

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1487-16T4

FRANKLIN JACK BURR, II,

Plaintiff-Appellant,

v.

NEWARK MORNING LEDGER CO.,
RICHARD VEZZA, and ADVANCE
PUBLICATIONS,

Defendants-Respondents.

Submitted March 19, 2018 – Decided April 26, 2018

Before Judges Messano, Accurso, and Vernoia.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Docket No.
L-2939-16.

Evelyn F. Garcia, attorney for appellant.

Robinson Miller LLC, attorneys for respondents
(Keith J. Miller and Michael J. Gesualdo, on
the brief).

PER CURIAM

Plaintiff Franklin Jack Burr II appeals from the Law
Division's October 28, 2016 order dismissing his amended complaint
against defendants Newark Morning Ledger Co., Richard Vezza, and

Advance Publications, with prejudice. The amended complaint contained allegations of libel and trade libel resulting from the publication of an article (the article) on defendants' website, NJ.com, on May 13, 2013, which coincided with the issuance of our unpublished opinion affirming plaintiff's conviction for third-degree endangering the welfare of a child. State v. Burr, No. A-2671-10 (App. Div. May 13, 2013) (slip op. at 3-10).¹ That conviction resulted from the retrial following our reversal of defendant's earlier 2004 conviction for second-degree sexual assault, N.J.S.A. 2C:14-2(b), and third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a). State v. Burr, 392 N.J. Super. 538, 542-55 (App. Div. 2007), aff'd as mod., 195 N.J. 119 (2008). Although the article included specific references to the trial testimony we described in our opinion, plaintiff alleged it also contained false statements.

Defendants successfully moved to dismiss plaintiff's initial complaint without prejudice, permitting plaintiff to plead with greater specificity his causes of action. See Hoffman v. Hampshire

¹ Although citing an unpublished opinion is generally forbidden, we do so here to provide a full understanding of the issues presented and pursuant to the exception in Rule 1:36-3 that permits citation "to the extent required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law." See Badiali v. N.J. Mfrs. Ins. Grp., 429 N.J. Super. 121, 126 n.4 (App. Div. 2012), aff'd, 220 N.J. 544 (2015).

Labs, Inc., 405 N.J. Super. 105, 116 (App. Div. 2009). Plaintiff filed a nearly identical amended complaint, which defendants again moved to dismiss. Although plaintiff has not provided us with the moving papers filed by either side, we have the benefit of Judge Jessica R. Mayer's two comprehensive written decisions, from which we glean that plaintiff claimed to have first discovered the article in the winter of 2015 or 2016. He first filed suit May 16, 2016. Judge Mayer dismissed the libel claim as time-barred pursuant to N.J.S.A. 2A:14-3; she dismissed the trade libel claim because plaintiff failed to plead particularized special damages.

Plaintiff asserts it was error to dismiss his libel claim as time barred, arguing the discovery rule, equitable tolling, and the doctrine of substantial compliance should apply. Plaintiff further argues the judge erred in dismissing his trade libel claim because the complaint alleged damages "in an amount to be established through proof at trial." He contends the dismissal denied him "due process" because proof of damages was "supposed to be developed during the discovery phase." These arguments are unavailing, and we affirm substantially for the reasons articulated by Judge Mayer. We add the following comments.

"Whether a cause of action is barred by a statute of limitations is a question of law . . . reviewed de novo." Catena v. Raytheon Co., 447 N.J. Super. 43, 52 (App. Div. 2016) (citing

Estate of Hainthaler v. Zurich Commercial Ins., 387 N.J. Super. 318, 325 (App. Div. 2006). "[L]ibel is defamation by written or printed words." W.J.A. v. D.A., 210 N.J. 229, 238 (2012) (citation omitted). N.J.S.A. 2A:14-3 provides "[e]very action at law for libel or slander shall be commenced within [one] year next after the publication of the alleged libel or slander."

Plaintiff does not dispute that he failed to file his complaint within one year of the publication of the article on defendant's website. He contends, however, commencement of the limitations period should be tolled because of his belated discovery of the article. The Court addressed application of the discovery rule to libel suits in Lawrence v. Bauer Publishing & Printing LTD, 78 N.J. 371 (1979), where the Court noted:

The statute of limitations applicable to the present suit, however, does not measure the limitations period in terms of the 'accrual' of a cause of action. Instead, it provides that an action must be brought within one year of 'the publication' of the alleged libel. The Legislature has therefore fixed a precise date on which the limitations period begins to run. Once the date of the publication is determined, there is no need for further judicial intervention.

[Id. at 374-75.]

Plaintiff argues Lawrence did not create "a bright line rule" precluding the application of equitable doctrines extending the

time to file libel claims beyond the one-year statute of limitations. Recent unambiguous precedent dictates otherwise.

In NuWave Investment Corporation v. Hyman Beck & Company, 432 N.J. Super. 539, 566 (App. Div. 2013) (citations omitted), adhering to Lawrence, we held "the Legislature has fixed a precise date on which the limitations period begins to run[] in a defamation action, which must be brought within one year of 'the publication' of the alleged libel[,] . . . [h]ence, the discovery rule is inapplicable to libel actions." The Court affirmed our holding and added "[N.J.S.A. 2A:14-3's] clear and unqualified language requires all libel claims to be made within one year of the date of the publication." Nuwave Inv. Corp. v. Hyman Beck & Co., 221 N.J. 495, 500 (2015). Having failed to commence his libel action within one year of the article's publication, Judge Mayer properly dismissed plaintiff's complaint with prejudice.

Turning to the complaint's trade libel count, "[t]he standard a trial court must apply when considering a Rule 4:6-2(e) motion to dismiss a complaint for failure to state a claim upon which relief can be granted is 'whether a cause of action is "suggested" by the facts.'" Teamsters Local 97 v. State, 434 N.J. Super. 393, 412 (App. Div. 2014) (quoting Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989)). Dismissal is required "where the pleading does not establish a colorable claim and

discovery would not develop one." State v. Cherry Hill Mitsubishi, Inc., 439 N.J. Super. 462, 467 (App. Div. 2015) (citation omitted). We review the trial court's decision de novo. Flinn v. Amboy Nat'l Bank, 436 N.J. Super. 274, 287 (App. Div. 2014).

"Trade libel identifies the tort addressing aspersions cast upon one's business operation." Patel v. Soriano, 369 N.J. Super. 192, 246 (App. Div. 2004). "A plaintiff alleging trade libel must prove publication of a matter derogatory to the plaintiff's property or business, of a kind designed to prevent others from dealing with [it]." Id. 246. Moreover, "[t]he communication must . . . play a material part in inducing others not to deal with plaintiff." Id. at 247. Finally, a plaintiff must allege special damages, which "go[] to the cause of action itself." Id. at 248. "General, implied, or presumed damages of the kind available in personal defamation actions do not satisfy the requirement of special damages needed for disparagement causes of action." Id. at 249. "In New Jersey, 'a claim for trade libel is subject to the general six-year statute of limitations applicable to malicious interference claims.'" Fairfax Fin. Holdings Ltd. v. S.A.C. Capital Mgmt., L.L.C., 450 N.J. Super. 1, 62 (App. Div. 2017) (quoting Patel, 369 N.J. Super. at 247).

After his first complaint was dismissed without prejudice and Judge Mayer accorded plaintiff an opportunity to plead with greater

specificity, plaintiff's amended complaint only alleged the false statements in the article inhibited "his ability to practice his profession . . . of private music instruction" because "prospective clients shunned his business." The complaint was devoid of any reference to particularized damages and failed to identify the prospective clients allegedly lost as a direct result of the article's publication. Plaintiff argues his damage claim was "supposed to be developed during the discovery phase." However, only plaintiff was in a position to supply the necessary particularized information regarding damages caused by defendant's alleged trade libel. Judge Mayer properly dismissed this count of his amended complaint with prejudice.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION