IN THE SUPREME COURT OF FLORIDA

CASE NO.: 4D05-4870
SC No.: 06-2491

JEWS FOR JESUS, INC.,

Petitioner,

v.

EDITH RAPP,

Respondent.

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Respondent Rapp's ("Rapp") Answer Brief is both procedurally defective and substantively deficient. It is procedurally defective because it fails to adequately cite to the record, is unduly argumentative, contains matters immaterial and impertinent to the controversy between the parties, improperly requests this Court to grant affirmative relief despite the fact that Rapp failed to file a cross-appeal, and contains a conclusion that exceeds one page in length.

Rapp's Answer Brief is also substantively deficient. She misstates the actual holdings of this Court and other courts, misunderstands the history of false light invasion of privacy, and downplays the dangerous and very real prospects for this new tort to be used as a sword rather than a shield. For all of these reasons, this Court should decline the invitation to recognize the new tort of false light invasion of privacy.

ARGUMENT

I. RAPP'S BRIEF IS PROCEDURALLY DEFECTIVE AND SHOULD BE STRICKEN.

Rapp's brief is procedurally defective for several reasons. First, it fails to respond specifically to Petitioner's detailed statement of the case and facts, which contains exhaustive citations to the record for each factual proposition, as required by Fla. R. App. P. 9.210(b)(3). Instead of specifying any particular disagreements

with Petitioner's statement of the case and facts, Rapp ignores Petitioner's brief altogether and sets forth an entirely new statement of the case and facts, without adequate citations to the record, in plain violation of Fla. R. App. P. 9.210(c). *See* Answer Brief at 1-3.[1] This failure to cite the record alone constitutes an adequate basis for striking at least those portions of the brief. *See, e.g., Aptaker v. Department of Health, Bd. of Medicine*, 949 So.2d 1071, 1072 (Fla.1st DCA 2007) (striking brief because it "does not contain a citation to the record for each and every asserted fact"); *Davis v. Sails,* 306 So.2d 615 (Fla. 1st DCA 1975) (striking initial brief for failure to adequately cite to the record).

In addition, Rapp's Answer Brief is procedurally defective because it is unduly argumentative, contains matters immaterial and impertinent to the controversy between the parties, improperly requests this Court to grant her affirmative relief despite the fact that she failed to file a cross-appeal, and it contains a conclusion that far exceeds the requirements of Fla. R. App. P. 9.210(b)(6). The single question certified to this Court is as follows:

> 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?

[1] Petitioner is filing a motion to strike Respondent's Answer Brief simultaneously with this reply.

(A. 11). Yet Rapp includes allegations maligning the motives of Petitioner and third parties, even though many of these same allegations had been stricken *twice* by the lower court. *See* Ans. Br. at 1-3; A. 13-15.

These defects, more fully set forth in the motion to strike filed simultaneously herewith, warrant the striking of the entire brief. *See Greenfield v. Westmoreland*, 2007 WL 518637, *1 (Fla. 3d DCA 2007). At a minimum, the offending portions should be stricken.

II. THE TORT OF *FALSE LIGHT* INVASION OF PRIVACY HAS NEVER SQUARELY BEEN RECOGNIZED BY THIS COURT.

A. Neither *Fletcher* Nor *Straub* Recognized the Tort of False Light Invasion of Privacy.

Respondent Rapp argues in her first point that "the tort of invasion of privacy by false light *has been* and *remains* a valid cause of action under Florida law." *See* Answer Brief at 6 (emphasis added). Rapp is mistaken. In support of her assertion, Rapp cites two cases, *Florida Publishing Co. v. Fletcher*, 340 So. 2d 914 (Fla. 1976), and *Straub v. Scarpa*, 967 So.2d 437 (Fla. 4th DCA 2007). *See* Ans. Br. at 6. In fact, neither of those cases definitively recognized the false light invasion of privacy claim.

