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 REPLY BRIEF

BEVERLY A. POHL
BROAD AND CASSEL
100 S.E. Third Avenue
Suite 2700
Fort Lauderdale, FL 33394
(954) 764-7060

BRUCE S. ROGOW
BRUCE S. ROGOW, P.A.
Broward Financial Centre, Suite 1930
500 East Broward Blvd.
Fort Lauderdale, FL 33394
(954) 767-8909

WILLIE E. GARY
PHYLLIS GILLESPIE
C.K. HOFFLER
GARY,WILLIAMS, PARENTI, FINNEY, LEWIS, MCMANUS,WATSON & SPERANDO
221 E. Osceola Street
Stuart, Florida 34994
(772) 283-8260

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page**

CONSTITUTION/STATUTES

OTHER

INTRODUCTION

The Respondents' devote less than three pages to the certified question in this case – whether the specific 95.11(4)(g) two year defamation statute of limitations can be applied to a false light claim which clearly falls under the 95.11(3)(p) "any action not specifically provided for in these statutes." Respondents' Answer Brief, pp. 36-39. We address first the reasons why the attempt to avoid the plain language of the statute of limitations is unavailing. Then we address the Respondents real argument – that false light and defamation are one and the same – an argument which recognizes the weakness of its statute of limitations position and seeks to avoid reversal by convincing the Court to reject its long standing recognition of false light or find that Florida's libel statutes do not require false statements of fact despite their plain language.

ARGUMENT

A. THE STATUTE OF LIMITATIONS

The Respondents' offer *Old Plantation Corp. v. Maule Industries, Inc.*, 68 So. 2d 180, 181 (Fla. 1953) as their decisive case, saying that the slander of title in that case triggered the two year libel limitation statute, not the four year statute which would have been applicable to a claim for disparagement and impairment of the vendibility of title to real property. Respondents' Answer Brief, pp. 36-37.

Old Plantation opted for the two year statute because whatever name was attached to the claim, "it is based on false and malicious *statements*." *Id*. at 181 (emphasis supplied). Ironically, *Old Plantation* makes our point. Had Joe Anderson's false light claim been "based on false and malicious *statements*" it would have been a defamation claim and would have been subject to the two year statute. But that underscores the heart of this case. Anderson's claim was based on truthful statements, so they could not be brought as defamation under Chapter 770, leaving only false light and the four year statute. That analysis, which is driven by the plain language of Chapter 770, the plain language of Chapter 95, the plain language of the Florida Jury Instructions on libel and the plain language of Florida defamation law's requirement of false statements, explains why the Respondents and their *amici* urge the Court to find that false light and libel are the same causes of action. As we demonstrate below, they are wrong. In *Old Plantation*, disparagement of title and slander of title were synonymous; here libel and false light based on true statements are legally dissimilar.

B. Libel and False Light/True Facts are Not Synonymous in Florida

The Respondents recognize that nothing could be more harmful than to be branded – falsely – as a "wife murderer."' Respondents' Answer Brief, p. 23. But the theme of the Respondents' Answer Brief is that, assuming *arguendo* that is

what they did, Anderson's claim was a defamation claim and that he "re-pleaded a libel claim as one for false light invasion of privacy in order to avoid the two year statute of limitations that applies to defamation claims." *Id.* at 27.

It is important to keep in mind that the certified question in this case is a narrow one:

> 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.

The question rightly assumes the existence of false light in Florida and although the Respondents and their *amici* would like to close the door on false light (even attempting to introduce legislation to accomplish that goal,)[1] their only hope in this case is to try and convince the Court that the defamation statute of limitations governs this false light case and that our "effort to distinguish libel from false light is flawed." Respondents' Answer Brief, p. 32.

Let us analyze the "flaws." First, Respondents say that

---

[1] *See* Appendix C to Petitioner's Initial Brief containing the bills submitted in the 2006 session aimed at false light and the statute of limitations. The legislative effort has carried over to this session. *See* S.B. 1650, 39th Legis. Sess. (Fla. 2007) and H.B. 1061, 39th Legis. Sess. (Fla. 2007), each entitled "An act relating to actions involving freedom of speech and press; creating s. 770.09, F.S.; providing that the false light invasion of privacy cause of action is not recognized in Florida."

