

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
SEMINOLE COUNTY, FLORIDA

GEORGE ZIMMERMAN,

Plaintiff,

vs.

CASE NO.: 12-CA-6178

RON ALLEN, c/o NBC UNIVERSAL
MEDIA, LLC, LILIA RODRIGUEZ
LUCIANO and JEFF BURNSIDE,

Defendants.

FINAL JUDGMENT

THIS CAUSE came before the Court on June 19, 2014, upon Defendants' Motion for Summary Judgment and the Court having reviewed the Complaint; Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment; Affidavit of Kathleen Snyder, with Exhibits¹; Plaintiff's Answer and Memorandum of Law in Opposition to Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment; and, Defendants' Reply Memorandum in Support of Motion to Dismiss or for Summary Judgment. The Court having heard argument of counsel and being otherwise fully apprised, finds as follows:

UNDISPUTED FACTS:

The following facts set forth in the pleadings, affidavit and exhibits are undisputed:

Plaintiff, George Zimmerman ("Zimmerman"), is a resident of Seminole County, Florida.

Defendant, NBC Universal Media, LLC ("NBC") is a Delaware Corporation. Defendant, Ron Allen ("Allen"), is a reporter for NBC. Defendant, Lilia Rodriguez Luciano ("Luciano"), and Jeff Burnside ("Burnside") were at all times material reporters for NBC.

Jurisdiction is proper in the State of Florida. Venue is proper in Seminole County, Florida.

¹ References to Kathleen Snyder's Affidavit will be designated as Aff. ¶ __. References to the Exhibits attached to the Affidavit will be designated as Exh. __

During the February 2012 time period, Zimmerman lived in a community known as The Retreat at Twin Lakes in Sanford, Florida.

Due to increasing burglaries and crime in the Sanford area, Zimmerman organized a Neighborhood Watch Program in his residential community. In furtherance of that cause, he engaged in discussions with Sanford police officials explaining in an email to the then Chief of Police: "I have recently become active within my community, initiating a Neighborhood Watch Program, and working with Sanford Police Department [sic] in an effort to curtail the spike in robberies and home invasions in neighborhood [sic] within the past two months." Exh. 4.

Zimmerman held public meetings about the Neighborhood Watch Program and provided reports of its activities in his homeowner's association newsletter. Exh. 5. Thereafter, Zimmerman took charge of the Neighborhood Watch Program and took an active role in patrolling his community and in assisting his neighbors in matters relating to public safety. In the seven months prior to Trayvon Martin's ("Martin") death, Zimmerman made multiple calls to police about young men he observed while on patrol in his neighborhood whom he considered suspicious. Exh. 7 (b)-(e).

On the evening of February 26, 2012, Zimmerman saw Martin, a 17 year old black male, walking through the neighborhood. When he first spotted Martin, Zimmerman made a telephone call to the Sanford Police Department seeking its assistance ("the non-emergency call"). Exh. 7(a). The non-emergency call, which was recorded, see Exh. 9, contains the following colloquy between Zimmerman and the police dispatcher:

Zimmerman: Hey, we've had some break-ins in my neighborhood and there's a real suspicious guy. Ah, it is Retreat View Circle. The best address I can give you is 111 Retreat View Circle. This guy looks like he's up to no good or he's on drugs or something. It's raining and he's just walking around looking about.

Dispatcher: Okay. And this guy, is he white, black or Hispanic?

Zimmerman: He looks black.

Dispatcher: Did you see what he was wearing?

Zimmerman: Yeah. A dark hoodie, like a gray hoodie, and either jeans or sweatpants and white tennis shoes. He's here now and he's just staring -

--

Dispatcher: Oh, he's just walking around the area?

Zimmerman: --- and looking at all the houses.

Dispatcher: Okay.

Zimmerman: Now he's just staring at me.

Dispatcher: Okay. And you said its 1111 Retreat View or 111?

Zimmerman: That's the clubhouse.

Dispatcher: That's the clubhouse? Do you know what the ---. He's near the clubhouse right now?

Zimmerman: Yeah, now he is coming towards me.

Dispatcher: Okay.

Zimmerman: He's got his hand in his waistband. And he's a black male.

Dispatcher: Okay. How old would you say he looks?

Zimmerman: He's got a button on his shirt. Late teens.

Dispatcher: Late teens? Okay.

