



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Safeguard individual liberty -- This bill decreases the probability that individuals who sue newspapers and reporters under a theory of placing a person in false light will prevail.

#### B. EFFECT OF PROPOSED CHANGES:

##### **Background on False Light**

"Since its inception, critics have questioned and greatly criticized the existence of the false light form of invasion of privacy. Because it is similar to the more respected tort of defamation, it is attacked as a method of avoiding the constitutional protections of free speech and press that have developed in defamation."<sup>1</sup>

The greatest advantage presented by a false light cause of action is that an action or publication need not be defamatory before it is actionable. It is possible for a plaintiff to recover for a so-called "laudatory" false light. Laudatory false light recognizes that the mere publication of a false impression can be damaging to a plaintiff whether or not it is technically defamatory. In order to recover in defamation, a plaintiff must prove that the communication "lower[ed] him in the estimation of the community or ... [would] deter third persons from associating or dealing with him." By contrast, in a false light cause of action, the plaintiff must prove that the statement is false, and that the plaintiff was portrayed in a manner that "would be highly offensive to a reasonable person."<sup>2</sup>

The first case involving invasion of privacy to be heard by the U.S. Supreme Court was a false light case. In *Time, Inc. v. Hill*, 385 U.S. 374 (1967), the Court held that in order for a plaintiff to recover in a false light action for invasion of privacy, the plaintiff must demonstrate that the defendant published the statements with knowledge of their falsity or in reckless disregard of their truth. In the ruling, the Court acknowledged both the similarities and the distinctions between defamation and invasion of privacy.<sup>3</sup>

The *Time* Court "noted that an actionable statement under false light need not be defamatory, and could in fact be laudatory."<sup>4</sup> Further, the primary harm compensated in an invasion of privacy action is the mental distress caused by exposure to public view, rather than damage to reputation.<sup>5</sup> However, a successful plaintiff under either theory must prove the material falsity of the publication, as well as the publisher's knowledge of the falsity or reckless disregard for the truth.<sup>6</sup>

The second false light case heard by the U.S. Supreme Court was *Cantrell v. Forest City Publishing Co*, 419 U.S. 245 (1974).<sup>7</sup> The Supreme Court reaffirmed the decision in *Time* calling for actual knowledge of falsity or reckless disregard for the truth in order to establish the defendant's liability.<sup>8</sup>

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<sup>1</sup> Bryan R. Lasswell, *In Defense of False Light: Why False Light Must Remain A Viable Cause of Action*, 34 S. Tex. L. Rev. 149 (1993).

<sup>2</sup> Lasswell, 34 S. Tex. L. Rev. at 172.

<sup>3</sup> Lasswell, 34 S. Tex. L. Rev. at 155.

<sup>4</sup> Lasswell, 34 S. Tex. L. Rev. at 156.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

## Background from Restatement of Torts<sup>9</sup>

The Restatement Second of Torts ("Restatement") provides the following explanation of the tort of false light.

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>10</sup>

The Restatement clarifies the elements of a false light claim with the comment that "[t]he form of invasion of privacy covered by the rule stated in this Section does not depend upon making public any facts concerning the private life of the individual. On the contrary, it is essential to the rule stated in this Section that the matter published concerning the plaintiff is not true. The rule stated here is, however, limited to the situation in which the plaintiff is given publicity."<sup>11</sup>

The Restatement is clear that "[i]t is not, however, necessary to the action for invasion of privacy that the plaintiff be defamed. It is enough that he is given unreasonable and highly objectionable publicity that attributes to him characteristics, conduct or beliefs that are false, and so is placed before the public in a false position."<sup>12</sup>

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<sup>9</sup> The Restatement Second of Torts is a publication of the American Law Institute.

The American Law Institute was organized in 1923 following a study conducted by a group of prominent American judges, lawyers, and teachers known as "The Committee on the Establishment of a Permanent Organization for the Improvement of the Law." The Committee had reported that the two chief defects in American law, its uncertainty and its complexity, had produced a "general dissatisfaction with the administration of justice.

