IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC06-2491

JEWS FOR JESUS, INC.,
Petitioner,

v.

EDITH RAPP,
Respondent.

PETITIONER=S INITIAL BRIEF

On Certified Question from Fourth District Court of Appeal
Lower Tribunal No. 4D05-4870

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PRELIMINARY STATEMENT

In this Brief, the Petitioner, Jews for Jesus, Inc., will be referred to as Defendant or Petitioner. The Respondent, Edith Rapp, will be referred to as either Plaintiff or Respondent. Citations to the Record on appeal will be cited as (R. ___). Citations to the Appendix to Petitioner's Initial Brief will be to the page of the Appendix on which the document appears and will be cited as (A. ___). Citations to the Transcript will be cited as (T. ___).

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STATEMENT OF THE CASE AND FACTS

This case began on December 11, 2003, when Edith Rapp filed a Complaint for False Light Invasion of Privacy, Defamation and Emotional Distress against Jews for Jesus, Inc. (A. 18-24). The Complaint contained many irrelevant and scandalous allegations against Jews for Jesus as an organization. *See id.* The Complaint alleged that Bruce Rapp, an employee of Jews for Jesus, falsely stated in a praise report in a Jews for Jesus newsletter that Plaintiff Edith Rapp, Bruce=s step-mother, had repeated the sinner=s prayer[1] with him on one occasion and asked the reader of the newsletter to pray for Agrace and strength for new Jewish believer Edie.@ (A. 20). The newsletter stated, in relevant part, under the heading of a APraise Report@:

> This is not exactly a ABit from the Branch@ but since we have asked you on occasion to pray for the salvation of our family members, we wanted to share this simcha (joy) with you:
>
> Bruce Rapp reports, AI had a chance to visit with my father in Southern Florida before my Passover tour. He has been ill for some time and I was afraid that I may not have another chance to be with him. I had been witnessing to him on the telephone for the past few months. He would listen and allow me to pray for him, but that was about all. On this visit, whenever I talked to my father, my step-mother, Edie (also Jewish), was always close by, listening quietly. Finally, one morning Edie began to ask me questions about Jesus. I explained how God gave us Y=Shua (Jesus) as the final sacrifice for our atonement, and showed her the parallels with the Passover lamb. She began to cry, and when I asked her if she would like to ask God for forgiveness for her sins and receive Y=shua she said yes! My stepmother repeated the sinner=s prayer with me - praise God! Pray for Edie=s faith to grow and be strengthened. And please pray for my father

[1] The Asinner=s prayer@ is a common parlance referring to the prayer of conversion to Christianity.

Marty=s salvation.

(R.1-7, Exh. A). On page three of the newsletter, under the heading APrayer Prompters,@ the newsletter stated, APlease pray for: grace and strength for new Jewish believer Edie and salvation for her husband, Marty (p.5).@ *Id*.

Plaintiff=s Complaint contained allegations such as, ADefendant Jews for Jesus uses many false assertions and deception in order to try to induce members of the Jewish faith to abandon the beliefs of their heritage yet believe they are still Jews.@ (A. 18). The Complaint accused Jews for Jesus of holding views which are Aalien and contrary to Jewish beliefs,@ and even stated that, AJews for Jesus targets elderly Jews for conversion in order to persuade them to leave all or some of their money to Jews for Jesus instead of their families when they die.@ (A. 19). The Complaint stated, AMany Jews harbor feelings of extreme animosity towards Jews for Jesus which represents to them the latest example of an effort that has gone on for hundreds of years, i.e. the end of the Jewish religion and the Jewish faith.@ (A. 21).

Count 1 of the Complaint alleged False Light Invasion of Privacy, Count 2 alleged Defamation, and Count 3 alleged Intentional Infliction of Emotional Distress. (A. 18-24).

Defendant filed a Motion to Dismiss the Complaint and to Strike Certain Statements from the Complaint. (R. 13-31). Specifically, Defendant asked the Court to dismiss all the counts of the Complaint and to strike paragraphs 3, 4, 5, 6, 7, 8, 10, 11, 13, 20, 29, 30 and 37 with prejudice. *See id.* In an Order dated April 27, 2004, the

Circuit Court granted the Motion to Dismiss without prejudice and granted the Motion to Strike with prejudice. (R. 32; A. 13).

Plaintiff filed an Amended Complaint on June 8, 2004. (A. 25-41). The Amended Complaint contained the identical allegations that the Circuit Court had previously stricken with prejudice.

The Amended Complaint realleged the False Light Invasion of Privacy, Defamation and Intentional Infliction of Emotional Distress claims and also added a Count alleging Negligent Training and Supervision. (A. 25-41). Defendant filed a Motion to Dismiss the Amended Complaint with prejudice and to again strike certain statements from the Amended Complaint. (R.71-92).

On March 8, 2005, the Circuit Court entered an Order granting the Motion to Strike with prejudice the paragraphs of the Complaint that were previously stricken with prejudice. (A. 14-15). The Circuit Court also struck certain statements from the Amended Complaint that were similar to the paragraphs stricken with prejudice. *See id.* The Court granted the Motion to Dismiss with prejudice as to the False Light Invasion of Privacy and Defamation claims, but granted the Motion to Dismiss without prejudice as to the Intentional Infliction of Emotional Distress and Negligent Training and Supervision claims. *See id.*

On March 28, 2005, Plaintiff filed a Second Amended Complaint. (A. 42-59). Like the Amended Complaint, the Second Amended Complaint contained many of the

statements that were previously stricken with prejudice. Defendant moved to dismiss the Second Amended Complaint with prejudice and again moved to strike certain statements from the Second Amended Complaint that had been stricken with prejudice on two previous occasions by the Circuit Court. (R.120-136).

On June 13, 2005, Defendant=s Counsel served a Motion for Sanctions on Plaintiff=s Counsel pursuant to Fla. Stat. '57.105. (R.140 at &6). After the twenty-one day period under the statute had expired, on August 16, 2005, Defendant filed the Motion for Sanctions and requested that the Court sanction Plaintiff=s counsel and Plaintiff for including claims previously dismissed with no change in the factual or legal basis presented and for including in the Complaints, statements that had been previously stricken with prejudice. (R. 137-163). On November 8, 2005, a hearing was held before Judge Edward Fine on the Motion to Dismiss and the Motion for Sanctions. (T. 1-42). At the hearing, Defendant=s Counsel argued on the Motion for Sanctions that Plaintiff=s Counsel had been given statutory notice that the claims and allegations raised in the Complaints were frivolous and groundless and yet chose to pursue the issue. (T. 26-29). On August 16, 2005, Defendant served a Motion to Dismiss on the Plaintiff which detailed legal arguments explaining why each count of the complaint was legally deficient. At the hearing, Plaintiff=s counsel conceded on the record that there were absolutely no grounds for the negligent infliction of emotional distress claim and voluntarily withdrew that claim. (T. 33).

The Circuit Court granted the Motion to Dismiss with prejudice and concluded that it would not be possible for the Plaintiff to plead a cause of action. (A. 16-17). The Circuit Court also granted the Motion for Sanctions in part, stating:

> That portion of defense fees expended in responding to the First Amended Complaint that were incurred due to repetition by Plaintiff of the identical pleading that had previously been stricken are hereby taxed against the Plaintiff or Plaintiff=s attorney on the grounds that there was no legal basis to permit those repleadings. Regarding the latest Complaint, the Defendant=s Motion for Sanctions is granted, taxing fees and costs incurred in appearing at the latest dismissal hearing since the requisite notice was provided by Defendant pursuant to Florida Statute 57.105 and by that point it was clear that the claims presented were not supported by material facts necessary to establish a claim and were not supported by existing law.

