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Committee on Judiciary

ANALYSIS OF CAUSE OF ACTION FOR FALSE LIGHT INVASION OF PRIVACY

SUMMARY

False light invasion of privacy is publicity that unreasonably places a person in a false light before the public. Since the cause of action's inception, a struggle has existed to balance the competing interests of an individual's right to privacy and the constitutional right to free expression. Confusion has emerged in the Florida courts as they try to define the cause of action while maintaining this balance, resulting in inconsistent case law. The Legislature has several options, ranging from no action to eliminating the cause of action completely, if it wishes to prescribe policy enunciating Florida's position on the tort of false light.

BACKGROUND

Evolution of Invasion of Privacy

Legal scholars Samuel Warren and Louis Brandeis conceived the tort of invasion of privacy in 1890 from the basic notion that an individual has the right "to be let alone."[1] This idea materialized into their influential Harvard Law Review article titled *The Right to Privacy*,[2] which remained the authority on the invasion of privacy tort for many years. The tort was given further credence in 1939 when the Restatement of Torts recognized it.[3]

In 1960, Dean William Prosser made significant changes to the tort by expanding on Warren's and Brandeis' theory. Prosser concluded that the invasion of privacy tort actually consisted of four distinct interests: (1) intrusion; (2) public disclosure of private facts; (3) appropriation of name or likeness; and (4) false light in the public eye.[4] Several years later, Prosser's vision of the new tort was incorporated into the Restatement (Second) of Torts.[5]

False Light Invasion of Privacy

False light is one form of the tort of invasion of privacy. False light invasion of privacy "serves to protect individuals who have not placed themselves in the public eye"[6] and "is intended to remedy the emotional distress caused by certain kinds of false depictions of the plaintiff."[7] There are generally two minimum requirements associated with bringing a false light claim: (1) the falsehood must be material and substantial; and (2) communication of the misinformation must reach an audience sufficiently large enough to constitute widespread publicity.[8]

Florida first recognized invasion of privacy in *Cason v. Baskin*, 20 So. 2d 243 (Fla. 1944); however, the *Cason* court did not specifically recognize the subset tort of false light.[9] The Florida Supreme Court has yet to clearly decide a false light claim, but it did explicitly

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[1] Patricia Avidan, *Protecting the Media's First Amendment Rights in Florida: Making False Light Plaintiffs Play by Defamation Rules*, 35 STETSON L. REV. 227, 231 (2005).

[2] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[3] Avidan, *supra* note 1, at 232. The first Restatement defined 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." RESTATEMENT OF TORTS § 867 (1939).

[4] William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

[5] RESTATEMENT (SECOND) OF TORTS § 652A (1977).

[6] Robert H. Thornburg, *Florida Privacy Law: Potential Application of Intentional Tort Principles and Florida's Constitutional Right of Privacy as Safeguards to Governmental and Private Dissemination of Private Information*, 4 FLA. COASTAL L.J. 137, 152 (2003).

[7] Diane Leenheer Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. REV. 364, 371 (1989)

[8] *Id*. at 370-71.

[9] Avidan, *supra* note 1, at 233-34.

recognize the four types of invasion of privacy in 1996.[10] However, Florida may soon receive additional direction for the tort. There are currently two cases pending before the Florida Supreme Court: *Anderson v. Gannett Co., Inc.*, Case No. SC06-2174, and *Jews for Jesus, Inc. v. Rapp*, Case No. SC06-2491. Oral arguments for both cases are scheduled for March 6, 2008. For more information on these cases, see the Findings section of this report.

During the 2006 and 2007 regular legislative sessions, measures were introduced – but ultimately died in committee – to reform or eliminate the cause of action for false light invasion of privacy in Florida. In 2006, SB 1346 attempted to clarify the criteria for establishing liability under false light invasion of privacy. Specifically, the person bringing the action would have to show by clear and convincing evidence: (1) the matter published relates to a fact that is false; (2) the false fact placed the individual in a false light that is highly offensive to a reasonable person; (3) the person making the publication acted knowingly or in reckless disregard as to the falsity of the fact publicized; and (4) the person making the publication acted knowingly or in reckless disregard as to the false light in which the individual would be placed. In 2007, proposed SB 1650 went further by eliminating the cause of action completely.

