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 JURISDICTION

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES: PAGE

STATUTES:

INTRODUCTION

Throughout this Brief, Respondent, Plaintiff below, John H. Flanagan, will be referred to as "Respondent" or "Flanagan." Petitioner, Al. J. Cone will be referred to as "Cone." Petitioner, Wagner, Nugent, Johnson, Roth, Romano, Erikson & 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."

All emphasis is that of the author, unless otherwise noted. Copies of all authority cited in this Brief are attached as an Appendix pursuant to Florida Rule of Appellate Procedure 9.220.

STATEMENT OF THE FACTS AND OF THE CASE

Respondent generally agrees with the Statement of the Case and Facts as set forth by Petitioners. However, despite Petitioners' assertion, the record, at this point does not establish the context in which the defamatory letter was written. Further, Respondent disagrees with Petitioners' statement characterizing the holding of the Fourth District. Respondent asserts that the holding of the Fourth District quite correctly followed well reasoned, cited precedent on the issue.

SUMMARY OF ARGUMENT

Creviston v. General Motors Corp., 225 So. 2d 331 (Fla. 1969) established the well reasoned, accepted axiom that a 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. The Fourth District properly applied this doctrine to a cause of action for defamation.

The application of the rule in this case does not conflict with Florida Statute Section 95.031(1), which only addresses **when** the limitations period begins to run. The decision at bar addresses only **what** event triggers the limitations period (publication or discovery).

The Fourth District was correct in disregarding Gallizzi v. Williams, 218 So. 2d 499 (Fla. 2DCA 1969), which case lacked any reasoning or discussion.

Florida Statutes 770.07 does not apply to non-media, private defamation, and does not exempt Petitioners from liability to Respondents.

ARGUMENT

Appellees raise three arguments in support of their petition to invoke the discretionary jurisdiction of this Court. None of the three provides grounds for accepting jurisdiction.

I.

Appellees first argue (Page 5) that the Fourth District should not have relied upon Creviston v. General Motors Corp., 225 So. 2d 331 (Fla. 1969) in reversing the trial court, because Creviston preceded the 1974 enactment of F.S. 95.031(1). This contention was **expressly rejected** in Lund v. Cook, 354 So. 2d 940 (Fla. 2 DCA 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. 3 DCA 1984), also decided after the statute's enactment.

Petitioners' reliance on Houston v. Florida-Georgia Television Company, 192 So. 2d 540 (Fla. 1DCA 1966) is misplaced. The same First District receded from Houston when it, instead, cited Creviston with approval in its decision in Lund v. Cook, supra.

Petitioners' position that Creviston speaks to when a cause of action accrues is off the mark. Creviston, rather, speaks to the

what triggers the running of the statute.

Florida Statute 95.031(1) provides that the "cause of action accrues when the last element constituting the cause of action occurs." It does not determine what the last element is. Consistent with 95.031(1), Creviston dictates that the last element is discovery, rather than publication, and does no violence to the statute. The statute speaks to **when** the cause of action accrues, but does not address **what** it is that triggers the limitation period.

II

Next (at page 6), 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 [1]:

> 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

[1]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 on Jurisdiction as an Appendix. Although it is unpublished and not of official precedential value, its reasoning is compelling and instructive.

> 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.

Finally, at page 6 of Petitioners' Initial Brief, they seek to raise Florida Statutes, Section 770.07, as the determinative legislative definition of when the cause of action accrues. Petitioners admitted in their Motion for Rehearing in the Fourth District, that the statute was not raised, pled or argued below. It, therefore, should not be considered now.

However, even if this Court were to consider the statute, this Court should still decline jurisdiction, since the statute clearly has no application to the non-media Petitioners. The Petitioners in this case are a hospital, its attorneys and the particular attorney within the law firm that wrote the defamatory letter. 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. 2 DCA 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. 4 DCA 1985), the Fourth District followed Bridges, as did the Second District in Gifford v. Bruckner, 565 So. 2d 887, 888 (Fla. 2 DCA 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. 3 DCA 1984). See also, Corkery v. SuperX Drugs Corporation, 602 Fed. Supp. 42, 46 (M.D. Florida, Tampa Division, 1985).

The case cited by Appellee, JFK, 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 in its Opinion and no intercession by this Court is warranted.

CONCLUSION

This is not an appropriate case in which this Court should intervene. The decision of the Fourth District is consistent with logic and reason, as well as this Court's ruling in Creviston, supra. and the statutes pertaining to limitations periods. The Petition to Invoke Discretionary Jurisdiction should be denied.

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Appellant's Reply to Appellees' Motion for Rehearing, Rehearing en banc, and Certification was furnished by U.S. Mail this 20th day of May, 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 James M. McCann, Jr., 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, 839 17th Street, N.W., Washington, D.C., 20006 (co-counsel for JFK).

Respectfully submitted,

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IN THE SUPREME COURT OF FLORIDA
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CASE NO. 79,828

WAGNER, NUGENT, JOHNSON, ROTH,
ROMANO, ERIKSEN & KUPFER, P.A.,
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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 APPENDIX OF AUTHORITY

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CASES: PAGE

STATUTES:

Columbus BRIDGES and Alma P. Bridges, his wife, Appellants,

v.

Carlton WILLIAMSON, Robert Lee Kitchen, Willie Pounsel, James Cowart, Lawrence Poindexter and Al Bridges, Appellees.

No. 83-1622.

District Court of Appeal of Florida, Second District.

May 2, 1984.

Plaintiffs in defamation action sought review of order of the Circuit Court, Pinellas County, B.J. Driver, J., dismissing their complaint with leave to amend. The District Court of Appeal held that statute requiring a plaintiff to serve notice on a defendant five days prior to instituting a civil action for libel or slander does not apply to nonmedia defendants even when alleged defamatory statements made by nonmedia defendants are republished by the media.

Petition granted; order quashed; remanded.

1. Certiorari ⇐42(3)

District Court of Appeal has discretion to treat an improperly filed appeal as petition for writ of certiorari.

2. Certiorari ⇐5(2), 29

Certiorari is available when order under review does not conform to essential requirements of law and may reasonably cause irreparable injury which cannot be remedied on appeal.

3. Certiorari ⇐27

Although order dismissing defamation complaint was a nonappealable nonfinal order because it afforded opportunity for plaintiffs to amend, District Court of Appeal would exercise its discretion to grant certiorari because compliance with order could result in republication of a libelous statement that could irreparably injure plaintiffs.

4. Libel and Slander ⇐70

Statute requiring a plaintiff to serve notice on a defendant five days prior to instituting a civil action for libel or slander does not apply to nonmedia defendants even when alleged defamatory statements are republished by the media; refusing to follow *Laney v. Knight-Ridder Newspaper, Inc.*, 532 F.Supp. 910. West's F.S.A. § 770.01.

5. Courts ⇐97(6)

Rules of stare decisis do not require District Court of Appeal to follow federal court decisions that construe Florida's substantive law.

Alex D. Finch of Law Offices of Alex D. Finch, Clearwater, for appellants.

Darryl Ervin Rouson of Robinson, Athanason, Steagall, Grant, Silvers & Biesinger, St. Petersburg, for appellees.

PER CURIAM.

Appellants seek review of the trial court's nonfinal order dismissing their complaint with leave to amend. We reverse.

Appellants, Columbus Bridges and Alma P. Bridges, his wife, filed a complaint in the trial court seeking compensatory and punitive damages for alleged defamatory statements made by appellees, Carlton Williams, Robert Lee Kitchen, Willie Pounsel, James Cowart, Lawrence Poindexter, and Al Bridges. Some of the statements allegedly made by appellees were republished in a newspaper. Appellees filed a motion to dismiss the complaint because appellants failed to comply with section 770.01, Florida Statutes (1981). The trial court granted the motion but allowed appellants twenty days to amend their complaint to allege compliance with section 770.01. Appellants then filed an appeal of the trial court's nonfinal order.

[1-3] The order under review is a nonappealable nonfinal order because it afforded an opportunity for appellants to amend

their complaint. This appeal is properly before us, however, because we have discretion to treat an improperly filed appeal as a petition for writ of certiorari. *Briggs v. Salcines*, 392 So.2d 263 (Fla. 2d DCA 1980), *cert. denied*, 454 U.S. 815, 102 S.Ct. 92, 70 L.Ed.2d 84 (1981). Certiorari is available when the order under review does not conform to the essential requirements of law and may reasonably cause irreparable injury which cannot be remedied on appeal. *Briggs*. We grant certiorari in this case because compliance with the trial court order might result in republication of a libelous statement that could irreparably injure appellants. *See* § 770.02, Fla.Stat. (1981).

[4] We hold chapter 770, Florida Statutes (1981), does not apply to nonmedia defendants even when alleged defamatory statements made by a nonmedia defendant are republished by the media. Therefore, we find the trial court erred in requiring appellant to comply with section 770.01.

Section 770.01, Florida Statutes (1981), provides as follows:

> Notice condition precedent to action or prosecution for libel or slander.—Before any civil action is brought for publication or broadcast, in a newspaper, periodical, or other medium, of a libel or slander, the plaintiff shall, at least 5 days before instituting such action, serve notice in writing on the defendant, specifying the article or broadcast and the statements therein which he alleges to be false and defamatory.

The statute requires a plaintiff to serve notice on a defendant five days prior to instituting a civil action for libel or slander. This provision has been construed to apply exclusively to suits against newspapers and periodicals, as distinguished from private individuals. *Ross v. Gore*, 48 So.2d 412 (Fla.1950). In *Ross*, the supreme court recognized that one of the objectives of the statute was to afford newspapers and periodicals an opportunity to make full retraction in order to correct inadvertent errors and mitigate damages, as well as to save them the expense of answering to an unfounded suit for libel.

After *Ross*, the statute was amended to include civil actions for slander against broadcasting stations. Ch. 76-123, Laws of Fla. (1976) (codified as amended at § 770.01, Fla.Stat. (1983)). At that time, the legislature was aware of *Ross* since it is presumed to be cognizant of the judicial construction of a statute when contemplating changes in the statute. *See Seddon v. Harpster*, 403 So.2d 409 (Fla.1981). Had the legislature intended to extend the application of the statute to nonmedia defendants, it could have inserted such a provision into the statute at that time. *See Reino v. State*, 352 So.2d 853 (Fla.1977).

[5] Appellees contend that, rather than follow the rationale in *Ross*, this court should defer to the federal court's decision in *Laney v. Knight-Ridder Newspapers, Inc.*, 532 F.Supp. 910 (S.D.Fla.1982). We disagree. The rules of stare decisis do not require this court to follow federal court decisions that construe Florida's substantive law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Although the federal court in *Laney* extended the application of section 770.01 to include nonmedia defendants, we believe the legislature did not intend such an extension. The language of the statute is limited to newspapers, periodicals, and other media. Nowhere does the statute contain the words "nonmedia" or "private individuals." [1]

Accordingly, we grant the petition for writ of certiorari, quash the order dismissing appellants' complaint, and remand for proceedings consistent herewith.

DANAHY, A.C.J., and CAMPBELL and SCHOONOVER, JJ., concur.

1. See Staff Analysis of Senate Judiciary-Civil Comm., 1976 Legis., 1st Sess., Libel, Slander and Invasion of Privacy by Publication or Broadcast (1976) (staff analysis by S. Kubik).

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.

remind them of the 10:30 a.m. deadline for meeting the margin call.

26. As the price of silver continued to climb on July 23, the equity in defendants' account continued to drop. BACHE was required to make a margin call in defendants' account for $52,000 payable by 10:30 a.m.

27. Defendants failed to meet the margin call as required and at 11:08 a.m. on July 23 BACHE closed out all of defendants' silver positions at the best possible price during the trading day and liquidated defendants' 19 silver contracts at the market price, which resulted in a debit balance in defendants' account of $23,095.

28. To the extent the Findings of Fact herein contain conclusions of law, such conclusions of law are incorporated into the Conclusion of Law section herein. To the extent the conclusions of law herein contain findings of fact, such findings of fact are incorporated in the Findings of Fact section herein.

CONCLUSIONS OF LAW

1. Federal jurisdiction over the subject matter and venue is proper in this action. 15 U.S.C. § 78aa; 28 U.S.C. § 1332(a).

2. Plaintiff did not convert any of defendants' funds to plaintiff's own use.

[1] 3. Considering the contract and the relationship between the parties, access to necessary information, the knowledge that defendants were day traders, and related necessary facts, BACHE had a duty, if defendants failed to close out their positions by the close of the trading day at 11:15 a.m. on July 22, 1982, to liquidate the account. Plaintiff breached said duty.

[2] 4. Defendants are liable to BACHE for the $2,675 loss which would have resulted from the liquidation of their account on July 22, 1982. Plaintiff is responsible for bearing the remaining loss suffered when the account was liquidated on July 23, 1982.

[3] 5. Defendants, under the written agreement that they would maintain sufficient margin and pay on demand any debit owing in their accounts, had the obligation to deposit good funds in the account to pay for the trades they placed. Defendants breached said obligation.

[4] 6. Plaintiff is entitled to judgment against both defendants, jointly and severally, in the sum of $11,000 representing the amount of the checks on which defendants stopped payment. In addition, plaintiff is entitled to judgment against both defendants, jointly and severally, in the sum of $2,675 representing the loss for which defendants are liable had the account been liquidated on July 22, 1982 for a total judgment of $13,675 plus interest thereon at the rate of ten percent per annum from August 24, 1984. Defendants are not entitled to recovery on their counterclaim. Each party is to bear their own costs and attorneys' fees.

James M. CORKERY, and Carol A. Corkery, his wife, Plaintiffs,

v.

SUPERX DRUGS CORPORATION, and Kroger Company, Inc., Defendants.

No. 84-442 Civ-T-15.

United States District Court, M.D. Florida, Tampa Division.

Feb. 1, 1985.

Plaintiff brought suit against his former employer and others, alleging claims under section 1985, Employee Retirement Income Security Act and state law. On defendants' motion to dismiss, the District Court, Castagna, J., held that: (1) class of "handicapped employees" was insufficient for claim of "class-based" animus under

section 1985(3); (2) discrimination action under ERISA was not barred by statute of limitations; (3) count alleging intentional infliction of emotional distress stated a claim; and (4) statutory notice provision was not applicable to plaintiff's count for defamation.

Motion granted in part and denied in part.

1. Conspiracy ⇐7.5

Class of "handicapped employees" was insufficient for claim of "class-based" animus under section 1985(3). 42 U.S.C.A. § 1985(3).

2. Limitation of Actions ⇐16

In determining applicable statute of limitations, proper approach is to first determine essential nature of claim under federal law and then focus on period applicable to such claim under state law.

3. Master and Servant ⇐78.1(8)

State employment termination suit was most analogous to counts asserted under Employee Retirement Income Security Act, charging defendants with purposefully discriminating against plaintiff in attempt to interfere with his attainment of rights under his employer-supported health and retirement plan, and therefore Florida two-year statute of limitations was applicable and did not bar action. Employee Retirement Income Security Act of 1974, § 510, 29 U.S.C.A. § 1140; West's F.S.A. § 95.-11(4)(c).

4. Damages ⇐50.10

Under Florida law as predicted by federal district court, action for intentional infliction of severe emotional distress is viable even if unconnected to any other identifiable tort, so long as conduct is sufficiently outrageous.

5. Damages ⇐149

Count alleging intentional infliction of emotional distress involving job harassment and claim for insurance benefits alleged sufficiently outrageous conduct to state claim under Florida law.

6. Libel and Slander ⇐70

Statutory notice provision was not applicable to plaintiff's count for defamation. West's F.S.A. § 770.01.

Warren T. La Fray P.A. and Michael J. Ebin, Clearwater, Fla., for plaintiffs.

Peter W. Zinober, John P. McAdams, Kathleen S. Edwards, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, Tampa, Fla., for defendants.

AMENDED ORDER

CASTAGNA, District Judge.

The Court has for consideration the status of the above-styled case. The Defendants have filed a Motion To Dismiss the Plaintiff's fifteen Count complaint, which encompasses claims under 42 U.S.C. § 1985, the Employee Retirement Income Security Act (ERISA), and numerous state law claims. Both the Plaintiff and Defendant have supported their arguments with extensive memoranda, which the Court has carefully considered.

