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

PETITIONERS' BRIEF ON JURISDICTION

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PREFACE

The petitioners were the defendants and the respondent is the plaintiff. The parties will be referred to as the plaintiff and the defendants. The following symbol will be used:

(A) - Petitioner's Appendix.

ISSUE

DOES THE OPINION OF THE FOURTH DISTRICT, HOLDING THAT A CAUSE OF ACTION FOR DEFAMATION DOES NOT ACCRUE AT THE TIME OF PUBLICATION, CREATE CONFLICT?

STATEMENT OF THE CASE AND FACTS

The following facts are all found in the opinion of the Fourth District Court of Appeal:

JFK Medical Center, Inc., a hospital, was in the process of investigating fraud by some of its directors. During the course of this investigation, JFK's lawyer sent the following letter to the in-house counsel for its insurer:

> The documents indicate a minimum loss in the years 1984-1987 of approximately $2,000,000. This, however, does not include losses occurring in the construction fraud. . . . In order to finalize this figure, we will probably have to subpoena records from John Flanagan, the contractor. [T]his part of the loss will approximate $10,000,000. We do not believe these losses were a part of the conspiracy, but rather were a separate fraud by John Flanagan and other individuals in the hospital.

Although this letter was dated February 24, 1988, plaintiff, John Flanagan, did not learn of this letter until November, 1988. Flanagan filed a complaint for defamation against the lawyer who wrote the letter, his law firm, and JFK, on October 31, 1990, more than two years after publication of the letter, but less than two years after plaintiff discovered it.

The trial court dismissed the complaint for failure to state a cause of action because the claim was barred by the statute of limitations, and the Fourth District reversed, holding, for the first time in Florida, that a cause of action for defamation does not accrue at the time of publication, but rather when plaintiff discovers the defamation.

Although the Fourth District did not certify conflict, it did state on page 3 of its opinion:

> Appellees argue, and the trial court held, that the last element occurs upon publication. The case relied upon for this proposition held that a "[c]ause of action in slander accrues at the time of the alleged publication." Gallizzi v. Williams, 218 So.2d 499, 500 (Fla. 2d DCA 1969). See also Franklin Life Ins. Co. v. Tharpe, 131 Fla. 213, 179 So. 406 (1938); Houston v. Florida Georgia Television Co., 192 So.2d 540 (Fla. 1st DCA 1966).

Defendants seek review in this Court based on conflict.

SUMMARY OF ARGUMENT

In Gallizzi v. Williams, 218 So.2d 499 (Fla. 2d DCA 1969), the Second District held that a cause of action for slander accrues at the time of publication. In Houston v. Florida-Georgia Television Co., 192 So.2d 540 (Fla. 1st DCA 1966), the First District held to the same effect for invasion of privacy. The opinion of the Fourth District in the present case creates conflict and confusion which should be resolved by this Court.

ARGUMENT

ISSUE

DOES THE OPINION OF THE FOURTH DISTRICT, HOLDING THAT A CAUSE OF ACTION FOR DEFAMATION DOES NOT ACCRUE AT THE TIME OF PUBLICATION, CREATE CONFLICT?

In Gallizzi v. Williams, 218 So.2d 499 (Fla. 2d DCA 1969), the Second District stated on pages 499 and 500:

> It appears from the record that the suit was barred by the statute of limitations. Florida Statutes § 95.11(6), F.S.A. requires that an action for slander must be brought within two years from the date the cause of action accrued. Cause of action in slander accrues at the time of the alleged publication.

