UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ARTHUR ALAN WOLK, ESQUIRE	:	**NO. 2:09-CV-4001**
Plaintiff	:	**CIVIL ACTION**
vs.		
	:	**JURY TRIAL DEMANDED**
WALTER K. OLSON, ESQUIRE **THEODORE H. FRANK, ESQUIRE** **DAVID M. NIEPORENT, ESQUIRE** **THE OVERLAWYERED GROUP** **And OVERLAWYERED.COM**	:	
Defendants	:	

FILED
JUN 17 2010
MICHAEL E. KUNZ, Clerk
By_____Dep. Clerk

OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS PURSUANT TO RULE 12 (b) (6)

Plaintiff, Arthur Alan Wolk, Esquire, by and through jos undersigned attorneys, respectfully opposes Defendants' Motion to Dismiss Pursuant to Rule 12 (b) (6) for the reasons set forth in the attached Memorandum of Law, which is incorporated by reference herein.

Respectfully Submitted,

SPECTOR GADON & ROSEN, P.C.

By: AJD 3101

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Date: September 22, 2009

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And OVERLAWYERED.COM		
	:	
Defendants		

PLAINTIFF'S BRIEF IN OPPOSITION TO THE MOTION TO DISMISS PURSUANT TO RULE 12 (b) (6) OF DEFENDANTS

Plaintiff Arthur Alan Wolk, Esquire ("Plaintiff" or "Wolk"), by and through his attorneys, respectfully submits the following Memorandum of Law in Opposition to the Motion to Dismiss Pursuant to Rule 12 (b) (6) of the Defendants. In support thereof, Plaintiff avers as follows:

I. INTRODUCTION

Having maliciously defamed the Plaintiff by posting an article on their "Overlawyered" website falsely accusing Wolk of selling out his client for his own personal benefit, while posing as responsible journalists and concealing the fact that they are controlled by the aviation lobby and paid to defame Wolk as part of their larger political mission to discredit accident victims on behalf of their benefactors, without ever asking Wolk for comment or notifying him that the false story would be disseminated, the Defendants now seek to hide behind the statute of limitations to avoid responsibility, and make the incredible argument that a false suggestion that an attorney committed

professional misconduct is somehow non-defamatory and a non-actionable statement of opinion. Defendants' arguments are meritless.

As to the statute of limitations, the discovery rule applies to toll the statute of limitations until Wolk's 2009 discovery of the defamatory article. It is undisputed for purposes of this motion that Wolk had no reason to awaken inquiry as to the existence of the defamatory April 8, 2007 article until he performed a "Google" search of himself on the advice of judges at a CLE which took place in April 2009. The discovery rule in Pennsylvania is a rule of statutory construction applicable to all cases, including this case. The reasoning in the two cases relied upon by the Defendants in support of their argument was expressly rejected by **three** subsequent Pennsylvania Supreme Court cases which control this inquiry, and provide that the discovery rule applies in this case as a matter of law to toll the statute of limitations. Further, the issue of the applicability of the discovery rule cannot be determined at this stage. Thus, this argument fails.

Defendants' other arguments are just as unavailing. The false accusation that Wolk committed professional misconduct is not only defamatory, it is defamatory *per se*, and any argument that a false statement, accusing Wolk of selling out his client for personal gain, is not defamatory, is just silly. The argument that the false accusation is a mere statement of "opinion" is just as unavailing, because (1) it is a non-protected "accusation," rather than an opinion, (2) it is "sufficiently factual to be susceptible of being proved true or false," and (3) even if it could be considered opinion, it implies undisclosed and untrue facts (such as the assertion that the settlement for Wolk's client was insufficient), and wholly miscasts, misrepresents, and omits critical facts from its discussion of the judicial opinion upon which it purported to rely. This article was

nothing more than a "hatchet-job" to knowingly disseminate a defamatory falsehood about Wolk to satisfy the political agenda of the Defendants' paid benefactors, and to demean Wolk so he would be a less effective advocate for the injured persons he represents. Wolk lost clients as a result of the defamatory article. Thus, as set forth more fully below, the Defendants' Motion to Dismiss must be denied in its entirety.

