IN THE DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA
THIRD DISTRICT

Appellate Case No. 3D12-3189

IRINA CHEVALDINA,

Appellant

vs.

R.K./Fl MANAGEMENT, INC.; et.al.,

Appellees

On Appeal From the Circuit Court of the Eleventh Judicial Circuit
In and For Dade County, Florida
Case No. 11-17842-CA32
The Honorable Judge Ellen Leesfield

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE CASE AND THE FACTS

A. Introduction

This appeal seeks to cure an unlawful prior restraint on the Appellant's First Amendment rights, improperly imposed by the lower court. On November 19, 2012, the circuit court enjoined Appellant from writing "defamatory" blogs in the future, despite expressly making "*no findings of facts as to actual violations of law by the [Appellants], except that [Appellants] have blogged extensively about the [Appellee] and many of these blogs are arguably defamatory.*" (R-V1-1) The circuit court made this decision without following the mandates of Florida Rule of Civil Procedure 1.610. However, even if it had, the injunction is patently unconstitutional.

B. Statement of Facts

i. Appellees Sue Defendants for Exercising her First Amendment Rights

The facts of the case are deceptively simple, given the extended nature of the docket. Appellant Irina Chevladina (hereinafter "Chevaldina") is a former tenant of one of the Appellees (collectively referred to as "RKA"). RKA owns and operates over 6 million square feet of open air shopping centers, substantially in Sunny Isles, Florida. (Record Appendix Volume 1,

Tab 14, hereinafter all Appendix citations abbreviated in similar form as "R-V1-14"; see also R-V1-2, p.3) Appellee Raanan Katz and his family owns RKA and is a well-known public figure and part owner of the Miami Heat. (R-V1-2).

When Chevaldina was a tenant of RKA, she became aware of RKA's deceptive and unconscionable business practices by reviewing court documents from the many lawsuits between RKA and their tenants. (R-V1-13). She discovered multiple lawsuits between RKA and its tenants. As Florida's state court records are not readily accessible to the public (like federal court records are), Chevaldina began publishing court documents and her interpretations thereof and opinions of RKA's practices. (R-V1-3, R-V1-13) For example, she posted pointed out that one of RKA's lease terms (an automatic lease renewal clause) was determined by Miami-Dade Judge Ronald Friedman, to be a "repugnant" and unconscionable "gotcha" clause. (R-V1-4)

RKA prefers that the public and potential tenants have no knowledge of its judicially-condemned business practices. RKA and Katz, prefer that no one post a negative opinions about them anywhere. Therefore, they filed this unsupportable lawsuit against Chevaldina and a second Federal Court copyright infringement lawsuit based upon the use of a photo of Katz posted

on the same blogs. (R-V1-5) Months and months of litigation, thousands of dollars, and thousands of pages of documents later, RKA sought a clearly unconstitutional remedy – an injunction against *alleged* defamation prior to any court determination that the speech at issue was even legally capable of defamatory meaning, much less whether it was actually defamatory, privileged, or otherwise protected by the First Amendment. (R V1-6) The resulting Injunction Order was so over-broad and subject to abuse, that the RKA even sought an order for contempt based upon the Chevaldina doing no more than reporting the existence of the Order itself. (RV1-7).

The substance of the Order is not the only transgression. Even if the Order were substantively Constitutional, the circuit court entered it by ignoring procedural requirements for the imposition of a preliminary injunction. On May 15 the lower court held a *partial* hearing on RKA's first motion for preliminary injunction (R-V1-8), then continued that hearing into 2013. Dissatisfied by the wait, RKA brought another identical motion. (R-V1-6). Despite being 18 months after the litigation began, the lower court granted RKA's emergency hearing request and held a limited hearing on November 1, 2012. The circuit court, inexplicably, scheduled the hearing with procedural restrictions that belie any notion of due process. The court, in writing, made it clear that the purpose of the hearing was *only* to permit

Appellees to present evidence of "proof regarding whether statements made in Defendant's blog have or are likely to reach Plaintiff's potential customer and dissuade them from doing business with Plaintiff." (RV1-9).

The lower court seemed to have pre-judged the propriety of the injunction, seeking nothing more than the RKA's demonstration of harm visited upon it by the Chevaldina's exercise of her First Amendment rights. Nevertheless, the record of the limited damages hearing, shows no commercial or pecuniary harm to RKA. (R-V1-10, p.XX)

On November 19, the lower court entered the Order appealed herein. (R-V1-1). Two days later, RKA filed a motion for contempt (RV1-7), because Chevladina posted public court records and provided constitutionally protected opinions about them. (RV1-3) After the entry of the Order, Chevaldina continued to write, however, her writing was limited to posting that she was not allowed to write anything. (RV1-3, p.1-3) These limited post-Order writings triggered multiple complaints by RKA, who insist that those entries are defamatory. (R-V1-11 and V1-12).

In addition to the defamation and tortious interference claims by RKA, they also threw in claims of trespass, stalking, and invasion of privacy. (R-V1-6) These facts are explained later in the relative sections. These subsidiary facts are mere distractions to the blog articles. The court

entered an injunction without following the basic requirements for preliminary injunctions in this State. Even if the lower court had followed those requirements, the remedy it imposed was patently unconstitutional. This Court must correct these errors.

ii. RKA Seeks a Preliminary Injunction Restraining Chevaldina's Rights to Free Speech

RKA sought extraordinary relief in the form of a prior restraint to enjoin alleged defamation. This relief is not recognized in this State, nor anywhere else in this Country. In addition to ignoring the First Amendment and almost a century's worth of common law, the lower court ignored virtually all procedural requirements for the issuance of a preliminary injunction.

iii. The Circuit Court Entered an Order Restraining Chevaldina's Speech.

On November 19, the circuit court entered an Order enjoining Chevaldina's right to engage in First Amendment protected activity. (R-V1-1) By its own admission, the circuit court considered "limited" testimony (R-V1-9, R-V1-10), and considered only the evidence before it – evidence that was insufficient because of RKA's refusal to participate in discovery, and the lower court's order refusing to consider any evidence other than

RKA's damages. (R-V1-9). After these truncated hearings, the lower court issued a bizarre order, which is internally inconsistent, vague and ambiguous. The lower court made "no findings as to facts of actual violations of law by [Chevaldina], except that [Chevaldina] have blogged extensively about [RKA] and many of these blogs are *arguably* defamatory." (R-V1-1) (emphasis added). This Order came after the limited damages hearing, where all claims of damages associated with the blogs were disproved by RKA's own witness (R-V1-10) and contrary affidavit evidence. (R-V3-17).