In Houston v. Florida-Georgia Television Co., 192 So.2d 540 (Fla. 1st DCA 1966), the defendant television station broadcast a story about plaintiffs on November 3, 1960. Plaintiffs alleged that they were not aware of the broadcast until June 10, 1961. They filed their complaint for invasion of privacy on May 15, 1965,

which was more than four years (the period of limitations for invasion of privacy) after the publication. In holding that the cause of action accrued at the time of publication, not when plaintiffs discovered the invasion of their legal rights, the First District stated on page 543:

> In support of their position in this appeal, the appellees have cited to us several cases involving libel and slander from other jurisdictions, which types of action, we agree, are closely analogizable to the cause of action involved in the instant appeal--"publication" by television so to speak. One of the best of such cases is the decision of the Supreme Court of Mississippi in Forman v. Mississippi Publishers Corp., 195 Miss. 90, 14 So.2d 344, 148 A.L.R. 469, an action of libel, in which that court said:
>
> > "There seems to be no doubt that the statute of limitations begins to run from the date of the first publication * * * Since the gravamen of the offense is not the knowledge by the plaintiff nor the injury to his feelings but the degrading of reputation, the right accrued as soon as the paper was exhibited to third persons in whom alone such repute is resident."

Although the Fourth District acknowledged the contrary authority set forth above, it decided that it should apply this court's reasoning in Creviston v. General Motors Corp., 225 So.2d 331 (Fla. 1969), a products liability case, to this defamation case. There are several reasons why Creviston should not apply to defamation.

Section 95.031(1), Florida Statutes (1988), provides that "a cause of action accrues when the last element constituting the cause of action occurs". Section 95.031 was enacted by the legislature in 1974. Chapter 74-382, Laws of Florida. Thus, when this Court decided Creviston in 1969, there was no statute which spelled out when a cause of action accrues. When the legislature enacted Section 95.031 in 1974, it made exceptions in Section 95.031(3) for actions for products liability and fraud, and in Section 95.11 for actions founded on the design, planning or construction of improvements to real property and professional malpractice. The legislature specifically provided that in those actions the time runs from when plaintiff discovered or should have discovered the existence of the cause of action. It made no such provision for defamation or other causes of action.

When this Court decided Creviston in 1968, and adopted the "discovery rule" in products liability cases, it was changing the common law. The "discovery rule" was not contained in any of our statutes of limitations, nor did our statutes specifically spell out when a cause of action accrues. The Fourth District's application of the Creviston rationale (promulgated in 1969) after the legislature specifically spelled out when a cause of action accrues in 1974, is contrary to the well-established principle that statutes control and take precedence over the common law where there are inconsistencies between them. Matthews v. McCain, 125 Fla. 840, 170 So. 323, 327 (1936).

A second reason why the Fourth District should not have applied Creviston is found in this Court's statement in Creviston on page 334:

> 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.

A third reason why Creviston should not have been applied is found in Section 770.07, Florida Statutes (1988), which provides:

> The cause of action for damages founded upon a single publication or exhibition or utterance, as described in s.770.05, shall be deemed to have accrued at the time of the first publication or exhibition or utterance thereof in this state.

This court has recognized the above statute as defining when a cause of action for libel accrues. Perdue v. Miami Herald Pub. Co., 291 So.2d 604 (Fla. 1974).

CONCLUSION

The opinion of the Fourth District in the present case, holding that a cause of action for defamation does not accrue at the time of publication, creates conflict with Gallizzi and Houston, supra, is contrary to our statutes, and also creates confusion in this area of the law. It is, therefore, respectfully submitted that this Court should grant review on the merits.

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By: 
LARRY KLEIN
Florida Bar No. 043381

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished, by mail, this 11th day of May, 1992, to: STUART H. SOBEL, SOBEL & SOBEL, P.A., Penthouse #2, 155 South Miami Avenue, Miami, FL 33130.

By: 
LARRY KLEIN
Florida Bar No. 043381

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1991

JOHN H. FLANAGAN, JR.,

Appellant,

v.

WAGNER, NUGENT, JOHNSON, ROTH, ROMANO, ERIKSEN & KUPFER, P.A., f/k/a CONE, WAGNER, NUGENT, JOHNSON, ROTH & ROMANO, P.A., AL J. CONE and JFK MEDICAL CENTER, INC.,

Appellees.

CASE NO. 91-0305.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Opinion filed January 3, 1992

Appeal from the Circuit Court for Palm Beach County; Edward A. Garrison, Judge.