II. FACTS

A. Procedural History

Wolk initiated this action by filing a Writ of Summons in the Philadelphia County Court of Common Pleas on or about May 13, 2009. Wolk filed his Complaint, seeking recovery under theories of defamation, false light, and intentional interference with prospective contractual relations, in the Philadelphia County Court of Common Pleas, on August 17, 2009. Defendants removed the case to this Court on or about September 1, 2009, and filed the Motion to Dismiss on or about September 9, 2009.[1]

B. The Complaint

Wolk incorporates the entirety of his Complaint as though fully set forth herein. As discussed in the Complaint, Wolk is a prominent aviation attorney. [Complaint, ¶ 13]. Wolk is nationally known to be a zealous and successful advocate for his clients, and Wolk has ***never*** been accused of failing to zealously represent any client, or selling out a client to benefit himself financially. [Complaint, ¶ 16].

Overlawyered began in 1999. [Complaint, ¶ 17]. Overlawyered boasts approximately 9,000 "unique daily visitors," and the Defendants also disseminate an "Overlawyered" newsletter to "several thousand people." [Complaint, ¶¶ 23-24].

[1] Defendants' Motion to Dismiss was not timely filed under Federal Rule of Civil Procedure 81 (c) (2), as it was due on or before September 8, 2009. This Court should deny the within Motion on this basis alone.

Defendants Olson, Frank and Nieporent, who are attorneys, write for, edit and produce the content of Overlawyered, hold themselves out as having specialized knowledge in their field, and cast themselves as unbiased "watchdogs" over the legal system. [Complaint, ¶ 18-21]. In reality, the Defendants are funded by, seek to advance the agenda of, and controlled by, various industry and trade associations seeking to sway public opinion against accident victims. [Complaint, ¶ 28]. Defendants have never disclosed this affiliation, and the bias inherent in that assocation. [Complaint, ¶ 28].

Beginning in 2000, Wolk's law firm represented the victim of an aircraft accident in the Taylor Case described in the Complaint. [Complaint, ¶ 29]. After discovery disputes arose, the Trial Judge in the Taylor Case issued a September 2002 order critical of Wolk's conduct during discovery. [Complaint, ¶ 30]. In 2003, after Wolk filed a motion to vacate the order, the order was vacated. [Complaint, ¶ 32]. Thereafter, the Taylor Case settled for a sum that far exceeded the value previously placed on the Taylor Case by a federal magistrate, and all attorneys in the Taylor Case unanimously agreed that Wolk never committed any unprofessional, unethical or wrongful conduct in the Taylor Case. [Complaint, ¶ 32]. Neither Judge Carnes, nor any of the parties in Taylor, **ever suggested** that Wolk sold out his client for his personal gain, or that the settlement was inadequate, prior to the dissemination of the Frank Article.

On or about April 8, 2007, Defendants published an article relating to the Taylor Case (the "Frank Article"), on the Overlawyered website, which stated:

> Arthur Alan Wolk v. Teledyne Industries, Inc.
>
> by Ted Frank on April 8, 2007
>
> Judge writes scathing opinion about attorney; opponent attorney mails opinion to client; losing attorney sues other