(A. 17).

Plaintiff appealed to the Fourth District Court of Appeal, which issued a decision without oral argument on November 29, 2006. (A. 1-11). The court held that the Circuit Court=s order striking certain paragraphs from the Complaint was not an abuse of discretion, stating, AThe stricken paragraphs detail the theological animosity between the plaintiff and Jews for Jesus; they are redundant, bellicose, and unnecessary to state the causes of action alleged. A complaint in a lawsuit is not a press release.@ (A. 4). After holding that the First Amendment did not bar the tort actions, the court upheld the dismissal of the defamation claim, stating that the language in the newsletter was not defamatory because A[t]o the common mind, the idea intended to be conveyed in the newsletter was neither derogatory nor hateful.@ (A. 6). The court upheld the dismissal of the intentional infliction of emotional distress claim, holding that the Anewsletter

publication falls short of conduct required to support the tort of intentional infliction of emotional distress.@ (A. 8).

With regard to the false light invasion of privacy claim, the court held that, although the Supreme Court had yet to explicitly recognize the tort in the State of Florida, AThe court tacitly recognized this cause of action in *Ginsberg* and *Agency for Health Care*.@ (A. 10)(citing *Allstate Ins. Co. v. Ginsberg*, 863 So. 2d 156 (Fla. 2003); *Agency for Health Care Admin. v. Assoc. Indus. of Fla., Inc.*, 678 So. 2d 1239 (Fla. 1996)). The District Court stated, AWere we writing on a blank slate, we would be inclined to side with those courts rejecting the false light cause of action. However, *Ginsberg* and *Agency for Health Care*, as well as cases from this court, have given false light invasion of privacy a toehold in Florida law.@ (A. 10-11). The court then certified the following question to this Court as being one of great public importance:

> Does Florida recognize the tort of false light invasion of privacy, and if so, are the elements of the tort set forth in section 652E of Restatement (Second) of Torts?

(A. 11).[2]

The outcome of the District Court=s decision was that only the false light invasion of privacy claim and the negligent training and supervision claim remained. The dismissal of the remaining claims was affirmed.

[2] The District Court also reversed the dismissal of the negligent training and supervision claim because that dismissal was based on the dismissal of the other claims. (A.).

Jews for Jesus filed a Notice invoking this Court=s discretionary jurisdiction on December 20, 2006. This Court originally stayed this action pending the outcome of a Petition for Rehearing filed in the District Court. *See* Order of December 26, 2006. The District Court denied rehearing on January 9, 2007. (A. 12). Shortly thereafter, this Court stayed this case pending the outcome of the case of *Anderson v. Gannett Company, Inc.*, Case No. SC06-2174. *See* Order of April 13, 2007. On September 26, 2007, this Court lifted the stay in this case and ordered briefing and set this case for argument in conjunction with the *Anderson* case. *See* Order of September 26, 2007.

SUMMARY OF THE ARGUMENT

This Court should refuse to recognize the tort of false light invasion of privacy. The tort has had a checkered history, both in its origination and development in the case law. The false light invasion of privacy tort was never contemplated in the initial development of the tort of invasion of privacy. In fact, the tort of invasion of privacy, as well as the creators of the tort (Warren and Brandeis), were more concerned with the accurate reporting of truthful information. False light invasion of privacy did not appear anywhere in the Restatement of Torts nor in the case law of the courts dealing with invasion of privacy claims until 1960. In 1960, Dean Prosser posited that false light invasion of privacy was one of the torts contemplated within invasion of privacy. Dean Prosser=s inclusion of the tort in the scheme of invasion of privacy was, according to one commentator, Awishful thinking@ and was based on dubious analyzing of the case law. Even Dean Prosser had concerns with the tort of false light invasion of privacy and whether it would swallow up the whole law of defamation. Since the time the tort was created, false light invasion of privacy has rarely been successful in the courts. Indeed, no court in Florida has ever upheld liability on a false light invasion of privacy claim.

The tort of false light invasion of privacy is duplicative of other torts such as defamation, intrusion, public disclosure of private facts and negligent and intentional infliction of emotional distress. Virtually all of the false light invasion of privacy cases could have been brought under other torts already existing. While there is an exceedingly

small margin of factual situations where the tort does not overlap with existing law, allowing false light in those circumstances would give rise to significant constitutional concerns related to the prohibition of freedom of speech and the press. Furthermore, the very existence of the tort and its elusive and amorphous nature unconstitutionally chill speech. The tort is also unconstitutionally vague because no one knows what speech is prohibited and what is allowed. Even commentators and courts disagree over what speech falls solely within the false light invasion of privacy tort. Citizens and the media cannot be expected to know what speech is prohibited. The vagueness of the tort renders it unconstitutional and contributes to the chilling of freedom of speech and the press. The overlap of the tort with existing tort law and the significant constitutional concerns raised by the tort lead to the conclusion that this Court should reject recognition of the tort in Florida.

Finally, this case is not a vehicle for the recognition of the tort of false light invasion of privacy. The statements that were made here about the plaintiff were not highly offensive to a reasonable person. It is not offensive to a reasonable person to be called a Christian. Because there was no false light invasion of privacy in this case, there can be no recognition of the tort using this case as a vehicle.

STANDARD OF REVIEW

The Supreme Court=s review of a certified question is a question of law that is reviewed *de novo*. *See Nelson v. State*, 875 So. 2d 579, 581 (Fla. 2004). In reviewing an

order on a motion to dismiss for failure to state a cause of action, the standard of review is de novo. *See BellSouth Telecomms., Inc. v. Meeks*, 863 So.2d 287, 289 (Fla.2003).

ARGUMENT

I.

THIS COURT SHOULD NOT RECOGNIZE THE TORT OF FALSE LIGHT INVASION OF PRIVACY BECAUSE IT IS DUPLICATIVE OF EXISTING TORTS AND IT INFRINGES ON FIRST AMENDMENT PROTECTIONS.

Florida should not recognize the tort of false light invasion of privacy because it is duplicative of already existing torts that provide recovery for plaintiffs who are harmed and because accepting the tort causes genuine constitutional restrictions on freedom of speech and the press. No good reason exists for recognizing the tort generally for the state and if there is a minimal benefit to be had in recognizing the tort, it is overshadowed by the constitutional complications spawned by recognizing the tort.

A. Background of the False Light Invasion of Privacy Tort.

1. The Origin and Development of False Light Invasion of Privacy.

The tort of invasion of privacy is generally credited with first appearing in a law review article written in 1890 by Samuel D. Warren and his law partner Louis Brandeis, who later became a Justice of the United States Supreme Court. *See* Warren and

Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). AWarren and his wife, the daughter of Senator Bayard of Delaware, were among the social elite of Boston. This was during the era of >yellow journalism,= and the newspapers of Boston were specializing in articles embarrassing to >blue bloods.=@ *Renwick v. News & Observer Pub. Co.*, 312 S.E. 2d 405, 411 (N.C. 1984) (citing Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960)). Warren did not appreciate the Ayellow journalism@ of the era. AThe matter came to a head when the newspapers had a field day on the occasion of the wedding of a daughter, and Mr. Warren became annoyed.@ *Id*. That annoyance led to the publishing of the article entitled *The Right to Privacy* which became the foundation for the recognition of the tort of invasion of privacy.