In recognition of these prior legislative efforts, the purpose of this report is to analyze false light invasion of privacy in Florida in the event the Legislature wishes to enact legislation affecting the cause of action.

METHODOLOGY

Committee staff reviewed case law from Florida and other states on the cause of action for invasion of privacy and, more specifically, false light; reviewed legal literature on the cause of action for false light invasion of privacy; and consulted with industry representatives, practitioners, and legal scholars.

FINDINGS

False Light Invasion of Privacy in Florida

The Florida Supreme Court "has recognized the potential existence of a cause of action for invasion of privacy based on a false light theory, [but] it has never had occasion to decide whether such a cause of action actually exists in Florida."[11] However, the majority of district and circuit courts applying Florida law have recognized the cause of action.[12] Currently, Florida courts have not reached a consensus on what is required for a viable false light cause of action.

Heekin v. CBS Broadcasting, Inc.

In *Heekin v. CBS Broadcasting, Inc.*, 789 So. 2d 355 (Fla. 2d DCA 2001) ("*Heekin I*"), a controversial false light case in Florida, John Charles Heekin filed suit based on a CBS broadcast concerning domestic violence. Included in the broadcast was an interview with Heekin's ex-wife that showed images of her with their children. Heekin's complaint alleged that although the specific facts contained in the broadcast were true, they created a false impression that Heekin had abused his wife and children.[13]

Heekin I established that: (1) the tort of false light invasion of privacy can exist when the facts published are completely true; (2) the statute of limitations for a false light claim is the four-year "catch-all" statute of limitations, since false light is not specifically named in s. 95.11, F.S.; (3) neither knowledge of the falsity of the information nor reckless disregard for its truth are elements of false light; and (4) the fair reporting privilege does not bar a false light action.[14] It appears that under *Heekin I*, truthful publications are actionable as false light without regard to the content of the communications or the intent or fault of the publisher.

Thereafter, the case went back to the trial court where it was dismissed.[15] Back on appeal, the appellate court affirmed the trial court's judgment in favor of CBS without issuing an opinion. However, *Heekin I* remains the only substantive appellate decision of the case and is often cited in false light cases. The Second District's holding in *Heekin I* has led many practitioners to

[10] *Id*. at 234 (citing *Agency for Health Care Admin. v. Associated Indus. of Fla., Inc.*, 678 So. 2d 1239, 1252 n. 20 (Fla. 1996)).

[11] *Gannett Co., Inc. v. Anderson*, 947 So. 2d 1, 7 (Fla. 1st DCA 2006).

[12] *Lane v. MRA Holdings, LLC*, 242 F. Supp. 2d 1205, 1221 n. 71 (M.D. Fla. 2002).

[13] *Heekin*, 789 So. 2d at 357.

[14] *Id*. at 358-60.

[15] After reviewing the broadcast, the trial court granted CBS's motion for judgment on the pleadings because the "broadcast did not 'convey the "false impression" plaintiff allege[d].'" Avidan, *supra* note 1, at 243 (quoting *Heekin v. CBS Broad., Inc.*, No. 99-5478-CA (Fla. Cir. Ct. 12th Dist. July 28, 2003)).

question whether false light will become a "big growth area" in suits against the media.[16]

Gannett Co., Inc. v. Anderson

The *Heekin I* decision has recently been rejected by a subsequent district court of appeal in *Gannett Co., Inc. v. Anderson*, 947 So. 2d 1 (Fla. 1st DCA 2006). On December 12, 2003, a jury awarded Joe Anderson, Jr., an unprecedented $18.28 million in compensatory damages against the *Pensacola News Journal* and its parent companies for a published article that was true.

