IN THE SUPREME COURT OF FLORIDA

CASE NO. 06-2175

JOE ANDERSON, JR.,
Petitioner,
v.
GANNETT COMPANY, INC., MULTIMEDIA HOLDINGS CORP., d/b/a the PENSACOLA NEWS JOURNAL, and MULTIMEDIA, INC.,
Respondents.

ON CERTIFIED QUESTION FROM THE DISTRICT COURT OF APPEAL FOR THE FIRST DISTRICT OF FLORIDA (Case No. 1D05-2179)

AMENDED BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF THE AMICI CURIAE

Amici curiae submitting this brief (the "Amici") are publishers, a publishing trade association, news organizations, and news broadcasters.[1] Amici have an interest in this proceeding because it will have a significant impact upon the risks faced by those who disseminate news in Florida. Amici urge the Court to refuse to recognize the false light invasion of privacy cause of action in Florida, or alternatively, to find that the defamation statute of limitations and other defenses, privileges, conditions precedent, jurisdictional limits, and burdens of proof also apply to actions for false light invasion of privacy.

SUMMARY OF ARGUMENT

At its most basic level, this case presents the question of whether the statute of limitations for a false light invasion of privacy claim is four years or two years. Before turning to that question in their Answer Brief, Respondents raise valid questions concerning jurisdiction and the scope of issues before this Court. Amici, however, are in a unique position to address broader issues involved in false light litigation. Amici submit that the seemingly straightforward limitations question actually implicates much more fundamental free speech concerns.

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[1] This brief is amended solely to add Cox Enterprises, Inc., to the list of participating amici curiae. No other changes have been made or are intended. A complete list of Amici is set forth in Appendix A to this Brief.

Statutes of limitation and other rules restraining speech-related torts serve important constitutional interests. As this Court has explained, "preservation of our American democracy depends upon the public's receiving information speedily – particularly upon getting news of pending matters while there still is time for public opinion to form and be felt." *Ross v. Gore*, 48 So. 2d 412, 415 (Fla. 1950). Consequently, "it is vital that no unreasonable restraints be placed upon the working news reporter or the editorial writer." *Id.* In this case, Petitioner's broad interpretation of the nebulous false light tort would impose unreasonable restraints on speech. If Petitioner's view prevails, "the press could become so inhibited that its great and necessary function of policing our society through reporting its events and by analytical criticism would be seriously impaired." *Id.*

To illustrate the troublesome impact of Petitioner's view of the false light tort, suppose that a person mentioned in a newspaper article sends the newspaper a notice claiming the statements in the article are false and defamatory, as Section 770.01 of the Florida Statutes requires prior to initiating a defamation lawsuit. Suppose the notice also claims the statements cast the person in a false light. If the newspaper prints a retraction, would it cut off liability for punitive damages in a libel action but not in a false light action? Could the person later sue for false light relating to *different* statements in the same article? Or does he have to identify the statements giving rise to the false light before he initiates a false light lawsuit?

Amici submit that the plaintiff does have to give notice and identify the statements, but if Petitioner's position prevails, it would cast serious doubt on this conclusion.

Similarly, suppose that a witness in a criminal trial gives testimony that the defendant claims creates a false and negative impression of him. Does the fair report privilege protect a broadcaster who reports those statements? Under libel law, the answer is clearly yes. But what if the criminal defendant asserts a false light claim? Can he overcome the privilege by arguing that the broadcast was a true and accurate reflection of what transpired in the courtroom but that the true information nevertheless cast him in a false light?

These questions are not merely theoretical. These are some of many real world problems Florida news organizations face daily because of disarray in the lower courts' treatment of false light. News organizations routinely must make quick decisions about the content of news that they provide the public. Those decisions are informed by twin goals of informing the public and complying with the law. But the ambiguities and uncertainties inherent in the false light tort impede free speech and the ability of Amici to inform the public in a timely manner. The negligible differences between false light and defamation claims do not outweigh the potential for false light to impede the publication of factually accurate speech. This case presents an opportunity for the Court to reign in a confusing and unwieldy tort that directly affects free speech and free press rights in

Florida, and Amici urge the Court to do so by joining the ten other states that reject the false light tort.

