G.D.,	:	SUPREME COURT OF NEW JERSEY
Plaintiff,	:	DOCKET NO. 65,366
	:	Appeal No. A-16-09
v.	:	
	:	Civil Action
BERNARD KENNY and	:	
HUDSON COUNTY DEMOCRATIC	:	On Appeal from
ORGANIZATION, Defendants	:	Superior Court of New Jersey
	:	Appellate Division
	:	Docket No. A-3005-08T3
G.D., Plaintiff	:	
v.	:	
CRAIG GUY; HAROLD E.	:	Sat Below:
DEMELLIER, aka BUD	:	Hon. Dorothea Wefing, PJAD
DEMELLIER; RAUL GARCIA	:	Hon. Jane J. Grall, JAD
aka RUDY GARCIA; NICOLE	:	Hon. Laura M. Lewinn, JAD
HARRISON-GARCIA,	:	
Defendants	:	
&	:	
NEIGHBORHOOD RESEARCH	:	
CORP., dba MOUNTAINTOP	:	
MEDIA; RICHARD K.	:	
SHAFTAN; CAREYANN SHAFTAN	:	
JOHN DOE; and ABC CORP.	:	
Defendants	:	

BRIEF OF AMICUS CURIAE
ELECTRONIC PRIVACY INFORMATION CENTER (EPIC)

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INTEREST OF AMICUS

The Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other Constitutional values.[1]

EPIC has participated as *amicus curiae* before this Court, State v. Reid, 194 N.J. 386 (2008), and in many other jurisdictions, concerning privacy issues, new technologies, and Constitutional interests. See, e.g., Doe v. Reed, 529 F.3d 892 (9th Cir. 2008), cert. granted, 130 S. Ct. 1011 (U.S. Dec. 14, 2009) (No. 09-559); Flores-Figueroa v. United States, 129 S. Ct. 1886 (2009); Herring v. United States, 129 S. Ct. 695 (2009); Crawford v. Marion County Election Board, 128 S. Ct. 1610 (2008); Hiibel v. Sixth Judicial Circuit of Nevada, 542 U.S. 177 (2004); Doe v. Chao, 540 U.S. 614 (2003); Smith v. Doe, 538 U.S. 84 (2003); Department of Justice v. City of Chicago, 537 U.S. 1229 (2003); Watchtower Bible and Tract Society of N.Y., Inc. v. Village of Stratton, 536 U.S. 150 (2002); Reno v. Condon, 528 U.S. 141 (2000); National Cable and

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[1] This brief was prepared with the assistance of Veronica Louie, a law student at Northeastern University School of Law and participant in the EPIC Internet Public Interest Opportunities Program (IPIOP).

Telecommunications Association v. Federal Communications Commission, 555 F.3d 996 (D.C. Cir. 2009); Kohler v. Englade, 470 F.3d 1104 (5th Cir. 2006) 470 F.3d 1104 (5th Cir. 2006); United States v. Kincade, 379 F.3d 813 (9th Cir. 2004), cert. denied, 544 U.S. 924 (2005); and State v. Raines, 857 A.2d 19 (Md. 2003).

EPIC has a particular interest in the subject of expungement, see e.g., EPIC, Expungement, (outlining common elements of state expungement statutes), http://epic.org/privacy/expungement/. The social consequences of a criminal record can effectively lead to the denial of an individual's opportunity for employment, housing, education, credit, and the right to civic participation.

ARGUMENT

I. COMMERCIAL BUSINESS PRACTICES SHOULD NOT VITIATE NEW JERSEY'S EXPUNGMENT STATUTE

A judicial determination of expungement is important as a legal matter, as a policy issue, and as a matter of social justice. After someone has been rehabilitated, having paid the prescribed debt to society, he or she should not be penalized in perpetuity. Expungement reflects a judicial determination of fairness that should be respected, regardless of new business practices or technological change.

However, data mining companies ignore judicial determinations and attempt to make conviction records live forever when they buy these records from state governments, repackage and sell them for employment background checks, credit ratings, and other commercial uses. Data aggregators such as ChoicePoint, Experian, and DataTrace advertise that their products are accurate because they get their data, including court records, from the government. Their claim is a legal falsity; the publication of the expungement record is itself proscribed. N.J.S.A. 2C:52-30.

To omit the fact of an individual's expungement introduces error into these databases – both the databases sold by the states and the commercial databases sold by

data mining companies. Absent the enforcement of the state interest in expungement, there is no avenue to correct these errors, either the data aggregators' or the government's.