Nevertheless, the lower court found that RKA's risk of injury outweighed all other procedural and constitutional concerns. The lower court enjoined Chevaldina from "directly or indirectly publishing any blogs or any other written or spoken matter calculated to defame [...] or otherwise cause harm to [Appellees]."[1]

SUMMARY OF ARGUMENT

RKA has shown no harm at all, much less irreparable harm. (R-V1-10) Even if there were, monetary damages are adequate to compensate

[1] Chevaldina notes that this very appeal brief is arguably calculated to "cause harm" to RKA. That harm is legal and lawful, but nevertheless, technically speaking, by the very act of filing this brief, Chevaldina and her counsel are in violation of the letter of the order.

defamed plaintiffs. Moreover, RKA is unlikely to prevail in this matter, and thus cannot show likelihood of success on the merits, as Chevaldina's statements range from provably true[2] to matters of opinion, rather than fact. (R-V1-3, R-V2-13).

Even if RKA could show that they were likely to prevail, a preliminary injunction to enjoin allegedly defamatory publications, including publications that have not yet been written (much less examined by a court), is constitutionally impermissible.

ARGUMENT

Standard of Review

Florida appellate courts apply a *de novo* standard of review to the determination of whether a temporary injunction constitutes an unconstitutional prior restraint on free speech. *Forrest v. Citi Residential Lending, Inc.*, 73 So. 3d 269, 275 (Fla. 2d DCA 2011); *Post-Newsweek Stations Orlando, Inc. v. Guetzloe*, 968 So. 2d 608, 609 (Fla. 5th DCA 2007).

[2] It is important to note that RKA must prove Chevaldina's statements as false in order to prevail on a defamation claim – Chevaldina does not need to prove them to be true. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986) ("the plaintiff [must] bear the burden of showing falsity, as well as [the defendant's] fault, before recovering damages"); *see also Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-20 (1990) (requiring plaintiff to prove statements false in a defamation case).

A. Injunctions Against Speech are Prior Restraints

An injunction prohibiting speech is *per se* prior restraint. *Erwin Chemerinsky, Constitutional Law: Principles and Policies* 918 (2002) ("The clearest definition of prior restraint is ... a judicial order that prevents speech from occurring"). In defamation actions, and virtually all other actions, the Supreme Court has roundly rejected prior restraint. *Near v. Minnesota*, 283 U.S. 697 (1931); *Brandenburg v. Ohio*, 395 US 444, 447 (1969). The term "prior restraint" is used "to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. U.S.*, 509 U.S. 544, 550, 113 S. Ct. 2766, 2771 (1993). The essence of a prior restraint is that it places First Amendment protected speech under the personal censorship of a single judge. *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 468 (5th Cir. 1980). *See also State v. Globe Commc'ns, Corp.*, 622 So. 2d 1066, 1073 (Fla. 4th DCA 1993), *aff'd*, 648 So. 2d 110 (Fla. 1994) (explaining that prior restraints come in the form of both injunctions and legislation). Any prior restraint comes to a reviewing court bearing a heavy presumption against its constitutional validity. See *Near*, 283 U.S. 697, *Brandenburg*, 395 US at 447 (prior restraints may be permissible only to prevent imminent lawless action).

Moreover, any content-based restriction (such as a prior restraint) must overcome strict scrutiny. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 120 L. Ed. 2d 305, 112 S. Ct. 2538 (1992). On appeal, an appellate court must review the injunction to ensure that it furthers a compelling state interest through the least intrusive means possible. *See North Florida Women's Health & Counseling Services, Inc. v. State*, 866 So. 2d 612, 2003 Fla. LEXIS 1160, 28 Fla. L. Weekly S549 n. 16 (Fla. July 10, 2003). If it fails to further a compelling interest, it will not stand.

B. Injunctions in Defamation Cases are Always an Unlawful Prior Restraint

Preliminary injunctive relief in defamation cases is unavailable, as such an injunction imposes an unlawful prior restraint of speech, violating the First Amendment, with no constitutionally permissible justification.

The Order represents an impermissible restraint on speech and was unjustified based upon the evidence. *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963). The injunction is, *inter alia*, a content-based restriction on speech, and thus must overcome strict scrutiny in order to stand. There is no "compelling state interest" at issue in this case, as the lower court's injunction merely regulates the private rights of the parties. *Animal Rights*

Fdn. of Fla., Inc. v. Siegel, 867 So. 2d 451, 457 (Fla. 5th DCA 2004). Accordingly, the injunction has a fatal condition, even without further analysis.

This case closely resembles – and compels the same outcome as – *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), where a group of protestors were enjoined from protesting a real estate company's business practices. The Supreme Court struck down the injunction as "an impermissible restraint on First Amendment rights." *Id.* at 417-18, 418 n. 1. In invalidating the prior restraint, the Court wrote "[n]o prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants the injunctive power of a court." *Id.* at 419.

In this case, the Chevaldina is no different than the protestors in *Keefe*. The fact that her protest took place online rather than in front of RKA's office is irrelevant. Moreover, the Supreme Court has conclusively held that speech on the Internet is afforded the same protections as pre-Internet speech. *Reno v. ACLU*, 521 U.S. 844 (1997). ("Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could with any soapbox.") While the mediums used in *Keefe* and the instant case may differ, the speech at issue –

the constitutionally valuable protest in support of consumer protections – is one and the same. It is worth nothing that the injunction also reaches to any in-person protest as well – making *Keefe* precisely on point. Just as a prior restraint against free expression was improper in *Keefe*, it is improper in this case as well.

C. RKA Shows No Likelihood of Success on the Merits of Their Claim.

RKA must demonstrate a substantial likelihood of success on the merits to obtain a preliminary injunction. RKA failed to do so. "Given the extraordinary nature of the remedy, the courts require a movant **to carry its overall burden clearly**. [...] [T]he movant must clearly convince the Court that they are substantially likely to succeed." *Anderson v. Upper Keys Business Group, Inc.*, 61 So.3d 1162, (Fla 3d DCA 2011) (emphasis added) (citing *Gulf Coast Commercial Corp. v. Gordon River Hotel Assocs.*, 2006 WL 1382072, at *4 (M.D.Fla, 2006)). It has not done so, and the record supports the conclusion that it would be a legal impossibility to do so.

To obtain a preliminary injunction, RKA was required to specifically state the grounds for the motion and convince the court that they were substantially likely to succeed at trial. *Anderson*, 61 So.3d 1162. The lower court's injunction, however, did not state any reason for its entry. See Fla. R.

