IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

MELVIN CEDENO
a/k/a "ICKEDMEL"
Plaintiff,

v.

RYAN UPCHURCH and
FICTITIOUS PERSONS 1-100
Defendants

Case No. 3:23-cv-00876
Judge Aleta A. Trauger

MEMORANDUM IN OPPOSITION TO DEFENDANT RYAN UPCHURCH'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

COMES NOW, the Plaintiff, MELVIN CEDENO a/k/a "ICKEDMEL," by and through counsel, and hereby submits his memorandum of authorities in opposition to Defendant Ryan Upchurch's ("Mr. Upchurch's") Motion to Dismiss (Doc. No. 15) ("Motion"), *to-wit*:

I. Standard of Review

Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Handy-Clay v. City of Memphis, 695 F.3d 531, 538 (6th Cir. 2012). A complaint will survive a motion to dismiss if the plaintiff alleges facts that "state a claim to relief that is plausible on its face" and that, if accepted as true, are sufficient to "raise a right to relief above the speculative level." Id. (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)); see also Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). The complaint must thus "contain either direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory."

Handy-Clay, 695 F.3d at 538 (quoting Eidson v. Tenn. Dep't of Children's Servs., 510 F.3d 631, 634 (6th Cir. 2007)); see also Mezibov v. Allen, 411 F.3d 712, 716 (6th Cir. 2005)).

In analyzing the sufficiency and plausibility of the claim, this Court should "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." See Directv, Inc. v. Treesh, 487 F.3d 471, 476 (6th Cir. 2007). Although the Court does not have to accept as true any legal conclusion couched as a factual allegation, see Twombly, 550 U.S. at 555, nor any unwarranted factual inference, Treesh, a motion to dismiss must be denied if the Plaintiff can prove any set of facts in support of his claim which would entitle him to relief. Cf. Guzman v. U. S. Dep't of Homeland Sec., 679 F.3d 425, 429 (6th Cir. 2012).

II. Objection to Defendant's Use of Material Outside the Pleadings

Normally, when "matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." See Fed. R. of Civ P. 12 (d). As Mr. Upchurch notes, "documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint ***and are central to her claim***." Weiner v. Klais & Co., 108 F.3d 86, 89 (6th Cir. 1997) (internal citations omitted) (emphasis added). As such, the Motion refers to various exhibits that are not part of the Complaint, *to-wit*:

- Exhibit "A" – A webcast posted on Mr. Cedeno's YouTube page entitled, "Kiely Rodni Missing Updates, Hoodie, Necklace | California Girl Disappears During Party In The Woods."

- Exhibit "B" – Video entitled, "'Ickedmel' is a sex trafficing [sic] code word [emoji]."

- Exhibit "C" – Video entitled, "Xanamay & ickedmel linked to hidden YouTube Pedo site [emoji] #kielyrodni."

- Exhibit "D" – Video entitled, "Ickedmel explaining how he's able to hack your phone camera and do weird illegal internet s**t [emoji]."

- Exhibit "E" – Screenshot of Specimen 2 chat feed.

- Exhibit "F" – Screenshot of Ickedmel's YouTube channel.

The Complaint references these exhibits to varying degrees. However, Exhibits A and F are not central to Mr. Cedeno's claims because they are not dispositive. As such, they should not be considered by this Court. See Clarke v. Baptist Mem'l Healthcare Corp., No. 06-2377 Ma/V, 2007 U.S. Dist. LEXIS 96710, at *28 (W.D. Tenn. May 17, 2007) ("The court will not consider the IWPR study because Plaintiffs do not refer directly to the study in their complaint and because the study is not central to their claims. … Although the study might be introduced at a later stage in support of Plaintiffs' claims, it is not dispositive of those claims.").

The video described in Exhibit A was referenced in the Complaint (at ¶¶ 18-19) simply to show that Florida was the only place where the parties had any relationship. See Hataway v. McKinley, 830 S.W.2d 53, 59 (Tenn. 1992) (describing how "the place where the relationship, if any, between the parties is centered" bears upon the question of which state has the more significant contacts). Therefore, while the mere allegation that Mr. Upchurch had contacted Mr. Cedeno in Florida by dialing a Florida telephone number may be dispositive of the choice-of-law issue in and of itself, that issue can be resolved without an examination of the video itself. Restated, the simple fact that Mr. Upchurch made a call to Mr. Cedeno's channel is more germane to Mr. Cedeno's claims than what the parties discussed on the video. See Clarke, supra. The video is mentioned simply to give a frame of reference for why the call was made.

Similarly, Mr. Cedeno's channel or its overall content are not dispositive of his claims, either. Thus, they are not central to his claims. See id. Mr. Upchurch's defamatory remarks and written statements came from his channel, not from Mr. Cedeno's channel.

Exhibits A and F should be excluded from the Court's consideration because they are not dispositive of Mr. Cedeno's claims. See id; see also Jones v. City of Cincinnati, 521 F.3d 555, 561 (6th Cir. 2008) ("The court did not abuse its discretion when it disregarded evidence that the defendants filed in support of their motion to dismiss… .") Accordingly, Mr. Cedeno asks that the Court disregard any reference to these exhibits in the Motion.

III. Statement of Background Facts

This diversity action arises from the defamatory and tortious conduct of Defendant Ryan Upchurch. It has facts in common with those stated in the Amended Complaint (Doc. No. 9) for Robertson v. Upchurch, No. 3:23-cv-00770 (M.D. Tenn, August 2, 2023). Complaint at ¶ 1.

Mr. Upchurch, a Tennessee resident, is a prominent YouTube personality whose eponymous channel boasts 3,140,000 subscribers. Doc. No. 1 ("Complaint") at ¶¶ 2, 11. The Plaintiff, Melvin Cedeno, a/k/a Ickedmel ("Mr. Cedeno"), a Florida resident, is also on YouTube. Complaint at ¶¶ 3, 10. Between August 6 and August 21, 2022, the parties made videos concerning the disappearance of Kiely Rodni ("Miss Rodni"), a sixteen-year-old girl who had disappeared after leaving a party in California. Complaint at ¶ 4.

Mr. Upchurch theorized that Ms. Rodni had been kidnapped by sex traffickers. Complaint at ¶ 5. This theory, however, was discredited when Ms. Rodni's body and her missing car were found in a lake on August 21, 2022. Complaint at ¶ 5. As it turns out, Ms. Rodni had driven her car off the road in a tragic accident. Complaint at ¶ 5. Ergo, Ms. Rodni's disappearance and death involved no foul play.

On August 20, 2022, Mr. Upchurch uploaded a video to YouTube in which he states that Mr. Cedeno's handle, "Ickedmel," is a "sex trafficing [sic] code word." Complaint at ¶ 20. In this video, Mr. Upchurch uses a marker and a sheet of paper to write anagrams of "Ickedmel," such as "cel me kid" and "licked me." Complaint at ¶ 20. In the video, Mr. Upchurch also states:

> All right so check this out. You know how these [f— k]in weirdos out here who like do stuff to kids and [s— t] have like code words?
>
> Okay, well the dude who's like, "Hey Ryan, I don't know anything about this missing kid." Okay, look at his name. Look how it's spelled. All right.
>
> His YouTube name is spelled I-C-K-E-D-M-E-L. "Ickedmel." If you unscramble it, it says…. That's only using the letters that are there — and it also says, "licked me." Why is his name unscrambled say, "cel me kid" [and] "licked me," like … like "sell me kid. If you sound it out it says, "Sell me kid."
>
> Why? Why does it say, "licked me?" If you look for children and your page is dedicated to looking for children and covering missing children.
>
> Why? Why? Why? This is [f— k]in weird disco man. Explain this mother [f— k]er!

