IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

DR. SUALEH KAMAL ASHRAF,

Appellant,

v. CASE NO. 5D15-2415

ADVENTIST HEALTH SYSTEM / SUNBELT, INC., ET. AL.,

Appellees.

On Appeal from the Circuit Court of the Eighteenth Judicial Circuit, in and for Seminole County, Florida
Case No.: 2014-CA-002745-16T-K
The Honorable Jessica J. Recksiedler, presiding

APPELLANT'S INITIAL BRIEF

Troy J. Webber, FB# 79105
Sarah S. Hussein, FB# 34974
HUSSEIN & WEBBER, P.L.
1608 Walnut Street
Jacksonville, Florida 32206
Telephone: (904) 444-3952
Facsimile: (904) 458-8714
twebber@husseinandwebber.com
shussein@husseinandwebber.com

Attorneys for Appellant
Dr. Sualeh Kamal Ashraf

TABLE OF CONTENTS

Page No.

TABLE OF CITATIONS

Cases Page No.

Statutes

Secondary Sources

PRELIMINARY STATEMENT

Appellant, DR. SUALEH KAMAL ASHRAF, will be referred to herein as "Appellant," or if necessary, individually as Dr. Ashraf. Appellee, ADVENTIST HEALTH SYSTEM / SUNBELT, INC., d/b/a FLORIDA HOSPITAL APOPKA, will be referred to herein as "Appellee," or if appropriate, as "Florida Hospital."

For purposes of this brief, references to the original record on appeal will be in the format "R" followed by the appropriate volume and page number or numbers as assigned by the clerk. Orders by this Court will be referred to by name or description and the date of entry.

STATEMENT OF THE CASE AND FACTS

Appellant is a medical doctor licensed to practice by the Florida Board of Medicine, the State Medical Board of Ohio, and the Michigan Board of Medicine. (R. 4-5). He has practiced medicine in the United States for over twenty-six years and holds board certifications in Interventional Cardiology, Internal Medicine, Endocrinology, Diabetes, and Metabolism, Advanced Perioperative Transesophageal Echocardiography, Nuclear Cardiology, and Adult Echocardiography. (R. 4-5).

From 2006 to 2008, Appellant was employed by Appellee as a physician in the cardiology department of Florida Hospital Apopka, a healthcare facility owned and operated by Appellee. (R. 5). On June 28, 2007, Appellant was notified by Appellee that quality of care and patient safety concerns had allegedly arisen regarding Appellant's medical practices at the Apopka facility. (R. 23). Appellee advised that an 'Investigative Committee,' composed of doctors employed at Florida Hospital, would be formed to investigate Appellant's practices and to make findings and recommendations regarding Appellant's clinical privileges. (R. 24).

Appellant asserts that, throughout the proceedings conducted by the Investigative Committee, he was denied the right to counsel, denied basic procedural safeguards mandated by the Healthcare Quality Improvement Act (HCQIA), 42 U.S.C. §§ 11101 through 11152, denied formal notice of a hearing, denied the right

to call or cross-examine witnesses, and was denied the ability to present evidence on his own behalf. (R. 10-11).

On November 15, 2007, the Investigative Committee concluded its investigation and issued twenty-two adverse factual findings and conclusions with respect to Appellant's medical practice and clinical privileges. (R. 9; 24). These findings and conclusions were later adopted without a hearing by Appellee's Medical Executive Committee, and were upheld by a subsequent "Fair Hearing" panel, which was empowered by the bylaws of Florida Hospital to convene only in an appellate capacity. (R. 24-25). Appellant disputes the twenty-two factual allegations and asserts that the allegations were false, defamatory, and made intentionally with knowledge of their falsity. (R. 17).

On December 17, 2008, the Board of Florida Hospital reported the twenty-two factual findings of the Investigative Committee to the National Practitioner Databank (NPDB). The NPDB is a Federal database that serves as a repository of information about medical professionals. (R. 25). When entities, such as a hospital, initiate "peer review" proceedings against a doctor and make negative findings regarding the doctor's quality of care or professional competence in his or her employment, the hospital reports any adverse findings and actions to the NPDB. (R. 25, 88).

The NPDB is constituted to subsequently republish the information about the subject doctor upon inquiry by qualifying healthcare requestors. (R. 88). This republication is conducted with the knowledge and intent of the original reporting hospital, and the hospital possesses full authority to retract the adverse report or to correct any inaccuracies contained therein. (R. 47). The adverse report concerning Appellant was published through the NPDB as recently as September 2014, and directly resulted in the denial of employment opportunities to Appellant. (R. 16).

On October 14, 2014, Appellant filed a Complaint against Appellee in the Circuit Court for the Eighteenth Judicial Circuit, in and for Seminole County, Florida, Case No. 2014-CA-002745-16T-K. (R. 4-21). The Complaint stated causes of action for defamation (Count I) and permanent injunctive relief (Count II). (R. 4-21).

On December 15, 2014, Appellee filed a motion to dismiss the Complaint. (R. 22-37). Appellee asserted that the subject claims were time-barred because, under the 'single publication rule,' codified under Section 770.71, Florida Statutes (2014), the two-year statute of limitations applicable to defamation claims began to run at the time of Florida Hospital's initial publication to the NPDB in 2008. (R. 29-32).