This case involves the unusual factual situation of a Plaintiff who fell victim to a system of discrimination that he unwittingly helped promote at an earlier time. According to the factual allegations of the Complaint, which the Court of course must accept as true for purposes of a motion to dismiss under Fed.R.Civ.P. 12(b)(6), *e.g., Miree v. DeKalb County, Ga.*, 433 U.S. 25, 27 n. 2, 97 S.Ct. 2490, 2492 n. 2, 53 L.Ed.2d 557 (1977), the Plaintiff is a former employee of Defendant SuperX. Plaintiff alleges that he was originally employed in July of 1977 as SuperX's Regional Loss Prevention Manager and was subsequently promoted to the position of National Security Manager in charge of the entire SuperX chain. During 1980 and up to April of 1981, the Plaintiff was directed by his immediate superior, a Mr. Layfield, to conduct investigations into the background of certain designated employees. Layfield later informed Plaintiff that the purpose of these investigations was to discover pretexts to justify

the termination of those employees, all of whom were handicapped.

On or about April 6, 1981, the tide turned on the Plaintiff, however, when he suffered serious congestive heart failure at the age of 42. Plaintiff was unable to work until May 18, 1981, at which time he returned to work. Upon return, the complaint alleges, the Plaintiff was met with a markedly different, and hostile, work environment. The adverse working atmosphere escalated, aggravating the Plaintiff's health condition to the point that he took permanent disability status in March of 1982. The Plaintiff alleges that the adverse working conditions were purposefully perpetrated to the detriment of his already fragile physical condition. Subsequently, Defendant SuperX allegedly communicated to the company's group employee insurer a falsehood—that Plaintiff had obtained other employment—resulting in the wrongful discontinuation of his disability benefits.

Following this background, the instant controversy ensued. Count I of the complaint seeks redress for violations of 42 U.S.C. § 1985(3), alleging the violation of numerous of Plaintiff's state-conferred rights as a member of the class of "handicapped employees" against whom the Defendants' discriminatory animus was based. Counts II and III are asserted under ERISA, 29 U.S.C. § 1140, charging the Defendants with purposefully discriminating against the Plaintiff in an attempt to interfere with his attainment of rights under his employer supported health and retirement plans. Count V seeks relief for intentional/negligent infliction of emotional distress contending that the Defendants' activities were undertaken with full knowledge of the Plaintiff's particular susceptibility to emotional upset and for the specific purpose of inflicting emotional harm. As to Count VII, based upon defamation, Plaintiff seeks to prove he was defamed by representations made to the group insurer that Plaintiff, in effect, had attempted to perpetrate a fraud to receive disability benefits. The remaining counts present grounds for recovery based upon civil conspiracy, breach of contract and interference with contract, among others.

As to Count I, based upon § 1985(3), the Defendants contend that the Plaintiff has failed to allege the requisite "class-based" animus which is necessary to state a claim under that provision. *See Griffin v. Breckenridge,* 403 U.S. 88, 102, 91 S.Ct. 1790, 1798, 29 L.Ed.2d 338 (1971). The class asserted by Plaintiff is that he was a "member of the class of handicapped employees toward whom the conspirators' discriminatory animus was directed." Complaint, Paragraph 25. In *Whilhelm v. Continental Title Co.,* 720 F.2d 1173, 1176 (10th Cir.1983), *cert. denied,* — U.S. —, 104 S.Ct. 1601, 80 L.Ed.2d 131 (1984), the Tenth Circuit addressed precisely this same question and determined:

> It is apparent that different individuals are handicapped in vastly different ways, for different periods of time, and to very different degrees or extent. The variations in each category are infinite and as a consequence the term "handicapped" does not have a definition capable of a reasonably precise application for the purposes before us.... The Complaint does not contain a description of a class of persons or group that is sufficiently definite or precise to set against the "class of persons" terminology in § 1985(3).

The *Wilhelm* Court went on to hold that even if further amendment could have developed a sufficiently defined "class" of handicapped persons, under the Supreme Court decisions in *United Brotherhood of Carpenters v. Scott,* 463 U.S. 825, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983) and *Breckenridge, supra,* handicapped persons are not a class contemplated or protected by § 1985(3).

[1] Plaintiff cites *People By Abrams v. 11 Cornwell Co.,* 695 F.2d 34, 42–43 (2d Cir.1982), *modified on other grounds,* 718 F.2d 22 (1983), where the Court determined that a class of "mentally retarded" persons was sufficient for § 1985(3) purposes. That case can be distinguished to a certain degree from the instant case and *Wilhelm*

by the fact that "mentally retarded persons" is a significantly more limited class than the broader categorization of "handicapped persons." *People By Abrams* also predates the recent *United Brotherhood of Carpenter's* decision. And finally, the Court notes that the instant case much more closely approximates *Wilhelm* on a factual basis—a § 1985(3) claim brought by a handicapped employee against his employer for, *inter alia*, improper discharge. Count I will therefore be dismissed without leave to amend, and the Court need not reach the other proffered grounds for dismissal of this count.

As to Counts II and III, the Defendants urge dismissal based upon a statute of limitations argument. The parties agree that this Court must look to the most analogous state statute of limitations for guidance, and offer as alternatives *Fla.Stat.* § 760.10(10) (1983) (180 days for handicap discrimination); § 95.11(4)(c) (two years for action to recover lost wages); § 95.11(3)(f) (four years for action on statutory liability); and § 95.11(2)(b) (five years for contract action based upon written instrument). The parties also agree that there is no authority supporting which limitations period should be used in relation to the specific section of ERISA in question, section 510, 29 U.S.C. § 1140.

[2] In determining the applicable statute of limitations, "the proper approach is to first determine the essential nature of the claim under federal law and then focus on the period applicable to such a claim under state law." *McGhee v. Ogburn*, 707 F.2d 1312, 1315 (11th Cir.1983). The *McGhee* Court went on to observe that:

> But as recognized in *Braden v. Texas A & M University System*, 636 F.2d [90] at 92 [(5th Cir.1981)], and *Shaw v. McCorkle*, 537 F.2d 1289, 1292 (5th Cir. 1976), the distinction between the two steps becomes blurred since the federal characterization of the claim draws heavily on state law. [*Broward Builders Exchange, Inc. v.*] *Goehring* [231 So.2d 513 (Fla.1970)] suggests that no matter how an employment termination suit is characterized, Florida law dictates that the two-year statute applies. *McWilliams* [*v. Escambia County School Board*, 658 F.2d 326 (5th Cir. Unit B 1981)] holds that even though § 95.11(4)(c) may appear on its face to be limited to actions for the recovery of back-pay, it applies to § 1983 employment suits in which the plaintiff requests legal and equitable relief.

Significantly, *McGhee* dealt with the statute of limitations applicable to racial discrimination in an employment case under § 1983 and determined that the "spirit of Florida law appears to be that employer/employee cases are governed by the two year period." 707 F.2d at 1314. As a signal of the breadth of the Court's interpretation of Florida law, the Court concluded: "Thus, no matter the theory or legal basis for the cause of action, the two year statute applies." *Id.*

[3] With this frame of reference, it is clear that a discrimination action under § 510 of ERISA is analogous to an employment termination case. The Court in *West v. Butler*, 621 F.2d 240, 245 (6th Cir.1980), broadly examined the purposes behind § 510. The *West* Court noted that "it appears Congress designed § 510 primarily to protect the employment relationship that gives rise to an individual's pension rights," observing that the statute covers discrimination that may "make an employee's work life so unpleasant as to amount to a constructive discharge." Id. at 245. As the *McGhee* Court determined, "no matter how an employment termination suit is characterized, Florida law dictates that the two-year statute applies." 707 F.2d at 1314. This Court consequently finds that the essential federal nature of this ERISA claim is most strongly analogous to a state employment termination suit, and consequently the applicable state statute of limitations is the two year period contained in *Fla.Stat.* § 95.11(4)(c). It is apparent from the Defendant's argument that the only finding that would result in dismissal of the ERISA Counts would be an application of the 180 day limit for handicap discrimi-

nation cases, and dismissal therefore is not warranted.

[4, 5] Turning to Count V, the Court recognizes that the Florida District Courts of Appeal are split over the viability of an action for intentional infliction of severe emotional distress. The First, Third, Fourth and Fifth Districts recognize such a claim, *see Dominguez v. Equitable Life Assur. Soc.*, 438 So.2d 58, 59–60 (Fla. 3d DCA 1983) and cases cited therein, while the Second District does not, *see Gmuer v. Garner*, 426 So.2d 972 (Fla. 2d DCA 1982). Siding with the greater weight of authority, this Court finds such an action viable even if unconnected to any other identifiable tort, so long as the conduct is sufficiently outrageous. The Eleventh Circuit in *Mundy v. Southern Bell Telephone & Telegraph Co.*, 676 F.2d 503, 506 (11th Cir.1982), has interpreted job harassment allegations similar to those found here as not meeting the requisite standard for outrageous conduct under Florida law, noting that no Florida case to that time had permitted such an action by an employee against an employer. The Court notes that the instant case, unlike *Mundy*, is more than a pure "employment" case. It also involves a claim for insurance benefits, as did *Dominguez* which postdates *Mundy* and in fact seems to lessen the "outrageous" standard somewhat where benefits claims are involved. Specifically, *Dominguez*, cited with approval two cases dealing with withholding of insurance or disability benefits that, in this Court's estimation, contain no more "outrageous" conduct than the allegations of this Complaint. *See Holmes v. Oxford Chemicals, Inc.*, 510 F.Supp. 915 (M.D.Ala.1981), *aff'd*, 672 F.2d 854 (11th Cir.1982); *Strader v. Union Hall, Inc.*, 486 F.Supp. 159 (N.D.Ill. 1980). Although at a later time this point may be raised again on a motion for summary judgment for factual insufficiency, *see Mundy*, 676 F.2d at 505 n. 4, Count V is sufficient under *Dominguez* to withstand dismissal on a Rule 12(b)(6) motion.

[6] As to Count VII for defamation, the Defendant moves to dismiss based upon the Plaintiff's failure to comply with the notice requirement found in *Fla.Stat.* § 770.01. The Court recognizes that *Ross v. Gore*, 48 So.2d 412 (Fla.1950), can be read to support Plaintiff's reasoning, although Judge King reached a contrary interpretation of *Ross* in *Laney v. Knight-Ridder Newspapers, Inc.*, 532 F.Supp. 910 (S.D.Fla.1982). *Laney*'s construction of § 770.10 and *Ross* has recently been soundly rejected by two Florida court opinions holding the statutory notice provision *not* applicable to nonmedia defendants. *See Bridges v. Williamson*, 449 So.2d 400, 401 (Fla. 2d DCA 1984); *Davies v. Bossert*, 449 So.2d 418, 421 (Fla. 3d DCA 1984). Count VII, therefore, need not be dismissed.

The Court has carefully examined each of the Defendants' remaining points urging dismissal, especially the challenges of the sufficiency of the conspiracy allegations, and finds them lacking. Accordingly, it is

ORDERED:

1. The Defendants' Motion To Dismiss is granted to the extent that Count I brought under § 1985(3) is dismissed with prejudice. In all other respects, the Motion is denied.

2. The Defendants' Request For Oral Argument is denied.

Russell ANDERSON, Plaintiff,

v.

Margaret HECKLER, Secretary, Department of Health and Human Services, Defendant.

No. 84 C 5693.

United States District Court, N.D. Illinois, E.D.

Feb. 6, 1985.

Action was brought by claimant seeking to review final decision of the Secretary

The trial court was correct in denying the motion to dismiss and its decision is accordingly,

Affirmed.

ROBERTS, DREW and ADKINS, JJ., concur.

ERVIN, C. J., concurs in judgment of affirmance.

Ruth H. CREVISTON, Petitioner,

v.

GENERAL MOTORS CORPORATION and J. W. Whitesides, Respondent.

No. 37657.

Supreme Court of Florida.

July 2, 1969.

Proceeding for writ of certiorari to review a decision of the District Court of Appeal, 210 So.2d 755, Allen, J., affirming order of the Circuit Court, Sarasota County, Lynn N. Silvertooth, J., dismissing action based on breach of implied warranty for injuries sustained by refrigerator buyer when door fell off. The Supreme Court, Ervin, C. J., held that three-year statute of limitations began to run, in case not governed by Uniform Commercial Code, against claim by refrigerator buyer for injuries sustained when door fell off refrigerator from time buyer first discovered, or reasonably should have discovered, the defect, not from date of sale of refrigerator.

Judgment of District Court of Appeal quashed; cause remanded with directions.

1. Limitation of Actions ⇐95(2)

Three-year statute of limitations began to run in case not governed by Uniform Commercial Code against claim by refrigerator buyer against manufacturer, based on breach of implied warranty, for injuries sustained when door fell off refrigerator from time buyer first discovered, or reasonably should have discovered, the defect, not from date of sale of refrigerator. F.S.A. § 95.11(5) (e).

2. Limitation of Actions ⇐199(1)

Rule that three-year statute of limitations begins to run against action on implied warranty for personal injury from time plaintiff first discovered, or reasonably should have discovered, defect in product does not preclude relevant factual consideration pertaining to discoverability of such defect prior to occurrence of actual injury or relevant considerations by jury at trial of questions pertaining to various defenses available to defendant generally in resisting claims predicated on breach of warranties in products liability area. F.S.A. § 95.11(5) (e).

Lawrence J. Robinson and David S. Yost, of Cramer, Robinson, Ginsburg & Ross, Sarasota, for petitioner.

Dart, Bell & Dickinson and Millican & Trawick, Sarasota, for respondent.

ERVIN, Chief Justice.

We consider here a petition for conflict certiorari to review the decision of the District Court of Appeal, Second District, reported in 210 So.2d 755.

In February, 1962, Petitioner, Ruth H. Creviston, purchased a new Frigidaire refrigerator which was manufactured by Respondent General Motors Corporation. On December 2, 1966, while Petitioner was opening the refrigerator door its upper hinge came apart. The door fell and injured Petitioner. On April 6, 1967, Petitioner filed a four-count complaint, of which three counts were voluntarily dismissed. Count I was based on breach of implied warranty. On motion by Respondents, the trial judge dismissed Count I because he thought it was barred on its

face by the three-year statute of limitations provided in Section 95.11(5) (e), Florida Statutes 1961, F.S.A. In affirming the trial judge, the District Court decided that the instant cause of action for personal injuries accrued when the refrigerator was purchased in 1962. The accident occurred four years and ten months after the purchase of the refrigerator. The District Court of Appeal affirmed, saying:

"* * * We are unable to find any Florida cases touching directly on the limitations of actions based on warranties although certain other personal injury cases are persuasive.

* * * * * *

"We are of the opinion that the statute of limitations in this case is three years, based on Section 95.11(5) (e). An implied warranty is an action founded on contract not in writing and normally on actions on contracts the limitations usually commence to run when the cause of action accrues. Generally the time of the breach of the agreement and not the date of actual damages sustained commences the breach. * * *" (210 So.2d at 756, 757.)

The pertinent issue here to be decided is whether in a personal injury case founded on breach of a products liability warranty the three-year statute of limitations, Section 95.11(5) (e), dealing with unwritten contracts,[1] begins to run from the time the warranty was breached by the sale of a defective product, or whether said statute of limitations begins to run from the time the injured party discovered or should have discovered, the existence of the defect in the product constituting a breach of the warranty agreement.

We have granted conflict certiorari because the decision below appears to directly conflict with certain pronouncements adhered to in City of Miami v. Brooks (Fla. 1954), 70 So.2d 306; Edgerly v. Schuyler (Fla.App.1959), 113 So.2d 737, and Miami Beach First National Bank v. Edgerly (Fla.1960), 121 So.2d 417, 82 A.L.R.2d 927.

The facts in City of Miami v. Brooks, supra, are as follows: The appellee, plaintiff below, brought suit for a breach of contract against the City of Miami for personal injuries resulting from an overdose of x-ray radiation received during treatment at appellant's hospital. The x-ray treatment was applied in 1944. The injury developed and first became known in 1949. At the time of the application of the x-ray treatment there was nothing to put the plaintiff on notice of any probable or even possible injury. The City of Miami appealed a judgment for the plaintiff, asserting that plaintiff's claim was barred by the statute of limitations. Our Court held that the statue of limitations did not commence to run until plaintiff was first put on notice that she had sustained an injury or had reason to believe that her right of action had accrued.

The facts in Edgerly v. Schuyler, supra, are as follows: The plaintiff-depositor brought suit against the defendant bank for damages resulting from the bank's payment of depositor's check upon a forged endorsement. The bank set up as an affirmative defense the failure of the depositor to commence the suit for breach of an implied contract until after the running the statute of limitations, Section 95.11(5) (e). The depositor appealed a summary judgment in favor of the bank. On these facts, the District Court of Appeal, Third District, ruled that the applicable statute of limitations begins to run from the discovery of the forgery by the depositor unless it can be demonstrated to the satisfac-

1. While we accept for purposes of resolving the present question that the warranty here involved is governed by the statute of limitations dealing with actions founded on unwritten contracts, we note the forward trend in the area of products liability cast considerable doubt on the classification of a breach of such a warranty as *ex contractu*. See Prosser, Torts, § 83 (2d ed. 1955); Lily-Tulip Cup Corp. v. Bernstein, Fla.1946, 181 So.2d 641; Manheim v. Ford Motor Co., Fla.1967, 201 So.2d 440.

tion of the trier of fact that at an earlier time the depositor would have discovered the forgery if he had used ordinary business care. The determination of the time of the commencement of the running of the statute of limitations was held to be one of fact.