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The founding Committee had recommended that the first undertaking of The American Law Institute should address uncertainty in the law through a restatement of basic legal subjects that would tell judges and lawyers what the law was. The formulation of such a restatement thus became the first endeavor of the Institute. Between 1923 and 1944, Restatements of the Law were developed for Agency, Conflict of Laws, Contracts, Judgments, Property, Restitution, Security, Torts, and Trusts. In 1952, the Institute started Restatement Second—new editions of the original Restatements that updated them, reflected new analyses and concepts, and expanded upon the authorities used in reaching the conclusions set forth. Restatement Second also treated subjects not included in the first Restatement, such as Landlord and Tenant and the Foreign Relations Law of the United States. In 1987 a new Restatement of the Foreign Relations Law of the United States inaugurated a third series of Restatements, which also now includes Restatements of Unfair Competition, Property (Mortgages and Servitudes), Suretyship and Guaranty, Torts (Products Liability and Apportionment of Liability), and The Law Governing Lawyers. New Restatements on Agency, Property (Wills and Other Donative Transfers), Restitution and Unjust Enrichment, Trusts, Torts (Liability for Physical Harm), and Employment Law are also being developed as part of Restatement Third. The Restatement Case Citations are additional aids designed to provide easy access to court decisions that cite the Restatements.

*About the American Law Institute* (last visited Mar. 29, 2006) <<http://www.ali.org/ali/thisali.htm>>.

<sup>10</sup> Restatement (Second) of Torts s. 652E cmt. A (1977).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* s. 652E cmt. B.

As for damages, the Restatement provides that a plaintiff may recover compensatory damages for the harm to the plaintiff's reputation, and emotional distress or humiliation.<sup>13</sup> It is also possible that a plaintiff could recover special damages so long as they are pleaded and proved.<sup>14</sup>

Finally, "the right protected by the action for invasion of privacy is a personal right, peculiar to the individual whose privacy is invaded."<sup>15</sup> Therefore, such a cause of action "is not assignable, and it cannot be maintained by other persons such as members of the individual's family, unless their own privacy is invaded along with his. The only exception to this rule involves the appropriation to the defendant's own use of another's name or likeness."<sup>16</sup>

## Florida's Privacy Actions

"The right to one's person may be said to be a right of complete immunity: to be let alone."<sup>17</sup> That phrase encapsulates Florida's concept of the privacy actions or torts.<sup>18</sup>

The law recognizes a right of privacy in our tort law,<sup>19</sup> and there are four types "of wrongful conduct that can all be remedied with resort to an invasion of privacy action."<sup>20</sup> These four privacy actions 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 place a person in a false light even though the facts themselves may not be defamatory.<sup>21</sup>

Of the four invasion of privacy torts, "only false-light invasion of privacy contemplates any issue of falsehood, and even then, the tort may exist when the facts published are completely true."<sup>22</sup>

## Element of a False Light Claim

In order to succeed on a case alleging false light, the plaintiff must demonstrate: (1) the false light must be highly offensive to a reasonable person; and (2) the defendant must have acted either knowingly or in reckless disregard as to the falsity of the publicized material and the false light in which it would be placed.<sup>23</sup> Neither knowledge of the falsity of the information nor reckless disregard for the truth is an element of a cause of action for false light.<sup>24</sup>

The bill provides new elements for the tort of false light. A person may not be held liable for publishing a matter concerning an individual which places that individual before the public in a false light, unless:

- The published matter is false;

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<sup>13</sup> *Id.* s. 652H cmts. A-B.

<sup>14</sup> *Id.* s. 652H cmt. D.

<sup>15</sup> Restatement (Second) of Torts s. 652I cmt. A.

<sup>16</sup> Restatement (Second) of Torts s. 652I cmt. A.

<sup>17</sup> *Forsberg v. Housing Auth. Of the City of Miami Beach*, 455 So. 2d 373, 376 (Fla. 1984).

<sup>18</sup> A tort is defined as: "a civil wrong for which a remedy may be obtained, usu[ally] in the form of damages; a breach of a duty that the law imposes on everyone in the same relation to one another as those involved in a given transaction." Black's Law Dictionary 1497 (7th ed 1999)

<sup>19</sup> *Agency for Health Care Admin. v. Associated Indus. of Fla., Inc.*, 678 So.2d 1239, 1252 (Fla.1996).

<sup>20</sup> *Agency for Health Care Admin.*, 678 So.2d 1252 n. 20.