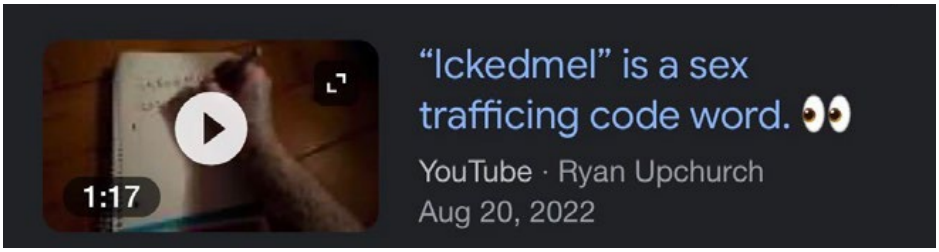
Complaint at ¶ 20. The video is entitled, "*'Ickedmel' is a sex trafficing [sic] code word.* 👀." Complaint at ¶ 20 n.6. "The statements and/or implications contained within this video ***and in its title*** are referred to herein as 'Defamation Specimen 1.'" Complaint at ¶ 20 (emphasis added).

That same day, Mr. Upchurch republished one of Mr. Cedeno's videos wherein he describes the genesis of his handle, "Ickedmel." Complaint at ¶ 21. In this 2016 video, Mr. Cedeno does not mention any sexual reason behind the selection of the name, nor does he mention pedophilia or sex trafficking. Complaint at ¶ 22. Indeed, "Ickedmel" is not a code word for sex trafficking. Complaint at ¶ 41. Nor is Mr. Cedeno a sex trafficker or a pedophile. Complaint at ¶¶ 40, 42. Therefore, Mr. Upchurch had actual knowledge that his statement about "Ickedmel" being a sex-

trafficking code word was false, or at the very least, he invariably had a high degree of awareness of its probable falsity. Complaint at ¶¶ 22, 47. Despite this, Mr. Upchurch acted with actual malice and/or with reckless disregard for the truth when he made this false and defamatory assertion about "Ickedmel" being a sex-trafficking code word. Complaint at ¶ 22.

Defamation Specimen 1 has been viewed at least 124,000 times and has been liked 6,990 times. Complaint at ¶ 23. Thus, approximately 7,000 people have expressed belief in what Mr. Upchurch has stated or implied, thereby evincing prodigious damage to Mr. Cedeno's reputation and character. Complaint at ¶ 23. Moreover, the libelous title to Defamation Specimen 1 ("*'Ickedmel' is a sex trafficing [sic] code word.* 👀.") has been impressed upon the YouTube feeds of between 1.2 million and 6.1 million people. Complaint at ¶¶ 24-26.

Thus, even though only 124,000 people have viewed the video, millions of people have seen the written text, "*'Ickedmel' is a sex trafficing [sic] code word.* 👀." Complaint at ¶ 26. Along this line, a Google search of the word "Ickedmel" on August 20, 2023, produced the following result:



Complaint at ¶ 27. Thus, Mr. Cedeno's videos were still being suppressed in the Google search algorithm by Mr. Upchurch's defamatory videos, including Defamation Specimen 1, as recently as August 2023. Complaint at ¶ 28.

On August 21, 2022, Mr. Upchurch uploaded another video which falsely states and/or implies that Mr. Cedeno (*i.e.*, Ickedmel) was linked to a hidden YouTube sex trafficking website.

Complaint at ¶ 29. The video is entitled, "*Xanamay & ickedmel linked to hidden YouTube Pedo site* 👺 *kielyrodni.*" Complaint at ¶ 29 n. 11. "The statements and implications contained within this video ***and in its title*** are referred to as 'Defamation Specimen 2.'" Complaint at ¶ 29 (emphasis added). This video is transcribed as follows:

> Dude. The evidence is not stopping against these mother [f— k]ers. All right. So, we already linked Ickedmel to Ronnie Jones and showed y'all who both them really were and linked the bump-lip girl to them as well. Bump lip girl just deleted her [f— k]ing YouTube, so I went to go type in her name on, uh, the [f— k]ing podcast thing. The Xanamayx. It goes to a YouTube channel that is talking about Kiely Rodni.
>
> And when you click the [f— k]ing comments dude, it is links to like child porn and [s— t]. Dude, it even says 18 and below. Dude. Dude. Y'all some sick mother [f— k]ers.
>
> Anybody following Ickedmel after today, well, [f— k], we'll know where all the weirdos are., I guess.

Complaint at ¶ 29.

In this August 21, 2022, video, the only reasons that Mr. Upchurch presents for his assertion that Ickedmel (*i.e.*, Mr. Cedeno) is linked to a hidden YouTube pedo site (which is short for "pedophilia website") are that (1) certain links to pornographic videos had been placed into the chat feed of another YouTuber's video, and that (2) these links say, "18 and below." Complaint at ¶ 30. However, the other YouTuber, "Burden of Proof," has no connection to Mr. Cedeno. Complaint at ¶ 31. As such, Mr. Cedeno had nothing to do with the placement of these links on the Burden of Proof YouTube video. Complaint at ¶ 31.

Mr. Upchurch's attempt to associate Burden of Proof with Mr. Cedeno may be described as follows: First, Mr. Upchurch claims, "we already linked Ickedmel to Ronnie Jones and showed y'all who both them really were and linked the bump-lip girl to them as well." Complaint at ¶ 29. Apart from his singular assertion about how "we already linked" the bump-lip girl to Ickedmel and

Mr. Jones, Mr. Upchurch lays no predicate to support his conclusion that Ickedmel is connected to the bump-lip girl.[1] See Complaint at ¶ 29. Next, Mr. Upchurch says that he typed the bump-lip girl's name into a "podcast thing." Complaint at ¶ 29. Then, he claims that from this he came across Burden of Proof's YouTube page, where he found these pornographic links. Complaint at ¶ 29. Finally, he claims that these links are for "child porn" and that "it even says 18 and below," Complaint at ¶ 29.[2]

---

[1] Mr. Upchurch does not refer viewers to any previous video that gives support for his conclusion that Xanamay and Ickedmel are linked, nor does he give any synopsis of the facts giving rise to his conclusion that may have been found in any such video. Therefore, this lack of factual predicate belies Mr. Upchurch's contention that he, "in real time, presented all of the information from which he reached his conclusions" in the video. Memorandum in Support of Motion to Dismiss ("Upchurch Memo") (Doc. No. 15) at p. 31.

[2] Referencing a screen capture from Defamation Specimen 2, Mr. Upchurch states in his Memorandum:

> As the Court can see, the statement features a downward facing arrow prominently next to the words "18 year." Mr. Upchurch's comment, thus, when taken in context, is based on his subjective interpretation of a publicly available comment.

Upchurch Memo, at p. 18. However, the complete English comment to which he references is depicted below:

Upchurch Memo, Exhibit E, third comment. Moreover, the only other English comment on this screen-capture is depicted below:

Complaint at ¶32; Upchurch Memo, Exhibit E, first comment.

