UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 63 | Number 4 Article 6

4-1-1985

Renwick v. News & Observer Publishing Co.: North Carolina Rejects the False Light Invasion of Privacy Tort

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The false light invasion of privacy tort, which frequently is associated with and compared to the defamation tort, has been widely accepted by courts and commentators. The status of this tort in North Carolina was unsettled until recently. Although the court of appeals had indicated its willingness to recognize the false light tort,[1] the North Carolina Supreme Court never had confronted the issue squarely.

In *Renwick v. News & Observer Publishing Co.*[2] the North Carolina Supreme Court addressed the question whether an individual injured by a false statement that refers to him should be entitled to maintain a false light invasion of privacy cause of action. A divided court answered this question in the negative,[3] stating that a person who alleges such an injury must recover under the well-established torts of libel and slander.[4] Although a number of arguments support the court's refusal to recognize the false light tort, its decision may deny relief to some worthy plaintiffs. This Note analyzes the logic underlying the court's conclusion, discusses the implications of the decision, and advances an alternative solution to the issue presented in *Renwick*.

The controversy in *Renwick* arose out of an editorial published in two North Carolina daily newspapers.[5] The editorial vehemently denounced various negative reports and charges emanating from federal officials regarding the minority recruitment and enrollment policy of the University of North Carolina at Chapel Hill. It attributed to Renwick,[6] a university official, a published allegation that the University of North Carolina at Chapel Hill had denied admission to approximately 800 black applicants between 1975 and 1978 because of their race.[7] The editorial claimed that this allegation was the catalyst for the negative

1. *See* Brown v. Boney, 41 N.C. App. 636, 255 S.E.2d 784, *disc. rev. denied*, 298 N.C. 294, 259 S.E.2d 910 (1979); Barr v. Southern Bell Tel. & Tel. Co., 13 N.C. App. 388, 185 S.E.2d 714 (1972).

2. 310 N.C. 312, 312 S.E.2d 405 (1984). Plaintiff Renwick filed duplicate actions against the News & Observer Publishing Company and the Greensboro News Company. The cases were consolidated for appeal. *Id.* at 313, 312 S.E.2d at 406.

3. *Id.* at 326, 312 S.E.2d at 413. For a discussion of the dissenting opinions, see *infra* notes 13 & 15.

4. *Renwick*, 310 N.C. at 322, 312 S.E.2d at 411.

5. The editorial, titled "And He Calls It Bias?," is included verbatim in the North Carolina Supreme Court opinion. *Renwick*, 310 N.C. at 314-15, 312 S.E.2d at 407. The editorial originally was printed in the *Raleigh Times* on April 22, 1981, and was republished in the *Greensboro Daily News & Record* on April 26, 1981. *See id.* at 314, 312 S.E.2d at 407.

6. At the time of the trial, plaintiff Hayden B. Renwick was Associate Dean of the College of Arts and Sciences at the University of North Carolina at Chapel Hill. Prior to 1978 Renwick was in charge of the minority admissions program at the Chapel Hill campus. Renwick v. News & Observer Publishing Co., 63 N.C. App. 200, 204, 304 S.E.2d 593, 596 (1983), *rev'd*, 310 N.C. 312, 312 S.E.2d 405 (1984).

7. *Renwick*, 310 N.C. at 314, 312 S.E.2d at 407. The text of the 1978 newspaper article in which Renwick's "allegations" were made was not part of the record on appeal. *See id.* at 320, 312 S.E.2d at 410. The clear implication of the editorial, however, was that Renwick's 1978 "allegations" suggested that the denial of admission to some black applicants was the result of unfair discrimination. *See* Renwick v. News & Observer Publishing Co., 63 N.C. App. 200, 219, 304 S.E.2d 593, 605 (1983), *rev'd*, 310 N.C. 312, 312 S.E.2d 405 (1984).

reports and charges from the federal government.[8]

Contending that this statement in the editorial was false, Renwick sued both newspapers, relying on the tort theories of libel per se and false light invasion of privacy.[9] The trial court dismissed both claims for failure to state a cause of action.[10] The North Carolina Court of Appeals reversed, holding that Renwick's complaint stated valid causes of action for both libel and false light invasion of privacy.[11] On appeal, however, the North Carolina Supreme Court reversed the court of appeals on both the libel and false light issues.[12] The most significant feature of the supreme court's decision is its conclusion that North

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8. *Renwick*, 310 N.C. at 314, 312 S.E.2d at 407.

9. *Id.* at 313, 317, 312 S.E.2d at 406-07. For a brief definition of defamation, see *infra* note 58. Recovery for libel requires proof that a written defamatory statement which was both untrue and unprivileged was published about the plaintiff. *See* Arnold v. Sharpe, 296 N.C. 533, 537-40, 251 S.E.2d 452, 455-57 (1979). The *Arnold* court outlined the contours of libel per se in North Carolina.

> Libel *per se* is the publication, expressed in writing or printing, or by signs and pictures which when considered alone without innuendo tends to subject one to ridicule, public hatred, contempt or disgrace, or tends to impeach one in his trade or profession. It is not essential that the words involve an imputation of crime, moral turpitude or immoral conduct. . . . When a publication is libelous *per se*, a prima facie presumption of malice and a conclusive presumption of legal injury arise entitling the victim to recover at least nominal damages without proof of special damages.

Id. at 537-38, 251 S.E.2d at 455.

Plaintiffs often favor a false light cause of action because some false statements are compensable under the false light theory even though they are not sufficiently offensive to be defamatory. *See infra* notes 61, 67 & 71 and accompanying text. "The falsehoods in privacy litigation have traditionally been of a less serious character than that for which relief is granted in defamation." M. MAYER, RIGHTS OF PRIVACY 118 (1972). False light generally resembles defamation in that it requires publication of an untrue statement regarding the plaintiff. Instead of applying the defamation standard, however, the false statement usually will satisfy the false light claim if it "would be highly offensive to a reasonable person." RESTATEMENT (SECOND) OF TORTS § 652E (1977).

10. *Renwick*, 310 N.C. at 315, 312 S.E.2d at 407. The trial court judgment dismissing the complaint did not explain why the complaint was dismissed. Renwick v. News & Observer Publishing Co., 63 N.C. App. 200, 203, 304 S.E.2d 593, 595-96 (1983), *rev'd*, 310 N.C. 312, 312 S.E.2d 405 (1984).

11. Renwick v. News & Observer Publishing Co., 63 N.C. App. 200, 242, 304 S.E.2d 593, 618 (1983), *rev'd*, 310 N.C. 312, 312 S.E.2d 405 (1984).