Warren and Brandeis argued that the common law should protect the right to privacy and argued that, AAlthough no English cases articulated a >right to privacy,= several cases decided under theories of property, contract, or breach of confidence also included invasion of privacy as a basis for protecting personal violations.@ *Lake v. Wal-Mart Stores, Inc.*, 582 N.W. 2d 231, 234 (Minn. 1998) (citing Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. at 203-10). The article encouraged a change in the common law based on the authors= view that the common law changes over time to Ameet the wants of an ever changing society and to apply immediate relief for every recognized wrong.@ Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. at 213 n.1. AThus Messrs. Warren and Brandeis endeavored to demonstrate, and quite successfully, that the

right of privacy was inherent in the common law and had been protected , as shown by a number of English cases, under the guise of property rights, etc., and that the time had come for a recognition of this right of privacy as an independent right of the individual.@ *Cason v. Baskin*, 20 So. 2d 243, 248 (Fla. 1945).

Notably, the Warren and Brandeis article never mentioned any tort akin to false light invasion of privacy and instead focused more on accurate reporting of personal facts. AWarren and Brandeis . . . did not identify the publication of false information as a wrong demanding some new remedy. Their primary concern was press exposure of accurate but personal information.@ Diane Leenheer Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. REV. 364, 375-76 (1989). In fact, Athe article suggests that Warren and Brandeis assumed that the law of defamation provided all the protection that was needed against >inaccurate portrayal of private life.=@ *Id*. at 376 n.68.

After the article was published, courts across the nation began to recognize the tort of invasion of privacy almost exclusively in the realm of misappropriation of personal information for commercial advertising uses. In 1902, New York=s highest court held that the use of a photograph of a young lady as part of an advertisement for the sale of flour was not an invasion of privacy. *See Roberson v. Rochester Folding-Box Co.*, 64 N.E. 442 (N.Y. 1902). About a year later, the New York legislature adopted a statute prohibiting the unauthorized use of a person=s name or picture for advertising purposes. *See Cason*, 20 So. 2d at 249. Two years later, the Supreme Court of Georgia held that

the publication of a picture of the plaintiff without his consent as part of a newspaper advertisement for insurance constituted invasion of privacy. *See Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1904). *Pavesich* is generally acknowledged to be the seminal case recognizing the tort of invasion of privacy for the first time. ALittle evidence exists that, prior to 1960, courts deciding seminal cases in this area would have identified falsity as an important issue, or even an issue at all. If the problem was falsity, plaintiffs could sue for defamation.@ Zimmerman, *False Light Invasion of Privacy: The Light that Failed*, 64 N.Y.U. L. REV. at 374.

Prior to 1960, the courts deciding cases involving invasion of privacy were concerned, as were Warren and Brandeis, with the accurate reporting of personal information, such as misappropriation of personal information *for commercial gain*. False light invasion of privacy, involving the publication of false information, was simply not a concern of the courts prior to 1960, and if it was a concern, it was rightly confined to the area of defamation. As evidence that false light invasion of privacy was simply not a concern of the courts developing invasion of privacy tort law, in 1939, the American Law Institute recognized the tort of false light invasion of privacy by including it in the Restatement of Torts, but the definition does not come anywhere close to recognizing a tort like false light invasion of privacy. The Restatement defined invasion of privacy as, AA person who unreasonably and seriously interferes with another=s interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other.@

Restatement of Torts ' 867 (1939).

False light invasion of privacy was not a judicially or legislatively created doctrine. Rather, the tort was first created by Dean William L. Prosser and was blessed by the American Law Institute when it included the tort in the Restatement (Second) of Torts. In 1960, Prosser published a law review article on the subject of invasion of privacy. *See* William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960). In the article, Prosser stated that invasion of privacy Ais not one tort, but a complex of four. The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff . . . >to be let alone.=@ *Id.* at 389. One of the torts recognized by Prosser as falling within the area of invasion of privacy was conduct that Aconsists of publicity that places the plaintiff in a false light in the public eye.@ *Id.* at 398. Prosser=s Aefforts at creative taxonomy, applied to the rather amorphous body of judicial opinion on privacy, in a real sense >invented= the false light tort by singling out previously unacknowledged features common to most of the nonadvertising appropriation cases.@ Zimmerman, *False Light Invasion of Privacy: The Light that Failed*, 64 N.Y.U. L. REV. at 382. As one commentator has pointed out, Prosser=s assertion that the tort of false light invasion of privacy had Amade a rather nebulous appearance in a line of decisions@ and that it had begun to receive independent recognition, was inaccurate. J. Clark Kelso, *False Light Privacy: A Requiem*, 32 SANTA

CLARA L. REV. 783, 790 (1992). AThe 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.@ *Id*.[3]

Prosser himself was concerned about the false light invasion of privacy tort he created and was particularly concerned that the tort would Afunction entirely free of the restraints that imposed at least some check on the tendency of defamation law to impede free speech and encourage trivial disputes.@ Zimmerman, *False Light Invasion of Privacy: The Light that Failed*, 64 N.Y.U. L. REV. at 382 (citing Prosser, *Privacy*, 48 CALIF. L. REV. at 401).

ABy 1960, Prosser was widely recognized as one of the leading torts scholars in the country and held the influential position of Reporter for the Restatement (Second) of Torts.@ Kelso, *False Light Privacy: A Requiem*, 32 SANTA CLARA L. REV. at 789. It was Prosser=s position and influence that led the American Law Institute to adopt the false light invasion of privacy tort in the Restatement (Second) of Torts in 1977. *See* Restatement (Second) of Torts ' 652E (1977). The Restatement (Second) defined the

[3] For an excellent analysis of the cases Prosser used to create the tort of false light invasion of privacy, *see id*. at 788-814. The author concludes, after analyzing each of the cases Prosser relied upon in creating the false light invasion of privacy tort, that AEach of the cases which Prosser cites is readily explainable on another basis that does not involve what Prosser ultimately calls false light privacy.@ *Id*. at 789. The author describes Prosser=s assertion that the cases had independently recognized a false light invasion of privacy tort as Awishful thinking@ and noted that, because of Prosser=s position as the Reporter of the Restatement (Second) of Torts, AMany believed that if Prosser said the cases stood for a particular proposition, then it must be true.@ *Id*.

false light tort as:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Id. The Restatement (Second) even recognized the close relation and overlap between false light invasion of privacy and the tort of defamation. The comment to section 652E states, AIn many cases to which the rule stated here applies, the publicity given to the plaintiff is defamatory, so that he would have an action for libel or slander under the rules stated in Chapter 24. In such a case the action for invasion of privacy will afford an alternative or additional remedy, and the plaintiff can proceed upon either theory, or both, although he can have but one recovery for a single instance of publicity.@ *Id*. at Comment b.

After Prosser=s article and the Restatement (Second)=s inclusion of the false light invasion of privacy, some courts began to acknowledge a separate tort of false light invasion of privacy. The Supreme Court of the United States decided two cases involving the false light invasion of privacy tort. In 1967, the Court held that a false light invasion of privacy action against a publisher could only proceed on a showing of knowing or reckless falsity. *See Time, Inc. v. Hill*, 385 U.S. 374 (1967). Seven years later, in 1974, the Court affirmed a verdict of liability for a publisher who ran an inaccurate story discussing the impact upon a family of the death of a father from a bridge collapse. *See Cantrell v.*

Forest City Pub. Co., 419 U.S. 245 (1974). The Court=s focus in *Cantrell* was the propriety of a jury instruction requiring knowing or reckless falsehoods. *Id*.