Civ. P. 1.610(c) (2011) ("Every injunction shall specify the reasons for entry . . . ."); *Burtoff v. Tauber*, 85 So. 3d 1182, 1184 (Fla. 4th DCA 2012) ("[R]eversal is required because the . . . order does not contain the findings required by Florida Rule of Civil Procedure 1.610(c)."") (footnote omitted). Instead, RKA conclusorily stated that "[t]he Blogs are defamatory per se, and the plaintiffs have a substantial likelihood that they will ultimately prevail on the merits." (R-V1-6, p.19) The lower court was even more dismissive of the constitutional values at risk, blithely stating:

> [T]here are some very basic things in this order that I think anybody would sign off on. It's like Defendants, Irina Chevaldina, Dimitri Chevaldina and John Doe and all others acting by and through them, with them, or on their behalf are precluded from publishing any other blogs calculated to defame, tortiously interfere with, or invade the privacy of or cause harm to the Plaintiffs. Well, that's easy, I certainly don't want them to do that so I don't see why I shouldn't indicate that. (R-V2-10, at 55:19-56:3).

The circuit court was required, *inter alia*, to analyze both the facts of this case and the law on defamation. Instead, the circuit court did nothing more than restate RKA's own repetition of the words "defamation per se," while making no findings, and specifically stating that it made no findings of fact or law. (R-V1-1). Apparently, the court believed that "defamation *per se*" means that neither factual nor legal analysis is required. While "*per se*" applies in some contexts, it does not in connection with defamation. The

defamation *per se* rule does not exist in Florida after the U.S. Supreme Court's edicts in *Firestone v. Time, Inc.* and *Gertz v. Welch.* As this District recognized in *Miami Herald Publ'g. Co. v. Ane*, the United States Supreme Court abolished strict liability in defamation actions for private figures. 423 So.2d 376 (Fla. 3d DCA 1982). In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974), the plaintiff was required to prove at least a negligent disregard for the truth. *Miami Herald,* 423 So.2d 376 (Fla. 3d DCA 1982), citing *Firestone v. Time, Inc.*, 305 So.2d 172 (Fla.1974) ("It is, therefore, clear that the ultimate decision of the Florida Supreme Court in this litigation adopted, without discussion, the *Gertz-Firestone* standard of negligence, and no higher standard, as the controlling law in the case which the trial court was to apply upon remand.").

D. Preliminary Injunctions against Defamation are Impermissible and Unconstitutional

Prior restraints are "the most serious and least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stewart*, 427 U.S. 539, 559 (1976). There is a "deep-seated American hostility to prior restraints." *Id.* at 589 (Brennan, J. concurring). This hostility is not merely rhetorical.

There is not a single Supreme Court case upholding a prior restraint in a defamation action.[3]

Injunctive relief to prevent actual or threatened defamation is so heavily disfavored because it interferes with the First Amendment and amounts to censorship prior to a judicial determination of the lawlessness of the speech. *See Moore v. City Dry Cleaners & Laundry*, 41 So. 2d 865, 872 (Fla. 1949). "The special vice of a prior restraint," the Supreme Court has held, "is that communication will be suppressed . . . *before* an adequate determination that it is unprotected by the First Amendment." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390

[3] While cases affirming prior restraints are virtually nonexistent, those that reject them are legion, and represent rejections of prior restraints even in cases involving substantially more important interests than the hurt feelings of RKA. *See, e.g., Butterworth v. Smith*, 494 U.S. 624, 110 S.Ct. 1376, 108 L.Ed.2d 572 (1990) (invalidating criminal statute to extent it prohibited witness from disclosing content of witness's grand jury testimony); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978) (invalidating state's criminal statute prohibiting publication of information regarding judicial review commission proceedings); *Neb. Press Ass'n*, 427 U.S. 539, 96 S.Ct. 2791 (invalidating, as improper prior restraint, pretrial gag order prohibiting publication of defendant's confession in highly publicized murder trial, despite state's competing interest in protecting defendant's right to fair trial); *N.Y. Times Co. v. U.S.*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971) (prohibiting injunction, as improper prior restraint, against publication of stolen, classified government documents). Indeed, in over two centuries, the Supreme Court has never sustained a prior restraint involving pure speech, such as the one at issue here. *See Matter of Providence Journal Co.*, 820 F.2d 1342, 1348 (1st Cir. 1986).

(1973). Thus, if a court issues an injunction prior to adjudicating the First Amendment protection of the speech at issue, the injunction cannot pass constitutional muster. *See Fort Wayne Books, Inc. v. Indiana,* 489 U.S. 46, 66 (1989); *M.I.C., Ltd. v. Bedford Township*, 463 U.S. 1341, 1343 (1983) (Brennan, Circuit Justice) (issuing an emergency stay and noting that a stay is constitutionally mandated when "the trial court's broad proscription will bar, in advance of any final judicial determination that the suppressed films are obscene, the exhibition of any film that might offend the court's ban").

In this case, the circuit court expressly skipped the essential step of adjudicating the First Amendment protections relevant to the speech at issue, and whether the statements were even defamatory. The circuit court declined to make any findings of fact or rulings of law, much less review, the blog articles and the First Amendment. (R-V1-1). In fact, after more than a year of litigation, the circuit court still refuses to make a decision on the purely legal question of whether RKA are public figures. There has been no legal determination as to whether RKA are public figures. If they are, then RKA could only prevail if they can prove knowing falsity or a reckless disregard for the truth. *N.Y. Times Co. v. Sullivan*, 403 U.S. 713, 715 (1971) ("it is unfortunate that some [...] are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would

make a shambles of the First Amendment") (Black, J., concur). If Chevaldina's statements about these public figures do not meet this standard, then they cannot be actionably defamatory.

