THE
BRECHNER REPORT

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Florida Supreme Court rejects false light

PRIVACY

TALLAHASSEE – Florida does not recognize false light invasion of privacy claims, held the Florida Supreme Court.

In a duo of cases, the Court held because aggrieved individuals can sue under libel and defamation laws, false light claims are superfluous.

In a case against Jews for Jesus, the court issued a 37-page opinion saying false light could potentially chill free speech.

"Because the benefit of recognizing the tort, which only offers a distinct remedy in relatively few unique situations, is outweighed by the danger of unreasonably impeding constitutionally protected speech, we decline to recognize a cause of action for false light invasion of privacy," wrote Justice Barbara Pariente.

Edith Rapp, the stepmother of a Jews for Jesus employee, sued the group after it published an article claiming she was affiliated with it.

A separate ruling by the Court upheld the 1st Circuit Court of Appeal's decision to throw out a case against the *Pensacola News Journal*. Contractor Joe Anderson sued after the *Journal* published a story allegedly implying he murdered his wife, whom he shot unintentionally while hunting. Authorities ruled the shooting was accidental. Anderson was awarded $18 million by the lower court.

"Today the Court shut the courthouse door to every Floridian who is falsely accused by a newspaper when they publish words that are literally true but carefully crafted to include thinly veiled accusations of wrongful conduct," said Anderson, according to the *Journal*.

"It's a big deal to everybody in the media, not only a victory for us," said *Journal* President and Publisher Kevin Doyle, according to the *Journal*. "Justice prevailed."

Source: Pensacola News Journal and The Reporters Committee for Freedom of the Press

DHS expands border searches

WASHINGTON – The Department of Homeland Security now allows agents to search and copy electronic materials at the border without suspicion.

Before changing its policy in July 2007, Customs and Border Patrol agents needed probable cause to conduct a search.

The latest change in July 2008 lets agents detain electronic devices and documents for any period of time and copy them with no suspicion.

Searches of laptop computers could reveal "a massive amount of private information such as personal e-mails, financial data or confidential business records," said Electronic Frontier Foundation staff attorney Marcia Hofmann, according to *The Washington Post*.

The DHS said it changed its policies to combat terrorism and be more transparent. Critics, though, say the law was changed without adequate public input.

"For 20 years the government has at least implicitly recognized there were some First Amendment restrictions on reading and copying documents," said Shirin Sinnar, a staff attorney with the Asian Law Caucus, according to *The Post*. "It's disturbing now that the government has jettisoned that policy in favor of one that violates First Amendment rights."

The new DHS policy also allows CBP agents to share data obtained during a search with other law enforcement agencies if there is suspicion of illegal behavior.

At worst, other law enforcement agencies could theoretically turn this policy "into a loophole" and obtain information for which they ordinarily would need probable cause or reasonable suspicion, said Georgetown University law professor David D. Cole, according to *The Post*.

Source: The Washington Post

Court to rule on ownership

ACCESS RECORDS

SARASOTA – The Florida Department of Law Enforcement asked the court to decide who owns software used in machines to determine DUI defendants' blood-alcohol content.

The ruling affects whether the defendants can examine Intoxylizer 8000 software code for anything that might cause a false positive.

The defendants claim if the state owns the software, it must disclose the code under the Public Records Law.

The FDLE, however, says the code is a confidential trade secret owned by the manufacturer, CMI Inc. of Kentucky. The software purchase contract licenses the FDLE to use the software.

CMI – already facing fines of over $2 million for failing to comply with Sarasota and Manatee county judges' orders to turn over the code – fears disclosure could harm business by telling its competitors how the machines work.

"You might as well just give their company away," said CMI attorney Jarrod Malone, according to the *Sarasota Herald Tribune*.

CMI is still fighting the issue in appellate courts.

