

STATE OF MICHIGAN  
IN THE SUPREME COURT

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**FOUNDATION FOR BEHAVIORAL**

**RESOURCES**, a Michigan non-profit  
corporation,

Supreme Court No. 161592

Plaintiff-Appellant,

Court of Appeals No. 345415

v

**W.E. UPJOHN UNEMPLOYMENT  
TRUSTEE CORPORATION, d/b/a  
UPJOHN INSTITUTE d/b/a W.E. UPJOHN  
INSTITUTE FOR EMPLOYMENT  
RESEARCH**, a Michigan non-profit  
corporation, and **BEN DAMEROW**,

Kalamazoo County Circuit Court  
Case No.: 2016-0309-CZ

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Defendants-Appellees.

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**PLAINTIFF/APPELLANT FOUNDATION FOR BEHAVIORAL  
RESOURCES' BRIEF IN OPPOSITION TO THE AMICUS CURIAE**

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## TABLE OF CONTENTS

INDEX OF AUTHORITIES.....	iii
LIST OF EXHIBITS .....	v
STATEMENT OF FACTS .....	1
ARGUMENTS.....	2
I.    The Court should not consider the amici curiae’s argument about whether a corporation has a right to privacy. ....	2
A.    The Court ordered the parties to only address the “private party/malice” issue and invited amici curiae briefs on only that issue. ....	2
B.    The parties to this action have control of the issue before the Court and the Court should only consider that issue.....	2
C.    In the Trial Court, Defendants failed to raise the issue of whether FBR had a right to privacy. For that reason the Trial Court did not address it. Defendants failed to preserve for appellate review the question of whether a corporation has a right to privacy.....	4
D.    Defendants are bound to the basis upon which they defended this action in the Trial Court and abandoned the corporate privacy issue.....	5
II.    The Michigan Court of Appeals jurisprudence about a corporation’s privacy rights, despite lacking precedential effect and having arisen within a context other than a false light invasion of privacy action, recognized that there may be circumstances in which the disclosure of sensitive corporate information could harm a corporation’s privacy interests. This action arises out of such a circumstance. Cases from other jurisdictions and legal scholars also have recognized a corporation’s privacy rights. For these reasons, the Court should find that FBR has a right to privacy which supports its false light invasion of privacy action .....	6
A.    The Amici’s reliance upon <i>Booth News v Kent Cty Treasurer</i> , 175 Mich App 523; 438 NW2d 317 (1989) is misplaced. ....	6
B.    The Amici’s reliance upon <i>United States v Morton Salt Co.</i> , 338 US 632, 652; 70 S Ct 357; 94 L Ed 401 (1950) is also misplaced.....	7
C.    Some Courts have found and commentators have advocated that corporations have a right to privacy.....	8

III. The United States Supreme Court’s opinion in <i>Gertz v Robert Welch, Inc.</i> , 418 US 323; 94 S Ct 2997; 41 L Ed2d 789 (1974), which adopted a negligence standard applicable to a private figure Plaintiff’s defamation action, took out the First Amendment legs of <i>Time, Inc. v Hill</i> , 385 Mich 374; 87 S Ct 534; 17 L Ed2d 456 (1967) which this Court can and should limit to its facts and leave to the United States Supreme Court the prerogative of overruling <i>Time, Inc v Hill, supra</i> .....	12
IV. A false light invasion of privacy action seeks redress for, among other things, damage to a party’s reputation. ....	14
V. Adoption of a reasonable-person standard of care (negligence) in a false light invasion of privacy action brought by a private figure plaintiff against a non-media defendant about a private matter will neither burden the Members of the Press nor result in the restriction of the free flow of non-false light information to the public.....	15

