SUPREME COURT OF FLORIDA

CASE NO.: SC06-2491

Appeal Lower Tribunal Case No.: 4D05-4870

JEWS FOR JESUS, INC.,

Petitioner,

v.

EDITH RAPP,

Respondent.

RESPONDENT'S ANSWER BRIEF

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Statement of the Case and Facts

Edith Rapp filed a Second Amended Complaint against Jews for Jesus, Inc. in March 2005 alleging a cause of action against Jews for Jesus for defamation, intentional infliction of emotional distress, false light invasion of privacy and negligent training and supervision for publishing an article by their employee and Edith's step-son, Bruce Rapp. Bruce Rapp reported that, while visiting his dying father, his stepmother, Edith, repeated the sinner's prayer and agreed to receive Y'shua (Jesus) and, ultimately, denounced her Jewish religion and heritage. (*See Petitioner's Appendix, p. 43*, hereinafter "A. p. __). According to the well pled allegations of the Complaint, which are taken as true for the purposes of adjudicating a motion to dismiss, the newsletter also went on to state that Edith was a new believer, and had now joined the ranks of an organization which was reviled by the Jewish community because it is perceived by the Jewish community and many others, as an organization whose ultimate goal is to destroy the Jewish religion by stealth, deception and fraud, convince Jews to abandon their faith by deception, and an organization which targets the old to give their life savings to Jews for Jesus by deception, and targets the young to leave the Jewish faith. (*See complaint attached to Appendix to Petitioner's Initial Brief pp. 18 to 24*). Also published in the newsletter was a prayer prompt, asking readers to "Please pray for

grace and strength for the new Jewish believer, Edie, and salvation for her husband, Marty." (A. p. 44). The word "believer" in this context, according to the well pled allegations of the complaint, means not only that Plaintiff is now a believer in Christianity, but also a believer in an organization which is reviled by the Jewish people for reasons stated above. This newsletter was published and placed on the Internet where it was seen by a relative of Edith Rapp and many others. (A, pp. 47-48). Edith Rapp is a very active and proud member of the Jewish community, and a member of a prominent Jewish congregation in Palm Beach, County, Florida, of which her sister is a founding and former president. (A. p. 48). According to the allegations of the complaint, all of these published statements are untrue. As a result of the false allegations against Edith Rapp, she suffered damage to her reputation and standing within her community, and was subject to ridicule, distrust, and contempt. (A. pp. 52, 55).

Bruce Rapp reported these false accounts to both elevate his status within the Jews for Jesus organization by being able to convert family members, and as retaliation against Edith for shielding her dying husband from Bruce Rapp's attempts to convert him in his dying days. (A. pp. 47-48). Jews for Jesus, as an employer of Bruce Rapp, took no action to verify the truth of these allegations, nor did they contact Edith Rapp to confirm the statements attributed to her. When advised of the false nature of these allegations, Jews for Jesus took no action to

correct the false impression created, to repudiate the statements, or to tell the truth about Edith Rapp (A. p. 54).

On November 23, 2005, the trial court dismissed Edith Rapp's complaint with prejudice, after previously striking many of the crucial paragraphs from the earlier version of the complaint without explanation in response to Petitioner's motion to strike these allegations as irrelevant and/or scandalous. (A. pp. 13 to 17). The order was appealed to the Fourth District Court of Appeal. That court upheld the trial court's order in respect to the intentional infliction of emotional distress and defamation counts. (A. p. 11). However, the court noted that while a cause of action for defamation may be cognizable as identified in §559(e) of the Restatement of Torts, the Florida Supreme Court had not yet adopted this section and, therefore, the district court could not recognize the defamation count on that basis. (A. pp. 7-8). Concerning the false light invasion of privacy count, the district court noted that Edith Rapp may have redress under this count, but that the tort has never been "expressly held" as a cognizable claim by the Florida Supreme Court. (A. p. 10). The court certified the question to this Court to resolve whether Florida recognizes, and/or should recognize the tort of false light invasion of privacy. (A. p. 11).

Summary of the Argument

This Court has and should recognize the tort of false light invasion of privacy. False light invasion of privacy is recognized by the United States Supreme Court, the majority of state jurisdictions, and has been continually recognized in various Florida decisions for three decades. Abandoning the tort of false light invasion of privacy would overturn decades of precedent.

