20220234

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
OCTOBER 14, 2022
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

BRIEF OF APPELLANT JIM ARTHAUD

ORAL ARGUMENT REQUESTED

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STATEMENT OF ISSUES

[¶ 1] Whether the district court erred when it held that the discovery rule only tolls the statute of limitations for defamation claims that are based on "inherently undiscoverable" statements.

[¶ 2] Whether the district court erred when it held that Fuglie's defamatory statements were inherently discoverable.

STATEMENT OF THE CASE

[¶ 3] This is a case premised on a defamatory blog post published by Defendant Jim Fuglie ("Fuglie") in August 2018. Plaintiff Jim Arthaud ("Arthaud") learned of the blog post in September 2021 and commenced the present lawsuit against Fuglie several weeks later.

[¶ 4] Fuglie filed a motion to dismiss, asserting that Arthaud's claim is barred by the two-year statute of limitations. Arthaud disagreed, arguing the discovery rule applied and that he brought his claim well within two years after he knew or reasonably should have known of the defamatory blog post.

[¶ 5] The district court granted the motion to dismiss. In its Order, the district court concluded that it was appropriate to apply the discovery rule in defamation cases but limited the rule to only those instances where the defamatory statements at issue were "inherently undiscoverable." (R33:6:¶12). It further concluded that Fuglie's blog post was inherently discoverable as a matter of law. (R33:6–7:¶¶14–15). Arthaud's claim was dismissed as time-barred. (R33:7:¶17). This appeal followed.

STATEMENT OF FACTS

[¶ 6] At all times relevant to this action, Arthaud served as a Billings County Commissioner. (Complaint, R2:1:¶4). During Arthaud's tenure as a Commissioner, the

Billings County Commission proposed building a bridge across the Little Missouri River. (R2:1:¶5). Fuglie vehemently opposed the bridge proposal, and Arthaud found himself a consistent target of Fuglie's animosity. (*See* R2:1:¶6).

[¶ 7] Fuglie published false statements about the bridge proposal and Arthaud on a blog called "Unheralded.Fish." (R2:2:¶7). Relevant here, Fuglie falsely stated in one blog post that Arthaud had bragged about using a campaign contribution to improperly influence an elected official—a federal crime. (R2:2:¶8); *see* 18 U.S.C. § 201(b). Specifically, Fuglie wrote:

> Arthaud knows something about dealing with politicians. Here's a story from a friend of a friend of a friend. Someone was in Arthaud's office and needed something from Sen. John Hoeven. Artaud picked up the phone, dialed up Hoeven's office in Washington, D.C., got Hoeven on the phone, got what his friend needed, hung up, and said, 'That's what $20,000 will get you.'

(R2:2:¶8). As alleged in the Complaint, this statement was false, defamatory, unprivileged, and made with actual malice. (R2:2–3:¶¶9–11, 13).

[¶ 8] Fuglie first published this blog post in August 2018, but Arthaud did not learn of it until September 2021. (R2:2:¶12). Arthaud commenced his lawsuit against Fuglie for libel soon thereafter, on October 5, 2021.

STANDARD OF REVIEW

[¶ 9] This Court reviews a district court's decision to grant a Rule 12(b)(6) motion to dismiss de novo. *Krile v. Law.*, 947 N.W.2d 366, 373 (N.D. 2020). The Court is to "construe the complaint in the light most favorable to the plaintiff and accept as true the well-pleaded allegations in the complaint." *Id.* "Because determinations on the merits are generally preferred to dismissal on the pleadings, Rule 12(b)(6) motions are viewed

with disfavor." *Schmitz v. N. Dakota State Bd. of Chiropractic Examiners*, 958 N.W.2d 496, 498 (N.D. 2021). A motion to dismiss should not be granted unless "it is disclosed with certainty the impossibility of proving a claim upon which relief can be granted." *Id.*

LAW AND ARGUMENT

[¶ 10] It is uncontested that the statute of limitations for libel claims is two years. *See* N.D.C.C. § 28-01-18(1). It is also uncontested that the defamatory blog post forming the basis for Arthaud's libel claim was first published on August 2, 2018, which was more than two years before he commenced this lawsuit on October 5, 2021. (R2:2:¶12).

[¶ 11] Arthaud's claim is timely, however, because the discovery rule applies to his claim. "Under the discovery rule, a cause of action does not accrue, and the limitations period does not begin to run, until a plaintiff knew, or with the exercise of reasonable diligence should have known, of the wrongful act and its resulting injury." *Wells v. First American Bank West,* 598 N.W.2d 834, 838 (N.D. 1999) (internal citations omitted). As alleged in the Complaint, Arthaud did not learn of Fuglie's defamatory blog post until September 2021, a mere month before he filed his claim. (R2:2:¶12). As a result, his claim is not barred under the relevant statute of limitations and the district court's dismissal of his claim should be reversed.

[¶ 12] There is no basis in law for the district court's decision to limit application of the discovery rule to only those defamation claims that involve "inherently undiscoverable" statements. And, even if the application to defamation claims should be so limited, it was erroneous for the district court to determine that Fuglie's blog post was inherently discoverable as a matter of law. These arguments will be addressed in turn.

I. The Discovery Rule Applies to Defamation Claims.

[¶ 13] Whether the discovery rule applies to libel claims is a matter of first impression, but the path the Court must follow to make its decision is well-trodden. *See Atkinson v. McLaughlin*, 462 F. Supp. 2d 1038, 1055 (D.N.D. 2006). This Court has consistently found that the discovery rule applies to claims where, as here, the relevant statute of limitations begins with the language: "The following actions must be commenced within ... years after the claim for relief [or cause of action] has accrued." *Hebron Pub. Sch. Dist. No. 13 of Morton Cnty. v. U.S. Gypsum Co.*, 475 N.W.2d 120, 124 (N.D. 1991); *see* N.D.C.C. § 28-01-18 (an action for libel "must be commenced within two years after the claim for relief has accrued"). The discovery rule has therefore been "liberally applied to numerous statutory limitations on various causes of action based in tort or contract." *Atkinson*, 462 F. Supp. 2d at 1055 (collecting cases applying discovery rule); *see also Hebron*, 475 N.W.2d at 124 (same).

[¶ 14] Indeed, this Court has already applied the discovery rule to N.D.C.C. § 28-01-18(1)—the limitations period at issue—which governs not just libel, but slander, assault, battery, and false imprisonment. *See Osland v. Osland*, 442 N.W.2d 907, 909 (N.D. 1989) (applying the discovery rule to assault and battery claims); *see also Hebron*, 475 N.W.2d at 125 n.1 (noting that N.D.C.C. § 28-01-18 "may reflect a legislative presumption that the discovery rule determines when a cause of action accrues except in those instances in which the Legislature specifies that the discovery rule is not applicable").

[¶ 15] Based on the clear precedent set by this Court in applying the discovery rule to actions governed by N.D.C.C. § 28-01-18 and other sections containing similar accrual language, the discovery rule should determine when this libel claim accrues.

II. Narrow Application of the Discovery Rule to Defamation Cases is Improper.

[¶ 16] Citing *Atkinson* and a smattering of cases from state and federal courts, the district court concluded that "in order for the discovery rule to be applicable in defamation cases, the allegedly defamatory communications at issue need to be inherently undiscoverable." (R33:6:¶12). There is no cognizable basis under case law from this Court to make such a determination.

[¶ 17] As noted in *Hebron*, this Court's preference has always been to apply the discovery rule consistently across claims. In *Hebron*, the Court considered whether the discovery rule applied to an asbestos claim, and ultimately concluded that it did because the Court "perceive[d] no principled basis upon which to distinguish this action . . . from many of the cases in which this court has already applied a discovery rule." 475 N.W.2d at 124. And, although the Court was presented with some additional language in the statute that suggested application of the discovery rule in the asbestos context may be different, it wrote:

> We recognize the strength of this argument and might be persuaded by it if we were writing on a clean slate. However, because of the range of our previous decisions applying a discovery rule in other actions in which such an argument would have been equally persuasive and in light of legislation incorporating discovery rules in other statutes of limitations, we decline to now hold that a discovery rule is not applicable to this action . . . .

Id. at 124–25.

[¶ 18] Here, there is no "principled basis" upon which to distinguish a libel claim from the myriad other claims where the discovery rule applies. The relevant statute of limitations does not separate libel from slander, assault, battery, or false imprisonment—two of which have already been held subject to the discovery rule. And the statute of

limitations does not contain any additional language suggesting that only a subset of libel claims should be subject to the discovery rule, where other claims are subject to the discovery rule in their entirety. Arthaud is not aware of any case law that would justify this distinction, either. On this basis alone, the Court should hold that the discovery rule applies to all defamation cases, without caveat.

[¶ 19] Further, a narrow reading that only applies the discovery rule to claims involving "inherently undiscoverable" defamatory statements serves no legitimate purpose. The discovery rule already measures claim accrual from the date that a plaintiff either "knew, *or with the exercise of reasonable diligence should have known*, of the wrongful act and its resulting injury." *Wells*, 598 N.W.2d at 838 (emphasis added). When a plaintiff knows, or with reasonable diligence should know, that a potential claim exists is a question of fact. *Osland*, 442 N.W.2d at 909; *see also Wall v. Lewis*, 393 N.W.2d 758, 761 (N.D. 1986). The discovery rule thus accounts for a plaintiff's constructive knowledge of a claim—effectively negating any benefit that could be gained from limiting the discovery rule to "inherently undiscoverable" statements.

[¶ 20] Simply put, it is improper and unnecessary to take a longstanding factual determination as to the plaintiff's actual or constructive knowledge of their claim, i.e., their discovery of their claim, and transform it into a threshold determination to be made by a court as to whether a statement is "inherently undiscoverable." This is especially true in North Dakota—a jurisdiction where "determinations on the merits are generally preferred." *See Schmitz*, 958 N.W.2d at 498.

III. Fuglie's Blog Post Was Not "Inherently Discoverable" as a Matter of Law.

[¶ 21] Even if the discovery rule only applies to defamation claims where the defamatory statement is inherently undiscoverable, it was error for the district court to hold that Fuglie's blog post was inherently discoverable as a matter of law. As stated above, a plaintiff's actual or constructive knowledge of their claim is ordinarily a question of fact. *Osland*, 442 N.W.2d at 909; *see also Wall*, 393 N.W.2d at 761.

[¶ 22] It is undisputed for the purpose of the present motion that Arthaud only had actual knowledge of the blog post in September 2021, just a few weeks before filing his complaint. There is no allegation in the Complaint as to Arthaud's constructive knowledge of the blog post, and no discovery has been conducted to date as to the blog itself or Arthaud's awareness of it. Simply put, this is not a case where "the evidence is such that reasonable minds could draw but one conclusion," as the district court suggests. *Wall*, 393 N.W.2d at 761.

[¶ 23] A review of *Wall* is helpful to put into perspective the exceptional circumstances that must be present to justify a determination that there is only "one conclusion" to be drawn in a case. There, the plaintiffs attempted to argue that they had only discovered their potential legal malpractice claim when a court upheld IRS tax assessments implicating their attorney's work. The Court granted summary judgment to the attorney because the record showed that the plaintiffs had in fact discovered their potential malpractice claim six years earlier, when a second attorney had explicitly advised them of the possible claim. The Court cautioned that its decision was atypical, and "that summary judgment will rarely be appropriate on the issue of discovery." *Id.* at 762.

[¶ 24] *Atkinson*, cited at length in the district court's Order, also concerned a motion for summary judgment. There, the court concluded that the discovery rule applied

to the defamation claim at issue because the defamatory statements were inherently undiscoverable and therefore a cause of action "would not be barred by the two-year statute of limitations as a matter of law." 462 N.W.2d at 1057. Setting aside the impropriety of applying an "inherently undiscoverable" standard, the fact section in that case demonstrates that the record before the court included deposition testimony, documents, and filings from two years' worth of litigation. *Atkinson*, 462 F. Supp. 2d 1041–47. And even still, the court did not decide *when* the defamatory statements were discovered by plaintiffs, it only concluded that the discovery rule applied and therefore preserved a later decision by the court on that issue. By dismissing Arthaud's claim as a matter of law, the district court has deprived him of this fact-intensive inquiry.

[¶ 25] Taken to its natural conclusion, the district court's reasoning would in fact deprive *many* individuals of their day in court. A decision that the defamatory blog post in this case is "inherently discoverable" necessarily implies that almost anything on the internet is inherently discoverable *as a matter of law* by the fact of its mere posting. In its Order, the district court found persuasive that the defamatory blog post was "open to the public" and "not a private communication"—statements that are true of most content online. (R33:7:¶15). It further notes that the burden on Arthaud was not significant, as he "simply had to log onto a computer." (R33:7:¶15). But the real issue here is not access, but knowledge. Even logged onto a computer, Arthaud could not search for a statement he did not know existed. The internet is vast, containing untold amounts of data, websites, videos, images, books, blog posts, articles, and more. The district court would place an obligation on the public to proactively search this content to see if they have been defamed online. This cannot be the law.

CONCLUSION

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

REQUEST FOR ORAL ARGUMENT

[¶ 27] Appellant Jim Arthaud requests oral argument in this matter. As indicated above, this appeal presents issues of first impression for the Court. Oral argument would be helpful to the Court in deciding these issues and would allow the Court to raise any concerns with the parties related to these issues not otherwise addressed in the parties' briefing.

Dated this 14th day of October, 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 twelve pages.

Dated this 14th day of October, 2022.

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STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on October 14th, 2022, I electronically filed and served the 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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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on October 20th, 2022, I electronically filed and served the corrected 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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Dated this 21st day of October, 2022.

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