

**IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR COLLIER COUNTY, FLORIDA**

CIVIL ACTION

FIDDLER’S CREEK FOUNDATION, INC.,

Plaintiff,

Case No. 13-314-CA

v.

JAMES A. SCHUTT

Defendant.

DEFENDANT JAMES A. SCHUTT’S ANSWER TO COMPLAINT

Defendant James A. Schutt (“Schutt,” or the “Defendant”) hereby responds to the Complaint of Plaintiff Fiddler’s Creek Foundation, Inc. (“Fiddler’s Creek,” or the “Plaintiff”) and Answers as follows:

The Parties

1. Admitted.
2. Admitted for the purposes of this litigation only.

Venue

3. Admitted.

The Foundation

4. Defendant is without sufficient knowledge as to the merits of this paragraph’s allegations and therefore denies it, leaving Plaintiff to submit proof that it is true.

5. Defendant is without sufficient knowledge as to the merits of this paragraph's allegations and therefore denies it, leaving Plaintiff to submit proof that it is true.

6. Defendant is without sufficient knowledge as to the merits of this paragraph's allegations and therefore denies it, leaving Plaintiff to submit proof that it is true.

7. Defendant is without sufficient knowledge as to the merits of this paragraph's allegations and therefore denies it, leaving Plaintiff to submit proof that it is true.

8. Defendant admits that "[i]n accordance with the terms of the Declaration, membership in the Foundation is mandatory for homeowners" and "[h]omeowners are required to pay assessments to the Foundation as part of their membership," but is without knowledge as to every other allegation in this paragraph and therefore denies them, leaving Plaintiff to submit proof they are true.

9. Defendant is without sufficient knowledge as to the merits of this paragraph's allegations and therefore denies it, leaving Plaintiff to submit proof that it is true.

The Blog Site

10. Defendant admits that a website titled "Fiddler's Creek homeowners Blog Spot," referenced as the "Blog Site" in the Complaint, was created at some point, but otherwise denies this paragraph.

11. Defendant denies all allegations in this paragraph.

12. Defendant admits only that he can find the Blog Site on the World Wide Web, but is otherwise without knowledge as to all other allegations in this paragraph and therefore denies them.

Schutt's Libel *Per Se*¹ Published On The Blog Site

13. Defendant denies all allegations in this paragraph.
14. Defendant denies all allegations in this paragraph.
15. Defendant denies all allegations in this paragraph.
16. Defendant denies all allegations in this paragraph.

Homeowner's Assessments and The Foundation's Payment of Management Fees

The Facts

17. Defendant is without sufficient knowledge as to the merits of this paragraph's allegations and therefore denies it, leaving Plaintiff to submit proof that it is true.

18. Admitted.

19. Defendant is without sufficient knowledge as to the merits of this paragraph's allegations and therefore denies it, leaving Plaintiff to submit proof that it is true.

20. Defendant is without sufficient knowledge as to the merits of this paragraph's allegations and therefore denies it, leaving Plaintiff to submit proof that it is true.

21. Defendant is without sufficient knowledge as to the merits of this paragraph's allegations and therefore denies it, leaving Plaintiff to submit proof that it is true.

22. Defendant is without sufficient knowledge as to the merits of this paragraph's allegations and therefore denies it, leaving Plaintiff to submit proof that it is true.

23. Defendant is without sufficient knowledge as to the merits of this paragraph's allegations and therefore denies it, leaving Plaintiff to submit proof that it is true.

¹ Defendant denies this characterization of his statements, but includes this language for continuity because it appeared in Plaintiff's Complaint.

24. Defendant denies all allegations in this paragraph.

25. Defendant is without sufficient knowledge as to the merits of this paragraph's allegations and therefore denies it, leaving Plaintiff to submit proof that it is true.

Schutt's Lies²

26. Defendant denies all allegations in this paragraph.

27. Defendant denies all allegations in this paragraph.

28. Defendant denies all allegations in this paragraph.

29. Defendant denies that the statements contained within this paragraph are "defamatory," as, when viewed in their proper context, they are true, substantially true, statements of opinion, or rhetorical hyperbole, and would not be interpreted as statements of fact by a reasonable reader.

