CA 3.4.93

IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. 79,828

WAGNER, NUGENT, JOHNSON, ROTH, ROMANO, ERIKSEN & KUPFER, P.A., etc., et. al.,

Petitioners,

vs.

JOHN H. FLANAGAN, JR.,

Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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INTRODUCTION

Throughout this Brief, Respondent, Plaintiff below, John H. Flanagan, Jr. will be referred to as "Respondent" or "Flanagan." Petitioner, Al. J. Cone will be referred to as "Cone." Petitioner, Wagner, Nugent, Johnson, Roth, Romano, Eriksen & Kupfer, P.A., formerly known as Cone, Wagner, Nugent, Johnson, Roth & Romano, P.A., will be referred to as "Wagner, Nugent." Finally, Petitioner, JFK Medical Center, Inc., will be referred to as "JFK."

References to Petitioners' Initial Brief on the Merits will be by "PB __".

All emphasis is that of the author, unless otherwise noted.

SUMMARY OF ARGUMENT

Florida Statutes Section 770.07 does not apply to this action, since the Defendants are not members of the media.

The 1974 enactment of Florida Statutes, Section 95.031(1) does not override the reasonable discovery rule approved in Creviston v. General Motors Corp., 225 So.2d 331 (Fla. 1969). Further, the holding in Creviston is not limited to products liability cases and the notion that the interpretative aid "expressio unius est exclusio alterius" limits the application of the reasonable discovery rule to causes of action specifically enunciated by the legislature has been rejected.

Petitioners' reliance on Houston v. Florida-Georgia Television Co.. 192 So.2d 540 (Fla. 1DCA 1966) is misplaced. The court that decided Houston has since receded from that opinion and relied, instead on the reasoning of Creviston. Lund v. Cook, 354 So.2d 940 (Fla. 1DCA 1978).

Even the court that issued the opinion in Gallizzi v. Williams, 218 So.2d 499 (Fla. 2DCA 1969) has recently cited this very case, Flanagan v. Wagner, Nugent, 594 So.2d 776 (Fla. 4DCA 1992), along with Lund and Senfield v. Bank of Nova Scotia, 450 So.2d 1157 (Fla. 3DCA 1984) in applying a discovery rule in a negligence action. Keller v. Reed, 603 So.2d 717 (Fla. 2DCA 1992).

Neither the nature of defamation nor cases from other jurisdictions provide any reason or justification for departing from the reasonable discovery rule.

ARGUMENT

I

Petitioners assert (PB 3-6) that Florida Statute Section 770.07 controls this action and prohibits the bringing of an action for defamation more than one year after publication of the defamatory matter. Plainly, Section 770.07 has absolutely no application to the facts at bar, in that the statute has repeatedly been held to apply only to defamation actions against the media. Here the Defendants are non-media. The defamation is private, contained within a letter from an attorney to an insurance company, and not within the purview of Chapter 770. The Petitioners in this case are a hospital, its attorneys and the particular attorney within the law firm that wrote the defamatory letter to the hospital's insurance carrier. As the Fourth District recognized, in the very first sentence of its opinion, publication in this case was **private.** Chapter 770 of the Florida Statutes pertains exclusively to media defendants. The Second District, in Bridges v. Williamson, 449 So.2d 400, 401 (Fla. 2DCA 1984), held that: "Chapter 770 does not apply to nonmedia defendants even when alleged defamatory statements made by a nonmedia defendant are republished by the media." In Della-Donna v. Gore Newspaper Company, 463 So.2d 414 (Fla. 4DCA 1985), the Fourth District followed Bridges, as did the Second District in Gifford v. Bruckner, 565 So.2d 887, 888 (Fla. 2DCA 1990). The Third District also reached the same conclusion and refused to apply Chapter 770 to nonmedia defendants in Davies v. Bossert, 449 So.2d 418, 420

(Fla. 3DCA 1984). See also, Corkery v. SuperX Drugs Corporation, 602 Fed. Supp. 42, 46 (M.D. Florida, Tampa Division, 1985).

The case cited by Petitioners, Perdue v. Miami Herald Publishing Company, 291 So.2d 604 (Fla. 1974), involves **public** publication by a media defendant and has no bearing on this case.

By its very nature, defamation by media defendants, is wide spread, where discovery will, or should, closely coincide with publication. Thus, a different rule, such as set forth in F.S. 770.07, makes sense for **media** defendants. However, where, as here, publication is private, and not readily susceptible of discovery, the appropriate rule is the one followed by the District Court. To hold otherwise "would indeed be a harsh rule and prevent relief to an injured party who was without notice during the statutory period of any negligent act that might cause injury." City of Miami v. Brooks, 70 So.2d 306, 309 (Fla. 1954).

II

Creviston v. General Motors Corp., 225 So.2d 331, 334 (Fla. 1969) crystallized the "blameless ignorance" doctrine discussed in City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954), Miami Beach First National Bank v. Edgerly, 121 So.2d 417 (Fla. 1960) and Urie v. Thompson, 337 U.S. 163 (1949) thusly:

> Such a doctrine is merely a recognition of the fundamental principle that **regardless of the underlying nature of a cause of action**, the accrual of the same must coincide with the aggrieved party's **discovery or duty to discover** the act constituting an invasion of his legal rights.

Appellees argue (PB 6-8) that the Fourth District should not have

relied upon Creviston in reversing the trial court, because Creviston preceded the 1974 enactment of F.S. 95.031(1). Yet, in 1975, this Court refused to recede from Creviston when it ruled that the statute of limitations does not begin to run in a breach of warranty case until the breach is discovered, even though the breach occurs when delivery of the warranted item is tendered. AB CTC v. Morejon, 324 So.2d 625, 628 (Fla. 1975). Reliance on Creviston after the enactment of F.S. 95.031 was **expressly approved** in Lund v. Cook, 354 So.2d 940 (Fla. 2DCA 1978), a case decided **after** the enactment of the statute:

> Chapter 74-382, Laws of Florida, did not change this rule though it did provide an overall limitation on its application as to certain specific types of cases. **Rather than abrogate the rule, the amendment reinforces it...**When we turn to the Supreme Court's ruling in Creviston, **we find that the cause of action accrues with the aggrieved party's discovery or duty to discover** the act constituting an invasion of his legal rights. **We find nothing in the statute that abrogates this ruling in Creviston.** 354 So.2d at 942.

To the same end, see Senfield v. Bank of Nova Scotia, 450 So.2d 1157 (Fla. 3DCA 1984), decided after the statute's enactment. Senfield approves of both Lund and Creviston. In Senfield at page 1163, the court **considered and rejected** the same argument Petitioners raise (PB 7) regarding the interpretative aid[1] expressio unius est exclusio alterius.

> There [Lund], the court held that the express inclusion of discovery language in the statute

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[1]It is important to note that the maxim is **not** a rule of law; rather only an aid in interpreting a statute. Smalley Transportation v. Moed's Transfer, 373 So.2d 55 (Fla. 1DCA 1979).

> of limitations relating to certain specified causes of action...did not abrogate the rule of Creviston...

The court thus refused to limit application of the discovery rule to only those actions where the statute of limitations expressly provides that the limitations period runs from the time of actual or constructive discovery. The Senfield court declined the opportunity to hold that in all other actions, the period of limitations commences at the time of the occurrence itself. Expressio unius est exclusio alterius does not provide a basis for reversing the Fourth District.

Petitioners rely on Houston v. Florida-Georgia Television Company, 192 So.2d 540 (Fla. 1DCA 1966) as the basis for their assertion (PB 5, 9) that the discovery rule cannot obtain in the absence of an express legislative directive. However, Petitioners' reliance on Houston is misplaced. As the Senfield court wrote (at pages 1162, 1163):

> While Houston certainly supports Senfield's position, reliance upon it as authority is unjustified in light of City of Miami v. Brooks, 70 So.2d 306 and Miami Beach First National Bank v. Edgerly, 121 So.2d 417, and, a fortiori, in light of the later decisions of Creviston and Lund v. Cook, 354 So.2d 940 (Fla. 1DCA 1978). In both Brooks and Edgerly, the Florida Supreme Court applied the discovery rule to actions (negligence and contract, respectively) other than one where the statute of limitations expressly provided for the application of the rule...
> ...Were there any doubt about the continued vitality of Houston after Creviston, such doubt was set to rest in Lund v. Cook, 354 So.2d 940 (Fla. 1DCA 1978), by the very same court which decided Houston.

