FILED, Clerk of the Supreme Court, 13 Dec 2024, **088836**

SALVE CHIPOLA III, Plaintiff/Appellant, v. SEAN FLANNERY and JOHN/JANE DOES 1-10, Defendants/Respondents.	SUPREME COURT OF NEW JERSEY DOCKET NO. 088836 CIVIL ACTION On Appeal from a Final Order of the Superior Court of New Jersey, Appellate Division, Docket No. A-3571-21 Sat Below: Hon. Greta Gooden Brown, J.A.D. Hon. Lisa A. Puglisi, J.A.D.

BRIEF OF PROPOSED AMICUS CURIAE NEW JERSEY CENTER FOR NONPROFIT JOURNALISM AND THE NEW JERSEY INDEPENDENT LOCAL NEWS COLLECTIVE

PASHMAN STEIN WALDER HAYDEN
A Professional Corporation
Court Plaza South
21 Main Street, Suite 200
Hackensack, NJ 07601
Tel: (201) 488-8200
Fax: (201) 488-5556
CJ Griffin (031422009)
cgriffin@pashmanstein.com

Attorneys for Proposed Amicus Curiae,
New Jersey Center for Nonprofit Journalism and the New Jersey Independent Local News Collective

On the Brief:
CJ Griffin (031422009)

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STATEMENT OF INTEREST OF AMICI CURIAE

The proposed amici curiae are the New Jersey Center for Nonprofit Journalism and the New Jersey Independent Local News Collective. They ask for leave to file this amicus brief and participate in oral argument.

The New Jersey Center for Nonprofit Journalism is the parent organization and publisher of *The Jersey Vindicator*. Founded in 2023, *The Jersey Vindicator* is an independent, nonpartisan newsroom dedicated to high-quality investigative and public-service journalism about New Jersey government and urgent statewide issues, including elections, voting, public records, education, economic development, health, housing, the environment, criminal justice, human trafficking, and more. *The Jersey Vindicator* was founded to address a crisis in journalism — the ongoing and rapid decline of corporate-owned legacy media outlets, which is greatly diminishing access to trusted and factual accountability and investigative reporting in the state. *The Jersey Vindicator* seeks to uncover stories that would otherwise go untold and cut through partisanship and misinformation to deliver trusted, reliable journalism to residents of the Garden State. Its aim is to tell stories no one else is telling about how government functions in New Jersey, with the aim of

sparking change that improves the quality of life for residents.

The New Jersey Independent Local News Collective is an association representing more than two dozen nonpartisan local news publishers across the state. The members of the association report on local government, education, businesses and events and employ professional journalists who follow the Society of Professional Journalists ethical standards.

The amici seek leave to participate in this case because they will be directly impacted by the Court's decision in this case. If the Court were to reverse the Appellate Division's decision and upend precedent that is fifteen years old, the statute of limitations for defamation claims will effectively become two years because a plaintiff can, as here, evade the ordinary one-year limitations period for defamation by simply calling his defamation claim a "false light" claim. As a result, the news industry, which is already financially struggling, will be exposed to greater liability than the Legislature intended when it intentionally made the statute of limitations for defamation claims very short.

PRELIMINARY STATEMENT

The issue in this case is quite simple: for whatever reason, the plaintiff missed the one-year statute of limitations to file his defamation *per se* claim.

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Instead of accepting this fate, plaintiff cleverly tried to disguise his claim as a cause of action for false light invasion of privacy. In other similar cases, plaintiffs have attempted to bring their time-barred defamation claims under other tort theories, such as intentional or negligent infliction of emotional distress. Thankfully, courts in New Jersey and across the nation have always seen right through this blatant ploy to evade the strong free speech protections set in place for defamation claims. Where a claim sounds in defamation, courts have held that those claims must be treated like defamation claims.

As independent news publishers, the amici ask the Court to find that Plaintiff's complaint is time-barred. The media, especially small publishers, cannot afford to be subjected to a longer liability period simply because a plaintiff re-labeled a defamation claim as another cause of action. Moreover, the amici ask the Court to reconsider the recognition of the false light invasion of privacy tort altogether. Many states across the nation have rejected the tort because it causes great free speech concerns, is vague and amorphous to apply, and is too often used by plaintiffs to evade the rigid statute of limitations and other protections in place for defamation claims.

