
IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1251

ERICA TYNE, ET AL.,

Plaintiffs/Movants,

vs.

TIME WARNER ENTERTAINMENT CO., L.P., ET AL.

Defendants/Respondents.

On a Certified Question from the
United States Court of Appeals for the Eleventh Circuit
Case No. 02-13281

DEFENDANTS'/RESPONDENTS' ANSWER BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

The question before this Court – whether Florida Statute Section 540.08 applies to expressive works such as *The Perfect Storm* – is not a new one. The Fourth District Court of Appeal in *Loft v. Fuller*, the federal district court in this matter, and indeed the Eleventh Circuit itself in *Valentine v. CBS*, all have held that the statute does not apply to films, songs, and similar works protected by the First Amendment. Applying the fundamental rule that statutes should be construed so as to avoid constitutional conflict, those courts sensibly have limited the application of Section 540.08 to the realm for which the tort of commercial misappropriation was designed – to prevent the unauthorized use of names and likenesses on products and in advertising. Respondents Time Warner Entertainment Co., L.P., d/b/a Warner Bros. Pictures, Baltimore/Spring Creek Pictures, L.L.C., and Radiant Productions, Inc. (collectively, “Defendants” or “Warner Bros.”), now urge this Court to affirm the correctness of those prior holdings, and to inform the Eleventh Circuit that Section 540.08 does not apply to the portrayal of a person in a motion picture or other expressive work. Alternatively, Defendants ask this Court to advise the Eleventh Circuit that such portrayals are subject to the “newsworthiness” or “public interest” exemption found in subsection 3(a) of the statute.

In limiting the application of the statute, the cases mentioned above have followed virtually uniform precedent in Florida and other states around the country. In case after case, courts have rejected, as a matter of law, commercial misappropriation claims brought by persons (or heirs of persons) portrayed in

motion pictures and other expressive works. Those courts have recognized that in a free society, an author or film producer does not need permission to speak about persons and events of public interest. They have, of course, put carefully prescribed limits on that freedom of speech, recognizing the viability of tort claims brought by living persons for defamation and false light invasion of privacy. But they have been fully aware of the dangers of expanding the commercial misappropriation tort beyond the realm of product merchandising and advertising. Courts have understood that an expanded tort of commercial misappropriation, lacking the strict limitations of defamation and false light, would turn persons portrayed in historical works (or their heirs) into censors, and thereby threaten long-established and legitimate genres of expression, such as unauthorized biography, historical fiction, and motion picture dramatization.

As recognized by Judge Conway in her district court opinion in this matter, Plaintiffs are trying to achieve precisely what those courts have refused to allow – an end run around the law of defamation and the use of the commercial misappropriation tort where it was not meant to apply. Plaintiffs’ Section 540.08 claims are, in reality, post-mortem defamation claims masquerading as commercial misappropriation claims. Plaintiffs’ essential assertion has always been that Warner Bros. falsely portrayed decedent Billy Tyne and did so with “actual malice.” If Tyne were alive, those allegations might state a claim for defamation. But they do not state a claim under Section 540.08, a statute which has nothing to do with defamation and in which falsity (and hence “malice”) is not even an element.

To reconcile the statute with well-established First Amendment protections for expressive works, the *Loft* Court held that the use of a name in a book or movie is not a trade or commercial/advertising use. That approach strikes a statutorily correct and constitutionally sound balance. So applied, the statute forbids the unauthorized uses of person's name or likeness on products and in advertising. Section 540.08, however, does not give people the right to forbid others to speak about them in books, movies, and other expressive works. And, under *Loft*, issues of falsity are left where they exclusively belong – in the jurisprudence of defamation and false light. That sound approach should be affirmed by this Court in the present case, and this Court should answer the Eleventh Circuit's question so as to establish that the facts of this case clearly do not give rise to liability under Section 540.08.

STATEMENT OF THE CASE

Statement Of Facts

The Storm and Public Interest

In October 1991, a powerful storm struck off the coast of New England. A fishing boat, the *Andrea Gail*, was caught in the storm, lost radio contact, and was never heard from again. All six fishermen on board perished. Slip Op. at 3. Newspapers and television stations reported extensively on these events. (Doc 77-Pg 4; Doc 81-Grubb Aff. ¶¶ 3-5 & Exh. A.)

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Author Sebastian Junger researched and wrote a best-selling book about the October 1991 storm. Slip Op. at 3. The book, titled “The Perfect Storm,” reported on the fate of the *Andrea Gail* and its captain (Billy Tyne) and crew (including Dale Murphy), as well as other vessels and people affected by the storm.

The Motion Picture: *The Perfect Storm*

In 1997, Warner Bros. purchased from Sebastian Junger and his publisher the rights to make a motion picture based on Junger’s copyrighted book. Warner Bros. produced the Picture and released it for theatrical distribution in June 2000. *Id.* Actors and actresses depicting decedent Billy Tyne, decedent Dale Murphy,

¹ The Certificate of Readiness of Record on Appeal issued by the U.S. District Court did not include an index to the record. Accordingly, citations to the record are to the document number assigned by the district court and listed on the docket sheet, and to the page number within the document (Doc __ -Pg__). Where appropriate, exhibit numbers are provided.

and each Plaintiff appear in the Picture. Warner Bros. did not seek permission from Plaintiffs to depict them in the Picture and did not compensate them. *Id.*

The Picture is based on actual events but also contains dramatized or fictional events, characters, and dialogue created for the Picture.² Accordingly, “[t]he Picture did *not* hold itself out as factually accurate.” Slip Op. at 4 (emphasis added). The first words that appear at the beginning of the Picture are: “THIS FILM IS BASED ON A TRUE STORY.” The closing credits contain the following disclaimer:

This film is based on actual historical events contained in ‘The Perfect Storm’ by Sebastian Junger. Dialogue and certain events and characters in the film were created for the purpose of dramatization.

Slip Op. at 4.

Depiction of Billy Tyne and Dale Murphy and of Plaintiffs

Billy Tyne was the captain of the *Andrea Gail*. He is portrayed in the Picture by actor George Clooney. Dale Murphy was a crewmember on the *Andrea Gail* and is portrayed by actor John C. Reilly. Both actors are on screen for a significant portion of the Picture. (Doc 77-Pg 10.)

Plaintiffs Erica and Billy-Jo Tyne, the daughters of decedent Billy Tyne, are

² Plaintiffs claim that Warner Bros. repeatedly denied that it invented any of the events depicted in the Picture. This is not true. During discovery, Warner Bros. and Plaintiffs could not agree on the legal significance, if any, of the word “fictionalized,” but Warner Bros. always acknowledged that events, characters, and dialogue were dramatized in the Picture. Indeed, given the fact that all six men aboard the *Andrea Gail* died and no one (including Plaintiffs) knows what happened to the boat and crew, it is not possible to make a movie about this tragedy without creating many of the events surrounding it.

portrayed by actresses in the Picture, but are on screen for less than 30 seconds, do not speak, and are never referenced by name. (Doc 77-Pg 5-7; Doc 81-Grubb Aff. Exh. B.)

Plaintiff Dale R. Murphy, Jr., the son of decedent Dale Murphy, is portrayed by an actor in the Picture who speaks several lines and is on screen for less than five minutes. Plaintiff Debra Tigie, the divorced wife of decedent Dale Murphy, is portrayed by an actress who speaks six lines and is on screen for less than three minutes. (Doc 77-Pg 7-9; Doc 81-Grubb Aff. Exh. B.)

Plaintiff Douglas Kosko, a former crewmember of the *Andrea Gail*, is portrayed by an actor who is on screen for less than one-and-a-half minutes. (Doc 77-Pg 9; Doc 81-Grubb Aff. Exh. B.)

Proceedings And Dispositions In Federal Court

Plaintiffs, who all reside in Florida, filed their original Complaint on August 24, 2000 in the United States District Court for the Middle District of Florida, Orlando Division. In their Second Amended Complaint (the operative complaint), Plaintiffs asserted three types of claims based on Florida law: (1) “commercial misappropriation” of their names, or of the names of decedents Billy Tyne and Dale Murphy, under Florida Statute Section 540.08; (2) common law false light invasion of privacy claims brought by Plaintiffs Erica Tyne and Billy-Jo Tyne on behalf of their deceased father, Billy Tyne; and (3) common law public disclosure of private facts invasion of privacy claims brought by Plaintiffs Dale R. Murphy, Jr. and Debra Tigie. *See* Complaint at 15-27.

On May 9, 2002, United States District Court Judge Anne Conway properly granted summary judgment on all counts of the Complaint. With respect to Plaintiffs' Section 540.08 (commercial misappropriation) claims, Judge Conway found that this case was controlled by *Loft v. Fuller*, 408 So. 2d 619 (Fla. 4th DCA 1981), and that Plaintiffs failed to raise a genuine issue of material fact as to whether Warner Bros.'s use of their names in the Picture fell within the purview of Section 540.08 (*i.e.*, whether their names were used for "purposes of trade or for any commercial or advertising purpose"). *Tyne v. Time Warner Entm't Co.*, 204 F. Supp. 2d 1338, 1341-42 (M.D. Fla. May 9, 2002). The court further concluded that the Picture was exempt from liability under Section 540.08(3)(a) as a presentation "having a current and legitimate public interest" and that the First Amendment prohibited the application of Section 540.08 to a motion picture. *Id.* at 1342-43.