Stuart H. Sobel of Sobel & Sobel, P.A., Miami, for appellant.

Eric A. Peterson of Peterson & Bernard, West Palm Beach, for Appellees-Wagner, Nugent, Johnson, Roth, Romano, Eriksen & Kupfer, P.A., and Al J. Cone.

David Povich of Williams & Connolly, Washington, D.C., and James M. McCann of Mershon, Sawyer, Johnston, Dunwoody & Cole, West Palm Beach, for Appellee-JFK Medical Center, Inc.

HERSEY, J.

This appeal in an action for defamation raises the question of when the statute of limitations begins to run where the publication is private. JFK Medical Center, Inc., of West Palm Beach (JFK) was in the process of filing a claim with its insurer

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under a directors' and officers' liability policy for certain fraudulent acts of JFK's directors. As JFK investigated, it came to the conclusion that there had been a separate fraud committed by a construction contractor, appellant John Flanagan. During the course of the claim investigation, JFK's attorney sent a letter to in-house counsel for JFK's insurer. Flanagan alleges that the following excerpt from that letter defames him:

> The documents indicate a minimum loss in the years 1984-1987 of approximately $2,000,000. This, however, does not include losses occurring in the construction fraud. . . . In order to finalize this figure, we will probably have to subpoena records from John Flanagan, the contractor. [T]his part of the loss will approximate $10,000,000. We do not believe these losses were a part of the conspiracy, but rather were a separate fraud by John Flanagan and other individuals in the hospital.

(Emphasis added.)

This letter was dated February 24, 1988. Flanagan did not learn of the letter and its allegedly defamatory statements until a friend, who had received a copy of the letter anonymously in the mail, showed it to him in late November 1988. On October 31, 1990, Flanagan filed a complaint for defamation against the attorney, his law firm, and JFK Medical Center. The defendants moved to dismiss on the ground that the statute of limitations on an action for defamation is two years. An additional basis for the motion to dismiss was that the defamatory statement was not actionable because it was made by an attorney regarding an insurance claim as a necessary prerequisite to a judicial proceeding, so that the statement was absolutely privileged.

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The trial court agreed with the defendants that the action was barred by the statute of limitations, and entered a written order dismissing the complaint.

The statute of limitations applicable to an action for libel or slander is two years. § 95.031(1), Fla. Stat. (1989). The cause of action for defamation arises "when the last element constituting the cause of action occurs." § 95.031(1), Fla. Stat. (1989).

Appellees argue, and the trial court held, that the last element occurs upon publication. The case relied upon for this proposition held that a "[c]ause of action in slander accrues at the time of the alleged publication." Gallizzi v. Williams, 218 So.2d 499, 500 (Fla. 2d DCA 1969). See also Franklin Life Ins. Co. v. Tharpe, 131 Fla. 213, 179 So. 406 (1938); Houston v. Florida Georgia Television Co., 192 So.2d 540 (Fla. 1st DCA 1966). As further support for this position appellee makes reference to specific legislative history and cites to a number of cases from other jurisdictions.

Appellant suggests that the better rule is that the last element occurs and thus the cause of action accrues when the plaintiff knew or through the exercise of reasonable diligence should have known of the invasion of his legal rights. This is the so-called "discovery rule" or the "blameless ignorance doctrine." This position, too, is supported by citation to Florida and foreign authority. More importantly, it appears to have been adopted by the Supreme Court of Florida.

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In Creviston v. General Motors Corp., 225 So.2d 331 (Fla. 1969), the plaintiff was injured when the door fell off her refrigerator. Refusing to follow the rule that the statute of limitations began to run on the day the refrigerator was purchased, the court applied the discovery rule in this action for breach of an implied warranty. As authority, the opinion relied upon, inter alia, its earlier decision in City of Miami Beach v. Brooks, 70 So.2d 306 (Fla. 1954). In Brooks, a medical malpractice case, the court held that the statute of limitations commenced to run when the plaintiff knew or should have known that she had sustained an injury or invasion of her legal rights.

