

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 991 Defamation, False Light, and Unauthorized Publication of Name or Likenesses

SPONSOR(S): Andrade and others

TIED BILLS: **IDEN./SIM. BILLS:** SB 1220

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	14 Y, 4 N	Mawn	Jones
2) Judiciary Committee			

SUMMARY ANALYSIS

The First Amendment to the United States Constitution provides that “Congress shall make no law ... abridging the freedom of speech, or of the press....” Courts apply the First Amendment to the states through the Fourteenth Amendment, thus prohibiting the states from enacting laws which abridge the freedom of speech or of the press. Courts also apply the First Amendment to civil lawsuits between private parties where the courts must, in deciding the claims, apply a state rule of law touching on the freedoms guaranteed by the First Amendment, including claims for:

- Defamation, which is a tort arising out of a statement that injures a third party’s reputation.
- Invasion of privacy, which is a tort that generally falls into one the following three categories:
 - Unauthorized publication of another’s name or likeness;
 - Unreasonable public disclosure of private fact; or
 - Publicity that unreasonably places another in a false light before the public.

In these instances, the courts recognize that the First Amendment guarantees are not absolute. Instead, the courts must balance the rights of the defendant to speak or otherwise publicize information with the rights of the plaintiff to protect his or her reputation or privacy. This is especially important where the plaintiff is a public figure; in such instance, a court, recognizing the necessity of the free flow of information of public importance, generally requires a public figure suing for defamation to prove actual malice on the part of the defendant before he or she can prevail, instead of mere negligence, as is the usual standard. Further, Florida law establishes a journalist’s privilege, which prevents a journalist from being compelled to testify about or provide information obtained while gathering news in most situations, including the identity of any sources.

HB 991:

- Defines “defamation or privacy tort” and modifies the venue requirements for a defamation action.
- Resuscitates the tort of false light and provides standards.
- Specifies that an allegation that the plaintiff has discriminated against another person or group because of race, sex, sexual orientation, or gender identity is defamation *per se*.
- Specifies that the journalist’s privilege does not apply in defamation actions brought under chapter 770, F.S., when the defendant is a professional journalist or media entity.
- Modifies the actual malice provisions applicable to defamation claims brought by public figures.
- Specifies that information provided by an anonymous source is presumptively false.
- Provides that Florida’s offer of judgment statute does not apply to defamation or privacy tort claims.
- Modifies the attorney fee provision applicable to claims made under the laws prohibiting “Strategic Lawsuits Against Public Participation.”
- Authorizes a prevailing plaintiff in a defamation or privacy tort claim to recover his or her reasonable costs and attorney fees.
- Provides for severability.

The bill may have an indeterminate fiscal impact on state and local government. The bill provides an effective date of July 1, 2023.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

First Amendment Guarantees: Freedom of Speech and of the Press

The First Amendment to the United States Constitution provides that “Congress shall make no law ... abridging the freedom of speech, or of the press...”¹ In 1940, the United States Supreme Court held that the Fourteenth Amendment’s concept of liberty embraced the liberties guaranteed by the First Amendment, which provides, in pertinent part, that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.”²

Thus, courts apply the First Amendment to the states through the Fourteenth Amendment, therefore prohibiting the states from enacting laws which abridge the freedom of speech or of the press. Courts also apply the First Amendment to civil lawsuits between private parties where the courts must, in deciding the claims, apply a state rule of law, whether statutory or common law,³ touching on the freedoms guaranteed by the First Amendment.⁴ In applying the First Amendment to such lawsuits, the United States Supreme Court recognizes that the constitutional protections for the freedom of speech and of the press were guaranteed to the people to assure the free exchange of ideas for the bringing about of political and social changes desired by the people.⁵ The Court has also acknowledged that maintaining the opportunity for free political discussion so that government may be responsive to the will of the people and changes may be obtained by lawful means is a fundamental principle of the constitutional system; indeed, noted the Court, the freedom of speech and of the press “is the indispensable condition of nearly every other form of freedom.”⁶

General Tort Law

The main purpose of Florida’s civil justice system is to properly and fairly redress the civil wrongs committed throughout the state. A functioning civil justice system, when it operates justly:

- Provides a fair and equitable forum to resolve disputes;
- Discourages persons from resorting to self-help methods to redress wrongs;
- Appropriately compensates legitimately harmed persons;
- Shifts losses to responsible parties;
- Provides incentives to prevent future harm; and
- Deters undesirable behavior.⁷

A goal of the civil justice system is to redress tortious conduct, or “torts” – that is, a wrong for which the law provides a remedy. Torts are generally divided into three categories, as follows:

- An intentional tort, examples of which include assault, battery, or false imprisonment.⁸

¹ The First Amendment was ratified on December 15, 1791, as part of the Bill of Rights; that is, the first ten Amendments to the United States Constitution. Library of Congress, *The Bill of Rights*, <https://www.loc.gov/item/today-in-history/december-15/#:~:text=On%20December%2015%2C%201791%2C%20the.of%20peaceful%20assembly%20and%20petition> (last visited March 14, 2023).

² *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

³ Common law is law arising from judicial decisions. Legal Information Institute, *Common Law*, https://www.law.cornell.edu/wex/common_law (last visited March 14, 2023).

⁴ See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); see also, e.g., *American Fed’n of Labor v. Swing*, 312 U.S. 321 (1941).

⁵ See, e.g., *Sullivan*, 376 U.S. at 269.

⁶ *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967)

⁷ Cf. Am. Jur. 2d Torts s. 2.

⁸ Legal Information Institute, *Intentional Tort*, https://www.law.cornell.edu/wex/intentional_tort (last visited March 14, 2023).