In Miami Beach First National Bank v. Edgerly, supra, the District Court of Appeal, Third District, certified that its decision in Edgerly v. Schuyler, supra, passed upon a question of great public interest. This Court considered the cause on certiorari. The facts are the same as those of Edgerly v. Schuyler, supra, and on these facts this Court affirmed the decision of the District Court of Appeal, holding that the statute of limitations on an action for breach of an implied contract begins to run from the time the breach was, or reasonably should have been discovered.

[1] From the rationale of the three cases discussed above, we conclude in an action on implied warranty for personal injury under the facts of this case, the three-year statute of limitations, F.S. Section 95.11(5) (e), F.S.A., begins to run from the time Petitioner first discovered, or reasonably should have discovered the defect constituting the breach of warranty. We reach this conclusion because an arbitrary determination that a cause of action accrues and the statute runs on a products liability injury from the date of sale appears illogical with respect to a latently defective product where the defect is not known and cannot be known at the time of sale. **The purpose served generally by statutes placing a time limit on the right to assert claims is to prevent a stale assertion of such claims after an aggrieved party is placed on notice of an invasion of his legal rights.** A blanket stereotype limitation applied as of the date of sale of any particular product can hardly foster the designed purpose of such statutory limitation in those instances where an aggrieved party has no notice of the invasion of his legal rights in the form of the latently defective condition of the product.

Therefore, based on the allegations in Petitioner's complaint that discovery of the defect first occurred on December 2, 1966, the date the refrigerator door fell on Petitioner, causing her injury, we hold the motion dismissing Petitioner's complaint predicated on the running of the three-year statute of limitations was improperly granted.

The above conclusion we think is amply fortified by the reasoning employed by our Court in City of Miami v. Brooks, supra, where we adopted a portion of the opinion of the United States Supreme Court in Urie v. Thompson, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282, 11 A.L.R.2d 252 (1949):

> "'If Urie were held barred from prosecuting this action because he must be said, as a matter of law, to have contracted silicosis prior to November 25, 1938, it would be clear that the federal legislation afforded Urie only a delusive remedy. **It would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs;** under this view Urie's failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability.
>
> * * * * * *
>
> "'**We do not think the humane legislative plan intended such consequences to attach to *blameless ignorance*.** Nor do we think those consequences can be reconciled with the traditional purpose of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights. * * *" (Emphasis supplied.) (City of Miami v. Brooks, supra, 70 So.2d at 309.)

This Court in Brooks thereupon concluded:

> "* * * In other words, the statute attaches when there has been notice of

an invasion of the legal right of the plaintiff or he has been put on notice of his right to a cause of action. 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. It is the testimony of one of the expert witnesses that injury from treatment of this kind may develop anywhere within one to ten years after the treatment, so that the statute must be held to attach when the plaintiff was first put upon notice or had reason to believe that her right of action had accrued. 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." (City of Miami v. Brooks, supra, 70 So.2d at 309.)

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.** Applied particularly in the area of products liability, where a warranty attaches to the sale of a product, the above doctrine vitalizes the concept that the cause of action does not accrue and the statute does not commence to run until the breach of warranty in the form of a defective product is or should be discovered.[2]

[2] In reaching the conclusion here announced, we recognize that in most cases involving a personal injury precipitated by the defective condition of a product, the injury will often coincide with discovery of the defect constituting the breach of warranty. Notwithstanding this observation, we also note the potentiality of instances where an injury precipitated by a defective or malfunctioning product occurs subsequent to the patent or observable existence of the accident producing defect. In such instances, the view here adopted does not in any way preclude relevant factual considerations pertaining to the discoverability of such defects prior to the occurrence of actual injury. Similarly, in the view here adopted, we do not intend thereby to preclude relevant considerations by the jury at trial of questions pertaining to various defenses available to a defendant generally in resisting claims predicated on breach of warranties in the products liability area. For example, wear and tear, coupled with lapse of time and the propensity of the product to degenerate; misuse of the product; intervening cause, and other defenses available in the breach of warranty area (see Frumer and Friedman, 2 Products Liability, § 16.01 [3], [4]) are unaffected by our views herein announced. 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. Furthermore, we note specifically this case is not governed by the Uniform Commercial Code and nothing herein is intended to foreshadow related considerations under applicable Code provisions.

The judgment of the District Court of Appeal, Second District, is quashed and the cause remanded with directions that further proceedings be in accordance herewith.

It is so ordered.

DREW, THORNAL, CARLTON, ADKINS and BOYD, JJ., concur.

2. See Lopucki, Statute of Limitations in Warranty, 21 U.Fla.L.Rev. 236 (1969).

Richard & Richard and Dennis Alan Richard, Miami, for appellant.

Smith & Mandler and Mitchell W. Mandler, Miami Beach, for appellees.

Before BASKIN, DANIEL S. PEARSON and JORGENSON, JJ.

PER CURIAM.

The appellees have correctly conceded that the trial court erred in dismissing Counts II, III and IV of the appellant's complaint, since it is abundantly clear that (1) the statute of limitations provides no basis for dismissal unless, which is not the case here, it affirmatively appears on the face of the complaint that the counts are limitations barred; (2) similarly, the dead man's statute, § 90.602, Fla.Stat., cannot support a dismissal since a trial court, in considering a motion to dismiss, "is not permitted to speculate as to whether a plaintiff will be able to prove his allegations, rather a court is required to accept all well pleaded allegations contained in the complaint as true," *Raney v. Jimmie Diesel Corp.*, 362 So.2d 997, 998 (Fla. 3d DCA 1978); *see also Wallace v. Gilbert*, 250 So.2d 14 (Fla. 2d DCA 1971); and (3) each of the dismissed counts states a cause of action so as not to be subject on that ground to dismissal, much less, as occurred below, dismissal with prejudice. Accordingly, the order under review is reversed and the cause remanded for further proceedings.

Reversed and remanded.

A.B., a juvenile, Appellant,

v.

The STATE of Florida, Appellee.

No. 83-2452.

District Court of Appeal of Florida, Third District.

May 8, 1984.

Appeal from Circuit Court, Dade County; Ralph B. Ferguson, Jr., Judge.

Bennett H. Brummer, Public Defender and Karen M. Gottlieb, Asst. Public Defender, for appellant.

Jim Smith, Atty. Gen. and Julie S. Thornton, Asst. Atty. Gen., for appellee.

Before BASKIN, DANIEL S. PEARSON and JORGENSON, JJ.

PER CURIAM.

Affirmed. *See J.M. v. State*, 292 So.2d 398 (Fla. 3d DCA 1974).

Larry C. DAVIES, Appellant,

v.

Michael BOSSERT, Appellee.

No. 83-2552.

District Court of Appeal of Florida, Third District.

May 8, 1984.

Fisherman brought libel action against citizen's band radio operator for allegedly defamatory statements made by operator. The Circuit Court, Monroe county, Helio Gomez, J., dismissed complaint on grounds that jurisdictional condition precedent requiring plaintiff to give defendant five days' notice prior to filing libel suit had not

been met, and plaintiff appealed. The District Court of Appeal, Ferguson, J., held that the notice requirement, for purposes of apology or retraction, applies only to media defendants; thus citizen's band radio operator need not have received such notice.

Reversed and remanded.

1. Libel and Slander ⇐70

Statute requiring five days' notice to defendant for purposes of apology or retraction before a libel or slander suit is brought applies only to media defendants; thus, citizen's band radio operator did not have to receive notice under statute; disapproving *Laney v. Knight-Ridder Newspapers, Inc.*, 532 F.Supp. 910. West's F.S.A. §§ 770.01–770.04.

2. Libel and Slander ⇐70

Term "other medium" in statute requiring five days' notice to defendant for purposes of apology or retraction before libel or slander suit is brought was intended to include only television and radio broadcasting stations. West's F.S.A. § 770.01.

See publication Words and Phrases for other judicial constructions and definitions.

3. Statutes ⇐214, 223.1

In absence of legislative history, court can look to earlier enactments and other sections of the same statutory chapter to determine intent and meaning of words in statute.

4. Statutes ⇐223.5(6)

Where legislature enacted only minor amendments to statute requiring five days' notice to defendant for purposes of apology or retraction before a libel or slander suit is brought, and such amendments were consistent with technological developments in mass communication media, the legislature was presumed to have approved the interpretation given the earlier statute by the Supreme Court whereby only media defendants need receive such notice. West's F.S.A. § 770.01.

Ferrell & Ferrell, and Milton Ferrell, Miami, for appellant.

Frigola, Devane & Wright and Alfredo Frigola, Marathon, for appellee.

Before SCHWARTZ, C.J., and NESBITT* and FERGUSON, JJ.

FERGUSON, Judge.

This appeal questions the applicability of Section 770.01, Florida Statutes (1983)—which requires a complainant to give a defendant five days' prior notice for the purpose of apology or retraction before an action for libel or slander may commence—where allegedly defamatory statements were made by a private citizen over an emergency channel of a citizen's band radio.

The complaint alleges that defendant, while flying a small plane over a fishing area in the vicinity of Key West, broadcasted on Channel 19, VHF, that plaintiff, a lobster fisherman, was pulling a yellow and white buoy which belonged to another fisherman; that the broadcast was heard by hundreds of listeners; and that a third person told plaintiff that a number of listeners told him that they understood the broadcast to mean that plaintiff had been caught stealing.

[1] The trial court granted defendant's motion to dismiss on grounds that plaintiff failed to plead compliance with Section 770.01, which is a jurisdictional condition precedent to the right to maintain the action. Reliance was placed on *Laney v. Knight-Ridder Newspapers, Inc.*, 532 F.Supp. 910 (S.D.Fla.1982) for the finding that "F.S. 770.01 requiring five days' notice to the defendant before a libel or slander suit is brought applies to all defendants, 'media' and 'non-media'." We disapprove of the *Laney* holding on authority of *Ross v. Gore*, 48 So.2d 412 (Fla.1950), and reverse.

* Judge Nesbitt did not hear oral argument.

Although the issue before the Florida Supreme Court in *Ross* was different, the court unavoidably recognized that the statute had no application to non-media defendants. The main issue in *Ross* was whether the statute was discriminatory in that it permitted media defendants to avoid punitive damages by publishing a retraction or apology for libelous statements while not affording the same privilege to non-media defendants. The court did not hold, as does *Laney*, that Section 770.01 applies to media and non-media libelees alike, but recognized that the unambiguous language of the statutory condition precedent applies only to media defendants. *Ross*, 48 So.2d at 414–15.

In discussing Ross' equal protection argument with respect to Section 770.02, which in 1950 referred only to newspapers and periodicals, the court reiterated that "[t]he provision for retraction is peculiarly appropriate to newspapers and periodicals, as distinguished from private persons." 48 So.2d at 414. It reasoned further that Section 770.01, which requires a written notice only in suits against newspapers and periodicals, contains a valid classification which has a substantial relation to the purpose of the legislation. The basis for the classification was held to be, in essence, the public interest in the "free dissemination of news," and the reasonable likelihood of occasional error as a result of the tremendous pressure to deliver the information quickly.

The earlier version of Section 770.01, which was construed in *Ross v. Gore*, referred only to publication of a libel in a newspaper or periodical. In 1976, the statute was amended to include reference to (1) "broadcast" (in addition to "publication"), (2) "other medium" (in addition to "newspaper and periodical"), and (3) "slander" (in addition to "libel"). Ch. 76–123, § 1, Laws of Fla. The following additions were also made to Section 770.02: "or broadcast station" in the section's heading; "or broadcast" (as an addition to "article"); and a reference to correction, apology, or retraction in the case of a broadcast. Section 770.03 was also amended so as to refer to broadcasting stations in general and not just to radio broadcasting stations. Section 770.04 refers specifically to the civil liability of an "owner, licensee, or operator of a radio or television broadcasting station, and the agents, or employees of any such owner, licensee or operator."

[2, 3] Since no other section of Chapter 770 uses the language "other medium" as found in Section 770.01, we can infer reasonably that the legislature intended that term to include television and radio broadcasting stations. There is no logical reason to suppose that Section 770.01 contemplates any form of medium not covered by other sections of the chapter. In the absence of legislative history, we can look to earlier enactments and other sections of the present Chapter 770 to determine the intent and meaning of the words "or other medium" in Section 770.01. *See Florida State Racing Commission v. McLaughlin*, 102 So.2d 574 (Fla.1958) (if part of a statute appears to have a clear meaning if considered alone but when given that meaning is inconsistent with other parts of the same statute or others in pari materia, the court will examine the entire act and those in pari materia in order to ascertain the overall legislative intent); *Wheeler v. Green*, 286 Or. 99, 593 P.2d 777, 791 (1979) (in determining whether Oregon's retraction statute's reference to "publisher" was limited to a media entity, court looked to the other provisions of the statute).

[4] Further, because the legislature enacted only minor amendments to the statute, consistent with technological developments in mass communication media, it is presumed that it approved the interpretation given the earlier statute by the Florida Supreme Court. *See Peninsular Supply Co. v. C.B. Day Realty of Florida, Inc.*, 423 So.2d 500 (Fla. 3d DCA 1982), citing *National Lead Co. v. United States*, 252 U.S. 140, 40 S.Ct. 237, 64 L.Ed. 496 (1920) and *State ex rel. Szabo Food Services, Inc. of North Carolina v. Dickinson*, 286 So.2d 529 (Fla.1973).

All of the Florida state court cases which interpret the notice requirement of Section 770.01 involve newspapers, periodicals or broadcasting companies (either radio or television).[1] *See, e.g., Edward L. Nezelek, Inc. v. Sunbeam Television Corp.*, 413 So.2d 51 (Fla. 3d DCA), *rev. denied*, 424 So.2d 763 (Fla.1982); *Hulander v. Sunbeam Television Corp.*, 364 So.2d 845 (Fla. 3d DCA 1978), *cert. denied*, 373 So.2d 459 (Fla.1979).

Courts of several other jurisdictions have applied the same interpretation as the Florida Supreme Court to similar state retraction statutes by limiting the application of the statutes to news media defendants. The rationale is also the same. *See Alioto v. Cowles Communications, Inc.*, 519 F.2d 777 (9th Cir.), *cert. denied*, 423 U.S. 930, 96 S.Ct. 280, 46 L.Ed.2d 259 (1975) (statute's requirement that a retraction be demanded does not apply to magazines which have more time than newspapers and broadcast media to ascertain the truth of accusations before publishing them; California legislature which had amended statute twice so as to encompass radio and then television had not seen fit to amend again to extend coverage explicitly to magazines); *Fifield v. American Automobile Association*, 262 F.Supp. 253 (D.Mont.1967) (retraction statute strictly interpreted to apply only to media specifically enumerated in statute, and not to books; news dissemination media, unlike non-media defendants, have the capability of publishing a retraction which has an almost instant countering effect); *Comer v. Louisville & N.R. Co.*, 151 Ala. 622, 44 So. 676 (1907) (publishers of newspaper are in the class which the retraction statute was designed to protect but advertisers who prepare an article and pay for its publication are excluded); *Field Research Corp. v. Superior Court*, 71 Cal.2d 110, 77 Cal.Rptr. 243, 453 P.2d 747 (1969) (statute requiring notice to libel defendants does not apply to non-media defendants who are not under the time pressures imposed by publication or broadcast deadlines, are not especially susceptible to unwarranted defamation suits and claims for excessive damages, and are not in a position to publish widely-circulated, effective retractions); *Werner v. Southern California Associated Newspapers*, 35 Cal.2d 121, 216 P.2d 825 (1950), *appeal dismissed*, 340 U.S. 910, 71 S.Ct. 290, 95 L.Ed. 657 (1951) (same); *Wheeler v. Green*, 286 Or. 99, 593 P.2d 777 (1979) (retraction statute not applicable to defendants who wrote defamatory letters published in a newsletter; same rationale as in *Werner*).

Reversed and remanded with instructions to reinstate the complaint.

1. *See* Rahdert and Snyder, *Rediscovering Florida's Common Law Defenses to Libel and Slander*, 11 Stetson L.Rev. 1, 20–22 (1981) noting that the defenses set forth in Chapter 770 apply principally to news media defendants in libel and slander actions.

OLD REPUBLIC INSURANCE COMPANY, Appellant,

v.

James B. WILSON, et al., Appellees.