The Creviston court expressly adopted the "blameless ignorance" doctrine discussed in Urie v. Thompson, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949), and was careful to point out that application of the doctrine was not limited to cases involving breach of an implied warranty. The court explained that the doctrine was "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." Creviston, 225 So.2d at 334.

Ordinarily the determination of when the plaintiff knew or, with the exercise of reasonable diligence, should have known, of the invasion of his or her rights is a question for the trier of fact rather than one of law. Cowan v. Turchin, 270 So.2d 449 (Fla. 4th DCA 1972)(following and applying Creviston).

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In Lund v. Cook, 354 So.2d 940 (Fla. 1st DCA), cert. denied, 360 So.2d 1247 (Fla. 1978), where the cause of action was one for negligence in making a survey and plat, the court held that the cause of action accrued "with the aggrieved party's discovery or duty to discover the act constituting an invasion of his legal rights." Id. at 942 (quoting Creviston).

In the context of an action for conversion, the third district applied Creviston, documenting the demise of the holdings of earlier cases that did not follow the discovery rule. In Senfeld v. Bank of Nova Scotia Trust Co., 450 So.2d 1157 (Fla. 3d DCA 1984), the court explained:

> While it is true that "mere ignorance of the facts which constitute the cause of action will not postpone the operation of the statute of limitations," Franklin Insurance Co. v. Tharpe, 131 Fla. 213, 214, 179 So. 406, 407 (1938), it is equally true that where the plaintiff's ignorance is blameless, the cause of action will not arise until the plaintiff knows or is chargeable with knowledge of an invasion of his legal right, Miami Beach First National Bank v. Edgerly, 121 So.2d 417 (Fla.1960)(action against bank for payment on a forged endorsement does not arise until maker receives, or by exercise of reasonable business care would have received, notice that endorsement forged); City of Miami v. Brooks, 70 So.2d 306 (Fla.1954)(medical malpractice action does not arise until notice of consequences or negligent act); see Franklin Insurance Co. v. Tharpe, 179 So. 406.

Id. at 1162. Accordingly, we follow well-established Florida authority in applying the discovery rule to the facts of the present case.

Earlier we alluded to legislative intent. This reference pertained to recitations in legislative materials to the effect

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that the statute of limitations in an action for libel or slander commenced to run at the time that the allegedly defamatory statement is made or published. See Staff of Fla. H.R. Comm. on Judiciary, HB 832 (1986) Staff Analysis 2 (rev. May 2, 1986)(Florida State Archives); Staff of Fla. S. Comm. on Judiciary, CS for SB 1239 (1986) Staff Analysis 1 (May 15, 1986)(Florida State Archives). We do not feel compelled to translate these staff observations into Florida law. We interpret them as simply a misunderstanding of what the law was. In addition, the amendment under consideration dealt with a reduction of the limitations period from four to two years, impacting on section 95.11(4)(g), and having no effect on the statutory section dealing with the question of when the limitation period commences to run; that is, section 95.031(1). Accordingly, we find this legislative material legally irrelevant to the issue before us.

Finally, appellees invite us to apply the "right for the wrong reason" analysis of Applegate v. Barnett Bank, 377 So.2d 1150 (Fla. 1979), in order to affirm the result reached by the trial court. The essence of their argument is that the allegedly defamatory statement was made under circumstances which confer on the publisher of the letter an absolute privilege. We decline their invitation for two reasons. The first is that the trial court has not yet had an opportunity to address and rule upon this issue. The second is that the record is not sufficiently developed to permit us to make a determination as to whether the privilege in question here is absolute rather than limited or qualified, even if we were otherwise inclined to so determine.

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Accordingly, we reverse and remand for further appropriate proceedings consistent with this opinion.

REVERSED AND REMANDED.

GLICKSTEIN, C.J., and GUNTHER J., concur.