The First District further implicitly proclaimed the triumph

of Creviston over Houston in Branford State Bank v. Hackney Tractor Company, 455 So.2d 541 (Fla. 1DCA 1984). In Branford, the court relied on Lund and Creviston, without mentioning its own Houston decision. The reasonable discovery rule, then, is and has been the law, without dispute for many years.

The case relied upon by Petitioners and the trial court for the dismissal of the complaint, Gallizzi v. Williams, 218 So.2d 499 (Fla. 2DCA 1969), lacking in reason, analysis or logic, is no longer even relied on by the court that decided it. That court, in Keller v. Reed, 603 So.2d 717 (Fla. 2DCA 1992), held that the reasonable discovery rule applies in a negligence action. As authority, the Second District cited this case, Flanagan v. Wagner, Nugent, 594 So.2d 776 (Fla. 4DCA 1992), along with Lund and Senfield, rather than Gallizzi.

Next (PB 8), Petitioners argue that Creviston should not apply because, supposedly by its own terms, its holding is "limited solely to the matter of the commencement of the running of the three years statute of limitations in the factual posture of this case." This identical tactic, of taking the quoted portion of Creviston out of context and misapplying it to avoid its result in a defamation claim was rejected in the unpublished opinion of the United States 11th Circuit Court of Appeals, Caster v. Hennessey [2]:

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[2]On appeal from the United States District Court for the Southern District of Florida, Case No. 86-5572, D.C. Docket No.82-8533, Decided November 23, 1987. The Opinion is attached to all copies of Respondent's Answer Brief. Although it is unpublished and not of official precedential value, its reasoning is compelling and instructive.

In Caster, the 11th Circuit Court of Appeals analyzing and

> Appellees' position is unfounded as they have taken this language out of context, because it appears at the end of a paragraph in which the court discusses its concerns that the decision should not preclude factual questions as to the discoverability of defects prior to injury. Likewise, the court was emphasizing that the decision is not intended to limit the relevant inquiries into various defenses which might affect the discoverability issue...**When read in context, this language does not curtail the court's discussion of the blameless ignorance doctrine.** Opinion at page 9.

III

Petitioners' final argument is that "Defamation is not concerned with the plaintiff's own humiliation..." (PB 8,9) and that since the injury is to a plaintiff's reputation, the cause of action is complete upon publication. This argument begs the question that has been addressed throughout. The cause of action accrues and the running of the statute of limitation begins, upon actual or constructive discovery, not publication. Lund at 942. Further, defamation is clearly concerned with plaintiff's humiliation. Humiliation, embarrassment and mental anguish are among the first elements of damage a jury is instructed to consider in a defamation case. Florida Standard Jury Instructions, MI 4.4a.

If one were to accept Petitioners' argument, a victim of

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applying Florida law, held that the cause of action for defamation accrues and the statute of limitations begins to run, when the plaintiff knew or should have discovered the fact of defamation. The Caster court considered and expressly rejected Gallizzi. It relied on Creviston and City of Miami v. Brooks as the settled, established law in Florida. In fact, the Caster court declined to certify the issue to this Court, finding (at page 9 of its opinion) that "there is adequate precedent to determine that Florida has adopted a discovery rule."

defamation would have no right of action for the humiliation and mental anguish he suffers upon discovery, because, unknown to him, his reputation had been damaged two years earlier, when publication was made. Such a result is contrary to reason, logic and law.

In discussing cases from other jurisdictions (PB 10,11), Petitioners cite a New Jersey case, Lawrence v. Bauer Publishing and Printing Ltd., 396 A.2d 569 (1979), for the proposition that the discovery rule does not apply. Petitioners quote from a concurring opinion, not the majority opinion. Even so, contrary to the case at bar, that case was decided based on a New Jersey statute which specifically and expressly mandated that an action for libel be brought **"within one year of publication."** Since the Florida statute provides no such directive, the case is not persuasive. Indeed, the concurring opinion in Lawrence reflects that the discovery rule was preferable and would better serve the interests of justice, but that the court was precluded from applying the discovery rule by the express dictates of the particular statute.

Petitioners' attempt to then tie the Lawrence analysis to Florida Statute 770.07 (PB 11) again overlooks the fact that F.S. 770.07 does not apply to non-media defendants such as the Petitioners and that Florida does not have a statute of limitation that expressly prohibits application of the discovery rule.

