IN THE SUPREME COURT OF FLORIDA
Case No. 06-2174
Lower Court Case No. 1D05-2179

JOE ANDERSON, JR.,
Petitioner,

vs.

GANNETT CO., INC., MULTIMEDIA HOLDINGS CORP., d/b/a the PENSACOLA NEWS JOURNAL, and MULTIMEDIA, INC.
Respondents.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

BRIEF OF AMICUS CURIAE FIRST AMENDMENT FOUNDATION IN SUPPORT OF RESPONDENTS GANNETT CO., INC. ET AL.

JON MILLS
Florida Bar No. 148286
TIMOTHY McLENDON
Florida Bar No. 0038067
Post Office Box 2099
Gainesville, Florida 32602
Telephone: (352) 378-4154
Facsimile: (352) 336-0270

JONATHAN D. KANEY JR.
Florida Bar No. 0115251
JONATHAN D. KANEY III
Florida Bar No. 0023426
COBB & COLE
P.O. Box 2491
Daytona Beach, Florida 32115
Telephone: (386) 255-8171
Facsimile: (386) 238-7003

Attorneys for Amicus Curiae, First Amendment Foundation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Florida Constitution:

Florida Statutes:

Other Authorities:

STATEMENT OF AMICUS CURIAE IDENTITY AND INTEREST

The FIRST AMENDMENT FOUNDATION ("FAF') is a Florida corporation not-for-profit qualified under Section 501(c)(3) of the Internal Revenue Code of 1986. It was founded in 1984 for the purpose of ensuring that public commitment and progress in the areas of free speech, free press, and open government do not become checked and diluted during Florida's changing times.

FAF's members are organizations and individuals committed to education and informing the public about First Amendment rights and responsibilities and access to public information. This includes more than 200 members, including most of Florida's daily newspapers and other media organizations as well as First Amendment and media law attorneys, students, private citizens and public interest organizations.

FAF is interested in this case because the trial court's rulings on the false light tort, if affirmed, would eviscerate the legal protections, including First Amendment protections, built into defamation law over the past forty (40) years.

SUMMARY OF ARGUMENT

This Court should hold that Anderson's claim is barred by a two-year statute of limitations for two reasons. First, Anderson filed a libel claim, then abandoned that claim to pursue a false light claim. Second, under Florida's single action rule, Anderson's false light claim was barred by the two-year statute of limitations for libel because it was predicated on precisely the same statements as his libel claim.

Notwithstanding Anderson's form over substance argument to the contrary, Anderson is not permitted to make an end-run around defamation defenses simply by re-casting his libel claim as that of a false light claim. The First District's decision should be affirmed.

STANDARD OF REVIEW

Florida courts review issues of law under the standard of *de novo* review. *State v. City of Clearwater*, 863 So.2d 149, 151 (Fla. 2003). That standard applies because this case presents only issues of law.

ARGUMENT

The First District Court of Appeal has certified the following question to this Court:

> Is an action for invasion of privacy based on a false light theory governed by the two-year statute of limitation that applies to defamation claims or by the four-year statute that applies to unspecified tort claims?

Gannett Co., Inc. v. Anderson, Slip Op. at 24.[1]

As the following argument will demonstrate, this case is simply a libel case filed after the statute of limitations. Anderson is attempting to circumvent the statute of limitations and the values of the First Amendment. The libel statute of limitations is set at two years to foster and protect free expression of ideas. To

[1] This Court has discretionary jurisdiction to hear cases certified by district courts of appeal as being in conflict with other districts, or as being of great public importance. Art. V, Sec. 3(b)(4), Fla. Const. A question having been certified by the district court, this Court has discretion to decide that question, or to re-frame the legal question before it in a manner better suited for its review. *See, e.g., Waite*

allow an artificial and contrived extension of the statute through sleight of hand is in conflict with First Amendment principles.

