

IN THE SUPREME COURT OF FLORIDA

CASE NO. 06-2175

JOE ANDERSON, JR.,

Petitioner,

vs.

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

Respondents.

PETITIONER'S INITIAL BRIEF

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STATEMENT OF THE CASE

Petitioner Joe Anderson, Jr. seeks reversal of a decision of the First District Court of Appeal, which certified conflict and certified a question of great public importance on the issue of the applicable statute of limitations for a false light invasion of privacy claim. In the District Court, the Appellants (Respondents in this Court) raised numerous issues, but the District Court reversed on statute of limitations grounds, and declined to address the other issues presented by the Respondents.

This case began in 2001 when Joe Anderson, Jr. sued the Pensacola News Journal and its parent companies for libel, tortious interference with a business relationship and, in an amended complaint, false light invasion of privacy. RI-1-30; RII-212-27. (orig. Compl., Amended Compl.). The lawsuit was prompted by a series of articles published between December 13, 1998 and July 12, 2000, which concerned work done in Escambia County by Anderson's road paving company, Anderson Columbia, Inc. The only claim that went to trial was Anderson's false light claim based on the Pensacola News Journal's December 14, 1998 story headlined "**Company pursues political clout**" and inside page headline "**Anderson Columbia keeps eye on state, local politician.**" See Appendix A to

this Brief. The article contained these three paragraphs in the midst of the “political clout” story:

In 1988, while still on probation and before his conviction was reversed, Anderson shot and killed his wife, Ira Anderson with a 12-gauge shotgun.

The death occurred in Dixie County just north of Suwanee where days before the shooting Joe Anderson had filed for divorce but then had the case dismissed.

Law enforcement officials determined the shooting was a hunting accident.

The story continued.

A federal judge ruled that by having the shotgun, Anderson violated his probation, and the judge added two years to Anderson’s probation.

Capt. Bob Stanley of the Florida Game and Fresh Water Fish Commission, was one of the officials who went to the scene of the shooting.

Anderson said that he and his wife were deer hunting when she walked one way down a road and he walked the other way, Stanley recalls. A deer ran between them and Joe Anderson fired twice. One shot hit the deer, the other hit his wife.

“One buckshot pellet hit her under the arm and went through her heart,” Stanley said.

When investigators arrived on the scene, he said, they found that the other people in the hunting party had taken the deer back to the hunt club and were cleaning it.

“You have to understand, it’s Dixie County,” he said. “Back then, they shut down the schools for the first week of hunting season.”

He said that Anderson had stayed behind at the shooting scene, and he described Anderson as looking “visibly upset” after the shooting.

The complete December 14, 1998 article is reproduced in Appendix A.

Anderson stipulated that the facts set forth in the story were literally true. RXX-3844-65. His false light claim was that The News Journal, acting with “actual malice,” *i.e.*, reckless disregard, intentionally portrayed him as a murderer. *Id.* The evidence of that intentional portrayal included the patent discordance of the 1988 death/divorce/deer hunting/deer cleaning into the 1998 “political clout” headline story. It also included the testimony of the reporter and editors who sought to explain the relevancy of death and deer hunting in 1988 to the Anderson

Columbia 1998 story, and the editorial oversight of the story. The reporter maintained that the ten year-old incident was relevant to the “political clout” story because it was connected to a fifteen year-old (reversed) mail fraud conviction that arose from a bribery prosecution of Hillsborough County Commissioners. TR14-768-783. One of the editors testified that including the dismissal of the divorce petition in the initial paragraph served this purpose: “[I]f anybody even wondered about that, obviously they were happy.” *Id.* at 991-92.

The jury returned a verdict in favor of Anderson, awarding him \$18.3 million dollars. RXXV-4069-70. The News Journal and its parent companies appealed, asserting the following “Points,” in the following order: “I: Plaintiff failed to prove material falsity; II: Plaintiff failed to prove that Defendants published with ‘actual malice’; III: The News Journal article was privileged; IV: Plaintiff failed to prove damages for which he may be properly compensated; and V: Plaintiff’s claim is barred by the two year statute of limitations.” Appellants’ District Court Initial Brief, pp. i-ii.

