Motion for rehearing overruled; Opinion of June 7, 2001, withdrawn, Affirmed and Corrected Opinion filed August 9, 2001.

In The

Fourteenth Court of Appeals

NO. 14-98-00888-CV

RICHARD ABRAHAM, Appellant

V.

EXXON CORPORATION, KEITH FULTON AND RON EMBRY, Appellees

On Appeal from the 234th District Court
Harris County, Texas
Trial Court Cause No. 89-44350

C O R R E C T E D O P I N I O N

Appellant, Richard Abraham, alleged Exxon Corporation, through its employees, Keith Fulton and Ron Embry, defamed him. A Harris County jury returned a verdict in favor of Exxon and its employees, and the trial court entered judgment on this verdict. Abraham appeals this verdict in eight issues, which we have grouped together in five categories, arguing that: (1) the trial court abused its discretion by failing to submit the proper definition of "clear and convincing" evidence in a case controlled by the common

law; (2) the trial court erred by improperly excluding evidence; (3) appellees' closing argument was incurable, reversible error; (4) the trial court committed reversible error by reprimanding counsel in front of a jury and the magnitude of the trial court's errors amounted to cumulative error; and (5) the trial court erred in granting appellees' motions for summary judgment. We affirm.

BACKGROUND

Abraham is the Executive Director of Texans United, which helps local citizens organize grass-roots environmental organizations. Between 1988 and 1990, Abraham worked closely with citizens of Baytown, Texas to promote increased understanding and knowledge about the operations of the Exxon facilities in Baytown. During this time, Abraham had direct dealings with: (1) Keith Fulton, who was then manager of the Exxon Chemical Plant in Baytown; (2) Walt Buchholtz, who supervised regulatory compliance; and, (3) Ron Embry, who was then handling public relations.

Abraham assisted the Baytown citizens in forming a group called Baytown Citizens Against Pollution, or "BayCap." Abraham and BayCap met several times with Fulton, Embry, and Buchholtz between 1988 and 1990. During this time, Embry wrote an internal memo discussing the growing environmental awareness in the Baytown area. This memo was uncovered in the discovery process in an unrelated lawsuit against Exxon. The Embry memo became the subject of an article appearing in the *Houston Chronicle* on June 25, 1989, which stated in pertinent part:

> Jeanie Richardson, secretary-treasurer of BAYCAP, said BAYCAP is organizing itself into an effective tool to fight the pollution that members believe leaves black soot on their homes and cars, kills their trees and causes cancer. Her 5-year-old son, diagnosed with brain cancer, is among 40 cancer patients who have lived within a three-block area of Wooster.
>
> Some of the patients have died.
>
> She said Exxon was negotiating with Wooster residents to reduce its emissions but has since quit because of the group's association with Texas

> United, a statewide organization with 9,000 members concerned about preserving the environment and a healthy economy.
>
> "They don't want us there, because we've been openly critical of their practices and are trying to help the working class who live up against their fences," Rick Abraham, a Texans United spokesman. "The type (of community) a large company likes to write off."
>
> He said he suspects Exxon was unhappy with his group because he had been openly critical of the company's toxic emissions, protested the disastrous Alaska oil spill in front of the plant on Earth Day and obtained a sample of discharge water leaving the plant site, which was proved to contain 38 percent petroleum products.
>
> Embry said Abraham had been "irresponsible" for hanging a huge protest sign on the company's main gate and twice trespassing on company property.
>
> "We want to work with our neighbors," he said.

Houston Chronicle, Sunday June 25, 1989.

Later in the summer of 1989, Fulton concluded that Abraham was not working with him in good faith and warned BayCap that Exxon would only work with BayCap if Abraham was not involved. BayCap would not agree to that term, and its meetings with Exxon ended.

Soon thereafter, Abraham brought a slander suit against Fulton, Embry and Exxon. Exxon, Abraham alleged, was liable under the doctrine of *respondeat superior*.