Fletcher was an action by an individual against a newspaper arising out of its coverage of a fatal fire alleging trespass, intentional infliction of emotional

distress, and *invasion* of privacy – not *false light* invasion of privacy. The invasion of privacy count was stricken below on summary judgment, which ruling was upheld on appeal. 340 So.2d at 916. In passing, this Court quoted a dissenting court of appeals judge who noted that there was no contention that the photograph and news story of which plaintiff complained portrayed the facts in a false light, and therefore there could be "no recovery under the `false light' doctrine of invasion of privacy." *Id.* at 918 (quoting *Fletcher v. Florida Pub. Co.*, 319 So.2d 100, 113 (Fla.1st DCA 1975) (McCord, J., dissenting)). This passing reference to *obiter dictum* hardly established the tort of false light invasion of privacy.

Rapp's second authority is similarly unavailing. In *Straub*, a case decided *after* the case *sub judice*, a member of the board of directors of a homeowners' association sued a homeowner over a letter the homeowner had circulated about the board. 967 So.2d at 438. The Fourth District Court of Appeals, which had also heard the instant case, reiterated its concern that "an expansive view of the tort of false light invasion of privacy would infringe on freedom of expression." *Id.* It then warned: "This case demonstrates an attempt to use the tort to stifle political speech in a community." *Id.*

Having already certified the question whether Florida recognizes the tort of false light invasion of privacy, the appeals court assumed for purposes of

reviewing a dismissal for failure to state a cause of action that there was such a cause of action. Finding that even if there were such a cause of action the plaintiff in *Straub* failed to set forth the necessary elements in his allegations, and the court affirmed the dismissal. *Id.* Contrary to Rapp's contentions (Ans. Br. at 6-7), *Straub* offers no support for the claim that the tort of false light invasion of privacy has been recognized in this state. If anything, *Straub* is further support for Petitioner's position that such a cause of action should *not* be recognized. Whereas *Straub* involved an attempt to stifle *political* speech by use of this tort, this case involves an attempt to stifle *religious* speech by the same method.[2]

B. Neither the General History of the Development of False Light Invasion of Privacy Nor the Decisions of Courts from Other Jurisdictions Provide Any Support for Recognition of the Tort in this Jurisdiction.

Rapp next argues variously that the history of the tort of false light invasion of privacy and decisions from other jurisdictions somehow support her position

[2] Rapp goes so far as to impugn the Fourth District's certification of the question to this Court, and argue that the tort has been plainly recognized in this state for years. *See* Ans. Br. at 6, 10. Inexplicably, however, Rapp fails even to mention the companion case in this matter, *Gannett Co., Inc. v. Anderson*, 947 So. 2d 1, 6 (Fla. 1st DCA 2006), which similarly concluded after surveying Florida case law that "[o]ther district courts have tacitly recognized false light privacy claims in theory, but in no other instance has a Florida court ever upheld a claim based on this theory."

that this Court should recognize the tort. *See generally* Ans. Br. at 7-9. As Petitioner suggested in its Initial Brief, however, the history of false light invasion of privacy presents at best a checkered past. *See* Petitioner's Initial Brief at 11-19 (setting forth history of the tort). As emphatically stated by the Texas Supreme Court, this tort "remains the least-recognized and most controversial aspect of invasion of privacy." *Cain v. Hearst Corp.*, 878 S.W. 2d 577, 579 (Tex. 1994) (citing Bruce W. Sanford, *Libel and Privacy*, § 11.4.1 at 567 (2d ed. 1991) ("Of Dean Prosser's four types of privacy torts, the 'false light' school has generated the most criticism because of its elusive, amorphous nature.")). History is therefore of little help to Rapp.

Likewise, the case of *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974), heavily relied upon by Rapp (Ans. Br. at 8-9), is far from dispositive here.[3] The High Court in *Cantrell*, a diversity case, merely acknowledged the fact that the state courts of Ohio and West Virginia recognized the tort of false light invasion of privacy. 419 U.S. at 248. It did not analyze whether as a matter of policy it is good for a state to recognize the tort. Rather, the Court simply applied the law before it. *Cantrell* thus provides no support for Rapp's position.

