IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D03-4651

JACK RUDLOE, Individually, and GULF SPECIMEN COMPANY, INCORPORATED, a Florida Not for Profit Corporation,

Appellants,

v.

DR. DAVID MICHAEL KARL, Individually, and THE FLORIDA STATE UNIVERSITY BOARD OF TRUSTEES,

Appellees.
_____/

Opinion filed November 5, 2004.

An appeal from the Circuit Court for Leon County.
L. Ralph Smith, Judge.

H. Richard Bisbee, Esquire and Patrick R. Frank, Esquire, Tallahassee, for Appellants.

Brian C. Keri, Esquire, Tallahassee, for Appellee Florida State University Board of Trustees and John S. Derr, Esquire of the Derr Law Frim, Tallahassee, for Appellee Dr. David Michael Karl.

BENTON, J.

Jack Rudloe and the Gulf Specimen Company, Inc., a biological supply service "of which Mr. Rudloe is President and [with which he is] closely affiliated," appeal an order "dismiss[ing] from this action with prejudice" the Florida State University Board

of Trustees. See Fla. R. App. P. 9.110(k). Because it is clear from their second amended complaint that the plaintiffs' libel action against the University was barred by the statute of limitations, we affirm.

"Whether a complaint should be dismissed is a question of law." City of Gainesville v. State, Dep't of Transp., 778 So. 2d 519, 522 (Fla. 1st DCA 2001). "A trial court's ruling on a motion to dismiss based on a question of law is subject to de novo review." Execu-Tech Bus. Sys., Inc. v. New Oji Paper Co., 752 So. 2d 582, 584 (Fla. 2000). "For purposes of ruling on the motion to dismiss, the trial court was obliged to treat as true all of the amended complaint's well-pleaded allegations, including those that incorporate attachments, and to look no further than the amended complaint and its attachments. See Brewer v. Clerk of the Circuit Court, 720 So.2d 602, 603 (Fla. 1st DCA 1998)." City of Gainesville, 778 So. 2d at 522. "A reviewing court operates under the same constraints." Andrews v. Fla. Parole Comm'n, 768 So. 2d 1257, 1260 (Fla. 1st DCA 2000).

Plaintiffs first filed suit on March 15, 2002, against David Michael Karl, an alumnus of Florida State University's Department of Oceanography, who authored an account of "what it was like to be a student at the department" and submitted it in response to the Department's request for "students['] . . . version[s] of departmental history during the time they were here." The complaint alleged that Dr. Karl's account

defamed Mr. Rudloe, a fellow alumnus, by insinuating that Mr. Rudloe had stolen a "priceless Neopilina specimen . . . from the lab [because the rare specimen] . . . later show[ed] up for sale in Rudloe's Gulf Specimen Company catalog." On September 23, 2002, plaintiffs filed an amended complaint, adding Florida State University (FSU) as a defendant and alleging:

> 12. Upon information and belief, during the month of May, 2000, the Defendant, Dr. Karl authored, printed, published and circulated, or caused to be printed, published and circulated by the Defendant, FSU, in the FSU Department of Oceanography Newsletter, (Spring/Summer Edition), an article contained in the "Alumni Notes" section concerning the Plaintiffs. . . .[1]

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[1]Dr. Karl's account of departmental history published in the newsletter reads as follows:

> During my first year as a graduate student, I had an opportunity to participate in a research expedition to the Cariaco Trench . . . .
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> Also aboard the R/V Eastward Cariaco Trench expedition was Allan Z. Paul, a graduate student of the department's most famous scientist at that time, Bob Menzies. . . . Among other discoveries, Menzies is known for his recovery from the abyssal regions of the Peru-Chile trench, of the "living fossil" mollusc Neopilina. There was a former FSU-ocean student, Jack Rudloe who also owned the Gulf Specimen Company and wrote a book entitled The Erotic Ocean. An unconfirmed rumor in the department at that time was that Menzies' priceless Neopilina specimen once disappeared from the lab only to later show up for sale in Rudloe's Gulf Specimen Company catalog. We were never sure whether that was the cause of his "former

. . . .

> 16. The Defendants, Dr. Karl and FSU, with evil motive and actual malice . . . intended to cause the individual plaintiff to suffer emotional distress, and to falsely depict Plaintiff to be a thief; dishonest or otherwise lacking in good moral character; and with knowledge of the falsity or serious doubt as to the truth of the statements and claims made in the article, authored the article and caused the article to be published and distributed both in paper form and electronically, worldwide, republished daily on a "24/7" basis on the FSU Department of Oceanography web site up to and including February 8, 2002.

