QUESTIONS PRESENTED

Whether the enhanced appellate review reiterated in *New York Times Co. v. Sullivan* is required for First Amendment protection in a defamation case with a private plaintiff and non-media defendant.

Whether it is negligent within the protections of the First and Fourteenth Amendments for a mother to privately share concerns to another mother about pornographic affiliations of a gymnastics facility that advertises false credentials and posts pictures of themselves online at the Playboy mansion.

Whether the First and Fourteenth Amendments require the application of the "different effects" test, as adopted in *Masson v. New Yorker Magazine,* to a denial of a defamation claim on the basis of substantial truth.

LIST OF PARTIES

Petitioner, Jodi A. Smith was the plaintiff/counter-defendant in the Circuit Court Case 2015 CA 5720, and appellant in the Second District Court of Appeal Case 2D17-3288.

Respondents, Lakewood Ranch Gymnastics LLC, Laura Parraga, and David Parraga were the defendants/counterclaimants in the Circuit Court Case 2015 CA 5720, and the appellees in the Second District Court of Appeal Case 2D17-3288.

CORPORATE DISCLOSURE STATEMENT

Petitioner has no corporate affiliations.

TABLE OF CONTENTS

Petition for Writ of Certiorari

TABLE OF CONTENTS

Appendix

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

OPINIONS BELOW

The Twelfth Judicial Circuit Court entered a written opinion with its judgment on June 16, 2017. The motion for rehearing was denied on July 10, 2017.

The Second District Court of Appeal affirmed the judgment without written opinion on June 20, 2018. The motion for rehearing en banc and for written opinion was denied on August 7, 2018.

JURISDICTION

The Florida Appellate Court entered its decision per curiam affirmed on June 20, 2018, and denied the request for a rehearing and request for a written opinion on August 7, 2018.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

CONSITUTIONAL PROVISION INVOLVED

U.S. Const. amend. I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV

> All persons born or naturalized in the United States, and subject to the jurisdiction

> thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE MATERIAL FACTS

Petitioner, Jodi A. Smith ("Smith"), is a mother of a young female gymnast. She had her daughter training at the gymnastics facility, Lakewood Ranch Gymnastics LLC ("LWRG") that falsely advertised on its website that one owner of the facility, David Parraga, was a Pan American Games All-Around Champion as well as a gold medal winner on two events at the men's World Gymnastics Championships. The website also detailed Laura Parraga ("Parraga")(collectively "Respondents") as a former Atlanta Falcons cheerleader.

After a year at the gym, and in an effort to find the year David Parraga made his remarkable achievements, Smith reviewed the internet, but could find nothing about him except pictures of he and his wife, Laura, at a Playboy function. Smith became concerned about exposure of pornography to children because gyms had been in trouble locally and nationally for similar things. Smith also saw that Parraga, a former Falcons cheerleader, was friends on Facebook with Tiffany Fallon, another Falcons cheerleader, who had a Playboy

bunny under her name. Smith, associating Parraga to Playboy and being a Falcons cheerleader, typed into Yahoo, an internet search engine, the words, Playboy, Falcons, and cheerleaders. The search results revealed "NFL cheerleaders in the buff or something like that." Smith tapped the link and it revealed a nude image of a woman she could not identify, but she believed had familiarity and similar facial features to Parraga. Smith was "terrified" and took a photograph of the face of the woman with her cell phone. (App. 39-41a).

Smith, in continuing conversations about concerns of the facility where the children trained, talked privately to two of her closest friends at the facility about her inability to find anything about David Parraga's credentials and the pornographic affiliations. (App. 41a).

After a period of two weeks, a meeting was held with Respondents. At the close of the meeting, all parties agreed to part ways and shook hands. However, immediately after the meeting Parraga decided a post on Facebook to over one hundred other mothers that Smith was spreading lies about David Parraga's credentials and Parraga being associated with Playboy among other things. (App. 41-42a).

Smith filed suit in state court for defamation, misrepresentation, and false advertising. Respondents filed a counterclaim for defamation and tortious interference. After a three-day non-jury trial, the trial court, through written opinion, entered judgment denying all of Smith's claims, and entered judgment for Respondents for

defamation per se. (App. 1a). After denying Smith's motion for rehearing, Smith appealed. (App 30a). After full briefing and oral argument, the judgment was affirmed without opinion by the appellate court. (App 31a). Smith sought rehearing en banc and made request for written opinion. Both motions were denied summarily. (App. 32a).

In finding liability for defamation, the trial court found Smith made false statements of fact set forth in requests for admissions, deposition transcripts, her testimony, text messages, and a recorded conversation. (App 16a, 26a). However, none of the statements, as quoted by the court, ever appear in the record. (App 43a-52a). Further, the trial court concluded she made the defamatory statements with negligence. (App 25a). In denying Smith's claim for liability the court found the Facebook post made about her was substantially true. (App 14-17a).

On appeal, Smith argued the appellate court had an obligation to review the entire record on appeal to assure that she was not denied First Amendment protection by being held liable for statements that did not exist. (App 43a-52a). She also argued to the trial court and appellate court that any statement she made was not negligent (App 33-35a)(App 59-62a), and that the court failed to apply the different effects test under *Masson* v. *New Yorker Magazine, Inc*., 501 U.S. 496, 517 (1991). (App 35-38a)(App 62-65a).

REASONS FOR GRANTING THE WRIT

This Court, at this time when protection of

children is a prominent issue[1], should grant this writ of certiorari to clarify whether there is an obligation in a purely private matter for a reviewing court to look at the entire record to assure First Amendment protection; define for parents what is negligent under the First Amendment when concerns arise about the safety and welfare of children; and whether the "different effects" test is required under the First Amendment for a purely private matter in a determination of substantial truth.

a. Enhanced Appellate Review

In *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964), this Court adopted an enhanced appellate review of the evidence in "proper cases" stating, "We must "make an independent examination of the whole record," so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." (Citing *Edwards v. South Carolina*, 372 U.S. 229 (1963)).

In *Bose Corp. v. Consumers Union of United States, Inc.,* 466 US 485, 499 (1984), it was held, "in cases raising First Amendment issues we have

[1] The federal government has instituted new federal regulation regarding reporting suspected abuse. *https://www.congress.gov/bill/115th-congress/senate-bill/534/text?format=txt*. And, as of March 2017, the new United States Center for Safesport has implemented new procedures and programs to encourage parents and others to speak up about abuse in order to protect our children. See *https://usagym.org/pages/education/safesport/*.

repeatedly held that an appellate court has an obligation to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression." This Court explained, "This process has been vitally important in cases involving restrictions on the freedom of speech protected by the First Amendment, particularly in those cases in which it is contended that the communication in issue is within one of the few classes of "unprotected" speech." *Id* at 503. Libelous speech has been held to constitute one such category. *Id.*

The enhanced review has been reiterated by this Court in numerous other cases, but they generally involve the review of the record to determine whether a defendant is either a "public official" or "public figure" for purposes of whether to apply the "actual malice" standard. See *Bose*; *Snyder v Phelps*, 131 S. Ct. 1207 (2011); and *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989).

However, this Court has not specifically addressed whether the enhanced review is required in a case of a private plaintiff and non-media defendant. The case provides the perfect opportunity for this Court to clarify this Constitutional protection is deserving to private citizens because private individuals are more vulnerable to injury than public officials and public figures. See *Gertz v. Robert Welch, Inc.,* 418 U.S. 322, 345 (1974). Further, "In libel cases, … we view an erroneous verdict for the plaintiff as most

serious. Not only does it mulct the defendant for an innocent misstatement . . . but … would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate." *Rosenbloom v. Metromedia, Inc.,* 403 U. S. 29, 50 (1971).

In this case, Smith was found liable by the courts for "unprotected" libelous speech. The Circuit Court found Jodi liable for statements that she told, or suggested, Laura was in Playboy, accused the Respondents of cheating at gymnastics competitions, that they may have used drugs or been under the influence, and had misused money from other parents. (App 15-16a and 25-26a) The Court specifically stated the Playboy statement was derived from requests for admissions, her testimony and her deposition transcript. The remaining statements were derived from text messages and the recorded conversation played into the record. A review of the evidence specifically identified by the Court finds no support for the court's determination that Smith made these alleged false statements of fact. Further, the statements she did make on these topics were isolated by the court and taken completely out of context. And, the court failed to evaluate the cautionary statements, medium of the communications and the perception of the audience to whom she spoke. (App 43-59a).

On appeal, Smith argued the Second District Court of Appeals was required to review the entire record so that her First Amendment rights were not violated, and detailed all of the specific evidence to reveal no such statements existed.

(App 43a). The Second District Court upheld the judgment without opinion for defamation although not a single false statement of fact was supported in the record. (App 31a).

If this Court applies the enhanced appellate review to private plaintiff, non-media defendant cases it would protect those most vulnerable to injury and negate the strong impetus in place for self-censorship which cannot be tolerated under the First Amendment.

b. Negligence

"It is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling." *Globe Newspaper Co.* v. *Superior Court,* 457 U. S. 596, 607 (1982). "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *Prince* v. *Massachusetts,* 321 U. S. 158, 168 (1944)." *New York v. Ferber*, 458 U.S. 747, 756-7 (1982).

Under Florida defamation law, a private plaintiff must prove a statement was made with negligence. *Jews for Jesus, Inc. v. Rapp*, 997 So.2d 1098 (Fla. 2008). This Court has yet to provide a constitutional definition of negligence, although in *Gertz*, this court adopted a negligence standard in defamation cases between a private plaintiff and media defendant.

This case presents a perfect opportunity for

this court to define "negligence" as it applies under the First and Fourteenth Amendments. If it is a "reasonable person" standard, then in light of the concern our society places on the protection of children, the question begs:

Is it reasonable for a mother who suspects a gymnastics facility is lying about their credentials, posting pictures of themselves at the Playboy mansion, has concerns about children being hurt, and sees similarities between Parraga and an internet picture, to discuss these matters privately with her two other concerned mothers who share similar concerns with each other daily?

The problem lies in exactly what this Court has struggled with on prior occasions. "The reasonable-care standard is "elusive," *Time, Inc.* v. *Hill, supra,* at 389; it saddles the press (or in this case Smith) with "the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait."" *Gertz* at 366. Further, "the flexibility which inheres in the reasonable-care standard will create the danger that a jury will convert it into "an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks' … which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail" *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971)." *Id.* at 367. And, this is exactly what the Circuit Court did to Smith in this case by taking vague generalities about her unpleasant communications about the

Respondents and converting them into liability without any explanation other than to state it was negligent.

"It is perhaps unavoidable that in the area of tension between the Constitution and the various state laws of defamation there will be some uncertainty as to what publications are and what are not protected … "Inevitably its outer limits will be marked out through case-by-case adjudication, as is true with so many legal standards for judging concrete cases, whether the standard is provided by the Constitution, statutes, or case law." *St. Amant* v. *Thompson,* 390 U. S. 727, 730-731." *Monitor* at 276.