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made them, and the law he applied is unexceptionable. See United States v. Savage Truck Line, Inc., 209 F.2d 442, 44 A.L.R.2d 984 (4th Cir. 1953), cert. den. 347 U.S. 952, 74 S.Ct. 677, 98 L.Ed 1098 (1954), 44 A.L.R.2d 984, and the annotation at 44 A.L.R.2d 993.

Affirmed.

LILES, C. J., and PIERCE, J., concur.

AEROSONIC CORPORATION and Diversified Components Division of B & F of Clearwater, Inc., Appellants,

v.

DIVERSIFIED CONSTRUCTION COMPONENTS, INC., Appellee.

No. 68-86.

District Court of Appeal of Florida.

Second District.

Jan. 31, 1969.

Rehearing Denied Feb. 27, 1969.

Appeal from Circuit Court, Pinellas County; B. J. Driver, Judge.

Burton C. Easton, Clearwater, for appellants.

Stephen D. Hughes, Largo, for appellee.

PER CURIAM.

Affirmed. See Barber-Greene Co. v. Gould, 1926, 215 Ala. 73, 109 So. 364, and Restein v. McCadden, 1895, 166 Pa. 340, 31 A. 99.

LILES, C. J., and PIERCE and MANN, JJ., concur.

Pasquale L. GALLIZZI, also known as P. L. Gallizzi, M.D., Appellant,

v.

Juanita WILLIAMS, also known as Dr. Juanita Williams, Appellee.

No. 68-242.

District Court of Appeal of Florida.

Second District.

Jan. 29, 1969.

Rehearing Denied Feb. 27, 1969.

Action for slander. The Circuit Court, Pinellas County, William A. Patterson, J., held in favor of defendant, and plaintiff appealed. The District Court of Appeal held that action for slander filed three years and three months after alleged publication was barred by statute of limitations.

Summary judgment affirmed.

1. Action ⇐61

Cause of action in slander accrues at time of alleged publication.

2. Limitation of Actions ⇐55(1)

Action for slander filed three years and three months after alleged publication was barred by statute of limitations. F.S.A. § 95.11(6).

P. L. Gallizzi, in pro. per.

John W. Boult, of Fowler, White, Collins, Gillen, Humkey & Trenam, Tampa, for appellee.

PER CURIAM.

This is an appeal from a summary judgment in favor of defendant-appellee in an action for slander.

[1,2] It appears from the record that the suit was barred by the statute of limita-

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tions. Florida Statutes § 95.11(6), F.S.A. requires that an action for slander must be brought within two years from the date the cause of action accrued. Cause of action in slander accrues at the time of the alleged publication. From the record it appears that the suit was filed three years and three months after the alleged publication. Therefore, the summary judgment entered by the trial judge is affirmed.

LILES, C. J., and HOBSON and McNULTY, JJ., concur.

Booker T. WRIGHT, Appellant,

v.

STATE of Florida, Appellee.

No. 68-574.

District Court of Appeal of Florida.

Second District.

Feb. 7, 1969.

Proceeding upon prisoner's postconviction motion for discharge. The Circuit Court for Manatee County, Robert E. Willis, J., denied motion, and prisoner appealed. Upon state's motion to quash appeal, the District Court of Appeal held that appeal from order denying postconviction motion for discharge would be quashed where prisoner, who attacked judgment and sentence in which he had been found guilty of exhibiting obscene literature, had not attacked validity of sentence for which he was in custody.

Motion to quash granted.

Criminal Law ⇐998(5)

Appeal from order denying postconviction motion for discharge would be quashed where petitioner, who attacked judgment and sentence in which he had been found guilty of exhibiting obscene literature, had not attacked validity of sentence for which he was in custody. 33 F.S.A. Rules of Criminal Procedure, rule 1.850.

Walter R. Talley, Public Defender, Bradenton, for appellant.

Earl Faircloth, Atty. Gen., Tallahassee, and M. J. Hanlon, Asst. Atty. Gen., Lakeland, for appellee.

ON MOTION TO QUASH

PER CURIAM.

