection of himself into a pre-existing controversy, rather than extent of public interest in it).

> malice only in regard to certain issues. Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

(Emphases supplied.) *Accord* Mile Marker, Inc. v. Petersen Publ'g., L.L.C., 811 So.2d 841, 856-46 (Fla. 4th DCA 2002).

This holding is consistent with the decisions of the United States Supreme Court. In Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974), the decision cited by the Florida courts and upon which defendants purport to rely, the Court recognized **two** classes of public figures, stating:

> Respondent's characterization of petitioner as a public figure raises a different question. That designation may rest on either of **two** alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

(Emphasis supplied.) The Court has declined to recognize a third category, the so-called "involuntary public figure," stating that one cannot be made into a public figure simply by being "dragged unwillingly into [a public] controversy … [or] just by becoming involved in or associated with a matter that attracts public attention." Wolston v. Reader's Digest Ass'n., Inc., 443 U.S. 157, 166-67 (1979). *See* n.5, supra.

The Court also expressly **rejected** the notion, which the present defendants advance, "that any person who engages in criminal conduct automatically becomes a public figure for purposes of comment on a limited range of issues." Wolston, 443 U.S. p. 168. *Accord* Jones v. Taibbi, 400 Mass. 786, 512 N.E.2d 260 (1987) (individual taken into police custody in connection with serial murders did not become a public figure). While defendants argue

otherwise, they are careful to avoid any mention of Wolston's rejection of their position. *See* Def.'s Mot. p. 29.

Ignoring the clear holding of the U.S. Supreme Court, they erroneously imply that Madsen v. United Television, Inc., 797 P.2d 1083 (Utah 1990), overruled, O'Connor v. Burningham, 165 P.3d 1214 (Utah 2007) held that Utah deems anyone involved in a fatal shooting to be a public figure. Madsen involved a police officer who fatally shot a man involved in a domestic dispute. The Court held the police officer was a public **official** (not a public **figure**) because he had been involved in a line-of-duty shooting. The Utah Supreme Court subsequently **overruled** this holding and found that police officers are private figures, not public officials. O'Connor. Thus, even were Utah case law relevant (which it is not), Utah does **not** hold anyone involved in a fatal shooting to be a public figure.

2. Defendants Cannot Be Heard to Contend That Plaintiff Was a Public Figure for the Purposes of the Controversy They Created

The instances in which an individual has achieved such "pervasive fame or notoriety" that he will be deemed "a public personality for all aspects of his life," Gertz, 418 U.S. at 352, are rare, and defendants do not contend that the plaintiff falls into that very limited category.[6] They do contend, however, that the plaintiff is a limited purpose public figure.

To succeed on this claim, they will first need to demonstrate that their defamatory broadcasts concerned a particular public controversy which existed **before** they broadcast their manipulated recordings. If they succeed in that, they will next need to show that the plaintiff

[6] Even the defendants do not attempt to argue that the plaintiff is the equivalent of a Jerry Falwell, a "nationally known minister" who is also "the host of a nationally syndicated television show and was the founder and president of a political organization formerly known as the Moral Majority," Hustler Mag., Inc. v. Falwell, 485 U.S. 46 (1988), or a Johnny Carson, who described himself in his own brief as a "pre-eminent entertainer and show business personality," Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976).

played a central role in that pre-existing controversy and that the alleged defamation was germane to that role. Saro, 595 So.2d p. 89.

In that regard, a publisher of a defamatory statement cannot be heard to claim that a person was a public figure for purposes of a certain controversy, where the publisher itself created the controversy. As the Court stated in Hutchinson, 443 U.S. p. 135: "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." Rather, the requirement that otherwise private individuals must "have thrust themselves to the forefront of particular public controversies" means there must been a pre-existing controversy, before the defamatory statements. Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 591 (1st Cir. 1980). *Accord* Lluberes v. Uncommon Productions, LLC, 663 F.3d 6, 13 (1st Cir. 2011) ("to avoid improper bootstrapping …, the controversy must predate the defamation"); Little v. Breland, 93 F.3d 755, 757 (11th Cir. 1996) ("[t]he public controversy must have pre-existed the alleged defamation"); Blue Ridge Bank v. Veribank, Inc., 866 F.2d 681, 688 (4th Cir. 1989) (a plaintiff should not be considered a limited-purpose public figure absent the existence of a pre-defamation public controversy" which "directly or proximately" concerns the particular subject of the defamation); Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1297 (D.C. Cir. 1980), cert. denied, 449 U.S. 898 (1980) (to determine whether a particular controversy existed before the defamatory statements were published, "courts must look to what already were disputes").

The plaintiff has alleged there was **no** pre-existing public controversy over whether he was guilty of racially profiling Trayvon Martin, as proven by his own statements on the audio recording, until the **defendants created** one. He has alleged, *inter alia,* that the defendants "set about to **create** the myth that George Zimmerman was a racist and predatory villain"

(Complaint, ¶1) (emphasis supplied) who "'us[ed] a racial epithet' while describing Martin during the call to the dispatcher on that fateful night" and "told the dispatcher that he suspected Martin was engaged in criminal activity because 'he's a black male'" and otherwise made "remarks during his call to the non-emergency 911 line [which] suggested that [plaintiff's] actions were motivated by racial stereotypes, rather than by concern for his safety and for the safety of this neighbors" (Complaint, ¶3). Plaintiff further alleged that "**NBC <u>created</u>** this false and defamatory misimpression" by "manipulating [plaintiff's] own words, splicing together disparate parts of the recording to create the illusion of statements that [plaintiff] never made" (Complaint, ¶4). (Emphasis supplied.) Plaintiff further alleged that the "media frenzy" which followed was "**provoked** by **NBC personnel**" (Complaint, ¶72). (Emphasis supplied.)

On a motion to dismiss, the plaintiff's averments must be taken as true, <u>Anson</u>, 736 So.2d p. 1210, and all reasonable inferences must be drawn in his favor, <u>Regis Ins. Co.</u>, 902 So.2d p. 968. Therefore, it must be assumed that defendants "**created** the myth that George Zimmerman was a racist and predatory villain," and any contention that the plaintiff had already made himself a limited purpose public figure for purposes of the controversy must be rejected.

Evidently recognizing this, the defendants are careful to avoid any mention of the **allegations** of the Complaint regarding **their** responsibility for **creating** the public controversy over the plaintiff's alleged racial profiling of Martin. Ignoring the Complaint, they attempt to present their own contrary "facts" instead and argue that the plaintiff was a public figure for the limited purpose of the controversy they created over whether he was guilty of **racially profiling Martin** because, they contend, (a) he had been involved in a **different** matter (challenging alleged police lethargy in investigating another incident) and (b) he had helped start a neighborhood watch program in his immediate area. *See* Def.s' Mot. p. 28.

Those contentions must fail for several reasons. First, they rely on information outside the four corners of the Complaint: a multitude of exhibits defendants claim support these contentions. These exhibits cannot be considered at this stage of the proceedings. "It is well settled that when a trial court considers a motion to dismiss, it is limited to the four corners of the complaint…" Anson, 736 So.2d p. 1210. *Accord* Greene, 130 So.3d 724. Thus, the defendants' exhibits and arguments relying upon them cannot be considered.

