STATE OF MICHIGAN

IN THE SUPREME COURT

KENNETH MITAN,

Plaintiff-Appellee,

vs.

MAURA CAMPBELL,

Defendant-Appellant.
_____/

Supreme Court
Docket No. 126451

Court Of Appeals
Docket No. 242486

Ingham County
Circuit Court
No. 01-94411-NZ

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126451

SUPPLEMENTAL BRIEF OF PLAINTIFF-APPELLEE

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STATEMENT OF QUESTION PRESENTED

I. DID THE COURT OF APPEALS ERR IN REVERSING THE TRIAL COURT'S GRANT OF SUMMARY DISPOSITION?

The Court of Appeals said "No"
Appellant says "Yes"
Appellee says "No"

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

This is a defamation action based upon statements made by Defendant-Appellant Maura Campbell ("Campbell"). Campbell's statements were broadcast on television, on February 25, 2000, by WXYZ-TV (First Amended Complaint, ¶4).

The instant case was commenced on February 26, 2001, when Plaintiff-Appellee Kenneth Mitan ("Mitan") filed a Complaint against Campbell in Oakland County Circuit Court.

On March 23, 2001, in lieu of answering the Complaint, Campbell moved for summary disposition because the applicable statute of limitations is one year, and the Complaint was filed one year and one day after the broadcast.

On May 2, 2001, Mitan filed his response to Campbell's motion for summary disposition. In it, Mitan argued that the action was not barred by the statute of limitations because February 25, 2001 was a Sunday. Mitan also filed his First Amended Complaint that same day (May 2, 2001).

When it came on for hearing on May 9, 2001, the Oakland County Circuit Court persuaded Campbell to voluntarily withdraw her motion for summary disposition, due to the fact that February 25, 2001 was a Sunday.

Campbell subsequently filed an Answer and moved for a change of venue. The Oakland County Circuit Court granted her motion, and venue was changed to Ingham County Circuit Court.

On January 28, 2002, Campbell filed a second motion for summary disposition. This motion was again based on the statute of limitations, but now argued that Campbell made the statements during a videotaped interview on February 22, 2000 (three days before WXYZ-TV broadcast them).

On April 24, 2002, Mitan filed his response to that motion, asserting that the statute of limitations ran from the date that the videotaped interview was broadcast, and not from the date that the videotaped interview was made.

When that motion came on for hearing, on May 1, 2002, the Ingham County Circuit Court ruled:

> Well, my opinion is that Michigan law does not cover this specific point. And I think that if parties are shown to be, by the facts to be acting in concert, you could have one liable, one responsible for the later statements and liable for the later one. But in this case where someone is interviewed and the third party may never repeat the statement and could repeat it, could use it, may cut part of it, they may even change it, whatever they wanted it to say, the first party is not responsible for that later admission unless there's some other showing. So I believe the statute has run in this case. And I might add this is the brush of my first impression as to the law. If you would have sued a week earlier, you know, you could have solved all these problems, Mr. Mitan, but I understand sometimes you can't get to court. So that's my ruling. (Transcript, May 1, 2002, Page 11, Line 24 to Page 12, Line 13).

On May 17, 2002, the Ingham County Circuit Court entered the Order which memorialized that ruling.

On May 30, 2002, Mitan filed a motion for reconsideration.

On June 10, 2002, the Ingham County Circuit Court entered an Order denying Mitan's motion for reconsideration.

On July 1, 2002, Mitan filed a Claim Of Appeal to the Court of Appeals.

On May 20, 2004, the Court of Appeals issued an Opinion reversing the decision of the Ingham County Circuit Court and remanding the matter for further proceedings.

ARGUMENT

I. THE COURT OF APPEALS DID NOT ERR IN REVERSING THE TRIAL COURT'S GRANT OF SUMMARY DISPOSITION

A. Applicable Standard Of Review

The applicable standard of review is *de novo*, because conclusions of law by the trial court are involved. Beason v. Beason, 435 Mich. 791, 460 N.W. 2d 207 (1990).

B. Discussion

"(T)he authorized or anticipated repetition of a defamation by a third person gives rise to a cause of action upon which the statute of limitations runs from the date of the repetition." 50 Am Jur 2d, Libel and Slander § 427.

The Court of Appeals correctly applied this principle in the instant case:

> While a reporter need not publish the information received during an interview, one could plausibly argue that publication of the interview or portions of it is a natural and, indeed, the intended result of the interview being conducted in the first place. (Opinion, at 2).

In fact, the Affidavit of Maura Campbell (the "Affidavit") states that Campbell "had no other contact with Shelly Smith regarding Kenneth Mitan". (Affidavit, ¶7, Exhibit A to the Application for Leave to Appeal).

Campbell's statements were made during a videotaped interview. The subsequent broadcast *was the exclusive purpose* of that videotaped interview.

Obviously, WXYZ-TV's repetition of Campbell's statements was authorized and anticipated. In the Affidavit, Campbell explains that the interview occurred at the broadcaster's request:

> On February 18, 2000, I received a telephone call from Shelly Smith, a reporter for Channel 7, WXYZ-TV, a Detroit, Michigan area television station. Ms. Smith requested an interview with me regarding wage and hour claims being handled by the Department of Consumer and Industry Services related to Kenneth Mitan, a business owner. An interview was scheduled for February 22, 2000 at 10:00 a.m. (Affidavit, ¶3, Exhibit A to the Application for Leave to Appeal).

Campbell made her statements to WXYZ-TV *with full authorization and anticipation* that WXYZ-TV would repeat her statements in a subsequent broadcast. As a result, the statute of limitations does not bar Mitan's claim based upon that subsequent broadcast.

Moreover, WXYZ-TV's subsequent broadcast was *the natural and probable result* of Campbell's videotaped interview:

> (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." *Weaver v. Beneficial Financial Co.*, 199 Va. 196, 98 S.E.2d 687, 692 (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. Moore v. Allied Chemical Corporation, 480 F. Supp. 364, 376 (E.D. Virginia, 1979).

In Weaver v. Beneficial Finance Co., 199 Va. 196, 98 S.E. 2d 687 (1957), the Virginia Supreme Court was faced with the same issue that was presented in the instant case. A defamatory statement was made by the defendant more than a year before the complaint was filed. Claims based upon that statement were barred by the one-year statute of limitations. However, the defendant's statement was repeated by a third party less than one year before the complaint was filed. As a result, the Virginia Supreme Court concluded that the action was not barred by the statute of limitations:

> When, as the motion here alleges, the republication of a libelous article by a third person is a natural and probable result of what the wrongdoer did, or its republication is actually or presumptively authorized by the original wrongdoer, then the republication goes not merely to increase the damages of the injured person, but gives the latter a new cause of action against the original author...It necessarily follows that if a 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 did not begin to run* until on or about March 21, 1956, the date of such republication. 98 S.E. 2d at 692. (Emphasis added.)

The Virginia Supreme Court has also applied the same doctrine to oral statements which have been repeated by third parties:

> Though the repetition was verbal, it was nevertheless an intended circumstance in a contemplated sequence of events and thus not mere hearsay but an item or element of damage that was a natural, direct and probable result of the original wrong. Luhring v. Carter, 193 Va. 529, 69 S.E. 2d 416, 421 (1952).

In the instant case, Campbell's statements were not made in private, in confidence, or with the intention that they would

not or should not be repeated. Instead, Campbell's statements were made *for the exclusive purpose of being repeated by third party WXYZ-TV*. WXYZ-TV's repetition was a natural, direct, and probable result of Campbell's statements, and that repetition was actually and presumptively authorized by Campbell. *At the minimum, there is a question of material fact regarding Campbell's intentions*, which should have prevented summary disposition from being granted.

Campbell argues that the Court of Appeals erred in finding that an issue of fact exists regarding whether the broadcast was the natural and probable result of the original publication. Yet, nothing in the Affidavit indicates that it was anything except the natural and probable result. Additionally, discovery had not been completed in the instant case. Summary disposition is premature if granted before discovery on a disputed issue is complete. Huff v. Ford Motor Co., 127 Mich. App. 287, 338 N.W. 2d 387 (1983). Kortas v. Thunderbowl and Lounge, 120 Mich. App. 84, 327 N.W. 2d 401 (1982).

Finally, while federal courts recognize the "single publication" rule, that rule not been adopted in Michigan:

> Not being controlled by Michigan authority, I feel free to state that the "single publication" doctrine with respect to the statute of limitations appears to be more reasonable, and I therefore adopt it. Tocco v. Time, Inc., 195 F. Supp. 410 (E.D. Michigan, 1961).

However, even if the "single publication" rule did apply in the instant case, *the broadcast, on February 25, 2000, (not*

the February 22, 2000 interview) would constitute the "single publication":

> The single publication rule is a common law creation which applies to mass publication printings or broadcasts and conclusively presumes that the cause of action accrued at the single date of first publication...The general rule is that *the single publication occurs when the defamatory material is released for sale* in accord with trade practices. Crook v. Peacor, 579 F. Supp. 853, 856-857 (E.D. Michigan, 1984). (Emphasis added.)

In the instant case, the defamatory material was "released for sale" when it was publicly broadcast (on February 25, 2000), not when the private interview occurred (on February 22, 2000).

The videotaped interview prior to the broadcast is similar to a draft of a written article. The draft of a written article does not constitute "single publication":

> The single publication rule in no way implies that the single date of publication will be at the time when a draft of the article is circulated or otherwise viewed by individuals involved in its publication. Crook v. Peacor, supra, 579 F. Supp. at 856.

For the same reasons, a videotaped interview prior to a broadcast does not constitute "single publication".

CONCLUSION AND RELIEF REQUESTED

WHEREFORE, the Appellee, Kenneth Mitan, respectfully requests that this Court deny the Application for Leave to Appeal.

Respectfully submitted,

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Dated: January 24, 2005

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PROOF OF SERVICE

Keith J. Mitan certifies that he served a true copy of the SUPPLEMENTAL BRIEF OF PLAINTIFF-APPELLEE and this PROOF OF SERVICE in connection with the above captioned matter on:

Patrick J. O'Brien
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by ordinary U.S. mail, with postage fully prepaid thereon, on this 24th day of January, 2005.

Keith J. Mitan

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JAN 24 2005
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