- Recklessness, which is behavior so careless that it is considered an extreme departure from the care a reasonable person would exercise in similar circumstances.⁹
- Negligence, which is the failure to behave with the level of care that an ordinary prudent person would have exercised under the same circumstances.¹⁰ To prevail in a negligence lawsuit, the plaintiff must show that the:
 - Defendant had a legal duty of care requiring the defendant to conform to a certain standard of conduct for the protection of others, including the plaintiff, against unreasonable risks;
 - Defendant breached his or her duty of care by failing to conform to the required standard;
 - Defendant's breach caused the plaintiff to suffer an injury; and
 - Plaintiff suffered actual damage or loss resulting from such injury.¹¹

Some torts, such as defamation and invasion of privacy, touch on conduct which amounts to speech, or which is carried out by the press; in these instances, the courts recognize that the First Amendment guarantees are not absolute.¹² Instead, the courts must balance the rights of the defendant to speak or otherwise publicize information with the rights of the plaintiff to protect his or her reputation or privacy.

Defamation

Defamation is a tort arising out of a statement that injures a third party's reputation – in other words, it is a statement that tends to harm the reputation of another by lowering him or her in the community's estimation.¹³ More broadly stated, it is a statement that exposes another to hatred, ridicule, or contempt or injures another's business, reputation, or occupation.¹⁴ Such statements fall into one of two categories:

- Libel, which is a defamatory statement expressed in print, writing, pictures, signs, effigies, or any communication embodied in physical form.¹⁵
- Slander, which is a defamatory statement made orally.¹⁶

To prove defamation, a plaintiff generally must show:

- A false statement purporting to be fact;
- Publication or communication of that statement to a third person;
- Fault amounting to at least negligence; and
- Damages – that is, some harm caused to the plaintiff's reputation.

Florida law also recognizes defamation by implication.¹⁷ Thus, a technically true statement can be defamatory where, by its context or the omission of other facts, it creates a false impression and satisfies all of the other elements of defamation.¹⁸

⁹ Legal Information Institute, *Reckless*, <https://www.law.cornell.edu/wex/reckless> (last visited March 14, 2023).

¹⁰ Legal Information Institute, *Negligence*, <https://www.law.cornell.edu/wex/negligence> (last visited March 14, 2023).

¹¹ 6 *Florida Practice Series* 1.1; see *Barnett v. Dept. of Fin. Serv.*, 303 So. 3d 508 (Fla. 2020).

¹² See, e.g., *Herbert v. Lando*, 441 U.S. 153 (1979) ("Given the required proof, damages liability for defamation abridges neither freedom of speech nor freedom of the press"); see also *Butts*, 388 U.S. at 146 (society has "a pervasive and strong interest in preventing and redressing attacks upon reputation").

¹³ Fla. S. Ct., *Standard Jury Instructions – Civil Cases (No. 00-1)*, 795 So. 2d 51 (2001).

¹⁴ *Id.*

¹⁵ Legal Information Institute, *Libel*, <https://www.law.cornell.edu/wex/libel> (last visited March 14, 2023).

¹⁶ Legal Information Institute, *Slander*, <https://www.law.cornell.edu/wex/slander> (March 14, 2023).

¹⁷ *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098 (Fla. 2008).

¹⁸ *Id.* at 1108.

Venue for Defamation Action

For civil lawsuits not relating to real property, including defamation claims, Florida law provides two locations where venue is proper (that is, where the lawsuit may be filed); specifically, such lawsuits may be filed in the county where the defendant resides or the county in which the cause of action accrued.¹⁹ Florida law also prohibits a person from having more than one choice of venue for damages for defamation founded upon any single publication, exhibition, or utterance, such as one:

- Newspaper edition;
- Book;
- Magazine;
- Presentation to an audience;
- Broadcast over radio or television; or
- Motion picture exhibition.²⁰

Recovery in such an action must include all damages for the alleged tort suffered by the plaintiff in all jurisdictions.²¹

Cause of Action for Defamation

A person who believes he or she is a defamation victim has two years to file a lawsuit raising the defamation allegation, with the time in which to bring a lawsuit for damages founded upon a single publication, exhibition, or utterance running from the time of the first publication, exhibition, or utterance at issue in Florida.²² Further, a judgment in any jurisdiction for or against the plaintiff on the substantive merits of an action for damages founded on a single publication, exhibition, or utterance bars any other action for damages by the same plaintiff against the same defendant founded on the same publication, exhibition, or utterance.²³

Defenses to Defamation

Truth is an absolute defense to most defamation allegations, except for allegations of defamation by implication; however, in such cases, truth is still available as a defense to a defendant who can prove that the implication created by the allegedly defamatory statement is true.²⁴ Defamation law also shields publishers from liability for minor factual inaccuracies; thus, a statement is considered substantially true where its “substance or gist conveys essentially the same meaning that the truth would have conveyed.”²⁵

Certain privileges may also provide a defense to defamation, although the degree of the defense provided depends on whether the privilege is absolute or qualified.²⁶ An absolute privilege provides complete immunity to defamation liability; in such instances, the statement’s falsity and the speaker’s intent are irrelevant.²⁷ However, a qualified privilege only provides immunity from defamation liability where the defendant did not act with actual malice.²⁸

Damages

¹⁹ S. 47.011, F.S.

²⁰ S. 770.05, F.S.

²¹ *Id.*

²² Ss. 95.11(4)(g), F.S.; 770.07, F.S.

²³ S. 770.06, F.S.

²⁴ *Butts*, 388 U.S. at 151.

²⁵ Fla. S. Ct., *Standard Jury Instructions*, *supra* note 13.

²⁶ Legal Information Institute, *Defamation*, <https://www.law.cornell.edu/wex/defamation> (last visited March 14, 2023).

²⁷ For example, an absolute privilege extends to statements made by judges, attorneys, witnesses and jurors in a judicial proceeding where the statements are relevant to the issue before the court. *Myers v. Hodges*, 44 So. 357 (1907).

²⁸ For example, a qualified privilege extends to statements made by judges, attorneys, witnesses and jurors in a judicial proceeding where the statements are irrelevant to the issue before the court. *Id.* at 362.