STATEMENT OF FACTS

The amici adopt the statement of facts from the Appellate Division's decision and highlight the following allegations in Count I of Plaintiff's complaint:

Plaintiff alleges that on January 9, 2020, Defendant Sean Flannery had a single conversation with two individuals—a staff member from the Clearview Regional High School and a third party—during which Defendant allegedly "informed on him" that Plaintiff sold drugs to students and purchased alcohol for them. Compl. ¶¶8-12; 32; 35-37. Plaintiff alleges that:

- Defendant's January 9, 2020 statements "were harmful to [Plaintiff's] reputation." Compl. ¶40 (emphasis added).
- Plaintiff's "reputation as a drug dealer became publicized throughout Gloucester County—he was barred from other school sporting events, and his photo was posted throughout Gloucester County as a drug dealer—which created a false public impression of the Plaintiff as a drug dealer." Compl. ¶41 (emphasis added).
- Defendant "knew of or acted in reckless disregard as to the false light that his statements to" the staff member "would put Plaintiff's reputation . . . (sic)." Compl. ¶42 (emphasis added).

- Defendant's statements put Plaintiff's "reputation in a false light and were the tort of false light invasion of privacy." Compl. ¶43 (emphasis added).
- Defendant's statements put Plaintiff's "character, history, activities and reputation" in a false light and caused Plaintiff to suffer "emotional distress and harm to his reputation." Compl. ¶47 (emphasis added).

Plaintiff's complaint asserts only that Defendant had a single conversation with the school staff member and the third party on January 9, 2020. It provides no factual allegations whatsoever to explain how Plaintiff's "reputation as a drug dealer" was "publicized throughout Gloucester County" or when this publicity occurred.

Plaintiff's complaint was filed on December 28, 2021, nearly two years after the January 9, 2020 conversation between Defendant and two other individuals.

LEGAL ARGUMENT

I. PLAINTIFF'S COMPLAINT WAS PROPERLY DISMISSED BECAUSE IT IS DEFAMATION COMPLAINT IN DISGUISE

When a statute of limitations has expired or a substantive or procedural hurdle cannot be overcome, it is not unusual for a plaintiff to try to describe his

cause of action differently in hopes of surviving a motion to dismiss. That is exactly what happened in this case. Plaintiff has taken a time-barred defamation claim and slapped a "false light" label upon it in an attempt to evade outright dismissal. As argued further below, courts look at the nature of the factual allegations—not the label used for the cause of action—to determine which statute of limitations applies. In this case, the one-year statute of limitations for defamation must apply. Moreover, even if Plaintiff could succeed with re-labeling his defamation claim, he has not met the requirements necessary to establish a false light claim.

A. A Plaintiff Cannot Evade the Statute of Limitations or Other Defamation Defenses by Simply Naming Their Defamation Claim Something Different

It is widely accepted that "[i]t is not the label placed on [a cause of] action that is pivotal but the nature of the legal inquiry." Couri v. Gardner, 173 N.J. 328, 340 (2002) (holding that an affidavit of merit was required even though plaintiff labeled his cause of action a breach of contract rather than legal malpractice because the "underlying factual allegations require[d] proof of a deviation from the professional standard of care"). Consistent with this principle, New Jersey courts have routinely held that where a cause of action sounds in defamation, the court must treat those claims like defamation claims

regardless of the label the plaintiff used in the complaint. See Rodriguez v. Home News, 137 N.J. Super. 320 (App. Div. 1975) (finding plaintiff's "negligence" claim was really a defamation claim and was time-barred); McCleneghan v. Turi, 567 Fed. Appx. 150 (3d Cir. 2014) (because a claim of tortious interference was based on the alleged false and defamatory character of a communication, the plaintiff could not "circumvent the defamation statute of limitations by repackaging the same claims under a tortious interference theory").[1]

This means that where, as here, such a re-labeled action was filed after the one-year statute of limitations for defamation had expired, it must be dismissed

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[1] Courts have also held that the defenses applicable to defamation claims retain their full status for derivative tort claims that are based on allegedly defamatory speech. "[I]f an intentional tort count . . . is predicated upon the same conduct on which the defamation count is predicated, the defamation cause completely comprehends" the intentional tort claims. LoBiondo v. Schwartz, 323 N.J. Super. 391, 417 (App. Div. 1999); see also Binkewitz v. Allstate Ins. Co., 222 N.J. Super. 501, 516 (App. Div. 1988) (holding "words which are absolutely privileged against an action for defamation are also absolutely privileged against an action for tortious interference with contract or economic advantage."). Additionally, "a party who claims that its reputation has been damaged by a false statement cannot circumvent the strictures of the law of defamation . . . by labeling its action as one for negligence." Dairy Stores, Inc. v. Sentinel Pub. Co., Inc., 191 N.J. Super. 202, 217 (Law Div. 1983), aff'd, 104 N.J. 125 (1986).