CONCLUSION

Based upon the foregoing authority and analysis, it is clear that the time of commencement of the running of the statute of limitations applicable to an action for defamation should not be changed. It should continue to commence when the plaintiff learns of or, in the exercise of reasonable diligence, should have learned of the defamation. Thus, the opinion of the Fourth District should be **AFFIRMED.**

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Respondent's Answer Brief on the Merits was furnished by U.S. Mail this 3rd day of December, 1992 to Larry Klein, Klein & Walsh, P.A., 503 Flagler Center, 501 South Flagler Drive, West Palm Beach, Florida 33401, and to Eric A. Peterson, Peterson & Bernard, Post Office Drawer 15700, West Palm Beach, Florida 33416 (co-counsel for Cone and Wagner, Nugent, Johnson, Roth, Eriksen & Kupfer, P.A.), and to Mary Valletta, Mershon, Sawyer, Johnston, Dunwoody & Cole, Phillips Point-East Tower, 777 South Flagler Drive, Suite 809, West Palm Beach, Fl 33401 and David Povich, Williams & Connolly, 725 12th Street, N.W., Washington, D.C., 20005 (co-counsel for JFK).

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PERMANENT

NO. 86-5572

D.C. Docket No. 82-8533

PAUL CASTER,

Plaintiff-Appellant,

versus

THOMAS H. HENNESSEY, and
ST. MARY'S HOSPITAL,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

(November 23, 1987)

Before JOHNSON and EDMONDSON, Circuit Judges, and HOFFMAN*, Senior District Judge.

*Honorable Walter E. Hoffman, Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

HOFFMAN, Senior District Judge:

Plaintiff-appellant, Paul Caster, appeals from a verdict directed in favor of the defendant-appellees in appellant's libel and slander action.

FACTS

Caster began work for the appellee, St. Mary's Hospital in West Palm Beach, Florida, on November 10, 1975. Caster was hired by appellee Thomas H. Hennessey, the chief executive officer at St. Mary's, as fiscal services director for the hospital. During the course of his employment, Caster supervised approximately one hundred people and was charged to develop more credibility with respect to financial reports and operating activities of the facility.

Appellant's employment by St. Mary's Hospital was terminated on November 18, 1977. His re-employment efforts began shortly thereafter by responding to advertisements and submitting applications. Appellant testified that the resume which he distributed to potential employers listed his work at St. Mary's, and that he sometimes divulged to interviewers that Hennessey had been his immediate supervisor. It was estimated by the appellant that he submitted thousands of job applications between the fall of 1977 and sometime in 1981.

After these numerous failures to secure employment, the appellant attempted to ascertain the reason why he was not being hired from people with whom he had applied for positions, such as employment agencies. Caster never contacted the hospital concerning the matter.

During a prior suit challenging his termination, which resulted in a directed verdict for the defendants, Caster v. Hennessey, CIV NO. 80-8148 (S. D. Fla.), aff'd, 727 F.2d 1075 (11th Cir. 1984), appellant first became aware of the alleged injurious act for which this suit was commenced. In that prior suit, appellant attempted to discover the contents of his personnel file, but the request was denied by the defendants. By order dated June 3, 1982, the district court granted the appellant's motion to compel.

This personnel file contained a document titled, "St. Mary's Hospital Employee Separation," bearing the date of March 2, 1978. The report stated that the reason for leaving was "[i]nsubordination and declining standard of performance," and made a reference to Caster being in below average health. There was also a printed question on the report which said "Hospital Property Returned?" under which the selection "No" was checked. Appellant testified that he first learned of the separation report after the motion to compel was granted. It was upon this report that the appellant brought this suit alleging libel and slander on November 30, 1982.

An attempt to amend his complaint to include a count of "placement in false light" to prospective employers and others was made on April 22, 1985. Such motion was denied by the court for failure to specify the reason for delay in filing.

A judgment was entered in favor of the appellees under the four-year statute of limitations for libel and slander. Fla. Stat. Ann. § 95.11(3)(o)(1982), amended by Fla. Stat. Ann. § 95.11(4)(g)(Cum. Supp. 1987).[1] The district court concluded that the appellant failed to show any publication after November 30, 1978, and therefore the cause was barred by the statute of limitations at the time of filing on November 30, 1982.