Secondly, defendants' argument misstates the issue. The question is not whether an individual has ever been involved in **a** controversy, but "the nature and extent of an individual's participation in the **particular controversy giving rise to the defamation**." Gertz, 418 U.S. at 352. (Emphases supplied.)

The plaintiff in Gertz was a prominent civil rights lawyer whose highly controversial cases frequently "commanded a wide following in the press and media." Gertz v. Robert Welch, Inc., 322 F. Supp. 997, 998 (N.D. Ill. 1970), aff'd., 471 F.2d 801 (7th Cir. 1972), rev'd., 418 U.S. 323 (1974). He also had "written books, articles and reviews which … enjoyed wide circulation," "appeared frequently on radio and television," "delivered numerous speeches" and "long been involved in civic affairs." Id.

The Supreme Court held that this did not make him a public figure for purposes of the **particular** controversy ignited by the publisher of a monthly outlet for the John Birch Society, in an article attacking the plaintiff for bringing a civil rights action on behalf of the family of a youth who had been fatally shot by a Chicago police officer. Although the attorney had not been involved in the criminal prosecution of the officer which preceded the civil rights action, the article accused him of being "an architect of the 'frame-up'" and also claimed that there was a police file on the attorney that took "a big, Irish cop to lift." Gertz, 418 U.S. p. 326.

If the present defendants' rationale were correct, the Court should have found that the lawyer was a limited purpose public figure, because of his involvement in **other** controversies, including civil rights controversies. The Court **rejected** this reasoning, however, and held that whether an individual is a limited purpose public figure must be determined "by looking at the nature and extent of [his] participation in the **particular** controversy giving rise to the defamation." Gertz, 418 U.S. at 352. (Emphasis supplied.)

Following Gertz, the courts have held that an individual will not be considered a public figure for purposes of one controversy, merely by assuming a leading position in relation to another. For example, the Supreme Court of Arkansas held that a former United States Attorney who had "routinely issued press releases" and been identified in "numerous newspaper articles" pertaining to high-profile investigations his office conducted was not a public figure for purposes of a newspaper article that falsely identified him as a Whitewater defendant. Little Rock Newspapers, Inc. v. Fitzhugh, 330 Ark. 561, 954 S.W.2d 914 (Ark. 1997). Similarly, the Supreme Court of New Mexico held that a "well known attorney and well known member of the Democratic party" was not a public figure for purposes of an article that falsely accused him of engaging in organized crime. Marchiando v. Brown, 98 N.M. 394, 399-400, 649 P.2d 462, 467-69 (N.M. 1982). In another case, a Texas Court of Appeals held that a former special counsel who "had achieved some notoriety when he acted as defense counsel for a city patrolman who had been dismissed by the chief of police for various alleged disciplinary infractions," "when he was appointed to serve on a panel investigating the causes of a jail riot" and "when he was appointed special counsel for a court of inquiry charged with investigating alleged irregularities in the way in which … County funds were being managed" was not a public figure for purposes of a news story falsely linking him to a club used as a front for orgies and prostitution. Durham

v. Connan Communications, Inc., 645 S.W.2d 845, 849-50 (Tex. App. 1982). In yet another case, the Supreme Court of Wyoming held that an attorney who had represented numerous controversial clients, including Lee Harvey Oswald and Karen Silkwood, was not a public figure for purposes of an article attacking him for representing another client, Andrea Dworkin, in an action against Hustler Magazine for publishing pornography. Spence v. Flynt, 816 P.2d 771 (Wyo. 1991), cert. denied, 503 U.S. 984 (1992).

Martin v. Committee for Honesty and Justice at Star Valley Ranch, 101 P.3d 123 (Wyo. 2004), cited by defendants, is not to the contrary. The plaintiff in that case had chosen to thrust himself to the forefront of **the very controversy** which was the subject of the allegedly defamatory publications: the termination of the general manager of ranch association. The plaintiff "chose to involve himself in the dispute" over the employment" of a general manager, "hired an attorney to investigate the claims against [the general manager] and to present the case for his termination" and "was actively involved in the debate concerning [the general manager] and his employment as general manager." Martin, 101 P.3d p. 131. The Court held that he was a public figure for purposes of bulletins criticizing his role in the general manager's firing – the **particular** controversy giving rise to the defamation.[7]

[7] The other decisions relied on by defendants are also distinguishable on this basis. In Vice v. Kasprzak, 318 S.W.3d 1, 15-16 (Tex. Ct. App. 2009), the Court held that publications concerning the president of a homeowner's association who also was an attorney for an entity related to the subdivision's developer which had been involved in multiple lawsuits against the property owners was a limited purpose public figure for purposes of publications challenging his dual capacities, where they "were all part of an ongoing controversy" over this which had already "played out in … local newspapers" before the publications at issue. Similarly, in Smith v. A Pocono Country Place Property Owners Ass'n., Inc., 686 F. Supp. 1053 (M.D. Pa. 1987), the Court held that the General Manager of a residential development who had been openly critical of a settlement agreement concerning the proper directorship of the Association and of one group of directors seeking control, in an attempt to influence the outcome of the controversy, was a limited purpose public figure for purposes of a dispute over the rightful membership of the Board of Directors and a document seeking to discredit the group of directors and the plaintiff's

Defendants' contentions regarding the plaintiff's alleged involvement in a **different** matter is irrelevant, and the very decision they cite does not hold otherwise. The only question is the nature and extent of his participation in "the particular controversy giving rise to the defamation." Id. In that regard, the plaintiff has alleged that there was no public controversy over whether he was guilty of racially profiling Martin, until defendants created one; thus, he could not have been a limited purpose public figure for purposes of their broadcasts.

3. Defendants' Contention Is Contrary to the Allegations of the Complaint, Which Must Be Taken as True and to Which Judicial Review Is Limited at This Stage

To "prove" that the plaintiff was a public figure for purposes of their broadcasts, and thus under the burden of proving actual malice, defendants rely upon exhibits and information outside the four corners of the Complaint. As has already been explained, it would be improper to consider anything outside of the Complaint and entirely premature to determine the plaintiff's status at this stage of the proceedings.

Defendants themselves recognize the **fact**-dependent nature of this inquiry. As supposed support for their contention that plaintiff is a limited purpose public figure for purposes of the controversy they created, they rely on **exhibits** they have attached which they contend show that he had become involved in a **different** incident (involving an allegedly slow police response to a beating) and in a neighborhood watch program in his development. Such evidence cannot be considered at this stage of the proceedings.

They also cannot rely on newspaper articles to prove the truth of the matter. "A newspaper article, introduced to prove the truth of out of court statements contained therein,

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stated reasons for supporting them. In Gulrajaney v. Petricha, 381 N.J. Super. 241, 885 A.2d 496 (2005), the Court held that a candidate in a "hotly-contested" election for a seat on the board of directors of a condominium association was a limited purpose public figure for purposes of the ongoing debate over her "qualifications" to sit on the board.

constitutes inadmissible hearsay." Dollar v. State of Florida, 685 So.2d 901, 903 (Fla. 5th DCA 1996), review den., 695 So.2d 701 (Fla. 1997). Indeed, the statements in these articles are largely derived from third parties and thus constitute inadmissible hearsay within inadmissible hearsay.

C. The Plaintiff Has Alleged Actual Malice, Which Certainly Is Provable Here, and Defendants' Contrary Contention Cannot, in Any Event, Be Decided Before the Plaintiff Has Had the Opportunity to Take Pretrial Discovery

A determination of whether the evidence is sufficient to create a jury issue with respect to actual malice depends upon a factual record; *i.e.*, whether there is

> *record evidence* sufficient to satisfy the court that a genuine issue of material fact exists which would allow a jury to find by clear and convincing evidence the existence of actual malice on the part of the defendant.

Mile Marker, 811 So.2d pp. 846-47. (Emphases in original.) That is a **fact**-sensitive inquiry which must await the completion of discovery, including depositions of the defendants. Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 668 (1989).

"Proof of the necessary state of mind could be in the form of objective circumstances from which the ultimate fact could be inferred." Herbert v. Lando, 441 U.S. 153, 160 (1979). In addition, "the **thoughts and editorial processes of the alleged defamer would be open to examination**." Id. (Emphases supplied.) However, the plaintiff has not yet had the opportunity to examine them, by taking depositions. **Circumstantial** evidence of a defendant's state of mind, including evidence of ill will or motive, evidence the defendant had reason to doubt the accuracy of their broadcasts before they were aired, and evidence defendants chose not to interview witnesses who could verify or refute their accusations and the defamatory implications of their broadcasts or otherwise purposefully avoided the truth, may also be presented. Harte-Hanks, 491 U.S. pp. 668, 682 and 688. Assuming there is sufficient evidence, it will be a **jury**

question whether defendants broadcast the statements with knowledge or reckless disregard of the alterations they made. Masson.

Even if the plaintiff's status as a public or private figure were not in dispute, the only potential issue at this stage could be whether he has alleged actual malice. Defendants have not raised this issue. There is **no question** that the plaintiff has alleged actual malice. He has alleged that defendants knowingly and deliberately manipulated his own words, by splicing together disparate parts of the recording of his 911 call, to create the illusion that plaintiff targeted Martin because Martin looked Black and that his death was the result of a heinous act of racial profiling. Complaint, ¶¶1-17, 48-68, 78-80 and 84-86. The plaintiff further alleged that this "was specifically done to imply that Zimmerman had a racist motive" (Complaint, ¶10); "[t]he defendants knew when they created, broadcast, and rebroadcast the manipulated audio and the false statements about the recordings' contents that the entire basis of their reporting was manifestly improper" (Complaint, ¶19); "[t]he defendants intentionally and manipulatively deleted critical intervening dialogue, to portray Zimmerman as a hostile racist" (Complaint, ¶62); "[i]n spite of being well aware that this tragedy was not racially motivated, the defendants, for their own material greed and to incite a national uproar, manipulated the audio recordings and lied about Zimmerman uttering a racial epithet" (Complaint, ¶79); "[d]efendants had knowledge of, or acted in reckless disregard as to, the falsity of the matters they publicized" (Complaint, ¶82); and "[d]efendants knew (or recklessly disregarded that) their statements were false, but nonetheless intentionally and maliciously portrayed Zimmerman as a hostile 'racist' to undermine his position and reputation in the minds of the defendants' viewers, the nation and potential jurors" (Complaint, ¶84). The plaintiff further alleged that "[t]he defendants knew that Zimmerman did not use a 'racial epithet' to describe Martin, yet they maliciously and

conclusively stated that he did, for the purpose of portraying Zimmerman as a hostile racist" (Complaint, ¶12); "this claim was made "without any legitimate basis – *and in spite of what the Sanford Police had concluded*" (Complaint, ¶53); and "[t]he truth, as known to defendants, was that Zimmerman said 'f_____ punks' and there was no evidence, or reason to believe, that Zimmerman uttered a racial epithet during the call" (Complaint, ¶58).

Thus, even assuming, *arguendo,* that the defendants are able to show the plaintiff was a public figure for purposes of their broadcasts and under the burden of alleging actual malice, these averments were sufficient to do so. Defendants themselves do not argue otherwise.

Instead, they attempt to present "facts" contrary to, and outside the four corners of, the Complaint and argue that the Court should accept their "facts" concerning the underlying events and their broadcasts, derived from hearsay news articles, as true. That is impermissible. At this stage of the proceedings, the Court is limited to the four corners of the Complaint and must accept the **plaintiff's averments** as true.

It would also be impermissible for a court to grant summary judgment where, as here, the material facts are in dispute. At most, defendants' argument suggests that the parties dispute the events of that fateful night and the implications of the defendants' broadcasts. These disputes can only be resolved by a jury.

D. Defendants' Efforts to Raise Disputed Issues of Fact Regarding Plaintiff's Conversation with the Dispatcher Are Belied by the Actual Recording, and the Implications of Their Broadcasts Require the Denial of Their Motion

1. The March 19 Broadcast

On March 19, 2012, defendants broadcast a false and defamatory version of the plaintiff's 911 call, which defendants created by intentionally and maliciously removing intervening dialogue between the plaintiff and the dispatcher, to create the false impression that

plaintiff stalked Martin because Martin "looks black." The edits made it appear that the plaintiff had **volunteered** Martin's **race** as the reason he had said Martin was "a real suspicious guy," a guy who "looks like he is up to no good or he is on drugs or something." Their deletions were a blatantly false effort to cast the plaintiff as an aggressive racist who had stalked Martin because "he looks black," and Martin as the passive victim of the plaintiff's racial bias. Thus, the plaintiff has alleged that "[t]he intervening, intentionally deleted dialogue clearly described the context of" his statements, and by intentionally editing this audio, defendants made it appear as though Zimmerman had volunteered Martin's race as a reason to suspect his conduct, thereby implying that Zimmerman was a racist, and that this racism was the reason why Zimmerman suspected Martin and was a cause of the tragedy that ensued" (Complaint, ¶49).

These averments are ample to allege "a material difference between" the edited recording and the truth. Masson, 501 U.S. p. 522. It is for the **jury** to decide the materiality of these differences. As the Supreme Court explained in Air Wisconsin, 134 S. Ct. pp. 867-68:

> We have held that under the *First Amendment*, a court's role is to determine whether "[a] reasonable jury could find a material difference between" the defendant's statement and the truth. *Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 522, 111 S. Ct. 2419, 115 L. Ed. 2d 447 (1991).* That makes sense, since **materiality is the sort of "mixed question of law and fact" that "has typically been resolved by juries.**" *United States v. Gaudin, 515 U.S. 506, 512, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995).* **The jury has a vital role to play in the materiality inquiry**, which entails "delicate assessments of the inferences a 'reasonable decisionmaker' would draw from a given set of facts and the significant of those inferences to him" and is therefore "peculiarly one for the **trier of fact**.'" *Ibid.* (quoting *TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 450, 96 S. Ct. 2126, 48 L. Ed. 2d 757 (1976);* brackets omitted). **Such a question cannot be withdrawn from the jury** unless "the facts and the law will reasonably support only one conclusion" on which "reasonable persons … could [not] differ." *McDermott Int'l., Inc. v. Wilander, 498 U.S. 337, 356, 111 S. Ct. 807, 112 L. Ed. 2d 866 (1991).*

(Emphases supplied.)