Further, there is no conflict among the District Courts of Appeal on the issue of the statute of limitations for libel. Both Anderson and *Heekin v. CBS Broadcasting, Inc.*, 789 So.2d 355 (Fla. 2d DCA 2001), agree that the statute of limitations for libel is two years. That is the dispositive issue in this case.

I. ANDERSON'S CLAIM IS BARRED BY THE TWO-YEAR STATUTE OF LIMITATIONS FOR LIBEL BECAUSE HE FILED A LIBEL CASE AFTER THE STATUTE OF LIMITATIONS HAD RUN AND THEN SOUGHT TO CHANGE THE ACTION TO A FALSE LIGHT CLAIM.

As the First District noted, Petitioner initially brought a claim against Respondents in the form of a libel action. Slip Op. at 16-17. Only when Petitioner realized that his libel action was barred by the two-year statute of limitations imposed under Section 95.11(4)(g), Florida Statutes, did he amend his complaint to provide that the same set of factual circumstances should instead support a claim for false light. *Id.*

---

v. Waite, 618 So.2d 1360 (Fla. 1993).

A. Libel is the intentional conveyance of a damaging falsehood through false textual statements or by implication.

To overcome the early misstep, Anderson must show that his claims could not have been brought as an action for libel.[2] Anderson endeavors to avoid the consequences of this initial mistake by misinterpreting the definitions of "libel" and "defamation" in *Black's Law Dictionary*. *See* Br. of Petitioner, at 9. According to Anderson, because the statements printed by Respondent were not actually false, they cannot possibly fit the definition of libel. *Id*. Actually, defamation in general, and libel in particular, may involve false statements, but also may involve true statements that convey a damaging falsity. The Civil Florida Standard Jury Instructions, quoted by Anderson, make clear that the falsehood required for libel is the information that is "conveyed" to the reader: "A statement is in some significant respect false *if its substance or gist conveys a materially different meaning than the truth would have conveyed*." Fla. Civil Standard Jury Instructions, 4.3(b) (emphasis added). In other words, the falsehood required for a libel claim lies in the information conveyed and understood by the reader.

Libel usually involves textually untruthful statements. However, Florida

courts have recognized "libel by implication," where an otherwise truthful account may, by implication, have a defamatory effect. *See, e.g., Brown v. Tallahassee Democrat, Inc.*, 440 So.2d 588, 589 (Fla. 1st DCA 1983); *Boyles v. Mid-FloridaTelevision Corp.*, 431 So.2d 627, 634-35 (Fla. 5th DCA 1983); *Piver v. Hoberman*, 220 So.2d 408 (Fla. 3d DCA 1969); *Piplack v. Mueller*, 121 So. 459 (Fla. 1929); *see also* Thomas B. Kelley & Steven D. Zansberg, *Libel by Implication*, COMMUNICATIONS LAWYER (Spring 2002), at 3. Black's Law Dictionary recognizes this possibility as "libel *per quod*" and "defamation *per quod*." BLACK'S LAW DICTIONARY (6th ed., 1990).

In fact, at trial, Anderson argued vigorously that the *Pensacola News Journal* intentionally conveyed the meaning that Anderson wrongfully killed his wife.[3] Clearly, falsely accusing a person of murdering his wife is defamation. *See* Slip Op. at 22. Anderson has made the internally inconsistent argument that the

---

[2] *See infra* Part I.B of the Argument (discussing the single action rule).

[3] Amicus First Amendment Foundation argued in the District Court that Anderson did not prove either the falsity of any alleged impression or that the newspaper intentionally published a falsehood. Further the publication was also speech protected under the First Amendment. Those arguments are still valid, but the focus here is Anderson's breach of the statute of limitations. Other Amici, including several Florida news organizations, have been granted leave to file a brief that will address other issues this case presents. Rather than repeat those arguments here, the First Amendment Foundation refers the Court to the brief of the Florida news organizations and adopts their arguments by reference.

newspaper's statements were *intentionally* false, yet, for purposes of libel, are *true* statements and therefore cannot be libel. Anderson has tried to express the illogical argument in number of different ways. He is alleging conveyance of a false impression to support false light liability while at the same moment arguing that *the very same statement* is not false, and therefore not libel. Neither law nor logic supports this rhetorical sleight of hand.

