VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JOHN C. DEPP, II

Plaintiff,

v.

AMBER LAURA HEARD

Defendant.

Civil Action No.: CL-2019-0002911

PRAECIPE

Plaintiff John C. Depp, II, by and through his undersigned counsel, respectfully attaches four cases (with relevant portions highlighted) that he seeks leave to refer to in oral argument on June 28, 2019, in reference to Defendant Amber Heard's Motion to Dismiss. These cases relate to Ms. Heard's republication argument as raised for the first time in her Reply Brief of May 31, 2019

Dated: June 13, 2019

Respectfully submitted,

By: [redacted]

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of June 2019, I served the foregoing via First Class Mail (postage prepaid) and electronic mail upon the following:

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866 F.2d 681
United States Court of Appeals,
Fourth Circuit.

BLUE RIDGE BANK, Plaintiff–Appellee,
v.
VERIBANC, INC., Defendant–Appellant.
BLUE RIDGE BANK, Plaintiff–Appellant,
v.
VERIBANC, INC., Defendant–Appellee.

Nos. 87–2213, 87–2223.
|
Argued Oct. 6, 1988.
|
Decided Jan. 20, 1989.

Synopsis
Bank brought libel action against reporting company that had allegedly published inaccurate figures concerning bank's financial stability. The United States District Court for the Western District of Virginia, Turk, Chief Judge, entered judgment in favor of bank, and reporting company appealed. The Court of Appeals, Harrison L. Winter, Chief Judge, held that: (1) bank was not a public figure that was required to show actual malice in order to recover; (2) evidence was sufficient to support verdict in favor of bank; and (3) expert testimony was admissible to show bank's future lost profits.

Affirmed.

West Headnotes (11)

[1] **Constitutional Law**
Particular Issues and Applications
Libel and Slander
Words Tending to Injure in Profession or Business

Reporting company's published figures indicating bank's annualized net income and projected months until bank reached zero equity were statements of fact rather than statements of opinion, so that bank's libel action based on company's publication of allegedly inaccurate figures was not barred by First Amendment. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[2] **Constitutional Law**
Opinion

If defamatory statement is expression of opinion rather than declaration of fact, then it is constitutionally protected under First Amendment and judgment should be entered for defendant. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[3] **Libel and Slander**
Criticism and Comment on Public Matters; Public Figures

Reporting company's statements concerning bank's financial health related to matter of public concern, for purposes of bank's libel action against company. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[4] **Libel and Slander**
Criticism and Comment on Public Matters; Public Figures

Bank was not a public figure that was required to prove actual malice on part of reporting company in order to recover from company in libel action arising when company published inaccurate figures concerning bank's financial stability; bank did not enjoy either widespread power or pervasive influence necessary to effect resolution of public issues necessary to elevate it to general purpose public figure, and there was no specific preexisting public controversy directly or proximately concerning bank's

solvency necessary for bank to be limited-purpose public figure. U.S.C.A. Const.Amend. 1.

9 Cases that cite this headnote

[5] **Libel and Slander**
Intent, Malice, or Good Faith

Public figures may not recover in libel action absent clear and convincing proof of actual malice or reckless disregard of truth on part of speaker or publisher of false statements. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[6] **Libel and Slander**
Criticism and Comment on Public Matters; Public Figures

"General purpose public figure," required to prove actual malice in libel action, is one who occupies position of such pervasive power and influence and pervasive fame or notoriety in community that he assumes special prominence in resolution of public questions and in affairs of society. U.S.C.A. Const.Amend. 1.

8 Cases that cite this headnote

[7] **Libel and Slander**
Criticism and Comment on Public Matters; Public Figures

Business enterprise does not lose protection afforded by traditional law of defamation simply as result of being subject to pervasive government regulation. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[8] **Libel and Slander**
Criticism and Comment on Public Matters; Public Figures

Plaintiff that is subject to government regulation should not be considered limited-purpose public figure in libel action absent existence of predefamation public controversy in which plaintiff has become directly involved. U.S.C.A. Const.Amend. 1.

15 Cases that cite this headnote

[9] **Libel and Slander**
Weight and Sufficiency

Evidence was sufficient to establish that reporting company negligently published inaccurate figures concerning bank's financial stability and supported bank's recovery from company in libel action.

Cases that cite this headnote

[10] **Libel and Slander**
By Others in General

Virginia law of republication did not protect reporting company from being held liable to bank in libel action arising when company published inaccurate figures concerning bank's financial stability and figures were republished in local newspaper; although newspaper article did not contain balance and qualifying explanation company sought to impart to its report and was substantial revision of article circulated by columnist who received permission to use figures, article did not fundamentally distort information regarding bank contained in company's report.

4 Cases that cite this headnote

[11] **Libel and Slander**
Special Damage

Under Virginia law, expert testimony concerning bank's future lost profits as result of reporting company's publication of inaccurate figures concerning bank's financial stability was admissible in bank's libel action against the company, although the bank had recently been converted from a savings and loan association; even if conversion was equivalent to start of a new business, bank had been operating for six months when inaccurate figures were published.

1 Cases that cite this headnote

Attorneys and Law Firms

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Before WINTER, Chief Judge, SPROUSE and WILKINS, Circuit Judges.

Opinion

HARRISON L. WINTER, Chief Judge:

This is a diversity action arising from the alleged libel of Blue Ridge Bank by Veribanc, Inc. Blue Ridge Bank is a full-service banking institution located in Floyd County, Virginia, and Veribanc is a Massachusetts corporation engaged in the generation and dissemination of information concerning financial institutions based on data submitted to federal regulatory agencies. Following a jury trial, the district court entered judgment for plaintiff in the amount of $600,000. Defendant appeals the liability determination and the assessment of damages, and plaintiff cross-appeals the district court's ruling that it is a *683 "public figure" required to prove actual malice or recklessness on the part of the defendant. Because we conclude that Blue Ridge Bank was not a public figure and was therefore only required to prove negligence on the part of Veribanc, we affirm.

I.

Blue Ridge Bank is one of two banks located in Floyd County, Virginia. It was chartered on November 18, 1982, and is the successor to Blue Ridge Savings & Loan which had operated in Floyd County since 1978. After November 18, 1982, Blue Ridge was required to file "call reports" each quarter with the Federal Reserve Board (FRB) which, in turn, creates a unified data base covering the nation's banks. Call reports contain a variety of financial data reflecting both the bank's operating performance and capital structure.

Veribanc is a gatherer, processor, and distributor of information concerning a variety of financial institutions including banks, savings and loan associations, and credit unions. Under the Freedom of Information Act, Veribanc obtains "tightly packed" magnetic tapes containing the call report data for approximately 35,000 financial institutions each quarter of the year. Veribanc typically receives the magnetic tapes approximately four months after the close of the quarter for which the call report is submitted.

Veribanc then decodes the tape and loads the information into its own data base. Once in its data base, Veribanc is able to retrieve and manipulate the data to generate various standardized and customized reports for its customers. One of the thirty-five standard reports generated by Veribanc is titled "Federally Insured U.S. Commercial Banks Which Could Reach Zero Equity Within One Year" (hereafter "List Series Report"). This List Series Report was available to the general public for about $30.00 in 1983.[1]

In early 1983, Veribanc was contacted by Dan Dorfman, a nationally syndicated newspaper columnist, who inquired about the number and location of the banks projected to reach zero equity within the year. Dorfman had written

one previous article based on a Veribanc report regarding the growing number of insolvent banks, and was doing an update on that story. Veribanc supplied Dorfman with a copy of its most recent List Series Report on May 18, 1983 without charge. In exchange, Veribanc expected to be cited as the source of information. By separate cover letter, Veribanc stressed the need for balanced reporting and the need to include various caveats regarding proper interpretation of the report. These caveats are also printed on the back of each page of the List Series Report itself.

The List Series Report furnished to Dorfman identified Blue Ridge Bank as one of 126 banks "which could reach zero equity within one year." The article Dorfman sent to the syndicated newspapers was edited substantially by the *Richmond Times Dispatch* (*RTD*), which published it on May 22, 1983. The article published by the *RTD* was titled "Possible bank flops listed," and included Blue Ridge Bank as one of five banks in an accompanying table denominated "A partial list of troubled banks." The five banks included in the table were apparently considered to be of local interest by the *RTD* editors. No other reference to Blue Ridge Bank was made.

It is undisputed that Blue Ridge Bank was mistakenly included in the List Series Report. In order to generate its report, Veribanc "annualizes" the net income for the most recently reported quarter for each bank and then compares the projected per-month loss with each bank's reported equity. If the projected per-month rate of loss would consume the bank's reported equity within twelve months from the time of publication, then the bank is included in the report.

A more detailed explanation of these calculations is necessary to understand the nature of Veribanc's error and our disposition of the case. Banks themselves calculate ***684** their net gain or loss as part of the information supplied the FRB in the quarterly call reports. The net gain or loss is listed as a year-to-date figure. In order for Veribanc to annualize a bank's most recent quarterly performance, it is first necessary to calculate the bank's net income for the most recently reported quarter. This is accomplished by comparing the most recently reported year-to-date net income figure with that listed in the previous quarter's call report. Once a quarterly net loss is established, that loss is multiplied by four ("annualized net income") and then divided by twelve to obtain a projected monthly rate of loss if the bank's performance in the reported quarter were to continue. Finally, Veribanc divides the bank's reported equity by the projected monthly rate of loss to determine the number of months before the bank would reach zero equity. This number is, in turn, reduced by four to reflect the time lag between the close of the reported quarter and the generation of data by Veribanc.

This methodology produced the following figures for Blue Ridge Bank based on its call report for the fourth quarter of 1982. First, Veribanc's computer correctly identified the reported year-to-date loss as $119,000. Because Blue Ridge Bank had never sent a call report to the FRB, there was no previously reported quarterly data with which to compare this figure and Blue Ridge was perceived to have sustained the $119,000 loss entirely in the fourth quarter. The annualized net loss was then calculated as $476,000 leading to a projected monthly rate of loss of $38,167. At that rate, the reported equity of $558,000 would be consumed within 15 months. Reduction of this period by four months to account for the delay in access to the information resulted in a projection that Blue Ridge Bank's equity would be consumed within one year from the date of publication.

The source of error underlying Blue Ridge Bank's inclusion is now clear. The year-to-date net loss figure reported by Blue Ridge Bank included its operating performance as a savings and loan institution prior to November 18, 1982.[2] Accordingly, the "annualized net loss" and other calculations (including the "projected months until zero equity") painted a picture of financial health significantly more bleak than the reality. Although conversions from savings and loan associations to banks are now more common, Blue Ridge was the first such conversion in Virginia, and apparently only the third or fourth in the country since 1966.

Testimony at trial established that neither the call report filed with the FRB nor the magnetic tapes received by Veribanc explicitly identified Blue Ridge Bank as a recently converted institution. However, there was also testimony indicating that portions of the call report data received by Veribanc were illogical and unreasonable absent some operations predating the fourth quarter of 1982. Veribanc made no inquiries of Blue Ridge Bank at any time prior to publishing the List Series Report.

Fortunately, publication of the *RTD* article indicating that Blue Ridge Bank was possibly on the road to insolvency did not lead to a run on the bank, but it did result in a great deal of concern in Floyd County about the financial health of the institution. Blue Ridge Bank sued Veribanc for libel seeking a total of $3,000,000 in compensatory and punitive damages. Following a jury trial, it was awarded $600,000 in compensatory damages with no punitive damages. On appeal, Veribanc attacks the legal basis for both the judgment and the award of damages.

II.

[1] Blue Ridge Bank claims to have been libeled by Veribanc's inclusion of it in the List Series Report. Specifically, Blue Ridge identifies the figures for "annualized net income" and "projected months until zero equity" as factually incorrect, and argues that Veribanc's representation that these figures are "based on Federal Reserve ***685** Reports of Condition and Reports of Income" is deliberately misleading and contrary to fact. Blue Ridge Bank contends that the concepts of "annualization" and "months until zero equity" as well as the reported figures are entirely the creation of Veribanc and are not derived from the call report.

[2] Initially, we must decide whether Blue Ridge Bank may properly maintain an action for libel under the circumstances: "[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz v. Welch,* 418 U.S. 323, 339–40, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789 (1974). Thus, if the defamatory statement is an expression of opinion rather than a declaration of fact, then it is constitutionally protected under the First Amendment and judgment should be entered for the defendant. *Potomac Valve & Fitting, Inc. v. Crawford Fitting Company,* 829 F.2d 1280 (4 Cir.1987).