The importance here is that without a clear defined standard of what constitutes First Amendment negligence parents with children in organized youth athletics, who now under federal law have an obligation to report suspicions, could be subject to liability if they discuss suspicions privately that may end up not being 100% true. It is imperative this Court provides guidance through this case to provide that outer limit on the elusive standard of First Amendment negligence.

c. "Different Effects" Test

In *Masson* v. *New Yorker Magazine, Inc*., 501 U.S. 496, 517 (1991), this Court concluded that a deliberate alteration of the words uttered by a plaintiff do not equate with knowledge of falsity for purposes of *Sullivan* and *Gertz* "unless the alteration results in a material change in the

meaning conveyed by the statement." "Put another way, the statement is not considered false unless it "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." R. Sack, Libel, Slander, and Related Problems 138 (1980)" *Id.*

The question unresolved in *Masson* is whether the "different effects" test falls within the ambit of the First Amendment. It appears from the holding that the test for substantial truth is perhaps limited to determinations of "actual malice." However, by this Court specifically referencing *Gertz*, it appears the "different effects" test is required for all determinations under the First Amendment where substantial truth is raised.

In *Smith v. Cuban American Nat. Foundation*, 731 So. 2d 702, 707 (Fla. 3d DCA 1999), the Florida Court specifically stated, "the U.S. Supreme Court decision in *Masson v. New Yorker Magazine,* 501 U.S. 496 (1991), which specifically addresses substantial truth, and brings it into the ambit of constitutional law."

This case is an excellent case for this Court to provide guidance on this issue. The Facebook post made by Parraga included a portion which stated, Smith was a "liar" spreading untruths about David Parraga's credentials.

Parraga then stated:

She (*Smith*) is telling people that David

> has said he was a world champion gymnast. Which was NEVER said. What he is is a Specialty Worldwide Champion for those athletes that did not compete All-Around; (App 63a).

Similar to *Masson*, we are dealing with quotations attributed to an author. In *Masson*, this Court evaluated the statements attributed to determine if they had a different effect than what was actually spoken. Here, Parraga attributed to Smith, "She is telling people that David has said he was a world champion gymnast." Here, Parraga is attributing to Smith a statement that she made on her website. Then, Parraga follows with additional false statements about David Parraga's credentials and denies her own statements on her website ever existed.

In a twist, the Circuit Court determined that this Facebook post about Smith was substantially true without any application of the "different effects" test. If the court had applied the test, if required under the First Amendment, it would have determined that if the truth was told, the effect on the mind of the reader would change because the truth was Respondents, not Smith, were disseminating false information about David Parraga's credentials, not only in their many promotional materials, but within the FB Post itself. Under the "different effects" test, this portion of the FB Post was not substantially true.

As such, Smith requests this Court review this

matter to clarify the scope of the proper application of the "different effects" test as it applies to substantial truth under the First and Fourteenth Amendments.

CONCLUSION

For the foregoing reasons, Petitioner requests this petition for writ of certiorari be granted.

Respectfully submitted,

DAVID W. SMITH, ESQ.
Law Office of David W. Smith
5020 Clark Rd. # 412
Sarasota, Florida 34233
(941) 312-3078
david@dwsmithlaw.com

APPENDIX

JUDGMENT OF THE TWELFTH JUDICIAL CIRCUIT COURT

(June 16, 2017)

Jodi A Smith

v.

Lakewood Ranch Gymnastics LLC, Laura Parraga, and David Parraga

THIS MATTER was tried before this Court on April 24 through 26, 2017. David W. Smith appeared with plaintiff, Jodi A. Smith. Jennifer L. Grosso and Kelly R. High appeared with defendants, David and Laura Parraga, individually and on behalf of Lakewood Ranch Gymnastics, LLC. The Court, having reviewed the relevant pleadings and evidence, having heard testimony and arguments of counsel and being otherwise fully advised in the premises, finds as follows:

Summary of Claims and Defenses

On December 8, 2015, plaintiff filed her complaint against the defendants. On January 29, 2016, plaintiff filed a seven-count amended complaint ("Amended Complaint") against defendants for damages under count I - Defamation Per Se; II - Defamation by Implication; III - Violation of Florida Deceptive and Unfair Trade Practices Act; IV - Intentional Misrepresentation; V - Negligent Misrepresentation; VI - False

Advertising; and VII - Breach of an Implied Agreement of Non-Disparagement. On February 8, 2016, defendants filed their Answer, Affirmative Defenses, and Counterclaim. Defendants raised twenty affirmative defenses, and defendants asserted a Counterclaim against plaintiff for damages under count I - Defamation Per Se and II
Tortious Interference. On February 17,2016, plaintiff filed her Answer and Affirmative Defenses
to the Counterclaim, asserting six affirmative defenses. During the trial, defendants voluntarily dismissed count II-Tortious Interference of their Counterclaim.

On April 26, 2017, after the plaintiff rested her case, the Court granted the defendants motion for involuntary dismissal as to Count III - Violation of Florida Deceptive and Unfair Trade Practices Act and Count IV - Intentional Misrepresentation, ofthe Amended Complaint. Then later that day on April 26, 2017, after the defendants had rested their case, the Court granted defendants renewed motion for involuntary dismissal as to Count VII - Breach ofImplied Agreement of NonDisparagement
of the Amended Complaint. Therefore, what remained for the Court to decide was plaintiff's Amended Complaint for damages under Count I - Defamation Per Se; II – Defamation by Implication; V - Negligent Misrepresentation; and VI - False Advcrtising; and defendant's Counterclaim for damages under count I - Defamation Per Se.

Findings of Fact

In early 2014, plaintiff had her daughter attending Acrofit Gymnastics ("Acrofit"), a

gymnastics training center near their home in Sarasota, Florida.

Defendant, Lakewood Ranch Gymnastics, LLC, has operated a gymnastics training facility in Lakewood Ranch, Florida (Lakewood Ranch Gymnastics, LLC, and its facility are referred to herein as "LWRG") since 2013. The business focuses on gymnastics training and competition for children and is known throughout Florida for its accomplishments. It maintains a website containing information about the gym and its coaches. David and Laura Parraga are the owners of LWRG and serve as coaches. The LWRG website was created in 2011 by a LWRG parent who had some website design experience. The website designer for LWRG obtained the information for David and Laura Parraga's biographies from the LaFleur's Gymnastics ("LaFleur's) website. LaFleur's is a gym in Largo, Florida where David and Laura Parraga previously coached. The LaFleur's website was not created by David or Laura Parraga and was not reviewed by them. When David Parraga first came to the United States of America in 1999, he provided some general information to LeFleur's representative about his background including his gymnastics experience. David Parraga speaks English however that is not his native language and he is not fluent. David Parraga also never reviewed the content on the LWRG website, and Laura Parraga did not closely review it either.

The LWRG website provided that David Parraga was a member of the Venezuelan National Gymnastics Team, as well as was a Pan American

Games all-around champion and a competitor in the World Gymnastics Championships for specialists where he took home the gold medal on vault and floor. These statements were not accurate. David Parraga competed in the Junior Pan American Games, not the Pan American Games, and while David also competed successfully in numerous international competitions, he did not take home medals at the World Gymnastics Championships. The LWRG website portrayed David Parraga as an accomplished gymnast, winning medals and accolades in worldwide competitions and that is true. David Parraga was named the Athlete of the Year for Venezuela as a result of his gymnastics achievements.

One of the purposes of the LWRG website is to promote LWRG's business. LWRG, and David and Laura Parraga did not intentionally include these two inaccuracies of David Parraga's credentials on the LWRG website to induce parents to choose L WRG for their children. David and Laura Parraga were not aware of the inaccuracies on the LWRG website until the plaintiff brought it to their attention as discussed in this Judgment.

Sometime in early 2014, plaintiff heard about L WRG through friends who had daughters taking gymnastics at that program. She reviewed the website of L WRG and did other research about the program at LWRG. Apparently, plaintiff was pleased with what she read on the website and heard from other parents, because in early 2014, plaintiff considered moving her daughter from Acrofit to L WRG.

In March 2014, plaintiff brought her daughter to LWRG for an evaluation of her gymnastics skills. The evaluation was conducted by one of the LWRG coaches, Caroline Weiss. During this time, plaintiff met David and Laura Parraga. Plaintiff never asked anyone if David Parraga would be her daughter's coach if she enrolled her at LWRG. In late Mayor early June 2014, plaintiff decided to enroll her daughter in gymnastics training at LWRG. Her daughter was coached by a rotation of four coaches, and David Parraga was not a part of this coaching rotation. Even though David Parraga may have coached plaintiff's daughter in one special program, he was not her primary coach because David Parraga primarily coaches the advanced gymnasts. During all relevant times, plaintiff's daughter was not an advanced gymnast.

From June 2014 through January 2015, Plaintiff continued to allow her daughter to take gymnastics at L WRG and she was pleased with the coaching her daughter received there. Plaintiff and her husband, David Smith, were involved at LWRG as parents. They joined the Parents Club and participated in meetings and events. Along with other parents, they assisted David and Laura Parraga and the other coaches moving the operation of LWRG to a new facility in July 2014. They also attended the grand opening of LWRG in this new facility in September 2014 when Olympic Gold Medalist Aly Raisman appeared as a special guest. Eventually, in September 2014, plaintiff became involved with the welcoming committee at L WRG and served as the events coordinator.

Plaintiff even indicated in a text that she liked it when Laura Parraga coached her daughter.

On January 14, 2015, plaintiff received a letter from her daughter's coach, Caroline Weiss, advising plaintiff that her daughter would be moving from Level 3 to Level 3 Junior. Plaintiff was confused and unhappy that her daughter would not be moving to a higher level.[1] It does not appear that plaintiff asked Caroline Weiss why her daughter would not be moving to Level 4. Prior to receiving the January 14, 2015 letter, plaintiff's communications regarding LWRG were positive and plaintiff had nothing negative to say about LWRG or David and Laura Parraga. After receiving the January 14, 2015 letter, plaintiff's feeling (as shown by numerous text messages) about LWRG changed, however she did not inquire or complain to Caroline Weiss or any of the other coaches at LWRG, including David and Laura Parraga. Plaintiff did however begin communicating in text messages, to friends (who also had children at LWRG) about her criticisms of LWRG and the coaches. Plaintiff began to make statements to other parents of children at LWRG that the coaches at LWRG may have cheated at competitive meets, were mentally abusive to some of the girls and terrorizing children at the programs. She also accused LWRG of stealing money from the parents and that some of the people involved in the LWRG Parents Club were

[1] Plaintiff believed that her daughter should have been moved to Level 4 or a higher level because of her performance, both in training and at competitive meets.

dishonest. Plaintiff also communicated to LWRG parents about other gymnastic programs in the area that might be better and that she might be opening her own gym in the future.

Even though she had made some criticisms about the defendants, in July 2015, plaintiff was still committed to LWRG and allowing her daughter to be trained there. To do something nice for David Parraga, plaintiff thought about planning a party for him to celebrate his accomplishments on the anniversary of the Pan American Games. She was going to make or buy a cake and wanted to top it off with an item symbolizing the Pan American Games on the internet to confirm David Parraga's involvement in those games. Not only did plaintiff not find confirmation that David Parraga was a champion at the Pan American Games, but she also did not find any information about his credentials.[2] Plaintiff reached the conclusion that David Parraga's credentials on the LWRG's website were not correct, and in fact misleading. Plaintiff, however did not approach David or Laura Parraga to ask them about David Parraga's credentials as shown on the website, which she believed were misleading. Instead, plaintiff began sharing her research and conclusions with other people (in text messages), including parents with children at LWRG and telling them that David Parraga was not a world champion gymnast and he was not who he said he was on the website. Apparently, plaintiff

[2] She did not fine that he was a Junior Pan American Champion or Venezuelan Athlete of the Year.

was upset with the lack of information she discovered from her research about David Parraga.