Through this erroneous characterization of the falsehood inherent in libel, Anderson attempts to distinguish libel by implication and the cases dealing with it. He does this by essentially erasing libel by implication from the law and requiring only textually untruthful statements for libel. *See* Br. of Petitioner, at 13-15. This interpretation ignores established legal principles. As has long been recognized, factually accurate statements may be juxtaposed or additional information may be omitted in such as way as falsely to convey a defamatory meaning. *See, e.g.*, PROSSER & KEETON ON THE LAW OF TORTS § 116.

Notwithstanding Anderson's attempt to distinguish *Boyles*, that case involves libel by implication because of defendant's publication of factually accurate statements (about allegations and investigations of abuse and reprimands) in such a way as to convey materially false and intensely damaging implications - that the

plaintiff had abused group home patients. 431 So.2d at 634-35. It was the context, juxtaposition of facts and omission of other material facts that made these statements libelous.

To evaluate the content of a communication, "the words should be given a reasonable construction in view of the thought intended to be conveyed," and construed as the " 'common mind' would naturally have understood them." *Wolfson v. Kirk*, 273 So.2d 774, 778 (Fla. 4th DCA 1973).

Thus, the mere fact that Respondents' statements may have been textually factual is not in itself a bar to a defamation claim under the theory of libel by implication - the libelous implication of statements about the death of Anderson's wife allegedly being that he had in fact murdered her. Anderson cannot argue libelous conduct and then claim that there is no claim for libel simply to allow him to file a false light claim after the expiration of the statute of limitations for libel.

B. Florida's single action rule bars a plaintiff from re-characterizing a defamation claim simply to avoid a valid statute of limitations defense.

The First District accurately noted that Petitioner's attempt to re-characterize his claim from libel to false light was done solely to evade the two-year statute of limitations imposed on defamation claims. Slip Op. at 16-17. As the Second

District correctly stated in *Heekin v. CBS Broadcasting, Inc.*, 789 So.2d 355, 358 (Fla. 2d DCA 2001), "[a] plaintiff may not avoid the two-year statute of limitations for defamation actions by simply renaming the defamation action as one for false light invasion of privacy." Writing to concur in the result of the First District's decision, Judge Lewis correctly noted that Florida's single action rule prevents plaintiffs from bringing multiple actions based on a single defamatory publication in order to avoid valid defenses. Slip Op. at 29 (Lewis, J., concurring) (citing *Callaway Land & Cattle Co., Inc. v. Banyon Lakes C. Corp.*, 831 So.2d 204, 208 (Fla. 4th DCA 2002)).

Simply stated, the single publication/single action rule is the following: if a non-defamation tort claim is based upon the same publication which formed, or could have formed, the basis of a defamation claim, then the non-defamation tort claim is precluded or, at the very least, defamation defenses apply. The purpose for this rule is not only to prevent double recovery for the same wrong, but also to prevent a plaintiff from circumventing the free speech and free press protections built into defamation law simply by disguising a defamation claim under the name of another tort. As the following discussion shows, the rule has been thoroughly fleshed out in case law.

In *Orlando Sports Stadium, Inc. v. Sentinel Star Co.*, 316 So.2d 607 (Fla. 4th DCA 1975), the Fourth District Court of Appeal affirmed the dismissal with prejudice of an intentional interference with business claim because it was based upon the same publication as the plaintiff's failed libel claim in the next count. In so holding, the court said:

> The numerous news articles attached to the instant amended complaint are the same publications upon which appellants base their claim for intentional interference in count one and for libel in count two. The thrust of appellants' complaint in both counts is that said news articles were injurious to appellants' reputation. The appellants contend that counts one and two are separate causes of action. This court cannot agree with such contention, as such actions are nothing more than separate elements of damage flowing from the alleged wrongful publications. `Florida courts have held that a single wrongful act gives rise to a single cause of action, and that the various injuries resulting from it are merely items of damage arising from the same wrong', Easton v. Wier, Fla.App., 167 So.2d 245.