The Election of a Homeowner Representative to the Board

The Facts

30. Admitted.

31. Defendant is without sufficient knowledge as to the merits of this paragraph's allegations and therefore denies it, leaving Plaintiff to submit proof that it is true.

32. Admitted.

33. Defendant is without sufficient knowledge as to the merits of this paragraph's allegations and therefore denies it, leaving Plaintiff to submit proof that it is true.

34. Admitted.

² Defendant denies this characterization of his statements, but includes this language for continuity because it appeared in Plaintiff's Complaint.

35. Defendant is without sufficient knowledge as to the merits of this paragraph's allegations and therefore denies it, leaving Plaintiff to submit proof that it is true.

Schutt's Lies³

36. Defendant denies all allegations in this paragraph.

37. Defendant denies all allegations in this paragraph.

38. Defendant denies all allegations in this paragraph.

39. Defendant denies that the statements contained within this paragraph are "defamatory," as, when viewed in their proper context, they are true, substantially true, statements of opinion, or rhetorical hyperbole, and would not be interpreted as statements of fact by a reasonable reader.

The Foundation's Purchase of the Park Land

The Facts

40. Defendant is without sufficient knowledge as to the merits of this paragraph's allegations and therefore denies it, leaving Plaintiff to submit proof that it is true.

41. Defendant is without sufficient knowledge as to the merits of this paragraph's allegations and therefore denies it, leaving Plaintiff to submit proof that it is true.

42. Defendant is without sufficient knowledge as to the merits of this paragraph's allegations and therefore denies it, leaving Plaintiff to submit proof that it is true.

43. Defendant is without sufficient knowledge as to the merits of this paragraph's allegations and therefore denies it, leaving Plaintiff to submit proof that it is true.

³ Defendant denies this characterization of his statements, but includes this language for continuity because it appeared in Plaintiff's Complaint.

44. Defendant admits only that Plaintiff obtained an appraisal that purports to confirm the value of the Park Land with improvements was \$550,000; Defendant otherwise denies this paragraph.

Schutt's Lies⁴

45. Defendant denies that the statements contained within this paragraph are “false” as, when viewed in their proper context, they are true, substantially true, statements of opinion, or rhetorical hyperbole, and would not be interpreted as statements of fact by a reasonable reader.

46. Defendant denies that the statements contained within this paragraph were made “falsely” and further denies that he “lied,” as, when viewed in their proper context, the statements are true, substantially true, statements of opinion, or rhetorical hyperbole, and would not be interpreted as statements of fact by a reasonable reader.

47. Defendant denies that the statements contained within this paragraph were made “falsely,” as, when viewed in their proper context, the statements are true, substantially true, statements of opinion, or rhetorical hyperbole, and would not be interpreted as statements of fact by a reasonable reader. Plaintiff concedes this point by alleging that Defendant’s alleged statements constituted a “parody.”

48. Defendant denies that the statements contained within this paragraph are “defamatory,” as, when viewed in their proper context, they are true, substantially true, statements of opinion, or rhetorical hyperbole, and would not be interpreted as statements of fact by a reasonable reader.

⁴ Defendant denies this characterization of his statements, but includes this language for continuity because it appeared in Plaintiff’s Complaint.

49. Defendant is without sufficient knowledge as to the merits of this paragraph's allegations and therefore denies it, leaving Plaintiff to submit proof that it is true.

Count I - Defamation

50. This paragraph calls for neither an admission nor denial.

51. This paragraph calls for neither an admission nor denial.

52. Defendant denies all allegations in this paragraph.

53. Defendant denies all allegations in this paragraph.

54. Defendant denies all allegations in this paragraph.

55. Defendant denies all allegations in this paragraph.

56. Defendant denies all allegations in this paragraph.

57. Defendant denies all allegations in this paragraph.

58. Defendant is without sufficient knowledge as to the merits of this paragraph's allegations and therefore denies it, leaving Plaintiff to submit proof that it is true.

Response to Request for Relief

Defendant denies that Plaintiff is entitled to any relief; Defendant instead requests the Court enter judgment in his favor, including an award of his reasonable attorneys' fees and costs, and any further relief the Court may deem appropriate.