## INDEX OF AUTHORITIES

### Cases

<i>Battaglieri v Mackinac Ctr For Pub Policy</i> , 261 Mich App 296; 689 NW2d 915 (2004) .....	15
<i>Behavioral Res Found v Upjohn Corp</i> , 332 Mich App 406; 957 NW2d 352 (2020) .....	15
<i>Booth News v Kent Cty Treasurer</i> , 175 Mich App 523; 438 NW2d 317 (1989) .....	6, 7, 8
<i>Chambers v NASCO, Inc.</i> , 501 U.S. 32; 111 S Ct 2123; 115 L.Ed.2d 27 (1991) .....	2
<i>Dayton Newspapers, Inc. v City of Dayton</i> , 23 Ohio Misc 49; 259 NE2d 522 (Ohio Com Pl 1970), aff'd, 28 Ohio App 2d 95; 274 NE2d 766 (Ohio Ct App 1971) .....	10
<i>E. I. duPont deNemours &amp; Co. v Christopher</i> , 431 F2d 1012 (5th Cir 1970) .....	9
<i>Gertz v Robert Welch, Inc.</i> , 418 US 323; 94 S Ct 2997; 41 L Ed2d 789 (1974) .....	12, 13
<i>Greenlaw v United States</i> , 554 U.S. 237; 128 S. Ct. 2559; 171 L.Ed.2d 399 (2008) .....	4
<i>Gross v Gen Motors Corp</i> , 448 Mich 147; 528 NW2d 707 (1995) .....	5
<i>Health Central v Comm'r of Insurance</i> , 152 Mich App 336; 393 NW2d 625 (1986) .....	7, 8
<i>Lau v Stack</i> , 269 Mich 396; 257 NW 848 (1934) .....	3
<i>Lazaro v Lomarey, Inc.</i> , No. C 09-02013 RMW (PVT), 2010 WL 3636207 (N.D. Cal. Sept. 14, 2010) .....	9
<i>Locricchio v Evening News Association</i> , 438 Mich 84; 476 NW2d 112 (1991) .....	13
<i>Maldonado v Ford Motor Co</i> , 476 Mich 372; 719 NW2d 809 (2006) .....	2
<i>Michigan Gun Owners, Inc. v Ann Arbor Public Schools</i> , 502 Mich 695; 918 NW2d 756 (2018) .....	4
<i>Midwest Glass Co. v Stanford Dev. Co.</i> , 34 Ill App 3d 130; 339 NE2d 274 (1975) .....	10
<i>Napier v Jacobs</i> , 429 Mich 222; 414 NW2d 962 (1987) .....	4, 5
<i>People v Jemison</i> , 505 Mich 352; 952 NW2d 394 (2020) .....	12, 14
<i>People v McGraw</i> , 484 Mich 120; 771 NW2d 655 (2009) .....	5
<i>People v Walker</i> , 504 Mich 267; 934 NW2d 727 (2019) .....	5

<i>Roberts v Gulf Oil Corp.</i> , 147 Cal App 3d 770; 195 Cal Rptr 393 (Cal App 1983).....	9
<i>Rodriguez de Quijas v Shearson/American Express, Inc.</i> , 490 US 477; 109 S Ct 1917; 104 L Ed2d 526 (1989) .....	12, 13
<i>Rouch v Enquirer &amp; News</i> , 427 Mich 157; 398 NW2d 245 (1986).....	13, 15
<i>Socialist Workers Party v Att'y Gen. of U.S.</i> , 463 FSupp 515 (SDNY 1978).....	10
<i>Tavoulareas v Washington Post Co.</i> , 724 F2d 1010 (DC Cir), reh'g granted and opinion vacated on other grounds (Mar 15, 1984), on reh'g, 737 F.2d 1170 (DC Cir 1984) .....	9
<i>Time, Inc. v Hill</i> , 385 Mich 374; 87 S Ct 534; 17 L Ed2d 456 (1967) .....	12, 13, 14
<i>Union Steam Pump Sales Co v Secretary of State</i> , 216 Mich 261; 185 NW 353 (1921) .....	3
<i>United States v Hubbard</i> , 650 F.2d 293 (D.C. Cir. 1980) .....	8
<i>United States v Morton Salt Co.</i> , 338 US 632; 70 S Ct 357; 94 L Ed 401 (1950).....	7, 8, 9
<i>Walters v Nadell</i> , 481 Mich 377; 751 NW2d 431 (2008) .....	4
<i>Young v Wierenga</i> , 314 Mich 287; 23 NW2d 92 (1946) .....	3

#### Other Authorities

Allen, Anita L., " <i>Rethinking the Rules Against Corporate Privacy Rights: Some Conceptual Quandries for the Common Law</i> " (1987). Faculty Scholarship at Penn Law, <a href="https://scholarship.law.upenn.edu/faculty_scholarship/1256">https://scholarship.law.upenn.edu/faculty_scholarship/1256</a> . ....	10, 11
Kayla Robinson, <i>Corporate Rights and Individual Interests: The Corporate Right to Privacy As A Bulwark Against Warrantless Government Surveillance</i> , 36 Cardozo L. Rev. 2283, 2289-90 (2015) .....	11
Pollman, Elizabeth, " <i>A Corporate Right to Privacy</i> " (2014). Faculty Scholarship at Penn Law. 2562. <a href="https://scholarship.law.upenn.edu/faculty_scholarship/2562">https://scholarship.law.upenn.edu/faculty_scholarship/2562</a> .....	10
<i>Prosser, Privacy</i> , 48 Cal. L. Rev. 383 .....	14

## LIST OF EXHIBITS

Exhibit 1 - March 24, 2021 Order

## STATEMENT OF FACTS

On March 24, 2021, the Court ordered the parties to file supplemental briefs to address the following question:

[W]hether private-figure plaintiffs must prove malice to establish the tort of false light invasion of privacy (Exhibit 1-March 24, 2021 Order).

