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**FILED**

SID J. WHITE

DEC 20 1992

CLERK, SUPREME COURT.

By \_\_\_\_\_  
Chief Deputy Clerk

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' REPLY BRIEF ON MERITS

MERSON, SAWYER, JOHNSTON,  
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ARGUMENT

ISSUE

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

Plaintiff argues that Chapter 770 applies only to media defendants, and that Section 770.07, Florida Statutes (1988), which provides that a cause of action for defamation accrues at the time of the first publication, exhibition or utterance in this state, is inapplicable. Plaintiff relies on several District Court of Appeal opinions, in which the specific issue was whether Section 770.01, Florida Statutes (1988), which requires five days notice to the defendant before filing an action for defamation, is applicable to non-media defendants. Those cases are not persuasive for several reasons.

Chapter 770 is entitled "Civil Actions for Libel". There is nothing in the title which would indicate it was applicable solely to newspapers, or radio or television stations, etc. Section 770.01, Florida Statutes (1988), which was involved in the cases on which plaintiff relies, 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.  
(Emphasis added)

Two of the definitions of the word "medium" found in The Random House Dictionary of the English language (2d edition unabridged) are:

6. an intervening agency, means, or instrument by which something is conveyed or accomplished: Words are a medium of expression.

7. one of the means or channels of general communication, information, or entertainment in society, as newspapers, radio, or television.

The allegedly defamatory letter in the present case was clearly a "medium" of expression under the first definition above.

If the statute had used the word "media", plaintiff's argument would be more persuasive; however, the use of the word "medium" by the legislature would clearly include a letter.

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 770.05, Florida Statutes (1988) provides:

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. (Emphasis added)

Publication of defamation by letter would clearly fall within the loose, general language of Section 770.05, Florida Statutes (1988).

In Laney v. Knight-Ridder Newspapers, Inc., 532 F.Supp. 910 (S.D. Fla. 1982), the court held that Section 770.01, Florida Statutes (1982), requiring five days notice, is not limited to media defendants. The court stated on page 912:

The language of the provision is not dispositive of the issue before the Court. The provision simply requires that a plaintiff, prior to bringing a civil action for publication or broadcast in a newspaper, periodical or other medium, "serve notice in writing on the defendant...." Fla.Stat.Ann. s 770.01. The Court observes, however, that the provision fails to specify that notice need be provided only to media-defendants. If the legislature did intend to so limit the applicability of this provision, it seems logical that a specific restriction would have been inserted into the statute. One may reasonably infer from the generality of the language, therefore, that the statute requires notice to all potential defendants in an action for libel or slander.

Florida cases are divided on whether the five day notice requirement in Section 770.01 applies to non-media defendants; however, even if Section 770.01 were interpreted as being limited to newspapers, etc., it does not follow that Section 770.07 is likewise limited. Section 770.07 is broadly worded and constitutes a clear expression by our legislature that the discovery rule is not applicable in defamation cases.

Plaintiff's argument that the discovery rule should be applied in defamation cases is not supported by one single Florida case. Lund v. Cook, 354 So.2d 940 (Fla. 1st DCA), cert. denied, 360 So.2d 1247 (Fla. 1978), on which plaintiff relies, involved the negligence of a surveyor. Senfeld v. Bank of Nova Scotia Trust

Co., 450 So.2d 1157 (Fla. 3d DCA 1984), on which plaintiff also relies, involved conversion and replevin.

The discovery rule has been adopted by the Florida legislature for some causes of action. It has not been adopted for libel and slander. On the contrary, our legislature provided in Section 770.07, Florida Statutes (1988), that a cause of action for libel or slander "shall be deemed to have accrued at the time of the first publication".

CONCLUSION

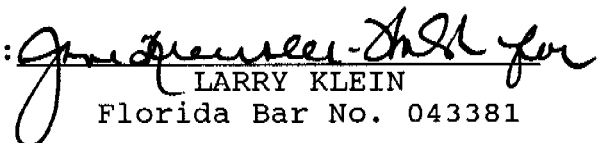
The opinion of the Fourth District should be reversed and the summary judgment entered by the trial court reinstated.

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By:   
LARRY KLEIN  
Florida Bar No. 043381

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by mail, this 28<sup>th</sup> day of December, 1992, to: STUART H. SOBEL, SOBEL & SOBEL, P.A., Penthouse #2, 155 South Miami Avenue, Miami, FL 33120.

By: *Larry Klein*  
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