

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Judiciary Committee

BILL: CS/SB 1346

INTRODUCER: Judiciary Committee and Senator Smith

SUBJECT: Free Speech or Defamation Actions

DATE: April 27, 2006

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Luczynski</u>	<u>Maclure</u>	<u>JU</u>	Fav/CS
2.	_____	_____	<u>RC</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill codifies the common law tort of false light invasion of privacy.¹ This is accomplished by adopting the Restatement Second of Torts (“Restatement”) definition of false light invasion of privacy.²

A false light invasion of privacy lawsuit is based on a legal theory that allows a plaintiff to sue for damages due to publicity that places the plaintiff in a “false light” which would be highly offensive to a reasonable person. Consistent with the Restatement, the bill provides that the defendant have had knowledge or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed.

The civil action of false light arises when something factually untrue has been communicated about an individual. The Restatement notes that “it is essential to the rule stated . . . that the matter published concerning the plaintiff is not true.”³ Some courts have held that the civil action

¹ The Florida Supreme Court initially recognized the common law tort of invasion of privacy, in *Cason v. Baskin*, 20 So. 2d 243 (1944), without reference to the four specific privacy torts. *Cason* is most analogous to the specific invasion of privacy tort “public disclosure of private facts – the dissemination of truthful private information that a reasonable person would find objectionable.” Until *Heekin v. CBS Broadcasting, Inc.*, 789 So. 2d 355 (Fla. 2d DCA 2001), the majority approach required the publicized matter in a false light claim to be false and the actor to have 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 have been placed. The *Heekin* court, relying on *Cason*, permitted a false light claim without requiring falsity of the matter or actual malice.

² Restatement (Second) of Torts § 652E (1977).

³ *Id.* cmt. a.

of false light arises not only when something factually untrue has been communicated about an individual, but also when the communication of true information carries a false implication.⁴

Under the Restatement “one who is publicly placed in a false light . . . may recover damages for the harm to his reputation from the position in which he is placed.”⁵

The bill also provides for a two-year statute of limitations.

This bill creates section 770.09, Florida Statutes. The bill substantially amends section 95.11, Florida Statutes.

II. Present Situation:

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.”⁶

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.”⁷

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*, 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.⁸ In the ruling, the Court acknowledged both the similarities and the distinctions between defamation and invasion of privacy.⁹

⁴ See e.g., *Braun v. Flynt*, 726 F.2d 245, 253 (5th Cir. 1984) (noting that Texas has adopted the Restatement (Second) of Torts, false light invasion of privacy and recognizing false-light claim based on the false implication of true information); *contra Fudge v. Penthouse Int'l, Ltd.*, 840 F.2d 1012, 1017-20 (1st Cir. 1988) (citing Restatement (Second) of Torts and refusing to adopt implied false light theory on facts similar to *Braun*); *Machleder v. Diaz*, 801 F.2d 46, 54-55 (2d Cir. 1986) (citing Restatement (Second) of Torts and concluding that only literal falsity should be actionable).

⁵ Restatement (Second) of Torts § 652H cmt. a. (1977).

⁶ Bryan R. Lasswell, *In Defense of False Light: Why False Light Must Remain a Viable Cause of Action*, 34 S. Tex. L. Rev. 149, 150 (1993).

⁷ *Id.* at 172 (citations omitted).

⁸ 385 U.S. 374, 388 (1967).

⁹ Lasswell, *supra* note 6, at 155.

The *Time* Court “noted that an actionable statement under false light need not be defamatory, and could in fact be laudatory.”¹⁰ 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.¹¹

The second false light case heard by the U.S. Supreme Court was *Cantrell v. Forest City Publishing Co*, 419 U.S. 245 (1974).¹² 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.¹³

Background from Restatement of Torts

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.¹⁴

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.”¹⁵

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.”¹⁶

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.¹⁷ It is also

¹⁰ *Id.* at 156.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Restatement (Second) of Torts § 652E (1977).

¹⁵ *Id.* cmt. a.

¹⁶ *Id.* cmt. b.

¹⁷ Restatement (Second) of Torts § 652H cmts. a-b (1977).

possible that a plaintiff could recover special damages so long as they are plead and proven.¹⁸ Finally, “the right protected by the action for invasion of privacy is a personal right, peculiar to the individual whose privacy is invaded.”¹⁹ 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.”²⁰

Florida’s Privacy Actions

“The right to one’s person may be said to be a right of complete immunity: to be let alone.”²¹ That phrase encapsulates Florida’s concept of the privacy actions or torts.²² The Florida Supreme Court recognized and created a distinct right of privacy as part of Florida tort law in *Cason v. Baskin*, 20 So. 2d 243 (Fla. 1945).²³ There are four types “of wrongful conduct that can all be remedied with resort to an invasion of privacy action.”²⁴ 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.²⁵ 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.”²⁶

In order to succeed in a common law false light action, 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.²⁷ 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.²⁸

III. Effect of Proposed Changes:

The bill codifies the common law tort of false light invasion of privacy.²⁹ This is accomplished by adopting the Restatement Second of Torts (“Restatement”) definition of false light invasion of privacy.³⁰ The bill provides that a person who gives publicity to another person which places the

¹⁸ *Id.* cmt. d.

¹⁹ Restatement (Second) of Torts §. 652I cmt. a.

²⁰ *Id.*

²¹ *Forsberg v. Housing Auth. of the City of Miami Beach*, 455 So. 2d 373, 376 (Fla. 1984).

²² 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).

²³ *Agency for Health Care Admin. v. Associated Indus. of Fla., Inc.*, 678 So. 2d 1239, 1252 (Fla. 1996)

²⁴ *Id.* at 1252 n. 20.

²⁵ *Id.*

²⁶ *Heekin v. CBS Broadcasting, Inc.*, 789 So. 2d 355, 358 (Fla. 2d DCA 2001).

²⁷ 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)).

²⁸ 19A Fla. Jur. 2d Defamation and Privacy s. 222 (citing *Heekin v. CBS Broad., Inc.*, 789 So. 2d 355 (Fla. 2d DCA 2001)).

²⁹ See *supra* note 1.

³⁰ Restatement (Second) of Torts § 652E (1977).

other person before the public in a false light is subject to liability to the other person for invasion of his or her privacy, if:

(1) The false light in which the other person was placed would be highly offensive to a reasonable person; and

(2) 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 person would be placed.

The civil action of false light arises when something factually untrue has been communicated about an individual. The Restatement notes that “it is essential to the rule stated . . . that the matter published concerning the plaintiff is not true.”³¹ Some courts have held that the civil action of false light arises not only when something factually untrue has been communicated about an individual, but also when the communication of true information carries a false implication.³²

Under the Restatement “one who is publicly placed in a false light . . . may recover damages for the harm to his reputation from the position in which he is placed.”³³

Under current Florida case law, common law false light invasion of privacy is subject to the statutory four-year “catch-all” statute of limitations.³⁴ The bill provides for a two-year statute of limitations on an action for false light. An action must be filed within two years after the first publication of the matter that forms the basis of the claim.

The bill provides an effective date of July 1, 2006.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

³¹ *Id.* cmt. a.

³² *See supra* note 4.

³³ Restatement (Second) of Torts § 652H cmt. a. (1977).

³⁴ *See Heekin*, 789 So. 2d at 358; Section 95.11(3)(p), F.S.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