Zimmerman: Um-hum. Something's wrong with him. Yep, he's coming to check me out. He's got something in his hands. I don't know what his deal is.

Dispatcher: Sounds good. Just let me know if he does anything, okay?

Zimmerman: Please just get an officer over here.

Dispatcher: Yeah, and we've got them on the way. Just let me know if this guy does anything else.

Zimmerman: Okay. These assholes, they always get away. When you come to the clubhouse, you come straight in and make a left. Actually you would go past the clubhouse.

Dispatcher: Okay. So it's on the left-hand side from the clubhouse?

Zimmerman: No. You go in straight through the entrance and then you make a left - uh, yeah. You go straight in, don't turn, and make a left. Shit. He's running.

Dispatcher: He's running? Which way is he running?

Zimmerman: Down towards the other entrance of the neighborhood.

Dispatcher: Okay. Which entrance is that, that he's heading towards?

Zimmerman: The back entrance. (inaudible)

Dispatcher: Are you following him?

Zimmerman: Yeah.

Dispatcher: Okay. We don't need you to do that.

Zimmerman: Okay.

Dispatcher: All right sir. What is your name?

Zimmerman: It's George. He ran.

Shortly after the non-emergency call, Zimmerman shot Martin resulting in Martin's death. A public controversy surrounding Martin's death immediately pursued.

Following Martin's death, the shooting and Zimmerman's role in it had already been the subject of news reports throughout Florida, in both newspapers and on multiple television stations. See Exh. 10, and Aff. ¶¶47-52. Zimmerman relocated to the Washington, D.C. area where he felt "safe" in the face of the multiple death threats he and his family had received. Exh. 3 ("when I realized the gravity of the situation and when my family began to receive death threats, at that time I became terrified"). *Id.*

On March 7, Reuters published an article about the incident, first reporting to a national audience that Martin's parents wanted to see Zimmerman arrested and that, because Martin was black and "Zimmerman is white, Martin family attorney, Benjamin Crump ("Crump") said race is "the 600 pound elephant in the room." Aff. ¶53.

The next day, CBS became the first national television network to report the story, broadcasting a segment on "CBS This Morning." Exh. 12 and Aff. ¶54. That network introduced its story as one about "a case that has serious racial overtones." *Id.* Later that afternoon, Martin's parents and Crump held a widely publicized news conference. See, e.g., Aff. ¶¶55-57.

During a news conference, on or about March 12, 2012, the Sanford police reported that Zimmerman had received death threats. Exh. 13.

By March 14, Martin's death was reported in newspaper articles as the focal point of an ongoing controversy regarding race relations and public safety in Sanford. Aff. ¶58, 59 and 60, and by the NAACP, *Id.* ¶61.

On March 15, the *Orlando Sentinel* reported that Zimmerman's father, Robert Zimmerman Sr., had, on his son's behalf, written a letter and given an interview to the newspaper that day claiming that "[t]he media portrayal of George as a racist could not be further from the truth." *Id.* ¶62. The *Sentinel's* report on his father's statement noted that George Zimmerman and the Sanford Police Department were already "at the center of a firestorm." *Id.* The letter itself became the subject of multiple news reports in both the local and national press. *Id.* ¶¶63-67.

On March 16, Sanford Police released to the press and public the recording of Zimmerman's call to police as well as recordings of seven 911 calls made by witnesses that night. *Id.* ¶68. As a result, newscasts across the country played excerpts from the recording and newspapers and other publications similarly quoted portions of the calls. *Aff.* ¶¶69, 70, 71 and 72.

~~Media coverage of the Martin case intensified. *Aff.* ¶¶33, 69, 74 and 75. On March 19, when several members of Congress called for a federal hate crime investigation, protests and demonstrations in Sanford continued, and the White House press secretary acknowledged that President Obama was aware of the case. *Aff.* ¶73.~~

On March 19, the State released to the press and public recordings of Zimmerman's previous calls to police about other "suspicious persons." Exh. 14(a), 15. Additionally, the Justice Department announced that its Civil Rights Division and the FBI would investigate Martin's death. *Id.* ¶77. There were several News broadcasts following these announcements. *Aff.* ¶¶70 and 80. *See also* Exh. 16.

Zimmerman was arrested on April 11, 2012, and charged with second-degree murder. Exh. 20 and 21.