In *Potomac Valve* we set forth a two part test involving a consideration of four factors to determine whether a defamatory statement is one of fact or opinion. Drawing heavily on *Ollman v. Evans,* 750 F.2d 970 (D.C.Cir.1984) (en banc), *cert. denied,* 471 U.S. 1127, 105 S.Ct. 2662, 86 L.Ed.2d 278 (1985), we declared that the threshold inquiry is whether the challenged statement can be objectively characterized as true or false. If the statement cannot be so characterized, it is not actionable, but if the challenged statement can be so characterized, then three additional factors must be considered to determine whether the statement is nevertheless an opinion because "a reasonable reader or listener would recognize its weakly substantiated or subjective character—and discount it accordingly." *Potomac Valve,* at 1288. These additional factors are the author or speaker's choice of words; the context of the challenged statement within the writing or speech as a whole; and the broader social context into which the statement fits. *Id.,* at 1287–88.

We have no difficulty concluding that the challenged statements in this case are objectively characterizable as true or false: either the numbers reported for "annualized net income" and "projected months until zero equity" were accurate or they were not.[3]

Therefore, we turn our attention to the remaining factors identified in *Ollman* and adopted in *Potomac Valve.* First, the words employed by Veribanc were neither hyperbolic nor incapable of precise meaning so as to alert the reader that the statements were something other than factual declarations.[4] Second, examination of the statements in the context of the article as a whole reveals only that the validity of the projections is dependent upon the timeliness and accuracy of the information in the call reports. An interpretation of the statements in the context of the List Series Report as a whole, including its caveats and disclaimers, does not suggest an alternative meaning for the challenged statements or that the projection is a mere "hunch" based on the author's review of the relevant data.[5] Finally, consideration of the broader social context in which the statements are made offers no solace to Veribanc. There is nothing to suggest the ***686** inherent unreliability of Veribanc or the existence of a relationship between Veribanc and Blue Ridge Bank which would alert the reader to be aware of distortions and exaggerations.

Thus, we conclude that the challenged statements were factual and an action for libel based on their injurious effect is not barred by the First Amendment.

III.

[3] Next, we must determine the appropriate standard for imposing liability under the circumstances of this case. This determination requires us to consider both whether the defamatory speech involves a matter of legitimate public concern and whether Blue Ridge Bank is a public or private figure. *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 775, 106 S.Ct. 1558, 1563, 89 L.Ed.2d 783 (1986). Because of the obvious importance of banks to the financial health of our communities and the historic governmental interest in the operations and solvency of these institutions, we have no difficulty concluding that Veribanc's statements relate to a matter of public concern.[6]

[4] [5] We turn our consideration then to the question of whether Blue Ridge Bank is a public or a private figure. Public figures may not recover in a libel action absent

clear and convincing proof of actual malice or of reckless disregard of the truth on the part of the speaker or publisher of the false statements. *New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967); *Gertz,* 418 U.S. at 342, 94 S.Ct. at 3008. State law continues to govern the standard of liability in cases involving the defamation of private figures. *Gertz,* 418 U.S. at 347, 94 S.Ct. at 3010. Under Virginia law, private figure plaintiffs must prove negligence by a preponderance of the evidence in order to recover compensatory damages. *Gazette v. Harris,* 229 Va. 1, 325 S.E.2d 713, *cert. denied,* 472 U.S. 1032, 105 S.Ct. 3513, 87 L.Ed.2d 643, 473 U.S. 905, 105 S.Ct. 3528, 87 L.Ed.2d 653 (1985).

The district court ruled that Blue Ridge Bank was a public figure and therefore required it to prove actual malice or reckless disregard of the truth. The district court's ruling rested on three considerations: (1) that in connection with its conversion from a savings and loan association, Blue Ridge Bank had "thrust itself into the public eye" and "assumed the accompanying risk,"[7] (2) that Blue Ridge Bank is part of a heavily regulated industry reflecting its public importance and is one of only two financial institutions in Floyd County; and (3) that Blue Ridge Bank had demonstrated access to the media.

In *Gertz,* the Supreme Court drew a distinction between public and private figures based on two considerations: the plaintiff's access to the media, and the extent to which the plaintiff, by virtue of his position in the community or involvement in a particular matter of public concern, can be said to invite public comment and attention. The Court noted that the second of these two considerations was the more important. *Gertz,* 418 U.S. at 344–45, 94 S.Ct. at 3009–10.

Explaining this "invitation of public comment" consideration more fully, the Court further distinguished between those public figures who assume a general risk of defamatory comment and those who assume such a risk with respect to only certain topics:

> In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, *687 an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.

418 U.S. at 351, 94 S.Ct. at 3013.

Thus, we must determine whether the circumstances of this case support the conclusion that Blue Ridge Bank was either a public figure in all contexts or a public figure for a limited range of issues. The district court did not say whether it considered plaintiff a general or limited-purpose public figure, so we will consider both possibilities.

[6] A general purpose public figure is one who occupies a position "of such persuasive power and influence" and "pervasive fame or notoriety" in the community that he assumes "special prominence in the resolution of public questions" and "in the affairs of society." *See Gertz* at 345, 351, 94 S.Ct. at 3009, 3013. The attainment of general public figure status is not to be lightly assumed, even if the plaintiff is involved in community affairs, and requires clear evidence of such stature. *Id.* at 352, 94 S.Ct. at 3013. We recognize, as did the district court, that Blue Ridge Bank occupies a position of considerable importance in the economy of Floyd County. However, we find no evidence to suggest that Blue Ridge Bank enjoys either the widespread power or pervasive influence necessary to affect the resolution of public issues in a manner which elevates it to a general purpose public figure. Thus, we conclude the district court's requirement that Blue Ridge Bank establish actual malice or recklessness could only be proper if plaintiff is properly viewed as a limited-purpose public figure.

In *National Foundation for Cancer Research v. Council of Better Business Bureaus,* 705 F.2d 98 (4 Cir.), *cert. denied,* 464 U.S. 830, 104 S.Ct. 108, 78 L.Ed.2d 110 (1983) ("NFCR"), we considered the question of whether the plaintiff was properly characterized as a limited-purpose public figure.[8] We stated that under *Gertz,* "the key to determining whether a party is a public figure is the party's own conduct," and cited the following passage:

> It is preferable to reduce the public figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation. [418 U.S. at 352, 94 S.Ct. at 3013]
>
> *NFCR* at 101.

In that case we concluded that the plaintiff was a limited-purpose public figure because "[t]he evidence is uncontroverted that the Foundation had thrust itself into the public eye, not only through its massive solicitation

efforts ... but also through the claims and comments it made in many of these solicitations where it extolled its judicious use of donated funds...." *Id.* Central to our conclusion was both the presence of extensive advertising (creating a high public profile and demonstrating media access) and a direct relationship between the promotional message and the subsequent defamation (indicating plaintiff's pre-existing involvement in the particular matter of public concern and controversy).[9]

On appeal, Veribanc argues that Blue Ridge Bank engaged in an extensive promotional campaign at the time of its conversion thereby making the case analogous to *NFCR.* However, unlike the factual pattern in *NFCR,* there is no evidence to suggest that Blue Ridge Bank ever raised the issue of its corporate financial health—the subject of Veribanc's report—as part of its promotional efforts or that Veribanc's consideration of Blue Ridge Bank's financial health was in any way prompted by ***688** this advertising.[10] Thus, we perceive no grounds for finding plaintiff a limited purpose public figure in the mold of *NFCR.*

There is, of course, the alternative possibility that Blue Ridge Bank voluntarily injected itself or was drawn into a pre-existing controversy concerning its financial health that was not of its own making. In this regard, Veribanc points to the plaintiff's participation in a government regulated industry of national economic importance, and the fact that plaintiff is intimately involved in the economic welfare of Floyd County as one of only two local banks.

[7] We cannot accept the proposition, tacitly adopted in some jurisdictions, that a business enterprise loses much of the protection afforded by the traditional law of defamation simply as a result of being subject to pervasive governmental regulation.[11] We do not believe that the existence of an ongoing public interest in the stability of society's financial institutions and markets, or in the supervision of the gaming industry, or in the regulation of utilities automatically elevates every member of the regulated class to public figure status. Such an approach would effectively collapse the Court's dual inquiry, prescribed in *Gertz,* regarding the subject matter of the publication (i.e., whether it is a matter of public concern) and the status of the defamed entity into a single consideration: a result which has been rejected by the Court in decisions following *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971). *See e.g., Gertz, supra; Time, Inc. v. Firestone,* 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976); *Hutchinson v. Proxmire,* 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979).

[8] Rather, we think that in this context, as in others, a plaintiff should not be considered a limited-purpose public figure absent the existence of a pre-defamation public controversy in which the plaintiff has become directly involved.[12] When these first two conditions are satisfied, the plaintiff is a public figure with respect to those statements that are directly relevant to its involvement in the identified controversy. In this case, there simply was no specific pre-existing public controversy directly or proximately concerning Blue Ridge Bank's solvency.

Ironically, the vulnerability of banks and savings and loan associations to runs on deposits both supports regulation of the industry and suggests the imprudence of automatically elevating the standard of proof for recovery in defamation cases involving such institutions. Absent involvement ***689** in a pre-existing controversy, we perceive no constitutional interest in free speech which outweighs the right of regulated business enterprises to recover for false statements of fact. In this respect, regulated businesses should be treated no differently from other members of the community.[13] To summarize, there is no adequate basis for concluding that plaintiff was either a general or limited purpose public figure.

[9] Having concluded that Blue Ridge Bank was not a public figure under the circumstances of this case, we think it unnecessary for us to decide whether Blue Ridge Bank succeeded in proving actual malice by clear and convincing evidence. We must, however, determine whether Blue Ridge Bank, because it was a private figure, established by a preponderance of the evidence that Veribanc was negligent in making the false statements. *Gazette v. Harris, supra.* Plaintiff argues that the jury's determination of liability under the clear and convincing/actual malice standard subsumes a determination that Veribanc was liable under a preponderance/negligence standard. We agree. *See Richmond Newspapers v. Lipscomb,* 234 Va. 277, 287–88; 362 S.E.2d 32, 37–38 (1987), *cert. denied,* 486 U.S. 1023, 108 S.Ct. 1997, 100 L.Ed.2d 228 (1988); *Great Coastal Express, Inc. v. Ellington,* 230 Va. 142, 152, 334 S.E.2d 846, 853 (1985). We also have no doubt that evidence regarding additional data on the magnetic tapes indicating the existence of a financial institution prior to the fourth quarter and the absence of any inquiry or investigation by Veribanc prior to publication was legally sufficient to establish Veribanc's negligence in making the false statements. Thus, we conclude that the determination of liability on the part of Veribanc should not be disturbed.

IV.

The remaining issues raised on appeal by Veribanc require little discussion.

[10] Veribanc charges that the district court's refusal to instruct the jury on law of republication in Virginia was reversible error. Blue Ridge Bank argues that this issue was not adequately preserved for appellate review, and that, in any event, the district court did not err under the circumstances of this case. We believe that the question was adequately preserved and therefore will address its merits.

In *Weaver v. Beneficial Finance Co., Inc.*, 199 Va. 196, 199, 98 S.E.2d 687, 690 (1957), the Virginia Supreme Court succinctly stated the law in this area:

> It is well settled that the author or originator of a defamation is liable for republication or repetition thereof by third persons, provided it is the natural and probable consequence of his act, or he has presumptively or actually authorized or directed its republication ... However, the original author is not responsible if the republication is not the natural and probable consequence of his Act, but is the independent and unauthorized act of a third party.

Veribanc argues that the *RTD* article was not a republication of its List Series Report, nor the natural and probable consequence of its publication. Although the *RTD* article does not contain the balance and qualifying explanation Veribanc sought to impart to its report, and, in fact, is a substantial revision of the article circulated by Dorfman, we do not think that the *RTD* article fundamentally distorts the information regarding Blue Ridge Bank contained in the List Series Report. The table containing five banks in the *RTD* article accurately reproduces the figures published by Veribanc, and, although the column headings in the *RTD* table are somewhat different from those used by Veribanc, the explanatory footnotes included in the table make the headings at least as informative as those in the List Series Report. Thus, the *RTD* article cannot be said to be the *690 unnatural or improbable consequence of Veribanc's publication in the sense that it imparts a fundamentally different message.[11]

Equally important, Veribanc cannot convincingly argue that publication of the *RTD* article was an improbable or unnatural result of its decision to furnish the List Series Report to Dorfman. Although Veribanc cannot be said to have authorized the *RTD* article itself, it is beyond dispute that it authorized the use of the factual statements contained in its report by Dorfman and those newspapers carrying his column.

[11] Veribanc also challenges the district court's decision to allow expert testimony concerning the future lost profits of Blue Ridge Bank. Veribanc argues that the expert testimony should have been disallowed because Blue Ridge's conversion from a savings and loan association to a bank is equivalent to the start of a new business, and because the testimony presented was inherently too speculative.

Under Virginia law, there can be no recovery of lost profits for a new business or enterprise. *See Coastland Corp. v. Third National Mortgage Co.*, 611 F.2d 969, 977–78 (4 Cir.1979) (discussing the Virginia rule and case law). However, even if we assume, without deciding, that the financial products and services offered by a full-service bank are sufficiently different from those offered by a savings and loan association to support viewing a conversion of the latter to the former as the establishment of a new business, Veribanc's argument ignores the fact that the conversion took place, and Blue Ridge Bank operated as a bank, approximately six months prior to publication of the List Series Report and the *RTD* article. Thus, unlike the factual situations in which the Virginia rule is routinely applied, there exists in this case an operating business at the time of injury. We do not think that the Virginia rule prohibits the recovery of damages or supports the exclusion of the testimony under these circumstances.