Whether the statute of limitations did in fact bar the cause of action is the primary issue on appeal.

DISCUSSION

The statute applicable to this case, Fla. Stat. Ann. §95.11 (1982), amended by Fla. Stat. Ann. § 95.11(4)(g)(Cum. Supp. 1987), reads:

> (3) Within four years.--
>
> (o) An action for libel, slander, assault, battery, false arrest, malicious prosecution, malicious interference, false imprisonment, or any other intentional tort, except as provided in subsection (5).

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[1]As amended the limitation period for libel and slander has been decreased from four to two years. Fla. Stat. Ann. § 95.11(4)(g) (Cum. Supp. 1987).

A statute of limitations begins to run "from the time the cause of action accrues." Fla. Stat. Ann. § 95.031 (1982), amended by Fla. Stat. Ann. § 95.031 (Cum. Supp. 1987). Accrual of the cause of action occurs "when the last element constituting the cause of action occurs." Fla. Stat. Ann. § 95.031(1)(1982). Although this language may help to some degree, we must turn to the relevant case law to determine if the discovery rule is applicable to a libel and slander cause of action.[2] Since there are no Florida decisions exactly on point, this court sitting in diversity must predict what the Supreme Court of Florida would hold when confronted with this issue. First National Life Insurance Co. v. Fidelity & Deposit Co., 525 F.2d 966, 968 (5th Cir. 1976).[3]

The district court relied on two Florida District Court of Appeal decisions in finding that the statute of limitations began to run upon publication. In Galizzi v. Williams, 218 So.2d 499 (Fla. 2d Dist. Ct. App. 1969), the appellate court affirmed the summary judgment of the defendant in a slander cause of action. Galizzi, however, is only a one paragraph opinion where the statute of limitations was found to begin to run upon publication. Id. at 500. Due to the brevity of this decision it is unclear whether or not the court considered a concealment question, and thus the case is far from controlling on the issue of the case at bar.

The second case, Houston v. Florida-Georgia Television Co., 192 So.2d 540 (Fla. 1st Dist. Ct. App. 1966), involved the issue of when the limitations period begins to run in an invasion of privacy action--from the time when the invasion was committed or from the point when the plaintiff first learned of the alleged invasion. Without

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[2]A discovery rule has been provided by the legislature in the statute of limitations for latent defects in the "design, planning, or construction of an improvement to real property," Fla. Stat. Ann. § 95.11(3)(c)(1982); professional and medical malpractice, Fla. Stat. Ann. § 5. 11(4)(a), (b)(1982); violations of chapter 517 and personal injury caused by phenoxy herbicides, Fla. Stat. Ann. § 95.11(4)(e), (f) (Cum. Supp. 1987); and products liability and fraud. Fla. Stat. Ann. § 95.031(2) (Cum. Supp. 1987).

[3]All Fifth Circuit cases handed down prior to the close of business on September 30, 1981, are binding precedent upon the Eleventh Circuit. Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981)(en banc).

the plaintiff's consent, the defendant television company had filmed the plaintiffs as they watched a moonshine raid on a nearby barn. This film was televised later in the day accompanied by narration describing the raid. The plaintiffs alleged that they first became aware of the telecast on a date within the four-year statute of limitations period, rather than at the time of the telecast which was beyond four years. Id. at 542.

The Houston court relied on "37 Corpus Juris, Limitations of Actions, page 969, par. 350" for the proposition that ignorance of when the statute begins to run is no excuse for want of diligence. Houston, 192 So.2d at 543. Summary judgment for the defendant television company was affirmed by the court determining that the statute began to run upon publication. There was no concealment of the alleged invasion found by the court, but quite the opposite since this was televised over a public channel. Id.