On April 30, 2012, Zimmerman's counsel launched a Facebook page, a website and a Twitter account. Exh. 22 and *Aff.* ¶¶87 and 88.

On July 6, 2012, Zimmerman's lawyers issued a public statement. *Aff.* ¶89. Thereafter, Zimmerman and his counsel made a series of media appearances. *Aff.* ¶¶40, 41 and 90.

Zimmerman filed his Complaint in this case on December 6, 2012, alleging Count I Defamation and Count II Intentional Infliction of Emotional Distress, challenging portions of four news reports broadcast nationally by NBC News and a fifth broadcast by NBC's owned and operated television station WTVJ.

On July 13, 2013, Zimmerman was acquitted of all criminal charges against him for the death of Martin.

THE CHALLENGED BROADCASTS:

In his Complaint, Zimmerman challenges the following NBC Broadcasts:

March 19, 2012, WTVJ Broadcast. WTVJ broadcast to its viewers in the greater Miami metropolitan area a report by Burnside about the 911 calls, a rally that day at the Seminole County courthouse, and presidential spokesman Jay Carney's remarks that the White House was "aware of the incident." Exh. 17(a). In the portion of the report recapping the non-emergency call, Burnside explained to viewers, "[h]ere are excerpts of that call," *Id.*, followed immediately by these portions of the audio of Zimmerman's voice:

- "There is a real suspicious guy."
- "Ah, this guy looks like he is up to no good or he is on drugs or something."
- "He looks black."

The audio includes the exchange, in the non-emergency call, in which the dispatcher asks if Zimmerman is following the suspicious person. *Id.* Burnside also reported that police "are calling it self-defense, and say they have a lot more investigating to do. *Id.*²

Burnside further reported that "the father of George Zimmerman, the shooter, weighed in his opinion because he sent a letter to the Orlando Sentinel saying his son is being misunderstood and is not a racist." *Id.*

March 20, 2012, TODAY show broadcast. TODAY show reporter Luciano broadcasted an interview she conducted with Zimmerman's neighbor and friend Frank Taaffe, in which she paraphrases Taaffe as saying that Zimmerman "is neither trigger-happy nor a racist." Exh. 17(b). Luciano's report includes excerpts from the non-emergency call in which Zimmerman says:

- "This guy looks like he's up to no good or on drugs or something."
- "He's got his hand in his waistband. And he's a black male."

The broadcast also reports that "Police have now released more calls from Zimmerman revealing he had a history of reporting suspicious neighborhood activity." *Id.*

March 20, 2012, NBC Nightly News broadcast. NBC News reporter Allen reported, among other matters, that "Sanford Police say George Zimmerman shot and killed Trayvon Martin in self-defense, a shooting with no racial overtones, no hate crime. But when Zimmerman was calling police the night Trayvon Martin was killed, he

² This Court entered an Order on June 24, 2014, dismissing, with prejudice, Defendant Burnside and the March 19, 2012, WTVJ broadcast.

described the victim using a racial epithet.”³ Exh. 17(c). The broadcast included an audio excerpt from the non-emergency call, with both of the words Zimmerman muttered “bleeped.” *Id.*⁴

The next day, March 21, 2012, Luciano explained on the TODAY show that the recording of Zimmerman’s call to police was “fueling speculation online that Zimmerman may have used a racial epithet. Though some news outlets believe he muttered the word ‘punks.’” Exh. 14(d). The report then played the relevant clip from the non-emergency call with the two words in question bleeped. *Id.*

March 22, 2012, TODAY Show Broadcast. TODAY show reporter Luciano described expanding public protests and reiterated the Sanford Police conclusion that the evidence supported Zimmerman’s claim of self-defense. Exh. 17(d). The broadcast also included excerpts from the non-emergency call in which Zimmerman is heard saying:

- “He looks like he’s up to no good. . . .”
- “He looks black.”

Exh.17(d).

Three days later, March 25, 2012, the TODAY show broadcast the first of six live interviews with Craig Sonner, who was then Zimmerman’s counsel. Ex. 14(e). In those interviews, Sonner reiterated Zimmerman’s assertions that he acted in self-defense, explaining that Martin had attacked his client, broken his nose, and knocked him down. *Id.* TODAY also interviewed Zimmerman’s friend Joe Oliver, who asserted that there had been a rash of criminal activity in Zimmerman’s neighborhood, which explained his decision to follow Martin. *Id.* On March 26, Sonner and Oliver again appeared on the TODAY show. During that broadcast, Sonner repeated that Zimmerman had been attacked, had shot Martin in self-defense, and was not a racist. Ex. 14(f). Asked by host Ann Curry if he thought Zimmerman was capable of racial profiling, Oliver responded emphatically that the answer was “no.” *Id.*

March 27, 2012, TODAY Show broadcast. TODAY show reporter Allen reported that “George Zimmerman’s defenders say there was a life and death struggle that night, with Zimmerman bloodied and beaten and on the ground because of Trayvon Martin,” a version of events Allen explained was set out in the materials Sanford Police had sent to prosecutors. Exh. 17(e). The broadcast also included excerpts from the non-emergency call, in which Zimmerman is heard to say:

³ Numerous news commentators, after listening to the released non-emergency call asserted, in published accounts, that Zimmerman could be heard saying “fucking coons” during the non-emergency call. Exh. 18 and Aff. ¶¶81 and 82. Multiple news reports followed. *Id.* ¶¶83, 84 and 85.

⁴ The official report issued by the FBI’s Digital Evidence Laboratory concluded that “the specific request to identify the word following ‘fucking’...could not be done due to weak signal level and poor recording quality.” Exh. 19.

- "He looks like he's up to no good. . . ."
- "He looks black."

Allen further reported on the continuing public and national protests, including comments by civil rights leaders reporting "One by one civil rights activist's warned Sanford the entire world is watching." Exh. 17(e).

PUBLIC FIGURE:

It is well settled law in Florida that "the 'public figure status' of a defamation claimant is a question of law to be determined by the court." *Mile Marker, Inc., v. Petersen Publishing, L.L.C.*, 811 So. 2d 841 (Fla. 4th DCA 2002). Courts have recognized three categories of public figures: general purpose; limited purpose; and, involuntary. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). "Limited purpose" public figures are those who voluntarily inject their views or are otherwise drawn by their conduct into a particular public controversy, and are therefore treated as public figures when they sue about statements bearing on that controversy. *Arnold v. Taco Props., Inc.*, 427 So. 2d 216, 218 (Fla. 1st DCA 1983).

To determine whether a person is a limited purpose public figure, a court typically considers (1) whether one or more public controversies existed at the time of the alleged defamation, (2) whether the plaintiff played an important role in such a controversy, and (3) whether the publication or broadcast at issue was germane to the plaintiff's role in the controversy. *Silvester v. ABC*, 839 F.2d 1491, 1494 (11th Cir. 1988); *Friedgood v. Peters Publ'g Co.*, 521 So. 2d 236, 239 (Fla. 4th DCA 1988); *Della-Donna v. Gore Newspapers Co.*, 489 So. 2d 72, 76-77 (Fla. 4th DCA 1986).

A "public controversy" includes "any topic upon which sizeable segments of society have different, strongly held views," *id.* at 76 (quoting *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 138 (2d Cir. 1984)), or a dispute that a reasonable person would expect to affect people beyond its immediate participants, see *Mile Marker*, 811 So. 2d at 846. A plaintiff is held to have played a sufficiently important role in such a controversy when he has either voluntarily injected himself into the debate that surrounds it in an attempt to influence its outcome or he has been drawn into the controversy by his own voluntary actions. *Arnold*, 427 So. 2d at 218-19.

Based upon the undisputed facts as stated herein, this Court finds, as a matter of law, that Zimmerman became a limited purpose public figure. He voluntarily injected his views into the public controversy surrounding race relations and public safety in Sanford and pursued a course of conduct that ultimately led to the death of Martin and the specific controversy surrounding it. *Della-Donna v. Gore Newspapers Company*, 489 So. 2d 72 (Fla. 4th DCA 1986). Moreover, Zimmerman's shooting of Martin rendered him a public figure in the ensuing controversy. *Madsen v. United Television, Inc.*, 797 P.2d 1083, 1085 (Utah 1990), *Berry v. NBC*, 480 F.2d 428, 431 (8th Cir. 1973). See

also *Ruebke v. Globe Commc'ns Corp.*, 738 P.2d 1246, 1251-52 (1987); *Talley v. WHIO TV-7*, 722 N.E.2d 103, 107 (Ohio Ct. App. 1998); *Friedgood* Id. at 241.