Count II – Defamation – (Injunction)

59. This paragraph calls for neither an admission nor denial.

60. This paragraph calls for neither an admission nor denial.

61. Defendant denies all allegations in this paragraph.

62. Defendant is without sufficient knowledge as to the merits of this paragraph's allegations and therefore denies it, leaving Plaintiff to submit proof that it is true.

63. Defendant is without sufficient knowledge as to the merits of this paragraph's allegations and therefore denies it, leaving Plaintiff to submit proof that it is true.

64. Defendant denies all allegations in this paragraph.

65. Defendant denies all allegations in this paragraph.

Response to Request for Relief

Defendant denies that Plaintiff is entitled to any relief; Defendant instead requests the Court enter judgment in his favor, including an award of his reasonable attorneys' fees and costs, and any further relief the Court may deem appropriate.

AFFIRMATIVE DEFENSES

Defendant asserts the following affirmative defenses with respect to the claims found in Plaintiff's Complaint, and reserves the right to supplement and amend these affirmative defenses as the case progresses:

1. Failure to State a Claim: Plaintiff's statements do not constitute defamation, and as such Plaintiff has failed to state either of its causes of action.

2. The First Amendment of the United States Constitution: The First Amendment of the United States Constitution immunizes Defendant from liability for his statements concerning Plaintiff and its conduct. By operation of the First Amendment, Defendant is immunized from liability for defamation on the statements complained of.

3. Public Figure Doctrine: Plaintiff is a public figure and, as such, cannot meet the requisite standard of proving Defendants acted with actual malice in order to prevail on its defamation claims.

4. Substantial Truth: Defendant's statements are substantially true and thus non-defamatory. Defendant's statements are generally correct and therefore do not constitute defamation.

5. Truth: Defendant's statements are true and thus non-defamatory. As a matter of law, a true statement cannot be defamatory.

6. Statements of Opinion: Defendant's statements concerning Plaintiff are statements of opinion, not fact, and cannot be the proper basis of a defamation claim. As such, Plaintiff's defamation claims fail as a matter of law, as Defendant's statements are ones of opinion, rather than fact. On the particular statements alleged to be opinion, the defense not only entitles the Defendant to prevail, but to an award of attorneys' fees under Fla. Stat. Section 57.105.

7. Rhetorical Hyperbole: Defendant's statements are protected as rhetorical hyperbole, a species of opinion statements, as no reasonable reader of the statements would interpret them as being factual. As such, they cannot constitute defamation and Plaintiff's claims fail as a matter of law on that basis.

8. Common Law Privilege: Defendant's statements address matters of public concern and relate to a public figure, and as such are afforded the First Amendment's strongest protections. The public import of Defendant's statements privilege their content against being a source of liability for Plaintiff's defamation claims.

9. Failure to Satisfy Conditions Precedent: Plaintiff has failed to meet all conditions precedent to asserting its claims against Defendant.

10. Intervening Cause: Plaintiff's claims are barred against Defendant due to Plaintiff's injuries arising from an intervening cause.

11. Supervening Cause: Plaintiff's claims are barred against Defendant due to Plaintiff's injuries arising from a supervening cause.

12. The Fifth Amendment of the United States Constitution: Plaintiff seeks damages that are prohibited by the due process clause of the United States Constitution.

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CIVIL ACTION

JAMES A. SCHUTT,

Counterclaimant,

Case No. 13-314-CA

v.

FIDDLER’S CREEK FOUNDATION, INC.,

Counterclaim-Defendant.

COUNTERCLAIM

James A. Schutt (“Schutt,” or the “Counterclaimant”) hereby brings the following Counterclaim against Fiddler’s Creek Foundation, Incorporated (“Fiddler’s Creek,” or the “Counterdefendant”) and alleges as follows:

ALLEGATIONS COMMON TO ALL CLAIMS

1. This is an action for damages in excess of \$15,000 exclusive of interest and attorneys’ fees.
2. Schutt is a resident of Collier County, Florida, and owns a home within the Fiddler’s Creek Community.
3. Fiddler’s Creek is a Florida not-for-profit corporation doing business in Collier County, Florida and Plaintiff in the underlying civil action.
4. Schutt is a resident within the Fiddler’s Creek community and a member of its homeowners’ association. This association is owned and/or operated by Fiddler’s Creek.