As with Galizzi, we feel that the Houston decision is improper precedent for this case. The Houston facts, where the alleged invasion is televised, are at the opposite end of the spectrum from this libel and slander action where the alleged injurious act is concealed in a discharge report to which the plaintiff had no access. Furthermore, the same District Court of Appeal which decided Houston adopted a discovery rule in two subsequent cases. Branford State Bank v. Hackney Tractor Co., 455 So.2d 541 (Fla. 1st Dist. Ct. App. 1984) (statute of limitations did not begin to run at the time of the alleged conversion where there was no showing that the bank knew, or should have known, of an invasion of its legal rights); Lund v. Cook, 354 So.2d 940 (Fla. 1st Dist. Ct. App.) (statute of limitations began to run at the time the plaintiff knew or should have known of the existence of the defects, rather than at the time of the delivery of the survey and plat to the plaintiffs), cert. denied, 360 So.2d 1247 (Fla. 1978).[4]

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[4]The District Court of Appeal for the Third District stated that: "Were there any doubt about the continued vitality of Houston after Creviston, such doubt was set to rest in Lund v. Cook, 354 So.2d 940, by the very same court which decided Houston." Senfeld v. Bank of Nova Scotia Trust Co., 450 So.2d 1157, 1163 (Fla. 3d DCA 1984) (holding that the discovery rule applies to an action for conversion).

Our primary reason for declining to follow Galizzi and Houston is that they precede the Supreme Court of Florida case of Creviston v. General Motors Corp., 225 So.2d 331 (Fla. 1969), which we conclude is controlling on this statute of limitations issue. Creviston was a breach of warranty action in which the door of a refrigerator injured the plaintiff when it fell off after the upper hinges came apart.[5] The district court found that the three-year statute of limitations barred the action, because the accident occurred four years and ten months after the refrigerator was purchased. Id. at 331-32.

The Supreme Court of Florida reversed the district court holding that the statute of limitations began to run when the plaintiff discovered or should have discovered the defect. After a thorough discussion of the applicable case law, the court concluded:

> From the standpoint of legal principles, the holdings in the cases above discussed appear to crystallize in favor of application of the blameless ignorance doctrine in those instances where the injured plaintiff was unaware or had no reason to know that an invasion of his legal rights has occurred. In reality, such a doctrine is merely a recognition of the fundamental principle that regardless of the underlying nature of a cause of action, the accrual of the same must coincide with the aggrieved party's discovery or duty to discover the act constituting an invasion of his legal rights.

Id. at 334.

Creviston's blameless ignorance doctrine, or discovery rule, has not only been followed in Branford and Lund, the two First District Court of Appeal cases subsequent to Houston, but in numerous other court of appeal decision. Dubin v. Dow Corning Corp., 478 So.2d 71, (Fla. 2d Dist. Ct. App. 1985); R. A. Jones & Sons, Inc. v. Holman, 470 So.2d 60 (Fla. 3d Dist. Ct. App. 1985), rev. dismissed, 482 So.2d 348 (Fla. 1986);

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[5]Although Fla. Stat. Ann. § 95.031(2) provides for a discovery rule, at the time of Creviston the section was not in existence. See Fla. Stat. Ann. § 95.031(2) (1982) (this law became effective Jan. 1, 1975, while Creviston is a 1969 decision), amended by Fla. Stat. Ann. § 95.031(2) (Cum. Supp. 1987).

Meehan v. Celotex Corp., 466 So.2d 1100 (Fla. 3d Dist. Ct. App. 1985); Senfeld v. Bank of Nova Scotia Trust Co., 450 So.2d 1157 (Fla. 3d Dist. Ct. App. 1984); Kelly Tractor Co. v. Gurgiolo, 369 So.2d 992 (Fla. 3d Dist. Ct. App. 1979); Smith v. Continental Insurance Co., 326 So.2d 189 (Fla. 2d Dist. Ct. App. 1976); Cowan v. Turchin, 270 So.2d 449 (Fla. 4th Dist. Ct. App. 1972); Hendon v. Stanley Home Products, Inc., 225 So.2d 553 (Fla. 3d Dist. Ct. App. 1969). The Supreme Court of Florida reaffirmed its Creviston holding in AB CTC v. Morejon, 324 So.2d 625, 628 (Fla. 1975).

In deciding Creviston the Supreme Court was not without its own precedent for applying the blameless ignorance doctrine. In City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954), a plaintiff brought suit for burns sustained from negligent x-ray treatment. An overdose of x-ray therapy for the removal of warts from the plaintiff's left heel occurred at a hospital operated by the City of Miami. In 1944 the heel gave the appearance of being cured and in good condition. Not until 1949 did an ulcer develop resulting in the filing of the suit in 1950. Among other issues, the question of when the statute of limitations begins to run for giving notice to the city was addressed by the court. Id. at 307.