Anderson's "claim is not based upon the *literally* true statements contained in the article," but upon the '"statement' allegedly *implied* by the article" and that therefore "falsity is the 'essence' of plaintiff's claim." *Id.* at 32 (emphasis in original). We agree that "falsity" is the essence of this case, but it is semantic (and legal) sophistry to say that the "falsity" in false light is synonymous with the "falsity" for defamation.

Chapter 770 governs "Civil Action for Libel." Section 770.01 provides:

> **Notice condition precedent to action or prosecution for libel or slander**
>
> Before any civil action is brought for publication or broadcast, in a newspaper, periodical, or other medium, of a libel or slander, the plaintiff shall, at least 5 days before instituting such action, serve notice in writing on the defendant, *specifying the* article or broadcast and the *statements therein which he alleges to be false and defamatory*. (emphasis supplied).

So the *sine qua non* for initiating a libel action in Florida is telling the newspaper which of its "statements" are false. *See Orlando Sports Stadium, Inc. v. Sentinel Star Co.*, 316 So. 2d 607 (Fla. 4th DCA 1975):

> The statute clearly and expressly requires the notice to *specify the statements* therein which the plaintiff alleges to be *false and defamatory*. Although Appellants' notice

> specified the article *there is no specification as to the statements* therein alleged to be false and defamatory.

Id. at 610. Indeed *Gannett* has hoisted at least one plaintiff on the petard of the statute's specific statements requirements. In *Gannett Florida Corp. v. Montesano*, 308 So. 2d 599 (Fla. 1st DCA 1975), a fellow provided this 770.01 notice to Gannett:

> "Pursuant to Florida Statute 770.01, you are hereby notified that a civil action for libel will be brought against The Gannett Florida Corporation in the Circuit Court of Volusia County Florida, after five days from the service of this notice for the publication in the newspaper "Today" on or about May 10, 1970, of the attached article which was false and defamatory in that it imputed a crime to my client, Mr. Carmen Montesano."

Id. at 599. Gannett refused to retract, Montesano won at trial, and Gannett appealed, arguing that the 770.01 notice was insufficient. The court agreed and reversed the judgment against Gannett:

> An examination of plaintiff's notice above quoted in toto with the applicable statute, also above quoted in toto, readily reveals the deficiency. The statute clearly and expressly requires the notice to specify "the article, *and the statements therein*, which he [plaintiff] alleges to be false and defamatory." Although plaintiff's notice specified the article and attached a copy

> thereof there is no specification as to the statements therein alleged to be false and defamatory. The notice was therefore insufficient. (See special concurring opinion in *Adams v. News-Journal Corporation*, Sup. Ct.Fla. 1955, 84 So.2d 549).

Id. at 599-600.

The purpose of the 770.01 notice is to allow the false "statements" to be corrected in order to avoid exemplary damages. *See* section 770.02(1) which speaks of "facts" and "reasonable grounds for believing that the *statements*. . . were *true*. . . ." (emphasis supplied).[2]

---

[2] The 770.02 statute provides, in relevant part:

> **Correction, apology, or retraction by newspaper or broadcast station**
>
> (1) If it appears upon the trial that said article or broadcast was published in good faith; that its falsity was due to an honest mistake of the *facts*; that there were reasonable grounds for believing that the *statements* in said article or broadcast *were true*; and that, within the period of time specified in subsection (2), a full and fair correction, apology, or retraction was, in the case of a newspaper or periodical, published in the same editions or corresponding issues of

It is interesting to consider what Anderson could have done under 770.01 – how could he have specified false statements when the statements were actually true? What would the Respondents do if they had been confronted with a 770.01 letter which said that "everything you have written about me is true, but I want you to retract it anyway because it makes me look like I murdered my wife." Undoubtedly they would have done nothing, properly relying upon the statutory requirement that Anderson could not bring a libel or slander suit in Florida unless he met the condition precedent of 770.01, a condition precedent that he was absolutely unable to meet.

At the heart of the Respondents' (and *amicis*') efforts to equate false light and defamation is their wilfull blindness to the stringent Chapter 770 pre-suit requirements for a libel or slander claim. Anderson's argument is tied to Florida law, not general theories about libel, slander and false light. An example of the Respondents' attempt to generally conflate false light and libel is their offer of

---

> the newspaper or periodical in which said article appeared and in as conspicuous place and type as said original article or, in the case of a broadcast, the correction, apology, or retraction was broadcast at a comparable time, then the plaintiff in such case shall recover only actual damages. (emphasis supplied).

