IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-2491

JEWS FOR JESUS, INC.,

Petitioner,

v.

EDITH RAPP,

Respondent.

AMICUS CURIAE BRIEF OF JOE ANDERSON, JR., SUPPORTING RESPONDENT'S ANSWER BRIEF

On Certified Question from the Fourth District Court of Appeal
Lower Tribunal No. 4D05-4870

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I.

THE INTEREST OF THE AMICUS CURIAE

Joe Anderson, Jr. is the Petitioner in *Joe Anderson, Jr. v. Gannett Co., Inc., et al.,* No. 06-2174 which has been set for oral argument on March 6, 2008, in tandem with this case. Anderson's case presents the certified to be of great public importance question of whether the section 95.11(4)(g), Florida Statutes two year defamation statute applies to a false light claim. This case presents a different certified 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? *Rapp v. Jews for Jesus*, 944 So. 2d 460, 468 (Fla. 4th DCA 2006).

Anderson obtained an $18.3 million judgment in his false light claim, but the judgment was reversed by the First District Court of Appeal on statute of limitations grounds, leading to the statute of limitations certified question. Anderson's interest in the outcome of this case is obvious; a negative answer to the *Jews for Jesus* certified question could affect the foundation of the *Anderson* judgment and require a determination of whether the elimination of false light could be applied retroactively. A positive answer – that false light is recognized in

Florida – would obviate the retroactive application question and make the statute of limitations question paramount in his case.

In this *amicus curiae* brief, Anderson argues that the false light cause of action is viable in Florida, but that if it is disavowed, such a disavowal could be prospective only and could not apply to his pending case. Anderson, as *amicus curiae,* will bring to this Court's attention a recent report of the Florida Senate – "Analysis of Cause of Action for False Light Invasion of Privacy" – and discuss its relevance to the issues presented in this case.

II.

SUMMARY OF ARGUMENT

Florida case law has specifically recognized the false light cause of action and set forth its four types of invasion of privacy. *Agency for Health Care Admin. v. Associated Press of Fla., Inc.*, 678 So. 2d 1239, 1252 n.20 (Fla. 1996); *Allstate Insurance Company v. Ginsberg*, 863 So. 2d 156, 162 (Fla. 2003) ("But here we affirm that the statement in AHCA does correctly state what is included in Florida's tort of invasion of privacy.")

That the tort exists is confirmed by the legislature's repeated rejection of its elimination. *See* SB 1346 (2006 Regular Session); SB 1650 (2007 Regular Session). There would be no need to remove or reform the Florida false light cause

of action if it was not recognized as a part of Florida law. Since it is a recognized cause of action, the certified question in this case must be answered "Yes."

If the Court were to answer "No," then the change in the law can only be applied prospectively, and cannot apply to pending cases because it would "reach back to disturb or to attack legal consequences to patterns of conduct premised . . . on a different understanding of the controlling of judge-made law from the rule that ultimately prevailed." *Lemon v. Kurtzman*, 411 U.S. 192, 198, 93 S.Ct. 1463, 36 L.Ed 2d 151 (1973); *International Studio Apartment Assoc. Inc., v. Lockwood*, 421 So. 2d 1119, 1121-22 (Fla. 4th DCA 1982).

III.

ARGUMENT

FALSE LIGHT IS A RECOGNIZED CAUSE OF ACTION IN FLORIDA LAW

The Florida Senate Interim Project Report 2008-144 "Analysis of Cause of Action for False Light Invasion of Privacy," November 2007 (attached as Appendix A to this Brief) provides an overview of false light in Florida and touches upon many of the arguments that have been made to this Court in this case and in *Anderson*. The Report relates the 2006 and 2007 failed legislative attempts to eliminate or reform false light and states the *raison d'etre*

for the Report: "In recognition of these prior legislative efforts, the purpose of this report is to analyze false light invasion of privacy *in the event the legislature wishes to enact legislation affecting the cause of action*." Appendix A, p. 2 (emphasis supplied).[1]

The Report acknowledges as one of its "Findings" that "the majority of district and circuit courts applying Florida law have recognized the cause of action." *Id.* (footnote omitted). That is not surprising, given this Court's decisions in *Agency for Health Care* and *Ginsberg*, *supra*, and the Report goes on to recognize that "there is a distinction in the statute of limitations between false light and defamation; that defamation has a two year limitation and "[b]ecause 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." *Id.* at 6 (footnote omitted).