The Court's Order also said that "Persons or groups interested in the **determination of the issue presented in this case** may move the Court for permission to file briefs amicus curiae." (Exhibit 1) (emphasis added).

On or about October 11, 2021, the Members of the Press moved to file an amicus curiae brief. Although that brief addressed the Court-ordered question above, (Brief Amici Curiae by Members of the Press, §II-IV, pp. 11-17) it included an argument about whether the Foundation for Behavioral Resources, a Michigan nonprofit corporation, has a right to privacy (Brief Amici Curiae by Members of the Press, §I, p. 10). The Court's March 24, 2021 Order did not include this issue.

Defendants failed to argue in the Trial Court whether the Foundation for Behavioral Resources has a right to privacy (Defendants' Answer to Application for Leave to Appeal Exhibit A-Defendant's Brief in Support of Motion for Summary Disposition). The Trial Court rightfully refrained from ruling *sua sponte* upon that unraised issue (Application for Leave to Appeal Appendix 2-Trial Court's Order).

On October 15, 2021 the Court accepted the amicus curiae brief on the Court's Chief Justice's order.

## ARGUMENTS

### **I. The Court should not consider the amici curiae's argument about whether a corporation has a right to privacy.**

The Court should not consider the amici curiae's argument about whether a corporation has a right to privacy for one or more of the following reasons.

#### **A. The Court ordered the parties to only address the "private party/malice" issue and invited amici curiae briefs on only that issue.**

The Court has the authority to enforce its orders. *See generally, Maldonado v Ford Motor Co*, 476 Mich 372, 376; 719 NW2d 809 (2006) which said that a court has the inherent authority to "...manage their own affairs so as to achieve the orderly and expeditious disposition of cases," citing *Chambers v NASCO, Inc.*, 501 U.S. 32, 43; 111 S Ct 2123; 115 L.Ed.2d 27 (1991). Here, the Court ordered the parties to only address the "private party/malice" issue (Exhibit 1). Likewise, it invited amici curiae briefs only on that issue. The amici curiae's brief includes an issue which is beyond the scope of both parts of the Court's Order (Exhibit 1). The Court should enforce its order and decline to consider the amici curiae's argument.

#### **B. The parties to this action have control of the issue before the Court and the Court should only consider that issue.**

The issue in the Foundation for Behavioral Resources' ("FBR") Application for Leave to Appeal is whether it as a private figure Plaintiff may establish its false light invasion of privacy action without having to prove malice (Application for Leave to Appeal, Argument I, 10-23; FBR's Reply Brief in Support of Application for Leave to Appeal, Arguments III-V, pp. 2 and 4-6, FBR's Supplemental Brief in Support of Application for Leave to Appeal, pp. 2-6 and FBR's Supplemental Reply Brief, pp. 1-10).

Likewise, the Defendants have addressed that issue in their filings (Defendants' Answer to Application for Leave to Appeal, pp. 5-6 and 9-15. Defendants' Supplemental Brief in Support of Answer to Application for Leave to Appeal, pp. 1-10).

This Court has historically declined to consider amici arguments about issues which the parties have not raised before the Court. *See, Union Steam Pump Sales Co v Secretary of State*, 216 Mich 261, 263; 185 NW 353 (1921) (“...under our practice the parties to the case have control of the issues, and we find it necessary to only consider the issues raised by them”). *See also, Lau v Stack*, 269 Mich 396, 403-404; 257 NW 848 (1934), which relied upon *Union Steam Pump Sales*, *supra*, and declined to “follow the reasoning of the brief of amici curiae” which was based upon a “different theory” than that which the parties addressed and *Young v Wierenga*, 314 Mich 287, 299; 23 NW2d 92 (1946) which also relied upon this Court’s rule in *Union Steam Pump Sales*, *supra*, stating among other things that “[t]he issues are controlled by the parties in the case, and new issues raised by amicus curiae do not control.”

The issue before the Court in this action is whether a private party Plaintiff in a false light invasion of privacy action may prevail without having to prove malice. The parties have briefed that issue. The Court specifically ordered the parties to file supplemental briefs on only that issue. The Court also invited amici briefs only on that issue. In accordance with its decisions in *Union Steam Pump Sales*, *supra* and its progeny, the Court should decline to consider the instant amici’s argument about a corporation’s right to privacy.