A prevailing plaintiff in a defamation action may recover his or her actual damages where the award is supported by competent evidence.²⁹ Such damages may be economic damages (that is, monetary losses) or noneconomic damages (such as damages for pain and suffering or humiliation).³⁰ Moreover, nominal damages³¹ may be awarded to vindicate a plaintiff where defamation is found but no actual damages are proved, and punitive damages³² may be awarded where the plaintiff proves the defendant acted willfully, wantonly, or maliciously.³³

Defamation Per Se

“Defamation *per se*” is a statement that is so egregious that the law presumes that it was defamatory.³⁴ In determining whether a statement is defamation *per se*, the fact-finder must look only to the language of the statement itself without relying on implications.³⁵ Courts have found that certain statements are defamation *per se*, including a false statement:

- That a person committed a crime of moral turpitude;³⁶
- Charging a person with having a sexually-transmitted or other communicable disease;
- Tending to subject a person to hatred, distrust, ridicule, contempt, or disgrace, such as by imputing that a woman is unchaste; or
- Tending to impute to another conduct, characteristics, or a condition incompatible with the proper exercise of his or her lawful business, trade, profession, or office.³⁷

When a defamation claim involves defamation *per se*, malice and damages are generally presumed as a matter of law and thus do not need to be proved; these presumptions may justify a punitive damages³⁸ award even where the jury does not find that the plaintiff suffered actual damages.³⁹ However, the Florida Supreme Court has found that the malice and damages presumption does not apply against defendants who are members of the media; thus, even where defamation *per se* is alleged against such a defendant, malice and damages must still be proved.⁴⁰

Discrimination Allegations

Courts typically hold that an allegation that a person is racist, sexist, homophobic, transphobic or otherwise holds feelings of dislike or hatred toward a particular class of persons is an “opinion” not amounting to defamation, since the truth of the opinion cannot be proved or disproved.⁴¹ However, courts typically hold that a false allegation that a person discriminated against a person or group of people on the basis of race, sex, sexual orientation, gender identity, or membership in another class amounts to defamation, as it is more of a factual assertion, the truth of which can be proven or disproved.⁴² At least one court has found that an allegation that a business discriminated against would-be patrons on the basis of their race was defamation *per se*.⁴³

²⁹ *Army Aviation Heritage Found. And Museum, Inc. v. Buis*, 504 F. Supp. 2d 1254 (N.D. Fla. 2007); Legal Information Institute, *Actual Damages*, https://www.law.cornell.edu/wex/actual_damages (last visited March 14, 2023).

³⁰ *Id.*

³¹ “Nominal damages” is a trivial sum of money awarded to a plaintiff whose legal right was technically violated but who has not established that he or she is entitled to an actual damages award because there was no accompanying loss proved. Legal Information Institute, *Nominal Damages*, https://www.law.cornell.edu/wex/nominal_damages (last visited March 14, 2023).

³² “Punitive damages” are damages awarded to punish the defendant and deter the future bad behavior of others. Legal Information Institute, *Punitive Damages*, https://www.law.cornell.edu/wex/punitive_damages (last visited March 14, 2023).

³³ *Buis*, 504 F. Supp. 2d at 1262.

³⁴ *Layne v. Tribune Co.*, 146 So. 234 (Fla. 1933).

³⁵ *Id.* at 237.

³⁶ A “crime of moral turpitude” is a crime involving wicked or deviant behavior constituting an immoral, unethical, or unjust departure from ordinary social standards such that it would shock a community. Legal Information Institute, *Moral Turpitude*, https://www.law.cornell.edu/wex/moral_turpitude (last visited March 14, 2023).

³⁷ *Blake v. Giustibelli*, 182 So. 3d 881 (Fla. 4th DCA 2016) (citing *Richard v. Gray*, 62 So. 2d 597, 598 (Fla. 1953)).

³⁸ “Punitive damages” are damages awarded to punish the defendant and deter the future bad behavior of others. Such damages are usually only available where a plaintiff proves the defendant acted willfully, wantonly, or maliciously. Legal Information Institute, *Punitive Damages*, https://www.law.cornell.edu/wex/punitive_damages (last visited March 14, 2023).

³⁹ *Layne*, 146 So. at 236; *Lawnwood Medical Center, Inc. v. Sadow*, 43 So. 3d 710 (Fla. 4th DCA 2010).

⁴⁰ *Mid-Florida Television Corp. v. Boyles*, 467 So. 2d 282 (Fla. 1985).

⁴¹ See, e.g., *Williams v. Lazer*, 495 P.3d 93 (Nev. 2021); *Garrard v. Charleston Cnty. Sch. Dist.*, 838 S.E. 2d 698 (S.C. Ct. App. 2019).

⁴² See, e.g., *Gibson Brothers, Inc. v. Oberlin College*, 187 N.E. 3d 629 (Ohio Ct. App. 2022).

⁴³ *Id.* at 653.

Pre-Suit Notice for Media Entities

Before a defamation lawsuit may be filed in Florida against a newspaper, periodical, or other medium for publishing or broadcasting a defamatory statement, the plaintiff must, at least five days before filing suit, serve notice in writing on the defendant, which notice specifies the article or broadcast and the statements therein which the plaintiff alleges are defamatory.⁴⁴ Further, the plaintiff in such a suit is limited to recovering his or her actual damages if it appears from the evidence presented at trial that:

- An article or broadcast was published in good faith;
- Its falsity was due to an honest mistake of facts;
- There were reasonable grounds for believing the statement at issue was true; and
- Within a specified time period, a full and fair correction, apology, or retraction was, in the case of a:
 - Newspaper or periodical, published in the same editions or corresponding issues of the newspaper or periodical in which the defamatory article appeared, and in as conspicuous a place and type as said article; or
 - Broadcast, the correction, apology, or retraction was broadcast at a comparable time.⁴⁵

However, “full and fair correction” must be made, in the case of a:

- Broadcast or a daily or weekly newspaper or periodical, within 10 days after service of notice;
- Newspaper or periodical published semi-monthly, within 20 days after service of notice;
- Newspaper or periodical published monthly, within 45 days of the notice; and
- Newspaper or periodical published less frequently than monthly, in the next issue, if notice is served no later than 45 days before such publication.⁴⁶

In other words, the plaintiff may not recover punitive damages where the defendant newspaper or broadcast station published or broadcast the defamatory statement in good faith and issued a timely and appropriate correction, apology, or retraction.

