

THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

Case No. 502015CA013133XXXXMB AB

George B. Lilly,

Plaintiff,

v.

Nicholas Bessenroth, a/k/a
Nicholas Bruno Bessenroth,

Defendant.

_____ /

FINAL JUDGMENT

THIS CAUSE came before the Court for a non-jury trial commencing on May 28, 2019 and ending May 30, 2019. The Court has received evidence, heard testimony and arguments of counsel, and is otherwise fully advised in the premises. The Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Plaintiff George B. Lilly's ("Lilly") brought claims for damages against Defendant Nicholas Bessenroth ("Bessenroth") for (1) statutory violation of Section 39.206(10), Florida Statutes, and (2) defamation *per se*.

2. The Plaintiff is the current husband of the Defendant's former spouse, Jessica Buthman, and step-father to the Defendant's biological daughter, O.B.

3. At the heart of this case is the extremely antagonistic relationship between ex-husband/father, the Defendant Bessenroth, and the new husband/stepfather, Plaintiff Lilly. O.B.'s parents were divorced in March of 2011. The parties have an adversarial relationship history that

intensified when Plaintiff, his new wife non-party Jessica Buthman (“Buthman”), and his new stepdaughter O.B., who was approximately five (5) years old, relocated from West Palm Beach, Florida to Nashville, Tennessee in late 2012. The Defendant blames the Plaintiff for the failure of his marriage and for the loss of primary custody of his biological daughter. The Defendant, who had unsuccessfully attempted to prevent the relocation in the Unified Family Court in Palm Beach County, Florida, was unhappy with the resulting custody arrangement which, in effect, required him to maintain a second residence in Tennessee and be away from his business for approximately one-third of each month which created a financial burden on him.

4. In the summer of 2014, on the first day of Bessenroth’s summer break with O.B., he served his ex-wife, Buthman, with a Motion for Contempt and Enforcement in an attempt to modify the new custody/relocation arrangement. In an Order issued on April 7, 2015, the Court found the Defendant “fell woefully short of meeting his evidentiary burden.” (Plaintiff’s Exhibit 4).

5. The Defendant began his summer 2015 time-sharing with O.B. in the beginning of June of 2015, when the two drove together from Nashville, Tennessee to Palm Beach County, Florida where O.B. would spend the next six weeks with the Defendant. According to the Defendant, it is during this long car trip that O.B., who was approximately seven years of age, allegedly began telling her father of purported “child abuse” by the Plaintiff. However, the Defendant did not immediately act on the information and failed to mention any purported concerns to hospital staff at Good Samaritan Hospital where he brought O.B. to the emergency room due to a minor illness a couple of weeks later in mid-June of 2015.

6. The Defendant called in a report of child abuse to the Department of Children and Families (“DCF”) accusing the Plaintiff of abusing his step-daughter, O.B., on or about June 27,

2015 – nearly a month after O.B. had allegedly told the Defendant of the purported abuse, and on the same day that the Defendant and O.B. were leaving on a two-week vacation in Europe. Within a couple of hours of receiving the call from the Defendant, a case was opened by the DCF and an investigator along with a law enforcement officer was sent to interview the Defendant and O.B. before they left for the airport. (Plaintiff's Exhibit 7). Shortly following this report by the Defendant and while he was still in Europe with his current wife and O.B., the Defendant filed a Supplemental Petition for Change of Custody in the family court in Palm Beach County, based on his report to the DCF alleging that it was in the child's best interest that the Petition be granted pending the conclusion of the DCF investigation. (Plaintiff's Exhibit 8).

