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

DR. SUALEH KAMAL ASHRAF,

Appellant,

vs. **CASE NO.: 5D15-2415**

ADVENTIST HEALTH SYSTEM/
SUNBELT, INC., a Florida corporation,
d/b/a FLORIDA HOSPITAL APOPKA,

Appellee.

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

ANSWER BRIEF OF APPELLEE, ADVENTIST HEALTH SYSTEM/ SUNBELT, INC., a Florida corporation, d/b/a FLORIDA HOSPITAL APOPKA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

Appellant, DR. SAMUEL KAMAL ASHRAF ("Dr. Ashraf"), appeals the entry of final judgment in favor of Appellee, ADVENTIST HEALTH SYSTEM/SUNBELT, INC., a Florida Corporation, d/b/a FLORIDA HOSPITAL APOPKA, ("the Hospital"), which is based on the trial court's Order of dismissal with prejudice entered in favor of the Hospital on June 8, 2015.

On July 5, 2015, Dr. Ashraf filed his Notice of Appeal challenging the trial court's Order of dismissal with prejudice. On August 5, 2015, this Court entered an Order to Show Cause to Dr. Ashraf to show cause as to why the instant appeal should not be dismissed for lack of jurisdiction, inasmuch as an order granting a motion to dismiss is not a final, appealable order. However, on September 22, 2015, this Court accepted jurisdiction of this matter.

The Record on Appeal consists of one (1) volume. All citations to the Record on Appeal are referred to as "R" followed by the appropriate page number(s) assigned by the Clerk.

STATEMENT OF THE CASE AND FACTS

Dr. Ashraf appeals the entry of final judgment in favor of the Hospital, which is based on the Order of dismissal with prejudice entered on June 8, 2015 by the underlying tribunal. (R. 70, 71). The underlying litigation arises out of the permanent suspension of the clinical privileges of Dr. Ashraf at the Hospital. (R. 22). By way of background, Dr. Ashraf is a physician licensed to practice medicine in the State of Florida, and currently practices as a cardiac physician in Orange County, Florida. (R. 4, 5, 23). In his underlying Complaint, Dr. Ashraf alleges that in or around August 2006, he became "employed" as a physician in the Cardiology Department at the Hospital, and maintained clinical privileges in connection with same. (R. 5, 23). Dr. Ashraf also alleges that in or around February 2007, his clinical privileges were renewed by the Hospital for the 2007 and 2008 calendar years. (R. 5, 23).

On June 22, 2007, the Chairman of the Medical Staff's Medical Executive Committee sent correspondence to Dr. Ashraf informing him of the suspension of his clinical privileges. (R. 5, 6, 23). In the correspondence, Dr. Ashraf was informed that his clinical privileges were being suspended due to concerns regarding the safety of his patients and the quality of care he was providing. (R. 6,

23). Subsequently, on June 28, 2007, Dr. Ashraf was notified via certified mail that the Medical Executive Committee ("MEC") voted to continue the suspension of his clinical privileges and that an Investigative Review Committee ("IRC") would be convened to formally investigate the concerns regarding the quality of care Dr. Ashraf was providing. (R. 6, 23). At that same time, Dr. Ashraf was also advised that his clinical privileges would remain suspended up to and until the IRC released its findings. (R. 6, 24).

On October 31, 2007, Dr. Ashraf appeared before the IRC and was interviewed regarding the care and treatment he provided to a number of patients. (R. 7, 24). Following this interview, Dr. Ashraf was informed on November 2, 2007 that his clinical privileges remained suspended, and on November 15, 2007, the IRC issued its 22 written findings and recommendations regarding Dr. Ashraf. (R. 7, 24). In its findings, the IRC recommended that Dr. Ashraf's clinical privileges and staff appointment be permanently revoked. (R. 9, 24).

On November 19, 2007, the MEC adopted the findings and recommendations of the IRC. (R. 9, 24). Correspondence conveying the MEC's decision was sent to Dr. Ashraf on November 27, 2007. (R. 9, 24). This correspondence contained verbatim the factual findings and recommendations of the IRC. (R. 9, 24).

On December 27, 2007, pursuant to the Medical Staff Bylaws, Dr. Ashraf requested a Fair Hearing Panel to examine the recommendations of the IRC and the MEC's approval of same. (R. 7, 25). A Fair Hearing Panel was convened on September 8 and 9, 2008. On September 17, 2008, the Fair Hearing Panel upheld the recommendations and actions of the IRC and MEC, and forwarded its recommendation to the Hospital's Board of Directors for approval. On December 17, 2008, the Hospital's Board of Directors approved the recommendations of the MEC and permanently revoked Dr. Ashraf's clinical privileges and staff appointment. (R. 7, 25).