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as time-barred. The Appellate Division's decision in Swan v. Boardwalk Regency Corp., 407 N.J. Super. 108 (App. Div. 2009), makes this clear. In Swan, the plaintiff was named as a defendant in an April 2005 complaint brought by the Division of Gaming Enforcement, which alleged that plaintiff and other employees of a casino improperly used the casino's surveillance cameras to zoom in on the body parts of several female patrons and employees. Id. at 112. In response to the widely publicized complaint, the casino issued a press release in September 2005 stating that it had "absolutely zero tolerance for the kind of behavior that occurred." Id. at 114. Months later, the Casino Control Commission found the plaintiff engaged in no wrongdoing. Thereafter, in November 2006, plaintiff brought a "false light/invasion of privacy" claim against the casino, alleging that by issuing a press release and posting copies of newspaper articles about the incident on its bulletin board, the casino "created the false impression he was a 'pervert who abused his position as a surveillance officer and used surveillance cameras to leer at and stalk females on the Casino floor.'" Ibid.

The trial court held that the "false light/invasion of privacy" claim was "similar to defamation" and dismissed the claim as time-barred because it was

filed beyond the one-year statute of limitations period for defamation. Id. at 120. The Appellate Division affirmed that decision and noted that:

> [a] significant number of other state and federal courts throughout the country have applied the same statute of limitations to false light and defamation claims, reasoning that holding otherwise would allow a plaintiff, in a defamation action where there has been a general publication, to avoid a shorter defamation statute of limitations merely by phrasing the cause of action in terms of invasion of privacy, which was a concern expressed by Dean Prosser.
>
> [Id. at 122 (citations omitted).]

Thus, the court affirmed the trial court's summary judgment dismissal because the plaintiff's invasion of privacy claim was "essentially one of defamation," and allowing it to stand would "condone a transparent evasion of the one-year statute of limitations in New Jersey." Id. at 122-23 ("Neither law nor logic justifies why Count Two of plaintiff's complaint labeled 'Defamation' should be subject to a one-year statute of limitations while his same claims re-labeled 'False Light/Invasion of Privacy' in Count Three should be governed by a longer limitations period.").

B. Swan Was Correctly Decided and Should Be Upheld

Plaintiff asks this Court to overrule Swan and find that his complaint is subject to a two-year limitations period because false light constitutes an injury

to the person, not an injury to reputation like a defamation claim.[2] Although the Supreme Court has never expressly held that a false light claim has a one-year statute of limitations, the Swan decision is fully in line with the Court's prior decisions.

The first reason Swan is correct is because it cited persuasive dicta by this Court in Rumbauskas v. Cantor, 138 N.J. 173 (1994), where the Court recognized that "case law in other jurisdictions indicates that [actions for public disclosure of private facts or placing one in a false light] . . . are subject to the limitations period for defamation claims, which is one year in New Jersey." Swan, 407 N.J. Super. at 120 (quoting Rumbauskas, 138 N.J. at 183). Today, even more states have held that a false light claim is subject to the statute of limitations for defamation. See, e.g., Gannett Co. v. Anderson, 947 So. 2d 1, 8 (Fla. Dist. Ct. App. 2006), aff'd on other grounds, 994 So. 2d 1048 (Fla. 2008) (the statute of limitations "cannot be undone by engaging in a semantic exercise" where a defamation claim is reworded to be a false light claim); Weiner v.

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[2] Although in Romaine v. Kallinger, 109 N.J. 290, 294 (1988), this Court characterized a false light claim as protecting a plaintiff's "peace of mind," as opposed to reputation, Dean Prosser—whose scholarship informed the Restatement (Second) of Torts—wrote that "[t]he interest protected is clearly that of reputation, with the same overtones of mental distress as in defamation." William L. Prosser, Privacy, 48 Calif. L. Rev. 383, 400 (1960).

Superior Court, 130 Cal. Rptr. 61, 63 (Ct. App. 1976) (applying same statute of limitations for defamation and false light); Torrance v. Morris Pub. Grp. LLC, 636 S.E.2d 740, 744 (Ga. Ct. App. 2006) (rejecting plaintiff's argument that the statute of limitations for injuries to a person should apply and instead applying the limitations period for defamation claims because false light is an injury to reputation); Sullivan v. Pulitzer Broadcasting Co., 709 S.W.2d 475 (Mo. 1986) (two-year defamation statute of limitations applies to false light privacy claim); Stout v. FedEx Ground Package Sys., Inc., 2015 WL 7259795 (N.D. Ohio 2015) (applying defamation's one-year statute of limitations to the false light invasion of privacy claim); Magenis v. Fisher Broad., Inc., 798 P.2d 1106, 1109 (Or. Ct. App. 1990) ("when a claim characterized as false light alleges facts that also constitute a claim for defamation, the claim must be filed within the period for bringing a defamation claim" because ["t]o hold otherwise would permit a plaintiff to elect the longer limitation period . . . simply by characterizing a defamation claim as one for false light."); West v. Media Gen. Convergence, Inc., 53 S.W.3d 640, 648 (Tenn. 2001) ("[A]pplication of different statutes of limitation for false light and defamation cases could undermine the effectiveness of limitations on defamation claims."); Jensen v. Sawyers, 130 P.3d 325, 336 (Utah 2005) (the statute of limitations for defamation applies to false light

claims based on the same operative facts that would support a defamation claim); Eastwood v. Cascade Broad. Co., 722 P.2d 1295, 1299 (Wash. 1986) ("We are persuaded that because of the duplication inherent in false light and defamation claims that the same statute of limitations is applicable to both actions."). Indeed, the Restatement (Second) of Torts itself suggests that the statute of limitations for a false light claim should mirror the limitations period for defamation:

> When the false publicity is also defamatory so that either action can be maintained by the plaintiff, it is arguable that limitations of long standing that have been found desirable for the action for defamation should not be successfully evaded by proceeding upon a different theory of later origin, in the development of which the attention of the courts has not been directed to the limitations.
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> [Restatement (Second) of Torts § 652E (1977), cmt. e.]

The second reason Swan is correct is because it fully aligns with decisions where this Court found that other tort claims must fail where they are based on the same factual allegations as the defamation claim. See Petro-Lubricant Testing Labs., Inc. v. Adelman, 233 N.J. 236, 243, (2018) (dismissing entire complaint, including claims of false light and intentional infliction of emotional distress, because "fair report" privilege applied to defamation claim). For example, when analyzing claims of negligent infliction of emotional distress

brought in the context the alleged publication of false statements about a plaintiff, the Court has held that there is "a certain symmetry or parallel between claims of emotional distress and defamation that calls for consistent results." Decker v. Princeton Packet, Inc., 116 N.J. 418, 432 (1989). Accord G.D. v. Kenny, 205 N.J. 275, 307 (2011) ("The intentional- and negligent-infliction-of-emotional-distress claims also fail because those torts are predicated on the same conduct alleged in the defamation claim."). See also Hustler Magazine, Inc. v Falwell, 485 U.S. 46 (1988) (rejecting argument that defamation's standards did not apply simply because the claim was emotional distress rather than reputational harm). This Court recognized that if more lenient standards were applied, "plaintiffs would be able to use the tort of negligent infliction of emotional distress to overcome defenses to defamation actions, to avoid short statutes of limitations for defamation, and to circumvent judicial barriers to punitive damages." Decker, 116 N.J. at 432. See also Salek v. Passaic Collegiate Sch., 255 N.J. Super. 355, 361 (App. Div. 1992) (plaintiff may not use a negligent infliction of emotional distress claim "to circumvent defenses to the defamation action") (citing Decker, 116 N.J. at 432).[3]

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[3] This is a theme that runs through national jurisprudence as well. See, e.g., Weyrich v. New Republic, 235 F.3d 617, 627-28 (D.C. Cir. 2001) (A "plaintiff may not avoid the strictures of the burdens of proof associated with defamation

In this regard, Plaintiff's argument that McGrogan v. Till, 167 N.J. 414 (2001), requires a court to look at the "nature of the injury, not the underlying theory of the claim" is misplaced. Decker and G.D. v. Kenny involved causes of action for intentional or negligent infliction of emotional distress, which are ordinarily subject to a two-year statute of limitations period because they constitute an injury to the person. Fraser v. Bovino, 317 N.J. Super. 23, 34 (App. Div. 1998). But when the emotional distress flows from the same facts that would give rise to a defamation claim, the Court made it clear that the emotional distress claim must be treated consistently with the defamation claim. To hold otherwise would allow a plaintiff to re-label his cause of action to a different tort "to overcome defenses to defamation actions, to avoid short statutes of limitations for defamation, and to circumvent judicial barriers to punitive damages." Decker, 116 N.J. at 432.

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by resorting to a claim of false light invasion."); Brown v. Hearst Corp., 862 F. Supp. 622 (D. Mass 1994), aff'd, 54 F.3d 21(1st Cir, 1995); Piscatelli v. Smith, 424 Md. 35 A.3d 1140, 1146-47 (2012).
claim; where there is symmetry between the false light claim and a defamation claim (even if the defamation claim was not pleaded), then the statute of limitations for defamation should apply. See G.D. v. Kenny, 205 N.J. at 307-08 ("Because [plaintiff]'s arguments in support of his false-light claim are essentially the same as those he advances on his defamation claim, the result can

There is no reason why the same logic would not apply to a false light be no different."). Otherwise, a plaintiff could easily make an end-run around the statute of limitations and other defamation defenses.

C. Plaintiff's Claim is Defamation in Disguise and Time-Barred

In this case, there is no doubt that Plaintiff's has done exactly what our case law guards against—he dressed up a defamation per se claim in an attempt to evade the statute of limitations. Both lower courts correctly recognized this obvious ploy and dismissed his complaint because it is time-barred.

"A defamatory statement, generally, is one that subjects an individual to contempt or ridicule, one that harms a person's reputation by lowering the community's estimation of him or by deterring others from wanting to associate or deal with him." G.D. v. Kenny, N.J. at 293. If the defamatory statement is written, it is libel; where it is spoken, it is slander. W.J.A. v. D.A., 210 N.J. 229, 238 (2012). Where the defamatory statement imputes to the plaintiff "(1) a criminal offense; (2) a loathsome disease; (3) conduct, characteristics or a condition that is incompatible with his business, trade or office; or (4) serious sexual misconduct," then it is "defamation *per se*." Biondi v. Nassimos, 300 N.J. Super. 148, 154 (App. Div. 1997) (quoting Restatement (Second) of Torts §§ 570–574 (1977); Gnapinsky v. Goldyn, 23 N.J. 243, 250 (1957).

Plaintiff's complaint clearly sets forth a slander *per se* claim against Defendant that he has tried to label a false light claim. He asserts that Defendant's verbal accusations to the school staff member and a third person that Plaintiff sold drugs and alcohol to kids "were harmful to [his] reputation" or gave him a "reputation as a drug dealer." Compl. ¶¶40-41. As a result, Plaintiff claims he suffered "emotional distress and harm to his reputation." Compl. ¶47.

Plaintiff argues that because he has pleaded emotional distress damages, his claim must be treated as false light rather than defamation and should be subject to a two-year statute of limitations for an injury to the person. See Pb11 (quoting Romaine, 109 N.J. 290). But a defamation plaintiff may also recover emotional damages that result from reputational harm. Per the model jury charges:

> The foundation of an action for defamation is the injury to reputation. Hence, any award you choose to make as part of the compensation to [plaintiff] may only be to redress consequences which followed from injury to [plaintiff's] reputation. In connection with [plaintiff's] claimed emotional distress, I instruct you that [plaintiff] may be compensated by you for such ill effects only if you find that [plaintiff] experienced them because of the actual damage done to [plaintiff's] reputation. If you find that [plaintiff's] emotional suffering was caused only by [plaintiff] having [read the libel/heard the slander], and not by the publication's

> impact upon [plaintiff's] reputation, you may not consider such suffering in arriving at the amount of damages you choose to award [plaintiff].
>
> [Model Jury Charge 8.46(C) (citing Cole v. Richards, 108 N.J.L. 356, 357 (E. & A. 1932); Arturi v. Tiebe, 73 N.J. Super. 217, 222-23 (App. Div. 1962).]

Here, Plaintiff's complaint similarly asserts that it was the fact that his "character, history, activities, and reputation" were tarnished that caused him emotional distress. Compl. ¶47.

The fact that Plaintiff's complaint is really a defamation claim rather than a false light claim is further buttressed by the fact that what he has alleged is not a false light privacy violation. One places another in a false light when they

> give[] publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.
>
> [Restatement (Second) of Torts § 652E (1977). See also Romaine, 109 N.J. at 290.]

"Publicity" is defined as:

FILED, Clerk of the Supreme Court, 13 Dec 2024, **088836**

> The form of invasion of the right of privacy covered in this Section depends upon publicity given to the private life of the individual. "Publicity," as it is used in this Section, differs from "publication," as that term is used in § 577 in connection with liability for defamation. "Publication," in that sense, is a word of art, which includes any communication by the defendant to a third person. "Publicity," on the other hand, means that the matter is made public, by communicating it 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. The difference is not one of the means of communication, which may be oral, written or by any other means. It is one of a communication that reaches, or is sure to reach, the public.
>
> Thus it is not an invasion of the right of privacy, within the rule stated in this Section, to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons.
>
> [Restatement (Second) of Torts § 652D (1977) (emphasis added).[4]]

Here, Plaintiff's complaint alleges only that Defendant "informed on him" to a school staff member, in the presence of one other person, on January 9, 2020. Defendant told that staff member that Plaintiff sold drugs and purchased alcohol for students. While that is a "publication" sufficient to constitute *slander per se*, it does not constitute "publicity" sufficient to establish a false light claim.

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[4] The Restatement (Second) of Torts § 652E, Comment a, refers the reader to Restatement (Second) of Torts § 652D, Comment a, for the definition of "publicity."

Plaintiff pleads no facts whatsoever, and certainly none tied to Defendant, to establish how it somehow became known throughout Gloucester County that Plaintiff was a drug dealer. See Miele v. Rosenblum, 254 N.J. Super. 8, 13 (App. Div. 1991) (concluding a plaintiff must plead facts sufficient to identify defamatory words, their utterer, and the fact of their publication and a "vague conclusory allegation is not enough") (citing Zoneraich v. Overlook Hosp., 212 N.J. Super. 83, 101 (App. Div. 1986), certif. den. 107 N.J. 32 (1986)). As a result, Plaintiff's complaint could have also been dismissed by the trial court for a failure to state a claim of false light invasion of privacy.

II. FALSE LIGHT SHOULD NO LONGER BE RECOGNIZED AS A CAUSE OF ACTION IN NEW JERSEY

Plaintiff's hollow arguments actually provide a greater rationale for this Court to de-recognize the common law tort of false light altogether, like our sister state of New York. Ever since the "false light" invasion of privacy tort first appeared in the Restatement (Second) of Torts, it has been subject to significant criticism. Many scholars have called for its rejection based on First Amendment concerns, its frequent redundancy with defamation, or its vague or amorphous nature that makes it difficult to apply. See, e.g., Sandra F. Chance & Christina M. Locke, When Even the Truth Isn't Good Enough: Judicial Inconsistency in False Light Cases Threatens Free Speech, 9 First Amend. L.

Rev. 546, 571 (2011) ("The tort of false light is inconsistent with First Amendment values and historic protections for journalists. False light plaintiffs should not be allowed to punish speech that is rightfully protected by the First Amendment simply because their feelings get hurt."); J. Clarke Kelso, False Light Privacy: A Requiem, 32 Santa Clara L. Rev. 783, 886–87 (1992) ("[T]he few 'true' false light decisions do not establish the independent vitality of a cause of action that deserves judicial recognition. Each of these cases is more properly treated as either defamation or intentional infliction of emotional distress or both. False light privacy, may it rest in peace."); Harvey L. Zuckman, Invasion of Privacy—Some Communicative Torts Whose Time Has Gone, 47 Wash. & Lee L. Rev. 253, 257 (1990) ("While all actionable defamatory statements place the victim in a false light in the eyes of those who receive and accept such communications, the tort also encompasses false nondefamatory statements, thereby increasing the chill on free expression."); Diane Leenheer Zimmerman, False Light Invasion of Privacy: The Light That Failed, 64 N.Y.U. L. Rev. 364, 366 (1989) ("False light invasion of privacy has caused enough theoretical and practical problems to make a compelling case for a stricter standard of birth control in the evolution of the common law.").