12. *Renwick*, 310 N.C. at 326, 312 S.E.2d at 414. The supreme court remanded the consolidated *Renwick* cases to the court of appeals with instructions to remand the cases to the trial court to permit the judgments dismissing plaintiff's actions to be reinstated. *Id.*

In each case plaintiff's libel claim was dismissed because it failed to satisfy the requirements for libel per se; the editorial reference to plaintiff reasonably was subject to both a defamatory and a nondefamatory interpretation. *Id.* at 318, 312 S.E.2d at 409. The court stated:

> But defamatory words to be libelous *per se* must be susceptible of *but one meaning* and of such nature that the court can presume *as a matter of law* that they tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided.

Id.

The court noted that in addition to libel per se two other types of libel are recognized in North Carolina: false statements susceptible of both a defamatory and a nondefamatory interpretation and false statements that do not appear to be defamatory but become so when "considered with innuendo, colloquium, and explanatory circumstances." *Id.* at 316, 312 S.E.2d at 408. These latter types of libel are known as libel per quod. The court noted that Renwick's complaint failed to allege the essential elements for either of these alternative libel theories. *Id.* at 316-17, 312 S.E.2d at 408. The complaint did not state the first alternative theory because there was no allegation that the editorial was susceptible of both a defamatory and a nondefamatory meaning and that the defamatory meaning was intended by the speaker and understood by the audience. *Id.* The complaint did not establish libel per quod because special damages, an essential element of libel per quod, were not pleaded. *Id.*

Carolina does not recognize a cause of action for false light invasion of privacy.[13]

The court offered two policy reasons to support its decision not to countenance a false light tort. First, the court stated that plaintiffs claiming injury from false statements are afforded adequate legal remedies under traditional defamation actions, and therefore a false light cause of action is superfluous.[14] Second, the court noted that creating a false light cause of action would not be prudent because such an action increases tension between the law of torts and the first amendment guarantee of freedom of the press.[15]

It has been almost a century since the invasion of privacy tort was suggested; an acclaimed 1890 *Harvard Law Review* article urged courts to recognize such a cause of action.[16] In 1960 Dean William L. Prosser undertook a comprehensive evaluation of relevant cases; he concluded that the invasion of privacy theory advanced in the 1890 article had been used and interpreted by courts to create four essentially independent and distinct invasion of privacy torts.[17] "False light in the public eye" was one of these torts.[18] Prosser defined and distinguished the false light tort as follows:

> The false light need not necessarily be . . . defamatory . . . . [I]t must be something that would be objectionable to the ordinary reasonable man under the circumstances . . . .
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> The false light cases obviously differ from those of intrusion, or disclosure of private facts. The interest protected is clearly that of reputation . . . . There is a resemblance to disclosure; but the two differ in that one involves truth and the other lies, one private or secret facts and the other invention. Both require publicity.[19]

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13. *See id.* at 326, 312 S.E.2d at 413. Justice Meyer filed a separate opinion in which he concurred in part and dissented in part. He agreed that plaintiff's complaint did not state a valid claim for libel per se, but disagreed with the majority determination that North Carolina should not recognize the false light tort. *See id.* at 326-27, 312 S.E.2d at 414-15 (Meyer, J., concurring in part and dissenting in part). Justice Frye also dissented from the majority holding that no false light cause of action should exist in North Carolina. *See id.* at 331, 312 S.E.2d at 416 (Frye, J., dissenting).

14. *Id.* at 323, 312 S.E.2d at 412; *see infra* notes 43-47 and accompanying text.

15. *Renwick*, 310 N.C. at 323, 312 S.E.2d at 412. In the dissenting portion of his opinion, Justice Meyer disputed the first amendment rationale advanced by the majority. "The First Amendment provides no absolute protection for any individual or member of the news media to make false material statements of fact and then to draw defamatory conclusions therefrom." *Id.* at 330, 312 S.E.2d at 416 (Meyer, J., concurring in part and dissenting in part); *see infra* notes 86-88 and accompanying text.

16. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). "The article by Warren and Brandeis had a profound and almost immediate impact and 'has come to be regarded as the outstanding example of the influence of legal periodicals upon the American law.' " *Renwick*, 310 N.C. at 321, 312 S.E.2d at 411 (quoting Prosser, *Privacy*, 48 CALIF. L. REV. 383, 383 (1960)).

17. *See* Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

18. Prosser described the four privacy torts as follows:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

Id.

19. *Id.* at 400. Prosser also noted that false light differs from both intrusion and appropriation because false light protects the reputational interest, *id.*, whereas intrusion protects an individual's

Since 1960 this analysis of invasion of privacy has been accepted widely by state courts and other authorities.[20] One authority recently documented that courts in thirty-seven states,[21] including the North Carolina Court of Appeals prior to *Renwick*,[22] had recognized a false light cause of action. The states that have adopted or recognized a false light tort, however, differ greatly in defining the elements of the claim and the interests protected by the tort.[23] Although it is impossible to formulate a universal definition of a false light cause of action, the Restatement (Second) approach probably is the most commonly cited. According to the Restatement (Second) of Torts, false light invasion of privacy is defined 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 his 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
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> (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.[24]

Prior to *Renwick*, false light was invoked or mentioned only rarely in North Carolina cases. Although the court of appeals in *Renwick* cited the 1938 case of *Flake v. Greensboro News Co.*[25] for the proposition that a false light cause of action had been recognized in North Carolina,[26] the supreme court disputed this interpretation of *Flake* and implied that the *Flake* decision rested upon the appropriation type of invasion of privacy rather than false light.[27] In *Flake* plain-

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interest in his mental tranquility, *id.* at 392, and appropriation protects an individual's proprietary interest in his name and likeness, *id.* at 406. For a more complete discussion of the definitions and distinct characteristics of the four privacy torts, see W. PROSSER & W. KEETON, THE LAW OF TORTS § 117 (W. Keeton 5th ed. 1984).

20. For a state-by-state evaluation of each of the four torts, see Kovner, *Recent Developments in Intrusion, Private Facts, False Light and Commercialization Claims*, in 2 PRACTICING LAW INSTITUTE, COMMUNICATIONS LAW 1983, at 292, 366-92 (1983). "With few exceptions, courts confronting the issue as a matter of first impression will recognize the four categories perceived by Prosser and adopted by the Restatement." *Id.* at 366; *see* RESTATEMENT (SECOND) OF TORTS §§ 652A-652E (1977). A survey of the relevant cases reveals that most courts which have considered the issue have recognized Prosser's four torts as separate and distinct torts comprising the general invasion of privacy tort. Thus, in most jurisdictions it would be inaccurate to speak of the "invasion of privacy" tort without specifying which type of invasion of privacy has been alleged.