Source: Sarasota Herald Tribune

School district ordered to disclose information

LAKELAND – A circuit judge ordered the Polk County School District to turn over the names, phone numbers, addresses and dependents' names of the nearly 13,000 employees receiving health care.

The PCSD unsuccessfully argued the information was protected under the 1996 Health Insurance Portability and Accountability Act.

Some PCSD personnel were uncomfortable with copy salesperson Joel Chandler's request for the information.

It is "an assault on personal information that serves no public good," said Polk Education Association President Marianne Capoziello, according to *The Ledger (Lakeland)*.

Capoziello sent thousands of teachers an e-mail saying Chandler would use the information for marketing.

In response to a letter from State Sen. Paula Dockery, R-Lakeland, asking the office to investigate whether employees should be exempt from disclosing such personal information, the Attorney General's Office sided with Chandler.

While medical information is protected, "there is no clear statement that extends to the name, address, age or other non-medical information of such participants," wrote Assistant Attorney General Lagran Saunders. "When doubt exists as to whether a particular document is exempt from disclosure under Florida's Public Records Law, the exemption is to be narrowly construed and any doubt resolved in favor of public access."

Chandler said he should not have to disclose his plans for the records. "It's no one's business what I plan to do," said Chandler, according to *The Ledger*.

Polk County Circuit Judge Roger Alcott also ordered the PCSD to pay Chandler's attorneys' fees.

Chandler also filed a contempt of court order request after the PCSD violated the order by disclosing Chandler's name in a mass e-mail to employees.

Legislators are considering a "fix" to protect employees' privacy, said State Sen. Mike Fasano, R-New Port Richey, according to the *St. Petersburg Times*.

Source: The Ledger (Lakeland) and the St. Petersburg Times

Panel makes recommendation

TALLAHASSEE – Soon, Floridians may be able to see – and request corrections to – information state agencies gather about them.

The Fair Information Practices Act, proposed by the Commission on Open Government, would also require agencies to justify the need for the information.

The proposal would also enable foster children to obtain DCF records – including medical records – after they turn 18.

Further, most DCF records would be available to the public with personally-identifying and sexual abuse information removed.

Social security numbers will be removed from documents except for businesses that need it for legitimate reasons such as credit checks and identity verification.

A final report on the recommendations will be submitted to Gov. Charlie Crist by the end of the year.

Source: Sebring News-Sun

Venice records woes continue

SARASOTA – The Venice City Council allegedly used code names for city officials, hand-delivered memoranda, and used private citizens to evade the Public Records Law, according to documents filed in Sarasota County circuit court.

Anthony Lorenzo, a citizen suing the city and a dozen current and former officials, filed the motion to access the phone records of council members Sue Lang and John Moore and Mayor Ed Martin.

The motion says the City Council and airport advisory board members used five private citizens to relay information on airport plans.

The citizens, according to the motion, used a code based on Disney's "Snow White and the Seven Dwarfs" to hide communications. One member was referred to as "DC" for "Doc," and another was called "BL" for "Bashful."

City Council officials denied they used the references to bolster secrecy. "It sounded like a fun way to talk about it," said City Council candidate Thomas McKeon, according to the *Sarasota Herald Tribune*.

The council dismantled the airport board in September.

Lorenzo's lawsuit alleges the officials violated the Public Records and Open Meetings laws by using private computers to send e-mails discussing public business.

Source: Sarasota Herald Tribune

Court hears arguments in "fleeting expletives" case

FIRST AMENDMENT

WASHINGTON – The Supreme Court heard arguments in *FCC v. Fox*, a case about the use of indecent four-letter words on television.

The *Fox* case centers on the FCC's 2004 policy of fining stations for "fleeting expletives" – one-time, accidental uses of four-letter words.

The FCC implemented the policy after three celebrities used offensive words during live awards broadcasts in 2002 and 2003. The FCC, however, said it would not fine the stations for those slips.

Television networks then sued the FCC for failing to apply its "fleeting expletives" policy consistently.

