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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Jim Arthaud, Plaintiff and Appellant, v. Jim Fuglie, Defendant and Appellee.	Supreme Court No. 20220234

Appeal from Order Dated June 17, 2022,
Case No. 08-2021-CV-1885
County of Burleigh, South Central Judicial District
The Honorable Cynthia Feland, District Judge, Presiding

REPLY BRIEF OF APPELLANT JIM ARTHAUD

ORAL ARGUMENT REQUESTED

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LAW AND ARGUMENT

I. The Discovery Rule Applies to Defamation Claims.

[¶ 1] Jim Fuglie ("Fuglie") begins his brief by taking an extreme position that was not endorsed by either the district court in this case nor the United States District Court for the District of North Dakota in *Atkinson*: that the discovery rule does not apply to defamation claims. (Brief of the Appellee Jim Fuglie ("Fuglie Brief"), § I.A.) There is no principled basis for this argument. As discussed at length by Jim Arthaud ("Arthaud") in his principal brief, this Court has liberally applied the discovery rule to numerous statutes of limitations, including the very subsection implicated by this lawsuit. *See Atkinson v. McLaughlin*, 462 F. Supp. 2d 1038, 1055 (D.N.D. 2006) (collecting cases); *Hebron Pub. Sch. Dist. No. 13 of Morton Cnty. v. U.S. Gypsum Co.*, 475 N.W.2d 120, 124 (N.D. 1991) (same); *Osland v. Osland*, 442 N.W.2d 907, 909 (N.D. 1989) (applying the discovery rule to claims under N.D.C.C. § 28-01-18(1)). A decision that the discovery rule does not apply to defamation claims would be inconsistent with decades of North Dakota case law. Moreover, Arthaud has not appealed the district court's general conclusion that the discovery rule applies to defamation claims—only its decision to limit the discovery rule to claims based on "inherently discoverable" statements. There is no other appeal before this Court.

[¶ 2] Fuglie further claims that the discovery rule is only applicable where there are certain "outside factors" that make claims "difficult to detect," and states that "[a]n internet blog post does not involve the circumstances like concealment or memory affects [sic] that would make a claim difficult to detect." (Fuglie Brief at ¶¶ 13–14.) Fuglie's analysis is flawed for two reasons.

[¶ 3] First, one of the cases he cites, *Hebron*, directly contradicts his analysis. Fuglie spends a full paragraph explaining the compelling fact pattern giving rise to *Hebron*—an asbestos case involving ceiling plaster installed in a school. (*See* Fuglie Brief at ¶ 13.) He neglects to mention that in *Hebron*, this Court did not decide that the discovery rule should apply because of that particular fact pattern, or only to the particular asbestos claim at issue. It instead held that the discovery rule should apply to any claim under N.D.C.C. § 28-01-16(1)—i.e., any "action upon a contract, obligation, or liability, express or implied, subject to [certain statutory exceptions]." *Hebron*, 475 N.W.2d at 126. There is no discernible reason why defamation claims should be treated differently.

[¶ 4] Second, even if the test to apply the discovery rule is whether claims are "difficult to detect," that test clearly raises a factual question that is improperly decided on a motion to dismiss. A motion to dismiss is used to test the legal sufficiency of a claim and will only be granted where there is *no* potential for proof to support the claim. *Krile v. Law.*, 2020 ND 176, ¶ 15, 947 N.W.2d 366. It is not appropriate to resolve disputed factual issues regarding the discoverability of a particular blog post at this stage of the proceedings.

II. The Uniform Single Publication Act Does Not Bar Application of the Discovery Rule to Defamation Claims.

[¶ 5] Fuglie asserts without citation that "[t]he single publication rule stands for the proposition that defamation claims involving the publication of a statement accrue upon the first publication of the statement." (Fuglie Brief at ¶ 17.) This interpretation is not supported by the plain language of North Dakota's Uniform Single Publication Act (the "Act"), which reads in full:

> No person may have more than one claim for relief for damages for libel or slander or invasion of privacy or any

> other tort founded upon any single publication or exhibition or utterance, such as any one edition of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action must include all damages for any such tort suffered by the plaintiff in all jurisdictions.
>
> A judgment in any jurisdiction for or against the plaintiff upon the substantive merits of any action for damages founded upon a single publication or exhibition or utterance as described in this section bars any other action for damages by the same plaintiff against the same defendant founded upon the same publication or exhibition or utterance.

N.D.C.C. § 14-02-10.

[¶ 6] The Act does not have any language at all bearing on claim accrual, the applicable statute of limitations, or the discovery rule. Arthaud has not attempted to bring more than one libel claim based upon Fuglie's defamatory blog post, and he is not requesting additional or duplicative damages in any other jurisdiction. This is also the only action that Arthaud has brought or maintained against Fuglie. There are no other requirements built into the Act. Simply put, Arthaud's claim does not violate the Act, and neither does his request for application of the discovery rule.

[¶ 7] Moreover, application of the discovery rule to libel claims would not thwart the purpose of the Act. As many courts have explained, the purpose of the Act "is to protect publishers from [a] multitude of lawsuits based on one tortious act." *In re Philadelphia Newspapers, LLC*, 450 B.R. 99, 107 (Bankr. E.D. Pa. 2011); *see also Wathan v. Equitable Life Assur. Soc. of the U.S.*, 636 F. Supp. 1530, 1532 (C.D. Ill. 1986); *Belli v. Roberts Bros. Furs*, 240 Cal. App. 2d 284, 288, 49 Cal. Rptr. 625, 628 (Ct. App. 1966). The single-publication rule places limits on the number of "publications" (and thus the number of claims) that can result from "a single publication or exhibition or utterance." N.D.C.C. §

14-02-10. Applying the discovery rule to a libel claim would simply mean that the claim does not accrue until *discovery* of the single publication allowed by the rule, rather than upon *publication* of the single publication allowed by the rule. Because there is only a single publication, there can only be a single discovery. Accordingly, the discovery rule does not, in any way, impair the single-publication rule provided for by the Act.

[¶ 8] In his discussion of the single-publication rule, Fuglie cites *Atkinson* for the proposition that "[i]n the context of internet publication, other jurisdictions are nearly unanimous in holding the statute of limitations is triggered the moment the allegedly defamatory material is first made available to the public by posting on the website." (Fuglie Brief at ¶ 17.) This is a complete misstatement of *Atkinson*. *Atkinson* states that "other jurisdictions are nearly unanimous in holding that the single publication rule applies to defamation actions arising out of internet publications." *Atkinson*, 462 F. Supp. 2d at 1051. It is not unreasonable to conclude that an internet publication would be covered by the Act, and that statement is not at issue in this case.

[¶ 9] Further, it is irrelevant that the statute of limitations for defamation claims generally begins to run at the time of publication—a point Fuglie states again and again in his brief. (Fuglie Brief at ¶¶ 9, 17, 19, 21.) *Every* application of the discovery rule tolls the running of a general statute of limitations. Indeed, the entire purpose of adopting the discovery rule was to remedy the "often harsh and unjust" rule that statutes of limitations generally "begin[] to run from the commission of the wrongful act giving rise to the cause of action." *Wells v. First Am. Bank W.*, 1999 ND 170, ¶ 9, 598 N.W.2d 834, 837. This weighs in favor of application of the discovery rule, not against it.

[¶ 10] Fuglie principally relies on a California case, *Shively*, to assert that the single-publication rule should bar application of the discovery rule to a libel claim in North Dakota court. *See Shively v. Bozanich*, 80 P.3d 676, 688 (Cal. 2003). North Dakota has referred to California case law in its discussions of the discovery rule in the past. In *Hebron*, for example, this Court excerpted the following language from a California case regarding the discovery rule's remedial purpose:

> A common thread seems to run through all the types of actions where courts have applied the discovery rule. The injury or the act causing the injury, or both, have been difficult for the plaintiff to detect. In most instances, in fact, the defendant has been in a far superior position to comprehend the act and the injury. And in many, the defendant had reason to believe the plaintiff remained ignorant he had been wronged. Thus, there is an underlying notion that plaintiffs should not suffer where circumstances prevent them from knowing they have been harmed. And often this is accompanied by the corollary notion that defendants should not be allowed to knowingly profit from their injuree's ignorance.

475 N.W.2d at 122 (quoting *April Enterprises, Inc. v. KTTV*, 147 Cal. App. 3d 805, Cal. Rptr. 421, 436 (1983). North Dakota spoke approvingly of the California court's analysis, and eventually used it to lend support to its decision to expand the discovery rule in North Dakota to contract actions. *Id.* at 123.

[¶ 11] But, as North Dakota has expanded its application of the discovery rule in the three decades since *Hebron* was decided, California has since taken an unduly restrictive approach. For example, in *Shively*, the court decided that the discovery rule should not apply in defamation cases where materials had been made available to the public. Later decisions would apply this rule no matter how small or limited the public circulation—taking it to almost comically restrictive lengths. In *Hebrew Academy of San Francisco v. Goldman*, the California Supreme Court barred a defamation claim after

applying the *Shively* analysis to an oral history project consisting of a series of interviews that resulted in *fewer than 10 copies* of transcripts being published in certain university libraries. 42 Cal. 4th 883, 887–88, 173 P.3d 1004 (2007).

[¶ 12] In contrast, North Dakota courts have adopted the more liberal application of the discovery rule to various tort and contract actions. *See Atkinson*, 462 F. Supp. 2d at 1055; *Hebron*, 475 N.W.2d at 124. North Dakota courts also prefer determinations on the merits. *Schmitz v. N. Dakota State Bd. of Chiropractic Examiners*, 2021 ND 73, ¶ 6, 958 N.W.2d 496. It is not consistent with the case law of this State to dismiss a claim on the pleadings simply because a plaintiff had the misfortune of being defamed on a medium that was accessible to the public, without regard to the particular circumstances giving rise to the claim.

CONCLUSION

[¶ 13] For the reasons stated above, Appellant Jim Arthaud respectfully requests that the Court reverse the District Court's decision and remand for further proceedings.

Dated this 28th day of November, 2022.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Plaintiff and Appellant Jim Arthaud, hereby certifies the above brief is in compliance with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure. The total number of pages in the brief, excluding the certificate of service and this certificate of compliance, is ten pages.

Dated this 28th day of November, 2022.

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STATE OF NORTH DAKOTA)
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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on November 28th, 2022, I electronically filed and served the Reply Brief of Appellant Jim Arthaud with the Clerk of the North Dakota Supreme Court and served by E-mail on the following:

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