STANDARD OF REVIEW:

Summary Judgment:

Rule 1.510 F.R.C.P. sets forth the requirements for obtaining summary judgment. Sections (b) and (c) state, in pertinent part:

(b) A party against whom a claim, ... is asserted ... may move for summary judgment in that party's favor as to all or any part thereof at any time ..."

(c) The motion shall state with particularity the grounds upon which it is based and the substantial matters of law to be argued and shall specifically identify any affidavits, ...and other materials as would be admissible in evidence ("summary judgment evidence) on which the movant relies. ... The adverse party shall identify, by notice ... at least 5 days prior to the date of the hearing, or delivered no later than 5:00 p.m.2 business days prior to the day of the hearing, any summary judgment evidence on which the adverse party relies. ... The judgment sought shall be rendered forthwith if the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Defamation:

In order to prove an action for defamation a plaintiff must prove that the alleged defamatory statements were made; that the alleged statements were false; that the alleged false statements were published to a third party; and, that the alleged false statements resulted in damages. *Don King Productions, Inc., v. Walt Disney Company ABC*, 40 So. 3d 40 (Fla. 4th DCA 2010) citing *Mile Marker*, 811 So. 2d at 845. A public figure bringing a defamation claim must also prove that the publisher acted with actual malice. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Mile Marker*, 811 So. 2d at 845.

This Court has determined that Zimmerman is a "public figure." Therefore, on summary judgment Zimmerman must present record evidence sufficient to satisfy the Court that a genuine issue of material fact exists which would allow a jury to find by clear and convincing evidence the existence of actual malice on the part of Defendants. *Lampkin-Asam v. Miami Daily News, Inc.*, 408 So. 2d 666, 669 (Fla. 3d DCA 1981); see also *Dockery v. Fla. Democratic Party*, 799 So. 2d 291 (Fla. 2d DCA 2001)(noting when a motion for summary judgment is brought by a defendant against a public-figure plaintiff, and thus the actual malice standard applies, summary judgments are to be more liberally granted).

Rational Interpretation Doctrine (racial epithet):

Under the "rational interpretation" analysis of actual malice, the Supreme Court has held that as a matter of law, actual malice may not be inferred simply from the falsity of a statement as long as the statement represents a rational interpretation of an ambiguous source. See *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971). See also *Bose Corp. v. Consumers Union of the U.S., Inc.*, 466 U.S. 485, 512-13 (1984).

Intentional Infliction of Emotional Distress ("IIED"):

In Florida, a plaintiff alleging IIED must show that: (1) the alleged wrongdoer's conduct was intentional or reckless; (2) the conduct was outrageous; (3) it caused emotional distress; and (4) the emotional distress was severe. *Williams v. Worldwide Flight Servs., Inc.*, 877 So. 2d 869, 870 (Fla. 3rd DCA 2004) (per curiam).

CONCLUSIONS OF LAW

The Court accepts the legal conclusions as set forth in Defendants' Motion for Summary Judgment with Memorandum of Law, as follows:

In this case, Zimmerman has alleged two counts against Defendants based upon five alleged defamatory news broadcasts. In reviewing these broadcasts, it is necessary to analyze the challenged publications "in its natural sense without a forced or strained construction." *Byrd v. Hustler Magazine, Inc.*, 433 So.2d 593, 595 (Fla. 4th DCA 1983). The court must evaluate the entire broadcast not just the discrete portions of it that the plaintiff claims are defamatory. *Smith v. Cuban American Nat. Foundation*, 731 So.2d 702, 705 (Fla. 3DCA 1999).

In his Complaint, Zimmerman claims that in the **March 20, 2012, TODAY show broadcast**, Defendants employed "deceptive and exploitative" manipulations of Zimmerman's "own words... to create the illusion of statements that Zimmerman never actually made." Complaint ¶¶3, 4.

The Supreme Court in *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 111 S.Ct. 2419 (1991) held "a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for purposes of *New York Times Co. v. Sullivan*, unless the alteration results in a material change in the meaning conveyed by the statement." *Id.* at 517. The Court went on to explain that before a public figure may be permitted to pursue a defamation claim, the trial judge must first determine, as a threshold issue of law, whether the altered quotations, as published, carried the same "gist" or "sting" as the plaintiff's actual statements, regardless of the words used. *Id.* at 515-517. Simply stated, "[if] an author alters a speaker's words but effects no material change in meaning, including any meaning conveyed by the manner or fact of expression, the speaker suffers no injury to reputation that is compensable as defamation." *Id.* at 516. The Court concluded, "if every [such] alteration constituted the

falsity required to prove actual malice, the practice of journalism, which the First Amendment standard is designed to protect, would require a radical change, one inconsistent with our precedents and First Amendment principles." *Id.* at 514-515

It is undisputed that Zimmerman spoke the words attributed to him and that he made the challenged statement about Martin's race with no prompting from the dispatcher ("He's got his hand in his waistband. And he's a black male"). Exh. 9.

A "party's accurate quoting of another's statement cannot defame the speaker's reputation since the speaker is himself responsible for whatever harm the words might cause." *Thomas v. Pearl*, 998 F.2d 447, 452 (7th Cir. 1997); see *Broker's Choice of Am., Inc. v. NBC Universal, Inc.*, No. 09-cv-00717, 2011 WL 97236 (D. Colo. Jan. 11, 2011) (broadcast that repeated plaintiff's statements was substantially true).

Zimmerman cannot carry his burden of proving that the single, allegedly defamatory statement he challenges in the March 20 TODAY show broadcast was disseminated with actual malice. As the Supreme Court explained in *Masson*, defendants cannot be said to have published that statement despite a "high degree of awareness of [its] probable falsity," *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964), where, as here, its selection of excerpts from the non-emergency call for inclusion in its broadcast did not effect a "material change in [the] meaning" of what Zimmerman actually said, *Masson*, 501 U.S. at 516. *Accord, Air Wis. Airlines Corp. v. Hooper*, 134 S. Ct. 852, 861 (2014), ("we have long held that actual malice requires material falsity") (emphasis added).

Zimmerman bases his claim that the **March 20 Nightly News broadcast** defamed him alleging that defendant Allen falsely reported, during the non-emergency call, that Zimmerman uttered a "racial epithet." Zimmerman cannot meet his burden of proving that the use of the phrase "racial epithet" was false. First, Zimmerman denies that he used such an expression. Second, the FBI has concluded that it is impossible to verify what Zimmerman actually said "due to weak signal level and poor recording quality." Ex. 19. Based upon the undisputed facts, whether Zimmerman used a racial epithet "cannot be verified as false." *Auvil v. CBS 60 Minutes*, 836 F. Supp. 740, 742 (E.D. Wash. 1993), *aff'd*, 67 F.3d 816 (9th Cir. 1995). And, as a result, he cannot, as a matter of law, carry his burden of proving material falsity. See *id.* at 743

Moreover, Zimmerman as a public figure must prove "actual malice," a heavy burden that requires him to demonstrate by clear and convincing evidence that, at the time the Defendants disseminated a challenged publication or broadcast, they "realized that [its] statement was false or . . . subjectively entertained serious doubt as to the truth." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 511 n.30 (1984). The question whether a plaintiff can carry his burden of proving actual malice is, as a threshold matter, an issue of law to be decided by the court. *Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 657, 685 (1989), cited in *Sharkey v. Fla. Elections Comm'n*, 90 So. 3d 937, 939 (Fla. 2d DCA 2012).

In applying the actual malice standard, the Supreme Court has identified certain recurring scenarios in which a plaintiff's allegations with respect to a defendant's conduct, even if credited, are insufficient as a matter of law to constitute the clear and convincing evidence necessary to support a finding of actual malice. See, e.g., *Bose Corp.*, 466 U.S. at 486; *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971). One of those is the "rational interpretation" doctrine articulated by the Court in *Pape* and *Bose*.

In this case, application of the rational interpretation doctrine precludes, as a matter of law, a finding that the March 20 Nightly News broadcast's description of the non-emergency call as containing a "racial epithet" was disseminated with actual malice – i.e., with the requisite "high degree of awareness" that it was "probabl[y] false." *Garrison*, 379 U.S. at 216. The tape recording itself is, at best, ambiguous. Under such circumstances, the broadcast's interpretation of that ambiguous portion of the recording, like *Time's* interpretation of the Commission report in *Pape* and Consumers Union's interpretation of what its reviewers heard on the audio recording at issue in *Bose*, cannot support a finding of actual malice as a matter of law.

Zimmerman claims that the **March 19 WTVJ and March 22 and 27 TODAY Show broadcasts** falsely implied that he is a racist by omitting the dispatcher's question before playing and quoting his response.

The Supreme Court's analysis of two of the contested quotations at issue in *Masson* demonstrates why, under these undisputed circumstances, NBC's inclusion of the "he looks black" excerpt in these three broadcasts cannot be held, as a matter of law, to have effected a material change in the meaning of what Zimmerman actually said.

Especially in the wake of the Supreme Court's analysis of the allegedly fabricated quotations at issue in *Masson*, and the Court's reaffirmation of that analysis in *Air Wisconsin Airlines Corp.*, Zimmerman cannot base a defamation claim on NBC's airing of his recorded statement that the man he was following "looks black" when he volunteered precisely that same information at another point during the non-emergency call without prompting from the dispatcher. It is undisputed that Zimmerman volunteered to the dispatcher that the person he was following was "a black male." The fact that his separate statement that the man "looked black" was preceded by a question, which was not included in the broadcasts, does not result in the kind of material falsity necessary to support a finding of actual malice as a matter of law. As in *Masson* and *Air Wisconsin Airlines Corp.* the excerpt from the non-emergency call quoted in NBC's broadcasts accurately captured the "gist" and "sting" of what Zimmerman actually said and were not false in any material sense. *Id.*

As the Supreme Court explained in *Masson*, an edited quotation cannot be held to have been published or broadcast with actual malice unless the alteration "would have a different effect on the mind of the reader" than what the plaintiff actually said. *Masson*, 501 U.S. at 517. See also *Air Wis. Airlines Corp.*, 134 S. Ct. at 856. Absent such a showing, the First Amendment protects such editorial decisions from defamation

liability because, as the Supreme Court has also emphasized, "editing is what editors are for; and editing is the selection and choice of material." *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 124 (1973).

In this case, because Zimmerman is unable to demonstrate that the editing choices at issue resulted in a materially false change in the meaning of what he actually said, he cannot pursue his defamation claims arising from those choices as a matter of law.

Damages:

In Florida, a defamation plaintiff not only must plead and prove actual injury, he must also demonstrate that the allegedly defamatory statements proximately caused that injury. See, e.g., *Smith*, 731 So. 2d at 705 (citing *Byrd*, 433 So. 2d at 595).

In his Complaint, Zimmerman contends that the five challenged broadcasts exposed him "to public contempt, ridicule, hatred and threats to his life," as well as to "severe and permanent emotional distress, mental anguish, embarrassment and humiliation." Compl. ¶¶86, 87. He further alleges that, as a result of the broadcasts, he has had to live in hiding and wear a bulletproof vest. Id. ¶¶23, 72.

The undisputed evidence shows negative publicity was directed at Zimmerman by the Martin family's lawyer, by civil rights activists, and by a litany of news media entities well before the non-emergency call was released to the public and before NBC broadcast any of the news reports at issue. See, e.g., Ex. 26. See also Ex. 10, 12-13, 26-28 and Aff. ¶¶33, 53-63, 67-68, 73-75. Prior to any of the challenged broadcasts, multiple national news organizations had disseminated detailed accounts of the Martin family's contention that their unarmed son had been profiled and killed by Zimmerman because of his race. Aff. ¶¶53, 60 and Ex. 27. Public demonstrations were held demanding Zimmerman's arrest and members of Congress called for a federal investigation of what they described as a "hate crime." Ex. 28 and Aff. ¶¶60, 63, 69, 104. Zimmerman and his family had received death threats and had gone into hiding long before any of the challenged broadcasts; his father and friends therefore reached out to the media to make the case that he is not a racist. Ex. 3, 13 & 26 and Aff. ¶¶62, 105. At that same time, Zimmerman had already told police that his doctor had diagnosed him as suffering from post-traumatic stress disorder. Ex. 8 at 6.

The question of whether allegedly tortious conduct was the "but for" cause of a plaintiff's claimed injuries can be resolved by the court as a matter of law "where the facts are unequivocal, such as where the evidence supports no more than a single reasonable inference." *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 504 (Fla. 1992). Based upon the undisputed facts, this Court finds that the challenged excerpts from and characterization of Zimmerman's statements during the non-emergency call could not have been the required "but for" cause of Zimmerman's alleged injuries.