As required under federal law, on December 17, 2008, the Hospital's Board of Directors reported the revocation of Dr. Ashraf's clinical privileges and staff appointment to the National Practitioners Data Bank ("NPDB") (R. 25). See 45 C.F.R. § 60.5 (2011). The NPDB is a federal databank which serves as a source of information about medical professionals and can be accessed by hospitals and healthcare providers. (R. 11, 25). The report submitted regarding Dr. Ashraf ("NPDB Report") included "verbatim" the 22 findings issued by the IRC on November 15, 2007. (R. 11, 12, 25).

On October 14, 2014, approximately six (6) years following the publication of the NPDB Report, Dr. Ashraf filed the underlying Complaint, attempting to

assert causes of action for defamation (Count I) and permanent injunctive relief (Count II) against the Hospital. In his Complaint, Dr. Ashraf alleges that the NPDB Report submitted by the Hospital contains defamatory statements, and that the same alleged defamatory statements are republished on a continuing basis each time Dr. Ashraf applies for employment and the NPDB Report is requested by a prospective employer. (R. 16). On December 16, 2014, the Hospital filed its Motion to Dismiss with prejudice the underlying Complaint on several grounds, including that Dr. Ashraf's claim for defamation was time-barred.

A hearing was held on the Hospital's Motion to Dismiss on June 8, 2015, in the Circuit Court of the Eighteenth Judicial Circuit, in and for Seminole County, Florida. During the hearing, the trial court granted the Hospital's Motion to Dismiss with prejudice and found that Dr. Ashraf's claim is barred by the statute of limitations. (R. 69).

On July 5, 2015, Dr. Ashraf filed his Notice of Appeal. (R. 70). On August 5, 2015, this Court entered an Order to Show Cause ordering Dr. Ashraf to show cause as to why the instant appeal should not be dismissed for lack of jurisdiction, inasmuch as an order granting a motion to dismiss is not a final, appealable order. However, on September 22, 2015, this Court accepted jurisdiction of this matter.

SUMMARY OF THE ARGUMENT

Florida law is clear that the statute of limitations on a claim for defamation is two (2) years. See § 95.11(4)(g), Fla. Stat. (2014). This two (2) year period begins to run from the time the cause of action accrues. See § 95.031, Fla. Stat. (2014). Under Florida law, accrual of a claim for defamation occurs at the time of the first publication or exhibition or utterance of the alleged defamatory statement in this state. See § 770.07, Fla. Stat. (2014). This long-standing rule, known as the single-publication rule, was codified by the Florida Legislature in 1967 and remains undisturbed. This rule has been determined by the Florida Supreme Court to apply to all civil litigants, both public and private. See Wagner, Nugent, Johnson, Roth, Romano, Erikson, & Kupfer, P.A. v. Flanagan, 629 So. 2d 113, 115 (Fla. 1993).

Accordingly, in pursuing his claim for defamation, Dr. Ashraf is bound by the single-publication rule. It is undisputed and was pled by Dr. Ashraf in his Complaint that the Hospital published the NPDB Report on December 17, 2008. (R. 7, 25). Thus, any potential cause of action for defamation based on the publication of the NPDB Report accrued at that time, beginning the running of the statute of limitations. Dr. Ashraf's approximate six (6) year delay in filing his

claim for defamation falls outside the bounds of the two (2) year statute of limitations. Accordingly, the trial court's finding that Dr. Ashraf's claim is time-barred is appropriate as it is in accordance with Florida law and policy, and the Order of dismissal entered in favor of the Hospital should be affirmed.

STANDARD OF REVIEW

The primary purpose of a motion to dismiss is to request the trial court to determine whether a complaint properly states a cause of action upon which relief can be granted, and, if it does not, to enter an order of dismissal. See Sobi v. Fairfield Resorts, Inc., 846 So. 2d 1204, 1206 (Fla. 5th DCA 2003) (citing Provence v. Palm Beach Taverns, Inc., 676 So. 2d 1022, 1024 (Fla. 4th DCA 1996). Although the statute of limitations is an affirmative defense, a complaint is still subject to dismissal on statute of limitations grounds if the applicability of the defense appears on the face of the complaint itself. See Jones v. Bock, 549 U.S. 199, 215 (2007); see also Jelenc v. Draper, 678 So. 2d 917, 918-19 (Fla. 5th DCA 1996) (citing Fla. R. Civ. P. 1.110).