Relying on Urie v. Thompson, 337 U.S. 163 (1949) (determining that the statute of limitations in a silicosis action did not begin to run until the plaintiff discovered the injury, in absence of any evidence showing that he should have known of the condition), the court held that the statute does not begin to run until the plaintiff is on notice of the invasion of his legal rights.

> In the instant case, at the time of the x-ray treatment there was nothing to indicate any injury or to put the plaintiff on notice of such, or that there had been an invasion of her legal rights . . . . To hold otherwise, under circumstances of this kind, would indeed be a harsh rule and prevent relief to an injured party who was without notice during the statutory period of any negligent act that might cause injury.

Brooks, 70 So.2d at 309.

This blameless ignorance doctrine first established in Brooks and then expanded by Creviston applies very neatly to the case at bar. The appellant attempted to ascertain from the people from whom he was seeking employment as to why he was unsuccessful in obtaining a job. However, it was not until the appellee was compelled by court order to turn over Caster's personnel file that the separation report was discovered. How could the appellant have been any more blamelessly ignorant to the contents of the separation report generated by his former employer three and one half months after he was fired?[6] Absent the motion to compel, the appellant would have never known the contents of this allegedly slanderous report. As with the faulty hinge in Creviston and the overdose of x-ray therapy in Brooks, the cause of action was not discoverable at the time of the allegedly injurious act. Appellant cannot be held barred by the statute of limitations when he was unaware of the possible invasion of his legal rights. The Supreme Court of Florida was very clear in Creviston that the limitations period begins to run upon discovery or duty to discover "regardless of the underlying nature of a cause of action. . . ." Creviston, 225 So.2d at 334. Upon application of this principle to this libel and slander cause of action, we hold that the statue of limitations did not begin to run until the appellant discovered the report after the June 3, 1982, granting of the motion to compel.

Appellee urges us to restrict the use of Creviston due to the court's statement: "Our holding is limited solely to the matter of the commencement of the running of the three years statute of limitations in the factual posture of this case and is not otherwise extended." Creviston, 224 So.2d at 334. Appellees' position is unfounded as they have taken this language out of context, because it appears at the end of a paragraph in which the court discusses its concerns that the decision should not preclude factual questions as to discoverability of defects prior to injury. Likewise, the court

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[6]Appellant was terminated by St. Mary's Hospital on November 18, 1977, while the separation report is dated March 2, 1978.

was emphasizing that the decision is not intended to limit the relevant inquiries into various defenses which might affect the discoverability issue. Id. When read in context, this language does not curtail the court's discussion of the blameless ignorance doctrine.

An alternative available to this court would be to certify this statute of limitations question to the Supreme Court of Florida. Certification is allowed "whenever the answer is determinative of the cause and there is no controlling precedent of the Supreme Court of Florida." Fla. R. App. P. 9.150. Such decision as to whether or not to certify the question rests in the sound discretion of the federal court. Lehman Brothers v. Schein, 416 U.S. 386, 394 (1974).

Two reasons are present for our decision not to certify this case. First, as discussed supra, there is adequate precedent to determine that Florida has adopted a discovery rule. Second, the answer must be determinative of the cause. If the Supreme Court of Florida were to decide that the discovery rule did not apply, then the cause of action would end. But, a decision in favor of the discovery rule would require a remand to the district court, with the issues of privilege and publication still potential problems. Since the question might not be determinative of the cause and there is adequate precedent to resolve the issue, certification is inappropriate.

OTHER ISSUES

Caster raises two additional points on appeal which we will discuss very briefly. He first claims that denial of his motion for leave to amend the complaint to include a count of "placement in false light" was an abuse of discretion by the district court. Such claim allegedly arises from Hennessey's alleged statement to prospective employers that he could not speak with them due to pending litigation. Caster's motion was denied for failure to specify the reason for delay in filing. We express no opinion as to whether there was an abuse of discretion, but we direct the district court to review its decision to the extent it was based on the statute of limitations.

In Caster's other point of contention he alleges an abuse of discretion by the district court in not granting a change of venue to transfer the case to another judge. We reject appellant's argument as he has made no showing of any bias whatsoever on the part of the district court in favor of the appellees.

For the reasons stated herein the judgment is REVERESED and REMANDED to the district court.