

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Lexie Redden,
Petitioner, Plaintiff below**

vs.) No. 101209 (Greenbrier County 09-C-201)

**Martin Staunton and West Virginia Media Holdings, LLC
Respondents, Defendants below**

FILED

February 11, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the dismissal of petitioner’s action for libel and invasion of privacy. The appeal was timely perfected by counsel with the entire record accompanying petitioner’s brief. A timely response was filed by respondents. Petitioner seeks a reversal of the circuit court’s decision and the reinstatement of his Complaint. He also seeks a finding by this Court that the torts of libel and slander may be continuing torts such that the statute of limitations does not run until they are either abated or discontinued.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. Having utilized a *de novo* standard of review in the consideration of the parties brief and the record, the Court finds no substantial question of law nor does the Court disagree with the decision of the lower tribunal as to the question of law. *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995). Moreover, the Court finds no prejudicial error. For these reasons, and having reviewed the relevant decision of the circuit court, the Court is of the opinion that the decisional process would not be significantly aided by oral argument and that a memorandum decision is appropriate under Rule 21 of the Revised Rules.

The petitioner, Lexie Redden (“Mr. Redden”), filed his Complaint against the defendants, West Virginia Media Holdings, Inc. (“WV Media”) and Mark Staunton (“Staunton”) (sometimes jointly referred to as “defendants”), alleging libel and invasion of privacy arising out of the continued publishing of certain news stories on the Internet. These stories were first broadcast on WOWK, one of WV Media’s television stations in a series of three investigative reports in November of 2005. Staunton was the reporter. The investigative reports involved the allegations of

sexual harassment that had been made against Mr. Redden arising out of his employment with the West Virginia State Tax Department. These same investigative reports were placed on, and continued to appear on, WOWK's web site. The investigative reports have not been altered, nor have there been allegations that they have changed, since their original posting in November of 2005.

Mr. Redden's accuser filed a civil action against him that resulted in a jury verdict favorable to Mr. Redden in August of 2008. On August 25, 2008, defendants ran a follow-up story with the result of the civil trial, which also continues to appear on WOWK's web site.

Mr. Redden states that an Internet search under his name immediately produces these investigative reports with photographs. In a letter dated April 29, 2009, Mr. Redden asked WV Media to remove these investigative reports from the Internet stating that they were a continuation of the libel and slander of his good name and reputation. WV Media refused to do so.

On August 31, 2009, Redden instituted the case-at-bar alleging libel and false light invasion of privacy under West Virginia law. Defendants filed a motion to dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. The circuit court held a hearing on the motion on April 20, 2010.

On May 17, 2010, the circuit court entered a detailed order that adequately and fairly sets forth the reasons for its dismissal of the Complaint.¹ The circuit court correctly concluded that an action for libel is governed by the one-year limitation period in West Virginia Code §55-2-12(c), and that this Court has not adopted the continuing tort theory involving the publication of Internet content. Although the circuit court discussed the "single publication rule,"² the Court does not need to reach the statute of limitations issue in order to affirm the circuit court's dismissal.

Both libel and false light invasion of privacy require a plaintiff to prove, *inter*

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The Clerk is directed to append the circuit court's Order of May 17, 2010, to this memorandum decision when it is posted on the Court's website.

2

The "single publication rule" essentially states that "for purposes of the statute of limitations in defamation claims, a book, magazine, or newspaper has one publication date, the date on which it is first generally available to the public." *Jankovic v. International Crisis Group*, 494 F.3d 1080, 1087 (D.C. Cir. 2007), citing *Mullin v. Washington Free Weekly, Inc.*, 785 A.2d 296, 298 n. 2 (D.C. 2001).

alia, the falsity of the statements in question. Syl. Pt. 7, *Greenfield v. Schmidt Baking Co., Inc.*, 199 W.Va. 447, 485 S.E.2d 391 (1997), citing Syl. Pt. 1, *Crump v. Beckley Newspapers, Inc.*, 173 W. Va. 699, 320 S.E.2d 70 (1983). On page two of his Complaint, Mr. Redden stated that the investigative reports “presented only [plaintiff’s accuser’s] side of the story and very strongly suggested that her allegations were true.” Mr. Redden failed to allege in either his Complaint or in his response to WV Media’s motion to dismiss that any of the content of the investigative reports was either untrue or false, or that they were published with a bad intent or for unjustifiable ends. Accordingly, the circuit court correctly concluded that a dismissal under Rule 12(b)(6) was appropriate.