21. *See* Kovner, *supra* note 20, at 366-92.

22. *See id.* at 384 (citing Brown v. Boney, 41 N.C. App. 636, 647-48, 255 S.E.2d 784, 791, *disc. rev. denied*, 298 N.C. 294, 259 S.E.2d 910 (1979)); *see also* Barr v. Southern Bell Tel. & Tel. Co., 13 N.C. App. 388, 392, 185 S.E.2d 714, 717 (1972) (jury could find invasion of privacy when defendant published likeness of someone other than plaintiff and published plaintiff's name as identification).

23. Comment, *False Light: Invasion of Privacy?*, 15 TULSA L.J. 113, 113-14 (1979) ("Neither the elements of the tort . . . [of false light] nor the interests it seeks to protect have been adequately defined so as to allow consistent application.").

24. RESTATEMENT (SECOND) OF TORTS § 652E (1977); *see supra* note 9.

25. 212 N.C. 780, 195 S.E. 55 (1938).

26. Renwick v. News & Observer Publishing Co., 63 N.C. App. 200, 240, 304 S.E.2d 593, 617 (1983), *rev'd*, 310 N.C. 312, 312 S.E.2d 405 (1984).

27. *Renwick*, 310 N.C. at 322, 312 S.E.2d at 411. The *Renwick* court stated:

> Although *Flake* involved overtones of "false light" publicity, we neither reached nor decided the precise question presented by the plaintiff here—whether publicity by a defend-

tiff sued for libel and for invasion of privacy. The court dismissed the libel claim[28] but held that plaintiff did state a valid privacy claim.[29] Plaintiff's suit was predicated on a newspaper advertisement in which a picture of plaintiff dressed in a bathing suit was used as an endorsement for a bread product.[30] Plaintiff had not consented to the use of her picture in this manner; the newspaper mistakenly had used the wrong picture.[31] "The clearest context of a[n] . . . [appropriation] claim is the unauthorized use of plaintiff's name or likeness for purposes of advertisement or promotion."[32] In *Flake* the court stated, "[W]e are presently called upon to decide . . . the right of an individual to prohibit the unauthorized use of an image of her features and figure in connection with and as part of an advertisement."[33] Thus, the language and reasoning in *Flake* most directly and strongly support the conclusion that the type of privacy claim on which the court was relying was the as yet unarticulated appropriation theory.[34] This analysis is corroborated by the fact that the court seemed to stress nonpecuniary injury plaintiff may have suffered only when dealing with plaintiff's libel claim, leading to the inference that plaintiff's privacy claim was based solely on pecuniary injury.[35] The focus of the court's privacy discussion was the "property" interest a person has in his name and likeness.[36]

The next North Carolina case apparently involving a false light tort was *Barr v. Southern Bell Telephone & Telegraph Co.*,[37] decided by the court of appeals in 1972. In *Barr* the court of appeals held that a plaintiff could recover nominal damages on an invasion of privacy theory.[38] Although the *Barr* court never expressly acknowledged that it was permitting recovery on a false light theory, false light was the invasion of privacy theory most supported by the facts.[39]

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ant which places a plaintiff in a false light before the public gives rise to a claim for which relief can be granted upon a theory of invasion of privacy.

Id. For the distinction between false light and appropriation, see *supra* notes 18-19 and accompanying text.

28. *Flake*, 212 N.C. at 790, 195 S.E. at 62.

29. *Id.* at 793, 195 S.E. at 64.

30. *Id.* at 782-83, 195 S.E. at 57-58.

31. *Id.* at 783, 195 S.E. at 58.

32. *See* Kovner, *supra* note 20, at 348.

33. *Flake*, 212 N.C. at 791, 195 S.E. at 63.

34. *Id.* at 793, 195 S.E. at 64. Prosser did not articulate his categorization of the invasion of privacy tort until 22 years after the *Flake* decision. *See supra* notes 17-18 and accompanying text. The *Flake* court noted:

> If it be conceded that the name of a person is a valuable asset in connection with an advertising enterprise, then it must likewise be conceded that his face or features are likewise of value. Neither can be used for such a purpose without the consent of the owner without giving rise to a cause of action.

Flake, 212 N.C. at 793, 195 S.E. at 64.

35. *Flake*, 212 N.C. at 783, 785-90, 195 S.E. at 58-62.

36. *Id.* at 792, 195 S.E. at 64.

37. 13 N.C. App. 388, 185 S.E.2d 714 (1972). Barr sued the telephone company on an invasion of privacy theory following an incident in which the telephone company mistakenly placed the picture of a much older man, rather than plaintiff's picture, over plaintiff's name in a yellow pages advertisement for plaintiff's employer's business. *Id.* at 388-89, 185 S.E.2d at 715.

38. *Id.* at 393, 185 S.E.2d at 717.

39. The facts in *Barr* did not support an appropriation cause of action because plaintiff gave his

The final pre-*Renwick* North Carolina case addressing a false light action was the 1978 *Brown v. Boney* decision.[40] Although its language was dictum, the court of appeals unambiguously indicated that it would have recognized a false light tort had plaintiff's complaint pleaded the essential elements.[41] Because neither *Barr* nor *Brown* advanced beyond the court of appeals, *Renwick* afforded the supreme court its first opportunity since *Flake* to address the validity of a false light claim.

The supreme court in *Renwick* advanced two primary reasons for not adopting the false light tort.[42] Those reasons focus on the major points of scholarly discussion and debate regarding the merits of the false light tort.

The first reason cited by the court for its rejection of the false light tort was the court's perception that the cause of action is largely unnecessary because most of the same wrongs can be redressed in a defamation action.[43] The court commented that "[i]t has often been recognized that claims for false light invasion of privacy and claims for libel or slander are at least very similar and that many of the same considerations apply to each type of claim,"[44] and intimated that the situations in which an otherwise remediless plaintiff would be afforded relief under a false light theory in North Carolina would not be of sufficient number or importance to make the false light tort worth recognizing.[45] Therefore, the restraints placed on a free press by the recognition of a false light claim[46] and the judicial time required to consider false light claims, most of

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consent for the use of his name and photograph. There was no allegation that the telephone company had gained a pecuniary benefit as a result of placing plaintiff's name under the picture of another person. Many of the authorities cited by the *Barr* court, however, lead to the inference that the court believed it was considering an appropriation claim. *See also* Kovner, *supra* note 20, at 385 (citing *Barr* for the proposition that North Carolina recognizes appropriation invasion of privacy). Similarly, an intrusion cause of action was not supported by the facts because there was no prying into or interference with plaintiff's private affairs or concerns. Finally, plaintiff could not establish a case for public disclosure of private facts because his name was not a private fact that plaintiff was entitled to keep out of the public view. Plaintiff's case fits best into the false light mold because his claimed injury resulted from the false impression given to the public when his name was placed under the picture of an older man.