In a lame attempt to excuse their conduct, defendants note that they said they were playing "excerpts" from the 911 call. Even the defendants, however, do not attempt to argue that a reasonable listener would have understood from that single word that plaintiff had merely replied "he looks black," in answer to a direct question from the dispatcher, or that the plaintiff had been concerned about break-ins in his neighborhood and a stranger who was walking around in the rain, with no apparent destination. In short, they do not and cannot argue that a reasonable listener would have understood **where** the defendants had made deletions and **what** they deleted. The word "excerpts" did not restore the **context** defendants excised.

They also attempt to excuse their outrageously false broadcast by falsely asserting that "during another portion of the Call, Zimmerman volunteered that the person he was following was "a black male," and did so without prompting from the dispatcher. That is a complete distortion of what occurred. When the dispatcher had asked the plaintiff "and this guy, is he white, black or Hispanic?", Martin had been too far away for the plaintiff to be certain, so he gave a qualified response: "He looks black." By the same token, when the dispatcher asked about what Martin was wearing, the plaintiff gave a general description of what he could see from a distance: "a dark hoodie like a gray hoodie and either jeans or sweat pants and white tennis shoes."

The plaintiff subsequently told the dispatcher that "he is coming towards me" and was able to definitively confirm his earlier response about Martin's race and add other details: "He's got his hand in his waistband. And he is a Black male. He has a button on his shirt." Thus, the plaintiff's statement about Martin's race was simply an effort to confirm his earlier equivocal response to the dispatcher's query.

Defendants also claim that they somehow cured their falsehoods by noting that "police at this point are **calling** it self-defense and say they have a lot more investigating to do." That was not alleged in the Complaint and therefore cannot be considered at this stage of the proceedings.

It is also meritless. This statement did not alter the false impression they created, through their misleading edits, that plaintiff had **volunteered** Martin's race as his explanation for his statements regarding his suspicions about Martin and that the plaintiff had stalked and shot Martin because "he looks black."

Far from suggesting that the plaintiff shot Martin in self-defense, the defendants deliberately **excised** plaintiff's statements about **Martin approaching him**: "Now, he is coming towards me," "yup, he is coming to check me out." They also **excised** plaintiff's statements about his inability to see what Martin had in his hands (whether Martin had a weapon) -- "He's got his hand in his waistband"; "He's got something in his hands" – and his **plea for police assistance** ("Just get an officer over here"). In short, they deliberately edited the recording to make it appear that the claim of self-defense was completely unfounded and thereby materially altered the meaning of the plaintiff's statements.

This was accompanied by numerous statements repeating protesters' demands that state or federal authorities take over the investigation from the Sanford Police, because the latter had not arrested the plaintiff. Defendants stated, *inter alia*: "Protesters are demanding the arrest of a neighborhood watch captain who shot an unarmed South Florida teen last month;" "Protesters today are calling for state or federal authorities to take over the death investigation of 17-year-old Trayvon Martin;" "Remember [the Sanford Police] have not arrested George Zimmerman the shooter who lives right here;" "They are calling now for the Governor or the U.S. Attorney to

take over the investigation from Sanford Police because George Zimmerman has not been arrested."

There was **no** suggestion in the broadcast that Martin had ever approached the plaintiff and that the plaintiff had reason for concern. There was also **no** suggestion that Martin had been slamming the plaintiff's head into the sidewalk when the plaintiff shot him.

A jury will have every right to find that defendants effected a material change in the meaning of plaintiff's statements and the events as he recounted them. The implications of defendants' changes and their effect on the meaning of plaintiff's conversation with the dispatcher must be determined by the jury, as the finder of fact. Wisconsin Air; Masson.

2. The March 20, 2012 TODAY Show Broadcast

On March 20, 2012, defendants broadcast a similarly false and defamatory version of the plaintiff's 911 call, which defendants created by intentionally and maliciously removing intervening dialogue between the plaintiff and the dispatcher, to create the false impression that plaintiff stalked Martin because "he's a black male." Once again, defendants deliberately removed the plaintiff's stated reasons for concern and the dispatcher's direct question about Martin's race: "Okay, and this guy, is he white, black or Hispanic?" They also excised the plaintiff's qualified reply ("He looks black"), as well as plaintiff's statement that "now he is coming towards me," which explained the plaintiff's ability to confirm his earlier equivocal reply about Martin's race and state, with confidence, "he is a black male." They also excised his agreement not to continue following Martin: "Okay."

As a result of these false and misleading edits, the plaintiff's actual conversation with the dispatcher was again utterly transformed. Defendants' edits made it appear that the plaintiff had **volunteered** Martin's race as his **reason for being suspicious of Martin**: "And he's a black

male." To support this conclusion, defendants were careful not to leave pauses between sentences or otherwise show where they had made deletions, or even indicate that they had made any. The net effect of their edits was that the plaintiff was heard to say the following as consecutive statements, without pause:

> Ah, this guy looks like he is up to no good or he is or drugs or something. He's got his hand in his waistband. And he's a black male.

To reinforce their false implication that the plaintiff had no legitimate reason to be suspicious of Martin and was guilty of racial stalking, defendants also made further deletions. Having already excised the plaintiff's explanation that "we've had some break-ins in my neighborhood" and "[i]t's raining and he's just walking around looking about," they followed this up by deleting his statement that "he is just staring and looking at all the houses." The stated behaviors which had caused the plaintiff to be suspicious of Martin (none of which was racial) were gone.

Defendants also deleted all statements suggesting Martin was becoming aggressive. The plaintiff told the dispatcher: "Now he is just staring at me"; "now he is coming towards me"; "[y]up, he is coming to check me out." He begged: "Just get an officer over here." Defendants cut these statements out. They also removed the plaintiff's agreement not to continue following Martin.

Their deletions were deliberately done in a blatantly false effort to cast the plaintiff as an aggressive racist who had stalked Martin because "he is a black male," and Martin as the passive victim of the plaintiff's racial bias. Thus, the plaintiff has alleged that "[t]he intervening (and deleted) 46 seconds clearly described the context of these statements, and by intentionally auditing this dialogue from the audio, defendants made it appear as though Zimmerman had volunteered Martin's race as a reason to suspect his conduct, thereby implying that Zimmerman

was a racist and that this racism was the reason why Zimmerman suspected Martin and was a cause of the tragedy that ensued" (Complaint, ¶51).

3. The March 20, 2012 Nightly News Broadcast

a. Plaintiff Has Alleged an Actionable Defamation Claim

On March 20, 2012, defendants added a false and unfounded accusation that the plaintiff had used a racial epithet during the 911 call. *See* Complaint, ¶53. "In particular, the defendants falsely claimed that Zimmerman said "f_____ coons" during the February 26, 2012 call, knowing that claim would incite outrage throughout the Nation" (Complaint, ¶57). "The truth, as known to the defendants, was that Zimmerman said "f_____ punks" and there was no evidence, or reason to believe, that Zimmerman uttered a racial epithet during the call; indeed, as made clear from the full transcript, Zimmerman only ever mentioned Martin's race when prompted to describe Martin's race by the dispatcher" (Complaint, ¶58).