Under the Constitution, prior restraints are the most serious and least tolerable infringements of First Amendment rights. *N.Y. Times Co. v. U.S.*, 403 U.S. 713, 714, (1971) (reversing injunction on newspapers' publication of classified Viet Nam historical studies); *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 467 (5th Cir. 1980) (reversing injunction prohibiting parties and counsel from communicating with potential class members without court approval). Injunctions against speech are presumptively unconstitutional. Moreover, such restraints have *never* been constitutionally permitted simply to protect business interests. *See Animal Rights Foundation of Florida, Inc. v. Siegel*_867 So.2d 451 (Fla. 5th DCA 2004) (reversing injunction covering picketing and leafleting protesting animal show practices that allegedly tortiously interfered with plaintiff's business interest, invaded plaintiff's privacy rights and defamed plaintiff; "there is **no** 'compelling state interest' which is met by the instant injunction terms, which merely regulate the private rights of the parties"); *see also Baily v. Sys. Innovation, Inc.*, 852 F.2d 93, 99-100 (3d Cir. 1988) (finding restriction on attorney statements

about pending cases unconstitutional); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

Florida's courts have affirmed the First Amendment principles enunciated by the federal courts. This is unequivocal:

> [E]quity will not enjoin either an actual or threatened defamation. *Demby v. English*, 667 So.2d 350 (Fla. 1st DCA 1995); *Reiter v. Mason*, 563 So.2d 749 (Fla. 3d DCA 1990). In fact, most prior restraints on an individual's constitutional right of free expression are presumptively unconstitutional. *Animal Rights Foundation of Fla., Inc. v. Siegel*, 867 So.2d 451, 457 (Fla. 5th DCA 2004). Because injunctive relief is generally unavailable, a complainant is typically left to his or her remedy at law. *Moore v. City Dry Cleaners & Laundry*, 41 So.2d 865 (Fla. 1949); *United Sanitation Servs.of Hillsborough, Inc. v. City of Tampa*, 302 So.2d 435 (Fla. 2d DCA 1974).

Weiss v. Weiss, 5 So.3d 758, 759 (Fla. 5th DCA 2009).[4]

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[4]This common law principle appears to be accepted in every state in the Union. *See, e.g., Cohen v. Advanced Med. Group of Georgia, Inc.*, 496 S.E.2d 710, 711 (Ga. 1998) ("Consistent with this Court's firm policy to protect the right of free speech, we apply the general rule that 'equity will not enjoin libel and slander...'"); *Greenberg v. De Salvo, 229 So. 2d 83, 86 (La. 1969)* ("Generally an injunction will not issue to restrain torts, such as defamation or harassment, against the person."); *Rosenberg Diamond Dev. Corp. v. Appel, 735 N.Y.S.2d 528, 529 (N.Y. App. Div. 2002)* ("Prior restraints are not permissible, as here, merely to enjoin the publication of libel."); *Hajek v. Bill Mowbray Motors, Inc.*, 647 S.W.2d 253, 255 (Tex. 1983) ("Defamation alone is not a sufficient justification for restraining an individual's right to speak freely."); *Nyer v. Munoz-Mendoza, 430 N.E.2d 1214, 1217 (Mass. 1982)* ("We note, further, that even allegedly false and defamatory statements are protected from prior injunctive restraint by the First Amendment."); *Matchett v. Chicago Bar Assn., 467 N.E.2d 271, 275 (Ill. App. Ct. 1984)* ("Further, it is settled law that unless a plaintiff can

In *Post-Newsweek Stations Orlando, Inc. v. Guetzloe*, Mr. Guetzloe lost private records, including his and his family's medical records. When he failed to pay rent on a mini-warehouse, they found them in his unit. While Guetzloe was hardly a household name, he was a public figure in his particular community.[5] Despite being a local public figure, Guetzloe claimed that the publication of the medical records would violate his privacy rights because the public had no legitimate interest in that information. The trial court entered the requested injunction against publication of those records upon finding that they would violate Mr. Guetzloe's privacy rights.

Despite more compelling facts than the case at bar, the Fifth DCA weighed the parties' respective claims and concluded that Guetzloe's privacy rights could not trump the First Amendment, even though the public had no lawful interest in the published information.

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establish the existence of one of a very limited number of exceptions, equity will not enjoin the publication of a libel, so strong are the constitutional guarantees of freedom of speech and of the press.")

[5] Appellees RKA and Ranaan Katz are public figures. Ranaan Katz is well known in the Southern Florida area – he is a part owner of the Miami Heat, he has streets and days named after him by local governments, and he is frequently in the press. (R-V1-2). *See, generally, Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997 (1974) (Setting malice standard for limited public figures); *Mile Marker, Inc. v. Petersen Publ'g, L.L.C.*, 811 So. 2d 841 (Fla. 4th DCA 2002) (Finding hydraulics manufacturer to be a limited public figure for purposes of article comparing hydraulics gear).

Gagliardo v. Branam Children, 32 So.3d 673 (Fla. 3d DCA 2010) is an analogous Florida case which brings home the point that prior restraints against publication are constitutionally intolerable. In that case, an author wished to write a book about minor children whose parents were lost at sea – a story which apparently garnered international attention. The trial court enjoined publication of pictures of the children or any information concerning their story or the loss of their parents. The Third DCA reversed:

> Prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights. As such, prior restraints are presumed unconstitutional. Therefore, only in "exceptional cases," will the courts consider censorship of publication acceptable. *Guetzloe*, 968 So.2d at 610.
>
> We determine that this is not an "exceptional case" that triggers infringement on our precious First Amendment rights. Here, the order enjoined the writer from speaking about or publishing any information relating to the children and/or circumstances surrounding their parents' widely publicized disappearance at sea. There were no exceptional circumstances present to justify censoring the writer. Thus, the trial court improperly entered this order.

Id. at 674.

Florida Pub. Co. v. Brooke, 576 So.2d 842, 846 (Fla. 1st DCA 1991) (a gag order preventing the publication of a letter with potentially injurious statements struck down under the presumption that all prior restraint is

unconstitutional). Even where a court considers children's well-being, this is not a compelling enough intent to justify a prior restraint.

> Prior restraints have been described as presumptively unconstitutional. *Nebraska Press Association v. Stuart*, 427 U.S. 539, 558, 96 S.Ct. 2791, 2802, 49 L.Ed.2d 683, 697 (1976). ... In the instant case, the judge's written order made no findings as to the need for the restraint of the press. At the hearing, Judge Brooke orally expressed his concern that E.B. could be injured by the publication of the letter, but he was not specific as to what the possible injury might be. In an analogous situation, the protection of a juvenile from the adverse effects of the publication of his name was held not to be a sufficiently strong state interest to withstand a First Amendment challenge. (citation omitted).

Id. at 846; *See also Miami Herald Pub. Co. v. McIntosh*, 340 So.2d 904 (1976) (gag order on trial reporting held to be an invalid prior restraint).

