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SALVE CHIPOLA III, Plaintiff/Appellant v. SEAN FLANNERY and JOHN/JANE DOES 1-10, Defendants/Respondents	Supreme Court of New Jersey App. Div. Docket No. A-003571-21 Civil Action

PETITION FOR CERTIFICATION AND APPENDIX

DATE OF INITIATION TO THE SUPREME COURT: November 14, 2023

NATURE OF PROCEEDING IN THE APPELLATE COURT: Final Judgment on October 30, 2023 Affirming Order of Dismissal on June 10, 2022

NAME OF THE COURT BELOW: Superior Court of New Jersey, Law Division, Gloucester County

SAT BELOW: Hon. Samuel J. Ragonese Jr. J.S.C.

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STATEMENT OF PROCEDURAL HISTORY OF THE MATTER

A Complaint consisting of one count against Defendant, Sean Flannery, for false light invasion of privacy, for an occurrence on January 9, 2020, was filed on December 28, 2021. The complaint alleged that Flannery's commission of the tort of false light invasion of privacy had caused him emotional distress. An Answer with Jury Demand was filed by Flannery on May 20, 2022. This was followed, on May 24, 2022, by a motion for dismissal. An Opinion granting the Motion for Dismissal was filed by the Honorable Samuel J. Ragonese, J.S.C. on June 10, 2022 (Pa8). An appeal to the Appellate Division followed. The Appellate Division issued a final judgment on October 30, 2023, affirming the trial court's dismissal of the action (Pa2).

STATEMENT OF FACTS OF THE MATTER INVOLVED

On January 9, 2002, Plaintiff/Appellant, Salve Chipola III, was a visitor to the gym at Clearview Regional High School, in Mullica Hill,

New Jersey. The purpose of Chipola's visit to the high school was to attend and watch a high school basketball game.

Also on January 9, 2020, Defendant/Appellee, Sean Flannery, was in attendance at the Clearview Regional High School gym. At halftime of the basketball game, Chipola walked past a group of three people. One of the persons in the group of three people was Flannery. The second person (Person #2) in the group of three people knew Chipola. The third person (Person #3) in the group of three people was a Clearview Regional High School staff member. All three of the people in the group were talking to each other.

Chipola walked past the group of three people. He heard them talking to each other, but did not pay any attention to it.

During the night of January 9-10, 2020, Chipola received a telephone call from Person #2. Person #2 told Chipola that Flannery had spoken about him to Person #3 earlier that evening.

On January 10, 2020, a Clearview Regional High School District administrator drafted a letter addressed to Chipola. It said, in pertinent

part, "[a]s of today, you are being directly notified that you are no longer permitted on the premises of the Clearview Regional High School District." While attending a game on January 14, 2020, Chipola was personally served with the January 10, 2020 letter by Patrolman McGowan. At the same time and place, Patrolman McGowan asked Chipola if he was selling drugs to students or purchasing alcohol for students. Chipola denied doing either of those things, while thinking Patrolman McGowan's questions were bizarre.

Upon reflection, Chipola recalled the telephone call he had received from Person #2 during the night of January 9-10, 2020. Chipola connected the dots and suspected that Flannery had informed on him to a Clearview Regional High School District staff member on January 9, 2020. Chipola confronted Flannery during the night of January 14-15, 2020 by using text messages. Chipola asked Flannery why he had told such terrible lies about him on January 9, 2020. Flannery made certain admissions which confirmed Chipola's suspicions.

Chipola had never sold drugs to students, nor had he ever purchased

alcohol for students. Subsequently, Chipola's reputation as a drug dealer became publicized throughout Gloucester County. Chipola was barred from other school sporting events, and his photo was posted throughout Gloucester County as a drug dealer. Chipola suffered emotional distress caused by these events.

STATEMENT OF THE QUESTION PRESENTED

Should the statute of limitations for the tort of false light invasion of privacy be two years?

STATEMENT OF THE ERRORS COMPLAINED OF

The Appellate Division erred by following Swan v. Boardwalk Regency Corp., 407 N.J. Super. 108, 121 (App. Div. 2009). In doing so, the Appellate Division erred in concluding that Swan was properly decided and by declining to disapprove Swan's holding.

STATEMENT OF THE REASONS WHY CERTIFICATION SHOULD BE ALLOWED

The question of when an action for false light invasion of privacy becomes time-barred is one of general public importance which has not been but should be settled by the Supreme Court.

COMMENTS WITH RESPECT TO THE APPELLATE DIVISION OPINION

The Appellate Division incorrectly relied on dictum from Rumbauskas v. Cantor, 138 N.J. 173, 180-82 (1994), while ignoring McGrogan v. Till, 167 N.J. 414 (2001), Montells v. Haynes, 133 N.J. 282, 291 (1993) and Romaine v. Kallinger, 109 N.J. 282 (1988).

LEGAL ARGUMENT

POINT I

SWAN v. BOARDWALK REGENCY CORP. IS UNSOUND AND THE ISSUES DECIDED THEREIN ARE APPROPRIATE FOR DISAPPROVAL BY THE SUPREME COURT

The two-year statute of limitations imposed by N.J.S.A. 2A:14-2 is the statute of limitations which controls for all personal injury claims. Baird v. Am. Med. Optics, 155 N.J. 54, 65 (1998). "Where the damages sought are for injuries to the person, the applicable statute [of limitations] is [N.J.S.A. 2A:14-2] which fixes the period of two years irrespective of the form of the action." Burns v. Bethlehem Steel Co., 20 N.J. 37, 39-40 (1955).

A. SWAN v. BOARDWALK REGENCY CORP. IS UNSOUND DUE TO THE COURT'S FAILURE TO USE THE ANALYTICAL FRAMEWORK REQUIRED BY SUPREME COURT PRECEDENT

Which statute of limitations to apply is determined by using the test

set forth in McGrogan v. Till, 167 N.J. 414, 422-23 (2001). Smith v. Datla, 451 N.J. Super. 82, 164 A.3d 1110, 1117 (App. Div. 2017). In looking to the most analogous cause of action to determine the appropriate statute of limitations, "the focus is on the nature of the injury, not the underlying theory of the claim when determining which statute of limitations applies." Smith v. Datla, *supra,* 451 N.J. Super. 82, 164 A.3d at 1117 (citing Montells v. Haynes, 133 N.J. 282, 291 (1993)) (citing Heavner v. Uniroyal, Inc., 63 N.J. 130, 145 (1973)).

Accordingly, the selection of which statute of limitations to apply is controlled by "the nature of the injuries generally identified with the specific cause of action," rather than "on the complaint-specific legal theories that plaintiffs plead." McGrogan v. Till, *supra,* 167 N.J. 414, 771 A.2d at 1192 (citing Montells v. Haynes, *supra,* 133 N.J. at 291) (citing Heavner v. Uniroyal, Inc., *supra,* 63 N.J. at 145).

The analytical framework required by McGrogan had been in effect for eight years when Swan v. Boardwalk Regency Corp., 407 N.J. Super. 108 (App. Div. 2009), was decided. Yet, inexplicably, Swan failed to

even cite McGrogan (or Montells) in its opinion. Swan erred by (a) failing to analyze the nature of the injury typically suffered by false light invasion of privacy plaintiffs generally; and (b) failing to analyze whether those injuries are more akin to an "injury to the person" or an injury typically suffered by defamation plaintiffs generally.

Rather than follow the McGrogan analytical framework, Swan used a basis for its decision which McGrogan had rejected. Swan did so by analyzing the underlying legal theory of the claim: "…. we, too, are persuaded that the nature of plaintiff's [false light] invasion of privacy claim is essentially one of defamation, and that the type of objectionable conduct by defendant is dissimilar to that giving rise to the two-year statute of limitations ('intrusion on seclusion'), Rumbauskas, *supra,* [Rumbauskas v. Cantor, 138 N.J. 172 (1994)] or six-year limitations period ('appropriation'), Canessa, *supra,* [Canessa v. J.J. Kislak, Inc., 97 N.J. Super. 327 (Law Div. 1967)]." Swan v. Boardwalk Regency Corp., *supra,* 407 N.J. Super. 108, 969 A.2d at 1154.

B. THE NATURE OF THE INJURY TYPICALLY SUFFERED BY FALSE LIGHT INVASION OF PRIVACY PLAINTIFFS GENERALLY IS MORE AKIN TO AN INJURY TO THE PERSON, RATHER THAN THE INJURY TO REPUTATION TYPICALLY SUFFERED BY DEFAMATION PLAINTIFFS GENERALLY

In Durando v. Nutley Sun, the amended complaint added tort claims of casting one in a false light, together with intentional and negligent infliction of emotional distress, for which "plaintiffs sought compensatory, emotional-distress, and punitive damages." Durando v. Nutley Sun, 209 N.J. 235 (2012).

In DeAngelis v. Hill, plaintiff testified at his deposition that defendant's publication of a certain newsletter caused him "loss of sleep, stress and embarrassment," although he did not seek medical treatment or counseling. DeAngelis v. Hill, 180 N.J. 1 (2004).

In Hornberger v. American Broadcasting Cos., Inc., "[p]laintiffs asserted that the ABC executive defendants maliciously injured their reputations, damaged their employment prospects, and subjected them to

nationwide humiliation and ridicule, resulting in emotional distress." Hornberger v. American Broadcasting Cos., Inc., 351 N.J. Super. 577 (App. Div. 2002).

i. CONTRAST WITH THE NATURE OF THE INJURY TYPICALLY SUFFERED BY DEFAMATION PLAINTIFFS GENERALLY

In DeVries v. McNeil Consumer Products Co., the complaint alleged that defendants "did falsely and maliciously accuse and criticize DeVries in her professional capacity and caused it to be believed that she was not completely discharging her duties and that she was engaging in unprofessional and unethical practices, and that this constituted defamation *per se.*" DeVries v. McNeil Consumer Products Co., 250 N.J. Super. 159, 161-62 (App. Div. 1991).

In Kotlikoff v. The Community News, the suit alleged that the newspaper's publication of a certain letter was "libelous, defamatory and damaging to [plaintiff's] reputation." Kotlikoff v. The Community News, 89 N.J. 62, 65-66 (1982).

C. THE SUPREME COURT TOOK NOTICE PRE-SWAN THAT THERE IS A DIFFERENCE BETWEEN THE NATURE OF THE INJURY TYPICALLY SUFFERED BY FALSE LIGHT INVASION OF PRIVACY PLAINTIFFS GENERALLY, AND THE NATURE OF THE INJURY TYPICALLY SUFFERED BY DEFAMATION PLAINTIFFS GENERALLY

"There are differing interests protected by the law of defamation and the law of privacy, which account for the substantive gradations between these torts. The interest protected by the duty not to place another in a false light is that of the individual's *peace of mind, i.e.,* his or her interest 'in not being made to appear before the public in an objectionable false light or false position, or in other words, otherwise than he is.'" Romaine v. Kallinger, 109 N.J. 282, 537 A.2d 284, 294 (1988) (quoting *Restatement (Second) of Torts* Sec. 652E, comment (b)) (emphasis added). "'The action for defamation,' on the other hand, 'is to protect a person's interest in a good reputation ….'" Romaine v. Kallinger, *supra,* 109 N.J. 282, 537 A.2d at 294 (quoting *Prosser and Keeton on the Law of Torts* Sec. 117, at 864 (5th ed. 1984)).

Swan erred by ignoring this passage from Romaine. Unrecognized by

Swan, this passage from Romaine is dispositive in identifying (1) that there is a difference in the nature of the injury typically suffered by false light invasion of privacy plaintiffs generally, and the injury typically suffered by defamation plaintiffs generally; and (2) that the nature of the injury typically suffered by false light invasion of privacy plaintiffs generally is more akin to an injury to the person, rather than the injury to reputation typically suffered by defamation plaintiffs generally.

CONCLUSION

For all the reasons stated, Swan v. Boardwalk Regency Corp. is appropriate for disapproval, and as a result of that disapproval, the two-year statute of limitations applicable for personal injury claims should be allowed for all false light invasion of privacy claims.

KOBER LAW FIRM, LLC

BY: s/ Peter Kober
Peter Kober, Esq.

DATED: November 17, 2023

CERTIFICATION

I certify that this Petition represents a substantial question of law and is filed in good faith and not for purposes of delay.

KOBER LAW FIRM, LLC

BY: Peter Kober
Peter Kober, Esq.

DATED: November 17, 2023