

# PROTECTING THE MEDIA'S FIRST AMENDMENT RIGHTS IN FLORIDA: MAKING FALSE LIGHT PLAINTIFFS PLAY BY DEFAMATION RULES

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## I. INTRODUCTION

In December 2003, a Pensacola, Florida jury awarded Joe A. Anderson Jr. \$18.28 million because it found that an article in a local newspaper portrayed Anderson in a false light.<sup>1</sup> The claim stemmed from a *Pensacola News Journal* article focusing on Anderson's road-paving business and the political influence it wielded.<sup>2</sup> The article also disclosed that, in 1988, Anderson shot and killed his wife.<sup>3</sup> According to Anderson, the facts in the article

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1. *Anderson Columbia Co., Inc. v. Gannett Co., Inc.*, No. 2001 CA 001728 (Fla. Cir. Ct. 1st Dist. filed Aug. 28, 2001); *see also \$18.28-Million Awarded in Suit against Newspaper*, St. Petersburg Times 5B (Dec. 13, 2003) (reporting about the jury verdict in the *Anderson* case); Ginny Graybiel, *Anderson Wins Suit against News Journal*, Pensacola News J. 1C (Dec. 13, 2003) (available at 2003 WLNR 12968616) (same). The multi-million dollar award was for compensatory damages only. *Id.* The jury was unable to come to a decision regarding punitive damages, causing the trial judge to declare a mistrial on that issue. *Id.* The trial judge ordered a second trial on the punitive damages issue, but, in an odd twist, the judge subsequently dismissed the punitive damages claim because Anderson and his attorneys disobeyed a court order prohibiting the use of the *News Journal's* pre-trial polling data. Bill Kaczor, *Newspaper Faces Paying \$18 Million Verdict: Pensacola News Journal Won't Face Punitive Damages, Though*, Tallahassee Democrat B6 (Apr. 8, 2005) (available at 2005 WLNR 5487612).

2. Graybiel, *supra* n. 1, at 4C.

3. *Id.* Former *News Journal* reporter Amie Streater, who wrote the article, included the shooting accident in the story because Anderson's possession of a firearm violated the

were true, but the paper's failure to state that authorities determined that the shooting was a hunting accident until two sentences after the article mentioned Anderson shot and killed his wife created the false impression that Anderson had murdered his wife.<sup>4</sup> Anderson claimed that the story cost him over \$18 million in business, and the jury agreed, finding that the article's structure intentionally created a false impression.<sup>5</sup>

The *Anderson* verdict—and its hefty award—caused alarm among members of the media and media advocates.<sup>6</sup> Advocates claimed that the *Anderson* outcome eroded the media's First Amendment rights and had a chilling effect on the media's ability to report the truth without fear of debilitating lawsuits.<sup>7</sup>

The media—or the “press”—is distinct as the only private institution expressly guaranteed constitutional protection.<sup>8</sup> The First Amendment to the United States Constitution provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .” The Framers of the First Amendment recognized that an uninhibited press and the robust exchange of ideas were central to a thriving democracy.<sup>9</sup> The United States Supreme Court affirmed these values in opinions that put the public's need for a free press ahead of the interests of those offended or embarrassed by news about them.<sup>10</sup>

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terms of his probation from a bribery conviction in 1986. Stephen Nohlgren, *Verdict Shows Truth No Shield*, St. Petersburg Times 1B (Jan. 4, 2004).

4. Graybiel, *supra* n. 1, at 4C.

5. *Id.* After stating that Anderson shot and killed his wife, the article noted that Anderson filed for divorce two days prior to the accident. Nohlgren, *supra* n. 3, at 1B. In the next sentence, the story told readers that the police found that the shooting was accidental. *Id.* Anderson claimed this created the false impression that he had a motive for killing his wife. *Id.*

6. Bill Kaczor, *Lawyers: Verdict May Hurt Reporting*, The Bradenton Herald 10 (Jan. 17, 2004) [hereinafter *Hurt Reporting*]; Nohlgren, *supra* n. 3, at 1B; see also Joe O'Neill, *O'Pinions To Go Online, The "Libel Lite" Case: Truth AND Consequences*, <http://opinionstogoonline.com/read.asp?ArtID=506> (Jan. 12, 2004) (noting that “[j]ournalists, media attorneys and most legal scholars were—and still are—shell shocked at the [*Anderson*] verdict – and what passed muster as evidence”).

7. Kaczor, *Hurt Reporting*, *supra* n. 6, at 10; Nohlgren, *supra* n. 3, at 1B.

8. Potter Stewart, “*Or of the Press*,” 26 *Hastings L.J.* 631, 633 (1975).

9. See generally David A. Anderson, *The Origins of the Press Clause*, 30 *UCLA L. Rev.* 455 (1983) (chronicling the history of the First Amendment); see also Stewart, *supra* n. 8, at 634 (arguing that “[t]he primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches”).

10. See e.g. *N.Y. Times v. Sullivan*, 376 U.S. 254, 279–280, 285–286 (1964) (holding

Florida has departed from these tenets of First Amendment law by allowing a cause of action against the press for the common law tort of false light invasion of privacy (or false light).<sup>11</sup> False light allows a person to sue the press even if the facts in a story are completely true, but those facts create a false impression in the public eye.<sup>12</sup> Plaintiffs in Florida have discovered that false light may be easier to prove—and harder for the media to defend against—than defamation, the claim plaintiffs typically have used against the press.<sup>13</sup> Defamation, unlike false light, requires that the offending communication be false; truth is an absolute defense against defamation.<sup>14</sup> In addition, Florida's statute of limitations allows a person alleging false light two more years to state

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that public officials must prove with convincing clarity "actual malice" in libel claims against the media). In *Sullivan*, the Court wrote as follows: "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *Id.* at 271–272 (citing *NAACP v. Button*, 371 U.S. 415, 433 (1963)). The Court added the following:

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred . . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so . . . . The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

*Id.* at 279. See also *Curtis Publ. Co. v. Butts*, 388 U.S. 130, 155 (1967) (applying the actual malice standard announced in *Sullivan* to public figures); *Phila. Newsps., Inc. v. Hepps*, 475 U.S. 767, 776–777 (1986) (holding that plaintiffs in most media defamation cases bear the burden of proving falsity).

11. Kaczor, *Hurt Reporting*, *supra* n. 6, at 10; Nohlgren, *supra* n. 3, at 1B.

12. *Agency for Health Care Admin. v. Associated Indus. of Fla., Inc.*, 678 So. 2d 1239, 1252 (Fla. 1996); *Heekin v. CBS Broad., Inc.*, 789 So. 2d 355, 359 (Fla. 2d Dist. App. 2001).