In making a determination regarding dismissal, the trial court must confine its review to the four (4) corners of the complaint, draw all inferences in favor of the pleader, and accept as true all well-pleaded allegations. See Sobi, 846 So. 2d at 1206 (citing Cintron v. Osmose Wood Preserving, Inc., 681 So. 2d 859, 860-61 (Fla. 5th DCA 1996). "The question for the trial court to decide is simply whether, assuming all the allegations in the complaint to be true, the plaintiff would be entitled to the relief requested." See id.

When an appellate court reviews an order determining the sufficiency of a complaint, the appellate court must apply the same principles as the trial court. See id. at 1207. Because the determination whether a complaint sufficiently states a cause of action resolves an issue of law, an order granting a motion to dismiss with prejudice is reviewable on appeal by the *de novo* standard of review. See id.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DISMISSED DR. ASHRAF'S CLAIM FOR DEFAMATION BECAUSE DR. ASHRAF'S CLAIM IS BARRED BY FLORIDA'S TWO (2) YEAR STATUTE OF LIMITATIONS.

Defamation, in the broadest sense, involves a defendant's publication of a false statement, about a plaintiff, to a third party, such that the defendant's false statement causes injury or damage to the plaintiff. See Valencia v. Citibank Int'l, 728 So. 2d 330, 330 (Fla. 3d DCA 1999) (citing Seropian v. Forman, 652 So. 2d 490, 493 (Fla. 4th DCA 1995); see also Jews for Jesus, Inc. v. Rapp, 997 So. 2d 1098, 1105 (Fla. 2008) (citing Restatement (Second) of Torts §§ 558B, 580A–580B). Florida law is clear that the statute of limitations for a claim for defamation is two (2) years. See § 95.11(4)(g), Fla. Stat. (2014); see also Wagner, 629 So. 2d at 115 ("The legislature has established unequivocal guidelines governing the statute of limitations for defamation suits and has decided on a two-year period"). This two (2) year period begins to run from the time the cause of action accrues. See § 95.031, Fla. Stat. (2014).

As issue in the instant appeal is the determination as to when Dr. Ashraf's claim for defamation based on the NPDB Report accrued. The Hospital submits that the cause of action for defamation accrues upon the original published

statement's *first publication*. See Wagner, 629 So. 2d at 115 (emphasis added). This position is supported by the Florida Supreme Court in Wagner, supra, and formed the basis of the trial court's Order of dismissal of Dr. Ashraf's Complaint. (R. 69). However, contrary to this well settled Florida law, in his Initial Brief it is Dr. Ashraf's position is that a new cause of action for defamation accrues each time the NPDB Report is republished, including each time same is provided to a prospective employer. As set forth below, it remains clear that subsequent republications of the NPDB Report does not revive an otherwise time-barred claim against the Hospital.

Early common law, as far back at 1849, held that a separate cause of action accrued each time the alleged defamatory statement was revealed to a third party. See Daytona Beach News-Journal Corp. v. First Am. Dev. Corp., 181 So. 2d 565, 567, n.1 (Fla. 3d DCA 1966); see also First Am. Dev. Corp. v. Daytona Beach News-Journal Corp., 196 So. 2d 97, 101 (Fla. 1966). Under the so-called "multiple-publication rule," each time a defendant, or a transmitting third-party, exposed an additional audience to the same false statement, the occurrence was considered a new defamatory publication, for which the defendant could be held liable. See First Am., 196 So. 2d at 101. As the multiple-publication rule enabled long-delayed and multifarious cases over one original statement and/or publication,

judicial effort was expended by the Florida courts to develop the "single-publication rule." See Daytona, 181 So. 2d at 567, n.1. The goal of the single-publication rule is to condense "all causes of action for widely circulated [defamation]" into one trial, so that "each [publication] need not be separately pleaded and proved." See id. Instead of creating a new cause of action for each repetitive publication, the original statement's "reach" or the number of publications of the statement would be a matter solely to the issue of damages.