The amended complaint also alleged that FSU negligently breached its duties "to the Plaintiffs to research and verify facts concerning the Plaintiffs prior to authoring and publishing publications concerning same. . . . [and] to carefully review materials that it solicited for publication so as to not defame persons . . . in university publications."

The trial court granted FSU's motion to dismiss, addressed to the amended complaint and seeking dismissal as a party, "on the basis of sovereign immunity,"[2] but

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student" status or not, and quite frankly were afraid to ask.

[2]In pleading malice on the part of FSU in the amended complaint, Mr. Rudloe pleaded (by necessary implication) an intentional tort on the part of a University employee or other agent. The doctrine of sovereign immunity bars recovery on such a theory. See § 768.28(9)(a), Fla. Stat. (2000) ("The state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee, or agent committed while acting outside the course and scope of her or his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property."); Smith v. State, Bd. of Regents, 701 So. 2d 348, 349-50 (Fla. 1st DCA 1997) ("Florida has not waived its original

allowed plaintiffs twenty days in which to file a second amended complaint. In their second amended complaint, plaintiffs again alleged that FSU breached its duty to verify the facts in Dr. Karl's submission and specifically relied on Miami Herald Publ'g Co. v. Ane, 458 So. 2d 239 (Fla. 1984), but plaintiffs abandoned their allegations that FSU had published Dr. Karl's article with malice. As to FSU, the trial court dismissed plaintiffs' second amended complaint with prejudice, and this appeal ensued.

We assume for purposes of decision that the second amended complaint adequately stated a claim for relief against FSU for negligent publication of defamatory material, a cause of action that would have been viable,[3] if the complaint naming FSU had been timely filed. See Ane, 458 So. 2d at 242 (holding that "it is sufficient that a private plaintiff prove negligence" in a defamation action). "First, for there to be governmental tort liability, there must be either an underlying common law or statutory duty of care with respect to the alleged negligent conduct." Trianon Park Condo. Ass'n, Inc. v. City of Hialeah, 468 So. 2d 912, 917 (Fla. 1985). Unless a private

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sovereign immunity as to acts done maliciously or in bad faith, as alleged in the complaint here on review.").

[3]The second amended complaint alleges compliance with the notice requirement laid down by section 770.01, Fla. Stat. (2000), as a condition precedent to suit.

We find no merit in FSU's highly problematic assertion that it enjoys blanket immunity for anything editors of its alumni publications say, write or allow to be published (in the course of their employment) about FSU alumni.

plaintiff is a public figure, "it is sufficient that a private plaintiff prove negligence" in the defendant's publication. Ane, 458 So. 2d at 242. The negligent fact checking alleged here was "tactical or 'operational,'" and did not involve "basic governmental policy making," White v. City of Waldo, 659 So. 2d 707, 711 (Fla. 1st DCA 1995), of the kind that occurs in "the discretionary planning or judgment phase." City of Hialeah, 468 So. 2d at 919.

But plaintiffs did not file against FSU for more than two years after the Department allegedly published the item Dr. Karl had submitted.[4] Even though the plaintiffs did file the original complaint against Dr. Karl within two years of the alleged publication, when an "amended pleading introduces a new defendant, it does not relate back to the filing of the original pleading for purposes of tolling the statute of limitations as to that defendant." Doyle v. Shands Teaching Hosp. & Clinics, 369 So. 2d 1020, 1022 (Fla. 1st DCA 1979). But see, e.g., Hohl v. Croom Motorcross, Inc., 358 So. 2d 241, 243 (Fla. 2d DCA 1978) (explaining that relation back is proper where

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[4]Counsel for plaintiffs agreed at oral argument that the second amended complaint alleged that the Department published Dr. Karl's account in print and posted it on the internet in its Spring/Summer 2000 edition of the newsletter in May of 2000; and that it remained on the Department's website "up to and including February 8, 2002." Plaintiffs originally filed suit on March 15, 2002, naming Dr. Karl as a defendant. Plaintiffs filed the amended complaint first naming FSU as a defendant on September 23, 2002.

there the originally named defendant is a "misnomer" and "where the originally [mis]named defendant is related to the proper defendant and, through its participation in the proceedings or otherwise, has led the plaintiff to believe that the correct defendant was sued").