Thus, there can be no doubt that false light lives in

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[1] Copies of Senate Bill 1346 (2006) and Senate Bill 1650 (2007) are attached as Appendices B and C. It is interesting to note that the 2006 bill sought to codify the cause of action and require "reckless disregard" as an element of proof, and it sought to bring the false light cause of action within a two year statute of limitations. *See* Appendix B, SB 1346, Staff Analysis, p. 5 ("Under current Florida case law, common law false light invasion of privacy is subject to the statutory four year 'catch all' statute of limitations." (footnote omitted). In 2007, the press effort was different – eliminating the cause of action. Appendix C. But both bills confirm that false light is a recognized cause of action in Florida.

Florida. The Report poses four legislative options in light of the existence of false light: "(1) No action;" (2) "Change the statute of limitations;" "(3) Codify the Restatement of Torts;" "(4) Eliminate the cause of action." Appendix A at 7. Each of those alternatives pre-suppose the existence of the cause of action in Florida. Therefore, the certified question should be answered in the affirmative.

Furthermore, good reasons exist to resist the call for abolishing the cause of action. We understand the reasons why the press seeks to shield itself from litigation, but the Supreme Court decision in *Time, Inc. v. Hill*, 385 U.S. 374, 387-88, 87 S. Ct. 534, 17 L.Ed 2d 456 (1967) makes the same defamation First Amendment protections applicable to a public figure/public interest false light claim. The Court wrote: "We hold that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth." In a non-public interest/public figure setting, there is no reason to diminish privacy rights in order to protect the press. Dean Prosser "felt that false light would succeed in many instances that defamation would not in providing a remedy to a deserving plaintiff." Brogan R. Lasswell, *In Defense of False Light: Why False Light Must Remain a Viable Cause of Action*, 34 S.Tex.

L.Rev. 149, 153 (1993) (footnote omitted).

Another commentator has nicely stated the case for the co-existence of false light and defamation:

> There exists a constant struggle between the right to privacy and the right to free speech and press, with critics often asserting that a restriction on speech is more dangerous than an invasion of a citizen's right to privacy. However, these rights have previously co-existed and can continue to do so if a commitment to recognizing and balancing both torts exists in Texas courts. This is not a competition with a winner and loser. These are both important societal interests that can and must be balanced. The solution lies not in the extermination of false light, but in a compromise of both rights based on individual case-by-case analysis. There are specific and prominent interests protected by false light. The same interests that Warren and Brandeis recognized over one hundred years ago, such as emotional tranquility, peace of mind, a stable sense of security, and the right to be let alone are still vital interests today-perhaps even more so in our modern environment. False light is unique and necessary because it allows for recovery when one's privacy has been invaded, yet one's reputation has not been harmed. Numerous situations exist when defamation will not allow recovery and false light provides the only hope of redress.

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, 1232-33 (2003). Since *Cason v. Baskin*, 20 So. 2d 243 (Fla. 1945), this Court has adhered to the existence of "a distinct right of privacy as part of our tort law that made particular conduct actionable." *Agency for Health Care, supra*, 678 So. 2d at 1252. The Court should not retreat from that ruling.

If it does, the retreat cannot be retroactive. Anderson's case began in 2001. It was tried to a jury and appealed. His false light cause of action was derived from this Court's decisions. To apply it retroactively would disturb settled expectations that were the product of settled law. The Supreme Court of the United States explained why a court's subsequent change of mind should not be applied retroactively:

> "[S]tatutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing the doctrine of nonretroactivity.

Lemon v. Kurtzman, supra, 411 U.S. at 199, quoted with approval in *International Studio Apartment Assoc. Inc., supra*, 421 So. 2d at 1122.

IV.

CONCLUSION

This Court should answer "Yes" to the question certified by the Fourth District Court of Appeal and hold that a false light invasion of privacy occurs 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 of the false light in which the other would be placed. *Cf.* Restatement (Second) of Torts § 652(E).

Respectfully submitted,

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CERTIFICATE OF SERVICE

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I HEREBY CERTIFY that this *Amicus Curiae* Brief is in compliance with Rule 9.210, Fla.R.App.P., and is prepared in Times New Roman 14 point font.

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