Defendants do not and cannot deny that this was sufficient to plead defamation. Instead, they present information **outside the four corners of the Complaint** and contend it definitively proves that what the plaintiff said (whether he said "coons" or "punks") cannot be demonstrated. This argument must fail for several reasons. To begin with, at this stage of the proceedings, the "trial court is limited to the four corners of the complaint and the allegations in the complaint must be taken as true without regard to the pleader's ability to prove them. Anson, 736 So.2d p. 1210. *Accord* Greene. A libel complaint which outlines or states the words used and alleges that they were false and made about the plaintiff with malice to damage him, resulting in injury, is sufficient to withstand a motion to dismiss. Diaz.

The plaintiff has alleged that "[t]he defendants knew that Zimmerman did not use a 'racial epithet' to describe Martin, yet they maliciously and conclusively stated that he did, for

the purpose of portraying Zimmerman as a hostile racist" (Complaint, ¶12); "this claim was made "without any legitimate basis – *and in spite of what the Sanford Police had concluded*" (Complaint, ¶53); and "[t]he truth, as known to defendants, was that Zimmerman said 'f_____ punks' and there was no evidence, or reason to believe, that Zimmerman uttered a racial epithet during the call" (Complaint, ¶58). Such a claim, that the defendant **manufactured** a quotation and attributed it to the plaintiff, so that he would appear to be guilty of a repellant and socially opprobrious statement, is actionable. Id.

b. The Plaintiff Is Entitled to Present Sworn Testimony and Other Evidence That He Did Not Utter a Racial Slur, and Evidence Defendants Broadcast Their False Accusation When They Could Not Tell from the Recording What He Said and Avoided Confirming the Probable Falsity of Their Accusation Confirms They Broadcast the Accusation With Actual Malice

As in Barnes v. Horan, 841 So.2d 472 (Fla. 3d DCA 2002), "the falsity of this statement can **be verified** by receiving **sworn testimony**." Such testimony can be provided by the plaintiff and others, including the **prosecution's investigators,** who attested in a sworn affidavit filed with the Court that the plaintiff did not state "f_____ coons" (using a racial slur as defendants claimed in their broadcasts), but instead said "these f_____ punks." The **dispatcher** and the prosecution's investigators did not testify otherwise, and the **audio-recording** is also available.

The alleged opinion of the FBI examiners that the "weak signal level and poor recording quality" did not allow **them** to determine what was said from listening to the **recording** does not require a contrary conclusion. That is so for several reasons. First, that opinion is outside the four corners of the Complaint and cannot be considered. Secondly, it also cannot be considered because it is hearsay. Lee v. Dept. of Health and Rehab. Servs., 698 So.2d 1194, 1201 (Fla. 1997) ("records that rely on information supplied by outside sources or that contain evaluations or statements by a public official are inadmissible under" public records exception to hearsay

rule; Florida does not recognize an exception to the hearsay rule for records setting forth findings resulting from an investigation made pursuant to authority granted by law). Thirdly, any alleged inability of the FBI examiners to hear the **recording** does not defeat the ability of the plaintiff to present testimony from the **participants** in the conversation, as well as from others who will testify that they **were** able to determine what was said.

Fourthly, evidence defendants could not determine **what** the plaintiff said and chose not to confirm the probable falsity of their accusation before they aired it strongly supports a finding they broadcast it with **actual malice**. The United States Supreme Court has expressly held that where there is reason to doubt the accuracy of a defamatory statement and the publisher chooses not to interview the logical witness who could refute it, this is proof they purposefully avoided the truth and published their falsehood with actual malice. Harte-Hanks, 491 U.S. pp. 668, 682 and 688.

It would be an abuse of discretion to require the plaintiff to present all the evidence in support of his claims now, before he has even had the opportunity to complete discovery -- a process he has not even had the opportunity to **begin**. Crowell, 845 So.2d p. 327. *Accord* Harvey Covington & Thomas; Lubarsky. The trial court should continue any hearing on the summary judgment motion until the plaintiff has had the opportunity to complete discovery and the material facts have been sufficiently developed for the court to be reasonably certain that no genuine issue of material fact exists. Crowell, 845 So.2d p. 327.

c. Defendants Could Not Have Adopted a "Rational Interpretation" of a Word They Could Not Hear, and It Is an Issue of Fact for the Jury Whether They Manufactured the Racial Epithet and Avoided Confirming the Falsity of Their Charge

Defendants' assertion that they adopted a "rational interpretation" of a word they could not hear on the recording is absurd. They did not tell their listeners that they were presenting

their "interpretation" of a word they could not hear; they stated as categorical fact that plaintiff had used a racial slur. Plaintiff and others will testify that he did not use any such epithet. These others include the **prosecution's investigators,** who attested in a sworn affidavit filed with the Court that the plaintiff did not state "f_____ coons" during the 911 call.

The FBI report, upon which defendants purport to rely, does not support their position that their false charge was a "rational interpretation" of the audio-recording of the call. The examiners stated that they could **not "identify** the word following 'fucking' … due to weak signal level and poor recording quality." *See* Def.s' Ex. "19." Thus, their report supports the plaintiff's contention that defendants **manufactured** their false charge and deliberately avoided confirming its probable falsity.

The United States Supreme Court has expressly held that a claim a defendant **manufactured** a false quotation is actionable:

> A **fabricated** quotation may injure reputation in at least two senses, either giving rise to a conceivable claim of defamation. First, the quotation might injure because it attributes an untrue factual assertion to the speaker….Secondly, regardless of the truth or falsity of the factual matters asserted within the quoted statement, the attribution may result in injury to reputation because the manner of expression or even **the fact that the statement was made indicates a negative personal trait or an attitude the speaker does not hold**.

Masson, 501 U.S. p. 511. (Emphases supplied.) In this case, the fabricated quotation "(f_____ coons") attributed to the plaintiff during the 911 call was used to indicate that he is a racist and guilty of racially profiling Martin. The word the plaintiff actually used ("punks") did **not** convey this same racist attitude and conduct. Indeed, it is **undisputed** that the change from "punks" to a racial slur ("coons") effected a **material change** in the **meaning** of the plaintiff's statement.

Because the manufactured quotation had a materially "different effect on the minds" of listeners, it is actionable.[8] Masson.

4. The March 22, 2012 TODAY Show Broadcast

After having laid the racist groundwork during the March 19 and 20, 2012 broadcasts, NBC and its employee Luciano broadcast via NBC's *Today Show* an edited audio, prefaced by the accusation that the plaintiff had "gunned down" Trayvon Martin "as he [Martin] walked through the gated community." That was a deliberate lie. They knew that Martin was not "walking" when he was shot, but on top of the plaintiff, smashing his head against the concrete sidewalk.

Once again, defendants deliberately removed the plaintiff's stated reasons for concern in general and about Martin in particular and excised the dispatcher's direct question about Martin's race, so that what had been a response to the dispatcher's question – "He looks black" – became the reason the plaintiff volunteered for thinking Martin "looks like he is up to no good." To underscore the notion of prejudice, defendants also edited the plaintiff's description of Martin's apparel and left only a single item intended to further suggest that the plaintiff relied on a stereotype for thinking Martin looked suspicious: "a dark hoodie." They also repeated the segment in which the plaintiff and the dispatcher discussed whether the plaintiff was following Martin and excised the plaintiff's agreement to stop doing that ("okay"), as well as plaintiff's

[8] Defendants' attachment of articles indicating that, after they broadcast the defamatory falsehood on their 6:30 p.m. Nightly News, others in the news media repeated it in subsequent broadcasts (*see* Def.'s Mot. p. 38 n.18) does not avail them. The articles are inadmissible hearsay, Terry Dollar, and only demonstrate the false storm defendants ignited; their claim that the broadcasts were prior to their own is incorrect and contrary to the times identified in their own affidavit. Moreover, even if their claim had been correct, it would not prevent a jury from finding that their broadcast was false and defamatory.

comments about Martin coming towards him. The conclusion is inescapable that they sought to create the false impression the plaintiff stalked and shot Martin because he "looks black."

4. The March 27, 2012 TODAY Show Broadcast

To maximize the damage of their scandalous and false broadcasts, the defendants broadcast another intentionally manipulated version of the February 26, 2012 audio between Zimmerman and the dispatcher. Once again, defendants deliberately removed the plaintiff's stated reasons for concern in general and about Martin in particular and the dispatcher's direct question about Martin's race, so that what had been a response to a direct question – "He looks black" – became the reason the plaintiff volunteered that Martin "looks like he is up to no good." As before, they played up the notion of prejudice by eliminating most of the plaintiff's description of Martin's apparel and leaving only the "dark hoodie," to further suggest that the plaintiff relied on a stereotype for thinking Martin looked suspicious. They also repeated the segment in which the plaintiff and the dispatcher discussed whether the plaintiff was following Martin but excised the plaintiff's agreement to stop doing that ("okay"). The net effect was as intended: they made it appear the plaintiff stalked and shot Martin because "he looks black," while Martin himself did nothing.

This deliberate alteration of the meaning of his statements is actionable, as defendants themselves concede. Masson. The plaintiff has alleged and will show precisely what the actual broadcasts reveal and how the defendants doctored them. It will be up to the jury to decide whether the defendants created and aired their lies with actual malice. Therefore, their motion must be denied.

VIII. IT IS UNDISPUTED THAT THE PLAINTIFF HAS PROPERLY ALLEGED DAMAGES, AND DEFENDANTS' SPECIOUS EFFORTS TO DISPROVE THE PLAINTIFF'S CLAIMS IS NOT COGNIZABLE, LET ALONE MERITORIOUS

A plaintiff in a defamation action may recover damages for harm to his reputation and the personal humiliation, mental anguish and suffering he has sustained. Jews for Jesus, 997 So.2d p. 1110. Florida "do[es] not require damage to reputation as a predicate to a defamation action"; rather, the jury may base its award on other elements, such as personal humiliation and mental anguish and suffering. Id. *Accord* Miami Herald Publishing Co. v. Ane, 458 So.2d 239 (Fla. 1984). To survive a motion to dismiss, a libel plaintiff is simply required to allege some actual damage. Id.; Greene.

Plaintiff George Zimmerman has done so, as defendants themselves concede. He has alleged that the defamatory broadcasts caused "severe emotional distress to Zimmerman and damage to his reputation," and even "threats to his life" (Complaint, ¶19). He has further alleged that he "has suffered greatly, with death threats, a bounty placed on his head, threats of capture, and a constant, genuine fear for his life resulting in his need to, among other things, live in hiding and wear a bullet proof vest" (Complaint, ¶23). The plaintiff has further alleged that the broadcasts "substantially contributed to a media frenzy … and public misunderstand which has caused severe damage to the plaintiff, including death threats and a bounty for his capture, all of which have forced Zimmerman to live in hiding, wear a bullet proof vest, and suffer other permanent and severe emotional injuries and damages as described in this Complaint" (Complaint, ¶72). He has further alleged that "[d]efendants' false and defamatory statements, innuendos and implications have severely injured Zimmerman in that they have permanently damaged Zimmerman's reputation; have exposed Zimmerman to public contempt, ridicule, hatred and threats to his life; have conveyed the impression that Zimmerman is a hostile 'racist' who shot Trayvon Martin because the young man was African American" (Complaint, ¶86). He has further alleged that the defendants' broadcasts "have subjected Zimmerman to severe and

permanent emotional distress, mental anguish, embarrassment and humiliation, and have interfered with Zimmerman's professional and personal lives" (Complaint, ¶87).

Rather than challenge the sufficiency of the Complaint, defendants argue (in effect) that the plaintiff will be unable to prove that their defamatory broadcasts were the **sole** cause of his injuries. That argument does not avail them, for several reasons. First, on a motion to dismiss, the court is not permitted to consider information outside the four corners of the Complaint, such as the numerous exhibits attached and relied on by defendants to support their contention that there were other contributing factors to the plaintiff's harm. Greene; Anson, 736 So.2d p. 1210. Where, as here, a libel complaint outlines or states the words used and alleges that they were false and made about the plaintiff with malice to damage him, resulting in injury, it is sufficient to withstand a motion to dismiss, and a court will not go beyond those allegations. Diaz.

Secondly, a defamation plaintiff is **not** barred from recovery merely because there may have been other concurring causes which contributed to his harm, and the jury will be so instructed. As set forth in Florida Standard Jury Instruction 405.6(b) (Concurring Cause):

> In order to be regarded as a legal cause of [loss] [injury[[or] [damage] a [statement] [publication] need not be the only cause. A [statement] [publication] may be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] if the [statement] [publication] contributes substantially to producing such [loss] [injury] [or] [damage].

A publisher is also liable for all reasonably foreseeable republications of the defamation by others. Granda-Centeno v. Lara, 489 So.2d 142, 143 n.3 (Fla. 3d DCA 1986).

Thirdly, defendants' argument erroneously **presumes** that the plaintiffs' injuries and damages came from other sources, or are not separable from what they term "a virtual firestorm of negative publicity directed at Zimmerman well before the first broadcast at issue here —

including allegations from several quarters that he killed Martin after profiling him because of the color of his skin and demands that he be charged with murder as a result." *See* Def.s' Mot., p. 50. They further assert that this alleged "firestorm" is "reveal[ed]" by what, with equal **presumption**, they term "[t]he undisputed evidence of record." Id.

Their use of that term "undisputed" is not self-activating, realized by their mere use of it — and here the use is fallacious. The plaintiff has alleged that their defamatory broadcasts caused the severe emotional distress, damage to reputation and death threats he suffered. That is the limit of the inquiry at this stage.

Furthermore, their descriptions and citations to that alleged "virtual firestorm of negative publicity" actually reveal those "quarters" from whence, according to **defendants**, it came and gaping **factual** flaws in their argument. That is, the sources thus identified are predominantly **Mr. Martin's family, counsel, and other supporters**; *i.e.*, **their** words, to journalists and broadcasters. *See* Def.s' Mot., pp. 50-51. That is hardly surprising, given the tragic circumstance in which they found themselves. But that is different in kind from the sources at issue here: the **journalists and broadcasters *themselves***, putatively ***dis*interested**, understood by the broader public to be **reporting *facts***, and the **Plaintiff himself**, through ***his own*** (**doctored**) **words**.