Declining to consider the amici’s corporate privacy argument is also consistent with the well-established “parties presentation principle” where the Court relies “ ‘...on the parties to frame the issues for decision and assign to the courts the role of neutral arbiter of matters the parties present.’ ” *Michigan Gun Owners, Inc. v Ann Arbor Public Schools*, 502 Mich 695, 709-

710; 918 NW2d 756 (2018), quoting from and approvingly citing *Greenlaw v United States*, 554 U.S. 237, 243; 128 S. Ct. 2559; 171 L.Ed.2d 399 (2008). In reliance upon that rule, the Court in *Michigan Gun Owners, Inc.*, *supra* declined to reach an issue which the parties had failed to raise. 502 Mich at 710. Likewise it should decline to address a corporation's right to privacy issue because Defendants failed to raise it in the Trial Court, the Trial Court did not rule upon it and it was thereby unnecessary for the parties to discuss it on appeal to the Court of Appeals and this Court. The parties have not argued about the corporation's right to privacy issue. For that reason the Court should decline to consider it. *Michigan Gun Owners, Inc.*, *supra*, 502 Mich at 710.

**C. In the Trial Court, Defendants failed to raise the issue of whether FBR had a right to privacy. For that reason the Trial Court did not address it. Defendants failed to preserve for appellate review the question of whether a corporation has a right to privacy.**

As the Court stated in *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008), "Michigan generally follows the 'raise or waive' rule of appellate review," citing *Napier v Jacobs*, 429 Mich 222, 228; 414 NW2d 962 (1987).

A party "...must preserve an issue for appellate review by raising it in the trial court." *Id.*, and authorities cited therein. Although the Court has the inherent authority to review an unpreserved issue to prevent a miscarriage of justice, "...generally a 'failure to timely raise an issue waives review of that issue on appeal.'" *Id.*, quoting from *Napier, supra*, 429 Mich at 227.

Defendants failed to raise the corporate privacy issue in the Trial Court. Defendants failed to raise the corporate privacy issue in the Court of Appeals as an alternative basis for affirming the Trial Court's grant of summary disposition of FBR's false light action. Defendants failed to preserve the corporate privacy unpreserved issue for appellate review. Defendants'

failure to preserve this issue for appellate review should also preclude their amici supporters from belatedly raising this issue.

Defendants and their supporting amici may claim that reviewing the unpreserved issue will prevent a “miscarriage of justice.” However, the possible loss of a favorable lower court decision is not a miscarriage of justice. As this Court found in *Napier, supra* the Defendant therein’s loss of a favorable jury verdict was neither a miscarriage of justice nor manifest injustice. 429 Mich at 233-234.

**D. Defendants are bound to the basis upon which they defended this action in the Trial Court and abandoned the corporate privacy issue.**

During the course of finding that the appellee (prosecution) had abandoned an issue by failing to raise it, this Court in *People v McGraw*, 484 Mich 120, 131, n. 36; 771 NW2d 655 (2009) said that “[A] party is bound to the theory on which the case was prosecuted or defended in the court below,” quoting from *Gross v Gen Motors Corp*, 448 Mich 147, 162, n 8; 528 NW2d 707 (1995). The instant Defendants failed to defend this action based upon the corporate privacy issue in the Trial Court. Rather they are bound to the malice theory on which they defended the false light action in the Trial Court. By failing to the raise the corporate privacy issue below the Defendants abandoned it. *People v McGraw, supra* and *People v Walker*, 504 Mich 267, 276; 934 NW2d 727 (2019). The Court should not consider the amici’s argument about an issue which the Defendants have abandoned.

For one or more of the above reasons the Court should decline to consider the amici’s belatedly raised and unpreserved corporate privacy issue.

II. The Michigan Court of Appeals jurisprudence about a corporation's privacy rights, despite lacking precedential effect and having arisen within a context other than a false light invasion of privacy action, recognized that there may be circumstances in which the disclosure of sensitive corporate information could harm a corporation's privacy interests. This action arises out of such a circumstance. Cases from other jurisdictions and legal scholars also have recognized a corporation's privacy rights. For these reasons, the Court should find that FBR has a right to privacy which supports its false light invasion of privacy action.<sup>1</sup>

A. The Amici's reliance upon *Booth News v Kent Cty Treasurer*, 175 Mich App 523; 438 NW2d 317 (1989) is misplaced.

The Court of Appeals in *Booth News*, *supra*, held that corporate tax records of hotels and motels were not exempt from disclosure under Michigan's Freedom of Information Act's privacy exemption in MCL 15.243(1)(a). 175 Mich App at 531. During the course of its opinion, the Court said that "[t]here is no common-law or constitutional right to privacy **in the information which plaintiff seeks in this case.**" 175 Mich App at 528 (emphasis added). The Court distinguished the hotels' and motels' tax records from other kinds of corporate information such as trade secrets, stating that the county had failed to persuade the Court that the tax records were "sensitive commercial information" or that the hotels and motels "...would be harmed in any appreciable way..." by the disclosure of the tax records. 175 Mich App at 529.