40. 41 N.C. App. 636, 255 S.E.2d 784, *disc. rev. denied*, 298 N.C. 294, 259 S.E.2d 910 (1979). Brown sued defendant newspaper editor on the theories of libel and invasion of privacy after defendant published plaintiff's name in a driver's license revocation list. *Id.*

41. *Id.* at 647-48, 255 S.E.2d at 791. The *Brown* court stated:

> [W]ith regard to invasion of privacy of the false light variety, it is essential that the matter published concerning the plaintiff is not true, and it is sufficient if the matter published attributes to him characteristics, conduct, or beliefs that are false so that he is portrayed before the public in a false position.

Id. (citing RESTATEMENT (SECOND) OF TORTS § 652E (1977)). The court concluded that Brown failed to state a false light claim because he did not allege that the statement was false. *Id.*

42. *See supra* notes 14-15 and accompanying text.

43. The *Renwick* court cited and extensively quoted the opinions of Dean Prosser to make its point. " 'In many if not most cases . . . the false light is defamatory and an action for libel or slander will also lie.' " *Renwick*, 310 N.C. at 325, 312 S.E.2d at 413 (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 813 (4th ed. 1971)). " 'The question may well be raised . . . whether . . . [false light] . . . is not capable of swallowing up and engulfing the whole law of public defamation . . . .' " *Id.* at 324, 312 S.E.2d at 412 (quoting Prosser, *supra* note 17, at 400-01).

44. *Id.* at 323, 312 S.E.2d at 412.

45. *Id.* at 326, 312 S.E.2d at 413. The court implicitly acknowleged that its holding would circumscribe the remedies available to plaintiffs. *See infra* note 47 and accompanying text.

46. For a more complete treatment of this issue, see *infra* notes 86-96 and accompanying text.

which already are covered by a defamation action, would be too costly when compared with the limited benefit a false light cause of action might afford deserving claimants.[47]

Many of the premises relied on by the *Renwick* court to determine whether false light is merely an unnecessary and inefficient duplication of existing causes of action are debated intensely.[48] The disagreement centers primarily on the question of what interests the false light tort is intended to protect.[49] The North Carolina Supreme Court demonstrated its adherence to Prosser's conceptualization of the false light tort, including his basic tenet that, like defamation, the primary purpose of the false light action is to protect an individual's reputational interest.[50] Although this view undeniably is prominent, a significant line of authority exists that espouses the view that false light does not protect the reputational interest but instead protects the individual's interest in his peace of mind and mental tranquility.[51] Some who hold this latter view argue that if the false light tort, like defamation, is designed to protect a person's reputation, then no meaningful distinction between false light and defamation can be made.[52]

The privacy tort that Prosser labeled "false light in the public eye" is

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47. The *Renwick* court stated:

> Given the First Amendment limitations placed upon . . . false light invasion of privacy actions by *Hill*, we think that such additional remedies as we might be required to make available to plaintiffs should we recognize false light invasion of privacy claims are not sufficient to justify the recognition . . . of such . . . inherently constitutionally suspect claims for relief. Additionally, the recognition of claims for relief for false light invasions of privacy would reduce judicial efficiency by requiring our courts to consider two claims for the same relief which, if not identical, would not differ significantly.

Renwick, 310 N.C. at 326, 312 S.E.2d at 413.

Similar sentiments can be found elsewhere. "In the false light cases another remedy most often does exist. When it does not, . . . the plaintiff's interest should be subjugated." Note, *Right of Privacy: Is "False Light" Recognized in California?*—Werner v. Times Mirror Co. *(Cal. 1961)*, 50 CALIF. L. REV. 357, 364 (1962).

48. *See* Comment, *Privacy: The Search for a Standard*, 11 WAKE FOREST L. REV. 659, 669-70 (1975).

49. *See* Kovner, *supra* note 20, at 293. Different authorities attach fundamentally different meanings to common terminology. *Id.*

50. *See Renwick*, 310 N.C. at 322-24, 312 S.E.2d at 412 (citing Prosser, *supra* note 17, at 400-01); *see, e.g.*, Note, *Tort Recovery for Invasion of Privacy*, 59 NEB. L. REV. 808, 825 (1980) ("The quintescence [sic] of the false light action is the protection of the plaintiff's reputation rather than his or her right to be free from the public scrutiny.").

51. *See, e.g.*, Froelich v. Adair, 213 Kan. 357, 360, 516 P.2d 993, 996-97 (1973) ("[Invasion of privacy] is a cause of action based upon injury to plaintiff's emotions and his mental suffering; . . . [defamation] is a remedy for injury to plaintiff's reputation."); Thermo v. New England Newspaper Publishing Co., 306 Mass. 54, 57, 27 N.E.2d 753, 755 (1940); Kovner, *supra* note 20, at 326; Comment, *supra* note 23, at 115-19, 137 (suggesting that mental anguish should be the sole measure for recovery in privacy cases and harm to reputation should not be compensable under privacy claims); Comment, *supra* note 48, at 665-69. The label "invasion of privacy" and its connotations, including the primary interest of an individual in keeping his private affairs private, lend credence to the argument that the privacy right protects something other than reputation.

One commentator has suggested that different constitutional interests compete with the privacy and defamation torts. *See id.* at 665. She claims that free public discussion is the constitutional interest competing with defamation whereas the public's right to know is the constitutional interest competing with invasion of privacy. *See id.* This asserted difference in the constitutional interests protected by the different torts, however, does not contribute anything substantive to the debate of whether defamation and false light are essentially the same tort.

52. *See* Ellis, *Damages and the Privacy Tort: Sketching a "Legal Profile,"* 64 IOWA L. REV. 1111, 1117 (1979); Comment, *supra* note 23, at 126.

> closely analogous to defamation. . . . As Prosser and his followers have defined false light, there is no clear boundary between it and libel. Indeed, it is difficult to conceive of facts that would amount to defamation that would not also fit under false light . . . .[53]

Ironically, the authorities that subscribe to the view that false light and defamation both protect primarily the reputational interest often find other distinguishing features.[54]

If false light protects the reputational interest, then the only rationale for recognizing it as a separate tort would be to provide a diluted "defamation" action for individuals unable to satisfy the stringent requirements of traditional defamation theory.[55] On the other hand, using false light to protect an individual's interest in remaining free from serious mental suffering provides a separate basis for compensating a person for a specific wrong inflicted upon him. Under this approach, false light appears to have a meaning and purpose altogether independent of the defamation action; it responds to the criticism that a false light action is merely a "watered-down" version of defamation.[56]

The "interest protected" distinction probably would have no significant practical effect when the false statement also is defamatory because in addition to a damaged reputation, a defamatory statement almost always will cause mental anguish. When the falsehood does not reach the defamatory level but nonetheless causes the plaintiff to suffer mental anguish,[57] however, the recognition that false light protects mental tranquility, rather than the reputational interest, makes a practical difference. This result follows because the functional differences between false light and defamation are maintained, and the plaintiff is compensated for his injury even though the statement was not defamatory.

Another significant distinction between false light and defamation is that the false light action is more comprehensive than the defamation action. Although both false light and defamation theories permit plaintiffs to recover for injuries caused by falsehoods published about them, false light is more liberal than defamation. Defamation requires that the falsehood cause the subject to suffer public contempt or avoidance or to suffer in his business or employment;[58]

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53. Ellis, *supra* note 52, at 1117.

54. *See infra* notes 58-73 and accompanying text.

55. For a harsh criticism of such a result, see Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326 (1966).

> [I]f the colonization of defamation by privacy does take place, it will only be because by the use of a fiction the courts have turned at last to the reform of the law of defamation. It will not be because they have perceived that logically defamation is subsumed in privacy. They will simply be calling false statements by a new name.

Id. at 341. Although Kalven did not advocate liberalizing defamation law, in making his point he asked, "[I]f the desire is to relax somewhat the criteria of what is defamatory, would it not be more rational to do that openly and directly?" *Id.* at 340.

56. *See supra* note 55.

57. For illustrative cases, see *infra* notes 61 & 70-71 and accompanying text.

58. Although there are numerous formulations of the test for determining whether material is defamatory, a recent case stated that material is defamatory (libel per se) if it "tends to subject one to ridicule, public hatred, contempt or disgrace, or tends to impeach one in his trade or profession." Arnold v. Sharpe, 296 N.C. 533, 537, 251 S.E.2d 452, 455 (1979); *see also* McCall v. Courier-Journal & Louisville Times, 623 S.W.2d 882, 884 (Ky. 1981); *supra* note 9.

a false light action only requires that the statements be "highly offensive" or cause severe emotional harm.[59] False light allows some statements[60] to be actionable even though they do not reach the level of being defamatory.[61] Not only do the courts and authorities that define false light and defamation as protecting different interests[62] recognize this distinction, but virtually all authorities—including Dean Prosser,[63] the Restatement (Second) of Torts,[64] and the North Carolina Supreme Court in *Renwick*[65]—accept the distinction as a genuine difference between defamation and false light.[66]

This distinction has led to arguments both in favor of and against recognition of the false light tort. Some commentators have criticized the false light theory because it is too favorable to plaintiffs; it allows a plaintiff to recover when the falsehood does not reach the level of defamation.[67] Another criticism was expressed by the *Renwick* court, which stated that freedom of the press

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59. Although there is apparently no clear authority for the proposition, it seems logical that the test for an actionable false light statement should depend on which interest the cause of action is deemed to protect. If false light protects the plaintiff's peace of mind or mental tranquility, severe emotional harm should be required; on the other hand, if false light protects the plaintiff's reputational interest, the cause of action should require a statement that "would be highly offensive to a reasonable person." *See supra* note 9.

In reality, courts and other authorities usually do not draw such bright-line distinctions, Kovner, *supra* note 20, at 293; often plaintiffs in false light cases recover even though the false light is less than "highly offensive." *See id.* at 327.

Some commentators who believe false light protects an individual's mental tranquility find the "highly offensive" test satisfactory for determining whether a person is entitled to recover under false light for mental suffering. "[I]t appears that the purpose of . . . the 'highly offensive' test used by the RESTATEMENT is to ensure that the false statement would be highly offensive to a reasonable person, and not only the hypersensitive individual, so as to result in mental suffering." Comment, *supra* note 23, at 121. Analyzing mental suffering under the "highly offensive" standard seems acceptable if one remembers that the sole interest being protected is mental tranquility and that the defamation should compensate the plaintiff for any injury to reputation.

60. *See supra* note 9.

61. This result would occur if the false statement does not satisfy the strict test for a defamatory statement, *supra* note 58, but nevertheless is the type of falsehood that would cause a reasonable person to suffer the consequences of a false light statement, *see supra* note 59.

Leverton v. Curtis Publishing Co., 192 F.2d 974 (3d Cir. 1951), is a classic illustration of the use of the false light tort to compensate a person for injury resulting from a nondefamatory falsehood. For the facts of *Leverton* and further discussion, see *infra* notes 70-72 and accompanying text. *See also* Kovner, *supra* note 20, at 326 (stating that although false light is somewhat similar to defamation, a statement that is not actionable under defamation may be actionable under false light); Comment, *The Absence of False Light from the Wisconsin Privacy Statute*, 66 MARQ. L. REV. 99, 121 (1982) (noting that a defamatory statement "is facially more outrageous" than a nondefamatory false light statement).

62. *See supra* notes 51-52 and accompanying text.

63. W. PROSSER & W. KEETON, *supra* note 19, § 117, at 864.

64. RESTATEMENT (SECOND) OF TORTS § 652E comment b (1977).

65. *Renwick*, 310 N.C. at 325, 312 S.E.2d at 413.

66. *See supra* text accompanying note 54.

67. *See* Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093, 1121 (1962) (warning that the false light tort will permit plaintiffs to recover for falsehoods while avoiding many of the restrictions applicable to defamation); Comment, *supra* note 23, at 122-23. The student author, although generally favoring the false light tort, notes that a plaintiff might be able to recover on the basis of a false but laudatory statement. "[T]his is precisely the type of case in which recovery should not be permitted under a false light theory." *Id.* at 123. The student author, however, also notes, "[A] plaintiff should be permitted to recover to the full extent of her mental injury under a false light cause of action in those instances in which the falsehood does not rise to the level of being defamatory." *Id.* at 138.

would be seriously and unreasonably curtailed if plaintiffs are permitted to recover for nondefamatory false statements.[68] Other authorities, however, note that a person may suffer a genuine injury as a direct result of a false statement, and yet the statement may not satisfy the requirements for a defamation claim.[69] Relying on this rationale, the United States Court of Appeals for the Third Circuit in *Leverton v. Curtis Publishing Co.*[70] allowed recovery for a false light claim when a picture of the innocent plaintiff lying injured on the street after being struck by an automobile was published by defendant in conjunction with an article about the carelessness of pedestrians near highways.[71] The *Leverton* court concluded:

> [W]e think this . . . publication was an actionable invasion of plaintiff's right of privacy. [Although] she was "newsworthy" with regard to her traffic accident . . . [t]his use of her picture had nothing . . . to do with her accident. It related to the general subject of traffic accidents and pedestrian carelessness. Yet . . . the little girl . . . was at the time of her accident not careless and the motorist was. The picture is used in connection with several headings tending to say that this plaintiff narrowly escaped death because she was careless of her own safety. That is not libelous; a count for defamation was dropped out in the course of the trial. But we are not now talking about liability for defamation. We are talking about the privilege to invade her interest in being left alone.[72]

Other factors also distinguish defamation from false light; these additional factors, however, do not affect whether a false light cause of action is needed to provide otherwise remediless plaintiffs with a viable claim for relief.[73] Thus, the

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68. *Renwick*, 310 N.C. at 325, 312 S.E.2d at 413. The *Renwick* court expressed its belief that nominal damages and injunctive relief in false light cases only further threaten first amendment freedoms. *Id.*

69. *See supra* note 61.