Appellant asserts that subsequent defamatory reports issued through the NPDB as intended or foreseen by the original reporting hospital are not subject to

the 'single publication rule,' but should instead be governed by the 'multiple publication rule,' as articulated by Musto v. Bell South Telecommunications Corp., 748 So. 2d 296, 297 (Fla. 4th DCA 1999) in the context of credit databank reporting. (R. 38-55). This would result in the setting of a new statute of limitations each time an adverse report is republished through the National Practitioner Databank as intended by Appellee. The majority of courts to consider the issue have held that the multiple publication rule is applicable to defamation claims brought on the basis of subsequent NPDB reporting. (R. 49). The issue is one of first impression in the State courts of Florida. (R. 31).

At hearing on June 8, 2015, the Circuit Court of the Eighteenth Judicial Circuit, in and for Seminole County, Florida, granted Appellee's Motion to Dismiss. (R. 79-94). The trial court concluded that Appellant's claims were barred by the statute of limitations and, as a result, the Complaint failed to state a cause of action. (R. 69).

On July 5, 2015, Appellant filed his Notice of Appeal, challenging the trial court's Order granting Appellee's Motion to Dismiss. (R. 70). This Court accepted jurisdiction on September 22, 2015, discharging a previous Order to Show Cause with regard to jurisdictional issues and ordering this matter to proceed as a final appeal. Appellant has timely perfected his appellate rights.

SUMMARY OF THE ARGUMENT

The trial court erred in dismissing Appellant's Complaint on grounds that the statute of limitations had expired. Although a cause of action for defamation founded upon a single publication begins to accrue at the time of the initial utterance or communication, the limitations period in this case was nonetheless renewed under the 'multiple publication rule' with each subsequent repetition of the defamatory matters through the NPDB. Appellee is liable for those republications because the repetition of the information was authorized, intended, or reasonably expected by Appellee.

Accordingly, this Honorable Court must reverse the Order granting Appellee's motion to dismiss, as rendered by the trial court below, and allow this case to proceed on the merits.

STANDARD OF REVIEW

When reviewing a trial court order dismissing a complaint for failure to state a cause of action, the standard of review is *de novo*. See Siegle v. Progressive Consumers Ins. Co., 819 So. 2d 732 (Fla. 2002); Meadows Community Ass'n v. Russell-Tutty, 928 So. 2d 1276, 1278 (Fla. 2d DCA 2006); Lutz Lake Fern Road Neighborhood Groups, Inc. v. Hillsborough County, 779 So.2d 380, 383 (Fla. 2d DCA 2000).

ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S COMPLAINT ON STATUTE OF LIMITATION GROUNDS BECAUSE DEFAMATORY STATEMENTS MADE THROUGH THE NATIONAL PRACTITIONER DATABANK ARE PROPERLY SUBJECT TO THE 'MULTIPLE PUBLICATION RULE,' TRIGGERING A NEW STATUTE OF LIMITATIONS WITH EACH SUBSEQUENT PUBLICATION AUTHORIZED, INTENDED, OR FORESEEN BY APPELLEE.

A. Under Florida Law, the 'Single Publication Rule' is not Applicable to Cases Involving Separate and Distinct Repetitions of Defamatory Matters

It is the general rule that each communication of the same defamatory matter, whether to a new person or to the same person, is a separate and distinct publication for which a separate cause of action arises. Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); Musto v. Bell South Telecommunications Corp., 748 So. 2d 296, 297 (Fla. 4th DCA 1999) (citing Restatement (Second) of Torts § 577A cmt. a (1977)). This general rule is referred to as the "multiple publication rule." Musto, 748 So. 2d at 297.

An exception to this rule is the "single publication rule," which is applied where the same communication is heard at the same time by two or more persons. Id. (citing Restatement (Second) of Torts § 577A at cmt. b). The 'single publication rule' treats the communication to the entire group as one publication giving rise to only one cause of action "[i]n order to avoid multiplicity of actions and undue harassment of the defendant by repeated suits by new individuals, as well as

excessive damages that might have been recovered in numerous separate suits...." Id.

Thus, the single publication rule is a liability limitation whereby "only one cause of action arises against the publisher as a result of the composite act of the publisher in releasing multiple copies of the publication at a given time." Firstamerica Development Corp. v. Daytona Beach News-Journal Corp., 196 So.2d 97, 101 (Fla. 1966). The rule is intended to apply in defamation cases where a single publication reaches a group audience, thus creating a risk of "endless litigation" and excessive damages. Musto, 748 So. 2d at 298-99.

For cases encompassed by the 'single publication rule,' a cause of action for damages begins to accrue at the time that a defamatory statement is first published. Section 770.07, Florida Statutes (2015), 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 (emphasis added).

By its plain language, § 770.07 sets the time of accrual for causes of action that are "founded upon a single publication or exhibition or utterance." Wagner, Nugent, Johnson, Roth, Romano, Erikson & Kupfer, P.A. v. Flanagan, 629 So.2d 113, 115 (Fla.1993). The statute does not apply where subsequent republications occur. Musto, 748 So. 2d at 199. Every separate repetition of a defamatory statement

continues to be considered a publication. Doe v. America Online, Inc., 783 So. 2d 1010 (Fla. 2001) (quoting Zeran v. America Online, Inc., 129 F.3d 327, 331-32 (4th Cir. 1997).

B. The Majority of Courts That Have Addressed the Present Issue Have Applied the Multiple Publication Rule To Subsequent Republications of Defamatory Matters Through the National Practitioner Databank.

Although an issue of first impression in Florida, the majority of courts that have considered the issue at bar have held that subsequent reports disseminated from the NPDB are subject to the multiple publication rule. The existing case law demonstrates that multiple publications occur in the context of subsequent NPDB reporting, that publications through the databank are attributable to and actionable against the original reporting hospital, and that the policy concerns underlying the adoption of the 'single publication rule' are not applicable in such cases.