False light invasion of privacy is a tort that specifically addresses the right of individuals to be "left alone" and not be subjected to false statements or allegations while thrust, unjustly, in the public eye. False light invasion of privacy is not the same tort as defamation since false light invasion of privacy centers on the defendant's impact on the plaintiff's privacy, and also contemplates liability for false statements that are harmful to Plaintiff's reputation, and which create a false impression about the Plaintiff, but may not necessarily be defamatory.

Furthermore, this Court should recognize *§559E of the Restatement of Torts* concerning defamation and, thus, should recognize the false statements of Bruce Rapp as defamatory on their face. Taken as true, if these statements do not constitute false light invasion of privacy or defamation, then the Plaintiff and all other Floridians would have no recourse for very serious false allegations, which are intentionally designed to harm the Plaintiff due to malicious motives, and which, according to the allegations of the complaint, which are taken as true for the

purposes of the motion to dismiss, have caused serious harm to Plaintiff's reputation both in her community, and in the community at large. Moreover, the Court had no basis to strike the guts of the plaintiff's complaint, and then to dismiss the complaint based on a lack of allegations to support a claim, which had been alleged in the paragraphs previously stricken by the Trial Court.

THE TORT OF INVASION OF PRIVACY BY FALSE LIGHT IN THE PUBLIC EYE HAS BEEN, AND REMAINS A VALID CAUSE OF ACTION UNDER FLORIDA LAW.

The case comes before this Court by virtue of the Fourth District Court of Appeal certified question, asking whether "Florida recognize[s] the tort of false light invasion of privacy?" *Rapp v. Jews for Jesus, Inc.*, 944 So. 2d 460, 468 (Fla. 4th DCA 2006). The certification of that question was not necessary because the subject tort has been long recognized in Florida, S*ee Florida Publishing Co. v. Fletcher*, 340 So. 2d 914, 918 (Fla. 1976). The District Court of Appeal's uncertainty regarding this cause of action is unwarranted. *See Rapp*, 944 So.2d at 468 ("[w]ere we writing on a blank slate, we would be inclined to side with those courts rejecting the false light cause of action.").

The Fourth District recently acknowledged its continued belief in the validity of this cause of action, but expressed its concern about "an expansive view of the tort of invasion of privacy" in the case of *Straub v. Gaye Scarpa*, 32 FLW 2588, (Fla. 4th DCA, 2007), where the Court, unlike the case at bar, determined that the Defendant did not place the Plaintiff in a false light, did not even mention the Plaintiff by name, and where the Court determined that a letter was not "highly offensive to a reasonable person". Moreover in *Straub*, the Court expressed the view that "[I]n a residential community governed by a homeowner's association, vigorous debate over community expenditures is a value to be encouraged, not a

pathway to litigation." No such redeeming feature has ever been found to exist in this case by the lower courts which have heard this case, and have no such redeeming features have been argued thus far by the Petitioner to justify the false statements published by the Petitioner. Thus the Fourth District held once again in *Straub* but that in *Straub,* as opposed to the case at bar, the allegations did not meet the required elements of this cause of action.

The tort of false light in the public eye appears in legal history as early as 1816 when Lord Byron was successful in stopping publication of an inferior poem he did not write, yet was attributed to him. *See* Prosser, *Privacy*, 48 Cal. L. Rev. 383, 398 (1960), citing Wigmore, *The Right Against False Attribution of Belief or Utterance*, 4 Ky. L.J. 8 (1916). This is precisely what constitutes the claims of the Respondent in the case at bar, i.e. that the Defendants have falsely and intentionally attributed to her beliefs and utterances to the effect that the Plaintiff holds beliefs that are not her own, and which in fact, are beliefs that she finds odious, a threat to her people, and which holds her subject to ridicule, scorn and contempt by those in her community. If these allegations do not meet the technical requirements for defamation, then a cause of action should be recognized under false light invasion of privacy, in order to provide legal recourse for this very serious and intentional wrong, which has caused great damage to the Respondent.