"[F]alse light 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)). Indeed, several states have either refused to recognize or outright rejected the false light tort. See Bextel v. Fork Rd. LLC, 474 P.3d 625, 632 (Wyo. 2020); Jews for Jesus, Inc. v. Rapp, 997 So. 2d 1098 (Fla. 2008); Denver Publ'g Co. v. Bueno, 54 P.3d 893 (Colo. 2002); WJLA-TV v. Levin, 564 S.E.2d 383 (Va. 2002)); Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231 (Minn. 1998); Hougum v. Valley Mem'l Homes, 574 N.W.2d 812, 816 (N.D. 1998); Brown v. Pearson, 483 S.E.2d 477 (S.C. Ct. App. 1997); Cain v. Hearst Corp., 878 S.W.2d 577 (Tex. 1994); Howell v. N.Y. Post Co., Inc., 612 N.E.2d 699 (N.Y. 1993); ELM Med. Lab., Inc. v. RKO Gen., Inc., 532 N.E.2d 675 (Mass. 1989); Renwick v. News & Observer Publ'g. Co., 312 S.E.2d 405 (N.C. 1984); Zinda v. La. Pac. Corp., 440 N.W. 2d 548 (Wis. 1989).

In the same law review article where he described the four categories of privacy violations that were later adopted by the Restatement (Second) of Torts, Prosser himself recognized the serious concerns with the false light tort:

> The question may well be raised, and apparently still is unanswered, whether this branch of the tort [false light] is not capable of swallowing up and engulfing the whole law of public defamation; and whether there is

> any false libel printed, for example, in a newspaper, which cannot be redressed upon the alternative ground. If that turns out to be the case, it may well be asked, what of the numerous restrictions and limitations which have hedged defamation about for many years, in the interest of freedom of the press and the discouragement of trivial and extortionate claims? Are they of so little consequence that they may be circumvented in so casual and cavalier a fashion?
>
> [Prosser, Privacy, 48 Cal. L.Rev. at 401.]

When this Court first recognized false light as a valid claim in Romaine, 109 N.J. 282, it did so without any analysis whatsoever. Rather, the Court simply said the cause of action had been recognized in New Jersey and cited decisions by federal courts and lower state courts:

> It is accepted in New Jersey that a cause of action exists for invasions of privacy involving "publicity that unreasonably places the other in a false light before the public." See, e.g., Machleder v. Diaz, 801 F.2d 46, 53 (2d Cir.1986), cert. denied, Machleder v. CBS, Inc., 479 U.S. 1088 (1987) (applying New Jersey law); Cibenko v. Worth Publishers, Inc., 510 F. Supp. [761], 766 [(D.N.J. 1981)]; Faber v. Condecor, Inc., 195 N.J. Super. 81, 86–87 (App. Div.), certif. denied, 99 N.J. 178 (1984); Bisbee v. John C. Conover Agency, 186 N.J. Super. 335, 339 (App. Div. 1982); N.O.C., Inc. v. Schaefer, 197 N.J. Super. 249, 253–54 (Law Div. 1984); Devlin v. Greiner, 147 N.J. Super. 446, 461–62 (Law Div. 1977); Palmer v. Schonhorn Enterprises, Inc., 96 N.J. Super. 72, 75 (Ch. Div. 1967).
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> [Romaine, 109 N.J. at 293-94.]

Not all those cases, however, even dealt with false light privacy claims. See, e.g., N.O.C., 197 N.J. Super. at 254 (claim of intrusion upon seclusion); Faber, 195 N.J. Super. at 86 (claim of appropriation of the other's name or likeness); Palmer, 96 N.J. Super. at 75 (claim of appropriation of the other's name or likeness).

Amici respectfully request that the Court now undertake a careful analysis to determine whether false light should continue to be a viable cause of action in New Jersey. It was First Amendment concerns, among other things, that caused many other states to reject the tort. New Jersey's Constitution is much more protective of free speech than the First Amendment. N.J. Coalition Against War in the Middle East v. J.M.B. Realty Corp., 138 N.J. 326, 353 (1994) ("Precedent, text, structure, and history all compel the conclusion that the New Jersey Constitution's right of free speech is broader than the right against government abridgement of speech found in the First Amendment."). Due to the significant chilling effect a false light claim has on the media and free speech in general, amici believe this Court should reject the tort. As the Supreme Court of Colorado explained:

> Because tort law is intended both to recompense wrongful conduct and to prevent it, it is important that it be clear in its identification of that wrongful conduct. The tort of false light fails that test. The sole area in