70. 192 F.2d 974 (3d Cir. 1951).

71. *Id.* at 978. There was no evidence that plaintiff was contributorily negligent. Approximately a year and a half after the accident, however, a picture of plaintiff lying injured in the street was published by defendant in connection with a feature article titled, "They Ask to Be Killed." The article concerned pedestrian highway safety. Although the court determined that the use of the picture did not defame plaintiff, it stated that the picture strongly suggested that plaintiff's carelessness was at least partly to blame for her accident. Therefore, the court concluded that the evidence supported an inference that the juxtaposition of the picture and the article depicted plaintiff in a false light. The court upheld a damage judgment for plaintiff. *Id.*; *see supra* note 60-61 and accompanying text; *infra* note 72 and accompanying text.

72. *Leverton*, 192 F.2d at 977-78.

73. One commentator has advanced the proposition that the false light requirement that the falsehood be "highly offensive to a reasonable person," RESTATEMENT (SECOND) OF TORTS § 652E (1977), means that a higher degree of falsity must be proven for false light claims than for defamation actions. *See* Comment, *supra* note 23, at 120 (asserting that the "highly offensive" standard means the statement must be "substantially or materially false"). *But cf.* Comment, *supra* note 61, at 120-21 (asserting that "defamation is facially more outrageous" than false light).

A second and more minor distinction between false light and defamation involves the publication requirement. Defamation requires only a private communication. This requirement is satisfied even if the falsehood is conveyed only to a limited group of people. False light, however, requires a "public" communication. Thus, the general public must understand that the plaintiff is the subject of the false statement. *See* Comment, *supra* note 23, at 128; Note, *Defamation, Privacy and the First Amendment*, 1976 DUKE L.J. 1016, 1024 n.34. Some authorities have advocated liberalizing of the false light publication requirement, and one court has instituted an intermediate "particular public"

crucial distinction is the interest that the plaintiff is seeking to protect; some nondefamatory statements harm this interest.

Conceding that the North Carolina Supreme Court predicated its *Renwick* decision on the debatable premise that false light and defamation protect the same interest, there nevertheless is significant support for the court's rationale that a false light cause of action largely is a redundant remedy. In addition to the common explanation that false light claims already are covered by traditional defamation actions,[74] some authorities suggest that false light claims also are compensable under a theory of intentional infliction of mental distress.[75] Even assuming the validity of these arguments, however, the real controversy arises over the need for a false light cause of action for false statements that are neither defamatory nor rise to the level of intentional infliction of emotional distress.

One commentator recently suggested that a false light cause of action is not necessary, even for nondefamatory statements, because such statements frequently fit under one of Prosser's other invasion of privacy torts.[76] Although this argument is somewhat persuasive, it manifests two weaknesses. First, even though some claims fall under more than one of Prosser's privacy torts, each of the torts has its own peculiar requirements.[77] Second, this analysis presupposes that Prosser's other privacy torts have been adopted by the jurisdiction. A review of the present status of the privacy torts, however, reveals that many states as yet have not recognized all four privacy torts;[78] some states that have rejected the false light tort also have not adopted one or more of the other privacy torts.[79]

Moreover, acceptance of the other privacy torts without recognition of false

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publication requirement. *See* Beaumont v. Brown, 401 Mich. 80, 105, 257 N.W.2d 522, 531 (1977) (defining "particular public" publication as exposure of "private facts to a public whose knowledge of those facts would be embarrassing to the plaintiff").

74. *See supra* notes 43-57 and accompanying text; *see also* Beaumont v. Brown, 65 Mich. App. 455, 237 N.W.2d 501, 505 (1975) (stating that the invasion of privacy tort overlaps with the defamation tort), *rev'd on other grounds*, 401 Mich. 80, 257 N.W.2d 522 (1977); Note, *supra* note 47, at 364 n.60 (noting that false light cases often are covered by defamation).

75. *See* Beaumont v. Brown, 65 Mich. App. 455, 237 N.W.2d 501, 505 (1975), *rev'd on other grounds*, 401 Mich. 80, 257 N.W.2d 522 (1977). Generally, strict requirements must be satisfied to recover under the tort of intentional infliction of mental distress. *See* Byrd, *Recovery for Mental Anguish in North Carolina*, 58 N.C.L. REV. 435, 460-63 (1980) (noting that a common requirement for recovery is proof of "severe emotional distress intentionally or recklessly caused by extreme and outrageous conduct"). Because an intentional infliction claim is difficult to establish, it is questionable whether intentional infliction of mental distress is a realistic and feasible alternative theory for a potential false light plaintiff.

76. Ellis, *supra* note 52, at 1117; *see supra* note 18. For a general discussion of the four privacy torts, see W. PROSSER & W. KEETON, *supra* note 19, § 117.

77. *See supra* notes 17-19 and accompanying text.

78. *See* Kovner, *supra* note 20, at 366-92. Kovner surveyed North Carolina law prior to *Renwick* and found that North Carolina recognized the false light and appropriation types of invasion of privacy. *Id.* at 384-85. The North Carolina Court of Appeals, in dictum, also had assumed the existence of an intrusion cause of action. *See* Morrow v. King's Dep't Stores, 57 N.C. App. 13, 22-23, 290 S.E.2d 732, 738 (1982); Kovner, *supra* note 20, at 384-85. There apparently is no indication whether North Carolina courts would recognize the public disclosure of private facts type of invasion of privacy. Thus, appropriation is the only invasion of privacy cause of action unequivocally sanctioned in North Carolina.

