

## Missouri Court of Appeals Recognizes False Light

### Digital Media and Data Privacy Law Blog

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In October 2008, we reported that the Florida Supreme Court rejected the false light invasion of privacy tort as a viable claim for relief under Florida law. On December 23, 2008, the Missouri Court of Appeals went the opposite direction and held that Missouri does recognize false light invasion of privacy as an actionable tort.

In *Meyerkord v. Zipatoni Co.*, the Missouri Court of Appeals vacated and remanded the trial court's dismissal of a plaintiff's claim alleging that the defendant company, Zipatoni, had cast the plaintiff in a false light by failing to remove the plaintiff as the registrant of a certain website. The plaintiff was a former employee of Zipatoni (a marketing firm) and was listed as the registrant for the company's account with Register.com. Three years after the plaintiff left the company, Zipatoni registered a certain marketing website through Register.com---the Register.com account listed the plaintiff as the website's registrant even though the plaintiff had nothing to do with the creation, registration, or marketing for the website. The website ([alliwantforxmasisapsp](#)) was apparently used during a "viral marketing campaign" related to Sony's Play Station Portable. The website and those associated with it, including the plaintiff, became the subject of "concern, suspicion, and accusations" in the online community.

The plaintiff filed a complaint against Zipatoni alleging false light invasion of privacy. The complaint claimed that the content of the website was "'publicly attributed'" to the plaintiff and that "his 'privacy had been invaded, his reputation and standing in the community had been injured, and he has suffered shame, embarrassment, humiliation, harassment, and mental anguish.'" The trial court dismissed the complaint because no Missouri court had previously recognized the false light invasion of privacy tort.

In reaching its conclusion to vacate and remand the case, the Court of Appeals reasoned that Missouri had long recognized a cause of action for "invasion of privacy," the umbrella term for four different torts: intrusion on seclusion, misappropriation of likeness, public disclosure of private facts, and false light. *See, e.g.,* Restatement (Second) of Torts, Section 652(A)-(E). The Court of Appeals also acknowledged that Missouri courts had never explicitly recognized a cause of action for false light. However, the Court of Appeals also reasoned that the Missouri Supreme Court left open the possibility that false light could be recognized in the future. In [Sullivan v. Pulitzer Broadcasting Co.](#), 709 S.W.2d 475 (Mo. 1986) (en banc), a decision that declined to recognize false light based on the facts presented, the Missouri Supreme Court wrote, "[i]t may be possible that in

Missouri Court of Appeals Recognizes False Light Invasion of Privacy

the future Missouri courts will be presented with an appropriate case justifying our recognition of the tort of 'false light invasion of privacy.' The classic case is when one publicly attributes to the plaintiff some opinion or utterance, whether harmful or not, that is false, such as claiming that the plaintiff wrote a poem, article or book which plaintiff did not in fact write."

In Meyerkord, the Court of Appeals noted that a majority of jurisdictions that have confronted the issue of whether or not to recognize false light as a separate actionable tort have chosen affirmatively to recognize the tort (the court cited 27 jurisdictions), whereas a minority of jurisdictions have refused to recognize false light (the court cited 8 jurisdictions). According to the Court of Appeals, the jurisdictions that have rejected false light have done so primarily due to three concerns: (1) the protection provided by false light duplicates or overlaps interests already protected by defamation, (2) recognizing false light would increase tension with the First Amendment to the extent false light allows recovery beyond that allowed for defamation, and (3) recognizing false light would require courts to consider two claims for nearly identical relief. The Meyerkord decision addressed each of these concerns as follows:

- False light is "sufficiently distinguishable" from defamation. Under defamation law, "the interest sought to be protected is the objective one of reputation, either economic, political, or personal, in the outside world." On the other hand, the interest protected by false light "is the subjective one of injury to the person's right to be let alone." Additionally, the marketplace of ideas operates to alleviate defamation injuries, while the marketplace *intensifies* the injuries that flow from false light.
- The First Amendment concerns attendant to recognition of false light are lessened by adopting a heightened standard of fault, such as actual malice---knowledge of falsity or reckless disregard for the truth---or recklessness.
- The heightened actual malice standard also alleviates concerns related to judicial economy. Moreover, the requirement that a plaintiff must prove the complained of statement is "highly offensive to a reasonable person" decreases the possibility of excessive litigation over false light claims.

The Court of Appeals wrote:

As noted earlier, the Missouri Supreme Court has considered the issue of whether Missouri courts should adopt the tort of false light invasion of privacy, but the Supreme Court concluded it had not yet been confronted with a factually suitable case. We now find that the facts of the present case properly present the issue of false light invasion of privacy and we hold that a person who places another before the public in a false light may be liable in Missouri for the resulting damages. In

Missouri Court of Appeals Recognizes False Light Invasion of Privacy

recognizing this cause of action, we note that as a result of the accessibility of the internet, the barriers to generating publicity are quickly and inexpensively surmounted. . . . Moreover, the ethical standards regarding the acceptability of certain discourse have been diminished. Thus, as the ability to do harm grows, we believe so must the law's ability to protect the innocent.

In so ruling, the Court of Appeals adopted the Restatement (Second) of Tort's formulation of false light invasion of privacy, which requires a plaintiff to show: (1) the false light in which the plaintiff was placed would be highly offensive to a reasonable person, and (2) the defendant had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed. The Court of Appeals expressly adopted the actual malice standard for *all* false light claims, whether they involve public officials, private individuals, public matters, or private matters.

Turning to the facts of the case, the Court of Appeals determined that the plaintiff had adequately alleged that the viral marketing website was publicly attributed to him and that the misrepresentation was highly offensive to a reasonable person. However, the plaintiff had failed to adequately allege the actual malice standard of fault, so the trial court had not erred in dismissing the complaint. The Court of Appeals vacated the trial court's decision and remanded the case to allow the plaintiff an opportunity to amend his complaint and plead actual malice.

It is important to recognize that the Meyerkord decision was issued by the Court of Appeals, which is an intermediate state appellate court. The Missouri Supreme Court has not yet had an opportunity to rule definitively that Missouri courts recognize false light invasion of privacy as a separate actionable tort. The juxtaposition of the Meyerkord case and the Rapp case out of Florida also underscores that the status of invasion of privacy torts, and particularly the status of the false light invasion of privacy tort, remains fluid across U.S. jurisdictions. We will keep you apprised as other states address this issue.