In Swafford v. Memphis Individual Practice Association, No. 02A01-9612-CV-00311, 1998 WL 281935 (Tenn. Ct. App. 1998), the plaintiff was a licensed physician practicing family medicine in Tennessee. Entities that plaintiff had been associated with (a health maintenance organization and an organization responsible for supervising physicians who treat policyholders in Tennessee) had reported to the National Practitioner Data Bank that the plaintiff's clinical privileges had been revoked due to violations of quality care standards. Id. at 1. The court found that

the NPDB was an electronic database, operated pursuant to federal law, which stores information related to the quality of care of physicians. Id. at 5. Information contained in the NPDB was confidential and could be accessed only by certified health care entities. Id.

At least three entities had retrieved information about the plaintiff from the NPDB. Id. at 1. Under these facts, Swafford held that each dissemination of defamatory information from the databank, in response to an affirmative request by a certified hospital or other health care entity, gave rise to a separate cause of action for defamation. Id. at 4-11. These circumstances were considered analogous to the discrete dissemination of credit reports at the request of creditors, as to which a multiple publication rule had been applied. Id. at 6.

The Swafford court found the circumstances dissimilar to the mass publication of a book or magazine, as to which the single publication rule had been applied, because information contained in the databank was not made available to the general public in a mass publication. Id. at 8. Since no "aggregate publication" occurred when specifically authorized users requested information from the database, "the justification for the single publication rule, a vast multiplicity of lawsuits resulting from a mass publication, is simply not present." Id. at 8.

In Stephan v. Baylor Medical Center at Garland, 20 S.W.3d 880 (Tex. App.-Dallas 2000), a physician sued a hospital after being denied staff privileges and

reported to the NPDB. Id. at 884-885. The complaint included a count for defamation. Id. On summary judgment, the hospital argued that the defamation claim was barred by the statute of limitations because the physician filed his suit more than three years after the hospital initially sent its adverse action report to the NPDB. Id. at 885.

On Appeal, the Texas Court of Appeals reversed the trial court's order granting summary judgment as to the defamation claim. Id. at 893-94. The Court held that a report submitted to the NPDB was subject to the multiple publication rule and that each transmission from the database to a specific requestor resulted in a separate and distinct injury to which a separate statute of limitations applied. Id. at 889.

Stephan rejected the argument that the claim was subject to the single publication rule, explaining:

> The [single publication] rule does not apply to separate printings of the same publication or to situations in which the same information appears in different publications. Under those circumstances, it is apparent that the publisher intends to reach different audiences and this intention justifies a new cause of action. (citations omitted).

Id.

The single publication rule was furthermore inapplicable due to the absence of a "mass publication." Although the adverse information provided by the hospital was contained in a single report made available to a wide audience through the

NPDB, "the confidential nature and restricted dissemination of the report means it necessarily reaches a separate and discrete audience with each dissemination by the NPDB." Id. A physician may suffer a new and distinct injury with each republication of an allegedly defamatory report by the NPDB and, therefore, "each transmission of the report is a new publication and a possible separate tort." Id.

Stephan further rejected the argument that the single publication rule should apply because once the hospital made its report, it "relinquished all right of control, title, and interest in the printed matter." Id. at 889-90. Although the NPDB released the report regarding the physician at its own discretion, the hospital had made its original report "with full knowledge of how the information would be used and potentially disseminated by the NPDB." Id. Although the general rule is that one is not liable for repetition of a defamatory statement by a third person,

> [I]f a reasonable person would recognize that his actions create an unreasonable risk that the defamatory matter will be communicated to other parties, his conduct becomes a negligent publication to those parties with the same consequences as a direct and intentional communication.

Id. (citing First State Bank v. Ake, 606 S.W.2d 696, 701 (Tex. Civ. App.-Corpus Christi 1980); S.H. Kress & Co. v. Lindley, 46 S.W.2d 379, 381 (Tex. Civ. App.-El Paso 1932, no writ).

In the Court's view, the risk in NPDB cases that an allegedly defamatory report would be communicated to others was almost certain. Id. Since the hospital

was fully aware that its statements would be communicated to the NPDB and to any authorized person that made a later request to the database, the hospital could not deny responsibility for subsequent publications that it knew would occur. Id.

In Williams v. University Medical Center of Southern Nevada, 2010 WL 3001707 (D. Nev.), a physician filed suit against a hospital in a multi-count complaint, which alleged defamation in the hospital's reporting activities to the NPDB. Id. at 1. On summary judgment, the hospital argued that the defamation claims were time-barred due to the fact that more than two years had elapsed from the time the allegedly defamatory information was provided to the databank. Id. The physician contended that his defamation claims fell within the limitation period because the defamatory NPDB entry had been accessed by and published to healthcare entities within the previous two years. Id.

With respect to the defamation claims deriving from subsequent publications from the NPDB, the Federal District Court of Nevada denied the hospital's Motion for Summary Judgment, holding that the subsequent publications were subject to multiple publication rule. Id. at 7. As explained by the Court:

> Nevada also would follow *Oja, Swafford,* and the Restatement's comment regarding the difference between general internet publishing and a second publication of the same information to a new audience. A report to the NPDB database is not the same as a single edition of a newspaper. It can be accessed only by a select group of individuals and only upon their request. It is not widely and generally available and thus is not a single, aggregate publication. Each time the information is released to a requester, it is published anew.