While the trial court did not dismiss on statute of limitations grounds, the rule is "that the theory or reason advanced by a trial court for making an order is not controlling, and if there is any reason or theory to support the ruling, it will be affirmed." Chase v. Turner, 560 So. 2d 1317, 1320 (Fla. 1st DCA 1990). See Robertson v. State, 829 So. 2d 901, 906-07 (Fla. 2002) ("The key to the application of this doctrine of appellate efficiency is that there must have been support for the alternative theory or principle of law in the record before the trial court."). Here the pertinent record that supports the "alternative theory" is the second amended complaint. See Fariello v. Gavin, 873 So. 2d 1243, 1245 (Fla. 5th DCA 2004) ("A limitations defense is generally raised affirmatively in an answer or other responsive pleading, but may be asserted in a motion to dismiss if its applicability is demonstrated on the face of the complaint or exhibits.").

The second amended complaint attempted to plead around the statute of limitations by alleging that the alleged libel was "republished daily on a '24/7' basis on

the FSU Department of Oceanography web site up to and including February 8, 2002." FSU argued the statute of limitations in its answer brief, and appellants' counsel conceded at oral argument that there was a statute of limitations issue, referring to his argument in the initial brief that "every instance in which the [web]page containing . . . Dr. Karl's newsletter [is accessed] . . . constitutes a new cause of action. . . . Republication can, and will, occur again and again, ad infinitum."

Under the statute of limitations, the plaintiffs had two years from the accrual of their causes of action in which to file suit. See § 95.11(4)(g), Fla. Stat. (2000) ("Actions other than for recovery of real property shall be commenced as follows: . . . . (4) WITHIN TWO YEARS. – . . . . (g) An action for libel or slander."); § 95.031, Fla. Stat. (2000) ("Except as provided . . . elsewhere in these statutes, the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues."). "A cause of action for defamation accrues on publication." Wagner, Nugent, Johnson, Roth, Romano, Erikson & Kupfer, P.A. v. Flanagan, 629 So. 2d 113, 115 (Fla. 1993). See also § 770.07, Fla. Stat. (2000) ("The cause of action for damages founded upon a single publication or exhibition or utterance . . . shall be deemed to have accrued at the time of the first publication or exhibition or utterance thereof in this state.").

Section 770.07 applies "to all civil litigants, both public and private, in defamation actions." Wagner, 629 So. 2d at 115. How section 770.07 applies when defamatory matter is posted on the internet is, however, apparently a question of first impression in Florida. The issue is whether posting on the internet is "a single publication," § 770.07, so that any cause of action accrues on posting, even though the defamatory matter remains accessible and later "hits" actually occur.

Aligning ourselves with other courts that have considered the question, we reject appellants' argument that a defamatory statement is republished, so that the limitations period begins anew, each time another internet user accesses the defamatory statement. See Firth v. State, 775 N.E.2d 463, 465-66 (N.Y. 2002) (holding "each 'hit' or viewing of the [defamatory item on the internet is not] a new publication that retriggers the statute of limitations," and that the statute of limitations runs from the initial posting on the internet); see also Lane v. Strang Communications Co., 297 F. Supp. 2d 897, 900 (N.D. Miss. 2003) (holding that where article was published in a magazine and then posted online on the defendant's website, the "claims began to run at the latest on . . . the date that . . . the article[] w[as] posted online on the Defendant's website"); Mitan v. Davis, 243 F. Supp. 2d 719, 724 (W.D. Ky. 2003); Van Buskirk v. New York Times Co., 2000 WL 1206732, at *1-2 (S.D.N.Y. Aug. 24, 2000); Traditional Cat Ass'n Inc. v. Gilbreath, 13 Cal. Rptr. 3d 353, 404 (Cal. Ct. App. 2004); McCandliss

v. Cox Enters., Inc., 593 S.E.2d 856, 858 (Ga. Ct. App. 2004). "To hold otherwise and treat internet publications differently would result in the endless retriggering of the statute of limitations." Abate v. Maine Antique Digest, 2004 WL 293903, at *1 (Mass. Super. Jan. 26, 2004). Although a later hit may mean another person will see the defamatory material for the first time, an analogous situation obtains when a library patron checks out a book published years earlier.

Since the newsletter containing Dr. Karl's submission was printed in hard copy and posted to the internet in May of 2000, the claims first stated against FSU in a pleading filed on September 23, 2002, were barred by the statute of limitations. On that basis, we affirm the order dismissing plaintiffs' second amended complaint as to FSU with prejudice.

Affirmed.

PADOVANO and HAWKES, JJ., CONCUR.