5. All conditions precedent to the bringing of this counterclaim have been performed, waived, or excused.

6. Counterclaimant has engaged the undersigned attorneys to prosecute this action.

FIRST COUNTERCLAIM: VIOLATION OF FLA. STAT. § 720.304(4)(b)

7. Counterclaimant incorporates by reference and restates all allegations contained in each preceding paragraph.

8. Counterclaimant, a parcel owner within the Fiddler's Creek community, made numerous statements about matters of public concern regarding the governance of his community. Such statements were made over the Internet on the "Fiddler's Creek Homeowners Blog Spot" (the "Blog").

9. The sum and substance of Counterclaimant's statements commented upon and criticized actions of the Homeowners' Association board, seeking to influence the electorate, elected officials, HOA board members, and other decision makers, as well as the Fiddler's Creek Homeowners' Association board itself.

10. Schutt's comments on the "Fiddler's Creek homeowners Blog Spot," (the "Blog") were attempts to petition public officials, the electorate, HOA board members and institutions to take action regarding matters of political and public importance, and to instruct and inform both the public living within Fiddler's Creek and the Homeowners' Association's representatives about the state of affairs within the community.

11. Through the publication of these comments, Schutt exercised his constitutional right of free speech to instruct his representatives, and to speak out about community issues that directly affect him as a parcel owner within the Fiddler's Creek community.

12. Schutt's exercise of free speech included criticism of the Counterdefendant's handling of numerous matters within the community.

13. Because of these statements and for no other reason, Counterdefendant wrongfully, intentionally, and unlawfully filed suit against Schutt, asserting two causes of action for defamation in retaliation for Counterclaimant's exercise of his right of fair comment, and in an attempt to stifle Schutt's free speech.

14. Fiddler's Creek's claims are without merit, and have no factual or legal basis.

15. Schutt's statements are protected by the United States Constitution and the Florida Constitution, Article I, Section 5.

16. Counterdefendant's lawsuit against Schutt is but one case in a disturbing trend of abusive litigation recognized by the Florida Legislature as Strategic Lawsuits Against Public Participation, or "SLAPP" suits.

17. The Florida Legislature has further recognized that these types of suits are particularly troublesome, and should be "expeditiously disposed of by the courts."

18. Due to Counterdefendant's unlawful and wrongful conduct, Schutt has been damaged by being subjected to the expenditure of unnecessary attorneys' fees to defend Counterdefendant's frivolous SLAPP suit and has suffered a chilling effect upon his free speech rights.

19. Schutt specifically reserves his right to amend this pleading to assert an entitlement to an award of punitive damages upon providing evidence demonstrating a reasonable basis for the recovery of those damages.

WHEREFORE, Counterclaimant requests judgment for compensatory damages in excess of \$15,000, plus costs, pre- and post-judgment interest, and awards of reasonable attorneys' fees

and treble damages under Florida Statutes § 720.304(4), along with such further relief as deemed just and necessary by the Court.

SECOND COUNTERCLAIM: VIOLATION OF FLA. STAT. § 720.304(4)(d)

20. Counterclaimant incorporates by reference and restates all allegations contained in each preceding paragraph.

21. Upon information and belief, Counterdefendant has expended funds belonging to its Homeowners Association in bringing the case-in-chief – an action for defamation – against Schutt, a parcel owner within the Fiddler’s Creek community.

22. Counterdefendant’s action for defamation constitutes a SLAPP suit and is without factual or legal merit.

23. Counterdefendant’s action for defamation was wrongfully, intentionally, and unlawfully brought solely to harass and punish Schutt for lawful exercising his free speech rights.

24. Due to Counterdefendant’s unlawful and wrongful conduct, Schutt has been damaged by being subjected to the expenditure of unnecessary attorneys’ fees to defend Counterdefendant’s frivolous SLAPP suit filed against him, and has suffered a chilling effect upon his free speech rights.