Now that he is the subject of a multi-million-dollar suit for defamation, Mr. Upchurch has tried to retcon into the downward arrow (depicted above) a post-hoc interpretation to suggest that the videos were of minors. However, the only English words in the comments state otherwise. Therefore, Mr. Upchurch must have published the statement, "*Dude, it even says 18 and below*," with a high degree of awareness of probable falsity. See Thomas M. Cooley Law Sch. v. Kurzon Strauss, LLP, 759 F.3d 522, 527 (6th Cir. 2014). At the very least, Mr. Cedeno could prove a "set of facts in support of his claim" that such was his mental state. Cf. Guzman, 679 F.3d at 429.

Mr. Upchurch knew Defamation Specimen 2 and its title were false, or at the very least, he behaved with actual malice and/or with reckless disregard for the truth when he published these assertions. Complaint at ¶ 37. In fact, Mr. Upchurch had actual knowledge that Mr. Cedeno was not linked to a hidden pedophilia website. Complaint at ¶ 47.

Defamation Specimen 2 has been viewed at least 167,000 times and has been liked 9,380 times. Complaint at ¶ 38. Thus, over 9,000 people have expressed belief in what Mr. Upchurch has stated or implied. Complaint at ¶ 38. Beyond this, the false and defamatory title to Defamation Specimen 2 ("*Xanamay & ickedmel linked to hidden YouTube Pedo site* 👺 *kielyrodni"*) has been seen by 1.6 million to 8.3 million people. Complaint at ¶ 39.

On the day he claimed that Ickedmel is linked to a "hidden YouTube pedo site," Mr. Upchurch revealed Ickedmel's identity and disclosed that he lived in Florida. Complaint at ¶ 42. Therefore, Mr. Upchurch intentionally directed the statements and/or implications complained of herein toward the specific end of defaming Mr. Cedeno, and not simply an anonymous YouTube figure named "Ickedmel." Complaint at ¶ 44.

On or about September 14, 2022, Mr. Cedeno received a Facebook message from Ralph Simard from Bangor, Maine in which he threatens to "put a gun" into Mr. Cedeno's "mother[f—k]ing mouth." Complaint at ¶ 45 (a). In this message, Mr. Simard calls Mr. Cedeno a "pedo" while referencing "Ryan" – three weeks after Mr. Upchurch had first implied that Mr. Cedeno was a pedophile. Complaint at ¶ 45 (a). Mr. Simard also referenced Xanamay and a guest on Mr. Upchurch's webcast. Complaint at ¶ 45 (a). Thus, Mr. Simard was referring to what Mr. Upchurch had said about Mr. Cedeno, and as such, he clearly believed what Mr. Upchurch had said about Mr. Cedeno. Complaint at ¶ 45 (a). In reaction to this death threat and other hateful messages he

received from other persons, Mr. Cedeno feared for the lives of his daughter and himself, he filed a criminal report, and he purchased security cameras for his home. Complaint at ¶ 45 (a)-(d).

Mr. Upchurch had actual knowledge of the wrongfulness of his conduct. Complaint at ¶ 47. Furthermore, given that his audience is comprised of more than 3,100,000 subscribers, Mr. Upchurch knew that there was a high probability that injury or damage to Mr. Cedeno would result. Complaint at ¶ 48. Mr. Upchurch had the specific intent of causing harm to Mr. Cedeno. Complaint at ¶ 48. He acted with malice and with deliberate disregard for Mr. Cedeno's safety and wellbeing, wanting only to see his audience grow. Complaint at ¶ 48.

Even though Mr. Cedeno sent Mr. Upchurch two retraction letters, Mr. Upchurch has not provided any retraction. Complaint at ¶¶ 50-53.

IV. CHOICE OF LAW

Mr. Cedeno concurs with Mr. Upchurch's analysis of the choice of law framework, but only to a point. Mr. Upchurch argues, and Mr. Cedeno agrees, that:

> A federal court sitting in diversity must apply the choice-of-law rules of the forum state, which, in this case, is Tennessee. Montgomery v. Wyeth, 580 F.3d 455, 459 (6th Cir. 2009); MacDonald v. Gen Motors Corp., 110 F.3d 337, 341 (6th Cir 1997). In this case, a conflict of laws does exist between Tennessee and Florida law. See Complaint at ¶¶ 56, 57.
>
> Where a conflict of laws does exist, "Tennessee follows 'the most significant relationship' approach of the *Restatement (Second) of Conflict of Laws* to decide choice-of-law questions." Montgomery, 580 F.3d at 459 (citing Hataway, 830 S.W.2d at 59) (adopting *Restatement (Second) of Conflict of Laws* §§ 6, 145, 146). However, "if a multistate defamation did occur, then Section 150 [of the Restatement] applies." Glennon v. Dean Witter Reynolds, Inc., No. 3-93-0847, 1994 U.S. Dist. LEXIS 21081, at *19 (M.D. Tenn. Dec. 15, 1994). "Subsection 2 provides that in that instance, 'the state of most significant relationship will usually be the state where the person was domiciled at the time.'" Id.

Upchurch Memo, at pp. 3,4.

Mr. Upchurch cites only one case that pertains to multistate defamation in the context of an internet publication, *to-wit*: Prince v. Intercept, 634 F. Supp. 3d 114 (S.D.N.Y. 2022). This case involves a Wyoming plaintiff who sued a New York media defendant in New York federal court. Id. at 123. Although the Prince Court did use a significant relationship test to decide which state's law should apply, it does not expressly reference the Restatement. Id. at 132. Here, the deciding factor appears to be New York's "strong policy interests in regulating the conduct of its citizens and its media." Id. (citing Kinsey v. The N.Y. Times Co., 991 F.3d 171, 177 (2nd Cir. 2021); Condit v. Dunne, 317 F. Supp. 2d 344, 353 (S.D.N.Y. 2004)) (internal quotations omitted). In view of that factor, the Prince Court set aside the presumption that the law of the Plaintiff's domicile should control in a multistate defamation case. Id. at 134.

As Mr. Upchurch admits, Prince is "not controlling." See Upchurch Memo, at p, 4. Even if it were, the Condit case cited in Prince provides superior support for Mr. Cedeno's position. There, the Second Circuit found that California law triumphed over New York law in a case where a former California congressman had sued a New York author for libel. Condit, 317 F. Supp. 2d at 348. The Condit Court held that while New York "extends greater protections to the media," and therefore, "has an interest in applying its laws to the speaker," California, conversely, "has an interest here in applying its laws to the target." Condit, 317 F. Supp. 2d at 355. Because the defendant had spoken to a national audience about a California congressman – instead of speaking solely to a New York audience – the Court held that California (the domicile of the plaintiff) had a more significant interest in the litigation than New York. Id.; see also La Luna Enterprises v. CBS Corp., 74 F. Supp. 2d 384, 389 (S.D.N.Y. 1999) (acknowledging that "New York has an interest in protecting the free speech rights of publishers within its borders," but applying Florida law because, among other things, plaintiff was from Florida and alleged that it suffered injury in

Florida); Machleder v. Diaz, 538 F. Supp. 1364, 1370 (S.D.N.Y. 1982) (finding that New York's interest "in establishing a standard of fault for its news media" is outweighed by New Jersey's "interest in protecting its citizens from defamation").

The seminal case on modern conflicts-of-law analysis in Tennessee is Hataway, 830 S.W.2d at 60 (holding that the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship). The Glennon case, referenced by Mr. Upchurch and cited supra, appears to be the only case that cites Hataway and addresses the substance of multistate defamation. In Glennon, a New York company moved this Court, *inter alia*, to vacate a $1.5 million arbitration award for defamation suffered by a Tennessee resident. 1994 U.S. Dist. LEXIS 21081, at *2, 20. In determining the preliminary question of whether the laws of Tennessee should apply, this Court looked to Sections 149 and 150 of the *Restatement (Second)*. Id. at *17.