Plaintiffs appealed their false light and commercial misappropriation claims to the Eleventh Circuit Court of Appeals which, on July 9, 2003, affirmed the dismissal of Plaintiffs' false light claims and certified a question to this Court concerning the Section 540.08 claims. As a result, Defendants now have prevailed on both the false light and public disclosure of private facts claims. This proceeding concerns only Plaintiffs' commercial misappropriation claims under Section 540.08.

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³ Curiously, after three years of litigation, Plaintiffs now assert that their (continued...)

CERTIFIED QUESTION

To what extent does Section 540.08 of the Florida Statutes apply to the facts of this case?

ARGUMENT

I. Under The Well-Settled Law Of Florida, Section 540.08 Applies Only When A Person’s Name Or Likeness Is Used To Directly Promote A Product Or Service, And Does Not Apply To A Motion Picture

The key issue facing this Court is whether a motion picture which portrays and uses the names of real persons does so “for purposes of trade or for any commercial or advertising purpose” within the meaning of the statute. This precise issue was addressed by the Fourth District Court of Appeal more than twenty years ago in an opinion written by then-Judge Anstead: *Loft v. Fuller*, 408 So. 2d 619 (Fla. 4th DCA 1981).

⁴ *Loft* squarely held that Section 540.08 does not apply to the use of a person’s name in a motion picture because such use is not “for purposes of trade or for any commercial or advertising purpose.”

Plaintiffs’ efforts to distinguish *Loft* miss the mark because the facts and claims in *Loft* were virtually identical to those here, including the presence of alleged falsity.

(...continued)

Section 540.08 claims are not actually “commercial misappropriation” claims. *See* Movants’ Initial Brief at 22 n.8 (claiming that the scope of Section 540.08 is not limited to “commercial misappropriation”). However, in each of their Complaints (the original Complaint, the First Amended Complaint, and the Second Amended Complaint) Plaintiffs expressly labeled their Section 540.08 claims as “Commercial Misappropriation” claims. (*See* Doc 1-Pg 13; Doc 6-Pg 15; Doc 133-Pg 15.)

⁴ This Court denied review of the *Loft* decision in 1982. *See* 419 So. 2d 1198 (Fla. 1982).

Robert Loft was a commercial airline pilot who died when his plane crashed. *Loft*, 408 So. 2d at 620. Author John Fuller investigated the crash and wrote a book concerning it, titled *The Ghost of Flight 401*. *Id.* The book detailed events before and after the crash, including the reported sightings of the “reappearing ghost” of Robert Loft after his death. Indeed, Robert Loft was referred to in the book as a “reappearing ghost.” *Id.* After the book was published, a made-for-television movie based on the book was produced and broadcast. Although the movie was rooted in real events – a plane crash, the supposed appearances of a ghost, etc. – the movie’s telling of the story of Robert Loft’s plane crash obviously required some dramatization and/or fictionalization (including, for example, the creation of fictional dialogue).

Loft’s surviving family members sued the author and filmmakers under Section 540.08.

⁵ *Id.* at 622. The *Loft* court expressly rejected the plaintiffs’ claim that the use of Loft’s name in a book or film constituted a trade, commercial, or advertising use within the meaning of the statute:

In our view, Section 540.08, by prohibiting the use of one’s name or likeness for trade, commercial or advertising purposes, is designed to prevent the unauthorized use of a name ***to directly promote the product or service*** of the publisher. Thus, the publication is harmful not simply because it is included in a publication that is sold for a profit, but rather because of the way it associates the individual’s name or his personality with something else. Such is not the case

⁵ In addition, the *Loft* plaintiffs brought claims for common law false light invasion of privacy, public disclosure of private facts, and intrusion upon seclusion. *See Loft*, 408 So. 2d at 623.

here. While we agree that at least one of the purposes of the author and publisher in releasing the publication in question was to make money through sales of copies of the book and that such a publication is commercial in that sense, this in no way distinguishes this book from almost all other books, magazines or newspapers and *simply does not amount to the kind of commercial exploitation prohibited by the statute.*

Id. at 622-23 (emphasis added). Thus, contrary to Plaintiffs’ suggestion, Florida courts have addressed the precise scope of Section 540.08, and unequivocally decided that the use of a person’s name in a motion picture (or book) does not give rise to liability under the statute.

Consistent with *Loft*, Warner Bros.’s use of Plaintiffs’ names in the Picture does not violate Section 540.08. Plaintiffs try to distinguish *Loft* by arguing that it did not involve an allegedly false or “fictionalized” work. According to Plaintiffs, this case differs from *Loft* because, unlike the *Loft* defendants, Warner Bros. held the Picture out as factually accurate, but also included knowingly fictional elements. Plaintiffs are mistaken in their reading of *Loft* and in their description of the Picture.

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In *Loft*, the Plaintiffs alleged that the book and movie in question **falsely** implied that they were “the wife and children of a ghost.” *Id.* at 621. Similarly, the Plaintiffs’ complaint contained not only a Section 540.08 claim, but also a **false light** claim. *See id.* at 623 (stating that plaintiffs brought claims under “the three other forms of common law invasion of privacy” – *i.e.*, intrusion upon seclusion,

⁶ “The Picture did **not** hold itself out as factually accurate.” Slip. Op. at 4 (emphasis added).

public disclosure of private facts, and *false light*). Moreover, the opening credit on the “docudrama” film involved in *Loft* described the film as “the true story of Flight 401,” even though it depicted Loft as a ghost. (See Doc. 81-Grubb Aff. ¶¶

10-11 & Exh. D.)

Because the *Loft* plaintiffs brought a false light claim, and because the defendants represented that the motion picture was a “true story,” the *Loft* Court necessarily faced the same argument that Plaintiffs make in this case – that the film misled the audience into believing false information (*i.e.*, that the plaintiffs were relatives of a ghost). Despite this fact, the *Loft* Court did not find that such alleged falsity had any relevance to the Section 540.08 claim. Rather, the pertinent question was whether the defendants used plaintiffs’ names “to directly promote [a] product or service.” *Loft*, 408 So. 2d at 622-23. Thus, Plaintiffs’ entire argument about fiction “holding itself out as truth,” was rejected under almost identical circumstances in the *Loft* decision.⁷

In the more-than twenty years since *Loft* was decided, no Florida state or federal court ever has doubted its correctness.⁸ In fact, shortly after *Loft* was decided, the

⁷ Moreover, as discussed *infra*, Section 540.08 itself never mentions “fictionalization” or “falsity” because falsity is not an element of a Section 540.08 claim. See Fla. Stat. § 540.08 (2000). Plaintiffs’ suggestion that falsity is key to the statute’s application simply has no support in the statute itself or in any reported Florida case construing the statute.

⁸ Plaintiff’s contention that the *Loft* decision was questioned by *Facchina v. Mutual Benefits Corp.*, 735 So. 2d 499 (Fla. 4th DCA 1999) is baseless. In *Facchina*, the plaintiff brought a Section 540.08 claim and alleged that the defendant published advertisements containing his photograph in periodicals directed to the homosexual community and that the advertisements implied that he was homosexual and had AIDS. *Facchina*, 735 So. 2d at 500-01. The trial court dismissed the complaint based on Florida’s economic loss rule (“ELR”) because the plaintiff sought purely economic losses, which cannot be recovered in tort where such damages arise from a breach of contract. *Id.* at 501.

(continued...)

Eleventh Circuit itself expressly agreed with *Loft* that Section 540.08 does not apply to use of a person’s name in an expressive work, even if that work is sold for profit. *See Valentine v. C.B.S., Inc.*, 698 F.2d 430, 433 (11th Cir. 1983). In *Valentine*, the plaintiff sued for the unauthorized use of her name in a song by Bob Dylan that concerned the murder trial of prizefighter Rubin “Hurricane” Carter.

The song’s lyrics described the plaintiff’s role as a witness to the murder.

Consistent with *Loft*, the *Valentine* Court held that the “[u]se of a name is not harmful simply because it is included in a publication sold for profit.” *Id.*

Moreover, the appellate court specifically considered the proper scope of Section 540.08 and held that by construing the statute to prevent only the use of a person’s

name “to directly promote a product or service,” the district court “**properly construed the statute.**” *Id.* (emphasis added).

Indeed, since *Loft* was decided, every reported case from a Florida state or federal court considering the scope of Section 540.08 has agreed that it prohibits only the unauthorized use of a person’s name or likeness “to directly promote a product or service.” *See, e.g., Lane v. MRA Holdings, LLC*, 242 F. Supp. 2d 1205, 1212 (M.D. Fla. 2002) (Section 540 prohibits “using a person’s name or likeness to directly promote a product or service”); *Epic Metals Corp. v. CONDEC, Inc.*, 867

(...continued)

The court of appeal reversed, holding that the ELR, as a judge-made rule, cannot be applied to limit the **remedies** available by statute. *Id.* at 502. The court never addressed the question of what a plaintiff must prove to establish **liability** under Section 540.08. In fact, the court expressly stated that “we limit our decision to the ELR issue only and do not address the legal sufficiency of the pleading, the nature of any defenses thereto, or the proof needed to sustain it.” *Id.* at 502 n.4. *Facchina* did not even mention the *Loft* decision, let alone cast doubt on it.