7. Shortly thereafter, the DCF case was transferred to the Tennessee Department of Children's Services ("DCS"), because the child and her primary caregivers, the Plaintiff and Buthman, all reside in Tennessee. At that point, the Florida DCF closed its file for lack of jurisdiction and no findings were made as to the veracity of the allegations of abuse, nor was there any investigation into whether the report by Defendant to the DCF was false. Following its investigation, the Tennessee DCS closed the case and classified it as "No Services Needed", meaning that there was no support for the allegations of abuse and no determinations by investigators to warrant removing the child from the Plaintiff and Buthman's care. (Plaintiff's Exhibit 11). The parties stipulated that the Tennessee DCS's determination of "No Services Needed" was tantamount to finding that the allegations of child abuse were unsubstantiated.

8. In the summer of 2016, following a dispute with his ex-wife regarding summertime custody sharing dates, the Defendant hired a private investigator, George Reid Rust who, on the authority of the Defendant's counsel, J. Matthew Thorstad, Esq., authored and delivered a letter addressed to Kathrine McLaughlin, the sister of the Plaintiff's ex-wife, Meghan McLaughlin,

which published false accusations of child abuse against the Plaintiff. Rust's letter failed to mention that the investigation into the alleged "abuse" had been closed nearly a year earlier as unfounded and falsely implied that the Plaintiff was continuing to abuse the child. The letter states in pertinent part that "GBL lately has also been the subject of a DCF Investigation here in Florida and in Nashville Tennessee involving child abuse/mistreatment. That child is Nick Bessenroth's daughter [O.B.], a cute little 7 year old girl who was 5 when these problems started. I am assuming you are a parent, that you can understand Mr. Bessenroth's concern for his daughter health, safety and welfare." (Plaintiff's Exhibit 14).

9. In the following late spring of 2017, the Defendant filed a Petition for Order of Protection against the Plaintiff in Tennessee, alleging that the Plaintiff was harassing the Defendant and continuing to abuse O.B., and requested the court there to issue an immediate temporary "no-contact" Order against the Plaintiff. (Plaintiff's Exhibit 16). Similar to the Defendant's prior Motion for Contempt against Buthman in 2014 and his report of child abuse against the Plaintiff to state agencies in 2015, the Tennessee Petition for Order of Protection was denied because the Defendant "did not prove the evidence in [his] petition." (Plaintiff's Exhibit 17).

10. The Defendant's mother, Margrit Bessenroth, testified that she never abused the Defendant, Bessenroth, as a child, even though the Defendant testified under oath in a deposition in 2011 that Margrit and his father physically abused him and then later recanted his testimony.

11. The Defendant's current wife, Melissa Rose Bessenroth, stated that O.B. began discussing the abuse allegations with the Defendant at the end of May 2015, and perhaps weeks or even months before that, yet the Defendant did not do anything about it until June 24, 2015 when

he started calling Jessica Buthman and then contacted the DCF on June 27, 2015, the day he and his entire family, including O.B., were leaving for vacation to Europe.

12. The private investigator hired by the Defendant, George Reid Rust, testified that he wrote the letter dated May 12, 2016 addressed to Kathrine McLaughlin at the express direction and approval of Mr. Thorstad, Defendant, Bessenroth's attorney. See Plaintiff's Exhibit 14. Mr. Rust confirmed the Defendant was aware of the letter dated May 12, 2016 and was within earshot when Rust and Thorstad discussed the letter and that, although he declined to actually review it, the Defendant knew about the letter before it was sent to Ms. McLaughlin.

13. The Plaintiff's stepmother, Cheryl M. Lilly, testified she received a copy of the May 12, 2016 letter by George Reid Rust via email dated June 14, 2016 from the Defendant's ex-wife, Meghan Scott, indicating that Ms. Scott, and her sister, Kathrine, had clearly received and seen Mr. Rust's letter where Meghan Scott stated in the e-mail: "I am really upset by the contents. I am hoping this is not actually happening to George." See Plaintiff's Exhibit 15.