ARGUMENT

I. THE FALSE LIGHT TORT THREATENS TO OVERWHELM LONG-STANDING DEFAMATION LAW.

Nearly fifty years ago, when Professor William L. Prosser identified four distinct branches of the tort of invasion of privacy, "false light" was among those he listed. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960). Prior to Prosser's article, not a single reported decision identified "false light" as a protected privacy interest.[2] But in the years that followed, the false light tort was defined to provide redress for publicity placing a person in a false light that is highly offensive to a reasonable person when the matter was publicized with knowledge of or reckless disregard for the false light in which the person would be placed. *See* RESTATEMENT (2D) TORTS § 652E; *Lane v. MRA Holdings, LLC*, 242 F. Supp. 2d 1205 (M.D. Fla. 2002) (quoting *Harris v. District Bd. of Trs. of Polk Cmty. Coll.*, 9 F. Supp. 2d 1319, 1329 (M.D. Fla. 1998)).

[2] It is important to recognize that false light is not an outgrowth of the common law but that Prosser himself created it by borrowing from defamation, misappropriation, and private facts law. *See, e.g.*, J. Clark Kelso, *False Light Privacy: A Requiem*, 32 SANTA CLARA L. REV. 783, 788-814 (1992) ("The first appearance of false light privacy and its first independent recognition took place in the pages of Prosser's own article, not in the cases themselves."); *see also* J. Thomas McCarthy, THE RIGHTS OF PUBLICITY & PRIVACY, § 1:22 (2006) (acknowledging that Prosser relied on libel cases when he defined false light).

Because *falsity* (whether direct or implied) is the essence of the false light tort, courts and commentators have struggled to distinguish false light from defamation. In fact, Prosser himself acknowledged tension between the two torts:

> The question may well be raised, and apparently still is unanswered, whether [false light] is not capable of swallowing up and engulfing the whole law of public defamation; and whether there is any false libel printed, for example, in a newspaper, which cannot be redressed upon the alternative ground. If that turns out to be the case, it may well be asked, what of the numerous restrictions and limitations which have hedged defamation about for many years, in the interest of freedom of the press and the discouragement of trivial and extortionate claims? Are they of so little consequence that they may be circumvented in so casual and cavalier a fashion?

Prosser, *supra*, at 401.

Prosser did not answer these rhetorical questions, but they are as pertinent today as they were nearly fifty years ago. Because false light claims are nearly indistinguishable from defamation claims in almost every instance, and because a plaintiff's decision to apply the false light label rather than the defamation label generally has no real substantive basis, speakers face duplicative claims focused at the same conduct but with inconsistent and sometimes directly contradictory rules.

Courts likewise must wrestle with the inconsistent rules as between false light and defamation. This case, for example, raises the problem that claims labeled as defamation are governed by a two-year statute of limitations, while those labeled false light might be subject to a four-year limitations period. Under

this view of the law, a plaintiff who fails to file a timely defamation claim, as Petitioner did in this case, can simply refile the same claim, call it false light, and receive a two-year extension of the statute of limitations, as the trial court here permitted. If this is the law, then many potential claims Amici believe are statutorily barred may in fact still be viable. This not only creates a significant risk of additional litigation but also is illogical and fundamentally unfair.

A. The Single Action Rule, Properly Applied, Renders False Light Redundant.

For many years, concerns about false light swallowing the whole of Florida defamation law were dealt with by the single action rule. In *Fridovich v. Fridovich*, 598 So. 2d 65 (Fla. 1992), a plaintiff sued for defamation and for intentional infliction of emotional distress based upon the same allegedly defamatory statements. This Court declared that a plaintiff cannot "make an end-run around a successfully invoked defamation privilege by simply renaming the cause of action and repleading the same facts." *Id.* at 69. Moreover, the Court concluded, "*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.'" *Id.* at 70. Thus, the single action rule prohibits a plaintiff from relabeling a defamation claim and thereby avoiding the privileges and defenses applicable in defamation actions.