Public Figures

Courts classify persons who have achieved a certain measure of notoriety, whether by achievement or celebrity, or who hold public office, as “public figures” for the purpose of defamation law.⁴⁷ A person may achieve such pervasive fame or notoriety that he or she becomes a public figure for all purposes and in all contexts of his or her life.⁴⁸ More commonly, however, a person voluntarily injects himself or is drawn into a particular controversy and thereby becomes a public figure for a limited range of issues.⁴⁹

Recognizing the unique role public figures play in society, the United States Supreme Court has held that the negligence standard applicable in a defamation claim involving a private citizen is the inappropriate standard in a defamation claim brought by a public figure; instead, a public figure must prove the statement at issue was made with “actual malice” – that is, with knowledge that it was false or with reckless disregard as to whether it was false or not.⁵⁰ Mere proof of failure to investigate, without more, does not establish the reckless disregard for the truth which would constitute “actual malice.”⁵¹

In justifying the actual malice standard, the U.S. Supreme Court has noted that criticism of official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes a public figure’s official reputation.⁵² Further, the Court has noted that authoritative

⁴⁴ S. 770.01, F.S.

⁴⁵ S. 770.02(1), F.S.

⁴⁶ S. 770.02(2), F.S.

⁴⁷ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

⁴⁸ *Id.* at 351.

⁴⁹ *Id.*

⁵⁰ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁵¹ *Gertz*, 418 U.S. at 330.

⁵² *Sullivan*, 376 U.S. at 271-272, citing *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963) and quoting *Sweeney v. Patterson*, 128 F. 2d 457 (D.C. Cir. 1942).

interpretations of the First Amendment's constitutional guarantees do not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered."⁵³ Erroneous statements, according to the Court, are inevitable in free debate and must be protected if the freedoms of expression are to survive; "cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors."⁵⁴

Invasion of Privacy

Florida law recognizes a right to privacy – that is, the right to be let alone and live in a community without being held up to the public gaze against one's will.⁵⁵ An invasion of privacy claim is a tort ("privacy tort") that generally falls into one of the following three categories:⁵⁶

- Unauthorized publication of another's name or likeness;
- Unreasonable public disclosure of private fact; or
- Publicity that unreasonably places another in a false light before the public.⁵⁷

A person who believes he or she has been the victim of a privacy tort generally has four years to bring a lawsuit raising the invasion of privacy allegations; however, an unauthorized publication cause of action may not be brought if the name or likeness used belongs to a decedent and the use on which the action is based occurred more than 40 years after the decedent's death.⁵⁸

Further, as with defamation:

- The cause of action for damages founded upon a single publication, exhibition, or utterance is deemed to have accrued at the time of the first publication, exhibition, or utterance thereof in Florida.⁵⁹
- No person may have more than one choice of venue for damages for a privacy tort founded upon any single publication, exhibition, or utterance and recovery in such an action must include all damages for any such tort suffered by the plaintiff in all jurisdictions.⁶⁰
- A public figure has a lower expectation of privacy that a non-public figure.⁶¹

However, unlike in defamation claims, mere spoken words do not give rise to a privacy tort; the conduct at issue must be published or broadcast in some fashion.⁶² Further, neither the truth of the published matter nor the absence of malice or wrongful motive on the part of the writer or publisher constitute a defense to a privacy tort.⁶³

Damages available to a prevailing plaintiff in a privacy tort include actual damages and punitive damages where the defendant's conduct was willful, wanton, or malicious.⁶⁴ However, the plaintiff need not prove actual damages to prevail in a privacy tort claim and may recover nominal damages if actual damages are not proved.⁶⁵

Unauthorized Publication

Florida courts recognize the common law tort of unauthorized publication of another's name or likeness (sometimes referred to as "appropriation").⁶⁶ Florida law also codifies this tort in s. 540.08, F.S., the

⁵³ *Sullivan*, 376 U.S. at 271.

⁵⁴ *Id.*

⁵⁵ *Cason v. Baskin*, 20 So. 2d 243 (Fla. 1944).

⁵⁶ A fourth category, unreasonable intrusion into another's seclusion, is not discussed here, as it does not require publication.

⁵⁷ Restatement (Second) of Torts s. 652A.

⁵⁸ Ss. 95.11(3)(p) and 540.08(4), F.S.; *Epic Metals Corp. v. Condec, Inc.*, 867 F. Supp. 1009 (M.D. Fla. 1994).

⁵⁹ S. 770.07, F.S.

⁶⁰ S. 770.05, F.S.

⁶¹ *Cason*, 20 So. 2d at 251.

⁶² *Id.* at 251-252; *In re Carter*, 411 B.R. 730 (U.S. Bankr. Ct., M.D. Fla. 2009).

⁶³ *Cason*, 20 So. 2d at 252.

⁶⁴ *James v. Intelligent Software Solutions*, 2017 WL 5634293 (11th Cir. 2017).

⁶⁵ *Facchina v. Mut. Benefits Corp.*, 735 So. 2d 499 (Fla. 4th DCA 1999).

⁶⁶ *Coton v. Televised Visual X-Ography, Inc.*, 740 F. Supp.2d 1299 (M.D. Fla. 2010).

elements of which generally coincide with the elements of the common law tort.⁶⁷ Specifically, s. 540.08, F.S., prohibits a person from publishing, printing, displaying, or otherwise publicly using for purposes of trade or for any commercial or advertising purpose⁶⁸ the name, photograph, or other likeness of any natural person without the express written or oral consent to such use given by:

- The natural person whose name or likeness is to be used;⁶⁹
- Any other person authorized in writing by such person to license the commercial use of his or her name or likeness; or
- If such person is deceased:
 - Any person authorized in writing to license the commercial use of the decedent's name or likeness; or
 - If no person is so authorized, then by the decedent's surviving spouse or any one of his or her surviving children.⁷⁰