14. Jessica Buthman's mother and O.B.'s natural grandmother, Renee Whatley, testified that Plaintiff, Lilly and O.B. had a great relationship, based on her frequent observations and never acted afraid of her stepfather. Ms. Whatley testified that O.B. said that she was told by her father that she needs to "choose a side" between him and her mother. O.B. also told Ms. Whatley that she was told by her father that her mother cheated on him with the Plaintiff, which was why they got a divorce. Finally, Ms. Whatley testified that O.B. falsely accused her of choking her when she realized she was being tape-recorded by Whatley because of certain misbehavior, and when her grandmother told her it was wrong to falsely accuse people, O.B. told her that she does it because it makes other people do what she wants. This incident happened right after returning from her father's custody for ten (10) days.

15. O.B.'s mother, ex-wife of the Defendant and current wife of the Plaintiff, Jessica Buthman, testified that during the Defendant's deposition on January 20, 2011 in their divorce proceedings, the Defendant, Bessenroth testified under oath that he was abused by his mother and father, but later recanted his testimony during a November 17, 2011 deposition. See Plaintiff's Exhibits 18 and 19. Ms. Buthman described how the Defendant was extremely unhappy about their divorce, his bitterness towards her, and the Defendant's hatred of the Plaintiff, Lilly. She described the attempts by the Defendant to create circumstances or arguments to change the custody/time-sharing arrangement after she and the Plaintiff moved to Tennessee with O.B. Ms. Buthman testified about the numerous phone calls and text messages between her and the Defendant in the several days leading up to the Defendant making the false report to Florida DCF. The text messages (see Plaintiff's Exhibit 6) show that Buthman did not want O.B. put in the middle of her parents' arguments or used as a pawn by the Defendant because it was damaging to the child. She repeatedly testified that during virtually every phone call to O.B., she would hear the Defendant coaching, prompting, leading and telling O.B. what to say to her about the alleged abuse by the Plaintiff. She described how distraught she was when her 7-year-old daughter, O.B., told her, on the day she was leaving with her father and his family for a lengthy vacation to his home country of Germany, that she "was not coming back home." Ms. Buthman described the various expenses incurred by the Plaintiff as a result of the Defendant's report to the Florida DCF, and that she advanced some of them, for example, babysitter payments, child therapy counseling for O.B. and some payments to Georgia Newman, Esq. for attorney's fees. See Plaintiff's Exhibits 22, 24 and 25A. She also testified that she was reimbursed by the Plaintiff for these payments. See Plaintiff's Exhibit 21A.

16. Georgia Newman, an attorney who represented Buthman in her divorce proceedings with the Defendant, Bessenroth and in the subsequent proceedings involving the relocation, contempt, the Florida DCF report and supplemental petition for change of custody filed by the Defendant, testified as follows:

a. She described how the Defendant sent an audio-tape to Buthman in July 2015 that was recorded by the Defendant while O.B. was speaking to him, which Newman listened to, and she explained that the recording sounded like the Defendant was prompting and leading O.B. to say the things she said about the alleged abuse.

b. She further testified with respect to the attorney's fees paid to her by the Plaintiff, Lilly and Buthman for having to deal with the false Florida DCF report and the related Supplemental Petition for Temporary Change of Child Custody filed by Bessenroth's counsel on July 2, 2015 ("Petition"), which was based solely on the DCF Report. See Plaintiff's Exhibit 8.

c. Ms. Newman testified that she contacted Kala Saunders a/k/a Kala Williams, the Florida DCF investigator assigned to the case initiated by the Defendant's report to advise her she was concerned the Defendant was trying to get an advantage in the ongoing custody battle between Ms. Buthman and the Defendant by filing the false report to DCF. She described her several attempts to set a hearing on her Amended Motion to Dismiss the Defendant's Petition to Change Custody, shortly after the Tennessee DCS "No Services Needed" letter was issued, and that the Defendant, by his attorney J. Matthew Thorstad, Esq. eventually filed a Notice of Voluntary Dismissal of Former Husband's Supplemental Petition for Temporary Change of Child Custody dated September 25, 2015. See Plaintiff's Exhibit 12.