It is an unfortunate fact of life in our society that there are frequently incidents when young men are shot and that when the one shot is of a different racial or ethnic group from the alleged shooter, this very fact may engender accusations and outcries from his family, friends and supporters that the incident was racially or ethnically motivated. It is also understood that such accusations sometimes have credence, and sometimes do not.

But that is **not** the case when the very media to which the public looks for the **dispassionate** reporting of **fact** inflames misguided passions by reporting malicious falsehoods

as claimed facts. The public is far more likely to assume the accusations must be true, when they are broadcast by the media. That is particularly so when the falsehood is presented by that media in the **most damaging** way: as coming out of the **accused's *own* mouth** as ***self*-condemnation**. Masson, 501 U.S. p. 512 ("[a] self-condemnatory quotation may carry more force than criticism by another. It is against self-interest to admit one's own criminal liability, arrogance, or lack of integrity, and so **all the more easy to credit** when it happens"). (Emphases added).[9] Then the stain is indelible, the injury lasting and grievous. That is the case here.

This is all the more reason that the provenance of the injuries and damages averred by plaintiff, having been well-pleaded in the Complaint, is not properly subject to challenge on the Motion at bar. It is an issue of **fact**, to be further developed in discovery and, ultimately, resolved by a jury.

It is fundamental — as stated in a decision reviewing some of the very case-law cited by defendants at bar — that proximate cause is a **jury** question:

> Proximate causation is usually a question for the **jury** and trial courts are free to take proximate cause from the jury ***only*** where the facts are unequivocal, such as where the evidence supports no more than a single reasonable inference. McCain v. Florida Power Corp., 593 So. 2d 500, 504 (Fla. 1992). Generally, proximate cause means that the wrong of the defendant caused the damage claimed by plaintiff. Fellows v. Citizens Fed. Sav. & Loan Ass'n of St. Lucie County, 383 So. 2d 1140 (Fla. 4th DCA 1980). As such, for proximate cause to exist, there must be such a natural, direct and continuous sequence between the negligent act and the injury that it can reasonably be said that but for the act the injury would not have occurred. Jones v. Utica Mut. Ins. Co., 463 So. 2d 1153 (Fla. 1985). Furthermore, two separate acts can be the proximate cause of the same injury.[10] If

[9] It may be observed that defendants, in prefatory parts of their Motion, citing other extraneous matter, also refer to other media reports that they do ***not*** reference in this argument, respecting damages. Even defendants appear to concede that those reports either followed or were different in kind from these, in any event, and are irrelevant here.

[10] Proximate cause is **not**, of course, the same as sole cause. *See, e.g.*, Apgar & Markham Construction Company v. Golden, 190 So.2d 323, 325-26 (Fla. 1966); Jackson v. Florida Weathermakers, 55 So. 2d 575, 577-78 (Fla. 1951). *Also see* Stazenski v. Tennant Co., 617

> an injury is caused by the concurring negligence of two or more parties, each of them is liable to the injured party to the same extent as though the injury had been caused by each party's negligence alone. Jackson v. Florida Weathermakers, 55 So. 2d 575 (Fla. 1951).

McDonald v. Florida Department of Transportation, 655 So.2d 1164, 1168 (Fla. 4th DCA 1995). (Emphases added). Florida courts have repeatedly held that it is the jury's responsibility to determine issues of proximate and concurring cause in a libel action. *See, e.g.,* DeStefano v. Adventist Health System Sunbelt, 973 So.2d 492 (Fla. 5th DCA 2007) (jury properly permitted to determine damages which were result of being slandered by defendant and those caused by plaintiff's subsequent self-publication of defamatory statements).

Plaintiff is entitled to proceed and prove — and the jury, then, to determine — the damages caused by defendants. Their Motion, seeking to have this Court usurp the jury's function, should be denied.

IX. DEFENDANTS' MOTION TO DISMISS THE WELL-PLEADED CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS SHOULD BE DENIED

Defendants concede, as they must, that Florida recognizes the tort of intentional infliction of emotional distress. *See* Ford Motor Co. v. Sheehan, 373 So.2d 956 (Fla. 1st DCA 1979) (affirming a jury verdict for intentional infliction of emotional distress). A claim for intentional infliction of emotional distress was deemed cognizable in Williams v. City of Minneola, 575 So.2d 683 (Fla. 5th DCA 1991), cited by defendants, which reversed orders of summary judgment for defendants and ordered the claim to proceed to trial, where a videotape of the autopsy of plaintiffs' decedent was alleged played by police officers in a party atmosphere and,

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So.2d 344, 346-47 n. 3 (Fla. 1st DCA 1993) (noting "there may be more than one proximate cause of an injury"); Martin v. JLG Industries, Inc., 2007 U.S. Dist. LEXIS 58541, *10 (M.D. Fla. Aug. 10, 2007) (same).

in a separate incident, photographs of the autopsy were allegedly shown to a person who was cleaning the office of the Chief of Police. The Court held that such callousness could be considered outrageous. Williams, 575 So.2d p. 691. *See also* Mallock v. Southern Memorial Park, Inc., 561 So.2d 330 (Fla. 3d DCA 1990) (ejecting family who had come to cemetery on anniversary of their son's death was outrageous and supported claim for intentional infliction of emotional distress).

Thereafter, the Court held that allegations a publication involved serious threats to the plaintiff and her children were sufficient to support a cause of action for intentional infliction of emotional distress and reversed orders dismissing the plaintiff's complaints. Nims v. Harrison, 768 So.2d 1198 (Fla. 1st DCA 2000). The Court recognized that serious threats to personal safety are not only offensive, but intolerable in a civilized community, and thus outrageous. The same is true of other oppressive behavior. Lashley v. Bowman, 561 So.2d 406, 407-410 (Fla. 5th DCA 1990) (reversing summary judgment for defendant restaurant owner on plaintiff's IIED claim, based on owner's having her arrested when she refused to pay for meal she insisted was inedible, where there was "a disputed issue of fact" as to "whether the food served to [plaintiff] was inedible, as she contended" (id. at 408), "the facts could sustain a finding that the [defendant's] intent was to cause [plaintiff] emotional distress sufficient to induce [her] to pay money she did not owe," if it was inedible (id. at 409), and, "[i]f [plaintiff's] version is believed, a jury could find [defendant's] calculated use of emotional distress to extort money sufficiently outrageous to warrant recovery for the tort of intentional infliction of emotional distress" (id. at 410)).

The facts averred by Mr. Zimmerman are even more outrageous. He has alleged that defendants falsely created a broadcast which made it appear that he was guilty of racially

profiling Trayvon Martin and that this alleged conduct was the cause of Martin's death, **knowing** that this "was **certain** to cause not just severe emotional distress to Zimmerman and damage to his reputation, but also **threats to his life** and calls for his criminal prosecution" (Complaint, ¶19). He has further alleged that he in fact suffered "**death threats, a bounty placed on his head**, threats of capture, and a **constant, genuine fear for his life** resulting in his need, to, among other things, live in hiding and wear a bullet proof vest" (Complaint, ¶23). *See also* Complaint, ¶72. He has also alleged that "[d]efendants' actions even resulted in certain African American community members, apparently believing Zimmerman to be a hostile racist, tweeting Zimmerman's address, which resulted in more threats to Zimmerman" (Complaint, ¶73).