F. Supp. 1009, 1016 (M.D. Fla. 1994) (“Florida Statute § 540.08 prevents the unauthorized use of a name or personality to directly promote the product or service of the publisher”); *National Football League v. The Alley, Inc.*, 624 F. Supp. 6, 10 (S.D. Fla. 1983) (“Section 540.08 of the Florida Statutes prohibit [sic] unconsented use of an individual’s name and likeness only when such directly promotes a commercial product or service”).⁹

The foregoing unbroken line of authority delineating the scope of Section 540.08 is consistent with the historical development of the tort of commercial misappropriation in the United States. In 1977, the Restatement (Second) of Torts expressly identified this tort as the “use of the plaintiff’s name or likeness to advertise the defendant’s business or product, or for some similar commercial purpose.” Restatement (Second) Torts § 652C, cmt. b (1977).

Similarly, the Restatement (Third) of Unfair Competition states that, without

⁹ Plaintiffs argue that the *Loft* construction of the statute is too narrow. See Movants’ Initial Brief at 39 n.18. This is not true. Under *Loft*, the statute correctly prohibits the improper commercial exploitation of an individual’s name or likeness, and does so without violating the First Amendment. For example, the following uses would be prohibited under *Loft*:

- Advertisements or Commercials. If a seller of automobiles uses a photograph of deceased race car driver Dale Earnhardt in an advertisement for the seller’s automobiles, that use would violate Section 540.08 because it is an unauthorized use that promotes the seller’s products. Such a prohibition is constitutionally sound.
- Placement of a Name on a Product. If the Nike Corporation, without permission, sells a basketball shoe called the “Shaquille O’Neal Sneaker,” such use of Shaquille O’Neal’s name violates Section 540.08. Even if the name is not used in advertisements themselves, its placement on the product promotes the product and therefore violates the statute. This construction of Section 540.08 would not violate the constitution.
- Use of a Photograph on a Product. If a photographer takes a picture of a baby, without authorization from the baby’s parents, and that picture is used by Gerber on a jar of baby food, the use violates Section 540.08. While there may not be an advertisement involved, the use of the baby’s picture on the jar of baby food plainly has the purpose of inducing (*i.e.*, promoting) sales of the baby food.

permission, a person's name or likeness may not be used "for purposes of trade":
i.e., they may not be used "in advertising the user's goods or services, or [] placed
on merchandise marketed by the user, or . . . used in connection with services
rendered by the user." *See* Restatement (Third) Unfair Competition § 47 (1995).
However, the Restatement expressly excludes the use of a person's identity "in
news reporting, commentary, entertainment, works of fiction or nonfiction, or in
advertising that is incidental to such uses." *Id.* Consequently, the Restatement
(Third) of Unfair Competition and the Restatement (Second) of Torts, reaffirm
Section 540.08's scope as articulated in *Loft* and its progeny. This Court should
not disturb this sound line of reasoning which makes it clear that Section 540.08
does not apply to the facts of this case because Plaintiffs do not allege that Warner
Bros. ever used their names or their relatives' names to directly promote any
product or service.¹⁰

¹⁰ Plaintiffs contend that the Ninth Circuit's decision in *Solano v. Playgirl, Inc.*, 292 F.3d 1078 (9th Cir. 2002), demonstrates that proof of "extraneous product endorsement" is not necessary to support a Section 540.08 claim. *See* Movants' Initial Brief at 41-43. This assertion is wrong. First, *Solano* was decided under California law, Cal. Civ. Code Section 3344, not Florida law. Section 3344 was amended by the California Legislature in 1984 to broaden its scope beyond that of Section 540.08 by "eliminating the requirement that the misappropriation must occur in a product advertisement, endorsement or solicitation." *Solano*, 292 F.3d at 1089 n. 7. Second, the facts of *Solano* are completely inapposite. In *Solano*, the Ninth Circuit reversed summary judgment for defendant on a misappropriation cause of action, where defendant published a shrink-wrapped issue of its magazine with a cover promising nude pictures of plaintiff, when in fact the magazine contained no such pictures. *Id.* at 1080, 1088-90. Whereas the *Solano* defendants implied the plaintiff's personal participation in the magazine, there are no allegations or evidence in this case that Warner Bros. ever implied the personal participation of Plaintiffs in the Picture.

II. Section 540.08 Must Be Construed So As To Protect Expression And Thereby Avoid Constitutional Conflict

Applying pertinent rules of statutory construction to Section 540.08 will lead to the same result reached by the *Loft* Court, that Section 540.08 does not apply to expressive works. Those rules are discussed in detail below. *See infra* Section III. In addition, however, as *Loft* recognized, it is a fundamental canon of construction in Florida that “a statute should be construed in such a manner as to avoid conflict with the Constitution.” *Schultz v. State*, 361 So. 2d 416, 418 (Fla. 1978). *See also St. Mary’s Hosp., Inc. v. Phillipe*, 769 So. 2d 961, 972 (Fla. 2000); *State v. Mozo*, 655 So. 2d 1115, 1117 (Fla. 1995); *Loft*, 408 So. 2d at 623.

In *Loft*, the Court specifically rejected the broad reading of the word “commercial” proposed by the plaintiffs because such a reading “would result in a substantial confrontation between this statute and the first amendment to the United States Constitution guaranteeing freedom of the press and of speech.” *Loft*, 408 So. 2d at 623. The Eleventh Circuit reached the same conclusion in *Valentine*. *See Valentine*, 698 F.2d at 433 (“an interpretation that the statute absolutely bars the use of an individual’s name without consent for any purpose would raise grave questions as to constitutionality”).

As recognized in *Loft*, the most important objective in a case of this kind is to construe Section 540.08 in a manner consistent with the First Amendment and Article I, Section 4 of the Florida Constitution. There are two ways to do that: (1) by finding, as *Loft* did, that the use of real persons’ names in films, books and other expressive works is not a trade, commercial or advertising use; or (2) by

holding that even if Section 540.08(1) applies to expressive works, the Picture is exempted from liability under Section 540.08(3)(a) because it involves a “presentation have a current and legitimate public interest.” The federal district court in this case correctly held that the Picture was protected against Plaintiffs’ claims on both of these grounds. *See Tyne*, 204 F. Supp. 2d at 1341-43.

A. Motion Pictures, Whether Factual, Fictional, Or A Combination Of The Two, Are Protected By The First Amendment

Motion pictures are unquestionably protected by the First Amendment. *See, e.g., Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952). Indeed, entertainment generally as a form of creative expression is entitled to full constitutional protection.¹¹ Despite this clear authority, Plaintiffs contend that Section 540.08 applies, and that the Picture does not enjoy constitutional protection, because it contains fictional dialogue and events. *See* Movants’ Initial Brief at 47-48. In fact, consistent precedent establishes that First Amendment protections apply regardless of the presence, absence, or extent of fictional material in a motion picture. In *Guglielmi v. Spelling-Goldberg Prod.*, 603 P.2d 454 (Cal. 1979), the court flatly rejected the plaintiffs’ claim that the use of Rudolph Valentino’s name in a

¹¹ *See, e.g., Guglielmi v. Spelling-Goldberg Prod.*, 603 P.2d 454, 458-59 (“Our courts have often observed that entertainment is entitled to the same constitutional protection as the exposition of ideas. That conclusion rests on two propositions. First, ‘[t]he line between the informing and the entertaining is too elusive for the protection of the basic right. Everyone is familiar with instances of propaganda through fiction. What is one man’s amusement, teaches another doctrine.’ [citation omitted]. Second, entertainment, as a mode of self-expression, is entitled to constitutional protection irrespective of its contribution to the marketplace of ideas.”).

fictionalized movie about Valentino violated the “right of publicity”:¹² “any assertion that fictional accounts pose a unique threat to the right of publicity not found in truthful reports is simply not justified.” *Id.* at 461 (concurring opinion by majority of justices). The court rejected the very same claim made by Plaintiffs in this case, that the creator of a motion picture loses all First Amendment protection when he knowingly includes fictional material in a film depicting “real people.” The constitutional safeguards protecting fictional speech were similarly affirmed in *Seale v. Gramercy Pictures*, 949 F. Supp. 331 (E.D. Pa. 1996). In that case, Bobby Seale, one of the co-founders of the Black Panther movement, brought a commercial misappropriation claim based on a movie titled *Panther*, a “docudrama” which “combine[d] fiction with history.” *Id.* at 334-35. The court rejected the plaintiff’s argument that the fictional elements deprived the film of First Amendment protection: “The Defendants’ use of the Plaintiff’s name and likeness was for the purpose of First Amendment expression: the creation, production, and promotion of a motion picture and history book which integrates fictitious people and events with the historical people and events” *Id.* at 337. And, in *Ruffin-Steinback v. dePasse*, 82 F. Supp. 2d 723, 726 (E.D. Mich. 2000), *aff’d*, 267 F.3d 457 (6th Cir. 2001), the plaintiffs argued that use of their names in a partially fictional movie about the musical group the Temptations violated their rights of publicity. Based on the First Amendment, the court rejected the argument,

¹² Courts generally use one of two labels for the tort at issue in this case: either “commercial misappropriation” or “right of publicity.” Both are used interchangeably in this Brief.

stating “[t]he scope of the right of publicity does not depend . . . on the fictional or non-fictional character of the work.” *Id.* at 730.

In each of these cases rejecting commercial misappropriation claims, the courts refused to base their decisions on the degree of fictionalization, if any, in the works. Rather, the courts recognized that they are not suited “to pass on literary categories, or literary judgment.” *Frosch v. Grosset & Dunlap, Inc.*, 427 N.Y.S.2d 828, 829 (N.Y. App. Div. 1980) (“It is enough that the book is a literary work and not simply a disguised commercial advertisement for the sale of goods or services.”). As a result, First Amendment considerations “are no less relevant whether the work in question is fictional, non-fictional or a combination of the two.” *Ruffin-Steinback*, 82 F. Supp. 2d at 730.

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Consistent with *Loft*, the federal district court in this case avoided possible conflict with the First Amendment by construing Section 540.08 so as not to apply to expressive works – such as the Picture – regardless of whether they are factual, fictional, or a combination of the two. As this Court explained in *Schultz v. State*, statutes must be construed so as to avoid constitutional infirmities – a problem precisely inherent in Plaintiffs’ proposed reading of Section 540.08. *See Schultz*, 361 So. 2d at 418. The *Loft* approach – finding that Section 540.08 is not

¹³ See also *Matthews v. Wozencraft*, 15 F.3d 432, 440 (5th Cir. 1994) (The defendant’s book “falls within the protection of the First Amendment. It is immaterial whether [the book] ‘is viewed as an historical or a fictional work.’”) (internal quotation omitted); *Taylor v. National Broad. Co.*, 22 Media L. Rep. 2433, 2437 (Cal. Sup. Ct. 1994) (“Constitutional protection is not limited to factual works but is extended to all expressive works, whether factual or fictional”).

applicable to motion pictures – appropriately follows the foregoing line of authority and is a clear and sensible method of avoiding constitutional conflict.

B. *The Perfect Storm* is Exempt Under Section 540.08(3) Because The Picture Is Clearly A “Presentation Having A Current And Legitimate Public Interest”

Even if this Court were to find that Section 540.08(1) applies to the use of names and likenesses in expressive works, Plaintiffs’ claims would fail because the Picture is protected by the exemptions contained in Section 540.08(3)(a). Indeed, the federal district court so held, as an alternative ground for granting summary judgment. *See Tyne*, 204 F. Supp. 2d at 1342.

Section 540.08(3)(a) states that the statute does not apply to:

The publication, printing, display, or use of the name or likeness of any person in any newspaper, magazine, book, news broadcast or telecast, *or* other news medium or publication as part of any bona fide news report *or* presentation having a current and legitimate public interest and where such name or likeness is not used for advertising purposes.

Fla. Stat. § 540.08(3)(a) (2000) (emphasis added). Thus, assuming a name is not independently used for advertising purposes, the statute exempts liability on three independent grounds: (1) use in any “newspaper, magazine, book, news broadcast or telecast”; (2) use in any “other news medium or publication as part of any bona fide news report”; or (3) use in any “presentation having a current and legitimate public interest.”

The “public interest” exemption is a well-established method of making commercial misappropriation statutes consistent with the First Amendment. The Supreme Court has “frequently affirmed that speech on public issues occupies the

‘highest rung on the hierarchy of First Amendment values,’ and is entitled to special protection.” *Connick v. Myers*, 461 U.S. 138, 145 (1983). As a consequence, “[t]he scope of the subject matter which may be considered of ‘public interest’ . . . has been defined in most liberal and far reaching terms.” *Paulsen v. Personality Posters, Inc.*, 299 N.Y.S.2d 501, 506 (N.Y. Sup. Ct. 1968).

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Whether an issue is a matter of public concern is determined by looking at the reported issue in general, not by looking at the specific information disclosed. *See, e.g., Florida Star v. B.J.F.*, 491 U.S. 524, 536-37 (1989) (court should look at subject matter of news story generally, rather than at specific identification of plaintiff, in making public concern inquiry); *Dresbach v. Doubleday & Co., Inc.*, 518 F. Supp. 1285, 1289-90 (D.D.C. 1981). Also, it is well-settled that the public concern inquiry applies to expressive works like songs or films as well as news reports. *See, e.g., Valentine*, 698 F.2d at 432-33. The statute makes this application clear by exempting from liability any “presentation” of public interest and by separating the “public interest” exemption from the newsworthiness

¹⁴ The public interest exemption must apply to all expressive works. The Supreme Court has established that motion pictures are entitled to as much protection under the First Amendment as any other type of expressive work. *Joseph Burstyn, Inc.*, 343 U.S. at 501. The Supreme Court has also established that the government may not discriminate among various media. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 659 (1994) (“[r]egulations that discriminate among media . . . present serious First Amendment concerns”); *see also Minneapolis Star & Tribune Co. v. Minnesota*, 460 U.S. 575, 591 (1983) (finding that ink-and-paper tax unconstitutionally burdened smaller newspapers, and newspapers generally, more than other protected media). Thus, Section 540.08(3)(a) applies not only to books, magazines, and newspapers, but also to movies.

exemption.¹⁵

The Perfect Storm is exempt from liability because it used Plaintiffs' names in a "presentation having a current and legitimate public interest." *Tyne*, 204 F. Supp. 2d at 1342-43. It is beyond dispute that the public has a current and legitimate interest in the events surrounding the October 1991 storm and the fate of the *Andrea Gail*. The Eleventh Circuit noted that newspaper and television reported "extensively" on the storm and its impact on the people caught up in it. Slip Op. at 3. Although the book "The Perfect Storm" was published nearly six years after the events recounted, it still generated enormous public interest and was a best-seller. Significantly, Plaintiffs do not even challenge the fact that the storm and fate of the *Andrea Gail* crew are matters of public interest. Rather, their only argument is that Warner Bros. cannot rely on Section 540.08(3)(a) because the Picture contained fictional elements. *See, e.g.*, Movants' Initial Brief at 20, 48. But, Section 540.08 never mentions "fictionalization," "falsity," "truth," or "non-fiction." Indeed,

¹⁵ The presentation of historical events, not just news stories, are in the "public interest." *See, e.g. Partington v. Bugliosi*, 56 F.3d 1147, 1159 (9th Cir. 1995) ("authors should have 'breathing space' in order to criticize and interpret the actions and decisions of those involved in a public controversy. If they are not granted leeway in interpreting ambiguous events and actions, the public dialogue that is so important to the survival of our democracy will be stifled. We must not force writers to confine themselves to dry, factual recitations or to abstract expressions of opinion wholly divorced from real events"); *Street v. NBC*, 645 F.2d 1227, 1236 (6th Cir. 1981) ("[t]here is no reason for the debate to be any less vigorous when events that are the subject of current discussion occurred several years earlier. The mere passage of time does not automatically diminish the significance of events or the public's need for information. . . A contrary rule would tend to restrain efforts to shed new light on historical events and reconsideration of past errors").

Plaintiffs have not identified a single reported case from a Florida state or federal court holding that fictionalization or falsity are relevant to the exemption in Section 540.08(3)(a). That is because fictionalization and falsity are neither elements of a Section 540.08 claim, nor are they pertinent to the application of the Section 540.08(3)(a) exemption.¹⁶

Thus, even if section 540.08 facially applies to expressive works such as the Picture – which Warner Bros. does not concede – the Picture is exempt from liability under subsection 3(a). Because the Picture unquestionably concerns a matter of “current and legitimate public interest,” Plaintiffs’ Section 540.08 claims must fail. For this additional constitutional and statutorily-based reason, this Court should decide that the facts of this case do not give rise to liability under Section 540.08.

C. Neither Fictionalization Nor Falsity Deprives The Picture Of Constitutional Protection

Plaintiffs argue that the Picture is not constitutionally protected because it contains “deliberate falsity” or lacks adequate disclaimers. This argument is completely unsupported by case authority and is refuted by sound First Amendment jurisprudence, which provides full constitutional protection for non-fictional as well as wholly or partly fictionalized works. Indeed, this protection

¹⁶ “The privilege of enlightening the public is by no means limited to the dissemination of news in the sense of current events but extends far beyond to include all types of factual, educational and historical data, *or even entertainment and amusement*, concerning interesting phases of human activity in general” *Paulsen*, 299 N.Y.S. 2d at 506 (emphasis added).

would be meaningless under the broad reading of Section 540.08(1) that Plaintiffs propose.

Any expressive work can be accused of presenting fictional elements. Even a documentary film could alter the sequences of events, omit scenes or simply fail to capture events on camera – all of which could arguably give rise to a “false” impression of some kind. Furthermore, *all* works that portray real persons have at least some non-fictional element – *i.e.*, those *real* persons’ names and/or likenesses. Thus, any expressive work that uses real persons’ names or likenesses necessarily combines fiction and non-fiction elements. As explained above, such works are – and must be – protected by the First Amendment.

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Like all dramatizations, the Picture contains “deliberate falsity” in the form of fictional scenes and dialogue. Genres involving fictionalization or dramatization are always “deliberately false” to some degree, yet as the cited precedent clearly demonstrates, courts uniformly have recognized that fictionalized works deserve full First Amendment protection against commercial misappropriation claims. This is sound and necessary because to do otherwise, to say that works containing fiction require the consent of those portrayed, would effectively give censorship power to the subjects of those works and accordingly create the very chilling effect which the First Amendment is designed to prevent.¹⁸

¹⁷ By contrast, Plaintiffs’ reading of the statute, which would deny protection to these works, would threaten many well-known forms of expression. *See infra* Section III.E.

¹⁸ It is important to note, moreover, that even under Plaintiffs’ reading of the (continued...)

1. Plaintiffs Wrongly Introduce Elements From The Torts Of Defamation And False Light, Thus Misstating The Standard For Properly Applying Section 540.08

While defamation and false light invasion of privacy law do create recognized limitations on freedom of speech, in fictionalized works or otherwise, those causes of action are wholly inapplicable to this case.

¹⁹ Plaintiffs’ falsity arguments are a transparent attempt to expand defamation claims to apply to deceased persons, but without the usual restrictive elements of the cause of action, including that the speech involved actually be defamatory.²⁰

This misplaced reliance on defamation law is the essence of Plaintiffs’ claim; indeed, large portions of their brief are devoted to establishing the admitted (and

(...continued)

statute, Section 540.08 does not require that all depictions of real people be “true” or “non-fictional.” Instead, so long as the person portrayed (or, where that person is deceased, the person’s spouse or child) *authorizes* the depiction in question, it does not matter whether the depiction is factual or fictional. In this regard, Plaintiffs’ reading of Section 540.08 has nothing to do with protecting the so-called “truth”; rather it is a means of giving the subjects of films, books, or other expressive works the right to dictate the content of those works.

¹⁹ Indeed, Plaintiffs brought a false light claim on behalf of decedent Billy Tyne but the federal district court granted Warner Bros. summary judgment on that claim, which the Eleventh Circuit affirmed. *See Tyne*, 204 F. Supp. 2d at 1343; Slip Op. at 11-14.

²⁰ In addition, to be actionable under defamation law, a statement must be one of fact, not opinion or rhetorical hyperbole. *See, e.g., Pullum v. Johnson*, 647 So. 2d 254, 258 (Fla. 1st DCA 1994). Whether the statement is defamatory is determined by considering the publication as a whole, not just the allegedly defamatory language. *See, e.g., id.* at 257. Similarly, where a media defendant is involved, a defamation plaintiff must make a retraction request pursuant to Section 770.02, Florida Statutes, before filing a lawsuit. And, of course, a defamation claim may not be brought on behalf of a decedent. *See, e.g., Robertson v. Wegmann*, 436 U.S. 584, 592 n. 6 (1978). None of these safeguards is contained in Section 540.08.

obvious) fact that the film contains fictional elements and to the analysis of inapposite defamation and false light privacy cases.

The reason that courts consistently conclude that fictional works do not give rise to commercial misappropriation claims is that falsity is not an element of a commercial misappropriation claim. Indeed, it is not even mentioned in Section 540.08. *See Fla. Stat. § 540.08 (2000)* (no mention of falsity). Nor do the cases interpreting Section 540.08 introduce falsity into the cause of action. *See, e.g., id.; Loft*, 408 So. 2d at 622-23; *Valentine*, 698 F.2d at 433.²¹ In short, the commercial misappropriation tort, as defined in Section 540.08, asks only if there was unauthorized use of a plaintiff's name or likeness in a commercial product or an advertisement for the same. Because the statute does not apply to a motion picture at all, the fictional or non-fictional content of the Picture is irrelevant. Plaintiffs' "proof" that the Picture is partly fictional proves nothing; rather, it demonstrates a critical misunderstanding of the right of publicity tort and appears intended to create unnecessary confusion.

²¹ Plaintiffs' assertion that falsity is relevant to a Section 540.08 claim because the *Valentine* Court considered issues of falsity while assessing the plaintiff's commercial misappropriation claim is patently incorrect. *See* Movants' Initial Brief at 36-37. The *Valentine* Court did assess falsity in the context of reviewing the plaintiff's *defamation* claim. *See Valentine*, 698 F.2d at 431-32. When the court reviewed the plaintiff's commercial misappropriation claim, by contrast, it never mentioned or considered falsity. *Id.* at 433. Of course, this demonstrates once again that Plaintiffs have confused the torts of defamation and commercial misappropriation.

According to Plaintiffs, expressive works lose their First Amendment protections if they contain knowingly fictional elements, because knowing fictionalization equals “actual malice.” Plaintiffs’ introduction of the “actual malice” standard from defamation law is misplaced, however, because it is fundamentally inconsistent with applicable precedent protecting works like the Picture, which contain “falsity” only in the form of fictionalization.²² As explained above, falsity is not an element of a Section 540.08 claim or of other commercial misappropriation claims. The Supreme Court explained the distinction between false light/defamation and misappropriation:

The differences between these two torts are important. . . . [T]he State’s interests in providing a cause of action in each instance are different. ‘The interest protected’ in permitting recovery for placing the plaintiff in a false light ‘is clearly that of reputation, with the same overtones of mental distress as in defamation.’ . . . By contrast, the State’s interest in permitting a ‘right of publicity’ is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment. . . . [T]he State’s interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation.

Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573 (1977) (citation

²² For example, Plaintiffs spend pages 45 to 47 of their Brief analyzing *People’s Bank & Trust Co. v. Globe International Publishing, Inc.*, 978 F.2d 1065 (8th Cir. 1992), but *People’s Bank* is a false light case, not a commercial misappropriation case.

omitted).

Plaintiffs' attempt to inject falsity into the commercial misappropriation analysis explains their reliance on *Time, Inc. v. Hill*, 385 U.S. 374 (1967) and several other "actual malice" cases. For purposes of this case, the most significant fact about

²³ As noted in the leading treatise on the right of publicity (J. Thomas McCarthy, *The Rights of Publicity & Privacy* § 8:76 (2d ed. 2000)), arguments about falsity have been raised by plaintiffs in right of publicity cases before, but the argument simply does not make sense. According to Professor McCarthy:

A line of right of publicity decisions appears to follow a "tennis game" sort of progression when a First Amendment defense is asserted:

Step 1: The Serve. Plaintiff sues, alleging that defendant's unpermitted use of plaintiff's identity and persona is an infringement of plaintiff's right of publicity.

Step 2: The Return. Defendant asserts the defense that its use is immunized from right of publicity infringement liability because it is protected by the First Amendment as having a reasonable relationship to news or entertainment.

Step 3: The Server's Return. Plaintiff responds that defendant has exceeded its First Amendment immunity by some element of falsity, such as a false statement of fact about plaintiff in a news story or fictional biography or a false implication of plaintiff's endorsement of defendant's publication. This "return shot" does not count unless a "public" plaintiff proves the constitutionally required elements of *New York Times v. Sullivan*: that defendant published knowing of the falsity or with reckless disregard of the truth.

J. Thomas McCarthy, *The Rights of Publicity & Privacy* § 8:84. As explained by Professor McCarthy, Step 3 is illogical:

It is step 3 that is bizarre. It introduces a foreign element into proof of a claim for infringement of the right of publicity. That element is falsity, which is not part of proving or disproving an infringement of the right of publicity. Falsity is an essential element of other legal counts, such as defamation, false light invasion of privacy and false advertising. Treating step 3 as a "rebuttal" to the First Amendment defense is bizarre because it suddenly injects an element wholly foreign to the original claim. To pursue the tennis analogy, it is as though the server, instead of hitting back the ball originally served, took a new ball and lobbed it back. Some courts seem to act as though nothing unusual has happened and the same point were still being played. In fact, in the author's opinion, the server-plaintiff has *not* returned the ball he served. The server has lost the point. A new point is now being played. That point involves the "new ball" of either defamation, false light invasion of privacy, or false advertising.

Id. § 8:84.

Time, Inc. is that the Supreme Court has declared that it applies only to false light invasion of privacy claims, ***not to commercial misappropriation/right of***

publicity claims, such as Plaintiffs’ claims under Section 540.08:

Time, Inc. v. Hill . . . involved an entirely different tort from the ‘right of publicity’. . . . The Court was aware that it was adjudicating a ‘false light’ privacy case involving a matter of public interest, not a case involving . . . ‘appropriation’ of a name or likeness for the purposes of trade. . . .

Zacchini, 433 U.S. at 571-72. *See also Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 1090 (5th Cir. 1984) (noting that *Time, Inc. v. Hill* concerned a false light invasion of privacy claim). Furthermore, in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), the Supreme Court explained the *Zacchini* case as “ruling that the ‘actual malice’ standard does **not** apply to the tort of appropriation of the right of publicity.” *Id.* at 52 (emphasis added). Thus, the Supreme Court has cautioned that

(1) *Time, Inc. v. Hill* applies only to false light claims, not commercial misappropriation claims, and (2) actual malice (*i.e.* knowing falsity) is not relevant to commercial misappropriation claims. Plaintiffs should not be permitted to bootstrap a post-mortem defamation claim into one for commercial misappropriation.²⁴

²⁴ The federal district court in this case also noted the confusion created by Plaintiffs’ arguments about “falsity”:

Plaintiffs’ arguments regarding the alleged fictionalization of the Picture suggest that they have confused the statutory action of unauthorized publication with the common law action of false light invasion of privacy. The Court, however, has no such problem distinguishing these two causes of action. Consequently, the Court determines that the truth or falsity of the events depicted in the Picture is of no import to the issue of whether there was unauthorized publication of the Plaintiffs’ and decedents’ likenesses.