The Court also said that the tax records "...did not involve **...a corporate right to privacy which might arise with regard to sensitive commercial information.**" 175 Mich App at 530 (emphasis added).

The above emphasized statements indicate that the Court of Appeals in *Booth News* left the door open to recognizing a corporation's right to privacy regarding sensitive commercial

<sup>1</sup> This argument is without prejudice to and does not waive argument I, *supra*.

information. That is exactly the kind of information which is the subject of FBR's false light invasion of privacy action. Defendants' false statement about FBR's failure to achieve the minimum qualifying score to be considered for the contract (which the Defendant Upjohn Institute awarded to itself) referred to sensitive commercial information which placed FBR in a false light (Application for Leave to Appeal, Statement of Facts, pp. 6-7). Unlike the corporate tax records which the Court in *Booth News, supra*, deemed disclosable under MCL 15.243(1)(a), Defendants' false statements about FBR's failure to meet the minimum qualifying standard to obtain the contract to provide the services which it had provided for many years conveyed sensitive commercial information which was harmful to FBR.

In any event, *Booth News, supra*, a 1989 decision, and/or another Court of Appeals upon which *Booth News* relied at 175 Mich App at 528-529 (*Health Central v Comm'r of Insurance*, 152 Mich App 336, 346; 393 NW2d 625 [1986]), both of which the Court of Appeals decided before November 1, 1990, are not binding precedent. MCR 7.215(J)(1). Even if the Defendants had raised this issue in the Trial Court and in turn the Court of Appeals (which they failed to do; see Argument I, *supra*), *Booth News* and *Health Central* could have been disregarded.

**B. The Amici's reliance upon *United States v Morton Salt Co.*, 338 US 632, 652; 70 S Ct 357; 94 L Ed 401 (1950) is also misplaced.**

FBR acknowledges that the Court in *Morton Salt, supra*, said "corporations can claim no equality with individuals in the enjoyment of a right to privacy." 338 US at 368-369. That case concerned whether the Federal Trade Commission could require the corporation Morton Salt and other corporate salt producers to file reports showing compliance with an earlier order to cease certain trade practices. 338 US at 635. The Court's discussion of privacy, i.e. the "right to be let alone," arose within the context of the corporation's argument that the FCC's order violated the Fourth Amendment's protection against unreasonable searches and seizures and

the Fifth Amendment's due process clause. 338 US at 651. That Court's Fourth and Fifth Amendment related analysis is inapplicable to FBR's common law false light invasion of privacy action.

The statement in *Morton Salt, supra*, that "corporations can claim no equality with individuals in the enjoyment of a right to privacy," 338 US at 368, upon which the Court of Appeals in *Booth News* and *Health Central, supra* and the Amici relied upon is often misconstrued as a blanket rule applicable to all corporate privacy matters. That is not so. *United States v. Morton Salt Co.*, failed to say that corporations have no privacy rights. Rather, the Court said that a corporation's privacy right is not equal to that of individuals.

**C. Some Courts have found and commentators have advocated that corporations have a right to privacy.**

While many courts like the Michigan Court of Appeals in *Booth News* and *Health Central, supra*, have relied upon *Morton Salt's* statement to find that corporations lack rights of privacy, other courts have extended a right of privacy, *albeit limited*, to various entities. For example, the Court in *United States v Hubbard*, 650 F.2d 293, 306 (D.C. Cir. 1980) found that a Church which was a corporation and third party to the underlying litigation, had a privacy interest in preventing its seized documents from becoming public. After the Court in *Hubbard* acknowledged *Morton Salt's* statement about how corporations lack the same privacy rights as individuals, it provided a standard by which to consider corporate privacy:

"Whether and to what extent the privacy interests protected by state law may be asserted by corporate bodies is still unsettled. 47 However, we think one cannot draw a bright line at the corporate structure. The public attributes of corporations may indeed reduce pro tanto the reasonability of their expectation of privacy, **but the nature and purposes of the corporate entity and the nature of the interest sought to be protected will determine the question whether under given facts the corporation per se has a protectible privacy interest.** Moreover at least certain types of organizations corporate or non-corporate should be able to assert in good faith the privacy interests of their members.

FOOTNOTE 47: The suggestion can usually be traced to *United States v. Morton Salt Co.*, 338 U.S. 632, 651-52, 70 S. Ct. 357, 368, 94 L. Ed. 401 (1950) whose rationale has not been as well remembered as its language.” (emphasis added.)