17. The Plaintiff, George B. Lilly, testified as follows:

a. The Defendant was frequently uncooperative with time-sharing arrangements for O.B., evinced anger and resentment towards Lilly and his relationship with Buthman, and took his anger out on both Buthman and O.B. by cutting off child support payments at one point, and insisting on strict adherence to time-sharing days, even if it was inconveniencing O.B.

b. The first time the Plaintiff became aware of any allegations that he had abused O.B., physically or otherwise, was some time in mid/late June, approximately June 20, 2015, when his wife, Buthman mentioned she had received a phone call from Defendant Bessenroth and indicated something to the effect “here we go again with Nick talking crazy”.

c. The Plaintiff vehemently denied all of the allegations of physical abuse against O.B. as set forth in the DCF intake report. He denied the allegations that he had thrown objects or scissors, and specifically stated that he never threw any object at O.B. or her mother and was never violent or physical towards O.B. or her mother in any way. He admitted that he and his wife have been known to yell at each other.

d. The Plaintiff testified about his relationship with O.B., how he was her primary caregiver for several hours each day when she returned from school in the mid-afternoon until her mother, Buthman, would get home from work several hours later; how he would take her to activities and events, including sports activities and how he even coached her soccer team for a period of time. He stated that although he had rules for her to obey and would occasionally discipline her or enforce those rules, he was never abusive towards her, and that her mother would not have permitted any such thing to take place. Lilly explained that overall he had a very good step-father/daughter relationship with O.B. and cared for her well-being and welfare very deeply.

e. He testified that although Attorney Newman was retained by Buthman, the Plaintiff guaranteed payment of her fees. The services Attorney Newman rendered both in dealing with the

Florida DCF and in responding to the Supplemental Petition in the court proceedings benefitted both Buthman and the Plaintiff. In fact, as shown by Plaintiff's Exhibit 8 at paragraph 12, Bessenroth requested injunctive relief against the Plaintiff, which Ms. Newman addressed in her court filings on the Plaintiff's behalf.

f. The Plaintiff reimbursed Buthman for any legal fees that she paid to Georgia Newman, Esq. for these services, and otherwise directly paid, through his line of credit, the balance of Ms. Newman's legal fees incurred in connection with those proceedings. See Plaintiff's Exhibit 20 and 21B. Overall, he expended \$24,383.66 for Ms. Newman's services rendered between late June through late September of 2015 in connection with the issues arising out of the DCF report. See Plaintiff's Exhibit 25A.

g. The Plaintiff also testified he and Buthman had to hire Tennessee counsel to deal with the Tennessee DCS, and that Lilly paid \$5,000.00 for these legal services. See Plaintiff's Exhibit 25B. He described the significant personal humiliation and mental/emotional anguish that he suffered as a result of Defendant's false report to the Florida DCF. He testified to the damage it caused his marriage and that he needed therapy and he and his wife required marital counseling as a result of the DCF report.

h. The Plaintiff testified that when he and his wife attended a weekly marital therapy workshop, the Defendant called the emergency number given to him by his wife to find out where they were and then used that information with his attorney, J. Matthew Thorstad, Esq., to begin subpoenaing their confidential therapy session records which caused even more distress to the Plaintiff and Buthman and cost them even more money in legal fees. The Plaintiff incurred \$13,310.00 in marital therapy counseling fees.

i. The Plaintiff also explained that babysitters were hired by Buthman to be with O.B. during the times when she needed to be supervised after school, in lieu of having him do so as he had done for several years, in order to avoid any more false reports by the Defendant. Both Buthman and the Plaintiff testified that the decision to employ babysitters on a regular basis was not done because of any concern of abuse, but simply as a protective measure to negate any further attempts by the Defendant to make false abuse allegations against Lilly. The Plaintiff testified he incurred \$19,789.50 in babysitter expenses. See Plaintiff's Exhibit 22. The Plaintiff also described how, nearly a year after the false report was made, and ten (10) months after the Tennessee DCS had issued its "No Services Needed" letter, see Plaintiff's Exhibit 11, which the parties have stipulated is tantamount to finding that the allegations of abuse were unsubstantiated, Lilly learned in June 2016 that the Defendant's agent had sent a letter to Lilly's ex-wife, Meghan Scott and her sister Kathrine McLaughlin, publishing the false allegations of child abuse against him. The Plaintiff testified that he suffered personal humiliation, embarrassment and mental anguish as a result of this additional false accusation published to his ex-wife and her family.

