

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

FEDELYNE BERNABE,
Plaintiff/Appellant,

v.

TAREN ELLIS LANGFORD AND RICHARD LANGFORD, HUSBAND AND WIFE;
STATE OF ARIZONA,
Defendants/Appellees.

No. 2 CA-CV 2017-0167
Filed July 18, 2018

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20161838
The Honorable Cynthia T. Kuhn, Judge

AFFIRMED

COUNSEL

Keith M. Knowlton L.L.C., Tempe
By Keith M. Knowlton
Counsel for Plaintiff/Appellant

Mark Brnovich, Arizona Attorney General
By Jennifer J. Sanders, Assistant Attorney General, Tucson
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Judge Eppich authored the decision of the Court, in which Presiding Judge Vásquez and Judge Staring concurred.

E P P I C H, Judge:

¶1 Fedelyne Bernabe appeals the trial court’s order dismissing three of her claims with prejudice.¹ She argues the court improperly concluded her notice of claim and complaint were untimely. We affirm.

Factual and Procedural Background

¶2 On November 26, 2014, the Arizona Attorney General, through Assistant Attorney General Taren Langford, filed a consumer fraud complaint against 3 Gorillas Moving and Storage, LLC; Troy Emerson, individually; and Emerson and his wife, Fedelyne Bernabe, jointly. The complaint detailed Bernabe’s involvement with 3 Gorillas, including allegations that she had assisted Emerson with the operations of 3 Gorillas on behalf of the marital community. On April 1, 2015, the state filed an amended complaint which further detailed Bernabe’s involvement with 3 Gorillas, including allegations that she had “acted as the Operations Manager and/or Insurance Agent” for the company. At an April 27, 2015 hearing on Bernabe’s motion to dismiss or alternatively for a more definite statement, the state clarified that it intended to pursue Bernabe as a member of the marital community, and not in her individual capacity.

¶3 On October 19, 2015, 202 days after the state filed its amended complaint, Bernabe filed a notice of claim with the Arizona Attorney General alleging damages suffered as a result of the consumer fraud case and indicating a sum-certain amount for which her claim against the state could be settled. Bernabe alleged that, “[a]s a result of the Complaint and Amended Complaint in [the consumer fraud case], [t]he Better Business

¹Bernabe also appealed the trial court’s order dismissing one of her claims without prejudice. We dismissed that portion of Bernabe’s appeal for lack of jurisdiction. *See McMurray v. Dream Catcher USA, Inc.*, 220 Ariz. 71, ¶¶ 4-5 (App. 2009) (dismissal without prejudice generally not appealable as final judgment); *see also* A.R.S. § 12-2101(A)(1) (requiring final judgment for appellate jurisdiction).

BERNABE v. LANGFORD
Decision of the Court

Bureau of Southern Arizona would not extend to her accounting business any accreditation.” She also alleged the complaint had been “well publicized in Arizona,” causing harm to her separate accounting business.

¶4 On April 18, 2016, 384 days after the state filed its amended complaint, Bernabe filed a complaint in superior court against Langford and others, including the State of Arizona. She alleged the consumer fraud case (and publications related to it) constituted defamation and libel, intentional infliction of emotional distress, and wrongful prosecution of a civil action. Her complaint also asserted Bernabe had discovered the underlying facts supporting her complaint on January 9, 2015. All three of Bernabe’s claims were related to the state’s filing of the complaint and amended complaint in the consumer fraud action.

¶5 The state filed a motion to dismiss Bernabe’s complaint alleging, among other things, Bernabe had failed to comply with the statutory deadlines set forth in A.R.S. §§ 12-821 and 12-821.01. The state argued Bernabe’s claim had accrued no later than January 9, 2015, the date alleged in Bernabe’s complaint, triggering her duty to file a notice of claim within 180 days and file a complaint within one year. *See* §§ 12-821, 12-821.01. It thus pointed out that neither Bernabe’s notice of claim nor her complaint were timely filed.

¶6 In response, Bernabe filed both a response to the motion to dismiss and an amended complaint. The amended complaint removed the assertion that Bernabe had discovered the facts supporting her complaint on January 9, 2015, and replaced that date with April 27, the date of the hearing on her motion, at which the state clarified its intent to pursue Bernabe as a member of her marital community. The amended complaint also included a claim that the Arizona Attorney General had engaged in negligent hiring, retention, or supervision of the employees involved in the case. In Bernabe’s response to the motion to dismiss, she argued her claim had not accrued until the hearing on April 27, 2015, which would have made her notice of claim and complaint timely.