Tyne, 204 F. Supp. 2d at 1342-43.

2. Section 540.08 Was Not Intended To Require Disclaimers On Expressive Works

Apparently recognizing that their defamation-based actual malice argument “proves too much,” Plaintiffs ultimately concede that fictionalized films are protected by the First Amendment. *See* Movants’ Initial Brief at 45 (noting that “avowed fiction . . . would be protected speech under the First Amendment”). In doing so, Plaintiffs narrow the basis of their claim to a thin reed: Warner Bros.’s alleged failure to include an adequate disclaimer on the Picture. But constitutional protection cannot possibly turn on whether a court or jury finds, years after a film’s release, that a proper disclaimer was used. As the cited precedents make clear, no case has so held. Indeed, such an approach would have a significant chilling effect, amounting to an “on the fly” labeling regulation in which the required labels would be unknown until after the fact.

Plaintiffs’ reading of Section 540.08 as requiring Warner Bros. to have disclosed exactly which portions of the Picture were fictional finds no support in the statute. No reading of Section 540.08 requires any disclaimer, let alone the type of disclaimer urged by Plaintiffs here.

²⁵ Indeed, no case involving film dramatization has ever found the adequacy of

²⁵ Section 540.08 prohibits only the unauthorized use of a person’s name or likeness “for purposes of trade or for any commercial or advertising purpose.” Despite this language, Plaintiffs want to read the statute to prohibit the unauthorized use of a person’s name or likeness “for purposes of trade or for any commercial or advertising purpose, *or for any fictional purpose which is not fully disclosed.*” These additional words obviously are not in the statute and have nothing to do with a commercial misappropriation claim.

such a disclaimer to be the determinative legal test in a commercial misappropriation case. Once again, the First Amendment mandates that result. If courts are unwilling to make judgments about the degree of fictionalization – *see, e.g., Frosch v. Grosset & Dunlap, Inc.*, 427 N.Y.S.2d 828, 829 (N.Y. App. Div. 1980) – then surely they cannot permit fundamental rights of expression to turn on *post hoc* evaluation, through litigation, of whether and to what extent the degree of fictionalization was disclosed. A contrary result, applying Plaintiffs’ logic, would apply *ad infinitum* and *ad nauseam*, requiring disclaimers **during** a film, where icons bearing the words “fact” and “fiction” would constantly appear as audiences tried, in vain, to enjoy the movie. These labels, however, would be meaningless since both fact **and** fiction are protected from misappropriation liability under the First Amendment, and since someone, undoubtedly, would claim that even the most tedious disclaimers did not accurately reflect the content of their work. Thus, under Plaintiffs’ strained conception of Section 540.08, liability would attach to any motion picture that combined fictional and non-fictional elements, no matter what the disclaimer “avowed.”

Moreover, Plaintiffs simply are wrong when they assert that Warner Bros. held the Picture out as a factually accurate story. *See* Movants’ Initial Brief at 13. The Eleventh Circuit noted that Warner Bros. provided a disclaimer at the beginning of the Picture, stating that the Picture was “based on a true story,” and a disclaimer at the end of the Picture acknowledging that events, characters, and dialogue were created for the Picture. Slip Op. at 4. Critically, it also concluded that “the Picture

did *not* hold itself out as factually accurate.” *Id.* (emphasis added). Thus, Plaintiffs’ entire argument about fiction “masquerading” as fact is unsupported by the record and has been rejected by the federal courts in this case.²⁶

This Court should not be misled by Plaintiffs’ attempts to blur the distinctions between commercial misappropriation and defamation. Falsity is not relevant to this case and does not rescue Plaintiffs’ baseless Section 540.08 claims.

III. Rules Of Statutory Construction Dictate That Section 540.08 Does Not Apply To The Picture

As explained below, rules of statutory construction also demonstrate that *Loft* (and the federal district court) properly construed the statute to apply only when a name is used “to directly promote a product or service.” In particular, relevant canons of statutory construction establish that (1) Section 540.08’s general term “commercial” must be construed as synonymous with its more precise term “advertising,” which is how the *Loft* Court construed it; (2) the *Loft* Court properly looked to interpretations of similar language from other courts when it construed Section 540.08; and (3) legislative inaction in response to the *Loft* decision demonstrates legislative acquiescence in the *Loft* decision.

²⁶ In their Reply Brief, Plaintiffs likely will try to challenge the Eleventh Circuit’s factual conclusion, but obviously that issue is not before this Court. Indeed, when certifying its question to this Court, the Eleventh Circuit described the relevant facts and then posed a *legal* question to this Court: “To what extent does Section 540.08 of the Florida statutes apply to the *facts* of this case?” Slip Op. at 11 (emphasis added). The Eleventh Circuit obviously did not ask (and could not have asked) this Court to make any factual findings. *See Fla. R. App. P. 9.150(a)* (authorizing this Court to consider a certified “question of law” from federal court of appeals).

²⁷ There is no extant legislative history to consult concerning the enactment of Section 540.08.

A. The Terms In Section 540.08 Must Be Read Together In Order To Give A Consistent Effect To The Meaning Of The Statute

This Court recognizes the doctrine of “*noscitur a sociis*, which “permits reference to accompanying words as a means of determining the definition of a specific word.” *In re Advisory Opinion*, 243 So. 2d 573, 584 (Fla. 1971) (Ervin, J., dissenting). *See also Transcon Trailers, Inc. v. Northland Ins. Co.*, 436 So. 2d 380, 381 (Fla. 5th DCA 1983) (under doctrine of *noscitur a sociis*, general and specific words “take color from each other so that the general words are restricted to a sense analogous to the specific words”). This Court also recognizes the long-standing and related doctrine of *ejusdem generis*, under which a general term in a statute must be construed in a manner consistent with the more precise terms with which it is associated. *See, e.g., Dunham v. State*, 192 So. 324, 326 (Fla. 1939).

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Section 540.08 prohibits the unauthorized use of a person’s name or likeness when the name or likeness is used “for purposes of trade or for any commercial or advertising purpose.” Fla. Stat. § 540.08(1) (2000). Plaintiffs acknowledge that the terms “trade” and “advertising” “have a rather narrow definition that would come close to the definition used by the [federal] district court below [i.e., “to directly promote a product or service].” Movants’ Initial Brief at 28 n.10. If “trade” and

²⁸ The doctrine of *ejusdem generis* existed and was followed by this Court long before Section 540.08 was enacted in 1967. *See, e.g., Ex Parte Amos*, 112 So. 289, 293 (Fla. 1927). The doctrine also was current at the time Section 540.08 was enacted. *See, e.g., Arnold v. Shumpert*, 217 So. 2d 116, 119 (Fla. 1968). And the doctrine of *ejusdem generis* is still used by this Court today. *See, e.g., Holland v. State*, 696 So. 2d 757, 760 (Fla. 1997).

“advertising” are treated as “narrow” terms, as Plaintiffs suggest, then the term “commercial” – even if it is general – must be given a meaning consistent with “trade” and “advertising” under the doctrines of *noscitur a sociis* and *ejusdem generis*. Indeed, the terms “trade,” “commercial” and “advertising” must be read together to give the statute a coherent meaning.²⁹ That coherent meaning has been supplied time and again, where courts have limited Section 540.08’s application to uses in product merchandising and advertising that “directly promote the product or service of the publisher,” while providing full constitutional protection for the content and promotion of expressive works. *See, e.g., Loft*, 408 So. 2d at 622-23. The terms “trade,” “commercial,” and “advertising” may have different meanings in different contexts, but the thrust of their meaning within the context of Section 540.08 is the same – they seek to limit the unconsented use of names and likenesses in direct connection with the promotion of a product or service. Plaintiffs make no claim that Warner Bros. used Plaintiffs’ names and/or likenesses in trade or advertising. *See* Movants’ Initial Brief at 27-31. Instead, Plaintiffs turn to the word “commercial” to bolster their claim under Section 540.08.

B. The Only Constitutional Way To Interpret The Word “Commercial” Is To Conclude That It Does Not Apply To The Use Of Names And Likenesses In Expressive Works

Plaintiffs claim that Warner Bros. has used their names and likenesses for a “commercial purpose,” and that Warner Bros. therefore is liable under Section

²⁹ One of the definitions of the word “commercial” is “[p]aid for by an advertiser or advertising.” *Webster’s II New Collegiate Dictionary* at 225 (1995).

540.08. Plaintiffs explain their theory that “[t]he profit motive which is inherent in any major motion picture ... would seem to suggest that some sort of ‘commercial purpose’ was involved in making and distributing the film.”

³⁰ Movants’ Initial Brief at 28 n.10. But Plaintiffs’ attempt to apply Section 540.08 through the term “commercial purpose” has been squarely rejected by the United

States Supreme Court:

It is urged that motion pictures do not fall within the First Amendment’s aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree. That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures.