79. *See* Kovner, *supra* note 20, at 366-92.

light sometimes would allow a remedy when a defendant has committed a wrong no more serious or harmful than publicity portraying the plaintiff in a false light. For example, it would be patently illogical to recognize a privacy action for public disclosure of private facts while refusing to recognize a false light claim.[80] Recognizing public disclosure while declining to recognize false light would lead to the anomalous result that a statement made regarding the plaintiff is actionable if it is true but is not actionable if it is false and nondefamatory.[81]

The false light tort also has been criticized as providing a convenient means for plaintiffs with weak cases to avoid many of the restrictions and limitations of defamation actions.[82] Some courts and other authorities have resolved this anomaly by imposing the defamation defenses and limitations on false light claims when the underlying false statement is defamatory.[83]

> When the false publicity is also defamatory so that either [a false light or a defamation] action can be maintained by the plaintiff, it is arguable that limitations of long standing that have been found desirable for the action for defamation should not be successfully evaded by proceeding upon a different theory of later origin, in the development of which the attention of the courts has not been directed to the limitations.[84]

Under this analysis, defamation defenses and limitations, however, do not apply to the false light action if the statement that gives rise to the claim is nondefamatory. Since false light is similar to defamation in that both compensate plaintiffs for injuries resulting from false statements published about them, it would be logical to impose the traditional defamation limitations on all false light claims,

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80. Comment, *supra* note 61, at 113. The primary distinction between public disclosure and false light is that public disclosure permits plaintiffs to recover when true private information about the plaintiff has been disclosed to the public; false light permits recovery for the publication of falsehoods about the plaintiff. Both causes of action, however, require that the publicized material be "highly offensive" to a reasonable person. W. PROSSER & W. KEETON, *supra* note 19, § 117, at 856-68.

81. Comment, *supra* note 61, at 113. *But see* W. PROSSER & W. KEETON, *supra* note 19, § 117, at 865. Prosser and Keeton note that:

> Recovery for an invasion of privacy on the ground that the plaintiff was depicted in a false light makes sense only when the account, if true, would not have been actionable as an invasion of privacy. In other words, the outrageous character of the publicity comes about in part by virtue of the fact that some part of the matter reported was false and deliberately so.

82. *See, e.g.*, Rinsley v. Brandt, 446 F. Supp. 850, 858 (D. Kan. 1977) (holding that a libel claim is barred by the statute of limitations but the false light claim arising from the identical facts is not barred); Wade, *supra* note 67, at 1121 ("[T]he great majority of defamation actions can now be brought for invasion of the right of privacy and . . . many of the restrictions and limitations of libel and slander can be avoided."); Note, *supra* note 47, at 364 ("The denial of a remedy in . . . [false light] cases seems preferable to a complete abrogation of the defamation limitations.").

83. *See* Smith v. Esquire, Inc., 494 F. Supp. 967, 970 (D. Md. 1980) (applying one-year statute of limitations for defamation actions to a false light cause of action: "[W]here the basis of the cause of action is the false nature of the publication, *i.e.*, a defamation, the action should be governed by the various limitations placed on an action for defamation."); Devlin v. Greiner, 147 N.J. Super. 446, 464-65, 371 A.2d 380, 390 (Law Div. 1977) (holding that absolute and qualified privileges that traditionally have been associated with defamation actions apply to false light claims).

84. RESTATEMENT (SECOND) OF TORTS § 652E comment e (1977). There is very little authority to support this proposition. *Id.*

including those based on nondefamatory statements.[85]

The second major reason offered by the *Renwick* court for not recognizing the false light tort is the tendency of such recognition "to add to the tension already existing between the First Amendment and the law of torts."[86] In expressing its concern that sanctioning a false light cause of action would impede the healthy and legitimate function of a free press, the court quoted *Time, Inc. v. Hill*,[87] in which the United States Supreme Court had addressed this issue.[88] In *Hill* the Court held that the "actual malice" standard formulated in *New York Times Co. v. Sullivan*[89] for "public figure" defamation plaintiffs also applied to plaintiffs relying on a false light theory if the allegedly false statement concerned a matter of "public interest."[90]

The *Renwick* court, however, employed flawed logic in determining that first amendment considerations warrant the refusal to recognize a false light tort. Although the court implicitly expressed its belief that first amendment concerns are not sufficiently compelling in defamation actions to disallow a defamation tort,[91] it concluded that such concerns justify the prohibition of false light claims. *Renwick* suggests that false light defendants require greater state-

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85. If certain limitations are believed necessary for defamation actions—which involve falsehoods generally held to be more offensive than nondefamatory, false light falsehoods—then the policy reasons supporting imposition of such limitations would be at least as strong for the false light tort.

> Discreditable remarks by the media will usually be defamatory as well, and even when they are not . . ., it probably makes sense to treat them as if they were. Insofar as privacy as such is in issue, the defamation rules are less obviously pertinent—though analysis suggests that the issues are often the same and call for similar treatment.

Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1274 (1976). The qualified and absolute privilege defenses to a defamation action, *see* W. PROSSER & W. KEETON, *supra* note 19, §§ 114-115, should be carried over into the false light field. All procedural restrictions on defamation actions, such as statutes of limitation, retraction statutes, bond requirement statutes, and special damages pleading requirements (at least when the publication is not actionable per se), also should be applied in the false light context. *See* RESTATEMENT (SECOND) OF TORTS § 652E comment e (1977); W. PROSSER & W. KEETON, *supra* note 19, § 117, at 867-68. Significantly, the United States Supreme Court has imposed all constitutional limitations applicable to defamation actions on false light claims. *See infra* notes 89-90, 94-96 and accompanying text.

86. *Renwick*, 310 N.C. at 323, 312 S.E.2d at 412.

87. 385 U.S. 374 (1967).

88. *Renwick*, 310 N.C. at 325, 312 S.E.2d at 413.

89. 376 U.S. 254 (1964). In *Sullivan*, the Supreme Court had held:

> The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Id. at 279-80.

90. *Hill*, 385 U.S. at 387-88, 390-91. It is ironic that the *Renwick* court cited and quoted *Hill* so extensively in an attempt to support its decision not to recognize a false light cause of action. The irony lies in the fact that in *Hill* the Supreme Court addressed this same issue and implicitly determined that the "actual malice" standard provided sufficient protection for defendants' first amendment interests. *Id.* at 390-91.