Mr. Cedeno invites the Court to examine comment "e" to § 150 of the Restatement, viz.:

> Rules of defamation are designed to protect a person's interest in his reputation. When there has been publication in two or more states of an aggregate communication claimed to be defamatory, at least most issues involving the tort should be determined, subject to the possible limitation stated in Comment d, by the local law of the state where the plaintiff has suffered the greatest injury by reason of his loss of reputation. This will usually be the state of the plaintiff's domicil if the matter complained of has there been published.

Restat 2d of Conflict of Laws, § 150, cmt. e. (2nd 1988). This accords with the holding of the Second Circuit in Condit and in Machleder, where the substantive law of the state where the plaintiff was domiciled was selected.

Therefore, while Tennessee law would be used to determine the question of the statute of limitations as Mr. Upchurch contends, Florida law should govern all other issues considering that

the Plaintiff resides in Florida, the Plaintiff suffered injury in Florida, and the parties only contacts with each other were directed to the state of Florida. See Complaint at ¶ 18.

V. ARGUMENT

A. Plaintiff's Claims Are Not Barred by the Tennessee Statute of Limitations

Mr. Upchurch succinctly describes the issue relating to the statute of limitations:

> In Tennessee, the statute of limitations for libel is one year, and the statute of limitations for slander is six months. See T.C.A. § 28-3-104; T.C.A. § 1-3-102. Plaintiff's claim was brought on August 21, 2023–the latest date Plaintiff could have brought an action for libel and six months too late for slander. See Complaint at ¶ 15. Thus, if this Court finds that Mr. Upchurch's statements were alleged slander, and not alleged libel, Plaintiff's defamation claims are time barred.

Upchurch Memo, at p. 6. Thus, Mr. Upchurch concedes that Mr. Cedeno's claims are timely insomuch as he alleges a valid claim for libel, as opposed to slander.

"The law of defamation includes both slander, which is spoken, and libel, which is written." Quality Auto Parts, Co. v. Bluff City Buick Co., 876 S.W.2d 818, 820 (Tenn. 1994). Neglecting, for now, any distinction about whether a YouTube video may have characteristics of permanence more akin to that of a written statement than that of a spoken utterance, which disappears milliseconds after it passes the lips of the speaker, the simplest way for this Court to resolve this question is to see if any alleged defamation complained of in the Complaint is in writing.

The Complaint speaks of Defamation Specimens 1 and 2, each being comprised of a video and its written title. See Complaint at ¶¶ 20, 29. Restated, the Complaint clearly identifies that the written titles to these specimens are defamatory.

The written title to Defamation Specimen 1 is "'*Ickedmel' is a sex trafficing code word.* 👀." See Complaint at ¶ 20 n. 6. The written title to Defamation Specimen 2 is "*Xanamay*

& ickedmel linked to hidden YouTube Pedo site 👺 *kielyrodni."* See Complaint at ¶ 29 n. 11. Both titles have stand-alone meanings that communicate a defamatory message.

A person searching for "Ickedmel" on Google will read that "Ickedmel" is a sex-trafficking code word – even if he or she never clicks the video's link. See Complaint at ¶ 27. Likewise, anyone who stumbles across Defamation Specimen 2 would read that Ickedmel is linked to a hidden YouTube pedophilia site – even if he or she never clicks the video's link. Thus, these written titles are as defamatory as anything that Mr. Upchurch has verbalized in his videos.

Assuming, *arguendo*, that Mr. Upchurch is correct when he says that the videos might be slander but not libel, it follows that Mr. Upchurch could have avoided a libel suit by simply rewording his titles. For example, he could have entitled Defamation Specimen 1 as "*What I believe 'Ickedmel' means."* Similarly, Mr. Upchurch could have entitled Defamation Specimen 2 as "*Websites I believe Ickedmel is linked to.*" Or he could have said for either specimen, "*More thoughts about Ickedmel.*" In any event, he could have described the nature of his discourse in these videos by using innocuous descriptions in the written titles without communicating a defamatory message. Instead, to drive traffic, Mr. Upchurch used written titles that claimed Mr. Cedeno (a/a/a Ickedmel) was linked to pedophilia websites and sex trafficking.

Because the specimens are comprised of written titles that communicate a stand-alone defamatory meaning, the written titles, if nothing else, are libel. See id. Moreover, Mr. Upchurch did rearrange the word "Ickedmel" using pen and paper. Either way, by virtue of Mr. Upchurch's own concession, the statute of limitations does not bar this suit.

B. The Complaint States Valid Claims for Defamation and Defamation by Implication Under Both Tennessee and Florida Law

As Mr. Upchurch states in his brief, "there is no meaningful difference in Tennessee's law and Florida's law as to the elements of defamation nor the analysis to determine which statements

are actionable." Upchurch Memo, at p. 10; cf. Jews for Jesus, Inc. v. Rapp, 997 So. 2d 1098, 1106 (Fla. 2008) (describing the elements of defamation in Florida); Sullivan v. Baptist Mem'l Hosp., 995 S.W.2d 569, 571 (Tenn. 1999) (describing the elements of defamation in Tennessee). Mr. Cedeno agrees. Therefore, Mr. Cedeno will analyze his claim under the rubric of Florida law.

The tort of defamation under Florida law has the following five elements: (1) publication; (2) falsity; (3) the 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. See Jews for Jesus, Inc., at 1106.

Defamation by implication is a variation of defamation in which literally true statements can be defamatory where they create a false impression. See id.; see also Armstrong v. Simon & Schuster, Inc., 85 N.Y.2d 373, 649 N.E.2d 825, 829-30, 625 N.Y.S.2d 477 (N.Y. 1995) ("'Defamation by implication' is premised not on direct statements but on false suggestions, impressions and implications arising from otherwise truthful statements.")

1. Defamation Specimens 1 and 2 are publications.

It is undisputed that Mr. Upchurch's statements were publications. Cf. Upchurch Memo, at p. 35 ("… the remaining claims premised upon Mr. Upchurch's publication must also fail."). Therefore, the first element of defamation is met. See id.

2. Defamation Specimens 1 and 2 are false.

In the title to Defamation Specimen 1, Mr. Upchurch states unequivocally that "Ickedmel" is a sex-trafficking code word. Complaint at ¶ 20. Because this Court must take the Complaint's allegations as being true, see Directv, Inc., 487 F.3d at 476, "Ickedmel" is not a sex-trafficking code word. Complaint at ¶ 41. Therefore, the title to Defamation Specimen 1 is false.

Similarly, in the title to Defamation Specimen 2, Mr. Upchurch states unequivocally that Ickedmel is linked to a hidden YouTube "pedo" site. Complaint at ¶ 39. Because this Court must take the Complaint's allegations as being true, see id., "Ickedmel" is not linked to a hidden YouTube pedo site. Complaint at ¶ 70. Therefore, the title to Defamation Specimen 2 is false.

Because Mr. Upchurch made false statements in his publications, the second element of defamation is met. See Jews for Jesus, Inc., 997 So. 2d at 1106.

3. Mr. Upchurch published Defamation Specimens 1 and 2 with knowledge that they are false or with reckless disregard as to the falsity on a matter concerning a public official, or at least negligently on a matter concerning a private person.