18. The Defendant, Nicholas Bessenroth, provided the following testimony at the non-jury trial:

a. He admitted that he was unhappy about his divorce from Buthman, and he admitted that he blames Plaintiff Lilly for causing the divorce.

b. The Defendant testified that he called the Florida DCF to file his report of child abuse as he and O.B. were leaving for a family vacation, and a police officer came to his house with the Florida DCF investigator. The Defendant acknowledged that he did not report the alleged child abuse to the hospital staff on June 15, 2015.

c. Defendant testified that upon his return from Florida with O.B. after the European vacation, when he took her back to Tennessee in or about mid-July 2015, he first went to the DCS office with O.B. to meet with the DCS investigators, and was then directed to take the child directly to her mother's home i.e. Lilly and Buthman's residence, to return her to the custody of her mother and step-father.

CONCLUSIONS OF LAW

In Count I, the Plaintiff seeks money damages pursuant to section 39.206(10), Florida Statutes alleging that the Defendant filed a false report against the Plaintiff with the Department of Children and Families.

Section 39.206(10) provides in pertinent part:

A person who knowingly and willfully makes a false report of abuse, abandonment, or neglect of a child, or a person who counsels another to make a false report may be civilly liable for damages suffered, including reasonable attorney fees and costs, as a result of the filing of the false report.

The term "false report," as used in this section means:

A report of abuse, neglect, or abandonment of a child to the central abuse hotline, which report is maliciously made for the purpose of:

- (a) Harassing, embarrassing, or harming another person;
- (b) Personal financial gain for the reporting person;
- (c) Acquiring custody of a child; or
- (d) Personal benefit for the reporting person in any other private dispute involving a child.

Fla. Stat. §39.01(27).

The above statutory provisions must be read in context of the entire statute which contemplates a procedure whereby the Department is the state agency responsible for not only receiving and investigating reports of abuse, abandonment and neglect for Florida's children, but is also the entity that must bring administrative action where needed regarding false reports. It is

undisputed that no administrative action was brought by DCF, either in Florida or Tennessee, against the Defendant for making a false report.

The language set forth in subsection (10) of the statute set forth above that a person who files a false report may be civilly liable for damages suffered including reasonable attorney's fees appears to refer to the civil penalty that may be imposed under subsection (1). This is particularly true when read in conjunction with subsection (6) which provides that in determining the amount of the fine to be imposed, the Department may consider certain factors including "the probability that serious physical or emotional harm to any person will result or has resulted, the severity of the actual or potential harm, and the nature of the false allegation."

Section 39.206, Florida Statutes does not explicitly provide individuals with a private cause of action against those making false reports under the statute. In order to determine whether a private cause of action should be judicially inferred, the Court must look to the legislative intent. *See Murthy v. N. Sinha Corp.*, 644 So.2d 983 (Fla. 1994); *Mora v. South Broward Hosp. Dist.*, 710 So.2d 633, 634 (Fla. 4th DCA 1998); *Fisher v. Metcalf*, 543 So.2d 785 (Fla. 3d DCA 1989).

The Court recognizes that this issue has been addressed by prior orders which rejected various motions to dismiss Count I without explanation. However, "the trial court retains inherent authority to reconsider and, if deemed appropriate, alter or retract any of its non final rulings prior to entry of final judgment." *See Silverstone v. Edell*, 721 So.2d 1173, 1175 (Fla. 1998).