Following the recognition of the single-publication rule, Florida courts refused to participate in "judicial pruning" of defamation law, but rather, in 1966, invited the Florida Legislature to create "a new substantive rule. . .by the process of legislation." See id. Immediately thereafter, during the 1967 legislative session, the Florida Legislature enacted sections 770.05 and 770.07, Florida Statutes (1967). Section 770.05, Florida Statutes (1967) states in pertinent part that:

> [n]o 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…. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

(Emphasis added). Additionally, section 770.07, Florida Statutes (1967) provides that:

> [t]he 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). Notably, the language of neither section has been disturbed following their enactment in 1967. A plain reading of these provisions is also supportive of the Hospital's position that an originally published defamatory statement does not create a separate claim against a defendant each time it reaches a new person in circulation. See also Wagner, 629 So. 2d at 115.

Additionally, this issue has been addressed and upheld by the Florida Supreme Court. Specifically, in Wagner, the plaintiff did not learn of the alleged defamation until six months after the publication, and thus argued that the statute of limitations period should run from the time of discovery, not from the time of publication. See id. at 114. Contrary to the plaintiff's position, the court found that his claim was controlled by the "plain language" of section 770.07, Florida Statutes (1967). See id. The court held that since the plaintiff filed suit more than two (2) years after the *first* publication of the alleged defamation, his suit was time-barred, regardless of the timing of his discovery. See id. In support of its ruling, the court stated, that "[t]o rule otherwise would allow potentially endless liability since Florida Statutes contains no statute of repose for this particular tort. We

doubt the legislature would have intended this." See id. (Emphasis added). Notably, as of the date of the instant appeal, there remains no statute of repose for the tort for defamation under Florida law, and the Wagner opinion remains in full force and effect.

While the original intent of the provisions of chapter 770 (including the single-publication rule) was to primarily address media defendants, the Wagner court noted: "[w]e hold [Chapter 770] applicable to *all* civil litigants, both public and private, in defamation actions." See id. at 115 (emphasis added). In filing his claim for defamation, as a private civil litigant, Dr. Ashraf is bound by the single-publication rule.

In the instant appeal, Dr. Ashraf has pled that the publication of the NPDB Report occurred on December 17, 2008. (R. 11, 25). Specifically, Dr. Ashraf has pled that he was aware that the published report contained verbatim the 22 factual findings of the IRC. (R. 11, 12). Further, during the June 8, 2015 hearing on the Hospital's Motion to Dismiss, Dr. Ashraf conceded that "[t]he statute of limitations has run if the [c]ourt" applies the single-publication rule, because if same applies the "moment [the Hospital] publishes" the NPDB Report "then the statute begins to run." (R. 82). Thus, because Dr. Ashraf is bound by the single-publication rule, any potential cause of action for defamation accrued on December 17, 2008 and

expired on December 17, 2010. Yet, it was not until approximately six (6) years after the publication of the NPDB Report that Dr. Ashraf instituted the underlying litigation rendering the action time-barred. See § 95.11(4)(g), Fla. Stat. (2014); See also Wagner, 629 So. 2d at 115. Accordingly, the trial court's Order of dismissal on the grounds that Dr. Ashraf's claim is barred by the two (2) year statute of limitations should be affirmed.

II. THE MULTIPLE-PUBLICATION RULE AS APPLIED TO THE CAUSE OF ACTION FOR CREDIT SLANDER DOES NOT APPLY TO THE PUBLICATION OF NPDB REPORTS.

In his Initial Brief, Dr. Ashraf has taken the position that the statute of limitations has not expired and continutes to run, because the NPDB Report continues to be republished to potential employers each time he applies for employment. (R. 16). Dr. Ashraf submits that "[e]very separate repetition of a defamatory statement continues to be considered a publication." In support of this statement, Dr. Ashraf relies on Doe v. Am. Online, Inc., 783 So. 2d 1010, 1017 (Fla. 2001) (citing Zeran v. Am. Online, Inc., 129 F.3d 327, 331-32 (4th Cir. 1997) and Musto v. Bell S. Telecomm. Corp., 748 So. 2d 296, 298 (Fla. 4th DCA 1999). However, Dr. Ashraf's reliance on Doe, supra, is entirely misplaced. The court's opinion in Doe does not involve the applicability of the two (2) year statute of

limitations to a claim for defamation. See generally id. Rather, at issue before the Doe court, was whether section 230 of The Communications Decency Act of 1996 preempts Florida law as to causes of action based in negligence. See id. at 1013 (citing 47 U.S.C. § 230 (1998)). Accordingly, Dr. Ashraf's reliance on the Doe court is without legal support.

Additionally, as set forth in greater detail below, Dr. Ashraf's relies on the court's narrow holding in Musto. However, Musto is in no way applicable to the facts of the instant case, and has been specifically rejected by a Florida federal court in Pierson v. Orlando Reg'l Healthcare Sys., Inc., 2010 WL 1408391, at *12 (M.D. Fla.) aff'd, 451 F. App'x 862, 862 (11th Cir. 2012).

a. The Court's Narrow in Holding Musto is Inapplicable to Dr. Ashraf's Claim.