<sup>21</sup> *Agency for Health Care Admin.*, 678 So.2d 1252 n. 20.

<sup>22</sup> 19A Fla. Jur. 2d Defamation and Privacy s. 222 (citing *Heekin v. CBS Broad., Inc.*, 789 So. 2d 355 (Fla. 2d DCA 2001)).

<sup>23</sup> 19A Fla. Jur. 2d Defamation and Privacy s. 222 (citing *Lane v. MRA Holdings, LLC*, 242 F. Supp. 2d 1205 (M.D. Fla. 2002); *Harris v. Dist. Bd. of Trs. of Polk Cmty. College*, 9 F. Supp. 2d 1319, (M.D. Fla. 1998)).

<sup>24</sup> 19A Fla. Jur. 2d Defamation and Privacy s. 222 (citing *Heekin*).

- The false fact placed the individual in a false light that is highly offensive to a reasonable person;
- The person making the publication acted knowingly or in reckless disregard as to the falsity of the fact publicized; and
- The person making the publication acted knowingly or in reckless disregard as to the false light in which the individual would be placed.

### Statute of Limitations

Since no defamation is required for an invasion of privacy claim, the statute of limitations for defamation<sup>25</sup> actions (2 years) does not apply to invasion of privacy actions.<sup>26</sup> Therefore, the four-year general statute of limitations, in s. 95.11(3)(p), F.S. applies to false light claims.<sup>27</sup>

The bill provides for a two year statute of limitations on an action for false light. Specifically, an action must be filed within 2 years after the first publication of the matter that forms the basis of the claim.

The bill further provides that a cause of action for damages founded upon a single publication accrues at the time of the first publication in this state. A judgment in any jurisdiction for or against the plaintiff upon the substantive merits of any action for damages founded upon a single publication bars any other action for damages by the same plaintiff against the same defendant founded upon the same publication.<sup>28</sup>

### Selection of Remedies

The law provides that a "plaintiff may not avoid the two-year statute of limitations for defamation actions by simply renaming the defamation action as one for false light invasion of privacy."<sup>29</sup>

The bill provides that an action may for false light not be brought or maintained if a claim based upon the same published fact or facts is, or could be, brought under the common law of defamation.

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<sup>25</sup> Despite a similarity of elements, false light and defamation are independent torts. Defamation involves injury to reputation; false light involves injury to the person, primarily through mental and emotional distress. The elements of defamation are as follows:

A common law claim for defamation 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. A communication is "defamatory" if it tends to harm the reputation of another as to lower him or her in estimation of community or deter third persons from associating or dealing with the defamed party.

*Mile Marker, Inc. v. Petersen Publ'g, L.L.C.*, 811 So. 2d 841, 845 (Fla. 4th DCA 2002)(internal citations omitted).

<sup>26</sup> *Id.*

<sup>27</sup> *Heekin*, 789 So. 2d at 358.

<sup>28</sup> This provision of the bill appears to be substantially similar to s. 770.06, F.S. which provides for adverse judgments in any jurisdiction. Specifically, s. 770.06, F.S. states: "A judgment in any jurisdiction for or against the plaintiff upon the substantive merits of any action for damages founded upon a single publication or exhibition or utterance as described in s. 770.05 shall bar any other action for damages by the same plaintiff against the same defendant founded upon the same publication or exhibition or utterance."

<sup>29</sup> *Heekin*, 789 So. 2d at 358. The *Heekin* court expounded: "[w]e do, however, recognize one exception to this general rule. When a plaintiff has a cause of action for libel or slander 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." *Id.*

## Burden of Proof

The bill imposes a greater standard of proof in false light cases. Generally, in civil cases the burden of proof is a preponderance of the evidence. The Florida Supreme Court admitted that numerous definitions for preponderance of the evidence, but cited to *McCormick on Evidence* 575 (4th ed.1992) for this definition:

The most acceptable meaning to be given the expression, proof by a preponderance, seems to be proof which leads the jury to find the existence of the contested fact is more probable than its nonexistence. Thus the preponderance of the evidence becomes the trier's belief in the preponderance of probability.<sup>30</sup>

Another definition for the term is "evidence preponderates when it is more convincing to the trier than the opposing evidence."<sup>31</sup>

This bill imposes a greater standard of proof in false light cases. This bill requires a plaintiff must prove the elements listed above by clear and convincing evidence. This standard of proof has been defined by the Florida Supreme Court as an "intermediate level of proof [that] entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy."<sup>32</sup>

## Presuit Requirement

Currently there is no presuit requirement for filing a false light claim.