13. See *Mile Marker, Inc. v. Petersen Publ., L.L.C.*, 811 So. 2d 841, 845 (Fla. 4th Dist. App. 2002) (noting the requirements of defamation). In Florida, a private plaintiff's successful defamation action against the media "requires the unprivileged publication (to a third party) of a false and defamatory statement concerning another, with fault amounting to at least negligence on behalf of the publisher, with damage ensuing." *Id.* (citing *Thomas v. Jacksonville TV, Inc.*, 699 So. 2d 800, 803–804 (Fla. 1st Dist. App. 1997)). A statement "is 'defamatory' if it tends to harm the reputation of another as to lower him or her in the estimation of [the] community or deter third persons from associating or dealing with the defamed party." *LRX, Inc. v. Horizon Assocs. Jt. Venture*, 842 So. 2d 881, 885 (Fla. 4th Dist. App. 2003) (citing *Mile Marker*, 811 So. 2d at 845).

14. David A. Anderson, Fred H. Cate & Marc A. Franklin, *Mass Media Law* 369 (6th ed., Found. Press 2000) (noting that "truth [is] a complete defense" to defamation); see also *infra* pt. III (describing the elements of defamation and comparing it with false light).

a claim against the press than it allows a person alleging defamation.<sup>15</sup>

Plaintiffs often allege both defamation and false light invasion of privacy claims in their complaints.<sup>16</sup> In practice, however, the distinctions between defamation and false light are not crystal clear.<sup>17</sup> While courts in Florida and in other jurisdictions struggle to distinguish the two torts, the similarities between defamation and false light are obvious, and both torts can have an equally devastating impact on the media.<sup>18</sup>

This Comment begins with a look at the origin and development of invasion of privacy as a cause of action throughout the United States and Florida and, more specifically, the evolution of false light invasion of privacy. Part III will compare false light and defamation, and analyze how courts in Florida and elsewhere have interpreted these two torts. This Comment will shed light on the inconsistent and confusing ways in which courts handle false light and defamation, especially when the facts alleged in a false light claim would support a defamation claim. This inconsistency often allows plaintiffs to claim false light as a means to circumvent procedural and substantive protections granted to the press in defamation actions, such as the statute of limitations and retraction statutes, and it often eliminates the defenses available to the press in defamation actions. In Part IV, this Comment will focus on *Heekin v. CBS Broadcasting, Inc.* (“*Heekin I*”),<sup>19</sup> a Florida

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15. False light invasion of privacy is not included in any subsection of Florida Statutes Section 95.11. Therefore, some Florida courts have applied the four-year statute of limitations for all actions “not specifically provided for in these statutes.” Fla. Stat. § 95.11(3)(p) (2004); e.g. *Putnam Berkley Group, Inc. v. Dinan*, 734 So. 2d 532, 533 (Fla. 4th Dist. App. 1999). A two-year statute of limitations applies to defamation claims. Fla. Stat. § 95.11(4)(g). For a discussion regarding the application of the statute of limitations to false light claims, see *infra* pt. V(A).

16. See Russell G. Donaldson, *False Light Invasion of Privacy, Cognizability and Elements*, 57 A.L.R.4th 22, § 9 (1987) (noting that in most cases defamation and false light can be brought as alternative torts, but the plaintiff may only get a single recovery for dual claims based on the same facts); Gary T. Schwartz, *Explaining and Justifying a Limited Tort of False Light Invasion of Privacy*, 41 Case W. Res. L. Rev. 885, 887 (1990) (quoting the *Restatement (Second) of Torts*’s observation that an “action for privacy [can] afford an alternative or additional remedy” to defamation).

17. See Rodney A. Smolla, *Accounting for the Slow Growth of American Privacy Law*, 27 Nova L. Rev. 289, 291 (2002) [hereinafter Smolla, *Slow Growth*] (noting the difficulty distinguishing false light invasion of privacy from defamation).

18. See *infra* pt. III (discussing the overlap of false light and defamation).

19. 789 So. 2d 355 (Fla. 2d Dist. App. 2001).

decision that provides an excellent example of the problems courts have distinguishing between the two torts. *Heekin I* also highlights the inconsistent interpretation of which statute of limitations to apply as well as the difficulties that media in Florida encounter when trying to defend against false light claims.<sup>20</sup>

Finally, this Comment will argue that the media's rights under the First Amendment require that Florida courts be vigilant in determining whether an action for false light is actually an action for defamation. Furthermore, a defamation action masquerading as a false light action should be treated the same as defamation in terms of the procedural and substantive limitations imposed on Florida plaintiffs.

## II. HISTORICAL BACKGROUND

This section of the Comment describes the origin and development of the invasion of privacy in the United States and Florida. It also explains how the initial concept of invasion of privacy expanded to include false light and how the United States Supreme Court has interpreted false light.

### A. Invasion of Privacy

The invasion-of-privacy tort was the brainchild of Boston law partners Samuel D. Warren and Louis D. Brandeis.<sup>21</sup> In 1890, Warren and Brandeis wrote a Harvard Law Review article titled *The Right to Privacy*,<sup>22</sup> in which they proposed expanding the common law to include the right of an individual "to be let alone."<sup>23</sup> Publication of accurate but personal information appeared to be the main concern of Warren and Brandeis, who were apparently offended by the "yellow" journalism of the day.<sup>24</sup> Their

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20. *Id.* at 357–359.

21. Commentators suggest that Warren and Brandeis were inspired by concerns that journalists were interfering in private citizens' personal lives. Michael F. Mayer, *The Libel Revolution: A New Look at Defamation and Privacy* 157 (L. Arts Publishers 1987).

22. Samuel D. Warren & Louis Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

23. *Id.* at 195 (quoting Thomas M. Cooley, *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract* 29 (2d ed., Callaghan 1888)).

24. *Id.* at 195–196, 216. Yellow journalism is defined as "a type of journalism in which sensationalism triumphs over factual reporting." Wikipedia, *Yellow Journalism*, [http://en.wikipedia.org/wiki/Yellow\\_journalism](http://en.wikipedia.org/wiki/Yellow_journalism) (accessed Aug. 28, 2004). For a detailed

article did not mention or even allude to false light invasion of privacy.<sup>25</sup>

Following Warren and Brandeis's conceptualization of the new tort, legislatures and courts began to fashion their own laws to protect privacy rights.<sup>26</sup> These lawmaking bodies focused mainly on misappropriation.<sup>27</sup> For example, the first attempt to recover on an invasion-of-privacy claim occurred in New York in 1902, when a plaintiff sued a flour company for using her picture in an advertising campaign without her permission.<sup>28</sup> In *Roberson v. Rochester Folding Box Co.*,<sup>29</sup> the New York Court of Appeals refused to recognize the tort of invasion of privacy.<sup>30</sup> However, the New York legislature subsequently enacted a law prohibiting the use of "the name, portrait or picture" of another for advertising purposes without consent.<sup>31</sup>

In 1905, the Georgia Supreme Court held that a plaintiff could recover for the unauthorized use of his or her name, picture, and testimonial in an advertisement.<sup>32</sup> This decision was the first judicial recognition of invasion of privacy.<sup>33</sup> The tort was further recognized in 1939 when the *Restatement of Torts* acknowledged a right to privacy.<sup>34</sup>

The tort of false light invasion of privacy did not emerge until 1960, when Dean William L. Prosser expanded on the Warren

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description of the historic roots of "yellow" journalism, see PBS Online, *Crucible of Empire*, <http://www.pbs.org/crucible/journalism.html> (accessed Aug. 28, 2004).