It is possible (although entirely speculative) that the information posted on the Chevaldina's blog articles will be embarrassing and may injure the Plaintiff's reputation.[6] However, there are no circumstances where the mere possibility of embarrassment to an individual is so extreme that the "need for secrecy is manifestly overwhelming." *Id.* Protecting private

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[6] Chevaldina denies that the information she has published and seeks to publish is defamatory because the information is entirely truthful. (R-V3-13). Falsity is a required element of all defamation actions. *See Internet Solutions Corp. v. Marshall*, 39 So. 3d 1201 (Fla. 2010). Furthermore, RKA are public figures and the information Chevaldina wishes to disseminate is of interest to the public. RKA's Motion simply assumes that the contents of the website are defamatory without analyzing the contents, addressing the privilege of truthful communications, or evaluating the parties' relative burdens of proof. (R-V1-6).

medical records is not enough. Protecting children is not enough. Even protecting the U.S. government is not enough. *New York Times Co v. United States*, 403 U.S. 713, 715 (1971). But, the circuit court believed that protecting an owner of the Miami Heat and his multiple companies from embarrassment over public documents was enough. This cannot stand.

E. RKA's Tortious Interference Claim is not a Substitute for Defamation.

i. Where Tortious Interference is Based Upon Defamation, as is the Case Here, It is Treated as Defamation.

RKA made mighty attempts to cast this as a tortious interference case, in order to circumvent the well-established body of First Amendment law. This will not stand either, as the single action rule prohibits such gamesmanship. *Easton v. Weir*, 167 So.2d 245 (Fla. 2d DCA 1964) (holding that a single wrongful act gives rise to only a single cause of action). In *Orlando Sports Stadium*, a plaintiff filed suit against a newspaper for defamation and tortious interference, alleging that the articles concerning the plaintiff were defamatory. *Orlando Sports Stadium v. Sentinel Star Co.* 316 So. 2d, 608 (Fla. 4th DCA 1975). The appellate court found that the defamation and tortious interference claims were essentially the same because they were based on the same articles and because the "thrust" of the complaint was that these articles were injurious to the plaintiff. *Id.* at 609.

The extraneous tortious interference claim in *Orlando Sports Stadium* was "nothing more than separate elements of damage flowing from the alleged wrongful publications." *Id.* While pled as tortious interference, the claims at issue in that case were based on allegedly defamatory statements and, in fact, simply restated the defamation claims. "This single publication/single action rule is designed to discourage the erosion of free speech safeguards by the simple expedient of looking to a substitute cause of action." *Orlando Sports Stadium*, 316 So. 2d at 609. Reconstituted claims of this type are an impermissible attempt to evade First Amendment safeguards, which are well-ingrained in defamation law. *See Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988). *See also DeMeo v. Goodall*, 640 F. Supp. 1115 (D.N.H. 1986).

By re-casting its defamation claim as one for tortious interference, RKA convinced the circuit court to enter the injunction. The First DCA warned of such tactics in the past:

> Any libel of a corporation can be made to resemble in a general way this archetypal wrongful-interference case, for the libel will probably cause some of the corporation's customers to cease doing business with it; and whether this involves an actual breaking of contracts or merely a withdrawal of prospective business would make no difference under the modern law of wrongful interference. But this approach would make every case of defamation of a corporation actionable as wrongful interference, thereby enabling the plaintiff to avoid

> the specific limitations with which the law of defamation - - presumably to some purpose - - is hedged about.

Seminole Tribe v. Times Publ'g Co., 780 So. 2d 310, 318 (Fla. 4th DCA 2001).

It is not necessary for the defamation claim to be resolved in Chevaldina's favor in order to realize that the tortious interference claim fails, as a matter of law. *Ovadia v. Bloom*, 756 So. 2d 137, 141 (Fla. 3d DCA 2000); *Orlando Sports Stadium*, 316 So.2d at 609. Even when a court does not dispose of a defamation claim, the single publication rule prohibits multiple instances of liability arising from the same instance of speech. *Trujillo v. Banco Central del Ecuador*, 17 F. Supp. 2d 1334, 1339 (S.D. Fla. 1998); *accord Callaway Land & Cattle Co., Inc. v. Banyon Lakes C. Corp.*, 831 So.2d 204, 208 (Fla. 2d DCA 2002) (finding that in Florida, a single publication gives rise to a single cause of action).

The alleged conduct involved in this case is pure speech that may not be enjoined, despite being recast as tortious interference. *See Animal Rights Found. of Fla., Inc. v. Siegel*, 867 So. 2d 451, 458 (Fla. 5th DCA 2004); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 73 L. Ed. 2d 1215, 102 S. Ct. 3409 (1982) (enjoining non-violent political protests in order to prevent a tortious interference with business violates the first amendment);

Seminole Tribe v. Times Publ'g Co., 780 So. 2d 310, 315 (Fla. DCA 2001); *Smith v. Emery Air Freight Corp.*, 512 So. 2d 229, 230 (Fla. 3d DCA 1987).

F. The Injunction Was Not Narrowly Tailored

Because of the First Amendment's great import to society and free expression, injunctions against its exercise are rare, if not forbidden, and typically spoken of in the hypothetical. The United States Supreme Court has described prior restraints as a "most extraordinary" remedy, to be used only when the resulting harm would be "both great and certain and *cannot* be mitigated by less intrusive measures." *CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (emphasis added). Because the risk of harm concomitant with inhibiting one's First Amendment rights is so great, any injunction implicating those rights "must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate ad the essential needs of the public order." *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968). The circuit court failed to heed these directives, and accordingly entered an erroneous prior restraint Order.

The circuit court's Order reached far beyond what was necessary or proper. Had the circuit court made any determinations of fact or law, or found any of Chevaldina's statements defamatory, Chevaldina would know what statements she was prohibited from making in the future. Instead, the

circuit court broadly forbade Chevaldina "from directly or indirectly publishing any blogs or any other written or spoken matter calculated to defame [...] or otherwise cause harm" to RKA. (R-V1-1) The court blithely stated, "if she goes over the line, she will be in violation of a Court Order." (R-V2-10, p.84, ln. 23-24) By refusing to find any violations of law, the court implicitly acknowledges that it has no idea where that line lies. The circuit court glibly stated:

> [W]e could argue from today until the end of time as to the definition of these things, but I'm just going to say something that's very reasonable, that Ms. Chevaldina is precluded from publishing blogs that are calculated to defame, tortiously interfere with, invade the privacy of, or otherwise cause harm to the Plaintiffs. That doesn't seem to me to be a tall order.

(R-V2-10, p. 82:18-24)

How is Chevaldina to know where the line is when the circuit court was unwilling to make that same determination for statements previously published? The Fifth DCA eloquently articulated the problem with the court's rationale.