The development of the common law in the United States included, in the latter portion of the 19th century, recognition of the right of individuals to be spared from an invasion of their "zone of privacy" through the improper publication of personal information. *See generally* Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 93 (1890). The protection against "invasion of privacy" gradually gained acceptance as a distinct cause of action, and in 1944 this Court specifically accepted it as an actionable tort. *See Cason v. Baskin*, 20 So.2d 243, 247 (Fla. 1944). In so doing, this Court acknowledged that there was a "right to privacy" cognizable under the common law in Florida "distinct in and of itself and not merely incidental to some other recognized right, and for breach of which an action for damages will lie." *Cason*, 20 So.2d at 250. Florida courts have clarified the doctrinal parameters of the "right of privacy" torts since World War II. *See Allstate Insur. Co. v. Ginsberg*, 863 So. 2d 156, 161 (Fla. 2003) ("[s]ince *Cason*, Florida decisions have filled out the contours of this tort right to privacy").

In 1974, the United States Supreme Court acknowledged that, under the common law then accepted in numerous states, "publicity that places the plaintiff in a false light in the public eye is generally recognized as one of the several distinct kinds of invasions actionable under the privacy rubric." *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 248 (1974), 95 S. Ct. 465, 42 L.Ed. 2d 419

(U.S. Ohio Dec. 18, 1974) citing Prosser, *Privacy*, 48 Cal. L. Rev. 383, 398–401 (1960); *Restatement (Second) of Torts §652E* (Tent. Draft No. 13).

In 1976, this Court reviewed a case centering on a fire in a private residence, with media members entering to take photographs of the premises, including the "silhouette" where the body of a teenager was found. *Florida Publishing Co. v. Fletcher*, 340 So. 2d 914, 915–16 (Fla. 1976). The plaintiffs in that case filed a suit alleging trespass, invasion of privacy and intentional infliction of emotional distress. *Id*. at 916. As to the existence of a cause of action for invasion of privacy by false light in the public eye, this Court approved the reasoning in the dissenting opinion of First District Court of Appeal Judge McCord:

> We agree with and approve the following well-reasoned explication by Judge McCord in his dissenting opinion . . .
> *There is no contention that the particular photograph complained of (the silhouette picture) and the news story were in any way false or inaccurate*. There could, therefore, be no recovery under the 'false-light' doctrine of invasion of privacy.

Id. at 918, citing *Cantrell, supra*.

The rationale expressed by The First District Court of Appeal and approved by the Florida Supreme Court supports the Respondent's position that the Florida Supreme Court has consistently recognized and approved of the existence of a cause of action for false light invasion of privacy. If not, Judge McCord would have simply said that a cause of action for false light invasion of privacy does not exist in Florida, and dismissed the case on that basis with no further discussion.

Instead, Judge McCord acknowledged the existence of this cause of action without hesitation. Rather the First District and this Court expressed the view that such a cause of action exists in Florida, but that the complaint failed to allege the proper elements, e.g. that the news story was in any way inaccurate. Neither the First District nor this Court ever considered that this cause of action did not exist in its 1976 decision. The case at bar is clearly distinguishable from *Florida Publishing vs. Fletcher,* in that the Respondent has alleged that the statements, beliefs and the actions attributed to the Respondent by the Petitioners were false, inaccurate, and a blatant misrepresentation of her core beliefs.

While dismissing the cause of action due to the Plaintiff's failure to properly allege the necessary elements, this Court's approval of the existence of false light invasion of privacy's doctrinal boundaries in 1976, clearly belies the assertion by the Fourth District Court of Appeal in the instant case that ***recent*** decisions have "given false light invasion of privacy a toehold in Florida law." *Rapp*, 944 So. 2d at 460, citing *Agency for Health Care Admin. v. Associated Indus. of Fla.*, 678 So. 2d 1239 (Fla. 1996); *Allstate Insur. Co. v. Ginsberg*, 863 So. 2d 156 (Fla. 2003). Clearly, if the subject tort was not recognized in Florida in 1976, the Court would have simply noted that reality and summarily disposed of the claim.

Florida precedent, as well as the United States Supreme Court and other sources cited herein, indicate that the tort of false light invasion of privacy can be

traced back to a long stream of cases dating from the early 19th century, and thus enjoys a long history of precedent in this country and in Florida.