The state has moved to quash this appeal, which is from an order of the circuit court denying a post-conviction motion for discharge under Criminal Procedure Rule 1.850, 33 F.S.A.

Petitioner-appellant is currently in custody serving a valid sentence in state prison imposed on September 1, 1967, as the result of a jury verdict of guilty of breaking and entering with intent to commit a felony.

In his motion for post-conviction relief, petitioner has attacked a judgment and sentence dated December 11, 1957, in which he was found guilty of exhibiting obscene literature. In petitioner's motion for post-conviction relief, he has not attacked the validity of the sentence for which he is currently in custody.

Therefore, the motion to quash is granted under the authority of Johnson v. State, Fla.1966, 184 So.2d 161; Escue v. State, Fla.App.1966, 192 So.2d 524, and Yates v. State, Fla.App.1967, 199 So.2d 340.

LILES, C. J., and HOBSON and McNULTY, JJ., concur.

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corporate entity. Irving and Hyman Green have at no time questioned the jurisdiction over their persons and have participated in this litigation, without challenge as to the jurisdiction of this Court, by moving to discharge the lis pendens in this cause, which motion if granted would have resulted in substantial benefits to Irving and Hyman Green in that it would have released all of the property described in the complaint from the restrictions imposed by the lis pendens, and further in moving to increase the bond they would have gained substantially in obtaining a greater security in the event that the Court should ultimately rule that the injunction was improvidently issued. These motions filed by the Defendants, Irving and Hyman Green, if granted, would have been of material and substantial benefits to both of them and in substance was in effect a litigation of some of the issues involved in this proceeding. In STAVANG vs. AMERICAN POTASH and CHEMICAL CORP., 5 Cir., 344 F (2nd) 117, a 1965 decision, the facts were somewhat different from those in the present case; however, this Court believes that the law set forth in the STAVANG case is apropos here. In that case the Federal Court made this statement:

> 'If a defendant proceeds *first* on the merits, as by a motion to dismiss for failure to state a claim or by an answer on the merits, and *thereafter* attempts to challenge jurisdiction over his person or improper venue, the challenge should fail; it comes too late, and has not been made in the manner prescribed in Rule 12.'

The writer of this opinion thinks the quotation above is particularly applicable here. The Defendants, Irving Green and Hyman Green, in this case have failed to challenge the jurisdiction over their persons in any way whatsoever, and yet have participated as above set forth in this litigation.

IT IS, THEREFORE, THE JUDGMENT OF THIS COURT and this Court so rules, as to the defendants, Irving Green and Hyman Green, that they are properly before this Court as defendants and they are hereby required to file their Answer or other defensive pleadings to the Amended Complaint herein on or before twenty (20) days from the date of this Order."

Rule 12 of the Federal Rules of Civil Procedure, referred to in the Stavang case, cited in Judge Smith's Order, has its counterpart in Rule 1.11 of the Florida Rules of Civil Procedure, 30 F.S.A. See St. Anne Airways, Inc. v. Webb, Fla.App.1962, 142 So.2d 142.

The "Order on Motions" brought here by interlocutory appeal is hereby affirmed.

Affirmed.

SHANNON, Acting C. J., and DAYTON, ORVIL L., Jr., Associate Judge, concur.

Charla Mae HOUSTON, Individually, and Betty Lee Houston, a minor, by her next friend and natural guardian, Charla Mae Houston, Appellants,

v.

FLORIDA-GEORGIA TELEVISION COMPANY, Inc., a Florida corporation, Appellee.

No. H-44.

District Court of Appeal of Florida.

First District.

Dec. 8, 1966.

Action against television company for invasion of privacy. The Circuit Court, Clay County, Roger J. Waybright, J., entered summary judgment for television

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company and appeal was taken. The District Court of Appeal, Carroll, Donald K., J., held that where action for invasion of privacy was commenced more than four years after television company photographed plaintiffs whose land adjoined buildings where moonshine raid took place, but plaintiffs learned of invasion less than four years prior to commencement of action, four-year statute of limitations barred action.

Affirmed.