The single action rule has been applied repeatedly in Florida to prohibit relabeled or mislabeled defamation claims.[3] But unfortunately this well-established rule is not being applied consistently. In *Heekin v. CBS Broadcasting, Inc.*, 789 So. 2d 355 (Fla. 2d DCA 2001), a decision relied upon by the trial court in this case, the single action rule was ignored. The result has put journalists in the untenable position of not knowing what rules apply when they report the news.

B. The *Heekin* Decision Violates The Single Action Rule.

In *Heekin*, the plaintiff (Heekin) sued CBS for false light invasion of privacy based upon a *60 Minutes* television broadcast about the justice system's response to the problem of domestic violence. 789 So. 2d at 357. Heekin admitted that everything about him in the broadcast was true, but he alleged that truthful facts were juxtaposed with other facts in such a way as to give the false impression that he had abused and battered his wife and children. *Id.* In other words, Heekin alleged a defamation claim – *i.e.*, that CBS broadcast a story falsely implying that he abused his wife and children. But he called his claim false light.

In response, the Second District decided that neither truth nor the absence of actual malice could constitute a defense to a false light claim. *Id.* at 359. The

[3] *See, e.g.*, *Callaway Land & Cattle Co., Inc. v. Banyon Lakes Corp.*, 831 So. 2d 204, 208 (Fla. 4th DCA 2002); *Ovadia v. Bloom*, 756 So. 2d 137, 141 (Fla. 3d DCA 2000); *Byrd v. Hustler Magazine, Inc.*, 433 So. 2d 593, 595 (Fla. 4th DCA 1983); *Orlando Sports Stadium, Inc. v. Sentinel Star Co.*, 316 So. 2d 607, 609 (Fla. 4th DCA 1975).

Second District also concluded that because Heekin's claim purported to be based upon the broadcast of truthful, non-defamatory facts, rather than false, defamatory facts, it was not really a defamation claim and therefore the single action rule did not apply. *Id.* at 358.

Heekin is wrong because it fails to recognize that the gist of Heekin's claim was not that the defendant broadcast true, non-defamatory facts, but that the broadcast created a false and defamatory *implication* from those facts. The false implication that Heekin complained about – that he abused his wife and children – was undoubtedly defamatory, even if the underlying truthful facts about Heekin were not, and this was Heekin's real objection.[4] Heekin's claim was really one for defamation by implication and should have been barred by the two-year defamation statute of limitations under the single action rule.

Misapplying the single action rule, the Second District reinstated *Heekin*'s false light claim. Likewise, the trial court in this matter did not recognize that the single action rule should have precluded Petitioner's false light claim. Because the single action rule is so often misunderstood, continuing recognition of the false

[4] A statement that the plaintiff abused his wife and children is defamatory. *See e.g.*, *Woodruff v. Trepel*, 725 A.2d 612, 623 (Md. Ct. Spec. App. 1999) (reversing dismissal of defamation claim based on accusation of child abuse); *Wilson v. Grant*, 687 A.2d 1009, 1013 (N.J. Super. Ct. App. Div. 1996) ("We acknowledge that the words "wife-beating," taken alone, could be defamatory, especially in light of our society's heightened awareness of domestic violence.").

light tort in Florida creates tremendous uncertainty as to how speakers might prevent false light claims, especially in cases, such as this one, where a report contains no factual inaccuracies.

II. THE FALSE LIGHT TORT CREATES SUBSTANTIAL UNCERTAINTY IN THE LAW.

The perverse practical effect of false light law as it currently exists is that, paradoxically, defendants are left with more protection for publishing false and defamatory statements than they are for publishing truthful statements that might convey a false implication. For example, in *Heekin*, had CBS actually called the plaintiff a wife beater, the plaintiff would have been required to pursue a defamation claim and to meet procedural and substantive requirements that accompany such a claim. Likewise, in this case, had the newspaper called Petitioner a murderer, it would have enjoyed the constitutional safeguards of defamation law. Yet because (according to the plaintiffs) these clearly defamatory implications arose from the reporting of *truthful* facts, Petitioner argues, the protections of defamation law do not apply. This situation leaves speakers in an untenable position of not knowing for sure how to gauge the legality of their conduct. The statute of limitations problem highlighted by this case is just one in a series of real-world problems for journalists created by the existence and indefiniteness of the false light tort and the consequent misapplication of the single

action rule. As discussed below, these problems significantly threaten First Amendment rights.

A. What Procedural Protections Apply To False Light Claims?

Defamation law provides several important procedural barriers to filing a lawsuit. For example, Sections 770.01 and 770.02, Florida Statutes, require that a defamation plaintiff serve notice on a media defendant before filing a defamation lawsuit and permit a media defendant to avoid punitive damages by printing a retraction or correction. Similarly, Section 95.11(4)(g), Florida Statutes, requires that a cause of action for defamation be brought within two years after the initial publication. Under Petitioner's view, these statutes would not apply when a plaintiff brings a false light claim because the statutes specifically refer to "libel" and "slander" but do not mention false light. *See* §§ 95.11(4)(g), 770.01, 770.02, Florida Statutes (2005).

The important speech protections that Florida law provides should not be so easy to plead around. For example, Section 770.01, which affords the media notice and an opportunity to retract or correct errors "*in every case*," frees journalists to report on the news in a timely manner without having to be unduly concerned about potential lawsuits. *Ross v. Gore*, 48 So. 2d 412, 415-16 (Fla. 1950). Section 770.02, which allows the media to avoid punitive damages by publishing a correction, enhances true and accurate reporting. Together, these statutes protect

"the public's interest in the free dissemination of news." *Mancini v. Personalized Air Conditioning & Heating, Inc.*, 702 So. 2d 1376, 1378 (Fla. 4th DCA 1997).

Prior case law indicated that the requirements of defamation law typically must be met by false light plaintiffs – *i.e.*, they must serve notice on media defendants at least five days before initiating litigation and bring their cause of action within two years. *See Orlando Sports Stadium, Inc. v. Sentinel Star Co.*, 316 So. 2d 607 (Fla. 4th DCA 1975). "A contrary result might very well enable libel plaintiffs to circumvent the notice requirements of Section 770.01 by the simple expedient of redescribing the libel action to fit a different category of intentional wrong." *Id.* at 609. Yet *Heekin* and Petitioner's arguments in this case lead to just that result so long as a plaintiff does not file an explicit libel claim.

If not rejected, *Heekin* and Petitioner's argument would create real uncertainty. Can a newspaper expect a Section 770.01 notice prior to a defamation action but not a false light action? If a broadcaster receives a notice specifying false statements contained in a broadcast, but a lawsuit is not filed within the two-year limitations period, can a plaintiff simply file a false light lawsuit premised upon those same statements within four years? What implications would such a rule have on journalists' document retention policies?

B. After *Heekin*, Must a False Light Plaintiff Prove Falsity and Actual Malice?

The trial court's rulings below and *Heekin* also undermine the speech-protecting rules of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny. In *Sullivan*, the Court required a libel plaintiff to show that the defendant published a falsehood "with knowledge that it was false or with reckless disregard of whether it was false." *Id.* at 280. The Court later applied the same rule to allegations of falsity under New York's privacy statute. *See Time, Inc. v. Hill*, 385 U.S. 374, 377, 387-88 (1967). And still later the Court emphasized that, under *Sullivan*, a libel plaintiff suing the news media has the burden of proving falsity. *See Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 777 (1986). Today other jurisdictions routinely follow this binding precedent by requiring false light claimants to allege and prove actual malice and falsity. *See, e.g., Howard v. Antilla*, 294 F.3d 244, 248-49 (1st Cir. 2002) (false light invasion of privacy action subject to same constitutional limits that would apply to analogous defamation claim); *Machleder v. Diaz*, 801 F.2d 46, 56 (2d Cir. 1986) (false light plaintiff had burden of proving substantial falsity).

Consistent with *Sullivan*, Florida's common law must preclude false light claims that do not meet defamation's constitutional standards of falsity and actual malice. The single action rule – correctly applied – forces plaintiffs asserting false speech claims to meet these well-established requirements. But when courts disregard or misapply the single action rule, the constitutional protections

announced in *Sullivan* are jeopardized. *See, e.g.*, *Heekin*, 789 So. 2d at 358 (rejecting argument that false light claims are subject to "several well-recognized defenses to libel and slander actions" and libel law's allocation of burden of proof of damages); *Gannett Co., Inc. v. Anderson*, 31 Fla. L. Weekly D2616, *8, 11 (Fla. 1st DCA 2006) (noting trial court's ruling that relieved false light plaintiff from burden of proving falsity).

If the *Sullivan* rules do not apply to false light claims, critical speech-protective standards by which journalists have long measured their conduct are eliminated. Even when they are certain that the facts they are reporting are true, they may face the real possibility of a viable false light claim. As *Sullivan* makes clear, the threat of such a claim, standing alone, constrains free speech. *Sullivan*, 376 U.S. at 278 (explaining that regardless of whether a newspaper can survive repeated lawsuits, "the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive"). *Sullivan* and its progeny, therefore, require that this Court reject false light or at least impose the constitutional constraints applicable to defamation claims.

C. What Privileges Apply To False Light Claims?

In order to protect the timely flow of information to the public, this Court has recognized a number of important privileges that journalists rely upon daily in

reporting the news. *See Shiell v. Metropolis Co.*, 136 So. 537 (1931) (recognizing a privilege for fair and accurate reports of judicial proceedings); *Layne v. Tribune Co.*, 146 So. 234 (Fla. 1933) (recognizing a privilege for accurate republication of information obtained from wire services). These privileges "provide broad protection for freedom of speech and of the press" by encouraging publishers to report matters of great public interest. *Nodar v. Galbreath*, 462 So. 2d 803 (Fla. 1984). The privileges also recognize that protection of defamation plaintiffs is not the only societal interest served by tort law:

> No newspaper could afford to warrant the absolute authenticity of every item of its news, nor assume in advance the burden of specially verifying every item of news reported to it by established news gathering agencies, and continue to discharge with efficiency and promptness the demands of modern necessity for prompt publication, if publication is to be had at all.

Layne, 146 So. at 139.

Defamation privileges, therefore, are essential to reporting the news. But now it is unclear under Florida law what role these privileges play in false light actions. *See Heekin*, 789 So. 2d at 359-60 (holding that fair reporting privilege does not bar false light action as a matter of law). Under *Heekin*, it may be possible for a plaintiff to sidestep important defamation privileges by the use of the false light label. Again, such a result would be illogical as it would provide greater protection for false speech than it would for true speech that might give rise to a

false implication. And allowing nebulous false light claims predicated on the supposedly false impression conveyed by true facts would undermine the First Amendment's goal of creating an informed citizenry.

III. THERE IS NO PRACTICAL REASON TO RECOGNIZE THE FALSE LIGHT TORT IN FLORIDA.

If the single action rule is properly applied, the false light tort will be unnecessary because it is virtually always duplicative of defamation. If, however, the single action rule is misapplied as it was in *Heekin* and in the trial court in this case, the result will be tremendous uncertainty in the applicability of defamation defenses, privileges, and conditions precedent. To avoid such disarray, this Court should join the ten other states that have refused to recognize the false light tort.[5] At the very least, the Court should define the tort consistent with the application of both the single action rule and necessary constitutional constraints.

A. The Court Should Reject The False Light Tort.

False light is the most controversial and least accepted of the invasion of privacy torts.[6] Although reasons that some states have proffered for recognizing false light vary somewhat, most benefits claimed for the tort are in fact illusory.

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[5] *See Cain v. Hearst Corp.*, 878 S.W.2d 577, 586 (Tex. 1994) (listing and joining nine other states that do not recognize the tort).

[6] "Of Dean Prosser's four types of privacy torts, the 'false light' school has generated the most criticism because of its elusive, amorphous nature." Bruce W. Sanford, LIBEL AND PRIVACY § 11.4.1 at 567 (2d ed. 1991).

One rationale proffered for recognizing false light is that the tort protects a person's interest in being left alone, rather than the reputational interest that defamation law serves. *See, e.g.*, *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 83 (W. Va. 1984) (identifying these separate interests as basis for recognizing false light tort). "This distinction is often elusive, however, and not completely satisfactory." Rodney A. Smolla, LAW OF DEFAMATION § 10:10, at 10-14 (2006). Two other privacy torts – intrusion upon seclusion and public disclosure of private facts – are specifically tailored to protect an individual's legitimate interest in being left alone. *See Agency for Health Care Admin. v. Associated Indus.*, 678 So. 2d 1239, at 1252 n.20 (Fla. 1996). False light adds little to this protection.

In addition, if an individual's desire to be left alone were the interest behind false light, the tort ought not extend to speech on matters of legitimate public concern. Such a limitation would track this Court's prior pronouncements on invasion of privacy generally. *See Cason v. Baskin*, 20 So. 2d 243, 251 (Fla. 1944). However, trial courts have failed to apply a public concern limitation to false light claims. Consequently, false light does not in fact protect any real privacy interest.

In reality, false light case law does not reveal any effort to protect the desire to be left alone. Florida false light cases – in essence and in effect – largely relate

to reputational injury.[7] The pending case illustrates this point, of course, because it has nothing to do with the Petitioner's desire to be left alone. Rather, the Petitioner's damage claim is based on the purported loss of business he suffered because of damage to his name or his standing in the community. In other words, it is a claim arising out of purported reputational injury.

False light proponents sometimes argue that the tort provides a needed response to factually correct speech that conveys a false impression. This argument is undoubtedly wrong, as the district court recognized below. *Anderson*, 31 Fla. L. Weekly D2616 at *10 (citing defamation by implication cases).

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[7] Every reported false light case in Florida was or could have been brought as a defamation claim or some other tort. *See Lane*, 242 F. Supp. 2d 1205 (implication that plaintiff engaged in lewd acts in public); *Tyne v. Time Warner Entm't Co.*, 204 F. Supp. 2d 1338 (M.D. Fla. 2002) (implication that boat captain recklessly jeopardized crew's lives); *Trujillo v. Banco Central del Ecuador*, 17 F. Supp. 2d 1334 (S.D. Fla. 1998) ("partisan attack" imputing conduct and characteristics incompatible with proper exercise of a lawful business); *Harris*, 9 F. Supp. 2d 1319 (implication that plaintiffs were responsible for rule violations and terminated as a result); *Rapp v. Jews for Jesus*, Case No. 06-2471 (Fla. 4th DCA 2006) (statement that plaintiff abandoned Judaism and adopted Christianity could give rise to defamation claim under Restatement analysis of reputation among substantial and respectable minority or to intentional infliction of emotional distress claim); *Heekin*, 789 So. 2d 355 (implication that plaintiff abused his wife and children); *Ovadia*, 756 So. 2d 137 (statement that plaintiff was a dangerous doctor); *Byrd*, 433 So. 2d 593 (Fla. 4th DCA 1983) (implication that plaintiff made an obscene gesture); *Loft v. Fuller*, 408 So. 2d 619 (Fla. 4th DCA 1982) (statement that deceased pilot reappeared as ghost could give rise to intentional infliction of emotional distress claim).

It also has been argued that false light protects a plaintiff against statements that are highly offensive, but not necessarily defamatory. *See, e.g.*, *Crump v. Beckley Newspapers, Inc.*, 320 S.E. 2d 70, 87 (W.Va. 1984); *McCall v. Courier-Journal and Louisville Times Co.*, 623 S.W. 2d 882, 888 n.9 (Ky. 1981). This distinction derives from the fact that a false light claim requires that the plaintiff be placed in a false light that is "highly offensive to a reasonable person," *Harris v. District Bd. of Trs.*, 9 F. Supp. 2d 1319, 1329 (M.D. Fla. 1998), but not *necessarily* defamatory. A defamation claim requires a defamatory statement – *i.e.*, one that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Thomas v. Jacksonville Television, Inc.*, 699 So. 2d 800, 803 (Fla. 1st DCA 1997) (quoting RESTATEMENT (SECOND) OF TORTS § 559). Although these terms are not precisely congruent, it is plain that a "highly offensive" light and a "defamatory" meaning will both, nearly always, impugn the plaintiff's reputation or deter others from associating with him. Indeed, courts and commentators have recognized that in almost every false light claim the false implication actually will be defamatory.[8]

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[8] *See, e.g.*, Harvey L. Zuckman et al., MODERN COMMUNICATIONS LAW § 4.6.D n.80 (1999) ("Of course, there exists considerable congruity between the respective torts since actionable false defamatory communications always place the victims in a false light."); *Lake v. Wal-Mart Stores, Inc.*, 582 N.W. 2d 231, 235-36 (Minn. 1998) ("Most false light claims are actionable as defamation claims . . . ."); *(footnote continued on next page)*

This Court has stated, in dicta, that false light might be alleged based upon statements that "place a person in a false light even though the facts themselves may not be *defamatory*." *Agency for Health Care Admin.*, 678 So. 2d at 1252 n.20 (emphasis added). As a practical matter, however, such claims do not arise.[9]

If essentially all false light claims could be brought in defamation, and if the single action rule properly applied would subject all false light claims to defamation defenses, the question arises: What purpose would be served by recognizing false light as a distinct cause of action, particularly when the considerable confusion surrounding the tort is antithetical to free speech and press rights? In Amici's view, it not only would serve no purpose, but would present a grave risk of harm to vital free-speech interests. Accordingly, Amici urge the Court not to recognize the tort.

B. If False Light Is Recognized It Must Be Constitutionally Constrained.

If the false light tort is to be recognized, this Court must answer the questions posed by Prosser when he first envisioned the false light tort almost fifty years ago: Does false light engulf the law of defamation? Do defamation defenses

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Cain, 878 S.W.2d at 580 ("If we were to recognize a false light tort in Texas, it would largely duplicate several existing causes of action, particularly defamation."); *Sullivan v. Pulitzer Broad. Co.*, 709 S.W.2d 475, 479 (Mo. 1986) (The statement that a false light need not be defamatory "may be a semantic distinction without a substantive difference.").

[9] *See supra* n.7.

that protect speakers apply to false light claims? Or are the protections afforded defamation of so little consequence that they may be circumvented by the simple expedient of re-labeling a cause of action? The proper answer to these questions – indeed, the only answer that comports with the First Amendment – is that false light must be constrained by the defenses, privileges, and other free-speech protections of defamation law. It has long been the rule in Florida that courts "look for the reality, and the essence of the action and not its mere name." *Orlando Sports Stadium*, 316 So. 2d at 609 (internal quotation omitted). This principle requires that false light claims – based as they are upon allegations of false speech – be subject to all the requirements that defamation law provides.

CONCLUSION

Although no practical need exists for the false light tort in Florida, a real desire for the tort does exist among plaintiffs looking for a means of evading the requirements of defamation law. Uncertainties surrounding the tort have created real-world problems for journalists, as false light claims – which can be based upon accurate reporting – are nearly impossible to guard against and exceedingly difficult to defend. This largely redundant, confusing, and ultimately dangerous tort should be rejected as antithetical to the public interest in speech on matters of public concern. But if the tort is to be recognized in Florida, false light must be constrained by the single action rule and other principles of defamation law.

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

Undersigned counsel hereby certifies that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) inasmuch as the brief is printed in Times New Roman, 14 point and otherwise meets the requirements of the rule.

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