The First District Court of Appeal reversed only on the statute of limitations issue, finding it “unnecessary” to address the newspaper’s other arguments:

In summary we conclude that an invasion of privacy case based on the false light theory is governed by the two-year statute of

limitations that applies to defamation actions and not the four-year statute that applies to unspecified torts.

* * *

Accordingly, we certify the following question as a question of great public importance:

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

Appendix B, pp. 23-24. The court also recognized that its decision could not be reconciled with *Heekin v. CBS Broadcasting, Inc.*, 789 So. 2d 355, 358 (Fla. 2d DCA 2001), and certified conflict with *Heekin. Id.* at 23.

Judge Lewis concurred in the reversal, believing that on the facts of this case the two year statute should apply, but disagreed with the notion that all false light invasion of privacy claims are subject to the two year statute. *Id.* at 25.

In this appeal, Joe Anderson seeks reversal of the District Court of Appeal decision and the reinstatement of his judgment. Simply put, Anderson's argument is that because the Pensacola News Journal published an article that was "true," he

could not have brought a libel or slander claim, therefore the libel or slander statute of limitations cannot be applied to this case. The only relevant statute of limitations that could be applied is the four year statute of limitations set forth in section 95.11(3)(p), Florida Statutes: “within four years” for “any action not specifically provided for in these statutes.”

SUMMARY OF THE ARGUMENT

The certified question must be answered in accordance with the plain statutory limitations language. An “action for libel or slander” is governed by a two year statute of limitations. A false light invasion of privacy claim — a species of tort long recognized by Florida law — is not an action for “libel or slander,” therefore it is not governed by the two year statute. Since the Florida Statutes do not set forth a limitations period for false light claims, the claim is “not specifically provided for in these statutes” (*see* section 95.11(3)(p)) and thus the four year statute applies. That answer is correct because the statutes of limitations are specific and not subject to judicial realignment “and where there is any reasonable doubt as to legislative intent, the preference is to allow the longer period of time.” *Baskerville-Donovan Engineers, Inc. v. Pensacola Executive House Condominium Assoc. Inc.*, 581 So. 2d 1301-1303 (Fla. 1991).

ARGUMENT

THE STATUTE OF LIMITATIONS FOR A FALSE LIGHT CLAIM IS FOUR YEARS, NOT TWO YEARS

The standard of review is *de novo* because the outcome of the appeal turns on the interpretation of Florida statutes, a purely legal matter. *McBride v. Pratt Whitney*, 909 So. 2d 386, 387 (Fla. 1st DCA 2005); *Racetrack Petroleum, Inc. v. Delco Oil, Inc.*, 721 So. 2d 376, 377 (Fla. 5th DCA 1998).

A. The Statute of Limitations

The certified question is succinct:

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

App. B, p. 24.

The obligation to follow plain statutory language provides the answer to the certified question. The two year statute that applies to defamation claims *does not* apply, because a false light claim based on true statements *is not* a “libel or slander claim.” Chapter 95, Florida Statutes, governs “Limitations of Actions.” Section

95.11 4(g) provides:

(4) WITHIN TWO YEARS. —

* * *

(g) An action for libel or slander.

Section 95.11 (3)(p) provides:

95.11 Limitations other than for recovery of real property. — Actions other than for recovery of real property shall be commenced as follows:

* * *

(3) WITHIN FOUR YEARS. —

* * *

(p) Any action not specifically provided for in these statutes.