After the Supreme Court=s reception of false light invasion of privacy, courts began applying the tort in specific cases. From the time of the creation of the tort in 1960 to 1992, there were over 600 cases mentioning false light invasion of privacy by name. In a study done in 1992, the author concluded that Athere is not even a single good case in which false light can be clearly identified as adding anything distinctive to the law. In the overwhelming majority of cases, false light is simply added on at the end of the complaint to give the complaint the appearance of greater weight and importance. False light is on the periphery, and the core of the case lies elsewhere, in defamation, in misappropriation, or in intentional infliction of emotional distress.@ Kelso, *False Light Privacy: A Requiem*, 32 SANTA CLARA L. REV. at 785. The author=s study revealed that, AWhat becomes clear upon this examination is that there is no practical need for the false light cause of action.@ *Id*. at 786. The same holds true in the intervening years since 1992. *See Gannett Co., Inc. v. Anderson,* 947 So. 2d 1, 6 (Fla. 1st DCA 2006) (surveying Florida appellate court decisions involving false light invasion of privacy and concluding, AOther 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.@).

Since false light invasion of privacy was first recognized in 1960, it Aremains the least-recognized and most controversial aspect of invasion of privacy.@ *Cain v. Hearst*

Corp., 878 S.W. 2d 577, 579 (Tex. 1994)(citing Bruce W. Sanford, *Libel and Privacy*, ' 11.4.1 at 567 (2d ed. 1991)(stating AOf Dean Prosser=s four types of privacy torts, the >false light= school has generated the most criticism because of its elusive, amorphous nature.@)); *cf.* Zimmerman, *False Light Invasion of Privacy: The Light that Failed*, 64 N.Y.U. L. REV. at 366 (stating, AFalse light invasion of privacy has caused enough theoretical and practical problems to make a compelling case for a stricter standard of birth control in the evolution of the common law.@). A majority of states have recognized and accepted the tort of false light invasion of privacy. *See e.g., West v. Media General Convergence, Inc.*, 53 S.W. 3d 640 (Tenn. 2001). However, other states have flatly rejected the tort. *See Renwick v. News & Observer Pub. Co.*, 312 S.E. 2d 405 (N.C. 2984); *Sullivan v. Pulitzer Broadcasting Co.*, 709 S.W. 2d 475 (Mo. 1986)(en banc); *Cain v. Hearst Corp.*, 878 S.W. 2d 577 (Tex. 1994); *Lake v. Wal-Mart Stores, Inc.*, 582 N.W. 2d 231 (Minn. 1998); *Denver Pub. Co. v. Bueno*, 54 P.3d 893 (Col. 2002).[4] Florida has not remained immune from the problems engendered by false light invasion of privacy.

2. Florida Recognizes Invasion of Privacy, But Has Never Recognized False Light Invasion of Privacy.

Florida first recognized the tort of invasion of privacy in 1945 in the case of *Cason*

[4] Some states have refused to recognize the tort on the ground that the state=s privacy claims are governed by statute and the statutes do not recognize false light invasion of privacy. *See e.g., Colandrea v. Town of Orangetown*, 490 F. Supp. 2d 342 (S.D. N. Y. 2007).

v. Baskin, 20 So. 2d 243 (Fla. 1945). In that case, a woman sued the author of a book claiming that the portrayal of her in the book invaded her privacy. After tracing the development of the right to privacy, this Court recognized the tort of invasion of privacy. This Court did caution, though, "But the right of privacy has its limitations. Society also has its rights. The right of the general public to the dissemination of news and information must be protected and conserved. Freedom of speech and of the press must be protected." *Id*. at 251.

Over fifty years later, this Court acknowledged the tort of invasion of privacy in *Agency for Health Care Administration v. Associated Industries of Florida, Inc.*, 678 So. 2d 1239 (Fla. 1996). The Court stated, "In *Cason v. Baskin*, [] this Court recognized and created a distinct right of privacy as part of our tort law that made particular conduct actionable." *Id*. at 1252. This Court then stated:

> The four types of wrongful conduct that can all be remedied with resort to an invasion of privacy action are: (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 places a person in a false light even though the facts themselves may not be defamatory.

Id. at 1252 n.20. The Court's discussion in *Agency for Health Care* was dictum, that was intended to dispel the argument that a defendant has an absolute constitutional right to affirmative defenses once created, by citing examples where affirmative defenses had been eliminated or abolished. *See id* at 1251-53. The footnote citing the four types of

privacy torts was neither necessary nor important to the Court=s holding in that case.

Nevertheless, in 2003, this Court decided *Allstate Insurance Company v. Ginsberg*, 863 So. 2d 156 (Fla. 2003). In *Ginsberg*, this Court was asked to answer a certified question from the Eleventh Circuit whether unwelcome sexual contact and touching constitute a tort of invasion of privacy in Florida. *Id*. at 158-59. After surveying Florida law, this Court stated, ABut here we affirm that the statement in *AHCA* does correctly state what is included in Florida=s tort of invasion of privacy.@ *Id*. at 162. This Court ultimately answered the certified question in the negative, but not before stating, AAs we noted at the time we first recognized this tort in *Cason*, the tort of invasion of privacy was not intended to be duplicative of some other tort.@ *Id*. at 162.

This Court has mentioned the false light invasion of privacy tort in passing, but has never explicitly recognized the tort as viable in Florida law. *See e.g., Tyne v. Time Warner Entertainment Co.*, 901 So. 2d 802 (Fla. 2005); *Cape Publications Inc v. Hitchner*, 549 So. 2d 1374 (Fla. 1989). However, AAs Justice Anstead pointed out in his concurring and dissenting opinion in *Ginsebrg*, general statements such as these are made not to adopt or reject a particular cause of action, but rather to >provide some organizational structure= to the various kinds of claims that have been identified by the case law or other legal authorities.@ *Anderson*, 947 So. 2d at 6 (quoting *Ginsberg*, 863 So. 2d at 164 (Anstead, J., concurring)). Therefore, this Court has never sanctioned, other than in passing, the tort of false light invasion of privacy.

The false light invasion of privacy tort has not fared well in the lower courts in Florida either. The First District Court of Appeal in the *Anderson* case recently surveyed Florida law on the subject of false light invasion of privacy and concluded that, "Other 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." *Anderson*, 947 So. 2d at 7 (citing Florida cases discussing false light invasion of privacy). "A review of the Florida appellate decisions that mention the false light theory reveals that the courts have often repeated Dean Prosser's summary of the four kinds of invasion of privacy claims, but without much analysis. In no case has a Florida appellate court affirmed a judgment for the plaintiff in a false light invasion of privacy case." *Id*.[5]

In short, false light invasion of privacy has a checkered history in Florida. It has been cited in passing by many courts, including this Court, but its viability has never been directly confronted. No Florida appellate decision upholds a false light invasion of privacy case. Even if one were to accept that this Court had recognized the false light invasion of privacy claim (a dubious proposition at best), the tort has remained nothing more than a

[5] *Heekin v. CBS Broadcasting, Inc.*, 789 So. 2d 355 (Fla. 2d DCA 2001), is not to the contrary. In *Heekin*, the Second DCA held only that the plaintiff stated a claim for false light invasion of privacy, not whether the plaintiff was actually successful on his claim. *Heekin* also assumed that this Court had recognized the tort which is something this Court has not explicitly done. On remand, the trial court held that the broadcast that was the subject of plaintiff's complaint did not create the false impression plaintiff alleged, and even if it did, it was barred by the two year statute of limitations for defamation. The appellate court affirmed the decision without comment. *See* Patricia Avidan, *Protecting the Media's First Amendment Rights in Florida: Making False Light Plaintiffs Play by Defamation Rules*, 35 STETSON L. REV. 227, 243 (2005).