During the next nine years, in which the parties engaged in extensive pre-trial discovery, Abraham repeatedly amended his petition, each time adding either new factual allegations or causes of action concerning an increasing array of alleged statements by Fulton, Embry, and other unnamed Exxon employees about Abraham.

After a first trial in 1994 ended in a mistrial, the parties were called to trial in April 1998. Before the jury returned with a verdict, the trial court granted Exxon's Motion for Partial Summary Judgment, which held portions of Abraham's defamation and intentional infliction of emotional distress claims were barred by limitations. The jury returned a

verdict finding Fulton and Embry did not defame Abraham. The trial court rendered judgment on this jury verdict that Abraham take nothing by his claims against Fulton, Embry, and Exxon.

ANALYSIS

Jury Charge

In his fifth issue, Abraham contends the trial court abused its discretion by failing to give the common law definition of clear and convincing evidence in the jury charge. Because the trial court ruled that Abraham was a limited-purpose public figure for purposes of this action, Abraham was required to prove his case by clear and convincing evidence. *See Casso v. Brand*, 776 S.W.2d 551, 554 (Tex. 1989); *Knox v. Taylor*, 992 S.W.2d 40, 55 (Tex. App.—Houston [14th Dist.] 1999, no pet.). On appeal, Abraham does not challenge either the ruling on his public figure status or the application of the clear and convincing standard of proof to his claims. Abraham's only complaint is about the jury charge—principally, that the trial court erred by not defining "clear and convincing" as an intermediate evidentiary standard.

Civil Procedure Rule 277 provides that the trial judge "shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict." TEX. R. CIV. P. 277. A trial judge is given wide discretion to determine the sufficiency of definitions and instructions incorporated into the jury charge. *See Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 791 (Tex. 1995); *Knoll v. Neblett*, 966 S.W.2d 622, 633 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). A trial court does not abuse its discretion unless the requested instructions are determined to be necessary to enable the jury to properly render a verdict, and the absence of these instructions by the court's refusal, caused or probably did cause rendition of an improper verdict. *See Harris County v. Bruyneet*, 787 S.W.2d 92, 94 (Tex. App.—Houston [14th Dist.] 1990, no writ). We find the given definition was within the discretion given to the trial judge to include in the jury

charge.

> Here, in the jury's charge, clear and convincing evidence was defined as follows:
>
> 'Clear and convincing evidence' means more than a greater weight than the evidence opposed to it, and must produce in your minds a firm belief or conviction about the facts to be proved.

The Texas Supreme Court previously defined this same standard as follows:

> "Clear and convincing evidence" is that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. This is an intermediate standard, falling between the preponderance standard of ordinary civil proceedings and the reasonable doubt standard of criminal proceedings.

State v. Addington, 588 S.W.2d 569, 570 (Tex. 1979); *see In re K.R.*, 22 S.W.3d 85, 89 (Tex. App.—Houston [14th Dist.] 2000, no pet. h.).

Here, the jury charge tracked the Supreme Court's definition regarding clear and convincing evidence in *Addington*. Thus, the jury's instruction effectively and properly conveys to the jury that a clear and convincing standard requires the plaintiff to prove "more than a greater weight than the evidence opposed to it." In this instruction, the jury is told how to weigh the evidence in answering the question it precedes in the charge. The trial court was not required to supplement the jury charge to tell the jury that the clear and convincing evidence falls between the preponderance of the evidence and the reasonable doubt standards. The jury was properly instructed on how to weigh the evidence; thus, the absence of an instruction distinguishing between clear and convincing, preponderance of the evidence, and the reasonable doubt standards of review neither caused nor was reasonably calculated to cause the rendition of an improper verdict. Accordingly, we overrule appellant's fifth issue.