Plaintiff also cites to the "Florida Senate Interim Project Report 2008-105", titled False Reports of Child Abuse Abandonment or Neglect, dated October 2007. While the Report does quote 39.206(10) as a third civil penalty against a false reporter in one instance, the Report is not consistent. For example, in the Report's "Summary" it refers only to the Department's ability to impose an administrative fine, which it does rarely, and criminal penalties, which are noted to be

some of the most stringent in the United States. Without mention of any “private cause of action” the Summary then concludes that these consequences appear to be effective deterrents and “*any additional tightening of the statutory provisions . . . may result in a chilling effect on legitimate reports of child abuse.*” (emphasis added).

The Court notes that in the 1998 legislative history to Chapter 98 – 403, Laws of Florida, the bill relocates relevant sections of Chapter 415, F.S. into Chapter 39, F.S. and provides procedures for local law enforcement to investigate reports of abuse that are suspected to be false reports and increase the maximum amount of an administrative fine that may be imposed for false reporting from \$1,000.00 to \$10,000.00. Specifically, section 39.206, Florida Statutes was amended to add subsection (10) in 1998 through the Marriage Preparation and Preservation Act. 1988 Fla. Sess. Law Serv. Ch. 98-403 (H. B. 1019).

In conjunction with this bill, the Florida House of Representatives prepared a staff analysis report summarizing the present state of the law and the effect of the proposed changes. Florida Staff Analysis, H.B. 1019, 6/17/1998. In reference to the changes to section 39.206, Florida Statutes, the Legislature wrote:

Section 36. Amends and rennumbers s. 415.5131, Florida Statutes, as s. 39.206, Florida Statutes, to add “abandonment” to “abuse and neglect” as a situation where an individual is subject to an administrative fine for failure to report. The maximum amount of an administrative fine that may be imposed is increased from \$1,000 to \$10,000.00.

The section provides that a person who knowingly and willingly makes a false report of child abuse, abandonment, or neglect, or who counsels another to make such a report may be held civilly liable for damages suffered as the result of the filing of a false report. Damages may include reasonable attorney fees and costs.

Nowhere in the report does the Legislature indicate an explicit intent to create a separate, private cause of action, or otherwise elaborate on the wording used in the statute. In the section

dedicated to describing the effects of the proposed changes, the report only acknowledges the increased criminal penalty for false reporting and the increase in permitted administrative fine amounts. This issue appears to be a matter of first impression. There are no reported cases addressing or interpreting section 39.206(10), Florida Statutes.

In Plaintiff's Response in Opposition to Defendant's Amended Motion to Dismiss Complaint (DE 130), the Plaintiff cited *Ross v. Blank*, 958 So.2d 437 (Fla. 4th DCA 2007), for the proposition that a plaintiff seeking money damages under section 39.206(10) stemming from a false report properly brings such action "in circuit civil divisions". This is inaccurate. The *Ross* opinion states, "Appellant sued Blank for defamation per se and negligence" and there is no mention of a statutory cause of action under 39.206(10). In point of fact, the issue on appeal was seeking relief from the trial court's award of summary judgment to the defendant as to the defamation claim.

By way of comparison, section 415.1111, Florida Statutes specifically provides, "A vulnerable adult who has been abused, neglected or exploited as specified in this chapter has a cause of action against any perpetrator and may recover actual and punitive damages for such abuse, neglect or exploitation. No such language is found in Section 39.206(10). There is simply no indication, either explicit or implicit to suggest a legislative intent to create a private remedy on behalf of those who have had false reports filed against them under Section 39.206(1), Florida Statutes.

To read into the false report statute (Section 39.206(10)), a private cause of action for its breach would create a large and new field of tort liability beyond what existed at common law without clear legislative direction to do so. See *Freehauf v. School Board of Seminole County*,

623 So.2d 761 (Fla. 5th DCA 1993). For these reasons, the Court finds that Plaintiff is not afforded a private civil cause of action under Section 39.206(1) based on the filing of a false report.