The Fourth District Court of Appeal opinion that false light has only received "tacit" recognition by this Court is wrong; *Agency for Health Care Admin. v. Associated Indus. of Fla.*, 678 So. 2d 1239 (Fla. 1996) listed Invasion of Privacy – False Light in the Public Eye as one of the four recognized "invasion of privacy" torts in Florida. *Agency for Health Care Admin.*, 678 So. 2d at 1252 n.20. In *Allstate Insurance Company v. Ginsberg*, 863 So. 2d 156, this Court again noted that Florida's common law includes "False Light in the Public Eye" as an actionable tort. *Id.* at 161.

In a recent decision, a federal district court surveyed Florida law's recognition of the false light invasion of privacy claim, concluding that "the overwhelming weight of authority applying Florida law has recognized such a cause of action exists." *Lane v. MRA Holding, LLC*, 242 F. Supp. 2d 1205, 1221 n.71 (M.D. Fla. 2002).[1]

Petitioner Jews for Jesus argues that recognition of the tort of Invasion of Privacy by False Light constitutes, in and of itself, a transgression of free speech

1. *Citing Trujillo v. Banco Cent. Del. Ecuador*, 17 F. Supp. 2d 1334, 1340 n.5 (S.D. Fla. 1998); *Harris v. Dist. Bd. of Trs. Of Polk Cmty. College*, 9 F. Supp. 2d 1319, 1329 (M.D. Fla. 1998); *Heath v. Playboy Enter., Inc.*, 732 F. Supp. 1145, 1147-48 (S.D. Fla. 1990); *Agency for Health Care Admin. v. Associated Indus. of Florida, Inc.*, 678 So. 2d 1239, 1352 n.20 (Fla. 1996); *Florida Publishing Co. v. Fletcher*, 340 So. 2d 914, 918 (Fla. 1976); *Heekin v. CBS*, 789 So. 2d 355, 358 (Fla. 2nd DCA 2001); *Williams v. Minneola*, 575 So. 2d 683, 689 n.5 (Fla. 5th DCA 1991); *Loft v. Fuller*, 408 So. 2d 619, 621 (Fla. 4th DCA 1981); *Cape Publications, Inc. v. Bridges*, 387 So. 2d 436, 440 n.6 (Fla. 5th DCA 1980).

rights. *See* Petitioner's Initial Brief, Subsection I(C). In support of this expansive proposition, the Petitioner relies upon free speech concerns expressed by the state courts in Texas and Colorado, and relies upon Justice Douglas' dissent in *Cantrell*. that, "it seems clear that in matters of public import such as the present news reporting, there must be freedom from damages lest the press be frightened into playing a more ignoble role than the Framers visualized." *Cantrell*, 419 U.S. at 255 (Douglas, J., dissenting).

In *Cantrell*, however, Justice Douglas was on the short end of an 8-1 decision, and the dissent's reliance on the First and Fourteenth Amendment was rejected. The *Cantrell* majority focused on the dichotomy between "actual malice" and "common-law malice," and refused to strike down the state law protections of privacy on constitutional grounds. Here, as was the case in *Cantrell*, the false light invasion of privacy claim is constitutionally sound. Despite the strong and cherished protection that Freedom of Speech rightly enjoys in this country and in our state, this freedom has never been held to be absolute, as is well expressed by the statement that one cannot yell "fire" in a crowded theater. There have always been parameters placed on this most valuable freedom, and the courts have long recognized the harm that can come from the spoken and written word. The tort of false light invasion of privacy prevents the unscrupulous from hiding behind the constitution in order to destroy the reputation of another with intentionally false

information and harmful statements and attributions of beliefs about one's adversaries, which may not meet the technical definition of defamation, but which can be every bit as harmful, or even more harmful than statements that meet the criteria of defamation.

In fact, Article 1 Section 4 of the Florida Constitution, unlike its federal counterpart, explicitly places a limitation on one's freedom of speech, which does not appear in the United States Constitution, providing that: "Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. Thus, the Constitutional right of free speech in Florida is more narrowly construed in Florida than under federal law. Accordingly, Florida's Constitution provides greater support for the cause of action of false light invasion of privacy than what is provided for under the United States Constitution or the laws of other states, even if they were binding on this state. This case provides a clear example of the abuse of Freedom of Speech, and thus runs afoul of the Florida Constitution. A remedy is therefore appropriate in Florida pursuant to the torts of defamation and false light invasion of privacy.