[3] Rapp's assertion that in *Cantrell* the Supreme Court "has adopted the elements of false light invasion of privacy" as stated in the Restatement (Second) of Torts is incorrect. *See* Ans. Br. at 14 n.2. In fact, the Court merely acknowledged that Dean Prosser's pet tort "is generally recognized as one of the several distinct kinds of invasions actionable under the privacy rubric." *Cantrell*, 419 U.S. at 248 n.2.

Neither does the Supreme Court's earlier opinion in *Time, Inc. v. Hill,* 385 U.S. 374 (1967), cited by Rapp, decide this matter. There, the Court was faced with an issue as to the constitutionality of a New York right of privacy statute. *Id.* at 376. In reviewing the law, the Court was solicitous of free speech and free press rights, even when made in error: "Erroneous statement [sic] is no less inevitable in such a case than in the case of comment upon public affairs, and in both, if innocent or merely negligent, ... 'it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need ... to survive' ....'" *Id.* at 388 (ellipses in original) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-272 (1964)).

C. This Court's Mere Mention of the Tort of False Light Invasion of Privacy in Past Cases Does Not Ultimately Determine its Validity.

Rapp cites *Allstate Ins. Co. v. Ginsberg*, 863 So.2d 156 (Fla. 2003) and *Agency for Health Care Admin. v. Associated Indus. of Fla.*, 678 So. 2d 1239 (Fla. 1996) as authority for the proposition that this Court has definitively recognized the tort of false light invasion of privacy. *See* Ans. Br. at 11, 15. Once again, Rapp is mistaken.

In *Agency for Health Care Administration*, the issue was succinctly stated by this Court as the review of "a final order and declaratory judgment of the Second Judicial Circuit Court holding that significant portions of the Medicaid Third-Party

Liability Act (Act)**Error! Hyperlink reference not valid.** are unconstitutional." 678 So.2d 1239, 1243 (footnote omitted). In other words, the issue was the constitutionality of a statute, not whether false light invasion of privacy ought to be recognized as a valid cause of action. Footnote 20, relied on by Rapp (Ans. Br. at 11), was an historical aside in a lengthy and scholarly opinion, quoting a concurrence from a case decided in 1984. *See Agency for Health Care Admin.*, 678 So.2d at 1252 n.20 (quoting *Forsberg v. Housing Auth. of Miami Beach*, 455 So.2d 373, 376 (Fla.1984) (Overton, J., concurring)). That case neither established nor affirmatively addressed the tort of false light invasion of privacy.

Allstate Ins. Co. v. Ginsberg, 863 So.2d 156 (Fla. 2003) is similarly distinguishable. The question certified to this Court there was whether unwelcome touching in a sexual manner could constitute invasion of privacy under Florida law. It was not a false light invasion of privacy case. Once again, in an historical footnote, the Court quoted *Agency for Health Care Administration*, which in turn quoted the concurring opinion in *Forsberg*. To suggest that these cases somehow established the validity of the tort of false light invasion of privacy is beyond the pale. They did not.

III. RAPP'S INTERPRETATION OF THE FLORIDA STATE CONSTITUTION IS UNPRECEDENTED AND UNWARRANTED.

In remarkable fashion, Rapp asserts that "the Constitutional right of free speech in Florida is more narrowly construed in Florida than under federal law," and consequently the tort of false light invasion of privacy should receive "greater support" here than elsewhere. *See* Ans. Br. at 13. In other words, Rapp suggests that the Free Speech Clause of the Florida Constitution, Art. I, § 4, effectively preempts the First Amendment to the federal constitution. Merely to state such a proposition is to reveal its absurdity. It is black letter constitutional law that a state constitution may afford *more*, but not *less* protection of the rights of its citizens than the federal constitution. *See, e.g., Pruneyard Shopping Center v. Robins*, 447 U.S. 81 (1980); *Rossello-Gonzalez v. Calderon-Serra*, 398 F.3d 1, 12 (1st Cir. 2004); *Norwest Bank Nebraska, N.A. v. W.R. Grace & Co.-Conn.*, 960 F.2d 754, 756 (8th Cir. 1992); *State v. Viglielmo*, 95 P.3d 952, 962 (Haw. 2004).