Id. at 6 (citing Swafford v. Memphis Individual Practice Association, No. 02A01-9612-CV-00311, 1998 WL 281935 (Tenn. Ct. App. 1998); Oja v. U.S. Army Corps of Eng'rs, 440 F.3d 1122, 1130 (9th Cir. 2006), Restatement (Second) of Torts § 577A (1977).

In denying summary judgment, Williams rejected the hospital's argument that applying the multiple publication rule would permit physicians to trigger future publications by applying to hospitals who then would request the NPDB report, and thereby increase damages and re-trigger the limitations period. The Court responded that:

> Defendants can remove the posting or modify it at any time, and thus can control whether the information is published to future requesters. Defendants thus can avoid the concerns of increased liability and continuous resetting of the statute of limitations that underlie the single publication rule. . . Moreover, this same argument could apply in the credit report situation, where a plaintiff could trigger requests for his credit history by taking actions which would induce third parties to request his credit history. However, courts have not applied the single publication rule to that *analogous situation* (emphasis added).

Id.

The rationale of Swafford and its progeny received implicit approval by the United States Ninth Circuit Court of Appeals in Oja v. U.S. Army Corps of Eng'rs, 440 F.3d 1122, 1130-32 (9th Cir. 2006). There, the Court addressed the issue of whether the single publication rule should apply to internet postings as the functional

equivalent of traditional print media. Although ultimately applying the single publication rule to "aggregate communications" posted on the internet for the general public, the Court approved of the distinction made in Swafford that justified the application of the multiple publication rule to cases involving the NPDB. Id. at 1133. As stated in Oja:

> Unlike a typical Internet publication, the information at issue in Swafford was not available for the general public to access, nor could any unregistered and non-specific entities access the registered databank. Swafford is much more akin to the release of personal credit reports . . . *in such cases, it has been widely accepted that the transmission or publication of the information does not warrant application of the single publication rule and each transmission or publication is actionable* (emphasis added).

Id.; Canatella v. Van De Kamp, 486 F.3d 1128, 1133, 1136 (9th Cir. 2007) (also distinguishing Swafford because the plaintiff's information was widely available to the general public on the webpage, even if the public had to perform a search on his name to find it).

State appellate courts in Florida have not addressed the issue of whether subsequent repetitions of allegedly defamatory matters through the NPDB are subject to the 'single publication rule' or the 'multiple publication rule.' The issue is one of first impression. See Pierson v. Orlando Regional Healthcare Systems, Inc., 2010 WL 1408391 (M.D. Fla) (describing the issue as one "of first impression"); Pelullo v. Patterson, 788 F. Supp. 234, 239 (D.N.J. 1992) (describing the absence of Florida case decisions addressing the issue).

In cases involving analogous credit reporting databanks, however, at least one Florida court has determined that the subsequent issuance of a credit report containing allegedly defamatory information constitutes a separate instance of publication attributable to and actionable against the original reporting creditor. Musto v. Bell South Telecommunications Corp., 748 So. 2d 296, 297 (Fla. 4th DCA 1999). Thus, State case precedent does exist for applying the 'multiple publication rule' in scenarios involving reporting databases accessed by a limited number of requestors. Musto, 748 So. 2d at 298.

In Musto, a debtor sued a creditor for slander following a credit bureau's reporting of defamatory information that had been previously supplied by the creditor and its collections agent. The original information concerned an alleged overdue payment, and was provided by the creditor to the credit bureau databank nearly four years prior to suit being filed by the debtor. Id. at 297. The debtor brought suit four years later only after the defamatory information was republished from the databank to a prospective lender. Id.

On summary judgment, the creditor argued that, under Section 770.07, the debtor's cause of action accrued on the date of the first publication, and was therefore time-barred by a two-year statute of limitation. Id. Relying on Wagner, the trial court concluded that, because Section 770.07 was applicable to all civil litigants, the

debtor's action could not be brought more than two years after the creditor made its initial report to the bureau. Id.

The Fourth District Court of Appeal reversed, holding that the statute of limitations on a credit card slander claim begins anew and new cause of action accrues each time a credit report is issued. Id. at 299. In declining to apply the single publication rule, the Court explained:

> The instant case is analogous to cases where a litigant alleges credit slander under the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 et seq. Several courts, including this court, have held the two-year statute of limitations under the Fair Credit Reporting Act (FCRA) begins to run when an inaccurate credit report is issued, rather than when the plaintiff discovers the credit report has been improperly issued.

Id. (citing Lamothe v. Equifax Credit Info. Serv., Inc., 718 So.2d 326 (Fla. 4th DCA 1998); Clark v. State Farm Fire & Cas. Ins. Co., 54 F.3d 669 (10th Cir.1995); Hyde v. Hibernia Nat'l Bank, 861 F.2d 446 (5th Cir.1988); Lawhorn v. Trans Union Credit Info. Corp., 515 F.Supp. 19 (E.D.Mo.1981) (determining liability arises when credit reporting agency's practices lead to the preparation of an erroneous or incomplete consumer report); Wilson v. Porter, Wright, Morris & Arthur, 921 F.Supp. 758 (S.D.Fla.1995) (holding two-year statute of limitations under FCRA began to run when credit reports were issued).

The single publication rule was furthermore "inapplicable because the protection of the Act was not extended to situations where the defendant republished

material knowing the matter was allegedly libelous. Id. (citing Schneider v. United Airlines, Inc., 208 Cal.App.3d 71, 256 Cal.Rptr. 71 (1989). Thus, in the context of credit slander claim, the subsequent communication from a credit databank of defamatory information previously provided by a creditor constituted a "republication" by the creditor for purposes of applying the multiple publication rule and setting a new statute of limitations period. Id. at 298-99.