The allegations of the complaint which are taken as true in a motion to dismiss, fly in the face of the safeguards established in the Florida Constitution, and constitute not the exercise, but rather the abuse of this cherished freedom. If there were no recourse for the very serious and harmful allegations of the

complaint under either defamation or false light invasion of privacy in the State of Florida, not only would such a result go against all legal precedent established on a national and state level, it would also render meaningless the provisions of our State's Constitution, which firmly establish the rights and privileges of all Florida citizens, as well as the limitations of the right of free speech under Florida law.

THE ELEMENTS OF FALSE LIGHT INVASION OF PRIVACY AS IDENTIFIED IN §652E OF THE RESTATEMENT (SECOND) OF TORTS ARE DIFFERENT FROM THE ELEMENTS OF DEFAMATION.

The essential elements in Florida for false light invasion of privacy are 1) the false light must be offensive to a reasonable person, and 2) the defendant must have acted in knowing or reckless disregard as to the falsity of the published material. *Lane v. MRA Holdings, LLC*, 242 F. Supp. 2d 1205, 1221 (M.D. Fla. 2002); *see also §652E of the Restatement (Second) of Torts*.[2] The elements for defamation include the publication of false and defamatory statements without reasonable care to the truth of those statements that cause damage to a plaintiff. *Byrd v. Hustler Magazine, Inc.*, 433 So. 2d 593 (Fla. 4th DCA 1983). Defamatory statements are those that will "subject one to hatred, distrust, ridicule, contempt or disgrace or tend to injure one in one's business or profession." *American Airlines,*

2. The United States Supreme Court has adopted the elements of false light invasion of privacy as stated in *§652E Restatement (Second) of Torts*. *See Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 248 n.2 (1974).

Inc. v. Geddes, 960 So.2d 830, 833 (Fla. 3rd DCA 2007), quoting *Seropian v. Forman*, 652 So.2d 490, 495 (Fla. 4th DCA 1995).

The Supreme Court has distinguished the claim of false light invasion of privacy from defamation by noting that the false light claim concerns itself with the mental distress of being exposed to the public view, and not necessarily from harm to one's reputation. *Time, Inc. v. Hill*, 385 U.S. 374, 386 n.9 87 S.Ct. 534 17 L.Ed. 2nd 456 U.S.N.Y.(1967). In addition, liability may attach to a false light claim if the publication is not defamatory. *Id*. This Court has agreed with the Supreme Court's interpretation when it held that false light invasion of privacy concerns the publication of facts that "place a person in a false light ***even though the facts themselves may not be defamatory***." *Allstate Ins. Co. v. Ginsberg*, 863 So. 2d 156, 162 (Fla. 2003) (emphasis added).

While Petitioner argues that the false light claim need not be recognized in Florida because recovery for such actions can be found in other claims, this Court has expressly stated that the right to privacy is "distinct in and of itself and not merely incidental to some other recognized right." *Id*. at 160, quoting *Cason v. Baskin*, 20 So.2d 243, 250 (Fla. 1944). Florida recognized the tort of false light invasion of privacy as a means to redress false publications that offend an individual's right to be left alone. Defamation cannot properly address these grievances since, in order to bring a claim for defamation, a statement must be both

false and defamatory. Florida has recognized the tort of false light invasion of privacy to fill a gap not covered by existing common law torts.

This case is a fitting example of why false light invasion of privacy should stand. Ms. Rapp did nothing that indicated a desire to be publicized as a convert to Christianity or as affiliating with a group that seeks to destroy her faith by deception and fraud. Even if the false statements attributed to her may not be deemed contemptuous or disgraceful to the Petitioners, she has been harmed nevertheless, and the laws should thus provide redress.