Exclusion of Evidence

In his sixth issue, Abraham argues the trial court erred by excluding an Exxon memorandum filed with the Texas Water Commission. The memorandum contained the following statement, detailing a telephone call to the Texas Water Commission from Steve Wavro, an Exxon engineer, about a stormwater discharge:

> Mr. Wavro called to report that stormwater had been discharged. The first discharge began 1 - 30 -89 2:30 a.m. to 3:30 a.m., 15 million gallons were released. The second discharge was 1-30-89 4:40 a.m. to 8:40 a.m., 13 million gallons were released. The second discharge was stopped when an oil sheen was noted in the discharge channel. No sheen was noted in the ship channel. Oil boom was placed in the channel to prevent the release of oil. One sample was collected from the first discharge. Three samples were collected from the second discharge. Mr. Wavro will follow this call with a letter if the samples are not compliant.

Abraham claims this document reveals Exxon had been in violation of state and federal law and exhibits Exxon's motives for its "plan to disconnect" him from the community. Abraham concludes that had this one document been admitted, the jury "would have likely found that Exxon did act with actual malice and answer the first question of the jury charge affirmatively." We disagree.

Even assuming the trial court erroneously excluded the memorandum, Abraham offers no viable explanation as to why this error was reversible. Although Abraham argues the memorandum shows "that Exxon did act with actual malice," this contention is irrelevant to his case. *See* TEX. R. EVID. 401; *see Erisman v. Thompson*, 167 S.W.2d 731, 733 (Tex. 1943) ("[I]t is not [] proper to admit evidence unless it is addressed or bears upon some issue raised by the pleadings."). Abraham's defamation claim is based solely upon statements allegedly made by Fulton and Embry; thus, Exxon's alleged liability derives from its status as Fulton and Embry's employer. Abraham was required to prove that Fulton or Embry acted with actual malice, not that Exxon acted with actual malice. Additionally, the jury was not asked to decide the issue of Exxon's actual malice, and Abraham has not complained of the omission of such a question on appeal. Consequently,

even if the memorandum did prove Exxon acted with actual malice, it is irrelevant to the issues in this case. Accordingly, we overrule Abraham's sixth issue.

Closing Argument

In issue number seven, Abraham contends Exxon's trial counsel committed reversible error by making an incurable jury argument, in which he commented on facts outside the record. Specifically, Abraham argues that the incurable jury argument reflected negatively on his counsel because Exxon's counsel called Abraham's counsel a liar. Exxon's counsel stated the following in his closing argument:

> One thing I want to get out of the way real fast and real quick is something that Ms. Davenport just said that is very offensive to me. I've been practicing law for almost 37 years. And you heard her badger Mr. Buchkoltz [sic] about white-outs and why this has gone. And she said he whites them out, they white them out. I'll — I'm here to tell you, ladies and gentlemen, I whited those documents out under instructions and orders of a Court in discovery proceedings that took place long before Judge Brister ever got this case. And to accuse Exxon —

At that point, Abraham's counsel objected to the argument as an incorrect rendition of the facts. Before the trial judge, there was a discussion about a hearing before a discovery master, regarding the redaction of the documents. Afterwards, the trial judge sustained the objection. Abraham did not subsequently request an instruction for the jury to disregard the comment or move for a mistrial.

Improper jury arguments are usually referred to as one of two types: "curable" or "incurable." A jury argument is "curable" when the harmful effect of the argument can be eliminated by a trial judge's instruction to the jury to disregard what they have just heard. *Otis Elevator Co. v. Wood*, 436 S.W.2d 324, 333 (Tex. 1968). Once the instruction to disregard is issued, the error is "cured" and rendered harmless. *Id.* On the other hand, an argument may be so inflammatory that its harmfulness cannot be eliminated by an instruction to the jury to disregard it making it "incurable." *Id.*

To obtain a reversal on the basis of improper jury argument, Abraham must establish "(1) an error (2) that was not invited or provoked, (3) that was preserved by the proper trial predicate, such as an objection, a motion to instruct, or a motion for mistrial, and (4) was not curable by an instruction, a prompt withdrawal of the statement, or a reprimand by the judge." *Reese*, 584 S.W.2d at 839-40; *Melendez v. Exxon Corp.*, 998 S.W.2d 266, 280 (Tex. App.—Houston [14th Dist.] 1999, no pet.). The appellate court must closely examine all of the evidence to determine the arguments' probable effect on a material finding. *Reese*, 584 S.W.2d at 840. "From all of these factors, the complainant must show that the probability that the improper argument caused harm is greater than the probability that the verdict was grounded on the proper proceedings and evidence." *Melendez*, 998 S.W.2d at 280. Additionally, appellant must show that the argument, by its nature, degree, and extent constituted reversible error, based on an examination of the entire record to determine the argument's probable effect on a material finding. *See Reese*, 584 S.W.2d at 839-40.