> The law of slander and defamation is so ancient it contains numerous illogical twists and refinements stemming from ecclesiastical law, as well as the common law. Currently it is overlaid with statutory and constitutional requirements and limitations. It is confusing, unclear, illogical, and somewhat in conflict. Courts and judges frequently disagree with one another as to whether an actionable defamation has been established, as a matter of law.

Scott v. Busch, 907 So.2d 662, 665-66 (Fla. 5th DCA 2005) (internal citations omitted). *Scott* lays bare the failings in the lower court's Order.

Facially, the circuit court's Order fails the Supreme Court-mandated requirement of being narrowly tailored. The Order does not specify what, if any, specific statements should not be made. Thus, even if Chevaldina's statements are protected by the First Amendment, they face an unending torrent of sanction motions. RKA's motion for contempt two days after the entry of the Order, shows the likely onslaught of future motions. (R-V1-7) Alternatively, Chevaldina is prohibited from speaking until she runs to court for approval of each and every new statement about RKA, and is forced to prove to the court that her statements are lawful, non-defamatory and not going to "otherwise cause harm." The United States Supreme Court has previously described this scheme of obtaining clearance for protected speech as "the essence of censorship," that no court can abide. *Near v. Minn. ex rel Olson*, 283 U.S. 697, 713 (1931).

If Chevaldina's statements are not defamatory, then she should be free to repeat and publish them. The circuit court, however, has refused to rule on whether <u>any</u> of the Chevaldina's statements even rise to the level of being capable of a defamatory meaning, much less whether they are privileged or otherwise lawful. The circuit court called this line drawing "easy" and "not a

big request" yet the court itself refused to rule on what is, and what is not, defamatory. (R-V2-10, p.56, 80 and 82)

Even if Chevaldina guesses right, her First Amendment-protected speech will also bring motion after motion for contempt, without any repercussions for RKA's abuse of that process. RKA now complains that posts about the Order are defamatory. (R-V1-11 and V1-12). RKA has transformed their civil proceeding into a criminal trial, with RKA holding the threat of incarceration and sanctions over the Chevaldina like a sword of Damocles, while benefitting from only having to carry a civil standard to impose such severe penalties.

G. The Injunction For Alleged Trespass Was Not Proper

In addition to the injunction's failures under defamation and tortious interference law, its extension prohibiting trespass onto RKA's multiple properties is legally flawed. The only facts RKA submits to support its claim of trespass are allegations that Chevaldina went into retail stores located on RKA's property and used adjacent parking lots while shopping. (R-V2-10) These facts are insufficient to establish civil or criminal liability for trespass. RKA leases commercial space to retail stores and professionals covering over 6,000,000 square feet of open-air shopping centers. (R-V1-14). Chevaldina has a right, as a member of the public and patron of many of

the businesses in RKA's open-air shopping centers, to visit any store that is open to the public. (R-V3-13). These businesses include banks, supermarkets, and restaurants, which are all essential parts of Chevaldina's personal and professional lives. This fundamental freedom as an invitee to stores open to the public, renders the circuit court's injunction improper.

i. Authorization, License or Invite Avoids a Claim of Trespass

If Chevaldina has some authorization, license or invite to the property, her conduct is not trespassing. In *Smith v State*, 2D99-4273, December 29, 2000 (Fla. 2nd DCA 2000), the court construed Florida's criminal trespass law, Fla. Stat. § 810.09, to include the following elements: "(1) wilfully entering upon or remaining in any property; (2) other than a structure or a conveyance; (3) without being authorized, licensed or invited; (4) where notice against entering or remaining is given either by actual communication to the offender or by posting, fencing or cultivation." Fla. Stat. §810.08 defines trespass as acting "without being authorized, licensed, or invited." More importantly, it is the tenant, not RKA, who can grant the authorization or invitation to Chevaldina. *Fla.Stat.* § 810.08(3). As such, RKA does not even have standing to claim Chevaldina trespassed on their tenant's property, further rendering the injunction improper.

ii. Business Open to the Public Constitutes An Invite to the Property

A business open to the public provides an invitation to visit the premises. "[T]he opening of an office to transact business with the public is a tacit invitation to all persons having business with the proprietor, and a permission to others to enter the place of business." *Fletcher v. Florida Pub. Co.*, 319 So. 2d 100, 104-05 (Fla. 1st DCA 1975) decision quashed, 340 So. 2d 914 (Fla. 1976) (on other grounds).

It is the tenant, and not the landlord, who ultimately controls the customers permission to do business.

> **A landlord generally does not have the right to deny entry to persons a tenant has invited to come onto his property. This law also applies to the common areas of the premises.** Right of third person to enter premises against objection of the landlord, 6 A.L.R. 465. See also *49 Am.Jur.2d, Landlord and Tenant*, sections 228, 235.... **One who thus comes upon the premises upon the invitation of the tenant, although expressly forbidden to do so by the landlord, is not guilty of criminal trespass.** *49 Am.Jur.2d, Landlord and Tenant*, section 235.

L.D.L. v. State, 569 So. 2d 1310, 1312 (Fla. 1st DCA 1990)(emphasis added).

"There appears to be no dispute that, under certain circumstances, a store owner may ask a member of the public to leave the premises and warn them that if they return, they will be trespassing. We have found little case law explaining the extent of this prerogative." *Rivers v. Dillards Dept. Store,*

Inc., 698 So. 2d 1328, 1332 (Fla. 1st DCA 1997). "Since lack of authorization is an element of trespass, there is no trespass when consent is present." *Gruver v. State*, 816 So. 2d 835, 837 (Fla. 5th DCA 2002); see also *State v. Woods*, 624 So.2d 739, 740 (Fla. 5th DCA 1993)("shopping malls are quasi-public places which must be open to the public on a nondiscriminatory basis.").

iii. Adjacent Parking Lots For Retailers Fall Within an Invitation to the Public

Access to the retail stores is meaningless in today's society unless one can access a public parking lot. Florida law supports the proposition that no trespass lies for the use of an adjacent building or structure.

> [T]he area around a structure to be considered part of the "curtilage" for purposes of the crime of trespass of a structure or conveyance, that area must be enclosed in some manner. Thus, where the parking lot of a convenience store was not enclosed, it thus was not part of the curtilage of the store. Likewise, the unenclosed area in front of an abandoned apartment building was not a "curtilage" and thus, the defendant did not commit trespass in a structure or conveyance by standing there.