Joseph Burstyn, Inc., 343 U.S. at 501-02 (footnote omitted); *Time, Inc.*, 385 U.S. at 397 (same); *see also Smith v. California*, 361 U.S. 147, 150 (1959) (“[i]t is of course no matter that the dissemination [of books and other forms of the printed word] takes place under commercial auspices”). Plaintiffs’ interpretation and reliance on the term “commercial” – as Plaintiffs have defined it – cannot be

³⁰ However, throughout their Initial Brief, Plaintiffs studiously avoid offering a precise definition of the scope of Section 540.08. In fact, it is quite apparent that Plaintiffs cannot provide such a definition. *See, e.g.*, Movants’ Initial Brief at 27 (“the term ‘commercial purpose’ *may* include activity beyond mere product endorsement”); *id.* at 28 n.10 (Warner Bros.’s profit motive “*would seem to suggest* that some sort of ‘commercial purpose’ was involved in making and distributing the film”); *id.* at 30-31 (under the statute, “*certain depictions* for commercial purposes” are covered); *id.* at 34 n.14 (false speech which exploits a person’s name “*may well have* a commercial purpose if the intent is to unjustly enrich the offender”); *id.* at 35 n.14 (it is “*utter folly*” to suggest that a motion picture which generated substantial revenue “lacks a commercial purpose”) (emphasis added).

squared with the First Amendment. For this independent reason, Section 540.08 does not apply to the facts of this case.

C. The *Loft* Court Properly Considered Case Law Interpreting The Term “Commercial”

As this Court has explained on numerous occasions, “it is a well-settled rule of statutory construction that in the absence of a statutory definition [of a term], courts can resort to definitions of the same term found in case law.” *Rollins v. Pizarelli*, 761 So. 2d 294, 298 (Fla. 2000). *See also Level-3 Communications, LLC v. Jacobs*, 841 So. 2d 447, 452 n.4 (Fla. 2003) (court properly may look to case law to assist in defining statutory term). Because Chapter 540 of the Florida Statutes does not define the term “commercial,” the *Loft* Court properly considered other courts’ interpretations of it.

In particular, the *Loft* Court reviewed and found persuasive the following commercial misappropriation/right of publicity cases: (1) *Jenkins v. Dell Publishing Co.*, 251 F.2d 447, 450 (3d Cir. 1958) (holding that in right of publicity case, the term “commercial” means a person’s name is associated with some other product in commercial advertising); (2) *Cordell v. Detective Publications, Inc.*, 307 F. Supp. 1212, 1217-18 (E.D. Tenn. 1968) (holding that a “commercial” use occurs when plaintiff’s name or likeness is used to advertise a product or add luster to a corporation), *aff’d* 419 F.2d 989 (6th Cir. 1969); and (3) *Mahaffey v. Official Detective Stories, Inc.*, 210 F. Supp. 251, 253 (W.D. La. 1962) (holding that unless a name is used to promote a product or service, it is not a “commercial” use).

Each of these decisions is consistent with the conclusion reached in *Loft*, that Section 540.08 applies only to the unauthorized use of a person’s name “to directly promote a product or service.” *See also Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 759 (1976) (noting that advertisements are “classic examples of commercial speech”).

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D. The Florida Legislature Has Accepted The *Loft* Construction Of Section 540.08 And Any Asserted Redundancies In The Statute Are Either Defensible Or Immaterial

In the two decades since *Loft* and *Valentine* were decided, the Florida

³¹ Plaintiffs argue that the *Loft* Court was required to construe Section 540.08 in accordance with New York law, but they are mistaken for a number of reasons. First and foremost, there is no evidence that Section 540.08 is based on New York law. There is no legislative history to support Plaintiffs’ assertion, and no Florida federal court or state court has ever even suggested that Section 540.08 is based on New York law. Second, Section 540.08 is not the same as New York’s statute (N.Y. Civil Rights Law §§ 50-51). The New York statute contains an exemption for professional photographers not found in Section 540.08, and is both a civil and criminal statute, while Section 540.08 is only civil. Section 540.08 contains a “newsworthy” exemption that the New York statute does not. In addition, Section 540.08 permits a claim to be brought on behalf of a decedent and establishes a 40-year statute of repose, while New York’s statute is non-descendible and does not provide a statute of repose.

Plaintiffs also misstate New York case law. Throughout their Brief, Plaintiffs cite to the decision in *Messenger v. Gruner + Jahr USA Publishing*, 994 F. Supp. 525 (S.D.N.Y. 1998), but fail to indicate that the federal district court’s decision *was reversed* by the Second Circuit after it certified a question to the New York Court of Appeals. *See Messenger v. Gruner + Jahr USA Printing & Publ’g*, 208 F.3d 122 (2d Cir. 2000) (reversing district court decision). Plaintiffs’ argument never mentions that the *Messenger* district court decision was reversed. *See, e.g.*, Movants’ Initial Brief at 26 (providing full citation to *Messenger* but failing to include subsequent history indicating that decision was reversed); *id.* at 31 (same); *id.* at 38 n.18 (providing “history” of *Messenger* case but again failing to indicate that case was reversed). In other words, Plaintiffs place great reliance on a New York case that is of no precedential value in New York, let alone Florida.

Legislature never has attempted to alter or amend the statute to overrule those decisions and make Section 540.08 applicable to expressive works. As this Court has declared, “[l]ong-term legislative inaction after a court construes a statute amounts to legislative acceptance or approval of that judicial construction.”

Goldenberg v. Sawczak, 791 So. 2d 1078, 1084 (Fla. 2001). Indeed, the inactivity of the Florida Legislature with respect to Section 540.08 is particularly notable in response to the *Valentine* decision, which certainly would have come to the Legislature’s attention because it concerned both Bob Dylan, one of the world’s most famous songwriters and recording artists, and also the notorious and “highly publicized” murder trial of boxer Rubin “Hurricane” Carter. *See Valentine*, 698 F.2d at 431.

³² Thus, the *Valentine/Loft* construction of the statute – that it applies only when a defendant uses a plaintiff’s name “to directly promote a product or service” – has, in effect, received the approval of the Florida Legislature.

The inaction of the Florida Legislature also strongly suggests that the *Loft* construction of Section 540.08 did not render any portions of the statute redundant, or mere surplusage, as Plaintiffs contend. In Plaintiffs’ view, if the statute prohibits only the use of a person’s name or likeness to directly promote a product or service, then the statute’s “newsworthy” and “resale” exemptions are

³² Indeed, the *Valentine* decision was covered by the media and reported on in both of the national wire services, the Associated Press and United Press International. *See, e.g.*, “Sues and Loses Over ‘Hurricane’ Lyrics,” The Associated Press, February 15, 1983; “People in the News,” The Associated Press, February 15, 1983 (available on LEXIS).

redundant and violate the canon of statutory construction that disfavors redundancy. *See* Movants’ Initial Brief at 27-30. Plaintiffs are mistaken.

1. Plaintiffs’ Interpretation Of The “Newsworthy” Exemption Is Incorrect

At first glance, the “newsworthy” exception contained in Section 540.08(3)(a) might appear redundant because it seemingly excludes from liability those uses of a name or likeness that would *not* constitute the direct promotion of a product or service. But this first glance is not properly focused on the meaning of subsection (3)(a). For example, in *Ewing v. A-1 Management, Inc.*, 481 So. 2d 99 (Fla. 3d DCA 1986), the court properly concluded that the defendant’s use of the plaintiffs’ names fell within the scope of Section 540.08(1), but that the use was exempted from liability under Section 540.08(3)(a). Thus, the newsworthy exemption served an entirely practical, non-redundant function in the *Ewing* case, and demonstrates that subsection (a)(3) would not be mere surplusage under the *Loft* construction of the statute.

³³ In *Ewing*, the plaintiffs were the parents of a fugitive from justice, and had provided collateral to the defendant surety company so that defendant would post a \$250,000 bond in favor of their son. *Ewing*, 481 So. 2d at 99. When the son skipped bail, the defendant published a wanted poster identifying the son and also including the names and address of the parents. The parents sued for unauthorized use of their names under Section 540.08. *Id.* The *Ewing* Court recognized that the defendants’ use of the parents’ names on its wanted poster fell within the initial scope of Section 540.08. (This is consistent with *Loft* because the defendant clearly used the parents’ names on the wanted poster to *promote* the capture and return of their son, an activity in which the defendant had a substantial pecuniary interest.) But, the court rejected the Section 540.08 claim under subsection (3)(a) because the use of the parents’ names also served a “legitimate [public] interest” in

(continued...)

Moreover, upon review of similar statutes in other states, it is clear that subsection (3)(a) – to the extent that it may be redundant – reflects the Legislature’s intent that matters of legitimate public interest unequivocally fall outside the scope of Section 540.08. Commercial misappropriation statutes in other states often have a clearer scope than Section 540.08, expressly limited to advertising or promotional uses of a name. Despite these clear limits, many of the statutes nevertheless contain an express exemption for the use of a name in connection with news reporting. These exceptions are not literally necessary (*i.e.*, they are redundant), because the statutes do not apply to news reporting in the first instance. But, as with Section 540.08, they appear to have been drafted to make doubly certain that protected First Amendment speech never falls within the scope of the statute.