Failure to press for an instruction at the time of a "curable" jury argument operates as a waiver of any complaint that may be made about the argument. *Busse v. Pacific Cattle Feeding Fund No. 1, Ltd.*, 896 S.W.2d 807, 815 (Tex. App.—Texarkana 1995, writ denied). Additionally, where the record fails to show that a motion for mistrial directed to the argument of counsel was not overruled by the trial court, no error is preserved for review. *Biard Oil Co. v. St. Louis Southwestern Ry. Co.*, 522 S.W.2d 588, 590 (Tex. Civ. App.—Tyler 1975, no writ).

We do not need to determine whether the statement was erroneous because Exxon's counsel's statement was curable by an instruction from the trial court. Argument outside the record, such as here, is "ordinarily curable by a timely objection and prompt instruction to disregard." *Haryanto v. Saeed*, 860 S.W.2d 913, 921 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (en banc) (citing *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 840-41 (Tex. 1979)). Additionally, the offending argument was an isolated comment,

which after the judge promptly sustained Abraham's objection, was not repeated. And, although Abraham's counsel failed to request an instruction, the argument along the line complained of was discontinued. *See id.* Thus, any error was cured and we overrule appellant's seventh issue.

Trial Court's Actions

In his first and third issues, Abraham argues the trial court erred in limiting his time to introduce evidence and in reprimanding his counsel when she tried to preserve error. In his eighth issue, he argues that all of the errors committed by the trial court constitute cumulative and harmful error that probably caused the rendition of an improper judgment. We overrule each of these issues.

Time Limits

In his first issue, appellant argues that the trial judge's "arbitrary decision" to limit the number of witnesses he could present and the number of days to present them "severely limited the amount of evidence" presented at trial. Abraham also argues that the trial court erred in excluding the testimony of several of his witnesses because of these time limits.

Because a trial judge has broad discretion to control a trial and the examination of witnesses, a judgment will not be reversed unless probable prejudice is shown. TEX. R. EVID. 611(a), (b); *Jones v. Lurie*, 32 S.W.3d 737, 744 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *see Hoggett v. Brown*, 971 S.W.2d 472, 495 (Tex. App.—Houston [14th Dist.] 1997, no pet.).

We review the trial court's decision regarding the exclusion of evidence for an abuse of discretion. *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex.1995); *Bean v. Baxter Healthcare Corp.*, 965 S.W.2d 656, 658-59 (Tex. App.—Houston [14th Dist.] 1998, no pet.). Reversal for improper exclusion of evidence is appropriate only when 1)

the trial court committed error in excluding certain evidence, and 2) the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. *Id.* An appellate court will not reverse the trial court's decision based on the exclusion of evidence where the evidence to be admitted is cumulative and not controlling on a material issue dispositive of the case. *Bean*, 965 S.W.2d at 659. We review the entire record to determine whether the complaining party showed that the judgment turns on the excluded evidence. *Alvarado*, 897 S.W.2d at 753-54.

Abraham argues he could not present Jim Shannon, Mike DeGuerin, Tom Pearson, and Sandra Mayeaux as witnesses because of the time limits imposed by the trial court. In order to preserve error in the exclusion of witness testimony, Abraham was required to make an offer of proof of the testimony that he sought to introduce. *See Melendez*, 998 S.W.2d at 274. Abraham completely failed to make an offer of proof or a bill of exceptions of the testimony of three of the four witnesses he references in his brief: Shannon, DeGuerin, and Pearson. Accordingly, no error has been preserved regarding these witnesses.