Apaper tiger,@ offering no additional help to plaintiffs than is already available under existing tort law. The history of false light invasion of privacy in Florida demonstrates that this Court should not recognize it as a viable cause of action. It is unnecessary and creates more problems than it fixes. As shown in more detail below, Florida=s experience with the false light tort is inherent in the very make-up of the tort. Thus, false light invasion of privacy should not be recognized in this state.

B. False Light Invasion Of Privacy Duplicates Existing Torts And Is Thus Unnecessary.

False light invasion of privacy duplicates existing torts and provides no additional remedies for plaintiffs that are not already available in tort law. The North Carolina Supreme Court was the first to recognize the overlap and duplication of false light with existing torts such as defamation. *See Renwick v. News & Observer Pub. Co.*, 312 S.E. 2d 405, 412 (N.C. 1984). In *Renwick*, the court stated, A[A]ny right to recover for a false light invasion of privacy will often either duplicate an existing right of recovery for libel or slander or involve a good deal of overlapping with such rights.@ *Id*. AIt has often been recognized that claims for false light invasion of privacy and claims for libel or slander are at least very similar and that many of the same considerations apply to each type of claim.@ *Id*. The North Carolina Supreme Court quoted Dean Prosser=s concern that, AThe question may well be raised, and apparently is still unanswered, whether this branch of the tort [of invasion of privacy] 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.@ *Id*. at 412 (quoting Prosser, *Privacy*, 48 CALIF. L. REV. at 400-01).

Likewise, the Supreme Court of Texas rejected the false light invasion of privacy tort on the ground that it duplicates existing torts. *See Cain v. Hearst Corp.*, 878 S.W. 2d 577, 580-81 (Tex. 1994). The court stated, AIf we were to recognize a false light tort in Texas, it would largely duplicate several existing causes of action, particularly defamation.@ *Id*. at 580. The court noted that the tort overlapped in its requirement of falsity with defamation and in the types of damages sought under the tort. The Texas Supreme Court concluded, AThus many, if not all, of the injuries redressed by the false light tort are also redressed by defamation. . . . We see no reason to recognize a cause of action for false light invasion of privacy when recovery for that tort is substantially duplicated by torts already established in this State.@ *Id*. at 581. Similarly, the Colorado Supreme Court undertook a careful analysis of the differing elements of the torts of libel and false light and concluded, AWe therefore believe that the highly offended plaintiff is adequately protected by existing remedies.@ *Denver Pub. Co. v. Bueno*, 54 P.3d 893, 903 (Col. 2002).

In Florida, the tort of libel is virtually identical in its elements with the tort of false light invasion of privacy, although it is difficult to establish the exact elements of the false light tort since no Florida Court, other than *Heekin*, has set forth the elements of false light invasion of privacy. As the chart below demonstrates, the elements of the two torts

are virtually identical:

Libel[6]	**False Light**[7]
1. Publication	1. Publication
2. False	2. False
3. Without reasonable care (negligence)	3. Reckless disregard / no standard[8]
4. Actual damages	4. Actual damages[9]
5. Defamatory	5. Highly offensive to a reasonable person
6. About plaintiff	6. About plaintiff

[6] *See American Airlines, Inc. v. Geddes,* 960 So.2d 830, 833 (Fla. 3d DCA, 2007).

[7] *See* Restatement (Second) of Torts ' 652E.

[8] *See Heekin v. CBS Broadcasting Inc.,* 798 So. 2d 355, 359 (Fla. 2d DCA 2001)(holding, pursuant to *Cason,* 20 So. 2d at 252, that neither the truth of the information published nor the absence of malicious motives in publishing the information is a defense to an action for invasion of privacy).

[9] *See* Restatement (Second) of Torts ' 652H.

Other than potential differences in the standard of conduct (negligence vs. reckless disregard or no standard), and in whether the statement must be defamatory versus highly offensive to a reasonable person, the two torts are identical. *See also Bueno*, 54 P.3d at 899 (setting forth chart comparing libel with false light in Colorado, which chart is virtually identical to the Florida standards). However, the differences between the two torts are superficial at best and do not amount to any practical differences that justify recognition of the tort in Florida.[10]

As the *Bueno* court noted, the two torts are virtually identical in their elements and the conduct they seek to punish. *See Bueno*, 54 P.3d at 900-01. AThus, it comes as no surprise when commentators generally agree that in cases in which alleged conduct will support a false light claim, the same conduct will also support a defamation claim.@ *Id*. at 900. The *Bueno* court concluded, AIn terms of actionable conduct, however, the two torts target substantially similar behavior.@ *Id*. at 901.

The main difference between defamation and false light involves the interests protected by the tort. AThe primary difference between defamation and false light is that defamation addresses harm to reputation in the external world, while false light protects harm to one=s inner self.@ *Lake v. Wal-Mart Stores, Inc.*, 582 N.W. 2d 231, 235 (Minn. 1998). As one commentator has stated:

It has been said that the tort of false light invasion of privacy is

[10] This is especially true when considering the Constitutional concerns with recognition of the tort as described below.

> distinguishable from the tort of defamation in that false light invasion of privacy protects a person=s interest Ain being let alone,@ whereas defamation protects one=s interest in a good reputation. This distinction is often elusive, however, and not completely satisfactory. The law of defamation may be primarily concerned with protecting reputation, but it has always served at least secondarily the interest in compensating for injured feelings. More important, however, is the fundamental flaw in any definition of a tort that concentrates more on the species of injury to the victim than on the type of conduct on the part of the plaintiff that makes it actionable. To put the issue squarely, is there any distinction between the conduct of the actor giving rise to a claim for defamation and the conduct giving rise to a claim for Afalse light?@

2 SMOLLA & NIMMER ON FREEDOM OF SPEECH ' 24:3 (2007). With regard to the interests protected by false light, ALying at the core of all these >interests= are the personal feelings of the false light plaintiff. The issue is not whether others are given cause to change their perception of the plaintiff, but how the plaintiff himself responds to the publication.@ *Bueno*, 54 P.3d at 901. The *Bueno* court stated, with regard to this distinction:

> We believe that recognition of the different interests protected rests primarily on parsing a too subtle distinction between an individual=s personal sensibilities and his or her reputation in the community. . . . False statements that a plaintiff finds Ahighly offensive@ will generally either portray that plaintiff negatively or attack his conduct or character. At the same time, publicized statements that are disparaging and false satisfy the elements of defamation. Thus, the same publications that defame are likely to offend, and publications that offend are likely to defame.

