

old terrier owned by Edna and Nancy Deas. After Alex died, the Deas filed complaints with the North Carolina Veterinary Medical Board against Dr. Jones and Dr. Monce, alleging a variety of acts of negligence and malpractice.

The Veterinary Medical Board issued a notice of reprimand to Dr. Monce, informing him that he could either accept the reprimand or refuse it and the board would begin a contested case in the Office of Administrative Hearings. Dr. Monce refused the reprimand and the board began a contested case. The contested case was based on two complaints, the one charging negligence and malpractice by the Deas and a second complaint initiated by the board itself for certain regulatory violations such as failing to report address and practice name changes and failure of Dr. Monce to have his trailer with diagnostic equipment inspected by the board.

Before the contested case came to hearing, Dr. Monce and the Veterinary Medical Board entered a Consent Order in April 2003. In the order Dr. Monce acknowledged and accepted discipline for certain regulatory violations that had been raised by the board. There were no admissions, findings or conclusions concerning professional malpractice, incompetence or negligence. The effect of the order was to dismiss the complaint filed by the Deas.

In November 2002 the Deas launched a website, aligus.com, dedicated to their complaints about the treatment of Alex. The headline on the home page reads: "Veterinary Malpractice, Incompetence & Negligence." Immediately below the headline are the words "Dana Jones, DVM, Durant Road Animal Hospital" and the words "Kevin Monce, DVM, VetSound, Inc." The home page also included 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 text of the website was revised from time to time by Nancy Deas, generally with the addition of new documents. It remained on line until April 4, 2005.

Dr. Monce filed his complaint on March 24, 2005.

ARGUMENT

I. THE STATEMENTS ON THE ALIGUS.COM WEBSITE ARE LIBELOUS *PER SE*.

The Deas appear not to contest that the statements about Dr. Monce on their web site are libelous *per se*. “[F]alse words imputing to a merchant or business man conduct derogatory to his character and standing as a business man tending to prejudice him in his business are actionable, and words so uttered may be actionable *per se*.” *Clark v. Brown*, 99 N.C. App. 255, 261, 393 S.E.2d 134, 137 (1990). In *Clark* the libelous *per se* statement was that the job performance of the plaintiff, an assistant district attorney, displayed “Incompetence.”

When words that are libelous *per se* are spoken or written, the law raises a *prima facie* presumption of malice and a conclusive presumption of legal injury and damage. *Id.*

II. THE STATUTE OF LIMITATIONS HAS NOT RUN ON PLAINTIFF’S CLAIM.

The Deas’ motion for judgment on the pleadings is based solely on the argument that the statute of limitations has expired. Under current North Carolina case law, the statute has not expired.

The statute of limitations for an action for libel is set at one year by G.S. 1-54(3). As the Deas correctly state in their brief, the action accrues at the time of publication,

regardless of the fact that the plaintiff may not discover the identify of the author until later. *Iadanza v. Harper*, __ N.C. App. __, 611 S.E.2d 217, 222-23 (2005) (citing *Gibson v. Mutual Life Ins. Co. of N.Y.*, 121 N.C. App. 284, 465 S.E.2d 56 (1996)).

It is undisputed that placement of the libelous statements on the aligus.com web site constitutes publication, and that the Deas first placed the libelous statements on the web site in November 2002. The legal issue for the Court is whether the statute of limitations runs from the *first* publication of the statements, and precludes any action for libel more than a year after that date, or whether the statute runs from the *most recent* publication of the statement on the web site, bringing Dr. Monce's lawsuit within the one-year statute.

The Deas are asking the Court to adopt the "single publication rule" for libel actions rather than the "multiple publication rule" which has been the general rule at common law:

The general rule that each communication of a defamatory statement to a third person constitutes a new publication which gives rise to a cause of action, is applicable to mass media publications in some states in the form of the 'multiple publication' rule. Under this rule, each time a libelous article is brought to the attention of a third person a new publication has occurred; each publication is a separate actionable tort; and each time a magazine containing a libelous statement is sold or distributed, a new publication has occurred and a fresh tort committed, which, defenses aside, is actionable.

50 Am. Jur. 2d, *Libel and Slander*, § 264 (2005). A number of jurisdictions have recognized (in some instances by adoption of the Uniform Single Publication Act) a "single publication rule" under which a single edition or issue of a publication constitutes a single publication and publication is considered complete as of the last day of that mass distribution. *Id.*

There is no appellate decision directly on point in North Carolina, but the only authority that exists says that this state follows the multiple publication rule and that each

publication constitutes a separate tort. In *Sizemore v. Maroney*, 263 N.C. 14, 138 S.E.2d 803 (1964), the issue before the court was whether North Carolina had jurisdiction over a libel action brought by a state resident against union officials in West Virginia. The Supreme Court held that North Carolina did not have jurisdiction, but in doing so the court discussed the nature of libel actions based on mailed statements, clearly articulating the multiple publication rule:

Unless otherwise provided by statute, libelous matter sent through the mails is generally actionable either at the place of posting or at the place of receipt by the addressee, even in another state, because libel actions are transitory in their nature. *The rationale of the rule is that each time a libelous matter is brought to the attention of a third party a new publication has occurred, and that each publication is a separate tort.*

Sizemore v. Maroney, 263 N.C. at 21 (emphasis added).

In *Ryan v. Brooks*, 634 F.2d 726, 728, n. 1 (4th Cir. 1980), a libel case decided on the issue of whether the plaintiff was a public figure, the Fourth Circuit noted that the action had been filed more than a year after first publication, but that the trial court had applied the multiple publication rule:

This action, filed more than one year after the date of publication of the book, would be barred by North Carolina's one-year statute of limitations for libel actions if the 'single publication' rule, followed in the majority of states, had been applied here. But the district court apparently applied the 'multiple publication' rule, under which a new cause of action accrues each time the libel is 'published,' that is, read by a third party. This may well be the rule that the North Carolina Supreme Court would adopt, but thus far it has considered the question of the accrual of a libel cause of action only in the context of deciding a jurisdictional issue. See *Sizemore v. Maroney*, 263 N.C. 14, 138 S.E.2d 803 (1964).

The only other case which appears to address the issue even indirectly is *Gibson v. Mutual Life Ins. Co. of N. Y.*, *supra*, in which the Court of Appeals rejected the plaintiff's

argument that a "continuing tort exception" should be applied to his libel action, saying: "In fact, our Courts have stated that each publication of defamatory material is a separate tort. See *Sizemore v. Maroney*, 263 N.C. 14, 21, 138 S.E.2d 803, 808 (1964)." *Gibson*, 121 N.C. App. at 287.

Thus, to the extent that the North Carolina appellate courts have spoken on the issue — and the federal courts have spoken on what appears to be the state courts' view of the issue — the multiple publication rule still is in effect in North Carolina. Based on that rule, each separate publication by the Deas, including the publication on their web site as late as the day the complaint was filed, constitutes a separate tort, meaning Dr. Monce's action is not barred by the statute of limitations.

Even in states that follow the single publication rule, republication of the libelous statement can result in a new action:

Under the single publication rule, however, it has been stated that the publisher of the defamatory matter is liable if he reprints it or republishes a new edition; or, as sometimes stated, the single publication rule does not include separate aggregate publications on different occasions, as, in such circumstances, the publication reaches a new group and the repetition justifies a new cause of action. In light of this principle, several courts have held that the printing of a later edition of a book, either in paperback form or in the same form as the original edition, did not constitute a single publication within the meaning of the single publication rule, thereby giving rise to a separate cause of action.

50 Am. Jur. 2d, *Libel and Slander*, § 264 (2005).

Thus, even the single publication rule applied in North Carolina, the Deas' republication of their libelous statements on numerous occasions within the last year would support Dr. Monce's action. The Deas have regularly revised and republished their web site, adding and deleting information.

CONCLUSION

The Deas' motion for judgment on the pleadings should be denied. Such motions are not favored, and the motion can be granted in this case only by ignoring the Supreme Court's declaration that the multiple publication rule applies in North Carolina.

RESPECTFULLY SUBMITTED, this 8th day of November 2005.

THARRINGTON SMITH, L.L.P.

Michael Crowell

Michael Crowell
State Bar No. 1029
209 Fayetteville Street Mall
Post Office Box 1151
Raleigh, North Carolina 27602-1151
Telephone: (919) 821-4711
Facsimile: (919) 829-1583
mcrowell@tharringtonsmith.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I certify that a copy of the **Plaintiff's Memorandum Of Law On Defendants' Motion For Judgment On The Pleadings** was served on the defendants by hand delivery to:

Hugh Stephens
Everrett, Gaskins, Hancock & Stevens
127 W. Hargett Street, Suite 600
Raleigh, North Carolina 27601

This 8th day of November 2005.

Michael Crowell

Michael Crowell