This element articulates the commonly held fault-standard for defamation cases. If the Plaintiff is a "public figure," he must also establish that the Defendant published the defamatory statement with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. Thomas M. Cooley Law Sch. v. Kurzon Strauss, LLP, 759 F.3d 522, 527 (6th Cir. 2014)("Cooley"); see also Herbert v. Lando, 441 U.S. 153, 156, 99 S. Ct. 1635, 60 L. Ed. 2d 115 (1979) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 280, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)).

There are two kinds of "public figure" plaintiffs: a "limited-purpose" public figure and a "general-purpose" public figure. Cooley, 759 F.3d at 527 (citing Bufalino v. Detroit Magazine, Inc., 449 N.W.2d 410, 416 (Mich. 1989) (Levin, J., concurring)). A limited-purpose public figure is a public figure with respect to "a limited range of issues," and one achieves that status by "voluntarily inject[ing] himself . . . into a particular public controversy." 759 F.3d at 527 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974)). A general-purpose public figure is one who attains "such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts." Id.

Mr. Cedeno is not a public figure in any sense of the term. But even if he is, he has sufficiently put Mr. Upchurch on notice of plausible facts that give rise to a claim for actual malice.

a. Mr. Cedeno is not a general-purpose public figure.

As Mr. Upchurch seems to acknowledge, the standard for determining whether a person is a general-purpose public figure is rather daunting:

> The Supreme Court has held that "only a small group of individuals . . . are public figures for all purposes." Tharp v. Media Gen., Inc., 987 F. Supp. 2d 673, 680 (D.S.C. 2013) (quoting Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 164, 99 S.Ct. 2701, 61 L. Ed. 2d 450 (1979)). It has also held that "[a]bsent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life." Id. (quoting Gertz, 418 U.S. at 351-52)).

Upchurch Memo, at p. 23. Beyond this, Mr. Upchurch does not cite any authority in the Sixth Circuit that would demonstrate how Mr. Cedeno might be a general-purpose public figure. Instead, he only cites a recent opinion from the District Court for the District of Nevada that is presently under appeal in the Ninth Circuit. See Wealthy, Inc. v. Cornelia, No. 2:21-CV-1173 JCM (EJY), 2023 U.S. Dist. LEXIS 174821 (D. Nev. Sep. 29, 2023); see also Wealthy, Inc. v. Cornelia, Nos. 23-3390, 23-3227 (9th Cir.).

In Wealthy, Inc., Dale Buczkowski is the owner and operator of Wealthy, which is described in the complaint as a "leading entrepreneurship, finance, business, real-estate and self-improvement company." 2023 U.S. Dist. LEXIS 174821 at *2. Buczkowski operates Wealthy under the name Derek Moneyberg, a federally registered trademark. Id. Buczkowski amassed a following of 23,700 subscribers on YouTube, and his videos have garnered over 1.2 million views on the platform. Id. The Court held that Wealthy and Buczkowski were public figures because they boasted about the reach of their YouTube channel in their complaint. See id. at *14.

However, nowhere does the Wealthy, Inc. Court find that Wealthy or Buczkowski were household names. That is significant because in Waldbaum v. Fairchild Publ'ns, 627 F.2d 1287 (DC Cir., 1980) (*cert. denied*), the DC Circuit Court of Appeals placed great emphasis on the fact that a general-purpose public figure must be a household name:

> From analyzing Gertz and more recent defamation cases, we believe that a person can be a general public figure only if he is a "celebrity," his name a "household word" whose ideas and actions the public in fact follows with great interest.

Id. at 1292. Admittedly, this opinion from the DC Circuit is not binding authority in either the Sixth Circuit or the Ninth Circuit. However, the Supreme Court denied certiorari in Waldbaum, whereas the Ninth Circuit has yet to entertain Wealthy, Inc. Moreover, Mr. Upchurch cites Waldbaum as authority in his brief, thereby giving further credence to its authority in this case. See Upchurch Memo, at p. 25. Thus, Mr. Cedeno respectfully suggests that this Court place greater weight upon the DC Circuit's established holding in Waldbaum than the Nevada District Court's untested holding in Wealthy, Inc. After which, Mr. Cedeno suggests that this Court should take Mr. Upchurch at his word that Mr. Cedeno is "not necessarily a house-hold name," Upchurch Memo at p. 24, and thus find that Mr. Cedeno is not a general-purpose public figure.

Finally, this Court should examine the opinion of Judge Richardson in the case of Santoni v. Mueller, No. 3:20-cv-00975, 2022 U.S. Dist. LEXIS 4336 (M.D. Tenn. Jan. 10, 2022). The plaintiff in that case, like Mr. Cedeno, was a social media enthusiast who used a pseudonym while discussing various topics and engaging in debate. See id. at *3. In view of these facts, the Court found, "Defendant does not argue that Plaintiff is a general-purpose public figure, nor could the Court come to such a conclusion." Id., at *25. Mr. Cedeno respectfully submits that the same should be said of Mr. Cedeno in the case at bar.

In short, Mr. Cedeno simply cannot be a general-purpose public figure.

b. Mr. Cedeno is not a limited purpose public figure.

In Santoni, Judge Richardson provides detailed analysis of what it means to be a limited-purpose public figure:

> Both federal courts and Tennessee state courts utilize a two-step approach to determine whether an individual is a limited-purpose public figure. See Clark v. ABC, Inc., 684 F.2d 1208, 1218 (6th Cir. 1982) (citing Gertz, 418 U.S. at 352); Hibdon v. Grabowski, 195 S.W.3d 48, 59 (Tenn. Ct. App. 2005). The first step is for the Court to determine whether there is a public controversy. Clark, 684 F.2d at 1218; Hibdon, 195 S.W.3d at 59. "A public controversy is defined as a real dispute, the outcome of which affects the general public or some identifiable segment of the public in an appreciable way." Hibdon, 195 S.W.3d at 59. The public controversy in question must be what "g[ave] rise to the defamation." Gertz, 418 U.S. 352. The second step is for the Court to determine whether Plaintiff has become so involved in the public controversy as to constitute a public figure via his involvement. Id.; see also Clark, 684 F.2d at 1218. There are three factors to consider in reviewing Plaintiff's involvement in a public controversy: the voluntariness of the involvement, the extent to which Plaintiff had access to channels of communication in order to counteract false statements, and the prominence of his role. Clark, 684 F.2d at 1218; see also Hibdon, 195 S.W.3d at 62.

Santoni, at *25-26.

Mr. Upchurch contends that the Defamation Specimens 1 and 2 flowed from the "Rodni disappearance controversy." Upchurch Memo, at p. 3. "The real public controversy at issue here," according to Mr. Upchurch, "is the mysterious disappearance of Kiely Rodni." Upchurch Memo, at p. 26. To support this assertion, Mr. Upchurch cites Unsworth v. Musk, No. 2:18-cv-08048-SVW-JC, 2019 U.S. Dist. LEXIS 229076 (C.D. Cal. Nov. 18, 2019), which describes how missing children in Thailand were a public controversy since it drew international media coverage. See id. at *14. However, an examination of the Unsworth opinion undermines Mr. Upchurch's claim that Mr. Cedeno is a limited-purpose public figure.

Vernon Unsworth was involved in the rescue of twelve Thai children and their coach from the Tham Luange Nang Non cave system ("Caves") from June to July of 2018 ("Rescue"). Id. at *2. Unsworth used his extensive knowledge of the caves to direct and assist the Thai government in the rescue, and he provided advice and guidance to the Thai Navy divers on where the children may have been located. Id. After inquiring with the Thai government, Elon Musk mobilized resources across several of his companies to assist in the rescue. Id. Under Musk's direction, the companies designed and produced three miniature submarines ("Subs"), which were delivered to the Thai government to assist in the Rescue. Id. Ultimately, the children were rescued by conventional divers, and the Subs were not used in the Rescue. Id. at *3. Defendant donated the Subs to the Thai government for use in future operations. Id. The Rescue concluded between July 8-10, 2018, when all children and their coach were safely extracted from the Caves. Id.

