Case No. 3D19-1555

IN THE FLORIDA THIRD DISTRICT COURT OF APPEAL

ALVARO H. SKUPIN, M.D.,
Appellant/Plaintiff,

v.

HEMISPHERE MEDIA GROUP, INC. et al.,
Appellees/Defendants.

On Appeal from the Eleventh Judicial Circuit in
and for Miami-Dade County, Florida
Lower Court Case No: 18-030227 CA (31)

ANSWER BRIEF FOR HEMISPHERE MEDIA GROUP, INC. AND HEMISPHERE MEDIA HOLDINGS, LLC

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"The fact that plaintiffs may not like the way [an] article was written or what it says about them does not automatically provide the basis for a libel suit." *Kurtell & Co. v. Miami Tribune, Inc.*, 193 So. 2d 471, 471 (Fla. 3d DCA 1967) (per curiam). This appeal embodies that principle.

Appellant, Dr. Alvaro H. Skupin, sued Appellees for publishing an in-depth investigation into stem-cell therapy in the Dominican Republic. But the lawsuit was not based on any factual error that Appellees published. Indeed, Dr. Skupin did not, and cannot, contest the actual damaging facts revealed by the investigation—that his clinic's employees told potential patients that stem-cell therapy can cure diabetes and Parkinson's, that a former government official believed Dr. Skupin did not deserve a medical license in the Dominican Republic, and that Dr. Skupin's acolytes believed stem-cell therapy can enlarge breasts without implants. Instead, twisting defamation beyond recognition, Dr. Skupin marshaled the novel legal theory that truthful factual statements can nevertheless be libelous when those truthful facts paint a plaintiff harshly. This theory has no support in the law and such a theory is inconsistent with Florida law and the First Amendment as it would make publishing the truth actionable.

To begin with, Florida law and the First Amendment protect opinion. Where, as here, a speaker discloses facts and draws conclusions from those facts,

those conclusions are not actionable, however derogatory they may be. As detailed in the background section of this brief, the investigation—which was featured in at least four separate television episodes—disclosed the facts on which it rested its ultimate conclusions. And Dr. Skupin did not and could not allege any of those *facts* as false.

In any event, Dr. Skupin's novel spin on defamation by implication—the theory of defamation on which Dr. Skupin appeared chiefly to base his lawsuit—is unsupported by law. No case ever has held that accurate facts are actionable merely because a listener may, based on those facts, draw an unsavory conclusion about a plaintiff. To the contrary, defamation by implication applies only where a series of facts are juxtaposed intentionally to create a false and defamatory connection between them. But the Complaint failed to allege what series of facts were juxtaposed or what defamatory connection that juxtaposition created. Instead, it pretended that the entire report of truthful, not-complained-of facts somehow allowed listeners to draw their own conclusions of Dr. Skupin's immorality, which somehow rendered Appellees liable. Reporting facts to allow the listener to decide is the essence of reporting. To hold otherwise would be constitutionally infirm.

The remainder of the Complaint was equally deficient. It sought to state a cause of action for libel by implication without meeting the necessary conditions precedent. It attempted to hide a frivolous defamation claim as a tortious-

interference claim in contravention of the single-action rule. And it hoped to state a cause of action for tortious interference without even alleging the elements or any underlying facts to support that claim and improperly asserted interference with the public at large.

For these reasons, this Court should affirm the circuit court's order, which correctly dismissed the Complaint for failure to state a cause of action.

STATEMENT OF THE CASE AND OF THE FACTS

On September 5, 2018, Appellant, Dr. Alvaro H. Skupin, filed his Complaint and Demand for Jury Trial against Appellees Nuria Piera; Producciones Video S.R.L.; Manuel de Jesus Estrella Cruz; Cadena de Noticias—Television (CDN-TV), S.A.; Multimedios del Caribe, S.A.; Corporacion Dominicana de Radio y Television, S.R.L.; Hemisphere Media Group, Inc.; and Hemisphere Media Holdings, LLC. [R. at 10] In his Complaint, Dr. Skupin raised six claims against Defendants. Five were based on defamation: defamation (Count I), libel by implication (Count II), libel per se for damage to personal and professional reputation (Count III), libel per se for criminal conduct (Count IV), and libel for reckless disregard or malice (Count V). The final claim was for tortious interference with advantageous business relationships (Count VI). [R. at 61–62, 65, 67, 69, 71–72]

These counts arose from a four-part investigation into stem-cell treatments. That investigation mentioned Dr. Skupin, who, by his own allegations, is a licensed doctor who is recognized "as one of the world's best physicians in the area of Adult Stem Cell Therapies" and "Regenerative Medicine." [R. at 12 ¶ 2]

I. THE ALLEGATIONS AROSE FROM THE AIRING OF FOUR REPORTS.

The Complaint alleged the following. Appellee Nuria Piera, through her Spanish-language television shows "Nuria: Investigacion Periodistica" and "Casos Recientes," broadcast four reports (the "Reports") in 2017, which, Dr. Skupin alleged, Appellees published or republished. [R. at 19 ¶ 30] The Complaint cited links from which a reader could play the Reports, and it attached transcripts of the Reports along with certified translations. [R. at 26 ¶ 58, at 30 ¶ 67, at 44 ¶ 88, at 51 ¶ 96]

A. The First Report Requests Regulations Concerning Stem Cells.

The first relevant report is titled "The Dominican Republic: A Paradise for the Business of Stem Cells, Which Proliferates Without Regulation" (the "First Report") and originally aired on August 5, 2017. [R. at 26 ¶ 58]

1. The need for regulations

In the First Report, Ms. Piera urges the Dominican Republic to regulate stem-cell therapy, which was unregulated at the time. [R. at 77]

To explain the need for regulations, the First Report dives into the science behind stem cells. It notes that "very few of these therapies have been approved," and one doctor on camera details an article published by the International Society for Stem Cell Research. [R. at 78] As the doctor describes the article, it "states that so far, stem cell treatment is effective and safe only for some hematological diseases, specifically oncological hematology, including leukemia and some cancers." [R. at 78] No scientific consensus exists for stem-cell therapy's efficacy as to diabetes, autism, Alzheimer's, and other diseases, the First Report explains, but some doctors in the Dominican Republic claim the opposite. [R. at 78–79]

To illustrate, the First Report shows an interview with Dr. Ynti Eusebio Alburquerque, a doctor who took a stem-cell course in a clinic directed by Dr. Skupin. [R. at 80] As a doctor providing stem-cell treatment, Dr. Eusebio touts his membership in the Latin American Society of Stem Cells (called by its Spanish-language acronym SOLCEMA throughout the Reports), an organization of stem-cell doctors created by Dr. Skupin. [R. at 77, 80] Dr. Eusebio also believes that stem cells can cure anything. On camera, Dr. Eusebio asserts that stem-cell therapy can cure diabetes, sports injuries, and degenerative osteoarthritis. [R. at 79] He asserts that, thanks to stem cells, he can enlarge a patient's "breasts and buttocks without the need to put any implants." [R. at 79]

After it shows the interview of Dr. Eusebio, the First Report shows the opinion of a doctor by the name of Fernando Morales. Dr. Morales opines on Dr. Eusebio, Dr. Eusebio's claim to have taken a course at Dr. Skupin's clinic, and his claim to be part of SOLCEMA: "Such a society is not subject to any regulation or acceptance by the legal apparatus of the State. They are merely associations that are formed by a group of people who do the same thing, who lie and engage in deceptive advertising." [R. at 80]

Given these disclosed facts, Ms. Piera draws the conclusion that the Dominican Republic is "bombarded with promotions of stem cell treatments as if they were a panacea to cure all the illnesses that have been and will be" and "has become a haven for doctors who perform stem cell treatments indiscriminately, and for a variety of businesses that have grown with this practice, despite lack of regulation." [R. at 77]

2. The Complaint's allegations

The Complaint never alleged that any of the following was false: (1) the Dominican Republic (at the time) did not regulate stem-cell treatment, (2) Dr. Skupin created SOLCEMA, (3) stem-cell treatment was safe only for hematological diseases, (4) Dr. Eusebio was a member of SOLCEMA, (5) SOLCEMA had no official recognition for medical training in the Dominican Republic, (6) Dr. Eusebio took a course in a clinic managed by Dr. Skupin, and (7)

Dr. Eusebio asserted that he could cure a host of diseases and even enlarge a patient's breasts and buttocks with stem-cell treatment.

Instead, the Complaint alleged that Dr. Skupin never "bombarded" the Dominican Republic with claims about stem cells. [R. at 29 ¶ 61] Even though he alleged that he is world-renowned for stem-cell therapy, Dr. Skupin alleged that he is not a "principal promoter[]" of stem-cell therapy or a "pioneer" in stem-cell therapy; thus, Dr. Skupin alleged that the use of the phrases or words "bombarded," "pioneer," and "principal promoter[]" was defamatory. [R. at 12 ¶ 2, at 29–30 ¶¶ 63–64] Finally, the Complaint alleged that Dr. Morales's opinion that groups like SOLCEMA are full of doctors like Dr. Eusebio who lie or engage in deceptive advertising was defamatory because Dr. Skupin never engaged in deceptive advertising. [R. at 30 ¶ 65]

3. Bank centers that store stem cells

In the First Report's next segment, Ms. Piera turns to a different concern—doctors and bank centers that store stem cells. [R. at 81] Discussing these stem-cell banks, one doctor comments, "Unfortunately a group of doctors with very low ethical values in regard to healthcare practices have dedicated themselves to this task, to deceive vulnerable people into undergoing treatments that will not benefit them at all." [R. at 83] At no point in this segment does anyone mention Dr.

Skupin, SOLCEMA, or Dr. Eusebio. Nonetheless, the Complaint alleged that the above-quoted statement about a "group of doctors" was defamatory. [R. at 30 ¶ 66]

B. The Second Report Explores Dr. Skupin's Practice.

The second relevant report is titled "New Revelations in the Case of Stem Cells" (the "Second Report"). [R. at 98]

1. A recap of the regulations

Ms. Piera begins the Second Report by noting that, after the First Report, the Ministry of Public Health promised to pass regulations on stem-cell treatments. [R. at 98] Without so much as mentioning Dr. Skupin or Dr. Eusebio, Ms. Piera states that there are "foreign doctors and Dominican doctors" who "have come to this country offering the panacea to cure any kind of disease and that is not true; although it may be true in the future." [R. at 98] Ms. Piera opines that Dominicans "cannot let them use us as guinea pigs and experiment with the Dominican people." [R. at 98] To support her concern for stem-cell tourism, Ms. Piera cites a study from the International Society for Stem Cell Research, which warns that "stem cell tourism and exaggerated offers [of stem cell's benefits] allow desperate patients to fall prey to doctors who are only looking for a quick profit." [R. at 99]

2. Dr. Skupin and anti-aging

From here, the Second Report turns its attention to Dr. Skupin, who Ms. Piera states has been practicing anti-aging medicine for 25 years and who "has

trained doctors in stem cell therapies for the past five years." [R. at 99] Here, the Second Report plays video clips in which Dr. Skupin and his family attest to the magic of stem-cell therapy.

In the Complaint, Dr. Skupin alleged that calling his Miami clinic "3Med Health Institute" was defamatory. [R. at 38 ¶ 71] But in the first clip, a host introduces Dr. Skupin as the "medical director of 3Med Health Institute in Miami," and Dr. Skupin thanks the host, does not correct the name of his Miami business, and describes himself as a proponent of alternative medicine including anti-aging and stem-cell therapy. [R. at 100]

The next clip is a promotional video from Dr. Skupin's clinic. There, a man named Max Lozano attests that Dr. Skupin's stem-cell therapy cured his irritable bowel problem, ended his anxiety, stopped his palms from sweating, made him sleep better, relaxed him, and allowed him to stop taking "medication completely" to boot. [R. at 100–01] Ms. Piera then explains that Max Lozano is, in fact, Dr. Skupin's nephew—a fact undisclosed in Dr. Skupin's promotion. [R. at 101] She thus concludes that Dr. Skupin "uses his own nephew to put in a good word for him." [R. at 101]

In the following clip, Dr. Skupin appears on some other talk show, and he describes how, "theoretically," stem-cell therapy will keep a patient from aging if the therapy is applied every four or five years. [R. at 101] Ms. Piera describes Dr.

Skupin in that clip as selling "the benefits of stem cells, which he greatly inflated in a marked manner." [R. at 101]

And in the clip after that, Dr. Skupin and his wife appear on yet another television show. There, Dr. Skupin's wife credits stem-cell treatment for her lack of wrinkles. [R. at 101] Meanwhile, Ms. Piera speaks of a newspaper article that "reported on a plastic surgery performed on Dr. Skupin's wife, a cosmetic surgery of the eyes, face, breast lift and bilateral liposuction." [R. at 101] As Ms. Piera discusses this, the newspaper article on which Ms. Piera relies appears onscreen, as do photographs of Dr. Skupin's wife receiving cosmetic surgery. [R. at 101] Based on the article and photographs, Ms. Piera asks, "So, were stem cells or surgery responsible for the lack of wrinkles?" [R. at 101] She also opines that Dr. Skupin "sells the idea of a magical youth with stem cell treatments by insisting on positive results obtained by his own wife." [R. at 101]

The Second Report continues as Ms. Piera reads and shows a Dominican Republic Public Health certification. That certification states that Dr. Skupin's clinic was approved in September of 2016 and was valid until September of 2020. [R. at 101–02] The Second Report notes that the certificate grants Dr. Skupin's clinic permission to provide "dermatological consultation, dermatological surgery, spa and cosmetology" services; the certificate does not, however, allow Dr. Skupin "to apply stem cells." [R. at 102] And yet, in a recording played on air, an

employee in Dr. Skupin's clinic offers a potential patient stem-cell therapy for diabetes, Parkinson's, and "almost all degenerative diseases." [R. at 102] Ms. Piera also reads a brochure from Dr. Skupin's clinic, which offered stem-cell treatment for strokes, pulmonary fibrosis, breast reconstruction, and buttock enlargement. [R. at 102] In the recording, Dr. Skupin's employee acknowledges that Dr. Skupin himself can perform the stem-cell treatment. [R. at 103] Finally, an attorney explains on camera that providing services outside the scope of the certification is contrary to law. [R. at 130]

From these facts, Ms. Piera concludes that "Dr. Skupin violates the license he was given by performing activities not included in his license." [R. at 103]

3. The Complaint's allegations

The Complaint failed to allege that any of these facts—the statements contained in Dr. Skupin's brochure, the photographs of his wife's receiving cosmetic surgery, or the relationship between Mr. Lozano and Dr. Skupin—was false. Nor did the Complaint allege that Ms. Piera misread the 2016 certification. It never alleged as false Dr. Skupin's employee's statement that Dr. Skupin personally performed stem-cell treatment or the attorney's statement that acting outside the scope of the certification may be illegal. Instead, the Complaint alleged that there were other certificates from 2012, 2013, 2014, and 2015 that the program did not mention. [R. at 40–41 ¶¶ 77–78]

4. License to practice

The Second Report continues with the investigation: "Another point on which we question Dr. Skupin," Ms. Piera states, "is whether, given that he is a foreign doctor, does he have the required medical license to practice in the country"? [R. at 103] Ms. Piera goes on to explain why she questions Dr. Skupin's license.

First, an attorney notes on camera that any doctor who is not licensed but nonetheless practices "could face up to two years in prison under the General Health Law" of the Dominican Republic. [R. at 103] Even though the attorney is speaking of doctors generally (and not of Dr. Skupin specifically) the Complaint alleged that the attorney's statement is defamatory by implication. [R. at 41 ¶ 80] Second, Ms. Piera cites the laws of the Dominican Republic, which she reads as requiring the completion of an internship; she notes that Dr. Skupin did not complete any internship. [R. at 103] Dr. Skupin never alleged that he completed an internship. Instead, according to the Complaint, Ms. Piera's noting that Dr. Skupin did not complete an internship is defamatory because it implies that Dr. Skupin engaged in fraud and deception. [R. at 41–42 ¶ 81]

5. Patients' statements

The Second Report also provides statements from several of Dr. Skupin's former patients. Ms. Lourdes Bisono, whose daughter consulted with Dr. Skupin in

his Miami clinic in an attempt to cure lupus, is one example. [R. at 103] According to Ms. Bisono, Dr. Skupin recommended stem-cell treatment for her daughter, charged $8700 for a single session, and, if anything, worsened her child's condition. [R. at 103–04] Finally, the Second Report informs viewers that other patients—this time from the Dominican Republic—have stated that they have paid over $8000 for stem-cell treatment from Dr. Skupin without "positive results." [R. at 104] Those patients, however, did not want to speak on camera. [R. at 104]

In his Complaint, Dr. Skupin did not allege any falsehoods in the statements made by Ms. Bisono or his former patients. Dr. Skupin alleged, rather, that these statements defamed him by implication because they implied that he "is engaged in fraud, deception, has engaged [*sic*] in unethical medical practices and/or has committed a crime and does not have a valid medical license to practice medicine in the U.S." or implied that he "may have threatened his patients." [R. at 42 ¶¶ 82–83]

6. The last 12 minutes of the report

The Second Report continues for another 12 minutes. There, it cites news articles from the *New York Times* highlighting the downsides of unregulated stem-cell therapy. [R. at 104] Ms. Piera explains that SOLCEMA's officers are all related to Dr. Skupin, including his wife (president) and his daughter (secretary). [R. at 105] Also, the Second Report offers an interview of yet another SOLCEMA

member, who, like Dr. Eusebio before him, proudly claims that stem-cell treatment "cures virtually every disease" and that his practice is perfectly legal because no law explicitly outlaws it. [R. at 105] Dr. Skupin did not allege that any of these statements was false and defamatory.

C. The Third Report Distinguishes Stem Cells and Plasma.

The third report is titled "Do You Know If You Receive Stem Cell Treatment" (the "Third Report"). [R. at 125] In this report, Ms. Piera distinguishes between treatment with stem cells and treatment with platelet-rich plasma. [R. at 125]

1. Plasma versus stem cells

The Third Report explains that most "stem cell treatments" are, in reality, treatment with platelet-rich plasma. A doctor appears on the show to explain the differences between plasma and stem cells. [R. at 126–27] Extraction of platelet-rich plasma, this doctor explains, is a simple process, while stem-cell therapy, by contrast, is a difficult and complex procedure requiring a specific and costly machine. [R. at 127] Indeed, only one hospital in the entire Dominican Republic can properly extract stem cells. [R. at 128] And a legitimate stem-cell procedure requires at least six hours simply to extract enough stem cells. [R. at 130]

Ms. Piera states that several of Dr. Skupin's patients agreed that the entire procedure completed by Dr. Skupin took about four hours, which contradicts the

doctor's explanation that simply extracting stem cells—a minor part of legitimate stem-cell treatment—takes six hours, minimum. [R. at 131] An employee of Dr. Skupin's clinic "in the Dominican Republic who preferred to withhold her identity to avoid retaliation … reports that the doctors at the institution maintain false expectations of healing the patient." [R. at 131] The program plays the recording of the employee, who says that "[m]anagement" leaves patients "with the idea that there is going to be a miracle cure," when there is no miracle cure. [R. at 131] A patient from Dr. Skupin's clinic by the name of Juan Pablo Burgos then appears and states that the treatment offered at the clinic provided him no improvement. [R. at 131]

2. The Complaint's allegations

The Complaint did not contest any of these factual assertions on the program—not one, nor could it. For instance, the Complaint did not contest the differences between stem cells and plasma. It did not allege any factual inaccuracy in the doctor's description of how stem cells are extracted. It did not contest that only one machine can extract stem cells in the entire Dominican Republic. It did not claim that the statements provided by Dr. Skupin's former patients were false or fabricated. In fact, the Complaint did not even allege that no doctor from his clinic maintained false expectations for the patients. All Dr. Skupin alleged was

that he, personally, never provided false expectations to his patients, a statement that the Third Report never makes. [R. at 48 ¶¶ 91–92]

D. The Fourth Report Discusses the Interpretation of a Statute.

At the end of the Third Report, Ms. Piera asserts that she has concerns about the validity of Dr. Skupin's license since he acquired his medical license without completing an internship. At the start of the report titled "Did Next IBS Comment and Legal Interpretation Allow Dr. Skupin To Have an Exequatur in DR" (the "Fourth Report"), Ms. Piera reads and shows a letter written by the Ministry of Public Health explaining why, exactly, Dr. Skupin "is authorized to practice medicine without going through an internship." [R. at 146]

1. The differing interpretations of the statute

Ms. Piera reads the letter from the Ministry of Public Health on the air. That letter explains that, under the Ministry of Public Health's interpretation of relevant law, Dr. Skupin was not required to complete an internship to receive a license. [R. at 146] After reading this letter, Ms. Piera states that she disagrees with the Ministry of Public Health's interpretation of the relevant law. [R. at 146] And she explains her reasons for doing so. Mainly, she applies the plain language of the statute and concludes that by its plain language foreign doctors must undertake an internship to get a license. [R. at 147]

2. The Complaint's allegations

The Complaint alleged that Ms. Piera's own disagreement with the Ministry of Public Health's interpretation is defamatory because that disagreement implies that Dr. Skupin has undertaken nefarious and criminal conduct. The Complaint also alleged that Ms. Piera's disagreement is defamatory because, in explaining her interpretation, she used disagreeable words or phrases, like "supposedly," "irritating," "alarming," and "blessed exequatur." [R. at 55–58 ¶¶ 99–103] Strangely, the Complaint alleged that Ms. Piera's reading of the Ministry of Public Health's interpretation is itself defamatory, because—even though the words and interpretations themselves tend to exonerate Dr. Skupin of wrongdoing—Ms. Piera's reading somehow implies that Dr. Skupin "does not have a valid medical license." [R. at 48 ¶ 93]

3. Lawyers' interpretations

The Complaint, Dr. Skupin's brief, and all other filings by Dr. Skupin failed even to acknowledge the remaining seven minutes of the report, where Ms. Piera consults with lawyers and former government officials, all of whom agree with Ms. Piera's interpretation of the relevant Dominican law. In fact, a former director of the Public Health Authorization in the Dominican Republic speaks on air, stating that in a meeting "with Dr. Skupin, his lawyers and … lawyers from the Ministry of Public Health," he told Dr. Skupin that, without an internship, he could

not get a license. [R. at 149] That former director states that he had "requested" an "investigation into the irregular way in which Dr. Skupin's exequatur had been obtained." [R. at 149]

As with the other reports, Dr. Skupin did not challenge any of these underlying facts. Instead, he simply alleged that the Fourth Report implied that he illegally obtained his license. [R. at 59 ¶ 104]

II. PROCEDURAL BACKGROUND

On September 5, 2018, Appellant filed the Complaint, which includes as exhibits the pre-suit notices citing section 770.01 of the Florida Statutes, transcripts of the Reports, and translations of those transcripts.

Soon afterward, Appellees Hemisphere Media Group, Inc. and Hemisphere Media Holdings, LLC moved to dismiss. That motion argued principally that the Reports' allegedly false and defamatory statements constituted "pure opinion," which is not actionable under Florida law or the First Amendment to the United States Constitution; that Dr. Skupin did not properly plead any claims under defamation or defamation by implication; that the Complaint failed to meet conditions precedent; and that the Complaint's tortious-interference claim was faulty. [R. at 549–70] All Appellees joined these arguments. Dr. Skupin opposed but never sought leave to file an amended complaint, instead arguing that what he alleged sufficed. [R. at 795]

In June of 2019, Judge Spencer Eig of the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida held a hearing on this motion to dismiss and the motion to dismiss of Ms. Piera. [R. at 1054–1201] The hearing lasted over three hours; in that hearing Dr. Skupin presented video clips from the Reports. [R. at 1123–42, 1189–1201]

On July 9, 2019, the circuit court entered its Order Granting Hemisphere Media Group, Inc.'s Motion To Dismiss Alvaro Skupin's Complaint (the "Order"). [R. at 1249–58] The circuit court noted correctly that, at the motion-to-dismiss stage, it had to "assum[e] the allegations in the [C]omplaint to be true and constru[e] all reasonable inferences therefrom in favor of" Dr. Skupin. [R. at 1252] It noted too that everyone agreed that the "transcript" incorporated by the Complaint "properly represents the contents of the four reports which were broadcasted." [R. at 1254] Likewise it noted (1) that the Complaint incorporated videos of the reports, which the circuit court saw, and (2) that whether statements constitute "opinion" is a question of law for a court. [R. at 1250, 1254]

After reviewing all the material, the circuit court held "that when viewed in its entirety with all reasonable inferences construed in the light most favorable to Dr. Skupin, the broadcasted series of four reports amounts to no more than an expression of opinion and commentary gleaned from intensive investigation and stated facts." [R. at 1254]

Dr. Skupin appealed.

SUMMARY OF THE ARGUMENT

This Court should affirm the circuit court's dismissal of the five counts based on defamation for two separate reasons.

First, as the circuit court correctly held, the supposedly false and defamatory statements alleged in the Complaint constitute "pure opinion" under Florida law and the First Amendment. Simply put, where a speaker provides truthful facts and then bases his or her statements on those facts, the allegedly defamatory statements constitute "pure opinion." Pure opinion, under Florida law and the First Amendment, is not actionable as libel. Here, the Reports are chock-full of such facts, including statements from former patients and video clips of interviews with Dr. Skupin and his acolytes. Because Dr. Skupin did not allege that these facts are false or defamatory, the law bars him from alleging the opinions based on those facts are actionable.

Second, this Court can also affirm because the Complaint utterly failed to allege any claim for libel. The Complaint and Dr. Skupin misapprehended defamation law. The Complaint assumed that any statement that irks Dr. Skupin constitutes libel. It likewise assumed that any true statement that may let a listener conclude something unsavory about Dr. Skupin constitutes defamation by implication. The law, however, is to the contrary.

As to the libel-by-implication claim, this Court should also affirm because Dr. Skupin failed to provide adequate notice as required by section 770.01 of the Florida Statutes, and it is too late do so now. A review of the notice shows that Dr. Skupin failed in any meaningful way to explain what factual statements were juxtaposed to create a defamatory connection, which is a requirement for defamation by implication.

This Court should also affirm the dismissal of the final count—tortious interference. The Complaint attempted to base its tortious-interference claim on statements made by Appellees that do not amount to defamation. The single-action rule explicitly bars Dr. Skupin's ploy—that is, his attempt to plead an otherwise defunct libel claim as some other tort. Regardless, dismissal of the tortious-interference claim is appropriate because the Complaint failed to plead the elements of tortious interference. To properly plead tortious interference, a plaintiff must allege interference with a business relationship under which that plaintiff has legal rights—something that the Complaint did not do.

ARGUMENT

The circuit court correctly and properly concluded that, even granting Appellant every reasonable inference, any supposedly false and defamatory statements made in the Reports constitute "opinions" protected by Florida law and the First Amendment to the United States Constitution. Anyway, independent

reasons exist for affirming the Order's dismissal of the libel claims. First, the Complaint failed to state claims for libel. Second, as to the libel-by-implication count, Dr. Skupin's pre-litigation notice failed to meet the standards required by Florida law. As to the tortious-interference claim, the single-action rule applies. In any event, the Complaint did not allege facts supporting a tortious-interference claim. This Court should affirm.

I. THIS COURT REVIEWS THE ORDER DE NOVO.

In defamation actions against the media, "pretrial dispositions are 'especially appropriate' because of the chilling effect these cases have on freedom of speech." *Stewart v. Sun Sentinel Co.*, 695 So. 2d 360, 363 (Fla. 4th DCA 1997). The "failure to dismiss a libel suit might necessitate long and expensive trial proceedings, which, if not really warranted, would themselves offend [First Amendment] principles … because of the chilling effect of such litigation." *Times, Inc. v. McLaney*, 406 F.2d 565, 566 (5th Cir. 1969). Finally, on appeal, "a trial court's order granting a motion to dismiss is reviewed *de novo*." *Nationstar Mortg., LLC v. Sunderman*, 201 So. 3d 139, 140 (Fla. 3d DCA 2015).

II. THE DEFAMATION-BASED CLAIMS WERE PROPERLY DISMISSED.

The Complaint fundamentally misunderstood defamation law, including concepts like opinion and defamation by implication.

A. As Pure Opinion, the Statements Are Not Actionable.

"A common law claim for defamation requires the unprivileged publication (to a third party) of a false and defamatory statement concerning another, with fault amounting to at least negligence on behalf of the publisher, with damage ensuing." *Don King Prods., Inc. v. Walt Disney Co.*, 40 So. 3d 40, 43 (Fla. 4th DCA 2010). Florida law also recognizes defamation by implication, which "applies in circumstances 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 Complaint alleged five counts of some form of libel, but none of those counts passed muster.

1. As a matter of law, pure opinion is not actionable.

Florida law and the First Amendment distinguish between three forms of statements: (1) a statement of fact (which may be actionable), (2) a statement of mixed opinion (which may likewise be actionable), and (3) a statement of pure opinion (which is *never* actionable). *See Scott v. Busch*, 907 So. 2d 662, 668 (Fla. 5th DCA 2005) ("'Pure opinions' are not actionable out of a deference for free speech and the First Amendment."); *Demby v. English*, 667 So. 2d 350, 355 (Fla. 1st DCA 1995) (per curiam) (pure opinion not actionable). Florida caselaw distinguishes between pure opinion and mixed opinion as follows:

> Pure opinion occurs when the defendant makes a comment or opinion based on facts which are set forth in the article or which are otherwise known or available to the reader or listener as a member of the public. Mixed expression of opinion occurs when an opinion or comment is made which is based upon facts regarding the plaintiff or his conduct that have not been stated in the article or assumed to exist by the parties to the communication.

Stembridge v. Mintz, 652 So. 2d 444, 446 (Fla. 3d DCA 1995) (quoting *From v. Tallahassee Democrat, Inc.*, 400 So. 2d 52, 57 (Fla. 1st DCA 1981)).

The distinction between mixed and pure opinion is not arbitrary. It arises because, to be actionable under the First Amendment or the common law, a statement must be "sufficiently factual to be susceptible of being proved true or false" based "on a core of objective evidence." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990). By definition, pure opinion is a judgment or conclusion made by a speaker based on his or her understanding of disclosed facts. And objective evidence cannot prove that judgment true or false. *See id.* at 20.

Because the ultimate interpretation of stated facts is not objectively provable or disprovable, "[c]ommentary or opinion based on facts that are set forth in the article or which are otherwise known or available to the reader or listener are not the stuff of libel." *Rasmussen v. Collier Cty. Publ'g Co.*, 946 So. 2d 567, 571 (Fla. 2d DCA 2006); *see also Demby*, 667 So. 2d at 355 ("[A]n expression of pure opinion … is not actionable defamation."). This is true "no matter how unjustified

and unreasonable the opinion may be or how derogatory it is." RESTATEMENT (SECOND) OF TORTS § 566 cmt. c.[1]

By contrast, a mixed opinion is one where no facts are disclosed when the opinion is made, therefore forcing the listener to conjure defamatory facts to support the speaker's opinion. *See Demby*, 667 So. 2d at 355. Because facts can be proven or disproven objectively, mixed opinion is actionable. *See id.*

Under this framework, simply stating that someone "illegally obtained building permits," without any factual support, is mixed opinion and therefore actionable. *Scott*, 907 So. 2d at 666. On the other hand, when an article notes that a plaintiff was given probation by a court, calling that plaintiff "a crook and a criminal" is pure opinion and not actionable. *See Hay v. Indep. Newspapers, Inc.*, 450 So. 2d 293, 294 (Fla. 2d DCA 1984). Similarly, a speaker is "not liable for defamation" if she notes that she has seen her neighbor just twice—both times with a drink at hand—and so calls her neighbor an "alcoholic." RESTATEMENT (SECOND) OF TORTS § 566 ill. 4.

Contrary to Dr. Skupin's protestations, "[w]hether statements are privileged expressions of pure opinion or unprivileged mixed expressions of opinion is a question of law properly resolved by the trial court." *Sepmeier v. Tallahassee*

[1] Florida courts "follow section 566 of the *Restatement* as a matter of state law." *Stembridge*, 652 So. 2d at 446 n.5.

Democrat, Inc., 461 So. 2d 193, 195 (Fla. 1st DCA 1984). In making this decision, a court "must construe the statement in its totality, examining not merely a particular phrase or sentence, but all of the words used in the publication." *Rasmussen*, 946 So. 2d at 571.

2. The relevant statements are pure opinion.

The circuit court reviewed the provided translation and provided videos. Afterward, it held "that when viewed in its entirety with all reasonable inferences construed in the light most favorable to Dr. Skupin, the broadcasted series of four reports amounts to no more than an expression of opinion and commentary gleaned from intensive investigation and stated facts." [R. at 1254] A simple analysis proves the circuit court correct.

Here every allegedly false and defamatory statement made by Appellees was based on facts disclosed in the Reports. The Reports are replete with facts that Dr. Skupin did not allege false. They embrace statements from SOLCEMA members that stem-cell treatment cures diabetes and lupus. They include interviews with former patients stating that Dr. Skupin promised to cure lupus and diabetes with stem-cell treatments. The Reports incorporate photographs of Dr. Skupin's wife receiving cosmetic surgery. They provide recordings of Dr. Skupin's employees hawking stem-cell therapy for diabetes and Parkinson's. And they include interviews with government officials contesting Dr. Skupin's license. The

Complaint did not allege that any of these facts was false. And, based on these facts, the Reports make conclusions about Dr. Skupin, SOLCEMA, and stem-cell treatment.

3. The relevant statements are therefore not actionable.

To be sure, Dr. Skupin is entitled to disagree with the conclusions drawn from those facts, but those conclusions constitute "pure opinion" and are thus not actionable, as the caselaw supports.

In two decisions involving materially similar television broadcasts to the Reports at issue here, two judges concluded that the plaintiffs-chiropractors' claims for defamation failed because the broadcasts consisted of non-actionable, protected opinion. *See Kirk v. CBS, Inc.*, No. 83-cv-2764, 1987 WL 11831 (N.D. Ill. June 4, 1987); *Spelson v. CBS, Inc.*, 581 F. Supp. 1195 (N.D. Ill. 1984). In those cases, a CBS affiliate broadcast a series of television reports called "Cashing In on Cancer," which "sought to uncover the questionable practice of various individuals"—including the plaintiffs-chiropractors—"who were engaged in 'cancer quackery.'" *Spelson*, 581 F. Supp. at 1197. The investigative reporter and others in the series made various comments criticizing what CBS viewed as questionable medical treatment practiced and promoted by the plaintiffs-chiropractors. *Id.* at 1198. Those statements included: "Cancer quackery is the cruelest form of medical fraud"; "the investigative team interviewed medical

experts and the victims of cancer con-artists and admitted to having been guinea pigs for some practitioners of fraud"; and the industry "is thriving on exploitation" by "untrained, unqualified and unscrupulous health practitioners [who] are exploiting desperate patients." *Id.* (internal quotation marks omitted).

In both cases, the courts concluded that these statements, and others like it, when viewed in their entirety, were non-actionable statements of opinion:

> Viewed in its entirety, the so-called "defamacast" … amounts to no more than an expression of opinion and commentary gleaned from intensive investigation and stated facts. The broadcasts clearly present the facts from which the opinions are derived and in so doing, allow for the possibility that an individual viewer could reach a different conclusion regarding the value of the practices which constitute the subject of the investigation ….

Id. at 1203; *see also Kirk*, 1987 WL 11831, at *4 ("Medical science … is a field in which many different theories and philosophies exist. Consequently, different and sometimes conflicting views will be expressed by different practitioners and organizations. The mere expression of an opinion contrary to the views of another is insufficient to serve as the basis for a cause of action for libel.").

Caselaw from Florida agrees. In *Morse v. Ripken*, Cal Ripken Jr.'s wife, Kelly, stated in an article published in *Ladies Home Journal* that the plaintiff was trying to sleep with her husband. 707 So. 2d 921, 921–22 (Fla. 4th DCA 1998). That statement, the court held, was pure opinion, because "[a]ll of the facts upon

which Kelly Ripken based her opinion were conveyed to the reader of the article: fans mob Cal wherever he goes; fans want to kiss him; and [the plaintiff], the lessor of a home to the Ripkens, had failed to vacate it before Cal's arrival." *Id.* at 923; *see also Stembridge*, 652 So. 2d at 447 ("When the Bar Inquiry form is read in its full context, it is clear that Stembridge has expressed a pure opinion, the basis for which is fully disclosed in the Bar Inquiry form."); *Della-Donna v. Yardley*, 512 So. 2d 294, 296 (Fla. 4th DCA 1987) ("[T]he statements in the letter are entitled to first amendment protection, taking into consideration the context of the letter, the fact that it was in response to prior publication on a matter of controversy, and the manner in which it was worded." (footnote omitted)).

And in *Turner v. Wells*, the U.S. Court of Appeals for the Eleventh Circuit affirmed dismissal of a complaint filed by a former coach for the Miami Dolphins, who alleged that a written report defamed him. 879 F.3d 1254, 1259–60 (11th Cir. 2018). Applying Florida law, the Eleventh Circuit noted that the report disclosed the facts upon which it relied to draw conclusions and so held that the statements were pure opinion. *Id.* at 1265. Critically, like Dr. Skupin, the former coach in *Turner* alleged that the report failed to include facts that would have sapped that report's ultimate conclusion. The Eleventh Circuit handedly rejected that argument: "The law of defamation is concerned with whether a publisher reports a story *truthfully*, not generously." *Id.* at 1270.

Kirk, *Spelson*, *Ripken*, and *Turner* apply here. When viewed in their entirety, the Reports amount to no more than expression of opinion and commentary, based on stated facts on stem-cell treatment, Dr. Skupin, regulation in the Dominican Republic, and SOLCEMA. And the "mere expression of an opinion contrary to the views of another is insufficient to serve as the basis for a cause of action for libel." *Kirk*, 1987 WL 11831, at *3. This is true no matter how "unjustified and unreasonable" or "derogatory" Dr. Skupin believes or alleges those opinions to be. RESTATEMENT (SECOND) OF TORTS § 566 cmt. c.

Finally, in his brief, Dr. Skupin distinguishes *Kirk* and *Spelson*, noting that they applied Illinois law. [Appellant's Br. at 47–48] This argument, however, ignores that *Kirk* and *Spelson* applied the common law principle of pure opinion reflected in section 566 of the *Restatement*, a section of the *Restatement* explicitly adopted as Florida law by this Court. *See Stembridge*, 652 So. 2d at 446 n.5. And it ignores *Turner* and *Ripken*—two opinions that Dr. Skupin never discusses, mentions, or even cites.

4. Dr. Skupin misreads the Order.

Incapable of arguing that the statements at issue are anything but pure opinion, Dr. Skupin raises every red herring. First, he argues repeatedly that the circuit court incorrectly applied the summary-judgment standard at the motion-to-dismiss stage. [Appellant's Br. at 6–7, 8, 12–14, 18] Second, he contests the

finding—which the circuit court neither made nor purported to make—that the fair-report privilege applies. [Appellant's Br. at 8, 22–24] And, third, he asserts that the circuit court ignored his claims for defamation by implication. [Appellant's Br. at 9, 24–42] These arguments outright misread the Order.

First, the circuit court applied the proper standard. At the motion-to-dismiss stage, a court is limited "to the four corners of the complaint, including any attached or incorporated exhibits." *Oceanside Plaza Condo. Ass'n v. Foam King Indus., Inc.*, 206 So. 3d 785, 787 (Fla. 3d DCA 2016). The court also must assume "the allegations in the complaint to be true and constru[e] all reasonable inferences therefrom in favor of the non-moving party." *Grove Isle Ass'n v. Grove Isle Assocs.*, 137 So. 3d 1081, 1089 (Fla. 3d DCA 2014) (per curiam). The circuit court exactly and explicitly used this standard. It noted that it had to accept allegations in the Complaint as true, that it had to construe all reasonable inferences in Dr. Skupin's favor, and that the Complaint incorporated the translation of the transcripts and the videos of the four reports.[2] [R. at 1250, 1252, 1254]

To seed doubt, Dr. Skupin asserts that the circuit court concluded that there was no "disagreement between [the] parties regarding the substance of genuine and material issues of fact regarding" the allegedly defamatory statements.

[2] Dr. Skupin acknowledges that the Complaint incorporated the transcripts, translations, and videos by reference. [Appellant's Br. at 14]

[Appellant's Br. at 14] But that is untrue. The circuit court merely noted—correctly—that the parties did not dispute the accuracy of the transcripts, that is, that the "transcript properly represents the content of the four reports which were broadcasted." [R. at 1254]

Dr. Skupin also steadfastly maintains that the circuit court ignored his allegations that the statements made were defamatory. [Appellant's Br. at 13] Essentially, Dr. Skupin argues that no court can conclude that a statement is pure opinion when a plaintiff alleges the legal conclusion that a statement is defamatory. Nonsense.

Initially, this argument begs the question and ignores that a court need not accept a pleading's legal conclusions. Contrary to Dr. Skupin's arguments, whether a statement, in context, is a pure opinion, mixed opinion, or fact is a question of law for the court to decide, not a question of pleading for the plaintiff to unilaterally declare. *See Sepmeier*, 461 So. 2d at 195. This argument, moreover, ignores that the Complaint incorporated the transcripts and their translations. Under Florida law, the transcripts' plain meaning—not Appellant's interpretation—bound the circuit court. *See Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So. 2d 490, 494 (Fla. 3d DCA 1994) ("Exhibits attached to the complaint are controlling, where the allegations of the complaint are contradicted by the exhibits, the plain meaning of the exhibits will control.").

Second, Dr. Skupin pretends that the circuit court made a determination on the fair-report privilege, which he asserts is an affirmative defense. [Appellant's Br. at 8, 22–24] But the Order never mentions the fair-report privilege. It merely concludes that the allegedly libelous statements were non-actionable pure opinion or consisted of protected opinion and commentary. [R. at 1253–55]

And, third, though Dr. Skupin asserts that the Order wholly forgot to analyze his defamation-by-implication allegations, that is false. [Appellant's Br. at 9, 24–42] The Order explicitly included Dr. Skupin's defamation-by-implication allegations when it analyzed defamation. [R. at 1253 ("Defamation by implication is a species of defamation ….")] The circuit court noted that defamation by implication "must conform to the First Amendment principles of general defamation law." [R. at 1253] And the circuit court's statement was absolutely correct, for "[a]ll of the protections of defamation law that are afforded to the media and private defendants are … extended to the tort of defamation by implication." *Jews for Jesus*, 997 So. 2d at 1108; *accord Turner*, 879 F.3d at 1269 ("[E]ven if the statements are defamatory by implication, a defendant is still protected from suit if his statements qualify as an opinion …."). And, based on that principle, the Order concluded that the allegedly defamatory statements—which were pure opinion—were non-actionable for defamation and defamation by implication. [R. at 1253] For his part, Dr. Skupin does not explain what part of this

analysis is incorrect. And because Dr. Skupin's initial brief does not contest the propriety of this legal conclusion, he cannot raise it in reply; Dr. Skupin, rather, forfeited the argument. *See D.H. v. Adept Cmty. Servs., Inc.*, 271 So. 3d 870, 880 (Fla. 2018) ("Claims of error not raised by an appellant in its initial brief are deemed abandoned.").[3]

B. Besides, the Complaint Did Not Properly Allege Defamation.

Even if the allegedly libelous statements did not constitute pure opinion, affirmance is required so long as "there is support for the alternative theory or principle of law in the record before the trial court." *Shands Teaching Hosp. & Clinics, Inc. v. Mercury Ins. Co.*, 97 So. 3d 204, 212 (Fla. 2012) (internal quotation marks omitted). As to the libel claims (Counts I through V), this Court should affirm because the Complaint did not properly plead libel.

The Complaint failed to allege causes of action for defamation, libel, or libel by implication. Going through the allegations one by one underscores serious misunderstandings about the law of defamation. The Complaint believed that anything a plaintiff takes personally constitutes defamation. It assumed that Dr. Skupin can act as the protector of stem-cell therapy. And it believed that the legal

[3] Likewise, on appeal, Dr. Skupin has not argued that the circuit court erred by failing to grant him leave to amend, a request he never made before the circuit court in any event.

phrase "defamation by implication" is to be interpreted literally as allowing a lawsuit when any truthful fact or statement implies something unsavory about a plaintiff. These assumptions and beliefs were erroneous, yet they underpin each and every allegation, rendering the entire Complaint unsupportable.

1. Defamation-based claims have specific elements.

The first issue with the Complaint is that it failed to grapple honestly with the elements for any claim based on defamation. Under Florida law, a cause of action for libel consists of five elements: "(1) publication; (2) falsity; (3) actor must act with knowledge or reckless disregard as to the falsity on a matter concerning a public official, or at least negligently on a matter concerning a private person; (4) actual damages; and (5) statement must be defamatory." *Jews for Jesus*, 997 So. 2d at 1106.

Alternatively, a claim for libel may be based on "defamation by implication" instead of on a false and defamatory statement. Contrary to Dr. Skupin's assumption, that legal doctrine is not to be read literally as allowing libel whenever a truthful factual statement implies something unseemly about a plaintiff. Defamation by implication occurs, rather, when a speaker (1) "juxtaposes a series of facts so as to imply a defamatory connection between them" or (2) "creates a defamatory implication by omitting facts, [such that] he may be held responsible

for the defamatory implication." *Id.* (alteration in original) (internal quotation marks omitted).

Dr. Skupin's Complaint ignored these principles. Instead of identifying specific allegedly false and defamatory statements, the Complaint alleged that a grab bag of statements implied something abstractly nefarious about Dr. Skupin. But Dr. Skupin never alleged that these statements are factually incorrect. Many of the statements do not concern Dr. Skupin. Some of these statements cannot even be considered defamatory, for they do not harm Dr. Skupin's reputation. And, finally, Dr. Skupin's entire underlying theory simply seeks to apply libel by implication where it does not apply.

2. Many of the allegations did not even concern Dr. Skupin.

The Complaint had a fundamental misconception: It believed that Dr. Skupin could sue for any defamatory statement made against stem-cell therapy or any of its practitioners. Throughout, the Complaint protested that Appellees published statements about SOLCEMA, doctors generally, a "group of doctors," "foreign and Dominican doctors," unscrupulous persons, professionals, and "doctors who are looking for a quick profit." [R. at 28 ¶ 60(a), (d)–(e), at 29 ¶ 61, at 30 ¶¶ 65–66, at 36 ¶ 69 (k), (o)–(r), at 41 ¶ 80, at 43–44 ¶¶ 84–87] Dr. Skupin, apparently, believes that he can sue for those statements—which were made about others, not him. Not so.

To be actionable, a communication must "of and concerning"—that is, "about"—the plaintiff. *Bass v. Rivera*, 826 So. 2d 534, 535 (Fla. 2d DCA 2002); *accord Hay*, 450 So. 2d at 294 ("To state a cause of action for libel, a private person must allege publication (1) of false and defamatory statements *of and concerning* that private person …." (emphasis added)). Yet none of the statements above are about Dr. Skupin.

Similarly, in another allegation, the Complaint protested statements made about a clinic Dr. Skupin owns—the 3Med clinic. [R. at 38 ¶ 71] These statements too do not concern Dr. Skupin. Under Florida law, statements about entities are not "of and concerning" their owners, officers, directors, or employees. *See McBride v. Crowell-Collier Publ'g Co.*, 196 F.2d 187, 189 (5th Cir. 1952) (applying Florida law); *accord Kirch v. Liberty Media Corp.*, 449 F.3d 388, 398 (2d Cir. 2006) ("A false disparaging statement about IBM ... would not … ordinarily be a defamatory statement 'of and concerning' all of IBM's suppliers, employees and dealers, however much they may be injured as a result."). Hence, statements about Dr. Skupin's business entity are not statements about Dr. Skupin himself, and Dr. Skupin cannot use these statements to properly plead claims for libel.

3. Many statements are not defamatory at all.

In another misstep, the Complaint assumed that any statement can be defamatory, so long as Dr. Skupin said so. Untrue.

"A communication is defamatory if it tends … to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Thomas v. Jacksonville Television, Inc.*, 699 So. 2d 800, 803 (Fla. 1st DCA 1997) (quoting RESTATEMENT (SECOND) OF TORTS § 559). A defamatory statement therefore must be of the kind that "exposes a person to distrust, hatred, contempt, ridicule or obloquy or which causes such person to be avoided, or which has a tendency to injure such person in his office, occupation, business or employment." *Id.* Innocuous or neutral statements, like "No one can stop us," do not constitute defamation. [R. at 55 ¶ 98(e)] Where a statement "could not possibly have a defamatory or harmful effect, the court is justified in … dismissing the complaint for failure to state a cause of action." *Byrd v. Hustler Magazine, Inc.*, 433 So. 2d 593, 595 (Fla. 4th DCA 1983); *see also McIver v. Tallahassee Democrat, Inc.*, 489 So. 2d 793, 794 (Fla. 1st DCA 1986) ("If the publication can bear only one meaning, the question of defamation is for the judge.").