Abraham did make an offer of proof regarding the deposition testimony of Mayeaux, but has not demonstrated reversible error in the exclusion of such evidence. Abraham contends Mayeaux's testimony was critical because it was relevant to the fact that the statements were not published only once, but repeatedly to other persons. However, Mayeaux's testimony was not relevant to any issue in the case. *See* TEX. R. EVID. 401, 402. Because it was not relevant, it is not improper to exclude irrelevant evidence. *See Erisman*, 167 S.W.2d at 733. Mayeaux's deposition testimony consists solely of statements allegedly made by Embry to her in September 1989 regarding Abraham. Abraham's defamation claim against Embry, however, arises solely out of Embry's alleged statements to Cindy Horswell, a *Houston Chronicle* reporter, which were made months before Embry's statements to Mayeaux. As a result, any testimony by Mayeaux concerning what Embry allegedly said *to Mayeaux* about Abraham is irrelevant

to any fact issue to be decided by the jury.

Reprimanding Counsel

In his third issue, Abraham argues the jury's verdict should be reversed because on one occasion, the trial court told Abraham's counsel not to seek to introduce into evidence a document that the trial court had previously excluded.

The only example of the trial judge allegedly improperly reprimanding Abraham's counsel occurred during the following exchange:

> Ms. Davenport [Abraham's counsel]: Sir, with regard to Exhibit No. 165, is this your letter to the Texas Water Commission?
>
> Mr. Malinak [Exxon's counsel]: Your Honor, I object. Counsel badgering the witness with a document that's not in evidence.
>
> Court: Well, she's just asked him whether that's his letter. But if I sustain it on relevance, I'm not going to admit it now, and you're wasting your valuable time which is fine; but at 2:00 o'clock on Thursday, your case is over. You want to —
>
> Ms. Davenport: I understand, Your Honor. And I understand that –
>
> Court: – to make a run at it again, you may do so.
>
> Ms. Davenport: I understand, Your Honor. And in order to enlighten the Court as to its possible, and I understand that the Court may not change its ruling, but I'd at least like to get it on the record as to how it would be relevant, and certainly as to this witness' credibility.
>
> Court: That's why we had a six-hour meeting before the jury got her[e] so you could do that. The Court has been enlightened enough. It is not relevant. And if you want to question him about whether it's his letter, I'll allow it; but I don't think that's disputed.
>
> Ms. Davenport: Your Honor, just for purposes of the record, we would re-tender at this time Exhibit No. 165.
>
> Court: I am not accepting that. We spent six-hours where you tendered 350 exhibits, and I'm not going to have you re-offer them again in front of this jury. We did it so we would not have to take their time doing it.
>
> Ms. Davenport: Well, Your Honor –
>
> The Court: So, you may not re-tender anything you've already

tendered once. That is an order.

Ms. Davenport: May I ask one question outside — and possible outside the presence of the jury?

Court: At lunch.

Ms. Davenport: Okay.

Court: We are not spending any more time. Move on with your case, please.

Ms. Davenport: Simply asking form, Your Honor. Thank you.

Although Abraham argues the trial court repeatedly reprimanded counsel, he only cited one example in the record. We find the trial court's comments were directed to expediting the case. As such, they did not indicate any bias or prejudice against Abraham or his counsel. *See Hoggett*, 971 S.W.2d at 496. Accordingly, we overrule Abraham's third issue.

Cumulative Error

In his eighth issue, Abraham argues the totality of the trial court's alleged errors supports a finding of reversible error. Multiple errors, even if considered harmless if taken separately, may result in reversal and remand for a new trial if the cumulative effect of such errors is harmful. *Jones*, 32 S.W.3d at 745; *Owens-Corning Fiberglass Corp. v. Malone*, 916 S.W.2d 551, 570 (Tex. App.—Houston [1st Dist.] 1996) *aff'd* 972 S.W.2d 35 (Tex. 1998). Here, appellant has not established that the trial judge committed error. Thus, there is no cumulative error requiring reversal. *See Melendez*, 998 S.W.2d at 284. Accordingly, we overrule appellant's eighth point of error.