For the foregoing reasons, we find no error in the decision of the circuit court and its dismissal of this action is hereby affirmed.

Affirmed.

ISSUED: February 11, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh

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IN THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA

**LEXIE REDDEN
Plaintiff**

v.

CIVIL ACTION NO. 09-C-201

**MARTIN STAUNTON AND WEST VIRGINIA MEDIA HOLDINGS, LLC
Defendants**

ORDER

This matter came for hearing on the 20th day of April, 2010, before the Court Joseph C. Pomponio Jr., presiding, upon a Motion to Dismiss. The Plaintiff, is represented by counsel, J. Steven Hunter. The Defendant, is, represented by counsel, Kevin A. Nelson. The Motion to Dismiss, memorandums, and correspondence were reviewed by Joseph C. Pomponio, Jr., Circuit Court Judge.

History

1. Plaintiff filed his complaint August 31, 2009 (hereinafter, "Complaint").
2. The Complaint alleges libel and false light invasion of privacy under West Virginia law.
3. Defendants filed their "Defendants' Motion to Dismiss and Incorporated Memorandum of Law in Support" (hereinafter, "Motion to Dismiss") on October 2, 2009.
4. Plaintiff filed his "Plaintiff's Response to Motion to Dismiss" (hereinafter, "Response") on April 8, 2010.
5. Defendants filed their "Defendants' Reply Brief in Support of Motion to Dismiss" (hereinafter, "Reply") on April 16, 2010.

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6. Oral arguments were held in the matter on April 20, 2010.

Findings of Fact

1. In 2005, Plaintiff was accused of sexually harassing an employee when he was employed as Director of the Compliance Division of the West Virginia Tax Department. Complaint, 1.
2. Plaintiff's accuser brought suit against the Plaintiff and went to trial in August of 2008. Complaint, 1-2.
3. Plaintiff was not held liable against his accuser at the conclusion of the trial. Complaint, 2.
4. In November 2005, Defendants published a three-part news broadcast regarding the sexual harassment allegations surrounding the Plaintiff entitled "I Team Investigates: Crossing the Line, Parts I, II, and III" (hereinafter, "Investigations") Id. at 2.
5. After the Plaintiff's sexual harassment trial ended in his favor, the Plaintiff requested that the Defendants remove the Investigations from their website; however, the Defendants refused. Id.
6. As of the date when the Complaint was filed, the Investigations were still available on the Defendants' website. Id.
7. The Complaint never alleges that any of the content in the Investigations is untrue or false; rather, the Complaint states that the Investigations "presented only [Plaintiff's accuser's] side of the story and very strongly suggested that her allegations were true." Id.
8. The Plaintiff does not allege that any of the content in the Investigations is untrue

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or false in his Response to the Motion to Dismiss. Response, 1-3.

9. The Plaintiff alleges in the Complaint that the Investigations are still available on the internet “even though almost four years have passed since the stories were originally broadcast” and that when a Google search is conducted of the Plaintiff’s name, the Investigations are the first results returned. Complaint, 2.

Conclusions of Law

1. “The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Syl. Pt. 3, Chapman v. Kane Transfer Co., Inc., 160 W.Va. 530, 530, 236 S.E.2d 207, 208 (1977), citing Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99 (1957).
2. “Every personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property; (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; and (c) within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative.” W. Va. Code, § 55-2-12.
3. “An action for libel is governed by the one-year limitation period established by W.Va.Code, 55-2-12(c).” Syl. Pt. 1, Cavendish v. Moffitt, 163 W.Va. 38, 38, 253 S.E.2d 558, 558 (1979).

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4. *Compare*, Syl. Pt. 3, Roberts v. West Virginia American Water Co., 221 W.Va. 373, 375, 655 S.E.2d 119, 121 (2007), citing Syl. Pt. 11, Graham v. Beverage, 211 W.Va. 466, 566 S.E.2d 603 (2002) (“Where a tort involves a continuing or repeated injury, the cause of action accrues at and the statute of limitations begins to run from the date of the last injury or when the tortious overt acts or omissions cease.”) *and* Syl. Pt. 4, Roberts v. West Virginia American Water Co., 221 W.Va. 373, 375, 655 S.E.2d 119, 121 (2007) (“The distinguishing aspect of a continuing tort with respect to negligence actions is continuing tortious conduct, that is, a continuing violation of a duty owed the person alleging injury, rather than continuing damages emanating from a discrete tortious act.”) *with* Firth v. State, 706 N.Y.S.2d 835, 843, 184 Misc.2d 105, 115,(N.Y.Ct.Cl., 2000) (“Applying established rules of law applicable to the accrual of defamation actions in this state requires a finding that the one year Statute of Limitations began to run on ...the date of the Report's original publication and the date when the Report was first made available on the Internet where it has remained unaltered to this date. Concerns regarding the rapid pace of changes in the way information is disseminated, the desire to avoid multiplicity of suits and the need to give effect to relevant Statutes of Limitation which gave rise to the single publication rule...are no less germane today than at the time of the rule's adoption. This Court sees no rational basis upon which to distinguish publication of a book or report through traditional printed media and publication through electronic means by making a copy of the text of the Report available via the Internet.”)
5. The “single publication” rule states that “for purposes of the statute of limitations

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in defamation claims, a book, magazine, or newspaper has one publication date, the date on which it is first generally available to the public.” Jankovic v. Int’l Crisis Group, 494 F.3d 1080, 1087 (D.C. Cir. 2007), citing Mullin v. Wash. Free Weekly, Inc., 785 A.2d 296, 298 n. 2 (D.D.C.2001).

6. “Today, almost all jurisdictions and the Second Restatement of Torts have recognized...the ‘single publication rule.’” Mitan v. Davis, 243 F.Supp.2d 719, 721 (W.D.Ky. 2003), citing Ogden v. Ass’n of the United States Army, 177 F.Supp. 498, 502 (D.D.C. 1959) and Applewhite v. Memphis State Univ., 495 S.W.2d 190, 193 (Tenn.1973). See also, Jankovic 494 F.3d at 1087-1088 for a comprehensive list of other jurisdictions that have adopted the “single publication” rule.
7. “The essential elements for a successful defamation action by a private individual are (1) defamatory statements; (2) a nonprivileged communication to a third party; (3) falsity; (4) reference to the plaintiff; (5) at least negligence on the part of the publisher; and (6) resulting injury.” Syl. Pt. 7, Greenfield v. Schmidt Baking Co., Inc., 199 W.Va. 447, 449, 485 S.E.2d 391, 393 (1997), citing Syl. Pt. 1, Crump v. Beckley Newspapers, Inc., 173 W.Va. 699, 320 S.E.2d 70 (1983).
8. “Although there are obviously a number of similarities between the right to privacy and the law of defamation, particularly when a ‘false light’ invasion of privacy is involved, there are also important *differences* which reflect the nature of the interests protected by each. Three major differences should be noted. In defamation law, only statements that are false are actionable; truth is, almost universally, a defense. In privacy law, *other than in false light cases*, the facts

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published are true; indeed, it is the very truth of the facts that creates the claimed invasion of privacy." 16 M.J. Right of Privacy, § 1, at 253 (2000), emphasis added.

9. "There are obviously a number of similarities between actions for false light invasion of privacy and actions for defamation. The most prominent characteristic shared by the two causes of action is that the matter publicized as to the plaintiff must be untrue." Crump v. Beckley Newspapers, Inc., 173 W.Va. 699, 715-716, 320 S.E.2d 70, 87 (1984), citations omitted.

Discussion

There are two reasons why this cause of action cannot withstand scrutiny under West Virginia Rules of Civil Procedure Rule 12(b)(6). First, the case was filed outside of the one year statute of limitations imposed on actions of libel. Second, there is no set of facts that the Plaintiff could prove to substantiate his Complaint because the Complaint fails to allege that any of the content of the Investigations are untrue or false.

Statute of Limitations

West Virginia allows one year to bring a cause of action based on libel. Cavendish, 163 W.Va. at 38. All other causes of action are to be brought within two years unless prescribed otherwise. W. Va. Code, § 55-2-12. The Plaintiff's action was not filed until almost four years after the Investigations were first published on the internet. As such, they are clearly outside the statute of limitations.

The Plaintiff, however, points to the "continuing tort" theory of statutes of limitation. He maintains that because the Investigations are currently on the internet, a "continuing" tort is committed so long as the Investigations remain available on the

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internet. Because the tort is ongoing and continuous, the statute of limitations does not begin to toll until the tort is completed. However, the only case the Plaintiff cites for such a proposition does not involve the publication of allegedly libelous information on the internet. Roberts, 221 W.Va. at 375. West Virginia has not adopted the “continuing tort” theory regarding publication of internet content. On the contrary, the other jurisdictions that have examined the issue have adopted the “single publication” rule regarding internet publication. The “single publication” rule contends that a tort is committed when a libelous statement is published the first time, but that the tort is not ongoing or continuous simply because it remains accessible on the internet. See, Firth, 706 N.Y.Sd at 843.

It is a matter of first impression in this state whether an allegedly libelous publication maintained on the internet should be analyzed under the “continuing tort” theory or the “single publication” theory regarding the statute of limitation. Therefore, this Court rules that it should be analyzed under the “single publication” theory, due to the number of other jurisdictions that have resolved the issue similarly. This Court rules that the original publication date of the Investigations is the date which controls the tolling of the statute of limitations. As such, this case should have been initiated within one year of the August 2005 publication date of the Investigations. Because this suit was filed after August 2006, it should be dismissed under West Virginia Rules of Civil Procedure Rule 12(b)(6) for failure to meet the statute of limitations.

Adequacy of the Complaint

Further, it should be noted, that the Plaintiff's Complaint must also necessarily fail because it fails to allege that any of the content of the Investigations is untrue. The

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Plaintiff has alleged two, distinct causes of action: libel and false light invasion of privacy. Both causes of action require that the Plaintiff prove the falsity of the statements in question. Greenfield, 199 W.Va. at 449, and Crump, 173 W.Va. at 715-716. Because the Plaintiff fails to plead a necessary element of both theories of liability, there is no set of facts which the Plaintiff could plead that would entitle him to relief. Therefore, dismissal of the Plaintiff's Complaint under West Virginia Rules of Civil Procedure Rule 12(b)(6) is appropriate.

It is, therefore, **ORDERED** that

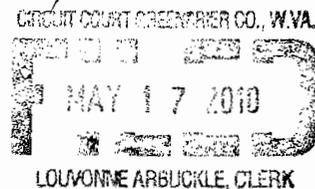
1. Plaintiff's Complaint is hereby **DISMISSED** pursuant to West Virginia Rules of Civil Procedure Rule 12(b)(6) for being untimely under the statute of limitations and for failure to state a claim upon which relief can be granted.

The Clerk is directed to forward a copy of this Order to J. Steven Hunter, counsel for the Plaintiff, and to Kevin A. Nelson, counsel for the Defendant.

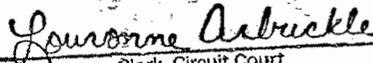
Entered May 17, 2010



Joseph C. Pomponio, Jr.



A True Copy:
ATTEST:



Clerk, Circuit Court
Greenbrier County, WV

By _____ Deputy