16B Fla. Jur 2d Criminal Law Substantive Principles and Offenses § 1655

Similarly, the courts have looked to permissive licenses when analyzing claims of trespass in residential buildings. *See Muniz v. Crystal Lake Project, LLC*, 947 So. 2d 464, 470 (Fla. 3d DCA 2006)(defendant

buyer had authorization to conduct a "walk-through" of the property). RKA's leasing of open-air shopping center space to tenants, inherently includes the right for visitors to park and use their parking lots for ingress and egress to the tenant stores.

iv. Issue Barred Under Res Judicata

Chevaldina and RKA have previously litigated this precise issue of trespass, and as such the matter should be closed. In that case, Chevaldina obtained a court order Miami-Dade Circuit Court Judge Friedman in 2009, stating that she had a right of public access. (R-V4-15) Judge Friedman's Order states: "Plaintiffs shall have the right to access all public areas in the City of Sunny Isles." (R-V4-15). This Order has not been overturned nor rejected by any court. Judge Friedman's Order was a result of a lawsuit that Chevaldina filed against RKA and the City of Sunny Isles seeking the right to visit retail stores, shops and professionals in the RKA shopping centers. RKA filed counterclaims and the case was ultimately settled. The circuit court erred as a matter of law by ignoring the Judge Friedman's Order on an identical issue and entering the Injunction Order.

H. An Injunction Was Not Proper For The Alleged Stalking

The circuit court also improperly entered the Injunction Order for stalking. RKA claimed in their motion that Chevaldina "stalk[s] and

harass[es] Plaintiffs and their family members on an almost daily basis ***through the blogs***." (R-V1-6, emphasis added). Also, **non-party** Suzanne Katz signed an affidavit claiming she believed Chevaldina was stalking her based upon a non-violent parking lot incident. (R-V1-6, p.33). Neither of these allegations meet the statutory requirements put in place for stalking.

First, the person who was allegedly stalked, Suzanne Katz, is not a party to this action. The stalking statute explicitly states that **only the victim can seek an injunction**. Fla.Stat. § 784.046 (herein the "Stalking Statute"). Regarding stalking through the blogs, this concept surely does not pass muster, since the blog articles cannot be viewed as violent acts. Second, the Statute requires two (2) acts by a Defendant, but herein there was only one act alleged. Fla.Stat. § 784.046. Third, oral communications are not sufficient. Fourth, given the position in the parking lot and the use of automobiles, there was no fear that violence was imminent. (Compare R-V1-6, p.33 with R-V3-13, p.7-8)

i. **Only A Victim As Plaintiff Can Enforce The Stalking Statute Injunction**

The Stalking Statute provides that only the victim of repeat violence may obtain an injunction. "There is created a cause of action for an

injunction for protection in cases of repeat violence...." Fla.Stat. § 784.046(2). The Statute is effective only for a victim.

> (a) Any person who is the victim of repeat violence or the parent or legal guardian of any minor child who is living at home and who seeks an injunction for protection against repeat violence on behalf of the minor child has standing in the circuit court to file a sworn petition for an injunction for protection against repeat violence.

Fla.Stat. § 784.046(2)(a).

The only asserted allegation of stalking by RKA (R-V4-16; R-V1-6) is the parking lot incident involving Suzanne Katz and Chevaldina. Suzanne Katz is not a party in this action. Her husband, Daniel Katz, is a Plaintiff/Appellee, but he was not the subject of the alleged stalking.

ii. **There Is No Proof Of Two Or More Qualifying Acts To Support Injunctive Relief**

The Statute is clear that to obtain an injunction, two (2) or more acts of threatened violence must be present to support an injunction.

> (a) "Violence" means any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, or false imprisonment, or any criminal offense resulting in physical injury or death, by a person against any other person.
> (b) "Repeat violence" means two incidents of violence or stalking committed by the respondent, one of which must have been within 6 months of the filing of the petition, which are directed against the Appellant or the Appellant's immediate family member.

Fla.Stat. § 784.046 (1)(a) and (b).

The court in *Long v. Edmundson*, 827 So. 2d 365, 366-67 (Fla. 1st DCA 2002), vacated an injunction from the lower court because a single act of waving a gun and pushing the victim, without another "qualifying act," does not support injunctive relief. See also, *Giddens v. Tisty*, 87 So. 3d 843, 843-44 (Fla. 1st DCA 2012)("The trial court made no findings of fact and therefore did not explicitly find two incidents of violence or stalking committed by Mr. Giddens. Our review of the record does not reveal evidence which would support finding the requisite two incidents."); *Power v. Boyle*, 60 So. 3d 496, 498 (Fla. 1st DCA 2011) ("The trial court's finding of two incidents of violence or stalking required for an injunction under section 784.046 must be supported by competent substantial evidence."); *Gianni v. Kerrigan*, 836 So. 2d 1106, 1107 (Fla. 2d DCA 2003)("Kerrigan did not allege or prove two incidents of violence and, accordingly, failed to put on a prima facie case entitling him to an injunction."): *McMath v. Biernacki*,776 So. 2d 1039, 1040 (Fla. 1st DCA 2001)(subjective distress by alleged victim was not enough to qualify under the statute); *Russell v. Doughty*, 28 So.3d 169, 170 (Fla. 1st DCA 2010) (holding that yelling profanities and threats at the Appellant, even after a previous battery by respondent against Appellant, was not sufficient for a finding of "repeat violence" without evidence that respondent took an action creating a "well-

founded fear that violence was imminent"); *Sorin v. Cole*, 929 So.2d 1092, 1094 (Fla. 4th DCA 2006) ("Mere shouting and obscene hand gestures, without an overt act that places the victim in fear, does not constitute the type of violence required for an injunction."); *Perez v. Siegel*, 857 So.2d 353, 355 (Fla. 3d DCA 2003) (holding that two separate incidents where respondent yelled at petitioner, even when respondent allegedly threatened to kill petitioner and her family, were not sufficient to support an injunction without some overt act creating a well-founded fear of imminent violence).

iii. Yelling And A Parking Lot Traffic Incident Do Not Amount To Threat Of Violence

Accepting non-party Suzanne Katz's retelling of the parking lot traffic incident as true would still not amount to a threat of violence. First, Suzanne Katz never indicates that Chevaldina waived a gun, knife or other object. Suzanne Katz never indicates that the cars were driven in an unsafe manner. Suzanne Katz never indicates that she was blocked from exiting her automobile.

