CASE COMMENTS

SHEDDING (FALSE) LIGHT: HOW THE FLORIDA SUPREME COURT'S REJECTION OF THE TORT FALSELY IMPLIES PROTECTION FOR MEDIA DEFENDANTS

Jews for Jesus, Inc. v. Rapp, 997 So. 2d 1098 (Fla. 2008)

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Edith and Marty Rapp, a Jewish Florida couple, were married until Marty's death in 2003.[1] Bruce Rapp, Marty's son and Edith's stepson, worked for Jews for Jesus.[2] Prior to Marty's death, Bruce included the following account in a Jews for Jesus[3] newsletter:

> I had a chance to visit with my father . . . [who] has been ill for sometime . . . [O]ne morning Edi[th] began to ask me questions about Jesus. I explained how G-d [sic] gave us Y'Shua (Jesus) as the final sacrifice for our atonement . . . She began to cry, and when I asked her if she would like to ask G-d for forgiveness for her sins and receive Y'Shua she said yes! My stepmother repeated the sinner's prayer with me-praise G-d![4]

Jews for Jesus published the newsletter on the Internet, where one of Edith's relatives saw it.[5]

Alleging that Jews for Jesus falsely, and without her permission, stated she had joined the organization and become a believer in its tenets, Edith Rapp sued the group for false light invasion of privacy, defamation, intentional infliction of emotional distress, negligent

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1. Jews for Jesus, Inc. v. Rapp, 997 So. 2d 1098, 1100 (Fla. 2008).
2. *Id.*
3. Jews for Jesus is a nonprofit evangelical group dedicated to converting Jews to Christianity. Jews for Jesus, About Us, http://www.jewsforjesus.org/about (last visited June 27, 2009); *see also* Jews for Jesus, What Christians Should Know About Jews for Jesus, http://files.jewsforjesus.org/pdf/other/what-christians-should-know.pdf.
4. *Rapp*, 997 So. 2d at 1100.
5. *Id.* at 1101.

training and supervision, and negligent infliction of emotional distress.[6] On appeal, the Florida Fourth District Court of Appeal affirmed the dismissal of the defamation claim, but, "because of uncertainty in this area of the law," certified to the Florida Supreme Court the question of whether Florida recognizes the tort of false light.[7] The Florida Supreme Court held that Florida does not recognize a cause of action for false light invasion of privacy but does recognize defamation by implication.[8] The court further held that a communication can be defamatory if it prejudices the plaintiff in the eyes of a substantial and respectable minority of the community.[9]

Boston lawyers Samuel D. Warren and Louis D. Brandeis first articulated the common law tort of invasion of privacy in 1890.[10] Dean William Prosser, a leading tort law scholar, conceptualized false light invasion of privacy in 1960[11] when he argued that invasion of privacy

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6. *Id*. Rapp brought these five claims in three complaints, all of which the trial court dismissed. *Id*.

7. *Id*. at 1101–02.

8. *Id*. at 1108, 1114.

9. *Id*. at 1115. A companion case to *Rapp*, *Anderson v. Gannett Co., Inc.*, 994 So. 2d 1048 (Fla. 2008) (*Anderson II*), actually garnered more attention from both the popular press and the legal community, most likely because of the $18.28 million false light jury verdict imposed against the media defendant for wholly truthful statements. *See, e.g.*, Patricia Avidan, Comment, *Protecting the Media's First Amendment Rights in Florida: Making False Light Plaintiffs Play by Defamation Rules*, 35 STETSON L. REV. 227, 227–28 (2005) (stating that the *Anderson* verdict and its hefty award "caused alarm" among media companies and their advocates); Stephen Nohlgren, *Verdict Shows Truth No Shield*, ST. PETERSBURG TIMES, Jan. 4, 2004, at 1B, *available at* 2004 WLNR 3736911 (stating "the verdict has flabbergasted attorneys for newspapers" and quoting the reporter's lawyer who described the verdict as "ludicrous").

In *Anderson*, a *Pensacola News Journal* article—one in a four-day investigative series published in 1998—focused on an influential road paver's political influence but also recounted a 1988 hunting accident in which the paver, Joe Anderson, Jr., shot and killed his wife. Gannett Co., Inc. v. Anderson, 947 So. 2d 1, 2–3 (Fla. 1st DCA 2006) (*Anderson I*). Although Anderson conceded that the facts in the article were true, he claimed that its failure to state that the authorities ruled the shooting accidental until two sentences after the original mention of the shooting created the false impression that he murdered his wife and escaped criminal prosecution because of his political influence. *Id.* Nearly three years later, however, the Florida First District Court of Appeal reversed the jury award, ruling that the trial court should have dismissed the case because Anderson mischaracterized his lawsuit as a false light claim to evade the two-year statute of limitations in defamation cases. *Id.* at 8–9. On the same day it released the *Rapp* opinion, the Florida Supreme Court ruled in *Anderson* that because Florida does not recognize false light, the statute of limitations issues raised on appeal were moot. *Anderson II*, 994 So. 2d at 1050 & n.2.

10. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (arguing that the common law should protect an individual's right to be left alone).

11. The Florida Supreme Court recognized invasion of privacy (without specific recognition of false light) as a common law cause of action in 1944 in *Cason v. Baskin*, 20 So. 2d 243, 250–51 (Fla. 1944) ("[T]he great fundamental object and principle of the common law was the protection of the individual in the enjoyment of all his inherent and essential rights and

consists of four separate torts: intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; public disclosure of embarrassing private facts about the plaintiff; publicity which places the plaintiff in a false light in the public eye; and appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[12] In 1977, the *Restatement (Second) of Torts* codified Dean Prosser's description of the four categories of invasion of privacy and defined false light as follows:

> One who gives 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 privacy, if
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> (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.[13]

The United States Supreme Court first addressed false light invasion of privacy in 1967 in *Time, Inc. v. Hill*.[14] Building on *New York Times Co. v. Sullivan*,[15] the seminal defamation case decided three years earlier, the *Hill* Court held that a false light plaintiff must prove actual malice against a media defendant.[16] Seven years later, in *Cantrell v. Forest City Publishing Co.*,[17] the Court ruled that a newspaper and its reporter placed the Cantrell family in a false light when the paper knowingly or recklessly published inaccuracies and falsehoods about the widow of a man who died when a bridge collapsed.[18] The Court has not addressed false light in over a quarter of a century, helping render

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to afford him a legal remedy for their invasion . . . [but] '[t]he right of privacy does not prohibit the publication of matter which is of legitimate public or general interest. At some point the public interest in obtaining information becomes dominant over the individual's desire for privacy.'") (citation omitted). *Cason* involved the invasion of privacy torts of misappropriation and the publication of private information. *Id.* at 244–45. For an excellent discussion of the origin and development of false light in both the United States and Florida, see generally Avidan, *supra* note 9, at 231–44.

12. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

13. RESTATEMENT (SECOND) OF TORTS § 652E (1977); *see also* Russell G. Donaldson, Annotation, *False Light Invasion of Privacy: Cognizability and Elements*, 57 A.L.R. 4th 22 (1987) (listing the five elements of false light as relation to a private matter, falsity, publicity, a high degree of offensiveness to a reasonable person, and actual malice).

14. 385 U.S. 374 (1967).

15. 376 U.S. 254 (1964).

16. *Hill*, 385 U.S. at 387–88.

17. 419 U.S. 245 (1974).

18. *Id.* at 247–48, 253.

the tort "the least-recognized and most controversial aspect of invasion of privacy."[19]

As the Florida Supreme Court notes in *Rapp*, it had never before considered the issue of false light invasion of privacy other than in dicta.[20] Prior to the *Rapp* and *Anderson* opinions, the leading false light appellate case in Florida was *Heekin v. CBS Broadcasting, Inc.*[21] In *Heekin*, the plaintiff alleged that a *60 Minutes* segment on domestic violence falsely portrayed him as a spousal abuser by juxtaposing an interview with his ex-wife with stories and pictures of women who were abused and killed by their domestic partners.[22] Heekin conceded the specific facts about him in the broadcast were true, and the trial court granted CBS' motion to dismiss, in part, because Heekin failed to state a cause of action for false light invasion of privacy when he did not allege that the information in the broadcast was false.[23] The appellate court reversed, however, holding that falsity of information is not an element of false light.[24] On remand, the trial court granted CBS' motion for judgment on the pleadings, finding that the broadcast did not convey a false impression.[25] The appellate court affirmed without an opinion.[26]

As with false light, the Florida Supreme Court had never considered defamation by implication until *Rapp*; however, Florida appellate courts had previously recognized the cause of action.[27] In *Boyles v. Mid-Florida Television Corp.*,[28] the Florida Fifth District Court of Appeal

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19. Cain v. Hearst Corp., 878 S.W.2d 577, 579 (Tex. 1994) (citations omitted). About two-thirds of states recognize false light, while about one-third either never recognized it or initially recognized it and then rejected the cause of action altogether. Avidan, *supra* note 9, at 236. The majority of states that have rejected the tort (now, including Florida) have done so "because of the 'overlap' between false light and defamation." *Id.*; *see also* J. Clark Kelso, *False Light Privacy: A Requiem*, 32 SANTA CLARA L. REV. 783, 788, 835 (1992) ("Because the overlap between defamation and false light is so pronounced even in theory, it is no surprise that false light and defamation almost always go hand in hand, and the cases involving allegations of both defamation and false light are the single largest class of false light cases. . . . It is time to end the confusion and declare that false light [invasion of] privacy forms no part of the common law."); Diane Leenheer Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. REV. 364, 369 (1989) (arguing that because of its duplication of defamation, false light is "a conceptually empty tort," and states with a commitment to freedom of speech will ultimately feel compelled to refuse to recognize its existence).

20. Jews for Jesus, Inc. v. Rapp, 997 So. 2d 1098, 1103 (Fla. 2008).

21. 789 So. 2d 355 (Fla. 2d DCA 2001).

22. *Id.* at 357.

23. *Id.*

24. *Id.* at 359 (citing Cason v. Baskin, 20 So. 2d 243, 252 (Fla 1944)).

25. Amended Order at 1, 2, Heekin v. CBS Broad., Inc., No. 99-5478-CA (Fla. Cir. Ct. 12th Dist. July 28, 2003).

26. Heekin v. CBS Broad., Inc., 892 So. 2d 1027 (Fla. 2d DCA 2004) (unpublished table opinion).

27. Jews for Jesus, Inc. v. Rapp, 997 So. 2d 1098, 1107 (Fla. 2008).

28. 431 So. 2d 627 (Fla. 5th DCA 1983).

reversed the trial court's dismissal of a libel per se claim based on a news broadcast that implied that the plaintiff was a habitual tormentor of retarded patients, that he had raped a patient in his care, and that he was a suspect in the death of a mentally retarded child who lived in a group home operated by the plaintiff's mother.[29] And in *Brown v. Tallahassee Democrat, Inc.*,[30] the Florida First District Court of Appeal reversed the trial court's dismissal of the plaintiff's complaint alleging the newspaper published a story about a murder trial, accompanied by a photograph of the plaintiff identified as the murder defendant.[31]

Armed only with Florida intermediate appellate court opinions and United States Supreme Court opinions dating back to the 1960s and 70s, the Florida Supreme Court in the instant case was essentially writing on a blank slate. In doing so, it initially recognized that although it had previously acknowledged the four categories of invasion of privacy, including false light, none of the cases specifically recognized the right.[32] In analyzing this issue of first impression, the court focused on the public policy implications of recognizing the tort[33] by comparing it and then contrasting it with defamation.[34]

The court first acknowledged false light proponents' argument that false light, unlike defamation, allows recovery for literally true statements that create a false impression,[35] but disposed of this argument by reinforcing the fact that Florida allows for recovery for defamation by implication, in which literally true statements that create a false impression of the plaintiff can be defamatory.[36] The state's jury instructions, the court said, recognize that a statement is not defamatory if its "gist" is true;[37] conversely, according to the court, defamation law will not protect defendants who have "'the details right but the 'gist' wrong.'"[38]

The court next addressed the nature of the interests protected by

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29. *Id.* at 630–31, 641.

30. 440 So. 2d 588 (Fla. 1st DCA 1983).

31. *Id.* at 589–90; *see also Anderson I*, 947 So. 2d 1, 11 (Fla. 1st DCA 2006) (rejecting the assertion that only false light claims can be based on statements that are true).

32. *Rapp*, 997 So. 2d at 1103 ("[W]e have reviewed each of the[] cases [that acknowledge the four general categories of invasion of privacy] and conclude that the Court was simply repeating citations from academic treatises or law review articles about privacy torts in general or discussing an alternative tort in particular.").

33. *Id.*

34. *Id.* at 1105–06.

35. *Id.* at 1106.

36. *Id.* Although the court stated that "defamation by implication . . . has a longstanding history in defamation law," *id.*, that tradition does not extend to Florida. *See supra* notes 27–31 and accompanying text. While three appellate courts in Florida have recognized the existence of this cause of action, the Florida Supreme Court has not approved of any of these decisions.

37. *Rapp*, 997 So. 2d at 1107.

38. *Id.* at 1108 (quoting DAN B. DOBBS ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 117, § 116 (5th ed. Supp. 1988)).

each tort, concluding that defamation protects the objective interest of reputation while false light protects the subjective interest of emotional injury.[39] Because Florida courts have recognized defamation by implication, and because the interests protected by the two torts are "too subtle" in their distinctions, the court stated that little justification exists for the recognition of false light.[40]

The court next acknowledged how First Amendment rights would be negatively affected by the recognition of false light, noting the chilling effect caused by the vagueness of the "highly offensive to a reasonable person standard."[41] The court also enumerated a number of privileges and safeguards associated with defamation but not false light.[42] The court noted that other states, including Tennessee, Utah, and West Virginia, simply extend the defamation safeguards to false light causes of action.[43] The Florida Supreme Court, however, left this option open to the Legislature.[44] Ultimately, because the court concluded that "false light is largely duplicative of existing torts, but without the attendant protections of the First Amendment," it declined to recognize the tort of false light but did recognize the tort of defamation by implication.[45]

Finally, the court held that an allegedly defamatory statement must be evaluated from the standpoint of a "'substantial and respectable' minority of the community," thereby adopting comment (e) to § 559 of the Restatement.[46] The court declined to consider the merits of Rapp's

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39. *Id.* at 1109 (quoting Welling v. Weinfeld, 866 N.E.2d 1051, 1057 (Ohio 2007)); *see also* Posting of Marc Randazza to Citizen Media Law Project, *Rapp v. Jews for Jesus*, Rehnquist in Brennan's Robes, http://www.citmedialaw.org/blog/2008/rapp-v-jews-jesus-rehnquist-brennans-robes (Oct. 24, 2008) (stating that false light provides compensation for "mere hurt feelings."). Similarly, former Florida Supreme Court Justice Harry Lee Anstead described the false light standard as a "thin-skinned" one. Oral Argument, Jews for Jesus, Inc. v. Rapp, 997 So. 2d 1098 (Fla. 2008) (No. SC06-2491), *available at* http://wfsu.org/gavel2gavel/archives/08-03.html.

40. *Rapp*, 997 So. 2d at 1109 (quoting Denver Publ'g Co. v. Bueno, 54 P.3d 893, 902 (Colo. 2002)). Also of concern to the court was the subjective nature of the false light standard. *Id.* at 1110. "[U]tilizing a subjective standard that 'fails to draw reasonably clear lines between lawful and unlawful conduct' may impermissibly restrict free speech under the First Amendment." *Id.* (quoting Cain v. Hearst Corp., 878 S.W.2d 577, 584 (Tex. 1994)).

41. *Id.* at 1110.

42. *Id.* at 1111–12. For example, these include the statutory requirement that a prospective plaintiff give a media defendant notice five days before initiating a civil action, and a statutory limit on damages when certain criteria are met. *Id.*

43. *Id.* at 1112.

44. *Id.* ("In fact, we note that this matter has already been studied by the Legislature, but no action has yet been taken.").

45. *Id.* at 1100.

46. *Id.* at 1115 ("[A]n unprivileged falsehood need not entail universal hatred to constitute a cause of action. No falsehood is thought about or even known by all the world. No conduct is hated by all."). *Id.* Justice Wells dissented on this point, stating that, "[t]he standard of a 'substantial and respectable minority' is plainly too vague to be a fairly applied standard. There is no way to know how many it takes to constitute a 'substantial' number or what constitutes a

defamation claim and remanded it to the Florida Fourth District Court of Appeal for consideration.[47]

Members of the media and their advocates rejoiced at the opinion,[48] and rightfully so. The Florida Supreme Court reinforced the First Amendment limits on defamation law by eliminating a cause of action that duplicates defamation but is devoid of the constitutional and statutory safeguards essential to freedom of expression. The rejection of the tort also protects media defendants from plaintiffs who use false light as an end run around defamation law and its strict requirements.[49]

Significantly, the court also places First Amendment interests above those "relatively few unique situations"[50] in which statements are offensive but not necessarily defamatory.[51] Thus, news organizations are free to publish statements without a fear of litigation brought by plaintiffs with hurt feelings. In striking the balance between the right of privacy and First Amendment interests, the court weighs in favor of the latter.

Ironically, though, by recognizing defamation by implication, the court eroded many of the protections it had just bestowed. Given, for example, the strong overlap between defamation by implication and false light,[52] the elimination of the latter is unlikely to serve as a

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'respectable minority.' What does 'respectable' mean in this context?" *Id.* at 1116. (Wells, J., dissenting).

47. *Id.* at 1114.

48. *See, e.g.*, Lucy Morgan, *Florida Court Rejects "False Light" Lawsuit*, ST. PETERSBURG TIMES, Oct. 24, 2008, at 7B ("'This is an incredible victory for anybody who reports or comments on issues of public concern. . . . The sort of mud bog false light threw us into for the past [ten] years has been damaging to journalism and to public knowledge and understanding.'" (quoting *St. Petersburg Times* lawyer Alison Steele) "'This is a great day, not only for the News Journal and Gannett, but also for newspapers and the media who will all benefit from this decision . . . It's been a long experience.'" (quoting *Pensacola News Journal* president and publisher Kevin Doyle)).

49. For further discussion of a plaintiff's use of false light as a means to evade defamation's shorter statute of limitations, see *supra* note 9 (discussing Joe Anderson, Jr.'s claim against the *Pensacola News Journal* and parent company Gannett).

50. *Rapp*, 997 So. 2d at 1114.

51. The court gives as an example the portrayal of the plaintiff as suffering from a terminal illness, a statement that is "not necessarily defamatory, but [is] potentially highly offensive." *Id.* at 1113 (quoting Denver Publ'g Co. v. Bueno, 54 P.3d 893, 902–03 (Colo. 2002)). Interestingly, another strong example seems to be the portrayal of a Jewish plaintiff who converted to Christianity. Some scholars have argued for a limited doctrine of false light that targets such statements. *See, e.g.*, Gary T. Schwartz, *Explaining and Justifying a Limited Tort of False Light Invasion of Privacy*, 41 CASE W. RES. L. REV. 885, 887, 919 (1991) (advocating for "a limited doctrine of false light" for "nondisparaging false statements" that are "highly offensive.").

52. The *Rapp* court itself stated that the different standards—highly offensive to a reasonable person for false light versus injury to reputation in the community for defamation—is the main distinction between the elements of the two torts and is "a distinction without a

deterrent to plaintiffs who feel they have been either injured or offended.[53] Simply put, the effect is not to protect the news media from litigation that would chill speech, but merely to collapse one set of cases, false light, into another, defamation by implication.[54]

More significant, though, is the fact that wholly true statements can still give rise to claims against the media. That is, journalists in Florida are still chilled by a requirement that they always consider not only whether their statements are capable of a defamatory meaning, but a defamatory implication as well. Such a determination is difficult for the reporter and difficult for the court to resolve at the summary judgment stage and could result in costly defamation litigation, [55] which creates a strong chilling effect. [56]

Along those same lines, the court's adoption of comment (e) to § 559 of the Restatement as the "community" standard for analyzing a

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difference in practice because conduct that defames will often be highly offensive to a reasonable person, just as conduct that is highly offensive will often result in injury to one's reputation." *Rapp*, 997 So. 2d at 1109.

53. *See* Barbara Busharis, *What's Truth Got To Do With It?—The Florida Supreme Court Recognizes Defamation by Implication*, TRIAL ADVOC. Q., Winter 2009, at 4, 5 (stating that few, if any, plaintiffs will be seriously disadvantaged by foreclosing false light as a separate cause of action).

54. Concededly, defamation by implication has always been an available cause of action in Florida, but the state has not seen the spate of defamation by implication cases that it has of false light cases, especially since the $18 million *Anderson* verdict in 2003. Contrast the existence of three appellate defamation by implication cases with the comments of James McGuire, a partner in the media law firm of Thomas, LoCicero & Bralow in Tampa, who said that the majority of his firm's cases in the last three years have been false light cases. James McGuire, Partner, Thomas, LoCicero & Bralow, Panel Discussion on False Light at the Annual Hot Topics in Media Law Workshop in Tampa, Fla. (Apr. 4, 2008) (notes on file with author) [hereinafter Panel Discussion on False Light]; *see also supra* note 36 (discussing Florida's scant treatment of defamation by implication). It seems feasible then that plaintiffs who formerly would have brought false light claims will now try to bring defamation by implication claims instead.

55. The juxtaposition of two truthful sentences in one article in a multi-day series spawned an eight-year legal battle between Gannett and road paver Anderson. *See supra* note 9.

56. Robyn Tomlin, Executive Editor of the *Wilmington* (N.C.) *Star-News* and former Executive Editor of the *Ocala Star-Banner*, said the *Anderson* verdict had a strong negative impact on media outlets in Florida. Robyn Tomlin, Executive Editor, *Wilmington* (N.C.) *Star-News*, Panel Discussion on False Light, *supra* note 54 (notes on file with author). Although editors at Ms. Tomlin's former paper never declined to run a particular story in the wake of the verdict, she said they were overly conscientious about the order in which statements appeared in stories. *Id.* Further, Ms. Tomlin said editors began to strongly evaluate, when deciding to pursue a particular story or not, whether the subject or subjects of the story were overly rich or litigious. *Id.* Though false light is no longer recognized in Florida, this same danger of costly litigation and large jury verdicts is now present in claims for defamation by implication. It is important to note, however, that although defamation by implication can still impose liability for truthful speech that creates a false implication, it is clearly preferable to false light because of the constitutional and statutory protections that mitigate the impact of the tort.

defamation claim is also likely to cause further litigation. The court does little to define what a "substantial and respectable minority of the community"[57] is, except to quote from a 1914 case saying that a reputational injury in a plaintiff's "personal, social, official or business relations" is sufficient to support a defamation claim.[58] Beyond these vagueness concerns, though, is the reality that a "community" standard will allow more claims to reach the trial stage.

The *Rapp* opinion, therefore, is not the sweeping victory for First Amendment proponents and news organizations that it may initially appear to be. To be sure, its rejection of false light in favor of constitutional protections for speech is forceful and likely to influence other courts to rule likewise. However, its recognition of defamation by implication has the potential to accomplish precisely what the court feared would occur with the false light standard: a strong chilling effect on speech brought about by more costly defamation litigation.

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57. *See supra* note 46 and accompanying text.

58. Jews for Jesus, Inc. v. Rapp, 997 So. 2d 1098, 1115 (Fla. 2008) (quoting Land v. Tampa Times Publ'g Co., 67 So. 130, 130 (Fla. 1914)). As an example, the court lists a doctor who had been represented as advertising his or her services. *Id.* What the court does not address, though (and what is most germane to this discussion), is whether a Jewish woman's reputation would be injured in the eyes of a "substantial and respectable minority of the community" by a report that she had converted to Christianity.