The Fourth District distinguished its decision from the facts in Wagner, 629 So.2d 113 (Fla. 1993), which held that § 770.07 applied to all civil litigants and that, for cases involving single publications, Plaintiffs were subject to a two-year statute of limitation from the date of initial publication. As explained in Musto:

> *Wagner, Nugent* is distinguishable not only because the instant case does not concern a single defamatory statement, but also because, as noted above, the "endless liability" envisioned by the *Wagner, Nugent* court is simply not a concern where no mass publication or potentially endless repetition of the defamatory statement is likely to occur. In the case of credit reports it is more likely that only a handful of the inaccurate credit reports will issue, and only to those potential creditors in a position to secure such a report.

Id. Thus, the single publication rule was inapplicable not only because multiple publications had occurred, but because the policy rationale for the rule was not even present where only a limited audience could obtain the information in the manner intended by the original creditor.

In the instant case, Appellee initiated peer review proceedings against Appellant and, at the conclusion of those proceedings, provided allegedly

defamatory information to a reporting databank known as the NPDB. Reports from the NPDB continue to be issued to the present day in response to individual inquiries by hospitals. Like the credit databank at issue in Musto, the National Practitioner Databank is a nationwide database accessible to a limited class of qualifying requestors.

Whereas the requestors in Musto involved prospective lenders and other creditors, the requestors in the present case consist of hospitals and other authorized healthcare entities. In both scenarios, the databank at issue is maintained and utilized for the intended purpose of having the subject information republished on separate and distinct occasions upon the request of authorized persons or entities. The class of requestors in a case involving the NPDB (authorized healthcare entities) is even more restricted than the credit databank scenario addressed in Musto.

The NPDB does not involve a group communication or a single communication with a mass dissemination of information. There is no "aggregate publication," or composite act of the original publisher in releasing multiple copies of the publication at a single time. Rather, there is a publication submitted with the intent of republication at a later date upon a subsequent request. The confidential nature and restricted dissemination of the NPDB reports means it necessarily reaches a separate and distinct audience with each individual issuance of a report. As stated by the above-cited authorities, each subsequent transmission of the report is

therefore a new publication and separate tort triggering a new statute of limitations.

The single publication rule has never been applied to situations where a defendant has material republished knowing the matter was allegedly libelous. Musto, 748 So. 2d at 299. For this reason, the majority of courts that have considered the issue have held that the multiple publication rule is applicable to defamation claims brought as a result of subsequent republications through the NPDB. See Swafford, No. 02A01-9612-CV-00311, 1998 WL 281935 (Tenn. Ct. App. 1998); Stephan, 20 S.W.3d 880 (Tex. App.-Dallas 2000); Williams, 2010 WL 3001707 (D. Nev.). These cases are squarely in line with Musto, and its legal rationale that the single publication rule does not apply where a party publishes or causes to be published separate and distinct defamatory statements.

Appellee cannot escape liability for republications through the NPDB by the fact that Appellee submitted its original report in 2008 and does not directly participate in subsequent NPDB reporting. Such an assertion incorrectly assumes that a republication legally attributable to Appellee can only occur where Appellee itself publishes the defamatory statement. As discussed in detail below, an original defamer is liable for repetition by third persons of defamatory statements if the original defamer authorized, intended, or reasonably expected the repetition to occur. See Restatement (Second) of Torts § 576 (1977).

C. Applying The Multiple Publication Rule To Subsequent Reporting that Takes Place Through the National Practitioner Databank Is Required By The Majority Tort Rule Imposing Liability On An Original Defamer For Third Party Republications Where The Republication Was Authorized, Intended, Or Reasonably Expected By The Original Defamer.

The general rule is that one who publishes a defamatory statement will not be held liable for the repetition of it by others. See 53 C.J.S. Libel and Slander; Injurious Falsehood § 91 (2005). When, however, the second publication is a natural and probable consequence of the first, the initial publisher is responsible for it. Barnette v. Wilson, 706 So. 2d 1164, 1166-67 (Ala. 1997) (citing Giordano v. Tullier, 139 So.2d 15 (La. App. 1962)).

According to the Restatement (Second) of Torts § 576 (1977), the original defamer is liable if either "the repetition was authorized or intended by the original defamer" (subd. (b)) or "the repetition was reasonably to be expected" (subd. (c)). In such a scenario, "[i]t is the foreseeable subsequent repetition of the remark that constitutes publication and an actionable wrong, even though it is the original author of the remark who is being held accountable." Shively v. Bozanich, 80 P.3d 676, 683 (Cal. 2003).

The Restatement rule has been adopted in the majority of jurisdictions throughout the United States. Bolduc v. Bailey, 586 F. Supp. 896, 901 (D. Colo 1984) (recognizing as the "majority rule" the Restatement principle "that a defendant

is liable for repetition by third persons of defamatory statements initially made by the defendant, if such repetition was reasonably to be expected"); Pelullo v. Patterson, 788 F. Supp. 234, 238 (D.N.J. 1992) (commenting on the nearly complete absence of State court decisions that have adopted a contrary rule); Hucko v. Joseph Schlitz Brewing Co., 302 N.W.2d 68, 71 (Wis. Ct. App. 1981) (describing the Restatement § 576 position as "an elementary rule of defamation law").