³⁴ It would not be unusual for the Legislature to take this approach.³⁵

(...continued)

securing the arrest of a criminal fugitive. *Id.*

³⁴ For example, Illinois’s statute prevents the use of a person’s name or likeness in connection with offering goods for sale or for purposes of advertising. 765 Ill. Comp. Stat. §§ 1075/30(a), 1075/5. Thus, in Illinois, use of an individual’s name in connection with a news report does not fall within the scope of the statute. Nevertheless, the Illinois statute contains a “redundant” exception under which the use of a name or likeness in “any news public affairs, or sports broadcast or account, or any political campaign” is exempt from the statute. *Id.* at § 1075/35(b)(2). *See also* Nev. Rev. Stat. §§ 597.770(1), 597.790(2), 597.790(2)(c) (containing a similar “redundant” newsworthy exemption); Tenn. Code Ann. §§ 47-25-1105(a), 47-25-1107(a) (same); Wash. Rev. Code. §§ 63.60.050, 63.60.070(1) (same).

³⁵ *See, e.g., Fort Stewart Schs. v. FLRA*, 495 U.S. 641, 646 (1990) (“It might reasonably be argued, of course, that these two exceptions are indeed technically unnecessary, and were inserted out of an abundance of caution – a drafting imprecision venerable enough to have left its mark on legal Latin (*ex abundanti cautela*)”); *see also Gutierrez v. Ada*, 528 U.S. 250, 258 (2000) (“But as one rule
(continued...)”)

In addition, while Plaintiffs insist on a literal, close reading of the so-called newsworthy exception, a truly literal reading of the exception renders its meaning absurd. By its express terms, Section 540.08 prohibits the unauthorized use of a “name, *portrait*, *photograph*, or other likeness.” Fla. Stat. § 540.08(1) (2000) (emphasis added). But the newsworthy exemption, by contrast, applies only to the use of a “name or likeness” in a news report. Fla. Stat. § 540.08(3)(a) (2000). Thus, literally speaking, subsection (3)(a) exempts from liability the newsworthy use of “names” and “likenesses,” but does not exempt from liability the newsworthy use of “portraits” or “photographs.” But such a literal reading of the statute is patently absurd and must be rejected. *State v. Atkinson*, 831 So. 2d 172, 174 (Fla. 2002).

2. Plaintiffs Misinterpret The “Re-Sale” Exemption

Similarly, Subsection (3)(b) – the “resale” exemption – is not redundant.

The exemption states that Section 540.08 does not apply to:

The use of such name, portrait, photograph, or other likeness in connection with the resale or other distribution of literary, musical, or artistic productions or other articles of merchandise or property where such person has consented to the use of her or his name, portrait, photograph, or likeness on or in connection with the initial sale or distribution thereof.

Fla. Stat. § 540.08(3)(b) (2000). This exemption does not merely allow a defendant to resell a book or CD that is already outside the scope of Section 540.08, as

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of construction among many, albeit an important one, the rule against redundancy does not necessarily have the strength to turn a tide of good cause to come out the other way”).

Plaintiffs suggest. *See* Movants’ Initial Brief at 30. Rather, the exemption allows retailers and other distributors of musical, literary, and artistic works to promote and advertise their products and establishments by using the names, photographs, or likenesses of the artists or celebrities whose works they are selling; it does not merely authorize the resale of exempted works themselves. Many states’ commercial misappropriation statute contain similar exemptions. *See* J. Thomas McCarthy, *The Rights of Publicity & Privacy* § 7:10 (2d ed. 2000).

The so-called newsworthy and resale exemptions are not redundant because they exempt from liability uses of a person’s name or likeness that could otherwise be prohibited by the statute. Indeed, if the *Loft Court*’s reading of Section 540.08 had rendered the newsworthy exemption redundant, the Florida Legislature certainly could have rectified the problem by amending the statute. As noted above, however, the Legislature’s inaction indicates legislative acquiescence in the *Loft* and *Valentine* decisions.

E. Plaintiffs’ Construction Of The Statute Is Nonsensical And Would Prohibit Or Seriously Endanger Established Forms Of Protected Expression

Plaintiffs assert that Warner Bros.’s “unauthorized use of Plaintiffs’ names and likenesses in a knowingly false manner to increase sales of the [film] falls directly within the scope of Section 540.08, Fla. Stat., and outside of the statute’s newsworthiness exemption.” Movants’ Initial Brief at 48 (internal quotation omitted). The fallacy of this argument is Plaintiffs’ simultaneous assertion that “knowing falsity” causes the statute to *apply* to expressive works in the first

instance and, at the same, that “knowing falsity” renders the public interest exemption *inapplicable*. Thus, only those expressive works that are *not* covered by the statute in the first place (because they are avowedly factual or fictional) can invoke the public interest exemption – an exemption which, of course, they do not need. This construction of the statute finds no support in the language of Section 540.08 and is absurd.

Moreover, Plaintiffs’ construction of the statute would seriously endanger many well-established and clearly protected forms of expression. For example, the unauthorized use of a real person’s name or likeness in television programs, historical fiction, textbooks, plays, poems, songs, fine artworks, and movies, among other things, would all presumptively be prohibited by Section 540.08 so long as they contain any element of fiction or falsity whatsoever.

A few examples of expressive forms that would violate the statute under Plaintiffs’ broad reading illustrate the infirmity of their argument.

- Movies Based On Historical Events Or Books. There are innumerable movies dramatizing historical people and events,

³⁶ and movies based on books about historical people and events.³⁷ Any attempt to

³⁶ For example, a short list of films featuring dramatizations of historical people and events would include, among many others: *Apollo 13* (1995), *Dog Day Afternoon* (1975), *Good Morning, Vietnam* (1987), *Nixon* (1995), *Reversal of Fortune* (1990), *Silkwood* (1983). Under Plaintiffs’ reading of the statute, these films would be prohibited unless their makers could demonstrate that they are not in any respects fictional or dramatized, or that every specific incident of fictionalization has been fully disclosed, which would be nearly impossible.

³⁷ For example, a short list of films featuring dramatizations of historical people and events based on books about those people and events, would include: *A Civil*
(continued...)

apply Section 540.08 to these expressive works not only would be unconstitutional, but would deprive audiences of serious works of art that convey ideas, information, and opinions, as well as entertainment.

- Sketch Comedy. Television programs such as *Saturday Night Live* frequently feature comedy skits in which actors portray real people and use real people's names, but which involve fictional events. According to Plaintiffs, the use of such names falls within the scope of Section 540.08(1) and cannot be exempted under Section 540.08(3)(a) because of the presence of fictional information. Thus, if Plaintiffs' reading of the statute is correct, these comedy skits violate Section 540.08. Moreover, since Section 540.08 does not contain a comedy, satire, or parody exception, such works would violate the statute.

- Unauthorized Biography. By definition, the subject of an authorized biography does not consent to the biography, and likely objects to it on the grounds that certain information contained in it is false.³⁸ Under Plaintiffs' reading of the statute, if any portion of the biography is false, the statute applies and the author forfeits the public interest exemption. Thus, only authorized biographies would be permitted.

The intent of the Florida Legislature when it enacted Section 540.08 cannot have been to eviscerate all of these genres, but Plaintiffs' proposed reading of the

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Action (1998, based on Jonathan Harr's "A Civil Action"), *Boys Don't Cry* (1999, based on Aphrodite Jones's "All She Wanted"), *Dangerous Minds* (1995, based on Louanne Johnson's "Dangerous Minds"), *Raging Bull* (1980, based on Jake LaMotta's "Raging Bull: My Story"), *The Right Stuff* (1983, based on Tom Wolfe's "The Right Stuff"). Again, under Plaintiffs' reading of the statute, these films would be prohibited unless their makers could demonstrate that they were not in any respect fictional or dramatized, or that every specific incident of fictionalization had been fully disclosed.

³⁸ It should go without saying that if the subject of an unauthorized biography believes the biography is false, his remedy is a claim for **defamation** or **false light**, not commercial misappropriation. Indeed, Plaintiffs brought a false light claim in this case, but the federal district court granted summary judgment against Plaintiffs on this claim, which the Eleventh Circuit affirmed.

statute, taken to its logical conclusion, would dictate this absurd result.

Fortunately, however, as overwhelming precedent, the First Amendment, and rules of statutory construction establish, Section 540.08 simply does not apply to the Picture, whether because the Picture does not fall within the scope of Section 540.08(1) (*i.e.*, the Picture does not use Plaintiffs’ names “for purposes of trade or for any commercial or advertising purpose”), or because the Picture is protected as a “presentation having a current and legitimate public interest.” The federal district court in this case properly relied on both of these bases to deny Plaintiffs’ claims, and that decision should be affirmed.

CONCLUSION

WHEREFORE, Respondents respectfully request that the Court answer the certified question from the Eleventh Circuit Court of Appeals so as to affirm that Section 540.08 does not apply to expressive works such as *The Perfect Storm* and therefore that the federal district court properly granted summary judgment to Warner Bros. on Plaintiffs' Section 540.08 claims.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Answer Brief, typed in 14 point
(proportionately spaced) Times New Roman, complies with the requirements of
Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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