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IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: 79,828

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

Petitioners,

vs.

JOHN H. FLANAGAN, JR.,

Respondent.

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

PETITIONERS' BRIEF ON MERITS

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PREFACE

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

(R) - Record on Appeal.

ISSUE

DOES A CAUSE OF ACTION FOR DEFAMATION ACCRUE AT THE TIME OF PUBLICATION OR WHEN THE DEFAMATION IS DISCOVERED?

STATEMENT OF THE CASE AND FACTS

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

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

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

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

The trial court dismissed the complaint for failure to state a cause of action because the claim was barred by the two year statute of limitations provided in Section 95.11(4)(g), Florida Statutes. The Fourth District reversed, holding, for the first time in Florida, that a cause of action for defamation does not accrue at the time of publication, but rather when plaintiff discovers the defamation.

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

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

This court has granted review based on conflict.

SUMMARY OF ARGUMENT

The Fourth District held in the present case, that a cause of action for defamation does not accrue at the time of publication, but rather when it is discovered by plaintiff. Section 770.07, Florida Statutes (1988), provides:

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

The opinion of the Fourth District is not only contrary to the above statute, but is also in conflict with Gallizzi v. Williams, 218 So.2d 499 (Fla. 2d DCA 1969). It is also contrary to Houston v. Florida-Georgia Television Co., 192 So.2d 540 (Fla. 1st DCA 1966), in which the First District held that a cause of action for invasion of privacy accrues at the time of publication. The opinion of the Fourth District is contrary to Florida's statutes and case law, and should be reversed.

ARGUMENT

ISSUE

DOES A CAUSE OF ACTION FOR DEFAMATION ACCRUE AT THE TIME OF PUBLICATION OR WHEN THE DEFAMATION IS DISCOVERED?

Chapter 770, Florida Statutes, is entitled "Civil Actions for Libel". Section 770.07, Florida Statutes, (1988) provides:

> The cause of action for damages founded upon a single publication or exhibition or

> utterance, as described in s.770.05, shall be deemed to have accrued at the time of the first publication or exhibition or utterance thereof in this state.

Section 770.5, Florida Statutes (1988), referred to above, provides:

> No person shall have more than one choice for 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, or 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.

This court has recognized the above statute as defining when a cause of action for libel accrues. Perdue v. Miami Herald Pub. Co., 291 So.2d 604 (Fla. 1974). The application of the discovery rule to defamation is clearly contrary to this statute.[1]

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

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

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[1] Section 770.07, Florida Statutes (1988), was not argued in the briefs filed in the Fourth District in this case; however, it was relied on in petitioners' motion for rehearing.

In Houston v. Florida-Georgia Television Co., 192 So.2d 540 (Fla. 1st DCA 1966), the defendant television station broadcast a story about plaintiffs on November 3, 1960. Plaintiffs alleged that they were not aware of the broadcast until June 10, 1961. They filed their complaint for invasion of privacy on May 15, 1965, which was more than four years (the period of limitations for invasion of privacy) after the publication. In holding that the cause of action accrued at the time of publication, not when plaintiffs discovered the invasion of their legal rights, the First District stated on page 543:

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

Although the Fourth District acknowledged the contrary cases set forth above, it decided that it should apply this court's reasoning in Creviston v. General Motors Corp., 225 So.2d 331 (Fla.

1969), a products liability case, to this defamation case. There are several reasons why the discovery rule announced in Creviston should not be broadened to apply to defamation.

The Fourth District's application of the rationale of Creviston, a products liability case, to defamation cases, is contrary to the intent of our legislature, as reflected by Section 770.07, Florida Statutes (1988). Legislative intent is significant in construing statutes of limitations. Foley v. Morris, 339 So.2d 215 (Fla. 1976).

Although Section 770.07, Florida Statutes (1988), should answer the issue of when an action for defamation accrues, in and of itself, other provisions in Chapter 95 also support the conclusion that the discovery rule does not apply to defamation.

Section 95.031(1), Florida Statutes (1988), provides that "a cause of action accrues when the last element constituting the cause of action occurs". Section 95.031 was enacted by the legislature in 1974. Chapter 74-382, Laws of Florida. Thus, when this Court decided Creviston in 1969, there was no statute which spelled out when a cause of action accrues. When the legislature enacted Section 95.031 in 1974, it made exceptions in Section 95.031(3) for actions for products liability and fraud, and in Section 95.11 for actions founded on the design, planning or construction of improvements to real property and professional

malpractice. The legislature specifically provided that in those actions the time runs from when plaintiff discovered or should have discovered the existence of the cause of action. It made no such provision for defamation or other causes of action.

The opinion of the Fourth District ignores the well-established principle of expressio unius est exclusio alterius. As the Fourth District stated in applying that principle in Biddle v. State Beverage Dept., 187 So.2d 65 (Fla. 4th DCA), cert. dismissed, 194 So.2d 623 (Fla. 1966), on page 67:

> More precisely, express exceptions made in a statute give rise to a strong inference that no other exceptions were intended. Williams v. American Surety Company of New York, Fla. App. 1958, 99 So.2d 877; see Knapczyk v. Ribicoff, 1962, N.D. Ill., 201 F.Supp. 283; C.I.T. Corporation v. Biltmore Garage, 1934, 3 Cal.App.2d Supp. 757, 36 P.2d 247; People ex rel. City of Downey v. Downey County Water District, 1962, 202 Cal.App.2d 786 21 Cal.Rptr. 370; see also 30 Fla.Jur. Statutes §129; 82 C.J.S. Statutes §§ 316, 328.

When this Court decided Creviston in 1968, and adopted the "discovery rule" in products liability cases, it changed the common law. The "discovery rule" was not contained in any of our statutes of limitations, nor did our statutes specifically spell out when a cause of action accrues. The Fourth District's application of the Creviston rationale (promulgated in 1968) after the legislature specifically spelled out when a cause of action accrues in 1974, is contrary to the well-established principle that statutes control

and take precedence over the common law where there are inconsistencies between them. Matthews v. McCain, 125 Fla. 840, 170 So. 323, 327 (1936).

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

> Our holding is limited solely to the matter of the commencement of the running of the three years statute of limitations in the factual posture of this case and is not otherwise extended.

It is well-settled within Florida that in order to maintain an action for libel, a plaintiff who is not a public official must prove that (1) a false and defamatory statement (2) concerning the plaintiff (3) was published (4) to a third person (5) without reasonable care as to the truth or falsity of the statement, (6) resulting in damage to the plaintiff. See, e.g. Hay v. Independent Newspapers, Inc., 450 So.2d 293, 294-295 (Fla. 2d DCA 1984).

Clearly all of the elements necessary to maintain a cause of action for libel occurred when publication was made on February 24, 1988. It is axiomatic that damage to the plaintiff occurs upon publication of the libelous statement to third persons, rather than upon discovery of the libel by the plaintiff. Defamation is an invasion of the interest in reputation and good name. Prosser, §111 The Law of Torts 737 (4th Ed. 1971). Defamation is not

concerned with the plaintiff's own humiliation; rather, it involves the opinions which others in the community may have, or tend to have, of the plaintiff. Id. The First DCA has stated that:

> the gravamen of the [libel] offense is not the knowledge by the plaintiff nor the injury to his feelings[,] but the degrading of reputation...

Houston v. Florida-Georgia Television Co., 192 So.2d 540, 543 (Fla. 1st DCA 1966).

Since defamation is a tort involving injury to the plaintiff's reputation rather than to his psyche (which is the case with the tort of intentional infliction of emotional distress), the damage to the plaintiff in a libel action is done the instant the libelous matter is communicated to a third party. It is at the time of initial publication that the plaintiff will first start to feel the effects of the libelous statement.

Since damage to the plaintiff's reputation inures the instant a third person views the libelous statement, the tort of libel is complete upon publication and the statute of limitations should start to run precisely at that moment. The plaintiff's knowledge (or lack thereof) of the allegedly libelous statement is not a required element of the tort, and thus should not be of any consequence in determining when the statute of limitations should start to run. See Tyler v. Garris, 292 So.2d 427, 429 (Fla. 4th DCA 1974) (libelous statement does not have to be published to the

plaintiff); Granda-Centeno v. Lara, 489 So.2d 142, 143 n.2 (Fla. 3d DCA 1986).

Cases from other jurisdictions are divided on application of the discovery rule to defamation cases. They are collected at Annot., Limitation of Action Time of Discovery of Defamation as Determining Accrual of Action, 35 A.L.R. 4th 1002 (1985). The cases in other jurisdictions applying the discovery rule to defamation actions will undoubtedly be cited by the respondents; however, those cases are not persuasive because the states which have adopted the discovery rule do not have a specific statute similar to Section 770.07, Florida Statutes, which spells out that a cause of action for defamation accrues at the time of publication.

In Lawrence v. Bauer Pub. & Printing Ltd., 78 N.J. 371, 396 A.2d 569 (1979), a libel action, plaintiff was making the same argument plaintiffs makes here, that the discovery rule should apply. In rejecting this argument because of the specificity of the New Jersey statute of limitations applicable to defamation, the court stated on pages 571:

> The so-called "discovery rule" is a doctrine that has been developed by this court, and courts in other jurisdictions, to deal with the sometimes harsh results that would ensue were causes of action deemed to accrue at the moment an alleged wrongful act is committed.
>
> * * *

> Plaintiffs' reliance upon this doctrine in the present litigation setting is wholly misplaced. The discovery rule derives from this Court's interpretation of the language of N.J.S.A. 2A:14-2 the statute of limitations applicable to personal injury suits. That statute provides that an action for damages must be commenced within two years after "the cause of . . . action shall have accrued." Due to the absence of any legislative specification as to the precise time when a claim accrues," our courts, in the exercise of their judicial function, have developed a rule which best serves the interests of justice....
>
> The statute of limitations applicable to the present suit, however, does not measure the limitations period in terms of the "accrual" of a cause of action. Instead, it provides that an action must be brought within one year of "the publication" of the alleged libel. The Legislature has therefore fixed a precise date on which the limitations period begins to run. Once the date of publication is determined, there is no need for further judicial interpretation. Hence, the discovery rule is inapplicable to libel actions.

In Florida, the Legislature has specifically provided that a cause of action for libel or slander "shall be deemed to have accrued at the time of the first publication...". §770.07, Fla. Stat. (1988). Although the discovery rule has been adopted by our Legislature for some causes of action, it has not been done for libel and slander.

CONCLUSION

The opinion of the Fourth District should be reversed and the summary judgment entered by the trial court reinstated.

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By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by mail, this 17th day of November, 1992, to: STUART H. SOBEL, SOBEL & SOBEL, P.A., Penthouse #2, 155 South Miami Avenue, Miami, FL 33120.

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