Moreover, Florida courts have uniformly interpreted Art. I, § 4 of the Florida constitution "as affording the same protection against infringements on the freedom of speech as does the First Amendment to the United States Constitution." *University Books and Videos, Inc. v. Metropolitan Dade County*, 78 F.Supp.2d 1327, 1343 (S.D. Fla. 1999) (citing *State v. Globe Communications Corp.*, 622 So.2d 1066, 1075 (Fla.Dist.Ct.App.1993) (*citing In Re Advisory Opinion to the Governor*, 509 So.2d 292, 302 n. 2 (Fla.1987)); *Department of Educ. v. Lewis*, 416

So.2d 455, 461 (Fla.1982); and *Florida Canners Ass'n v. State of Fla., Dep't of Citrus,* 371 So.2d 503, 517 (Fla.Dist.Ct.App.1979), *aff'd,* 406 So.2d 1079 (Fla.1981)). Rapp could not be more mistaken as to the meaning and significance of the Florida constitution.

IV. FALSE LIGHT INVASION OF PRIVACY IS LARGELY DUPLICATIVE OF EXISTING TORTS.

Rapp next argues that the elements of false light invasion of privacy "are different from the elements of defamation." *See* Ans. Br. at 14. Tellingly, Rapp did not directly address the argument in Petitioner's Initial Brief that the tort of false light invasion of privacy overlaps with existing torts, such as libel. *See* Petitioner's Initial Brief at 24-26. In particular, Petitioner painstakingly set forth the elements of libel under Florida law and compared them, point by point, against the elements of false light invasion of privacy. *See id.* at 26 (containing chart). Both torts require publication of false material about the plaintiff. *Id.* Both require proof of actual damages. Both require a showing that defendant acted without reasonable care (although the standard under false light is not well defined). *Id.* The only real difference between the two torts is in the fifth element, with libel requiring that the material itself be defamatory and false light requiring only that it be highly offensive to a reasonable person. *Id.*

Rapp also quotes *Cason v. Baskin*, 155 Fla. 198, 20 So.2d 243, 250 (Fla. 1944), for the proposition that the right to privacy is "distinct in and of itself and not merely incidental to some other right." *See* Ans. Br. at 15. While it may indeed be true that the *right to privacy* is distinct, *Cason* did not address the wisdom of

addressing a theory of *false light* invasion of privacy. Indeed, *Cason* was quick to recognize the dangers of extending such privacy rights too far:

> But the right of privacy has its limitations. Society also has its rights. The right of the general public to the dissemination of news and information must be protected and conserved. Freedom of speech and of the press must be protected. Section 13 of our Declaration of Rights reads in part as follows: ‘‘Every person may fully speak and write his sentiments on all subjects being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech, or of the press.’’
> * * *
> One of the primary limitations upon the right of privacy is that this right does not prohibit the publication of matters of general or public interest, or the use of the name or picture of a person in connection with the publication of legitimate news.

Cason, 20 So.2d at 251 (internal quotation marks and citations omitted). The *Cason* Court went on to emphasize that all the authorities on the subject, including Messrs. Warren and Brandeis (who had labored for recognition of the new tort), conceded that "*mere spoken words cannot afford a basis for an action* based on an invasion of the right of privacy." *Id.* (emphasis added).

Especially where, as here, recognition of a new cause of action infringes significantly upon fundamental rights to free speech and free press, the Court should act with the utmost caution. The substantial overlap of the proposed false light invasion of privacy with existing torts such as libel suggests that the minimal

gain it might offer for those wrongs not actionable under existing torts are far outweighed by the serious loss of free speech and free press rights. Furthermore, the vague and uncertain standard proposed

This case presents a paradigm example of the danger that recognizing the tort of false light invasion of privacy presents to society as a whole. Instead of supplying a shield for the weak and vulnerable, this tort would provide a sword for the strong and aggressive. And that sword would as often as not be wielded against those least able to defend themselves, non-profits and modest media groups seeking only to publish matters of interest to the public. Arming the aggressors hardly constitutes sound public policy.[4] This truism is all the more sobering when one considers the numerous cases cited by *amici* media interests detailing cases in which the plaintiffs alleged false light invasion of privacy *even though they could have filed for defamation*, simply because the false light avenue provided more strategic advantages. *See* Media General Operations, Inc., et. al. Amici Brief in Support of Petitioner at 9-12.

