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 REPLY BRIEF

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ARGUMENT

I. NEITHER WAGNER NOR SECTION 770.07 HAVE ABOLISHED THE LONG-STANDING 'MULTIPLE PUBLICATION RULE,' WHEREBY A CAUSE OF ACTION FOR DEFAMATION RENEWS EACH TIME A DEFENDANT REPUBLISHES A DEFAMATORY MATTER TO A NEW AUDIENCE

In its Answer Brief, Appellee broadly asserts that Dr. Ashraf "is bound by the single publication rule" because, under Section 770.07, Florida Statutes (2014), his cause of action for defamation can only accrue from the date of the "first publication" in 2008. (Answer Brief of Appellee, p. 6) (citing Wagner, Nugent, Johnson, Roth, Romano, Erikson & Kupfer, P.A. v. Flanagan, 629 So.2d 113, 115 (Fla. 1993). As discussed in detail below, Appellee has confused the rule applying to "single publications" with the rule that applies to original defamers who republish defamatory statements at a later date. Notwithstanding Wagner and the provisions of § 770.07, a cause of action for defamation in Florida continues to accrue under the 'multiple publication rule' each time a defamer subsequently repeats a defamatory matter.

Appellee's contention that a defamer can only be liable from the date of his "first publication," regardless of how many times he or she repeats the statement at a later date, is based on an incorrect reading of Wagner, which only applies to scenarios where a defendant has engaged in a "single publication." In Wagner, a contractor sued a hospital and its attorneys for defamation after a single letter was

issued to the hospital's insurer alleging that the contractor had engaged in construction fraud. Id. at 114. The letter was initially published to the insurer in February of 1988 and was unknown to the plaintiff-contractor until November of that year. Id. In October of 1990, the contractor filed suit for defamation, arguing that his claims were timely under the two-year statute of limitations because a private cause of action for defamation did not begin to accrue until the alleged libel or slander was discovered or reasonably should have been discovered. Id.

Citing to the "plain language" of Section 770.07, Wagner rejected the plaintiff's argument that his cause of action did not begin to accrue until the discovery of the alleged defamatory statement. Id. at 115. Section 770.07, Florida Statutes (2014), provides that:

> 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.

Id. (emphasis added). Since only a single publication had occurred, and since a cause of action in such cases accrues from the date that the defamatory statement is first uttered, Wagner held that the plaintiff's claims for defamation were time-barred. Id.

Clearly, the holding in Wagner is limited to single defamatory statements and the interpretation of Section 770.07, which, by its plain language, "sets the time of accrual of a cause of action founded upon a *single publication* or exhibition or

utterance." Musto v. Bell South Telecommunications Corp., 748 So. 2d 296, 298 (Fla. 4th DCA 1999) (emphasis added). Although Wagner states that Section 770.07 applies to "all civil litigants," the Court is clearly referring to civil litigants bringing claims that fall within the ambit of the statute at issue. To claim otherwise, is to ignore the specific language of the statute that Wagner was called upon to interpret.

Wagner makes no mention of scenarios involving subsequent republications (i.e. "multiple publications"), and there is no language in the decision indicating that the Florida Supreme Court, on the basis of a narrowly worded statute applying only to "single" publications, intended to outright abandon the long-standing general rule that a party is liable for separate and distinct republications of defamatory matters.

Despite the narrow holding of Wagner and the specific application of Section 770.07 as it pertains to "single publications," Appellee nonetheless concludes that Section 770.07 also applies to the present case, where there are multiple subsequent publications. In doing so, Appellee is confusing a scenario where a defendant publishes a single statement, and a scenario where a defendant publishes the same statement again at a later date.

In Florida, a defendant who makes a defamatory remark and then repeats the remark at a later date, continues to be liable for the later remark. Musto, 748 So. 2d at 297 (citing Restatement (Second) of Torts § 577A cmt. a (1977)); Baucom v. Haverty, 805 So.2d 959, 960 (Fla. 2d DCA 2001) (recognizing liability of a

defendant and the renewal of the statute of limitations each time the defendant caused an allegedly defamatory report to be republished to a new potential employer). Although liability for the first statement will extend only two years, the defendant is not free to continue repeating the defamatory statement on subsequent occasions. If he does so, he is liable for those *second* or subsequent publications.

Applying Section 770.07 even to scenarios where a defendant engages in multiple publications on later occasions would produce an absurd result. It would mean that a defendant, who makes an initial defamatory statement, could simply wait two years from the date of the first publication, and then be free to have that defamatory statement continually republished because, according to Appellee, his liability can only be measured from the date of the *first* publication. (Answer Brief of Appellee, p. 30). Thus, a defendant would be empowered to continually repeat a defamatory statement in the future so long as the same statement was also made more than two years ago.

Appellee's assertion that, under Wagner and Section 770.07, *all* defamation claims accrue from the time of the first publication, regardless of whether a defendant has the information republished at a later date, is also completely at odds with the provisions of Section 770.05, Florida Statutes (2014) which defines the term "single publication" 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.

Fla. Stat. § 770.05 (emphasis added). Obviously, a defamer who subsequently republishes or causes to be republished his or her original defamatory statements cannot be said to have engaged in only *one* broadcast, presentation, edition, or exhibition. The republication constitutes a *second* broadcast, presentation, edition, or exhibition, and is therefore not encompassed by Section 770.07.

In the end, Appellee's interpretation of Section 770.07 mistakenly presents an exception to a general rule as the general rule itself. The "multiple publication rule" is the "general rule" in Florida. Musto, 748 So. 2d at 297. It provides that, each time a defendant *repeats* a defamatory remark on a subsequent occasion (i.e. engages in multiple publications), he or she is liable for that subsequent remark and subject to a new cause of action. Id.; Baucom, 805 So. 2d at 960. Section 770.07 represents an "exception to this [general] rule." Musto, 748 So. 2d at 297. It provides that, where a defendant makes a single defamatory remark (i.e. a single publication), he or she is liable for that single remark only from the date it is "first published." The rule is intended to limit a defendant's liability in the event that a single publication reaches a group audience. Id. at 298-99.

The 'single publication rule' is not intended as a shield to permit a defendant to continually repeat defamatory statements in the future. The general rule remains

that, for each separate and distinct repetition of the statement, a new cause of action arises with a new two-year statute of limitations. This new limitations period applies, once again, from the date of "first publication."

II. THE ISSUE IN THIS CASE IS WHETHER THE SUBSEQUENT REPUBLICATION OF A DEFAMATORY MATTER THROUGH THE NATIONAL PRACTITIONER DATABANK (NPDB) IS ACTIONABLE AGAINST THE ORIGINAL REPORTING HOSPITAL, WHERE THE REPUBLICATION WAS AUTHORIZED, INTENDED, OR FORESEEN BY THE HOSPITAL

In its Answer Brief, Appellee repeats the assertion that the statute of limitations expired in this case because Dr. Ashraf's cause of action for defamation "accru[ed] upon the original published statement's first publication" in 2008. (Answer Brief of Appellee, p. 30). By focusing exclusively on the initial report to the National Practitioner Databank (NPDB) in 2008, Appellee fails to address the issue of original defamer liability for intended or foreseeable third-party republications. As discussed extensively in Appellant's Initial Brief, a cause of action for defamation is renewed under the 'multiple publication rule' each time the NPDB repeats a defamatory report that is authorized, intended, or foreseen by Florida Hospital.

Notwithstanding the provisions of Section 770.07, Florida Statutes (2014), it remains the general rule in Florida that "each communication of the same defamatory matter by same defamer, whether to a new person or to the same person,

is a separate and distinct publication for which a separate cause of action arises." Musto, 748 So. 2d at 297 (citing Restatement (Second) of Torts § 577A cmt. a (1977)). See also Baucom, 805 So.2d at 960 (Fla. 2d DCA 2001) (recognizing liability of a defendant and the renewal of the statute of limitations each time the defendant caused an allegedly defamatory report to be republished to a new potential employer) (citing Epic Metals Corp. v. CONDEC, Inc., 867 F.Supp. 1009 (M.D. Fla. 1994)). This general principle is referred to as the "multiple publication rule." Musto, 748 So. 2d at 297; Baucom, 805 So. 2d at 960.

Here, Dr. Ashraf is not alleging that only a single publication occurred in 2008. Dr. Ashraf alleges that *multiple* publications occurred, that they continued to occur as late as 2014, that those later publications are attributable to and actionable against Appellee under the majority tort rule outlined in Appellant's Initial Brief, and that with each subsequent republication legally attributable to Appellee, a new cause of action accrued.

Thus, the issue raised in this appeal is not whether Florida Hospital's first report to the NPDB in 2008 is actionable as a "single publication" under Section 770.07. Dr. Ashraf has not even sued on the basis of the 2008 NPDB report. (R. 16). The issue is whether multiple publications, attributable to and actionable against Florida Hospital, occur where a third party (the NPDB) repeats defamatory matters as authorized, intended, or foreseen by Florida Hospital. If so, then Section

770.07 is inapplicable and a new cause of action arises with each later publication, which occurred as recently as September of 2014. (R. 16).

Dr. Ashraf's position is firmly supported by the majority rule that an original defamer is liable for authorized, intended, or foreseeable republications by third parties. See Restatement (Second) of Torts § 576 (1977); Bolduc v. Bailey, 586 F. Supp. 896, 901 (D. Colo. 1984) (recognizing the principle as a "majority rule"); 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 Restatement the principle as "an elementary rule of defamation law"). Dr. Ashraf's position is further supported by the majority of case decisions that have addressed the liability of a reporting hospital for subsequent publications that take place through the NPDB. See Swafford v. Memphis Individual Practice Association, No. 02A01-9612-CV-00311, 1998 WL 281935 (Tenn. Ct. App. 1998); Stephan v. Baylor Medical Center at Garland, 20 S.W.3d 880 (Tex. App.-Dallas 2000); Williams v. University Medical Center of Southern Nevada, 2010 WL 3001707 (D. Nev.); Oja v. U.S. Army Corps of Eng'rs, 440 F.3d 1122, 1130 (9th Cir. 2006) (approving the rationale of Swafford).

As discussed in Appellant's Initial Brief, Florida Hospital is not relieved of liability for later NPDB republications by the mere fact that the hospital does not

directly participate in NPDB reporting activities. Under the majority tort rule, adopted in the vast majority of jurisdictions throughout the United States, an original defamer is liable for third party repetitions of defamatory statements if the original defamer authorized, intended, or reasonably expected the repetition to occur. Appellee is unquestionably aware that reports submitted to the NPDB will be republished at a later date, and Appellee unquestionably authorizes or intends for such a result to occur. Thus, a republication by the NPDB is actionable against Appellee. This results in a renewed cause of action for defamation from the date of the most recent NPDB report in September of 2014.

Contrary to the assertions made in Appellee's Answer Brief, Florida law is far from "clear" and "unequivocal" on the above-described issue. The issue is indisputably 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 law). As such, this Court "should look to other jurisdictions in determining how to best resolve it." Wiggins v. Parson, 446 So.2d 169, 171 (Fla. 5th DCA 1984).

III. APPLYING THE 'MULTIPLE PUBLICATION RULE' TO NPDB REPORTING CASES WOULD NOT RESULT IN "ENDLESS LITIGATION"

In its Answer Brief, Appellee contends that the 'multiple publication rule' should not be applied to NPDB reporting cases because of the potential for "endless litigation." (Answer Brief of Appellee, p. 25). To the extent that terminable litigation is an element required to impose liability on an original defamer for intended or foreseeable republications by a third party, Appellee's concerns are addressed both by the hospital's ability to correct or withdraw defamatory information, and by the doctrine of estoppel by judgment.

First, adverse reports submitted to the NPDB are not made available to the general public in a mass publication. The NPDB is accessible by a limited class of authorized healthcare entities and a vast multiplicity of lawsuits could not occur with such a restricted audience. As stated in Musto in the context of analogous third party credit reporting databanks, endless liability "is simply not a concern where no mass publication or endless repetition . . . is likely to occur." Musto, 748 So. 2d at 299.

Moreover, a reporting hospital can, at any time, remove or correct alleged defamatory information contained within the NPDB. Unlike a scenario involving newspapers, websites, or unforeseen distributions of documents, the hospital fully controls whether the information is republished to a subsequent audience. The offending hospital can withdraw the information at issue and thereby cut off its

liability for defamation.

Lastly, a defamed party who might seek to engage in successive lawsuits on the basis of NPDB reporting would arguably be prevented from doing so by the doctrine of "estoppel by judgment." Estoppel by judgment is an equitable doctrine, intended to bring an end to repetitive litigation of legal issues. The doctrine provides that, where a party is capable of bringing two different causes of action, the party will be barred in a second lawsuit from re-litigating common facts and issues already adjudicated in the first lawsuit. Gordon v. Gordon, 59 So.2d 40, 47 (Fla. 1952). The essential elements of estoppel by judgment are: (1) that the parties and issues be identical; (2) that the particular matter be fully litigated and determined in a contest; (3) which results in a final decision; and (4) in a court of competent jurisdiction. Husky Industries, Inc. v. Griffith, 422 So.2d 996, 999 (Fla. 5th DCA 1982) (citing Mobil Oil Corp. v. Shevin, 354 So.2d 372 (Fla.1977)).

Here, a doctor seeking to trigger successive defamation claims through the NPDB would, upon filing his or her initial lawsuit, be forced to litigate the issues of whether the subject statements were false and whether they were defamatory in nature. If, in the initial lawsuit, a judgment was entered or a jury verdict was rendered on these issues in favor of the hospital, the doctrine of estoppel by judgment would bar the filing of a subsequent lawsuit that attempted to readdress the same issues. Since a hospital's report to the NPDB does not change, the issues between

the two successive lawsuits would be identical, they would be determined in the first lawsuit, and the judgment or verdict on those issues in the first suit would represent a final decision in a court of competent jurisdiction and would prevent re-litigation.

CONCLUSION

Based on the foregoing authorities and arguments, and for the reasons outlined in Appellant's Initial Brief, this Court should reverse the trial court's ruling that Appellant's claims for defamation were time-barred by the statute of limitations.

Multiple publications occur in the context of defamatory statements repeated through the NPDB. Because such republications are authorized, intended, or foreseen by the original reporting hospital, the republication is legally attributable to and actionable against the hospital even where it does not directly participate in subsequent NPDB reporting activities. A separate republication by the NPDB is, under the majority rule outlined in Appellant's Initial Brief, a republication by Appellee.

Appellant's defamation claims were therefore timely, because a new cause of action accrued against Appellee with the most recent NPDB republication in September of 2014.

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, slaylward@ growerketcham.com, enotice@growerketcham.com, via electronic mail and/or e-filing portal on this 20th day of January, 2016.

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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.

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