These allegations demonstrate that the conduct at issue went beyond the "mere insults," "indignities" and "verbal attacks" in the cases cited by defendants. Unlike in those cases, defendants deliberately published lies they knew were certain to "incite outrage throughout the nation" and provoke "death threats" and "a bounty placed on [the plaintiff's] head" and "a constant, genuine fear for his life" (Complaint, ¶¶19, 23 and 57). Such behavior is callous and intolerable in a civilized society. It is therefore sufficient to sustain a cause of action for intentional infliction of emotional distress. Nims; Williams.

Defendants also contend that Plaintiff's defamation claim precludes him from maintaining his IIED claim here, in any event. Specifically, they contend that dismissal of the latter claim is mandated because "the Florida Supreme Court has foreclosed such claims where, as here, plaintiff has attempted to 'transform a defamation action into a claim for intentional infliction of emotional distress simply by characterizing the alleged defamatory statements as 'outrageous.'' Fridovich v. Fridovich, 598 So.2d 65, 69-70 (Fla. 1992)." Def.s' Mot., p. 53. Yet, neither Fridovich, specifically, nor Florida law generally forecloses Plaintiff's IIED claim

here.

The actual decision in Fridovich warrants closer examination. The primary issue before the Court involved whether there was a privilege — and, if so, what form — applicable to alleged "defamatory statements voluntarily … made by private individuals to the police or state's attorney prior to the institution of criminal charges." Fridovich, supra, 598 So.2d at 69. (Footnote omitted). The Court held that such statements "are presumptively qualifiedly privileged." Id. To overcome the privilege, "a plaintiff would have to establish by a preponderance of the evidence that the defamatory statements were false and uttered with **common law express malice** — i.e., that the defendant's primary motive in making the statements was the **intent to injure** the reputation of the plaintiff." Id. (Emphases added). Having resolved that issue, the Court turned to "[t]he other issue in the case," which "involves [plaintiff's] suit for intentional infliction of emotional distress." Id. That issue was framed, and decided, as follows:

> [Defendant] argues that to allow a plaintiff who has **not** overcome **a defamation privilege** to proceed with a claim for intentional infliction of emotional distress would defeat **the purpose of the privilege**.
>
> It is clear that a plaintiff is not permitted to make an end-run around **a successfully invoked defamation privilege** by simply renaming the cause of action and repleading the same facts. Obviously, if the sole basis of a complaint for emotional distress is **a privileged defamatory statement**, then no separate cause of action exists. See Anderson v. Rossman & Baumberger, P.A., 440 So. 2d 591, 593 (Fla. 4th DCA 1983) (finding no cause of action for intentional infliction of emotional distress where the primary conduct relied on was defamatory statements **in court pleadings**), review denied, 450 So. 2d 485 (Fla. 1984). In short, *regardless of privilege*, a plaintiff cannot transform a defamation action into a claim for intentional infliction of emotional distress simply by characterizing the alleged defamatory statements as "outrageous." See Boyles v. Mid-Florida Television Corp., 431 So. 2d 627, 636 (Fla. 5th DCA 1983), approved on other grounds, 467 So. 2d 282 (Fla. 1985).
>
> We thus find that the **successful invocation of a defamation privilege** *will* preclude a cause of action for intentional infliction of emotional distress if the

> sole basis for the latter cause of action is the defamatory publication. However, that **privilege** will **not** prevent recovery upon separate causes of action which are properly pled upon the existence of independent facts.

Fridovich, supra, 598 So.2d at 69-70. (Italicized emphases in original; other emphases added).

Obviously, most of this has **no** pertinence whatsoever to defendants' argument, and is wholly inapposite to the situation here, which involves **no** "successful invocation of a defamation privilege," or ***any*** issue of privilege at all. In fact, the only part of Fridovich that is conceivably relevant to that argument is the single sentence, amidst the above-quoted passages, stating that, "[i]n short, *regardless of privilege*, a plaintiff cannot transform a defamation action into a claim for emotional distress **simply by characterizing the alleged defamatory statements as** '**outrageous**.'" Id. at 70. (Italicized emphases in original; other emphases added). It is, plaintiff must note, a rather curious statement — particularly as, though prefaced, "[i]n short," it seems quite incongruous to anything stated before or after. Furthermore, as it clearly is, by its own terms, entirely **unnecessary** to the actual holding of the Court, it is, by definition, *dicta*. *See* Black's Law Dictionary (9th ed. 2009) (defining "obiter dictum" as "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)"). However, as defendants note, other Courts have used the same or similar language;[11] Plaintiff will assume *arguendo* it states Florida law.

The question here, then, is whether plaintiff's separately pleaded IIED claim is devoid of such indicia of separateness, in fact, that it is "**simply** … characteriz[ing] the alleged defamatory

[11] See, Boyles, supra, 431 So.2d at 636 (IIED Count merely "described the tort of libel while characterizing it as 'outrageous conduct,'" and, "[a]s such, it is ***merely*** **an imperfect repetition** of [the defamation] Count"); Silvester v. American Broadcast Cos., 650 F. Supp. 766, 780 (S.D. Fla. 1986) (IIED claim "***merely*** **reincorporate[d]** the allegations in the libel counts," and therefore "did not set forth [an] independent tort[]."). (Emphases added).

statement as 'outrageous'" (Fridovich, supra, 598 So.2d at 70), **merely** "describ[ing] the tort of libel while characterizing it as 'outrageous conduct,' and, "[a]s such, … **merely** an imperfect repetition of [the defamation] Count" (Boyles, supra, 431 So.2d at 636), "**merely** reincorporat[ing] the allegations in the libel counts" (Silvester, supra, 650 F. Supp. at 780). (Emphases added). It is not.

A signal difference between plaintiff's claims and those in Fridovich is intimated by Fridovich itself. As already noted, the plaintiff there, in order to prove his **defamation** claim, in light of the privilege, had to establish "**common law express malice** — i.e., that the defendant's primary motive in making the statements was the **intent to injure** the reputation of the plaintiff" (Fridovich, supra, 598 So.2d at 69 (emphases added)); *i.e.,* essentially the **same** thing that would have to be proven on an **IIED** claim. Here, in contrast, where there is **no** issue of privilege, the most Plaintiff could be held to have to prove to make out his claim for **defamation**, per defendants' own argument that he is a public figure, would be ***actual***, **not** ***common law***, malice (*see, e.g.,* Def.s' Mot., pp. 24, 33-34). His **IIED** claim, on the other hand, calls for proof of ***common law*** **malice** — it directly avers this. *See, e.g.,* Complaint, ¶ 94 ("[a]t all relevant times, the Defendants' conduct has been intentional, willful, and reasonably calculated to create extreme emotional distress and fear in the Plaintiff …). In fact, the dominant focus of his IIED claim is on the personal persecution of plaintiff and defendants' **intent to subject him to death threats and other serious harm** (*see* Count II, at ¶¶ 90-94). The claims, thus, are distinct as pleaded and in fact.

Accordingly, Defendants' Motion, on this ground too, should be denied.

CONCLUSION

WHEREFORE, it is respectfully requested that defendants' motion to dismiss the Complaint or for summary judgment be DENIED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was on this date served via Florida Court ECF and Overnight Delivery to:

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