1. Limitation of Actions ⇐195(3)

Since statute of limitations applicable to actions for invasion of privacy does not provide that four-year limitation period begins only when injured party obtains knowledge or notice of invasion, burden is upon plaintiffs to demonstrate that, under decisional law and in absence of such postponement provision in statute, such provision should be read into statute of limitations. F.S.A. §§ 95.01 et seq., 95.11 and (4), (5) (d).

2. Limitation of Actions ⇐95(1)

Mere ignorance of facts which constitute cause of action will not postpone operation of statute of limtiations, but statute of limitation will run from time cause of action first accrues notwithstanding such ignorance, in absence of secret fraud or fraudulent concealment on part of defendant.

3. Limitation of Actions ⇐55(1)

Where action for invasion of privacy was commenced more than four years after television company photographed plaintiffs whose land adjoined buildings where moonshine raid took place, but plaintiffs learned of invasion less than four years prior to commencement of action, four-year statute of limitations barred action. F.S.A. § 95.11(4).

4. Limitation of Actions ⇐55(1)

Four-year statute of limitations begins to run from time invasion of privacy is committed and not from time plaintiffs first learn of invasion. F.S.A. § 95.11(4).

Victor E. Raymos, Jacksonville, for appellants.

Rogers, Towers, Bailey, Jones & Gay, Jacksonville, for appellee.

CARROLL, DONALD K., Judge.

The plaintiffs in an action for invasion of privacy have appealed from a summary final judgment entered by the Circuit Court for Clay County in favor of the defendant, a television company.

The sole question presented for our determination in this appeal is whether the Circuit Court, under the circumstances shown by the record, correctly held that the plaintiffs' action was barred by the statute of limitations. The more specific and the ultimate question before us is whether in an action for invasion of privacy the statute of limitations begins to run from the time the invasion was committed or from the time when the plaintiffs first learned of the invasion. In their appellate briefs both parties submit, and we agree, that the point on appeal here makes this a case of first impression in this state.

On May 15, 1965, the plaintiffs, a minor female child and her mother as next friend and natural guardian, filed their complaint against the defendant, Florida-Georgia Television Company, Inc., a corporation, the owner and operator of television station WFGA-TV, Channel 12, alleging that on November 3, 1960, at about 3 P.M., Internal Revenue agents of the United States conducted a moonshine raid in a building located on land adjoining certain premises owned by the plaintiff mother, pursuant to a search warrant issued by the U. S.

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Commissioner; that the plaintiffs at that time and place were on the back porch of the home on the said premises when the defendant, through its servants, agents, and employees, trespassed upon the said premises without the plaintiffs' consent and photographed the plaintiffs with a television camera and later in the day produced and released to the television audience a news telecast showing the plaintiffs on the back porch accompanied by a spoken narrative describing the moonshine raid and mentioning that the plaintiff mother "watched from inside and the porch as the destruction went on at the nearby barn for over an hour." The plaintiffs claimed in their complaint that the defendant, by its said acts, violated their right of privacy and each demanded judgment in excess of $25,000.

To the plaintiffs' complaint the defendant filed its answer, denying many of the allegations of the complaint. Among other defenses in its answer, it affirmatively invoked the statute of limitations in bar of the cause of action, saying that the alleged cause of action "did not accrue within four years prior to the commencement of this action." The defendant then filed a motion for summary judgment on the principal ground that the pleadings affirmatively show that the cause of action is barred by the statute of limitations, which motion was granted by the Circuit Court in the final judgment appealed from herein.

In order to overcome the defendant's aforementioned defense of the statute of limitations, the plaintiffs filed counter-affidavits stating, among other things, that their first notice of the said telecast over the defendant's television station was on or about June 10, 1961, which date is, of course, less than four years before the plaintiffs' action was filed.

Thus the issue was drawn by the parties as to whether in an action for invasion of privacy the statute of limitations begins to run from the time the invasion was committed or from the time the plaintiffs first learned of the invasion. There is no dispute in this appeal as to the fact, and we so hold, that the four-year statute applies to an action of this kind.