Summary Judgment

In his second and fourth issues, Abraham argues the trial court improperly granted a partial summary judgment on limitations, which barred subsequent defamation allegations, and on his intentional infliction of emotional distress claim. In deciding whether this traditional summary-judgment motion was properly granted, we will use the

following standard of review:

1. The movant for summary judgment has a burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.
2. In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true.
3. Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor.

Nixon v. Mr. Property Management, 690 S.W.2d 546, 548-49 (Tex. 1985).

Additionally, a defendant moving for summary judgment on the affirmative defense of limitations has the burden to conclusively establish that defense. *KPMG Peat Marwick v. Harrison Cty. Housing Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999); *Ross v. Arkwright Mut. Ins. Co.*, 892 S.W.2d 119, 131 (Tex. App.—Houston [14th Dist.] 1994, no writ). Because the discovery rule has not been pleaded, Exxon must conclusively prove when the cause of action accrued. *Id*. The question of when a cause of action accrues is a question of law for the court. *Ross*, 892 S.W.2d at 131 (citing *Moreno v. Sterling Drug Co.*, 787 S.W.2d 348, 351 (Tex. 1990)).

Defamation

On October 18, 1989, Abraham filed his original petition, which contained the following slander allegations:

- As reported in the July 24, 1989 *Houston Chronicle*, Fulton stated to the *Chronicle* reporter that the samples of hydrocarbon waste taken by Abraham were from a holding pond awaiting treatment, rather than from an Exxon discharge point.
- Fulton stated to members of BayCap that BayCap "should separate and distance itself from Texans United since Texans United through its spokespersons and representatives had made false and misleading statements."
- As reported in the June 25, 1989 *Chronicle* article, Embry stated to the

Chronicle reporter that Abraham had committed the crime of trespassing on Exxon property.

On March 28, 1991, more than a year after he filed his Original Petition, Abraham filed his First Amended Petition, where he alleged new facts regarding different, defamatory statements purportedly made by Fulton and Embry. He also for the first time included facts in his petition alleging that Walt Buchholtz and other named and unnamed Exxon employees also made defamatory statements about Abraham. These statements by Buchholtz were made in an article published in the *Baytown Sun* on June 30, 1989, which was attached to the amended petition, "wherein Mr. Buchholtz was attributed with saying that on two occasions, Abraham, without authorization has used a boat to enter Exxon property along the Houston Ship Channel."

Abraham ultimately filed a total of ten amended petitions and a supplemental petition. Each amended petition repeated the allegations about the three different statements pleaded in the Original Petition and added a multitude of statements allegedly made by either Fulton, Embry, Buchholtz, or other named or unnamed Exxon employees, all about Abraham. Each petition, however, states that each of the newly pleaded statements was allegedly made by September 1989 at the latest.[1]

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[1] In the Tenth Amended Petition, Abraham alleged the following specific defamatory statements:

- APRIL 24, 1989: Buchholtz, a member of Exxon management who in these circumstances is in all things responsible, stated to Paula Cruickshank that Abraham had poured oil on the ground in front of Exxon.
- ON OR ABOUT MAY 20, 1989: Fulton stated to Paula Cruickshank that Abraham had trespassed on Exxon's property, that he was a criminal, and that by trespassing and taking samples, Abraham had committed a criminal act. Additionally, Fulton told Cruickshank that Abraham had lied to Exxon and used BayCAP to obtain information from Exxon dishonestly. Cruickshank was also told that Abraham and his organization had been discredited to the point where other organizations would not work with them. Fulton stated to Cruickshank that Abraham obtained information from Exxon dishonestly and lied to Exxon. Fulton also stated to Cruickshank that Abraham committed criminal trespass. Walter Buchholtz told Paula Cruickshank that Abraham had criminally trespassed on Exxon property to take a waste

(continued...)

Abraham also alleged that up until 1997, "Exxon and/or its representative defendants have continued to republish the aforementioned slanderous statements, and continued to attempt to increase, prolong and perpetuate the harm cause[d] to [Abraham] and his reputation."

In a case originally filed before the expiration of the limitations period, the test for determining whether the statute of limitations bars a cause of action alleged in an amended petition is whether the latter claims are wholly based upon and grow out of a new, distinct,

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[1] (...continued)

sample from a holding pond. Jeannie Richardson was told that Abraham criminally trespassed on Exxon's property.

- ON OR ABOUT JUNE 20, 1989: Buchholtz stated to Sandra Mayeaux that Abraham had illegally taken a sample of waste from Exxon's holding pond and committed criminal trespass. Buchholtz stated to BayCAP member Fannie Cook that Abraham had discredited himself and that other environmental organizations would not work with him.
- ON OR BEFORE JUNE 25, 1989: Embry stated to Cindy Horswell, a *Houston Chronicle* reporter, that Abraham was irresponsible for hanging a banner on Exxon's gate and trespassing and twice trespassing on Exxon's property.
- ON OR BEFORE JUNE 30, 1989: Exxon, by and through Buchholtz made false and slanderous statements to a reporter for the *Baytown Sun*, a local newspaper. An article was published on June 30 wherein Buckholtz was attributed with saying that Abraham and his organization had not acted in good faith.
- JULY 18, 1989: Defendants Fulton and Exxon, by and through Fulton, stated to Bill Dawson, a reporter for the *Houston Chronicle*, that talks between BayCAP and Exxon regarding the negotiation of a "good neighbor agreement" relating to toxic reductions had broken off at or near that date because Abraham "was not acting in good faith." Fulton identified Abraham's "actions" which, according to Exxon, led to breaking off the talks. These alleged actions included Abraham's collection of two samples of hydrocarbon waste awaiting treatment in a holding pond at the Exxon complex, Abraham's making untrue statements in public forums implying that Exxon was putting this waste in the Houston Ship Channel and Abraham's violation of a "working agreement" for the talks. The above statements were published and read by readers of the *Houston Chronicle* on July 24, 1989.
- SEPTEMBER 7, 1989: Exxon employee Kevin LeBlanc stated to Barbara Lotshaw and others that Abraham had trespassed on Exxon's property to take a sample of waste.
- SEPTEMBER 1989: Embry told Baytown resident and BayCAP member Sandra Mayeaux that Abraham had "illegally" taken a sample of waste from a "holding pond" and "holding tank" awaiting further treatment. Embry also stated that Abraham was using BayCAP to obtain material from Exxon he otherwise could not get and that Abraham was doing it in an underhanded way.

or different transaction or occurrence. *Leonard v. Texaco, Inc.*, 422 S.W.2d 160, 163 (Tex. 1967). We apply a two-part test to determine whether an amended petition relates back to the original petition. First, the cause of action asserted in the first pleading must not have been time barred when filed. Second, the amendment must not be based on a wholly new or different transaction or occurrence. *See Tanglewood Terrace v. City of Texarkana*, 996 S.W.2d 330, 343 (Tex. App.—Texarkana 1999, no pet.) (citing *Cooke*, 854 S.W.2d at 141). Here, Exxon only attacks Abraham's new defamation allegations as based on a wholly new and different transactions or occurrences.[2] Accordingly, we will address the second prong of the test.

Section 16.068 of the *Texas Civil Practice and Remedies Code*, which governs the relation back principle in applying the statute of limitations, provides:

> If a filed pleading relates to a cause of action, cross action, counterclaim, or defense that is not subject to a plea of limitation when the pleading is filed, a subsequent amendment or supplement to the pleading that changes the facts or grounds of liability or defense is not subject to a plea of limitation unless the amendment is wholly based on a new, distinct, or different transaction or occurrence.