If proper consent is not obtained, the person whose name or likeness was appropriated, or any person authorized to consent to the commercial use of the name or likeness, may sue under the statutory cause of action to enjoin the unauthorized use and recover damages, including an amount that would have been a reasonable royalty.⁷¹ The court may also impose a civil penalty of up to \$1,000 per violation if the person whose name or likeness was appropriated is a member of the armed forces.⁷² However, only the individual whose privacy was invaded may sue for unauthorized publication at common law.⁷³

Further, the statutory cause of action does not apply to, and Florida courts generally recognize common law exceptions for:

- The publication, printing, display, or use of the name or likeness of any person in any newspaper, magazine, book, news broadcast or telecast, or other news medium or publication as part of any bona fide news report or presentation having a current and legitimate public interest and where such name or likeness is not used for advertising purposes;
- The use of a name or likeness in connection with the resale or other distribution of literary, musical, or artistic productions or other merchandise or property where the person has consented to the use of his or her name or likeness on or in connection with the initial sale or distribution of the items; or
- Any photograph of a person solely as a member of the public, where such person is not named or otherwise identified in or in connection with the use of such photograph.⁷⁴

Public Disclosure of Private Facts

Florida courts recognize the common law tort of unreasonable public disclosure of private facts, which cause of action may only be brought by the person whose privacy was so invaded.⁷⁵ To prevail in a public disclosure claim, the plaintiff must prove that the:

- Defendant publicized a truthful but private⁷⁶ fact concerning the plaintiff; and

⁶⁷ A plaintiff may plead an unauthorized publication cause of action under both the statutory and common law remedies. A cause of action may exist under the common law tort regardless of whether the unauthorized publication was for trade, commercial, or advertising purposes as required by statute. *Lane v. MRA Holdings, LLC*, 242 F. Supp. 2d 1205 (M.D. Fla. 2002).

⁶⁸ A "commercial or advertising purpose" does not include publications which do not directly promote a product or service. It is not enough that a publication is offered for sale; rather, the liability inquiry turns on whether the plaintiff's name or likeness is associated with something else within the publication. *Tyne v. Time Warner Entertainment Co., L.P.*, 901 So. 2d 802 (Fla. 2005); *Loft v. Fuller*, 408 So. 2d 619 (Fla. 4th DCA 1981); *Valentine v. CBS, Inc.*, 698 F. 2d 430 (11th Cir. 1983).

⁶⁹ Consent may only be given on behalf of a minor by the guardian of his or her person or by either parent. S. 540.08(6), F.S.

⁷⁰ A person's "surviving spouse" is the person's surviving spouse under the law of his or her domicile at the time of his or her death, whether or not the spouse has later remarried, and a person's "surviving children" are his or her immediate offspring and any children legally adopted by the person. S. 540.08(1) and (6), F.S.

⁷¹ S. 540.08(2), F.S.; *Coton*, 740 F. Supp. 2d at 1312.

⁷² "Member of the armed forces" means an officer or enlisted member of the Army, Navy, Air Force, Marine Corps, Space Force, Coast Guard of the United States, the Florida National Guard, or the United States Reserve Forces, and includes any officer or enlisted member who died due to injuries sustained in the line of duty. S. 540.08(2) and (3), F.S.; *Coton*, 740 F. Supp. 2d at 1312.

⁷³ *Loft*, 408 So. at 623-625.

⁷⁴ S. 540.08(4), F.S.; see, e.g., *Jacova v. S. Radio & Television Co.*, 83 So. 2d 34 (Fla. 1955); *Zim v. W. Publ'g Co.*, 573 F. 2d 1318 (5th Cir. 1978).

⁷⁵ *Cape Publications, Inc. v. Hitchner*, 549 So. 2d 1374 (Fla. 1989); *Tyne*, 204 F. Supp. 2d at 1344.

- Matter publicized is of a kind that:
 - Publication would be highly offensive to a reasonable person; and
 - Is not of legitimate public concern – that is, the matter is not newsworthy.⁷⁷

Generally, the disclosure must also have been made to the public at large or to so many persons that the matter is substantially certain to become public knowledge.⁷⁸ There is no precise number of persons to whom disclosure must be made to satisfy this requirement; instead the court must consider the facts of each case in determining whether the publication was sufficiently “public.”⁷⁹ Further, the plaintiff’s consent to the publication is an absolute defense, which consent may be express or implied.⁸⁰

False Light

False light is a tort that Florida common law no longer recognizes, although other jurisdiction do recognize it. Traditionally, this tort arose out of a statement that would be highly offensive to a reasonable person; unlike defamation, which affords a remedy for damages to a person’s reputation, false light affords a remedy for emotional harm.⁸¹ Thus, to prevail in a false light claim, a plaintiff must prove that the:

- Publication places the plaintiff in a false light that would be highly offensive to a reasonable person; and
- Defendant acted knowingly or in reckless disregard as to the false light in which the plaintiff would be placed.⁸²

As with defamation by implication, truth is not an absolute defense to a false light claim, as such a claim may exist where the facts alleged are true but the implication or innuendo created by the juxtaposition or omission of the facts is false.⁸³ However, truth is available to a defendant in a false light claim where the defendant can show that the implication or innuendo created is true.⁸⁴

Florida courts recognized the tort of false light under the common law until 2008,⁸⁵ when the Florida Supreme Court held that it would no longer recognize false light because it overlapped so substantially with defamation.⁸⁶

Journalist’s Privilege

A legal privilege generally operates to keep communications or other information private to promote open communication and information-sharing in situations where such communication and information-sharing should be encouraged; such privileges can be affirmatively raised in legal proceedings to shield protected communications and information, but can also generally be waived by the person for whose benefit the privilege exists.⁸⁷

One such privilege is the journalist’s privilege, which, generally speaking, affords journalists the right not to disclose the identity of witnesses and other materials in court. Although it is journalists who

⁷⁶ To be considered “private,” a fact cannot already have been “in the public eye”; that is, the facts cannot already have been publicized by another source or through the plaintiff’s failure to conceal them. *Heath v. Playboy Enter. Inc.*, 732 F. Supp. 1145 (S.D. Fla. 1990); *Doe v. Univision Television Group, Inc.*, 717 So. 2d 63 (Fla. 3d DCA 1998).