As noted, in support of his argument that the statute of limitations has not expired, Dr. Ashraf relies on the Fourth District Court of Appeal's narrow holding in Musto. See id. at 299. In Musto, the plaintiff appealed a final summary judgment entered in favor of Bell South Telecommunications Corporation in which the trial court determined that his claim for "credit defamation," was barred by Florida's two (2) year statute of limitations. See id. at 297; see also § 95.11(4)(g), Fla. Stat. (2014). Upon appeal, the Fourth District Court of Appeals noted that it

was faced with an issue of first impression, and set forth the following *limited* inquiry: "[w]hether the 'single publication rule…' or the 'multiple publication rule' should be applied to determine when the statute of limitations begins to run on the common law tort of *credit slander*[?]" See Musto, at 297. (Emphasis added).

In its opinion, the court concluded that the multiple-publication rule (as opposed to the single-publication rule) should be applied to determine when the statute of limitations begins to run on the common law tort of "*credit slander*." See id. at 299 (emphasis added). Stated otherwise, the Court held that the statute of limitations on a credit card slander claim begins anew and a new cause of action accrues each time a credit report is issued. See id. at 299. As to the reasoning behind its holding the court noted that: "[w]hen a credit report is issued in confidence to only those people possessing the appropriate credentials to gain access to such reports, the plaintiff *may not learn* of the dissemination of the inaccurate reports *until well* after the initial inaccurate report issues." See id. at 298. (Emphasis added).

The Musto court rejected the concern voiced by the Wagner court, supra, that applying the multiple-publication rule "would allow potentially endless liability," but rather, noted that this "'endless liability' envisioned. . .is simply not

a concern where no mass publication or potentially endless repetition of the defamatory statement is likely to occur." See id. The court stated "[i]n the case of credit reports it is more likely that only a handful of the inaccurate reports will issue, and only to those potential creditors in a position to secure such a report." See id. The court joined "those jurisdictions which have held that the two (2) year statute of limitations in credit slander cases begins to run anew on each republication of the allegedly slanderous credit report," and, as such, the plaintiff's cause of action was not barred by the statute of limitations. See id. at 299.

The factual circumstances at issue in Musto differ substantially from the instant case, and the court's narrow holding and rationale, simply does not apply to the republication of NPDB reports. Of major concern to the Musto court was the fact that a plaintiff may not learn of the dissemination of the inaccurate reports until well after the initial inaccurate report is issued. See id. at 298. However, in the context of NPDB reports, a physician is immediately made aware of the publication of the report. See 45 C.F.R. § 60.6(c) (2011).

In the instant appeal, the policy concern of the Musto court does not exist. Rather, Dr. Ashraf was made aware of the publication of the NPDB Report well before the expiration of the two (2) year statute of limitations and has pled

knowledge of same prior to the expiration of the two (2) year statute of limitations. (R. 11, 25). Specifically, in his Complaint Dr. Ashraf unequivocally noted:

> [o]n *December 17, 2008*, Florida Hospital reported Dr. Ashraf to the National Practitioners Databank (NPDB), a Federal databank which serves as a repository of information about medical professionals, and which is accessed by all hospitals and other healthcare providers.

(R. 11). (Emphasis added). Further, in his Complaint, Dr. Ashraf noted that as of February 17, 2009 and November 20, 2009, he was aware the Florida Department of Health relied upon the NPDB Report. (R. 15).

During the June 8, 2015 hearing on the Hospital's Motion to Dismiss, the trial court addressed and rejected the Musto court's policy concern when granting the Hospital's Motion to Dismiss, noting:

> when I read Musto, the one thing that I'm curious about is it indicates in there that on the credit multiple publication rule for credit slander, the logic seems to be because the plaintiff may not learn of the dissemination of the inaccurate reports until well after the initial inaccurate report is issued…But in this instance, it's indicated he knew of it in 2009 [sic]. So if he knew of it in 2009 [sic], how does the multiple publication rule apply? Because the reason why it doesn't in credit cases is, because they may not know of it, especially when it's an inaccurate credit reporting. This is something that was a finding that was done. That finding was made, and then once the finding was made, it was published, and he knew that it was published.

