

No. SC86229

IN THE SUPREME COURT OF MISSOURI

STATE ex rel. BP PRODUCTS NORTH AMERICA INC.,

Relator,

v.

THE HONORABLE JOHN A. ROSS,

Respondent.

RESPONDENT'S BRIEF

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¹ All statutory references are to RSMo 2000.

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II. POINTS RELIED ON

A. The preliminary writ of prohibition should be quashed because the trial court did not err in applying a five-year statute of limitations because Respondents' claim constitutes an action not "otherwise enumerated" pursuant to sec. 516.120(4), in that Respondents' claim is for injurious falsehood, which is recognized in Missouri, distinct from other recognized torts and not otherwise enumerated in sec. 516.010 et seq.

Cuba's United Ready Mix, Inc. v. Bock Concrete Foundations, Inc., 785

S.W.2d 649 (Mo. App. 1990)

McCormack Baron Management Services v. American Guarantee &

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Sullivan v. Pulitzer Broadcasting Co., 709 S.W.2d 475 (Mo. banc 1986)

Section 516.010 et seq.

Section 516.120(4)

Restatement (Second) of Torts sec. 652E, Comment (e)

B. The preliminary writ of prohibition should be quashed because the trial court did not err in applying a five-year statute of limitations because, in the alternative, Respondents' claim is most analogous to a claim for slander of title and sec. 516.120(4) provides a five-year statute of limitations for slander of title.

Cuba's United Ready Mix, Inc. v. Bock Concrete Foundations, Inc., 785

S.W.2d 649 (Mo. App. 1990)

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Nolan v. Kolar, 629 S.W.2d 661 (Mo. App. 1982)

Restatement (Second) of Torts sec. 623A

Restatement (Second) of Torts sec. 624

Restatement (Second) of Torts sec. 624, Comment (a)

III. STANDARD OF REVIEW

"Prohibition is a discretionary writ, and there is no right to have the writ issued. Prohibition will lie only to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power." *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 856-57 (Mo. banc 2001) (citations omitted). Interlocutory review of trial court error by writ of prohibition "should occur only in extraordinary circumstances." *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo. banc 1994). "If the error is one of law, and reviewable on appeal, a writ of prohibition is not appropriate." *Id.*

IV. ARGUMENT

COME NOW Brian Wandersee ("Wandersee") and Advance Cleaning Technologies, Inc. ("ACT"), formerly known as OSCO Enterprises, Inc., by and through their undersigned counsel and submit the following as Respondent's Brief.

A. The preliminary writ of prohibition should be quashed because the trial court did not err in applying a five-year statute of limitations because Respondents' claim constitutes an action not "otherwise enumerated" pursuant to sec. 516.120(4), in that Respondents' claim is for injurious falsehood, which is recognized by this Court, distinct from other recognized torts and not otherwise enumerated in sec. 516.010 et seq.

1. Respondents' claims are for injurious falsehood

Before proceeding with an analysis of the statute of limitations, it is necessary to clarify that Respondents' claims are for the tort of injurious falsehood.

One is liable for injurious falsehood causing pecuniary loss if he: (1) publishes a false statement that is, (2) harmful to the interests of the plaintiff, where (3) he intends for publication of the statement to result in harm to interests of the plaintiff having a pecuniary value or either recognizes or should recognize that it is likely to do so, and (4) he knows that the statement is false or acts in reckless disregard of its truth or falsity.

Cuba's United Ready Mix, Inc. v. Bock Concrete Foundations, Inc., 785 S.W.2d 649, 651 (Mo. App. 1990).

Each of these elements was alleged in Respondents' Petition and each element is supported by the facts. (Relator's Ex. 3 at A-24 through A-28). The Petition does not describe a defamation claim because it arises out of the loss of Respondents' business interests and is therefore a claim for pecuniary loss rather than loss of personal reputation.

2. Tort limitations periods

Section 516.010 et seq. provides enumerated limitations periods for many torts. It also provides "catch-all" limitations periods for unlisted torts. At issue is sec. 516.120(4), a "catch-all" that provides a five-year limitations period for "[a]n action for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated."

A plaintiff cannot invoke the sec. 516.120(4) five-year limitations period by simply titling the tort something that is "not herein otherwise enumerated." *Sullivan v. Pulitzer Broadcasting Co.*, 709 S.W.2d 475 (Mo. banc 1986). To rely upon sec. 516.120(4), the petition must describe a tort that is recognized in Missouri and distinct from the other listed torts. *Id.* at 478. This prevents a plaintiff from artfully pleading around the shorter limitations periods of many of the "enumerated" torts. *Id.* at 476. If the tort is not recognized in Missouri or is essentially the same as recognized torts, then

the court must look to the "most analogous" recognized tort to determine the limitations period. *Id.* at 480. For example, "false light invasion of privacy" is not a distinct and recognized tort in Missouri, so this Court treated the claim as one for defamation for the purpose of the statute of limitations. *Id.*

In this case, the tort of injurious falsehood is both recognized and distinct from other recognized torts. *McCormack Baron Management Services v. American Guarantee & Liability Insurance Co.*, 989 S.W.2d 168, 171 (Mo. banc 1999) (cause of action of disparagement now referred to as injurious falsehood); *Cuba's United Ready Mix, Inc. v. Bock Concrete Foundations, Inc.*, 785 S.W.2d at 651 (Missouri cases have recognized injurious falsehood).

The statute does not provide a special limitations period for injurious falsehood (which is both recognized and distinct from other recognized torts), so the five-year limitations period of sec. 516.120(4) applies. Therefore, the trial court's ruling was correct and the preliminary writ must be quashed.

3. *Sullivan's misleading language*

Relator relies on *Sullivan* for the erroneous proposition that a court should apply the most analogous statute of limitations whenever a cause of action is not covered by a specific statute of limitations, rendering sec. 516.120(4) useless. In *Sullivan*, the plaintiff attempted to avoid the statute of limitations applicable to defamation claims by bringing a claim for "false light invasion of privacy" - a claim not recognized in Missouri. *Sullivan v. Pulitzer Broadcasting Co.*, 709 S.W.2d at 480. When taken out of the context of the

consideration of an unrecognized tort, *Sullivan's* language can be misleading. In adopting the Restatement's expression of concern about plaintiffs avoiding proper limitations periods through artful pleading, the Court stated:

Although declining to endorse any approach, [the drafters of the Restatement] indicate:

When the false publicity is also defamatory so that either action can be maintained by the plaintiff, it is arguable that limitations of long-standing that have been found desirable for the action for defamation should not be successfully evaded by proceeding upon a different theory of later origin, in the development of which the attention of the courts has not been directed to the limitation.

Restatement (Second) of Torts sec. 652E, Comment e, at 399. In an effort to avoid such a problem and because courts normally apply the most analogous statute of limitations, a number of courts that have either recognized the tort or assumed the existence of the action for argument's sake apply the statute of limitations for defamation actions to a claim for "false light." ... It can be argued that if the defamation statute of limitations is not applied, such a statute will become meaningless because parties will invariably claim a "false light" invasion of privacy instead of a defamation.

Id. (citations omitted).

As this statement was made in the context of a finding that "false light" would not be independently recognized, this Court did not hold that Missouri courts should apply

the most analogous statute of limitations whenever Missouri's statutes of limitation do not specifically cover a cause of action. However, the emphasized language above makes it easy to see why Relator finds solace in the opinion. Respondents urge this Court to clarify this language.

B. The preliminary writ of prohibition should be quashed because the trial court did not err in applying a five-year statute of limitations because, in the alternative, Respondents' claim is most analogous to a claim for slander of title and sec. 516.120(4) provides a five-year statute of limitations for slander of title.

1. Most analogous cause of action is slander of title

Assuming, arguendo, that Relator is correct and the limitations period for injurious falsehood is found by looking to the limitations period of the most analogous cause of action, nevertheless the preliminary writ must be quashed.

Injurious falsehood is most analogous to slander of title. The similarities between injurious falsehood and slander of title are discussed in sec. 623A and sec. 624 of the Restatement (Second) of Torts ("Restatement"). Both Relator and Missouri courts recognize the Restatement as authoritative and accept its definition of injurious falsehood. *Cuba's United Ready Mix*, 785 S.W.2d at 651 ("Missouri cases have recognized [the tort of injurious falsehood] as it is stated in Restatement (Second) Torts, sec. 623A"). In sec. 624, the Restatement defines slander of title in relation to injurious falsehood:

The rules on liability for the publication of an injurious falsehood stated in sec. 623A apply to the publication of a false statement disparaging another's property rights in land, chattels or intangible things, that the publisher should recognize as likely to result in pecuniary harm to the other through the conduct of third persons in respect to the other's interests in the property.

In sec. 624, comment (a), the Restatement notes that slander of title and injurious falsehood are the same tort, but that slander of title is a specific form of injurious falsehood:

[Section 624] is a special application of the general principle as to the publication of an injurious falsehood stated in sec. 623A, to which reference should be made....

The particular form of injurious falsehood that involves disparagement of the property in land, chattels, or intangible things, is commonly called "slander of title." ... The extension of the liability to other kinds of injurious falsehood has left the terms "slander of title," and "disparagement," merely as special names given to this particular form of the tort.

The Restatement establishes that the most analogous cause of action to injurious falsehood is slander of title. This view is shared by other jurisdictions. *Kn. Bankers Surety Co. v. Bahr Consultants, Inc.*, 69 F.Supp.2d 1004, 1015-16 (E.D. Tenn. 1999) ("disparagement of quality or trade libel," as defined by Restatement, was particularized form of injurious falsehood and "closely analogous" to slander of title); *Dickson*

Construction, Inc. v. Fidelity & Deposit Co., 960 S.W.2d 845, 850 (Tx. App. S.D. 1997) (injurious falsehood more akin to slander of title than to defamation); *Gregory's, Inc. v. Northland Bldg. Ctr.*, 545 N.W.2d 488, 492-93 (S.D. 1996) (slander of title and injurious falsehood are essentially same cause of action under Restatement).

The Court of Appeals has held that actions for slander of title are governed by the five-year limitations period of sec. 516.120(4). *Jones v. Rennie*, 690 S.W.2d 164, 167 (Mo. App. 1985); *Nolan v. Kolar*, 629 S.W.2d 661, 663 (Mo. App. 1982).

Contrary to Relator's argument, defamation is not the most analogous cause of action to injurious falsehood. Other jurisdictions have considered the distinction between defamation and injurious falsehood and concluded that the two torts protect distinctly different interests. *Dickson Construction, Inc. v. Fidelity & Deposit Co.*, 960 S.W.2d at 850 (injurious falsehood differs from defamation because "a defamation action protects the plaintiff's personal reputation while an action for [injurious falsehood] protects economic interest"); *Gregory's, Inc. v. Northland Bldg. Ctr.*, 545 N.W.2d at 493 n.2 (Restatement "carefully distinguishes" between injurious falsehood and defamation).

Relator acknowledges the distinction between injurious falsehood and defamation, but argues that Respondents' injurious falsehood claims shade more toward defamation because their claims reference injury to reputations. Although both Wandersee and ACT allege that Relator's conduct hurt their reputations, their injurious falsehood claims seek relief for the damage done to their economic interests and not to their reputations. (Relator's Ex. 3 at A-27 through A-28). Respondents allege that Relator caused "harm to the interests" of Respondents and caused Wandersee to lose "the benefits of his

ownership of ACT." (Relator's Ex. 3 at A-28). Furthermore, Wandersee's deposition testimony and Respondents' interrogatory answers indicate that Respondents' injurious falsehood claims seek relief for the damage Relator caused to Respondents' economic interests. (Relator's Ex. 9 at A-347). When deposed by Relator, Wandersee attested that Relator's conduct caused ACT to lose several distributorships and other business, to discount bids to customers in order to maintain its client base, to accept higher interest rates and greater bank oversight in order to maintain its line of credit and to sell its Fairview Heights, Illinois property. *Id.* Wandersee attested that Relator's conduct also allowed ACT's competitors to make inroads into its business. (Relator's Ex. 9 at A-348). These damages are pecuniary.

V. CONCLUSION

Respondents' claims are for injurious falsehood. The trial court properly applied the five-year limitations period of sec. 516.120(4) because injurious falsehood is a recognized tort that is distinct from other recognized torts and not otherwise enumerated within sec. 516.010 et seq. Even if Relator is correct that the trial court should have looked to the most analogous tort for a limitations period, the analogous tort would be slander of title, which also has a five-year limitations period.

The preliminary writ of prohibition should be quashed.

Respectfully submitted,

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VI. CERTIFICATE OF COMPLIANCE WITH RULES 84.06(b) AND 84.06(g)

The undersigned certifies that the foregoing complies with the limitations provided by Rule 84.06(b) and, according to the word count function of Microsoft Word 97 by which it was prepared, contains 3170 words.

The undersigned further certifies that the diskette filed herewith containing the Respondent's Brief in electronic form complies with Rule 84.06(g) because it has been scanned for viruses and is virus-free.

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VII. CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11th day of January 2005, a true and correct copy of the foregoing document was sent via first class U.S. mail, postage prepaid, to the following:

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