In 1998, the *News Journal* published a series of articles aimed at informing readers about the performance of state regulators in Escambia County. On the second day of the series, the *News Journal* published the story that became the issue in the case, titled "Contractor puts squeeze on state: Company pursues political clout." More than two years after the series was published, Anderson commenced litigation claiming the article implied that he had murdered his wife.[17] The relevant portion of the article is as follows:

> In 1988, while still on probation and before his conviction was reversed, Anderson shot and killed his wife, Ira Anderson, with a 12-gauge shotgun.
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> The death occurred in Dixie County just north of Suwannee where days before the shooting Joe Anderson had filed for divorce but then had the case dismissed.
>
> Law enforcement officials determined the shooting was a hunting accident.
>
> A federal judge ruled that by having the shotgun, Anderson violated his probation, and the judge added two years to Anderson's probation.
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> Capt. Bob Stanley of the Florida Game and Fresh Water Fish Commission, was one of the officials who went to the scene of the shooting.
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> Anderson said that he and his wife were deer hunting when she walked one way down a road and he walked the other way, Stanley recalls. A deer ran between them and Joe Anderson fired twice. One shot hit the deer, the other hit his wife.
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> "One buckshot pellet hit her under the arm and went through her heart," Stanley said.
>
> When investigators arrived on the scene, he said, they found that the other people in the hunting party had taken the deer back to the hunt club and were cleaning it.
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> "You have to understand, it's Dixie County," he said. "Back then, they shut down the schools for the first week of hunting season."
>
> He said that Anderson had stayed behind at the shooting scene, and he described Anderson as looking "visibly upset" after the shooting.[18]

The case was controversial, in part, because the article was based on true facts,[19] acquired through public records, and seemingly published without actual malice. Additionally, there was debate on whether the case was barred by the statute of limitations, since the claim was first filed as a libel claim. The First District Court of Appeal ultimately reversed the case, concluding that a false light cause of action is governed by the two-year statute of limitations that applies to defamation actions. The DCA recognized conflict with *Heekin I* and certified to the Florida Supreme Court the question of whether an action for false light is governed by the two-year statute of limitations that applies to defamation claims or by the four-year statute that applies to unspecified tort claims.[20] The Florida Supreme Court accepted jurisdiction and oral arguments are scheduled for March 6, 2008.

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[16] *Id*. at 241. Some practitioners in Florida believe that after *Heekin I* "Florida's approach to the false light tort is now out of line with every other jurisdiction in this country," because Florida does not require falsity or constrain the tort to constitutionally permissible limits. Materials from the Florida Press Association dated Aug. 2, 2007 (on file with the Senate Committee on Judiciary).

[17] Anderson's initial complaint sought damages for libel, but this action was barred by the two-year statute of limitations. Anderson amended the complaint to include a false light invasion of privacy claim. *Gannett*, 947 So. 2d at 2.

[18] Amie K. Streater, *Contractor puts squeeze on state: Company pursues political clout*, PENSACOLA NEWS J., Dec. 14, 1998, at 1A.

[19] Anderson acknowledged that the facts were "literally true." Appellee's Answer Br. 2.

[20] *Gannett*, 947 So. 2d at 11.

Rapp v. Jews for Jesus, Inc.

Not long after the *Gannett* decision, the Fourth District Court of Appeal was presented with a false light case. In *Rapp v. Jews for Jesus, Inc.*, 944 So. 2d 460 (Fla. 4th DCA 2006), Edith Rapp sued the religious organization Jews for Jesus, Inc., based on a copy of the organization's newsletter, which alleged that Rapp, who was Jewish, had accepted Christian beliefs. The circuit court dismissed her complaint for failure to state a cause of action. The Fourth District reversed, in part, holding that the plaintiff had stated a claim for false light.[21] However, because the court recognized that false light has been a "heated debate" in Florida, it certified to the Florida Supreme Court the following question: "Does Florida recognize the tort of false light invasion of privacy, and if so, are the elements of the tort set forth in section 652E of Restatement (Second) of Torts?"[22]

In April 2007, the Florida Supreme Court stayed the case pending disposition of *Gannett*. However, on September 26, 2007, the Court re-examined the opinions in both cases and determined that the disposition of *Gannett* would not necessarily be dispositive of *Rapp* because the certified questions differed. Therefore, determining that it would benefit from hearing both cases during the same calendar, the Court lifted the stay in *Rapp* and scheduled oral arguments for both cases on March 6, 2008.[23]

The Restatement of Torts

The Restatement of Torts is one of several influential treatises that describe the law in a given area and guide its development.[24] Although frequently cited, Restatements are not binding on the courts.