Id. at 609.

The Fifth District recognizes the rule. In *Boyles v. Mid-Florida Television Corp.*, 431 So.2d 627 (Fla. 5th DCA 1983), the court reversed the trial court's dismissal of plaintiff's defamation claim, but applied the single publication/single action rule to bar a claim for intentional infliction of emotional distress that was

based upon the same broadcast as the plaintiff's defamation claim. In affirming the circuit court's order dismissing the intentional infliction of emotional distress claim, the court held that "the allegations of this count describe the tort of libel while characterizing it as `outrageous conduct'". *Id.* at 636.

Although neither *Orlando Sports* (intentional interference) nor *Boyles* (intentional infliction of emotional distress) involved a false light claim, the nature of the tort claim pled in addition to the defamation claim is immaterial for purposes of the single publication/single action rule. In *Byrd v. Hustler Magazine,* 433 So.2d 593 (Fla. 4th DCA 1983), the plaintiff, a model who posed for a cigarette advertisement, sued Hustler Magazine for libel and false light invasion of privacy after it ran a touched up copy of the advertisement that made it look like Mr. Byrd (the plaintiff) was flipping the proverbial bird. After a verdict in favor of the plaintiff, the defendant appealed. With respect to the libel claim, the court held that when the photograph was viewed along with its caption, the common mind would not conclude that Mr. Byrd had posed for the picture as depicted. The court held, therefore, that Byrd had not satisfied the "falsity" element of his libel claim.

Having disposed of the libel claim, the *Byrd* court then turned to the false light claim. With respect to false light, the court applied the single action rule when

it said simply that "because the invasion of privacy claim was based on the same factual allegations and legal argument, it too must be rejected." *Byrd*, 433 So.2d at 595. Thus, it is settled that the single publication/single action rule applies to false light cases as well. *See also Ovadia, M.D. v. Bloom*, 756 So.2d 137 (Fla. 3rd DCA 2000) (false light claim barred by single publication/single action rule); *Town of Sewall's Point v. Rhodes*, 852 So.2d 949 (Fla. 4th DCA 2003) (same).

In an analogous situation, this Court applied the single publication/single action rule in *Fridovich v. Fridovich*, 598 So.2d 65 (Fla. 1992) to bar an emotional distress claim based upon the same statements as a defamation claim. In applying the single publication/single action rule, this Court held:

> It is clear that a plaintiff is not permitted to make an end-run around a successfully invoked defamation privilege by simply renaming the cause of action and repleading the same facts. Obviously, if the sole basis of a complaint for emotional distress is a privileged defamatory statement, then no separate cause of action exists. (Citation omitted). In short, *regardless of privilege*, a plaintiff cannot transform a defamation action into a claim for intentional infliction of emotional distress simply by characterizing the alleged defamatory statements as "outrageous". (Emphasis in original).

Id. at 69-70.

So also, in the instant case, Anderson is not free to circumvent Respondent's

valid statute of limitations defense by re-characterizing his action as a false light claim.

More recently, the Third District applied the single publication/single action rule to a false light claim in *Ovadia v. Bloom*, 756 So.2d 137 (Fla. 3d DCA 2000). Dr. Ovadia, one of the subjects of a "dangerous doctors" investigative piece by the late David Bloom, sued Bloom for defamation, false light invasion of privacy, conspiracy to commit false light invasion of privacy, intentional interference with an advantageous business relationship and conspiracy to interfere with an advantageous business relationship. The court entered summary judgment on the defamation count because the two-year statute of limitations on defamation suits had run. The court then applied the single publication/single action rule and entered summary judgment on the remaining tort counts, including false light, since they arose from the same publication as the defamation count. *Id*. at 140. In *Callaway*, the plaintiff brought claims for disparagement of title (i.e., defamation claim for a company), tortious interference and abuse of process, all based upon the same statements made by the defendant. The trial court dismissed the disparagement of title claim as being time barred by the two-year statute of limitations applicable to defamation actions and it dismissed the tortious

interference and abuse of process claims because they were based upon the same facts as the defamation claim.

The rationale for applying the rule to false light actions based on defamation is important to fundamental First Amendment principles that support the shorter statute of limitations for libel. Defamation cases are attended with numerous requirements "designed to ensure [protection of the] freedom of expression." Slip Op. at 9. A failure to recognize the two-year statute of limitations would undermine those protections and "render the shorter statute of limitations meaningless." Slip Op. at 19. Further, as the First District correctly noted, other jurisdictions have consistently applied the shorter statute of limitations when a false light action is based on a defamatory statement. Slip Op. at 18-22 (cases cited). A failure to do so allows the retrying of the same action to avoid the statute of limitations by merely rephrasing a cause of action.

II. EVEN FOR SELF-STANDING FALSE LIGHT CLAIMS, THE STATUTE OF LIMITATIONS SHOULD BE TWO YEARS IN CASES LIKE THIS ONE WHERE THE FALSE LIGHT CLAIM IS NOT DISTINGUISHABLE FROM AN ACTION FOR LIBEL.

As the majority found in the District Court below: "(i)n the original complaint, the plaintiff quoted the text of the December 14, 1998, article and alleged that the

article was 'false and defamatory.' In the amended complaint he quoted the text of the same article but alleged that the article was 'worded in such a way as to portray [the plaintiff] in a false light.' Surely the protections afforded by the statue of limitations cannot be undone by engaging in a semantic exercise such as this." Slip Op. at 17. This argument is distinct from that made in Part I, *supra*, that is based on actually filing a libel action and re-filing an identical action under false light. The majority opinion in the District Court concluded that, even if no previous action had been filed in libel, if the facts could support an action in libel, then a false light claim should be limited to the two-year libel restriction.[4] This conclusion is supported by logic and numerous decisions from other jurisdictions. *See* Slip Op. at 18-22 (cases cited).

III. THE *ANDERSON* CASE IS NOT IN DIRECT CONFLICT IN ANY SIGNIFICANT OR DIRECT WAY WITH THE LIMITATIONS RULE STATED IN *HEEKIN*.

The majority opinion of the District Court certified that the *Anderson* decision conflicts with *Heekin v. CBS Broadcasting, Inc.* Slip Op. at 15.

---

[4] The majority supports this conclusion by citing to numerous decisions from other jurisdictions, as well as to the RESTATEMENT (SECOND) OF TORTS § 652E, Comment e, at 399 (suggesting that it would be proper to apply the statute of limitations for defamation in false light cases based upon defamatory factual

However, a review of both opinions shows that there is no true holding conflict between the two cases. The *Heekin* majority opinion stated, "[w]hen a plaintiff has a cause of action for libel or slander and alleges a claim for false light invasion of privacy based on the publication of the same false facts, the false light invasion of privacy is barred by the two-year statute of limitations." 789 So.2d at 358. Thus, although *Heekin* went on to misapply that rule and to misstate the law in other respects not addressed herein, both districts seemed to agree that, in cases where the facts would support claims for both defamation and false light, the two-year statute of limitations should apply.

The reasoning of the First District in the instant case provides a sound basis for extending and refining the exception created by the Second District in *Heekin*: where a plaintiff alleges facts that would support defamation and false light, the two-year statute of limitations for defamation governs all claims.[2]

---

allegations).

[2] If, however, this Court decides that a four-year statute of limitations is the appropriate default standard, the District Court opinion below provides substantive reasons, supported by numerous commentators and the courts of sister states, for rejecting the tort of false light as dangerous to free speech and duplicative of defamation. See Slip Op. at 8-11 (noting that courts in Colorado, Massachusetts, Minnesota, North Carolina, Ohio, South Carolina, Texas, Virginia, and Wisconsin have ultimately rejected false light as a legitimate cause of action). The elements of false light are nearly identical to defamation: the conveying of a harmful falsity. A separate tort essentially exposes a party to a second cause of action for precisely

the same circumstances. Indeed, that is what Anderson seeks to do in this case.

In the event this Court decides to address false light, a better approach would be to recognize that, while Florida courts have mentioned false light, only a single court, the Second District in *Heekin*, has actually embraced it. Another case, *Rapp v. Jews for Jesus, Inc.*, recently certified by the Fourth District, presents a certified question as to the existence of false light. However, the instant case effectively demonstrates the potential for injustice and mischief that lies in a duplicative false light cause of action. This Court could clarify the issue by finding that false light is not recognized as a valid cause of action in this state.

CONCLUSION

Because Anderson initially filed his action as a claim for libel, the District Court correctly found that the two-year statute of limitations for libel governs his action for false light based on the same factual allegations.

Respectfully submitted,

/s/ Jonathan D. Kaney, III

JON MILLS
Florida Bar No. 148286
TIMOTHY McLENDON
Florida Bar No. 0038067
Post Office Box 2099
Gainesville, Florida 32602
Telephone: (352) 378-4154
Facsimile: (352) 336-0270

JONATHAN D. KANEY JR.
Florida Bar No. 0115251
JONATHAN D. KANEY III
Florida Bar No. 0023426
COBB & COLE
P.O. Box 2491
Daytona Beach, Florida 32115
Telephone: (386) 255-8171
Facsimile: (386) 238-7003

Attorneys for Amicus Curiae, First Amendment Foundation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 2nd day of February, 2007 to BEVERLY A. POHL, Esquire, Broad & Cassel, 100 S.E. Third Avenue, Suite 2700, Fort Lauderdale, Florida 33394; WILLIE E. GARY, Esquire, PHYLLIS GILLESPIE, Esquire, and C.K. HOFFLER, Esquire, Gary, Williams, Parenti, Finney, Lewis, McManus, Watson & Sperando, 221 East Osceola Street, Stuart, Florida 34994; BRUCE S. ROGOW, Esquire, Bruce S. Rogow, P.A., Broward Financial Centre, Suite 1930, 500 East Broward Boulevard, Fort Lauderdale, Florida 33394; DENNIS K. LARRY, Esquire, and DONALD H. PARTINGTON, Esquire, Clark, Partington, Hart, Larry, Bond & Stackhouse, 125 West Romana Street, Suite 800, Pensacola, Florida 32501; ROBERT C. BERNIUS, Esquire, Nixon Peabody, LLP, 401 9th Street, N.W., Suite 900, Washington, D.C. 20004-2128; Robert G. KERRIGAN, Esquire, Kerrigan, Estes, Rankin & McLeon, LLP, 400 East Government Street, Pensacola, Florida 32501; and TALBOT D'ALEMBERTE, Esquire, 1117 Myers Park Drive, Tallahassee, Florida 32306-1470.

/s/ Jonathan D. Kaney, III

_____

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the type style utilized in this brief is 14-point Times New Roman, proportionately spaced, in accordance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

/s/ Jonathan D. Kaney, III

_____

JON MILLS
Florida Bar No. 148286
TIMOTHY McLENDON
Florida Bar No. 0038067
Post Office Box 2099
Gainesville, Florida 32602
Telephone: (352) 378-4154
Facsimile: (352) 336-0270

JONATHAN D. KANEY JR.
Florida Bar No. 0115251
JONATHAN D. KANEY III
Florida Bar No. 0023426
COBB & COLE
P.O. Box 2491
Daytona Beach, Florida 32115
Telephone: (386) 255-8171
Facsimile: (386) 238-7003

Attorneys for Amicus Curiae, First Amendment Foundation