In *Tavoulareas v Washington Post Co.*, 724 F.2d 1010 (DC Cir), reh'g granted and opinion vacated on other grounds (Mar 15, 1984), on reh'g, 737 F.2d 1170 (DC Cir 1984) a non-party, Mobil Oil, sought to seal its documents obtained in discovery and prevent their use at trial. The Court reasoned that a court might implicate a constitutional privacy interest in nondisclosure when it forces disclosure of personal information in the discovery context, and in those circumstances a corporation's interest would be “essentially identical” to an individual's. Notably, the court discussed the crucial importance of protecting sensitive commercial information needed to continue business operations. *Id.* at 1022-1024.

The Court in *Roberts v Gulf Oil Corp.*, 147 Cal App 3d 770, 195 Cal Rptr 393 (Cal App 1983) held that corporations do not have a right to privacy under the California Constitution, nor a fundamental right to privacy, but do have a “general right to privacy.” The Court in *Roberts, supra*, said: “It is clear to us that the law is developing in the direction that the strength of the privacy right being asserted by a nonhuman entity depends on the circumstances. Two critical factors are 1) the strength of the nexus between the artificial entity and human beings and 2) the context in which the controversy arises.” *Id.* at 797.

Other courts have also discussed corporate privacy rights in various contexts. For example, the Court in *Lazaro v Lomarey, Inc.*, No. C 09-02013 RMW (PVT), 2010 WL 3636207, at \*2 (N.D. Cal. Sept. 14, 2010) granted a motion to compel against a corporate defendant but noted that corporations have some right to privacy. *See also E. I. duPont deNemours & Co. v Christopher*, 431 F.2d 1012, 1015 (5th Cir 1970) (“Commercial privacy must be protected from espionage which could not have been reasonably anticipated or

prevented.”); *Socialist Workers Party v Att’y Gen. of U.S.*, 463 FSupp 515, 525 (SDNY 1978) (“The protection of the association’s privacy is necessary for the protection of the privacy of the members.”); *Midwest Glass Co. v Stanford Dev. Co.*, 34 Ill App 3d 130; 339 NE2d 274 (1975) (corporation could bring privacy claim if appropriate kind and degree of injury alleged); and *Dayton Newspapers, Inc. v City of Dayton*, 23 Ohio Misc 49, 67; 259 NE2d 522, 534 (Ohio Com Pl 1970), *aff’d*, 28 Ohio App 2d 95; 274 NE2d 766 (Ohio Ct App 1971) (“The right of privacy applies to individuals, corporations, associations, institutions and to public officials.”)

The interest the Foundation sought to protect, that indeed was impaired by Defendant’s actions, was its reputation. Although metaphysically dissimilar, entities and natural persons alike possess reputations. *See*, Allen, Anita L., “*Rethinking the Rules Against Corporate Privacy Rights: Some Conceptual Quandries for the Common Law*” (1987). Faculty Scholarship at Penn Law, [https://scholarship.law.upenn.edu/faculty\\_scholarship/1256](https://scholarship.law.upenn.edu/faculty_scholarship/1256): “Although metaphysically dissimilar, corporations and natural persons alike possess reputations. Corporate reputations have commercial value in the form of good will. Injury to corporate reputations can correspondingly injure the community standing of natural persons closely associated with the corporation.” (*Id.*, p. 615) Like other corporations, FBR is comprised of nature persons.<sup>2</sup> Another commentator has recently written that:

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<sup>2</sup> Pollman, Elizabeth, “*A Corporate Right to Privacy*” (2014). Faculty Scholarship at Penn Law. 2562. [https://scholarship.law.upenn.edu/faculty\\_scholarship/2562](https://scholarship.law.upenn.edu/faculty_scholarship/2562) (“[A]s corporations are not monolithic organizations, one might imagine a spectrum—at one end there are corporations with characteristics that suggest individuals could be involved with privacy interests at stake that would be supported by a corporate right to privacy. The privacy interest could stem from the corporation being an organization that holds personal information or perhaps from the purpose or activities of the organization itself being related to a liberty or autonomy interest, such as a small religious or political group. Because of the wide-ranging variations in these sorts of organizations, and the indeterminacy of privacy, various factual scenarios could raise the potential for implicating privacy interests for the group.”)

“Three theories of the corporate personality have informed how courts conceptualize a corporation's legal rights: concession theory; aggregate entity theory; and natural entity theory. Under the concession theory, the corporation is conceptualized as a mere ‘concession of the state,’ the existence of which is wholly defined by its charter. The aggregate entity theory conceives of the corporation as a collection of individual members, the shareholders, who contract to achieve shared goals. The aggregate entity theory suggests that the rights of a corporation are derivative of the rights of the people who compose the corporation. The natural entity theory, which is commonly associated with the phrase ‘corporate personhood,’ posits that a corporation has a separate legal existence that entitles it to a bundle of rights similar to those of natural persons. This theory reflects a modern sense that a corporation is independent of its state of incorporation and even of the individuals who collectively own the corporation. Of the competing views on the legal nature of a corporation, the natural entity theory is the perspective that supports granting the most expansive array of rights to corporations.