The Second Restatement defines false light invasion of privacy as follows:

> One who gives publicity[25] 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.[26]

Distinct from Florida, under the Restatement, "it is essential to the rule stated in this Section that the matter published concerning the plaintiff is not true."[27]

In 1967, the U.S. Supreme Court held that the *New York Times Co. v. Sullivan* rule, requiring knowledge of the falsity of the statement or reckless disregard of the truth or falsity, applied to false light cases.[28] However, subsequent case law has cast doubt as to this actual malice standard.[29] The Restatement therefore provides a caveat, which leaves open the question of whether there may be liability based on a showing of negligence as to truth or falsity.[30] Unlike Florida, the Restatement also asserts that any privileges, absolute or conditional, that apply to defamatory matter also apply to invasion of privacy.[31]

Under the Second Restatement, damages recoverable for false light include compensatory damages for harm to reputation, emotional distress, and humiliation, as

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[21] The court also held that the plaintiff stated a cause of action for negligent supervision and retention.

[22] *Rapp*, 944 So. 2d at 468.

[23] Florida Supreme Court docket (Case No. SC06-2174), http://www.floridasupremecourt.org/pub_info/index.shtml (scroll to "Joe Anderson v. Gannett Co." and follow "Docket" hyperlink) (last visited Oct. 9, 2007).

[24] BLACK'S LAW DICTIONARY (8th ed. 2004).

[25] "Publicity" means "communicating the matter 'to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.'" Thornburg, *supra* note 6, at 154 (quoting RESTATEMENT (SECOND) OF TORTS § 652D cmt. a).

[26] RESTATEMENT (SECOND) OF TORTS § 652E.

[27] *Id*. at cmt. a. The U.S. Supreme Court has held that "there cannot be liability for invasion of privacy when there is the truthful reporting of information lawfully obtained from public records, at least unless there is a state interest of the highest order justifying liability." Erwin Chemerinsky, *Rediscovering Brandeis's Right to Privacy*, 45 BRANDEIS L.J. 643, 654 (2007) (citing *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989)).

[28] RESTATEMENT (SECOND) OF TORTS § 652E at cmt. d. The case announcing this rule was *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

[29] In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), the Court extended the *New York Times Co. v. Sullivan* rule in defamation cases to all matters of general interest. Three years later the Court repudiated this position in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). At this time it is uncertain how the *Gertz* opinion affects the holding in *Time, Inc. v. Hill.*

[30] RESTATEMENT (SECOND) OF TORTS § 652E cmt. d.

[31] *Id.* at §§ 652F and 652G.

well any special damages proven.[32] Specifically, "[o]ne who is publicly placed in a false light … may recover damages for the harm to his reputation."[33]

Most states recognizing the cause of action have adopted the Second Restatement's requirements.

False Light in Other Jurisdictions

Currently, false light invasion of privacy is recognized in 34 states and the District of Columbia.[34] Nine states have specifically rejected the tort,[35] while six states have not had occasion to address the tort. Nebraska and Rhode Island control invasions of privacy by statute.[36] For example, Nebraska's law states:

> Any person … which gives publicity to a matter … that places [a] person before the public in a false light is subject to liability for invasion of privacy, if:
>
> (1) The false light in which the other 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 would be placed.[37]

One state that has rejected the false light cause of action is Texas. In *Cain v. Hearst*,[38] the Texas Supreme Court held that there was no necessity for the tort because it "is too similar to the tort of defamation" and false light lacks the "limitations and restrictions applied to defamation that protect the constitutional rights to free speech and press under the First Amendment."[39]

According to the Florida Press Association, there are only four states that allow a false light cause of action to proceed upon truthful information: Arizona, Florida, Pennsylvania, and Tennessee.[40] However, Arizona, Pennsylvania, and Tennessee have further restrained the tort in some way, unlike Florida. For example, both Arizona's and Pennsylvania's legal standard requires a showing of actual malice.[41] In 2001, the Tennessee Supreme Court recognized that false light could be based upon a true statement, but that actual malice is required where the plaintiff is a public figure or if the claim is a matter of public concern.[42] Additionally, the Court held that all absolute and conditional privileges that apply to defamation also apply to false light, and that the statute of limitations for defamation also applies to the false light cause of action.[43]

False Light Versus Defamation

There has been little consensus among the courts and legal commentators as to the need for the tort of false light. The main reason for this is because of the difficulty in distinguishing false light from defamation.

Defamation is defined as "a communication that 'tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'"[44] The Second Restatement provides four elements to establish a cause of action for defamation:

> (a) a false and defamatory statement concerning another;
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> (b) an unprivileged publication to a third party;
>
> (c) fault amounting at least to negligence on the part of the publisher; and

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[32] Bryan R. Lasswell, *In Defense of False Light: Why False Light Must Remain a Viable Cause of Action*, 34 S. TEX. L. REV. 149, 163 (1993); *see also* RESTATEMENT (SECOND) OF TORTS § 652H.

[33] RESTATEMENT (SECOND) OF TORTS § 652H cmt. a.

[34] Robin Baker Perkins, *The Truth Behind False Light – A Recommendation for Texas' Re-Adoption of False Light Invasion of Privacy*, 34 TEX. TECH L. REV. 1199, 1218 n. 215 (2003); materials from the Florida Press Association dated Mar. 27, 2006 (on file with the Senate Committee on Judiciary).

[35] Although South Carolina appellate courts have opined that the high court would probably not recognize false light, the state has not been added to the list of states that outright reject the tort.

[36] Neb. Rev. Stat. §§ 20-201–20-211 (2007); R.I. Gen. Laws § 9-1-28.1 (2007).

[37] Neb. Rev. Stat. § 20-204 (2007).

[38] 878 S.W.2d 577 (Tex. 1994).

[39] Perkins, *supra* note 34, at 1208.

[40] Materials from the Florida Press Association dated Aug. 2, 2007 (on file with the Senate Committee on Judiciary).

[41] *Godbehere v. Phoenix Newspapers, Inc.*, 783 P.2d 781, 789 (Ariz. 1989); *Santillo v. Reedel*, 634 A.2d 264, 267 (Pa. Super. Ct. 1993).

[42] *West v. Media General Convergence, Inc.*, 53 S.W.3d 640, 647 (Tenn. 2001). The Court also held that if a claim is asserted by a private person regarding a private concern then the appropriate standard is negligence. *Id.* at 648.

[43] *Id.* at 648.

[44] Perkins, *supra* note 34, at 1202 (quoting RESTATEMENT (SECOND) OF TORTS § 559).

(d) either actionability of the statement irrespective of the special harm or the existence of special harm caused by the publication.[45]

Courts and commentators agree that the distinctions between false light and defamation are difficult to discern. For example, both torts require the communication of some information concerning the plaintiff. In defamation, the communication must only be made to a single third party, but in false light claims, the communication must be made to the public at large. The publicity aspect of false light usually means that false light actions will involve a media defendant. However, most defamation causes of action are also against the media.[46]

Both false light and defamation require some level of falsity. The alleged defamatory material must actually be false in defamation. Whereas, in a false light action, the communication may in fact be true, but it creates a false impression of the plaintiff in the public eye. This distinction is muddled, however, when jurisdictions recognize defamation by implication. Defamation by implication is when a "defamatory meaning may be inferred through the placement of an accurate story in a misleading context or by omitting clarifying details."[47] Various practitioners believe that the sole difference between false light and defamation by implication is that the actionable statement in a defamation by implication claim must be defamatory.

Actionable communications under false light do not have to be defamatory.[48] However, the communication must be defamatory in a defamation cause of action. Yet, practitioners have stated that every false light case in Florida has included some reputational harm. It is possible for a plaintiff to recover for "laudatory false light,"[49] which is when the false things said about the plaintiff make the plaintiff look good, but the falsehood is nonetheless highly offensive to a reasonable person.[50] However, most actionable statements or implications under false light are in fact defamatory.[51]

False light proponents argue that while false light and defamation share some characteristics, each protects a different personal interest. Defamation protects an individual's reputation. False light protects a person's right to be left alone. Some commentators have said that the interest protected by false light is the plaintiff's dignity.[52] However, in most cases, portraying someone in a false light actually harms his or her reputation.[53] When developing the tort, William Prosser noted that the interest protected in false light actions "is clearly that of reputation, with the same overtones of mental distress as in defamation."[54]

Finally, in Florida there is a distinction in the statute of limitations between false light and defamation. Section 95.11, F.S., sets out the statute of limitations for different causes of action. The statute of limitations on defamation actions in Florida is two years from the date of first publication.[55] Because the tort of invasion of privacy is not specifically listed in any subsection of s. 95.11, F.S., the traditional statute of limitations for these actions has been four years.[56]

Courts have recognized that both false light and defamation may have a chilling effect[57] on the media.[58] Critics also argue that the false light tort lacks many

[45] RESTATEMENT (SECOND) OF TORTS § 558.
[46] Avidan, *supra* note 1, at 238-41; s*ee also* 62A AM. JUR. 2D *Privacy* §128 (explaining the similarities and distinctions between false light and defamation).
[47] Avidan, *supra* note 1, at 239. Defamation by implication is recognized in Florida. *See Brown v. Tallahassee Democrat, Inc.*, 440 So. 2d 588, 589 (Fla. 1st DCA 1983); *Gannett,* 947 So. 2d at 11.
[48] Prosser, *supra* note 4, at 400; *see also* RESTATEMENT (SECOND) OF TORTS § 652E cmt. b (finding that while in many cases the publicity given to the plaintiff is defamatory, it is not necessary to the action that the plaintiff be defamed). "Defamatory" is defined as "tending to harm a person's reputation, usu. by subjecting the person to public contempt, disgrace, or ridicule, or by adversely affecting the person's business." BLACK'S LAW DICTIONARY (8th ed. 2004).
[49] Lasswell, *supra* note 32, at 172 ("[l]audatory false light recognizes that the mere publication of a false impression can be damaging to a plaintiff whether or not it is technically defamatory").
[50] Rodney A. Smolla, *Accounting for the Slow Growth of American Privacy Law*, 27 NOVA L. REV. 289, 295 (2002).
[51] Avidan, *supra* note 1, at 239; *see also* Prosser, *supra* note 4, at 400.
[52] Lasswell, *supra* note 32, at 177; *see also* Perkins, *supra* note 34, at 1209-10.
[53] Avidan, *supra* note 1, at 240.
[54] Prosser, *supra* note 4, at 400.
[55] Section 95.11(4)(g), F.S.
[56] Section 95.11(3)(p), F.S.
[57] "Chilling effect" is defined as the "result of a law or practice that seriously discourages the exercise of a constitutional right, such as the right to appeal or the right of free speech." BLACK'S LAW DICTIONARY (8th ed. 2004). For example, critics of false light argue that the tort may prevent the media from publishing a story of public interest for fear that someone may take offense to it.
[58] Avidan, *supra* note 1, at 238.

procedural safeguards, such as privileges and defenses, associated with defamation.[59] However, many jurisdictions that recognize false light have held that the traditional privileges and defenses recognized under defamation also apply to false light.[60]

Possible Legislative Alternatives

Based upon a review of cases on the false light cause of action and discussions with industry representatives and legal scholars, the Legislature has multiple potential courses of action. These courses of action range from no action to abolishing the cause of action.