While the 2nd U.S. Circuit Court of Appeals invalidated the policy in 2006 for inconsistent application, it did not address any First Amendment issues.

The FCC appealed to the Supreme Court, which considered whether the policy violated administrative law.

However, First Amendment concerns would be implicated if the Court determined the FCC had the authority to ban "fleeting expletives."

Audio recordings of oral arguments in Fox will be released next spring. The Court rejected C-SPAN's request to release them immediately.

Source: The Reporters Committee for Freedom of the Press

SAO clears council members

CAPE CORAL – Two council members did not violate the Open Meetings Law when they discussed a graph of budget information, according to the State Attorney's Office.

In a letter to the SAO, a citizen accused council members Pete Brandt and Bill Deile of discussing the budget outside an open meeting.

"Although we can certainly understand why a complaint was brought to us, based upon the statements made at the council meeting (May 5), we have determined that the evidence is insufficient to prove that an offense occurred," wrote Assistant State Attorney Dean Plattner to Brandt and Deile.

The complaint was based on comments made by council member Dolores Bertolini at an open council meeting suggesting that Brandt and Deile met privately before the meeting to create the graph.

"The resolution of this matter is just as I expected because I was confident that there had been no Sunshine violation," said Brandt, according to the *Cape Coral Daily Breeze*. "The investigation that was called for was a waste of taxpayers' money."

Source: Cape Coral Daily Breeze and News-Press

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City makes plans after Open Meetings violations

FORT WALTON BEACH – The city is developing plans to keep a committee's decisions from being negated after the city attorney found it violated the Open Meetings Law for seven years.

The Development Review Committee violated the law by improperly holding closed-door meetings, according to city attorney Toni Craig.

The DRC, which has met since 2001, consists of city department representatives who work with developers during the planning process.

Under state statutes, the DRC's actions on 136 development applications could be negated.

Craig developed a "cure plan" that would require the DRC to divide the applications into three groups to determine how they should be treated.

Under the plan, the DRC would reconsider some of the projects during new meetings open to the public. Other projects would require City Council approval again. Completed projects, however, could not be readdressed.

"We need to move beyond the pointing of fingers and fix it," said Mayor Mike Anderson, according to the *Daily News*.

Source: Daily News

ACCESS RECORDS CONTINUED

Chairman says requests must go through attorney

THE VILLAGES – A coalition chairman said all public records requests must be reviewed by an attorney.

Will Pruitt, chairman of the Early Learning Coalition of Lake County, issued the order to the group's executive director, Lesha Buchbinder, after *The Villages Daily Sun* requested public meetings minutes and budget information.

"As a best practice, all public records requests are vetted through legal counsel as a way to ensure that the records being requested are permissible," Buchbinder wrote to *The Sun*.

Although Pruitt's order is likely consistent with the Public Records Law, having "a third person or an attorney" review the requests could delay release of the information, said First Amendment Foundation director Adria Harper, according to *The Sun*. "It's an extra step that the person has to deal with to access a record."

Source: The Villages Daily Sun

Lawsuit threat prompts release

TAMPA – The Lowry Park Zoo released records on animal purchases, sales, trades, transfers and donations almost four months after Tampa's News Channel 8 requested them – and only then after the news channel threatened to sue for their release.

The records show 227 animal transactions among the zoo, its CEO, Lex Salisbury, and Safari Wild, which is Salisbury's private exotic-animal park in development. Among the animals transacted were rare white rhinoceroses and an African forest buffalo.

Zoo policy requires the Zoological Society's board chairman, Fassil Gabremariam, to approve any animal transactions in advance. Gabremariam also sits on Safari Wild's Conservation Foundation board.

The news channel filed a public records request because the city of Tampa owns Lowry Park Zoo and its animals.

After the news channel's reports became public, the city of Tampa began auditing the zoo's management and transactions.