Black's Law Dictionary's definition of "false-implication libel" as embracing "a false implication or impression even though each statement in the article, taken separately, is true." Respondents' Answer Brief, at 34. What is most important is that the definition is followed by this directive: "*See* FALSE LIGHT; INVASION OF PRIVACY." *Id.* So even Black's belies the Respondents' notion that "libel by implication" always swallows the fourth factor in Florida false light: "publication of facts which place a person in a false light even though the facts themselves may not be defamatory." *Agency for Healthcare*, 678 So. 2d 1239, 1252 n.20(Fla. 1996); *Allstate Ins. Co. v. Ginsberg*, 863 So. 2d 156, 162 (Fla. 2003) ("But here we affirm that the statement in AHCA does correctly state what is included in Florida's tort of invasion of privacy"). Indeed, the Court's recent reaffirmation of the false light principles bolsters our argument that it is different from defamation and negates the Respondents' invitation to revisit false light's reason for being.

Perhaps nothing reveals the Respondents desire to do away with false light *and* insulate themselves from "libel by implication" than the Respondents' footnote that "[p]remising a libel claim on false implications from truth stated facts poses an obvious danger to free speech." Respondents' Answer Brief, p. 34. They say there may be a "rare" case where "false implication is created by literally true statements" and offer *Brown v. Tallahassee Democrat*,

Inc., 440 So. 2d 588 (Fla. 1st DCA 1983) as an example. *Id*. But *Brown* involved a false fact: Brown's picture was identified to be "'Johnson, that of the accused in fact on trial [for murder]." 440 So. 2d at 589. One of Respondents' *amici* offers *Brown* too, along with several other Florida cases which they suggest indulge defamation by implication (Brief of *Amicus Curiae* First Amendment Foundation, p. 6), but we have already demonstrated that those cases involved factual falsities and did not suggest that literally true facts can ever be the subject of libel, slander or defamation. Petitioner's Initial Brief, pp. 14-15 and n.3.

The bottom line is that libel in Florida requires a false statement. The Respondents' and the multiple media organizations *amicus* brief offer J. Clark Kelso's 1992 "*False Light Privacy: A Requiem*" to support their arguments to kill false light in Florida. Respondents' Answer Brief, p. 29; Amended Brief of *Amicus Curiae* in Support of Respondents, p. 4. But Professor Kelso actually makes our point that truth and defamation are incompatible. Surveying the cases he wrote:

> Each of these cases could be cited as proof that false light exists, because in each case the court permitted the case to proceed to trial with false light as one possible theory. Yet it is plain in each case that if the *offending statement was false*, a prerequisite for liability under false light, *then there would also be liability for defamation*. The false light cause of action added nothing to the case that was already there. As a

> practical reality, these cases do not support independent existence of false light. They support only the limited proposition that if there can be liability for defamation there can also be liability for false light.

J. Clark Kelso, *False Light Privacy: A Requiem*, 32 Santa Clara L.Rev. 783, 843 (1992) (footnote omitted, emphasis supplied).

We agree that a false light claim based on false facts is defamation in disguise. But there is room for a false light claim based on true facts, and Kelso's commentary underscores the fact that his focus is on the former, not the latter. False light emanating from truthful facts is not "only in Prosser's mind" (*id.* at 787), it exists to fill a gap which the media want to close: "publication of facts which place a person in a false light even though the facts themselves may not be defamatory." *Agency for Healthcare*, *supra* at 1252 n.20.

Finally, Respondents' overbroad statement that "there is no meaningful difference between libel and false light in theory, and absolutely no difference between the torts in practical application" (Respondents' Answer Brief, p. 36) merely repeats their unwillingness to look the cases and Florida law in the eye.

The Respondents cannot avoid the fact that the Supreme Court of the United States has unequivocally left open the question of whether truthful

publications "may ever be subjected to criminal or civil liability" citing *Florida Star v. B.J.F.*, 491 U.S. 524, 532-33, 109 S.Ct. 2603, 105 L.Ed 2d 443 (1989) and *Bartnicki v. Vopper*, 532 U.S. 514, 529, 121 S.Ct. 1753, 149 L.Ed. 2d 787 (2001). Petitioner's Initial Brief, pp. 16-17. The Respondents' responded with a non-sequitur: "Nothing in *Florida Star* or *Bartnicki* undercuts the requirement that in false light cases proof of falsity is constitutionally mandated." Respondents' Answer Brief, p. 35. Obviously there would have to be a false portrayal; the Supreme Court was not suggesting that truthful facts conveying a truthful portrayal is potentially actionable.