On July 13, 2018, Unsworth participated in an interview with a cable news channel, CNN, to discuss the rescue. Id. Asked what he thought of the Subs, Unsworth stated that it was a "PR stunt," that it "had absolutely no chance of working," and that Musk "had no conception of what the cave passage was like," adding that Musk could "stick his submarine where it hurts." Id. Shortly thereafter, Musk posted four messages on Twitter,

> Never saw this British expat guy who lives in Thailand (sus) at any point when we were in the caves. Only people in sight were the Thai navy/army guys, who were great. Thai navy seals escorted us in — total opposite of wanting us to leave.
>
> Water level was actually very low & still (not flowing) - you could literally have swum to Cave 5 with no gear, which is obv how the kids got in. If not true, then I challenge this dude to show final rescue video. Huge credit to pump & generator team. Unsung heroes here.
>
> You know what, don't bother showing the video. We will make one of the mini-sub/pod goingss [sic] all the way to Cave 5 no problemo. Sorry pedo guy, you really did ask for it.

> Bet ya a signed dollar it's true.

Id. at *3-4. Musk doubled-down on his assertion that Unsworth was a pedophile in an August 28, 2018, email to BuzzFeed where he states:

> I suggest that you call people you know in Thailand, find out what's actually going on and stop defending child rapists, … He's an old, single white guy from England who's been traveling or living in Thailand for 30 to 40 years, mostly Pattaya Beach, until moving to Chiang Rai for a child bride who was about 12 years old at the time. There's only one reason people go to Pattaya Beach. It isn't where you'd go for caves, but it is where you'd go for something else. Chiang Rai is renowned for child sex-trafficking.

Id., at *6. Therefore, like Mr. Upchurch did to Mr. Cedeno, Elon Musk stated and/or implied that Vernon Unsworth was a pedophile and that he was involved in sex trafficking. See id.; cf. Complaint at ¶¶ 20, 29.

After Unsworth sued Musk for defamation, Musk moved for summary judgment, claiming that Unsworth was a limited purpose public figure. Id. at *10-11. Articulating the test for determining whether a person is public figure under Makaeff v. Trump Univ., LLC, 715 F.3d 254, 266 (9th Cir. 2013), the Unsworth Court states:

> To determine if Plaintiff is a limited-purpose public figure, "we consider whether (i) a public controversy existed when the statements were made, (ii) whether the alleged defamation is related to the plaintiff's participation in the controversy, and (iii) whether the plaintiff voluntarily injected itself into the controversy for the purpose of influencing the controversy's ultimate resolution." [Makaeff] at 266. The Court finds that Plaintiff satisfies prongs (i) and (iii) of the limited-purpose public figure test but fails prong (ii) because Defendant's statements were not related to Plaintiff's participation in the controversy.

Unsworth, at *12.

The Unsworth Court further states, "For Defendant's comments to relate to Plaintiff's participation in the public controversies, there must be some relationship between pedophilia and

the Rescue or the Subs—there is simply no credible connection here." Id. at *20. Similarly, in the case at bar, for Defamation Specimens 1 and 2 (and their titles) to relate to Mr. Cedeno's participation in the discussions about the Rodni disappearance, there must be some relationship between pedophilia or sex-trafficking and the disappearance of Ms. Rodni. See id.

Ms. Rodni's disappearance was not the result of pedophiles or sex-trafficking, but was caused by an unfortunate car accident. See Complaint at ¶ 5. Moreover, Mr. Upchurch gives no credible basis for his assertion that Mr. Cedeno is involved in sex trafficking, pedophilia, or the Rodni disappearance. Instead, his only basis for reaching this conclusion is that a man named Ronnie Jones called into Mr. Cedeno's show. See Complaint at ¶ 18. Therefore, this Court should likewise find that "there simply is no credible connection" between pedophilia or sex-trafficking and the Rodni disappearance or Mr. Cedeno. See Unsworth, at *20.

At first blush, there appears to be a difference in the test that the Ninth Circuit uses in Makaeff as compared to the Sixth Circuit's test in Cooley, supra. In Cooley, the Sixth Circuit replaces prongs two and three of the Makaeff test with a general question about whether Plaintiff has become so involved in the public controversy as to become a public figure via his involvement. Compare Unsworth, at *12 (citing Makaeff at 266) with Cooley, 759 F.3d at 529-30. However, that change does not alter the analysis because, as the Cooley notes, "the court must isolate the specific public controversy related to the defamatory remarks." 759 F.3d at 530. Thus there must be a nexus between the remarks and the controversy. In this sense, Cooley and Makaeff are in harmony because if there is no nexus between the defamation and the Plaintiff's involvement in a controversy, there can be no specific controversy related to the defamatory remarks. Cf. Id.

Mr. Upchurch claims that Mr. Cedeno "played a prominent role in the controversy." Upchurch Memo at p. 28. Given the backdrop of Unsworth in view of Cooley, this cannot be true.

In both Unsworth and the case at bar, there was at least one missing child. See Unsworth at *2; Complaint at ¶ 5. In both situations there was a search for the child(ren). See Unsworth at *2; Complaint at ¶ 5. Unlike Mr. Cedeno, who simply offered commentary on YouTube, Vernon Unsworth actively participated in the search. See Unsworth at *2. In both cases, the defendants called their respective plaintiffs "pedos." See Unsworth at *3-4; Complaint at ¶¶ 20, 29. Elon Musk claimed that Unsworth had gone to Thailand to engage in sex trafficking. See Unsworth at *3-4. Mr. Upchurch, on the other hand, claims that Mr. Cedeno was a sex-trafficker because some guy named Ronnie Jones called his show. Complaint at ¶¶ 20, 29.

Clearly, Unsworth played a more active role in the search for the children in Thailand than Florida resident Melvin Cedeno did in the search for Ms. Rodni in California. Unsworth assisted the Thai government with the search. Unsworth, at *2. Furthermore, Unsworth went on CNN – a television network with an established international audience – to discuss the search for the children. Unsworth, at *3. Finally, by going on CNN to criticize the Subs, Unsworth thrust himself to the forefront of this public controversy to influence the resolution of the issues involved. Cf. Unsworth, at *18; Gertz, 418 U.S. at 345. Mr. Cedeno, in contrast, merely went on his YouTube channel to discuss what was going on in the search for Ms. Rodni.

Ultimately, the Unsworth Court found that Vernon Unsworth was not a limited purpose public figure because Elon Musk's allegations of pedophilia had nothing to do with the search for the missing children. Unsworth, at *20. Likewise, Mr. Upchurch's specious claims of pedophilia and sex trafficking had nothing to do with the disappearance or search for Ms. Rodni.

Put simply, if Mr. Unsworth's involvement in the public controversy surrounding the missing Thai children (*i.e.*, his going to Thailand and advising the government on how to search for children in caves) was not extensive enough to make him a public figure, then by comparison,

Mr. Cedeno's lesser involvement in the discussions about the Rodni disappearance (*i.e.*, his making videos from his living room in Florida) should not make him a public figure, either. See Santoni, at *25-26 (citing Gertz at 352).