⁷⁷ There is no set standard for what is considered “newsworthy.” Instead, the courts look to the specific facts of each case to determine the newsworthiness of the private information publicized. *Hitchner*, 549 So. 2d at 1377; Restatement (Second) of Torts § 652D.

⁷⁸ *Guarino v. Mandel*, 327 So. 3d 853 (Fla. 4th DCA 2021).

⁷⁹ *Leach v. District Bd. of Trustees of Palm Beach*, 244 F. Supp. 3d 1334 (S.D. Fla. 2017).

⁸⁰ *Heath*, 732 F. Supp. At 1150.

⁸¹ *Rapp*, 997 So. 2d at 1108; Restatement (Second) of Torts § 652E; *Gannet Co., Inc. v. Anderson*, 947 So. 2d 1 (Fla. 1st DCA 2006).

⁸² Restatement (Second) of Torts § 652E.

⁸³ *Lane*, 242 F. Supp. 2d at 1221.

⁸⁴ *Id.* at 1222.

⁸⁵ See, e.g., *Gannet*, 947 So. 2d at 11.; see also, e.g., *Heekin v. CBS Broadcasting, Inc.*, 789 So. 2d 355 (Fla. 2d DCA 2001).

⁸⁶ *Rapp*, 997 So. 2d at 1113-1114.

⁸⁷ Legal Information Institute, *Privilege*, <https://www.law.cornell.edu/wex/privilege> (last visited March 14, 2023).

invoke the journalist's privilege, the theory behind the privilege is to shield informants who have information of value to the public, to encourage the free flow of such information.⁸⁸

Forty-eight states (including Florida) and the District of Columbia currently recognize a journalist's privilege either in statute or under the common law; some states make the privilege absolute, while others make the privilege qualified, and the laws vary as to who may claim the privilege and to what information it applies.⁸⁹ The United States Supreme Court has also recognized a journalist's limited First Amendment right to keep confidential the names of his or her sources and unpublished information provided by such sources; most federal courts also recognize such a privilege, but the scope of the privilege varies.⁹⁰

Journalist's Privilege in Florida

Florida law affords a professional journalist⁹¹ a qualified privilege not to be a witness concerning, and not to disclose the information, including the identity of any source, that the professional journalist has obtained while actively gathering news.⁹² This privilege applies only to information or eyewitness observations obtained within the professional journalist's normal scope of employment, and a journalist does not waive the privilege simply by publishing or broadcasting information.⁹³ However, the privilege does not apply to physical evidence, eyewitness observations, or visual or audio recording of crimes; thus, a professional journalist may be compelled to testify before a grand jury or in other criminal proceedings regarding criminal activity which he or she witnessed and to turn over any physical evidence or recordings of the crime he or she may have obtained.⁹⁴

Further, because the journalist's privilege is qualified, it may be overcome by a party who makes a clear and specific showing that:

- The information is relevant and material to unresolved issues that have been raised in the proceeding for which the information is sought;
- The information cannot be obtained from alternative sources; and
- A compelling interest exists for the required information disclosure.⁹⁵

The court, in turn, must order disclosure only of that portion of the information for which such a showing was made and support such order with clear and specific findings made after a hearing.⁹⁶

Attorney Fees

⁸⁸ Geoffrey R. Stone, *Why We Need A Federal Reporter's Privilege*, 34 Hofstra L. Rev. 39 (2005), https://law.hofstra.edu/pdf/academics/journals/lawreview/lrv_issues_v34n01_bb4_ideas-essays_stone_final.pdf (last visited March 14, 2023).

⁸⁹ Wyoming and Hawaii do not currently recognize a journalist's privilege. Student Press Law Center, *State-by-State Guide to the Reporter's Privilege for Student Media*, <https://splc.org/2019/08/state-by-state-guide-to-the-reporters-privilege-for-student-media/> (last visited March 14, 2023).

⁹⁰ *Branzburg v. Hayes*, 408 U.S. 665 (1972);

⁹¹ A "professional journalist" is a person regularly engaged in collecting, photographing, recording, writing, editing, reporting, or publishing news, for gain or livelihood, who obtained the information sought while working as a salaried employee of, or an independent contractor for a newspaper; news journal; news agency; press association; wire service; radio or television station; network; or news magazine. S. 90.5015(1), F.S.

⁹² "News" means information of public concern relating to local, statewide, national, or worldwide issues or events. S. 90.5015(2), F.S.

⁹³ S. 90.5015(2) and (4), F.S.; *State v. Davis*, 720 So. 2d 220 (Fla. 1998).

⁹⁴ S. 90.5015(2), F.S.; *Miami Herald Publishing Co. v. Morejon*, 561 So. 2d 577 (Fla. 1990) ("There is no privilege, qualified, limited, or otherwise, which protects journalists from testifying as to their eyewitness observations of a relevant event in a subsequent court proceeding.")

⁹⁵ S. 90.5015(2), F.S.

⁹⁶ S. 90.5015(3), F.S.

The traditional “English rule” entitled a prevailing party in civil litigation to recover his or her reasonable attorney fees from the non-prevailing party as a matter of right. However, Florida and a majority of other United States jurisdictions have adopted the “American rule,” under which each party bears its own attorney fees unless a statute or contract provides an entitlement to such fees.

Florida law does not establish a statutory right for a prevailing party in a defamation or privacy tort claim to recover his or her reasonable attorney fees and costs; thus, the American Rule controls and each party must generally bear his or her own attorney fees and costs.⁹⁷ However, the parties may be able to avail themselves of the fee-shifting provisions available under Florida’s offer of judgment statute and under s. 57.105, F.S., which allows the court to impose sanctions for frivolous claims or defenses or actions designed to cause unreasonable delay.

Offer of Judgment

Florida’s “offer of judgment” statute provides attorney fee incentives to encourage the swift settlement of civil lawsuits.⁹⁸ Specifically, under this statute, if a defendant in a civil action for damages makes an offer of judgment and the plaintiff does not accept such offer within 30 days, the plaintiff must pay the defendant’s reasonable costs and attorney fees incurred from the date the defendant made the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than the offer.⁹⁹ However, if the plaintiff in such an action files a demand for judgment and the defendant does not accept such demand within 30 days, the defendant must pay the plaintiff’s reasonable costs and attorney fees incurred from the date the plaintiff made the demand if the plaintiff recovers a judgment in an amount at least 25 percent greater than the demand.¹⁰⁰

Sanctions for Unsupported Claims or Defenses

Section 57.105, F.S., allows a party to recover his or her reasonable attorney fees and costs if, upon motion by the party, the court determines that the opposing party knew or should have known that a claim or defense presented to the court:

- Was not supported by the material facts necessary to establish a claim or defense; or
- Would not be supported by the application of the then-existing law to those material facts.

The court may also award attorney fees and costs under this section to any party who shows that the opposing party took some action in the civil proceeding primarily for the purpose of causing an unreasonable delay.

⁹⁷ *Asinmaz v. Semrau*, 42 So 3d 955 (Fla. 4th DCA 2010); *In re Carter*, 411 B.R. 730 (M.D. Fla. 2009).

⁹⁸ S. 768.79, F.S.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

Strategic Lawsuits Against Public Participation

A “strategic lawsuit against public participation” (“SLAPP”) is a lawsuit brought against someone who has spoken out on issues of public importance for the sole purpose of intimidating such person or driving him or her into silence from the sheer burden and expense of having to defend the lawsuit.¹⁰¹ The Florida Legislature has recognized that SLAPP lawsuits “are inconsistent with the right of persons to exercise...constitutional rights of free speech in connection with public issues.”¹⁰²

To that end, Florida law prohibits both persons and governmental entities from filing a lawsuit against another person or entity without merit and primarily because such person or entity has exercised the constitutional right of free speech in connection with a public issue, or right to peacefully assemble, to instruct government representatives, or to petition for redress of grievances before the various governmental entities of the state (“anti-SLAPP law”).¹⁰³ A person or entity sued in violation of the anti-SLAPP law may ask the court for:

- An order dismissing the action or granting final judgment in favor of such person or entity; or
- Summary judgment seeking a determination that the lawsuit violates the anti-SLAPP law.¹⁰⁴

The court must then set a hearing on the motion, to be held at the earliest possible time after the plaintiff files the required response.¹⁰⁵ Where the plaintiff is a governmental entity, the court may award the defendant actual damages¹⁰⁶ arising from the governmental entity’s violation of the anti-SLAPP law, and the court must award the prevailing party reasonable attorney fees and costs incurred in connection with a claim that an action was filed in violation of such law.¹⁰⁷

Effect of Proposed Changes

Defamation or Privacy Torts Defined

HB 991 amends s. 770.05, F.S., to define the term “defamation or privacy tort,” as used in chapter 770, F.S., to mean libel, slander, false light, invasion of privacy, or any other tort founded upon a single publication, exhibition, or utterance, including any one:

- Newspaper edition.
- Book.
- Magazine.
- Presentation to an audience.
- Radio or television broadcast.
- Motion picture exhibition.
- Internet publication, exhibition, or utterance.

The bill also creates s. 770.15, F.S., to resuscitate and codify the tort of false light. Specifically, the bill provides that any person who gives publicity to a matter concerning a natural person that places that person before the public in a false light is subject to liability if the:

- False light in which the person was placed would be “highly offensive” to a reasonable person; and
- Defendant had knowledge of or acted in reckless disregard as to the false implications of the publicized matter.

¹⁰¹ Samuel J. Morley, *Florida’s Expanded Anti-SLAPP Law: More Protection for Targeted Speakers*, 90 Fla. Bar J.16 (Nov. 2016), <https://www.floridabar.org/the-florida-bar-journal/floridas-expanded-anti-slapp-law-more-protection-for-targeted-speakers/> (last visited March 14, 2023).

¹⁰² Ss. 720.304(4) and 768.295(1), F.S.

¹⁰³ Ss. 720.304(4) and 768.295(3), F.S.

¹⁰⁴ Ss. 720.304(4) and 768.295(4), F.S.

¹⁰⁵ *Id.*

¹⁰⁶ The court may treble the damages awarded to a prevailing defendant who is a parcel owner in a homeowners’ association and was sued for exercising his or her right to speak on matters relating to the homeowners’ association. Generally, the damages award is limited by the sovereign immunity limitations in s. 768.28, F.S., which cap tort recovery against the state and its political subdivisions at \$200,000 per person and \$300,000 per incident. S. 720.304(4), F.S.

¹⁰⁷ Ss. 720.304(4) and 768.295(4), F.S.

Finally, the bill provides that:

- Editing any form of media so that it attributes something false or leads a reasonable viewer to believe something false about a plaintiff may give rise to a defamation or privacy tort.
- The standards set forth for defamation actions in chapter 770, F.S., are incorporated into s. 770.15, F.S., to whatever extent necessary.

Venue for a Defamation or Privacy Tort

The bill amends ss. 770.05 and 770.08, F.S., to expand the venue options available to a person suing for defamation. Specifically, the bill provides that, when the damages for defamation are based on material published through the:

- Radio or television, venue is proper in any county where the material was accessed.
- Internet, venue is proper in any county in the state.

These changes update venue laws as they pertain to defamation actions, reflecting the wide reach of the internet and certain broadcasts through which defamatory statements are easily spread.

Public Figures

The bill creates s. 770.105, F.S., to provide that a person may not be considered a public figure for purposes of establishing a defamation or privacy tort claim if his or her fame or notoriety arises solely from one or more of the following:

- Defending himself or herself publicly against accusations;
- Granting an interview on a specific topic;
- Public employment other than elected office or appointment by an elected official; or
- A video, image, or statement uploaded on the Internet that has reached a broad audience.

Practically speaking, any such person suing another for defamation would not have to prove actual malice to sustain his or her claim, as he or she would not be considered a public figure; thus, the usual negligence standard would apply.

The bill also creates s. 770.013, F.S., to provide that the usual negligence standard applies (that is, that a public figure need not prove actual malice) in a defamation action where the allegation does not relate to the reason for the plaintiff's public status. This provision applies even where the allegation might still be of public importance or otherwise newsworthy.

Further, the bill creates s. 770.11, F.S., to provide that a fact-finder must infer actual malice for purposes of a defamation action when:

- The allegation is fabricated by the defendant, is the product of his or her imagination, or is based on a wholly unverified anonymous report;
- An allegation is so "inherently implausible" that only a reckless person would have put it into circulation;
- There are obvious reasons to doubt the allegation's veracity or the accuracy of the informant's reports, which doubts arise when there is sufficient contrary evidence that was known to or should have been known to the defendant after a reasonable investigation or the report is "inherently implausible" on its face; or
- The defendant willfully failed to validate, corroborate, or otherwise verify the allegation.

Discrimination Allegations

The bill creates s. 770.11, F.S., to provide that an allegation that a person has discriminated against another person or group because of race, sex, sexual orientation, or gender identity is defamation *per se*. In other words, where any such discrimination allegation forms the basis of a defamation claim, malice and damages would generally be presumed as a matter of law and punitive damages could be awarded even if actual damages are not proven.

Further, under the bill, a defendant cannot prove the truth of an allegation of sexual orientation or gender identity discrimination by citing only to a plaintiff's constitutionally-protected religious expression or beliefs or scientific beliefs; thus, the defendant would have to point to some other additional evidence to sustain a truth defense. A prevailing plaintiff in an action raising such allegations is entitled to a statutory damages award of at least \$35,000 under the bill, in addition to "all other damages."

Journalist's Privilege

The bill amends s. 90.5015, F.S., to provide that the journalist's privilege does not apply to defamation actions brought under chapter 770, F.S., when the defendant is a professional journalist or media entity. Practically speaking, this means that, in such defamation actions, a journalist may be compelled to testify about information obtained while actively gathering news, including the identity of his or her sources. However, nothing in the bill requires a court to compel a journalist to reveal such information.

Anonymous Sources

The bill creates s. 770.12, F.S., to provide that a statement by an anonymous source is presumptively false for the purposes of a defamation action. Thus, a journalist who relied on information supplied by an anonymous source in making a statement alleged to be defamatory and who chooses to maintain the source's confidentiality would, if intending to rely on a truth defense, need to prove the statement's truth with independent evidence.

The bill also provides that, where a defendant in a defamation action refuses to identify the source of a defamatory statement, the plaintiff need only prove that the defendant acted negligently in making the statement. In other words, the actual malice standard would not apply.

Attorney Fees

The bill creates s. 770.09, F.S., to provide that Florida's offer of judgment statute does not apply to defamation or privacy tort claims; thus, the parties to such actions would no longer be able to avail themselves of the offer of judgment statute's fee-shifting provisions. The bill also specifies that a prevailing plaintiff in a defamation or privacy tort lawsuit is entitled to an award of reasonable costs and attorney fees, thus creating a one-way prevailing plaintiff standard for such claims. However, nothing in the bill precludes either party to such a lawsuit from obtaining his or her attorney fees and costs under s. 57.105, F.S., where the court finds that a claim or defense was frivolous or that an opposing party acted to cause unreasonable delay.

Strategic Lawsuits Against Public Participation

The bill amends ss. 720.304 and 768.295, F.S., to eliminate prevailing party attorney fee awards in connection with a claim that a lawsuit was filed in violation of the anti-SLAPP laws. Instead, the bill provides that the court in such a claim must award the non-moving party (that is, the plaintiff) reasonable attorney fees and costs incurred if such party prevails on a motion (such as a motion to dismiss or for summary judgment) filed by the defendant under the anti-SLAPP laws. However, where the moving party (that is, the defendant) prevails on such a motion, such party would not be entitled to an award of his or her reasonable attorney fees and costs.

Miscellaneous Provisions

The bill:

- Provides for severability.
- Provides an effective date of July 1, 2023.

B. SECTION DIRECTORY:

Section 1: Amends s. 90.5015, F.S., relating to journalist's privilege.

Section 2: Amends s. 770.05, F.S., relating to limitation of choice of venue.

Section 3: Amends s. 770.08, F.S., relating to limitations on recovery of damages.

Section 4: Creates s. 770.09, F.S., relating to application of costs and attorney fees in defamation cases.

Section 5: Creates s. 770.105, F.S., relating to limitations on judicial determination of a public figure.

Section 6: Creates s. 770.11, F.S., relating to clarifying defamation standards.

Section 7: Creates s. 770.12, F.S., relating to resumption regarding anonymous source.

Section 8: Creates s. 770.13, F.S., relating to actual malice for public figures in defamation cases.

Section 9: Creates s. 770.15, F.S., relating to invasion of privacy; place person before public in false light.

Section 10: Amends s. 720.304, F.S., relating to right of owners to peaceably assemble; display of flag; SLAPP suits prohibited.

Section 11: Amends s. 768.295, F.S., relating to strategic lawsuits against public participation (SLAPP) prohibited.

Section 12: Provides for severability.

Section 13: Provides an effective date of July 1, 2023.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See Fiscal Comments.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

See Fiscal Comments.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See Fiscal Comments.

D. FISCAL COMMENTS:

The bill would likely have a positive fiscal impact on prevailing plaintiffs in defamation suits and a negative fiscal impact on certain defendants in those suits

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

The bill eliminates the journalist's privilege in defamation actions where the defendant is a professional journalist or media entity, provides that certain allegations are defamation *per se*, specifies that an anonymous source's statement is presumptively false, and changes when the actual malice standard would apply.

The First Amendment to the United States Constitution provides that "Congress shall make no law ... abridging the freedom of speech, or of the press..." Courts apply the First Amendment to the states through the Fourteenth Amendment, thus restricting the states in enacting laws which abridge the freedom of speech or of the press.

In claims for defamation and invasion of privacy, the courts recognize that the First Amendment guarantees are not absolute. Instead, the courts must balance the rights of the defendant to speak or otherwise publicize information with the rights of the plaintiff to protect his or her reputation or privacy.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES