



FILED IN DISTRICT COURT
OKLAHOMA COUNTY

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

JUL 13 2022

RICK WARREN
COURT CLERK

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CHRISTOPHER AVELLONE,

Plaintiff,

v.

KELLY RAE BRISTOL,

Defendant.

Case No. CJ-2021-4340

The Honorable Anthony L. Bonner

DEFENDANT KELLY RAE BRISTOL'S REPLY ISO MOTION TO DISMISS

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I. The Discovery Rule Does Not Toll the Statute of Limitations for Libel.

A plaintiff's lack of knowledge of the defendant's identity does not toll the statute of limitations where the plaintiff is otherwise aware of his injury. *See Resolution Trust Corp. v. Grant*, 1995 OK 68, ¶8, 901 P.2d 807, 813 (statute begins to run when the plaintiff is aware he has been injured); *Weathers v. Fulgenzi*, 1994 OK 119, ¶ 12, 884 P.2d 538 (same); *see also Crawford on Behalf of C.C.C. v. OSU Med. Tr.*, 2022 OK 25, ¶ 13, 510 P.3d 824, 831 ("The one-year notice period began when C.C.C. lost his eye on June 21, 2017. ... The Crawfords did not need to know the identity of the tortfeasor's employer to state a cause of action."); *Wells v. Lowe's Home Centers, Inc.*, 2008 WL 2783161, at *2 (N.D. Okla. July 15, 2008) (no discovery rule where plaintiff knew of the injury but not the identity of the defendant); *Wandschneider v. Tuesday Morning, Inc.*, 2011 WL 3319562, at *4 (N.D. Okla. Aug. 1, 2011) (same); *Ballard v. Johnson & Johnson*, 2014 WL 5341851, at *5 (N.D. Okla. Oct. 20, 2014) (same); *Dorrough v. Corey*, 2016 WL 3829143, at *4 (W.D. Okla. July 12, 2016) (same). Here, Mr. Avellone concedes that he learned about the Twitter posts on the day they were made. *See* Response at 2 (citing Amended Petition at ¶ 31.) Thus, the discovery rule does not apply.

II. There is No Tolling from Fraudulent Concealment.

Fraudulent concealment only tolls the statute where it "prevents a plaintiff from discovering his wrong or the fact that a cause of action has accrued against him." *Morgan v. State Farm Mut. Auto. Ins. Co.*, 2021 OK 27, ¶ 32, 488 P.3d 743, 753. As discussed above, a cause of action accrues when the plaintiff knows or should have known he has been injured—not when he discovers the identity of the defendant. *Crawford*, 2022 OK 25, ¶ 13; *Resolution Trust Corp. v. Grant*, 1995 OK 68, ¶ 8; *Weathers*, 1994 OK 119, ¶ 12. Mr. Avellone's arguments about fraudulent concealment rely on the same failed premise that a cause of action does not run until the plaintiff knows the identity of the defendant. Because he admits he knew about the posts when they were made, it is irrelevant that Ms. Bristol posted them using an alias.

III. Mr. Avellone cannot avoid the Statute Of Limitations using other Claims.

Mr. Avellone tries to avoid the statute of limitations by recharacterizing his libel claim as other causes of action. This is not permitted. Mr. Avellone tries to distinguish *Nelson v. American Hometown Publishing, Inc.*, 333 P.3d 962, 969 (Okla. Ct. Civ. App. 2014) and *Jordan v. World Publ. Co.*, 872 P.2d 946, 947–48 (Okla. Ct. App. 1994), because those cases only addressed claims for negligence, rather than tortious interference and IIED. But the reasoning of those opinions applies here with equal force. As the court said in *Nelson*, plaintiffs may not plead different torts based on the identical facts “to circumvent defenses to defamation actions, *including shorter statute of limitations provisions.*” *Nelson*, 333 P.3d at 969 (emphasis added). And the court in *Jordan* specifically addressed a libel claim recharacterized as a claim for IIED. *Jordan*, 872 P.2d at 947–48. Mr. Avellone’s claim for tortious interference also directly relies upon the claim for libel to show wrongful conduct—an element for tortious interference. *Wilspec Techs., Inc. v. Dunan Holding Group Co.*, 204 P.3d 69, 74 (Okla. 2009). Where the predict claim is time-barred, it cannot be used as a predicate for an independent tort.

Mr. Avellone finally argues that his tort claims should survive based on the general permissibility of pleading multiple causes of action. (Opp. at 10.) The issue is not whether Avellone is permitted to bring these additional causes of action, which very well could survive *if* his libel claim was not barred. The issue is whether Avellone can take stale claims and repackage them as different torts where the underlying libel claim fails.

Avellone’s reliance on *Colbert v. World Publ’g Co.*, 1987 OK 116, 747 P.2d 286, 288-89 is likewise misplaced. In *Colbert*, there was no cause of action for libel. In fact, the Court explained that the claim for false light was not time barred precisely because there was no claim for libel. *See id.* (“Although single publication could conceivably touch both [libel and false light] interests, in this case no injury to the reputation of Frenche Colbert is alleged nor was any proven.”). In contrast, Mr. Avellone’s false light claim seeks to recover the same reputational losses alleged in his libel claim. *See Am. Pet.* ¶¶ 57–58.

As the Court recognized in *Colbert*, a claim regarding harm to one's reputation presents a claim of libel, not false light. See *Colbert*, 747 P.3d at 289. Therefore, it is barred by the one-year statute of limitations.

IV. The Savings Statute Does Not Apply.

Mr. Avellone concedes the Savings Statute only applies when the prior action was filed in Oklahoma. *Herron v. Miller*, 1923 OK 913, 220 P. 36. This court is bound to follow the Supreme Court's precedent.

V. Mr. Avellone Must Show Actual Malice.

Mr. Avellone is a public figure for the purposes of this action. On a Motion to Dismiss, the court is entitled to consider the facts that are admitted as true by the plaintiff in his petition. Here, Mr. Avellone alleges and admits that "he is an established computer game writer, having written games for blue-chip gaming franchise" Am. Pet. ¶ 4. Indicating his notoriety, he also alleges that Ms. Bristol's comments about him were covered by the national news publication, *Business Insider* (Am. Pet. ¶ 29), as well as the industry publications, *IGN* (Am. Pet. ¶ 25 n.3) and *Gamasutra* (Am Pet. ¶ 27 n.4). He also alleges that has such notoriety that gaming studios made public statements about his termination, rather than merely separating from him quietly. Am. Pet. ¶ 25. These admitted facts show that the allegations against Mr. Avellone—from Ms. Bristol and other women—were a matter of public concern, making him a public figure for the purposes of his claims in this case.

VI. Ms. Bristol's Statements Are Not Actionable.

As a public figure, to state claims for libel and false light, Mr. Avellone must prove that Ms. Bristol's statements were intentionally or recklessly false, by clear and convincing evidence. Here, Mr. Avellone cites a tweet posted by Ms. Bristol in September 2014, in which she stated that she had never been "boob-grabbed in a crowd" at the gaming convention. See Am. Pet. ¶¶ 14–15. That tweet has nothing to do with Mr.

Avellone or any of his claims in this case. None of the allegedly defamatory statements in this case have anything to do with Ms. Bristol being groped in a crowd.

As a fallback, Mr. Avellone argues that Ms. Bristol was simply lying. But the only part of Ms. Bristol's statements about Mr. Avellone that could even be arguably factual in nature is her comment that "his hand was on my ass." Am. Pet. ¶ 23. The rest of Ms. Bristol's statements are discussing her interpretation of his intentions in that moment and her opinions about his character. Yet nowhere in the Amended Petition has Mr. Avellone denied touching Ms. Bristol. While the response asserts he never touched Ms. Bristol, the portions of the petition he cites for that proposition do not contain any such denial. Indeed, in his claim for libel, Mr. Avellone identifies Ms. Bristol's characterization of him as a "predator" as the basis for the libel claim. *See* Am. Pet. ¶ 38. The same allegation is the basis for his false light claim. *See* Am. Pet. ¶ 55. Ms. Bristol is entitled to her opinion of whether Mr. Avellone behaved inappropriately.

VII. Mr. Avellone Fails to Claim Intentional Infliction of Emotional Distress.

Mr. Avellone fails to distinguish the Oklahoma cases cited in the Motion to Dismiss, each of which held that allegations of misconduct far worse than those at issue here were not sufficiently outrageous to support a claim for IIED. *See e.g., Branum v. Orscheln Farm and Home, LLC*, 2019 WL 2570527, at *5 (E.D. Okla. June 20, 2019) (false accusation that plaintiff used a racial slur); *Monaco v. Quest Diagnostics, Inc.*, Case No. 08-2500-KHV, 2010 WL 3843622, at *17 (D. Kan. Sept. 24, 2010) (false accusation that the plaintiff had threatened to kill a co-worker); *Nwakpuda v. Falley's, Inc.*, 14 F. Supp. 2d 1213, 1218 (D. Kan. 1998) (false accusation that plaintiff robbed a store); *Harris v. AmeriGas Propane, Inc.*, Case No. CV-12-860-RBJ-MEH, 2012 WL 7051302, at *6 (D. Colo. Dec. 5, 2012) (collecting cases where courts found false accusations of criminal conduct not sufficiently outrageous). Instead, Mr. Avellone relies on a single case from New Hampshire, *Hungerford v. Jones*, 998 F. Supp. 22, 27 (D.N.H. 1997). In *Hungerford*,

the defendant accused plaintiff of repeatedly raping and assaulting his three-year-old daughter. *Id.* at 27. This case is nothing like that.

VIII. Mr. Avellone Fails To State A Claim For Tortious Interference.

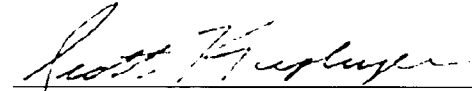
Both varieties of tortious interference require Mr. Avellone to allege and Mr. Bristol's intent in making her statements was to disrupt his business relationships. *See Loven v. Church Mut. Ins. Co.*, 452 P.3d 418, 425 (Okla. 2019). But none of the statements here were made to the gaming studios that separated themselves from Mr. Avellone after numerous women (not just Ms. Bristol) came forward about him. Rather, Ms. Bristol's statements were made in a private exchange between Ms. Bristol's and another person on Twitter. *See* Am. Pet. ¶¶ 20–22. They would have likely never come to anyone's attention had there not been a chorus of other women making far more serious claims about Mr. Avellone. The context that these statements were made in do not suggest that Ms. Bristol's intent was to disrupt Mr. Avellone's employment.

Mr. Avellone also cites a post on Reddit where Ms. Bristol expresses her approval of gaming studios to terminate Mr. Avellone. But that post came after his termination. While Ms. Bristol may have agreed with the result of his termination, it does not indicate that was her intent when she made her own statements. It also stretches the imagination to believe that Mr. Avellone was terminated because of Ms. Bristol's statements, rather than the far more serious claims of other women referenced in his Amended Petition and the news articles cited therein.

Mr. Avellone also fails to allege the future gaming studio relationships that he lost as a result of the alleged interference. *See Hetronic Int'l, Inc. v. Rempe*, 99 F. Supp. 3d 1341, 1350 (W.D. Okla. 2015); *Stillwell v. Brakhage*, No. CIV-17-262-R, 2017 WL 11296879, at *2 (W.D. Okla. July 14, 2017). Here, Mr. Avellone only identifies the studios that ended their relationship with him in 2020. He does not allege what manner of future contractual relationships he could have expected at that time, including what types of contracts and projects.

Dated: July 13, 2022.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Scott E. Kiplinger", written over a horizontal line.

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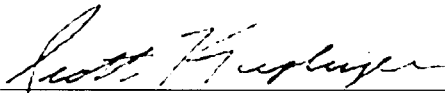
Attorney for Defendant Kelly Bristol

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2022, a true and correct copy of the foregoing was sent via U.S. Mail, postage prepaid, to the following counsel of record:

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