The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	SB 1780
INTRODUCER:	Senator Brodeur
SUBJECT:	Defamation, False Light, and Unauthorized Publication of Name or Likenesses
DATE:	February 2, 2024
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Collazo	Cibula	JU	**Pre-meeting**
2.			ACJ	
3.			FP	

I. Summary:

SB 1780 amends and creates several statutes relating to defamation. Specifically, the bill:

- Consolidates several defamation-related terms (libel, slander, false light, invasion of privacy, and other torts) into a single term, "defamation or privacy tort."
- Provides that editing any form of media so that it attributes something false about a person may give rise to a defamation or privacy tort.
- Provides that, in connection with damages for defamation based on material published on the radio or television, venue is proper in any county where the material is accessed; and in connection with material published on the Internet, venue is proper in any county in the state.
- Provides that the fee-shifting provisions of the offer of judgment and demand for judgment statute do not apply to defamation or privacy tort claims.
- Provides that prevailing plaintiffs are entitled to reasonable costs and attorney fees.
- Limits judicial determinations on who may be deemed a public figure.
- Requires fact finders to infer actual malice if a defamatory allegation is fabricated, inherently implausible, or doubtful as to its veracity, or if the defendant willfully failed to corroborate it.
- Provides that allegations against a plaintiff that he or she has discriminated against others because of their race, sex, sexual orientation, or gender identity constitutes defamation per se.
- Provides that allegations against a plaintiff that he or she has discriminated against others because of their sexual orientation or gender identity cannot be defended based on the plaintiff's religious or scientific beliefs.
- Provides that prevailing plaintiffs in discrimination cases are, in addition to all other damages, entitled to statutory damages of at least $35,000.
- Provides that statements by anonymous sources are presumptively false, and in cases where a defendant refuses to identify the source of a defamatory statement, the plaintiff only needs to prove that the defendant acted negligently in making it.
- Provides that public figures do not need to show actual malice to prevail if the allegation does not relate to the reason for his or her public status.

- Subjects people who give publicity to a matter concerning someone else that places him or her in a false light to liability, if certain conditions are met.

The bill also:
- Provides that the journalist's privilege does not apply to defamation claims if the defendant is a professional journalist or media entity.
- Requires nonmoving parties, instead of prevailing parties, to be awarded attorney fees and costs if they prevail on a motion filed under the anti-SLAPP statute.

The bill takes effect on July 1, 2024.

II. Present Situation:

Defamation

Generally

Defamation is the unprivileged publication of false statements that naturally and proximately result in an injury to another.[1] It has also been described as a statement that tends to harm the reputation of another by lowering him or her in the estimation of the community or, more broadly stated, one that exposes a plaintiff to hatred, ridicule, or contempt, or injures his business, reputation, or occupation.[2]

The Florida Constitution provides that every person may speak, write, and publish sentiments on all subjects, but will be responsible for the abuse of that right.[3] The law of defamation embodies the public policy that individuals should be free to enjoy their reputations unimpaired by false and defamatory attacks. An action for defamation is based upon a violation of this right.[4]

Different states vary in their anti-defamation statutes; as such, courts in different states will interpret defamation laws differently, and defamation statutes will vary somewhat from state to state.[5] But generally, defamation may take one of three forms:
- Spoken words, commonly known as "slander."[6]
- A written statement, commonly known as "libel."[7]
- An implication, commonly known as "false light" invasion of privacy.[8]

Before 2008, Florida courts recognized separate causes of action for slander and libel premised upon spoken or written defamatory statements, but did not recognize a separate cause of action

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[1] *Hoch v. Loren,* 273 So. 3d 56, 57 (Fla. 4th DCA 2019) (internal citation omitted).
[2] *Jews for Jesus, Inc. v. Rapp,* 997 So. 2d 1098, 1108-09 (Fla. 2008) (internal citation omitted).
[3] FLA. CONST. art. I, s. 4.
[4] 19 FLA. JUR. 2D s. 1 *Defamation and Privacy*.
[5] Cornell Law School Legal Information Institute, *Defamation*, https://www.law.cornell.edu/wex/defamation (last visited Jan. 26, 2024).
[6] *See Spears v. Albertson's, Inc.,* 848 So. 2d 1176, 1179 (Fla. 1st DCA 2003) (providing that "[s]lander may be defined as the speaking of base and defamatory words").
[7] *See Dunn v. Air Line Pilots Association,* 193 F.3d 1185, 1191 (11th Cir. 1999) (noting that under Florida law, libel is defined as the unprivileged written publication of false statements).
[8] *See* RESTATEMENT (SECOND) OF TORTS s. 652E.