Since there is no valid nexus between Mr. Upchurch's statements or implications about Mr. Cedeno being a sex-trafficking pedophile and the disappearance of Ms. Rodni, this Court simply cannot isolate the specific public controversy related to Mr. Upchurch's defamatory remarks. See Cooley, 759 F.3d at 530. That is because the defamatory remarks have no credible nexus to the disappearance of Ms. Rodni. Accordingly, the second prongs of both the Makaeff and the Cooley tests have not met, and as such, Mr. Cedeno is not a limited-purpose public figure.

c. Regardless of whether Mr. Cedeno is a public figure, he has demonstrated a plausible case for actual malice.

The plaintiff in a defamation action against a public figure must prove that the defamatory publication was made with "actual malice" – "that is, with knowledge that it was false or with reckless disregard of whether it was false or not." St. Amant v. Thompson, 390 U.S. 727, 728, 88 S. Ct. 1323, 1324 (1968). "The defendant in a defamation action brought by a public official cannot, however, automatically ensure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith." Id. at 732. However, "when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation" or "where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports," "professions of good faith will be unlikely to prove persuasive." Id.; accord Connaughton v. Harte Hanks Commc'ns, Inc., 842 F.2d 825, 839 (6th Cir. 1988).

Put simply, the subjective belief of the Defendant can be no defense to an assertion of actual malice when the defamatory remarks are inherently improbable or are obviously dubious. See St.

Amant, at 732. In the case at bar, the Complaint pleads sufficient facts to support such a conclusion.

Regarding Defamation Specimen 1, its title concludes that "Ickedmel is a sex-trafficing [sic] code word." Complaint at ¶ 20 Mr. Cedeno has demonstrated in his Complaint how Mr. Upchurch had actual knowledge of the falsity of this statement. On the very day that he made this statement, Mr. Upchurch published a video where Mr. Cedeno explains the genesis for the term. Complaint at ¶¶ 21, 22. Beyond this, it seems inherently improbable and reckless for Mr. Upchurch to rearrange the letters in Mr. Cedeno's handle to state that it is a sex-trafficking code word, and therefore to imply that Mr. Cedeno is communicating to the world that he is a sex trafficker, without providing additional evidence to that end. Thus, not only did Mr. Upchurch behave recklessly, but he also had actual knowledge that what he was saying was false. This is actual malice. See id.

Regarding Defamation Specimen 2, its title concludes that "Xanamay & ickedmel [are] linked to [a] hidden YouTube Pedo site." Complaint at ¶ 29. As the basis for this conclusion, Mr. Upchurch first claims that "we already linked" the "bump-lip girl" to Ickedmel and Mr. Jones. Complaint at ¶ 29. Next, Mr. Upchurch says that he typed the bump-lip girl's name into a "podcast thing." Complaint at ¶ 29. Then, he claims that from this he came across Burden of Proof's YouTube page, where he found these pornographic links in the comments section. Complaint at ¶ 29. Finally, he claims that these links are for "child porn" and that "it even says 18 and below," although the displayed comments speak nothing of the sort. Complaint at ¶ 29.

Nowhere in this video does he claim or otherwise assert that Xanamay or Mr. Jones are involved in pedophilia. Complaint at ¶ 29. Yes, he does say that "we … showed y'all who [Ickedmel and Ronnie Jones] were," but he never points the viewer to where he made these

disclosures. In fact, he does not describe in this video how Xanamay or Mr. Jones supposedly engage in pedophilia or sex trafficking, nor does he explain how Mr. Cedeno is linked to them.

Mr. Upchurch states unequivocally that "Bump lip girl just deleted her [f— k]ing YouTube," which means that she is no longer on YouTube. Complaint at ¶ 29. Yet somehow, when he types "Xanamay" into the "podcast thing," he goes to the channel of Burden of Proof and concludes that, somehow, her page has something to do with Xanamay, and by extension, Mr. Cedeno, simply because Burden of Proof is discussing Ms. Rodni. See Complaint at ¶ 29.

First, the conclusion found in the title to Defamation Specimen 2 is dubious if only because the pornographic sites to which Mr. Upchurch refers are by no means hidden. By simply typing the name of "bump lip girl" into a "podcast thing" to find these alleged "pedo sites," Mr. Upchurch demonstrated that websites are not only out in the open, but that whoever, or whatever, placed them into the comments section of Burden of Proof's page wanted them to be ubiquitous.

Beyond this, it is absurd that Mr. Upchurch could tie Mr. Cedeno to any websites – be they for adult porn, child porn, or whatever else – that may be found on the ***comments section*** of another person's YouTube page. This is especially true when no comment on that page references Mr. Cedeno or his handle "Ickedmel." Common sense dictates that comments sections are open to anyone who makes comments on videos. Furthermore, a person like Mr. Upchurch whose YouTube videos have been watched ***two billion times***, see Complaint at ¶ 2, should have plenty of experience with comments on his videos to understand how comments sections work.

On top of this, the videos to which Mr. Upchurch refers clearly state in plain English that they are "adult porn" for "18 and over." See Complaint at ¶ 32.

All in all, it was inherently improbable and obviously dubious of Mr. Upchurch to say that Mr. Cedeno was linked to a hidden YouTube pedophile website or that his handle was a sex

trafficking code word. See St. Amant, 390 U.S. at 728. Indeed, the anemic causal nexus that Mr. Upchurch uses to support his claims of sex trafficking and pedophilia would have made Josef Stalin proud. Stalin's chief of staff, Lavrentia Beria, once advised the Soviet leader, "You bring me the man; I'll find you the crime." Defamation Specimens 1 and 2 have brought the man, *i.e.*, Melvin Cedeno. Now, Mr. Upchurch has found the crimes, *i.e.*, sex trafficking and pedophilia. Mr. Upchurch's behavior is the black-letter-law definition for "recklessness." See id.

Therefore, Mr. Cedeno has made a plausible case in his Complaint for actual malice. See id. Because Mr. Upchurch acted with actual malice, the third element of defamation is met. See Jews for Jesus, Inc., 997 So. 2d at 1106.

4. Defamation Specimens 1 and 2 caused Mr. Cedeno to suffer actual damages.

In Time, Inc. v. Firestone, 96 S. Ct. 958 (1976), the Supreme Court made it clear that actual damage in a defamation case is not confined to simply damage to reputation:

> Petitioner has argued that because respondent withdrew her claim for damages to reputation on the eve of trial, there could be no recovery consistent with Gertz. Petitioner's theory seems to be that the only compensable injury in a defamation action is that which may be done to one's reputation, and that claims not predicated upon such injury are by definition not actions for defamation. But Florida has obviously decided to permit recovery for other injuries without regard to measuring the effect the falsehood may have had upon a plaintiff's reputation. This does not transform the action into something other than an action for defamation as that term is meant in Gertz. In that opinion we made it clear that States could base awards on elements other than injury to reputation, specifically listing "personal humiliation, and mental anguish and suffering" as examples of injuries which might be compensated consistently with the Constitution upon a showing of fault. Because respondent has decided to forgo recovery for injury to her reputation, she is not prevented from obtaining compensation for such other damages that a defamatory falsehood may have caused her.

Time, Inc., at 460. Citing this case, the Supreme Court of Florida indicated in Miami Herald Pub. Co. v. Ane, 458 So. 2d 239 (Fla. 1984) that the standard for actual injury is rather broad:

> Finally, petitioner argues that the damage award is erroneous because it was based on mental anguish and personal humiliation only, rather than injury to reputation. Actual damage to reputation is not required under Gertz, however, as long as there is evidence of some actual injury, of which injury to reputation is but one example.