The Complaint's allegations were filled with these sorts of neutral and innocuous statements. Somehow, for instance, the Complaint alleged that the following statements are defamatory:

- "And finally, this Friday afternoon, we received the dossier that we requested from Public Health on the approval process for the exequatur and Dr. Alvaro Skupin's exemption from internship ….

According to what they sent us, they determined … the revalidation was made by a university ….” [R. at 45 ¶ 90(c)]

- Using the words or phrases “supposedly,” “irritating,” “[n]o one can stop us,” and “blessed” to describe a fact or opinion. [R. at 28 ¶ 60(c), at 51 ¶ 98(a)–(e)]

- “He is one of the main promoters of [stem-cell therapy],” a “pioneer” in stem-cell treatment, and a “guru” in stem-cell treatment. [R. at 28 ¶ 60(b)–(c), at 32 ¶ 69(b)].

- “Dr. Skupin discusses the benefits of stem cells, which he greatly inflated in marked manner.” [R. at 33 ¶ 69(e)]

- Calling Dr. Skupin’s Miami clinic—Mother Stem Institute—“3Med Health Institute” by mistake. [R. at 38 ¶ 71]

Other supposedly defamatory statements fall within this category. [R at 35 ¶ 69(j), at 47 ¶ 90(d)] Yet none of those statements is remotely defamatory.

Calling Dr. Skupin a guru or pioneer or main promoter is not defamatory at all, when he himself acknowledges that he is “one of the world’s best physicians in the area of Adult Stem Cell Therapies.” [R. at 12 ¶ 2] Neither is calling Dr. Skupin’s Miami clinic “3Med.” Nor is reading, basically verbatim, a letter issued by a governmental agency defamatory. Indeed, Dr. Skupin cannot explain how any of these statements are defamatory. They are not.[4] And so dismissal is appropriate.

[4] A handful of the Complaint’s allegations sought to impose liability for Appellees’ failure to provide more facts. [R. at 34 ¶ 69(h)–(i)] But as the discussion above notes, defamation law does not require that a speaker disclose every relevant fact possible before opining. *See Turner*, 879 F.3d at 1270 (“The law of defamation is concerned with whether a publisher reports a story *truthfully*, not generously.”).

4. The Complaint butchered defamation by implication.

The Complaint made no serious attempt to allege that any statement made in the Reports was a false and defamatory statement of fact. Instead, the Complaint repeatedly propounded the theory that factually accurate statements constitute libel by implication because those statements, when juxtaposed with other statements (including innocuous statements not concerning Dr. Skupin), allegedly implied that Dr. Skupin was unethical. In its hodgepodge way, the Complaint alleged that the following true factual statements implied unsavory conduct by Dr. Skupin:

- "[T]here are several health centers that offer this specialty [stem-cell treatments] as part of the Latin American Society of Stem Cells created by Dr. Alvaro Skupin, a Colombian national who has been in the country for years performing stem cell treatments." [R. at 27 ¶ 60(a)]

- Dr. Skupin's "curriculum does not reflect studies in the area of stem cells, but it does state that he has been practicing anti-aging medicine for the past 25 years, and has trained doctors in stem cell therapies for the past five years." [R at 31 ¶ 69(a)]

- "Dr. Skupin has the 3Med clinic in this country, in one of the most luxurious and expensive shopping malls in the city …." [R. at 32 ¶ 69(c)]

- "He also sells the idea of a magical youth with stem cell treatments by insisting on positive results obtained by his own wife." [R. at 33 ¶ 69(f)]

- "In 2009, the newspapers at the time reported on a plastic surgery performed on Dr. Skupin's wife, a cosmetic surgery of the eyes, face, breast lift and bilateral liposuction. In the publications you can see the images from her procedure. So, were stem cells or surgery responsible for the lack of wrinkles?" [R. at 34 ¶ 69(g)]

- "It is strange and irregular that he obtained his exequatur in May 2001, according to Decree 519-01 without having completed the internship established by Law 478, which is obligatory to obtain a license to practice in the Dominican Republic." [R. at 35 ¶ 69(*l*)]

- "Ms. Lourdes Bisono took her 19-year-old daughter for a consultation to the doctor's clinic in Miami …. The doctor recommended stem cell treatment charging her eight thousand seven hundred dollars for one session.… But her result was not encouraging." [R. at 36 ¶ 69(m)]

- "Other patients seen in the Dominican Republic … have contacted us and certify that they have paid eight thousand three hundred and seventy dollars without positive results." [R. at 36 ¶ 69(n)]

- "[W]e were contacted by a 3Med employee ... [who] reports that the doctors at the institution maintain false expectations of healing the patients" and that "[m]anagement is irregular in regards to ethics with some patients." [R. at 45 ¶ 90(a)–(b)]

- "We consulted several foreign doctors who had to do their internship many years ago. We do not understand the benefit Dr. Skupin obtained." [R. at 47 ¶ 90(e)]

- "[W]e had asked last week for free access to public information, to the documents that validated the exequatur of Mr. Skupin or Dr. Skupin, the one of stem cells. We have already been doing a series of reports that have shown a series of alarming things …." [R. at 51 ¶ 98(a)]

Incredibly, the Complaint did not allege that any of the facts stated in these statements was false. It did not, for example, allege that Ms. Bisono lied or that her daughter was never Dr. Skupin's patient. [R. at 42 ¶ 82] It did not allege that Dr. Skupin's wife never undertook cosmetic surgery or that the photographs published on air proving those surgeries were fabricated. [R. at 39 ¶ 76] Nor did it allege that

the employee from Dr. Skupin's clinic lied when she reported that some doctors in the clinic maintain false expectations. [R. at 48 ¶ 91]

The Complaint, rather, alleged that these factually true statements, when juxtaposed against other factually true statements or the innocuous or irrelevant statements cited above, painted Dr. Skupin poorly in some abstract way. Under this novel theory, because Appellees' true factual statements let a listener draw the conclusion that Dr. Skupin is a cheat, deceiver, fraudster, snake-oil salesman, or even a criminal, Appellees are liable for libel by implication. [R. at 29 ¶ 62, at 38 ¶¶ 70, 72, at 39 ¶¶ 75–76, at 41–42 ¶¶ 81–83, at 48 ¶ 92, at 50 ¶ 95, at 55 ¶ 99] Dr. Skupin's view of defamation by implication—that truthful factual statements are actionable if they imply something unsavory about a plaintiff—has no support in the law and would eviscerate the First Amendment.

Defamation by implication arises, rather, where a speaker juxtaposes a series of factually true statements to imply a defamatory and false connection between those facts. *See Jews for Jesus*, 997 So. 2d at 1106. The prototypical example is imposing a photograph of a bystander next to a story about a murder trial. *See Brown v. Tallahassee Democrat, Inc.*, 440 So. 2d 588, 589 (Fla. 1st DCA 1983). In this example, the juxtaposed statements are easily identifiable: (1) the photograph of the bystander and (2) the accurate headline about a murder trial. The defamatory connection between those two true statements is also easily identifiable: the

bystander is the criminal defendant. Alternatively, defamation by implication includes mixed opinion, viz, a statement of derogatory opinion without disclosing supporting facts, which in turn forces a listener to conjure defamatory facts to support the speaker's opinion. *See Jews for Jesus*, 997 So. 2d at 1108; *accord Milkovich*, 497 U.S. at 18 ("If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth.").

As shown above, none of Dr. Skupin's allegations are of this ilk. Nowhere in the Complaint did Dr. Skupin identify any supposedly juxtaposed statements that imply a false and defamatory connection between them. Rather, the Complaint mixed all sorts of statements—including innocuous statements, statements not concerning Dr. Skupin, factually true statements, and pure rhetoric—and alleged that they were all juxtaposed with each other. That is not enough. *See Ginsberg*, 645 So. 2d at 501 (alleging mere legal conclusion is not enough).

Simply put, in any well-pleaded defamation case, a plaintiff must allege what statement in particular is false and defamatory. In all of his libel counts, Dr. Skupin failed to do that. Instead, he alleged that dozens of statements, when taken together, imply nefarious conduct by Dr. Skupin. Hence, Dr. Skupin believed that because what the Reports state truthfully would make persons think less of him, he could sue for defamation. Not so: "The fact that [a] plaintiff[] may not like the way

[an] article was written or what it says about [him] does not automatically provide the basis for a libel suit." *Kurtell*, 193 So. 2d at 471.

C. The 770 Notice Was Deficient.

Yet another reason on the record exists for affirming dismissal of the libel-by-implication claim (Count II). Under section 770.01 of the Florida Statutes, a plaintiff must "serve notice in writing on the defendant, specifying the article or broadcast and the statements therein which he or she alleges to be false and defamatory" before suing a defendant for defamation attributable to "publication or broadcast, in a newspaper, periodical, or other medium." FLA. STAT. § 770.01. Strict compliance with section 770 is required; "the statute requires the best possible notice." *Nelson v. Associated Press, Inc.*, 667 F. Supp. 1468, 1474 (S.D. Fla. 1987). "Failure to comply with the notice provision of section 770.01 requires dismissal of the complaint for failure to state a cause of action." *Mancini v. Personalized Air Conditioning & Heating, Inc.*, 702 So. 2d 1376, 1377 (Fla. 4th DCA 1997). The Complaint contained the 770 Notice as an attachment, and its deficiencies were apparent.

Dr. Skupin's 770 Notice failed to comply with the statute. Like the Complaint, the 770 Notice nowhere identified which "series of facts" were "juxtapose[d]" "to imply a defamatory connection between them," or what "defamatory implication" was created by omitting which facts. *See Jews for Jesus*,

997 So. 2d at 1106. Although the 770 Notice stated in conclusory fashion that the Reports "contain[ed] the following false and defamatory statements … , including libel by implication," that is not "the best possible notice" that "the statute requires." *Nelson*, 667 F. Supp. at 1474. In fact, it barely constitutes notice at all.

III. THE CLAIM FOR TORTIOUS INTERFERENCE WAS PROPERLY DISMISSED.

The first five counts in the Complaint all alleged a form of libel, but in the sixth count the Complaint alleged a claim for tortious interference with advantageous business relationships. [R. at 71–72] The Order dismissed this claim, holding that "Florida's single action rule" barred it. [R. at 1243] This Court should affirm this dismissal for two separate reasons.

To begin with, the Order was correct. The single-action rule bars Dr. Skupin's attempt to clothe defamation-based claims as tortious-interference claims. Next, the Complaint simply failed to state a cause of action. Despite having 151 allegations, there are no factual allegations whatsoever about the tortious-interference claim, rendering it defective.

A. The Single-Action Rule Bars the Tortious-Interference Claim.

Under the single-action rule, a plaintiff cannot plead separate claims "when they arise from the same publication upon which a failed defamation claim is based." *Callaway Land & Cattle Co. v. Banyon Lakes C. Corp.*, 831 So. 2d 204, 208 (Fla. 4th DCA 2002). And here Dr. Skupin seeks to accomplish exactly that—

allege a tortious-interference claim based on statements in publications that cannot form a proper claim for libel. Indeed, the Complaint alleged that in two reports the Appellees "attack[ed] Dr. Skupin and his medical practice" by defaming him. [R. at 60 ¶¶ 107–08]

Dr. Skupin seeks to avoid the single-action rule by asserting that "Dr. Skupin's tortious interference count was *not based* on facts arising from the 'four reports,' but was pled separately based" on supposed, different "television broadcasts." [Appellant's Br. at 49] But this misses the point. The purpose of the single-action rule is to prevent plaintiffs from making "an end-run around a successfully invoked defamation privilege by simply renaming the cause of action" as another claim, like tortious interference. *Fridovich v. Fridovich*, 598 So. 2d 65, 69 (Fla. 1992). A plaintiff cannot "transform a defamation action" into another tort, which is what Dr. Skupin seeks to do. *Id.* at 70. Because a plaintiff cannot clothe a libel claim as another tort, the Order correctly dismissed the tortious-interference claim. *See Int'l Sec. Mgmt. Grp. v. Rolland*, 271 So. 3d 33, 48 (Fla. 3d DCA 2018); *Boyles v. Mid-Fla. Television Corp.*, 431 So. 2d 627, 636 (Fla. 5th DCA 1983).

B. Alternatively, the Complaint Did Not Allege Tortious Interference.

Even if this Court concludes that the single-action rule is inapplicable, it should affirm because the Complaint failed to allege tortious interference. *See Shands*, 97 So. 3d at 212.

To plead a claim for tortious interference, a plaintiff must allege (1) "the existence of a business relationship between the plaintiff and a third person … under which the plaintiff has legal rights," (2) "the defendant's knowledge of the relationship," (3) "an intentional and unjustified interference with the relationship by the defendant which induces or otherwise causes the third person not to perform," and (4) "damage to the plaintiff resulting from the third person's failure to perform." *DNA Sports Performance Lab, Inc. v. Club Atlantis Condo. Ass'n*, 219 So. 3d 107, 110 (Fla. 3d DCA 2017). A complaint, moreover, must plead "the ultimate facts showing that the pleader is entitled to relief." FLA. R. CIV. P. 1.110(b). Thus, in the tortious-interference context, a complaint must allege that the "business relationship … afford[s] the plaintiff existing or prospective legal or contractual rights." *Register v. Pierce*, 530 So. 2d 990, 993 (Fla. 1st DCA 1988). The Complaint failed to allege this element.

The Complaint's allegations on tortious interference—paragraphs 105 through 109 and 146 through 151—did not even state in a conclusory fashion that Dr. Skupin had a business relationship "under which the plaintiff has legal rights," an element of the claim. *DNA Sports*, 219 So. 3d at 110. And the Complaint certainly did "not allege any facts to demonstrate that the business relationship between" Dr. Skupin and the third parties afforded him "any legal rights that have been substantively damaged due" to Appellees' conduct. *Register*, 530 So. 2d at

993. In similar circumstances, Florida courts have affirmed dismissals of tortious-interference claims as deficient. *See id.* ("The complaint contains insufficient allegations to support a cause of action for tortious interference …. The lower court correctly concluded that the amended complaint failed to allege a cause of action."); *S. Alliance Corp. v. City of Winter Haven*, 505 So. 2d 489, 496 (Fla. 2d DCA 1987) ("We affirm … because we conclude that Southern failed to plead the existence of a business relationship under which it has legal rights."). Since the Complaint failed at the most basic level—it failed to even allege the proper elements of tortious interference—the dismissal should be affirmed.

On appeal, Dr. Skupin argues that the Complaint pleaded interference with the public in general. [Appellant's Br. at 49–50 ("[The Complaint] asserted that Defendants intentionally and unjustifiably interfered with his medical practice business by making false accusations … to various governmental agencies and officials, medical associations and boards, lawyers, patients and doctors." (citing R. at 11–12 ¶¶ 1–2, at 15–19 ¶¶ 12–29, at 30–31 ¶¶ 66–68, at 41–44 ¶¶ 79–88))] There are two problems with Dr. Skupin's argument. First, it is a total fabrication. A perusal of the allegations cited by Dr. Skupin's brief shows that none of those allegations stated what Dr. Skupin says they stated. Indeed, most of the cited allegations concern venue, jurisdiction, and background on Appellees. As noted above, the Complaint had zero allegations as to any business relationship. Second,

even if Dr. Skupin alleged that Appellees interfered with his relationship to the public at large, as he incorrectly claims on appeal, that form of interference is not enough under Florida Supreme Court precedent. "In Florida, a plaintiff may properly bring a cause of action alleging tortious interference with present or prospective customers but no cause of action exists for tortious interference with a business's relationship to the community at large." *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So. 2d 812, 815 (Fla. 1994). Because interference with the community at large is, at best, what the Complaint alleged (and on appeal is the only argument forwarded by Dr. Skupin), affirmance is mandated.

CONCLUSION

For these reasons, this Court should affirm the Order Granting Hemisphere Media Group, Inc.'s Motion To Dismiss Alvaro Skupin's Complaint, which dismissed Appellant Alvaro Skupin's Complaint and Demand for Jury Trial.

Dated: April 22, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Clerk of Court via the eDCA system. I further certify that a copy of the foregoing document has been served via electronic mail on this 22nd day of April 2020 to:

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I HEREBY CERTIFY that this brief was typed in 14-point Times New Roman font, and in all other ways, complies with Florida Rule of Appellate Procedure 9.210.

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