25. Warren & Brandeis, *supra* n. 22, at 195–196, 216.

26. See *Cason v. Baskin*, 20 So. 2d 243, 249–250 (Fla. 1944) (discussing the evolution of invasion of privacy in United States courts); see also William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 383–388 (1960) (describing the history of invasion of privacy). For a detailed discussion of the early history of privacy in the United States, see Don R. Pember, *Privacy and the Press* (U. of Wash. Press 1972).

27. *Supra* n. 26.

28. *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 542 (1902).

29. 171 N.Y. 538 (1902).

30. *Id.* at 556.

31. 1903 N.Y. Laws, ch. 132, §§ 1–2; Prosser, *supra* n. 26, at 385.

32. *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).

33. Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 Ga. L. Rev. 1, 79 (1988); Jonathan Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 Cardozo Arts & Ent. L.J. 213, 216 (1999); Prosser, *supra* n. 26, at 386.

34. *Restatement of Torts* § 867 (1939). The *Restatement* defines invasion of privacy as follows: "A 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." *Id.*

and Brandeis theory in a law review article.<sup>35</sup> In the article, Dean Prosser concluded that invasion of privacy actually consisted of four separate torts: (1) unreasonable intrusion upon another person's solitude; (2) appropriation of another person's likeness or name; (3) unreasonable publicity about another person's private life; and (4) unreasonable publicity that places another person in a public false light.<sup>36</sup> Several years later, Dean Prosser's approach was incorporated into the *Restatement (Second) of Torts*, for which he was a Reporter.<sup>37</sup>

*Restatement* Section 652E, which is still widely used today, defines false light invasion of privacy as follows:

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.<sup>38</sup>

It is the application of the *Restatement*, in the context of First Amendment media rights, which sometimes poses a challenge for the courts—including Florida courts.<sup>39</sup>

## B. Invasion of Privacy Comes to Light in Florida

Florida first recognized the invasion-of-privacy tort more than sixty years ago in *Cason v. Baskin*.<sup>40</sup> In *Cason*, however, the

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35. Prosser, *supra* n. 26, at 389.

36. *Id.*

37. The *Restatement (Second) of Torts* § 652A(2) (1977) provides that “[t]he right of privacy is invaded by (a) unreasonable intrusion upon the seclusion of another . . . ; or (b) appropriation of the other's name or likeness . . . ; or (c) unreasonable publicity given to the other's private life . . . ; or (d) publicity that unreasonably places the other in a false light before the public . . . .”

38. *Id.* at § 652E.

39. See *e.g. infra* pt. IV (explaining *Heekin I*).

40. 20 So. 2d 243 (Fla. 1944).

Florida Supreme Court considered only two of the *Restatement's* four invasion-of-privacy torts: misappropriation and the publication of private information.<sup>41</sup> The *Cason* Court did not specifically recognize false light.<sup>42</sup>

A search of Florida state appellate court decisions reveals that the first mention of false light occurred in 1975.<sup>43</sup> In *Fletcher v. Florida Publishing Co.*,<sup>44</sup> the plaintiff alleged trespass, invasion of privacy, and wrongful intentional infliction of emotional distress against a newspaper publisher who printed photographs of the silhouette of the plaintiff's deceased daughter following a fire in the plaintiff's home.<sup>45</sup> The plaintiff tried to ground her invasion of privacy claim on false light theory, but the court found that there could be no recovery for false light on "a case bottomed on actual trespass."<sup>46</sup> Even though the court rejected the plaintiff's invasion of privacy claim, the decision suggests that the court recognized false light as a legitimate cause of action in Florida.

The Florida Supreme Court, while never deciding a false light claim, explicitly recognized the four types of invasion of privacy in 1996.<sup>47</sup> More recently, the Court affirmed its recognition of the tort of invasion of privacy, stating that the tort "was not intended to be duplicative of some other tort. Rather, this is a tort in which the focus is the right of a private person to be free from public gaze."<sup>48</sup>

### C. The United States Supreme Court: Shedding Little Light on False Light

The United States Supreme Court's first encounter with false light invasion of privacy occurred in 1967.<sup>49</sup> In *Time, Inc. v. Hill*,<sup>50</sup>

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41. *Id.* at 244–245. The plaintiff in *Cason* alleged that the author, Marjorie Rawlings, ruined her seclusion and exploited her name and likeness by including a biographical sketch of the plaintiff in the defendant's book, *Cross Creek*. *Id.*

42. *See id.* (failing to acknowledge specifically the tort of false light).

43. *Fletcher v. Fla. Publg. Co.*, 319 So. 2d 100, 107–108 (Fla. 1st Dist. App. 1975).

44. 319 So. 2d 100 (Fla. 1st Dist. App. 1975).

45. *Id.* at 103.

46. *Id.* at 108.

47. *Agency for Health Care Administration*, 678 So. 2d at 1252 n. 20 (citing *Forsberg v. Hous. Auth. of Miami Beach*, 455 So. 2d 373, 376 (Fla. 1984) (Overton, J., concurring)).

48. *Allstate Ins. Co. v. Ginsberg*, 863 So. 2d 156, 162 (Fla. 2003).

49. *Time, Inc. v. Hill*, 385 U.S. 374, 377 (1967).

50. 385 U.S. 374 (1967).



the Supreme Court, building on defamation law developed three years earlier in *New York Times Co. v. Sullivan*,<sup>51</sup> decided that media liability for false light could arise only if a plaintiff proved deliberate or reckless falsehood.<sup>52</sup>

The United States Supreme Court decided a second false light case seven years after *Hill*.<sup>53</sup> In *Cantrell v. Forest City Publishing Co.*,<sup>54</sup> the Supreme Court held that a media defendant unreasonably placed the Cantrell family, private individuals thrust into the public eye after a bridge accident killed a family member, in a false light by publishing deliberate falsehoods about the plaintiffs.<sup>55</sup> The Court, however, failed to answer the question of “whether a State may constitutionally apply a more relaxed standard of liability for a publisher or broadcaster of false statements injurious to a private individual under a false-light theory . . . or whether the constitutional standard announced in *Time, Inc. v. Hill* applies to all false-light cases.”<sup>56</sup> The Court’s failure to address this issue, combined with its decision in *Gertz v. Robert Welch, Inc.*,<sup>57</sup> a defamation case against the media decided just six months prior to *Cantrell*, has produced some uncertainty in regard to false light. In *Gertz*, the Court held that a private individual may recover actual damages in a defamation action against a publisher or broadcaster without a showing of “actual malice,” and that states may determine their own fault standard as long as they do not eliminate fault.<sup>58</sup>

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51. 376 U.S. 254 (1964). Commentators suggest that the *Sullivan* Court for the first time injected a constitutional element into defamation by requiring a public official to show fault on the part of the defendant in order to protect the right to criticize the government freely. Mayer, *supra* n. 21, at 1.

52. The *Sullivan* Court dubbed this fault requirement “actual malice”—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” 376 U.S. at 280. Furthermore, the public official plaintiff, to recover in defamation, bore the burden of proving by “convincing clarity” that the alleged defamatory statement was made with actual malice. *Id.* at 285–286. However, in *Hill*, the Court did not make a distinction between public and private plaintiffs, but held that in matters of public interest, plaintiffs must prove that the media “defendant published the report with knowledge of its falsity or in reckless disregard of the truth.” 385 U.S. at 387–388.

53. *Cantrell v. Forest City Publ. Co.*, 419 U.S. 245 (1974).

54. *Id.*

55. *Id.* at 247, 253.

56. *Id.* at 250–251.

57. 418 U.S. 323 (1974).

58. *Id.* at 343, 347–349. In Florida, in order for a private individual to recover actual damages, the appropriate fault standard after *Gertz* is negligence. *Trib. Co. v. Levin*, 426

Unfortunately, the United States Supreme Court has not addressed false light since the *Cantrell* decision, leaving states to interpret the tort, resulting in a mixed bag of case law. Approximately two-thirds of the states,<sup>59</sup> including Florida, recognize the tort of false light. The other states either never recognized the tort<sup>60</sup> or initially recognized it and then rejected false light actions completely.<sup>61</sup> The states that have rejected false light generally assert that there is no independent cause of action for false light invasion of privacy because of the “overlap” between false light and defamation.<sup>62</sup>

### III. THE OVERLAP

Courts and commentators—both detractors and proponents of false light invasion of privacy—agree that false light claims often overlap with defamation claims.<sup>63</sup> Plaintiffs often plead both false

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So. 2d 45, 46 (Fla. 2d Dist. App. 1982); *Miami Herald Publ. Co. v. Ane*, 423 So. 2d 376, 378 (Fla. 3d Dist. App. 1982); *Cape Publications, Inc. v. Teri's Health Studio, Inc.*, 385 So. 2d 188, 189 (Fla. 5th Dist. App. 1980).

59. Anderson, Cate & Franklin, *supra* n. 14, at 462.

60. See *Falwell v. Penthouse Intl., Ltd.*, 521 F. Supp. 1204, 1206 (W.D. Va. 1981) (noting that Virginia does not recognize a common law action of false light); *ELM Med. Laboratory, Inc. v. RKO Gen., Inc.*, 532 N.E.2d 675, 681 (Mass. 1989) (choosing not to recognize the false light tort); *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 235 (Minn. 1998) (declining to recognize false light in Minnesota); *Yeager v. Local Union 20*, 453 N.E.2d 666, 669–670 (Ohio 1983) (noting that the Ohio Supreme Court “has not recognized a cause of action for invasion of privacy under a ‘false light’ theory of recovery” and refusing to recognize false light in the present case); *Brown v. Pearson*, 483 S.E.2d 477, 484 (S.C. App. 1997) (noting that false light has never been recognized in South Carolina); *Zinda v. La. P. Corp.*, 440 N.W.2d 548, 555 (Wis. 1989) (stating that Wisconsin law recognizes three separate torts for the invasion of privacy but provides no cause of action for false light).

61. See *Renwick v. News & Observer Publ. Co.*, 312 S.E.2d 405, 411–412 (N.C. 1984) (rejecting false light as a basis for invasion of privacy claims in North Carolina); *Cain v. Hearst Corp.*, 878 S.W.2d 577, 578–580 (Tex. 1994) (rejecting false light because it “duplicates other rights of recovery” and because its lack of procedural limitations “unacceptably increas[es] the tension that already exists between free speech constitutional guarantees and tort law”).

62. *Renwick*, 312 S.E.2d at 412; *Cain*, 878 S.W.2d at 579–580.

63. *Renwick*, 312 S.E.2d at 412 (stating that “any 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”); *Crump v. Beckley Newsps., Inc.*, 320 S.E.2d 70, 87 (W. Va. 1983) (noting the similarities between false light and defamation); see also J. Clark Kelso, *False Light Privacy: A Requiem*, 32 Santa Clara L. Rev. 783, 785–786 (1992) (noting the obvious overlap between false light and defamation); Smolla, *Slow Growth*, *supra* n. 17, at 291 (commenting that “[m]any of the elements of false light and defamation overlap”); Diane Leenheer Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. Rev. 364, 386 (1989) (noting “a great deal of

light and defamation based on the same facts.<sup>64</sup> However, defamation, unlike false light, is a centuries-old, even ancient, tort.<sup>65</sup>

According to the *Restatement (Second) of Torts* § 558, defamation consists of the following elements:

- (a) a false and defamatory statement concerning another;
- (b) an unprivileged publication to a third party;
- (c) fault amounting at least to negligence on the part of the publisher; and
- (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.<sup>66</sup>

In *Sullivan*, the United States Supreme Court “constitution-  
alized” defamation by adding the fault requirement that now ap-  
pears in Section 558(c) of the *Restatement*.<sup>67</sup> In *Philadelphia*

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overlap” between the torts of defamation and false light).

64. See Kelso, *supra* n. 63, at 819, 835 (noting that in a study of more than 600 false light cases, “[b]ecause the overlap between defamation and false light is so pronounced even in theory . . . the cases involving allegations of both defamation and false light are the single largest class of false light cases”); Zimmerman, *supra* n. 63, at 431–432 (stating that defamation plaintiffs are often urged to plead false light “because the elements of the privacy tort are less technically demanding than those of defamation”).

65. In *Crump*, for example, the West Virginia Supreme Court of Appeals stated as follows:

The concept that a person’s reputation in the community is precious and should not be injured with impunity had been well established since ancient times. Slander was expressly forbidden by the law of Moses. *Exodus* 20:16 (King James) (“Thou shalt not bear false witness against thy neighbour.”) The Law of the Twelve Tables, compiled approximately three hundred years after the founding of Rome, provided that “who-soever slanders another by words or defamatory verses, and injures his reputation, shall be beaten with a club.” Under Alfred the Great, King of the Saxons at the end of the ninth century, “the slanderer’s tongue was excised unless he could redeem it by payment of his *wer geld*, which was the price of his life.” Throughout the Middle Ages, the ecclesiastical courts exercised general jurisdiction over defamation, punishing it with penance. It was not until the reign of Henry VIII, that the common law courts began to exercise some jurisdiction over actions for defamation. By the end of the sixteenth century, however, common law courts exercised practically absolute jurisdiction over these actions.

320 S.E.2d at 76 (citations omitted).

66. *Restatement (Second) of Torts* § 558 (1977).

67. See Rodney A. Smolla, *Suing the Press* 25 (Oxford U. Press 1986) (noting that the *Sullivan* decision “revolutionized the modern law of libel by declaring for the first time that state libel laws were subject to First Amendment restraints”).

*Newspapers, Inc. v. Hepps*, the Court subsequently added a requirement that plaintiffs bear the burden of proving the alleged defamatory statement was false.<sup>68</sup> These added protections were, in part, a response to the Court's recognition that defamation actions pose a threat to a free press.<sup>69</sup> The Court also recognized that false light invasion of privacy posed a similar threat to media defendants.<sup>70</sup>

In addition to the chilling effect that both false light and defamation may have on the media, courts and commentators note several other similarities between the two torts.<sup>71</sup> First, and most basically, both torts are communicative torts, requiring the communication of some information concerning the plaintiff.<sup>72</sup>

Second, both defamation and false light require some level of falsity.<sup>73</sup> In defamation, the alleged defamatory publication must be false, while in false light, the alleged communication, even if true, must place the plaintiff in a false light in the public eye.<sup>74</sup> Many commentators and courts cite the fact that plaintiffs may allege false light based on true statements as a major distinguishing factor between defamation and false light.<sup>75</sup> This distinction blurs,<sup>76</sup> however, in jurisdictions such as Florida, where courts recognize defamation by implication.<sup>77</sup>

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68. *Hepps*, 475 U.S. at 776.

69. *See id.* at 777 (noting that placing "the burden of proving truth upon media defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result"); *Sullivan*, 376 U.S. at 278 (stating that the risk of large civil damages chills protected speech, because a "pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive"); *see also Gertz*, 418 U.S. at 340 (stating that "[o]ur decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship").

70. *Hill*, 385 U.S. at 388–389.

71. *See supra* n. 63 (listing courts and commentators taking note of the similarities between false light and defamation).

72. *Restatement (Second) of Torts* §§ 558, 652E.

73. *Id.*

74. *Id.*

75. *See Smolla, Slow Growth, supra* n. 17, at 291 (citing *Goodrich v. Waterbury Republican-American, Inc.*, 448 A.2d 1317, 1331 (Conn. 1982), where the Court compared the elements of a false light claim to a defamation claim).

76. *Id.* at 293 n. 12.

77. *See Brown v. Tallahassee Democrat, Inc.*, 440 So. 2d 588, 589 (Fla. 1st Dist. App. 1983) (finding plaintiff's claim for defamation by implication proper); *Boyles v. Mid-Fla. TV Corp.*, 431 So. 2d 627, 635 (Fla. 5th Dist. App. 1983) (holding claim for libel per se was proper when libelous meaning is implied).

In claims alleging defamation by implication, a defamatory meaning may be inferred through the placement of an accurate story in a misleading context or by omitting clarifying details.<sup>78</sup> For example, in *Heekin I*,<sup>79</sup> the plaintiff, Heekin, alleged that a *60 Minutes* story created the false impression that he abused his children and former wife.<sup>80</sup> A false allegation of spousal and child abuse, a crime, is clearly defamatory.<sup>81</sup> Therefore, the CBS story, which implied that Heekin battered his ex-wife and children, would constitute defamation by implication if the abuse allegations were false, as Heekin claimed. In 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 complimentary, though highly offensive.<sup>82</sup>

This brings up a third similarity between false light and defamation: most actionable statements or implications under false light are in fact defamatory.<sup>83</sup> 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.<sup>84</sup>

Arguably, falsely attributing some heroic action to a person would be “highly offensive to a reasonable person”<sup>85</sup> and, as such,

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78. *Id.*; Thomas B. Kelley & Steven D. Zansberg, *Libel by Implication*, Commun. Law. (Spring 2002) (available at <http://w3.abanet.org/forums/communication/comlawyer/spring02/kelleyzansberg.pdf>).

79. *Heekin v. CBS Broad., Inc.*, 789 So. 2d 355 (Fla. 2d Dist. App. 2001); see *infra* pt. IV (describing the factual background and the Florida appellate court's decision in *Heekin D*).

80. *Heekin*, 789 So. 2d at 357.

81. See *Boyles*, 431 So. 2d at 634 (noting that falsely accusing someone of a crime is clearly libelous *per se*).

82. For a detailed discussion about cases involving false light claims that could not be pled as defamation, see Schwartz, *supra* n. 16. That author proposes allowing only nondisparaging statements as the foundation for false light claims. *Id.* at 892.

83. See *Sullivan v. Pulitzer Broad. Co.*, 709 S.W.2d 475, 479 (Mo. 1986) (observing that the statement that false light need not be defamatory “may be a semantic distinction without a substantive difference”); see also Zimmerman, *supra* n. 63, at 386 (noting that both defamation and false light involve false statements and “many false statements are also defamatory”).

84. See Zimmerman, *supra* n. 63, at 431 (stating many false light actions involve the same injury to reputation as libel and slander). Furthermore, the author argues that the emotional injury attributed to false light is vague. *Id.* at 432.

85. *Restatement (Second) of Torts* § 652E (a).

actionable under false light invasion of privacy.<sup>86</sup> In reality, however, plaintiffs seldom plead—or succeed in—actions for false light based on false, complimentary portrayals.<sup>87</sup>

Proponents of the false light tort also contend that defamation law redresses injury to the plaintiff's reputation, while false light actions remedy the plaintiff's emotional distress.<sup>88</sup> In most cases, however, portraying someone in a false light actually harms his or her reputation.<sup>89</sup> In fact, Dean Prosser erased this distinction, noting that the interest protected in false light actions "is clearly that of reputation, with the same overtones of mental distress as in defamation."<sup>90</sup> Likewise, plaintiffs in defamation suits often claim damages relating to emotional distress as well as reputational injury.<sup>91</sup>

Another claimed distinction between defamation and false light is that an actionable defamatory statement may be communicated to a single third party,<sup>92</sup> but false light requires that false information be made available to the public at large.<sup>93</sup> This communication-to-the-public-at-large requirement effectively means that false light actions will almost always involve a media defendant.<sup>94</sup> Studies show, however, that although plaintiffs can charge

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86. For a rare example, see *Hill*, 385 U.S. 375 (1967), in which the Court approved a false light claim in a case in which the falsehoods portrayed the plaintiffs as heroic, but the Court found for defendants on other grounds.

87. See e.g. *Cason*, 20 So. 2d at 254 (allowing false light recovery despite lack of malice).

88. See Robin Baker Perkins, Student Author, *The Truth behind False Light—A Recommendation for Texas' Re-Adoption of False Light Invasion of Privacy*, 34 Tex. Tech. L. Rev. 1199, 1209 (2003) (asserting that false light and defamation each protect unique, independent interests: defamation protects reputation, while false light protects "the right to one's own personal dignity"); Nathan E. Ray, Student Author, *Let There Be False Light: Resisting the Growing Trend against an Important Tort*, 84 Minn. L. Rev. 713, 745 (2000) (noting that false light safeguards one's interest in self-determination).

89. Graybiel, *supra* n. 1, at 4C. For example, in his false light action against the *Pensacola News Journal*, Joe A. Anderson alleged that the *News Journal's* story created a false impression about him, which caused his road-paving company to lose business—a claim linked to reputational harm rather than emotional or mental distress. *Id.*

90. Prosser, *supra* n. 26, at 400.

91. See Zimmerman, *supra* n. 63, at 428 (noting that "emotional distress has long been an element of the recovery in defamation" as long as plaintiffs can first show that the complained of falsehood injured their reputation).

92. *Restatement (Second) of Torts* § 558(b).

93. *Id.* at § 652E.

94. See Zimmerman, *supra* n. 63, at 371 (noting false light predominately affects the media).

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individuals with defamation, most defamation actions are also against the media.<sup>95</sup> Suing the media makes sense, given that the amount of reputational harm that a private individual's defamatory statement causes is likely to be minimal and the resulting damages slim, when compared with the potential for damages against a deep-pocketed media defendant.

#### IV. HEEKIN I: FALSE LIGHT'S ADVANTAGES FOR PLAINTIFFS SHINE

This section of the Comment focuses on *Heekin I*, a Florida appellate court decision that some media advocates fear could make false light a "big growth area" in suits against the media.<sup>96</sup> *Heekin I* illustrates how a plaintiff can bypass what should be a defamation suit and, in turn, the protections afforded the media in defamation, by claiming false light.<sup>97</sup>

##### A. Background and Facts

John Charles Heekin filed a suit for false light invasion of privacy against CBS on April 29, 1999, just one day shy of the fourth anniversary of the broadcast of a *60 Minutes* story on domestic violence.<sup>98</sup> In that story, *60 Minutes* interviewed Heekin's ex-wife and showed images of her with the couple's children.<sup>99</sup> Heekin's complaint alleged that, although the facts in the story were true, the juxtaposition of these facts with other segments of the story and pictures of women abused and killed by their partners created a false impression that Heekin battered his children and estranged wife.<sup>100</sup>

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95. See Randall P. Bezanson, Gilbert Cranberg & John Soloski, *Libel Law and the Press* 19 (The Free Press 1987) (finding that, between 1974 and 1984, 75.3% of documented defamation cases involved media defendants).

96. Telephone Interview with David Snyder, atty. representing CBS Broadcasting against Heekin (June 22, 2004). False light is a particularly attractive claim against the media because it is "so poorly defined in case law, especially in Florida." *Id.* In fact, *Pensacola News Journal* counsel maintains *Heekin I* "set the stage" for Anderson's successful false light claim against his client by relieving Anderson's burden of proving falsity and actual malice. Telephone Interview with Dennis K. Larry, atty. representing the *Pensacola News Journal* against Anderson (July 1, 2004).

97. 789 So. 2d 355.

98. *Id.* at 357.

99. *Id.*

100. *Id.*

The trial court granted CBS's motion to dismiss because it found that the two-year statute of limitations for defamation barred Heekin's action for false light invasion of privacy.<sup>101</sup> The trial court also granted CBS's motion to dismiss on grounds "that Heekin had failed to state a cause of action for false light invasion of privacy because he had not alleged that the information in the broadcast was false or that CBS had acted with reckless disregard for the truth."<sup>102</sup> Additionally, the trial court granted CBS's motion for summary judgment because the broadcast aired facts already contained in public records, and CBS was therefore protected by Florida's fair reporting privilege.<sup>103</sup>

The appellate court reversed the trial court's decision, holding that the statute of limitations for false light invasion of privacy is the four-year "catch-all" statute of limitations because the tort of invasion of privacy is not named specifically in Florida Statutes Section 95.11.<sup>104</sup> Although that statute provides a two-year statute of limitations for libel, the appellate court explained that the tort of invasion of privacy is a distinctly separate cause of action from libel.<sup>105</sup> The court went on to find, however, that if "a plaintiff has a cause of action for libel . . . and alleges a claim for false light invasion of privacy based on the publication of the same false facts, the false light invasion of privacy action is barred by the two-year statute of limitations."<sup>106</sup>

The appellate court also held that the trial court improperly dismissed Heekin's claim for failing to state a cause of action "because neither knowledge of the falsity of the information nor reckless disregard for its truth is an element of a cause of action for false light invasion of privacy."<sup>107</sup> Moreover, the appellate court

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101. *Id.*

102. *Id.*

103. *Id.* According to CBS, Heekin's ex-wife had filed Petitions for Injunction for Protection against Domestic Violence three times prior to the airing of the *60 Minutes* story in question, each resulting in Emergency Orders Forbidding Domestic Violence against Heekin. Ans. Br. at 1, *Heekin v. CBS Broad., Inc.*, 789 So. 2d 355 (Fla. 2d Dist. App. 2001). Heekin's ex-wife filed a fourth petition in 1997, which prompted the court to enter an Injunction for Protection against Domestic Violence against Heekin. *Id.* at 1 n. 1.

104. *Heekin I*, 789 So. 2d at 358–359. Florida Statutes Section 95.11 provides the statute of limitations for all causes of action in Florida other than the recovery of real property.

105. *Id.* at 357–358.

106. *Id.* at 358.

107. *Id.* at 359. In a narrow reading of *Hill*, the appellate court reasoned as follows:



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held that the trial court erred in finding that the fair reporting privilege barred Heekin's suit because the lower court failed to compare the broadcast with the public records.<sup>108</sup> The appellate court also ruled that the fair reporting privilege was irrelevant because Heekin alleged a false light invasion of privacy claim, not a public disclosure of private facts by CBS.<sup>109</sup>

### B. *Heekin II*: Keeping the Media in the Dark

In the summer of 2003, the case went back to the trial court, which granted CBS's motion for judgment on the pleadings.<sup>110</sup> At the new hearing, the trial court reviewed the broadcast, which was not previously part of the record, and found that the broadcast did not "convey the 'false impression' plaintiff allege[d]." <sup>111</sup> The trial court also held that if the *60 Minutes* story did falsely create the impression that Heekin abused his wife, then the two-year statute of limitations for defamation would bar his claim.<sup>112</sup> In October 2004, the appellate court affirmed the trial court's judgment on the pleadings in favor of CBS without issuing an opinion.<sup>113</sup>

The *Heekin II* outcome prompted the attorneys representing the *Pensacola News Journal* in the *Anderson* case to file a Motion to Reconsider Defendants' Renewed Motion for Directed Verdict and Judgment Notwithstanding the Verdict.<sup>114</sup> Although the *Pen-*

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*Time* [385 U.S. 374 (1967)] is inapplicable to this case for two reasons. First, *Time* involved allegations by a limited public figure that the publication of false facts about his family portrayed them in a false light; thus, the action was essentially one for defamation. The *Time* analysis does not apply to Heekin's action, which involves allegations by a private plaintiff that the publication of true facts portrayed him in a false light. Second, the issue in *Time* was whether New York's right to privacy statute, which created a statutory cause of action for misappropriation of a plaintiff's likeness, was unconstitutional as applied to actions against the press. Given that the case dealt with the interpretation and application of a New York misappropriation statute, the holding and analysis of *Time* is of questionable applicability to Heekin's false light claim under Florida common law.

*Heekin I*, 789 So. 2d at 359.

108. *Id.* at 360.

109. *Id.* at 359.

110. *Heekin v. CBS Broad., Inc.*, No. 99-5478-CA (Fla. Cir. Ct. 12th Dist. July 28, 2003).

111. *Id.* at 2.

112. *Id.*

113. *Heekin v. CBS Broad., Inc.*, 2004 Fla. App. LEXIS 15197 (Oct. 15, 2004) [hereinafter *Heekin II*].

114. In its memorandum supporting the motion, the *Pensacola News Journal* quoted

*sacola News Journal* acknowledged that Anderson was likely to argue that the per curiam affirmed decision in *Heekin II* has no precedential value, it nonetheless claimed that the fact that the appellate court “approved the extraordinary remedy of judgment on the pleadings, and affirmed the dismissal—as a matter of law—of the same complaint that *Heekin I* had initially upheld” had, in effect, undercut the *Heekin I* decision and eliminated support for “Anderson’s unique theory of tort liability.”<sup>115</sup> In April 2005, the trial court denied the *Pensacola News Journal’s* Motion, subsequently entering final judgment in favor of Anderson for \$18,284,334.00.<sup>116</sup> The case is currently pending appeal.<sup>117</sup>

### V. RECOMMENDATIONS

Courts and legislators in Florida and throughout the United States have developed and implemented several procedural and substantive measures to protect media defendants’ First Amendment rights in defamation lawsuits.<sup>118</sup> Media outlets defending a false light invasion of privacy claim face the same constitutional threat that defamation defendants face, and the media deserve many of the same protections in false light litigation.

On the procedural side, the Florida Legislature should address the proper statute of limitations for false light actions against the media. On the substantive side, the Florida Legislature and courts should consider three issues. First, notice and retraction statutes specifically carved out for defamation claims against the media<sup>119</sup> should be expanded to apply to false light invasion of privacy. Second, Florida courts should uncontroversially recognize the fair reporting privilege<sup>120</sup> in false light actions

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the trial court as saying “that it ‘basically hung its hat on . . . *Heekin*, and if *Heekin* doesn’t hold . . . [t]hat alone would cause this matter to come back to be revisited.” Defs.’ Memo. Supporting Mot. to Reconsider Defs.’ Renewed Mot. for Directed Verdict & Judm. Notwithstanding Verdict 1 (Nov. 16, 2004).

115. *Id.* at 4 n. 2 (emphasis in original).

116. *Anderson Columbia Co., Inc. v. Gannett Co., Inc.*, No. 2001 CA 001728 (Fla. Cir. Ct. 1st Dist. May 3, 2005).

117. *Gannett Co., Inc. v. Joe Anderson, Jr.*, No. 1D05-2179 (Fla. 1st Dist. App. filed May 9, 2005).

118. Anderson, Cate & Franklin, *supra* n. 14, at 396–398, 409–412.

119. Fla. Stat. §§ 770.01–770.02 (2004).

120. See *Ortega v. Post-Newsweek Stations, Fla., Inc.*, 510 So. 2d 972, 977 (Fla. 3d Dist. App. 1987) (holding “that a qualified privilege of reporting on official proceedings is the

against the media. Finally, the constitutional standard first enunciated in *Hill*, which requires that, in matters of public interest, all plaintiffs prove that the media defendant acted with actual malice, should apply to all false light claims.<sup>121</sup>

#### A. Two-Year Statute of Limitations for False Light

The statute of limitations for false light cases—especially those that are essentially defamation claims—should be the two-year statute of limitations for defamation even if the plaintiff does not plead defamation in the alternative. The appellate court's decision and reasoning in *Heekin I* was unnecessarily confusing and conflicted with that of other Florida courts.<sup>122</sup> A less confusing approach is to apply the same, two-year statute of limitations to both false light and defamation.

Other states have already moved to close this loophole, which allows plaintiffs to circumvent a shortened limitations period by characterizing a false light claim as one for defamation.<sup>123</sup> As an Oregon appellate court explained,

[A]lthough plaintiffs characterized their claim as “false light,” the alleged false light—that “plaintiffs were involved with stolen vehicles and narcotics”—is plainly defamatory. Plaintiffs could have filed a claim for defamation. That being the case, we conclude that the specific defamation Statute of Limitations controls. To hold otherwise would permit a plaintiff to elect the longer limitation period . . . simply by characterizing a defamation claim as one for false light.<sup>124</sup>

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settled law of Florida”).

121. *Hill*, 385 U.S. at 387–388.

122. See *Ovadia v. Bloom*, 756 So. 2d 137 (Fla. 3d Dist. App. 2000) (dismissing both defamation and false light claims arising under the same publication as time-barred under the two-year statute of limitations); *Schwab v. TV 12 of Jacksonville, Inc.*, 21 Media L. Rep. 1157, 1159 (Fla. Cir. Ct. 4th Dist. Jan. 11, 1993) (refusing to grant bill of discovery for plaintiffs to explore viability of false light claim because two-year statute of limitations for defamation bars false light claim).

123. For examples of courts imposing the statute of limitations for defamation on false light claims, see *Gashgai v. Leibowitz*, 703 F.2d 10, 13 (1st Cir. 1983) (applying Maine law); *Wagner v. Campbell County*, 695 F. Supp. 512, 517 (D. Wyo. 1988) (applying Wyoming law); *Sullivan*, 709 S.W.2d at 481; *Morrison v. Natl. Broad. Co.*, 227 N.E.2d 572, 574–575 (N.Y. 1967); *Eastwood v. Cascade Broad. Co.*, 722 P.2d 1295, 1296 (Wash. 1986).

124. *Magenis v. Fisher Broad., Inc.*, 798 P.2d 1106, 1109 (Or. App. 1990).

Florida should follow Oregon because, under the law set out in *Heekin I*,<sup>125</sup> plaintiffs in Florida can expand the limitation period by two years simply by calling a defamation claim “false light.” Alternatively, the Florida Legislature could clearly define the two torts and not allow a cause of action for false light when it is actually defamation.

### B. Applying Florida’s Pre-Notice and Retraction Statutes to False Light

Another important media protection in defamation actions that should apply to false light invasion of privacy is Florida’s pre-notice statute.<sup>126</sup> Florida Statutes Section 770.01 requires a defamation complainant to give a media defendant five days’ notice for the purpose of apology or retraction before commencing an action for defamation.<sup>127</sup> If a defamation plaintiff fails to comply with the pre-notice statute, the complaint is dismissed.<sup>128</sup> Furthermore, an adequate retraction should limit a false light plaintiff’s recovery to actual damages.<sup>129</sup>

As noted in a *Heekin* amicus brief filed on behalf of several media outlets, “[t]here is good reason to apply” these Florida statutes to false light claims.<sup>130</sup> Florida’s pre-notice and retraction

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125. 789 So. 2d at 358–359.

126. Fla. Stat. § 770.01.

127. Florida Statutes Section 770.01 states the following:

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 or she alleges to be false and defamatory.

128. See *Cummings v. Dawson*, 444 So. 2d 565, 566 (Fla. 1st Dist. App. 1984) (noting dismissal of a libel or slander claim is proper when plaintiff does not comply with Section 770.01).

129. Fla. Stat. § 770.02. Section 770.02(1) states that:

(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 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.

130. Amicus Br. at 16, *Heekin v. CBS Broad., Inc.*, 789 So. 2d 355 (Fla. 2d Dist. App.

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statutes “grant[ ] valuable and substantive rights to media defendants, rights that should not be eliminated merely because a plaintiff labels his claim as one for false light.”<sup>131</sup>

In *Ross v. Gore*,<sup>132</sup> the Florida Supreme Court explained the importance of the notice and retraction statutes and their role in safeguarding a free press as follows:

In the free dissemination of news, then, and fair comment thereon, hundreds and thousands of news items and articles are published daily and weekly in our newspapers and periodicals. This [C]ourt judicially knows that it frequently takes a legal tribunal months of diligent searching to determine the facts of a controversial situation. When it is recalled that a reporter is expected to determine such facts in a matter of hours or minutes, it is only reasonable to expect that occasional errors will be made. Yet, since the preservation of our American democracy depends upon the public's receiving information speedily—particularly upon getting news of pending matters while there still is time for public opinion to form and be felt—it is vital that no unreasonable restraints be placed upon the working news reporter or the editorial writer.<sup>133</sup>

The sentiments that the Florida Supreme Court expressed more than half a century ago apply equally to false light claims today. In fact, the Court's opinion may be even more true in today's highly competitive news market in which consumers demand more news faster and can choose from a host of media outlets.<sup>134</sup> Media defendants who allegedly place a plaintiff in a false light should have the chance to correct their mistakes.

### C. The Fair Reporting Privilege Applies to False Light

There should be no ambiguity: the fair reporting privilege applies to false light claims against the media.<sup>135</sup> The United States

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2001).

131. *Id.*

132. 48 So. 2d 412 (Fla. 1950).

133. *Id.* at 415.

134. The explosion of media outlets resulted from the growth of cable, satellite, the Internet, and other forms of media.

135. *Contra Heekin I*, 789 So. 2d at 359 (asserting fair reporting privilege did not apply to CBS).

Constitution, as well as Florida law, requires that accurately reported facts contained in public records cannot form a basis for media liability.<sup>136</sup> In *Cox Broadcasting Corp. v. Cohn*,<sup>137</sup> the United States Supreme Court held that “the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.”<sup>138</sup>

Florida common law also provides a qualified media privilege to report information found in public court records.<sup>139</sup> This privilege extends to the publication of information found in all official public documents, as long as the report is a reasonably accurate and fair description of the contents of the documents.<sup>140</sup> Given both federal and Florida precedents, and the important media rights involved, Florida courts should reject the crabbed reasoning of the *Heekin I* court and strictly apply the fair reporting privilege to false light actions against the media.<sup>141</sup>

#### D. *Hill's* Actual Malice Standard Still Applies to False Light

The constitutional standard announced in *Time, Inc. v. Hill*, requiring that the false light plaintiff prove actual malice,<sup>142</sup> should apply to all false light cases. Although the United States Supreme Court held in *Gertz* that private plaintiffs in defamation

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136. See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975) (holding that the media could not be held liable for invasion of privacy for releasing the identity of a rape victim because the media had obtained the name from public records); *Cape Publications, Inc. v. Hitchner*, 549 So. 2d 1374, 1378 (Fla. 1989) (holding *Cox* barred liability for publishing information obtained from a child abuse report); *Doe v. Am. Law. Media, L.P.*, 639 So. 2d 1021, 1022 (Fla. 3d Dist. App. 1994) (finding *Cox* barred liability for publishing names of parties in paternity action obtained from court records).

137. 420 U.S. 469 (1975)

138. *Id.* at 495.

139. *Ortega*, 510 So. 2d at 977.

140. See *Woodard v. Sunbeam TV Corp.*, 616 So. 2d 501, 502 (Fla. 3d Dist. App. 1993) (holding that the broadcast of information from official police report was privileged).

141. In *Heekin I*, the appellate court rejected the trial court's finding that Florida's fair reporting privilege barred a false light action against CBS for two reasons. 789 So. 2d at 359. First, the court explained that because plaintiff's action was based on false light, instead of the disclosure of private facts, the claim was “grounded on [CBS's] use of the information, not its source.” *Id.* at 359–360. Second, the court stated that the trial court's failure to compare the CBS broadcast with public records prevented a finding that the claim was barred by the fair reporting privilege. *Id.* at 360.

142. 385 U.S. at 387–388.

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suits need only prove negligence, the First Amendment and Florida law require a higher fault standard for false light.<sup>143</sup>

In *Hill*, the United States Supreme Court held that the First Amendment requires that a false light plaintiff prove “actual malice,” reasoning as follows:

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 non-defamatory matter . . . . [S]anctions against either innocent or negligent misstatement would present a grave hazard of discouraging the press from exercising the constitutional guarantees.<sup>144</sup>

Indeed, even the *Restatement* requires that plaintiffs alleging false light prove “the actor had knowledge of or acted in reckless disregard as to the falsity . . . .”<sup>145</sup>

Heightened First Amendment protections in a false light case comport with the common law and appropriately recognize the distinction between false light and defamation.<sup>146</sup> Unlike defamation, statements actionable under false light may be true, and these statements need only be “highly offensive,” not defamatory.<sup>147</sup> This means that false light potentially poses an even greater threat to a free press than defamation, and because of this threat, the “actual malice” standard for false light is needed to protect media First Amendment rights, even in private figure cases.

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143. *Id.* at 387–391; see also *Harris v. Dist. Bd. of Trustees of Polk Community College*, 9 F. Supp. 2d 1319, 1329 (M.D. Fla. 1998) (requiring false light plaintiff to prove defendant published information “knowingly or in ‘reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed’” (quoting *Kyser-Smith v. Upscale Commun., Inc.*, 873 F. Supp. 1519, 1527 (M.D. Ala. 1995))).

144. *Hill*, 385 U.S. at 389.

145. *Restatement (Second) of Torts* § 652E.

146. See *supra* pt. III (outlining some of the distinctions between false light invasion of privacy and defamation).

147. See *Heekin I*, 789 So. 2d at 358 (stating that out of the four invasion of privacy torts, “[o]nly false light invasion of privacy contemplates any issue of falsehood; and even then, the tort may exist when the facts published are completely true”).

## VI. CONCLUSION

A false light invasion of privacy claim, like an action for defamation, can have a devastating impact on the media. Multi-million-dollar awards, the mere threat of huge awards, and escalating legal fees erode the media's First Amendment rights and may inhibit the media from vigorously reporting important issues of public concern.

Florida courts have handled false light actions in inconsistent and confusing ways, especially when the facts alleged in a false light claim would support a defamation claim. This inconsistency often allows false light plaintiffs to avoid procedural and substantive protections granted to the press in defamation actions.

Media rights under the First Amendment require that Florida courts be vigilant in determining whether an action for false light is actually an action for defamation. Furthermore, a defamation action camouflaged as a false light action should be treated the same as defamation in terms of the application of procedural and substantive measures to protect media defendants' First Amendment rights.

In Florida, the Legislature and the courts should take a number of steps to ensure an unfettered media. The Legislature should apply the two-year statute of limitations for defamation and apply the State's notice and retraction statutes to false light invasion of privacy. Additionally, Florida courts should unequivocally recognize the fair reporting privilege in false light actions against the media and apply the "actual malice" fault standard to all false light claims.