Id, at 242.

In the case at bar, Mr. Cedeo has articulated actual damage in the Complaint. First, he articulates how Ralph Simard threatened to put a gun into Mr. Cedeno's mouth while referencing the words "pedo" and "Ryan" in his message, thereby indicating that the defamation complained of herein was published to him. Complaint at ¶ 45 (a). Mr. Cedeno also received other messages from Mr. Upchurch's followers, further indicating damage to Mr. Cedeno's reputation. Complaint at ¶ 45 (b). Fearing for his life and the life of his daughter, Mr. Cedeno then filed criminal charges against Simard in Hollywood, Florida, where Mr. Cedeno lives. Complaint at ¶ 45 (c). He then purchased security cameras for his home. Complaint at ¶ 45 (d). And in the days following the publication of this defamation, Mr. Cedeno lost subscribers to his channel. Complaint at ¶ 45 (e).

Thus, not only did Mr. Cedeno suffer damage to his reputation, but he also suffered extreme mental anguish and fear for the safety of his family. Thus, the fourth prong of the test for defamation has been met. See Jews for Jesus, Inc., 997 So. 2d at 1106.

5. Defamation Specimens 1 and 2 are defamatory.

A statement is pure opinion when it is "commentary or opinion based on facts that are set forth in the subject publication or which are otherwise known or available to the reader or listener." Skupin v. Hemisphere Media Grp., Inc., 314 So. 3d 353, 356 (Fla. 3d DCA 2020). By contrast, a statement is mixed opinion "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)). Likewise, "a statement that although ostensibly in the form of an opinion 'implies the allegation of undisclosed defamatory facts as the basis for the opinion,' is actionable." E. Air Lines, Inc. v. Gellert, 438 So. 2d 923, 927 (Fla. Dist. Ct. App. 1983) (quoting Restatement (Second) of Torts § 566 (1977)).

The definitions for "pure opinion" and "mixed opinion" referenced above, however, are lacking in one significant respect, at least with regard to the facts of this case: These definitions do not define at a rudimentary level what is an "opinion" – be it "pure," "mixed," or otherwise. For this definition, attention should be turned to the Supreme Court's holding in Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 575 U.S. 175 (2015):

> A fact is "a thing done or existing" or "[a]n actual happening." Webster's New International Dictionary 782 (1927). An opinion is "a belief[,] a view," or a "sentiment which the mind forms of persons or things." Id., at 1509. Most important, a statement of fact ("the coffee is hot") expresses certainty about a thing, whereas a statement of opinion ("I think the coffee is hot") does not. See *ibid.* ("An opinion, in ordinary usage . . . does not imply . . . definiteness . . . or certainty"); 7 Oxford English Dictionary 151 (1933) (an opinion "rest[s] on grounds insufficient for complete demonstration"). Indeed, that difference between the two is so ingrained in our everyday ways of speaking and thinking as to make resort to old dictionaries seem a mite silly.

Id., at 183.

Mr. Upchurch writes with ontological certitude that "Ickedmel is a sex-trafficking code word," and that "Xanamay and Ickedmel [are] linked to [a] hidden YouTube pedo site." See Complaint, at ¶¶ 20, 29. Thus, the definitive nature of these written titles belies any contention

they may be opinions of any sort. See id. These titles are factual assertions, not opinions. See id. Thus, they are afforded no special protection.

With respect to Defamation Specimen 1, Mr. Upchurch emphasizes that much of his monologue is devoted to asking questions as to why the name "Ickedmel" can be rearranged into "cel me kid" or "licked me." Upchurch Memo, at p. 21. But even then, Mr. Upchurch answers his questions with the definitive conclusion in the written title to his video, *to-wit*: "Ickedmel is a sex-trafficking code word." The answer in the title is a *fait accompli*, making the questions moot.

As for Defamation Specimen 2, Mr. Upchurch raises no questions in his underlying video. Thus, the conclusion in the title to Defamation Specimen 2 (*i.e.*, "Xanamay and Ickedmel linked to hidden YouTube pedo site.") expresses absolutely no ambiguity. Therein, he literally and unambiguously states that Ickedmel (*i.e.*, Mr. Cedeno) is linked to a hidden YouTube pedophilia website.

Because the statements raised in the titles to Mr. Upchurch's video are definitive statements of fact, Mr. Upchurch cannot hide behind opinion or hyperbole as being a shield. But even if he could claim that these statements were pure opinions, he would be hard pressed to do so.

For example, in the case of Defamation Specimen 2, Mr. Upchurch does not refer viewers to any previous video that supports for his assertion that Xanamay and Ickedmel are linked, nor does he give any synopsis of the facts giving rise to this conclusion that may have been found in any such video. See Complaint, at ¶ 29. Thus, because Mr. Upchurch is relying on hidden facts when he made this assertion, it is actionable. See E. Air Lines, Inc., 438 So. 2d at 927 (Fla. Dist. Ct. App. 1983) (quoting Restatement (Second) of Torts § 566 (1977)).

Because most of the community, speaking by and through their elected representatives in Congress and in the statehouses of Florida, Tennessee, and elsewhere, have condemned sex

trafficking and pedophilia by enacting criminal prohibitions thereto, Defamation Specimens 1 and 2, including their respective titles, tend to prejudice Mr. Cedeno in the eyes of, at minimum, a substantial and respectable minority of the community. And because these statements are not opinions, but factual assertions, they are defamatory.

Ergo, the fifth and final element of defamation under Florida law (*i.e.*, a defamatory statement) has been met.

C. The Complaint States a Valid Claim for Intentional Infliction of Emotional Distress and False Light (Tennessee Law).

Although Mr. Cedeno contends that Florida law should govern this action, he makes these arguments in case the Court finds that Tennessee law is the better choice of law.

Mr. Upchurch contends that Mr. Cedeno's claim for intentional infliction of emotional distress may be barred under Florida law pursuant to the single publication/single action rule. See Upchurch Memo, at p. 34. While that appears to be the case under Florida law in view of the cases cited by Mr. Upchurch, this does not appear to be the situation under Tennessee law. Therefore, if the Court does decide that Tennessee law governs, Mr. Cedeno contends that his claim for intentional infliction of emotional distress should remain viable.

Similarly, since Mr. Cedeno has demonstrated that he is not a public figure and that Mr. Upchurch did act with actual malice, see Section V (B)(3), supra, Mr. Cedeno's claim for false light should also remain viable.

VI. CONCLUSION

For all the reasons set forth above, Melvin Cedeno prays that this Honorable Court deny the Defendant's Motion to Dismiss the Complaint since it is possible for the Plaintiff to prove a set of facts in support of his claims. See Guzman, 679 F.3d at 429.

RESPECTFULLY SUBMITTED, on this the 4th day of December 2023,

MELVIN CEDENO

/s/ Matthew D. Wilson
BY: _____
Matthew Wilson (TN BPR 028175)
The Law Office of Matthew Wilson
2218-B West Main St., Tupelo, MS 38801
Phone: (662) 260-6544
Fax: (662) 546-4893
Email: *lawyermatt@betteraskmatt.com*

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been served on the following via the Court's CM/ECF system:

Cynthia A. Sherwood, 020911
Austin M. Correll, 039561
414 Union Street
Suite 1110
Nashville, TN 37219
cynthia@sherwoodlitigation.com
austin@sherwoodlitigation.com

RESPECTFULLY SUBMITTED, on this the 4th day of December 2023,

/s/ Matthew D. Wilson
_____