While researching for David Parraga's participation in the Pan American Games, plaintiff must have researched David Parraga's name on the internet without reference to the Pan American Games. Plaintiff also researched Laura Parraga's Facebook page and Eduardo Parraga's Facebook page.[3] She found a photo of a man standing next to Laura Parraga and she initially thought it was Eduardo Parraga because the man was much taller than Laura Parraga. Then she realized David Parraga was standing on something next to Laura Parraga. Both of them were fully dressed; David Parraga was wearing a sport jacket and Laura Parraga was wearing a dress. The photo of David and Laura Parraga showed them outside standing in front of posters of some models in the nude or semi-nude. On the left side of the photograph is part of a poster, which shows that BOY is part of the title of the poster. There is no dispute that the location of the photograph is somewhere outside of the Playboy Mansion. Plaintiff also found two other photographs with Laura Parraga in them. One photograph was Laura Parraga sitting on a well in front of the Playboy Mansion and the other is a photograph of her with two other women who are beside Hugh Hefner.[4] Apparently, in 2005, David and Laura Parraga attended an event at the Playboy Mansion as guests to support Tiffany Fallon, one of Laura Parraga's friends who was

[3] Apparently Eduardo Parraga is David Parraga's brother.

[4] The founder of Playboy magazine.

being honored. Laura Parraga and Tiffany Fallon were professional cheerleaders for the Altanta Falcons football team in the 1990's. After finding these photos, plaintiff decided to search Laura Parraga on the internet to determine if Laura Parraga had in fact posed for Playboy magazine as a model. She was suspicious. Apparently she was concerned about her daughter belonging to a gym and being trained where the owner of that gym may have posed for Playboy magazine. Using her I-Pad, plaintiff searched the internet by typing in "Playboy" and "Falcons Cheerleader." As a result of this search, plaintiff navigated to the www.playboyblog.com website, where she found a photo of a woman who plaintiff believed had facial features similar to Laura Parraga. The woman was nude. With her cell phone, plaintiff took a photograph of only the face of the woman. ("Playboy Image"). The words "playboyblog.com" are clearly legible at the top of the Playboy Image. Plaintiff apparently did not perform any additional research to determine the identity of the woman in the Playboy Image and to confirm that it was in fact Laura Parraga. Nor did plaintiff ever ask David Parraga or Laura Parraga if the woman in the Playboy Image was Laura Parraga.

On or about July 14, 2015, plaintiff was at Starbucks with her husband, David Smith when she ran into Elvira Faulconer ("Elvira"), another LWRG parent. In the presence of her husband, plaintiff showed the Playboy Image to Elvira and told her the image was Laura Parraga when she posed in Playboy magazine. On another day in July 2015, plaintiff ran into Angela Salvatore ("Angela"),

a LWRG parent, on the sidewalk in front of the LWRG parking lot. Plaintiff showed the Playboy Image to Angela and told Angela it was a picture of Laura Parraga when she posed in Playboy magazine. Angela could easily read "playboyblog.com" on the top of the Playboy Image. Plaintiff may have also shown the Playboy Image to other parents. Even after showing the photograph to Elvira and Angela, plaintiff did not perform any additional research to determine the identity of the woman in the Playboy Image.[5] The identity of the woman in the Playboy Image is not Laura Parraga and Laura Parraga never was in or posed in Playboy magazine.

Before and on July 29, 2015, David and Laura Parraga heard from several LWRG parents about plaintiff showing the Playboy Image to certain LWRG parents and telling each one of them that it was Laura Parraga when she had posed in Playboy magazine. These parents also told them that plaintiff was questioning David Parraga's credentials and the LWRG website, the honesty of the Parents Club officers' use of funds, and promoting other gyms instead of LWRG. On July 29, 2015, when plaintiff came to LWRG to drop off her daughter for her class, David Parraga asked plaintiff if she would meet with him and Laura Parraga. Plaintiff informed David Parraga that she had to be somewhere else, but would meet with them when she returned to pick up her daughter.

[5] Later, Plaintiff and her counsel determined that the woman in the photograph she took with her phone was not Laura Parraga, when they ordered the 1999 Playboy magazine from Amazon.

When plaintiff returned later that day, she met her husband, David Smith at LWRG and they went to the offices of L WRG to meet with David and Laura Parraga. At the meeting, Laura Parraga was upset and confronted plaintiff about her showing the Playboy Image to certain LWRG parents and telling them it was her. David and Laura Parraga also confronted plaintiff about the other accusations she was saying about them and LWRG. Plaintiff denied showing the Playboy Image to anyone and making these accusations against David and Laura Parraga and LWRG.[6] David and Laura Parraga suggested to plaintiff and her husband that it would be better if they would take their daughter out of the program at L WRG and terminate the relationship. David and Laura Parraga shook hands with plaintiff and David Smith, and plaintiff and David Smith left the office. Prior to the meeting, plaintiff was not planning on withdrawing their daughter from gymnastics at LWRG and terminating that relationship.

After the meeting, David and Laura Parraga stayed in their office and decided to address the accusations made by plaintiff to their customers and families to defend themselves. Laura Parraga went onto the LWRG private, closed Facebook parents page, and drafted comments to post on Facebook, which is a Stipulated Joint Trial Exhibit #1 ("Facebook Post"). Laura Parraga drafted and made the Facebook Post to respond to plaintiff's accusations about her and David Parraga and other

[6] When talking about the Playboy Image, plaintiff stated at one point "I do not know what you are talking about."

parents, and to protect the business interest of LWRG from misinformation.

The plaintiff and her husband left LWRG separately because they were in two cars. Plaintiff and her son left and drove to Dr. Grice's office. On the way, they telephoned plaintiffs friend, Carrie Mueller, and plaintiff taIked with her about the meeting she had just left with David and Laura Parraga. During the conversation, plaintiff stated that she had "no problems with the coaches".[7] When the plaintiff met with Dr. Grice, Dr. Grice showed her the Facebook Post that had been posted on the LWRG closed Facebook parents' page.[8]Plaintiff was embarrassed, humiliated and upset from what she read. Plaintiff's husband, David Smith, left the LWRG facility with their daughter and they went home to wait for plaintiff and their son.

From July 30, 2015 through the remainder of 2015, plaintiff made statements (in text messages) to other people including some parents with children at LWRG accusing David and Laura Parraga of inappropriate conduct, including but not limited to statements that they were using illegal drugs, were aware of sexual misconduct by LWRG coaches, and were manipulating gymnastics scores at gymnastics competitions.

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[7] Plaintiff's son recorded the telephone conversation and the recording was played at trial.

[8] Apparently, Dr. Grice was a parent who had her daughter at LWRG so she had access to the private, closed Facebook parents page.

Conclusions of Law

Count I - P1aintifrs Claim for Defamation per se against defendants

"To recover for libel or slander under Florida law, a plaintiff must demonstrate that: (I) the defendant published a false statement; (2) about the plaintiff; (3) to a third party; and (4) the [plaintiff] suffered damages as a result of the publication." *Thompson* v. *Orange Lake Country Club, Inc.,* 224 F. Supp. 2d 1368, 1376 (M.D. Fla. 2002) (citing *Valencia* v. *Cilibank Int'l,* 728 So. 2d 330, 330 (3d DCA 1999). "A published statement is libelous *per se* if: (1) it charges that a person has committed an infamous crime; (2) it charges a person with having an infectious disease; (3) it tends to subject one to hatred, distrust, ridicule, contempt, or disgrace; or (4) it tends to injure one in his trade or profession.'" *Klayman* v. *Judicial Walch, Inc.,* 22 F. SUpp. 3d 1240 (S.D. Fla. 2014) [quoting *Richard* v. *Gray,* 62 So. 2d 597, 598 (Fla. 1953) (en bane)].

Under Florida law, a claim for defamation per se must contain the following five elements: (1) a publication; (2) a falsity; (3) the actor must act at least negligently on a matter concerning a private person; (4) actual damages; and (5) the statement must be defamatory. *Jews For Jesus, Inc.* v. *Rapp,* 997 So. 2d 1098, 1106 (Fla. 2008).

In order to prevail in this case, the plaintiff must plead and prove the falsity of the alleged defamatory statement(s), focusing on the

statements contained in the Facebook Post. Plaintiff presented evidence that the statements contained in the Facebook Post were false by first denying that she had ever said anything false about the defendants and then presenting evidence that what she had said about the defendants was true. In other words, instead of just having to prove that the statements published in the Facebook Post were false; plaintiff had to prove that all the statements she had published about the defendants were in fact true. The facts of this defamation case are distinguishable from other cases since the Facebook Post was actually a response to statement that had been originally published by the plaintiff.

Truth is a complete defense to a defamation claim, even though a truthful statement may harm a plaintiff's reputation as much as a false statement. The rationale for exonerating a truthful defamer is that a truthful defamatory statement merely deprives the plaintiff of a reputation that she was not entitled to in the first place. Dissemination of truthful information also provides a public benefit that generally outweighs the plaintiff's interest in suppressing the inconvenient information. Likewise, related to the concept that truth is a defense to a defamation action is the doctrine of substantial truth, which is also a defense to a defamation action. *Smith* v *Cuban American National Foundation,* 731 So. 2d 702 (3,d DCA 1999); *McCormick* v. *Miami Herald Publication Co.,* 139 So. 2d 197, 200 (2d DCA 1962). Under the substantial truth doctrine, a statement does not have to be perfectly accurate if the "gist" or the "sting" of the statement is true. *Id.* And a

defendant does not have to prove the literal truth of a defamatory statement to prevail. An effective defense can rely on the substantial truth doctrine.

The plaintiff failed to prove by a preponderance of the evidence that the statements published in the Facebook Post were defamatory. The evidence proved that plaintiff had been communicating with third parties and accusing the defendants of being untruthful.[9] As discussed previously, the plaintiff discovered in a search over the internet that the LWRG website was not accurate because David Parraga's credentials were incorrect. Then plaintiff published her research and conclusions to other people, in person and through text.[10] The evidence also proved that after plaintiff had discovered a photo of David and Laura Parraga at the Playboy Mansion, she was curious as to whether Laura Parraga had also posed for Playboy magazine, presumably as a model. Plaintiff continued her research using a website dedicated to playboy models until she found a woman whose face she believed resembled Laura Parraga. Plaintiff took a photograph of the woman's face on her cell phone, which has been defined as the Playboy Image. She then showed the Playboy Image to several other

[9] In one text message dated July 18, 2015 to Angela Salvatore, plaintiff stated that "I think Laura is a habitual liar". In another text message dated July 25, 2015 to Elvira Faulconer, the plaintiff stated that "All of the gym lies".

[10] In one text message dated July 15, 2015 to Angela Salvatore, plaintiff stated that "Funny thing ... when
you try to search for David, there is absolutely nothing. He wasn't a Pan Am or World Champion."

women and told or suggested to them that it was Laura Parraga.[11] Plaintiff also communicated about the improprieties involved with the LWRG Parents Club to other people in person and through text messages.[12] Finally, plaintiff communicated some statements about plaintiff opening her own gym and what occurred at the meeting on July 29, 2015 between her and her husband, and David and Laura Parraga.[13]

Even though the statements published in the Facebook Post accused plaintiff of making certain derogatory statements and conduct against the defendants, those statements and conduct were substantially true. It is understandable that plaintiff was embarrassed and humiliated by the statements in the Facebook Post and that is unfortunate. However, the evidence which was admitted at trial did not support plaintiff s claim, but rather supported the defendants' defense that the statements published were substantially true. This finding is based on a comparison of the

[11] This evidence came out in the testimony from the plaintiff (trial & deposition) as well as request for admission number 4.

[12] This evidence came out in the testimony from the plaintiff (trial & deposition) and text messages between plaintiff and Andrea Delsanto and Elvira Faulconer accusing the funds for the Parents Club being used for hotel rooms in the Bahamas.

[13] The plaintiff's denial of these statements in the Facebook Post are contradicted by the testimony of the plaintiff (trial and deposition) as well as text messages between plaintiff and Laura Browne, Andrea Delsanto, Elvira Faulconer, Carrie Mueller and Angela Salvatore.

statements published in the Facebook Post against the statements published in the hundreds of text messages between plaintiff and her friends and the testimony of the witnesses. Since the statements in the Facebook Post are substantially true, the plaintiff has failed to prove by the preponderance of the evidence that she is entitled for damages for defamation per se.

Count II - Plaintifrs Claim for Defamation by Implication against defendants

Defamation by implication has long been recognized by the courts of this state, "as a valid variation of defamation." *Jews for Jesus, Inc.* v. *Rapp,* 997 So. 2d 1098, 1107 (Fla. 2008). "Defamation by implication arises, not from what is stated, but from what is implied when a defendant (I) juxtaposes a series of facts so as to imply a defamatory connection between them, or (2) creates a defamatory implication by omitting facts, [such that] he may be held responsible for the defamatory implication .... '" *Jews* at 1106, 1108. [quoting *Stevens* v. *Iowa Newspapers, Inc.,* 728 N. W. 2d 823, 827 (Iowa 2007)].

For the same reasons stated above, the Court finds the statements published in the Facebook Post are substantially true and therefore the plaintiff has failed to prove by the preponderance of
the evidence that she is entitled for damages for defamation by implication.

Count III - Plaintifrs Claim of a Violation of the Unfair and Deceptive Trade Practices Act

As stated above, the Court has already granted defendants' motion for involuntary dismissal at the trial as to plaintiff's claim that defendants violated the Florida Deceptive and Unfair Trade Practices Act (FDUTPA).

In order for a plaintiff to prevail on a claim that a defendant violated FDUTPA, there would have to be evidence that (I) the defendants committed a deceptive act or unfair practice; (2) the act or unfair practice caused the plaintiff to act and (3) the plaintiff suffered actual damages. § 501.201. Florida Statutes.

The evidence admitted at trial did not support plaintiff's claim that the defendants committed a deceptive act because the LWRG website was not accurate about David Parraga's credentials. The plaintiff did not submit any evidence of any other inaccuracies in the L WRG website. In the following section regarding the claim of false advertising, there is a discussion of the evidence considered by the Court to deny that claim. Those discussions will also apply to this section. After the plaintiff presented her case, the Court granted defendants' motion for involuntary dismissal because the plaintiff failed to prove by the preponderance of the evidence that defendants committed any deceptive act or unfair practice which would support a claim for damages under FDUTPA.

Count IV - Plaintifrs claim of Intentional Misrepresentation

As stated above, the Court has already ruled on the plaintiff's claim of intentional misrepresentation by finding that the plaintiff has failed to prove by a preponderance of the evidence that defendants intentionally misrepresented statements on the website of L WRG.

In order to prove a claim for intentional misrepresentation, plaintiff must prove (I) a false statement or misrepresentation of a material fact; (2) the representor's knowledge at the time the misrepresentation is made that such statement is false; (3) such misrepresentation was intended to induce another to act in reliance thereon; (4) action in justifiable reliance on the representation; and (5) resulting damage or injury to the party so acting. *Thor Bear, Inc.* v *Crocker Mizner Park, Inc.,* 648 So.2d 168 (4th DCA 1995).

The evidence necessary to support plaintiff's cause of action against defendants for intentional misrepresentation is similar to the cause of action of negligent misrepresentation except for the element of intent (which really makes it fraudulent misrepresentation). After the plaintiff presented her case, the Court granted defendants' motion for involuntary dismissal because the plaintiff failed to prove by the preponderance of the evidence that defendants intentionally misrepresented any statements on the LWRG's website. In the following section, there is a discussion of the evidence considered by the Court on negligent misrepresentation. Those discussions will also apply to this section.

Count V - Plaintiff's claim of Negligent Misrepresentation

In order to prove a claim for negligent misrepresentation, Plaintiff must show: (1) the defendant made a misrepresentation of material fact that he believed to be true but which was in fact false; (2) the defendant was negligent in making the statement because he should have known the representation was false; (3) the defendant intended to induce the plaintiff to rely on the misrepresentation; and (4) an injury suffered by the plaintiff acting in justifiable reliance upon the misrepresentation. *Ramo* v. *Amedex Ins. Co.,* 930 So. 2d 643, 651 (3d DCA 2006).

The evidence admitted demonstrated that while one of the purposes of the L WRG website was to promote LWRG' s business, the two alleged misrepresentations on the L WRG website about David Parraga's credentials were not made with the intent to induce plaintiff to enroll her daughter at LWRG. Plaintiffs testimony that her decision to move her daughter from Acrofit to LWRG was predominately based on the L WRG website that David Parraga was a Pan American Champion and world champion athlete was not credible to prove reliance. *Flood* v. *Union Planters Bank,* 878 So. 2d 407, 410 (3d DCA 2004) (acknowledging the ability of the trial court, when acting as a factfinder, to make credibility determinations about testifying witnesses); *Parsons* v. *State,* 981 So. 2d 1249 (Fla. 5th DCA 2008) (same). Plaintiff did not even discover that there was a discrepancy of David Parraga's credentials on LWRG's website until July

2015, twelve (12) months after she had enrolled her daughter for training at L WRG. It does not appear from the evidence that the plaintiff had any intention of withdrawing her daughter from L WRG when she discovered that the website describing David Parraga's credentials was not accurate. In addition, plaintiff's decision to enroll her daughter at LWRG because of David Parraga's credentials is not supported by the evidence. She did not know if David Parraga would be her daughter's coach and it turned out that he was not. Nor did plaintiff ever ask for David Parraga to be her daughter's coach.

Finally, plaintiff was not able to prove she had been damaged by any alleged misrepresentation on the LWRG website. The timing of when the plaintiff discovered the inaccurate information on the website also does not support her claim for damages that she detrimentally relied on the website which contained inaccurate information about David Parraga's credentials. Further, plaintiff was not damaged by enrolling her daughter at L WRG, since her daughter received gymnastics training and plaintiff never complained to LWRG about the gymnastics training and the coaching her daughter was receiving. It does not appear that the value of the training plaintiff's daughter was receiving, was not impacted in any way by the discrepancy of David Parraga's credentials on the L WRG website.

Accordingly, plaintiff has failed to prove by the preponderance of the evidence that defendants

negligently misrepresented any statements on the LWRG's website.

Count IV - Plaintiff's claim of False Advertising

As stated above, the Court has already granted defendants' motion for involuntary dismissal at the trial as to plaintiff's claim of false advertising against defendants.

To prevail on a claim for false advertising under section 817.41, Florida Statutes, Plaintiff must establish the elements for fraud in the inducement. *See Smith* v. *Mellon Bank,* 957 F.2d 856, 858 (II th Cir. 1992); *Taylor Woodrow Homes Fla., Inc.* v. *4146-A Corp.,* 850 So. 2d 536, 542 (5th DCA 2003). Plaintiff must show the following: (I) a false statement made regarding a material fact; (2) the individual who made the statement knew or should have known it was false; (3) the maker intended that the other party rely on the statement; (4) a reliance on the alleged misleading advertisement; and, (5) reliance to the party's detriment. *Id.* These are basically the same elements for intentional misrepresentation.

For the same reasons stated above, the Court finds the inaccurate statements contained in LWRG's website did not make the website false and misleading, plaintiff did not rely on the inaccurate statements before enrolling her daughter at L WRG and plaintiff did not suffer any damages by the inaccurate statements. Therefore the plaintiff has failed to prove by the preponderance of the evidence

that she is entitled to damages for false advertising.

Count VII - Plaintiff's Claim of Breach of Implied Agreement of Non-Disparagement

As stated above, the Court has already granted defendants' motion for involuntary dismissal at the trial as to plaintiff's claim of defendants' breach of implied agreement of nondisparagement entered into between the parties. A contract implied in fact is an enforceable contract "that is inferred in whole or in part from the parties' conduct, not solely from their words." *CDS and Associates oJthe Palm Beaches, Inc.* v 1711 *Donna Road Associates, Inc.,* 743 So. 2d 1223 (4th DCA 1999).

As shown the by evidence, there was no enforceable contract entered into between the plaintiff and David and Laura Parraga at the end of the July 29, 2015 meeting whereby they agreed not to disparage each other. The meeting appeared to have ended peacefully with an understanding that the plaintiff would be withdrawing her daughter from the gymnastics training at L WRG. There was no evidence of any mutual meeting of the minds.

Accordingly, the plaintiff has failed to prove by the preponderance of the evidence that there was an implied agreement of non-disparagement between the parties between plaintiff and David and Laura Parraga.

Defendants' Claim for Defamation against Plaintiff

After plaintiff filed this action against the defendants, the defendants responded with their own counter-claim of defamation and tortious interference for damages against the plaintiff/counter-defendant. At trial, the defendants/counter-plaintiffs voluntarily dismissed the claim for tortious interference against plaintiff/counter-defendant. The evidence of defendants/counter-plaintiffs' counter-claim against the plaintiff/counter-defendant includes the same statements and conduct by plaintiff/counter-defendant discussed previously and which necessitated the July 29, 2015 meeting and the Facebook Post. As stated above, the statements published in the Facebook Post were substantially true and the evidence proves that plaintiff/counter-defendant was publishing false statements to third parties. In addition, statements made by plaintiff/counter-defendant after the July 29, 20 IS meeting and the Facebook Post created additional evidence introduced at trial to support the defamation claims by defendants/counterplaintiffs against the plaintiff/counter-defendant.

Some of the statements that the plaintiff/counter-defendant has published to others, in person and in text messages about defendants/counter-plaintiffs prior to the July 29, 2015 meeting are misleading and then some are just false. While it is true that the L WRG website is not accurate because David Parraga's credentials have been misstated or embellished, taken as a whole the statements in L WRG website is not deceptive and does not rise to the level of

misleading and are not actionable as a violation of FDUPTA or false advertising (as stated above).

In addition, defendants/counter-plaintiffs have proven that plaintiff/counter-defendant used her knowledge that Laura Parraga had been an Atlanta Falcons cheerleader and had been at the Playboy Mansion, to search the internet on her I-Pad until she found a Playboy website with a photograph of a woman modeling in the nude with a face that she thought resembled Laura Parraga.[14] Then plaintiff/counter-defendant using her cell phone, took a photograph of the face of the woman which has now been referred to as the Playboy Image. Plaintiff/counter-defendant then showed that Playboy Image on her cell phone to several women who also had children training at L WRG and told them it was Laura Parraga when she posed for Playboy magazine. Plaintiff/counterdefendant's statements of publishing the Playboy Image to third parties and stating it was Laura Parraga when she posed in Playboy magazine are defamatory. The Court finds plaintiff/counterdefendant acted negligently in representing that the statements she was publishing about the defendants were true.