The impact of these errors in criminal justice records is not trivial. Individuals who are mistakenly listed as criminals or suspects can face consequences ranging from inconvenience to loss of liberty. Ellen Nakashima, A Good Name Dragged Down, Wash. Post, March 19, 2008. Police work is affected as well, as errors are introduced into criminal databases. As Justice Ginsburg stated recently, "Negligent recordkeeping errors by law enforcement threaten individual liberty, are susceptible to deterrence by the exclusionary rule, and cannot be remedied effectively through other means." Herring, v. U.S., 129 S.Ct. 695 (2009), Ginsburg, J., dissenting.

Absent the enforcement of expungement requirement, credit reporting agencies, developers of employee background checks, and other data aggregators pass judgment on individuals without accountability, motivated only by the profit that the sale of an additional record, accurate or not, provides. The process is also entirely obscure to those who are most directly impacted. People have no way to see information about themselves or demand corrections.

They do not know how the information is being disseminated, to whom it will be revealed, or how it will affect their opportunities for employment, housing, education, or credit.

Commercial business practices should not vitiate the remedy of expungement. "Practical obscurity" is necessary to ensure that individuals are able to enjoy the right privacy even though it may be theoretically possible to gather the disparate details of a private life. See, e.g., U.S. Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762 (1989). Now that companies seek to sell state records, the ability of the judiciary to safeguard fundamental fairness faces new challenges. Even when these records are made available only in the courthouse (as opposed to online), data aggregators seek to obtain obtain them over the counter and at courthouse terminals. See Report of the Supreme Court Special Committee on Public Access to Court Records, at 31, available at www.judiciary.state.nj.us/publicaccess/publicaccess.pdf

This phenomenon threatens to abrogate state and federal statutes, from the expungement statute, N.J.S.A. 2C:52-1 to -32, to the Fair Credit Reporting Act (FCRA). 15 U.S.C. § 1681. For example, FCRA provides that records of

bankruptcies may be expunged after 10 years. Now that bankruptcy filings are routinely published on the Internet, commercial entities can download and keep the bankruptcy records indefinitely in their proprietary databases. Without an opportunity to review, correct, and expunge their records, there will be no practical way to clear one's name and credit rating - ever.

A record of conviction makes it harder to get a job, rent an apartment and secure a loan. See, e.g., Jonathan D. Glatzer, Another Hurdle for the Jobless: Credit Inquiries, N.Y. Times August 7, 2009. For minority groups, this has repercussions, because blacks and Hispanics are overrepresented in the prison population in New Jersey. This problem is particularly severe for arrest-only records.

But there is no incentive to update or maintain records that have been purchased from the courts. Once the government has published information about an individual, it cannot punish others who publish the same information when it is obtained by lawful means. Cox Broad. Corp. v. Cohen, 420 U.S. 469 (1974); Florida Star v. B.J.F., 491 U.S. 524 (1989).

The state has an interest in limiting access to public records, when used for commercial purposes, see Los Angeles

Police Dept. v. United Reporting Pub. Corp., 528 U.S. 32 (1999), and for governmental purposes as well.

Police work, for example, is affected as errors are introduced into criminal justice databases. According to the Bureau of Justice Statistics, the National Criminal Information Center (NCIC) database has been plagued with errors for years. Bureau of Justice Statistics, Improving Access to and Integrity of Criminal History Records, NCJ 200581 (July 2005). “In the view of most experts, inadequacies in the accuracy and completeness of criminal history records is the single most serious deficiency affecting the Nation’s criminal history record information systems." Bureau of Justice Statistics, Report of the National Task Force on Privacy, Technology and Criminal Justice Information, NCL 187669, at 47 (Aug. 2001). Audits of criminal history records are rare. Bureau of Justice Statistics, Improving Access to and Integrity of Criminal History Records, NCJ 200581 (July 2005), at 13.

Inaccuracy problems are similarly rampant in commercial reports generated by data mining companies, which use conviction records. See, e.g., Evan Hendricks, Credit Scores and Credit Reports: How the System Really Works, What You Can Do (2004).