for defamation itself.[9] However, in 2008, the Florida Supreme Court recognized a standalone tort of defamation,[10] and in doing so effectively subsumed all claims for slander and libel into that tort. Therefore, defamation now encompasses both libel and slander.[11] False light is not recognized as a separate cause of action in Florida, but like slander and libel, it is nearly identical to a form of defamation, known as "defamation by implication."[12]

Although libel is generally perpetrated by written communication, it also includes defamation through the publication of pictures or photographs.[13] Alteration of a photograph may support a defamation action.[14]

Cause of Action

In Florida, the five required elements of a claim for defamation are:

- Publication.
- Falsity.
- Knowledge or reckless disregard as to the falsity on a matter concerning a public official, or at least negligently on a matter concerning a private person.
- Actual damages.
- A defamatory statement.[15]

"Publication" is a required element because a defamatory statement does not become actionable until it is published or communicated to a third person.[16] Publication requires proof that the statement is exposed to the public so it may be read or heard by a third person, but not necessarily that it has in fact been read or heard by a third person.[17]

The element of "falsity" requires that the defamation be "of and concerning" the plaintiff,[18] and that the allegation or representation about the plaintiff be false.[19] The falsity may be premised upon untruthfulness, such as in the case of slander or libel, or from truthful statements that imply falsely, such as in the case of defamation by implication.[20]

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[9] *See Delacruz v. Peninsula State Bank,* 221 So. 2d 772, 775 (Fla. 2d DCA 1969) (explaining that there is no such legal cause of action as 'defamation' and "[l]ibel and slander may be Founded [sic] on defamation, but the right of action itself is libel or slander, depending upon whether it is written or oral").

[10] *See Jews for Jesus, Inc.*, 997 So. 2d at 1105-08 (comparing the false light cause of action to the defamation by implication cause of action, and recognizing the existence of only the latter in Florida).

[11] *Norkin v. The Florida Bar,* 311 F. Supp. 3d 1299, 1303-04 (S.D. Fla. 2018) (internal citations omitted); *Klayman v. Judicial Watch, Inc.*, 22 F. Supp. 3d 1240, 1247 fn. 2 (S.D. Fla. 2014).

[12] *See Jews for Jesus, Inc.*, 997 So. 2d at 1108 (comparing the false light cause of action to the defamation by implication cause of action, and recognizing the existence of only the latter in Florida); *but see* RESTATEMENT (SECOND) OF TORTS s. 652E (recognizing a separate tort of false light).

[13] 19 FLA. JUR. 2D *Defamation and Privacy* s. 15 (citing 50 AM. JUR. 2D *Libel and Slander* s. 153).

[14] 50 AM. JUR. 2D *Libel and Slander* s. 153 (internal citations omitted).

[15] *Jews for Jesus, Inc.*, 997 So. 2d at 1106.

[16] *American Airlines, Inc. v. Geddes*, 960 So. 2d 830, 833 (Fla. 3d DCA 2007).

[17] *Axiom Worldwide, Inc. v. Becerra*, 2009 WL 1347398, *7 (M.D. Fla. 2009) (citing *Rives v. Atlanta Newspapers, Inc.,* 220 Ga. 485, 139 S.E.2d 395, 398 (1964) (noting, in applying single publication rule to newspaper, that "whether or not it is read is immaterial once it is shown that it was exposed to public view")).

[18] *Thomas v. Jacksonville Television, Inc.*, 699 So. 2d 800, 805 (Fla. 1st DCA 1997).

[19] *See generally Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 23 (1990) (Brennan, J., dissenting) (noting that "only defamatory statements that are capable of being proved false are subject to liability under state libel law").

[20] *Jews for Jesus, Inc.*, 997 So. 2d at 1106-08.

An actor must act with knowledge or reckless disregard as to the falsity on a matter concerning a public official, or at least negligently on a matter concerning a private person.[21] With respect to this element, case law has developed which purports to balance the interests of the First Amendment while also protecting people from being unjustly defamed.[22] Accordingly, courts apply an actual malice standard, which is addressed separately and in more detail below, to public figures, and a simple negligence standard to private individuals.[23] A private individual may recover actual damages from a media defendant that publishes false and defamatory statements and that fails to use reasonable care to determine their falsity.[24]

With respect to the element of actual damages, the recovery of actual damages depends upon whether the defamation was "per se" or "per quod." Defamation per se generally relieves plaintiffs of having to prove damages, because such statements are so inherently damaging that damages are typically presumed.[25] On the other hand, defamation per quod generally requires plaintiffs to provide supporting and extrinsic evidence in order to prove that the statement or publication was actually defamatory.[26]

Finally, the statements must actually be defamatory. To make this determination, courts consider allegedly defamatory statements in their totality. For example, they consider all the words, pictures, and illustrations as used and presented together, not just a particular phrase or sentence in isolation.[27] An allegedly defamatory statement should be considered in its natural sense without a forced or strained construction.[28] Courts also make threshold determinations regarding whether a claim should even be considered by a jury,[29] and whether a privilege applies.[30]