In addition, after the July 29, 2015 meeting and Facebook Post, plaintiff/counter-defendant made statements about LWRG, David Parraga and Laura

[14] The cover of the 1999 Playboy Magazine refers to 'NFL Cheerleaders as a feature' which is admitted into evidence, Joint Stipulated Exhibit "38', as an attachment to a deposition of plaintiff, Jodi Smith on February 9, 2017.

Parraga to several people, in person and in text messages.[15] Some of the statements included accusing David Parraga or Laura Parraga or the coaches at LWRG of cheating at gymnastics competitions, that David Parraga or Laura Parraga may have used drugs or been under the influence, and that LWRG had misused money from parents of children who train at LWRG. Plaintiff/counter-defendant failed to present any evidence to disprove that she did not make any of these statements or that the statements were true. The Court has considered the six affirmative defenses to the counterclaim raised by thevplaintiff/counter-defendant and finds them to be without merit. Defendants/counter-plaintiffs on the other hand denied that any of these statements were true. The statements made by plaintiff/counter-defendant after the July 29, 2015 meeting were false and defamatory.

A communication that imputes to another conduct, characteristic, or condition incompatible with the proper exercise of his lawful business, trade, profession or office is defamation per se. *Campbell* v. *Jacksonville Kennel Club,* 66 So.2d 495, 497 (Fla.1953); *Wolfson* v. *Kirk,* 273 So.2d 774, 777 (Fla. 4th DCA 1973). In defamation per se actions, general damages are presumed. *Hood* v. *Connors,* 419 So.2d 742, 743 (Fla. 5th DCA 1982). Plaintiff/counterdefendant's statements impute to defendants/counter-plaintiffs' conduct, characteristics and conditions which are

[15] Most of this evidence was in the form of text messages by plaintiff to friends and associates.

incompatible with the proper exercise of their lawful business.

Therefore, defendants/counter-plaintiffs have established that plaintiff/counter-defendant published false statements about them to others which were defamatory. In addition, through the testimony of Laura Parraga, evidence was presented that she and her husband, David Parraga and LWRG have been damaged by the conduct of the plaintiff/counter-defendant, however there was no evidence of an amount. Even if Laura Parraga did not testify as to the amount, it is only appropriate in this case to award nominal damages to defendants/counter-plaintiffs against the plaintiff/counter-defendants. *Myers* v *Jim Russo Prison Ministries, Inc.,* 3 So. 3d 411 (2nd DCA 2009). Accordingly, where there is no evidence of an amount to be awarded as damages, the Court will enter judgment in favor of defendants/counter-plaintiffs of $1.00 for nominal damages against plaintiff/counter-defendant.

Based on the foregoing analysis of the evidence and law it is hereby

ORDERED AND ADJUDGED that:

A. On Counts I and II of the Amended Complaint, plaintiff, Jodi A. Smith, shall take nothing from this action and defendants, Lakewood Ranch Gymnastics, LLC, David Parraga and Laura Parraga, shall go hence without day.

B. On Counts V and VI of the Amended Complaint, plaintiff, Jodi A. Smith., shall take

nothing from this action and defendants, Lakewood Ranch Gymnastics, LLC, David Parraga and Laura Parraga, shall go hence without day.

C. As to Counts III, IV and VII of the Amended Complaint, the Court granted defendants Lakewood Ranch Gymnastics, LLC, David Parraga and Laura Parraga's motion for involuntary dismissal during the trial as to these counts. As to Counts III, IV and VII of the Amended Complaint, plaintiff, Jodi A. Smith, shall take nothing from this action and defendants, Lakewood Ranch Gymnastics, LLC, David Parraga and Laura Parraga, shall go hence without day.

D. As to Count I of the Counterclaim, the Court finds for the defendants/counterplaintiffs. Defendants/counter-plaintiffs, Lakewood Ranch Gymnastics, LLC, David Parraga and Laura Parraga, shall recover from plaintiff, Jodi A. Smith, the sum of $1.00 together with interest at the statutory rate, for which let execution issue.

E. Count II of the Counterclaim was voluntarily dismissed by defendants/counterplaintiffs.

F. Defendant, Lakewood Ranch Gymnastics' address is 4235 Solutions Lane, Bradenton, Florida 34211.

G. Defendant, Laura Parraga's address is 504 Regatta Way, Bradenton, Florida 34206.

H. Defendant, David Parraga's address is 504 Regatta Way, Bradenton, Florida 34206.

I. The Court retains jurisdiction to enforce this Final Judgment and to enter such further orders and judgment as may be proper including the determination and award of award attorneys' fees and costs incurred in this action.

DONE and ORDERED in Chambers, Bradento ,Manatee County, Florida, this 16th day of June, 2017.

/s/Gilbert A. Smith, Jr.
Circuit Court Judge

ORDER ON MOTION FOR REHEARING OF THE TWELFTH JUDICIAL CIRCUIT COURT FOR THE STATE OF FLORIDA

(July 10, 2017)

Jodi A Smith

v.

Lakewood Ranch Gymnastics LLC, Laura Parraga, and David Parraga

THIS CAUSE is before the Court for consideration of Plaintiff's Motion for Rehearing and Motion for Sanctions, filed in this action on June 23, 2017. The Court has reviewed the Motion with the court file and being otherwise fully advised as to the premises, it is hereby

ORDERED AND ADJUDGED that Plaintiff's Motion for Rehearing and Motion for Sanctions is DENIED.

DONE AND ORDERED in Chambers in Bradenton, Manatee County, Florida, this 10th day of July, 2017.

/s/Gilbert A. Smith, Jr.
Circuit Court Judge

OPINION OF THE SECOND DISTRICT COURT OF APPEALS FOR THE STATE OF FLORIDA
(June 20, 2018)

JODI A. SMITH
Appellant,
v.
LAKEWOOD RANCH GYMNASTICS LLC, LAURA PARRAGA, AND DAVID PARRAGA
Appellees.

Case No. 2D17-3288

PER CURIUM.

Affirmed.

SILBERMAN, VILLANTI, and MORRIS, JJ., Concur

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA SECOND DISTRICT,
POST OFFICE BOX 327
LAKELAND, FL 33802-0327

August 07, 2018

CASE NO.: 2D17-3288
L.T. No.: 2015 CA 5720

JODI A. SMITH v. LAKEWOOD RANCH GYMNASITICS, ET AL.,

Appellant/Petitioner Appellee/Respondent

BY ORDER OF THE COURT:

Appellant's motions for rehearing and issuance of a written opinion are denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

/s/ Mary Elizabeth Kuenzel
Clerk

Seal of the Second District
Court of Appeal

MOTION FOR REHEARING –
RELEVANT PAGES
(June 23, 2017)

TWELFTH JUDICIAL CIRCUIT COURT FOR
THE STATE OF FLORIDA

Jodi A Smith

v.

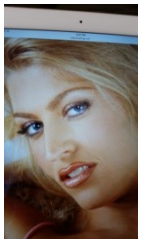
Lakewood Ranch Gymnastics LLC, Laura Parraga,
and David Parraga

[pg. 11]

b. No statement made by Jodi was made with negligence

Even if the Court, on rehearing, considers Jodi's alleged statements to contain actionable statements of fact, which it should not. Jodi's alleged statements were not even made with negligence. See *Tribune Co. v. Levin*, 458 So.2d 243 (Fla. 1984). Jodi had understandable doubts about the truthfulness of Laura and David because of the lies about David's credentials. **[pg. 12]** Jodi became concerned about affiliations with pornography because of pictures of David and Laura at the Playboy mansion that were posted on Laura's Facebook page. Jodi did a simple yahoo search and an image appeared that resembled Laura. She took a photograph of the face of the picture and shared concerns to two of her closest

friends who had children at the same facility. Her concerns were more than within a standard of reasonable care because every reasonable mother would have concerns about the moral character of a gymnastics facility that their children attended where they placed themselves at the *Playboy mansion* and concealed the *truth of their credentials*. However, under the Court's current conclusion of law it is negligent for a mother of an eight-year-old girl to briefly talk privately about **A**, after being unable to confirm the truth of **B**, and then viewing **C.**



A

B

C

The Court erred in its determination the Jodi acted with negligence in regards to the defamatory statements attributed to her, and the Court should vacate its judgment in this regard.
[pg. 20]

In its judgment, this Court concluded Jodi did not prevail on her claim for defamation per se. Specifically, the Court concluded, "Even though the statements published in the Facebook Post accused plaintiff of making certain derogatory statements and conduct against the defendants, those statements and conduct were substantially true."[16]

[16] In support, the Court stated, "The evidence proved that plaintiff had been communicating with third parties and accusing the defendants of

The Court erred in determining that the statements made by Laura in the Facebook post were substantially true. The Court either overlooked or erred in applying the applicable case law. And, the Court overlooked substantial evidence in the record to establish Jodi was defamed per se after July 29, 2015.

A. Under the "different effects" test, the statements in the Facebook Post about David's credentials are not substantially true.

The doctrine of substantial truth is set forth in *Smith v. Cuban American National Foundation*, 731 So. 2d 702 (Fla. 3rd DCA 1999). In *Smith*, the

being untruthful." As support, the Court referenced two text messages. One text message between Jodi and Elvira has no context whatsoever. The text message states, "All of the gym lies." The five words appear within the middle of a long text message that was redacted, but for the words, "Strange not to see Laura and David this week." The rest of the entire page of text messages between Jodi and Elvira was redacted. App. 18. This is clearly not substantial and competent evidence to support a find that Jodi was accusing defendants of being untruthful. The other text message cited by the Court was between Jodi and Angela Salvatori. The text message stated, "I think Laura is a habitual liar." The Court has taken this text message completely out of context. The entire text message appears at App. 19. The text message includes Jodi's statement from Laura that USAG was no longer taking multiple credit cards. Jodi then stated that she called USAG and that was not their policy. The statement Jodi made was also in context with her conversation with Angela who stated a couple of minutes prior, "Why are we paying 60$ for usag membership when the form clearly states $54?" The statement made by Jodi about Laura was true and there was no evidence presented to the contrary. This text message is not an accusation as suggested by the Court. It is a statement of pure opinion and not actionable. See *From v. Tallahassee Democrat, Inc*., 400 So. 2d 52 (Fla. 1st DCA 1981).

Court explained that to determine if a statement is substantially true the Court, under constitutional law, should apply the "different effects" test to determine if the statement "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Id* at 707.

The undisputed evidence indicates that David was not a Pan American all-around champion, nor did he win gold medals on two events at the World Championships. The **[pg. 21]** undisputed evidence showed that Jodi was communicating the **truth** when she talked to people about David's credentials.

However, the Facebook post stated:

> •"She has been spreading **untruths** specifically in the past two weeks regarding David…" emphasis added.