In Count II, the Plaintiff claims that the Defendant's statements made as part of his report to the Florida DCF, and his agent George Reid Rust's subsequent letter of May 12, 2016 to the Plaintiff's former in-laws, accusing the Plaintiff of the felony crime of child abuse, are each defamatory *per se*.

The Court finds that based on the evidence presented, the Defendant's conduct constitutes defamation *per se* as he has falsely accused the Plaintiff of a felony crime to one or more third parties, thereby inherently damaging the Plaintiff's reputation, standing, and emotional well-being. "To establish a cause of action for defamation, a plaintiff must show that (1) the defendant published a false statement about the plaintiff, (2) to a third party, and (3) the falsity of the statement caused injury to the plaintiff." *Razner v. Wellington Reg'l Med. Ctr., Inc.*, 837 So. 2d 437, 442 (Fla. 4th DCA 2002). Defamation, both libel and slander, is actionable *per se* without a showing of special damage if it imputes to another a criminal offense amounting to a felony. *Klayman v. Judicial Watch, Inc.*, 22 F. Supp. 3d 1240, 1247 (S.D. Fla. 2014) (applying Florida law), *aff'd* (Feb. 17, 2015); *Richard v. Gray*, 62 So. 2d 597, 598 (Fla. 1953) (recognizing that a statement charging a person with committing a crime is considered defamatory *per se*).

In this case, the Defendant's conduct constitutes defamation *per se* as the Defendant has accused the Plaintiff of the felony crime of child abuse to several audiences. Pursuant to *Fla. Stat.* §827.03 "Child Abuse" means, inter alia, "Intentional infliction of physical or mental injury upon a child," or an "intentional act that could reasonably be expected to result in physical or mental injury to a child." *Fla. Stat.* §827.03(1)(b). An act of Child Abuse constitutes a felony. *Fla. Stat.* §827.03(2). As such, the Plaintiff did not need to prove actual damages as part of his *prima facie*

case because general damages are presumed. *See Piplack v. Mueller*, 121 So. 459, 459 (Fla. 1929) (“General damages from the use of words defamatory in character *per se* follow in contemplation of law and need not be proved by evidence.”). As such, where defamation *per se* has been proved, the fact finder must award, at a minimum, nominal damages without any proof of actual damages.

The clear weight of the evidence presented at trial showed that (1) the Defendant published false statements about the Plaintiff (2) to one or more third parties and (3) which were defamatory *per se*, entitling the Plaintiff to general damages. The Plaintiff also demonstrated by the greater weight of the evidence that he suffered special damages due to the Defendant’s false statements.

The Court finds that the evidence demonstrates that the substance of these statements, the accusations of child abuse against the Plaintiff, were completely untrue and, as such, constitute false and defamatory statements sufficient to satisfy the first prong of the Fourth District Court of Appeal’s *Razner* test. The Court heard testimony from the Plaintiff Lilly and Buthman (O.B.’s mother), and others that all confirm the Plaintiff never abused O.B. and that the Defendant’s statements were false, injuring the Plaintiff. The Defendant admitted he did not know if the abuse actually happened. There is no requirement that the publication be public, rather defamation merely requires publication to a third party, such as the Florida DCF here. *See Wagner, Nugent, Johnson, Roth, Romano, Erikson and Kupfer, P.A. v. Flanagan*, 629 So. 2d 113 (Fla. 1993) (recognizing the defamation may be private; action was barred by statute of limitations, but otherwise viable). Moreover, the Defendant then publicly republished the defamatory statement days later in his Supplemental Petition for Change of Custody filed by his counsel, Mr. Thorstad in the court public record on July 2, 2015 at paragraphs 8 and 9. *See* Plaintiff’s Exhibit 8.