(R. 84, 85). The trial court continued:

> [i]n this instance, your client, even by the four corners of the complaint, has the NPDB report, that he knew it was filed, he knew

> the procedures that are originally in the findings that were made, he knew that it was reported in 200[8], and therefore, there's the fact that he had the knowledge. So it's based upon the fact -- and usually statute of limitations is a concern and the circumstances are based on knowledge, which was the reasoning behind Musto…I don't believe it applies in this type of instance.

(R. 90).

Additionally, the court's opinion in Musto does not address a situation where an individual is aware of an allegedly defamatory statement on its credit report, but continues to purposefully apply for credit to renew the statute of limitations. It is submitted that such behavior would not be supported by any court and would serve as a miscarriage of the court's objective in Musto. Certainly, the court did not intend to support such an action. However, such behavior is a viable possibility in the context of NPDB reports, for instance, when a physician (such as Dr. Ashraf) is made aware of the publication of a report, he or she could simply continue to apply for employment over and over again sparking the reissuance of an NPDB report, thus creating a new claim for defamation. This would unfairly allow for "potentially endless liability," as the physician could simply apply for employment on the day the statute of limitations expired and keep its claim alive. See Wagner, 629 So. 2d at 115. Thus, if Dr. Ashraf's position that the multiple-publication rule applies to the dissemination of NPDB reports there will be no

limitations period in Florida for a claim of alleged defamation in the context of NPDB reports.

Moreover, Musto is distinguishable because in the context of credit slander, a common plaintiff most likely would not be knowledgeable regarding the subject of credit reporting and/or may lack the resources to combat the finance industry. Thus, a two (2) year statute of limitations may not be sufficient for such a plaintiff to properly prosecute and bring its claim, thus requiring the protection of the multiple-publication rule. However, in regards to the dissemination of NPDB reports, physicians are educated individuals, who possess insider knowledge of the healthcare system, and are provided a copy of the report directly by the NPDB. See 45 C.F.R. § 60.6(c) (2011). Accordingly, there is no concern that a physician-plaintiff is unsophisticated or lacks the knowledge to challenge a published NPDB report. In the instant appeal, Dr. Ashraf is a sophisticated plaintiff, who has undergone an extensive education and has practiced medicine in the United States for over twenty-six (26) years. (R. 6). Accordingly, once Dr. Ashraf became aware of the existence of the NPDB Report, two (2) years was sufficient time to require him to bring his claim. To allow him additional time wholly defeats the purpose of Florida's two (2) year statute of limitations on a claim for defamation.

Additionally, the language of the Musto court's opinion indicates that it intended for its holding to remain narrow and only apply to the cause of action of "credit slander." On the face of its opinion, the court sets forth a very *limited* inquiry, i.e. "[w]hether the 'single publication rule. . .' or the 'multiple publication rule' should be applied to determine when the statute of limitations begins to run on the common law tort of *credit slander*[?]" See id. at 297 (emphasis added). Further, in its holding the court concluded that the multiple-publication rule should be applied to determine when the statute of limitations begins to run on the common law tort of "credit slander." See id. at 299. Had the Musto court intended to extend its holding beyond the context of a claim for credit slander, it would have done so. To the extent that the Musto court sought to conclude that the multiple-publication rule should apply to all claims for defamation it would have run afoul of Wagner. Rather, the language utilized by the court shows that it intended for this exception to Florida's single-publication rule to only apply in the context of credit slander.

b. The Middle District of Florida's Order in Pierson Should Be Applied to Dr. Ashraf's Claim.

While the applicability of the single publication rule to the dissemination of NPDB reports is an issue of first impression for the Florida state courts, this issue

has been thoroughly examined by a Florida federal court in Pierson. See 2010 WL 1408391, at *12. In an Order issued by the Honorable Judge John Antoon, II, for the Middle District of Florida, Orlando Division, the court looked to the holding in Musto, and found that the reasoning contained therein simply does not apply to the dissemination of NPDB reports. See id.

Pierson involved factual circumstances essentially identical to the instant case. Specifically, Pierson involved the suspension of the clinical privileges of Raymond H. Pierson, M.D. ("Dr. Pierson"), an orthopedic surgeon who served on the trauma and emergency call schedules at two (2) hospitals operated by Orlando Regional Healthcare System, Inc. ("ORHS"). See id. at *1. In November 1996, Dr. Pierson was summarily suspended from the trauma and emergency call schedules (but was otherwise allowed to treat patients) while a review of his surgical practices was conducted. See id. Upon completion of said review, by resolution of the ORHS Board, in January 2004, Dr. Pierson was indefinitely suspended. See id. Similar to the instant appeal, as required by federal law the action taken by the ORHS Board of suspending Dr. Pierson's privileges was reported to the NPDB. See id. It was not until four (4) years after ORHS's report to the NPDB that Dr. Pierson filed his eleven (11) count complaint (including a

claim for defamation) against ORHS, its President/CEO, the chief of staff of one of its hospital, fourteen (14) doctors, and two (2) physician groups. See id. at *4.

In his claim for defamation, Dr. Pierson alleged that ORHS and various physicians made and published false and defamatory written and spoken statements about him during the investigation into his surgical practices. See id. at *9. In response, the defendants filed several motions to dismiss based on several grounds, including that because Dr. Pierson did not file his claim until four (4) years after publication to the NPDB, his defamation claim was barred by Florida's two (2) year statute of limitations. See id. at *4. Dr. Pierson argued that an exception to the single-publication rule existed in regards to the statements made in the report filed with the NPDB. See id. at *10. Specifically, Dr. Pierson argued that "each time the [report] is republished, the two (2) year clock begins running anew." See id. Identical to Dr. Ashraf's position in the instant claim, Dr. Pierson relied on the court's holding in Musto in support of his position. See id. at *12.

Following oral argument, Judge Antoon issued a lengthy Order wherein he unequivocally "declin[ed] to extend Musto beyond the credit report context," and confirmed that while this was an issue of "first impression" for a Florida court, he would "act as [he] thinks *a Florida court* would *on this matter of Florida law*." See id. (emphasis added).

In his Order, Judge Antoon further rejected the policy concern of the Musto court - that a plaintiff may not learn of the dissemination of the inaccurate credit report until well after the initial inaccurate report issues, noting that:

> [h]ere, [Dr. Pierson] *knew* of the contents of the [] Report at the time it was issued to the NPDB; thus, the potential pitfall of credit report subjects not knowing of a defamatory credit statement until the statute of limitations has run *is not present*.

See id. (emphasis added). On all-fours with the facts of Pierson, in the instant appeal, Dr. Ashraf knew of the contents of the NPDB Report at the time it was issued to the NPDB; thus, the potential "pitfall" of "not knowing" of the alleged defamatory statements contained in the NPDB Report is non-existent.

Judge Antoon also reaffirmed the Wagner court's concern of the potential for endless litigation if the multiple-publication rule is applied, and noted that if the multiple-publication rule was to apply to the dissemination of NPDB reports, then a plaintiff could simply "apply for employment over and over again and create a new defamation claim based on reissuances of the NPDB report at his whim." See id. He concluded: "[t]his [c]ourt does not believe that the Musto court or other Florida courts would endorse such a rule." See id. Thus, Judge Antoon ordered that Dr. Pierson's claim for defamation accrued "when the report was made," and,

as such, the two (2) year statute of limitations expired in 2006, well before Dr. Pierson filed suit in January 2008. See id.

Further, Judge Antoon rejected Dr. Pierson's argument that a foreseeable subsequent repetition of a defamatory remark by another party constitutes a publication, and noted that there is no established Florida law on point to support such a rule. Since the issuance of Pierson, as conceded in Dr. Ashraf's Initial Brief, 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.

In his Initial brief, Dr. Ashraf argues that this Court should not rely on the Pierson Court as it was incorrectly decided. However, it is submitted by the Hospital that the Pierson Order issued by Judge Antoon was correctly decided and is a persuasive authority that was issued with the understanding that while an issue of first impression, the court was acting in accordance Florida law and policy. See Pierson at *12. Notably, Judge Antoon's Pierson Order was upheld on appeal, where the Eleventh Circuit Court of Appeals noted:

> [w]e have reviewed the record and considered the oral argument of counsel and find no reversible error as to the summary judgment awarded or as to the dismissal of claims, pursuant to Fed.R.Civ.P. 12(b)(6). The district court carefully analyzed every claim raised by Pierson and correctly applied the law.

See Pierson v. Orlando Reg'l Healthcare Sys., Inc., 451 F. App'x 862, 864 (11th Cir. 2012).

Further, Dr. Ashraf has provided no Florida law to support the rejection of Pierson. Rather, Dr. Ashraf relies on three (3) federal cases from other state jurisdictions in support of his claim and in his attempt to discredit the Pierson holding, where the courts hold that the multiple-publication rule in their respective states should apply to the dissemination of NPDB reports. First, Dr. Ashraf relies on Swafford v. Memphis Indiv. Prac. Ass'n, 1998 WL 281935, *1 (Tenn. Cr. App.). However, in Swafford, in reaching its conclusion the court noted that "[s]ince there are no reported defamation cases" on point, it would need to rely on "decisions with analogous facts" in reaching its conclusion. See id. at *6. Interestingly, the court relied solely on cases regarding the tort of *credit slander* in support of its holding. See id. However, as set forth at great length above, the application of the multiple-publication rule to a claim for credit slander simply does not apply to the dissemination of NPDB reports under Florida law and has been specifically rejected by Judge Antoon in Pierson. See Pierson, at *12.

Dr. Ashraf also relies on Stephan v. Baylor Med. Ctr. at Garland, 20 S.W.3d (Tex. App. 2000) – which applies Texas law. However, in Pierson, Judge

Antoon acknowledged the existence and the supportive nature of Stephan, but rejected its conclusion. See Pierson at *12, n. 15. Rather, Judge Antoon noted: "[a]lthough [Dr. Pierson's] assertion is not without some support, this [c]ourt must act as it thinks a Florida court would on this matter *of Florida law*—apparently one of first impression." See id. at *12. (Emphasis added). Again, as evidenced in Pierson, the applicability of existing Florida law does not support a finding that the multiple-publication rule should apply in the context of NPDB reports.

Finally, Dr. Ashraf relies on Williams v. University Medical Center of S. Nev., 2010 WL 3001707, at *1 (D. Nev.) for support. Similar to Judge Antoon's Order in Pierson, the Williams court notes that "[w]here the state's highest court has not decided an issue, the task of the federal courts is to predict how the state high court would resolve it." See id. at *4. In Williams the court applies Nevada law as it believes a Nevada court would. However, in consideration of the instant appeal, deference should be given to Judge Antoon's Pierson Order, as he made clear that he was applying Florida law as a Florida court should. Further, the highest court of Florida has already established in Wagner that the cause of action for defamation accrues upon the original published statement's *first* publication. See Wagner, 629 So. 2d at 115. (Emphasis added).

Based on the foregoing, the multiple-publication rule should not be applied to the dissemination of the NPDB reports, rather, this Court should hold that the single cause of action for any alleged defamatory statements found in an NPDB report accrues at the time of its original publication. In the instant appeal, based on Judge Antoon's analysis, the Wagner holding, and the plain language of sections 770.05 and 770.07, Florida Statutes (1967), it is should be found that Dr. Ashraf's claim for defamation is barred by Florida's two (2) year statute of limitations. It is undisputed that Dr. Ashraf knew of the contents of the NPDB at the time of publication, well-before the expiration of the statute of limitations. Accordingly, any cause of action Dr. Ashraf sought to bring as a result of this publication accrued on December 17, 2008, and expired on December 17, 2010.

CONCLUSION

The trial court was correct in entering its Order of dismissal with prejudice on the grounds that Dr. Ashraf's claim is barred by the statute of limitations. (R. 69). Florida law is clear and "unequivocal" that the statute of limitations for a claim for defamation is two (2) years, and accrues upon the original published statement's *first* publication. See § 95.11(4)(g), Fla. Stat. (2014); see also § 770.07, Fla. Stat. (1967); Wagner, 629 So. 2d at 115 (emphasis added). Dr. Ashraf has conceded that the publication of the NPDB Report occurred on December 17, 2008 (R. 7, 24, 25), thus any potential cause of action for the allegedly defamatory statements contained in the NPDB Report accrued at that time, beginning the running of the two (2) year statute of limitations. Because Dr. Ashraf waited approximately six (6) years from this date to initiate the underlying litigation, his claim is time-barred.

In light of the foregoing, the trial court's finding that Dr. Ashraf's claim is time-barred is appropriate as it is in accordance with Florida law and policy, and the Order of dismissal entered in favor of the Hospital should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished via electronic mail and has been filed with the Clerk of Court who will electronically serve copies this 12th day of January 2016 to: **TROY J. WEBBER, ESQUIRE**, Hussein & Webber, P.L., 1608 Walnut Street, Jacksonville, Florida 32206 at twebber@husseinandwebber.com, and **SARAH S. HUSSEIN**, Hussein & Webber, P.L., 1608 Walnut Street, Jacksonville, Florida 32206 at shussein@husseinandwebber.com.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Motion complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2), and pursuant to Florida Rule of Appellate Procedure Rule 9.210(a)(2), the type, size, and style used in this Motion is 14, Times New Roman.

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