No. 83-2842.

District Court of Appeal of Florida, Third District.

May 8, 1984.

Negligence action was brought against driver and driver's insurers to recover for personal injury. Plaintiff filed motion for summary judgment on issue of coverage, and one of the insurers filed motion for leave to file cross claim for reformation of the insurance policy. The Circuit Court, Monroe County, M. Ignatius Lester, J., denied insurer's motion for leave to file cross claim and entered summary judgment for plaintiff, and subsequently entered summary judgment in favor of other insurer and defendant driver on their cross claims, and

Appellant has not demonstrated any reversible error.

AFFIRMED.

DOWNEY and GLICKSTEIN, JJ., concur.

Alphonse DELLA-DONNA, Appellant,

v.

GORE NEWSPAPERS COMPANY, a Delaware corporation authorized to do business in the State of Florida; and Hamilton C. Forman, Appellees.

No. 83-2264.

District Court of Appeal of Florida, Fourth District.

Jan. 30, 1985.

Rehearing and/or Clarification Denied March 4, 1985.

The Circuit Court, Broward County, J. Cail Lee, J., entered a summary judgment in a defamation action, and an appeal was taken. The District Court of Appeal held that statute requiring written notice by plaintiff as a condition precedent to an action or prosecution for libel or slander does not apply to nonmedia defendants.

Reversed and remanded.

Libel and Slander ⇐70

Statute requiring written notice by plaintiff as a condition precedent to an action or prosecution for libel or slander does not apply to nonmedia defendants. West's F.S.A. § 770.01.

Frates, Bienstock & Sheebe, Miami; Jonathan W. Lubell and Mary K. O'Melveny of Cohn, Glickstein, Lurie, Ostrin, Lubell & Lubell, New York City, and Robert J. O'Toole, Fort Lauderdale, for appellant.

Karen Coolman Amlong of Holmes & Amlong, Fort Lauderdale; and Scott DiSalvo of Fazio, Dawson & DiSalvo, Fort Lauderdale, for appellee, Forman.

PER CURIAM.

The summary judgment entered in this cause is reversed. Section 770.01, Florida Statutes (1983), does not apply to non-media defendants. *Demolfetta v. American Sightseeing Tours*, 450 So.2d 312 (Fla. 3d DCA 1984); *Davies v. Bossert*, 449 So.2d 418 (Fla. 3d DCA 1984); *Bridges v. Williamson*, 449 So.2d 400 (Fla. 2d DCA 1984). Accordingly, this cause is remanded for further proceedings.

REVERSED AND REMANDED.

DOWNEY, HURLEY and BARKETT, JJ., concur.

Betty VENTURA, Appellant,

v.

PALM SPRINGS GENERAL HOSPITAL, Liberty Mutual Insurance Company, and the Division of Workers' Compensation, Appellees.

No. AV-466.

District Court of Appeal of Florida, First District.

Jan. 31, 1985.

In workers' compensation case, claimant appealed from order of Deputy Commissioner, Margarita Esquiroz, denying her claim for a lump-sum advance of permanent total disability benefits. The District Court of Appeal, Mills, J., held that claim-

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-

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.

of appellee's vehicle was "partly motivated by pretext." We reverse.

[1, 2] Appellee Miller was driving his vehicle at night with an inoperable tag light. He was stopped by Lee County Sheriff's Deputies Graham and Nestler. As Deputy Nestler was writing a citation to appellee for the inoperable tag light, he was advised by radio dispatch that appellee's driver's license was suspended. Deputy Graham had, during the time Deputy Nestler was writing the citation for no tag light, checked around the driver's seat of appellee's vehicle for weapons and found none. As Deputy Graham was leaving appellee's car, he heard on his portable radio carried on his belt the radio dispatch concerning appellee's driver's license. Deputy Graham testified he advised Deputy Nestler, a special deputy, to place appellee under arrest for the suspended driver's license violation and then turned back to search appellee's vehicle incident to the arrest he had just directed. While Deputy Nestler testified he did not hear Deputy Graham's direction to arrest appellee, we conclude that is not critical to Deputy Graham's right to search the vehicle incident to the arrest he had ordered and believed would be effected. During this subsequent search incident to the arrest he had directed, Deputy Graham discovered three small baggies of cocaine.

We find that this case falls within the permissible standards for a valid traffic stop of a vehicle announced in *Kehoe v. State*, 521 So.2d 1094 (Fla.1988). Under *Kehoe*, the stop is proper if a reasonable officer would have stopped the vehicle absent an additional invalid purpose. *Id.* at 1097. Here, after the stop was made because of a traffic violation (section 316.221(2), Florida Statutes (1987)), and during the time a citation was being written for that violation, Deputy Graham received information which gave him probable cause to arrest appellee and to conduct a search incident to that arrest. *See Moreland v. State*, 552 So.2d 937 (Fla. 2d DCA 1989), *rev. denied*, 562 So.2d 346 (Fla.1990); *State v. Fernandez*, 526 So.2d 192 (Fla. 3d DCA 1988).

Reversed and remanded for further proceedings consistent herewith.

SCHEB, A.C.J., and ALTENBERND, J., concur.

Janet L. GIFFORD, Appellant,

v.

William Maxwell BRUCKNER, Jr., a/k/a "Bill Bruckner" and Florida Aerial Advertising Inc., a Florida corporation, Appellees.

No. 90–00238.

District Court of Appeal of Florida, Second District.

Aug. 17, 1990.

Individual brought defamation suit against aerial advertising firm arising from allegedly defamatory banner towed by airplane. The Circuit Court, Pinellas County, Mark R. McGarry, Jr., J., dismissed action without prejudice for failure to comply with statutory condition precedent to filing defamation suit. Individual appealed. The District Court of Appeal held that: (1) dismissal without prejudice to refile action was final appealable order, and (2) statute requiring written notice of alleged defamation at least five days prior to filing suit had no application to nonmedia defendant such as aerial advertising firm with respect to banner towed overhead by airplane.

Reversed and remanded.

1. Appeal and Error ⇐78(4)

Order dismissing without prejudice defamation complaint for failure to comply with statutory condition precedent of giving written notice to defendant of alleged defamation at least five days before filing

suit was final order for purposes of appeal; circuit court order was dismissal without prejudice to refile, rather than merely to amend, since mere amendment of complaint would not have cured alleged defect. West's F.S.A. § 770.01.

2. Libel and Slander ⇐70

Statute requiring written notice to potential defendant at least five days before filing of defamation action does not apply when action is brought against nonmedia defendant. West's F.S.A. § 770.01.

3. Libel and Slander ⇐70

Defamation plaintiff was not required to give written notice to aerial advertising firm at least five days before bringing defamation suit based on allegedly defamatory banner towed by airplane; aviation advertising firm was not media defendant within purview of statute. West's F.S.A. § 770.01.

Paul E. Gifford of Law Offices of Paul E. Gifford, Miami, for appellant.

Brent A. Owens and Dennis P. Dore of Dennis P. Dore, P.A., Tampa, for appellee William Maxwell Bruckner, Jr.

Jawdet I. Rubaii, Clearwater, for appellee Florida Aerial Advertising, Inc.

PER CURIAM.

Janet Gifford appeals an order of the circuit court which dismisses her defamation action against appellees William Bruckner and Florida Aerial Advertising.[1] We reverse.

[1] Gifford's complaint charged that Bruckner, the controlling officer of Florida Aerial Advertising, overflew the city of St. Petersburg on various dates towing messages which Gifford asserted were defamatory. In its order of dismissal the circuit court found that the complaint failed to allege a cause of action and that Gifford had not complied with the requirements of section 770.01, Florida Statutes (1989). This section provides:

> Before any civil action is brought for publication or broadcast, in a newspaper, periodical, or other medium, of a libel or slander, the plaintiff shall, at least 5 days before instituting such action, serve notice in writing on the defendant, specifying the article or broadcast and the statements therein which he alleges to be false and defamatory.

[2, 3] Prior to filing her complaint Gifford wrote appellees' counsel demanding a retraction. It would appear that this letter, which did not fully identify the allegedly defamatory statements, provided insufficient notice. *See, e.g., Hulander v. Sunbeam Television Corp.*, 364 So.2d 845 (Fla. 3d DCA 1978), *cert. denied*, 373 So.2d 459 (Fla.1979).[2] However, this court has held that section 770.01 does not apply when an action is brought against a nonmedia defendant. *Bridges v. Williamson*, 449 So.2d 400 (Fla. 2d DCA 1984). A thorough analysis of the term "medium," as used in the statute, was conducted in *Davies v. Bossert*, 449 So.2d 418 (Fla. 3d DCA 1984), with the court concluding that the legislature intended to include only television and radio broadcasters. Despite ap-

1. This appeal was initiated by the timely filing of notice. However, because the circuit court's order indicates that the dismissal of Gifford's complaint is "without prejudice," appellees maintained that the order was non-final in nature and thus not appealable. *Hancock v. Piper*, 186 So.2d 489 (Fla.1966). Gifford, in response to the motion, suggested that review by certiorari would be appropriate because of the possibility of irreparable injury that would not be remediable by appeal. *See Bridges v. Williamson*, 449 So.2d 400, 401 (Fla. 2d DCA 1984). We denied appellees' motion to dismiss on this basis. Having reviewed the entire record as well as the briefs submitted by both parties, we now conclude that the circuit court's order is in fact a final order and therefore appealable. Compliance with section 770.01, where necessary, is a condition precedent to maintaining an action, and one cannot satisfy the statute by providing notice subsequent to filing the complaint. *Orlando Sports Stadium, Inc. v. Sentinel Star Co.*, 316 So.2d 607 (Fla. 4th DCA 1975). If the statute were applicable to Gifford's action, amendment of the existing complaint would not be authorized. Presumably, therefore, the circuit court dismissed the action without prejudice to *refile* rather than merely to amend.

2. A second and more thorough letter from Gifford's attorney followed, but not until *after* the filing of the complaint.

pellees' claim that Florida Aerial is engaged in "media activities [and] is a media defendant," we cannot agree that a banner towed overhead by an airplane falls within the purview of the statute. To the extent it holds to the contrary, the circuit court's order is in error.

Gifford does not contest on appeal that portion of the order which holds that her complaint fails to state a cause of action. Therefore, after remand the circuit court shall afford Gifford a reasonable time within which to amend her complaint.

Reversed.

DANAHY, A.C.J., and CAMPBELL and FRANK, JJ., concur.

Clarence SMITH, Appellant,

v.

The STATE of Florida, Appellee.

No. 87-2170.

District Court of Appeal of Florida, Third District.

Aug. 21, 1990.

An Appeal from the Circuit Court for Dade County; Phillip Knight, Judge.

Bennett H. Brummer, Public Defender, and Diane V. Ward, Sp. Asst. Public Defender, for appellant.

Robert A. Butterworth, Atty. Gen., and Richard L. Polin and Ivy Ginsberg, Asst. Attys. Gen., and Francine Thomas, Certified Legal Intern, for appellee.

Before SCHWARTZ, C.J., and NESBITT and GERSTEN, JJ.

PER CURIAM.

Affirmed. *See Mikenas v. State*, 460 So.2d 359, 362 (Fla.1984); *Johnson v. State*, 501 So.2d 94, 96 (Fla. 1st DCA 1987); *Brownlee v. State*, 427 So.2d 1106, 1107 (Fla. 3d DCA 1983); *Sheppard v. State*, 391 So.2d 346 (Fla. 5th DCA 1980).

Randall WEIL, Appellant,

v.

The STATE of Florida, Appellee.

No. 88-3068.

District Court of Appeal of Florida, Third District.

Aug. 21, 1990.

An Appeal from the Circuit Court for Monroe County; J. Jefferson Overby, Judge.

Donald L. Ferguson, Boca Raton, for appellant.

Robert A. Butterworth, Atty. Gen., and Patricia Ann Ash, Asst. Atty. Gen., for appellee.

Before BASKIN, JORGENSON and GODERICH, JJ.

PER CURIAM.

Affirmed. *See Smith v. State*, 521 So.2d 106 (Fla.1988); *Griffin v. State*, 474 So.2d 777 (Fla.1985), *cert. denied, Griffin v. Florida*, 474 U.S. 1094, 106 S.Ct. 869, 88 L.Ed.2d 908 (1986); *Duest v. State*, 462 So.2d 446 (Fla.1985).

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

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.

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

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.

ment and in towing the boat from the marina into the bay out of reach of the fire equipment. Both at the conclusion of the Pates' case and at the conclusion of the evidence, appellants moved for a directed verdict in their favor contending that no negligence on the part of Enterkin was shown to have caused the fire. The trial court reserved ruling on the motion until after the verdict was rendered and then denied it and entered the final judgment.

[1] Appellant contends that the record contains no evidence that negligence on the part of Enterkin caused the fire and, therefore, the court erred in not granting his motion for directed verdict. We agree. While the evidence creates a suspicion that the boat of which Enterkin was a part-owner may have been deliberately burned by someone or may have been put in such state by someone that it caught fire from unknown causes, there is no evidence to support a conclusion that the fire resulted from any negligence or action on Enterkin's part.

[2] Appellants' second point is a contention that the verdict in favor of Alligator Point Marina and against the Pates is contrary to the manifest weight of the evidence. The Pates did not appeal that judgment. Having reached the conclusion that judgment should be entered in Enterkin's favor in the Pates' action against him, we find that Enterkin has no standing to question the judgment in Alligator Point Marina's favor, such judgment not being adverse to Enterkin. We, therefore, refrain in this case from ruling on the question of whether or not Enterkin would have standing if our ruling were otherwise.

The judgment against appellants is reversed, and the cause is remanded with directions to enter judgment in favor of appellants.

BOYER and MILLS, JJ., concur.

ON PETITION FOR REHEARING

McCORD, Chief Judge.

By petition for rehearing appellees, Ebb W. Pate and Merri M. Pate, call our attention to an erroneous statement contained in the opinion in this cause. The opinion states that, both at the conclusion of the Pates' case and at the conclusion of the evidence, appellants moved for a directed verdict in their favor and that the trial court reserved ruling on the motion until after the verdict was rendered and then denied it and entered the final judgment. The motion for directed verdict which the trial court reserved ruling upon was the motion of appellee, Alligator Point Marina, Inc. The trial judge did not reserve ruling on the Pates' motions but ruled upon each after hearing argument at the time it was made. This erroneous statement does not change the ruling of our previous opinion. To correct the error, it is ordered that the sentence [beginning in line 8 from the top of page 940, column 1] is stricken, said sentence stating as follows:

"The trial court reserved ruling on the motion until after the verdict was rendered and then denied it and entered the final judgment."

In lieu thereof, the following sentence is inserted:

"The motions were denied."

We have considered the other points raised by the Pates in their petition for rehearing and find them to be without merit.

Petition for rehearing DENIED.

BOYER and MILLS, JJ., concur.

Gustav L. LUND and Harriet Bernice Lund, Appellants,

v.

J. W. COOK, Appellee.

No. FF-164.

District Court of Appeal of Florida, First District.

Feb. 2, 1978.

Rehearing Denied Feb. 28, 1978.

Action was brought for alleged negligence in making a survey and plat. The

Circuit Court, Santa Rosa County, Woodrow M. Melvin, J., entered summary judgment for defendant, and plaintiffs appealed. The District Court of Appeal, McCord, C. J., held that for purposes of limitations, limitations began to run at time when plaintiff knew or should have known of the existence of claimed defects, and not at time of delivery of survey and plat to plaintiffs.

Reversed.

Limitation of Actions ⇐55(2), 95(1)

For purposes of limitations applicable to cause of action for alleged negligence in making survey and plat, limitations began to run at time when plaintiff knew or should have known of the existence of claimed defects, and not at time of delivery of survey and plat to plaintiffs. West's F.S.A. §§ 95.031, 95.031(2), 95.11, 95.11(3)(a, c, p), (4)(a, b).

C. Roger Vinson of Beggs & Lane, Pensacola, for appellants.

A. G. Condon, Jr., of Holsberry, Emmanuel, Sheppard & Condon, Pensacola, for appellee.

McCORD, Chief Judge.

This appeal is from a summary judgment in favor of appellee by which the trial court ruled that the statute of limitations had run on appellants' cause of action. We disagree and reverse.

Appellants filed this action against appellee on January 20, 1976, for alleged negligence in making a survey and plat, the plat having been delivered to appellants in August, 1958. As stated by the trial judge in the summary judgment, appellee admitted the allegations of the complaint for the purposes of argument on the motion for summary judgment and the parties stipulated that the alleged errors in the survey work and plat were not readily apparent or discoverable by appellants; that there is evidence that appellants did not become aware of the error or errors in the survey work and plat until 1973 or 1974; that the applicable statute of limitations is § 95.-11(3)(a) or § 95.11(3)(p), Florida Statutes (1975), both of which specify a period of four years. The issue before the trial court and the issue here is whether or not the statute of limitations began to run at the time of delivery of the survey and plat to appellants or at the time appellants knew or should have known of the existence of the defects therein. Chapter 74–382, Laws of Florida, made certain changes in § 95.11, and appellants contend that these changes did not alter the well-established "discovery rule" in Florida as to this cause. Appellee contends that the 1974 amendment eliminated such rule, and the statute of limitations therefore began to run in 1958 rather than in 1973 or 1974 when the errors were discovered; that this action is thus barred.

From the allegations of the complaint it appears that appellants were the owners of certain property and employed appellee to survey the property and prepare and certify the plat of a subdivision; that appellants caused the plat prepared by appellee to be recorded and thereafter sold lots to purchasers under warranty deeds over an extended period of time; that appellants later discovered that the subdivision was inaccurately and improperly located by appellee's survey and that it seriously encroached upon other property; that appellants were forced as a result thereof to purchase all of the land shown on the survey as encroaching upon such other property, such purchase being made on November 14, 1974.

In *Creviston v. General Motors Corp.*, 225 So.2d 331 (Fla.1969), a products liability suit, the Supreme Court held that the statute of limitations on the action ran from the time the buyer first discovered or reasonably should have discovered the defect. The court there followed its previous rule established in *City of Miami v. Brooks*, 70 So.2d 306 (Fla.1954), a malpractice negligence action in which the court held that the statute of limitations attaches when there has been notice of an invasion of a legal right of the plaintiff or he has been put on notice of his right to a cause of action. The court there said:

"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."

In Creviston, the Supreme Court, referring to its previous ruling in Brooks and other cases, said:

"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 the 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." (emphasis supplied)

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. § 95.031, Florida Statutes (1975) now provides:

"Except as provided in subsection 95.051(2) and elsewhere in these statutes, the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues.

(1) A cause of action accrues when the last element constituting the cause of action occurs . . ."

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 statutes that abrogates this ruling in Creviston. It should be noted, however, that the amended statute does modify the rule to some extent in actions for products liability and fraud by placing an overall limitation thereon of 12 years after the date of delivery of the completed product to the original purchaser or the date of the commission of the alleged fraud, regardless of the date the defect in the product or the fraud was or should have been discovered. See § 95.031(2). Also, the amended statute places the same 12-year overall limitation upon an action founded on the design, planning, or construction of an improvement to real property which involves a latent defect. See § 95.11(3)(c). In addition, § 95.11(4)(a) and (b) place similar overall limitations upon actions for professional malpractice and actions for medical malpractice.

The record at this point affirmatively indicates that this action was filed within four years of the discovery by appellants of the defects in the survey and plat. The trial judge erred in entering summary judgment in favor of appellee.

REVERSED.

BOYER and MILLS, JJ., concur.

TOWN OF REDINGTON SHORES, a Florida Municipal Corporation, and Pinellas County, a political subdivision of the State of Florida, Appellants,

v.

REDINGTON TOWERS, INC., a Florida Corporation, Appellee.

No. 76–909.

District Court of Appeal of Florida, Second District.

Feb. 3, 1978.

Owners of condominium apartment building sought a declaration that sewer charges could not be assessed on unoccupied, unused units in the condominium

Robert E. Banker and Edward M. Waller, Jr., of Fowler, White, Gillen, Humkey, Kinney & Boggs, Tampa, and Smith, Hulsey, Schwalbe, Spraker & Nichols, Jacksonville, for petitioner.

Ronald H. Schnell of Carr & Schnell, St. Petersburg, for respondents.

PER CURIAM.

This cause is before us on petition for writ of certiorari to review the decision of the District Court of Appeal, Second District, reported at 271 So.2d 226. The District Court has certified its decision as one passing on a question of great public interest, to-wit:

"Can a plaintiff recover for mental pain and anguish in the absence of impact?"

The District Court, in reversing summary judgment for defendants and reinstating plaintiff's complaint, answered the certified question in the affirmative, but recognized that such result was at variance with the controlling precedent in Florida.

The issue presented on certification has been fully considered by this Court and answered in the negative in Gilliam v. Stewart, 291 So.2d 593. We are therefore compelled to quash the decision of the District Court insofar as it permits a plaintiff to recover for mental pain and anguish in the absence of impact. Specifically, the reinstatement by the District Court of Count III of the plaintiff's complaint was error.

In all other respects, the decision below is approved, and the cause is remanded to the District Court for further proceedings not inconsistent with this opinion.

It is so ordered.

CARLTON, C. J., and ROBERTS, BOYD and DEKLE, JJ., concur.

ERVIN, ADKINS and McCAIN, JJ., dissent.

Mattie PERDUE, a/k/a Mrs. Emmett Perdue, Petitioner,

v.

The MIAMI HERALD PUBLISHING COMPANY, a Florida corporation, Respondent.

No. 42604.

Supreme Court of Florida.

Jan. 17, 1974.

Rehearing Denied April 9, 1974.

Plaintiff brought action against newspaper for defamation and invasion of privacy. The Circuit Court, DeSoto County, John D. Justice, J., entered an order transferring the cause to the county where the newspaper was published. The District Court of Appeal, 263 So.2d 622, affirmed and certiorari was granted. The Supreme Court held that statute providing that cause of action for defamation founded upon a single publication shall be deemed to have accrued at the time of the first publication in the state was a statute of limitations provision and did not control venue; that under statute placing venue against a corporation in any county where the cause of action accrued, venue in action against corporate publisher for defamation was limited to those counties where the publication was distributed or placed on sale; and that where the record did not include any finding regarding the factual question of whether the publication was distributed or placed on sale in the county where suit was initially filed, the case would be remanded for determination of that question.

Decision quashed and case remanded.

Boyd, J., dissented and filed an opinion.

McCain, J., concurred in part and dissented in part and filed an opinion.

1. Courts ⇐216

Where statute relied upon by trial court to distinguish instant case from an-

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Const. art. 5, § 3(b)(3).

2. Limitation of Actions
Venue ⇐8(2)

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3. Venue ⇐8(2)

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4. Appeal and Error ⇐

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other did not provide a basis for distinguishing the cases, affirmance of trial court decision by the District Court of Appeal conflicted with the other case and the Supreme Court had jurisdiction. F.S.A. Const. art. 5, § 3(b)(3).

2. Limitation of Actions ⇐55(1)
Venue ⇐8(2)

Statute providing that cause of action for damages founded upon a single publication, exhibition or utterance shall be deemed to have accrued at the time of the first publication in the state provides a statute of limitations and does not control the venue of the action. F.S.A. § 770.07.

3. Venue ⇐8(2)

"Single publication" act, in conjunction with statute placing corporate venue in any county "where the cause of action accrued" limits venue in action against corporate publisher for defamation and invasion of privacy to county or counties where the publication is distributed or placed on sale, but only one of these available venues may be chosen. F.S.A. §§ 47.051, 770.05.

4. Appeal and Error ⇐1177(8)

Where record did not include any finding as to whether or not publication which was alleged to be defamatory and an invasion of privacy was distributed or placed on sale in county in which action was brought, case against corporate publisher would be remanded for determination of that question. F.S.A. §§ 47.051, 770.05.

Robert F. Nunez, St. Petersburg, for petitioner.

Dan Paul and John-Edward Alley, of Paul & Thomson, Miami, for respondent.

Thomas T. Cobb, of Cobb, Cole, Sigerson, McCoy, Bell & Bond, Daytona Beach, for News-Journal Corp., as amicus curiae.

Harold B. Wahl, of Loftin & Wahl, Jacksonville, for Florida Publishing Co., as amicus curiae.

PER CURIAM:

This cause is before us on petition for writ of certiorari to review the decision of the District Court of Appeal, Second District, reported at 263 So.2d 622.

The original suit in this matter commenced April 8, 1970, with the filing by petitioner, plaintiff below, of a complaint for damages for invasion of privacy resulting from an article published by respondent newspaper. The complaint was filed in DeSoto County, the Twelfth Judicial Circuit. On July 6, 1970, the trial court entered an order granting respondent's motion to transfer the cause for improper venue and transferring the file to the Circuit Court of Dade County. The decision of the trial court to transfer the cause was based on Florida Statutes §§ 47.051 [1] and 770.07 [2], F.S.A.

After transfer of the cause to Dade County, the suit was voluntarily dismissed by the plaintiff. No appeal was taken from the trial court's order transferring the original complaint from DeSoto County to Dade County.

One year later, on June 15, 1971, plaintiff again filed complaint in DeSoto County charging defamation and invasion of privacy. The same trial court on August 24, 1971, again entered an order transferring the cause to Dade County on the same grounds as his previous order. This time plaintiff appealed the trial court's order

1. Fla.Stat. § 47.051, F.S.A.: "Actions against domestic corporations shall be brought only in the county or district where such corporation has or usually keeps an office for transaction of its customary business, or where the cause of action accrued, or where the property in litigation is located. . . ."

2. Fla.Stat. § 770.07, F.S.A.: "The cause of action for damages founded upon a single publication or exhibition or utterance, as described in § 770.05, shall be deemed to have accrued at the time of the first publication or exhibition or utterance thereof in this state."

and the District Court entered the following decision herein sought to be reviewed.

"PER CURIAM.

"Affirmed. See, E. O. Painter Fertilizer Co. v. Du Pont (1907), 54 Fla. 288, 45 So. 507."

[1] For conflict with the foregoing decision petitioner cites Firstamerica Development Corp. v. Daytona Beach News Journal, 196 So.2d 97 (Fla.1966) and Steinhardt v. Palm Beach White House No. 3, Inc., 237 So.2d 590 (Fla.App. 3rd 1970). Both cases hold that a suit against a newspaper for libel and/or malicious interference with a contractual relationship, could be brought in a county where the newspaper was circulated and need not be brought in the county where the newspaper was published. In its order transferring venue to Dade County, the Circuit Court distinguished the *Firstamerica Development Corporation* case, *supra*, on the basis of the passage, since the time of that decision, of F.S. §§ 770.05–770.08, F.S.A., and held that venue of the instant action properly lay only in Dade County under these statutory provisions. We hold that the passage of these provisions does not provide a basis for distinguishing *Firstamerica* from the instant case, and that the District Court of Appeals' affirmance of the Circuit Court order is in conflict with *Firstamerica*. Accordingly, we have jurisdiction pursuant to Art. V, § 3(b)(3), Fla. Const., F.S.A.

In the *Firstamerica Development Corporation* case, *supra*, this Court relied upon F.S. § 46.04, F.S.A. as then worded,[3] which permitted (and still permits as present § 47.051) litigation against corporations in any county in which the cause of action arose. The Court held that venue could properly be laid in any county where the newspaper was published.

[2] In 1967 the Florida Legislature responded to the above decision by enacting Chapter 67–52 which in pertinent part became F.S. § 770.05, F.S.A. (limiting a damages claim founded upon any single publication to only one choice of venue) and F. S. § 770.07, F.S.A., (providing that the cause of action shall be deemed to have accrued at the time of the first publication in this state).

Such changes justify an implicit inference that the Florida Legislature intended to impose certain limitations on such a cause of action: 1) only one suit in one chosen venue to avoid multiple suits upon the one cause of action; and 2) a statute of limitations as to the time for filing the action which "shall be deemed to have accrued at the time of the first publication". F.S. § 770.07, F.S.A.

The record clearly establishes that the news item complained of was first published in Dade County in the evening and distributed to DeSoto County, nearly two hundred miles away, several hours later. The first publication obviously was in Dade County. Respondent contends that proper venue can only lie in Dade County, citing F.S. § 770.07, F.S.A. As above mentioned this statute on its face relates to the "time" of accrual of the cause action, a typical statute of limitations provision. It does not control the place (venue) of filing.

Of significance as to venue is F.S. § 47.051, F.S.A.,[4] which permits actions against domestic corporations also to be brought "where such corporation has or usually

3. "46.04 Suits against corporations. Suits against domestic corporations shall be commenced only in the county (or justice's district) where such corporation shall have or usually keep an office for the transaction of its customary business, or where the cause of action accrued, or where the property in litigation is located; and in the case of companies incorporated in other states or countries, and doing business in this state, suits shall be commenced in a county or justice's district wherein such company may have an agent or other representative, or where the cause of action accrued, or where the property in litigation is situated." Now F.S. § 47.051, F.S.A.

4. See footnote 1.

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keeps an office for transaction of its customary business." Ch. 67-52 (F.S. §§ 770.05 and 770.07, F.S.A.) did not *repeal* the application of any corporate venue statute, and to the extent applicable, all of these statutes must be read in pari materia and must not be applied in a way that extends special treatment to respondent, but in that manner which is consistent with equal protection required by the constitution.

[3] Aiding us in arriving at the solution to this problem is an earlier criminal case decided by our Court, the rationale of which although not directly applicable, nevertheless is of help. In Eberhardt v. Barker, 104 Fla. 535, 140 So. 633 (1932), the issue of proper venue for indictment in criminal libel was treated and our Court stated:

"Petitioner was subject to indictment . . . only in . . . county where the alleged libelous matter was composed and printed. . . . This holding goes only to the question of venue in prosecutions for criminal libel . . . *nor do we decide the question of venue where a bureau agency or office is maintained in another county or counties for the purpose of distribution or circulation*, . . ." (emphasis added)

Thus, when we read our "single publication" act (§ 770.05) in conjunction with the corporate venue acts (§§ 46.04 and 47.051) the advantages to both the press and the public, in our complex business and economic world, appear to be mutual and equal. Damages are limited to a single cause of action and the date of accrual of the claim is set, essentially establishing a statute of limitations period. Furthermore, the venue then is limited to (1) the county where the alleged libelous matter is first published or exhibited or uttered, *or* (2) the county or counties where the publisher "has or usually keeps an office for transaction of its customry business," (§ 47.051), *or* (3) "where a bureau agency or office is maintained * * * for the purpose of distribution or circulation" (*Eberhardt, supra*), *or* (4) (a fourth available venue) under F.S. § 46.04, F.S.A. "where the cause of action accrued" which we view in the case of a publication as limited to such county or counties where the publication is distributed or placed on sale. Of course, as earlier outlined, only one of these available venues may be chosen in accordance with F.S. § 770.05, F.S.A.

[4] The record in the instant case does not include any finding regarding the factual question of whether the publication was distributed or placed on sale in DeSoto County, from which the action was transferred, although this is alleged in the complaint to be the situation. Accordingly, the decision *sub judice* is quashed, and we remand this cause to the trial court for a determination of whether the publication here in question was distributed or placed on sale in DeSoto County, and for such other and further proceedings as shall be required in accordance with this opinion.

It is so ordered.

CARLTON, C. J., and ROBERTS, ERVIN, ADKINS and DEKLE, JJ., concur.

BOYD, J., dissents with opinion.

McCAIN, J., concurs in part and dissents in part with opinion.

BOYD, Justice (dissenting).

Both the trial court and the District Court of Appeal were clearly correct.

As stated in the majority opinion, immediately after the *Firstamerica* case of 1966, the Florida Legislature sought to reverse the effect of that decision by enacting Section 770.05, Florida Statutes, which provided that suit could be brought only in the county of first publication. To arrive at the majority view, we must ignore the clear Legislative intent. The record shows that the first publication in the instant case was in Dade County where the Miami

Herald is published, and sold "hot off the presses". The Herald, of course, reaches DeSoto County, some two hundred miles from Miami, hours later.

I do not agree that the Legislature intended the foregoing statute to be a statute of limitation. The statute permitting suits against corporations in counties in which they maintain business offices is an older statute to which the foregoing venue statute clearly constitutes an exception.

I therefore respectfully dissent.

McCAIN, Justice (concurring in part dissenting in part):

As above indicated, I must respectfully concur in part and dissent in part from the majority view. I agree with the most erudite portion of the majority except for one part thereof, i. e. the *fourth* available venue provision which the majority grants under F.S. § 46.04 F.S.A. wherein the majority determines that a cause of action involving the case of a publication for libel may be brought in any county where the publication is distributed or placed upon sale.

DATA LEASE FINANCIAL CORPORATION, etc., Petitioners,

v.

Arnold SARAD et al., Respondents.

No. 44437.

Supreme Court of Florida.

Feb. 13, 1974.

Rehearing Denied March 19, 1974.

Proceeding to review judgment of the District Court of Appeal, Fourth District, 282 So.2d 176, voiding sale of stock and to answer questions certified by District Court regarding stock transaction. The Supreme Court, Dekle, J., held that stock transaction wherein purchasing corporation issued its stock to stockholders of corporation being acquired was not exempt from registration requirements of Blue Sky Law.

Questions answered.

Ervin, Acting C. J., filed a dissenting opinion.

1. Appeal and Error ⇐934(2)
Trial ⇐382

Where numerous defenses are raised, it is not necessary, although it is preferable, for trial judge to rule expressly upon each defense asserted; in absence of such express ruling, it is presumed that matter was resolved in manner consistent with judgment rendered, in accordance with general presumption of correctness of judgment.

2. Appeal and Error ⇐934(1)

Presumption exists that lower court did all things necessary to impart binding force to its judgment.

3. Trial ⇐382

Even though trial judge in suit to void stock transaction which occurred when purchasing corporation issued its stock to stockholders of corporation being acquired because of purchasing corporation's failure to register the issued stock did not expressly rule on defenses that stockholders were estopped to raise lack of registration, where trial judge ruled generally against purchasing corporation, trial judge inherently ruled adversely on question of estoppel.

4. Securities Regulation ⇐345

Main intent of Blue Sky Law is to protect investors by requiring registration which will provide potential investors with sufficient information to enable them to protect themselves. F.S.A. § 517.01 et seq.

5. Securities Regulation ⇐3

In suit to void stock tr statute requiring registrati making sales of unregistered where statutory requiremen estoppel is applicable only w himself is in pari delicto, management of issuing where some unusual circu justifying application of do pel. F.S.A. § 517.06.

6. Securities Regulation ⇐3

Even though stockhold issued stock from purchas in exchange for their stock being acquired secured se rights with issuing corp ceived the right to particip fering of stock of issuing part of exchange, where s not participate in manage corporation after acquiring not participate in the p stockholders were not esto tending that stock transactio lack of registration. F.S.A.

7. Securities Regulation ⇐26

A corporate reorganiza for tax-free treatment unde enue Code does not necessar "bona fide reorganization o tion" within meaning of provision exempting from r of registration the issuance security holders of a corp process of a bona fide re such corporation. F.S.A. § U.S.C.A. (I.R.C.1954) § 368.

See publication Words for other judicial constr definitions.

8. Securities Regulation ⇐26

Exemption from requir tration under Blue Sky Law

some provisions of the agreement, such as those relating to the retention of personal property, would be binding. However, the provisions of the agreement which clearly apply only upon the death of a party would not be affected.

The order setting aside the prenuptial agreement is REVERSED. Accordingly, the alimony or support provisions of the final judgment are REVERSED. In all other respects, the final judgment is AFFIRMED.

DAUKSCH, J., Associate Judge, concurs.

SHARP, W., Associate Judge, dissents in part with opinion.

SHARP, W., Associate Judge, dissenting in part.

The probable reason the trial court denied the wife any attorney's fees in this case was its substantial lump sum alimony award which we have just reversed. Accordingly, I think the trial court should be given the opportunity to reconsider its denial of fees to the wife under the present circumstances. I would reverse the denial of fees and remand this proceeding to the trial court for further consideration of that issue.

SKYLIGHT CORPORATION d/b/a The Blue Room Lounge, Appellant,

v.

STATE of Florida, DEPARTMENT OF BUSINESS REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, Appellee.

No. 83-2370.

District Court of Appeal of Florida, Second District.

April 27, 1984.

Rehearing Denied June 7, 1984.

Appeal from Dept. of Business Regulation, Div. of Alcoholic Beverages and Tobacco, for Hillsborough County.

Charles R. Wilson, Tampa, for appellant.

James N. Watson, Jr., Tallahassee, for appellee.

PER CURIAM.

Affirmed. *See Lash, Inc. v. Department of Business Regulation*, 411 So.2d 276 (Fla. 3d DCA 1982); *Pauline v. Lee*, 147 So.2d 359 (Fla. 2d DCA 1962).

CAMPBELL, A.C.J., and SCHOONOVER and LEHAN, JJ., concur.

Norman SENFELD, Appellant,

v.

The BANK OF NOVA SCOTIA TRUST COMPANY (CAYMAN) LIMITED, Appellee.

No. 83-854.

District Court of Appeal of Florida, Third District.

May 1, 1984.

Trust company brought civil suit for conversion, replevin and damages pursuant to the theft statute against corporation president who had erroneously received $10,000 from trust company which managed corporation's account. The Circuit Court, Dade County, Dick C.P. Lantz, J., tripled the damages found by jury based upon jury's finding that president knowingly obtained or used the money with an intent to deprive the trust company of a

right to or benefit from it or with an intent to appropriate it to his own use, and entered judgment against corporation president for $30,000, and corporation president appealed. The District Court of Appeal, Daniel S. Pearson, J., held that: (1) the action was not barred by the statute of limitations; (2) discovery rule applied to the action in determining when the statute of limitations began to run; (3) rules pertaining to criminal cases did not apply to the civil action even though it was brought under civil remedy section of criminal theft statute; (4) retroactive application of the theft statute did not violate president's due process rights; and (5) trial court's tripling of the damages awarded by jury was not improper.

Affirmed.

1. Trover and Conversion ⇐1

Conversion is an unauthorized act which deprives another of his property permanently or for an indefinite time.

2. Trover and Conversion ⇐2

Sum of money erroneously turned over to corporation president by trust company managing corporation's account was sufficiently identifiable to be capable of being converted.

3. Trover and Conversion ⇐9(1)

Where a person having a right to possession of property makes demand for its return and the property is not relinquished, a conversion has occurred.

4. Trover and Conversion ⇐9(1), 35

A demand for return of property and a refusal to do so constitute evidence that a conversion has occurred; however, it is unnecessary to prove a demand and refusal where the conversion can be otherwise shown.

5. Trover and Conversion ⇐3

Essence of conversion is not the possession of property by the wrongdoer, but rather such possession in conjunction with a present intent on part of the wrongdoer to deprive the person entitled to possession of the property.

6. Limitation of Actions ⇐66(14)
Replevin ⇐9

Essence of an action for replevin is the unlawful detention of personal property from a plaintiff at commencement of the action regardless of whether defendant acquired possession rightfully or wrongfully, and such an action arises with the refusal to return the property upon demand.

7. Limitation of Actions ⇐55(5), 66(14)

Civil action for conversion, replevin and damages pursuant to the theft statute, which was commenced within two years after demand for return of the property and refusal of such demand, was not barred by four-year statute of limitations, since jury could have justifiably found that intent to deprive trust company of the property was not formed until demand for return of the property went unanswered. West's F.S.A. §§ 95.11(3)(h, i, *o*), 812.012 et seq.

8. Limitation of Actions ⇐95(1)

Trust company's civil action for conversion, replevin and damages pursuant to theft statute against corporation president who had erroneously received $10,000 from trust company which managed corporation account was not barred by four-year statute of limitations, since jury could have justifiably found that discovery of the wrongful act occurred or should have occurred within four years of the filing of the suit. West's F.S.A. §§ 95.11(3)(h, i, *o*), 812.012 et seq.

9. Limitation of Actions ⇐95(1)

Mere ignorance of facts which constitute the cause of action will not postpone operation of the statute of limitations; however, where plaintiff's ignorance is blameless, the cause of action will not arise until plaintiff knows or is chargeable with knowledge of an invasion of his legal right.

10. Limitation of Actions ⇐95(1)

In determining whether civil action for conversion was barred by statute of limitations, discovery rule applied. West's F.S.A. §§ 95.11(3)(h, i, *o*), 812.012 et seq.

11. Trover and Conversion ⇐28, 40(1)

Fact that civil action for conversion, replevin and damages was brought pursuant to civil remedy section of the criminal theft statute did not mandate that rules pertaining to criminal cases apply to the civil action; therefore, criminal statute of limitations and criminal standard of proof beyond a reasonable doubt were inapplicable. West's F.S.A. §§ 812.012 et seq., 812.035(10).

12. Trover and Conversion ⇐18

A criminal conviction is not a necessary predicate to recovery under civil remedies provisions of the theft statute. West's F.S.A. § 812.012 et seq.

13. Limitation of Actions ⇐104(1)

Where statute of limitations for trust company's civil action for conversion, replevin and damages pursuant to the theft statute began to run from time trust company was on notice or reasonably should have been on notice of the alleged conversion or theft by president of corporation, who had erroneously received $10,000 from the trust company which managed the corporation account, it was irrelevant whether trust company showed that corporation president fraudulently concealed his actions from the trust company; disagreeing with *Bove v. PBW Stock Exchange, Inc.*, 382 So.2d 450. West's F.S.A. § 812.012 et seq.

14. Statutes ⇐263

In absence of an express legislative declaration that a statute have retroactive effect, the statute will be deemed to operate prospectively only.

15. Statutes ⇐265

Even a clear expression of retroactivity of a statute will be ignored if the statute impairs vested rights, creates new obligations, or imposes new penalties.

16. Constitutional Law ⇐302

Corporation president, who erroneously received $10,000 from trust company which managed corporation's account, was on notice that conversion was unlawful in 1975 and retroactive application of the 1977 theft statute, which contained civil remedies and which merely incorporated numerous prohibited conduct including conversion, violated none of president's due process rights. West's F.S.A. § 812.012 et seq.; U.S.C.A. Const.Amends. 5, 14.

17. Statutes ⇐267(1)

A statute which is solely remedial or procedural will be given retroactive application; rules of statutory construction which deem a statute containing no express legislative declaration of retroactive effect to operate prospectively only and which mandate that a statute impairing vested rights, creating new obligations, or imposing new penalties be given prospective application only are inapplicable.

18. Trover and Conversion ⇐14

Section of theft statute providing civil remedies is remedial in nature and applies retroactively. West's F.S.A. § 812.035.

19. Statutes ⇐212.1

Legislature is presumed to know that remedial legislation is given retroactive effect when enacting legislation which it declares to have remedial goals.

20. Monopolies ⇐28(9)

Treble-damage provision of the Sherman Anti-Trust Act, which is analogous to the treble-damage award provision of Florida's theft statute providing civil remedies, requires as matter of law that the actual damages found by the jury be tripled. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.; West's F.S.A. § 812.035(7).

21. Damages ⇐227

Award of triple damages under Florida theft statute providing civil remedies is nothing more than a ministerial act which has nothing whatever to do with fact-finding function of jury and, therefore, trial court may appropriately triple the actual damages awarded pursuant to such statute by the jury. West's F.S.A. § 812.035(7).

Robert A. Shupack and William T. Coleman, Hollywood, for appellant.

Arky, Freed, Stearns, Watson & Greer and Bradford Swing, Miami, for appellee.

Before NESBITT, DANIEL S. PEARSON and FERGUSON, JJ.

DANIEL S. PEARSON, Judge.

A jury returned a verdict finding by a preponderance of the evidence that Norman Senfeld wrongfully deprived the appellee, The Bank of Nova Scotia Trust Company (Cayman) Limited, of $10,000 that belonged in the Trust Company's possession and, additionally, that Senfeld knowingly obtained or used this money with an intent to deprive the Trust Company of a right to or benefit from it, or with an intent to appropriate it to his own use. Based upon the latter finding, which in effect determined that Senfeld had violated Florida's Anti-Fencing Act, more commonly called the theft statute, *see* §§ 812.012, et seq., Fla.Stat. (1983), the trial court, pursuant to Section 812.035(7), tripled the damages found by the jury and entered judgment against Senfeld for $30,000.[1] Senfeld appeals contending, as he did below, that (1) the Trust Company's counts for conversion, replevin and theft, having been filed more than five years after Senfeld's receipt of the $10,000 in question in 1975, were barred by the applicable statutes of limitations; (2) the theft statute, authorizing the tripling of actual damages, was enacted in 1977 and cannot be retroactively applied to a taking which occurred in 1975; (3) the Trust Company's claim under the theft statute was required to be proved beyond a reasonable doubt; and (4) it was the jury's, not the trial court's, function to triple the damages.[2] We reject Senfeld's contentions and affirm.

1. The trial court reserved jurisdiction to award attorneys' fees and costs. *See* § 812.035(7), Fla. Stat. (1983).

2. Senfeld raises several additional points concerning the quality of the evidence against him or the quality of the trial, which we find either to merit no discussion or which we will discuss in passing.

I.

Norman Senfeld was the President of Maccabee, a corporation whose account was managed by the appellee. In September 1975, Senfeld requested the appellee to send $10,000 to him in Miami and to debit his Maccabee account. On September 4, 1975, the appellee cabled Pan American Bank in Miami to pay the money to Senfeld and indicated that Bank of Nova Scotia, *New York* would cover this payment. On September 5, 1975, Pan American gave Senfeld a cashier's check and, without authority or instruction, debited the account of Bank of Nova Scotia, *Toronto* to cover the payment. Unaware of Pan American's anomalous act, the appellee, as originally intended, cabled its *New York* affiliate to cover the $10,000. When New York sent the money to Pan American, the latter bank (already whole by virtue of having debited Toronto) thought it was to pay $10,000 *more* to Senfeld, and on September 22, 1975, turned over another $10,000 in cash to Senfeld. At this point, Senfeld was up $10,000 and Bank of Nova Scotia, Toronto was out $10,000. In November 1978, Toronto finally solved the mystery of its $10,000 shortage, and on December 1, 1978, notified the appellee. The appellee immediately paid Toronto the money and began an investigation. In May of 1979, now assured that Senfeld owed it the money, the appellee wrote to Senfeld demanding that he return the money.[3] When Senfeld failed to respond to the demand that he return the $10,000, the appellee, in January 1981, instituted a suit for conversion, replevin and damages pursuant to the theft statute.

II.

A.

[1-7] It is well settled that a conversion is an unauthorized act which deprives an-

3. In all, three letters were sent to Senfeld. Despite the pleasant tone of the letters, it is clear to us that a demand for return of the money was made upon Senfeld.

other of his property [4] permanently or for an indefinite time. *See Star Fruit Co. v. Eagle Lake Growers, Inc.*, 160 Fla. 130, 33 So.2d 858 (1948). *See also West Yellow Pine Co. v. Stephens*, 80 Fla. 298, 304, 86 So. 241, 243 (1920) ("[T]he essential elements of a conversion is [sic], a wrongful deprivation of property to the owner, and neither manucaption nor asportation is an essential element thereof."); *Quitman Naval Stores Co. v. Conway*, 63 Fla. 253, 58 So. 840 (1912); *King v. Saucier*, 356 So.2d 930 (Fla. 2d DCA 1978); *Charter Air Center, Inc. v. Miller*, 348 So.2d 614 (Fla. 2d DCA), *cert. denied*, 354 So.2d 983 (Fla. 1977); *International Mail Order, Inc. v. Capital National Bank of Miami*, 192 So.2d 287 (Fla. 3d DCA 1966); *Goodrich v. Malowney*, 157 So.2d 829 (Fla. 2d DCA 1963); *General Finance Corp. of Jacksonville v. Sexton*, 155 So.2d 159 (Fla. 1st DCA 1963); *Armored Car Service, Inc. v. First National Bank of Miami*, 114 So.2d 431 (Fla. 3d DCA 1959). Where a person having a right to possession of property makes demand for its return and the property is not relinquished, a conversion has occurred. But while a demand and refusal constitute evidence that a conversion has occurred, it is unnecessary to prove a demand and refusal where the conversion can be otherwise shown. *Anderson v. Agnew*, 38 Fla. 30, 20 So. 766 (1896). *See also Watts v. Hendry*, 13 Fla. 523 (1869–71); *Robinson v. Hartridge*, 13 Fla. 501 (1869–71); *Mabie v. Tutan*, 245 So.2d 872 (Fla. 3d DCA 1971); *Goodrich v. Malowney*, 157 So.2d at 832 ("The purpose of proving a demand for property by a plaintiff and a refusal by a defendant to return it in an action for conversion is to show the conversion. The generally accepted rule is that demand and refusal are unnecessary where the act complained of amounts to a conversion regardless of whether a demand is made."). Thus, the essence of conversion is not the possession of property by the wrongdoer, but rather such possession in conjunction with a present intent on the part of the wrongdoer to deprive the person entitled to possession of the property, which intent may be, but is not always, shown by demand and refusal.[5]

In the present case, the jury would have been justified in finding from the evidence that although Senfeld came into possession of the money in 1975, his intent to deprive the Trust Company of the property was not formed until 1979, when the Trust Company's demand for the return of the property went unanswered. Since the special verdict form submitted to the jury with Senfeld's acquiescence did not require the jury to state when the conversion occurred, the verdict may be upheld against the attack that the action for conversion or theft was limitations barred by simply presuming that the jury found the conversion occurred

4. The property herein is sufficiently identifiable to be capable of being converted. *See Aero International Corp. v. Florida National Bank of Miami*, 437 So.2d 156 (Fla. 3d DCA 1983); (obligation to pay accrued interest on an escrow account); *Allen v. Gordon*, 429 So.2d 369 (Fla. 1st DCA 1983) (money wrongfully withdrawn from bank account); *All Cargo Transport, Inc. v. Florida East Coast Railway.*, 355 So.2d 178 (Fla. 3d DCA), *cert. denied*, 359 So.2d 1214 (Fla.1978) (creditor's application of money sent by debtor to satisfy debt other than one for which money earmarked). Neither *Belford Trucking Co. v. Zagar*, 243 So.2d 646 (Fla. 4th DCA 1970) (failure to pay an indebtedness on an open account is not conversion), nor *Armored Car Service, Inc. v. First National Bank of Miami*, 114 So.2d 431 (Fla. 3d DCA 1959) (money in deposit bag capable of being converted), supports Senfeld's contention that the $10,000 in the present case was not capable of being converted.

5. Unlike conversion, the essence of an action for replevin is the "unlawful detention of personal property from plaintiff at the commencement of the action, regardless of whether defendant acquired possession rightfully or wrongfully...." *Pavlis v. Atlas-Imperial Diesel Engine Co.*, 121 Fla. 185, 189, 163 So. 515, 516 (1935). *See Delco Light Co. v. John Le Roy Hutchinson Properties*, 99 Fla. 410, 128 So. 831 (1930); *see also Security Underwriting Consultants v. Collins, Tuttle Investment Corp.*, 173 So.2d 752 (Fla. 3d DCA 1965). Thus, the cause of action for replevin first arises with the refusal to return the property upon demand. Since the demand and refusal occurred in the present case in 1979 and the action was commenced two years later, it is obvious that Senfeld's claim that the action was barred by the applicable four-year statute of limitations, *see* § 95.11(3)(h) and (i), Fla.Stat. (1977), is totally without merit.

in 1979.[6] *See Colonial Stores, Inc. v. Scarbrough*, 355 So.2d 1181 (Fla.1978).

[8] But even if, arguendo, the evidence indisputably showed that the conversion occurred in 1975, there is yet another theory to justify the jury's implicit finding that the Trust Company's action for conversion was not limitations barred. Over Senfeld's objection, the jury was charged that the statute of limitations would begin running from the time the wrongful act was discovered or should have been discovered. By finding for the Trust Company, the jury could have found that discovery occurred or should have occurred within four years of the filing of suit. Senfeld contended below and contends here that the Trust Company's ignorance of the existence of the conversion did not postpone the running of the statute of limitations and that, as a matter of law, the Trust Company's time for filing suit for conversion expired in September 1979, four years after Senfeld received the money. We reject this argument as well.

[9] 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.

Senfeld suggests, however, that this discovery rule (that is, that the plaintiff knew or should have known of his cause of action) is limited to those actions, such as products liability or fraud, where the statute of limitations expressly provides that the period within which the action must be brought runs from the time of discovery or constructive discovery, § 95.031(2), Fla. Stat. (1983), and that all other actions, including conversion, run from the time the cause of action accrues, that is, "when the last element constituting the cause of action occurs," § 95.031(1), Fla.Stat. (1983).

Concededly, the court in *Houston v. Florida-Georgia Television Co.*, 192 So.2d 540 (Fla. 1st DCA 1966), applied the rule of *expressio unius, exclusio alterius* (the application of which is here urged by Senfeld) in deciding that a cause of action for invasion of privacy ran from the time the invasion occurred, not when the plaintiff first discovered the invasion. Finding discovery language in the statute of limitations relating to fraud (§ 95.11(5)(d), Fla.Stat. (1965)), but finding no such language in the statute of limitations pertaining to an invasion of privacy action (§ 95.11(4), Fla.Stat. (1965)), the court in *Houston* concluded that absent a specific postponement provision, one would not be read into the statute of limitations as a whole. While *Houston* certainly supports Senfeld'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 v. General Motors Corp.*, 225 So.2d 331 (Fla. 1969), and *Lund v. Cook*, 354 So.2d 940 (Fla. 1st DCA), *cert. denied*, 360 So.2d 1247 (Fla.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. In *Creviston*, the court, relying on *Brooks* and *Edgerly*, did the same and concluded that

6. An action for an intentional tort must be commenced within four years. § 95.11(3)(*o*), Fla. Stat. (1979).

"From the standpoint of legal principles, the holdings in the cases above discussed appear to crystalize 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.***"

225 So.2d at 334 (emphasis supplied). 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*. There the court held that the express inclusion of discovery language in the statute of limitations relating to certain specified causes of action (by then, products liability, fraud and professional malpractice) did not abrogate the rule of *Creviston* that ***regardless of the underlying nature of the cause of action,*** **the cause of action accrues with the aggrieved party's discovery or duty to discover the act constituting an invasion of his legal rights.**[7]

[10] We conclude, therefore, that the discovery rule applied to the Trust Company's action for conversion and that there was substantial evidence to support a jury's determination, under proper instructions, that the Trust Company neither discovered nor should have discovered the conversion, even assuming such conversion occurred in 1975, until, at the earliest, 1978.

B.

Senfeld's separate argument that the Trust Company's cause of action under the theft statute is limitations barred proceeds from the premise that because the statute provides a civil remedy for a crime, rules pertaining to criminal cases apply. He concludes, therefore, that since the statute of limitations for crimes begins to run when the crime is committed or when it is complete, *see State v. King*, 282 So.2d 162 (Fla.1973), without regard to when the crime is discovered, the statute of limitations began to run in 1975 when he appropriated the $10,000 to his own use.

[11, 12] Senfeld is mistaken in his premise. Although Section 812.035, Florida Statutes, the civil remedies section of the theft statute, is quite clearly incorporated in a statute which defines and prohibits crimes, it does not follow that rules pertaining to criminal cases apply to the civil action brought thereunder. Thus, in *James v. Brink & Erb, Inc.*, 452 N.E.2d 414 (Ind.Ct.App.1983), the defendant argued that in order to recover in a civil action brought under Indiana's nearly-identical theft statute, the plaintiff was required to show a violation of the statute by proof beyond a reasonable doubt, the standard of proof in criminal cases. The court rejected this argument, stating:

> "[The statute] provides that a person suffering a pecuniary loss 'may bring a *civil action*' .... If the language used in a statute is clear and unambiguous, the plain meaning of the statute will be given effect .... In enacting [the statute], the legislature conferred a right to bring a civil action; therefore, the plaintiff bears the burden generally imposed in a civil case, that of proving his claim by a preponderance of the evidence."[8]

452 N.E.2d at 416 (emphasis in original; citation omitted).

Accord, Ludwig v. Kowal, 419 A.2d 297 (R.I.1980) (case involving statute similar to

7. The court found in *Lund* that the express inclusion of the discovery rule in these certain causes of action was merely to point out that regardless of the date of discovery, there would be a maximum outside limit for the bringing of the action.

8. Senfeld's contention that the Trust Company's action under the theft statute was required to be proved by proof beyond a reasonable doubt is rejected by us for these reasons and upon this authority.

Florida's theft statute; court referred only to rules of civil procedure to determine that summary judgment for plaintiff was properly granted); *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94 (6th Cir. 1982) (same; RICO). *Cf. United States v. Cappetto*, 502 F.2d 1351, 1357 (7th Cir. 1974), *cert. denied*, 420 U.S. 925, 95 S.Ct. 1121, 43 L.Ed.2d 395 (1975) ("A civil proceeding to enjoin [criminal] acts is not rendered criminal in character by the fact that the acts also are punishable as crimes.").[9]

Perhaps even more compelling is the language of Section 812.035(10), which states in part:

> "Notwithstanding any other provision of law, a criminal or civil action or proceeding under ss. 812.012–812.037 may be commenced at any time within 5 years *after the cause of action accrues* ...." (emphasis supplied).

The Legislature's choice of "after the cause of action accrues" as the starting point for the commencement of the running of the statute of limitations is, in light of existing judicial construction of such language in civil cases, *see, e.g., Creviston v. General Motors Corp.*, 225 So.2d 331, strong indication that it intended that the limitations period for civil and criminal actions under Sections 812.012–812.037 will commence to run in accordance with the separate rules applicable to such cases.

[13] We conclude, therefore, that the court properly instructed the jury that the discovery rule applied to the Trust Company's civil action for theft[10] and that even assuming the theft occurred in 1975, there was substantial evidence to support a jury's determination that the Trust Company neither discovered nor should have discovered the theft until, at the earliest, 1978.

III.

[14–17] Assuming, once again, that the theft, even though not discovered until 1978, indisputably occurred in 1975, two years prior to the effective date of the theft statute, Senfeld argues that the Trust Company's cause of action for theft cannot be sustained because the statute cannot be retroactively applied.[11] While it is true that in the absence of an express legislative declaration that a statute have retroactive effect, the statute will be deemed to operate prospectively only, *Fleeman v. Case*, 342 So.2d 815 (Fla.1976); *Thayer v. State*, 335 So.2d 815 (Fla.1976); *Larson v. Independent Life & Accident Insurance Co.*, 158 Fla. 623, 29 So.2d 448 (1947), and that even a clear expression of retroactivity will be ignored if the statute impairs vested rights, creates new obligations, or imposes

9. It follows that a criminal conviction is not a necessary predicate to recovery under the civil remedies provisions of the theft statute. *See Roush v. State*, 413 So.2d 15 (Fla.1982); *Jayre Inc. v. Wachovia Bank & Trust Co.*, 420 So.2d 937 (Fla. 3d DCA 1982). *Accord, United States v. Cappetto*, 502 F.2d 1351; *Heinold Commodities, Inc. v. McCarty*, 513 F.Supp. 311 (N.D.Ill. 1979); *Farmers Bank v. Bell Mortgage Corp.*, 452 F.Supp. 1278 (D.Del.1978); *James v. Brink & Erb, Inc.*, 452 N.E.2d 414.

10. Having decided that the statute of limitations for an action for conversion or theft begins to run from the time one is on notice or reasonably should be on notice of the conversion or theft, it is irrelevant whether the Trust Company showed that Senfeld *fraudulently concealed* his actions from the Trust Company. To the extent that the dictum in *Bove v. PBW Stock Exchange, Inc.*, 382 So.2d 450, 452–53 (Fla. 2d DCA 1980), that the statute of limitations "begins to run at the time of the conversion, except where the latter is fraudulently concealed" suggests that the victim of the conversion must demonstrate not merely a lack of discovery or constructive discovery on his part in order to avoid the running of the statute of limitations, but rather a fraudulent concealment on the part of the converter, we disagree with such a suggestion.

11. If in fact the jury had found that the theft took place in 1975 (that is, Senfeld took the money with the then-formed intent to wrongfully deprive the Trust Company of it) and that the Trust Company knew or should have known of it *at that time*, then even assuming, arguendo, that the five-year statute of limitations provided in Section 812.035(10) applied, *but see Dade County v. Ferro*, 384 So.2d 1283 (Fla.1980); *McGlynn v. Rosen*, 387 So.2d 468 (Fla. 2d DCA 1980), *rev. denied*, 392 So.2d 1376 (Fla.1981), the Trust Company's action would have been limitations barred and the question of whether the statute is to be applied retroactively rendered moot.

new penalties,[12] *Village of El Portal v. City of Miami Shores*, 362 So.2d 275 (Fla. 1978); *Fleeman v. Case*, 342 So.2d 815; *accord, State v. Lavazzoli*, 434 So.2d 321 (Fla.1983), neither of these rules of statutory construction applies where the statute is solely remedial or procedural, *Walker & LaBerge, Inc. v. Halligan*, 344 So.2d 239 (Fla.1977); *City of Lakeland v. Catinella*, 129 So.2d 133 (Fla.1961); *McCord v. Smith*, 43 So.2d 704 (Fla.1949); *Department of Transportation v. Cone Brothers Contracting Co.*, 364 So.2d 482, 486 (Fla.2d DCA 1978), *reversed*, 384 So.2d 154 (Fla. 1980) ("A curative or remedial statute is necessarily retrospective in character."); *Grammer v. Roman*, 174 So.2d 443, 446 (Fla. 2d DCA 1965) ("Remedial statutes are exceptions to the rule that statutes do not come within the legal conception of a retrospective law, or the general rule against the retrospective operation of statutes."). *Cf. Village of El Portal v. City of Miami Shores*, 362 So.2d 275 (remedial statute with specific retroactivity provision).

[18, 19] We have little difficulty in concluding that Section 812.035 is remedial in nature and thus applies retroactively.[13] The statute itself, in Section 812.037, states that "notwithstanding s. 775.021 [strict construction for crimes], ss. 812.012–812.037 shall not be construed strictly or liberally, but shall be construed in light of their purposes to achieve their *remedial* goals."[14] (emphasis supplied). Moreover, like statutes have been consistently construed as remedial in nature. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977) (triple damages under the antitrust statute); *Tel Service Co. v. General Capital Corp.*, 227 So.2d 667 (Fla.1969) (new penalties under usury law could be applied retrospectively to a contract entered into before the effective date of the statute).

IV.

[20, 21] Senfeld's final contention that only the jury is permitted to triple the actual damages awarded[15] is also without merit. The analogous treble-damage provision of the Sherman Antitrust Act[16] requires as a matter of law that the actual damages found by the jury be tripled. *See*

12. The theft statute did not newly create the crime of conversion. Instead, it incorporated under theft "[c]onduct previously known as stealing; larceny; abstracting; embezzlement; misapplication; misappropriation; *conversion;* or obtaining money or property by false pretenses, fraud or deception; ..." § 812.012(2)(d)1 (emphasis supplied). *See Brewer v. State*, 413 So.2d 1217 (Fla. 5th DCA 1982). Thus, Senfeld was on notice that conversion was unlawful in 1975, and no due process right of his would be implicated by applying the statute retroactively.

13. This statement is limited to Section 812.035 providing for civil remedies. In *Faison v. State*, 390 So.2d 728 (Fla. 5th DCA 1980), the court held that the State had to prove the elements of a crime under the old larceny statute rather than the new theft statute, where the crime was committed before the effective date of the statute.

14. Since the existing case law is clear that remedial legislation is given retroactive effect, and the Legislature is presumed to know such existing law, *Migliore v. Crown Liquors of Broward, Inc.*, 448 So.2d 978 (Fla.1984), the Legislature's declaration that the statute is remedial in purpose is tantamount to a declaration that it is to be given retroactive effect.

15. The jury did not refuse to award triple damages; the issue simply was not submitted to the jury for its consideration. Thus, Senfeld's argument is not that the trial court's award of triple damages overrode the jury's verdict, but even if it were, it would fare no better than his argument that the tripling of damages is solely within the province of the jury.

16. Title 15 U.S.C. § 15 (1982) provides in pertinent part:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, ..."

Section 812.035(7), Florida Statutes (1983), provides in pertinent part:

"Any person who is injured in any fashion by reason of any violation of the provisions of ss. 812.012–812.037 shall have a cause of action for threefold the actual damages sustained ...."

Locklin v. Day-Glo Color Corp., 429 F.2d 873 (7th Cir.1970), *cert. denied*, 400 U.S. 1020, 91 S.Ct. 582, 27 L.Ed.2d 632 (1971). *See also Hydrolevel Corp. v. American Society of Mechanical Engineers*, 635 F.2d 118 (2d Cir.1980), *affirmed*, 456 U.S. 556, 102 S.Ct. 1935, 72 L.Ed.2d 330 (1982) (appellate court accepted without discussion that trial court tripled damages awarded by jury); *Yentsch v. Texaco, Inc.*, 630 F.2d 46 (2d Cir.1980) (same). It follows, of course, that the awarding of triple damages is nothing more than a ministerial act which has nothing whatever to do with the fact-finding function of the jury. We think the same holds true for the award of triple damages under Section 812.035(7), Florida Statutes.

Affirmed.

A & E INTERNATIONAL ENTERPRISES, INC., Appellant,

v.

GOLD CREDIT COMPANY, Appellee.

No. 83-2610.

District Court of Appeal of Florida, Third District.

May 1, 1984.

As Amended on Denial of Rehearing June 19, 1984.

Appeal was taken from the Circuit Court, Dade County, William A. Herin, J. The District Court of Appeal, Ferguson, J., held that statute creating conclusive presumption that attorney fee award provided for in a note or written instrument is reasonable if it does not exceed ten percent of principal amount is constitutional.

Affirmed.

Bills and Notes ⇐110

Statute creating conclusive presumption that attorney fee award provided for in a note or other instrument of writing is reasonable as long as amount thereof does not exceed ten percent of principal amount of instrument is constitutional. West's F.S.A. § 687.06.

Taylor, Brion, Buker & Green and Arnoldo Velez, Miami, for appellant.

Stroock & Stroock & Lavan and Gary A. Dumas, for appellee.

Before HUBBART, FERGUSON and JORGENSON, JJ.

FERGUSON, Judge.

As to an award of attorney's fees to a prevailing party pursuant to the provisions of an instrument sued upon (wherein it is agreed that "a reasonable attorney's fee shall be ten (10%) percent of the original principle amount"), Section 687.06, Florida Statutes (1983) [1] creates a conclusive presumption that the award is reasonable so long as the amount of the fee does not exceed ten percent of the principal amount of the instrument. We are not persuaded that the statute, so construed, is unconstitutional.

Affirmed.

1. Section 687.06, Florida Statutes (1983) provides in pertinent part:

> [I]t shall not be necessary for the court to adjudge an attorney's fee, provided in any note or other instrument of writing, to be reasonable and just, when such fee does not exceed 10 percent of the principal sum named in said note, or other instrument in writing.

TITLE VIII

LIMITATIONS

CHAPTER 95

LIMITATIONS OF ACTIONS; ADVERSE POSSESSION

95.011 Applicability.—A civil action or proceeding, called "action" in this chapter, including one brought by the state, a public officer, a political subdivision of the state, a municipality, a public corporation or body corporate, or any agency or officer of any of them, or any other governmental authority, shall be barred unless begun within the time prescribed in this chapter or, if a different time is prescribed elsewhere in these statutes, within the time prescribed elsewhere.

History.—s. 1, ch. 74-382; s. 1, ch. 77-174.

95.022 Effective date; saving clause.—This act shall become effective on January 1, 1975, but any action that will be barred when this act becomes effective and that would not have been barred under prior law may be commenced before January 1, 1976, and if it is not commenced by that date, the action shall be barred.

History.—s. 36, ch. 74-382.

95.03 Contracts shortening time.—Any provision in a contract fixing the period of time within which an action arising out of the contract may be begun at a time less than that provided by the applicable statute of limitations is void.

History.—ss. 1, 2, ch. 6465, 1913; RGS 2931; CGL 4651; s. 2, ch. 74-382.

95.031 Computation of time.—Except as provided in subsection (2) and in s. 95.051 and elsewhere in these statutes, the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues.

(1) A cause of action accrues when the last element constituting the cause of action occurs. For the purposes of this chapter, the last element constituting a cause of action on an obligation or liability founded on a negotiable or nonnegotiable note payable on demand or after date with no specific maturity date specified in the note, and the last element constituting a cause of action against any endorser, guarantor, or other person secondarily liable on any such obligation or liability founded on any such note, is the first written demand for payment, notwithstanding that the endorser, guarantor, or other person secondarily liable has executed a separate writing evidencing such liability.

(2) Actions for products liability and fraud under s. 95.11(3) must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in s. 95.11(3), but in any event an action for fraud under s. 95.11(3) must be begun within 12 years after the date of the commission of the alleged fraud, regardless of the date the fraud was or should have been discovered.

History.—s. 3, ch. 74-382; s. 1, ch. 75-234; s. 2, ch. 77-54; ss. 1, 2, ch. 78-289; s. 1, ch. 78-418; s. 1, ch. 80-280; s. 44, ch. 81-259; s. 10, ch. 85-80; s. 2, ch. 86-272.

95.04 Promise to pay barred debt.—An acknowledgment of, or promise to pay, a debt barred by a statute of limitations must be in writing and signed by the person sought to be charged.

History.—s. 1, ch. 4375, 1895; GS 1717; RGS 2930; CGL 4650; s. 6, ch. 74-382.

95.051 When limitations tolled.—

(1) The running of the time under any statute of limitations except ss. 95.281, 95.35, and 95.36 is tolled by:

(a) Absence from the state of the person to be sued.

(b) Use by the person to be sued of a false name that is unknown to the person entitled to sue so that process cannot be served on him.

(c) Concealment in the state of the person to be sued so that process cannot be served on him.

(d) The adjudicated incompetency, before the cause of action accrued, of the person entitled to sue. In any event, the action must be begun within 7 years after the act, event, or occurrence giving rise to the cause of action.

(e) Voluntary payments by the alleged father of the child in paternity actions during the time of the payments.

(f) The payment of any part of the principal or interest of any obligation or liability founded on a written instrument.

(g) The pendency of any arbitral proceeding pertaining to a dispute that is the subject of the action.

Paragraphs (a)–(c) shall not apply if service of process or service by publication can be made in a manner sufficient to confer jurisdiction to grant the relief sought. This section shall not be construed to limit the ability of any person to initiate an action within 30 days of the lifting of an automatic stay issued in a bankruptcy action as is provided in 11 U.S.C. s. 108(c).

(2) No disability or other reason shall toll the running of any statute of limitations except those specified in this section, s. 95.091, the Florida Probate Code, or the Florida Guardianship Law.

History.—s. 16, Nov. 10, 1828; ss. 14, 17, ch. 1869, 1872; RS 1284, 1285; GS 1715, 1716; RGS 2928, 2929; CGL 4648, 4649; s. 4, ch. 74-382; s. 2, ch. 75-234; s. 1, ch. 77-174; s. 3, ch. 86-266; s. 1, ch. 89-26.

Note.—Former ss. 95.05, 95.07.

95.091 Limitation on actions to collect taxes.—

(1)(a) Except in the case of taxes for which certificates have been sold or of taxes enumerated in s. 72.011, any tax lien granted by law to the state or any of its political subdivisions, any municipality, any public corporation or body politic, or any other entity having authority to levy and collect taxes shall expire 5 years after the date the tax is assessed or becomes delinquent, whichever is later. No action may be begun to collect any tax after the expiration of the lien securing the payment of the tax.

(b) Any tax lien granted by law to the state or any of its political subdivisions for any tax enumerated in s. 72.011 shall expire 20 years after the last date the tax may be assessed, after the tax becomes delinquent, or after the filing of a tax warrant, whichever is later. An action to collect any tax enumerated in s. 72.011 may not be commenced after the expiration of the lien securing the payment of the tax.

(2) If no lien to secure the payment of a tax is provided by law, no action may be begun to collect the tax after 5 years from the date the tax is assessed or becomes delinquent, whichever is later.

(3)[1](a)1. With the exception of taxes levied under chapter 198 and tax adjustments made pursuant to s. 220.23, the Department of Revenue may determine and assess the amount of any tax, penalty, or interest due under any tax enumerated in s. 72.011:

a. Within 5 years after the date the tax is due, any return with respect to the tax is due, or such return is filed, whichever occurs later;

b. Within 6 years after the date the taxpayer either makes a substantial underpayment of tax, or files a substantially incorrect return;

c. At any time while the right to a refund or credit of the tax is available to the taxpayer;

d. At any time after the taxpayer has failed to make any required payment of the tax, has failed to file a required return, or has filed a grossly false or fraudulent return; or

e. In any case in which there has been a refund of tax erroneously made for any reason, within 5 years after making such refund, or at any time after making such refund if it appears that any part of the refund was induced by fraud or the misrepresentation of a material fact.

2. For the purpose of this paragraph, a tax return filed before the last day prescribed by law, including any extension thereof, shall be deemed to have been filed on such last day, and payments made prior to the last day prescribed by law shall be deemed to have been paid on such last day.

(b) The limitations in this subsection shall be tolled for a period of 2 years if the Department of Revenue has issued a notice of intent to conduct an audit or investigation of the taxpayer's account within the applicable period of time as specified in this subsection.

(4) If administrative or judicial proceedings for review of the tax assessment or collection are begun within a period of limitation prescribed in this section, the running of the period shall be tolled during the pendency of the proceeding. Administrative proceedings shall include taxpayer protest proceedings initiated under s. 213.21 and department rules.

History.—s. 20, ch. 74-382; s. 37, ch. 85-342; s. 49, ch. 87-6; ss. 29, 66, ch. 87-101; s. 4, ch. 88-119.

[1]**Note.**—As amended by s. 4, ch. 88-119, applicable to taxes which remain open to assessment on July 1, 1988.

95.10 Causes of action arising out of the state.— When the cause of action arose in another state or territory of the United States, or in a foreign country, and its laws forbid the maintenance of the action because of lapse of time, no action shall be maintained in this state.

History.—s. 18, ch. 1869, 1872; RS 1295; GS 1726; RGS 2940; CGL 4664; s. 5, ch. 74-382.

95.11 Limitations other than for the recovery of real property.—Actions other than for recovery of real property shall be commenced as follows:

(1) WITHIN TWENTY YEARS.—An action on a judgment or decree of a court of record in this state.

(2) WITHIN FIVE YEARS.—

(a) An action on a judgment or decree of any court, not of record, of this state or any court of the United States, any other state or territory in the United States, or a foreign country.

(b) A legal or equitable action on a contract, obligation, or liability founded on a written instrument.

(c) An action to foreclose a mortgage.

(3) WITHIN FOUR YEARS.—

(a) An action founded on negligence.

(b) An action relating to the determination of paternity, with the time running from the date the child reaches the age of majority.

(c) An action founded on the design, planning, or construction of an improvement to real property, with the time running from the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his employer, whichever date is latest; except that, when the action involves a latent defect, the time runs from the time the defect is discovered or should have been discovered with the exercise of due diligence. In any event, the action must be commenced within 15 years after the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his employer, whichever date is latest.

(d) An action to recover public money or property held by a public officer or employee, or former public officer or employee, and obtained during, or as a result of, his public office or employment.

(e) An action for injury to a person founded on the design, manufacture, distribution, or sale of personal property that is not permanently incorporated in an improvement to real property, including fixtures.

(f) An action founded on a statutory liability.

(g) An action for trespass on real property.

(h) An action for taking, detaining, or injuring personal property.

(i) An action to recover specific personal property.

(j) A legal or equitable action founded on fraud.

(k) A legal or equitable action on a contract, obligation, or liability not founded on a written instrument, including an action for the sale and delivery of goods, wares, and merchandise, and on store accounts.

(l) An action to rescind a contract.

(m) An action for money paid to any governmental authority by mistake or inadvertence.

(n) An action for a statutory penalty or forfeiture.

(o) An action for assault, battery, false arrest, malicious prosecution, malicious interference, false imprisonment, or any other intentional tort, except as provided in subsections (4) and (5).

(p) Any action not specifically provided for in these statutes.

(4) WITHIN TWO YEARS.—

(a) An action for professional malpractice, other than medical malpractice, whether founded on contract or tort; provided that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence. However, the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional.

(b) An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered, or should have been discovered with the exercise of due diligence; however, in no event shall the action be commenced later than 4 years from the date of the incident or occurrence out of which the cause of action accrued. An "action for medical malpractice" is defined as a claim in tort or in contract for damages because of the death, injury, or monetary loss to any person arising out of any medical, dental, or surgical diagnosis, treatment, or care by any provider of health care. The limitation of actions within this subsection shall be limited to the health care provider and persons in privity with the provider of health care. In those actions covered by this paragraph in which it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury within the 4-year period, the period of limitations is extended forward 2 years from the time that the injury is discovered or should have been discovered with the exercise of due diligence, but in no event to exceed 7 years from the date the incident giving rise to the injury occurred.

(c) An action to recover wages or overtime or damages or penalties concerning payment of wages and overtime.

(d) An action for wrongful death.

(e) An action founded upon a violation of any provision of chapter 517, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, but not more than 5 years from the date such violation occurred.

(f) An action for personal injury caused by contact with or exposure to phenoxy herbicides while serving either as a civilian or as a member of the Armed Forces of the United States during the period January 1, 1962, through May 7, 1975; the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence.

(g) An action for libel or slander.

(5) WITHIN ONE YEAR.—

(a) An action for specific performance of a contract.

(b) An action to enforce an equitable lien arising from the furnishing of labor, services, or material for the improvement of real property.

(c) An action to enforce rights under the Uniform Commercial Code—Bulk Transfers.

(d) An action against any guaranty association and its insured, with the period running from the date of the deadline for filing claims in the order of liquidation.

(e) An action to enforce any claim against a payment bond on which the principal is a subcontractor or subcontractor as defined in s. 713.01(16) and (17), for private work as well as public work, from the last furnishing of labor, services, or materials, or from the last furnishing of labor, services, or materials by the general contractor if the general contractor is the principal on a bond on the same construction project, whichever is later.

(6) LACHES.—Laches shall bar any action unless it is commenced within the time provided for legal actions concerning the same subject matter regardless of lack of knowledge by the person sought to be held liable that

CHAPTER 770

CIVIL ACTIONS FOR LIBEL

770.01 Notice condition precedent to action or prosecution for libel or slander.—Before any civil action is brought for publication or broadcast, in a newspaper, periodical, or other medium, of a libel or slander, the plaintiff shall, at least 5 days before instituting such action, serve notice in writing on the defendant, specifying the article or broadcast and the statements therein which he alleges to be false and defamatory.

History.—s. 1, ch. 16070, 1933; CGL 1936 Supp. 7064(1); s. 1, ch. 76-123.

770.02 Correction, apology, or retraction by newspaper or broadcast station.—

(1) If it appears upon the trial that said article or broadcast was published in good faith; that its falsity was due to an honest mistake of the facts; that there were reasonable grounds for believing that the statements in said article or broadcast were true; and that, within the period of time specified in subsection (2), a full and fair correction, apology, or retraction was, in the case of a newspaper or periodical, published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared and in as conspicuous place and type as said original article or, in the case of a broadcast, the correction, apology, or retraction was broadcast at a comparable time, then the plaintiff in such case shall recover only actual damages.

(2) Full and fair correction, apology, or retraction shall be made:

(a) In the case of a broadcast or a daily or weekly newspaper or periodical, within 10 days after service of notice;

(b) In the case of a newspaper or periodical published semimonthly, within 20 days after service of notice;

(c) In the case of a newspaper or periodical published monthly, within 45 days after service of notice; and

(d) In the case of a newspaper or periodical published less frequently than monthly, in the next issue, provided notice is served no later than 45 days prior to such publication.

History.—s. 2, ch. 16070, 1933; CGL 1936 Supp. 7064(2); s. 1, ch. 76-123; s. 233, ch. 77-104; s. 1, ch. 80-34.

770.03 Civil liability of broadcasting stations.—The owner, lessee, licensee, or operator of a broadcasting station shall have the right, except when prohibited by federal law or regulation, but shall not be compelled, to require the submission of a written copy of any statement intended to be broadcast over such station 24 hours before the time of the intended broadcast thereof. When such owner, lessee, licensee, or operator has so required the submission of such copy, such owner, lessee, licensee, or operator shall not be liable in damages for any libelous or slanderous utterance made by or for the person or party submitting a copy of such proposed broadcast which is not contained in such copy. This section shall not be construed to relieve the person or party or the agents or servants of such person or party making any such libelous or slanderous utterance from liability therefor.

History.—ss. 1, 2, 3, ch. 19616, 1939; CGL 1940 Supp. 7064 Supp. 7064(4); s. 1, ch. 20869; s. 1, ch. 76-123.

770.04 Civil liability of radio or television broadcasting stations; care to prevent publication or utterance required.—The owner, licensee, or operator of a radio or television broadcasting station, and the agents or employees of any such owner, licensee or operator, shall not be liable for any damages for any defamatory statement published or uttered in or as a part of a radio or television broadcast, by one other than such owner, licensee or operator, or general agent or employees thereof, unless it shall be alleged and proved by the complaining party, that such owner, licensee, operator, general agent or employee, has failed to exercise due care to prevent the publication or utterance of such statement in such broadcasts, provided, however, the exercise of due care shall be construed to include the bona fide compliance with any federal law or the regulation of any federal regulatory agency.

History.—s. 1, ch. 23802, 1947; s. 1, ch. 25278, 1949.

770.05 Limitation of choice of venue.—No person shall have more than one choice of venue for damages for libel or slander, invasion of privacy, or any other tort founded upon any single publication, exhibition, or utterance, such as any one edition of a newspaper, book, or magazine, any one presentation to an audience, any one broadcast over radio or television, or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

History.—s. 1, ch. 67-52.

770.06 Adverse judgment in any jurisdiction a bar to additional action.—A judgment in any jurisdiction for or against the plaintiff upon the substantive merits of any action for damages founded upon a single publication or exhibition or utterance as described in s. 770.05 shall bar any other action for damages by the same plaintiff against the same defendant founded upon the same publication or exhibition or utterance.

History.—s. 2, ch. 67-52.

770.07 Cause of action, time of accrual.—The cause of action for damages founded upon a single pub-

lication 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.

History.—s. 3, ch. 67-52.

770.08 Limitation on recovery of damages.—No person shall have more than one choice of venue for damages for libel founded upon a single publication or exhibition or utterance, as described in s. 770.05, and upon his election in any one of his choices of venue, then he shall be bound to recover there all damages allowed him.

History.—s. 4, ch. 67-52.