See also Shively, 80 P.3d at 683; Mitchell v. Superior Court, 690 P.2d 625, 633 (Cal. 1984) (adopting Restatement (Second) § 576); Schneider v. United Airlines, Inc., 256 Cal. Rptr. 71, 74 (Cal. Ct. App. 1989) (stating that the originator of a defamatory matter can be liable for the repetition of the matter by a second party, "if he could reasonably have foreseen the repetition"); Muirhead v. Zucker, 726 F. Supp. 613, 617 (W.D. Pa. 1989) (describing as "ludicrous" defendants' claims that they could not be held liable for providing defamatory information that was foreseeably republished by a newspaper); Davis v. National Broadcasting Co., 320 F. Supp. 1070, 1072 (E.D. La. 1970) (stating that "where there were circumstances, known to the original defamer at the time of his publication that might reasonably lead him to expect a repetition, he is responsible for it"); Weaver v. Beneficial Finance Co., 98 S.E. 2d 687, 691 (Va. 1957) (holding that liability attaches to an original defamer if the republication at issue was the natural and probable consequence of the original publication or if defendants actually or presumptively

authorized its republication); Cobb v. Garlington, 193 S.W. 463, 468 (Tex. App. 1917); Murphy v. Boston Herald, Inc., 865 N.E. 2d 746, 764 (Mass. 2007); Barnette v. Wilson, 706 So. 2d 1164, 1166 (Ala. 1997); Stephan v. Baylor Medical Center at Garland, 20 S.W. 3d 880, 889 (Tex. Appp. 2000); Tumbarella v. Kroger Co., 271 N.W. 2d 284, 290 (Mich. Ct. App. 1978); Pendergrass v. ChoicePoint, Inc., 2008 WL 5188782 (E.D. Pa. 2008); Dube v. Likens, 167 P.3d 93, 107 (Ariz. Ct. App. 2007); Shepard v. Nabb, 581 A.2d 839 (Md. Ct. Spec. App. 1990) (citing Restatement (Second) of Torts §§ 576(c), 577A, 53 C.J.S. Libel and Slander § 54, and Annot., Liability of Publisher of Defamatory Statement for its Repetition or Republication by Others, 96 A.L.R.2d 373 (1964); Spears Free Clinic & Hosp. for Poor Children v. Maier, 261 P.2d 489, 492 (Colo. 1953); Brown v. First National Bank of Mason City, 193 N.W.2d 547, 555 (Iowa 1972) (recognizing liability for damages resulting from a repetition of a libelous statement "when such repetition or republication was reasonably foreseeable to the person making the statement"); Wright v. Bachmurski, 29 P. 3d 979, 984 (Kan. Ct. App. 2001) (stating that an original publisher may be liable for republication if repetition by third persons was reasonably expected as the natural and probable consequence of the original publication); Williams v. Fulks, 167 S.W. 93 (Ark. 1914); Zier v. Hoflin, 33 Minn. 66, 68 (Minn. 1885); Wayne Works v. Hicks Body Co., 55 N.E. 2d 382 (Ind. 1944); Elms v. Crane, 118 Me. 261, 264 (Me. 1919); Bigley v. National Fidelity & Casualty

Co., 144 N.W. 810, 812 (Neb. 1913); Sawyer v. Gilmers, Inc., 126 S.E. 183, 187 (N.C. 1925).

As demonstrated by the above case authorities, the mere fact that Appellee first submitted its allegedly defamatory report to the NPDB in 2008 does not end the analysis as to whether liability may be imposed for subsequent republications. If Appellee authorized the republication, intended for the republication to occur, or should have reasonably expected the republication, then the foreseeable subsequent repetition by the NPDB "constitutes *publication and an actionable wrong*" on part of Appellee. See Shively, 80 P.3d at 683 (emphasis added).

Here, the Board of Florida Hospital originally reported its adverse findings regarding Appellant to the NPDB on December 17, 2008. (R. 25). Appellee, however, acknowledges that the NPDB "is a Federal databank which serves as a source of information about medical professionals and can be accessed by all hospitals and/or healthcare providers." (R. 25). Unquestionably, an original defamer who submits allegedly defamatory information to a databank constituted for the specific purpose of subsequent republication to healthcare requestors should reasonably expect that the databank will eventually serve the functions imposed upon it by Federal law, and actually republish the subject report. The content of the report is determined exclusively by Appellee, and Appellee fully intends that its

allegations will be repeated at later dates to the limited class of healthcare requestors authorized to access the NPDB.

Thus, Appellee does not escape liability in this case by the mere fact that it first submitted its adverse databank report in 2008. Such an assertion incorrectly assumes that an actionable republication legally attributable to Appellee can only occur where Appellee itself repeats the defamatory matter. As demonstrated above, this is not the law in the vast majority of jurisdictions to consider the issue. Where the NPDB subsequently repeats defamatory information as intended by, authorized by, or foreseen by Appellee, a "republication" legally attributable to Appellee is deemed to have occurred. This creates a new cause of action for defamation and begins anew the running of the statute of limitations. In Appellant's case, the statute began to run in September 2014, the date of the most recent republication by the NPDB. (R. 16).

D. The U.S. District Court Decision In Pierson Is Non-Binding Authority On Florida Courts And Is Inconsistent With The Majority Tort Rule Imposing Liability On An Original Defamer For Third Party Republications Where The Republication Was Authorized, Intended, Or Was Reasonably Expected By The Original Defamer.

In support of its position for the application of the single publication rule, Appellee points to the decision in Pierson v. Orlando Regional Healthcare Systems, Inc., 2010 WL 1408391 (M.D. Fla). (R. 31-32). In Pierson, the U.S. District Court for the Middle District of Florida departed from the majority line of cases applying the 'multiple publication rule' in the context of defamation claims brought as a result of NPDB reporting.