Nor does the Respondents' invocation of *Bartnicki's* comments about privacy, public interest and the Warren and Brandeis 1890 law review article (Respondents' Answer Brief, pp. 35-36) close the door on the question left open by the Supreme Court. Respondents say "the article about political clout in this case" is protected as a matter of public interest (*id.* at 35), but they omit the fact that the false light passages were not about "political clout," but were about a ten year old hunting accident and divorce petition gratuitously thrown in to signal murder and motive. No "public interest" was served by that portion of the article. *Florida Star* and *Bartnicki* were prescient in leaving the door open:

> Our cases have carefully eschewed reaching this ultimate question [of whether truthful

> publication may be punished consistent with the First Amendment], mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily.

Florida Star, 491 U.S. at 532-33.

CONCLUSION

The Court should accept jurisdiction and reverse the decision below. The Respondents' and their *amici* clearly view the issue in this case as one of great public importance. When the New York Times, ABC, ESPN the Association of American Publishers, the Florida Press Association, Media General, Cox Enterprises, the Orlando Sentinel, E.W. Scripps, and the Sun Sentinel Co. band together (Amended Brief of *Amici Curiae* in Support of Respondents) and then join with the First Amendment Foundation (Brief of *Amicus Curiae* First Amendment Foundation in Support of Respondents Gannett Co., Inc. et al.), one knows that more than the First Amendment is at stake; the desire to tailor Florida law to suit their interests is paramount. This Court should decide whether the decision below was consistent with Florida law. The fact that the Court of Appeals certified its decision to this Court reflects both the importance of the issue and the Court of Appeals' recognition that there may be a different answer than the one given below to the question presented.

Respectfully submitted,

BRUCE S. ROGOW
Florida Bar No. 067999
BRUCE S. ROGOW, P.A.
Broward Financial Centre, Suite 1930
500 East Broward Blvd.
Fort Lauderdale, FL 33394
Ph: (954) 767-8909
Fax: (954) 764-1530
e-mail: guntherc@rogowlaw.com
and
BEVERLY POHL
Florida Bar No. 907250
BROAD AND CASSEL
100 S.E. Third Avenue, Suite 2700
Fort Lauderdale, FL 33394
Ph: (954) 764-7060
Fax: (954) 713-0962
e-mail: bpohl@broadandcassel.com
and
WILLIE E. GARY
Florida Bar No. 187843
PHYLLIS GILLESPIE
Florida Bar No. 130801
C.K. HOFFLER
Florida Bar No. 188646
GARY,WILLIAMS, ET AL.
221 E. Osceola Street
Stuart, Florida 34994
Ph: (772) 283-8260
Fax: (772) 463-4319

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via U.S. Mail this 19th day of March, 2007 to the following persons:

DENNIS K. LARRY
DONALD H. PARTINGTON
CLARK, PARTINGTON, HART, LARRY, BOND AND STACKHOUSE
125 West Romana Street, Suite 800
Pensacola, Florida 32501
Ph: (850) 434-9200
Fax: (850) 432-7340
Attorneys for Gannett Co., Inc.

ROBERT C. BERNIUS, ESQ.
NIXON PEABODY LLP
401 9th Street, N.W., Suite 900
Washington, D.C. 20004-2128
Ph: (202) 585-8000
Fax: (202) 585-8080
Attorneys for Multimedia Holdings Corp.

ROBERT G. KERRIGAN
KERRIGAN, ESTES, RANKIN & MCLEON, LLP
400 E. Government Street
Penascola, Florida 32501
Ph: (850) 444-4444
Fax: (850) 444-4495
Attorneys for Multimedia, Inc.

TALBOT (SANDY) D'ALEMBERTE
1117 Myers Park Drive
Tallahassee, FL 32306-1470
Ph: (850) 644-0800
Attorney for Appellants

JON MILLS
TIMOTHY MCLENDON
P.O. Box 2099
Gainesville, FL 32602
Ph: (352) 378-4154
Fax: (352) 336-0270
Attorneys for Amicus Curiae

JONATHAN D. KANEY, JR.
JONATHAN D. KANEY III
COBB & COLE
P.O. Box 2491
Daytona Beach, FL 32115
Attorneys for Amicus Curiae

_____

BRUCE S. ROGOW

CERTIFICATE OF COMPLIANCE

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.

_____

BRUCE S. ROGOW