

NORTH CAROLINA  
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
05 CVS 4005

KEVIN A. MONCE,

Plaintiff

v.

NANCY G. DEAS and EDNA E. DEAS,  
Defendants

**Defendants' Memorandum of Law  
In Support of Motion for  
Judgment on the Pleadings**

Defendants Nancy G. and Edna E. Deas, through their undersigned counsel of record and pursuant to Rule 5(a1) of the North Carolina Rules of Civil Procedure, respectfully submit this memorandum of law in support of their Motion for Judgment on the Pleadings.

**Summary of Motion**

Pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure, defendants are entitled to the entry of judgment on the pleadings in their favor because the complaint and the verified answer filed in this cause demonstrate on their face that the plaintiff's libel claim is barred by the applicable statute of limitations.

**Parties and Pertinent Facts**

The plaintiff is a veterinarian. The defendants are sisters whose pet Manchester terrier, Alex, was treated by the plaintiff in January 2000. The complaint, which was filed March 24, 2005, alleges that the plaintiff was defamed by two statements published on [www.aligus.com](http://www.aligus.com), an Internet website created by the defendants. The verified complaint asserts a single claim, for libel *per se*.

The defendants' verified Amended Answer was filed and served on October 3, 2005. In it, defendants admit that they published both of the statements about which the plaintiff complains – the first in November 2002 and the second between December 15, 2002 and February 14, 2003. The verified Amended Answer further states that each of the statements at issue remained on the defendants' website "continuously and without material alteration from the date of its first publication until after the date of the plaintiff's complaint." The verified answer further asserts, as the defendants' First Affirmative Defense, that "Plaintiff's claims are barred by the applicable statute of limitations."

### **Argument**

Because the formal pleadings reveal no dispute that the statements about which the plaintiff complains were published more than one year before this action was instituted, the plaintiff's claim for libel is barred by the one-year statute of limitations imposed by N.C. Gen. Stat. § 1-54(3).

**1. A motion for judgment on the pleadings is an appropriate vehicle for asserting that a claim is barred by the applicable statute of limitations.**

A motion for judgment on the pleadings is intended to dispose of baseless claims when the formal pleadings reveal their lack of merit. *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974); *George Shinn Sports, Inc. v. Bahakel Sports, Inc.*, 99 N.C. App. 481, 486, 393 S.E. 2d 580, 583 (1990). Judgment on the pleadings is proper when the pleadings reveal no genuine issue of material fact and present only questions of law. *Ragsdale* at 137, 209 S.E.2d at 499. When ruling on a motion for judgment on the pleadings, the court is to

consider only the pleadings and any attached exhibits, which become part of the pleadings. *Gore v. Nationsbank Ins. Co., Inc.*, 153 N.C. App. 520, 521, 570 S.E.2d 115, 116 (2002).

It is well settled that a motion for judgment on the pleadings is an appropriate vehicle for asserting that a claim is barred by the applicable statute of limitations. See, e.g., *Toomer v. Branch Banking and Trust Co.*, \_\_\_ N.C. App. \_\_\_, 614 S.E.2d 328 (2005); *Groves v. Community Housing Corp. of Haywood County*, 144 N.C. App. 79, 548 S.E.2d 535 (2001); *Aetna Cas. & Sur. Co. v. Anders*, 116 N.C. App. 348, 447 S.E.2d 504 (1994). Judgment on the pleadings in favor of a defendant who asserts the statute of limitations is proper when all of the facts necessary to establish the limitation are alleged or admitted. *Flexolite Elec., Ltd. v. Gilliam*, 55 N.C. App. 86, 284 S.E.2d 523 (1981).

**2. In resolving a motion for judgment on the pleadings, the court must treat the non-movant's allegations as true with respect to all controverted facts but must grant the motion if the uncontroverted facts demonstrate that the movant is entitled to judgment.**

Plaintiff presumably will argue that judgment on the pleadings is disfavored under North Carolina law, and that the standard imposed on the movant is high. Both statements are correct as fundamental propositions or principles of North Carolina, but neither precludes the entry of judgment in the defendants' favor in this case.

As stated by the late Justice Sam J. Ervin, Jr., the rules that apply to the resolution of a motion for judgment are as follows:

When a party moves for judgment on the pleadings, he admits these two things for the purposes of his motion, namely: (1) the truth of all well-pleaded facts in the pleading of his adversary, and (2) the untruth of his own allegations in so far as they are controverted by the pleading of his adversary.

*Erickson v. Starling*, 235 N.C. 643, 656, 71 S.E.2d 384, 393 (1952) (emphasis supplied).

As explained below, the pleadings in this case demonstrate that the facts as to when the statements at issue were published, and thus when the statute of limitations began to run, are not controverted. Accordingly, under Justice Ervin's rules the defendants are entitled to have judgment entered in their favor.

**3. The facts pertinent to a resolution of defendants' motion are not controverted by the pleadings.**

At paragraphs 15 and 16, the plaintiff's complaint makes the following allegations about the statements he claims are libelous:

15. The headline on the home page of the *aligus.com* web site reads, "Veterinary Malpractice, Incompetence & Negligence." Immediately below that headline are the words, "Dana Jones, DVM, Durant Road Animal Hospital" and the words "Kevin Monce, DVM, VetSound, Inc."

16. Also appearing on the home page of the web site is the following: "The North Carolina Veterinary Medical Board decided our complaint March 23, 2001. It issued some discipline to the veterinarians nine months later. Included were reprimands for incompetence, gross negligence, or other malpractice in the practice of veterinary medicine."

The complaint does not include any allegations as to when the statements described in paragraphs 15 or 16 were published.

In their verified Amended Answer, the defendants responded to paragraphs 15 and 16 of the complaint as follows:

15. Admitted that the language quoted in paragraph 15 of the Complaint about which plaintiff complains was published on the web site [www.aligus.com](http://www.aligus.com) in November, 2002 and remained there continuously and without material alteration from the date of its first publication until after the date of the plaintiff's complaint.

16. Admitted that the language quoted in paragraph 16 of the Complaint about which plaintiff complains was published on the web site [www.aligus.com](http://www.aligus.com) between December 15, 2002 and February 14, 2003, and remained there continuously and without material alteration from the date of its first publication until after the date of the plaintiff's complaint.

In sum, the plaintiff's complaint includes no allegation as to when the allegedly libelous statements were published, whereas the defendants' verified Amended Answer states that they were published well over one year prior to the date on which the complaint was filed. Thus when the formal pleadings are considered in light of Justice Ervin's rule, there is no controversy with respect to plaintiff's allegation that the defendants published the statements about which he complains, but it also is undisputed that they were published more than a year before the plaintiff instituted this action.

**4. Under North Carolina law the statute of limitations for a claim of libel begins to run when the allegedly libelous statements are published.**

It is well settled under North Carolina law that in order to escape the bar of the statute of limitations applicable to claims for libel, the action must be commenced within one year from the date on which the claim accrues, and that

the action accrues at the date of the publication of the defamatory words, regardless of the fact that the plaintiff may become aware of them, or of the identity of the author, at a later date. *Gibson v. Mutual Life Ins. Co. of New York*, 121 N.C. App. 284, 465 S.E.2d 56 (1996); *Price v. J.C. Penney Co., Inc.*, 26 N.C. App. 249, 252, 216 S.E.2d 154, 156, *cert. denied*, 288 N.C. 243, 217 S.E.2d 666 (1975).

**5. The allegedly defamatory statements at issue were published when the defendants first posted them on their website.**

The defendants are not aware of any North Carolina decision addressing the issue of when the statute of limitations begins to run for libel purposes with respect to statements posted on an Internet website, but cases from other jurisdictions plainly demonstrate that the general rule is that the law treats Internet publications no differently from print or broadcast publications, and that the statute of limitations begins to run for libel purposes when the statements at issue are first posted on the Internet. See, e.g., *Firth v. State*, 98 N.Y.2d 365, 775 N.E.2d 463, 747 N.Y.S.2d 69 (2002); *Van Buskirk v. The New York Times Co.*, 325 F.3d 87 (C.A. 2, 2003); *Mitan v. Davis*, 243 F. Supp. 2d 719 (W.D. Ky., 2003); *Lane v. Strang Communications Co.*, 297 F. Supp. 2d 897 (N.D. Miss., 2003); *McCandliss v. Cox Enterprises, Inc.*, 265 Ga. App. 377, 593 S.E.2d 856 (2004); *Abate v. Maine Antique Digest*, 17 Mass. L. Rptr. 288, 2004 WL 293903 (Mass. Super., 2004); *Traditional Cat Ass'n, Inc., v. Gilbreath*, 118 Cal. App. 4th 392, 13 Cal. Rptr. 3d 353 (2004); *Churchill v. State*, 378 N. J. Super. 471, 876 A.2d 311 (2005).

**Conclusion**

Consideration of the pleadings reveals no controversy with respect to the critical facts that the statements at issue in this lawsuit were published in 2002 or 2003. Therefore, the plaintiff's claim for libel *per se*, which was not asserted until April, 2005, is barred by the one-year statute of limitations in N.C. Gen. Stat. §1-54(3).

Respectfully submitted this 30<sup>th</sup> day of November, 2005.

**EVERETT GASKINS HANCOCK & STEVENS, LLP**

By: 

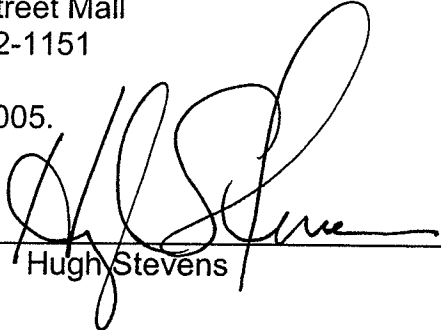
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Amended Answer was served on counsel by hand delivering a copy of the same to the following:

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This the 3<sup>rd</sup> day of November, 2005.

  
\_\_\_\_\_  
Hugh Stevens