Source: The Tampa Tribune

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Florida Supreme Court extinguishes false light

In two cases heard the same day, the Florida Supreme Court joined a growing number of jurisdictions in unanimously rejecting the false light invasion of privacy tort, saying false light duplicates defamation and likely impedes free speech.

Before *Jews for Jesus, Inc. v. Rapp* and *Anderson v. Gannett Co., Inc.*, the Court never considered false light substantively. False light first appeared in the early 1980s in Florida appellate courts, but no case upheld a judgment for the plaintiff. Florida's single-cause-of-action rule says litigants suing based on false or defamatory speech must sue for defamation – not other torts.

Deanna K. Shullman

In 2001, the landscape of the tort began to change. In *Heekin v. CBS Broadcasting, Inc.*, the 2nd District Court of Appeal held false light claims could stem from true speech. The plaintiff claimed a "60 Minutes" broadcast, though true, falsely implied he beat his wife and children. A flood of false light litigation ensued, including *Anderson* and *Rapp*.

The Back Page

By Deanna K. Shullman

In *Anderson*, the *Pensacola News-Journal* truthfully reported Joe Anderson accidentally killed his wife while hunting. Anderson claimed the article falsely implied he murdered his ex-wife and got away with it. The jury awarded Anderson roughly $18.3-million – the largest verdict against a news organization in Florida history. In October 2006, the 1st District Court of Appeal held the two-year statute of limitations for defamation actions also applied to false light. It reversed the judgment as time-barred and asked the Florida Supreme Court to decide which statute of limitations should apply to false light.

Shortly after, the 4th District Court of Appeal decided *Rapp*. Edith Rapp sued Jews for Jesus for defamation and false light based on an account by her stepson in a Jews for Jesus newsletter. The court affirmed dismissal of the defamation claim, but it reinstated the false light claim because a "major misrepresentation" of a person's religious briefs might be "highly offensive." In reinstating the claim, it asked the Florida Supreme Court to determine whether false light existed in Florida.

In March 2008, the Court heard argument in both cases. Several media organizations and First Amendment groups, as *amici curiae*, urged the Court to reject false light.

The Court agreed because of the substantial overlap between the torts. Both can be premised upon truthful statements implying falsity and allow plaintiffs to recover for reputational and emotional distress. The only notable difference, said the Court, is false light requires a statement be "highly offensive."

Defamation law, said the Court, is fairly certain. False light's "highly offensive" requirement, however, "create[s] a moving target whose definition depends on the specific locale in which the conduct occurs or the peculiar sensitivities of the day" and therefore "runs the risk of chilling free speech because the type of conduct prohibited is not entirely clear."

Moreover, defamation by implication – when truthful statements give rise to a defamatory impression – is constrained by privileges and defenses such as a short statute of limitations, pre-suit notice, and other constitutionally-mandated privileges. False light, which lacks similar constraints, might "persuade plaintiffs to circumvent these safeguards in order to ensure recovery," according to the Court.

The Court quashed *Rapp* to the extent the 4th Circuit reinstated the false light claim. It also quashed the portion of the appellate decision affirming dismissal of the defamation claim, saying defamation can be based on reputational damage in the eyes of a "substantial and respectable minority of the community."

Rapp, said the Court, rendered moot the statute of limitations issue in *Anderson*. The Court also rejected Anderson's argument that it could not retroactively abolish a cause of action because it had never recognized false light. The Court also disapproved of *Heekin* to the extent it assumed the false light tort existed.

Before *Rapp*, the media faced false light claims based on true speech and could not rely on defamation defenses and privileges. These suits were amorphously described by plaintiffs and difficult to anticipate or avoid. *Rapp* confirms suits based on false speech must be brought as defamation and that constitutionally developed protections, privileges, and defenses of defamation law will apply.

Deanna K. Shullman is a partner in Thomas & LoCicero PL's South Florida office. The firm represented the amici curiae in both cases.