In this case, not only in the eyes of her community, but in the eyes of any reasonable person, the claim that a person had affiliated with a group designed to undermine, subvert and destroy the integrity of her own religious group, through techniques characterized by fraud and deception, would be viewed in a negative light. This is all the more true when viewed by her own community. In reviewing the dismissal of a complaint upon a Motion to Dismiss, as occurred in this case, the Court must accept the allegations of the Complaint as true, even those which were wrongfully stricken for no stated reason by the trial court, which even if they may have caused the Trial Judge some discomfort, for reasons which were not explained, form an integral part of the cause of action, and thus should not have been stricken. In effect the Trial Court gutted the complaint of its allegations describing why the Respondent was held subject to ridicule and contempt by

belonging to the Petitioner organization, and then proceeded to dismiss the complaint, by ruling that there were no allegations to support that the Respondent was subject to ridicule and contempt by the claim that she had joined the ranks of this organization. However, Respondent claims that even with the paragraphs that were left after the Trial Court had wrongfully stricken some of the key paragraphs from the complaint, the Respondent was still able to state a cause of action under false light invasion of privacy, though not as strong a case as could be stated if the complaint had been left in tact by the Trial Judge.

In order to avoid liability, Petitioner need only have checked the facts written by Bruce Rapp with a single telephone call to Edith Rapp. Yet Petitioner did not bother to take this simple step to protect Edith Rapp from injurious falsehoods. In their opinion in this case, the District Court of Appeal said that the language in the Jews for Jesus newsletter was not defamatory since the group for which it was intended "would have viewed the information in a positive light." *Rapp v. Jews for Jesus, Inc.*, 944 So. 2d 460, 465 (Fla. 4th DCA 2006). If this reasoning were to be followed to its natural conclusion, then the Ku Klux Clan could publicly announce in a newsletter or a press conference that any of its civil rights adversaries had joined their ranks, and was committed to the cause of discrimination, and the denial of equal rights with inpunity. Under the Petitioner's argument, there should be no recourse for such harm in Florida, even if the false

attribution of beliefs and organizational affiliation were made via the internet or at a well publicized Ku Klux Clan meeting or rally, to which they invited the press, so long as the comments were directed to its members, regardless of how many others would be aware of and have ready access to such misinformation.

This would allow such groups to target their enemies by such statements with impunity. While a public figure may have some way of responding, without legal recourse, the response would most likely not be sufficient to offset the harm, or to clarify the record. In the case of a private individual such as the Respondent, who is not a public figure, and who would most likely not excite the interest of the media, without a cause of action for false light, there would likely be no recourse whatsoever for the individual to seek damages, or to set the record straight. Even if a private citizen victim could have something printed in the press to try to inform the public of the truth, this effort would most likely be woefully inadequate to offset the harm to her reputation, and the effort could easily backfire by providing more publication of the false allegations, and inviting more false allegations by the perpetrator.

Without the tort of false light invasion of privacy, media outlets and others would remain free to publish whatever false facts they want about individuals with reckless abandon, as long as those facts do not meet all the criteria of defamatory statements, but which may be every bit as false and harmful to the victim of these

statements. A person's privacy should not be invaded and persons should not be subject to knowingly false statements, intentionally designed by the media or anyone else to destroy their reputation, simply because those statements do not meet the criteria of defamation or are not viewed as "contemptuous enough".

It has been said that if someone takes all the money of another, the victim can recover the loss, but the loss of one's good name can never be regained.

For all of these reasons, this Court should reaffirm the elements of the tort of false light invasion of privacy consistent with prior case law within the state and consistent with *§652E of the Restatement (Second) of Torts*. These elements are not duplicative of existing torts.

THIS COURT SHOULD RECOGNIZE §559E OF THE RESTATEMENT OF TORTS AS A BASIS FOR A DEFAMATION CLAIM OR IN THE ALTERNATIVE REINSTATE THE DEFMATION CLAIM REGARDLESS OF WHETHER 559E IS RECOGNIZED.

§559E of the Restatement (Second) of Torts says:

> A communication to be defamatory need not tend to prejudice the other in the eyes of everyone in the community or of all of his associates, nor even in the eyes of a majority of them. It is enough that the communication would tend to prejudice him in the eyes of a substantial and respectable minority of them, and that it is made to one or more of them or in a manner that makes it proper to assume that it will reach them. . . . If the communication is defamatory only in the eyes of a minority group, it must be shown that it has reached one or more persons of that group, although if it is published in a newspaper it will be presumed, unless the contrary is shown, that it was read by them. . . . If the communication is obviously defamatory

> in the eyes of the community generally, the fact that the particular recipient does not regard it as discreditable is not controlling.