This has repercussions for citizens' faith in the judiciary. See, e.g., Peter A. Winn, Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information, 79 Wash. L. Rev. 307, 315 (2004) (access to court records will affect all participants in the judicial system). For example, the Asbury Park Press purchases bulk records from the New Jersey state government (including the courts), and republishes them online. While the records, which include property records and taxes, government payrolls, school performance report cards, crime reports and conviction records, are easy to use, the Asbury Park Press cannot take it upon itself to fix errors. See www.app.com/apps/pbcs.dll/section?Category=DATA

A specific piece of litigation arose from an ambiguity in New Jersey's Judiciary Electronic Filing and Information System (JEFIS). ChoicePoint issued a report based on a JEFIS record, stating that an individual named Karl Benedikt had been convicted of "kidnapping and coercion." The statement was not true. It reflected ChoicePoint's interpretation of a numerical code from the JEFIS record.[2] Karl Benedikt sued ChoicePoint, on a theory of negligence.

[2] Karl Benedikt was the citizen described in the Report of the Supreme Court Special Committee on Public Access to Court Records, at 52. www.judiciary.state.nj.us/publicaccess/publicaccess.pdf.

Benedikt v. ChoicePoint, No. MRS-L-1084-07 [settled on the eve of trial].

ChoicePoint disclaimed responsibility for the error, reasoning that it was entitled to rely on the records it obtained from the state. The State of New Jersey disclaimed responsibility for the error, because ChoicePoint placed its own interpretation on the numerical code it obtained from JEFIS.

It is impossible to know how frequently similar mistakes affect the lives of New Jersey citizens. As reported in the New York Times, it is entirely possible to be listed as a criminal because of a speeding ticket. Brad Stone, If You Run a Red Light, Will Everyone Know? N.Y. Times, August 3, 2008.

Individuals cannot cure this problem alone. It is the State that gathers the data and publishes the information that may adversely affect individuals. Citizens are entitled to a mechanism that would give them a remedy when injured by errors and omissions. At the very least, when an individual is rehabilitated, retains counsel, and secures an expungement, the State must ensure that the determination is meaningful.

People should have a remedy for the dissemination of falsehoods, including errors and omissions, such as the

omission of the fact that a criminal record has been expunged. That is why New Jersey’s expungement statute makes it a disorderly person’s offense to knowingly disclose a person's criminal history after expungement. N.J.S.A. 2C:52-30.

Appropriate civil remedies include tort recovery under the theories of false light and disclosure of private facts.

II. “TRUTH” IS NOT A DEFENSE TO PRIVACY TORTS, WHICH ARE DISTINCT FROM DEFAMATION

Assuming for the sake of argument that a criminal conviction is “true” despite having been expunged, the “truth” of the conviction does not defeat claims for invasion of privacy. Invasion of privacy claims are separate and distinct from defamation claims.

As Samuel Warren and Louis Brandeis observed in their seminal law review article, The Right to Privacy, 4 Harv. L. Rev. 193 (1890), the harm resulting from invasion of “bears a superficial resemblance to the wrongs dealt with by the law of slander and or libel.” Id. at 197. Yet “[t]he principle on which the law of defamation rests, covers, however, a radically-different class of effects from those for which attention is now asked.” Id.

In 1960, Dean Prosser set out the influential schema for the invasion of privacy torts, which include (1) intrusion upon seclusion or solitude, (2) public disclosure of private facts, (3) publicity which places the plaintiff in a false light in the public eye, and (4) appropriation of name or likeness. William Prosser, Privacy, 48 Cal. L. Rev. 383 (1960); ALI, Restatement of the Law, Torts, Second, § 652 (1977). None of these claims require establishing the falsehood of the underlying statement.

A. False Light Invasion of Privacy

A claim for false light invasion of privacy claim was historically meant to be distinguished from defamation. See Prosser & Keeton on Torts § 117 (5th ed. 1984); Prosser, supra, 48 Cal. L. Rev. at 383 (documenting the evolution of privacy law); Restatement (Second) of Torts § 652E (1977). Prosser highlighted the differences between defamation and false light invasion of privacy stating, “The privacy cases do go considerably beyond the narrow limits of defamation, and no doubt have succeeded in affording a needed remedy in a good many instances not covered by the other tort.” Prosser, supra, 48 Cal. L. Rev. at 400-01.

State and federal courts have treated false light invasion of privacy and defamation as distinct claims and discrete bases for relief. See Romaine v. Kallinger, 109

N.J. 282 (1988) (analyzing defamation and false light invasion of privacy claims separately); Machleder v. Diaz, 538 F. Supp. 1364, 1375 (S.D.N.Y. 1982) (applying N.J. law) (false light invasion of privacy cause of action separate from a defamation claim); Jankovic v. International Crisis Group, 494 F.3d 1080, 1092 (D.C. Cir. 2007) (reversing dismissal of false light claim because standards for defamation and false light invasion of privacy are not identical); Ritzmann v. Weekly World News, Inc., 614 F. Supp. 1336, 1341 (N.D. Tex. 1985) (recognizing false light claim not coterminous with defamation action); Godbehere v. Phoenix Newspapers, Inc., 783 P.2d 781, 787-88 (Ariz. 1989) (drawing distinction between a tort action for false light invasion of privacy and one for defamation); West v. Media General Convergence, Inc., 53 S.W.3d 640, 645 (Tenn. 2001) (recognizing false light invasion of privacy as a distinct actionable tort from defamation); Russell v. Thomson Newspapers, Inc., 842 P.2d 896, 905-06 (Utah 1992) (false light claim protects an individual's interest in being let alone which is distinct from a defamation claim's interest in reputation); Eastwood v. Cascade Broad., 708 P.2d 1216, 1218, rev'd on statute of limitations 722 P.2d 1295 (Wash. 1986) (defamation and false light invasion of privacy should carefully be distinguished); Crump v. Beckley

Newspapers, Inc., 320 S.E.2d 70, 87-88 (W.Va. 1984) (false light invasion of privacy distinct theory of recovery entitled to separate consideration and analysis).

Although there is some overlap between the elements of defamation and a false light invasion of privacy claim, courts recognize distinct claims and analyze the false light invasion of privacy tort separately from defamation. False light invasion of privacy seeks to protect different interests than defamation, redressing different harms. "A defamation action compensates *damage to reputation* or good name caused by the publication of false information. Privacy, on the other hand, does not protect reputation but protects mental and emotional interests." Godbeher supra, 783 P.2d at 787; see also Time, Inc. v. Hill, 385 U.S. 374, (1967); Flowers v. Carville, 310 F.3d 1118 (9th Cir. 2002); Hazlitt v. Fawcett Publ'ns, Inc., 116 F. Supp. 538, 541-42 (D. Conn. 1953); Russell, supra, 842 P.2d at 906; Eastwood, supra, 708 P.2d at 1218; Crump, supra, 320 S.E.2d at 87. "Indeed, '[t]he gravamen of [a privacy] action … is the injury to the feelings of the plaintiff, the mental anguish and distress caused by the publication.'" Godbehere, supra, 783 P.2d at 787 (citing Reed v. Real Detective Pub. Co., 162 P.2d 133, 139 (Ariz. 1945)). Thus, false light invasion of privacy seeks to redress mental and emotional harm

inflicted in the eyes of the individual bringing suit and defamation seeks to redress harm to one's reputation as perceived in the eyes of others.

The role of truth is different in defamation claims and false light invasion of privacy claims. "To be defamatory, a publication must be false, and truth is a defense." Godbehere, 708 P.2d at 787 (citing Prosser & Keeton at 865). However, a false light invasion of privacy action may arise when an individual publishes something untrue about another *or* when the publication of true information creates a false implication about an individual. Id. (citing Prosser & Keeton at 863-66). In a false light claim, the published fact may be true or false. Where the published fact is true, of significance is the false innuendo created by the publication of highly offensive material. E.g., Douglass v. Hustler Magazine, Inc., 769 F.2d 1128 (7th Cir. 1985), cert. denied, 475 U.S. 1094, 106 S. Ct. 1489, 89 L. Ed. 2d 892 (1986) (false light invasion of privacy claim upheld where publication of nude photos appeared in Hustler when plaintiff only consented to publication in Playboy). Therefore, both theories of recovery deter different conduct.

Furthermore, in a false light claim, the published fact does not have to be defamatory. Cibenko v. Worth

Publishers, 510 F.Supp. 761, 766 (D.N.J. 1981); Douglass, supra, 769 F.2d at 1134; Zechman v. Merrill Lynch, 742 F. Supp. 1359, 1373 (N.D. Ill. 1990); Fogel v. Forbes, Inc., 500 F. Supp. 1081, 1087 (E.D. Pa. 1980); UHL v. Columbia Broad. Sys., Inc., 476 F. Supp. 1134, 1139 (W.D. Pa. 1979); see also Restatement (Second) of Torts, supra, § 652E comment b ("It is not . . . necessary to the action for invasion of privacy that the plaintiff be defamed. It is enough that he is given unreasonable and highly objectionable publicity that attributes to him characteristics, conduct or beliefs that are false, and so is placed before the public in a false position."); Prosser & Keeton, at 866; Prosser, 48 Cal. L. Rev. at 400. Additionally, "[i]t has been said that all defamation cases can be analyzed as false-light cases, but not all false-light cases are defamation cases." Lovgren v. Citizens First Nat. Bank of Princeton, 534 N.E.2d 987, 991 (Ill. 1989); Eastwood, 772 P.2d at 1297.

Courts have found that in some cases, the false light invasion of privacy tort is the only redress available. Eastwood, supra, 722 P.2d at 1297 (when publicity is not defamatory but unreasonable and highly objectionable, false light invasion of privacy affords a different remedy not available in defamation); e.g., Hustler, supra, 769 F.2d at

1138 (no defamation claim because there was nothing untrue about the published photographs, but false light invasion of privacy claim survived); see Restatement (Second) of Torts, supra, § 652E comment b, illustrations 3, 4, 5.

Lastly, there are differences in the publication requirements between false light invasion of privacy and defamation. For a plaintiff to succeed in a false light invasion of privacy claim, he must show that the statement was not merely published to a third person but communicated to the public at large, or to so many persons that the matter likely becomes one of public knowledge. Zechman, supra, 742 F. Supp. at 1372; Restatement (Second) of Torts, supra, § 652D (differentiating "publicity" as used in invasion of privacy claims from "publication" as used in defamation).

B. Publication of Private Facts

The tort for invasion of privacy based on public disclosure of private facts is clearly distinct from a claim for defamation, and courts have treated the two causes of action as such. See Romaine v. Kallinger, 109 N.J. 282 (1988) (analyzing defamation and public disclosure of private facts claims separately); see also Bodah v. Lakevill Motor Express, Inc., 663 N.W.2d 550, 557 (Minn. 2003) ("We understand the tort of publication of private

facts to focus on a very narrow gap in tort law-to provide a remedy for the truthful but damaging dissemination of private facts, which is nonactionable under defamation rules."); Smith v. Stewart, 100, 660 S.E.2d 822, 834 (Ga. Ct. App. 2008) (public disclosure of private facts claim differs from one for defamation because the statements at issue are true but involve private matters); Prosser, supra, 48 Cal. L. Rev. at 398 (public disclosure of private facts "has no doubt gone far to remedy the deficiencies of the defamation actions, hampered as they are by technical rules inherited from ancient and long forgotten jurisdictional conflicts, and to provide a remedy for a few real and serious wrongs that were not previously actionable"). Thus, invasion of privacy claims, including public disclosure of private facts, require a separate analysis from a defamation claim.

As in a claim for false light invasion of privacy, in a claim for public disclosure of private facts the statements may be true. Romaine, supra, 109 N.J. at 298; International Union v. Garner, 601 F. Supp. 187,190 (M.D. Tenn. 1985); Bergfeld v. Board of Election Comm'rs for City of St. Louis, 2007 WL 5110310 at *7 (E.D. Mo. 2007); Smith v. Stewart, supra, 660 S.E.2d at 834; Uranga v. Federated Publ'ns, Inc., 67 P.3d 29, 31 (Idaho 2003); McCormack v.

Oklahoma Pub. Co., 613 P.2d 737, 741 (Okla. 1980). Truth is not a defense for public disclosure of private facts. Smith v. Doss, 37 So.2d 118, 120 (Ala. 1949); Kepallas v. Kofman, 459 P.2d 912, 921 (Cal. 1969).

Similar to the publication requirements under a false light invasion of privacy claim, public disclosure of private facts also requires publication to the public at large or to so many persons that the matter likely becomes one of public knowledge. Bodah, supra, 663 N.W.2d at 553-54; Restatement (Second) of Torts, supra, § 652D.

The history and development of false light invasion of privacy and public disclosure of private facts causes of action show that these torts are independent of a defamation allegation. Coupled with the fact that courts treat the invasion of privacy torts as separate from defamation claims, the appellate court should not have terminated G.D.'s false light invasion of privacy and public disclosure of private facts claims once it dismissed the defamation claim. Invasion of privacy remains an issue of fact for the jury. See Ritzmann, supra, 614 F. Supp. at 1341; Boese v. Paramount Pictures Corp., 952 F. Supp. 550 (N.D. Ill. 1996); Zechman, 724 F. Supp. 1359 at 1370-74; Moore v. Sun Pub. Corp., 881 P.2d 735, 737-38 (N.M. Ct. App. 1994).

CONCLUSION

For the reasons set forth above, this Court should enforce a determination of expungement, and recognize a cause of action for invasion of privacy.

Respectfully submitted,

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Grayson Barber

Dated: May 12, 2010