The second part of Veribanc's challenge with respect to damages is that the expert's testimony was predicated upon a variety of unsubstantiated and arbitrary assumptions regarding the actual and continuing effect of the libel on Blue Ridge Bank's deposit and account base. We acknowledge some reservations about the testimony to the extent that it was based entirely on a comparison of Blue Ridge Bank's performance compared with newly created banks in the region and did not consider either the impact of its previous operation as a savings and loan

association or the six months of actual operation prior to publication of the List Series Report.

However, we are not the trier of fact and we are persuaded that Veribanc had every opportunity to attack the premises and possible shortcomings of Blue Ridge Bank's expert's analysis at trial. Veribanc took advantage of this opportunity, but was unable to establish that the methodology employed by the expert was inappropriate or that the effects of the libel would likely be felt over a shorter time frame than he contemplated. Therefore, we find no basis to conclude that the testimony was too speculative to have been considered by the jury or that the award was not supported by the testimony received.

Finally, Veribanc argues that the district court judge impermissibly interjected himself into the proceedings. Upon review of the record, we find no merit in this contention.

AFFIRMED.

All Citations

866 F.2d 681, 16 Media L. Rep. 1122

Footnotes

1 Among Veribanc's regular customers are the Federal Deposit Insurance Corporation, U.S. Senate Banking Committee, and various state regulatory authorities.

2 There is no question that Blue Ridge Bank followed then-existing reporting requirements in combining its banking and savings and loan performances. FRB reporting regulations were subsequently amended to avoid the "mixing" of this data.

3 The List Series Report does not contain an explanation of the meaning of "annualized net income." It does explain that "projected months until zero equity" is based on continuing losses at the same rate as during the indicated fiscal period. We do not find anything inherently deceptive in these concepts, and accept Veribanc's explanation of how these numbers are generated. Blue Ridge Bank has accepted this explanation also, although it continues to argue the "annualization" of quarterly financial data is inherently deceptive and improper. We perceive no need to address this contention.

4 "The truth or falsity of the statement does not depend upon subjective values or indefinite terms." *Potomac Valve,* at 1289 (citation omitted). *See also* cases and discussion in *Potomac Valve,* at 1287 n. 21.

5 We specifically reject Veribanc's argument that any projection is incapable of being classified as a factual statement. Describing an event as being conditional upon the occurrence of another event or the existence of an additional circumstance does not automatically convert that description into an opinion where it is otherwise verifiable and plausible.

6 "[W]hether speech addresses a matter of public concern must be determined by the expression's content, form, and context as revealed by the whole record." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* 472 U.S. 749, 761, 105 S.Ct. 2939, 2946, 86 L.Ed.2d 593 (1985) (citation omitted).

7 These descriptions are drawn from *National Foundation for Cancer Research v. Council of Better Business Bureaus,* 705 F.2d 98 (4 Cir.), *cert. denied,* 464 U.S. 830, 104 S.Ct. 108, 78 L.Ed.2d 110 (1983) and *Steaks Unlimited, Inc. v. Deaner,* 623 F.2d 264 (3 Cir.1980), respectively.

8 In *NFCR,* the percentage of charitable donations used by the plaintiff for administrative and fund raising expenses was criticized by the defendant.

9 See also *Steaks Unlimited, Inc. v. Deaner,* 623 F.2d 264, 273–74 (3 Cir.1980), in which the Third Circuit first rejected the possibility that the plaintiff was a general purpose public figure, but concluded that it was a limited purpose public figure based on the extent and content of its advertising.

10 Blue Ridge Bank argues that its promotional effort did not rise to the magnitude of the efforts present in *NFCR* or *Steaks Unlimited.* Our resolution of this issue does not turn on the extent of defendant's advertising effort and accepts as a fact that Blue Ridge Bank enjoys a relatively high public profile in Floyd County. It is the absence of a correlation between plaintiff's promotional efforts and defendant's publication that is determinative.

11 *See e.g., Coronado Credit Union v. KOAT Television, Inc.,* 99 N.M. 233, 241, 656 P.2d 896, 904 (1982) (state chartered credit union is functionally equivalent to a bank and was a "public figure" because such institutions are affected with a public interest); *American Benefit Life Ins. Co. v. McIntyre,* 375 So.2d 239, 242 (Ala.1979) (insurance company is a public figure because closely regulated by the government and is "clothed with the public interest"); *Reliance Ins. Co. v. Barron's,* 442 F.Supp. 1341, 1348 (S.D.N.Y.1977) (insurance company plaintiff is a general purpose public figure based, among other factors, upon state regulation of the industry); *But compare Bank of Oregon v. Independent News,* 298 Or. 434, 693 P.2d 35, 42, *cert. denied,* 474 U.S. 826, 106 S.Ct. 84, 88 L.Ed.2d 69 (1985) (bank not a public figure absent a pre-existing public controversy); *Sisler v. Gannett Co., Inc.,* 104 N.J. 256, 516 A.2d 1083, 1090 (1986) (former bank president not a public figure in an action based on article questioning propriety of certain bank loans).

12 A public controversy has been defined as " 'a real dispute, the outcome of which affects the general public or some segment of it.' " *McDowell v. Paiewonsky,* 769 F.2d 942, 948 (3 Cir.1985), quoting *Waldbaum v. Fairchild Publications, Inc.,* 627 F.2d 1287, 1297 (D.C.Cir.), *cert. denied,* 449 U.S. 898, 101 S.Ct. 266, 66 L.Ed.2d 128 (1980). The plaintiff's involvement in the controversy must be more than tangential. *See e.g., Wolston v. Reader's Digest Ass'n., Inc.,* 443 U.S. 157, 167–68, 99 S.Ct. 2701, 2707–08, 61 L.Ed.2d 450 (1979); *Arctic Co., Ltd. v. Loudoun Times Mirror,* 624 F.2d 518, 522 (4 Cir.1980), *cert. denied,* 449 U.S. 1102, 101 S.Ct. 897, 66 L.Ed.2d 827 (1981).

13 Our decision today obviously does not mean that a regulated business can never be a public figure or even that such indicia of public importance should not be considered under the circumstances of each case. We simply conclude that this badge of prominence alone is insufficient to establish the enterprise as a public figure for defamation purposes.

14 We do not believe the "spicier" *RTD* headline, "Possible bank flops listed," irretrievably altered the basic message of Veribanc's report.

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58 Va. Cir. 3
Circuit Court of Virginia.

Guy SPONAUGLE
v.
Grace C. RUTLEDGE, et al.

No. 183772.
|
May 30, 2001.

Defendant's Motion to Change Venue.

Attorneys and Law Firms

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Jeffrey R. Schmieler, Esquire, Juanita F. Ferguson, Esquire, Saunders & Schmieler, P.C., Silver Spring, MD, Counsel for Defendant.

Opinion

KLEIN.

***1** Dear Counsel:

This matter comes before the court on Defendant Grace Rutledge's (Rutledge) *Motion for a Transfer in Venue or in the Alternative Transfer to a More Convenient Forum.* Rutledge contends that Fairfax County is not an appropriate venue pursuant to Virginia Code §§ 8.01-257, *et seq.* Plaintiff, Guy Sponaugle, responds, *inter alia,*[1] that at least one of the causes of action set out in his Motion For Judgment arose, in whole or in part, in Fairfax County, and this jurisdiction is therefore a permissible forum for this lawsuit. For the reasons that follow, Rutledge's motion to transfer venue is denied.

I. *Background*
Rutledge was previously married to plaintiff's former neighbor, Preston Rutledge. After acrimonious custody and divorce proceedings, the Rutledges divorced on January 7, 1997. Rutledge was granted physical custody of the Rutledge children with visitation rights reserved to Mr. Rutledge. According to the Motion For Judgment herein, Rutledge has, since May of 1996, filed multiple sexual abuse charges against her husband alleging that he has repeatedly sexually abused their children. Each of these charges was determined to be unfounded. Nonetheless, on or about December 18, 1997, Rutledge filed a complaint with the National Center for Missing and Exploited Children (NCMEC) alleging that her former husband and plaintiff Guy Sponaugle were sexually abusing the Rutledge children, as well as other children, and were leading an international child pornography ring. NCMEC disseminated Rutledge's allegations against Sponaugle to, among others, the Fairfax County Police Department. Sponaugle subsequently learned of Rutledge's report to NCMEC and of NCMEC's report to the Fairfax County Police Department.

On October 12, 1999, Sponaugle filed the pending Motion for Judgment in this court against Rutledge, NCMEC and Grace M. Coppola alleging: (1) defamation (count I); (2) intentional infliction of emotional distress (count II); and negligence (count III). Grace M. Coppola has never been served with this lawsuit and NCMEC was dismissed from the case by order entered December 6, 1999. In an Agreement of Stipulation filed with the Clerk of this Court on May 17, 2001, the parties stipulated that for purposes of the instant motion to transfer venue, NCMEC published Rutledge's allegations against Sponaugle in Fairfax County, Virginia.

II. *Analysis*
As there is no preferred venue for this action pursuant to Virginia Code § 8.01-261, Virginia's permissible venue statute, Virginia Code § 8.01-262, governs. Section 8.01-262 states, in relevant part, as follows:
In any actions to which this chapter applies except those actions enumerated in Category A [pursuant to § 8.01-261] where preferred venue is specified, one or more of *the following counties or cities shall be permissible forums,* such forums being sometimes referred to as "Category B" in this title:

1. Wherein the defendant resides or has his principal place of employment ...;

***2** 3. Wherein the defendant regularly conducts affairs or business activity ...

4. *Wherein the cause of action, or any part thereof, arose;*

See Va.Code Ann. § 8.01-262 (emphasis added); *see also Faison v. Hudson,* 243 Va. 413, 416-417 (1992).

Rutledge asserts that none of the categories of permissible venue apply to her as she lives and works in James City County and any alleged tortious acts by her occurred in that county. Sponaugle responds that his cause of action for defamation arose, at least in part, in Fairfax County as he was a resident of Fairfax County at all relevant times and NCMEC's republication of Rutledge's defamatory allegations occurred in Fairfax County.[1] Sponaugle argues that this republication constitutes a separate cause of action for which Rutledge would be liable. The court agrees with Sponaugle.

In *Weaver v. Beneficial Finance Co.,* 199 Va. 196 (1957), the Supreme Court of Virginia addressed the effect of a republication of a defamatory statement in the context of a trial court's dismissal of a defamation action on statute of limitation grounds. In *Weaver,* the statute had clearly run on a claim arising from the original publication but had not on a claim based upon the subsequent republication of the alleged defamatory statement. In reversing the trial court, the Supreme Court held as follows:

> "It is settled that the author or originator of a defamation is liable for a republication or repetition thereof by third persons, provided it is the natural and probable consequence of his act, or he has presumptively or actually authorized or directed its republication. This is based upon the principle that such republication *constitutes a new cause of action against the original author.*"

Id. at 199 (emphasis supplied); *see also Watt v. McKelvie,* 219 Va. 645, 649 (1978).

In paragraph 29 of his Motion For Judgment, Sponaugle alleges that both the original charges made to NCMEC and their "subsequent publication by all defendants" were defamatory. The republication by NCMEC in Fairfax County was the "natural and probable consequence" of Rutledge's initial publication to NCMEC. Indeed, one can reasonably assume that the original report to NCMEC was made for the purpose of assuring multiple publications to law enforcement agencies. As such, if the original report was defamatory, a separate cause arose against Rutledge when NCMEC republished the allegations in Fairfax County. As the cause of action, or any part thereof, arose in Fairfax County, venue is permissible here pursuant to Va. Code § 8.01-262(4).

Rutledge further argues that as she lives approximately two and one half hours from Fairfax County, this jurisdiction is not a convenient forum and the court should therefore transfer this case to James City County pursuant to Virginia Code § 8.01-265(ii). However, in general, venue statutes afford a plaintiff the right to choose the forum in which to bring the suit. *Norfolk & W. Ry. Co. v. Williams,* 239 Va. 390, 392 (1990). As the plaintiff lives in Fairfax County, a transfer to James City County would be equally inconvenient to him. Moreover, it would appear from the pleadings that many of the witnesses in this matter are located in Northern Virginia. As a result, Rutledge has failed to establish sufficient good cause to warrant a transfer of this case to her preferred venue.

*3 Accordingly, *Rutledge's Motion for a Transfer in Venue or in the Alternative Transfer to a More Convenient Forum* is denied. Enclosed is a copy of the order that I have entered this date denying the motion. Defendant's exception is noted for the reasons argued both orally and in writing.

All Citations

Not Reported in S.E.2d, 58 Va. Cir. 3, 2001 WL 1829998

Footnotes

1 Sponaugle also argues that venue was proper against a former co-defendant against whom the case was dismissed before service was effected on Rutledge, and, therefore, pursuant to Virginia Code § 8.01-263, venue properly lies in Fairfax County. In light of the analysis herein, this court need not decide that issue.

2 As Sponaugle has not argued that the cause of action for intentional infliction of emotional distress necessarily arose in Fairfax County, where he allegedly suffered the emotional distress, the court will not address that potential basis for permissible venue.

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480 F.Supp. 364
United States District Court, E. D. Virginia, Richmond Division.

William P. MOORE, Plaintiff,
v.
ALLIED CHEMICAL CORPORATION, the Travelers Indemnity Company, and Hooker Chemicals & Plastic Corp., Defendants.

Civ. A. No. 77-0379-R.
|
July 17, 1979.

Synopsis
Chemical manufacturer filed multicount complaint against chemical company and others arising from its production of toxic material Kepone for chemical company for use in insecticides and pesticides. On defendant's motions to dismiss, the District Court, Clarke, J., held that: (1) cause of action for emotional distress for chemical company's failure to inform chemical manufacturer of dangers of Kepone was not barred by Virginia statute of limitations; (2) Virginia's one-year statute of limitations barred action based upon chemical company's alleged failure to warn of dangers of Kepone; (3) common-law claim for libel and slander to personal reputation of chemical manufacturer could not be maintained under Virginia statute making it illegal to conspire for purpose of willfully and maliciously injuring another in his reputation, trade, business or profession; (4) no cause of action for breach of warranty of merchantability or for breach of warranty of fitness for particular purpose was stated within meaning of Virginia Commercial Code; (5) allegations that chemical company negligently misrepresented and concealed from manufacturer the true facts concerning dangers of Kepone was time barred; (6) manufacturer stated cause of action against chemical company for republications of allegedly defamatory statements occurring within one year prior to filing of complaint; (7) no cause of action could be maintained in Virginia under doctrine of strict liability, and (8) cause of action against insurer for its alleged negligence in inspection of manufacturer's plant was time barred.

Orders accordingly.

West Headnotes (22)

[1] **Federal Courts**
Diversity cases in general

When jurisdiction is rested upon diversity of citizenship, state statute of limitations must be applied.

1 Cases that cite this headnote

[2] **Damages**
Elements in general
Damages
Physical illness, impact, or injury; zone of danger

Virginia law recognizes cause of action for emotional distress, even when unaccompanied by physical injuries, when wrongdoer's conduct was intentional or reckless, conduct was outrageous and intolerable in that it offends against generally accepted standards of decency and morality, there was causal connection between wrongdoer's conduct, and emotional distress was severe.

4 Cases that cite this headnote

[3] **Limitation of Actions**
Injuries to the person

Under Virginia law, an action for emotional distress is an action for personal injuries carrying a two-year limitations period.

4 Cases that cite this headnote

[4] **Damages**
Mental suffering and emotional distress

Allegation that chemical company negligently, carelessly, deliberately and with conscious disregard of rights of chemical manufacturer and others encouraged manufacturer to increase and continue production of toxic material Kepone, despite its corporate knowledge that Kepone was highly dangerous to exposed humans and aquatic life, stated cause of action for intentional or reckless infliction of emotional distress, subject to Virginia's two-year limitations period.

3 Cases that cite this headnote

[5] **Products Liability**
Chemicals in general
Products Liability
Negligence

Allegation that chemical company negligently, carelessly, deliberately and with conscious disregard of rights of chemical manufacturer and others encouraged manufacturer to increase and continue production of Kepone, despite its corporate knowledge that Kepone was highly dangerous to exposed humans and aquatic life, stated cause of action that chemical company breached a duty to one manufacturer of effects of Kepone.

Cases that cite this headnote

[6] **Limitation of Actions**
Injuries to the person
Limitation of Actions
Injuries to Property

Under Virginia law, injuries which are personal in nature must be brought within one year after cause of action accrues; five-year statutory period governs when there has been direct injury to property or to property rights, not an indirect or consequential injury which results from direct injury to person. Code Va.1950, § 8–24 (Repealed).

Cases that cite this headnote

[7] **Limitation of Actions**
Injuries to Property

For purposes of application of Virginia's five-year statute of limitations, damage, to be direct, must be very first or initial damage done to property and property or property right must somehow be wasted, carried off, or damaged. Code Va.1950, § 8–24 (Repealed).

Cases that cite this headnote

[8] **Limitation of Actions**
Injuries to Property

In determining whether action survives for purposes of Virginia's five-year statute of limitations, court must regard real nature of injury, not form or method by which it is sought to be redressed or enforced. Code Va.1950, § 8–24 (Repealed).

Cases that cite this headnote

[9] **Libel and Slander**
Time to sue and limitations
Limitation of Actions
Injuries to the person
Torts
Time to sue and limitations

For purposes of Virginia's five-year statute of limitations, damage to reputation, pain, mental anguish and suffering, injury to credit and financial standing, and defamation of character are personal injuries. Code Va.1950, § 8–24 (Repealed).

1 Cases that cite this headnote

[10] **Limitation of Actions**
⚷Injuries to Property

For purposes of Virginia's five-year statute of limitations, subjection to litigation and governmental action and payment of attorney fees are indirect injuries. Code Va.1950, § 8–24 (Repealed).

Cases that cite this headnote

[11] **Limitation of Actions**
⚷Injuries to Property

For purposes of Virginia's five-year statute of limitations, loss of earnings, earning capacity, or of profits is not generally considered direct damage to property, because it does not involve destruction or asportation of existing property. Code Va.1950, § 8–24 (Repealed).

Cases that cite this headnote

[12] **Limitation of Actions**
⚷Injuries to Property

For purposes of Virginia's five-year statute of limitations, survivability of cause of action depends upon whether injury to property was direct. Code Va.1950, § 8–24 (Repealed).

Cases that cite this headnote

[13] **Products Liability**
⚷Chemicals in general
Products Liability
⚷Time to sue and limitations

Virginia's one-year statute of limitations period applied to cause of action alleging that chemical company negligently, carelessly, and deliberately failed to warn chemical manufacturer of dangers of toxic material Kepone which it knew, yet concealed, since action was on claim of personal nature for indirect and consequential damage to manufacturer's property.

Cases that cite this headnote

[14] **Conspiracy**
⚷Conspiracy to injure in property or business

Where chemical manufacturer did not claim that alleged conspiracy between chemical company and others with respect to its production of Kepone caused damage to his investment and monetary losses, but rather advanced common-law claim for libel and slander to personal reputation, such cause of action could not be maintained under Virginia statute making it unlawful to conspire for purpose of willfully and maliciously injuring another in his reputation, trade, business or profession. Code Va.1950, § 18.2–499.

14 Cases that cite this headnote

[15] **Sales**
⚷Time to sue; limitations and laches

In Virginia, an action for breach of warranty is governed by four-year limitations period. Code Va.1950, § 8.2–725.

Cases that cite this headnote

[16] **Sales**
⚷Fitness for Ordinary Purpose or Use; Merchantability
Sales
⚷Fitness for Particular Purpose or Use

Under Commercial Code of Virginia, an implied warranty of merchantability or warranty of fitness for particular purpose is made only when sale of goods occurs; sale must involve passing of title of goods from seller to buyer for price.

Code Va.1950, §§ 8.2–106, 8.2–314, 8.2–315.

7 Cases that cite this headnote

[17] **Sales**
⚭Particular actions and claims

Allegation that chemical company impliedly warranted to chemical manufacturer that Kepone contamination was unlikely and of no significant concern in manufacture of toxic material Kepone failed to state cause of action for breach of warranty of merchantability or breach of warranty of fitness for particular purpose within meaning of Virginia Commercial Code. Code Va.1950, §§ 8.2–106, 8.2–314, 8.2–315.

3 Cases that cite this headnote

[18] **Fraud**
⚭Time to sue and limitations

Allegations that chemical company negligently misrepresented and concealed from chemical manufacturer the true facts concerning the dangers in manufacture of toxic material Kepone were barred by Virginia's one-year statute of limitations period. Code Va.1950, § 8–24 (Repealed).

Cases that cite this headnote

[19] **Libel and Slander**
⚭By others in general
Libel and Slander
⚭Time to sue and limitations

Under Virginia Law, actions for defamation are governed by one-year limitations period; however, separate cause of action will lie against original publisher or wrongdoer for republication of libelous statement by third party when republication in natural and probable result of what wrongdoer did; thus, even if action against wrongdoer for initial publication of defamatory material is time barred, he still may be liable for those republications which occur within one-year period of limitations.

8 Cases that cite this headnote

[20] **Libel and Slander**
⚭By others in general

Although chemical company could not be held liable for initial making of allegedly defamatory statement with respect to chemical manufacturer's knowledge of dangers involved in production of toxic material Kepone and subsequent republications made one year prior to filing of action, chemical company could be held liable for republications of allegedly defamatory statements made within one year prior to filing of action if manufacturer could show that statement was defamatory and that republications within one year were natural and probable result of original publication.

4 Cases that cite this headnote

[21] **Products Liability**
⚭Warnings or Instructions
Products Liability
⚭Pesticides, herbicides, insecticides, fungicides, and rodenticides

Cause of action based on doctrine of strict liability in tort charging that chemical company supplied dangerous drugs to manufacturer without warning or instruction of possible dangers in use of product Kepone could not be maintained under Virginia law.

2 Cases that cite this headnote

[22] **Insurance**
⚭Statutes of limitations

Allegations that insurer negligently continued to inspect chemical manufacturer's plant and gave advice and suggestions relating to safety in production of toxic material Kepone, thus lulling manufacturer into a false sense of security with respect to production of Kepone, were governed by Virginia's one-year period of limitations. Code Va.1950, § 8–24 (Repealed).

Cases that cite this headnote

Attorneys and Law Firms

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Joseph M. Spivey III, Hunton & Williams, Richmond, Va., Harry E. McCoy, Seawell, McCoy, Dalton, Hughes, Gore & Timms, Norfolk, Va., W. Carter Younger, McGuire, Woods & Battle, Richmond, Va., for defendants.

MEMORANDUM OPINION

CLARKE, District Judge.

Plaintiff, a citizen of Virginia, brought this action against three defendants: Allied Chemical Company (hereinafter "Allied"), a New York corporation with its principal place of business in New Jersey; The Travelers Indemnity Company (hereinafter "Travelers"), a corporation organized in a state other than Virginia, with its principal place of business in the State of Connecticut; and Hooker Chemicals & Plastic Corp. (hereinafter "Hooker"), a New York corporation with its principal place of business in New York. Jurisdiction is based upon diversity of citizenship, 28 U.S.C. s 1332(a). The case comes before the Court on motions for summary judgment by all three defendants.

Factual Background

The basic history of this controversy is not in dispute. In the late 1940's, a chemist for Allied invented a compound commonly known as Kepone, or DMCP.[1] Allied and others subsequently used Kepone in the manufacture of various insecticides and pesticides. Hooker was a patent owner and producer of a chemical substance known as Hexachlorocyclopentadiene (HCP), the essential toxic raw material for DMCP.

Virtually all Kepone produced in the United States was exported, because the Food and Drug Administration prohibited its use on food crops in the United States in the early 1960's. For several years several independent companies produced most of the Kepone requirements for Allied. However, in 1966 Allied decided to produce Kepone in its "Semi-Works" facility at Hopewell, Virginia. Production commenced in that year and continued until 1974.

For reasons which are in dispute, Allied eventually decided to terminate its production ***368** of Kepone and "go outside" for its Kepone requirements. On November 30, 1973, Allied executed an agreement with Life Science Products Company (hereinafter LSP) for the production of Kepone. Under the agreement, Allied agreed to provide LSP with all the necessary raw materials, including HCP, which LSP would process and convert into Kepone. Allied agreed to receive the finished product in drums supplied by Allied at LSP's plant and to pay for certain quantities of the Kepone as produced. Title to all raw materials and to the Kepone produced by LSP remained at all times in Allied Chemical.

The two principals and sole stockholders of LSP were plaintiff William P. Moore and Virgil Hundtofte. Prior to his retirement, Moore worked as an inorganic chemist for Allied for twenty-seven years. Hundtofte worked for Allied from 1965 to 1973; for three years, he was plant manager at Allied Hopewell plant.

LSP commenced operations in March 1974. Six months later, an employee of LSP complained to the Occupational Safety and Health Administration (OSHA) of excessive pesticide fumes and dust in the LSP plant. OSHA found insufficient evidence to support the charge, however, and dismissed it. In June 1975, several workers at the LSP plant became extremely ill. Investigations were conducted by OSHA and State Health Department officials. LSP ceased operations voluntarily no later than July 24, 1975. Numerous lawsuits and administrative proceedings against LSP, Moore, and Hundtofte ensued. Moore paid fines to OSHA and pleaded nolo contendere to several criminal charges in connection with the

operation of the LSP plant.

Plaintiff Moore filed the complaint in this case on July 1, 1977. Seven counts are alleged. Count I alleges that Allied negligently, carelessly, and deliberately failed to warn plaintiff that DMCP was highly dangerous to exposed humans and aquatic life. Count II charges that on December 22 to 24, 1975, meetings were held between officials of Allied, Travelers and its underwriters, and Ruder & Finn (Allied's public relations firm). According to Moore, Allied and Travelers there and then did associate, agree, mutually undertake or concert together for the purpose of willfully and maliciously injuring him in his reputation, trade, and business, in violation of Va.Code Ann. s 18.2-499 (Repl.Vol.1975). In Count III, Moore alleges that Allied breached a warranty that DMCP was unlikely to cause contamination of the environment and humans. Count IV charges Allied with negligently misrepresenting and concealing from plaintiff the true facts concerning the dangers of Kepone. Count V accuses Allied of defamation in referring to plaintiff as the "world's expert" on Kepone and as the "real culprit" in the Kepone disaster. Count VI alleges that Allied and Hooker are strictly liable for their failure to warn him of possible dangers in the use of their products. Finally, Count VII alleges negligence against Travelers (which insured both Allied and LSP); that it negligently failed to warn plaintiff of the dangers of Kepone, made inspections, and rendered advice, thus lulling him into a "false sense of security."

Moore contends that he has suffered the following damages as a result of the alleged conduct of defendants: (1) loss of his reputation; (2) loss of trade, business, and profits; (3) pain, mental anguish, and suffering by reason of the sickness of his former employees and others; (4) subjection to civil lawsuits, prosecution by government agencies, and fines and penalties imposed; (5) attorney's fees; (6) injury to his credit and financial standing; (7) defamation of his character; (8) loss of earnings and diminution of his capacity to earn in the future; and (9) loss of investments.

Defendants argue that this suit is barred for a variety of reasons: the applicable statute of limitations; collateral estoppel; a previous accord, satisfaction, and release; lack of standing; lack of evidence to support the existence of a conspiracy; contributory negligence; and assumption of risk. Because all three defendants have raised the statute of limitations as a defense, the Court will examine that question first.

*369 *Statute of Limitations*

[1] When jurisdiction rests on diversity of citizenship, the state statute of limitations must be applied. Sides v. Richard Machine Works, Inc., 406 F.2d 445 (4th Cir. 1969). All parties agree that the applicable limitation provision here is Va.Code Ann. s 8-24 (Repl.Vol.1957), which provides in pertinent part:

> Of actions not before specified. Every action for personal injuries shall be brought within two years next after the right to bring the same shall have accrued. Every personal action, for which no limitation is otherwise prescribed, shall be brought within five years next after the right to bring the same shall have accrued, if it be for a matter of such nature that in case a party die it can be brought by or against his representative; and, if it be for a matter not of such nature, shall be brought within one year next after the right to bring the same shall have accrued.

This action was filed on July 1, 1977. Defendants argue that the applicable period of limitations as to all seven counts of the complaint is one year, thereby barring the entire suit. Plaintiff, on the other hand, argues that the suit is not time-barred, because the applicable limitations period is either two years or five years. Due to the various arguments made by the parties, the Court will examine each count separately.

A. Count I

According to Count I, Allied "negligently, carelessly, deliberately and with a conscious disregard of the rights of the plaintiff and others encouraged the plaintiff to increase and continue production of DMCP, despite its corporate knowledge that DMCP was highly dangerous to exposed humans and aquatic life."

Plaintiff agrees with Allied that this cause of action occurred no later than July 24, 1975, when LSP ceased operations. However, he argues that this count advances, in reality, two causes of action: intentional or reckless

infliction of emotional distress, and a breach of duty to warn. The former theory (an action for personal injuries) is subject to a two-year limitations period; the latter, five years. Under either theory, he argues, this count is not time-barred.

1. Infliction of Emotional Distress

[2] [3] Virginia recognizes a cause of action for emotional distress, even when unaccompanied by physical injuries, when the following elements are shown:

> One, the wrongdoer's conduct was intentional or reckless. This element is satisfied where the wrongdoer had the specific purpose of inflicting emotional distress or where he intended his specific conduct and knew or should have known that emotional distress would likely result. Two, the conduct was outrageous and intolerable in that it offends against the generally accepted standards of decency and morality. This requirement is aimed at limiting frivolous suits and avoiding litigation in situations where only bad manners and mere hurt feelings are involved. Three, there was a causal connection between the wrongdoer's conduct and the emotional distress. Four, the emotional distress was severe.

Womack v. Eldridge, 215 Va. 338, 210 S.E.2d 145, 148 (1974). Undoubtedly, an action for emotional distress is an action for personal injuries carrying a two-year limitations period. The question is whether Count I alleges such a cause of action.

[4] The Court finds that, when liberally construed, Count I does state a cause of action for emotional distress. Inter alia, plaintiff alleges that Allied knew of the devastating physiological effects which DMCP and Kepone could have on workers but deliberately failed to warn him. As a result of this failure to warn, he contends, many workers became chronically ill and permanently disabled. Their illnesses allegedly caused him "considerable pain, anguish and suffering." If plaintiff can prove his allegations, reasonable men could conclude that Allied showed a reckless disregard for the rights of the officers and employees of LSP, and should have known that its failure to warn would cause injury *370 to workers and severe emotional distress to Moore. Similarly, a reasonable fact finder could find that the failure to warn of Kepone's effects was "outrageous and intolerable" and caused severe emotional distress to Moore.

Insofar as Count I states a cause of action for emotional distress, the two-year limitations period applies. Because plaintiff and Allied were in a continuing contractual relationship, and because the alleged failure to warn would be a continuing wrong, plaintiff may recover under this theory for any injuries suffered as a result of the alleged wrong on or after July 1, 1975. See, e. g., Sides v. Richard Machine Works, Inc., 406 F.2d 445 (4th Cir. 1969); Tyler v. Street, 322 F.Supp. 541 (E.D.Va.1971); McCormick v. Romans, 214 Va. 144, 198 S.E.2d 651 (1973); City of Richmond v. James, 170 Va. 553, 197 S.E. 416 (1938).

2. Breach of Duty to Warn

According to plaintiff, Count I also should be construed to allege that Allied negligently, carelessly, and deliberately failed to warn him of the dangers of Kepone which it knew, yet concealed. He admits that the two-year limitations period is not applicable to this allegation because it cannot be construed as an action for personal injuries within the meaning of Va.Code Ann. s 8-24. However, he contends that the five-year limitations period is applicable. Defendants, on the other hand, argue that the claim is governed by the one-year period and is therefore time-barred.

[5] The Court finds that the complaint, when liberally construed, does allege that Allied breached a duty to warn plaintiff of the effects of Kepone. Therefore, the question is whether the period of limitations is one year or five years.

[6] [7] [8] Whether or not one applies the one year or five year time period depends upon the "survivability" of the claim. Section 8-24 states that the proper period is five years if the action is one which would survive the death of either party; if not, the one-year period applies. Survival depends upon whether or not the action concerns an injury to property or an injury to the person. Injuries which are personal in nature must be brought within one year after the cause of action accrues. The five-year

period governs when there has been a direct injury to property or to a property right, not an indirect or consequential injury which results from direct injury to the person. To be direct, the damage must be the very first or initial damage done to the property. Furthermore, the property or property right must somehow be wasted, carried off, or damaged. See, e. g., Holdford v. Leonard, 355 F.Supp. 261 (W.D.Va.1973); Travelers Insurance Co. v. Turner, 211 Va. 552, 178 S.E.2d 503 (1971); Carva Food Corp. v. Dawley, 202 Va. 543, 118 S.E.2d 664 (1961); Cover v. Critcher, 143 Va. 357, 130 S.E. 238 (1925); Mumpower v. Bristol, 94 Va. 737, 27 S.E. 581 (1897). In determining whether the action survives, the Court must regard the real nature of the injury, not the form or method by which it is sought to be redressed or enforced. E. g., Carva Food Corp. v. Dawley, supra.

[9] The Court's first inquiry is whether any of the injuries claimed are injuries to property, as opposed to personal injuries, within the meaning of Section 8-24. Among the injuries claimed are: damage to reputation; pain, mental anguish, and suffering; injury to credit and financial standing; and defamation of character. Under Virginia law, these are clearly personal injuries. E. g., Evans v. Sturgill, 430 F.Supp. 1209, 1215 (W.D.Va.1977); Worrie v. Boze, 198 Va. 533, 95 S.E.2d 192, 195 (1957); Watson v. Daniel, 165 Va. 564, 183 S.E. 183, 184 (1936).

[10] The remaining injuries claimed loss of trade, business, and profits; subjection to litigation and governmental action, plus resulting fines and penalties; attorney's fees; loss of earnings and diminution of earning capacity; and loss of investments theoretically, are injuries to property. The next question is whether Allied's conduct caused direct damage to this property. As described Supra, if the injury is indirect, it is governed by the one-year limitations *371 period. Clearly, subjection to litigation and governmental action, and payment of attorney's fees, are indirect injuries. These were not the initial injuries resulting from defendants' alleged breach. According to the complaint, the failure to warn plaintiff of the dangers of Kepone caused him to commence production of Kepone; because of the production of Kepone, LSP workers were exposed to serious hazards and, consequently, seriously injured; and as a result of these injuries, plaintiff was subjected to private and governmental action, as a result of which he was forced to pay fines, penalties, and attorney's fees. Under the extremely technical analysis employed by the Virginia Supreme Court, these expenses were indirect and consequential damages resulting from the need to prevent deprivation of liberty and to minimize further financial damage or injury to reputation. See, e. g., Evans v. Sturgill, supra.

[11] In certain cases, Virginia courts have held that the five-year period applies to the remaining injuries claimed by plaintiff loss of earnings and earning capacity, loss of trade, business, and profits, and loss of investments. However, the alleged injury must be direct and the property or property right must in some way be carried off, wasted, or damaged. Loss of profits or earnings is considered direct damage to property only in very limited circumstances: for example, where an employee breaches a specific covenant not to compete, Worrie v. Boze, supra ; or when an individual has an interest in property which is fraudulently sold for the purpose of depriving him of profits from that property, Blackwelder v. Millman, 522 F.2d 766 (4th Cir. 1975). Generally, the loss of earnings, earning capacity, or of profits is not considered direct damage to property, because it does not involve the destruction or asportation of existing property. See, e. g., Evans v. Sturgill, supra; Vance v. Maytag Sales Corp., 159 Va. 373, 165 S.E. 393 (1932); Mumpower v. Bristol, 94 Va. 737, 27 S.E. 581 (1897). Therefore, it becomes necessary to determine how and whether any property of plaintiff has been affected by Allied's alleged conduct.

[12] Plaintiff alleges that he has lost his trade, business, and investments as a result of Allied's failure to warn him of the dangers of Kepone. It may be that, but for the failure to warn, these dangers would not have occurred. The "but for" test, however, is not the test of survivability. Rather survivability depends upon whether the injury to property was direct. As Judge Dalton has stated:

> (T)he Virginia Supreme Court in s 8-24 cases is looking for the very first instance of harm, no matter how small or minute. It appears that the demarcation line between a direct and an indirect injury is drawn immediately after any initial harm. The obscurity or minuteness of such harm is of no consequence, and everything occurring after it is an indirect injury.

Holdford v. Leonard, supra, at 264.

The damage to property (trade, business, and investments) here was unquestionably indirect under Virginia law. According to plaintiff, had he known that Kepone could produce such tragic and disastrous results as those which occurred here, he never would have agreed to produce

Kepone. Thus, he first sustained injury when he entered into the contract with Allied and took steps to commence production of Kepone without knowledge of the risks involved. It makes no difference that the injury was slight, or that plaintiff was unaware of it. See, e. g., Richmond Redevelopment & Housing Authority v. Laburnum Construction Corp., 195 Va. 827, 80 S.E.2d 574 (1954) (damage caused to house by explosion resulting from defective gas pipe was indirect; plaintiff suffered direct injury when the defective pipe was installed. The injuries which followed the sickness of the workers; the shutdown of the plant; the civil suits, the governmental investigations, and the payment of fines, penalties, and attorney's fees; the shutdown of the plant; the loss of business, profits, and earning capacity were indirect or consequential results of the initial injury.)

*372 It is also apparent that plaintiff has sustained no property damage within the meaning of Section 8-24, as interpreted by the Supreme Court of Virginia. For the five-year statute of limitations to apply, the act of defendants must directly operate to take, carry away, waste, or damage the property of the plaintiff. E. g., Mumpower v. Bristol, supra. Plaintiff alleges that he has lost his investments in LSP and that the LSP plant has been closed and dismantled. But there is no evidence that Allied took, carried away, wasted, or destroyed his property. Rather, in charging Allied with breach of duty to warn, plaintiff seeks to hold Allied personally responsible for fraud directed at his person, not to recover for the damage to his property which was the consequential injury flowing from the fraud. It was not the property itself but the use of the property the chance to make profits and recover his investment which was affected by Allied's alleged conduct. Such a right of action is not survivable, and is governed by the one-year period. E. g., Carva Food Corp. v. Dawley, supra; Cover v. Critcher, supra; Mumpower v. Bristol, supra.

Plaintiff argues that the common thread running through those Virginia cases applying the one-year statute of limitations is that some wholly independent event or act intervenes with the original act, causing injury to property, without which there would have been no injury to the property involved. Here, he says, no intervening event occurred between the alleged failure to warn and the damage to his business. Thus, he concludes, the injury was direct.

The Court cannot agree with this analysis. There were intervening events here; after the alleged failure to warn, plaintiff commenced operation of the LSP plant and produced Kepone. Without his actions, the catastrophic results would never have occurred. This case is, therefore, quite similar to Travelers Insurance Co. v. Turner, 211 Va. 552, 178 S.E.2d 503 (1971). In that case, the assignee insurance company sued an insurance agent for his failure to effect insurance coverage as agreed between him and the assignor. Before the coverage had been effected at the time agreed, the assignor became involved in an accident, thus forcing the assignor to defend him and incur substantial expenses. The Supreme Court held that the one-year limitations period applied. The damage occurred because of an intervening event the assignor's operation of the car. Thus, the action was of a personal nature and the five-year period was inapplicable. In the case at bar, the injuries to the employees and to plaintiff's business did not occur when Allied failed to warn him, but when he proceeded to operate his plant and manufacture Kepone.

Nonetheless, plaintiff appears to argue that, even if his operation of the plant was an intervening event, Allied's failure to warn would have prevented that intervening event, and the subsequent damage for he never would have entered into the contract with Allied had he known of Kepone's effects. For that reason, he opines, Allied inflicted direct injury. This theory was rejected in MacKethan v. Peat, Marwick, Mitchell & Co., At Law No. 6899 (Cir.Ct. of the City of Richmond, Jan. 15, 1975). In MacKethan, a receiver of a savings and loan company sued an accounting firm for failure to report to the company's board of directors that, according to an audit, certain employees of the company were improperly diverting funds. The receiver argued that, while the employees actually caused the damage, they would have been prevented from doing the acts causing the damage if the defendant had disclosed the contents of the report in a timely manner to the company. However, the Circuit Court held that the one-year statute applied:

> (T)he direct causes of the loss and damages were the actions of Hall and other officers of the NS&L. No alleged acts of defendant Caused the damage, but plaintiff's contention is that If defendant had done what it is claimed it should have done, Hall and associates would have been Prevented from doing the acts which caused the damage.

Id. at 4.

The present case is on all fours with MacKethan. Plaintiff's basic theory is that, *373 had Allied properly warned him of the dangers of Kepone, either he would have taken steps to prevent injury to employees, or he never would have agreed to produce Kepone. The injuries to the employees, and the damages resulting therefrom, occurred because of the operation of the LSP plant by plaintiff and Hundtofte.

Plaintiff argues that MacKethan is distinguishable because that case involved totally independent intervening forces. The Court cannot agree. Plaintiff overlooks the fact that in MacKethan, the receiver for the company accused the accounting firm of Actively working with the employees "to keep the bad news from the Board." Id. at 3. The accounting firm and the employees were therefore Not totally independent; nevertheless, the Circuit Court found the lack of independence irrelevant. In any event, the intervening force here was not the failure to warn, but the operation of the LSP plant by Moore and Hundtofte. That LSP's operation was induced by the alleged failure to warn is irrelevant; as long as Any intervening force occurs, the injury to property is indirect. See Travelers Insurance Co. v. Turner, supra.

None of the Virginia cases which applied the five-year period are factually similar to the present action. Worrie v. Boze, 198 Va. 533, 95 S.E.2d 192 (1957), involved breach of a covenant not to compete by an employee. Other cases involved the fraudulent sale of worthless stock where the plaintiff gave value at the time of the transfer. See Arent v. Bray, 371 F.2d 571 (4th Cir. 1967); Trust Co. of Norfolk v. Fletcher, 152 Va. 868, 148 S.E. 785 (1929). Nor does the case at bar involve a sale of property where the buyer gave value in reliance on a fraudulent representation by the seller concerning certain features of the property itself. See Progressive Realty Corp. v. Meador, 197 Va. 807, 91 S.E.2d 645 (1956); Westover Court Corp. v. Eley, 185 Va. 718, 40 S.E.2d 177 (1956). And, obviously, this is not a case where an individual caused injuries for which the father must pay expenses, Watson v. Daniel, 165 Va. 564, 183 S.E. 183 (1936), or where a company discharges water on the property of another, Southern Railway Co. v. Fitzpatrick, 129 Va. 246, 105 S.E. 663 (1920).[2]

[13] For the reasons stated, the Court finds that under Virginia law, this is an action on a claim of a personal nature for indirect and consequential damage to plaintiff's property. The one-year limitation, therefore, applies to Count I insofar as it alleges a failure to warn by defendant. Since plaintiff himself admits that this cause of action accrued no later than July 24, 1975 (when LSP ceased operations), it is time-barred.

B. Count II

Count II of the complaint alleges that on or about December 22 to 24, 1975, meetings were held between officials of Allied, Travelers and its underwriters, and Allied's public relations firm. According to plaintiff, at the meeting Allied and Travelers did associate, agree, mutually undertake or concert together for the purpose of maliciously and willfully injuring him in his reputation, trade, or business, in violation of Va.Code Ann. s 18.2-499.

Section 18.2-499 makes it illegal to conspire "for the purpose of wilfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever . . ." The statute provides *374 a remedy for wrongful conduct directed to the business. Since the statute itself prescribes no limitation, the applicable period of limitations is determined by Section 8-24. Federated Graphics Companies, Inc. v. Napotnik, 424 F.Supp. 291 (E.D.Va.1976).

Allied and Travelers argue that Count II is actually a personal suit for defamation subject to the one-year period, and thus time-barred. Ordinarily, the Court would disagree. Although the alleged conduct might fairly be characterized as an action personal in nature (defamation and malicious prosecution), Section 18.2-499 "is applicable to Any malicious conduct which injures a business." Id. at 294. The statute does not restrict its coverage to corporations; by speaking of injury to "another in his reputation, trade, business or profession," Section 18.2-499 also protects individuals who own and operate a business. As co-owner of LSP, and an active participant in the management of LSP, Moore was arguably within the coverage of the statute insofar as the complaint alleged that the conspiracy injured LSP's reputation, trade, or business.

However, the Court is convinced from the deposition of plaintiff Moore that the real nature of Count II is slander and libel. In interrogatories 18A, 20, 24, 25, and 31, Moore described in detail the monetary and investment losses which he had incurred as a result of the alleged conduct of Travelers and Allied. Yet, in his deposition, Moore testified as follows:

> Q I take it, therefore, that with respect to the out-of-pocket losses that you assert for the value of your plant, for your criminal problems, and for the fees related to the criminal problems, for your OSHA fine

and legal costs, and for your adipic acid losses that you assert, that those losses had all pretty much been established by this alleged conspiratorial meeting on December 24, 1975 irreversibly?

A Well, I don't believe I said that all of those losses were due to that meeting.

Q Well, that is what I am trying to establish and get you to tell me exactly which losses you do attribute to the meeting. You don't attribute any of those to the meeting, do you?

MR. TAYLOR: Objection.

THE WITNESS: No.

BY MR. KOLODNY:

Q The die had been cast as to your relationship with Allied Chemical by that time, had it not?

A Yes.

Q So, your Agrinutrients profit loss that you are claiming was inevitable by that time?

A Well, I am not certain I follow that. I certainly had hoped to do something oh, I am sorry. You said Agrinutrients?

Q Yes, sir.

A Oh, yes.

Q So, as to the out-of-pocket damages listed in your Interrogatory Answer Number 25 and your investment damages listed in answer to Travelers' Interrogatory Number 31, which I will show you briefly, those damages you don't assert to be the result of the allegations of Count II of this suit?

NOTE: The document was handed to the witness.

A May I see Count II, please?

NOTE: The witness examined the document.

A Would you restate the question?

Q My question was whether or not you attribute any of the out-of-pocket losses listed in answer to Interrogatory Number 25 or any of your investment losses listed in answer to Interrogatory Number 31 to the allegations of Count II of the lawsuit?

A This says 25 we are looking at here.

MR. TAYLOR: 31 is Exhibit A.

THE WITNESS: No.

(Moore Dep. pp. 1375-77) (emphasis added).

Since plaintiff does not claim that the alleged conspiracy caused damage to his investment and monetary losses in connection with LSP, he obviously is advancing a common-law claim for libel and slander to his personal reputation. This type of claim is not actionable under Section 18.2-499.

*375 [14] In Federated Graphics, supra, Judge Merhige rejected the notion that the statute codifies common-law actions. Rather, statutory coverage is afforded only when malicious conduct is directed at one's Business, not one's Person. Id. at 294. On the basis of the deposition of Moore, the Court finds that Count II does not state a claim actionable under Va.Code Ann. s 18.2-499.[3]

C. Count III

Count III of the complaint alleges that Allied impliedly warranted that DMCP contamination was unlikely and of no significant concern. Because of this warranty, plaintiff allegedly was "lulled into a sense of security."

[15] [16] It is unnecessary for the Court to determine whether the one-year or five-year period is applicable to Count III. Plaintiff argues that Count III alleges a breach of an implied warranty of merchantability, or warranty of fitness for intended use. In Virginia, an action for a breach of warranty is governed by a four-year limitations period. Va.Code Ann. S 8.2-725 (1965). But the facts of this case do not remotely suggest that there has been a breach of warranty within the meaning of the Commercial Code of Virginia. An implied warranty of merchantability or a warranty of fitness for a particular purpose is made only when a sale of goods occurs. See Va.Code Ann. s 8.2-314 - 315 (1965). A sale must involve the passing of title of goods from the seller to the buyer for a price. Id. s 8.2-106.

[17] This case involved neither a passing of title nor a transfer of goods. Allied took to LSP all the raw materials necessary for the manufacture of Kepone. LSP processed the raw materials into Kepone and returned the finished product to Allied, which paid LSP for its services. Allied retained title to the raw materials and to the finished product at all times. Allied paid value to LSP, not vice versa. The compensation paid to LSP was for services

rendered, not for goods conveyed. For these reasons, the Court holds that Count III fails to state a cause of action for breach of warranty of merchantability or for breach of warranty of fitness for a particular purpose within the meaning of the Virginia Commercial Code.

D. Count IV

[18] In Count IV, plaintiff alleges that Allied negligently misrepresented and concealed from him the true facts concerning the dangers of DMCP. The Court finds no difference between this allegation and the allegation of Count I that Allied failed to warn him of the dangers of Kepone. Moreover, the damages claimed in Count I and Count IV are identical. Therefore, for the reasons stated in the discussion of Count I (Section A-2) Supra, the one-year period of limitations applies to Count IV. Since the alleged misrepresentation and concealment could have continued no later than July 24, 1975 (when LSP ceased all operations), and this suit was filed on July 1, 1977, Count IV is time-barred.

E. Count V

Count V alleges that Allied intentionally defamed, libeled, and slandered the character of Moore by referring to him as the "world's expert" on Kepone and the "real culprit" in the Kepone disaster. Allied argues that the defamation claim is time-barred.

The statement in question was first issued to the Columbia Broadcasting System in November 1975 and nationally telecast on the popular television program "60 Minutes" on December 14, 1975. Even the conspiracy alleged in Count II occurred in December *376 1975, and the statements supposedly resulting therefrom were issued in early 1976. According to Allied, the one-year period of limitations applies. Since this action was not filed until July 1, 1977, Count V is supposedly time-barred.

Plaintiff concedes that Section 8-24 imposes a one-year period for defamation actions. However, he contends that defendant is liable for republications of the allegedly defamatory statements which occurred within the one-year period. As examples of republications, he cites several newspaper stories which were published in September 1976 and a rebroadcast of the "60 Minutes" feature in August 1976.

[19] Actions for defamation are indeed governed by the one-year limitations period. See, e. g., Worrie v. Boze, 198 Va. 533, 95 S.E.2d 192, 195 (1957); Watson v. Daniel, 165 Va. 564, 183 S.E. 183 (1936). However, a separate cause of action will lie against the original publisher or wrongdoer for the republication of the libelous statement by a third party, when the republication is "the natural and probable result of what the wrongdoer did." Worrie v. Boze, 198 Va. 533, 95 S.E.2d 192, 195 (1957). Thus, even if an action against the wrongdoer for the initial publication of the defamatory material is time-barred, he still may be liable for those republications which occurred within the one-year period of limitations.

[20] The Court finds that, because of the one-year period of limitations, Allied cannot be held liable for the initial making of the allegedly defamatory statement and subsequent republications made prior to July 1, 1976. Nevertheless, Count V is not time-barred insofar as plaintiff seeks to hold Allied liable for republications of the allegedly defamatory statement occurring on or after July 1, 1976. If he can show that the statement was defamatory, he may be able to show that the republications of the statement were the natural and probable result of the original publication. The tragic and devastating physical effects of Kepone on the LSP workers were newsworthy items of national interest. Allied's statements concerning the Kepone affair might have been considered of such significance and relevance that they would have been included in any subsequent publication concerning the plight of the LSP workers. Perhaps the truth is otherwise, but at this time, the Court cannot say that republication of Allied's statement over a long period of time could not be a natural and probable result of the original statement.

Thus, Count V is time-barred only as to those publications or republications occurring before July 1, 1976.

F. Count VI

In Count VI, plaintiff charges that Allied and Hooker supplied dangerous chemicals to LSP without warning or instruction of possible dangers in the use of their products. Allied and Travelers are "strictly liable," he says, because the products were in a "defective condition unreasonably dangerous by reason of the absence of adequate warnings or instructions."

[21] Plaintiff admits in his brief that Count VI is a claim of strict liability. Virginia, however, has not yet espoused the

doctrine of strict liability in tort as stated in Restatement (2d) of Torts, s 402A. Matthews v. Ford Motor Co., 479 F.2d 399, 401 n. 2 (4th Cir. 1973); Brockett v. Harrell Brothers, Inc., 206 Va. 457, 143 S.E.2d 897, 902 (1965). On that ground alone, Count VI must fall.

Even if Count VI is considered as a claim that Allied and Hooker negligently, recklessly, or intentionally failed to warn Moore of the dangers of Kepone, the result is the same. Hooker supplied HCP to Allied, which then supplied all the raw materials necessary for the production of Kepone, including HCP, to plaintiff. For the reasons stated in the discussion of Count I (Section A-2) Supra, the one-year limitations period applies, and Count VI is time-barred. The injuries which plaintiff claims are indirect or consequential because (1) he initially suffered injury when he made his agreement with Allied and commenced business at LSP without knowledge of the dangers of Kepone and (2) the operation of *377 the LSP plant was an intervening force without which the injuries claimed here could not have occurred.

G. Count VII

In Count VII, Travelers is accused of negligence. Plaintiff contends that Travelers, which insured both Allied and LSP, was aware of Allied's former Kepone operation and in 1972 had classified it an "imminent danger." In 1974, Travelers made a series of inspections of the LSP plant and classified LSP as a "poor" risk for general liability purposes due to pollution exposure and "average" for workmen's compensation liability purposes. Moore complains that, despite its knowledge that LSP's policy excluded liability for pollution of the environment by LSP, Travelers negligently continued to inspect the LSP plant and gave advice and suggestions relating to safety. Thus, plaintiff says, he was "lulled into a false sense of security."

[22] The Court finds that Count VII is governed by the one-year period of limitations of Section 8-24. The discussion of Count I (Section A-2) is equally applicable here. All the injuries claimed were an indirect or consequential result of the alleged conduct of Allied. Plaintiff first suffered injury when he entered into the contract and began production of Kepone without knowledge of the 1972 report, and first suffered injury after each inspection or rendering of advice when he continued producing Kepone. It was the operation and existence of the LSP plant, not the conduct of Travelers, which caused the various injuries for which plaintiff seeks damages. Count VII is of the same nature as the allegation made in MacKethan v. Peat, Marwick, Mitchell & Co., supra : that the defendant made it possible for the claimed injuries to occur through the operation of the LSP plant, because plaintiff would have prevented the disaster if Travelers had revealed the 1972 report to him, properly inspected the plant, or properly advised him of the dangers of Kepone. As in MacKethan, the one-year limitations period applies. Since Travelers' alleged conduct ceased no later than July 24, 1975, Count VII is barred by the statute of limitations.

In summary: Count I is DISMISSED as time-barred except insofar as it alleges the infliction of emotional distress; Counts II and III are DISMISSED; Count IV is DISMISSED as time-barred; Count V is DISMISSED except insofar as it attempts to hold Allied liable for republications made on or after July 1, 1976; Counts VI and VII are DISMISSED as time-barred.

All Citations

480 F.Supp. 364, 28 UCC Rep.Serv. 670

Footnotes

1 Kepone is chemically known as decachlorooctahydro-1, 3, 4, metheno-2H-cyclobuta(cd)pentalen-2-one (DMCP). Officially, Kepone is known as chlordecone with the empirical formula C 10Cl 10O.

2 Insurance Company of North America v. General Electric Co., 376 F.Supp. 638 (W.D.Va.1974), on which plaintiff so heavily relies, is inappropriate here. In that case, a deep fryer erupted in flames and caused extensive damage to a building. Judge Dalton held that the five-year period applied in an action against the manufacturer because the initial harm to the building did not occur until the time of the fire; thus, all the damage, whether direct or consequential, occurred at one time. Id. at 648. Judge Dalton was considering only a motion to dismiss, and he emphasized that the manufacturer still could prove intervening causes at a later date. Id. at 649. In any event, this Court has previously expressed its disagreement with General Electric, and adheres to its view that the analytical underpinning of that case was erroneous. See Smithfield Packing Co. v. Dunham-Bush, Inc., 416 F.Supp. 1156 (E.D.Va.1976).

3 Plaintiff, of course, might argue that damage to his reputation would result in damage to his "business" or "profession" as a chemist. Under Section 8-24, however, such damage would be only to future earnings and profits an indirect or consequential injury. More important, since injury to personal reputation ordinarily causes damage to one's business or profession, nearly every defamation action would fall within the coverage of Section 18.2-499. Federated Graphics obviously rejected this theory.

End of Document

199 Va. 196
Supreme Court of Appeals of Virginia

WESLEY JAMES WEAVER
v.
BENEFICIAL FINANCE CO., INCORPORATED AND R. S. COSTIGAN.

Record No. 4677.
|
June 14, 1957.

*196 Present, Hudgins C.J., and Eggleston, Buchanan, Miller, Whittle and Snead, JJ.

Synopsis
Motion for judgment for libel. The Circuit Court of the City of Norfolk, Clyde H. Jacob, J., sustained a special plea in bar and dismissed motion for judgment with prejudice, and plaintiff brought error. The Supreme Court of Appeals, Snead, J., held that since action was based on republication of alleged libelous matter and was commenced within one year after such republication, though more than one year had elapsed since original publication by defendants, whether cause of action was barred by limitations depended upon whether such republication was the natural and probable consequence of original publication or was actually or presumptively authorized or directed by defendants.

Judgment reversed and case remanded for trial on the merits.

Buchanan and Whittle, JJ., dissented.

West Headnotes (8)

[1] **Libel and Slander**
⇐By Others in General

Author of libelous or slanderous matter is liable for any secondary publication or republication or repetition thereof by third persons, provided such republication is the natural and probable consequence of author's act or was actually or presumptively authorized or directed by him and such republication constitutes a new cause of action against original author.

15 Cases that cite this headnote

[2] **Libel and Slander**
⇐By Others in General

Author of libelous or slanderous matter is not liable for any republication or repetition thereof which is the independent and unauthorized act of a third person and not the natural and probable consequence of author's act.

4 Cases that cite this headnote

[3] **Libel and Slander**
⇐Publication

Generally, each time defamatory matter is brought to the attention of a third person there is a new publication constituting a separate cause of action against the person responsible for such new publication.

4 Cases that cite this headnote

[4] **Limitation of Actions**
⇐Form and Requisites in General

When right of action for slander has been once barred by limitations it cannot be revived by admission of defendant that he did utter the slanderous words. Code 1950, § 8-24.

1 Cases that cite this headnote

[5] **Limitation of Actions**
⇐Torts

The running of statute of limitations against right of action for slander cannot be prevented by repetition of the slander, though a separate action will lie for any repetition within the statutory time. Code 1950, § 8-24.

Cases that cite this headnote

[6] **Limitation of Actions**
Torts

Where action based on republication of allegedly libelous letter sent by defendants to government agency by which plaintiff was employed was commenced within one year after republication of letter before promotion board considering plaintiff's record, though more than one year had elapsed since original publication of letter, whether cause of action for libel was barred by limitations depended upon whether republication was the natural and probable consequence of original publication or was actually or presumptively authorized or directed by defendants. Code 1950, § 8-24.

14 Cases that cite this headnote

[7] **Limitation of Actions**
Torts

Motion for judgment for libel based on republication of allegedly libelous letter sent by defendants to government agency by which plaintiff was employed more than one year before commencement of action was not subject to special plea in bar on ground that action was barred by limitations, where action was commenced within one year after republication of letter before promotion board considering plaintiff's record and jury could conclude from letter that defendants were requesting that letter be republished to plaintiff's superiors at a future date or that republication was the natural and probable consequence of their act. Code 1950, § 8-24.

6 Cases that cite this headnote

[8] **Libel and Slander**
Libel

Where republication of libelous matter is the natural and probable result of what original wrongdoer did or is actually or presumptively authorized or directed by original wrongdoer, republication goes not merely to increase the damages, but gives injured person new cause of action against original wrongdoer.

8 Cases that cite this headnote

VIRGINIA REPORTS SYNOPSIS

Error to a judgment of the Circuit Court of the city of Norfolk. Hon. Clyde H. Jacob, judge presiding.

Reversed and remanded.

The opinion states the case.

VIRGINIA REPORTS HEADNOTES AND CLASSIFICATION

(1) Libel and Slander - Republication - Liability of Originator Stated.
1. The author of a defamation is liable for its republication by a third party, provided such republication is the natural and probable consequence of his act, or if he has presumptively or actually authorized its republication. Such republication constitutes a new cause of action against the original author.
(2) Libel and Slander - Republication Natural Consequence - Constitutes New Cause of Action.
2. In his motion for judgment plaintiff alleged that for accommodation of friends he endorsed a note payable to defendant and that upon default by the makers he and defendant arrived at a mutually satisfactory arrangement for payment by him. It was further alleged that despite this agreement defendant in February of 1955 wrote a letter to plaintiff's employer, the Industrial Relations Officer of the Norfolk Naval Air Station, stating that plaintiff was dishonest and insolvent and suggesting that

he might be induced to pay if someone in a supervisory capacity would explain his responsibilities to him; and that in March of 1956 this letter was shown by plaintiff's employer to a promotion board, to plaintiff's detriment. He asked damages for the republication. The trial court sustained a special plea that the one-year statute of limitations had run (on the theory that the only cause of action arose in February, 1955) and dismissed the action. It was held on appeal, however, that the jury might find the republication was a natural consequence of defendant's act, in which case there would be a new cause of action arising in March of 1956 on which the statute would not have run. Consequently the case was remanded for trial on the merits.

END OF VIRGINIA REPORTS HEADNOTES AND CLASSIFICATION

Attorneys and Law Firms

**688 *197 *William N. Eason (Philip White,* on brief), for the plaintiff in error.

Thomas H. Willcox and *Edward R. Willcox, Jr. (Richard B. Spindle, III; Willcox, Cooke & Willcox,* on brief), for the defendants in error.

Opinion

**689 JUDGE: SNEAD

SNEAD, J., delivered the opinion of the court.

Wesley James Weaver, appellant, instituted action on June 8, 1956 against Beneficial Finance Co., Incorporated and R. S. Costigan, appellees, for compensatory and punitive damages in the sum of $50,000 'due to the republication on or about March 21, 1956,' of a certain false, insulting and libelous letter written by appellees to appellant's employer on February 23, 1955.

Appellees filed a special plea in bar in which they averred that the action was barred by the statute of limitations. Appellant moved to dismiss the plea. The trial court overruled the motion to dismiss, sustained the special plea in bar and dismissed the motion for judgment with prejudice, to which action of the court appellant excepted. We granted plaintiff a writ of error.

No evidence was heard and the case is before us, as it was before the trial court, upon the motion for judgment and the special plea in bar. It is conceded by the parties that the one year statute of limitations applies (§ 8-24, Code 1950), and the sole question presented is whether or not the cause of action arose within one year from the date of institution of this action.

Appellant alleged in his motion for judgment that as additional security he gratuitously endorsed a note drawn by William E. Webster and Mary T. Webster, his wife, secured by a deed of trust on certain personal property for a loan of $300 advanced by the appellees to the Websters; that on January 29, 1955 appellees, through their agent, informed appellant that the Websters had defaulted in the monthly payments due on their note and called upon appellant to pay the balance due of $95, at which time appellant paid $5.20 and agreed to pay the then balance on or about June 15, 1955 which was satisfactory with appellees; that on February 23, 1955 appellees unlawfully and with malice wrote an insulting and libelous letter to Industrial Relations Officer, Naval Air Station, Norfolk, Virginia, appellant's employer, with intent to force payment which was not *198 due; that the libelous letter in question was republished on or about March 21, 1956 before a promotion board convened to consider appellant's record, at which time the contents of the letter were first made known to appellant; that the letter suggested that appellant was and is dishonest, insolvent and one to whom credit should not be extended; that it attacked his reputation for integrity; that appellees knew the libelous letter would be a permanent part of his record and would be republished in the future; that the republication of the letter was the natural and probable consequence of the appellees' act, and that the letter written and signed by appellee Costigan, manager of appellee Beneficial Finance Co., Incorporated, who was acting in the ordinary course of his employment, was authorized and ratified by appellee Beneficial.

The alleged libelous letter which was incorporated in the motion for judgment, is dated February 23, 1955, and reads as follows:

'On September 23, 1953, Mr. Weaver, who gave his employment as above secured a loan of $300.00. This money was lent on a fifteen months contract with payments of $24.29 per month. At no time has Mr. Weaver honored his contract promptly and now his account is four months past due. He refuses to answer any correspondence and personal calls have no effect.

'We realize that Government agencies can take no cognizance of a debt complaint against an employee beyond acknowledging receipt of the communication and that there is no legal jurisdiction over Federal pay excepting those matters relating to Government claims. However, it is understood that the Department of the

Navy expects all Naval personnel to discharge acknowledged and just obligations and desires to cooperate with persons and firms when difficulty in obtaining settlements is encountered.

**690 'Instigation of the removal of Mr. Weaver from his employment is not the intent of this company. However, we feel that if someone in a supervisory position will explain his liabilities and the possible effects of same upon himself, he will then be induced to bring his account to date and pay promptly thereafter.

'Any consideration given us in regard to this matter will be greatly appreciated.'

Appellant's cause of action is grounded upon the republication of the letter, on March 21, 1956. He contends that appellees are liable since the republication was the natural and probable consequence of their act or that they actually or presumptively authorized *199 or directed its republication and that the statute of limitations did not begin to run until March 21, 1956, the date of such republication. On the other hand, appellees maintain that the cause of action against them arose on February 23, 1955, the date the letter was written or published, and not on March 21, 1956, the date it was republished by a third party.

[1] [2] It is well settled that the author or originator of a defamation is liable for a republication or repetition thereof by third persons, provided it is the natural and probable consequence of his act, or he has presumptively or actually authorized or directed its republication. This is based upon the principle that such republication constitutes a new cause of action against the original author. However, the original author is not responsible if the republication or repetition is not the natural and probable consequence of his act, but is the independent and unauthorized act of a third party.

In 53 C.J.S., Libel and Slander, § 85, p. 137, it is stated:

'The author of the defamation is liable for any secondary publication which is the natural consequence of his act, and this rule applies both to libel and to slander. On the other hand, the originator of a defamation is not libel for any repetition or republication thereof, or any additional circulation given to it which is not the natural consequence of his act, but results from the independent and unauthorized act of another, that is, where defamatory matter is republished by a person other than the original author, the author is not liable therefor unless the republication is the natural and probable consequence of his own act, or unless he has actually or presumptively authorized or ordered its repetition. Thus, the publisher of a newspaper or magazine has been held not responsible for the acts of third persons who, after the original publication, sell copies of the newspaper or magazine to others.'

Newell, Slander and Libel (4th Ed.) § 303, p. 339, defines the author's liability for repetition by third persons as follows:

'Under the weight of authority the author of a libel or slander is not liable for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control, either as on a direct cause of action or by way of aggravation of damages, and such repetition cannot be considered in law a necessary, natural and probable consequence of the original slander or libel. But the rule has one important qualification. It is a general principle that every one is responsible for the necessary consequences *200 of his act, and it may be that the repetition of a slander or libel may be the natural consequence of the original publication, in which case the author of the original defamatory matter would be liable. And where the words declared on are slanderous per se their repetition by others is the natural and probable result of the original slander.'

For a further discussion of the liability of the author of a defamation for republication and repetition by third persons, see **691 33 Am. Jur., Libel and Slander, § 196, p. 184 and § 197, pp. 185-186; *Sawyer v. Gilmers, Inc.*, 189 N.C. 7, 126 S.E. 183, 41 A.L.R. 1184, and for a discussion of the rules applicable to newspapers and magazines see *Hartmann v. Time,* 166 F.2d 127, 1 A.L.R.2d 370.

[3] In 53 C.J.S., Libel and Slander, § 83, p. 136, it is said 'As a general rule, each time defamatory matter is brought to the attention of a third person there is a new publication constituting a separate cause of action against the person responsible for such new publication.' In [illegible] Judge Whittle, speaking for the court, stated: 'It would seem plain on principle that no matter on how many separate occasions one may utter slanderous words about another (though all may refer to the same transaction) each slander constitutes a new cause of action.' *Cf.* [illegible].

[4] [5] "When the right of action has been once barred by the statute of limitations, it cannot be revived by an admission of defendant that he did utter the slanderous words, nor can the running of the statute be prevented by repetitions of the slander, although, of course, a separate

action will lie for any repetition within the statutory time.' 53 C.J.S., Libel and Slander, § 156, p. 239, *Cf. Jean v. Hennessy, supra.*

[6] This action is expressly based on a republication of the alleged libelous letter on or about March 21, 1956 and not upon the original publication on or about February 23, 1955. If it be determined by the jury that the republication thereof was the natural and probable consequence of the original publication, or that appellees actually or presumptively authorized or directed its republication, then this latter publication constitutes a separate cause of action, and suit was timely instituted against appellees who were responsible for the new publication.

[7] Appellees stated in their letter to Industrial Relations Officer 'Instigation of the removal of Mr. Weaver from his employment is not ***201** the intent of the company. However, we feel that if someone in a supervisory position will explain his liabilities and the possible effects of same upon himself, he will then be induced to bring his account to date and pay promptly thereafter.' The jury could conclude from this statement that appellees were requesting that the letter be republished to his superiors at a future date or that the republication was the natural and probable consequence of their act.

Appellees cite *Housing Authority v. Laburnum Corp.,* 195 Va. 827, 80 S.E.2d 574 in support of their contention that the cause of action occurred on February 23, 1955, when the letter was published, and that the one year limitation commenced at that time. In that case it was alleged that a defective union in a gas pipe installed by defendant's subcontractor caused the damages claimed. There was only one installation of the pipe and, therefore, only one wrong committed. We held that the plaintiff's cause of action arose and the statute of limitations began to run when the defective pipe was installed, although it was not discovered until later. The case at bar is distinguishable in that this action is not based on the original publication of the letter, but upon a republication there of at a later date when its contents were revealed by the Industrial Relations Officer to a promotion board. The republication was a new wrong and the alleged cause of action arose at this time. Our holding in this case does not impair the rule enunciated in *Housing Authority v. Laburnum Corp., supra.*

Appellees argue that when defamatory material is republished by a third person and such republication is a natural and probable consequence of the author's act, or is presumptively or actually authorized or directed to be republished by a third ****692** person, the principles stated above relate merely to the damages which follow from the original publication. Hence, they say, this does not change the rule that the statute of limitations begins to run when the cause of action initially arises.

[8] It is true that in an action based on an original publication, evidence of a republication bears on the quantum of damages. But that is not the case here. When, as the motion here alleges, the republication of a libelous article by a third person is the natural and probable result of what the wrongdoer did, or its republication is actually or presumptively authorized or directed by the original wrongdoer, then the republication goes not merely to increase the ***202** damages of the injured person, but gives the latter a new cause of action against the original author.

As has been said, this action was brought on the republication of the letter, which is an alleged new cause of action. It necessarily follows that if the jury should conclude that its republication resulted from the natural and probable consequence of appellees' act, or that they actually or presumptively authorized or directed its republication, then the statute of limitations did not begin to run until on or about March 21, 1956, the date of such republication.

For the reasons stated, the judgment will be reversed and the case remanded for a trial on the merits.

BUCHANAN and WHITTLE, JJ., dissenting.

Reversed and remanded.

BUCHANAN, J., dissenting.

I cannot assent to the proposition that the statute of limitation on the alleged libel in this case runs not from the date of its publication but from the date of the alleged republication. It seems to me unwise to establish the principle that after the publication of a libelous letter a new and independent cause of action arises against its author each time its recipient shows it to some third person if, in the opinion of a jury, the recipient's act was a natural and probable consequence of the original wrong, or was actually or presumptively authorized by the author. On that basis suits may be brought, I suppose, just as long as the author lives and the recipient is able to exhibit the letter.

I do not understand the authorities cited in the court's opinion to say that every such republication establishes a new date from which the limitation begins to run. They simply say that it is generally agreed that the author of a defamation who publishes it is liable for the injurious consequences of a republication thereof by the person to whom it is addressed if such republication is authorized or is the natural and probable result of the original publication. 33 Am. Jur., Libel and Slander, § 197, p. 185. Or, as expressed in 53 C.J.S., Libel and Slander, § 83, p. 136, there is in such event 'a separate cause of action against *the person responsible* for such new publication.' (Emphasis added) That is far from saying that a new cause of ***203** action, subject to a new period of limitation, arises against the original author of the libel in every instance that the libel is published afresh by the person who first received it.

The question dealt with by the authorities cited in the opinion is whether liability against the author exists for such republication, not how long it will continue; and the question has usually arisen on the admissibility of evidence in actions against the original author relating to repetitions or new publications of the original libel. Not all the courts have agreed as to the extent of the original author's responsibility and a different rule is generally recognized as between libel and slander. See the opinion of Judge Sanborn in *Maytag v. Cummins,* 171 C.C.A. 110, 260 F. 74, 16 A.L.R. 712 and Annotation at 726.

****693** *Sawyer v. Gilmers, Inc.,* 189 N.C. 7, 126 S.E. 183, 41 A.L.R. 1184, dealt with the admissibility of evidence of repetition of a slander by third persons in an action against the author of it. The court said:

'We hold it to be the law in this state that the author of a defamation, whether it be libel or slander, is liable for damages caused by or resulting directly and proximately from any secondary publication or repetition which is the natural and probable consequence of his act. He is not liable for such damages where the secondary publication or repetition is without authority from him, express or implied. If the defamation is uttered under such circumstances as to time, place, or conditions as that a repetition or secondary publication is the natural and probable consequence of the original defamation and damage resulting therefrom, he is liable for such damage and evidence of such repetition or secondary publication and of damages resulting therefrom is admissible.'

A libel is published when the defamatory writing is read by or otherwise communicated to someone other than the person defamed. *Weidman v. Ketcham,* 278 N.Y. 129, 15 N.E.2d 426. When that is done the wrong is committed, the cause of action arises and the limitation on the right to sue should begin at that time. Questions of repetition and republication are relevant on the quantum of damages, depending in libel cases on whether the repetition or republication was authorized by the author or was a natural and probable consequence of the original act. *Jean v. Hennessy,* 69 Iowa 373, 28 N.W. 645, cited in the court's opinion, seems to hold no more than that. See also Newell, Slander and Libel, 4 ed., § 299, p. 336; *Wolfson v. Syracuse Newspapers,* 279 N.Y. 716, 18 N.E.2d 676; ***204** *Gregoire v. G. P. Putnam's Sons,* 298 N.Y. 119, 81 N.E.2d 45; *Rigney v. W. R. Keesee & Co.,* 104 W.Va. 168, 139 S.E. 650, 54 A.L.R. 1139; 53 C.J.S., Libel and Slander, § 156, p. 238.

We aligned ourselves pretty closely with this view in *Luhring v. Carter,* 193 Va. 529, 69 S.E.2d 416. There the action was brought for a slander which was alleged to have occurred December 16, 1948. Later the plaintiff filed a bill of particulars alleging a repetition of the slander. The defendants moved to strike out this allegation on the ground that it had the effect of allowing the plaintiff to amend his original action and it was argued that it set up a new and distinct cause of action committed January 9, 1949, not by the defendants but by a third party, and a tort that was actually barred by the statute of limitations before the bill of particulars was filed. We held that the repetition was a natural and probable result of the slander and an element of damage that was a natural, direct and probable result of the original wrong, and 'that the bill of particulars did not state a new and distinct cause of action against defendants nor was it an amendment to the original notice of motion. It only particularized, specified, and pointed out the intended and accomplished result of the original statements and the damages directly caused thereby.'

The present opinion states that in an action on the original publication evidence of a republication bears on the quantum of damages. That would necessarily be because it is an element of the original cause of action, as held in *Luhring v. Carter.* To say now, contrary to that holding, that a republication creates a new and distinct cause of action is to give the plaintiff two causes of action for an element of damage arising from the same wrong.

We are committed in Virginia to the rule that in tort actions the limitation on the right to sue begins to run when the wrong is committed and not when the plaintiff discovers that he has been damaged. *Street v. Consumers Min. Corp.* 185 Va. 561, 39 S.E.2d 271; *Housing Authority v. Laburnum Corp.,* 195 Va. 827, 838, 80 S.E.2d 574, 581.

**694 I think the judgment below should be affirmed.

MR. JUSTICE WHITTLE joins in this dissent.

All Citations

199 Va. 196, 98 S.E.2d 687

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