Defenses

In addition to general procedural and other defenses that may be available (*e.g.* a failure to allege and prove any of the elements of defamation), the following specific defenses are available in response to a claim of libel, slander, or defamation by implication:

- Statutory protections:
  - For radio and television broadcasters.[31]
  - For good faith reports of potential child abuse, abandonment, or neglect.[32]

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[21] *Id.* at 1106.
[22] Gleisy Sopena, *Attorney-Fee Shifting is the Solution to Slapping Meritless Claims Out of Federal Courts,* 16 FIU L. REV. 833, 842 (Spring 2022).
[23] *Jews for Jesus, Inc.*, 997 So. 2d at 1111.
[24] *Thomas*, 699 So. 2d at 804.
[25] *Wolfson v. Kirk*, 273 So. 2d 774, 776 (Fla. 4th DCA 1973); *Bass v. Rivera*, 826 So. 2d 534, 535 (Fla. 2d DCA 2002); *Delacruz,* 221 So. 2d at 775.
[26] *Boyles v. Mid-Florida Television Corp.*, 431 So. 2d 627, 633 (Fla. 5th DCA 1983) (quoting *Piplack v. Mueller*, 97 Fla. 440, 121 So. 459 (Fla. 1929)).
[27] *Byrd v. Hustler Magazine, Inc.*, 433 So. 2d 593, 595 (Fla. 4th DCA 1983).
[28] *Id.*
[29] *Id.; Wolfson,* 273 So. 2d at 778.
[30] *See Jews for Jesus, Inc.*, 997 So. 2d at 1111-12 (providing a list of cases that applied various privileges to defamatory statements)*; see also* s. 770.04, F.S. (regarding liability of radio or television broadcasters); *see also Wright v. Yurko*, 446 So. 2d 1162, 1164 (Fla. 5th DCA 1984) (holding privilege extends to communications made within lawsuits).
[31] *See generally* s. 770.04, F.S.
[32] *See generally* s. 39.203, F.S.

- Privilege:
  - Absolute immunity, for any act occurring during the course of a legislative, judicial, or quasi-judicial proceeding, so long as the act has some relation to the proceeding.[33]
  - Absolute immunity, for state executive officers[34] and public officials,[35] as long as their statements are made in connection with their duties and responsibilities.
  - Qualified immunity, when made in good faith and certain other conditions are met.[36]
- Immunity as an expression of pure opinion, which occurs when one makes a comment or opinion based on facts in an article or are otherwise known or available to the reader or listener as a member of the public.[37]

Actions for libel and slander must be brought within 2 years after the cause of action accrues.[38]

Actual Malice Standard

Private individuals only need to allege and prove simple negligence to recover in defamation actions, but public figures who sue for defamation actions are subject to a different standard known as the "actual malice" standard.[39]

As required by the landmark federal case *New York Times v. Sullivan*[40] and its progeny,[41] people who qualify as public figures must show actual malice by a publisher in order to maintain an action in defamation. The existence of actual malice must be proved by clear and convincing evidence.[42] Under the actual malice test, a public figure claimant must show that the disseminator of the information "either knew the alleged defamatory statements were false, or published them with reckless disregard despite awareness of their probable falsity."[43]

Because direct evidence of actual malice is rare, courts have permitted actual malice to be proved through inference and circumstantial evidence alone.[44] For example, actual malice may be found

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[33] *See Kidwell v. General Motors Corp.*, 975 So. 2d 503, 505 (Fla. 2d DCA 2007) (regarding judicial and quasi-judicial immunity); *see also Tucker v. Resha*, 634 So. 2d 756, 758 (Fla. 1st DCA 1994), *apprv'd,* 670 So. 2d 56 (Fla. 1996) (noting, with emphasis added, that "[t]he public interest requires that *statements made by officials of all branches of government in connection with their official duties* be absolutely privileged") (internal citations omitted).
[34] *Tucker*, 634 So. 2d at 758.
[35] *Hope v. National Alliance of Postal and Federal Employees, Jacksonville Local No. 320,* 649 So. 2d 897, 901 fn. 5 (Fla. 1st DCA 1995).
[36] *See Lundquist v. Alewine,* 397 So. 2d 1148, 1149 (Fla. 5th DCA 1981) (providing that the elements essential to the finding of a conditionally privileged publication are good faith; an interest to be upheld; a statement limited in its scope to this purpose; a proper occasion; and publication in a proper manner) (internal citations omitted).
[37] *Sepmeier v. Tallahassee Democrat, Inc.*, 461 So. 2d 193, 195 (Fla. 1st DCA 1984) (internal citation omitted); *Smith v. Taylor County Pub. Co., Inc.*, 443 So. 2d 1042, 1046-47 (Fla. 1st DCA 1983).
[38] *See* s. 95.11(4)(g), F.S. (providing a 2-year statute of limitations for libel or slander); *see also* s. 95.031(1), F.S. (providing that unless otherwise specified, the statute of limitations runs from the time the cause of action accrues).
[39] *Jews for Jesus, Inc.*, 997 So. 2d at 1105-06; *Mile Marker, Inc. v. Petersen Publishing, L.L.C.*, 811 So. 2d 841, 845 (Fla. 4th DCA 2002) (citing *New York Times*).
[40] 376 U.S. 254 (1964).
[41] In *New York Times Co. v. Sullivan,* 376 U.S. 254, 279-84 (1964), the U.S. Supreme Court applied the actual malice standard to public *officials*. Three years after *New York Times,* the Court applied the same standard to public *figures* in *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 164-65 (1967) (Warren, C.J., concurring in plurality opinion).
[42] *Lampkin-Asam v. Miami Daily News, Inc.*, 408 So. 2d 666, 668-69 (Fla. 3d DCA 1981).
[43] *Mile Marker, Inc.*, 811 So. 2d at 845 (citing *New York Times*).
[44] *Sindi v. El-Moslimany*, 896 F.3d 1, 16 (1st Cir. 2018).

where a publisher fabricates an account, makes inherently improbable allegations, relies on a source where there is an obvious reason to doubt its veracity, or deliberately ignores evidence that calls into question published statements.[45] Although motive alone cannot suffice to prove actual malice, it is a highly relevant consideration.[46] Reliance on an anonymous source for a defamatory statement constitutes actual malice only if the defendant had an obvious reason to doubt that source.[47]

Whether a person qualifies as a public figure is a question of law for courts to decide.[48] State and federal common law recognize two classes of public figures: "general public figures," who by reason of fame or notoriety in a community will in all cases be required to prove actual malice, and "limited public figures," who are individuals who have thrust themselves forward in a particular public controversy and are therefore required to prove actual malice only in regard to certain issues.[49]

Courts employ a three-part test to determine whether a claimant is a limited public figure.[50] First, the court must determine whether there is a public controversy. In determining whether a matter is a public controversy, the court determines whether a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution. Second, the court must determine whether the claimant played a sufficiently central role in the controversy. And third, the court must find that the alleged defamation was germane to the claimant's involvement in the controversy.[51]

Courts have found individuals to be public figures for purposes of a defamation action in many factual situations, including the following:

- A person defending himself against accusations.[52]
- A person granting an interview on a specific topic.[53]

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[45] *Id.; see also St. Amant v. Thompson,* 390 U.S. 727, 732 (1968) (remarking that publications are likely not made in good faith where "a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call[,]" or when the allegations "are so inherently improbable that only a reckless man would have put them into circulation[,]" or where there are "obvious reasons to doubt the veracity of the informant or the accuracy of his reports").

[46] *Sindi,* 896 F.3d at 16.

[47] *See Lorenz v. Donnelly,* 350 F.3d 1272, 1283-84 (D.C. Cir. 2003) (providing that a plaintiff must show that when the defendants published the alleged defamations they were subjectively aware that it was highly probable that the story was fabricated, so inherently improbable that only a reckless person would have put it in circulation, or based wholly on an unverified anonymous telephone call or some other source that appellees had obvious reasons to doubt).

[48] *Saro Corporation v. Waterman Broadcasting Corporation,* 595 So. 2d 87, 89 (Fla. 2d DCA 1992) (internal citation omitted).

[49] *Id.* (internal citation omitted)*; see also Mile Marker, Inc.,* 811 So. 2d at 845 (recognizing same at the state level); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 350 (1974) (recognizing same at the federal level).

[50] *Della-Donna v. Gore Newspapers Company,* 489 So. 2d 72, 77 (Fla. 4th DCA 1986) (internal citations omitted).

[51] *Id.*

[52] *See Berisha v. Lawson,* 973 F.3d 1304, 1311 (11th Cir. 2020) (finding a person a public figure because he defended himself against accusations that he was involved in an arms-dealing scandal).

[53] *See Mile Marker, Inc.,* 811 So. 2d at 846 (finding a person a limited public figure because, among other things, he gave an interview).

- A person obtaining public employment in a capacity other than as an elected officeholder or appointee of an elected officeholder.[54]
- A person who has uploaded a video, image, or statement on the Internet which has reached a broad audience.[55]

Criticisms

In 1993, when U.S. Supreme Court Justice Elena Kagan was still a law professor at the University of Chicago, she wrote a book review wherein she noted that extending the actual malice standard to public figures was "questionable" and the Court has "increasingly lost contact with the case's premises and principles[.]"[56] She observed that "to the extent [*New York Times*] decreases the threat of libel litigation, it promotes not only true but also false statements of fact – statements that may themselves distort public debate[,]" and in this way "the legal standard adopted in [*New York Times*] may cut against the very values underlying the decision."[57]

In 2021, U.S. Supreme Court Justices Clarence Thomas and Neil Gorsuch issued dissenting opinions in *Berisha v. Lawson* which heavily criticized the Court's extension of the *New York Times'* actual malice standard to public figures.

Justice Thomas advocated for reconsideration of the *New York Times* actual malice standard for two basic reasons. First, he argued that requiring public figures to establish actual malice lacks historical support and bears "no relation to the text, history, or structure of the Constitution."[58] Second, setting aside the constitutional concerns, the doctrine has "real-world effects" that should also be considered, because "[p]ublic or private, lies impose real harm" and the actual malice standard, which is an "almost impossible" standard to meet, effectively "insulate[s] those who perpetrate lies from traditional remedies like libel suits[.]"[59]

Justice Gorsuch echoed many of Justice Thomas' criticisms but also expanded upon how changes in the media landscape since 1964, the year the Court formulated the actual malice standard in the *New York Times*, have resulted in a proliferation of disinformation. After surveying those changes (*e.g.* the fall of traditional news outlets and professional fact-checking, the rise of cable news and social media platforms, *etc.*), he concluded that "[w]hat started in 1964 with a decision to tolerate the occasional falsehood to ensure robust reporting by a comparative handful of print and broadcast outlets has evolved into an ironclad subsidy for the publication of falsehoods by means on a scale previously unimaginable."[60]

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[54] *See Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) (finding that the "'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs").
[55] *See Berisha v. Lawson*, 141 S. Ct. 2424, 2429 (Mem) (2021) (Gorsuch, J., dissenting) (recognizing that private citizens can become public figures "on social media overnight").
[56] Elena Kagan, "A Libel Story: *Sullivan* Then and Now (reviewing Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* (1991))," 18 LAW AND SOCIAL INQUIRY 197, 209 (1993).
[57] *Id.* at 206-07.
[58] *Berisha*, 141 S. Ct. at 2424-25 (Thomas, J., dissenting) (citing *McKee v. Cosby*, 139 S. Ct. 675 (Mem) (2019) and quoting *Tah v. Global Witness Publishing, Inc.*, 991 F.3d 231, 251 (D.C. Cir. 2021) (Silberman, J., dissenting)).
[59] *Berisha*, 141 S. Ct. at 2425 (Thomas, J., dissenting) (listing several examples where defamatory statements caused real world harm).
[60] *Id.* at 2428 (Gorsuch, J., dissenting).

In his dissenting opinion, Justice Gorsuch also included a significant list of former U.S. Supreme Court Justices who have raised questions about various aspects of the *New York Times* case over the years.[61]

Journalist's Privilege

With respect to information that a professional journalist has obtained while actively gathering news, state law provides that the professional journalist may not be compelled to either be a witness concerning that information, or disclose that information, including the identity of any source.[62]

For purposes of the qualified privilege, a "professional journalist" means:

> 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 independent contractor for, a newspaper, news journal, news agency, press association, wire service, radio or television station, network, or news magazine. Book authors and others who are not professional journalists, as defined in this paragraph, are not included in the provisions of this section.[63]

"News" means information of public concern relating to local, statewide, national, or worldwide issues or events.[64]

The statute limits the privilege to information or eyewitness observations obtained within the normal scope of employment, with the exception that it does not apply to physical evidence, eyewitness observations, or visual or audio recording of crimes.[65]

The statute also provides that a party seeking to overcome this privilege must make 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 requiring disclosure of the information.[66]

[61] *Id.* at 2429-30 (Gorsuch, J., dissenting) (citing to several opinions and articles by past and present U.S. Supreme Court members).
[62] Section 90.5015(2), F.S.
[63] Section 90.5015(1)(b), F.S.
[64] Section 90.5015(1)(a), F.S.
[65] Section 90.5015(2), F.S.
[66] Section 90.5015(2)(a)-(c), F.S.

Offers of Judgment and Demands for Judgment

State law[67] provides for attorney fees where a party's offer to settle a case has been rejected. The statute states, in part:

> In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him … if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer…. If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees….[68]

An offer must:
- Be in writing and state that it is being made pursuant to this section.
- Name the party making it and the party to whom it is being made.
- State with particularity the amount offered to settle a claim for punitive damages, if any.
- State its total amount.[69]

The court may disallow an award of costs and attorney fees to the prevailing party if it is determined the prevailing party did not make the offer in good faith.[70] When determining the reasonableness of an award of attorney fees, the court must consider the following factors along with other relevant criteria:
- The then-apparent merit or lack of merit in the claim.
- The number and nature of offers made by the parties.
- The closeness of questions of fact and law at issue.
- Whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer.
- Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.

The amount of the additional delay cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged.[71]

Strategic Lawsuits against Public Participation

A strategic lawsuit against public participation (SLAPP) is one ostensibly brought to redress a wrong, such as an invasion of privacy, a business tort, or an interference with a contract or an economic advantage, but actually brought to silence one or more critics.[72]

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[67] Section 768.79, F.S.
[68] Section 768.79(1), F.S.
[69] Section 768.79(2), F.S.
[70] Section 768.79(8)(a), F.S.
[71] Section 768.79(8)(b), F.S.
[72] *See, e.g.,* The Florida Senate Committee on Judiciary, *Issue Brief 2009-332, Strategic Lawsuits Against Public Participation* (Oct. 2008), https://flsenate.gov/UserContent/Committees/Publications/InterimWorkProgram/2009/pdf/2009-332ju.pdf; Cornell Law School Legal Information Institute, *SLAPP suit,* https://www.law.cornell.edu/wex/slapp_suit (last

Because of the variety of nominal bases for a SLAPP suit, laws to prevent them, known as anti-SLAPP laws, are phrased in terms of rights to be protected. Florida's anti-SLAPP statute[73] protects the following rights:

- The right to exercise the rights of free speech in connection with public issues.
- The right to peacefully assemble.
- The right to instruct representatives.
- The right to petition for redress of grievances before the various governmental entities of the state as protected by the First Amendment to the U.S. Constitution and section 5, article I of the State Constitution.[74]

Specifically, the statute prohibits a person or governmental entity from filing or causing to be filed, through its employees or agents, any lawsuit, cause of action, claim, cross-claim, or counterclaim against another person or entity, without merit and primarily because such person or entity has exercised any of the above-listed rights.[75]

The statute also provides a right to an expeditious resolution of a claim that a suit has been filed in violation of the statute.[76] The person or entity sued by a governmental entity or another person may move the court for an order dismissing the action or granting final judgment in favor of that person or entity. As soon as practicable, the court must set a hearing on the motion, which must be held at the earliest possible time after the filing of the claimant's or the governmental entity's response. If the person or entity prevails, the court may award actual damages arising from the governmental entity's violation of the statute. 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 the anti-SLAPP statute.[77]

State law also contains a similar but separate anti-SLAPP statute specific to homeowners' associations.[78] Among other things, it also provides for the expeditious resolution of a claim that the suit is in violation of the rights protected under the statute.[79]

III. Effect of Proposed Changes:

SB 1780 creates and amends several statutes relating to defamation causes of action. Most significantly, the bill sets the burdens of proof for a party to prevail in a defamation action, matters not addressed in the current defamation statutes. The burdens of proof in the bill appear to make the actual malice standard, set by the United States Supreme Court in *New York Times v.*

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visited Jan. 26, 2024); Public Participation Project, *What is a SLAPP?*, https://anti-slapp.org/what-is-a-slapp (last visited Jan. 26, 2024); The Free Dictionary, *Legal Dictionary: Strategic Lawsuits against Public Participation*, http://legal-dictionary.thefreedictionary.com/Strategic+Lawsuits+against+Public+Participation (last visited Jan. 26, 2024); Reporters Committee for Freedom of the Press, *Understanding Anti-SLAPP laws*, https://www.rcfp.org/resources/anti-slapp-laws/ (last visited Jan. 26, 2024).

[73] Section 768.295(1), F.S.

[74] *Id.*

[75] Section 768.295(3), F.S.

[76] Section 768.295(4), F.S.

[77] *Id.*

[78] *See generally* s. 720.304, F.S.

[79] Section 720.304(4)(c), F.S.

Sullivan[80] and other cases, apply to fewer people and in fewer circumstances than in the Court's interpretations of the First Amendment. By setting the burdens of proof in statute, the bill may lead to appeals of decisions in defamation actions. These appeals may eventually provide the U.S. Supreme Court with additional opportunities to reconsider whether the First Amendment requires certain plaintiffs to prove that a defendant acted with actual malice in making a defamatory statement. For the most part, lowering the burden of proof set forth in the bill will not apply to elected officials who bring defamation actions.

Evidence Code

Section 1 of the bill amends s. 90.5015, F.S., regarding the journalist's privilege, to provide that it does not apply to defamation claims brought under the defamation statute when the defendant is a professional journalist or media entity. This privilege, under current law, provides a professional journalist 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."

Accordingly, in a defamation action against a professional journalist, the privilege "has the effect of making proof of actual malice impossible because establishing what the publisher knew or did not know at the time of the publication depends on the kind and quality of the information and identity of the sources at hand when the publication was made."[81]

Defamation Statute

Section 2 of the bill amends s. 770.05, F.S., regarding limitations to the choice of venue, to subsume all of the following torts under the one term "defamation or privacy tort," for which persons may have only one choice of venue for damages:

- Libel.
- Slander.
- False light.
- Invasion of privacy.
- Any other tort founded upon any single publication, exhibition, or utterance, such as:
  - Any one edition of a newspaper, book, or magazine.
  - Any one presentation to an audience.
  - Any one broadcast over radio or television.
  - Any one exhibition of a motion picture.
  - Any one publication, exhibition, or utterance on the Internet.

This provision is a codification of case law and not a change in Florida law.[82]

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[80] 376 U.S. 254 (1964).

[81] *News-Journal Corp. v. Carson,* 741 So. 2d 572, 576 (Fla. 5th DCA 1999) (recognizing further that "some state shield laws are made inapplicable in defamation suits where bad faith or malice are alleged or where the media defendant raises a confidential source as a defense," and citing Carl C. Monk, *Evidentiary Privilege for Journalists' Sources: Theory and Statutory Protection,* 51 MO. L. REV. 1, 8 (1986), in support).

[82] *See Jews for Jesus, Inc.*, 997 So. 2d at 1108 (finding that defamation by implication is subsumed within the tort of defamation).

The bill also 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 claim or privacy tort. This provision is a codification of case law and not a change in Florida law.

However, the bill also provides that notwithstanding any other provision of the defamation statute, or any other statute providing for venue, when:

- Damages for defamation are based on material published through the radio or television, venue is proper in any county where the material is accessed.
- Damages for defamation are based on material published through the Internet, venue is proper in any county in the state.[83]

Section 3 of the bill renames s. 770.08, F.S., from "limitation on recovery of damages" to "limitation on venue," and amends it to provide that except in the case of defamation based on material published through the radio or television, a person may not have more than one choice of venue for any defamation or privacy tort founded upon a single publication, exhibition, or utterance.

Section 4 of the bill creates s. 770.09, F.S, entitled "Application of costs and attorney fees in defamation cases," providing that the fee-shifting provisions of the offer of judgment and demand for judgment statute[84] do not apply to defamation or privacy tort claims. Notwithstanding any other provision of law, a prevailing plaintiff on a defamation or privacy tort claim is entitled to an award of reasonable costs and attorney fees.

Section 5 of the bill creates s. 770.105, F.S., entitled "Limitations on judicial determination of a public figure," providing 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 him or herself publicly against accusations.[85]
- Granting an interview on a specific topic.[86]
- Public employment other than elected office or appointment by an elected official.[87]
- A video, image, or statement uploaded on the Internet that has reached a broad audience.[88]

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[83] These provisions of the bill appear to codify state common law on this issue. *See Lowery v. McBee,* 322 So. 3d 110, 115-16 (Fla. 4th DCA 2021) (concluding that Palm Beach County was an appropriate venue in a defamation action, because the defamatory Facebook post at issue was accessed in that county).

[84] Section 768.79, F.S.

[85] Compare to *Berisha,* 141 S.Ct. at 2429 (Gorsuch, J., dissenting) (stating that "[l]ower courts have even said that an individual can become a limited purpose public figure simply by defending himself from a defamatory statement"); *McKee v. Cosby,* 139 S.Ct. 675 (2019) (Thomas, J., concurring) (explaining that the court of appeals "concluded that, by disclosing her accusation to a reporter, McKee had 'thrust' herself to the 'forefront' of the public controversy over 'sexual assault allegations implicating Cosby' and was therefore a 'limited-purpose public figure'").

[86] Compare to *Mile Marker, Inc.,* 811 So. 2d at 846 (showing that the plaintiff became a public figure because he gave an interview among other things).

[87] Compare to *Rosenblatt,* 383 U.S. at 86 (explaining that the public official designation for purposes of the actual malice standard applies to government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs).

[88] Compare to *Berisha,* 141 S.Ct. at 2429 (Gorsuch, J., dissenting) (stating that "private citizens can become 'public figures' on social media overnight").

The provisions above are inconsistent with court opinions defining whether a person is a public figure and making the actual malice standard applicable to public figures.

Section 6 of the bill creates s. 770.11, F.S., entitled "Clarifying defamation standards," providing for the inference of actual malice in defamation actions; defamation per se in connection with allegations of discrimination; and associated statutory damages.

The bill requires fact finders to infer actual malice for purposes of a defamation action when:

- The defamatory allegation is fabricated by the defendant, is the product of his or her imagination, or is based wholly on an unverified anonymous report.[89]
- An allegation is so inherently implausible that only a reckless person would have put it into circulation.[90]
- There are obvious reasons to doubt the veracity of the defamatory allegation or the accuracy of an informant's reports.[91] There are obvious reasons to doubt the veracity of a report when:
  - There is sufficient contrary evidence that was known or should have been known to the defendant after a reasonable investigation;[92] or
  - The report is inherently improbable or implausible on its face.[93]
- The defendant willfully failed to validate, corroborate, or otherwise verify the defamatory allegation.

The provisions above codify case law describing acts constituting actual malice.

The bill also provides that an allegation that the plaintiff has discriminated against another person or group because of their race, sex, sexual orientation, or gender identity constitutes defamation per se. Moreover, the bill provides that:

- A defendant cannot prove the truth of an allegation of discrimination with respect to sexual orientation or gender identity by citing a plaintiff's constitutionally protected religious expression or beliefs.
- A defendant cannot prove the truth of an allegation of discrimination with respect to sexual orientation or gender identity by citing a plaintiff's scientific beliefs.
- A plaintiff prevailing against such allegations of discrimination, in addition to all other damages, is entitled to statutory damages of at least $35,000.

Section 7 of the bill creates s. 770.12, F.S., entitled "Presumption regarding anonymous sources," to provide that a statement by an anonymous source is presumptively false for purposes of a defamation action. In cases where a defendant to a defamation action refuses to identify the source of a defamatory statement, the plaintiff only needs to prove that the defendant acted negligently in making the defamatory statement.

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[89] *St. Amant,* 390 U.S. at 732 (explaining that actual malice likely exists if "a publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation").
[90] *Id.*
[91] *Id.*
[92] *McFarlane v. Sheridan Square Press, Inc.,* 91 F.3d 1501, 1511 (D.C. Cir. 1996) (explaining that "actual malice may be inferred from an author's or publisher's inability to corroborate a story only when, in attempting to corroborate, he encounters persuasive evidence that contradicts the allegation").
[93] *St. Amant,* 390 U.S. at 732 (explaining that recklessness for purposes of the actual malice standard "may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports").

This provision may require a person who does not disclose the identity of the person who provided the information for the defamatory statement to be subject to the lower negligence standard in a defamation action. With respect to public figures, the provision conflicts with case law that would subject a public figure to the higher actual malice standard.

Section 8 of the bill creates s. 770.13, F.S., entitled "Actual malice for public figures in defamation cases," to provide that a public figure does not need to show actual malice to prevail in a defamation cause of action when the allegation does not relate to the reason for his or her public status.

Current case law does not appear to create exceptions from the actual malice standard for persons who are deemed public figures.

Section 9 of the bill creates s. 770.15, F.S., entitled "Invasion of privacy; place person before public in false light."

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.
- The defendant had knowledge of or acted in reckless disregard as to the false implications of the publicized matter.

According to the bill, this new section incorporates the standards set forth under the defamation statute for defamation causes of action to whatever extent necessary. Moreover, 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 claim for false light.

Anti-SLAPP Statutes

Sections 10 and 11 of the bill amend ss. 720.304 and 768.295, F.S., respectively, to require courts in anti-SLAPP cases to award the nonmoving party (instead of the prevailing party, as is currently the case) reasonable attorney fees and costs in connection with a claim that an action was filed in violation of the anti-SLAPP statute, if the nonmoving party prevails on a motion filed under it.

Severability

Section 12 of the bill provides that if any provision of the bill or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the bill which can be given effect without the invalid provision or application, and to this end the provisions of the bill are severable.

Effective Date

Section 13 states that the bill takes effect on July 1, 2024.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

The following provisions in the bill potentially conflict with *New York Times* and its progeny, which construe defamation standards in light of First Amendment protections:

- A person is not a public figure for purposes of a defamation action if the person acquires fame or notoriety from one or more of the following:
  - Defending him or herself publicly against accusations.
  - Granting an interview on a specific topic.
  - Public employment other than elected office or appointment by an elected official.
  - A video, image, or statement uploaded on the Internet that has reached a broad audience.
- A public figure does not need to show actual malice to prevail in a defamation cause of action when the allegation does not relate to the reason for his or her public status.
- In cases where a defendant to a defamation action refuses to identify the source of a defamatory statement, the plaintiff only needs to prove that the defendant acted negligently in making the defamatory statement.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Because the bill may ultimately make it easier for private plaintiffs to sue for defamation, it is anticipated that defendants in such cases may have to pay more in awards (to satisfy meritorious defamation claims), claim settlements, and additional legal fees and costs. On the other hand, persons held to higher standards to avoid making defamatory statements may incur additional costs for conducting investigations before making potentially defamatory statements.

C. Government Sector Impact:

Because the bill may ultimately make it easier for private plaintiffs to sue for defamation, it is anticipated that such suits will increase court caseloads to some degree, and the costs associated with maintaining same.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 90.5015, 770.05, 770.08, 720.304, and 768.295.

This bill creates the following sections of the Florida Statutes: 770.09, 770.105, 770.11, 770.12, 770.13, and 770.15.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.