Intentional Infliction of Emotional Distress:

Zimmerman alleges, in Count II of his Complaint, that he is entitled to damages for IIED. As stated herein, in Florida, a plaintiff alleging IIED must show that: (1) the alleged wrongdoer's conduct was intentional or reckless; (2) the conduct was outrageous; (3) it caused emotional distress; and (4) the emotional distress was severe. *Williams v. Worldwide Flight Servs., Inc.*, 877 So. 2d 869, 870 (Fla. 3rd DCA 2004) (per curiam). The outrageousness of the alleged conduct is the "threshold test" for recovery, *Ponton v. Scarfone*, 468 So. 2d 1009, 1011 (Fla. 2nd DCA 1985), and "is a legal question in the first instance for the court to decide as a matter of law," *Baker v. Fla. Nat'l Bank*, 559 So. 2d 284, 287 (Fla. 4th DCA 1990).

"Under Florida law, liability for [IIED] will lie only where the conduct in question has been so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." *Johnson v. Knupp*, No. 99-cv-50-OC-10C, 2000 WL 1238976, at *3 (M.D. Fla. Mar. 28, 2000) (citing *Metro. Life Ins. Co. v. McCarson*, 467 So. 2d 277, 278-79 (Fla. 1985)). In this case, where it is undisputed that multiple other news reports characterized and edited Zimmerman's statements in virtually the same manner as the challenged broadcasts, those editorial judgments cannot be deemed "outrageous" as a matter of law.

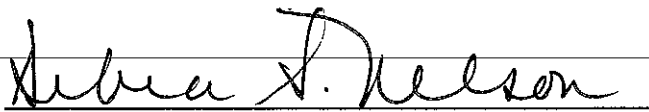
Even if Zimmerman were able to make out a prima facie case of IIED, the Florida Supreme Court has foreclosed such claims where, as here, the plaintiff has attempted to "transform a defamation action into a claim for intentional infliction of emotional distress simply by characterizing the alleged defamatory statements as 'outrageous.'" *Fridovich v. Fridovich*, 598 So. 2d 65, 69-70 (Fla. 1992) (plaintiff could not pursue IIED claim based on same statements underlying his unsuccessful defamation claim because litigants are "not permitted to make an end-run around" First Amendment); *Ortega Trujillo v. Banco Cent. del Ecuador*, 17 F. Supp. 2d 1340, 1343 (S.D. Fla. 1998) ("In Florida, a single publication gives rise to a single course of action. An attempt to state a claim for intentional infliction of emotional distress based on the same publication as the defamation count must fail."); *Boyles v. Mid-Fla. Television Corp.*, 431 So. 2d 627, 636 (Fla. 5th DCA 1983), *aff'd*, 467 So. 2d 282 (Fla. 1985); *Silvester*, 650 F. Supp. at 780 (dismissing IIED claim because it "merely reincorporate[d] the allegations in the libel counts" and therefore did "not set forth [an] independent tort[]"); *see also Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (plaintiffs may not circumvent First Amendment-based requirements limiting defamation tort by pleading claim for intentional infliction). As in the foregoing cases, Zimmerman's IIED claim is based on the same broadcasts he has placed at issue in his defamation claim. He has therefore failed to state an IIED claim as a matter of law.

Based upon the foregoing, this Court finds: that there are no genuine issues of material fact upon which a reasonable jury could find that the Defendants' acted with actual malice; that there exists absolutely no clear and convincing evidence that Defendants' knew that the information published was false at the time it was published,

or recklessly disregarded the truth or falsity of those statements at the time they were published; and, that the IIED claim is based on the same broadcasts at issue in the defamation claim and therefore not actionable as a matter of law. It is therefore

ORDERED AND ADJUDGED that Allen, NBC, Luciano and Burnside's Motion for Summary Judgment, as to both counts in the Complaint, is hereby **GRANTED**. Final Judgment is hereby entered in favor of Allen, NBC, Luciano and Burnside. Plaintiff, Zimmerman, shall take nothing by this suit and Defendants Allen, NBC, Luciano and Burnside, shall GO HENCE WITHOUT DELAY.

DONE in Chambers, Sanford, Seminole County, Florida this 30th day of June 2014.



DEBRA S. NELSON, Circuit Judge

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