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MISSING THE RIGHT OF PUBLICITY BOAT:

HOW *TYNE v. TIME WARNER ENTERTAINMENT CO.* THREATENS TO “SINK” THE FIRST AMENDMENT

I. INTRODUCTION

*Tyne v. Time Warner Entertainment Co.*¹ (“Time v. Time Warner”) examined the delicate balance between the personal right of publicity and the various rights of free expression granted under the First Amendment as they pertain to real individuals depicted, sometimes inaccurately, in a format that has come to be known as the “docudrama.”² *Tyne* comes on the heels of a number of high profile cases examining the right of publicity in other similarly expressive contexts.³

In *Tyne*, a former crew member and the surviving family members of individuals killed aboard a fishing vessel caught in a torrential storm⁴ sued the producers and distributors of the motion picture *The Perfect Storm* for violations of Florida’s right of publicity statute and for common law invasion of privacy—specifically, false light and public disclosure of private facts.⁵ The plaintiffs allege that these violations stem from defendants depicting their lives and the lives and deaths of their deceased

1. 336 F.3d 1286 (11th Cir. 2003).

2. J. THOMAS MCCARTHY, RIGHTS OF PUBLICITY AND PRIVACY § 8:74 (2d ed. 2000).

3. See *Winter v. DC Comics*, 69 P.3d 473 (Cal. 2003) (holding that the depiction of supernatural comic book characters half-worm and half-human resembling musicians, the Winter Brothers, did not violate their right of publicity); *Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003) (holding that OutKast’s rap song “Rosa Parks,” violated her right of publicity); *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915 (6th Cir. 2003) (holding that an artist’s print of Tiger Woods did not violate Ohio’s right of publicity statute); *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003) (holding that an athlete’s name used as a character in Todd McFarlane’s comic book, *Spawn*, was not protected by the First Amendment).

4. Erica Tyne and Billie-Jo Francis Tyne are the surviving children of decedent Billy Tyne. Plaintiff Jodi Tyne is the former spouse of decedent Tyne. Plaintiff Dale R. Murphy, Jr. is the surviving child of decedent Dale Murphy, Jr. Plaintiff, Debra Tigie, is the former spouse of decedent Murphy. Plaintiff Douglas Kosco is a former crewmember of the *Andrea Gail* who wisely withdrew from Tyne’s crew just before the *Andrea Gail*’s last voyage. Defendants’ Statement of Undisputed Facts in Support of Their Dispositive Motion for Summary Judgment at 1–2, *Tyne v. Time Warner Entm’t Co.*, 336 F.3d 1286 (11th Cir. 2003) (No. 02-13281).

5. *Tyne*, 336 F.3d at 1288.

family members without first seeking permission or compensating them in any way.⁶ While the media is afforded broad immunity from publicity and misappropriation claims for “public interest” publications,⁷ the use of an individual’s life story in entertainment without such permission remains a particularly controversial and unsettled area of law.⁸

The district court in *Tyne* narrowly interpreted Florida’s right of publicity statute, section 540.08,⁹ concluding that it extended only to the

6. *Id.*

7. See discussion *infra* Part V(C).

8. See MCCARTHY, *supra* note 2.

9. Fla. Stat. Ann. § 540.08 (West Supp. 2001). Unauthorized publication of name or likeness:

(1) No person shall publish, print, display or otherwise publicly use for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph, or other likeness of any natural person without the express written or oral consent to such use given by: (a) Such person; or (b) Any other person, firm or corporation authorized in writing by such person to license the commercial use of her or his name or likeness; or (c) If such person is deceased, any person, firm or corporation authorized in writing to license the commercial use of her or his name or likeness, or if no person, firm or corporation is so authorized, then by any one from among a class composed of her or his surviving spouse and surviving children. (2) In the event the consent required in subsection (1) is not obtained, the person whose name, portrait, photograph, or other likeness is so used, or any person, firm, or corporation authorized by such person in writing to license the commercial use of her or his name or likeness, or, if the person whose likeness is used is deceased, any person, firm, or corporation having the right to give such consent, as provided hereinabove, may bring an action to enjoin such unauthorized publication, printing, display or other public use, and to recover damages for any loss or injury sustained by reason thereof, including an amount which would have been a reasonable royalty, and punitive or exemplary damages. (3) The provisions of this section shall not apply to: (a) The publication, printing, display, or use of the name or likeness of any person in any newspaper, magazine, book, news broadcast or telecast, or other news medium or publication as part of any bona fide news report or presentation having a current and legitimate public interest and where such name or likeness is not used for advertising purposes; (b) The use of such name, portrait, photograph, or other likeness in connection with the resale or other distribution of literary, musical, or artistic productions or other articles of merchandise or property where such person has consented to the use of her or his name, portrait, photograph, or likeness on or in connection with the initial sale or distribution thereof; or (c) Any photograph of a person solely as a member of the public and where such person is not named or otherwise identified in or in connection with the use of such photograph. (4) No action shall be brought under this section by reason of any publication, printing, display, or other public use of the name or likeness of a person occurring after the expiration of 40 years from and after the death of such person. (5) As used in this section, a person’s “surviving spouse” is the person’s surviving spouse under the law of her or his domicile at the time of her or his death, whether or not the spouse has later remarried; and a person’s “children” are her or his immediate offspring and any children legally adopted by the person. Any consent provided for in subsection (1) shall be given on behalf of a minor by the guardian of her or his person or by either parent. (6) The remedies provided for in this section shall be in addition to and not in limitation of the remedies and rights of any person under the common law against the invasion of her or his privacy.

Id.

promotion of a product and not to the use of an individual's name or likeness in an expressive medium.¹⁰ The court granted defendants' summary judgment on both the right of publicity claim and the common law invasion of privacy claims.¹¹ Appealing to the Eleventh Circuit, plaintiffs asserted a statutory construction argument that would render the term "commercial" in section 540.08(1) superfluous.¹² Confronted with this innovative argument as to section 540.08's proper interpretation, as well as the applicability of a remarkably similar Florida state appellate court decision,¹³ the Eleventh Circuit certified the following question of law to the Florida Supreme Court: "*To what extent does Section 540.08 of the Florida Statutes apply to the facts of this case?*"¹⁴ This Note analyzes this issue and offers guidance to the Florida Supreme Court in resolving this question.

Part II of this Note explores the history and the current state of the right of publicity and common law invasion of privacy, both nationally and, more importantly, in Florida. Part III reviews the facts underlying *Tyne*. Part IV examines both the district court case and the Eleventh Circuit case that led to the question of law that is currently before the Florida Supreme Court. Part V critiques several statutory and constitutional arguments offered by both parties. Finally, Part VI concludes that the district court's original decision was correct in that Warner Bros. ("Warner") was not in violation of section 540.08 when it produced and distributed a fictionalized account of the lives and deaths of the fishermen tragically killed in New England's so-called "perfect storm." This Note argues that ruling otherwise would demean the First Amendment and would have dire legal consequences for numerous forms of creative expression.

II. BACKGROUND—STATUTORY AND COMMON LAW INVASION OF PRIVACY IN FLORIDA

A. *The Development of Invasion of Privacy as a Tort*

The right of privacy is rooted in the common law and provides individuals with the privilege to live a life free from unwarranted

10. *Tyne v. Time Warner Entm't Co.*, 204 F. Supp. 2d 1338, 1341 (M.D. Fla. 2002) (adopting the Fourth District Court of Appeal's interpretation of § 540.08 in *Loft v. Fuller*, 408 So. 2d 619 (Fla. Dist. Ct. App. 1981)).

11. *Tyne*, 204 F. Supp. 2d at 1344.

12. *Tyne*, 336 F.3d at 1291.

13. *See Loft*, 408 So. 2d at 623.

14. *Tyne*, 336 F.3d at 1291.

publicity.¹⁵ Thomas M. Cooley first described this right in his treatise on torts as the right “to be let alone.”¹⁶ A decade later, the tort of invasion of privacy became the subject of a law review article in which Samuel D. Warren and Louis D. Brandeis “argued that the law should protect a right of privacy, or ‘quiet zone,’ in each person’s life to protect human dignity from the prying of others.”¹⁷ Their argument for the establishment of a separate, recognizable invasion of privacy tort eventually won credence and recognition.¹⁸

New York was among the first states to address the elements of this new tort in *Roberson v. Rochester Folding Box Co.*,¹⁹ a case that concerned the unauthorized use of a photograph as part of an advertisement.²⁰ After the appellate court reversed the lower court decision and denied the existence of the right of privacy,²¹ a backlash of criticism led to the enactment of a New York privacy statute one year later in 1903.²² This statute prohibited the “use of any person’s ‘name, portrait, or picture’ for ‘advertising purposes,’ or for ‘purposes of trade,’ without that person’s written consent.”²³ New York’s innovative statute became the model for “name-and-likeness” statutes subsequently enacted in seven states,²⁴ including the Florida statute at issue in *Tyne*.²⁵

In his 1960 article, Professor Prosser established and outlined the four

15. See generally William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960) (outlining the creation of the law of privacy doctrine).

16. THOMAS M. COOLEY, *LAW OF TORTS* 29 (2d ed. 1888).

17. Alicia M. Hunt, Comment, *Everyone Wants To Be a Star: Extensive Publicity Rights for Noncelebrities Unduly Restrict Commercial Speech*, 95 NW. U. L. REV. 1605, 1612–13 (2001) (discussing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)).

18. Hunt, *supra* note 17, at 1613.

19. 64 N.E. 442 (N.Y. 1902).

20. See *id.*; see also MCCARTHY, *supra* note 2, § 6:3. (stating that the “‘right of publicity’ was first recognized . . . by the federal Second Circuit Court of Appeals under New York common law”).

21. *Roberson*, 64 N.E. at 448.

22. Hunt, *supra* note 17, at 1613.

23. Fred M. Weiler, *The Right of Publicity Gone Wrong: A Case for Privileged Appropriation of Identity*, 13 CARDOZO ARTS & ENT. L.J. 223, 224 (1994) (quoting 1903 N.Y. Laws 132 §§ 1–2 (codified as amended at N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 1992))).

24. MCCARTHY, *supra* note 2, § 6:3 n.8. (listing the seven states that have statutes that embody the right of publicity: California, Florida, Illinois, Kentucky, Ohio, Texas, and Wisconsin). New York is now seen as a special case, since courts have rejected the existence of common law rights of privacy in that state, despite the fact that the right of publicity exists within the framework of the New York statute. Hunt, *supra* note 17, at 1613.

25. See discussion *infra* Part I.

invasion of privacy torts for which remedies may be afforded.²⁶ These four categories are: “(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.”²⁷ In 1976, the authors of the Restatement (Second) of Torts adopted Prosser’s four invasion of privacy torts.²⁸

Prosser’s first tort of intrusion plays no role in *Tyne*, and therefore will not be discussed in this note. However, the remaining three torts are relevant to *Tyne* and will be addressed in the order set forth by the Restatement (Second) of Torts.

B. Right of Publicity: The Unauthorized Use of Name or Likeness

1. A Brief History

In 1953, Judge Jerome Frank in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*²⁹ coined the phrase “right of publicity.”³⁰ Judge Frank reasoned that prominent persons, “far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways.”³¹ Currently, under the right of publicity, “[o]ne who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade is subject to liability”³² In designating this tort the “right of publicity,” Judge Frank made progress toward breaking the “logjam of confusion”³³ regarding the similar and sometimes

26. Prosser, *supra* note, 15 at 389.

27. *Id.*

28. RESTATEMENT (SECOND) OF TORTS § 652A (1977).

(1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other. (2) The right of privacy is invaded by (a) unreasonable intrusion upon the seclusion of another, as stated in § 652B; or (b) appropriation of the other’s name or likeness, as stated in § 652C; or (c) unreasonable publicity given to the other’s private life, as stated in § 652D; or (d) publicity that unreasonably places the other in a false light before the public, as stated in § 652E. *Id.*

29. 202 F.2d 866, 868 (2d Cir. 1953).

30. MCCARTHY, *supra* note 2, § 1:26.

31. *Haelan*, 202 F.2d at 868.

32. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

33. See MCCARTHY, *supra* note 2, § 1:26.

befuddling privacy torts.³⁴

In 1977, the Supreme Court acknowledged the right of publicity in *Zacchini v. Scripps-Howard Broadcasting, Co.*³⁵ as a separate and distinct commercial tort.³⁶ However, since that landmark decision, the Supreme Court has refused to grant certiorari in any other right of publicity cases, perhaps expecting that "Congress will . . . federalize this severely Balkanized area of the law."³⁷

2. Privacy Right v. Property Right

The right of publicity is recognized in a majority of states through an assortment of statutes and common law.³⁸ The prevailing view recognizes the right of publicity as a tort that "protects the commercial value of one's identity,"³⁹ whereas the right of privacy protects the "right to be let alone."⁴⁰ According to J. Thomas McCarthy, since the recognition of the right of publicity as a separate and distinct tort, numerous jurisdictions have established that it extends primarily to celebrities as a *property right*,

34. See *id.* As a result of a medley of conflicting case law and statutes, legalese in this particular area of law is particularly difficult to define; terms such as invasion of privacy, right of privacy, right of publicity, appropriation, and misappropriation are often interchanged and misused. Throughout this paper the "name and likeness" torts, including § 540.08, will be referred to as right of publicity, never as right of privacy. Black's Law Dictionary defines these overlapping terms as follows: Right of privacy is the "right of a person and the person's property to be free from unwarranted public scrutiny or exposure." BLACK'S LAW DICTIONARY 1325 (7th ed. 1999). Right of publicity is the "right to control the use of one's own name, picture, or likeness and to prevent another from using it for commercial benefit without one's consent." *Id.*

35. 433 U.S. 562 (1977).

36. *Id.* at 573. *Zacchini* overcame the First Amendment challenge and successfully stated a right of publicity claim after a television station broadcasted his entire cannonball act during its newscast without the entertainer's permission. See *Zacchini* 433 U.S. 562. The Court said that much of the economic value of *Zacchini's* act "lies in the 'right of exclusive control over the publicity given to his performance'" because if the public can see the act for free on television, they will be less willing to pay to see it at a fair. *Id.* at 575.

37. Douglas E. Mirell, *Worming Around the First Amendment: An Overview of Recent Developments in Publicity Rights Litigation*, Address to the Los Angeles Copyright Society (Oct. 1, 2003).

38. See MCCARTHY, *supra* note 2, § 6:3. The seven states with statutes that embody the right of publicity discussed in note 24, are joined by eleven additional states, which have recognized a common-law right of publicity: Arizona, Alabama, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Kentucky, Michigan, Minnesota, Missouri, New Jersey, Ohio, Pennsylvania, Texas, Utah, and Wisconsin. Additionally, ten states (Indiana, Massachusetts, Nebraska, Nevada, New York, Oklahoma, Rhode Island, Tennessee, Virginia, and Washington) have statutes which are labeled "privacy," but are worded in such a way that embodies most aspects of the right of publicity. *Id.* at § 6:3 & n.9.

39. Hunt, *supra* note 17, at 1615.

40. RESTATEMENT (SECOND) OF TORTS § 652A cmt. a (1976).

while the right of privacy primarily applies to noncelebrities as a *privacy right*.⁴¹

The primary difference between these two torts is the type of damages awarded. The right of publicity protects monetary and commercial interests,⁴² “while privacy rights protect . . . less tangible interests in dignity and integrity of the self.”⁴³ In a right of publicity case, damages are generally measured by the commercial value of an identity based upon the fair market value the advertiser would have had to pay to use that person’s (usually celebrated) character.⁴⁴ By contrast, right of privacy damages are based on the mental distress⁴⁵ that result from an intrusion into “a secluded and private life, free from the prying eyes [and] ears” of the public.⁴⁶ Basically, a right of publicity infringement “focuses upon injury to the pocketbook, while an invasion of ‘appropriation privacy’ focuses upon injury to the psyche.”⁴⁷ The modern approach is to maintain a distinction between the two torts.⁴⁸ However, courts often fail to maintain this distinction,⁴⁹ and thus “confuse and blur the boundary between the two causes of action.”⁵⁰

3. Celebrity Status

Right of publicity cases are unique because they prevent “unjust enrichment by providing a remedy against exploitation of the goodwill and reputation that a person develops in his name or likeness through the investment of time, effort, and money.”⁵¹ Therefore, rights of publicity

41. See MCCARTHY, *supra* note 2, § 4:15.

42. See *id.*

43. Jonathan Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 CARDOZO ARTS & ENT. L.J. 213, 213 (1999).

44. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 cmt. d (1995).

45. See MCCARTHY, *supra* note 2, § 5:61 (distinguishing the two causes of action).

46. RESTATEMENT (SECOND) OF TORTS § 652A cmt. b (1976).

47. MCCARTHY, *supra* note 2, § 5:61.

48. See Hunt, *supra* note 17, at 1608–09 n.28 (“It is likely that most courts are not intentionally rejecting the modern explanation of the two torts. The most likely reason courts are often (though not always) using a property-based analysis in misappropriation cases is that the 1977 RESTATEMENT (SECOND) OF TORTS § 625C contains an explanation of the common-law tort of misappropriation that pre-dates the modern view. The RESTATEMENT adopts the view advanced by William Prosser, before the growth of the right of publicity, that invasion of privacy by misappropriation protects both the commercial value of one’s identity, as well as any commercial harm.”).

49. *Id.*

50. Kahn, *supra* note 43, at 214.

51. Bi-Rite Enter., Inc. v. Button Master, 555 F. Supp. 1188, 1198 (S.D.N.Y. 1983); see F. Jay Dougherty, *Foreword: The Right of Publicity—Towards a Comparative and International*

cases generally require celebrity status, as “there is little pecuniary gain in appropriating the name and likeness of an unknown individual.”⁵² Misappropriation cases that attach the “privacy” label can seriously confuse attorneys.⁵³ After all, how could public personalities “be concerned about privacy, since, by virtue of their celebrity, they had thrust themselves into the public light”?⁵⁴ This issue led earlier courts to reject the claim that the commercial use of a celebrity’s identity could possibly be considered an invasion of privacy since these plaintiffs were already in the public eye.⁵⁵ This rationale facilitated the establishment of the right of publicity as its own unique tort designed to protect the property value of celebrities’ identities, rather than their privacy interests.⁵⁶ Therefore, although the right to prohibit the unauthorized commercial use of identity developed first under the rubric of privacy law, the right of publicity developed specifically as a celebrity’s tort,⁵⁷ despite the fact there are actually hundreds of right of publicity cases involving noncelebrities.⁵⁸

While some courts have grappled with defining the term “celebrity,” comparing it to “trying to nail a jellyfish to the wall[.]”⁵⁹ in most jurisdictions celebrity status is no longer a required element for the tort.⁶⁰ The focus should not be on the individual’s celebrity, but “instead on the interest that would be protected in preventing the unauthorized use of that individual’s identity.”⁶¹ In fact, the majority view has extended protection to noncelebrities on the theory that fame or notoriety goes to the endgame of commercial damages, not to the existence of the right.⁶² In contrast to

Perspective, 18 LOY. L.A. ENT. L. REV. 421, 440–46 (1998) (discussing the rationales behind the right of publicity, which include both natural rights, theories, and economic theories; under the heading of natural rights theories fall unjust enrichment, labor theory, and personality theory, and under the rubric of economic theories, fall utilitarian/incentive theory, consumer protection arguments, and allocative economic theory).

52. Weiler, *supra* note 23, at 224 n.8.

53. See MCCARTHY, *supra* note 2, § 1:25.

54. Hunt, *supra* note 17, at 1614. See, e.g., O’Brien v. Pabst Sales Co., 124 F.2d 167, 170 (5th Cir. 1941) (holding that professional football player David O’Brien was a celebrity and could not be harmed by mere publicity when Pabst beer used his photograph in an advertising calendar).

55. See Hunt, *supra* note 17, at 1614.

56. MCCARTHY, *supra* note 2, § 1:7. See, e.g., *Haelan*, 202 F.2d at 868 (recognizing the monetary value of one’s own name and likeness).

57. MCCARTHY, *supra* note 2, § 1:7.

58. See generally I.J. Schiffrs, Annotation, *Invasion of Privacy by Use of Plaintiff’s Name or Likeness in Advertising*, 23 A.L.R. 3d 865 (1999) (summarizing the extent of particular uses of noncelebrity plaintiffs’ names or likenesses as constituting invasion of privacy).

59. *Rosanova v. Playboy Enter., Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976).

60. See MCCARTHY, *supra* note 2, § 4:15.

61. Hunt, *supra* note 17, at 1628.

62. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (1995) (“[c]elebrities are

this view, a minority of jurisdictions have held the right of publicity is solely a celebrity's right, and noncelebrities should only be able to recover when they can demonstrate considerable commercial value in their identity.⁶³ The American Bar Association's ("ABA") Intellectual Property Law Section's proposal for a federal right of publicity statute adopts the majority approach, allowing the right of publicity to apply to noncelebrities regardless of the demonstrable commercial value of their identity.⁶⁴

C. Florida's Approach to the Right of Publicity: Section 540.08

Invasion of privacy was firmly established as an actionable tort in the state of Florida in the 1944 landmark case of *Cason v. Baskin*.⁶⁵ Twenty-three years later, Florida enacted section 540.08,⁶⁶ recognizing the need to codify the right of publicity as a separate tort. Under Florida's commercial misappropriation statute, the publication of a name, portrait, photograph, or other likeness of any person for trade, commercial, or advertising purposes with neither that person's express written or oral consent, nor the consent of any other authorized person, including a surviving spouse or child, is prohibited.⁶⁷ In order to prevail in an action brought under section 540.08, the name or likeness must be specifically identifiable as that of the plaintiff⁶⁸ and must *directly promote* a product or service.⁶⁹

not precluded from establishing cognizable injury to personal interests in addition to commercial loss, nor are less well-known plaintiffs precluded from establishing commercial loss in addition to injury to personal interests . . .").

63. Hunt, *supra* note 17, at 1607. In Hunt's comment, she contends that the application of the right of publicity to noncelebrities is a problematic expansion of the tort, since the "right of publicity developed as a special right for celebrities to protect the commercial value that celebrities had developed in their persona. The extension of the right of publicity to noncelebrities is disturbing because in many instances, it interferes with the First Amendment's protection of commercial speech." *Id.* at 1609.

64. See *Proposed Right of Publicity Act*, 2000 A.B.A. SEC. OF INTELL. PROP. L. Comm. 201, Subcomm. C. 8, discussion available at <http://www.abanet.org/intelprop/coursematerials/committee-201-report.doc>. The Section's proposed statute is in draft form and has not been formally proposed or adopted by the ABA.

65. 20 So. 2d 243 (Fla. 1944) (identifying the *prima facie* case for right of privacy when plaintiff sued defendant for writing a partial biography containing unflattering descriptions).

66. FLA. STAT. ANN. § 540.08 (West Supp. 2001).

67. *Id.* at § 540.08(1).

68. See PROSSER & KEETON, THE LAW OF TORTS, § 117, at 853 (5th ed. 1984) (suggesting no liability for publishing a photo of a hand or a foot if there is nothing to indicate to whom it belongs).

69. *Loft v. Fuller*, 408 So. 2d 619, 622 (Fla. Dist. Ct. App. 1981).

1. Defining “Trade” and “Commercial” Under Section 540.08

Section 540.08 does not define the terms “trade,” “commercial,” or “advertising.”⁷⁰ Thus, the scope of the right of publicity varies widely depending on how judges or juries choose to interpret these terms.

According to case law, the terms “trade,” “commercial,” and “advertising” under section 540.08 are designed to prevent the unauthorized use of a name or likeness from “directly promot[ing] the product or service.”⁷¹ This narrow approach to defining “commercial” is illustrated in *Lane v. MRA Holdings*,⁷² where a 17-year-old girl exposed her breasts in a public place for a *Girls Gone Wild* video and related television commercials.⁷³ While her likeness was obviously a part of the video, it was not used to directly promote a product or service.⁷⁴ Thus, the use and publication of her likeness by the company did not violate section 540.08. In other words, the publication of her image in *Girls Gone Wild* did not become actionable simply because the tapes contained her image and were sold for a profit; in order to become actionable a defendant must use the name or likeness to directly promote sales of the tape.⁷⁵ In *Nottage v. American Express Co.*⁷⁶ “commercial use” was again interpreted narrowly, but with a different result.⁷⁷ The plaintiff, a condominium doorman, adequately stated a cause of action under section 540.08 when his picture

70. § 540.08(1).

71. *Loft*, 408 So. 2d at 622–23.

72. 242 F. Supp. 2d 1205 (M.D. Fla. 2002).

73. *Id.* at 1209.

Like *Tyne* and *Loft*, *Lane*’s lawsuit arose from an expressive work that has no purpose other than to entertain a segment of the general population. Moreover, as in *Tyne* and *Loft*, the Plaintiff in this case is not shown endorsing or promoting a product, but rather as participating in an expressive work.

Id. at 1215. *But see* Amicus Curiae Brief on Behalf of the Entertainment, Arts and Sports Law Section of the Florida Bar at 15–16, *Tyne v. Time Warner Entm’t Co.*, 336 F.3d 1286 (11th Cir. 2003) (No. 02-13281) (“The parade of horrors flowing from the erroneous *Loft* decision has already begun. This Court need look no further than the decision in *Lane* Now pornographers and pedophiles have been given an open door to video underage girls in the nude and distribute the same.”).

74. *Lane*, 242 F. Supp. 2d at 1215.

75. *Id.* *But see*, *Gritzke v. M.R.A. Holding, LLC*, No. 4:01CV495-RH, 2002 WL 32107540, at *1 (N.D. Fla. Mar. 15, 2002) (holding, under facts remarkably similar to *Lane*, that the plaintiff had “squarely alleged that defendant published her photograph in Florida for commercial and advertising purposes—specifically on the package of defendant’s videotape and in advertisements therefor—and that defendant did so without her permission”). However, the plaintiff in *Gritzke* was complaining about the use of her image on the outside cover of a videotape package, and in *Lane* the plaintiff did not allege that her likeness was used in box cover advertising.

76. 452 So. 2d 1066 (Fla. Dist. Ct. App. 1984).

77. *Id.* at 1068.

was taken at his place of work and used without his consent for mass-mailed postcards and large posters advertising the condominium.⁷⁸

More recently, in *Cummings v. Sony Music*,⁷⁹ a musician sued under section 540.08 alleging the unauthorized use of his commercial "image, name and vocals on eight compact disc recordings performed by the musical group, Harold Melvin & The Blue Notes."⁸⁰ The defendant sought a stay pending the decision in *Tyne*.⁸¹ The *Cummings* court however denied the stay, holding that even under a narrow reading of section 540.08, an allegation of public use of a photograph for commercial purposes, without permission, stated a sufficient commercial misappropriation claim.⁸² Unlike Lane's image, the photograph of Cummings was found on the packaging of the compact discs and therefore constituted a commercial use.⁸³ Clearly, courts in Florida are construing section 540.08 quite narrowly, employing it only for direct promotion of a product or service.

2. Descendibility Under Section 540.08

Jurisdictions that recognize either a statutory or common law right of publicity often disagree as to the inheritability of the right.⁸⁴ There are three distinct interpretations of descendibility in case law: "1) the right of publicity is a property right and thus inheritable; 2) the right of publicity is a personal privacy right, and thus may only be asserted by the individual during his or her lifetime; and 3) the right of publicity should be descendible only if the individual has attempted to commercially exploit his persona during his lifetime."⁸⁵ The issue of descendibility is no longer as contentious as it once was.⁸⁶ The majority of jurisdictions that have considered the issue now recognize that the right of publicity should be

78. *Id.*

79. No. 01-C4375, 2003 U.S. Dist. LEXIS 17394, at *1 (S.D.N.Y. Sept. 30, 2003) (interpreting Florida law in a New York court).

80. *Id.*

81. *Id.* at *4.

82. *Id.* at *10.

83. *Id.* at *11. See also *Gritzke*, No. 4:01CV495-RH. Under this rationale, plaintiffs in *Tyne* would have a stronger case if they or their family members' images were depicted on merchandise or DVD packaging of *The Perfect Storm*; however, no merchandise or videos contained their likenesses. See *Tyne v. Time Warner Entm't Co.*, 336 F.3d 1286, 1288-89 (11th Cir. 2003).

84. Weiler, *supra* note 23, at 225.

85. *Id.* at 235 n.90.

86. See Roberta Rosenthal Kwall, *Is Independence Day Dawning for the Right of Publicity?*, 17 U.C. DAVIS L. REV. 191, 207-28 (1983) (detailing various approaches courts have adopted to determine whether the right of publicity is descendible).

descendible.⁸⁷ Nonetheless, little uniformity exists with respect to the duration of that right subsequent to the plaintiff's death.⁸⁸

Under section 540.08, a decedent's name cannot be commercially exploited unless the requisite consent is obtained from the decedent's family or other designated representatives,⁸⁹ and an action may be brought to enjoin a defendant or to recover damages as long as the misappropriation occurs within forty years of the person's death.⁹⁰ The action may be instituted by a "person, firm, or corporation authorized in writing to license the commercial use" of a decedent's name or likeness, or if no written authority was so given, the surviving spouse and children may sue (like the surviving family did in *Tyne*).⁹¹ In theory, "right of publicity actions by relatives of a decedent . . . should not suffer from this confusion because the right of publicity, unlike the personal right of privacy, can be assigned or licensed during an individual's lifetime and made the subject of an express or implied contract."⁹²

3. Right of Publicity v. First Amendment

The right of publicity as recognized by statute and common law is fundamentally limited by the First Amendment.⁹³ Since newsworthy and political speech, as well as speech in the form of entertainment, enjoy the utmost protection under the First Amendment,⁹⁴ freedom of speech remains a legitimate defense against a right of publicity action.⁹⁵ The film and publishing industries are often designed purely around principles of entertainment value and are therefore widely immune from right of publicity liability.⁹⁶ This immunity is generally based on the grounds that artistic or expressive outlets demand high levels of First Amendment

87. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. h (1995).

88. *Id.* ("Statutes recognizing descendibility typically limit the duration of post mortem rights to a fixed term of years"). A number of states recognize post mortem publicity rights by statute, usually subject to a fixed duration. *See e.g.*, FLA. STAT. ANN. § 540.08(4) (40 years); CAL. CIV. CODE § 3344.1(h) (70 years).

89. § 540.08(1)(c).

90. § 540.08(4).

91. § 540.08(1)(c)(2).

92. *See* Kwall, *supra* note 86, at 210.

93. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (1995).

94. *Id.*

95. *See, e.g.*, *Rogers v. Grimaldi*, 695 F. Supp. 112, 122 (S.D.N.Y. 1988) (*aff'd* on other grounds, 875 F.2d 994 (2d Cir. 1989)); *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 461-62 (Cal. 1979).

96. *See generally* MCCARTHY, *supra* note 2, § 8:74 (stating fictional use of human identity in docudramas is not actionable as an invasion of privacy).

protection.⁹⁷ Thus, films and published works enjoy a level of shelter under the First Amendment that is not given to mere “merchandise” because they are “vehicles through which ideas and opinions are disseminated”⁹⁸ Consequently, the right of publicity does not ordinarily include the use of a person’s identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses.⁹⁹

Some courts have used a framework borrowed from copyright law’s fair use analysis¹⁰⁰ to resolve the tension between right of publicity and the First Amendment, while other courts have developed their own tests.¹⁰¹ The California Supreme Court recently relied on and expounded upon the transformative test that it developed in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*¹⁰² The transformative test asserts that it “does not matter what precise literary category the work falls into. What matters is whether the work is transformative rather than whether it is parody or satire or caricature or serious social commentary or any other specific form of expression.”¹⁰³ Professor F. Jay Dougherty writes that “[i]f the transformativeness test is subjected to the Supreme Court’s modern approach to assessing the constitutionality of state laws regulating speech, it should be found unconstitutional.”¹⁰⁴

The Missouri Supreme Court took another approach and turned to attorney Mark S. Lee’s proposed predominance test in *John Doe v. TCI Cablevision*.¹⁰⁵

If a product is being sold that predominantly exploits the commercial value of an individual’s identity, that product should be held to violate the right of publicity and not be protected by the First Amendment, even if there is some ‘expressive’ content in it that might qualify as ‘speech’ in other circumstances. If, on the other hand, the predominant purpose of the product is to make an expressive comment on or about a celebrity, the

97. *Id.*

98. *Hicks v. Casablanca Records*, 464 F. Supp. 426, 430 (S.D.N.Y. 1978). See *Joseph Burstyn v. Wilson*, 343 U.S. 495, 501–02 (1952).

99. See *Hicks*, 464 F. Supp at 430.

100. See MCCARTHY, *supra* note 2, § 8:38.

101. Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 57–61 (1994); MCCARTHY, *supra* note 2, § 8:38.

102. 21 P.3d 797 (Cal. 2001).

103. *Winter v. DC Comics*, 69 P.3d 473, 479 (Cal. 2003).

104. F. Jay Dougherty, *All the World’s Not a Stooge: The “Transformativeness” Test for Analyzing a First Amendment Defense to a Right of Publicity Claim Against Distribution of a Work of Art*, 27 COLUM. J.L. & ARTS 1, 35 (2003).

105. 110 S.W.3d 363 (Mo. 2003).

expressive values could be given greater weight.¹⁰⁶

Lee's predominance test "threatens core First Amendment interests . . . [and] is slanted heavily towards celebrity interests, provides no meaningful guidelines as to what purpose is 'predominate,' and could chill many traditional media uses of real names that clearly should be protected by the First Amendment."¹⁰⁷ Beyond copyright's fair use analysis and these particular tests, courts have also suggested avoiding the conflict entirely by narrowly construing the scope of the statute or common law at issue when it is applied to expressive works, including motion pictures.¹⁰⁸

Section 540.08 expressly circumscribes the right of publicity when it conflicts with the First Amendment, stating that the right of publicity is inapplicable when a name or likeness is used in any news medium as part of a good faith news report or presentation that has current, legitimate public interest, as long as the name or likeness is not used for advertising purposes.¹⁰⁹ As *Tyne* demonstrates, however, these statutory exceptions tend to be insufficiently flexible to resolve the right of publicity's conflict with the First Amendment.¹¹⁰ Nevertheless, expressive works generally tend to prevail when challenged by those who argue for narrow interpretations of right of publicity statutes.¹¹¹

Rogers v. Grimaldi provides an example of this First Amendment protection for motion pictures.¹¹² Ginger Rogers sued the producer of a Fellini film called *Ginger and Fred*, which was a fictional account of an Italian dance team that emulated Fred Astaire and Ginger Rogers.¹¹³ When Rogers alleged an infringement of her right of publicity,¹¹⁴ everything

106. *Id.* at 374. (quoting Marc S. Lee, *Agents of Chaos: Judicial Confusion in Defining the Right of Publicity—Free Speech Interface*, 23 LOY. L.A. ENT. L. REV. 471, 500 (2003)); see also Tina Spee, *Law Review Article Guides Missouri High Country in Ruling*, DAILY JOURNAL EXTRA, Sept. 22, 2003, at 6.

107. Dougherty, *supra* note 104, at 14 n.67.

108. See, e.g., *Valentine v. C.B.S., Inc.*, 698 F.2d 430, 433 (11th Cir. 1983) (holding that there was no direct use of a name to promote a product when plaintiff's name was used in song about the murder trial of prizefighter Ruben Carter).

109. § 540.08(3)(a).

110. See *Tyne*, 336 F.3d at 1291, 1293.

111. See generally MCCARTHY, *supra* note 2 § 8:74. "[E]ven if Defendants used Plaintiffs' names to advertise their film—a fact not reflected in the record—such advertisements would likewise be protected under the First Amendment." Amicus Curiae Brief of The Motion Picture Association of America, Inc., et al. at 14, *Tyne v. Time Warner Entm't Co.*, 336 F.3d 1286 (11th Cir. 2003) (No. 02-13281).

112. 695 F. Supp. 112, 124 (S.D.N.Y. 1988), *aff'd on other grounds*, 875 F.2d 994 (2d Cir. 1989).

113. See *id.* at 114.

114. *Id.* at 121.

seemed to be in her favor—she was a celebrity and the film was a commercial endeavor. However, the court held that the First Amendment provides a complete defense to a right of publicity action as long as a film is not an “advertisement in disguise.”¹¹⁵ Similarly, the plaintiff in *Polydoros v. Twentieth Century Fox Film Corp.*¹¹⁶ was precluded from prevailing on a claim of commercial misappropriation when a character, similar in name and appearance to him as a child, appeared in the film *The Sandlot*, which was written by his childhood acquaintance.¹¹⁷ Even though filmmakers used photographs of the character in advertising *The Sandlot*, the First Amendment protected the film from right of publicity liability.¹¹⁸ *The Perfect Storm*, like *Ginger and Fred* and *The Sandlot*, was an expressive work inherently protected by the First Amendment. Despite this precedent, plaintiffs argued in *Tyne* that the First Amendment does not protect Warner.¹¹⁹ The plaintiffs in *Tyne* sued not only under section 540.08, but also under common law theories of false light invasion of privacy and public disclosure of private facts.¹²⁰

D. Common Law Invasion of Privacy

1. False Light Invasion of Privacy

One that places another person “before the public in a false light” is subject to liability under the common law tort of false light invasion of privacy.¹²¹ Liability occurs so long as “(a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard¹²² as to the falsity of

115. *See id.* at 124.

116. 67 Cal. App. 4th 318 (2d Dist. 1997), *appeal dismissed*, 965 P.2d 724 (Cal. 1998). Both examples of first amendment protection come from California courts, simply because that is where the vast majority of Hollywood cases are heard. Under Part IV of this note, *Loft*, a Florida case that is highly comparable to *Tyne*, will be thoroughly analyzed, partially on First Amendment grounds.

117. *Id.* at 320–21.

118. *Id.* at 325.

119. *See discussion infra* Part IV.

120. *Tyne*, 336 F.3d at 1289.

121. RESTATEMENT (SECOND) OF TORTS § 652E (1977).

122. The American Law Institute that drafted the Restatement of Torts set forth a caveat that it took “no position on whether there are any circumstances under which recovery can be obtained . . . if the actor did not know of or act with reckless disregard as to the falsity of the matter publicized and the false light in which the other would be placed but was negligent in regard to these matters.” *Id.*

the publicized matter and the false light in which the other would be placed.”¹²³

It is essential that the matter published be false because the tort’s purpose is to protect people from appearing before the public in a light that is other than truthful.¹²⁴ A false light cause of action also requires publicity.¹²⁵ This is satisfied only when the matter in controversy is communicated to the public at large, or to enough individuals, so that it becomes general knowledge.¹²⁶ It is necessary that a reasonable person be seriously offended as a result of a major misrepresentation of character, history, activities or beliefs.¹²⁷ Thus, the hypersensitive will not be protected,¹²⁸ and mere inaccuracy in reporting will not support recovery.¹²⁹ Although it is not necessary for the plaintiff to be defamed, false light cases often form a basis for defamation actions as well.¹³⁰ However, the difference between these two actions is that the tort of defamation is intended to protect public reputation, while an action for false light protects the right to be let alone.¹³¹

2. Public Disclosure of Private Facts

Another common law tort recognized in Florida that falls under the invasion of privacy heading is public disclosure of private facts. This tort can remedy invasions into a non-celebrity’s privacy.¹³²

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.¹³³

There are four required elements in a cause of action for public disclosure of private facts: (1) the disclosure must be public; (2) the disclosure must

123. *Id.*

124. *Id.* § 652E cmt. a.

125. *See* Prosser, *supra* note 26, at 400.

126. RESTATEMENT (SECOND) OF TORTS § 652E cmt. a (1977).

127. *Id.* § 652E cmt. c.

128. *See* *Jacova v. S. Radio & Television Co.*, 83 So. 2d 34 (Fla. 1955) (holding that the plaintiff’s privacy had not been violated when he became the innocent subject of a televised gambling crackdown).

129. RESTATEMENT (SECOND) OF TORTS § 652E cmt. c (1977).

130. *See id.* § 652E cmt. b.

131. *See* Prosser, *supra* note 26, at 400.

132. Hunt, *supra* note 17, at 1607.

133. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

include private facts that are not already exposed to the public eye; (3) the disclosure must be highly offensive and objectionable to a reasonable person; and (4) there must be no legitimate public interest in the disclosure.¹³⁴ As with false light invasion of privacy, “the hypersensitive individual will not be protected.”¹³⁵ Unlike California, Florida has not adopted a fifth prong, which would require malice or a reckless disregard in addition to the offensiveness of the disclosure.¹³⁶

Written disclosure of private facts was originally required for a plaintiff to successfully bring a suit—mere spoken words could not support a privacy action.¹³⁷ More recently, this principle has been tailored to include disclosure through publication of photographs,¹³⁸ and through other media, including television¹³⁹ and motion pictures.¹⁴⁰ In *Cox Broadcasting Corp. v. Cohn*,¹⁴¹ the Supreme Court held that under the First Amendment there can be no recovery for disclosure of truthful facts that are a matter of public record.¹⁴² However, the case leaves open the question of whether liability can constitutionally be imposed for other private facts that would be highly offensive to a reasonable person and that are not of legitimate concern.¹⁴³ The Florida Supreme Court has declared that in determining whether a matter is of public concern, the court should focus on whether the published information as a whole is of general public concern, not whether particular facts are of legitimate public concern.¹⁴⁴ Often, whether something is of legitimate public concern hinges on the notoriety of the person as a public figure.¹⁴⁵

134. See *id.*

135. See, e.g., *Cape Publ'ns, Inc. v. Bridges*, 423 So. 2d 426, 427 (Fla. 1982), *cert. denied*, 464 U.S. 893 (1983) (stating that kidnapping situations are matters of general public interest, and therefore information that is lawfully obtained about a particular case is considered newsworthy).

136. See *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762, 768 (1983).

137. See *Warren & Brandeis*, *supra* note 17, at 217.

138. See, e.g., *Barber v. Time, Inc.*, 159 S.W.2d 291, 295 (Mo. 1942).

139. See, e.g., *Taylor v. K.T.V.B., Inc.*, 525 P.2d 984, 988 (Idaho 1974). In this case, a television station was sued for invasion of privacy after airing a film clip featuring the plaintiff. *Id.* at 985.

140. See, e.g., *Donahue v. Warner Bros.*, 272 P.2d 177, 184 (Utah 1954). There, a film studio was sued for invasion of privacy by a widow and daughter due to a film's depiction of a deceased entertainer. *Id.* at 178.

141. 420 U.S. 469 (1975).

142. See *id.* at 496.

143. See *id.* at 490–91.

144. See Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 299–300 (1983).

145. Courts have agreed that if a person emerges from seclusion and becomes an actor in an occurrence of public interest, then there is no invasion of privacy in publishing an account of the occurrence. See *Jacova*, 83 So. 2d at 36.

3. Procedural Standing for Common Law Invasion of Privacy

Courts have held that the right of privacy is a personal right peculiar to the person whose privacy has been invaded.¹⁴⁶ Since there can be no invasion of a personal right after the individual has died, the relatives of a decedent may not sue for an invasion of the decedent's privacy that occurred after his or her death.¹⁴⁷ Consequently, family members, unless their own rights of privacy have been violated as well, have no standing to sue under the common law.¹⁴⁸ Holding otherwise could lead to double recovery.¹⁴⁹ However, if the privacy of a family member has been independently violated as a result of the plaintiff's privacy having been invaded, the cause of action may succeed and the family member of the deceased will have standing to sue under the doctrine of "relational right of privacy."¹⁵⁰ This exception is only permitted where the portrayal of a dead family member is "sufficiently egregious," and not "merely inaccurate or dramatized."¹⁵¹

4. Damages

After establishing a cause of action for invasion of privacy, plaintiffs can be afforded injunctive relief¹⁵² or actual or compensatory damages¹⁵³

146. See Kwall, *supra* note 86, at 208.

147. See *Loft*, 408 So. 2d at 621.

148. See *Santiesteban v. Goodyear Tire & Rubber Co.*, 306 F.2d 9, 12 (5th Cir. 1962); See also Kwall, *supra* note 86, at 208.

149. *Santiesteban*, 306 F.2d at 12.

150. *Fla. SupCt Asked to Interpret Commercial Misappropriation Statute*, 31 Media Law Reporter 28, (July 22, 2003), at <http://ipcenter.bna.com/pic2/ip.nsf/id/BNAP-5PPL8T?OpenDocument>.

151. See *id.*

152. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 48(2) (1995).

The appropriateness and scope of injunctive relief depend upon a comparative appraisal of all the factors of the case, including the following primary factors: (a) the nature of the interest to be protected; (b) the nature and extent of the appropriation; (c) the relative adequacy to the plaintiff of an injunction and of other remedies; (d) the relative harm likely to result to the legitimate interests of the defendant if an injunction is granted and to the legitimate interests of the plaintiff if an injunction is denied; (e) the interests of third persons and of the public; (f) any unreasonable delay by the plaintiff in bringing suit or otherwise asserting his or her rights; (g) any related misconduct on the part of the plaintiff; and (h) the practicality of framing and enforcing the injunction.

Id.

153. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49(2) (1995).

Whether an award of monetary relief is appropriate and the appropriate method of measuring such relief depend upon a comparative appraisal of all the factors of the case, including the following primary factors: (a) the degree of certainty with which the plaintiff has established the fact and extent of the pecuniary loss or the actor's

based on injuries resulting from the tortious conduct, including impairment of health, mental anguish, loss of friends, loss of respect in the community, and injury to character or reputation.¹⁵⁴ If the evidence fails to demonstrate a substantial injury, the plaintiff may be awarded nominal or statutory damages.¹⁵⁵ *Tyne* should never reach an assessment of damages.¹⁵⁶ However, assuming that it does, damages will only be assessed under Florida's right of publicity statute, which specifically provides for both compensatory and punitive damages.¹⁵⁷

III. THE UNDISPUTED FACTS OF *TYNE V. TIME WARNER*

The material facts surrounding *Tyne v. Time Warner* are undisputed.¹⁵⁸ In October 1991, a rare confluence of meteorological events led to a powerful weather system off the New England Coast, termed the "storm of the century."¹⁵⁹ The *Andrea Gail*, a commercial fishing vessel, was lost at sea during the peak of the tempest.¹⁶⁰ All of the crewmembers aboard the vessel, including the boat's captain, Billy Tyne, and fisherman Dale Murphy, Sr., were presumed dead.¹⁶¹ The meteorological forces which caused the loss of the *Andrea Gail* were the subject of newspaper and television reports, as well as a book written by Sebastian Junger entitled *The Perfect Storm: A True Story of Men Against the Sea*.¹⁶² Published in 1997, the book was based upon news reports, as well as personal interviews

pecuniary gain resulting from the appropriation; (b) the nature and extent of the appropriation; (c) the relative adequacy to the plaintiff of other remedies; (d) the intent of the actor and whether the actor knew or should have known that the conduct was unlawful; (e) any unreasonable delay by the plaintiff in bringing suit or otherwise asserting his or her rights; and (f) any related misconduct on the part of the plaintiff.

Id.

154. See *Cason*, 20 So. 2d at 250.

155. See generally *id.* at 247 (allowing only nominal damages since there was no substantial injury or actual mental anguish suffered).

156. See *infra* Part V (discussing why the Florida Supreme Court should find in Warner's favor).

157. FLA. STAT. ANN. § 540.08(2). See *Santiesteban*, 306 F.2d at 12 ("[M]alice is not required to be shown in cases based on an alleged invasion of the right of privacy but malice may form the basis for punitive damages.").

158. See Defendants' Memorandum of Law in Support of Their Dispositive Motion for Summary Judgment at 2, *Tyne v. Time Warner Entm't Co.*, 336 F.3d 1286 (11th Cir. 2003) (No. 02-13281).

159. *Tyne v. Time Warner Entm't Co.*, 204 F. Supp. 2d 1338, 1339 (M.D. Fla. 2002).

160. *Id.*

161. *Id.*

162. *Tyne*, 336 F.3d at 1288.

with meteorologists, local fishermen and relatives of the deceased,¹⁶³ including plaintiffs Jodi Tyne and Debra Tigie.¹⁶⁴ That same year, Warner purchased motion picture rights to Junger's bestseller.¹⁶⁵

In June 2000, Warner released the film entitled *The Perfect Storm*, which predominantly depicted the lives and deaths of Tyne and Murphy,¹⁶⁶ played by George Clooney and John C. Reilly, respectively.¹⁶⁷ The film was far more fictionalized than Junger's book,¹⁶⁸ portraying Tyne, "the main protagonist in the [p]icture . . . as a down-and-out swordboat captain who was obsessed with the next big catch."¹⁶⁹ Furthermore, Warner took additional artistic license with the land-based interpersonal relationships between crewmembers and their families, including the plaintiffs, who were briefly depicted in the film.¹⁷⁰

Plaintiffs note that the motion picture was reviewed by film critics who found that Tyne was depicted as a captain who had "hit a dry patch" and whose last catch was "dwarfed by that of rival captain Linda Greenlaw (Mary Elizabeth Mastrantonio) and scorned by the greedy boat owner (Michael Ironside)."¹⁷¹ According to the film's scenario, Tyne, in sheer desperation, decided to head "with Ahab-like obsessiveness" into "the treacherous October weather."¹⁷² One particular scene is "an admittedly fabricated depiction of Tyne berating his crew for wanting to return to port in Gloucester, Massachusetts."¹⁷³ Tyne was left with the choice of "either waiting out the storm and losing the catch or facing it and perhaps losing" all of his crew; the script had Tyne choosing the latter.¹⁷⁴ However, since

163. *Id.*

164. Both Jodi Tyne and Debra Tigie consented to multiple meetings with Junger. Defendants' Statement of Undisputed Facts in Support of Their Dispositive Motion for Summary Judgment at 4, *Tyne* (No. 02-13281).

165. *Tyne*, 336 F.3d at 1288.

166. *Id.*

167. Defendants' Statement of Undisputed Facts in Support of Their Dispositive Motion for Summary Judgment at 10, *Tyne* (No. 02-13281).

168. Peterson explained under deposition that *The Perfect Storm* is "not a documentary [but rather] a motion picture, largely fictionalized." Appellants' Brief in Support of Appeal at 5-8, *Tyne v. Time Warner Entm't Co.*, 336 F.3d 1286 (11th Cir. 2003) (No. 02-13281). He went on to assert that "'Sebastian [Junger] hypothesized what might have happened and we dramatized that.'" *Id.* at 12.

169. *Tyne*, 336 F.3d at 1288.

170. *Id.*

171. Movants' Initial Brief on Question Certified By The Eleventh Circuit at 17 n.7, *Tyne v. Time Warner Entm't Co.*, 336 F.3d 1286 (11th Cir. 2003) (No. 02-13281) (quoting Peter Keough, *Sea Plus, The Perfect Storm is Downgraded*, THE BOSTON PHOENIX, June 29, 2000).

172. *Id.*

173. *Tyne*, 336 F.3d at 1288.

174. See Keough, *supra* note 171.

"the vessel was lost at sea and the crew was never found, no one [actually] knows the events that occurred aboard the *Andrea Gail* after it left Gloucester, Massachusetts in October 1991."¹⁷⁵

Warner admittedly "neither sought permission from the individuals depicted in the picture nor compensated them in any manner."¹⁷⁶ While *The Perfect Storm* did not hold itself out as precisely truthful, it did offer the disclaimer on screen that "THIS FILM IS BASED ON A TRUE STORY."¹⁷⁷ Early press releases contained a similar statement, suggesting that the film was "[the] true story of the fiercest, most powerful storm in modern history."¹⁷⁸ Additionally, a disclaimer inserted into the closing credits provided the following statement: "This film is based on actual historical events contained in 'The Perfect Storm' by Sebastian Junger. Dialogue and certain events and characters in the film were created for the purpose of fictionalization."¹⁷⁹

Defendants also concede that *The Perfect Storm* was quite successful at the box office grossing over \$150 million.¹⁸⁰ Furthermore, the motion picture has been released and sold in VHS and DVD formats, shown on cable and pay-per-view television, and has spawned merchandise, including t-shirts and posters.¹⁸¹ However, none of the merchandise contains the likenesses of Tyne, Murphy, or any of the plaintiffs.¹⁸²

On August 24, 2000, plaintiffs filed suit against Time Warner Entertainment Co., Baltimore/Spring Creek Pictures, and Radiant Productions, on a total of thirteen counts,¹⁸³ asserting claims for: "(1)

175. Defendants' Statement of Undisputed Facts in Support of Their Dispositive Motion for Summary Judgment at 3, *Tyne* (No. 02-13281).

176. *Tyne*, 336 F.3d at 1288.

177. *Id.* at 1288-89.

178. Defendants' Statement of Undisputed Facts in Support of Their Dispositive Motion for Summary Judgment at 10, *Tyne* (No. 02-13281).

179. *The Perfect Storm* (Warner Bros. 1997). Wolfgang Peterson, the film's Director and Executive Producer, testified that "nobody knows what really happened. So again, I had to fictionalize . . ." Appellants Brief in Support of Appeal at 7, *Tyne* (No. 02-13281). Peterson also admitted that the film's depiction of Tyne's earlier lack of commercial success was contradicted by facts of Junger's book and that the scene where Tyne berates the crew for wanting to turn back, was entirely fabricated. *Id.* at 8.

180. *Tyne*, 204 F. Supp. 2d at 1341.

181. *Id.*

182. *Id.*

183. Joint Final Pretrial Statement at 3, *Tyne v. Time Warner Entm't Co.*, 336 F.3d 1286 (11th Cir. 2003) (No. 02-13281).

Each of the Plaintiffs has filed a count of commercial misappropriation under F.S. 540.08 in their respective individual capacities (Counts Two, Three, Four, Nine, Ten and Thirteen). The Tyne and Murphy children have each filed a count of statutory misappropriation on behalf of their respective decedent fathers (Counts

unauthorized commercial appropriation of decedents' likenesses, in violation of [section] 540.08; (2) unauthorized commercial appropriation of Plaintiffs' likenesses, also in violation of [section] 540.08; (3) common law invasion of privacy—false light; and (4) common law invasion of privacy based on [public] disclosure of private facts.”¹⁸⁴ Plaintiffs sought \$10,350,000 in compensatory damages,¹⁸⁵ as well as additional punitive damages “based upon the intentional nature of Warner’s misconduct, including its actual knowledge of the wrongfulness of the conduct and the high probability of injury.”¹⁸⁶

IV. ANALYSIS OF THE FIRST TWO¹⁸⁷ TYNE CASES

A. Round #1—Florida’s District Court Decision

In a May 9, 2002 order, the district court granted Warner’s motion for summary judgment on all thirteen counts.¹⁸⁸

1. Right of Publicity

Plaintiffs alleged that by using the names and likenesses of decedents Tyne and Murphy in *The Perfect Storm* without the consent of their respective families, Warner violated section 540.08.¹⁸⁹ Plaintiffs also asserted claims based on the film’s depiction of their own likenesses

One and Eight). Additionally, the Tyne children have each filed common law counts of invasion of privacy under the theory of presentation in a false light arising from the false depiction of their deceased father, Billy Tyne (Counts Five and Six). Count Seven, which had originally alleged invasion of privacy by false light on behalf of Jodi Tyne, was voluntarily dismissed with prejudice by Plaintiff The Murphy child and his mother, Debra J. Tigie, have each filed common law counts of invasion of privacy under the theory of public disclosure of private facts (Counts Eleven and Twelve).

Id.

184. *Tyne*, 204 F. Supp. 2d at 1339.

185. Joint Final Pretrial Statement at 15, *Tyne* (No. 02-13281).

186. *Id.* at 17.

187. Before substantive issues directly related to the invasion of privacy claims were argued in the District Court case, preliminary matters of civil procedure were decided in *Tyne v. Time Warner Entm’t Co.*, 212 F.R.D. 596 (M.D. Fla. 2002). The Plaintiffs sought the production of documents that were identified by the studios as attorney-client privileged. *Id.* at 597. The court eventually granted in part and denied in part the family’s motion to compel documents. *Id.* at 601. Those documents that were protected by privilege would not be produced, while the remainder that was not protected would be produced. *Id.*

188. *Tyne v. Time Warner Entm’t Co.*, 204 F. Supp. 2d 1338, 1344 (M.D. Fla. 2002).

189. *Id.* at 1340.

without their consent.¹⁹⁰ Defendants argued that they did not violate section 540.08, since *The Perfect Storm* is an expressive work that has no commercial advertising purpose; however, it was plaintiffs' contention (1) that a commercial purpose existed by way of the marketing and distribution of *The Perfect Storm*, and (2) that the film was not protected under the First Amendment since it contained substantial material falsities or fictional elements.¹⁹¹

a. Commercial Purpose

The district court rejected the plaintiffs' "commercial purpose" argument, finding that plaintiffs presented "no evidence showing that their names and likenesses were used 'to directly promote' *The Perfect Storm*."¹⁹² In the absence of such evidence of a direct promotion, plaintiffs do not have a cause of action under section 540.08.¹⁹³ Since its enactment, every federal district court in Florida which has construed section 540.08 "has agreed that it applies only where a claimant's name or likeness is used to directly promote a product or service."¹⁹⁴ Furthermore, no court has ever applied section 540.08 to "an expressive work, such as a film, a book, or a song."¹⁹⁵

In *Loft v. Fuller*,¹⁹⁶ a case the district court found to be squarely on point with *Tyne*, Florida defined the term "commercial purpose" as it pertains to section 540.08.¹⁹⁷ Decedent Robert Loft was a commercial pilot on Eastern Airlines Flight 401 en route from New York to Miami when it

190. *Id.*

191. *Id.* at 1340-41.

192. *Id.* at 1342.

193. *Tyne*, 204 F. Supp. 2d at 1342.

194. Appellees' Answer Brief at 3, *Tyne v. Time Warner Entm't Co.*, 336 F.3d 1286 (11th Cir. 2003) (No. 02-13281); see, e.g., *Epic Metals Corp. v. CONDEC, Inc.* 867 F. Supp. 1009, 1016 (M.D. Fla. 1994) (holding that section 540.08 "prevents the unauthorized use of a name or personality to directly promote the product or service of the publisher"); *NFL v. The Alley, Inc.*, 624 F. Supp. 6, 10 (S.D. Fla. 1983) (holding that section 540.08 "prohibit[s] unconsented use of an individual's name and likeness only when such directly promotes a commercial product or service"); see also Defendants' Memorandum of Law in Support of Their Dispositive Motion for Summary Judgment at 8, *Tyne v. Time Warner Entm't Co.*, 336 F.3d 1286 (11th Cir. 2003) (No. 02-13281).

195. Appellees' Answer Brief at 3, *Tyne* (No. 02-13281). This approach is consistent with the Restatement (Third) of Unfair Competition, which asserts that "[u]se of another's identity in a novel, play, or motion picture is also not ordinarily an infringement." RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (1995).

196. 408 So. 2d 619 (Fla. Dist. Ct. App. 1981).

197. *Id.* at 622-23.

crashed into the Florida Everglades in 1972.¹⁹⁸ For months following the crash, the news media reported sightings of apparitions of Flight 401 crewmembers, including Loft.¹⁹⁹ Subsequently, John Fuller wrote a non-fictional account of both the crash and the reported poltergeists called *The Ghost of Flight 401*.²⁰⁰ In 1978, Fuller's book was adapted into a motion picture, just as Junger's bestseller has been.²⁰¹ Loft's family filed an action for unauthorized publication of Loft's name and likeness because the movie represented Loft as a "reappearing ghost."²⁰²

In *Loft*, the court held that "[s]ection 540.08, by prohibiting the use of one's name or likeness for trade, commercial or advertising purposes, is designed to prevent the unauthorized use of a name to directly promote the product or service of the publisher."²⁰³ The term "commercial," as employed in section 540.08, is not an absolute bar to the use of people's names.²⁰⁴ Rather, it protects individuals from the unauthorized use of their names or likenesses solely in the context of advertisement or promotion. While the film, like the book, was a "commercial" endeavor designed to generate money, this fact in no way distinguished it "from almost all other books, magazines or newspapers and simply does not amount to the kind of commercial exploitation prohibited by the statute."²⁰⁵ Therefore, the use of the decedent's name in the publication of *The Ghost of Flight 401* and the production and distribution of the subsequent movie was not a direct promotion of a product or service of the publisher under section 540.08.²⁰⁶

Applying the rationale of *Loft* to *Tyne*, the district court found that the depiction of plaintiffs and their deceased family members did not constitute an infringement of section 540.08.²⁰⁷ "Having determined that [the plaintiffs'] names and likenesses were not used for trade, commercial, or advertising purposes, the court need not extensively address the issue [whether *The Perfect Storm*] falls within the [section] 540.08(3) exception for publications 'having a current and legitimate public interest'"²⁰⁸ However, the court did note that motion pictures are entitled to complete

198. *Id.* at 620.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Loft*, 408 So. 2d at 620; see also *Tyne*, 204 F. Supp. 2d at 1341.

203. *Loft*, 408 So. 2d at 622-23.

204. *Id.* at 623.

205. *Id.*

206. *Id.* at 622-23.

207. *Tyne*, 204 F. Supp. 2d at 1341.

208. See *id.* at 1342. See also *infra* Part V.C.

protection under the First Amendment.²⁰⁹

b. Falsity

Plaintiffs' second argument involved a novel approach to overcoming the ambiguous language of section 540.08. Although plaintiffs concede the First Amendment embraces fictionalization, even with respect to motion pictures, they nevertheless contend that protection is forfeited where the work is passed off as truth instead of fiction or parody.²¹⁰ Both parties agreed that Junger's book "contains no substantial or material falsity and [therefore] enjoys complete protection under the First Amendment."²¹¹ Plaintiffs, however, argued that the *motion picture* adaptation of *The Perfect Storm* tells a different story, thus making it subject to publicity rights liability.²¹² Since "[n]othing in the language of the disclaimer suggests which characters or events 'were created for the purpose of dramatization,'" the film gives the impression that it is a work of non-fiction.²¹³ Plaintiffs argued that, unlike *Tyne*, the defendants in *Loft* did not allege any false statements about the deceased or fictionalize any portion of the story.²¹⁴ Since multiple legitimate media reports recounted Captain Loft's alleged "reappearing ghost,"²¹⁵ "[t]he only thing 'false' in *Loft* was the physiological impossibility that ghosts exist."²¹⁶ Still, the district court held that even though *The Perfect Storm* contained fictionalized elements while purporting itself to be "a true story," the plaintiffs' falsity argument was completely meritless.²¹⁷ Falsity is simply not an element of a right of publicity cause of action.²¹⁸

209. According to the Supreme Court "[t]hat books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures." *Joseph Burstyn v. Wilson*, 343 U.S. 495, 501-02 (1952).

210. Appellants' Brief in Support of Appeal at 30-32, *Tyne v. Time Warner Entm't Co.*, 336 F.3d 1286 (11th Cir. 2003) (No. 02-13281).

211. Appellants' Reply Brief at 10, *Tyne v. Time Warner Entm't Co.*, 336 F.3d 1286 (11th Cir. 2003) (No. 02-13281).

212. *Id.*

213. *See id.* at 12 n.2.

214. *Id.* at 18.

215. *Loft*, 408 So. 2d at 620.

216. Appellants' Reply Brief at 19, *Tyne* (No. 02-13281).

217. *Tyne*, 204 F. Supp. 2d at 1342.

218. MCCARTHY, *supra* note 2, § 8:83 (criticizing the line of cases treating falsity as a sufficient rebuttal to a First Amendment defense against a right-of-publicity claim, and observing that "[f]alsity should be relevant only to claims of defamation, false light invasion of privacy or false advertising.").

Other courts have also rejected plaintiffs' falsity argument. In *Guglielmi v. Spelling-Goldberg Prods.*,²¹⁹ the heirs of Rudolph Valentino brought a right of publicity claim based on a fictional motion picture about the silent-film star. The case held that "Valentino's heirs could not sustain a right of publicity claim even if the movie was knowingly false and made for financial gain."²²⁰ Similarly, the plaintiff in *Valentine v. CBS, Inc.*²²¹ brought claims under section 540.08 for commercial misappropriation based on the use of plaintiff's name in a Bob Dylan song.²²² After engaging in a thorough analysis of the song's accuracy in connection with plaintiff's defamation claim, the court turned to the section 540.08 claim.²²³ Once again, the court found that falsity was irrelevant and that the only issue concerning section 540.08 was whether the plaintiff's name was used to directly promote a product or service.²²⁴

Since Florida case law clearly did not support their falsity argument,²²⁵ plaintiffs urged the district court to consider the right of publicity laws of New York and California, which had rendered more favorable decisions on this issue.²²⁶ As "centers for the publishing and entertainment industries," these jurisdictions have developed the most extensive right of publicity case law.²²⁷ Plaintiffs specifically encouraged the district court to recast Florida law in the image of New York,²²⁸ where

219. 603 P.2d 454, 455 (Cal. 1979); *See also* Defendants' Memorandum of Law in Support of Their Dispositive Motion for Summary Judgment at 11, *Tyne* (No. 02-13281).

220. Defendants' Memorandum of Law in Support of Their Dispositive Motion for Summary Judgment at 11, *Tyne* (No. 02-13281); *see, e.g.*, *Seale v. Gramercy Pictures*, 949 F. Supp. 331, 332-33 (E.D. Pa. 1996), *aff'd without opinion*, 156 F.3d 1225 (3d Cir. 1998) (regarding a right of publicity claim by Bobby Seale, one of the co-founders of the Black Panther movement, for his portrayal in the docudrama *Panther*).

221. 698 F.2d 430, 431-32 (11th Cir. 1983).

222. *Id.* at 431.

223. *Id.* at 433.

224. "[A]s a matter of law, the ballad 'Hurricane' did not commercially exploit [the plaintiff's name, since] defendants did not use her name to directly promote a product or service." *Valentine*, 698 F.2d at 433.

225. Section 540.08 includes no references to "falsehood," "fictionalization," "falsity," "truth," or "non-fiction."

226. *See* Appellants' Reply Brief at 23, *Tyne* (No. 02-13281).

227. *Id.*

228. Appellants Brief in Support of Appeal at 39, *Tyne* (No. 02-13281). Plaintiffs argue that it is well-settled that when the legislature of a state has used a statute of another state or country as a guide for the preparation and enactment of a statute, the courts of the adopting state will usually adopt the construction placed on the statute in the jurisdiction of its inception.

Id. at 39 (citing *Donahue v. Warner Bros. Pictures Distrib. Corp.*, 272 P.2d 177, 180 (Utah, 1954)); *see also* *Crance Co. v. Richardson Constr. Co.*, 312 F.2d 269, 270 (5th Cir. 1963) (applying New York court's construction to Florida corporation law, patterned after New York

“cases suggest that falsity is an element of a ‘commercial misappropriation’ claim and suggest that it is not necessary to prove that a claimant’s name or likeness was used to ‘directly promote’ a product or service.”²²⁹ Rejecting this argument, the district court noted that plaintiffs had made their request because “the weight of Florida authority [was] against them.”²³⁰ Florida’s right of publicity law is “well-settled and unambiguous”—falsity is not an issue.²³¹

2. False Light Invasion of Privacy

The district court also found that Billy Tyne’s children did not have standing to bring an action for false light invasion of privacy on their deceased father’s behalf.²³² A cause of action for false light invasion of privacy is “strictly personal and may be asserted only by the person who is the subject of the challenged publication.”²³³ Relatives of a deceased person have no such cause of action “regardless of how close [their] personal relationship was with the deceased.”²³⁴

The only exception under the common law occurs when “plaintiffs experience an independent violation of their own personal privacy rights other than the violation alleged to have occurred indirectly by virtue of the publicity given to the deceased.”²³⁵ Both Erica and Billie-Jo Tyne argued that they “experienced an independent violation of their own personal privacy rights by having been individually depicted in the Picture.”²³⁶ Although both plaintiffs appeared as characters in the film, neither character spoke any lines at any point in the motion picture.²³⁷ The actresses portraying them were shown in a photograph in the wheelhouse of the *Andrea Gail* and were also shown attending their father’s memorial service.²³⁸ Both Erica and Billie-Jo disclosed that their father kept a photograph in the wheelhouse of the vessel and that they did in fact attend

law).

229. Appellees’ Answer Brief at 28–29, *Tyne* (No. 02-13281).

230. *Tyne*, 204 F. Supp. 2d at 1342 n.1.

231. *Id.* Nothing in *Loft, Valentine*, or any other Florida court decision interpreting section 540.08 indicates [a willingness] by Florida courts . . . to adopt New York’s analysis of commercial misappropriation claims. Appellees’ Answer Brief at 29, *Tyne* (No. 02-13281).

232. *Tyne*, 204 F. Supp. 2d at 1343.

233. *Loft*, 408 So. 2d at 621.

234. *Id.*

235. *Williams v. City of Minneola*, 575 So. 2d 683, 689 (Fla. Dist. Ct. App. 1991).

236. *Tyne*, 204 F. Supp. 2d at 1343.

237. *Id.*

238. *Id.*

the memorial service.²³⁹ Hence, “the Picture cannot be said to have portrayed Erica and Billie-Jo in a false light because they have admitted to the factual accuracy of the scenes depicting them.”²⁴⁰ Furthermore, the portrayal was “not sufficiently egregious in nature to establish a claim of invasion of privacy against Defendants.”²⁴¹ Since the plaintiffs did not provide any evidence of an independent violation of their *own* privacy rights, they could not maintain a relational cause of action based on the invasion of their father’s privacy.

3. Public Disclosure of Private Facts

Plaintiffs Debra Tighe and Dale R. Murphy, Jr. asserted claims for invasion of privacy by public disclosure of private facts, alleging that *The Perfect Storm* falsely portrayed them as living in Massachusetts.²⁴² Plaintiffs further contended that the film’s depiction of Debra as being intimately involved with another man is entirely fabricated in knowing or reckless disregard of the truth.²⁴³

The Florida Supreme Court has adopted the Restatement (Second) of Torts’ definition of invasion of privacy by public disclosure of private facts.²⁴⁴ Thus, the district court did not find it necessary to address the defendants’ assertion that the details of plaintiffs’ lives are of no concern to the public because an essential element of the tort of public disclosure of private facts under Florida law is that *the facts at issue must be true*.²⁴⁵ In a situation where the facts disclosed in a publication “are false, the interest invaded is that protected by the defamation and false-light torts: the interest in being represented truthfully to the world.”²⁴⁶ By basing their right of publicity cause of action on the “falsity” of the acts portrayed in the film, plaintiffs abrogated a key element in their public disclosure of private facts cause of action.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Tyne*, 204 F. Supp. at 1343.

243. *Id.* at 1343–44.

244. *See supra* Part II.D.2.

245. *Leidholdt v. L.F.P., Inc.*, 860 F.2d 890, 895 (9th Cir. 1988); RESTATEMENT (SECOND) OF TORTS, special note to § 652D (1976).

246. *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1230 (7th Cir. 1993). *See supra* Part IV.A.1.b.

B. Round #2—Eleventh Circuit Decision

Plaintiffs appealed the district court's summary judgment in favor of Warner to the Eleventh Circuit.²⁴⁷ The public disclosure of private facts claim was not challenged on appeal.²⁴⁸ However, the commercial misappropriation and false light invasion of privacy claims were appealed.²⁴⁹ On July 9, 2003, the Eleventh Circuit found in favor of Warner as to the false light invasion of privacy claim, but certified a question of law regarding the commercial misappropriation claim to the Florida Supreme Court.²⁵⁰

1. Right of Publicity

In their Eleventh Circuit appeal, plaintiffs continued to maintain that the First Amendment does not protect *The Perfect Storm's* portrayal because it contained falsities.²⁵¹ They also offered an innovative and initially persuasive statutory interpretation argument.²⁵²

a. Falsity

Plaintiffs argued that by failing to acknowledge the constitutional distinction between avowed fiction and fiction which is falsely packaged as true, "Warner betrays a fundamental misunderstanding of protected speech and ignores the long line of Supreme Court cases which hold that culpable falsehood does not enjoy First Amendment protection."²⁵³ Here again, plaintiffs distinguished their case from *Loft*, asserting that newspaper reports existed regarding Loft's reappearances on other flights, but the "depiction of the events at sea, and the relationships between the crew

247. See generally *Tyne*, 336 F.3d at 1286.

248. Appellees' Answer Brief at 6, *Tyne* (No. 02-13281).

249. *Id.* at 6-7.

250. See *Tyne*, 336 F.3d at 1291-92.

251. *Id.* at 1292.

252. Douglas E. Mirell, *Worming Around The First Amendment: An Overview of Recent Developments in Publicity Rights Litigation*, Address to the Los Angeles Copyright Society (Oct. 1, 2003) (expressing the view that these arguments could have been nullified had the Florida Legislature included a specific motion picture exception in the "messy" statute). Several states with publicity rights statutes, including California, Illinois, Nevada, Ohio, Oklahoma, Texas, and Washington, *explicitly* exempt from liability expressive audiovisual works, such as the work at issue here, as well as the attendant advertising of such works. Amicus Curiae Brief of The Motion Picture Association of America, Inc., et al. at 15, *Tyne v. Time Warner Entm't Co.*, 336 F.3d 1286 (11th Cir. 2003) (No. 02-13281).

253. Appellants' Reply Brief at 5, *Tyne* (No. 02-13281) (citing *The Florida Star v. B.J.F.*, 491 U.S. 524, 530 n.5 (1989)).

members and their children, had never been reported in the press and were intentionally fabricated.”²⁵⁴ Even though courts throughout the country (including the Supreme Court in *Zacchini v. Scripps-Howard Broad. Co.*,²⁵⁵ the Eleventh Circuit in *Valentine*, and the Florida Court of Appeals in *Loft*) have rejected the falsity argument on which plaintiffs rely,²⁵⁶ the Eleventh Circuit nevertheless certified the falsity question to the Florida Supreme Court.²⁵⁷

b. Statutory Interpretation

On appeal, in addition to their falsity argument, plaintiffs added a compelling statutory construction argument. Florida’s commercial misappropriation statute employs the phrase “any commercial or advertising purpose.”²⁵⁸ Plaintiffs contend that if the terms advertising and commercial are both read to refer to the promotion of a product or service, that constitutes surplusage.²⁵⁹ Plaintiffs argue that the district court’s interpretation of these terms is too restrictive.²⁶⁰ By requiring a finding of direct product endorsement, the court ignores the term “commercial purpose” as being distinct from “advertising purpose.”²⁶¹ According to the plaintiffs, this violates the well-known principle that “a statute should be read to give effect to each of its provisions and to avoid rendering any terms mere surplusage.”²⁶²

Plaintiffs likewise argued that if section 540.08 “were read solely to prevent the unauthorized use of a name to directly promote the product or service . . . it would conflict with language in the statute’s two ‘exception’ provisions.”²⁶³ Section 540.08(3)(a) states that commercial misappropriation “does not apply to the use of a person’s name or likeness in news or other media if the use implicates public interest and is not for an advertising purpose.”²⁶⁴ However, if section 540.08(1) exclusively applies

254. *Tyne*, 336 F.3d at 1290.

255. 433 U.S. 562 (1977).

256. Appellees’ Answer Brief at 37, *Tyne* (No. 02-13281).

257. *Tyne*, 336 F.3d at 1291.

258. FLA. STAT. ANN. § 540.08(1) (West Supp. 2001).

259. Appellants’ Brief in Support of Appeal at 43–44, *Tyne* (No. 02-13281).

260. *See id.* at 48.

261. *Id.* at 45–46 n.19.

262. *Tyne*, 336 F.3d at 1291. “It is an elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage.” *Id.* (citing *Hechtman v. Nations Title Ins.* 840 So. 2d 993, 996 (Fla. 2003)).

263. *Tyne*, 336 F.3d at 1291.

264. *Id.* For purposes of deciphering the perplexing statute, the Eleventh Circuit phrases

to advertising or promotional purposes, then section 540.08(3)(a) becomes unnecessary to limit the statute's applicability.²⁶⁵ Essentially, plaintiffs argued that if the statute only prohibits product endorsement, "there would be no need for a newsworthiness exemption or a defense predicated on the same."²⁶⁶ Therefore, a "narrow interpretation of 'commercial purpose' to mean nothing more than 'advertising purpose' renders the newsworthy interest exemption in the statute entirely superfluous."²⁶⁷

Under the same rationale, the second artistic works exemption would similarly be rendered superfluous if Florida's misappropriation statute is interpreted to only cover uses that directly promote a product or service.²⁶⁸ According to plaintiffs, it makes little sense for section 540.08(3)(b) to exempt the resale of artistic works if section 540.08(1) applies solely to advertisements.²⁶⁹

Plaintiffs' final statutory construction argument is that section 540.08, by its express terms, applies to any natural person, including any person deceased within the past forty years.²⁷⁰ It would therefore be inconsistent if the statute were limited to a kind of injury likely to be experienced only by celebrities, which make up an extremely small fraction of the population.²⁷¹ The Eleventh Circuit failed to address this argument.

The ambiguities of section 540.08 left the Eleventh Circuit with little choice but to certify the following question of law to the Florida Supreme Court: "*To what extent does Section 540.08 of the Florida Statutes apply to the facts of this case?*"²⁷²

2. False Light Invasion of Privacy

Plaintiffs conceded that "false light invasion of privacy claims are

section 540.08(3)(a) positively: "the statute continues to apply to (i.e. consent *is* required for) the use of a person's name or likeness in news or public interest settings that involve advertising." *Id.*

265. *See id.*

266. Appellants' Reply Brief at 8, *Tyne* (No. 02-13281).

267. Appellants' Brief in Support of Appeal at 43-44, *Tyne* (No. 02-13281).

268. FLA. STAT. ANN. § 540.08 (West Supp. 2001). This provision states that commercial misappropriation does not apply to the use of a person's name or likeness to resell or redistribute artistic works if the individual consented to the initial sale or distribution of the product. *Id.*

269. *See* Appellants' Brief in Support of Appeal at 44, *Tyne* (No. 02-13281).

270. § 540.08(4). This statute has no requirement that the plaintiff establish his celebrity or that his name or likeness had commercial value at the time of injury as seen in other jurisdictions. *Id.*; *see, e.g.*, CAL. CIV. CODE § 3344.1(h) (Deering 1999).

271. *See* Appellants' Reply Brief at 16 n.4, *Tyne* (No. 02-13281).

272. *Tyne*, 336 F.3d at 1291. "Substantial doubt about a question of state law upon which a particular case turns should be resolved by certifying the question to the state supreme court." *Jones v. Dillard's, Inc.*, 331 F.3d 1259, 1268 (11th Cir. 2003).

generally non-descendible; [however, they argued] that the district court erred in failing to recognize [a] . . . 'relational' right of privacy."²⁷³ Plaintiffs' argument is premised upon the personal invasion of privacy they themselves allegedly experienced when *The Perfect Storm* "vilified their father [Billy Tyne] as an 'obsessed boat captain'"²⁷⁴ and portrayed his relationship with them as estranged.²⁷⁵ Florida courts have established that under unusual circumstances a defendant's conduct toward a decedent may be sufficiently egregious to maintain an independent cause of action.²⁷⁶ The underlying principle behind the descendibility exception "is that the relatives of the deceased have their own privacy interest in protecting their rights in the character and memory of the deceased as well as the right to recover for their own humiliation and wounded feelings caused by the publication."²⁷⁷ Such relatives carry a "heavy burden" because no reported Florida case has ever permitted such a claim.²⁷⁸ Tyne's daughters argued that they should be permitted to bring their own false light claims based on Billy Tyne's portrayal, "even though the Picture barely depicts them, gives them no dialogue, does not identify them by name, does not identify them in its end credits, and is admittedly accurate in its portrayal of them."²⁷⁹ Defendants countered that these claims were "nothing more than a 'hook' to drag before the court the alleged defamation of a deceased person, Billy Tyne."²⁸⁰

The Eleventh Circuit concurred with the district court that the film's portrayal of Billy Tyne, although possibly disingenuous, did not meet the threshold of egregiousness²⁸¹ and thus did not warrant invocation of the relational right of privacy.²⁸²

273. See *Tyne*, 336 F.3d at 1292.

274. *Id.*

275. See Appellants' Reply Brief at 25, *Tyne* (No. 02-13281).

276. See *Loft*, 408 So. 2d at 624.

277. *Id.* See *Williams*, 575 So. 2d at 689.

278. Defendants' Memorandum of Law in Support of Their Dispositive Motion for Summary Judgment at 23–24 n.9, *Tyne* (No. 02-13281).

279. Appellees' Answer Brief at 15, *Tyne* (No. 02-13281).

280. *Id.*

281. See *Williams*, 575 So. 2d at 690 (finding that "the display of grotesque pictures of a deceased's body" was precisely the sort of "egregious situations envisioned in *Loft*," but refusing to reverse the district court's grant of summary judgment based on a "limited display of the videotape and the photographs").

282. *Tyne*, 336 F.3d at 1292. The court did not find that the Florida courts intended to extend the relational right of privacy exception to depictions that are "merely inaccurate or dramatized." *Id.* at 1293. The *Loft* court reached a similar conclusion, where the decedent's portrayal as a ghost was not sufficiently egregious in nature to establish a claim of relational right of privacy. See *Loft*, 408 So. 2d at 625.

V. WHY THE FLORIDA SUPREME COURT SHOULD RESOLVE THE QUESTION OF LAW IN WARNER'S FAVOR

The section 540.08 claim is currently in the hands of the Florida Supreme Court. The seven Justices of the Florida Supreme Court heard very different interpretations of section 540.08 on February 4, 2004.²⁸³ Attorney Gregg Thomas summarized Warner's argument, explaining that "a Chevrolet does not have a First Amendment right. A book does. A movie does. Music does We're entitled by the First Amendment to do fictional works of history."²⁸⁴ On the other hand, the Tyne attorney, Stephen Calvacca, countered that "when you sensationalize someone's life . . . to increase your profit, that's the ultimate wrong . . . [a]nd [Plaintiffs] want simply recognition that Warner made a mistake."²⁸⁵ The following analysis asserts that the Florida Supreme Court is constitutionally obligated to find that the scope of the right of publicity does not extend to the plaintiffs in *Tyne*.

First Amendment considerations "are no less relevant whether the work in question is fictional,²⁸⁶ non-fictional²⁸⁷ or a combination of the two [docudramas],"²⁸⁸ like *The Perfect Storm*, "since *all* such expressive works merit full constitutional protection."²⁸⁹ Defendants accurately described *The Perfect Storm* as a movie "based on a true story;" however, such disclaimers are not even necessary to defeat a publicity rights claim in a docudrama.²⁹⁰ The viewing public is savvy enough to understand that

283. See Marc Caputo, *Film's Take on Captain Stirs a Tempest*, MIAMI HERALD (Feb. 5, 2004), at <http://www.miami.com/mld/miamiherald/news/state/7876429.htm> (last visited Feb. 16, 2004).

284. *Id.*

285. David Royse, *Captain's Kin: 'Perfect Storm' Hyped as True, but Wasn't Quiet*, NAPLES DAILY NEWS (Feb. 5, 2004), at http://www.naplesnews.com/npdn/cda/article-print/1,1983,NPDN_14910_2630373.html (last visited Feb. 16, 2004).

286. The First Amendment protects the depiction of real persons in fictional stories as seen in *Rogers and Polydoros*. See *supra* Part II.C.3. "In most cases, the implied rationale is that the work is protected not because it is fictional, but because it is an expressive work, notwithstanding that it is fictional." Schuyler M. Moore, *Sex, Lies, and Videotape; The First Amendment vs. The Right of Publicity for Expressive Works*, 25 ENT. LAW REP. (2003).

287. *Ruffin-Steinback v. DePasse*, 82 F. Supp. 2d 723, 730 (E.D. Mich. 2000). The First Amendment also protects the depiction of real persons in non-fiction accounts, recognizing an exception for uses in "news" and any "presentation having a current and legitimate public interest." *Id.*

288. *Id.* at 730. Docudramas, works that blend non-fiction and fiction, are entitled to "substantial latitude" under the First Amendment. See *Partington v. Bugliosi*, 56 F.3d 1147, 1154 (9th Cir. 1995) (protecting a book and movie dramatizing real events).

289. Amicus Curiae Brief of The Motion Picture Association of America, Inc., et al. at 1, *Tyne v. Time Warner Entm't Co.*, 336 F.3d 1286 (11th Cir. 2003) (No. 02-13281).

290. *Id.* at 12.

dramatized expressive works obviously mix fact and fiction.²⁹¹ Construing section 540.08 in a manner consistent with the First Amendment is crucial. Achieving this fundamental objective can be reached in one of two ways: (1) by concurring with *Loft* that the use of “real” persons’ names in expressive mediums does not amount to trade, commercial, or advertising use,²⁹² or (2) by holding that even if section 540.08 does apply to expressive works, *The Perfect Storm* is exempt under the section 540.08(3)(a) since it is newsworthy and has “a current and legitimate public interest.”²⁹³ Although the second approach addresses the statutory interpretation issue raised by the plaintiffs, it might create problems for more obscure stories. “An unfortunate consequence of [applying] the newsworthiness defense” is an inappropriate focus on the “truth” or “falsity” of a portrayal, despite the fact that “truth or falsity should be considered only in the context of a defamation or false light invasion of privacy claim, and is irrelevant to a right of publicity . . . claim.”²⁹⁴ Ideally, the *Loft* approach is a more sound way to construe section 540.08 in a manner consistent with the First Amendment.

A. Falsity Revisited

In support of their falsity argument, plaintiffs rely upon two cases, *Peoples Bank & Trust Co. v. Globe Int’l Publ’g, Inc.*²⁹⁵ and *Messenger v. Gruner + Jahr USA Publ’g.*²⁹⁶ *Peoples Bank* asserts that the test for liability “is not whether the story is or is not characterized as ‘fiction,’ ‘humor,’ or anything else in the publication, but whether the charged portions in context could be reasonably understood as describing actual facts about the plaintiff or actual events in which [the plaintiff] participated.”²⁹⁷ However, *Peoples Bank* concerned a newspaper that was found liable for “false light invasion of privacy and outrage (intentional infliction of emotional distress)” for depicting plaintiff by name as a ninety-seven year old pregnant woman who was forced to quit her job;²⁹⁸

291. See *Partington*, 56 F.3d at 1154–55.

292. See *Loft v. Fuller*, 408 So. 2d 619, 622–23 (Fla. Dist. Ct. App. 1981).

293. FLA. STAT. ANN. § 540.08(3)(a) (West Supp. 2001).

294. Dougherty, *supra* note 104, at 6 n.32.

295. 978 F.2d 1065 (8th Cir. 1992).

296. 994 F. Supp. 525 (S.D.N.Y. 1998) (*certifying questions to*, 727 N.E.2d 549 (N.Y. 2000)).

297. *Peoples Bank*, 978 F.2d at 1068–69.

298. *Id.* at 1067. The Eighth Circuit held that the readers could rationally believe that the story was factually based and such undisclosed fictionalization “is the kind of *calculated* falsehood against which the First Amendment can tolerate sanctions without significant

this is “inapposite because it did not involve a ‘publicity rights claim.’”²⁹⁹ Similarly, plaintiffs rely on *Messenger* for the proposition that section 540.08 provides relief for culpably false or fictionalized publications, even on matters of public interest.³⁰⁰ The plaintiff in *Messenger* sued the publisher for the unauthorized use of her photograph in connection with an article that created the false impression that the plaintiff had engaged in certain described sexual conduct.³⁰¹ *Messenger* distinguished itself from both *Loft* and *Valentine*³⁰² by noting that neither of those cases involved reckless falsity.³⁰³ However, even assuming that the New York misappropriation statute applied in *Messenger* mirrors section 540.08, plaintiff’s reliance on the decision should be “given no weight because that ruling was reversed by the Second Circuit Court of Appeals.”³⁰⁴

Plaintiffs have failed to present any case law to firmly suggest that falsity is an element of a section 540.08 claim. Expressive works of any kind, whether documentary films or biopics, will inevitably have fictional elements, or “falsity.”³⁰⁵ Defendants assert that in order to meet plaintiffs’ interpretation of the statute, producers would be required to include “icons bearing the words ‘fact’ and ‘fiction’ [which] would constantly appear as audiences tried, in vain, to enjoy the movie.”³⁰⁶ Worse yet, producers would be required to obtain consent from every real person portrayed in an expressive work, thereby giving “censorship power to the subjects of those works and accordingly create the very chilling effect which the First Amendment is designed to prevent.”³⁰⁷

B. Statutory Interpretation Revisited

Plaintiffs’ statutory interpretation arguments present the Florida Supreme Court with a far more challenging and credible contention. The Eleventh Circuit decision noted that the use of three separate terms set out

impairment of its function.” *Id.* at 1070.

299. Amicus Curiae Brief of The Motion Picture Association of America, Inc., et al. at 11 n.6, *Tyne* (No. 02-13281).

300. Appellants’ Brief in Support of Appeal at 37, *Tyne v. Time Warner Entm’t Co.*, 336 F.3d 1286 (11th Cir. 2003) (No. 02-13281).

301. *Messenger*, 994 F. Supp. at 526.

302. *Valentine v. C.B.S., Inc.*, 698 F.2d 430 (11th Cir. 1983).

303. *Messenger*, 994 F. Supp. at 531.

304. Amicus Curiae Brief of The Motion Picture Association of America, Inc., et al. at 17 n.11, *Tyne* (No. 02-13281).

305. Defendants’/Respondents’ Answer Brief at 23, *Tyne v. Time Warner Entm’t Co.*, 336 F.3d 1286 (11th Cir. 2003) (No. 02-13281).

306. *Id.* at 30.

307. *Id.* at 23.

in the disjunctive (“trade,” “commercial,” or “advertising”) is a strong argument for distinctive applications of the terms in order to avoid surplusage or redundancy.³⁰⁸ Defendants argue that, under *Loft*, all three terms are in fact redundant since they all “seek to limit the unconsented use of names and likenesses in direct connection with the promotion of a product or service.”³⁰⁹ Defendants cite three examples of “improper commercial exploitation of an individual’s name or likeness [that would be prohibited under the *Loft* interpretation] without violating the First Amendment.”³¹⁰

The Eleventh Circuit decision also noted that the exceptions built into the statute³¹¹ suggest a broader interpretation of section 540.08 than mere product endorsement.³¹² If only depictions which have an “advertising purpose,” as Warner suggests, are prohibited by section 540.08, “not only would there be little need for a newsworthy exemption as a practical matter, but the application of the exemption would be negated by the very advertising purpose which implicates the statute.”³¹³ Likewise, there would be no need for the statute’s second exemption “regarding the resale of literary, musical, or artistic productions where the initial sale has been authorized if, in fact, the only prohibited commercial purpose is direct

308. See *supra* Part IV.B.1.b.

309. Defendants’/Respondents’ Answer Brief at 34, *Tyne* (No. 02-13281).

310. *Id.* at 13.

Advertisements or Commercials. If a seller of automobiles uses a photograph of deceased racecar driver Dale Earnhardt in an advertisement for the seller’s automobiles, that use would violate Section 540.08 because it is an unauthorized use that promotes the seller’s products. Such a prohibition is constitutionally sound. Placement of a Name on a Product. If the Nike Corporation, without permission, sells a basketball shoe called the ‘Shaquille O’Neal Sneaker,’ such use of Shaquille O’Neal’s name violates Section 540.08. Even if the name is not used in advertisements themselves, its placement on the product promotes the product and therefore violates the statute. This construction of Section 540.08 would not violate the constitution. Use of a Photograph on a Product. If a photographer takes a picture of a baby, without authorization from the baby’s parents, and that picture is used by Gerber on a jar of baby food, the use violates Section 540.08. While there may not be an advertisement involved, the use of the baby’s picture on the jar of baby food plainly has the purpose of inducing (*i.e.*, promoting) sales of the baby food.

Id. at 13 n.9. These examples illustrate that *Loft*’s reading of section 540.08 is broader than plaintiffs suggest.

311. See § 540.08(3)(a); § 540.08(3)(b).

312. *Tyne v. Time Warner Entm’t Co.*, 336 F.3d 1286, 1291 (11th Cir. 2003).

312. *Tyne*, 336 F.3d at 1288.

313. Movants’ Initial Brief on Question Certified By The Eleventh Circuit at 29, *Tyne v. Time Warner Entm’t Co.*, 336 F.3d 1286 (11th Cir. 2003) (No. 02-13281).

313. *Tyne*, 336 F.3d at 1288.

product endorsement.”³¹⁴ Furthermore, films are not specifically identified as works that are subject to either of the exceptions spelled out under section 540.08.³¹⁵

Although the exceptions are certainly contentious and highly debatable, they appear to have been drafted for a crucial reason, “to make doubly certain that protected First Amendment speech never falls within the scope of the statute.”³¹⁶ Ever since *Loft* and *Valentine* narrowly interpreted section 540.08, “the Florida Legislature never has attempted to alter or amend the statute.”³¹⁷ The Florida Supreme Court has declared that “[l]ong-term legislative inaction after a court construes a statute amounts to legislative acceptance or approval of that judicial construction.”³¹⁸ If the *Loft* or *Valentine* reading of section 540.08 had rendered the exceptions redundant, the Florida Legislature had over two decades to rectify the problem by amending the statute.³¹⁹

While plaintiffs’ statutory arguments are initially compelling, a long line of Florida Supreme Court cases have established the cardinal rule “that a statute be construed in such a way so as to effectuate legislative intent and that all doubts as to the validity of a statute should be resolved in favor of its constitutionality.”³²⁰ Since statutes should be construed so as to avoid constitutional infirmities, the Florida Supreme Court is required to adopt the *Loft* construction of section 540.08 to prevent any collision with the First Amendment.

Moreover, the Florida Supreme Court has also held that “[c]onstruction of a statute which would lead to an absurd result should be avoided.”³²¹ Under plaintiffs’ interpretation of section 540.08, the statute would require filmmakers to obtain permission from every living person and from the descendants of every deceased person with any connection to a fictionalized historical account or life story. This is simply not feasible and commercially absurd.

314. *Id.* at 30.

315. See § 540.08(3)(a); § 540.08(3)(b).

316. Defendants’/Respondents’ Answer Brief at 40, *Tyne* (No. 02-13281).

317. *Id.* at 37–38.

318. *Goldenberg v. Sawczak*, 791 So. 2d 1078, 1081 (Fla. 2001).

319. See Defendants’/Respondents’ Answer Brief at 42, *Tyne* (No. 02-13281).

320. *McKibben v. Mallory*, 293 So. 2d 48, 51 (Fla. 1974) (citing *State v. Dinsmore*, 308 So. 2d 32, 38 (Fla. 1975); *City of St. Petersburg v. Siebold*, 48 So. 2d 291, 294 (Fla. 1950); *State ex rel. Shevin v. Metz Constr. Co., Inc.*, 285 So. 2d 598, 600 (Fla. 1973); *Florida Jai Alai, Inc. v. Lake Howell Water and Reclamation Dist.*, 274 So. 2d 522, 524 (Fla. 1973); *Tornillo v. Miami Herald Publ’g Co.*, 287 So. 2d 78, 85 (Fla. 1973)).

321. *McKibben*, 293 So.2d at 51 (citing *City of Miami v. Romfh*, 63 So. 440, 442 (Fla. 1913); *State v. Willis*, 124 So.2d 48, 51 (Fla. Dist. Ct. App. 1960)).

In *Hershey v. City of Clearwater*,³²² the Eleventh Circuit followed both of these fundamental rules of statutory construction of Florida law.³²³ However, the same court ignored these rules in *Tyne*.³²⁴ Although the plaintiffs' statutory arguments are compelling, the Florida Supreme Court should find that their interpretation of section 540.08 would result in an unconstitutional and absurd form of censorship.

In order to uphold the First Amendment and support freedom of expression, the Florida Supreme Court should take the advice of the Motion Picture Association of America in its Amicus Brief and adopt the following bright-line rule: "Section 540.08 applies only to the direct commercial misappropriation of a person's name or likeness for advertising or promotional purposes, and does not apply to the use of such indicia of personality in any expressive works that recount or dramatize real events."³²⁵

C. Newsworthiness, Public Interest and The First Amendment

Even if the Florida Supreme Court does find that section 540.08 applies to expressive works, *The Perfect Storm* should still be exempt under section 540.08(3)(a), since it is both newsworthy and of public interest. Given that *The Perfect Storm* depicts a highly publicized event with massive media coverage, it falls within the newsworthiness exemption. However, plaintiffs not only assert the statutory interpretation arguments discussed in the prior section,³²⁶ but they also maintain that falsity vitiates the newsworthiness exception.³²⁷ This interpretation would subject entire bodies of everyday speech, ranging from news reports to political cartoons, to ongoing litigation. Rarely do newspaper columns or editorials contain an express warning of "avowed fiction."³²⁸ "Instead, the publisher almost always relies on the protections for hyperbole and opinion that are well established in the law of defamation and false light."³²⁹ Under plaintiffs' interpretation of section 540.08, an exaggerated or opinionated

322. 834 F.2d 937 (11th Cir. 1987).

323. *Id.* at 940.

324. *See Tyne*, 336 F.3d at 1291.

325. Amicus Curiae Brief of The Motion Picture Association of America, Inc., et al. at 3, *Tyne* (No. 02-13281).

326. *See supra* Part V.B.

327. *See* Movants' Initial Brief on Question Certified By The Eleventh Circuit at 20, *Tyne* (No. 02-13281).

328. Amici Curiae of Florida Media Organizations at 11, *Tyne v. Time Warner Entm't Co.*, 336 F.3d 1286 (11th Cir. 2003) (No. 02-13281).

329. *Id.*

news report would be comparable to a docudrama, and thus “be actionable under section 540.08 because it would be published for a profit, it would contain false facts [no matter how minimal] . . . and it would use the name or likeness of an individual without consent.”³³⁰ The judicial branch would no longer be neutral in the marketplace of ideas; courts would be forced to act as legislators and literary critics.³³¹ Fortunately, the *Loft* construction protects fictionalizations and avoids unnecessary conflicts between the newsworthiness exemption and the First Amendment.³³²

Plaintiffs also attempt to inject falsity into the public interest exemption. Plaintiffs do not try to challenge the public interest in the story, since “[i]t is beyond dispute that the public has a current and legitimate interest in the events surrounding the October 1991 storm and the fate of the *Andrea Gail*.”³³³ Rather, plaintiffs assert that Warner’s section 540.08(3)(a) claim is invalid because the picture contained falsehoods.³³⁴ However, “[t]he Supreme Court has frequently affirmed that speech on public issues occupies the ‘highest rung on the hierarchy of First Amendment values,’ and is entitled to special protection.”³³⁵ Since it is well established that the public interest exemption applies to expressive works like songs and films as well as news reports,³³⁶ applying the exemption to *The Perfect Storm* seems appropriate.

Plaintiffs’ interpretation of section 540.08(3)(a) is unreasonable because it would force journalists and filmmakers to acquire consent not simply from each character central to the story, which would be unnecessary in and of itself, but also from every person even minutely involved in the story. Where separate characters maintain different accounts of a newsworthy event, the article could not be written, nor could the film be produced, without necessarily incorporating some fictional elements. Under the plaintiffs’ construction of section 540.08(3)(a) many well-established and clearly protected forms of expression would be endangered, including “the unauthorized use of a real person’s name or likeness in television programs, historical fiction, textbooks, plays, poems, songs, fine artworks, and movies . . . so long as they contain any element of

330. *Id.*

331. *Id.* at 20.

332. *See id.*

333. Defendants’/Respondents’ Answer Brief at 21, *Tyne* (No. 02-13281).

334. Movants’ Reply Brief at 6 n.2, *Tyne v. Time Warner Entm’t Co.*, 336 F.3d 1286 (11th Cir. 2003) (No. 02-13281).

335. Defendants’/Respondents’ Answer Brief at 19–20, *Tyne* (No. 02-13281) (citing *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

336. *See, e.g., Valentine*, 698 F.2d at 432–33.

fiction or falsity whatsoever.”³³⁷ In its Answer Brief to the Florida Supreme Court, Warner lists several well-known docudramas based on books, including *A Civil Action* (1998, based on Jonathan Harr’s “A Civil Action”) and *Raging Bull* (1980, based on boxer Jake LaMotta’s “Raging Bull: My Story”), in order to illustrate the chilling effect that plaintiffs’ reading of section 540.08 would have on motion pictures.³³⁸ Asking filmmakers to demonstrate that detailed biopics, such as *A Civil Action* and *Raging Bull*, “are not in any respects [fictionalized] or dramatized, or that every specific incident of fictionalization has been fully disclosed,”³³⁹ would essentially prohibit the production of such films. Failing to protect partially dramatized or fictionalized stories about events that are newsworthy and that have public interest would defy the First Amendment and render section 540.08(3)(a) inconsequential.³⁴⁰

D. Disguised Defamation

Plaintiffs’ section 540.08 claims are post-mortem defamation claims³⁴¹ camouflaged as commercial misappropriation claims. Fiction and dramas based on true events, like *The Perfect Storm*, are perceived as “cloudy and muddled” since “courts have often mixed publicity rights together with other torts, such as defamation and false light.”³⁴² Even if an expressive work is protected by the First Amendment from a right of publicity claim, filmmakers “may still be liable under another claim, such as defamation or false light, for the use of an image in a falsified manner.”³⁴³ Plaintiffs argue that under the *Loft* interpretation of section 540.08, stories could be maliciously “sensationalized, embellished, distorted and . . . fabricated, yet marketed as ‘true’ . . . for the purpose of

337. Defendants’/Respondents’ Answer Brief at 43, *Tyne* (No. 02-13281) (categorizing three forms of expression that would violate the statute under Plaintiffs’ reading: movies based on historical events or books, sketch comedy, and unauthorized biography).

338. *See id.* at 44 n.37.

339. *Id.* at 43 n.36.

340. *See id.* at 44–45.

341. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

To create liability for defamation there must be: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Id.

342. Hunt, *supra* note 17, at 1634.

343. *Id.* at 1635.

achieving greater dramatic appeal and commercial success.”³⁴⁴ However, the cause of action for this wrong is defamation, not right of publicity, and courts have developed other limitations on defamation claims to reflect First Amendment concerns.³⁴⁵ Plaintiffs should not be permitted to avoid those limitations by phrasing their claims under the guise of the right of publicity.³⁴⁶

Since plaintiffs maintain that Warner maliciously depicted the fishermen and their families in a false light, “it would be reasonable to assume that Plaintiffs were pursuing a defamation claim against Warner Bros. But they are not doing so, at least not on the surface, likely in recognition of the fact that a defamation claim cannot be brought on behalf of the deceased.”³⁴⁷ Plaintiffs have always asserted that *The Perfect Storm* falsely portrayed decedents and plaintiffs with actual malice.³⁴⁸ These allegations might state a valid claim for defamation if decedents were still alive and if their portrayal was proved to be harmful to their reputation,³⁴⁹ but these allegations do not state a claim under section 540.08, the text of which includes neither “falsity” nor “malice.”³⁵⁰ Furthermore, had the decedents portrayed in the film lived, Warner would have had the opportunity to determine the true events of their voyage aboard the *Andrea Gail*, thereby avoiding a future defamation claim.

VI. CONCLUSION

The Florida Supreme Court should apply the *Loft* interpretation of section 540.08, thereby upholding the First Amendment and protection of expressive works. A ruling in plaintiffs’ favor would not only be an unconstitutional interpretation of section 540.08, but it would also turn Florida “into a magnet for misappropriation litigation and a pariah for the distribution and sale of expressive works.”³⁵¹ If the plaintiffs were to

344. Appellants’ Reply Brief at 16, *Tyne v. Time Warner Entm’t Co.*, 336 F.3d 1286 (11th Cir. 2003) (No. 02-13281).

345. *See Hustler Magazine v. Falwell*, 485 U.S. 46, 52–53 (1998).

346. *See id.*

347. Defendants’ Memorandum of Law in Support of Their Dispositive Motion for Summary Judgment at 4, *Tyne v. Time Warner Entm’t Co.*, 336 F.3d 1286 (11th Cir. 2003) (No. 02-13281); *see, e.g., Robertson v. Wegmann*, 436 U.S. 584, 591 n.6 (1978); *see also* RESTATEMENT (SECOND) OF TORTS § 560 cmt. a (1977).

348. Defendants’ Memorandum of Law in Support of Their Dispositive Motion for Summary Judgment at 4, *Tyne* (No. 02-13281);

349. Defendants’/Respondents’ Answer Brief at 2, *Tyne* (No. 02-13281).

350. *Id.*

351. Amicus Curiae Brief of The Motion Picture Association of America, Inc., et al. at 19, *Tyne v. Time Warner Entm’t Co.*, 336 F.3d 1286 (11th Cir. 2003) (No. 02-13281).

prevail under section 540.08, the statute would require filmmakers to obtain permission of every living person and all of the descendants of every deceased person who had any connection to any historical event or life story that is depicted in a motion picture. Not only would this imbue multiple individuals with the right to censor and control works protected by the First Amendment, but it would also prevent many notable stories from being expressed in film.³⁵² Fortunately, the First Amendment guarantees that filmmakers do *not* have to make the “Draconian choice” of either confining “their story to documented facts, [setting] their story in a wholly mythological world, or [submitting] to the censorship, and pecuniary demands of real-life characters and/or their heirs.”³⁵³

Plaintiffs continue to contend that Warner could have relied solely on Junger’s bestseller, “changed the names of the persons portrayed and the vessel they sailed on,” or they could have waited forty years until the statutory right to sue under section 540.08(4) expires.³⁵⁴ However, these options do not chill the First Amendment, they freeze it.³⁵⁵ By relying only on Junger’s work, the part of the film which is most newsworthy and of the most public interest, the demise of the fishing boat and her crew, could not be included. Because the *Andrea Gail* was lost at sea, there is no way the story of this ill-fated voyage could be told without fictionalizing it. Furthermore, changing names or waiting for the statutory period to end would strike at the very core of the First Amendment and would also deprive Warner of its rights under the newsworthiness and public interest exemptions of section 540.08(3)(a). Unless section 540.08 is read to maximize the First Amendment under the *Loft* interpretation (as was done by the district court in *Tyne*), any motion picture or other expressive work that involves the unauthorized depiction of real persons would be exposed

352. See Defendants’ Memorandum of Law in Support of Their Dispositive Motion for Summary Judgment at 2, *Tyne v. Time Warner Entm’t Co.*, 336 F.3d 1286 (11th Cir. 2003) (No. 02-13281). Threats of expensive and protracted right of publicity litigation have already forced most publishers and film companies to rely on the mantra “‘When in doubt, leave it out,’ resulting in a real hit to the First Amendment.” Schuyler M. Moore, *Sex, Lies, and Videotape: The First Amendment vs. The Right of Publicity for Expressive Works*, 25 ENT. LAW REP. (2003).

353. Amicus Curiae Brief of The Motion Picture Association of America, Inc., et al. at 2, *Tyne* (No. 02-13281).

354. Amicus Brief on Behalf of the Entertainment, Arts and Sports Law Section of the Florida Bar at 22, *Tyne v. Time Warner Entm’t Co.*, 336 F.3d 1286 (11th Cir. 2003) (No. 02-13281).

355. Under this theory, a film on the White House scandals behind the Clinton presidency could only be told either (1) by relying solely on a non-fiction book and acquiring consent from each and every person involved in the book’s account, (2) by changing the names of the characters (which would be preposterous), or (3) by waiting forty years after the death of Clinton and presumably anyone involved in any scandal portrayed in the film.

to liability. It is imperative that the Florida Supreme Court realize that “such a result would not only chill creative expression within this State, but would have profound nationwide—indeed global—ramifications on all such expressive works.”³⁵⁶

*Jordan Tabach-Bank**

356. Amicus Curiae Brief of The Motion Picture Association of America, Inc., et al. at 1, *Tyne* (No. 02-13281).

*This Note is dedicated to my mom, who will always be my rock, my provider, my hero, and most importantly my best friend. Your generosity, humor, intellect, strength, kindness, and love have made me the person that I am today. I can only hope that I will one day be half the parent to my children that you and dad have been to Lauren and me. We love you, and we will always be with you.