25. Schutt specifically reserves his right to amend this pleading to assert an entitlement to an award of punitive damages upon providing evidence demonstrating a reasonable basis for the recovery of those damages.

WHEREFORE, Counterclaimant requests judgment for compensatory damages in excess of \$15,000, plus costs, pre- and post-judgment interest, and awards of reasonable attorneys’ fees

and treble damages under Florida Statutes § 720.304(4), along with such further relief as deemed just and necessary by the Court.

THIRD COUNTERCLAIM: ABUSE OF PROCESS

26. Counterclaimant incorporates by reference and restates all allegations contained in each preceding paragraph.

27. On January 24, 2013, Counterdefendant retaliated against Schutt's constitutionally protected speech by filing the underlying action.

28. Since filing the underlying lawsuit, Counterdefendant has served process upon Counterclaimant and further served discovery demands upon him solely to punish him in the form of legal fees and hardship for exercising his First Amendment rights.

29. Counterdefendant has made an illegal, improper, or perverted use of the legal system by filing the underlying lawsuit, and use of other process against Schutt.

30. Counterdefendant has made further illegal, improper, or perverted use of the legal system by filing the complaint, persisting in maintaining the case, and further propounding discovery upon Schutt.

31. Counterdefendant possessed an ulterior motive or purpose in exercising these illegal, improper, or perverted processes.

32. Counterdefendant's filing of this action constitutes an abuse of process because the underlying lawsuit was not filed based on Counterdefendant's belief that the continued posting of Schutt's statements were actually legally defamatory, or because Counterdefendant suffered monetary loss from Schutt's statements, or even because Counterdefendant's reputation was harmed as a result of Schutt's statements. This action was not filed to redress any damage actually suffered by the Counterdefendant, or for any other proper purpose.

33. Schutt made constitutionally protected statements about a matter of a public concern on the Blog. Schutt's statements were made in furtherance of his rights to free speech and petition.

34. Despite knowing that Schutt's statements were protected by absolute and qualified privileges, as well as the First Amendment, Counterdefendant filed the underlying lawsuit with ulterior motives, and for improper purposes, including but not limited to:

- a. attacking the credibility of Schutt's opinions and views;
- b. intimidating Schutt and others with views and opinions unfavorable to the Counterdefendants so that Schutt and others would refrain from their expression of those views;
- c. attempting to intimidate Schutt and other Fiddlers' Creek residents and parcel owners from exercising their First Amendment rights;
- d. inhibiting Schutt's (and other Fiddlers' Creek residents') ability and desire to comment upon and speak publicly about the affairs of Counterdefendant's community, its operation, and the manner in which it conducted business affecting its numerous residents; and
- e. hampering Schutt's (and other Fiddlers' Creek residents') ability and willingness to exercise constitutional rights to freely express opinions, consequently censoring speech and infringing upon other First Amendment rights.

35. As a direct and proximate cause of Counterdefendant's conduct, Schutt's ability and willingness to express his constitutionally protected views have been negatively affected, as has his willingness to petition individuals and the public to seek redress of grievances or to

inform them on matters of public concern. Thus, Schutt has suffered damages as a result of Counterdefendant's actions.

36. Counterdefendant's filing of the underlying defamation action for a improper purpose was done willfully, oppressively, maliciously, and in conscious disregard of Schutt's First Amendment right to free speech.

37. Schutt specifically reserves his right to amend this pleading to assert an entitlement to an award of punitive damages upon providing evidence demonstrating a reasonable basis for the recovery of those damages.

WHEREFORE, Counterclaimant requests judgment for compensatory damages in excess of \$15,000, plus costs, pre- and post-judgment interest, and an award of reasonable attorneys' fees along with such further relief as deemed just and necessary by the Court.

Respectfully submitted this 14th day of March, 2013

/s/ Marc J. Randazza
Marc J. Randazza, Esq. (625566)
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Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this document has been furnished by email this 14th day of March, 2013, to Ricardo A. Reyes, Esq. and Carrie Stolzer Robinson, Esq. at the email addresses listed in their Notice of Designation of Email Address, filed in this case on January 24, 2013 (eservice@tobinreyes.com, rar@tobinreyes.com, and csrobinson@tobinreyes.com).

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