The statutory provision applicable to actions like the present one for invasion of privacy is subdivision (4) of Section 95.11, Florida Statutes, F.S.A., providing that actions other than for the recovery of real property "can only be commenced * * * WITHIN FOUR YEARS.—Any action for relief not specifically provided for in this chapter." An action for invasion of privacy is not specifically provided for or referred to elsewhere in Chapter 95. The said subdivision contains no reference to the time when the said four-year period begins to run, but it is noted that subdivision (5) (d) of Section 95.11 provides that in an action for relief on the ground of fraud, the cause of action is "not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud * * *." No similar provision for the postponement of the beginning of the limitations period is found in Section 95.11 and made applicable to actions other than for fraud. The reason for making such an exceptional provision in cases of fraud is obvious, for oftentimes fraud involves a concealment and it would be unjust to allow the period to run while the fact of the fraud may be concealed from the injured party by the perpetrator of the fraud.

[1] Since the statute of limitations (Section 95.11(4) applicable to actions for invasion of privacy does not provide that the four-year period begins only when the injured party obtains knowledge or notice of the invasion, the burden is upon the appellants to demonstrate that, under the decisional law and in the absence of such a postponement provision in the statute, such a provision should be read into the statute of limitations. The cases from other jurisdictions which are cited by the appellants in their brief in support of their contention

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are, as the appellees point out in their brief, cases involving concealment of the facts giving rise to the causes of action—in which circumstances, as we mentioned above, it seems just to postpone the commencement of the limitations period until knowledge is brought home to the injured party. In the present case, of course, there was no concealment of the invasion by the defendant—in fact, there was almost the opposite of a concealment—the telecasting of pictures on a news program over a television station.

[2] While no Florida decision has been found adjudicating the precise question before us in this appeal, the general rule recognized by the Supreme Court of Florida in Franklin Life Ins. Co. v. Tharpe, 131 Fla. 213, 179 So. 406 (1938), is applicable to the present question. In that case the Supreme Court quoted with apparent approval the following statement from 37 Corpus Juris, Limitations of Actions, page 969, par. 350:

"Ignorance and Concealment of Causes of Action—a. Ignorance in General. Omitting at this place any consideration of the effect of a mistake, trust relations in general, or laches, and except where there has been secret fraud or fraudulent concealment on the part of the defendant, the rule is generally established that mere ignorance of the facts which constitute the cause of action will not postpone the operation of the statute of limitations, but the statutes will run from the time the cause of action first accrues notwithstanding such ignorance. The reason of the rule seems to be that in such cases ignorance is the result of want of diligence and the party cannot thus take advantage of his own fault."

To the same general effect see 21 Fla.Jur., Limitations of Actions, Section 37, pages 194 and 195.

In support of their position in this appeal, the appellees have cited to us several cases involving libel and slander from other jurisdictions, which types of action, we agree, are closely analogizable to the cause of action involved in the instant appeal—"publication" by television so to speak. One of the best of such cases is the decision of the Supreme Court of Mississippi in Forman v. Mississippi Publishers Corp., 195 Miss. 90, 14 So.2d 344, 148 A.L.R. 469, an action of libel, in which that court said:

"There seems to be no doubt that the statute of limitations begins to run from the date of the first publication * * * Since the gravamen of the offense is not the knowledge by the plaintiff nor the injury to his feelings but the degrading of reputation, the right accrued as soon as the paper was exhibited to third persons in whom alone such repute is resident."

[3, 4] As mentioned early in this opinion, the present action was filed more than four years after the defendant's telecast which is the subject of this action. Since we have held that the four-year statute of limitations is applicable to this action and since the defendants properly invoked that statute as an affirmative defense in their answer to the plaintiffs' complaint, we hold that the Circuit Court correctly entered the summary final judgment appealed from herein. That judgment, therefore, must be and it is

Affirmed.

RAWLS, C. J., and WIGGINTON, J., concur.

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