Further, the Defendant published similar defamatory statements in his agent George Reid Rust’s May 12, 2016 letter to the Plaintiff’s ex-wife and her family. *See* Plaintiff’s Exhibits 14 and

15. The unrefuted evidence shows that the letter was delivered to the Plaintiff's former in-laws at the express direction and authorization of the Defendant's attorney and agent, J. Matthew Thorstad, Esq.,. The letter itself, in the third paragraph (see Plaintiff's Exhibit 14) contains defamatory statements which falsely implied that the Plaintiff was under investigation for child abuse in two states when, in fact, the child abuse investigation had ended nine months earlier with the allegations determined to be unsubstantiated. See Plaintiff's Exhibit 11, "No Services Needed" letter from Tennessee DCS. The letter goes on to falsely imply that the abuse of "a cute little 7 year old girl" by the Plaintiff is ongoing. Therefore, the first and second elements of the *Razner* test have been met with respect to the second defamatory publication by the Defendant, through his agents. The Court finds that the Plaintiff has satisfied all three (3) prongs of the *Razner* test and, therefore, general damages are presumed without the necessity of proof.

In defamation cases, there are typically two categories of damages which may be sought: "the affront to the plaintiff's dignity and the emotional harm done are called 'general damages,' to distinguish them from proof of actual economic harm, which is called 'special damages.'" *F.A.A. v. Cooper*, 566 U.S. 284, 301 (2012) (internal quotations omitted).

In *Hartley & Parker v. Copeland*, 51 So.2d 789 (Fla. 1951), the Court held that general damages are conclusively presumed to result from defamation *per se* and that "special damages need not be shown to sustain the action." 156 So.2d at 341. *As* such, where defamation *per se* has been proved the fact finder must award, at a minimum, nominal damages. *See Lawnwood Med. Ctr., Inc. v. Sadow*, 43 So.3d 710, 734 (Fla. 4th DCA 2010) ("If the jury finds defendant liable for slander *per se*, it must be instructed that nominal damages are deemed established as a matter of law."); *see also Myers v. Jim Russo Prison Ministries, Inc.*, 3 So. 3d 411, 412 (Fla. 2d DCA 2009)

(“One who is liable for a slander actionable per se or for a libel is liable for at least nominal damages.”).

In deciding the appropriate amount to award in general damages, “[t]here is no exact standard for fixing the compensation to be awarded on account of such elements of damage. Any award should be fair and just in light of the evidence.” *NITV, L.L.C. v. Baker*, 61 So. 3d 1249, 1254 (Fla. 4th DCA 2011).

The Court finds that the evidence demonstrates that both the Plaintiff and the Defendant allowed their animosity for one another to cloud their judgment when making decisions concerning the best interest of O.B. For example, evidence was presented indicating the Defendant told O.B. that her mother cheated on the Defendant with the Plaintiff which caused obvious distress to O.B. Additional evidence was presented demonstrating the parties inappropriately placed the child in the middle of their differences. In June of 2017, when O.B. came home from a summer visit with her father, the Plaintiff testified O.B. told him that “my daddy said you are going to jail.” The Plaintiff testified that he responded by telling O.B. that her dad had been to jail and showed O.B. a mug shot of the Defendant. Based on the totality of the evidence presented in this case, the Court finds that the Plaintiff is entitled to an award of general damages in the amount of \$10,000.00.

The Court finds that the Plaintiff is entitled to an award of special damages consisting of his out of pocket expenses caused by the conduct of the Defendant in the amount of \$62,783.16.

Finally, the Court determines that an award of punitive damages against the Defendant is not warranted under the facts of this case.

For all of the foregoing reasons, it is

ORDERED AND ADJUDGED THAT the Plaintiff George B. Lilly, whose address is 2922 Westmoreland Drive, Nashville, TN 37212, shall have and recover from the Defendant

Nicholas Bessenroth a/k/a Nicholas Bruno Bessenroth, whose address is 833 34th Street, West Palm Beach, FL 33407, the total sum of \$72,783.16, that shall bear interest at the statutory rate, for which let execution issue.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, on this 17 day of

July, 2019.

Janis Brustares Keyser
Janis Brustares Keyser
Circuit Court Judge

Copies furnished to counsel:

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