Id. at 902. After noting the interests protected were substantively the same, the Colorado Supreme Court stated, ARemarkably few instances exist where the false light claim proceeded, but defamation failed. Those that did were on atypical facts or dubious legal grounds.@ *Id*. Finally, the Court concluded:

> We acknowledge the potential for precluding such claims, but we are convinced that those scenarios represent a decidedly narrow band of cases. If the published statement insults and disparages the plaintiff, he will quite naturally suffer shame and humiliation because those that read the falsity will view him differently, and defamation will properly lie. . . . If, however, the published intimate details are true, then Adisclosure@ is the proper cause of action. Should the publication take plaintiff's likeness and use it for pecuniary gain, the tort of appropriation provides relief. And there remains the tort of intentional infliction of emotional distress/outrageous conduct for offensive publications in which the defendant engaged in Aextreme and outrageous conduct, recklessly or with the intent of causing the plaintiff severe emotional distress,@ provided the plaintiff actually incurs severe emotional distress as a result of the defendant's conduct. The great majority of the scenarios proffered above would support a cause of action under one of these alternative theories. We therefore believe that the highly offended plaintiff is adequately protected by existing remedies.

Id. at 903 (citations omitted).

The First District Court of Appeal echoed the Colorado Supreme Court=s analysis in *Anderson* when it stated, ADefamation protects against harm to the plaintiff=s reputation, whereas false light was designed to protect against emotional injury. This statement is correct in theory but, in practice, nearly all false light cases involve a claim that the false impression harmed the plaintiff=s reputation.@ *Anderson*, 947 So. 2d at 10. Couple this understanding with the evidence that virtually all false light claims could have proceeded on a different theory of recovery and it becomes patently clear that no practical gain would be had by recognizing the tort in Florida. *See* Kelso, *False Light Privacy: A Requiem*, 32 SANTA CLARA L. REV. at 783 (noting the dearth of evidence that any false light cases were viable solely on a false light theory); *see also Anderson*, 947 So. 2d at 7 (stating that in no instance has a Florida court upheld a claim based on the

false light invasion of privacy theory).

Another difference between defamation and false light invasion of privacy is that, at least in theory, false light claims can be based on statements that are highly offensive to a reasonable person, but are not defamatory. However, AThis distinction, like the one relating to the nature of the damages, is largely academic. Most false light claims involve statements that would also be defamatory.@ *Anderson*, 947 So. 2d at 11.

> Although communications actionable under false light need not be defamatory - in theory, another distinguishing feature between the two torts - instances of non-defamatory communications supporting a claim for false light are rare. Arguably, falsely attributing some heroic action to a person would by >highly offensive to a reasonable person= and, as such, actionable under false light invasion of privacy. In reality, however, plaintiffs seldom plead - or succeed in - actions for false light based on false, complimentary portrayals.@

Avidan, *Protecting the Media=s First Amendment Rights in Florida*, 35 STETSON L. REV. at 239. Despite this practical consideration, Prosser himself was concerned that false light, taken too far, had the potential to swallow up the whole law of defamation. In his article on privacy, Prosser stated:

> It is here, however, that one disposed to alarm might express the greatest concern over where privacy may be going. The question may well be raised, and apparently still is unanswered, whether this branch of tort 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, *Privacy*, 48 CALIF. L. REV. at 401. The Texas Supreme Court, when it considered and rejected the tort of false light invasion of privacy, noted that AIt is questionable whether a remedy for nondefamatory speech should exist at all.@ *Cain*, 878 S.W. 2d at 583. The court noted that the Supreme Court viewed with disfavor the restriction of nondefamatory speech in the New York privacy statute when it said:

> We create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person=s name, picture or portrait, particularly as related to nondefamatory matter.

Cain, 878 S.W. 2d at 583 (quoting *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967)). The Texas Supreme Court concluded:

> The class of speech restricted by defamation is only that which defames. False light may be brought against any untruth to which the subject of the speech takes umbrage. Editors for the media may guard against defamation by being alert to facts which tend to diminish reputation; under false light, any fact in the story, no matter how seemingly innocuous, may prove to be the basis for liability.

Id. This concern led the Texas Supreme Court to consider the chilling effect on speech recognizing false light invasion of privacy would have. As discussed below, recognizing false light invasion of privacy would lead to chilling and self-censorship of speech given the uncertainty over what speech is prohibited and what is not. The uncertainty of what is punished in this area is ample justification alone for rejecting this tort.

Allowing recovery for statements that are not defamatory, but are highly offensive

to a reasonable person (if there is such a statement) swallows up the whole law of defamation and allows plaintiffs to circumvent the protections afforded to defendants under defamation law. The answer here is not to simply apply the defamation restrictions to false light claims either. Because there are very few, if any, statements that are actionable under false light invasion of privacy that are not also actionable under defamation, it makes no sense to create an entirely new theory of recovery that does not benefit anyone and has the potential to swallow up a whole area of law that has been carefully crafted to both punish wrongdoing and protect the constitutional rights of freedom of speech and the press.

Another difference that some point out between defamation and false light claims is that, in theory, false light claims can be based upon true statements, while defamation claims cannot. AThe fallacy in this argument is that a claim of libel can also be asserted on the theory that the defamatory act was implied. There is no difference between a libel by implication claim and a false light invasion of privacy claim if the statements are defamatory in both cases.@ *Anderson*, 947 So. 2d at 11. AIn essence, in jurisdictions such as Florida, which recognize defamation by implication, false light claims can also be pled as defamation unless the false inference is nondisparaging or complementary, although highly offensive.@ Avidan, *Protecting the Media=s First Amendment Rights in Florida*, 35 STETSON L. REV. at 239. Philosophically, it is difficult to see how punishing the publication of truthful information, outside of limited contexts, could be consistent with

freedom of speech and the press. *See e.g., Near v. Minnesota*, 283 U.S. 697, 716 (1931)(hypothesizing that the Apublication of the sailing dates of transports or the number and location of troops@ would not be protected speech).

The Supreme Court has specifically left open the question whether truthful speech can be punished consistent with the First Amendment. *See The Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989). Privacy law that is well-settled already publishes truthful speech that injures an individual in some way. The tort of appropriation punishes truthful speech, i.e. a person=s picture or likeness, for the benefit of another. Likewise, the tort of public disclosure of private facts punishes the dissemination of truthful, private information which a reasonable person would find objectionable. Given the fact that such torts already protect against the dissemination of truthful facts about a person in limited circumstances, and the countervailing constitutional concerns that punishing such speech is inconsistent with the First Amendment, it makes no logical sense to recognize the tort of false light invasion of privacy to punish the dissemination of truthful facts that are highly offensive to a reasonable person, assuming that such circumstances exist.

The overlap between false light invasion of privacy is significant to the point that the subset of cases that fall solely within the false light invasion of privacy claim are either so few as to not matter, or are nonexistent. Many, if not all, claims that could be brought under false light invasion of privacy can also be brought under another tort such as defamation, appropriation, public disclosure of private facts, or even intentional or

negligent infliction of emotional distress. Florida should not recognize a tort that duplicates existing remedies, yet lacks the careful protections afforded to defendants from the development of the common law defenses in other torts. Couple these concerns with the practical evidence that there are very few, if any, false light claims that do not also fall within another subset of tort law, and it is exceedingly clear that Florida does not need to add the tort of false light invasion of privacy to its law. Additionally, as stated below, if all the foregoing concerns were not enough, the constitutional difficulties with recognizing false light invasion of privacy claims plainly outweighs any benefit to be gained by recognition of this dubious tort.

C. Recognition Of False Light Invasion Of Privacy Unconstitutionally Chills Speech.

As discussed above, the tort of false light invasion of privacy overlaps with other existing torts. While not wholly identical, the tort significantly duplicates existing protections afforded plaintiffs under tort law. There are minor differences between the two torts, but those differences are either largely academic or raise significant free speech and freedom of the press concerns that outweigh any slight benefit that may be had in recognizing the tort. AFar from persuading us that these distinctions justify a separate tort, we believe they demonstrate that adopting a false light tort in this State would unacceptably derogate constitutional free speech rights....@ *Cain v. Hearst Corp.*, 878 S.W. 2d 577, 581 (Tex. 1994). AFreedom of the press is a critical part of our constitutional framework. We must weigh torts in this area carefully against the

infringement they represent upon freedom of the press.@ *Denver Pub. Co. v. Bueno*, 54 P.3d 893, 903 (Col. 2002).

One major constitutional concern with the recognition of false light invasion of privacy is that the potential breadth of the speech that is restricted by the tort unconstitutionally chills speech.

> One difference from defamation is that false light invasion of privacy encompasses a broader class of speech than that reached by defamation. Defamation, by definition, applies only to a comparatively narrow class of falsehoods capable of injuring the reputations of its victims. In addition, a wide array of highly technical substantive and procedural requirements further limits the situations in which defamation victims can sue. By contrast, in most jurisdictions, a false light claim can be brought for virtually any untruth on the ground that it has caused injured feelings. Thus, a plaintiff upset by a flattering untruth is in as good a position to sue as someone who complains of a false allegation of criminal conduct. And unlike defamation, false light is relatively unencumbered by common law restrictions; the major limitations are the rather vague requirements of substantiality and offensiveness. Therefore, it represents a more serious challenge to traditional first amendment values.
>
> To plaintiffs tangled in the technicalities of defamation, false light may seem a model for needed reform. But its very simplicity, once touted by some as the raison d=etre for the development of this sort of privacy action, when viewed from a broader perspective, suggests why false light is in fact a legal misfortune rather than a salvation.

Diane Leenheer Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. REV. 364, 393-94 (1989). As the Supreme Court stated, AWhatever is added to the field of libel is taken from the field of free debate.@ *New York Times v. Sullivan*, 376 U.S. 254, 272 (1964). AWhile less compelling, these same considerations are also at play in private, non-political expression.@ *Cain*, 878 S.W. 2d at 582. ASuch

serious questions exist as to the constitutionality of allowing plaintiffs to recover for the dissemination of legally obtained, accurate information that courts most often laud the right of privacy in dicta, only to deny its application to virtually any case before them.@ Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. REV. at 367.

The Colorado Supreme Court noted, A[I]n the limited area in which false light invasion of privacy and defamation are not coextensive, there is ambiguity and subjectivity that would invariably chill open and robust reporting.@ *Bueno*, 54 P.3d at 904. APermitting plaintiffs to bring actions for false light without the limits established by defamation actions may inhibit free speech beyond the permissible range. On the other hand, no useful purpose would be served by the separate tort if these restrictions are imposed.@*Cain*, 878 S.W. 2d at 582.

The North Carolina Supreme Court recognized the constitutional difficulties with recognizing the false light invasion of privacy tort. *See Renwick*,312 S.E. 2d at 413. AIn 1964, the Supreme Court of the United States decided *New York Times Co. v. Sullivan*, [] which held that the First Amendment itself imposes limitations upon state claims for libel or slander. In 1967, the Supreme Court decided *Time, Inc. v. Hill*, [] which extended First Amendment protections *at least* as stringent as those required by *Sullivan* to defendants in cases for false light invasion of privacy.@ *Id*. at 413. (emphasis in original). The North Carolina Supreme Court noted that, even with these restrictions,

there is a grave risk of impairing First Amendment rights when punishing the publication of facts that are nondefamatory, but fall within false light. AThis [concern about impairment of First Amendment rights] is especially true since plaintiffs in actions for invasions of privacy are entitled to nominal damages and in some cases to injunctive relief B *a prior restraint* B without allegation or proof of special damages.@ *Id*. (emphasis in original).

The potential for the chilling of speech by recognizing false light invasion of privacy as a tort counsels strongly against recognition of the tort in Florida. The small area where the tort of false light invasion of privacy does not overlap with other torts intrudes upon the area of freedom of speech and the press and chills speech in derogation to the Constitutional freedoms in the First Amendment.

D. The Tort Of False Light Invasion Of Privacy Is Unconstitutionally Vague.

Not only does the tort of false light invasion of privacy unconstitutionally chill speech because of its uncertainty and breadth, it also is unconstitutionally vague because it does not in any way put individuals on notice as to what speech is prohibited and what is allowed.

A vague restriction on speech Aeither forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.@ *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). The vagueness doctrine ensures that Aall be informed as to what the

state commands or forbids.@ *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). The prohibition against overly vague regulations protects citizens from having to voluntarily curtail their First Amendment activities because of fear that those activities could be characterized as illegal. *See Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).[11]

The tort of false light invasion of privacy, if recognized, raises serious constitutional concerns of vagueness. AOf 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. Sandford, LIBEL AND PRIVACY ' 11.4.1 at 567 (2d ed. 1991). The distinction between false light invasion of privacy and defamation Ais often elusive, however, and not completely satisfactory.@ 2 SMOLLA & NIMMER ON FREEDOM OF SPEECH ' 24.3 (2007). The Colorado Supreme Court rejected the tort because of its vagueness concerns, stating:

> Because tort law is intended both to recompense wrongful conduct and to prevent it, it is important that it be clear in its identification of that wrongful conduct. The tort of false light fails that test. The sole area in which it differs from defamation is an area fraught with ambiguity and subjectivity. Recognizing Ahighly offensive@ information, even framed within the context of what a reasonable person would find highly offensive, necessarily involves a subjective component. The publication of highly offensive material is more difficult to avoid than the publication of defamatory information that damages a person's reputation in the community. In order to prevent liability under a false light tort, the media would need to anticipate whether statements are Ahighly offensive@ to a reasonable person of ordinary sensibilities even though their publication does no harm to the

[11] While the vagueness analysis applies most strongly in the criminal context, it is appropriate to analogize to it here given the mandate that the invasion of privacy has the effect of prohibiting speech.

> individual's reputation. To the contrary, defamatory statements are more easily recognizable by an author or publisher because such statements are those that would damage someone's reputation in the community. In other words, defamation is measured by its results; whereas false light invasion of privacy is measured by perception. It is even possible that what would be highly offensive in one location would not be in another; or what would have been highly offensive in 1962 would not be highly offensive in 2002. In other words, the standard is difficult to quantify, and shifts based upon the subjective perceptions of a community.

Bueno, 54 P.3d at 903-04. The concern about the false light invasion of privacy tort led the Colorado Supreme Court to conclude, A>[I]n the limited area in which false light invasion of privacy and defamation are not coextensive, there is ambiguity and subjectivity that would invariably chill open and robust reporting.@ *Id.* at 904.

The concern about the vagueness associated with false light is well placed. If commentators and courts cannot figure out what exactly is prohibited by the false light invasion of privacy tort, then how can the general public be tasked with understanding with certainty what speech is prohibited and what is not. The fact is that there is general disagreement among scholars and judges as to exactly what type of speech is prohibited by the false light invasion of privacy tort. The elusive and amorphous nature of the tort makes it impossible to precisely define. The lack of definition and precision renders the tort unconstitutionally vague.

The overlap between false light and existing torts coupled with the constitutional concerns about the minute area of distinction between the two torts and false light=s implications for freedom of speech and of the press means that Florida should not

recognize this tort.

II.

THIS CASE DOES NOT PROVIDE A VEHICLE FOR THE RECOGNITION OF FALSE LIGHT INVASION OF PRIVACY.

Regardless whether the Court is inclined to recognize the tort of false light invasion of privacy generally, it should not be recognized in this case particularly. The District Court of Appeals in this case held that plaintiff stated a cause of action for false light invasion of privacy. However, the court erred as a matter of law because plaintiff did not state a cause of action in this case for false light invasion of privacy.

Statements which attribute socially acceptable characteristics about a person cannot be considered highly offensive. There are numerous examples where courts have found that identifying people as having neutral or positive characteristics does not give rise to liability for invasion of privacy. *See e.g., McCabe v. Village Voice*, 550 F.Supp. 525 (E.D. Penn. 1982) (publication of nonpornographic picture of plaintiff bathing nude in a bathtub did not cast plaintiff in a false light); *Williams v. Church=s Fried Chicken*, 279 S.E. 2d 465, 470 (Ga. Ct. App. 1981) (portraying plaintiff as a high level corporate officer although he had resigned the position); *Arrington v. New York Times Co*, 434 N.E.2d 1319, 1321 (N.Y. App. Div.) *cert. denied*, 459 U.S. 1146 (1982) (portraying plaintiff as a member of the Ablack middle class@ although that description was unappealing to the plaintiff); and *Griffin v. Harris*, 490 N.Y.S. 2d 919 (N.Y. App. Div. 1985) (portraying a person as a plaintiff in a federal lawsuit when he was named a

plaintiff without his consent). In *Cox v. Hatch*, 761 P. 2d 556 (Utah 1988), the court held a picture that insinuated plaintiffs belonged to the Republican party was not Ahighly offensive to a reasonable person.@ *Id.* at 564. AHowever offensive the photograph in this case may have been to the plaintiffs@ it was not actionable, as a matter of law. *Id.* at 562.

Indeed, even representing a person as having unflattering characteristics does not necessarily give rise to liability. *See e.g. Fudge v. Penthouse Intern., Ltd*, 840 F.2d 1012 (1st Cir. 1988) (portraying plaintiffs as amazons who desired to dominate male classmates); *Machleder v. CBS, Inc.*, 801 F.2d 46 (2d Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987) (portraying plaintiff as intemperate and evasive); *Williams v. Church=s Fried Chicken*, 279 S.E.2d 465 at 470 (Ga. Ct. App. 1981) (portraying plaintiff as having organized boycott for personal reasons); *Phillips v. Washington Magazine*, 472 A.2d 98 (Md. Ct. App) *cert. denied*, 475 A.2d 1201 (1984) (portraying plaintiff as a CIA agent who was involved in overthrowing foreign government); *Morganroth v. Whitall*, 411 N.W. 2d 859 (Mich. Ct. App. 1987) (portraying plaintiff as a hairdresser for dogs); and *Romaine v. Kallinger*, 537 A.2d 284 (NJ 1988) (portraying plaintiff as person who knew a prisoner).

Obviously, portraying a person as one who is a Anew Jewish believer@ (A. 27 at & 15), or one who prayed Aa sinner=s prayer@ (A. 27 at & 17), especially in the context of a prayer request directed to other members of Jews for Jesus, cannot be considered Ahighly

offensive@ even if the Plaintiff were herself offended.[12] Regardless of one=s views about Christianity, asking people to pray for and celebrate the new-found spirituality (even falsely) is *per se* reasonable and cannot be offensive. A report, even if it is false, celebrating a conversion to one=s religion would not constitute material for a false light invasion of privacy claim. The portrayal must be highly offensive to a Areasonable person,@ B not necessarily the Plaintiff. AIt is well-recognized that an essential element of the >false light= tort of invasion of privacy is that >the false light in which the other was placed would be highly offensive to a reasonable person,= Restatement of Torts 2d, ' 652E(a), and >the hypersensitive individual will not be protected.=@ *Thomason v. Times-Journal*, 379 S.E.2d 551, 554 (Ga. Ct. App. 1989) (publication of an erroneous obituary was not highly offensive to a reasonable person) (quoting Prosser & Keeton on Torts (5th ed.), Defamation ' 111 at 864)). It was not offensive in *Cox v. Hatch* for the plaintiff to be portrayed as a member of the Republican party even though that characterization was highly offensive to the plaintiffs who did not want to be seen as endorsing Senator Hatch. Similarly, it was not offensive to a reasonable person in *Thomason* for the plaintiff, who was white, to be portrayed in an obituary as having her

[12] It is important to note that the praise report did not in any way portray plaintiff as a member of the Jews for Jesus organization, but rather as a new believer in Jesus Christ. Plaintiff was portrayed as a Christian, not a member of the Jews for Jesus organization. The two are not synonymous. One can be a Christian without belonging to Jews for Jesus just as one can be a Christian without belonging to a Baptist or Methodist church.

funeral in a historically African-American funeral home. Even though it may have been offensive to the plaintiffs in those cases, that is not the standard - it must be ***highly offensive*** to a ***reasonable person***.

The account in Defendant=s newsletter in this case cannot be highly offensive to a reasonable person no matter what Plaintiff individually believes. It is obvious that the statement complained about was not highly offensive since it related to a matter that was socially acceptable. In our nation, where churches abound, where religion has been an accepted part of the national heritage, where our federal Constitution specifically protects the freedom of religion, it cannot (in any stretch of the imagination) be scandalous to believe in Jesus or to pray a Asinner=s prayer.@ This is not a nation that ostracizes people of faith. It is incontrovertible that the history of this country Ais inseparable from the history of religion.@ *Engel v. Vitale*, 370 U.S. 421, 434 (1962). Many of our laws derive from Biblical teachings and even the United States Supreme Court realizes Athat religion has been closely identified with our history and our government.@ *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 212 (1963). We are Aa religious people whose institutions presuppose a Supreme Being.@ *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). A[O]ur history is pervaded by expressions of religious beliefs.@ *Lynch v. Donnelly*, 465 U.S. 668, 677 (1984). In fact, the undersigned has found no case where liability has attached for invasion of privacy for disclosing facts regarding religious beliefs or conversion experiences.

The Restatement (Second) posits that a false light invasion of privacy tort can lie when AA is a Democrat. B induces him to sign a petition nominating C for office. A discovers that C is a Republican and demands that B remove his name from the petition. B refuses to do so and continues public circulation of the petition, bearing A=s name. B is subject to liability to A for invasion of privacy.@ Restatement (Second) of Torts ' 652E (Illustration 4). However, the case law is inapposite to this example because a portrayal of an individual as a Republican when he is in fact a Democrat is not highly offensive to a reasonable person. *See Cox*, 761 P. 2d at 556. It is even more plain that portraying a person as a Christian cannot be highly offensive to a reasonable person.

The statements that were made in this case were not highly offensive to a reasonable person and, thus, this case is not a vehicle for the adoption of the false light invasion of privacy claim in Florida.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court refuse to recognize the tort of false light invasion of privacy in Florida and dismiss this case.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, First Class delivery this 19th day of October, 2007, to the following:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Answer Brief complies with the font size requirements of Fla. R. App. P. 9.210(a)(2).

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