¶7 The trial court concluded that Bernabe’s claims for defamation and libel, intentional infliction of emotional distress, and negligent hiring would have accrued at least by April 1, 2015, the date the state filed its amended complaint. Accordingly, the court dismissed those three claims with prejudice, concluding Bernabe’s notice of claim and complaint were untimely filed. The court also dismissed Bernabe’s claim for wrongful prosecution of a civil action without prejudice. The court

BERNABE v. LANGFORD
Decision of the Court

issued a final, appealable judgment, which Bernabe timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

Discussion

¶8 The sole issue for our consideration is when Bernabe’s claim accrued, triggering her duty to file a notice of claim and complaint within the timelines set forth in §§ 12-821 and 12-821.01.² Bernabe argues her claims did not accrue until April 27, 2015, because prior to that date she “did not have actual or constructive knowledge that the State of Arizona was not pursuing her [in her personal capacity] for consumer fraud.” We review de novo a trial court’s dismissal of a complaint based on the application of a statute of limitations. *Dube v. Likins*, 216 Ariz. 406, ¶ 5 (App. 2007).

¶9 Section 12-821.01(B) provides that “a cause of action accrues when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition that caused or contributed to the damage.” “The determination of when a cause of action accrues requires an analysis of the elements of the claim presented.” *Glaze v. Larsen*, 207 Ariz. 26, ¶ 10 (2004). A claim for defamation requires, at a minimum, the negligent publication of a statement that is both false and defamatory. *Boswell v. Phx. Newspapers, Inc.*, 152 Ariz. 1, 3 & n.1 (App. 1985). In Arizona, a defamation action accrues “at the time the statement is first published.” *Larue v. Brown*, 235 Ariz. 440, ¶¶ 19-20 (App. 2014).

¶10 A claim for intentional infliction of emotional distress requires proof that the plaintiff suffered emotional distress. *See Mintz v. Bell Atl. Sys. Leasing Int’l, Inc.*, 183 Ariz. 550, 553-54 (App. 1995). The emotional

²In their answering brief, appellees assert they enjoy absolute privilege and are absolutely immune from suit, insofar as the allegedly defamatory statements were made by a prosecutor acting in her official capacity in a judicial proceeding. Although their argument appears meritorious, *see Green Acres Tr. v. London*, 141 Ariz. 609, 613 (1984); *State v. Superior Court*, 186 Ariz. 294, 297 (App. 1996), we need not address it in light of the untimely filing of Bernabe’s notice of claim and complaint. Moreover, although appellees raised the issue of immunity in their motion to dismiss Bernabe’s original complaint, they failed to do so in their motion to dismiss the amended complaint, and the trial court did not address it. *See Navajo Nation v. MacDonald*, 180 Ariz. 539, 547 (App. 1994) (court will not address arguments raised for first time on appeal).

BERNABE v. LANGFORD

Decision of the Court

distress Bernabe alleges stems from the publication of the allegations in the consumer fraud case. This claim would have therefore accrued upon the state's publication of the complaint. *See* § 12-821.01(B).

¶11 A claim for negligent hiring, retention, or supervision of an employee requires a finding that an employee committed a tort. *See Kuehn v. Stanley*, 208 Ariz. 124, ¶ 21 (App. 2004). And a negligence claim requires a showing of actual damages. *Gipson v. Kasey*, 214 Ariz. 141, ¶ 9 (2007). Bernabe again alleges that she was damaged by the allegations in the consumer fraud case. Accordingly, Bernabe's claim would have accrued at the time of the purportedly tortious publication of the complaint. *See* § 12-821.01(B).

¶12 We fail to see how Bernabe's claims would have accrued upon hearing that she was not being pursued in her personal capacity but only as a member of the marital community. The damages asserted as to all three claims were caused by the purportedly false and misleading factual allegations in the complaint and amended complaint. All three claims would have therefore accrued upon publication of those documents. Accordingly, Bernabe's claims would have accrued no later than April 1, 2015, the date the state filed its amended complaint in the consumer fraud case. *See* § 12-821.01(B). We therefore agree with the trial court that Bernabe's notice of claim and complaint were untimely filed, and her claims were properly dismissed. *See* §§ 12-821, 12-821.01.

Disposition

¶13 The trial court's order is affirmed.