91. This conclusion is implicit in the *Renwick* decision; it expressed no concern that the *Sullivan* "actual malice" standard inadequately protected first amendment rights when employed in a defamation case. The court, however, determined that false light actions unreasonably infringe on first amendment freedoms even when the *Sullivan* test is applied. *Renwick*, 310 N.C. at 326, 312 S.E.2d at 413.

court protection than defamation defendants;[92] the *Sullivan* "actual malice" test, however, provides greater constitutional protection to false light defendants as a class than to defamation defendants.[93] In the 1974 *Gertz v. Robert Welch, Inc.* decision,[94] the United States Supreme Court held that only "public official" and "public figure" plaintiffs must prove "actual malice" to recover in a defamation action.[95] By contrast, *Hill* requires a much broader group of plaintiffs, including private plaintiffs involved in a matter of "public interest," to prove "actual malice" as a prerequisite to a false light recovery.[96] Thus, false light defendants are given greater protection from first amendment violations; they do not require the additional protection of the unavailability of the false light tort.

In *Renwick* the North Carolina Supreme Court also suggested that the false light tort's threat to first amendment freedoms is exacerbated because plaintiffs may recover nominal damages even absent proof of actual harm.[97] Although

92. By suggesting that first amendment concerns are compelling as to false light but not as to defamation, the court implies that Supreme Court cases have sufficiently eliminated the threat in defamation cases but not false light cases.

93. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342-43, 346-48 (1974); *Hill*, 385 U.S. at 387-88.

94. 418 U.S. 323 (1974).

95. *Id.* at 342-43, 346-48. The Court held that private plaintiffs would not be required to prove "actual malice" to recover for defamation. *Id.* at 347. Explaining its decision, the Court stated, "[S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher . . . of defamatory falsehood injurious to a private individual." *Id.*

Gertz also indicated that mere involvement in "community and professional affairs" does not make an individual a "public figure" or "public official"; the Court seemed intent on limiting the definitions of "public figures" and "public officials." *Id.* at 351-52.

96. *Hill*, 385 U.S. at 387-88 ("We hold that the constitutional protections for speech and press preclude the application of . . . [a false light cause of action] to redress false reports of matters of *public interest* in the absence of proof [of 'actual malice'].") (emphasis added). Arguably, any news report is, by definition, "of public interest."

One commentator has sought to clarify this confusion by applying a slightly different type of analysis. The commentator notes that *Hill* differs from *Sullivan* in that *Hill* applies the "actual malice" standard to the event ("public interest" or newsworthiness) rather than to the person's status ("public figure" or "public official"). *See* Comment, *supra* note 23, at 132-36.

It also has been suggested that broad application of the "actual malice" standard to false light actions could unfairly burden a person who "became involved in a topic of public concern through no voluntary, concerted action of her own." *Id.* at 135-36. Some predict that the United States Supreme Court eventually will extend *Gertz* into the false light area by limiting the "actual malice" requirement to "public figures" and "public officials" in false light actions as a replacement for the current "public interest" test. *See id.* at 132-36. The United States Supreme Court declined to decide this issue in Cantrell v. Forest City Publishing Co., 419 U.S. 425 (1974).

Of the state and lower federal courts that have addressed this issue, five have applied the *Gertz* rule to false light cases involving nonpublic figures and officials, whereas three have followed the *Hill* rule requiring even private plaintiffs involved in matters of "public interest" to prove "actual malice." *See* Kovner, *supra* note 20, at 328. For a case extending the *Gertz* rule to a false light cause of action, see Rinsley v. Brandt, 446 F. Supp. 850 (D. Kan. 1977). *But see* Note, *supra* note 73, at 1044-45 (arguing that the *Hill* rule should be retained for false light causes of action to guard against trivial claims and excessive verdicts).

97. *Renwick*, 310 N.C. at 325, 312 S.E.2d at 413; *see supra* note 68. The *Renwick* court cited the portion of *Flake* which held that "the unauthorized use of one's photograph in connection with an advertisement or other commericial enterprise gives rise to a cause of action which would entitle the plaintiff, without the allegation and proof of special damages, to a judgment for nominal damages." *Flake*, 212 N.C. at 792, 195 S.E. at 64, *cited in Renwick*, 310 N.C. at 325, 312 S.E.2d at 413.

Neither *Renwick* nor *Flake* actually defines the terms "special" and "nominal" damages. It is reasonable in this context, however, to infer that the technical dictionary definitions were intended. Special damages are "[t]hose which are the actual, but not the necessary, result of the injury com-

this criticism is valid, it is weak support for the court's decision to deny recognition of a false light cause of action. The prerequisites for an award of damages are within the province of the court;[98] thus, if the availability of nominal damages is a genuine barrier to the acceptance of the false light tort, the court could have remedied this problem simply by establishing a rule that nominal damages are unavailable in false light cases.

Under earlier North Carolina cases, there was no binding precedent for either recognizing or rejecting a false light tort. Furthermore, sound arguments have been advanced both in favor of and against the reasoning of the *Renwick* decision. The strongest support for *Renwick* is that most falsehoods that are sufficiently offensive to support a false light claim also will justify a recovery under one of the traditional defamation theories. In occasional cases, however, a nondefamatory false statement will cause a reasonable person to suffer substantial mental harm.[99] *Renwick* effectively denies relief to these plaintiffs; despite the small number of potential plaintiffs, this result is unduly harsh and arbitrary.

A practical solution for this dilemma would be to recognize a strictly circumscribed false light cause of action in which the plaintiff has a high burden of proving that a reasonable person in like circumstances would suffer serious emotional injury. The Restatement (Second) definition of false light[100] provides an excellent skeleton upon which to build this narrow false light tort. The enhanced burden of proof placed on the plaintiff, in addition to the "actual malice" test prescribed by the United States Supreme Court, would protect a defendant's first amendment freedoms adequately. All of the common-law and statutory defamation defenses and limitations, whether of a substantive or procedural nature, also could be made applicable to the new false light tort. Finally, the types of damages available to a false light plaintiff could be limited as the court or legislature deem appropriate. By following these conservative guidelines, needed relief could be afforded to plaintiffs grievously injured by false but nondefamatory statements. At the same time, the independence and viability of the defamation tort and the sanctity of the policies that have influenced its contours could be maintained.

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plained of, and which in fact follow it as a natural and proximate consequence in the particular case, that is, by reason of special circumstances or conditions." BLACK'S LAW DICTIONARY 354 (5th ed. 1979).

> Nominal damages are a trifling sum awarded to a plaintiff in an action, where there is no substantial loss or injury to be compensated, but still the law recognizes a technical invasion of his rights or a breach of the defendant's duty, or in cases where, although there has been a real injury, the plaintiff's evidence entirely fails to show its amount.

Id. at 353.

98. *See Gertz*, 418 U.S. at 348 (presumed and punitive damages no longer allowed in defamation actions).

99. *See, e.g.*, Leverton v. Curtis Publishing Co., 192 F.2d 974 (3d Cir. 1951) (discussed *supra* notes 61 & 70-72 and accompanying text).

100. *See supra* note 24 and accompanying text.