“[C]orporations are unique legal entities permitted to exercise personal rights. [P]rivacy can be as important for organizations as it is for individuals. The ability to shield certain actions and information from the public makes it possible for organizations to carry out the functions for which they are formed. There is demonstrable acceptance that businesses should be afforded zones of privacy, and although trade secret law does not define the scope of a corporation's constitutional rights, it lends credence to the idea that corporations, like individuals, should be shielded by privacy rights in certain spheres.” Kayla Robinson, *Corporate Rights and Individual Interests: The Corporate Right to Privacy As A Bulwark Against Warrantless Government Surveillance*, 36 Cardozo L. Rev. 2283, 2289-90 (2015).

As Anita Allen stated above:

“The privacy theories of Professors Bloustein and Westin suggest that business organizations have something akin to a moral claim to legal privacy rights, because privacy is desired by and beneficial to legitimate business. They seem to suggest that as a matter of political freedom in a democratic setting organizational privacy ought to be respected.

“Corporations are morally entitled to legal rights of privacy adequate to the task of protecting their reasonable expectations of freedom from others' highly offensive acts of intrusion, publication and commercial appropriation. Therefore, courts ought to permit actions for privacy invasion to lie on behalf of corporations.” Allen, *supra*, at p. 637.

In accordance with the cases and comments discussed above, FBR requests the Court to find that it has a right to privacy within the context of this matter and for that reason has the right to bring its false light invasion of privacy action.<sup>3</sup>

**III. The United States Supreme Court's opinion in *Gertz v Robert Welch, Inc.*, 418 US 323; 94 S Ct 2997; 41 L Ed2d 789 (1974), which adopted a negligence standard applicable to a private figure Plaintiff's defamation action, took out the First Amendment legs of *Time, Inc. v Hill*, 385 Mich 374; 87 S Ct 534; 17 L Ed2d 456 (1967) which this Court can and should limit to its facts and leave to the United States Supreme Court the prerogative of overruling *Time, Inc v Hill*, *supra*.**

The Amici's reliance upon the rule of *Rodriguez de Quijas v Shearson/American Express, Inc.*, 490 US 477, 484; 109 S Ct 1917; 104 L Ed2d 526 (1989) that only the United States Supreme Court can overrule its prior decisions in support of their second argument (Amici Curiae Brief, Argument II, pp. 11-12) is misplaced. FBR has not asked this Court to overrule *Time, Inc. v Hill*, *supra*. Rather, FBR has asked the Court to find, as many other Courts have found, that the United States Supreme Court's decision in *Gertz, supra*, which adopted and applied a negligence standard to a private figure Plaintiff's defamation action, casts into doubt the viability and applicability of *Time, Inc. v Hill*'s holding that malice applied to a private figure Plaintiff's false light invasion of privacy action involving a matter of public interest. 385 US at 378-379.

This Court in *People v Jemison*, 505 Mich 352, 356; 952 NW2d 394 (2020) found that although a later United States Supreme Court opinion had not expressly overruled one of its earlier opinions on the issue before the *Jemison* Court, the later opinion had "... (taken) out its legs." This Court then proceeded to reconcile the two United States Supreme Court opinions by reading the earlier opinion's "...holding according to its narrow facts." *Id.* This Court then

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<sup>3</sup> FBR's argument is without prejudice and does not waive its Argument I, *supra*.

recognized that the second United States Supreme Court opinion had not specifically overruled the earlier opinion and stated the rule in *Rodriguez de Quijas, supra*, that obviously only the United States Supreme Court can overrule its own decisions. 505 Mich at 363.

FBR has previously explained how many Courts have questioned the viability of *Time, Inc. v Hill, supra*, which based its pre-*Gertz* decision in a false light invasion of privacy action upon its prior defamation jurisprudence (385 US at 387-391, including the statement that “...the First Amendment principles pronounced in *New York Times* guide our conclusion...”<sup>4</sup>) in light of *Gertz*’s application of a negligence standard to a private figure Plaintiff’s defamation action (See, e.g., FBR’s Application for Leave to Appeal, §G, pp. 18-21 and FBR’s Supplemental Reply Brief, pp. 7-8). None of those Courts obviously “overruled” *Time, Inc. v Hill, supra*. Instead, they exercised their authority to find that *Time, Inc. v Hill* did not apply to the matters before them in light of the United States Supreme Court’s decision in *Gertz, supra*.