1. No action: If the Legislature takes no action, the cause of action for false light may continue to be handled inconsistently throughout the Florida courts, unless the Florida Supreme Court decides to clarify the tort. False light in Florida currently allows a plaintiff to sue even if the facts of a story are completely true, without providing common libel defenses to the defendant, and allows a four-year statute of limitations period for the plaintiff to bring suit. Practitioners interviewed by committee staff – both detractors and proponents of false light invasion of privacy – agree that some change may be needed to the tort.

2. Change the statute of limitations: Each practitioner committee staff spoke with agreed that the Legislature should codify a statute of limitations for the tort of false light. A common suggestion was that the Legislature could adopt a two-year statute of limitations – similar to that of defamation – for false light cases. Other states have already moved in this direction in order to prevent plaintiffs from circumventing a shorter statute of limitations by characterizing a defamation claim as one for false light.[61]

3. Codify the Restatement of Torts: The Legislature could choose to codify the Second Restatement and explicitly discuss areas of concern – for example, establishing a standard of proof and providing that all libel defenses also apply to false light. Similar to the 2006 legislation, this option would provide the most guidance for the tort.[62]

In addition to codifying the Second Restatement, the Legislature could also explicitly provide that all of the privileges associated with defamation law also apply to false light. The Legislature could also codify existing areas of false light common law, such as:

- There is no relational right of privacy;
- The single publication rule does not permit multiple false light actions to be brought upon each instance of publication of the item alleged to constitute false light; and
- The single action rule does not permit false light claims to be brought when they arise from the same facts as a defamation claim.[63]

These changes could help ensure that truthful speech is not actionable without being subject to the same First Amendment limitations as a libel claim. Additionally, these suggestions are consistent with most states that recognize false light.[64]

4. Eliminate the cause of action: Senate Bill 1650, from the 2007 Regular Session, would have eliminated the cause of action for false light completely. The legislation said that the tort "lacks clarity" and "there is substantial overlap between the tort of defamation and the tort of false light invasion of privacy."[65]

Constitutional concerns arise when the Legislature attempts to abolish an existing cause of action. Floridians enjoy a constitutional right of access to courts. Article I, section 21 of the Florida Constitution provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." This right of access "protects only rights that existed at common law or by statute prior to the enactment of the Declaration of Rights of the Florida Constitution."[66]

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[59] Perkins, *supra* note 34, at 1209.
[60] Lasswell, *supra* note 32, at 174-75.
[61] Avidan, *supra* note 1, at 245. The author cites the following examples of courts imposing the same limitations period for defamation and false light cases: *Gashgai v. Leibowitz*, 703 F.2d 10, 13 (1st Cir. 1983); *Wagner v. Campbell County*, 695 F. Supp. 512, 517 (D. Wyo. 1988); *Sullivan v. Pulitzer Broad. Co.*, 709 S.W.2d 475, 481 (Mo. 1986); *Morrison v. Nat'l Broad. Co.*, 227 N.E.2d 572, 574-75 (N.Y. 1967); *Eastwood v. Cascade Broad. Co.*, 722 P.2d 1295, 1296 (Wash. 1986). *See also Magenis v. Fisher Broad., Inc.*, 798 P.2d 1106, 1109 (Or. App. 1990); *Jensen v. Sawyers*, 130 P.3d 325, 337 (Utah 2005).