> Mere shouting and obscene hand gestures, without an overt act that places the victim in fear, does not constitute the type of violence required for an injunction. Even a representation that the offender owns a gun and is not afraid of using it is insufficient to support an injunction absent an overt act indicating an ability to carry out the threat or justifying a belief that violence is imminent.

Sorin v. Cole, 929 So. 2d 1092, 1094 (Fla. Dist. Ct. App. 2006)(citations omitted).

Threatening phone calls do not establish "proof of assault" nor "a well founded fear in appellee that violence was imminent." *Johnson v. Brooks*, 567 So.2d 34, 35 (Fla. 1st DCA 1990). In the same vein, traffic events in a public parking lot do not establish a threat of violence, let alone the two required acts. Therefore, an injunction under the Stalking Statute was not proper.

iv. RKA failed to comply with the requirements of the Stalking Statute

In accordance with the Statute, the **victim** of repeat violence is the only person who has standing and this victim is required to file a sworn petition for injunction, which must allege instances of "repeat violence." See Fla. Stat. 784.046(2)(a). The alleged victim, Suzanne Katz, did not file a sworn petition of repeat violence.

The statute further requires that "The sworn petition shall allege the incidents of repeat violence...and shall include the specific facts and circumstances that form the basis upon which relief is sought." See Fla. Stat. 784.046(4)(a). Suzanne Katz did not allege repeat violence. Additionally, the statute requires the sworn petition to be in a substantially similar form as provided in the text of the statute, section 4(b). Although

Suzanne Katz filed an affidavit (R-V4-16), it wholly fails to comply with the requirements of Fla. Stat. 784.046(4)(b). Failure to comply with the Statute has resulted in the dismissal of complaints and injunction motions. See *Bierlin v. Lucibella*, 955 So. 2d 1206, 1207 (Fla. 4th DCA 2007). These statutory defects were never addressed by the circuit court, and the injunction was improperly entered despite them. Moreover, the circuit court entered this "stalking" injunction with no testimony or discussion whatsoever, and "no findings of fact as to actual violations of law." (R-V1-1).

I. Invasion of Privacy on Public Data

RKA claims that Chevaldina invaded the privacy of RKA (R-V1-6) and the circuit court agreed, without comment. The sole allegation by RKA in its motion was: "Defendants have even published photographs of Daniel Katz's home on the internet in an effort to further disrupt his and his families' lives and invade their privacy. See September 9, 2012 Blog, attached hereto as Exhibit 'G.'" (R-V1-6, p.13). There was no testimony heard or discussion about invasion of privacy during the limited damages hearing. (R-V2-10). The circuit court erred as a matter of law by entering an injunction on this issue.

The "private facts" that RKA alleges to have been published by Chevaldina are a matter of public record and are not private under any reasonable analysis. The Google Map of RKA's property is viewable by all citizens for free. RKA believes that the reproduction of a Google Map showing the aerial view of Appellee Daniel Katz's home, is a "private fact" meriting protection. RKA may wish that its properties are "private" but county clerk records of property ownership and Google Maps proves that this data is legal, widely accepted and not private. The matters provided by Chevaldina's blog articles are publicly available and free to anyone searching the internet or searching records available through the Miami Dade County Tax Appraiser's Office and website. These are records that by definition are public, and by result are matters of public interest. See *Armstrong v. H & C Communications, Inc.*, 575 So. 2d 280, 283 (Fla. Dist. Ct. App. 5th Dist. 1991).

> [I]n Florida the right to privacy is expressly subservient to the Public Records Act. Florida's right to privacy provision states that the right to privacy "shall not be construed to limit the public's right of access to public records." Art. I, § 23, Fla. Const. Courts cannot judicially create any exceptions, or exclusions to Florida's Public Records Act.

Bd. of County Comm'rs v. D.B., 784 So.2d 585, 591 (Fla. 4th DCA 2001) (citations omitted)

RKA appears to complain of 16 residential addresses and aerial photos. (R-V4-16, R-V1-6). Chevaldina provides this publicly available

information and the assessed value of the property of one of the Appellees. (R-V1-6, p.36). These records are available free for all members of the public, and are so common place that there are websites, such as Zillow.com devoted to providing the public with this information. Chevaldina's position is well summarized in a prior Florida Supreme Court case:

> The public's right to know assumes special importance where judicial proceedings are concerned.... Cape lawfully obtained from government records additional and confidential child abuse information related to the case. It printed the information in an article on that particular trial. Its purpose in so doing was to scrutinize the judicial function. It was printing what it believed to be facts brought out at trial in an effort to hold up to the public what it considered to be a questionable judicial determination. It was not attempting to sensationalize a private nongovernment matter...We underscore the fact that the information published by Cape was lawfully obtained; it was freely given by government officials and thus was legitimately within the public domain.

Cape Publications, Inc. v. Hitchner, 549 So.2d 1374, 1378-79 (FL 1989).

Ultimately the circuit court blindly entered this prior restraint part of the injunction with no regard for the Florida Sunshine Laws and improperly silences Chevaldina with no legal or factual support.

CONCLUSION

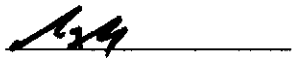
The circuit court's injunction Order should be dissolved, in its entirety, because (a) prior restraint preliminary injunctions are not available

for defamation; (b) under the single action rule when both defamation and tortiuos interference claims involve the same publication, injunctive relief is not proper; (c) the injunction as a whole is vague, ambiguous and is not narrowly drafted to reflect the balance between Chevaldina's First Amendment rights, RKA's alleged irreparable damage and the public's interest; (d) the injunction for trespass is overbroad in that it ignores the rights of RKA's tenants to invite Chevaldina into their publicly open establishments; (e) the injunction for stalking does not comply with the evidentiary and procedural requirements of the Stalking Statute; and (e) the injunction regarding privacy rights is overly broad since it prohibits the dissemination of publicly available information by Chevaldina.

Relief Requested

Chevaldina seeks an order dissolving the injunction and an application of law to the facts of this case.

Respectfully submitted this 14th day of December, 2012.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 14, 2012, I electronically filed the foregoing with the Florida Third District Court of Appeal's online eDCA service. I have furnished a copy to the following:

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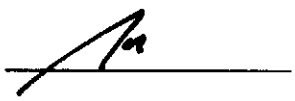
CERTIFICATE OF COMPLIANCE WITH FLA. R. APP. P. 9.210

I HEREBY CERTIFY that this brief complies in full with the font and formatting requirements of Fla. R. App. P. 9.210(a)(2). This brief has been rendered in Times New Roman at 14-point font.



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