Libel and slander is “specifically provided for;” false light is not “specifically provided for;” false light based on true statements is not libel and slander; therefore false light is subject to the four year statute of limitations.¹

“Libel” is “[a] method of defamation expressed by print, writing, pictures or

¹ Any doubts about that are resolved by the fact that the last session of the Legislature considered two bills that would have changed the statute of limitation for false light to two years. Both bills failed. *See* S.B. 1346, 38th Legis. Sess. (Fla. 2006) and H.B. 1323, 38th Legis. Sess. (Fla. 2006). Both bills and the accompanying Staff Analyses are attached as Appendix C to this Brief.

signs.” BLACK’S LAW DICTIONARY, 6th ed. (1990). “Slander” is “[t]he speaking of false and defamatory words tending to prejudice another in his reputation, community standing, office, trade, business or means of livelihood.” *Id.* Libel and slander constitute defamation. “Defamation” is “[a]n intentional false communication, either published or publicly spoken, that injures another’s reputation or good name. . . . [and] [i]ncludes both libel and slander.” *Id.*

Thus, falsity of the communication – the untruth of the communicated statement – is the touchstone of libel and slander. Every defamation case requires a published false statement. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279, 84 S. Ct. 710, 11 L.Ed 2d 686 (1964) (“The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct. . . .”) *See also* Justice Powell’s opinion for the Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339, 94 S.Ct. 2997, 41 L.Ed 2d 789 (1974) (“[T]here is no constitutional value in false statements of fact”); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19, 110 S. Ct. 2695, 111 L.Ed. 2d 1 (1990) (a false statement of fact gains no constitutional immunity if the speaker simply adds “the words ‘I think.’”). If there is no false statement of fact there is no action for defamation.

The actual words printed by The News Journal – the actual statements, the

actual communication – plainly involved no false statements. Therefore they did not constitute libel or slander. The Legislature’s words – “libel and slander” – have plain meaning, and the District Court erred in ignoring them in its effort to cast false light into the libel/slander two year statute. This principle is clear:

Where the wording of the law is clear and amenable to a logical and reasonable interpretation, a court is without power to diverge from the intent of the legislature as expressed in the plain language of the law.

United Auto Ins. Co. v. Rodriguez, 808 So. 2d 82, 85 (Fla. 2001). This Court has hued to that principle with special force in a statute of limitations setting:

The duty of this Court in construing statutory language is to determine what the legislature intended when it passed the statute. *Shelby Mut. Ins. Co. v. Smith*, 556 So. 2d 393, 395 (Fla. 1990). We are confined in the first instance to the plain meaning of the words the legislature chose to employ. *Id.* Furthermore, the legislature is presumed to know the meaning of the words chosen and to have expressed its intent by use of those words. *S.R.G. Corp. v. Department of Revenue*, 365 So. 2d 687 (Fla. 1978). When words or terms are not specifically defined in the statute, such words must be given their plain or ordinary meaning. *E.g., Citizens v. Public Serv. Comm’n*, 425 So. 2d 534 (Fla. 1982). Finally, statutes should be construed with reference to the common law, and we must

presume that the legislature would specify any innovation upon the common law. *Ellis v. Brown*, 77 So. 2d 845, 847 (Fla. 1955).

In addition to these principles governing statutory construction generally, we must also consider principles specifically governing statutes of limitations. Statutes of limitations bar the enforcement of an otherwise valid cause of action. The purpose is to “protect against the risk of error in decisions concerning the merits of such claims which results from the difficulty of obtaining evidence of events which transpired and circumstances which prevailed in the remote past.” 3A *Sutherland Statutory Construction* § 70.03, at 493 (Sands 4th ed. 1986). *Where a statute of limitations shortens the existing period of time the statute is generally construed strictly, and where there is reasonable doubt as to legislative intent, the preference is to allow the longer period of time. See Haney v. Holmes*, 364 So. 2d 81 (Fla. 2d DCA 1978), *appeal dismissed*, 367 So. 2d 1124 (Fla. 1979).

Baskerville-Donovan Engineers, Inc. v. Pensacola Executive House Condominium Assoc. Inc., 581 So. 2d 1301, 1302-03 (Fla. 1991) (emphasis supplied). *See also J.B. v. Sacred Heart Hosp.*, 635 So. 2d 945, 947-48 (Fla. 1994).