Likewise, FBR has asked this Court to find that the United States Supreme Court’s decision in *Gertz, supra*, the rule of which this Court adopted in *Rouch v Enquirer & News*, 427 Mich 157, 202; 398 NW2d 245 (1986), undermines the defamation-analysis based decision in *Time, Inc. v Hill, supra*, and allows this Court to find that negligence rather than malice applies to FBR’s false light invasion of privacy action which involves a private figure Plaintiff, a non-media Defendant and a private business matter which was not a matter of public interest. *Time, Inc. v Hill, supra*, involved a media publication about a matter of public interest involving a “newsworthy” plaintiff. 385 US at 378 and 384. None of those factors are present in this action.<sup>4</sup>

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<sup>4</sup> The Court in *Locricchio v Evening News Association*, 438 Mich 84, 118; 476 NW2d 112 (1991) summarized the United States Supreme Court’s First Amendment analysis which considers “...three important factors to define the parameters of libel liability: the public- or private-figure status of the plaintiff, the media or nonmedia status of the defendant, and the

As the Court did in *People v Jemison, supra*, it can leave to the United States Supreme Court the prerogative of overruling one of its decisions (*Time, Inc. v Hill, supra*), while reading that decision's holding according to its facts (its "discrete context," 385 US at 903, a media defendant, newsworthy involuntary public figure, issue of public interest) which are inapplicable to this action involving a private figure plaintiff, a nonmedia private party defendant and a statement about a private issue.

**IV. A false light invasion of privacy action seeks redress for, among other things, damage to a party's reputation.**

FBR acknowledges that the Court in *Time, Inc. v Hill, supra*, noted, in part, that in false light invasion of privacy actions "...the primary damage is the mental distress from having been exposed to public view...." 385 U.S. at 385, n. 9 (Amici Curiae Brief, p. 16).

However, the Amici's reference to *Time, Inc.*'s statement is incomplete. That Court also immediately said thereafter in the same footnote that "...**injury to reputation may be an element bearing upon such damage.**" *Id* (emphasis added). That Court also began its discussion about this issue by stating that "[c]ommentators have likened the interest protected in those 'privacy' cases which focus upon the falsity of the matter to that protected in cases of libel and slander-**injury to the reputation.**" *Id* (emphasis added). Among others, the Court cited the seminal article of *Prosser, Privacy*, 48 Cal. L. Rev. 383, 398-401. *Id*. FBR likewise relied upon the Prosser article's statement that "[t]**he interest protected [in false light actions] is clearly that of reputation,** with the same overtones of mental distress as in defamation." 48 Cal. L. Rev. at 400 (emphasis added). (FBR's Supplemental Reply Brief, p. 9). Contrary to the

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public or private character of the speech. The Court has most consistently interpreted the First Amendment to accord maximum protection to public speech about public figures."

Amici's contention, one may seek redress for damage to one's reputation in a false light invasion of privacy action.

**V. Adoption of a reasonable-person standard of care (negligence) in a false light invasion of privacy action brought by a private figure plaintiff against a non-media defendant about a private matter will neither burden the Members of the Press nor result in the restriction of the free flow of non-false light information to the public.<sup>5</sup>**

The Court in *Rouch v Enquirer & News*, *supra* put to rest a concern most likely expressed by the Defendant therein and its amici supporters that adoption of the negligence standard in a private figure's defamation action would lead to "self-censorship," would burden the press and would impair the free flow of information to the public. 427 Mich at 201-202. The Court said that it was not "...too much to ask or detrimental to the liberalizing influence of ...a free flow of information that the task be exercised with reasonable care." 427 Mich at 202. The Court also said that media's "raison d'être ...to report the news-as much and as quickly as possible" was unlikely to "...shrink in the face of a reasonable-person standard of care." 427 Mich at 202.

Likewise, the adoption of a reasonable-person standard of care (i.e., negligence) in a private figure plaintiff's false light invasion of privacy action based upon a nonmedia defendant's statement about a private matter will not impose an "intolerable burden" upon the media (Amici Curiae Brief, p. 15). Based upon the similarities between defamation and false light actions (*see, e.g., Behavioral Res Found v Upjohn Corp*, 332 Mich App 406, 412; 957 NW2d 352 (2020) referring to *Battaglieri v Mackinac Ctr For Pub Policy*, 261 Mich App 296, 304; 689 NW2d 915 (2004), this Court's lesson in *Rouch*, *supra*, applies just as well to a private party's speech-based false light invasion of privacy action.

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<sup>5</sup> See footnote 1, above.

Respectfully submitted,

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