TEX. CIV. PRAC. & REM. CODE ANN. § 16.068 (Vernon 1997). Section 16.068 liberalizes a plaintiff's right to amend a petition filed before a cause of action was barred by limitations and include any other causes of action that could be based on the same transaction or occurrence. *See Oliveros v. Dillon-Beck Mfg. Co.*, 260 S.W.2d 707, 710 (Tex. Civ. App.—Galveston 1953, no writ) (discussing former TEX. REV. CIV. STAT. ANN. art. 5539b (Vernon 1958), now codified as TEX. CIV. PRAC. & REM. CODE ANN. § 16.068).

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[2] Abraham argues that because he attached a copy of the July 24, 1989 *Houston Chronicle* article to his original petition, which was "made a part [of the petition] for all purposes," he should be permitted to toll the running of the statute of limitations for any statement contained in the article. We disagree. Mere recitation of facts in a petition, or as here, in an article attached to the petition will not toll the running of the statute of limitations. *See Cooke v. Maxam Tool and Supply, Inc.*, 854 S.W.2d 136, 141 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

Libel and slander claims must be brought within one year of the accrual of those claims. TEX. CIV. PRAC. & REM. CODE ANN. § 16.002 (Vernon 1986). A libel or slander claim accrues on the date of the communication or publication and not on the date of the consequences or sequelae. *Ross*, 892 S.W.2d at 131.

This court has previously discussed what is a separate, new transaction for purposes of limitation in *Harris v. Galveston County*, 799 S.W.2d 766 (Tex. App.—Houston [14th Dist.] 1990, writ denied). In *Harris*, the original petition alleged that medical malpractice occurred during surgery, and after the statute of limitations ran, the amended petition alleged negligence occurred after surgery. This Court concluded that the cause of action for post-operative negligence did not relate back to the filing of the original petition because it was based on a separate, new, and distinct transaction. Thus, the later filed negligence cause of action—even though it occurred very close in time—was barred by the statute of limitations. *See id.*, 799 S.W.2d at 769.

After comparing the latest petition to Abraham's original petition, we find the trial court properly granted summary judgment. Here, Abraham's newly-added defamation pleadings are on even more tenuous grounds than that of the *Harris* plaintiff, where the newly-added allegation had a stronger temporal relationship with the original transaction. *See Harris*, 799 S.W.2d at 769. Except for the allegations contained in statements number four and six, which merely restate allegations from his original petition, each of the allegations in Abraham's tenth amended petition are new, distinct defamation allegations.

As new, distinct allegations of defamation, Abraham is barred from bringing them after expiration of the statute of limitations. Accordingly, we overrule Abraham's second issue.

Intentional Infliction of Emotional Distress

Similarly, the trial court properly granted summary judgment on Abraham's intentional infliction of emotional distress claim because the claim was pled outside of the statute of limitations. Abraham first asserted this claim on February 3, 1992. Like his defamation claim, Abraham's intentional infliction of emotional distress claim was premised on statements allegedly made by Fulton and Embry about him. The statute of limitations for intentional infliction of emotional distress is two years. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a); *Bhalli v. Methodist Hosp.*, 896 S.W.2d 207, 212 (Tex. App.—Houston [1st Dist.] 1995, writ denied). Thus, Abraham's claim for intentional infliction of emotional distress was barred at the time it was asserted unless it arose out of conduct occurring after February 3, 1990. His petition alleging intentional infliction of emotional distress did not allege any facts concerning conduct by Fulton or Embry that occurred after February 3, 1990. Consequently, Abraham's intentional infliction of emotional distress claim is barred by the application of the statute of limitations. Accordingly, his fourth issue is overruled.

CONCLUSION

Having overruled each of Abraham's issues, we affirm the judgment of the trial court.

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Norman Lee
Justice

Judgment rendered and Opinion filed August 8, 2001.

Panel consists of Justices Sears, Lee, and Draughn.[***]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[***] Senior Justices Ross A. Sears, Norman Lee, Joe L. Draughn sitting by assignment.