The court below ignored its own longstanding recognition of the principle of strict application of plain statutory language. *See Florida Farm Bureau Casualty*

Insurance Co. v. Cox, 31 Fla. L.Weekly D2679, 2006 WL 3024902 (Fla. 1st DCA 2006):

“[T]his court is without power to construe an unambiguous statute in a way which would extend, modify, or limit its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power. *Am. Bankers Life Assurance Co. of Fla. v. Williams*, 212 So. 2d 777, 778 (Fla. 1st DCA 1968).” *Beshore v. Dep’t of Fin. Servs.*, [928 So. 2d 411, 413 (Fla. 1st DCA 2006)].

“It is a settled rule of statutory construction that unambiguous language is not subject to judicial construction, however wise it may seem to alter the plain language. . . . We trust that if the legislature did not intend the result mandated by the statute’s plain language, the legislature itself will amend the statute at the next opportunity.” [*Fla. Dept. Of Child. & Fam. Servs. v. McKim*, 869 So. 2d at 760, 762 (Fla. 1st DCA 2004)] (quoting *State v. Jett*, 626 So. 2d 691, 692 (Fla. 1993)). *Atlantis at Perdido Ass’n, Inc. v. Warner*, 932 So. 2d 1206, 1212-13 (Fla. 1st DCA 2006). We reaffirm our recently restated commitment to these fundamental principles, and acknowledge that our limited role in the constitutional scheme leaves statutory amendment to the Legislature.

Id. at D2680.

Had the court below followed those principles and this Court’s decisions it

would not have applied the libel/slander statute of limitations. The Legislature did not include the false light invasion of privacy tort in its statutes of limitations. The tort has long been recognized in Florida, as the District Court grudgingly acknowledged. App. B, pp. 12-13. There is no indication that the legislature intended to limit false light claims to the libel or slander limitations period. Indeed, the recent failed legislation, which sought to impose a two year limitation on false light (*see* p. 8, n. 1, *supra*), compels the conclusion we assert – false light and libel and slander are not synonymous for statute of limitations purposes.

One of the reasons the District Court equated false light with defamation was its view that “a claim of libel can also be asserted on the theory that the defamatory fact was implied,” therefore the court opined that the truth of the facts published about Anderson was not decisive. App. B, p. 23. However, the two cases cited by the court do not support its “false light equals defamation” approach because the “implications” in those cases *were based on actual falsities* and “implied defamation” does not mean that literally true statements can be actionable as libel or slander. Indeed, truth is the defense to a defamation claim. *See* Art. I, § 4, Fla. Const.² *See also* Florida Civil Standard Jury (Defense) Instructions 4.3 b

² That constitutional provision states: “Every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that

“A statement is substantially true if its substance or gist conveys essentially the same meaning that the truth would have conveyed. In making this determination, you should consider the context in which the statement is made and disregard any minor inaccuracies that do not affect the substance of the statement”). The law could not be clearer – true statements are not libel or slander.

In *Brown v. Tallahassee Democrat, Inc.*, 440 So. 2d 588 (Fla. 1st DCA 1983), a newspaper story about a murder trial involving a defendant named Johnson was accompanied by a small head-shot photograph of the plaintiff, George Thomas Brown. The caption beneath the picture was the single name “Johnson.” *Id.* at 589. The caption was false because the pictured Brown was not Johnson. Brown alleged that “the mispublication of his photograph gives the article a defamatory implication, namely that plaintiff Brown is guilty of or on trial for murder.” *Id.* Thus, the defamatory implied fact was the product of a false fact – putting Brown’s picture above the murder defendant’s name.

Boyles v. Mid-Florida Television Corp., 431 So. 2d 627 (Fla. 5th DCA 1983), the second case cited by the court below, is also not supportive of the

right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated.”

District Court's rationale. In *Boyles*, the plaintiff's picture was shown on screen while the television reporter made statements about serious misconduct and death occurring in a group home operated by his mother, and described the son (plaintiff Boyle) as having been "reprimanded repeatedly for taunting retarded patients" and "accused of raping one of the retarded patients." 431 So. 2d at 634-35. Boyle alleged falsity and the court found the statements to be "defamatory on their face." *Id.* at 635. There is no suggestion in the case that literally true facts can ever be the subject of libel or slander or defamation.³

³ Indeed, *Boyles* helps to explain why the District Court's use of "implied libel" does not support its attempt to impose a two-year limitations period. "Implied libel" relates to the difference between libel *per quod* and libel *per se*. Libel *per se* involves words that are actionable on their face and require no showing of special damage, "the imputation being such that the law will presume that any one so slandered must have suffered damage." BLACK'S LAW DICTIONARY, *supra*, "Libelous *per se*." Slander, of course, requires falsity. *Per quod* libel requires extrinsic facts to be alleged and proven and the *Boyles* court pointed out the confusion which has occurred. The court referred to a law review article which in turn cited *Piver v. Hoberman*, 220 So. 2d 408 (Fla. 3d DCA 1969). There, Piver, a City councilman, sued for libel based on a recall petition, charging that "the statement of grounds for the recall was false." The grounds did not charge a crime or misconduct in office and the court concluded that "if the statements in the petition are libelous, they are not libelous *per se* but *per quod*" and required "[a]n allegation of special damages." *Id.* at 408-09. So, libel by implication or innuendo, while needing to allege extrinsic facts and special damages, still requires that the statements spoken or written be false; the only difference between *per se* and *per quod* libel being that the harmfulness of the false statements is apparent from the words themselves. Either way, *per se*, *per quod*, or by implication or innuendo, a false statement is the *sine qua non* for libel or

The Civil Florida Standard Jury Instructions leave no doubt that the *statement must be factually false* to be actionable and support liability for defamation. The instructions, in relevant part, ask the jury to determine:

Whether (defendant's) statement concerning claimant was in some significant respect a false statement of fact. . . .

* * *

A statement is in some significant respect false if its substance or gist conveys a materially different meaning than the truth would have conveyed.

See 4.1, Florida Standard Jury Instructions. *See also, Rasmussen v. Collier County Publishing Co.*, 31 Fla. L. Weekly D3112a, 2006 WL 3615189 (Fla. 2d DCA 2006) (“To prevail in a libel action, Mr. Rasmussen, who conceded that he was a public figure, had to prove that the Daily News published defamatory statements that were (1) statements of fact, (2) false. . . .”

The importance of false statements, as distinguished from true statements, is underscored by the fact that the Supreme Court has expressly left open the question of whether truthful publications may be actionable “for invading ‘an area of

slander, but not for a false light claim.

privacy’ defined by the State.” *See Florida Star v. B.J.F.*, 491 U.S. 524, 109 S. Ct. 2603, 105 L.Ed. 2d 443 (1989):

Nor need we accept appellant’s invitation to hold broadly that truthful publication may never be punished consistent with the First Amendment. Our cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily. . . . Indeed, in *Cox Broadcasting [v. Cohn]*, 420 U.S. 469 (1975), we pointedly refused to answer even the less sweeping question “whether truthful publications may ever be subjected to civil or criminal liability” for invading “an area of privacy” defined by the State. 420 U.S. at 491.

Id. at 532-533, 109 S.Ct. at 2608-09; *see also Bartnicki v. Vopper*, 532 U.S. 514, 529, 121 S.Ct. 1753, 1762, 149 L.Ed. 2d 787 (2001) (“Our refusal to construe the issue presented more broadly is consistent with this Court’s repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment. . . .”) (citing and quoting *Florida Star*). Against that background, there can be no doubt that the publication of truthful facts presented in a false light is legally different from the publication of false facts, and that the former cannot be called libel or slander. Therefore the publication of truthful facts, as in this case, cannot be subject to a two year statute of limitations that applies

specifically to libel and slander.

The District Court's error in equating true statements of fact with defamation is exemplified by its analogies. The court wrote: "Courts in other jurisdictions have resolved the problem, as we have here, by applying the shorter of the two statutes when the false light action is based on a *defamatory statement*." App. B, p. 18. (emphasis supplied). Anderson's false light action is based on true statements which, by definition, are not defamatory. The point is solidified when one looks at the cases cited by the court below (*id.* at 18-19) to support the above quoted statement. Each of them involved *false statements* as the basis for the false light claim.⁴

⁴ In *Magenis v. Fisher Broadcasting, Inc.*, 798 P.2d 1106 (Or. Ct. App. 1990), the "alleged false light – that plaintiffs were involved with stolen vehicles and narcotics – is plainly defamatory. Plaintiffs could have filed a claim for defamation. That being the case, we conclude that the specific defamation Statute of Limitations controls." *Id.* at 1109. Joe Anderson could not file a claim for defamation because the published facts were true. In *Eastwood v. Cascade Broadcasting Co.*, 722 P.2d 1295 (Wash. 1986), Eastwood alleged that a broadcast describing him as "a co-conspirator, or an unindicted co-conspirator" in a federal criminal case was "false, untrue, and totally incorrect." *Id.* at 1795. In *Smith v. Esquire, Inc.*, 494 F. Supp. 967 (D. Md. 1985), the false light was a libel claim: "Thus where the basis of the cause of action is the false nature of the publication, *i.e.*, a defamation, the action should be governed by the various limitations placed on an action for defamation." *Id.* at 970. *Robinson v. Vitro Corp.*, 620 F. Supp. 1066 (D. Md. 1985) was a federal retaliatory discharge/employment discrimination case with a false light pendent claim and the court's comment that it agreed with "Judge Miller's reasoning [in *Smith v. Esquire*]" (*id.* at 1070) does nothing except

The erroneous hypothesis is further confirmed by the court's extended reliance on *Gashgai v. Leibowitz*, 703 F.2d 10 (1st Cir. 1983), and its use of the two-year Maine Statute in a 42 U.S.C. § 1983 case where the plaintiff doctor brought a federal civil rights action against members of the Maine Medical Association's Ethics and Discipline Committee, claiming the "Committee's report. . . to have been false and appellees are alleged to have known it was false." *Id.* at 12. Since there is no federal statute of limitations for § 1983 claims, federal courts must look to analogous state causes of action and state statutes of limitations and in *Gashgai* the court concluded that the defamation limitation was applicable. Clearly *Gashgai's* allegations of false statements met the definition of defamation, and the court's analogizing the cause of action to defamation was correct. But that analysis cannot apply to a true statement, which cannot be defamation. In addition, the *Gashgai* conclusion that a six- year statute would, "where 'false light' and defamation coincide[,] defeat the obvious legislative intent to impose a relatively short period of limitations for the bringing of defamation actions" (*id.* at 13), does not support a two year statute here. That is so because Anderson's false light claim, which is based on a true, non-defamatory statement, cannot constitute libel

confirm that without falsity, *i.e.* defamation, Joe Anderson could not bring a libel claim and therefore the libel limitations statute cannot be applied here.

or slander and does not “coincide” with defamation and the Florida Legislature *has not* equated false light with defamation. *See* p. 8, n. 1, *supra*, and Appendix C.

Thus, the First District’s decision cannot withstand scrutiny. It refuses to accept the legislature’s “libel or slander” language in section 95.11 (4)(g); it fails to abide by the principles of strict statutory construction, especially with regard to statutes of limitations; and its analogies are inapposite because the cases offered are premised on false statements of fact, not, as here, true statements of fact that cannot by established definitional, constitutional and common law principles be likened to libel or slander. All they can be is invasion of privacy – “false light in the public eye – publication of facts which place a person in a false light even though the facts themselves may not be defamatory.” *Agency for Health Care Administration v. Associated Industries of Florida, Inc.*, 678 So. 2d 1239, 1252, n. 20 (Fla. 1996).

B. Florida False Light Law

The District Court’s decision questioned the viability of a false light cause of action in Florida, although it acknowledged that this Court has recognized the claim. App. B, pp. 12-13. The court below wrote: “We conclude from all of these decisions that, although the supreme court has recognized the potential existence of a cause of action for invasion of privacy based on a false light theory, it has never

had occasion to decide whether such a cause of action actually exists in Florida.” App. B., p. 13. The court also noted that “[o]ther district courts have tacitly recognized false light privacy claims in theory, but in no other instance has a Florida court ever upheld a claim based on this theory.” *Id.* at 14.

The false light cause of action does exist in Florida, and the court’s attempt to question its existence is neither the subject of the certified question nor a basis for disregarding the legislative statutes of limitations.

This Court has acknowledged “a distinct right of privacy as part of our tort law that made particular conduct actionable” and set forth the “four types of wrongful conduct,” including placing another in a “false light”:

(1) appropriation – the unauthorized use of a person’s name or likeness to obtain some benefit; (2) intrusion – physically or electronically intruding into one’s private quarters; (3) public disclosure of private facts – the dissemination of truthful private information which a reasonable person would find objectionable; and (4) false light in the public eye – **publication of facts** which place a person in a **false light** even though the **facts** themselves may **not** be **defamatory**. *Forsberg v. Housing Auth. of Miami Beach*, 455 So. 2d 373, 376 (Fla. 1984) (Overton, J., concurring).

Agency for Healthcare, supra, 678 So. 2d at 1252, n. 20 (emphasis supplied). In

Allstate Ins. Co. v. Ginsberg, 863 So. 2d 156 (Fla. 2003), the Court quoted that *Agency for Health Care* language and affirmed its viability:

It is correct, as the appellees argue, that this Court set out the categories of the tort of invasion of privacy for the purpose of illustrating a point, not to directly address the point of what alleged facts state a cause of action for the tort of invasion of privacy. *But here we here affirm that the statement in AHCA does correctly state what is included in Florida's tort of invasion of privacy.*

Id. at 162 (emphasis supplied).

Heekin v. CBS Broadcasting, Inc., 789 So. 2d 355 (Fla. 2d DCA 2001), quoting the *Agency for Health Care* formulation of the four types of wrongful conduct, saw the difference between defamation and false light:

In considering the four types of invasion of privacy it becomes clear that invasion of privacy is a separate and distinct cause of action from libel or slander. Three of the four types of invasion of privacy do not reference any type of false information or defamation. Only false light invasion of privacy contemplates any issue of falsehood; and *even then the tort may exist when the facts published are completely true.*

Id., 789 So. 2d at 358 (emphasis supplied).

It is apparent that the District Court's statute of limitation decision was

driven by its doubts about false light claims. But the court's mistaken premises – that Florida has not accepted the cause of action and that false light (based on true facts) is somehow synonymous with defamation – led it to a decision that violates the rules of general statutory construction and the rules of statutory construction specific to statutes of limitations.

The court's reliance on commentator and case suggestions that false light duplicates defamation and adds nothing “distinctive to the law” (App. B, p. 9, n. 1) (*quoting* J. Clark Kelso, *False Light Privacy: A Requiem*, 32 Santa Clara L. Rev. 783, 785 (1992)), ignores the truth that defamation – libel or slander – must include words that are false. Libel or slander provides no remedy for an injurious truth. The fourth species of false light invasion of privacy fills that gap, and unless the legislature places a two year limitation on such a cause of action, the four year statute set forth in section 95.11(3)(p) must be applied.

CONCLUSION

For the foregoing reasons the certified question should be answered this way: “An action for invasion of privacy based on the false light theory is governed by the four-year statute of limitations that applies to unspecified tort claims.” The decision below should be disapproved and the trial court judgment affirmed.

Respectfully submitted,

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I HEREBY CERTIFY that this Initial Brief is in compliance with Rule 9.210, Fla.R.App.P., and is prepared in Times New Roman 14 point font.

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