The bill imposes presuit requirements by providing that ss. 770.01 and 770.02, F.S. apply to all false light actions. Sections 770.01 and 770.02, F.S., require plaintiffs to provide 5 days' written notice to a media defendant before instituting a defamation action in order to give such defendants an opportunity to correct the allegedly defamatory communications. Notice is a jurisdictional condition precedent to filing a defamation claim. If such a correction is published, the plaintiff is limited to recovering actual damages.

## Privilege

The bill provides that a publication that is privileged or otherwise protected from liability under the common law of defamation, the First Amendment to the United States Constitution, or s. 4, Art. I of the State Constitution is not subject to liability under this section.<sup>33</sup> A non-exhaustive list of some of the

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<sup>30</sup> *Dept. of Health and Rehabilitative Services v. M.B.*, 701 So. 2d 1155 n.20 (Fla. 1997)(citing *McCormick on Evidence* 575 (4th ed.1992).

<sup>31</sup> *Dept. of Health*, 701 So. 2d at 1155 n.20.

<sup>32</sup> *G.W.B., v. J.S.W.*, 658 So. 2d 951, 967 (Fla 1995)(citing *In re Davey*, 645 So. 2d 398, 404 (Fla. 1994)).

<sup>33</sup> The Restatement provides guidance on this point:

The free-speech and free-press provisions of the First Amendment have been held to apply to the common law of defamation and to impose certain restrictions on the availability of defamation actions. In *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, it was held that a public official could not recover for a false and defamatory publication unless he proved by clear and convincing evidence that the defendant had knowledge of the falsity of the statement or acted in reckless disregard of its truth or falsity. This rule was later extended to public figures. In the case of *Time, Inc. v. Hill* [385 U.S. 534 (1967)], involving a magazine pictorial treatment of a play based upon a real episode, which implied that certain fictitious incidents in the play transpired with the real-life parties, the Supreme Court held that the rule of *New York Times Co. v. Sullivan* also applies to the false-light cases covered by this Section. It is on the basis of *Time v. Hill* that Clause (b) has been set forth. The full extent of the authority of this case, however, is presently in some doubt.

affirmative defenses and privileges under Florida law for defamation are: truth coupled with a good motive;<sup>34</sup> pure opinion;<sup>35</sup> immunity from defamation liability to former employer for disclosure of information about former employee's job performance to prospective employer;<sup>36</sup> and a statement made by one who has a duty or interest in the matter.<sup>37</sup>

### Preclusion

It has been held that since privacy rights are personal, they die with the individual.<sup>38</sup> Therefore, in order to bring a false light action, a plaintiff must be alive.

The bill precludes a false light action, on or behalf of, a deceased person.

### Retroactivity

The bill provides that it is the expressed intent of the Legislature that this bill applies retroactively.

#### C. SECTION DIRECTORY:

Section 1 creates s. 770.09, F.S. relating to actions for false light.

Section 2 provides an effective date of July 1, 2006.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

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Although the Supreme Court had extended the rule of *New York Times Co. v. Sullivan* in defamation cases beyond public officials and public figures to all "matters of public or general interest," by a plurality opinion in *Rosenbloom v. Metromedia, Inc.*, [403 U.S. 29 (1970)], this position was subsequently repudiated in *Gertz v. Robert Welch, Inc.*, [418 U.S. 323 (1974)], which restricted the knowledge-or-reckless-disregard rule again to public officials and public figures, but held that in other cases the plaintiff must show that the defendant was at fault, at least to the extent of being negligent, regarding the truth or falsity of the statement. The effect of the Gertz decision upon the holding in *Time, Inc. v. Hill* has thus been left in a state of uncertainty. In *Cantrell v. Forest City Pub. Co.* [419 U.S. 425 (1974)], the court found that the defendant was shown to have acted in reckless disregard as to the truth or falsity of the statement, and it consciously abstained from indicating the present authority of *Time v. Hill*.

Pending further enlightenment from the Supreme Court, therefore, this Section provides that liability for invasion of privacy for placing the plaintiff in a false light may exist if the defendant acted with knowledge of the falsity of the statement or in reckless disregard as to truth or falsity. The Caveat leaves open the question of whether there may be liability based on a showing of negligence as to truth or falsity. If *Time v. Hill* is modified along the lines of *Gertz v. Robert Welch*, then the reckless-disregard rule would apparently apply if the plaintiff is a public official or public figure and the negligence rule will apply to other plaintiffs. If *Time v. Hill* remains in full force and effect because the injury is not so serious when the statement is not defamatory, the blackletter provision will be fully controlling.

<sup>34</sup> *Lipsig v. Ramlawi*, 760 So. 2d 170, 183 (Fla. 3d DCA 2000).

<sup>35</sup> *From v. Tallahassee Democrat, Inc.*, 400 So. 2d 52, 57 (Fla. 1st DCA 1981).

<sup>36</sup> *Linafelt v. Beverly Enterprises-Florida*, 745 So.2d 386, 388 (Fla. 1st DCA 1999).

<sup>37</sup> *Schreidell v. Shoter*, 500 So. 2d 288, 230 (Fla. 3d DCA 1987). The *Schreidell* court stated: The Florida Supreme Court in *Coogler v. Rhodes*, 38 Fla. 240, 248, 21 So. 109, 112 (1897) (citing Townshend on Slander & Libel s. 209 (4th ed.)), first enunciated the concept of a qualified privilege: Where a person is so situated that it becomes right, in the interests of society, that he should tell to a third person certain facts, then, if he bona fide, and without malice, does tell them, it is a privileged communication. Thus, a statement is qualifiedly privileged if made by one who has a duty or interest in the subject matter to one who has a corresponding duty or interest (some internal citations omitted).

<sup>38</sup> *Nestor v. Posner-Gerstenhaber*, 857 So. 2d 953, 955 (Fla. 3d DCA 2003) (citing *Williams v. City of Minneola*, 575 So. 2d 683, 689 (Fla. 5th DCA 1991)(citing Restatement (Second) of Torts s. 652I)).

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Prospective and Retrospective Effect of a Change in Statutory Law

Florida law provides that retroactive application of a statute is possible depending on the outcome of two inquiries. *Romine v. Fla. Birth Related Neurological Injury Comp. Ass'n*, 842 So.2d 148, 153 (Fla. 5th DCA 2003). First, is there clear legislative intent for the statute to apply retroactively? If not then that ends the inquiry and the statute will only apply prospectively. *Romine*, 842 So. 2d at 153. Second, would the retroactive application of the statute be constitutional? In other words, "[c]ourts will not permit the retroactive application of a statute if the statute impairs vested rights, creates new obligations, or imposes new penalties ..." *Romine*, 842 So. 2d at 153.

The bill expressly provides for the retroactive application of the changes to the false light torts. Therefore, the sole question before this Court is whether or not the changes to the Act would impair a vested right. A vested right has been defined as:

an immediate, fixed right of present or future enjoyment and also as an immediate right of present enjoyment, or a present, fixed right of future enjoyment. To be vested, a right must be more than a mere expectation based on an anticipation of the continuance of an existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand. Vested rights are distinguished not only from expectant rights but also from contingent rights. Rights are vested, in contradistinction to being expectant or contingent.



They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons, as a present interest. They are expectant when they depend upon the continued existence of the present condition of things until the happening of some future event. They are contingent when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting.

*R.A.M of South Fla., Inc., v. WCI Communities, Inc.*, 869 So.2d 1210, 1218 (Fla. 2d DCA 2004)(internal citations and quotations omitted).

It is unclear if the presuit and the higher standard of proof requirements in this bill would impinge upon a vested rights for cases filed before the enactment of this bill.

#### Selection of Remedies

It is unclear if the bill's limitation that a false light action may not be "brought or maintained" if a claim for defamation "is, or could be, brought" for the same facts, preclude pleading in the alternative by a plaintiff.

#### B. RULE-MAKING AUTHORITY:

None.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

It is unclear if the bill's limitation that a false light action may not be "brought or maintained" if a claim for defamation "is, or could be, brought" for the same facts, preclude pleading in the alternative by a plaintiff.

### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

N/A