Then the post stated:

> •"She is telling people that David has said he was a world champion gymnast. Which was NEVER said. What he is is a Specialty Worldwide Champion for those athletes that did not compete All-Around."[17]

It is a fact the LWRG website stated, "David is a former world champion …" It is a fact the LWRG website stated, "[David] had the opportunity to compete in the World Gymnastics Championships for specialists where he took home

[17] App. 5

the gold medal on vault and floor." [18] It is a fact the LWRG handbook stated, "David is a former world champion athlete…"[19] It is a fact the LWRG Facebook page stated, "David is a former world champion athlete…"[20] It is a fact, LWRG mounted and displayed articles in the lobby of its facility that referenced David as a "world champion gymnast' and "world champion athlete."[21] Therefore, any statement made by Jodi about what she read in those forums did not constitute a spreading of untruths. Yet, the Court stated, "The evidence proved that plaintiff had been communicating with third parties and accusing the defendants of being untruthful."[22] It was no accusation because the Defendants *were* untruthful. Jodi was speaking the truth. **[pg. 22]**

When Laura stated, "She has been spreading untruths specifically in the past two weeks regarding David..." That is a false statement of fact. There is no substantial truth to that portion of the Facebook post because there is no truth to the statement at all. This Facebook post statement is 100% factually *incorrect*.

The statement, "Which was NEVER said" is also a false statement of fact. As stated above, on multiple forums and on multiple occasions, it was stated that David *was* a world champion.

Laura's statement that David was a "Specialty Worldwide Champion for those athletes that did not compete All-Around" said is also an

[18] App. 1
[19] App. 2
[20] App. 3
[21] App. 4
[22] Page 7 second paragraph Court's Final Judgment

undisputed false statement of fact. The portion of David's deposition transcript that was read into evidence stated, "Q. Do you know of any written materials, any documents that have ever referred to you as a specialty worldwide champion for those athletes that did not compete all around? A. No." David did not testify at trial to contradict his deposition testimony.

In applying the "different effects" test, the Court must look to the perception of the reader. Here, the statements in the Facebook post indicated that Jodi was stating untruthful things about David's credentials and a reader would have thought she was a liar. However, the truth was David's credentials were not true. If the truth had been stated, that David was NOT a world champion, NOT a Pan American all-around champion, and NOT a Specialty Worldwide Champion for those athletes that did not compete All-Around, it would have had a different effect on the reader. If the truth was told, no reader could have possibly concluded that Jodi was a liar. The conclusion would have been that the Defendants were the liars, because they were.

As such, under constitutional law, the portion of the Facebook Post related to David's credentials was not substantially true, as the Court stated. The truth would have had a different **[pg. 23]** effect on the mind of the reader and Jodi requests the Court vacate its conclusion of law that this portion of the Facebook Post was substantially true, and enter judgment in her favor.

APPELLANT'S INITIAL BRIEF ON THE MERITS –RELEVANT PAGES
(December 11, 2017)

TWELFTH JUDICIAL CIRCUIT COURT FOR THE STATE OF FLORIDA

Jodi A Smith

v.

Lakewood Ranch Gymnastics LLC, Laura Parraga, and David Parraga

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[pg. 1]

STATEMENT OF THE CASE AND THE FACTS

In early 2014, Appellant Jodi A. Smith ("Jodi") had her seven-year-old daughter attending a gymnastics training center near her home in Sarasota County where her daughter became a state champion. [T: 1977-8, 1990]. Upon learning of Lakewood Ranch Gymnastics LLC ("LWRG"), Jodi reviewed its website at a dinner party at her house with a number of friends. [T:1979]. The website contained information about the owners of LWRG to promote its business. [R: 659, 663]. The website detailed credentials about David Parraga ("David"), that he was a gymnastics world champion, Pan American all-around champion, gold medal winner on vault at the world championships, and gold medal winner on floor at the world championships ("The Misrepresentations"). [R: 733]. Jodi was very "impressed" because these achievements are

"remarkable" and "rare." [T: 1985]. The website detailed Laura Parraga ("Laura") as a former cheerleader for the Atlanta Falcons. (LWRG, David, and Laura collectively "Defendants").

At the end of May in 2014, after attending a tryout, Jodi elected to have her daughter leave the facility in Sarasota, five minutes from her house, and join LWRG, twenty miles farther from her home. [T: 1988-92]. Jodi believed that LWRG was owned and operated by a former gymnast who had the talent and knowledge to win gold medals at the Pan-American and World Championships. After Jodi joined LWRG, she was provided a handbook which also contained The Misrepresentations. **[pg. 2]** [R: 805][T: 1995]. The Misrepresentations were also copied onto the LWRG Facebook page in which Jodi "liked." [R: 717-8][T: 2065]. The Misrepresentations were also endorsed by LWRG by mounting and displaying reporters' articles in its lobby which also contained false credentials. [R: 660, 666, 695, 697].

During her daughter's tenure at LWRG, Jodi became actively involved as a parent volunteer with the booster club ("Parents Club"), and made numerous friends with the other mothers within the program. [T: 1929, 1977, 1987]. Jodi even encouraged others to join LWRG because of David's credentials. [T: 2062]. During this time, multiple parents had expressed concerns to Jodi about LWRG including, but not limited to, mistreatment of and injuries to children. [R: 813, 931].

In mid-July of 2015, during the Pan-American Games, Jodi looking to celebrate David's Pan-American Games success, could not find any information about him on the internet. [R: 2070,

2072, 2443-4]. She reviewed Facebook and stumbled upon a photograph of David and Laura at a Playboy function ("Playboy Image"). [R: 730][T: 2446]. Jodi immediately became "shocked" and concerned about the truthfulness and pornographic affiliations of the owners of the facility where her daughter attended. [T: 2376]. She was concerned about exposure of pornography to children because gyms had been in trouble locally and nationally for similar things. [R: 885][T: 2447]. Jodi also saw that Laura, a former Falcons cheerleader, was friends on Facebook with Tiffany Fallon, another Falcons **[pg. 3]** cheerleader, who had a Playboy bunny under her name. [T: 2075]. Jodi, associating Laura to Playboy and being a Falcons cheerleader, typed into Yahoo, an internet search engine, the words, Playboy, Falcons, and cheerleaders. The search results revealed "NFL cheerleaders in the buff or something like that." [T: 2448]. Jodi tapped the link and it revealed a nude image of a woman she could not identify, but she believed had familiarity and similar facial features to Laura. [T: 2076, 2448]. Jodi was "terrified" and took a photograph of the face of the woman with her cell phone. ("Face Picture"). [T: 2076-7].

She privately discussed her concerns about The Misrepresentations and the Face Picture to two other mothers who had shared similar concerns with her about other matters at LWRG, Angela Salvatori ("Angela") and Carrie Mueller ("Carrie"). [T: 2080, 2450].

On July 29, 2015, a meeting was held at LWRG which was attended by the Jodi, Jodi's counsel, Laura, and David. [T: 2111]. Jodi testified that at the meeting David admitted to her the truth

of The Misrepresentations. [T: 2112]. She also recalled that Laura aggressively confronted her about her concerns she had in her private conversations with other mothers. [T: 2113]. Then, Jodi testified that the the meeting ended, the parties all shook hands, and amicably agreed that Jodi's daughter would no longer train at LWRG. [T: 2114]. **[pg. 4]**

However, within five minutes after the meeting, Laura made a pre-planned Facebook post ("FB Post") to about Jodi to one hundred twenty of the other parents whose children attended LWRG. [R: 726-7, 1408, 1421, 1461][T: 2119, 2631]. Laura stated, "I knew someone would show her the post and I wanted her to see it." [R: 1410, 1433, 1462]. And, through her deposition read at trial confirmed, "That she would not have made the post if she knew Jodi was not going to see it." [T: 2494]. Then, Laura blocked Jodi from Facebook so Jodi was unable to respond to the allegations in the FB Post. [T: 2119].

In the FB Post, Laura began a deflection of The Misrepresentations by accusing Jodi of being a "liar" spreading "vicious untruths" about David's credentials. Laura then denied that The Misrepresentations were ever told, and made up additional misrepresentations that David was a "Specialty Worldwide Champion for those athletes that did not compete all-around." [T: 2493]. She also accused Jodi of saying that Laura was in Playboy and implied Jodi superimposed and solicited pornography in the LWRG parking lot. [R: 726][T: 2122]. All the while, Laura was hiding the fact that: she and David had attended a Playboy function at the Playboy mansion [R: 730-732]; her

best friend was in Playboy [R: 1510]; and admitted just before making the FB Post that she desired to pose in pornography. [R: 1510][T: 2645]. Further, Laura stated in the FB Post that Jodi was accusing parent volunteers of stealing money, and recruiting parents to other programs. [R: 727].

[pg. 9]

In *Milkovich v. Lorain Journal, Co.*, 497 U.S. 1, 17 (1990), the Supreme Court stated:

> [T]hat "in cases raising First Amendment issues ... an appellate court has an obligation to `make an independent examination of the whole record' in order to make sure that `the judgment does not constitute a forbidden intrusion on the field of free expression.'" (Quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984)).

The statements the Circuit Court found Jodi liable for after the July 29, 2015, meeting were: "Accusing David Parraga or Laura Parraga or the coaches at LWRG of cheating at gymnastics competitions" [R:1642-3]; "That David Parraga or Laura Parraga may have used drugs or been under the influence" [R:1643]; and "That LWRG had misused money from parents of children who train at LWRG." [R:1643]. The Court also found Jodi liable for when she privately showed the Face Picture to other mothers, "stating it was Laura

Parraga when she posed in Playboy magazine."[23] [R: 1642].

The Circuit Court erred as a matter of law by not examining Jodi's statements in totality or in context because none of the statements when properly viewed constituted actionable false statements of fact to support a claim for defamation. **[pg. 10]**

i. The Circuit Court improperly isolated certain phrases instead of reviewing all of Jodi's words.

In regard to the statement about cheating, the Circuit Court failed to identify any specific statement Jodi made, or to whom it was made. Further, the Court did not even specify if the statement was about David, or Laura, or someone else entirely.[24] Yet, the Court found Jodi liable for some statement after July 29, 2015, with the phrase cheating. Presumably, although unknown, the Court heard the phrase "cheating" in the recorded conversation between Jodi and Carrie played at trial, from July 29, 2105, after Laura had made the FB Post. Or, possibly from a series of text messages between Jodi and Laura Bischoff in

[23] Possibly, the Court also found Jodi liable for statements about David's credentials by referencing the topic in the same paragraph as the statement about the Face Picture and stating she defamed the "defendants," [R: 1642] but it is not clear if this is what the Court intended.

[24] Through her motion for rehearing, Jodi asked the Court to specify the specific statements it determined were defamatory, but the Court denied her motion in its entirety. [R: 1659, 1814].

October of 2015. If this is where the Court captured the phrase "cheating," it failed to review all of the words used.

All of the words spoken by Jodi in the conversations with Carrie about her daughter that referenced the phrase "cheating" were as follows:

> I don't want her in 4 competing 3 like, you know, Andrea and Ellen, everybody being in 5th competing 4, that's cheating … [T: 2419].
>
> I just cannot in good conscience be in an environment where this is the lying, cheating, and stealing. I can't. I – I wasn't –I don't know if it goes against my religion or what it does, but I just cannot – I can't do it. Even for my child's sake, I just can't do it. It is not right. [R: 2429]. **[pg. 11]**

A review of all of the words indicates that it was Jodi's pure opinion that having kids complete a lower level than their skill level was cheating, and she had a moral conflict with the issue. She did not make any false statements of fact of accusing David or Laura or LWRG of cheating as the court concluded.

All of the words texted in a conversation between Jodi and Laura Bischoff from October 22, 2015, revealed the phrase "cheaters," but also included fifty other text messages from the same day and was a continuation of conversations from days before. A review of all the words would have revealed Jodi's opinion of why she used the word "cheaters." Jodi explained on October 10, 2015:

> Just got stuck in an elevator with people from SF who said a judge told them that LWR has an in with the other judges. [R: 1110].
>
> Then on October 11, 2015, Jodi explained about her daughter:
>
> Alexa was so brave today. All the lwr coaches 5 of them for 4 girls $$, kept trying to distract her and were mocking her as she did her routine. Carrie's daughter got it on video. She did a beautiful beam routine. They only gave her an 8.825. Another family I know said they saw Laura having breakfast with the beam judge, Laura knows beam is a strong event for her. [R: 1109].
>
> Then on October 22, 2015, Jodi explained:
>
> The scores are even higher than last year. Alexa was scored way lower compared to their routines and video to video… Alexa looked better. I think she is manipulating scores. Trying to make it look like they are exceptional coaches. Makes them look like cheaters instead. [R: 1104].

A review of all the words would have revealed that Jodi explained through her

conversation with Laura Bischoff that: based upon her conversations with others **[pg. 12]** at a gymnastics meet; her daughter being mocked by the coaches at LWRG; her daughter's score at the meet; and Jodi's observation of a comparison of videos and scores from the current year to last year, that it was her opinion that it made them "look like" cheaters, not that they were. At worst, by using the term "looks like" Jodi was making a non-literal assertion of fact, which is not actionable. *Horsley v. Rivera*, 292 F.3d 695, 701 (11th Cir. 2002) (quotations omitted)("[A] defamation claim may not be actionable when the alleged defamatory statement is based on non-literal assertions of fact or rhetorical hyperbole that cannot reasonably be interpreted as stating actual facts about an individual."). A review of all of the words used by Jodi in her conversations about cheating do not support she made any actionable false statements of fact.

In regards to the statement about drugs, the Court again failed to identify any specific statement that Jodi actually said or to whom it was said. The Court did not even specify if the statement was about David or Laura. Perhaps the Court isolated the phrase "may have used drugs or been under the influence" from the same private recorded conversation Jodi had with Carrie. All of the words spoken by Jodi about this phrase were as follows:

> Jodi: And, you know, if there's another link there, I can't figure it out. I don't know if it's drugs or what it is. I don't know. But David's very wired. And Andrea, when she was at my

> house at Christmas, kept disappearing, her nose was very red. And, you know, Laura looks – I don't – she doesn't look right to me. Laura, looks like she's lost weight **[pg. 13]** and acts real erratic. And she's been acting like a complete psychotic bitch lately. And so it's like – you know.
>
> Carrie: Are they snorting?
>
> Jodi: I don't know. I wouldn't be surprised. I don't know about – I mean it's speculation. I don't know… [T: 2422].

In reviewing all of the words spoken, Jodi clearly stated she observed David Del Santo and Andrea Del Santo exhibiting unusual behavior at a Christmas party, including acting wired, disappearing, and having a red nose. She had recently observed that it looked as if Laura had lost weight and acted "erratic." And, confirmed four times in the same conversation, "I don't know" and "that is pure speculation." A review of all the words spoken by Jodi related to the phrase "may have used drugs or been under the influence" does not support that she made any actionable false statements of fact.

The Court may also have isolated the phrase "may have used drugs or been under the influence" from a conversation Jodi had with Laura Bischoff in October of 2015. The entire conversation was as follows:

Laura Bischoff: Sure did I'm sure that

is what happened to me. Overnight I became contagious they never even said anything to me zap gone…Another person who had quit the gym a year prior commented or liked a post and laura actually texted her and then called her saying you wont believe what the bischoff family is putting us through…all friendly to a person she hadn't spoken to in a year and had actually bad mouthed to me..there is no limit to the depths she will go…impossible to defend. She is a sneaky witch. I planned the entire banquet and even put in 800 of my own $$$ to make it special. What a fool I was. **[pg. 14]**

Jodi: We donated at least $2000 and a ton of time over the year we were there. Laura always puts herself out there as the victim. She is sick. I think she is seriously mentally ill. Narcissistic, sociopathic, Borderline…all in one. Or on something. Her behavior isn't normal. She doesn't like people who are educated and have means.

Laura Bischoff: Social psychotic and sociopath I think. Yes, it is disgusting. I'm still reeling over the whole thing. And, so grateful we got Bo out unscathed. Well mostly. [R: 1116].

In a review of all the words spoken, Jodi was sharing her experience of how she perceived Laura had slandered her after she had spent over $2000 in donations to the gym. Laura Bischoff also shared her experience of how she got Bo out of the gym after spending $800 of her own money on a banquet only to have Laura say bad things about her to someone who had not been at the gym in a year. Both Jodi and Laura Bischoff shared their opinions on Laura's behavior and how it was not "normal." Jodi was not making any actionable false statements of fact and at worst was using rhetorical hyperbole. *Milkovich* at 20. ("Hyperbolic rhetoric itself negates the impression that the writer seriously maintained her words as statements of fact.").

In regards to the statement about misuse of money, the Court, again did not identify any specific statement Jodi made or to whom it was spoken. Perhaps the Court captured the phrase "misuse of money" from the same recorded conversation between Jodi and Carrie. The entire conversation was as follows:

> Jodi: Yeah. They won't pay. They're not going to cut into their – if there are going to charge everybody six extra dollars for their USAG form, they are not going to pay. So I have wondered, too. I've wondered if my USAG thing, if they're holding it out so that they think **[pg. 15]** she won't be able to compete or something. I wonder if they're going to pull something like that. I don't know. I've

> got to look into that.
>
> Carrie: You should just call USAG and just do it.
>
> Jodi: Yeah, but then I'd have to cancel out my check, see if they cashed it. If they don't do it, then it's just another thing they're going to be in big ass trouble for, for stealing my money. [T: 2425].

A review of all the words spoken in this conversation shows that Jodi was worried about whether a check she wrote to LWRG for a USAG registration prior to leaving was going to be cashed and her daughter not being registered to compete. A review of all of the words does not support that Jodi made any actionable statements of fact, "that LWRG had misused money from parents of children who train at LWRG."

In regards to the statement about the Face Picture, the Court failed to consider all the words spoken and simply isolated a particular sentence. The Court stated its conclusion of fact that the statement Jodi, "stated it was Laura Parraga when she posed for Playboy magazine," "came out" in Jodi's testimony, deposition transcript, and request for admissions. [R: 1638]. However, a review of all the words spoken in said evidence does not support she made any actionable statements of fact.

First, Jodi did not testify at trial that she told anyone conclusively that the Face Picture was Laura. In fact, she adamantly denied any such allegation. [T: 2097, 2439-40]. She testified that

she thought the image had similarities. [T: 2448-9]. And, she never testified that she ever made any reference to Playboy, Atlanta **[pg. 16]** Falcons, or cheerleaders. Her testimony was then supported by the recorded conversation from July 29, 2015, played at trial, that she never said such a thing. [T:2408]. These same statements were confirmed by Carrie in the same recorded conversation. [T: 2408]. The testimony of Angela confirmed Jodi never said the words Playboy. [T: 2583]. And, Angela's text messages confirmed she could not recall if Jodi actually said it was Laura. [R: 1593, 1624].

Second, Jodi's deposition, admitted into evidence contains no testimony whatsoever Jodi definitively stated it was Laura in the Face Picture. [R: 1129-1385].

The request for admission asked if Jodi stated the Face Picture may be Laura. Jodi admitted that statement. That it may be. Not that it was. It cannot be a false statement to support a claim for defamation if someone has an idea that ultimately becomes untrue. Under the First Amendment there is no such thing as a false idea. *Gertz* at 339 - 340.

Contrary to what was concluded by the Court, there is nothing in Jodi's testimony, deposition or request for admission that support the Court's finding of fact that Jodi stated the image was "Laura when she posed for Playboy magazine."

Based upon the testimony and evidence presented of all the words spoken, there is no support for the conclusion that Jodi made any actionable false statements of fact about the

Defendants.

ii. The Circuit Court failed to consider Jodi's cautionary terms.

In *Information* at 784, the Federal Appellate Court determined that alleged defamatory statements were not actionable based upon the use of cautionary terms in a press release and a statement of counsel published in a trade magazine that were "cautiously prefaced" as representing, "the opinion of Genesis management." Comparably, Jodi's alleged defamatory private statements were also cached within cautionary terms negating they were actionable false statements of fact.

In regards to the Defendants being untruthful, Jodi used cautionary words in a private text to Elvira by stating:

> Actually, you're not. That's the point. There's no way if he was a Pan Am and a world champion that he wouldn't be on the internet somewhere. **I hope I am wrong**. [R: 957]. (Bold added)

> Similarly, Jodi texted to Angela: For the love of God…**please never repeat**…a coach a lwr was asked about David. She said she can not confirm that he is who he says he is. [R: 930]. (Bold added)

In regards to the alleged statements about drug use, as stated supra at 14, Jodi cautiously stated five times to Carrie, "I don't know" and

followed up with "I mean that's speculation." [T:2422].

In regards to the Face Picture, Jodi's testimony was she not sure if it was Laura, only that the image had some similarities. [T:2448-9] The cautionary terms were affirmed in the recorded conversation between Jodi and Carrie, where Carrie stated:

> You never – you never once, and I've heard you many times over say, "I don't really know if it is her." [T: 2408]

Jodi expressed cautionary terms in text messages with Angela right before talking with her about the Face Picture by stating:

> I wish we could get together and I could **share some concerns that are serious** at some point. [R: 932]. (Bold added)

And, the day after Jodi talked with Angela about the Face Picture, Jodi texted:

> "Hey! **Didn't mean to freak you out last night!** Funny thing…when you try to search for David, there is absolutely nothing. He wasn't a Pan Am or world champion. At least according to the results. Nothing about him playing minor league baseball for the Astros either. Nothing about anything at all." [R: 931]. (Bold added)

Additionally, even Laura's own text messages support that when Jodi spoke with

Angela about the Face Picture she used cautionary measures hiding the picture from view. Laura texted to Angela, "She holds the phone to her chest then shows you a pic" [R: 1591].

The cautionary statements and measures taking by Jodi in her private conversations were significantly more cautious than the public statements made in *Information* that were determined not defamatory based upon cautionary measures. As such, the Circuit Court erred as a matter of law under the *Information* test when it failed to consider any of these cautionary terms or actions in concluding Jodi was liable for defamation.

iii. The Circuit Court failed to properly evaluate all of the circumstances surrounding Jodi's statements.

The Circuit Court failed to properly evaluate all of the circumstances surrounding Jodi's statements. The Court properly found, "Apparently she [Jodi] was concerned about her daughter belonging to a gym and being trained where the owner of that gym may have posed for Playboy magazine." However, the Court then concluded Jodi defamed Laura by stating to Elvira and Angela that the Face Picture was Laura when she posed in Playboy, as if she was attempting to cause some type of harm. The Court failed to evaluate all of the circumstances around Jodi's conversations with these mothers whereby they all shared numerous concerns with each other before and after Jodi's alleged statement.

Jodi and Angela had shared hundreds of

texts messages before and after July 14, 2015, in which they shared all types of concerns about LWRG. They texted about: Angela's complaints about being charged excessive fees by Laura [R: 930]; the children not receiving proper training [R: 934]; Angela's fear LWRG would be mean to her daughter [R: 933]; David's false credentials [R: 931]; excessive injuries to the children [R: 931]; other children quitting the gym [R: 931]; and even Angela's perception that Laura is a liar and bitch. [R: 922-3, 927, 930]. When these missing circumstances are combined with the fact that Jodi had valid concerns about the truthfulness and pornographic affiliations of the Defendants as set forth in detail at supra 2-3, it becomes clear that Jodi was not making actionable false statements of fact about the Defendants to Angela, but simply sharing understandable motherly concerns.

Jodi and Elvira also shared hundreds of text messages before and after they ran into each other at Starbucks, the place Elvira claims Jodi made defamatory statements. In fact, they shared seventy five text messages the day after the Starbucks meeting where they both shared serious concern[25] about: David's false credentials[26]; Elvira searching criminal affiliations of people associated with LWRG [R: 957-8]; dissatisfaction how people were treated at LWRG [R: 955]; and a child quitting because of a coach at LWRG [R: 956]. On

[25] Elvira texted, "Been serious, I know this is very delicate and very concerned." [R: 959].

[26] Elvira also searched for David's credentials on the internet and texted to Jodi, "Nothing shows about him not even in Spanish." [R: 957].

July 18, 2015, Elvira texted Jodi that she herself was sick to her stomach and totally agreed with Jodi about the concerns related to the false credentials, injuries to the kids, and how the kids were being yelled at by LWRG. [R: 951]. These concerns carried over to July 28 where Jodi and Elvira shared concern over one of the children being called "fat" by LWRG. [R: 945]. When these missing circumstances are combined with the fact that Jodi had valid concerns about the truthfulness and pornographic affiliations of the Defendants as set forth in detail at supra 2-3, it becomes clear that Jodi was not making actionable false statements of fact about the Defendants to Elvira.

Based upon a proper review of *all* of the circumstances surrounding the alleged statements there is no support that any statements that have been attributed to Jodi were actionable.

iv. The medium used by Jodi to make private communications does not support the statements were actionable.

Jodi's text messages were private conversations on her and the other mothers' private cell phones. No evidence was admitted that she ever showed, shared, copied or duplicated any of these privately stored electronic messages. There was no evidence that Jodi had any conversation with anyone about her concerns other than in private. The recorded conversation between Jodi and Carrie was a private phone call that was only overheard by Jodi's son, Avery who was sitting in the car with her. The Face Picture was on Jodi's personal cell phone. No evidence was offered that

she ever showed, shared, copied, or duplicated the Face Picture in any other manner.

In comparison, the mediums in *Hay* and *From* were local newspapers, and the medium in *Information* was a trade journal. *Hay* at 295; *From* at 57; and *Information* at 784. In all three cases the court evaluated the medium as one of the factors and determined the statements were not actionable statements of fact.

The medium in which Jodi's statements were published do not support the Court's conclusion that Jodi's statements were actionable false statements of fact.

v. The fact that Jodi only shared her opinions with other concerned mothers does not support the Court's conclusion the statements were actionable statements of fact.

In *Information* at 784, the Federal Appellate Court determined that alleged defamatory statements were not actionable based upon the audience to whom they were presented because even though the statements were made in a trade publication, "Business litigants frequently disparage an opponent's suit as a meritless tactical device. Such charges may not be commendable, but they are highly unlikely to be understood by their audience as statements of fact rather than the predictable opinion of management for one side about the other's motives."

In *From* at 57, the Appellate Court determined that the statements made in a tennis column in a local newspaper about a tennis professional were not actionable statements of fact

because the audience of the article, "would be expected to be aware of the tennis pro's situation."

In comparison, Jodi's alleged defamatory private statements were also to an audience that were highly unlikely to understand her comments as statements of fact rather than predictable opinion. Jodi had private conversations of her motherly concerns with a very small number of other concerned mothers in private mediums. If Jodi was trying to defame Laura, she could have made the alleged defamatory statements to a large audience in a more permanent medium, like Laura did by posting defamatory remarks on Facebook. Further, she could have shared her concerns with others who had not shared concerns about other matters, but she did not. Comparatively, Laura copied her FB Post and emailed it to others. [R: 781]. When viewed in perspective of the audience there is no support that any statements attributed to Jodi were actionable statements of fact.

When viewed in totality, none of the alleged statements identified by the court, rise to the level of actionable statements of fact. The alleged statements were isolated and not viewed in context. The alleged statements were made in a medium and to an audience that would understand the statements were her opinions. And, the circumstances surrounding the statements were such that she had understandable concerns about the ongoings at LWRG. As such, the trial court erred in concluding Jodi made any actionable statements of fact and this court should reverse the judgment for defamation on this basis alone.

B. The Circuit Court erred in its legal

conclusion that Jodi's statements were made with negligence in light of the public policy of parental concern as set forth by the Florida Supreme Court.

Even if this Court determines any of Jodi's alleged statements to be actionable statements of fact, which it should not, Jodi's alleged statements about David's false credentials and Laura's pornography affiliations were not made with negligence. In *Miami Herald Publishing Co. v. Ane*, 423 So. 2d 376 (Fla. 3d DCA 1982), the court defined negligence in a defamation setting as "without reasonable care as to whether the alleged false and defamatory statements were actually true or false." Jodi acted with reasonable care and the Court erred in concluding otherwise. [27]

The Supreme Court set forth the public policy that Florida courts should encourage, rather than discourage, regarding parental concern in an educational setting in *Nodar v. Galbreath*, 462 So. 2d 803, 812 (Fla. 1984). ("The series of personal visits, telephone calls, and letters, far from exhibiting a pattern of malicious harassment, demonstrates a degree of parental concern for the effectiveness of public schools which our state, through its courts of law, should attempt to encourage rather than discourage."). In *Nodar*, a father made statements at a public-school board

[27] "As a general rule, a decision in a nonjury case based on a finding of fact from disputed evidence is subject to the competent, substantial evidence standard of review on appeal." *In re Estate of Sterile*, 902 So. 2d 915, 922 (Fla. 2nd DCA 2005).

meeting, in which he expressed his dissatisfaction about two English teachers at his son's school. He stated his son was harassed, abused verbally, and victimized. The father also expressed dissatisfaction about the costs, and commented about the qualifications of the teachers. At FN[1].[28]

Similarly, Jodi shared parental concern with others in an educational setting. Jodi had valid concerns about truthfulness and pornographic affiliations of the owners of LWRG because she could not confirm David's credentials, she saw a picture of the Parragas at the Playboy mansion on Facebook, she saw Laura's association with Tiffany Fallon and Playboy, and a three-letter internet search of Playboy, Falcons, and cheerleader revealed a woman with similarities to Laura. Jodi took reasonable care by photographing the face without showing any nudity. She took further care by never duplicating the Face Picture or giving it to others. She even shielded the picture from view when discussing it with Angela. Jodi rightfully discussed her concern about the Playboy affiliation because she knew of other gyms being in trouble for these kinds of things. See all above in detail supra 2-3. Rightfully, Jodi only shared her concerns with others that also had similar concerns. However, Jodi's parental concern was not discussed publicly as in *Nodar*, her concern was all expressed in private. Jodi could have posted the picture on Facebook, or talked with others who had no interest in the welfare of children, but she did not.

However, contrary to Florida public policy,

[28] The Supreme Court found a full negligence analysis was unnecessary in *Nodar* because the case was properly decided under common law principles of qualified privilege. At 808.

under the trial court's holding, it is negligent for a mother of an eight-year-old girl to share non-malicious, private concerns to other concerned mothers about a gymnastics training facility that affiliates with pornography and repeatedly lies about their credentials.

Based upon the fact scenario, and public policy set forth in *Nodar*, Jodi's behavior was well within a standard of reasonable care. The Court erred in finding Jodi acted with negligence because there was substantial and competent evidence to support Jodi acted with reasonable case and this court should reverse on the basis Jodi did not act with negligence.

[pg. 32]

A. The Circuit Court erred in denying Jodi's claim for defamation per se.

In order to be entitled to a claim for defamation per se, Jodi was required to prove a "false and unprivileged publication by letter, or otherwise, which exposes a person to distrust, hatred, contempt, ridicule or obloquy." See *Blake v. Ann-Marie Giustibelli, P.A.*, 182 So. 3d 881, 884 (Fla. 4th DCA 2016).

However, the Circuit Court concluded Jodi did not establish falsity by stating, "Since the statements in the Facebook Post are substantially true, the plaintiff has failed to prove by the preponderance of the evidence that she is entitled for damages..." [R: 1638-9].

"As a general rule, a decision in a nonjury case based on a finding of fact from disputed

evidence is subject to the competent, substantial evidence standard of review on appeal." *In re Estate of Sterile* at 922.

i. There was no competent, substantial evidence to support the court's conclusion the portion of the FB Post related to David's credentials was substantially true.

To determine if a statement is substantially true the court, under the First Amendment, must apply the "different effects" test to determine if the statement "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Smith v. Cuban American National Foundation*, 731 **[pg. 33]** So. 2d 702, 707 (Fla. 3rd DCA 1999), (Citing *Masson v. New Yorker Magazine*, 501 U.S. 496, 517 (1991)). The inquiry is the same whether the burden rests upon the plaintiff or defendant. *Masson* at 517.

In the portion of the FB Post related to David's credentials, Laura stated about Jodi:

> She has been spreading untruths specifically in the past two weeks regarding David… [R: 726].
>
> She is telling people that David has said he was a world champion gymnast. Which was NEVER said. What he is is a Specialty Worldwide Champion for those athletes that did not compete All-Around; and
>
> We are very sad to lose an athlete … but

will NEVER tolerate liars … [R: 727].

The effect of this portion of the FB Post on a reader would have been that Jodi was a liar based upon Laura's statements that Jodi, "has been spreading untruths..." and Laura, "will NEVER tolerate liars …" However, the pleaded truth would have produced a different effect on the mind of a reader.

First, Laura's statement "Which was NEVER said" is false. The truth is the LWRG website, the LWRG Handbook, and the LWRG Facebook page all stated that David is a world champion gymnast. [R: 733][R: 805][R: 717-8]. If Laura would have stated the truth, that it WAS stated in these forums that David was a world champion gymnast, no reader would have perceived Jodi as a liar. **[pg. 34]**

Second, Laura's statement that "What he is is a Specialty Worldwide Champion for those athletes that did not compete All-Around" is also false. The truth is David is not a Specialty Worldwide Champion for those athletes that did not compete All-Around. [T: 2493]. If the truth of this statement was told, the effect would have been that a reader would not have perceived Jodi as a liar.

Third, Laura's statements that Jodi was spreading untruths about David's credentials, and that she is a liar are also false. The truth was the Defendants were spreading untruths about David's credentials on their website, in their Handbook, on their Facebook, and by hanging articles with his false credentials in their lobby. [R: 660, 666, 695,

697]. If Laura had told the truth that Jodi was not spreading untruths about David's credentials, then no reader would have perceived Jodi as a liar. Therefore, based upon the lack of competent, substantial evidence and the failure of the trial court to apply the First Amendment "different effects" test, the court erred in concluding Jodi did not prove falsity. Absent this error, Jodi established all of the elements for a claim for defamation per se under the nearly factually identical authority in *Blake*.