> which it differs from defamation is an area fraught with ambiguity and subjectivity. Recognizing "highly offensive" information, even framed within the context of what a reasonable person would find highly offensive, necessarily involves a subjective component. The publication of highly offensive material is more difficult to avoid than the publication of defamatory information that damages a person's reputation in the community. In order to prevent liability under a false light tort, the media would need to anticipate whether statements are "highly offensive" to a reasonable person of ordinary sensibilities even though their publication does no harm to the individual's reputation. To the contrary, defamatory statements are more easily recognizable by an author or publisher because such statements are those that would damage someone's reputation in the community. In other words, defamation is measured by its results; whereas false light invasion of privacy is measured by perception. It is even possible that what would be highly offensive in one location would not be in another; or what would have been highly offensive in 1962 would not be highly offensive in 2002. In other words, the standard is difficult to quantify, and shifts based upon the subjective perceptions of a community.
>
> [Denver Pub. Co. v. Bueno, 54 P.3d at 903–04.]

This concern about the impact false light claims have on the media has been echoed by scholars:

> This chill can be substantial given the hierarchical nature of the news and information media. News and information is normally gathered by reporters and researchers, and then presented to editors for processing and the decision whether to publish. Because defamatory material injures reputation, such

> material usually provides to the editors a red warning flag of legal danger that can be countered by careful verification of the questionable material or its modification or excision. But false statements that are neutral or even laudatory with respect to a subject's reputation or status provide no such warning to editors. Consequently, editors are unable to protect themselves and their publishers from liability except at the expense of laboriously checking the accuracy of all statements of fact about individuals presented by the reporters and researchers. There are thus two alternatives confronting editors because of the false light tort: either risk liability by failing to double check every asserted fact about individuals, or avoid liability at a great expenditure of time and money. The news and information media are burdened under either alternative.
>
> [Zuckman, Invasion of Privacy - Some Communicative Torts Whose Time Has Gone, 47 Wash. & Lee L. Rev. at 257-58.]

In the alternative, if the Court allows false light to continue to be a viable claim in New Jersey, the claim must comport with the First Amendment, New Jersey Constitution, and the long-established defamation protections.

> As a matter of policy, the fact that the tort deals with injury to feelings rather than injury to reputation ought not to affect whether a privilege is mandated, whether distribution of many copies of a communication constitutes more than a single publication, the period of time during which a plaintiff may bring suit, or perhaps the effect of correction or retraction.
>
> [Robert D. Sack, Sack on Defamation, § 12.3.4, at 12-33 (5th ed. 2017).]

These protections should also include the requirement that a false light claim cannot be brought if the speech involves matters of public concern. False light is an invasion of privacy claim and thus to state a claim, the false light must relate to plaintiff's private life. If the person has no reasonable expectation of privacy, is a public figure, or the matter is of a public concern, the claim should fail. See, e.g., 62A Am. Jur 2d. Privacy § 130 (1990) ("In order to be actionable, an action for false-light must involve the private affairs of the subject, and cannot relate to any matter which is inherently 'public' or 'of legitimate interest to the public.'); Sturgeon v. Retherford Pubns, Inc., 987 P.2d 1218, 1227 (Okla. Ct. App. 1999) (in a false light invasion of privacy case, "[t]he disclosure must be a public disclosure, and the facts must be private and of no legitimate public concern"); Godbehere v. Phoenix Newspapers, Inc., 783 P.2d 781, 789 (Ariz. 1989) (finding false light claim fails because the speech not only touched upon a matter of public concern, but related to the acts and duties of a public officer); Cox Comm'ns, Inc. v. Lowe, 328 S.E.2d 384, 386 (Ga. Ct. App. 1985) (rejecting false light claim because it was "based upon [defendant's] publication of [plaintiff's] likeness in the course of a news report about a subject of legitimate public interest").

Accordingly, amici ask the Court to reject the false light cause of action altogether or, in the alternative, to provide safeguards to provide the strongest free speech protections possible to the public and the media.

CONCLUSION

As argued above, Plaintiff's false light claim is really a defamation claim in disguise and it should be dismissed as time-barred. The statute of limitations for a false light invasion of privacy is one year and all the protections afforded to defamation should apply to a false light claim, if it remains a viable cause of action in this state.

Respectfully Submitted,

Pashman Stein Walder Hayden, P.C.

/s/ CJ Griffin

Dated: November 26, 2024