Defendant claims that there can be no claim for defamation since the false facts published by Bruce Rapp about his stepmother were "positive." A communication is defamatory if it tends so to harm the reputation of another by lowering him in the estimation of the community or deterring third persons from associating or dealing with him. *Joint Anti-Fascist Refugee Committee v. McGrath***,** 341 U.S. 123, 139; 71 S.Ct. 624; U.S. 95 L.Ed 817 (1951), citing *Restatement Torts § 559 (1938)* (where the Court held that dismissing the organization's suit was erroneous as the government acted improperly when including them on a list of Communist organizations). The Restatement goes on to give the following example: "A writes in a letter to B that C is a member of the Ku Klux Klan. B lives in a community in which a substantial number of the citizens regard this organization as a discreditable one. A has defamed C." *Id*. In the case at bar, Mr. Rapp and Jews for Jesus falsely proclaimed to the religious community and to the world, that Mrs. Rapp renounced her religion and joined the ranks of an organization whose goal was the destruction of Mrs. Rapp's religion by deception and fraud. As Mrs. Rapp's religious affiliation is a very significant part of her life, her community and her support system, the claim that she renounced it and now joined forces with a group that is reviled by her community due its efforts to

destroy Judaism form within, caused doubt and dismay from those in her community. While the Fourth District Court of Appeal held that the statements made about Plaintiff were not defamatory since they would be viewed as positive by the organization reading the newsletter, (*Rapp*, 944 So. 2d at 465), that assertion is simplistic and does not take into account how harmful being falsely labeled a member of an opposing religious organization would be, especially one which sought the destruction of one's own religious group through deception and fraud. Publicizing Edith Rapp as a convert to Christianity, and intentionally and falsely claiming that Ms. Rapp is now working with others to subvert, undermine and eventually eliminate the Jewish faith is far worse than simply claiming that she abandoned her religion, which is enough to constitute defamation. While Petitioner may believe that there is nothing inherently offensive about Christianity, or presumably any other religion, to those who hold deeply held religious beliefs, and congregate with others who share these beliefs, being falsely labeled as one who has abandoned those beliefs, and now belongs to an organization which holds antithetical beliefs and a wholly different religious doctrine is offensive and injurious, especially when knowingly done to intentionally harm an innocent victim because she rejected the beliefs of the perpetrator, as is alleged in this case.

While even under the allegations as originally pled there is no comparison to the maliciousness and harm caused by Jews for Jesus, and the harm caused by Al

Qaida, which is engaged in terrorism and killing innocent people, nevertheless under the legal argument advanced by the Petitioner, if someone were falsely accused of joining Al Qaida, and ascribing to their beliefs and methodology, by one who knew this to be false, the Petitioners would argue that the victim would have no remedy under Florida law, because there is nothing offensive about being labeled as belonging to a religious group which is different than one's own. Fortunately, the law in Florida does have a remedy for placing someone in such a false light, and should continue to have such a remedy under false light invasion of privacy, as well as defamation.

There is a vast difference between falsely claiming that one has abandoned her faith, with knowingly and falsely claiming that an adversary has joined a fringe group that is perceived as dangerous, unscrupulous and immoral in its efforts to subvert or destroy one's own religion, as was alleged by the Respondent in this case. However, under either scenario, with or without the stricken allegations, the false statements are harmful to the victim, and are actionable under Florida law under a cause of action for defamation and false light invasion of privacy.

While the Trial Court may have viewed the allegations which it struck as unsettling, this provides no basis to strike such allegations as was done by the Trial Court. These allegations are relevant and are taken as true for the purposes of a motion to dismiss. If one has been accused of belonging to the Ku Klux Clan, and

alleges that this organization behaved in ways that were improper and unpopular in the eyes of her community, or any reasonable community, thus explaining why it is deemed harmful to be linked with such an organization, it would not be appropriate for a Trial Court to strike all such negative depictions as scandalous, thus depriving the Plaintiff of the opportunity to allege the elements of the cause of action, and then striking the cause of action due to a "failure" to allege these elements. Accordingly, the Trial Court's order striking the allegations of the harmful reputation of Petitioner Jews for Jesus was also improper, and should be reversed, in order to permit the Respondent to fully and adequately allege her claims.

The Fourth District Court of Appeal relied on the "common-mind" principle as set forth in *Byrd v. Hustler Magazine*, 433 So. 2d 593 (Fla. 4th DCA 1983). However, the case at bar differs from *Byrd v. Hustler Magazine* because in *Byrd* the photograph that was the subject of the defamation suit was truthfully depicted as a retouching of a photograph, making it apparent that the subject of the suit was not a model. "A workable test is whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *McCormick v. Miami Herald Publishing Co.*, 139 So. 2d 197, 200 (Fla. 2nd DCA 1962), citing *Greenberg v. Winchell*, 136 N.Y.S.2d 877. Obviously, if Mr. Rapp had published the truthful account of his meeting with his step-mother, which was her steadfast belief in her Jewish faith, and her

vehement and consistent opposition to Jews for Jesus at all times, the readers of the newsletter would have a very different impression of Mrs. Rapp. The questions of whether the publication contained false statements and/or statements that could be interpreted as false are questions of fact which should be left for a jury to determine if the communication is ambiguous and is reasonably susceptible of a defamatory meaning. *Pep Boys v. New World Communs.*, 711 So. 2d 1325, 1328 (Fla. 2nd DCA 1998). In the case at bar, the falsehood claimed about Mrs. Rapp is not even ambiguous, it is clearly stated that she shared the beliefs of Jews for Jesus, and now had decided to join their ranks, abandoning her own faith. However, even if viewed as ambiguous, there is a viable cause of action for defamation as defined by the abovementioned case law and in *§559E Restatement (Second) of Torts*. This Court should expressly recognize *§559E Restatement (Second) of Torts* and remand this case for trial based on that finding.

Even if this Court does not recognize Section 559E of the Restatement, in light of the well pled allegations of the Complaint, including those which were improperly stricken by the Trial Court, the allegations make out a viable claim for defamation, and thus this Count should be reinstated.

VI. Conclusion

The tort of false light invasion of privacy has long been recognized by the United States Supreme Court, the majority of state jurisdictions, and the State of

Florida. Rejecting the tort now would overrule years of precedent as well as the Florida Constitution, and would unjustly prejudice those who have been exposed to false publicity.

False light invasion of privacy may be similar to the tort of defamation, but it is not "similar enough" to subsume the cause of action of false light within defamation. The definition of false light invasion of privacy, as repeatedly held by Florida courts, indicates a desire to address false publications that expressly fall outside of the scope of a defamation claim, but which are still false and harmful. False light invasion of privacy serves its own purpose in the common law.

In addition to the question certified to this Court, this Court should also address whether *§559E of the Restatement (Second) of Torts,* concerning the definitional basis for defamation, should be expressly recognized. This definition includes a necessary component of the tort of defamation, namely that a false allegation can be considered defamatory if it would be offensive to a minority group. Even if this restatement is not adopted, the allegations of the Complaint are defamatory to any reasonable person, whether they belong to Respondent's religious group or not.

Accordingly, Respondent requests that the Court uphold the causes of action based on false light invasion of privacy, and defamation, and that the Court clarify the definitional parameters of defamation and reverse the District Court of

Appeal's finding on that count, and remand this case to the trial court for further proceedings.

Respondent also requests that this Court reinstate the previously stricken paragraphs in order to permit the Respondent to properly present her cause of action to a jury, and to permit her to fully respond to Petitioner's assertion that the Respondent has failed to state a cause of action under all the legal theories presented in the original complaint.

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed this 28th day of November, 2007, and was furnished by U.S. mail to Mathew D. Staver, Esq. and Anita L. Staver, Esq. at Liberty Counsel, Second Floor, 1055 Maitland Center Commons, Maitland, Fl 32751-7214, Erik W. Stanley, Rena M. Kindevaldsen, and David M. Corry, Liberty Counsel, P.O. Box 11108, Lynchburg, VA 24506-1108.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fla. R. App. P. 9.210, and is prepared in Times New Roman 14 point font.

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