[62] *See* Senate Bill 1346 (2006 Regular Session).
[63] Materials from the Florida Press Association dated Mar. 27, 2006 (on file with the Senate Committee on Judiciary); *see also* SB 1346.
[64] *Id*. (Press Association materials).
[65] Senate Bill 1650 (2007 Regular Session).
[66] 10A FLA. JUR 2D *Constitutional Law* § 360 (2007). When analyzing an access to courts issue, the Florida

Constitutional limitations were placed on the Legislature's right to abolish a cause of action in the Florida Supreme Court case *Kluger v. White*, 281 So. 2d 1 (Fla. 1973). The Court held:

> [W]here a right of access … has been provided … the Legislature is without power to abolish such a right without providing a reasonable alternative … unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.[67]

It is unclear whether the Legislature can abolish a narrow cause of action that did not pre-date the Declaration of Rights when a broader cause of action did exist prior to 1968. Florida first recognized the invasion of privacy tort in *Cason v. Baskin* in 1944.[68] However, the *Cason* court did not specifically recognize false light. The first reported false light decision in Florida was *Loft v. Fuller* in 1981.[69] Because false light was not recognized by Florida common law prior to the 1968 Constitution, there appears to be no constitutional right of access to courts with respect to false light, and thus, no legislative prohibition against abolishing the tort.[70]

If, however, the tort of false light is found to have existed as part of Florida's common law prior to 1968, the Legislature would have to follow the test set out in *Kluger*: provide a reasonable alternative or show an overpowering public necessity for the abolishment of the right and that there is no alternative method of meeting the public necessity. Many practitioners believe that defamation law provides a reasonable alternative to false light, thereby satisfying one of the *Kluger* standards. On the other hand, proponents of the cause of action for false light argue that it protects a different individual interest than defamation and, therefore, there is a need for both torts.

In the wake of the *Heekin I* decision, numerous false light claims have been filed where it appears defamation law would have also provided an adequate remedy.[71] Many states, as well as Prosser himself, have questioned the constitutional implications of the false light tort.[72] Practitioners have opined that because there is no defined standard of fault in false light cases, there has been a chill on free speech.[73] Since there exists an important public interest in freedom of the press, abolishing the tort of false light may pass constitutional muster under the public-necessity prong of the *Kluger* test.

RECOMMENDATIONS

The Florida Supreme Court will hear oral arguments on the false light tort on March 6, 2008, and its decisions may provide guidance in this area of the law. The Supreme Court will most likely not issue any opinions until after the 2008 legislative session. Nevertheless, the Legislature may wish to wait for the Supreme Court decisions to be released before addressing changes to this cause of action. If the Legislature wishes to consider false light in the upcoming regular session, it has several policy options to consider, ranging from no action to abolishing the cause of action completely. At a minimum, the Legislature may wish to consider harmonizing the statute of limitations for false light with the two-year statute of limitations for defamation.

Supreme Court clarified that 1968 is the relevant year in deciding whether a common law cause of action existed. *Eller v. Shova*, 630 So. 2d 537, 542 n. 4 (Fla. 1993).

[67] *Kluger*, 281 So. 2d at 4.

[68] 20 So. 2d 243 (Fla. 1944).

[69] 408 So. 2d 619 (Fla. 4th DCA 1981) (false light claim failed because it was brought by the deceased's relatives).

[70] It has also been suggested that invasion of privacy, and specifically false light, did not comprise part of the English common law that the American Colonies adopted. Harvey L. Zuckman, *Invasion of Privacy – Some Communicative Torts Whose Time Has Gone*, 47 WASH. & LEE L. REV. 253, 258 (1990).

[71] Materials from the Florida Press Association dated Jan. 10, 2007 (on file with the Senate Committee on Judiciary).

[72] Prosser, *supra* note 4, at 401, 422 (Prosser questioned what would happen to the First Amendment protections established in defamation law if the false light tort crept into areas traditionally covered by defamation); *see also Denver Publ'g Co. v. Bueno*, 54 P.3d 893, 903 (Colo. 2002); *Cain v. Hearst Corp*., 878 S.W.2d 577, 581-82 (Tex. 1994).

[73] *See* Zuckman, *supra* note 70, at 257 (stating that false statements that are true or laudatory provide no warning to editors, which makes it hard for editors to protect themselves from liability); Zimmerman, *supra* note 7, at 452 (iterating the need for a requirement to "avoid the chill that would occur if the speaker could not reasonably predict in advance the particular speech that might be a source of liability").