While noting that this was an issue of first impression before any Florida court, Pierson concluded that a defamation claim premised on an adverse report submitted to the NPDB accrues when the report is initially made. Id. The court declined the plaintiff's request to extend the holding of Musto v. Bell South Telecommunications Corp., 748 So. 2d 296 (Fla. 4th DCA 1999) to defamation claims arising out of the NPDB, stating:

> Having considered Musto and the *policy* concerns noted therein, this Court declines to extend Musto beyond the credit report context. Here, Plaintiff knew of the contents of the Adverse Action Report at the time it was issued to the NPDB; thus, *the potential pitfall of credit report subject not knowing of a defamatory credit statement until the statute of limitations has run is not present*. Under Plaintiff's argument, Plaintiff could apply for employment over and over again and create a new defamation claim based on reissuances of the NPDB report at his whim.

Id. (emphasis added). As a result, Pierson held that the subject defamation claims were barred by the statute of limitations. Id.

Although Pierson is considered persuasive authority for this Court's consideration, Florida appellate courts are in no way bound by a federal district court decision addressing State law matters. State vs. Dwyer, 332 So. 2d 333, 335 (Fla. 1976) (stating that "[a] decision of a Federal District Court, while persuasive if well-reasoned, is not by any means binding on the courts of this state"); Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 11 (1987) (stating that "[w]hen federal courts interpret state statutes in a way that raises federal constitutional questions, a 'constitutional determination is predicated on a reading of the statute that is not binding on state courts and may be discredited at any time'") (citations omitted); Zakrzewska v. New Sch., 574 F. 3d 24, 27 (2d Cir. 2009) (stating that "a decision from our Court is only binding only within the federal courts of our Circuit").

Appellant respectfully submits that Pierson was incorrectly decided, and is inconsistent with the majority rule that a foreseeable subsequent repetition of a defamatory remark by another party constitutes a publication and actionable wrong on part of the original defamer. Shively, 80 P.3d at 683; Barnette, 706 So. 2d at 1166-67; Restatement (Second) of Torts § 576 (1977). By focusing almost exclusively on policy grounds distinguishing credit reporting from NPDB reporting, Pierson overlooks the dispositive legal conclusion of Musto that, in the context of

subsequent publications by a reporting databank, "multiple publications" occur and result in an actionable claim against the original defamer. Musto, 748 So. 2d at 298.

The decision in Musto was not based merely on policy concerns regarding the time in which a debtor might discover a defamatory credit report. The Fourth District decision also addressed the legal inapplicability of the single publication rule to a scenario where separate and distinct publications issue from a centralized databank constituted and partaken in for the express purpose of republication. Id. Musto specifically states that its holding is based on the California Appeals Court decision in Schneider v. United Airlines, Inc., 208 Cal.App.3d 71, 256 Cal.Rptr. 71 (1989). Musto, 748 So. 2d at 298. The Fourth District summarized that decision as follows:

> [T]he Uniform Single Publication Act was inapplicable because the protection of the Act was not extended to situations where the defendant republished material knowing the matter was allegedly libelous.

Id. The holding in Musto was "in keeping with the above-cited decision [in Schneider]." Id.

Schneider is a leading California appellate decision specifically adopting the majority Restatement rule that the originator of a defamatory matter can be liable for the repetition of the matter by a second party, "if he could reasonably have foreseen the repetition." Schneider, 256 Cal. Rptr. at 74. This legal rationale appears throughout Musto and is used in part to distinguish the Florida Supreme Court

decision in Wagner. Musto explicitly finds that the activities of the databank at issue constituted more than a single publication, thus rendering the single publication rule inapplicable. Musto, 748 So. 2d at 298-99.

The policy distinction between debtor and medical practitioner defamation claims does not and cannot account for Musto's underlying legal conclusion that multiple publications, attributable to the original defamer, occur in the context of defamatory statements that are repeated through a reporting databank. The fact that a potential injustice exists for debtors, who may not become aware of a defamatory credit report until after the statute of limitations has run, does not convert a 'single publication' into 'multiple publications.' The finding of multiple publications was instead based on Musto's implicit recognition of the majority Restatement rule, adopted in Schneider, that the original publisher of a defamatory matter is liable for second party republications that were intended or foreseen by the original defamer. Schneider, 256 Cal. Rptr. at 74.

The fundamental shortcoming of Pierson is that it fails to adequately to address or even recognize the majority Restatement rule imposing liability on original defamers for foreseeable or intended republications by second parties. Pierson's treatment of the subject is limited to a single footnote, wherein the Court states, in pertinent part:

> [T]he only authority cited by Plaintiff on this point is dicta in a footnote in a 1986 Florida appellate court case and citation of that dicta by a federal district court in New Jersey. See Granda-Centeno v. Lara, 489 So. 2d 142, 143 n. 3 (Fla. 3d DCA 1986); Pelullo v. Patterson, 788 F. Supp. 234, 238 (D.N.J. 1992). This Court does not find the Lara dicta sufficient to establish the law of Florida on this point, and thus this portion of Plaintiff's argument is rejected.

Although no Florida court has squarely addressed the issue of whether an original defamer can be held liable for the foreseeable or intended republication by a second party, this does not support Pierson's conclusion that Florida courts would reject the majority Restatement rule. The *dicta* contained within Granda-Centeno, 489 So. 2d at 143 n. 3, along with the overwhelming weight of case authority from other jurisdictions, supports the exact opposite conclusion. See Barnette, 706 So. 2d at1166-67; Giordano, 139 So.2d at 15; Shively, 80 P.3d at 683; Bolduc, 586 F. Supp. at 901; Pelullo, 788 F. Supp. at 238; Mitchell, 690 P.2d at 633; Schneider, 256 Cal. Rptr. at 74; Muirhead, 726 F. Supp. at 617; Davis, 320 F. Supp. at 1072; Weaver, 98 S.E. 2d at 691; Cobb, 193 S.W. at 468; Murphy, 865 N.E. 2d at 763-64; Stephan, 20 S.W. 3d at 889; Tumbarella, 271 N.W. 2d at 290; Pendergrass, 2008 WL 5188782; Dube, 167 P.3d at 107; Shepard, 581 A.2d at 839; Spears Free Clinic & Hosp. for Poor Children, 261 P.2d at 492; Hucko, 302 N.W.2d at 71; Brown, 193 N.W.2d at 555 Wright, 29 P. 3d at 979; Williams, 167 S.W. at 93; Zier v. Hoflin, 33 Minn. at 68; Wayne Works, 55 N.E. 2d 382; Elms, 118 Me. at 264; Bigley, 144 N.W. at 812; Sawyer, 126 S.E. at 187.

Contrary to the conclusions reached in Pierson, it is "an elementary rule of defamation law that the author of a libelous statement is liable for any secondary publication which is the natural consequence of his or her act." Hucko, 302 N.W. 2d at 71. Whether a defamed party, such as a debtor or a doctor, knew or should have known when the original defamatory statement was made, is irrelevant to the legal analysis applicable to cases involving intended or foreseeable republications by third parties. A defamed person's lack of prior knowledge of the original statement is not an element required to impose liability on the original defamer. The sole question is whether the original defamer intended for the republication to occur, or foresaw that it would occur. If so, the original defamer is liable for defamatory republications. See Restatement (Second) Torts § 576 subd. (b) and (c) (1977).

Lastly, Pierson fails to take adequate account of the policy rationale underlying the adoption of the single publication rule. The rule was adopted with the goal of "avoiding a vast multiplicity of lawsuits that would result from defamatory statements contained in a mass publication such as a newspaper or magazine." Musto, 748 So. 2d at 298. However, Musto explicitly finds that "endless liability" "is not a concern" in credit databank cases, "where no mass publication or potentially endless repetition of the defamatory statement is likely to occur." Id.

If, in the context of a reporting databank accessible to a limited number of potential creditors "endless liability" is not a concern justifying the application of

the single publication rule, it is unclear why it would be a concern justifying the application of such a rule in the context of a reporting databank (NPDB) involving an even more limited number of requestors.

In the present case, Appellee can remove its allegedly defamatory statements from the NPDB or modify them at any time, and thus can control whether the information is published to future requesters. Appellee thus can avoid the concerns of "endless liability" and continuous resetting of the statute of limitations that underlie the single publication rule.

CONCLUSION

The trial court erred in granting Appellee's Motion to Dismiss and must be reversed. Multiple publications occur in the context of defamatory statements republished through the NPDB and, because such republications are authorized, intended, or foreseen by the original reporting hospital, the republication is legally attributable to the hospital even where it does not directly participate in subsequent NPDB reporting activities. A separate republication by the NPDB is, under the majority Restatement rule outlined above, a republication by Appellee.

Since multiple publications, actionable against Appellee, occurred in this case, Appellant's claims are not subject to the 'single publication rule' and were not time-barred by the statute of limitations. Under the analysis adopted by the majority of courts to consider the issue at bar, the statute of limitations began to run in September of 2014, the date of the most recent repetition of the allegedly defamatory statement. Appellant's claims are therefore timely because Appellant filed suit within two years of the most recent publication.

This Court should adopt the majority Restatement rule imposing liability on an original defamer for intended or foreseeable republications by third parties. If adopted as the law in Florida, the rule necessitates a finding that subsequent reports issued through the NPDB are legally attributable to Appellee and subject Appellee to liability under the 'multiple publication rule.'

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Mason H. Grower, III, Grower, Ketcham, Rutherford, Bronson, Eide, & Telan, P.A., mhgrower@growerketcham.com, scorbett@growerketcham.com, erkatz@growerketcham.com, slaylward@growerketcham.com, enotice@growerketcham.com, via electronic mail and/or e-filing portal on this 23rd day of December, 2015.

HUSSEIN & WEBBER, P.L.

Troy J. Webber
Florida Bar No. 79105
twebber@husseinandwebber.com
Sarah S. Hussein
Florida Bar No.: 34974
shussein@husseinandwebber.com
1608 Walnut Street
Jacksonville, Florida 32206
Tel: (904) 444-3952
Fax: (904) 458-8714

Attorneys for Appellant
Dr. Sualeh Kamal Ashraf

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that that the above reply was typed in 14-point Times New Roman font, and is otherwise compliant with the formatting rules outlined in Rule 9.100(1), Florida Rules of Appellate Procedure.

HUSSEIN & WEBBER, P.L.

Troy J. Webber
Florida Bar No. 79105
twebber@husseinandwebber.com
Sarah S. Hussein
Florida Bar No.: 34974
shussein@husseinandwebber.com
1608 Walnut Street
Jacksonville, Florida 32206
Tel: (904) 444-3952
Fax: (904) 458-8714

Attorneys for Appellant
Dr. Sualeh Kamal Ashraf