[4] Rapp's parade of horribles suggesting that the Ku Klux Klan could intentionally misrepresent that civil rights activists had joined its ranks and so on miss the point. *See* Ans. Br. at 17-18. Such action by a group like the KKK, absent any good faith basis such as was present here, would likely constitute adequate grounds for a claim of intentional, or at least negligent, infliction of emotional distress. Surely the assertion that one has joined the KKK is by no means equivalent to a report that one has become a Christian.

If there is one overarching lesson to be gleaned from the past 40 years of tort law, it is that breeding litigiousness is as detrimental to the well-being of our society as breeding cancer. As cancer slowly but ineluctably destroys the weak cells of the body, so our ever-increasing tort litigation is destroying the weakest members of the body politic. What Rapp needs is not a new and better cause of action, but simply a new and better case that would allow recovery under any one of the numerous torts already recognized by this Court.

In the final analysis, Rapp seeks to punish Petitioner Jews for Jesus for a simple mistake (assuming it was a mistake in the first place). This fact is poignantly demonstrated by Rapp's demand letter, which sought not a simple retraction, but "compensation" of *$1,000,000*.[5] Missteps must in the nature of things occur, and should not be grounds for suit under these circumstances. As James Madison presciently observed long ago: "`Some degree of abuse is inseparable from the proper use of every thing, and in no instance is this more true than in that of the press.'" *Time, Inc. v. Hill, supra,* 385 U.S. 374, 388-389 (quoting 4 Elliot's Debates on the Federal Constitution 571 (1876 ed.)).

[5] *See* Exhibit 1 to Petitioner's Motion to Supplement the Record, filed simultaneously herewith.

The tort of invasion of privacy should not be extended to cover "false light" claims.

V. RAPP'S POINT 3, SEEKING AFFIRMATIVE RELIEF AND URGING THIS COURT TO RECOGNIZE §559e OF THE RESTATEMENT OF TORTS AS A BASIS FOR A DEFAMATION CLAIM, IS IMPROPER AND SHOULD BE STRICKEN.

Rapp devotes over five pages of her Answer Brief to an argument urging this Court to recognize §559e of the Restatement (Second) of Torts as a basis for a defamation claim, or alternatively reinstating her defamation claim. *See* Ans. Br. at 19-24. This argument is beyond the scope of this appeal, because Rapp failed to file a cross-appeal and is therefore estopped from seeking affirmative relief here. *See, e.g., A-1 Racing Specialties, Inc. v. K & S Imports of Broward County, Inc*., 576 So.2d 421, 422 (Fla. 4th DCA 1991) (granting motion to strike portion of answer brief seeking affirmative relief). What the Fourth District held in *A-1 Racing* is equally applicable here: "The appellee did not file a notice of cross appeal yet there were arguments in the answer brief demanding affirmative relief. The answer brief went well beyond the scope of the appellant's initial brief. The appellee thereby violated Florida Rules of Appellate Procedure 9.110(g) and 9.210(c)." *Id.*; *accord, Wiccan Religious Co-op. of Florida, Inc. v. Zingale* 898 So.2d 134, 136 (Fla. 1st DCA 2005).

This portion of Rapp's Answer Brief is improper, and should be stricken. It is also not well taken on the merits, and should be denied in any event.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court refuse to recognize the tort of false light invasion of privacy in Florida and dismiss this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, First Class delivery this 19th day of December, 2007, to the following:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply Brief complies with the font size requirements of Fla. R. App. P. 9.210(a)(2).

_____

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