> attorney for defamation. No dice, but even this ludicrous suit does not result in sanctions. [Beck/Herrmann]
>
> Beck and Herrmann miss, however, an especially interesting subplot. Wolk settled the underlying case, Taylor v. Teledyne, No. CIV.A.1:00-CV-1741-J (N.D. Ga.), on the condition that the order criticizing him be vacated. Did Wolk's client suffer from a reduced settlement so that his attorney could avoid having the order used against him in other litigation? (The discovery violation complained about was apparently a repeat occurrence.) The district court permitted a settlement that vacated the order, but its only reported inquiry into whether Wolk did not suffer from a conflict of interest and was adequately protecting his client's rights was Wolk's representation to the court that the client was alright with the size of the settlement. That begs the question whether the client was fully aware of the conflict of interest; if, as seems to be the case, the N.D. Ga. failed to do so, one really wishes courts would do more to protect fiduciaries of plaintiffs' attorneys before signing off on settlements. 338 F.Supp.2d 1323, 1327 (N.D. Ga. 2004), aff'd in unpublished summary per curiam opinion (11th Cir., Jun. 17, 2005).
>
> We've earlier reported on Mr. Wolk for his lawsuits against commenters at an aviation website that criticized him: Sep. 16-17, 2002. As the Taylor opinion notes, Wolk also threatened to sue the federal judge in that case. He also filed what the Eleventh Circuit called a frivolous mandamus petition. (Complaint, Ex. "A").

Wolk had absolutely no knowledge that the defamatory Frank Article had been published until the Spring of 2009. [Complaint, ¶ 47]. In April 2009, Wolk attended a Continuing Legal Education seminar where the speakers, a panel of judges, advised that during trial some jurors may perform a "Google" search on the attorneys in the case. Thus, the judges recommended that each listener perform a "Google" search on themselves. [Complaint, ¶ 46]. That night, for the first time, Wolk performed a "Google" search on himself, and saw the defamatory Frank Article. [Complaint, ¶ 47]. Because Wolk had no reason to "awaken inquiry" to determine the existence of the

defamatory article until April 2009, Pennsylvania's one-year statute of limitations was tolled until Wolk's discovery. Wolk subsequently learned that certain potential clients had, in fact, viewed the Overlawyered.com website and the defamatory Frank Article, viewed the accusations that Wolk is unethical, that he cheats and sells-out his clients, and the other false accusations, and decided not to engage Wolk as an attorney. [Complaint, ¶ 50].

III. ARGUMENT

A. Standard Of Review

"Fed.R.Civ.P. 8 requires only a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests, and ... this standard does not require detailed factual allegations." Phillips v. Allegheny County, 515 F.3d 224, 231 (3d Cir. 2008). "[O]n a Rule 12 (b) (6) motion, the facts alleged must be taken as true and a complaint may not be dismissed merely because it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits." Id. "Courts are required to accept all well-pleaded allegations in the complaint as true and to draw all reasonable inferences in favor of the non-moving party." Id. "Once a claim has been stated ... it may be supported by showing any set of facts consistent with the allegations in the complaint." Id. at 232.

According to the Third Circuit, in light the United States Supreme Court's recent holding in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), a Plaintiff must plead sufficient facts to make a "showing," rather than a blanket assertion of entitlement to relief. In other words, the plaintiff must not only provide "fair notice," but also the

factual underpinnings on which the claim rests. Id. Thus, the Phillips Court summed up the holding in Twombly as follows:

> [A] claim requires a complaint with enough factual matter (taken as true) to suggest the required element. This does not impose a probability requirement at the pleading stage, but instead simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element. Id. at 234.

In this case, as set forth below, accepting all of the Plaintiff's well-pled factual allegations as true, the Defendants' Motion to Dismiss cannot be granted.

B. Choice Of Law: Pennsylvania's State Statute Of Limitations, And Pennsylvania State Tolling Principles, Must Be Applied

Pennsylvania's statute of limitations, and Pennsylvania's state tolling principles, must guide the Court's determination of this matter. The Defendants removed this case to this Court based upon diversity jurisdiction. Thus, this Court should apply Pennsylvania's conflict of law rules to determine which state's law is applicable. Franklin Prescriptions, Inc. v. The New York Times Co., 267 F.Supp.2d 425, 431 (E.D.Pa. 2003). It is well-settled in Pennsylvania defamation cases that "the state of plaintiff's domicile generally has the greatest concern in vindicating plaintiff's good name and providing compensation for harm caused by the defamatory publication." Id. See also Marcone v. Penthouse Int'l. Mag. for Men, 754 F.2d 1072, 1077 (3d Cir. 1985), cert. den., 474 U.S. 864 (1985). In this case, because the Plaintiff is based in Pennsylvania, and has suffered harm in Pennsylvania, Pennsylvania law is applicable.

Also, in Pennsylvania, statutes of limitation are part of the substantive law. Menichini v. Grant, 995 F.2d 1224, 1228 n. 2 (3d Cir. 1993). Because Pennsylvania law must be applied to the Plaintiff's substantive claims, Pennsylvania's state statute of

limitations must also be applied. As to Wolk's claims of defamation and invasion of privacy, Pennsylvania has a one-year statute of limitations. 42 Pa.C.S.A. § 5523 (1).

"Generally, if a federal court applies a state limitations period, it should also apply state tolling principles." Harmelin v. MAN Financial, Inc., No. 06-1944, 2007 WL 2702638, at *9 (E.D.Pa. Sept. 12, 2007) (citing In re Mushroom Transp. Co., Inc., 382 F.3d 325, 335 (3d Cir. 2004)). Because this federal court sitting in diversity must "borrow from state law the relevant tolling principles," Mushroom, 382 F.3d at Id., the recent rulings of the Pennsylvania Supreme Court respecting the application of Pennsylvania's "discovery rule" are controlling. Thus, both Pennsylvania's statute of limitations, and its tolling principles, including the "discovery rule," are applicable.

C. The Defendants' Motion To Dismiss On Statute Of Limitations Grounds Must Be Denied At This Stage Of The Proceedings Because Of The Applicability Of The Discovery Rule

To support their argument that Pennsylvania's "discovery rule" does not apply, the Defendants rely solely on two federal court cases that held, upon a motion for summary judgment, that the discovery rule is inapplicable, Barrett v. Catacombs Press, 64 F.Supp.2d 440 (E.D.Pa. 1999) and Bradford v. American Media Operations, Inc., 882 F.Supp. 1508 (E.D.Pa. 1995). However, since Barrett and Bradford were decided, the Pennsylvania Supreme Court has issued three (3) opinions defining the scope of Pennsylvania's discovery rule, Wilson v. El-Daief, M.D., 964 A.2d 354 (Pa. 2009); Fine v. Checcio, 870 A.2d 850 (Pa. 2005); and Crouse v. Cyclops Industries, 745 A.2d 606 (Pa. 2000). Contravening the holdings in Barrett and Bradford, Wilson, Fine and Crouse make it absolutely clear that:

> (1) the discovery rule is directly applicable in this case (and in **all** other cases subject to Pennsylvania's statutes of

> limitation) to determine when Wolk's cause of action "accrued;"
>
> (2) whether the discovery rule applies to toll the statute of limitations in this case is a question of fact for the jury that cannot be determined at this stage;
>
> (3) the "all vigilance" standard applied in Barrett and Bradford is rejected; and
>
> (4) because Wolk had no reason to "awaken inquiry and direct diligence" to determine whether he was defamed by the Defendants prior to April 2009, were the case to be submitted to a jury, a jury would be constrained to find that the discovery rule applies and Wolk's claims against the Defendants are timely.

Pursuant to Wilson, Fine and Crouse, this Court's holdings in Barrett and Bradford, which were decided prior to the Supreme Courts' holdings, have absolutely no applicability, and contain analyses that were expressly rejected by the Pennsylvania Supreme Court. Accordingly, the Defendants' statute of limitations argument is inappropriate for resolution at this stage, and even if the statute of limitations issue could be determined now, the discovery rule applies in this case to toll the statute of limitations.

1. Introduction To The Discovery Rule

The applicable Pennsylvania statute of limitation is 42 Pa.C.S.A. § 5523 (1), which provides: "[t]he following actions and proceedings must be commenced within one year: (1) An action for libel, slander or invasion of privacy." 42 Pa.C.S.A. § 5502 (a) provides the method of computing periods of limitation:

> **(a) General rule.**--The time within which a matter must be commenced under this chapter shall be computed, except as otherwise provided by subsection (b) or by any other provision of this chapter, from the time the cause of action **accrued**, the criminal offense was committed or the right of appeal arose. (Emphasis supplied).

In Pennsylvania, the discovery rule is an exception to the general rule that "a cause of action accrues when the plaintiff could have first maintained the action to a successful conclusion." Fine, 870 A.2d at 857. "Although the discovery rule evolved out of the common law, it is now appropriately regarded as an application of statutory construction arising out of the interpretation of the concept of the 'accrual' of causes of action" described in 42 Pa.C.S.A. § 5502 (a). Wilson, 964 A.2d at 363. Accordingly, the Pennsylvania Supreme Court has made it crystal clear that the discovery rule applies to **all** causes of action that are subject to Pennsylvania's statutes of limitation:

> [T]he discovery rule applies to toll the statute of limitations in **any** case where a party neither knows nor reasonably should have known of his injury and its cause at the time his right to institute suit arises. Fine, 870 A.2d at 860 (emphasis supplied).

The discovery rule "tolls the running of the applicable statute of limitations until the point where the complaining party knows or reasonably should know that he has been injured and that his injury has been caused by another party's conduct." Crouse, 745 A.2d at 611. Further, the Pennsylvania Supreme Court has clarified the meaning of the term "reasonable diligence," and explained:

> [R]easonable diligence is not an absolute standard, but what is expected from a party **who has been given reason to inform himself** of the facts upon which his right to recovery is premised. As we have stated: "[T]here are [very] few facts which diligence cannot discover, but **there must be some reason to awaken inquiry and direct diligence** in the channel in which it would be successful. This is what is meant by reasonable diligence." Fine, 870 A.2d at 859 (citing Crouse, 745 A.2d at 611) (emphasis supplied).

Thus, "while reasonable diligence is an objective test, it is sufficiently flexible to take into account the differences between persons and their capacity to meet certain situations

and the circumstances confronting them at the time in question." Fine, 870 A.2d at 859 (citing Crouse, 745 A.2d at 611). Following the Supreme Court's holdings in Fine and Crouse, it is now well-settled in Pennsylvania jurisprudence that in all cases, the discovery rule applies to toll the statute of limitations until the plaintiff is given "some reason to awaken inquiry and direct diligence" to inform himself of the facts upon which his right to recovery is premised.[2]

Further, in light of Fine and Crouse, the Pennsylvania Supreme Court in Wilson addressed two previous, and inconsistent, formulations of the discovery rule, and resolved the inconsistency by rejecting the "all vigilance" formulation of the discovery rule in Pennsylvania in favor of a "reasonable diligence" standard as applied in Fine and Crouse. The Wilson court noted that previously, some courts, citing language from Dalrymple v. Brown, 701 A.2d 164, 170 (Pa. 1997) stating that the discovery rule "applies only to those situations where the nature of the injury itself is such that no amount of vigilance will enable the plaintiff to detect an injury," applied an "all vigilance" standard that placed an absolute duty on a plaintiff to discover the cause of his injury. Under this formulation, a plaintiff could not benefit from the discovery rule even if the plaintiff was unaware that the defendant's conduct was injurious or the existence of the injury. Wilson, 964 A.2d at 362-63. However, in Wilson, the Pennsylvania Supreme Court **rejected** the "all vigilance" approach, and found that only "reasonable diligence" was the proper inquiry. Id. The Court explained: "Most cases apply a reasonable

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[2] See Drelles v. Manufacturers Life Ins. Co., 881 A.2d 822, 831 (Pa.Super. 2005); Caro v. Glah, 867 A.2d 531, 534 (Pa.Super. 2005); Burton-Lister v. Sigel, Sivits and Lebed Assocs., 798 A.2d 231, 237 (Pa.Super. 2002); Donovan v. Idant Labs., 625 F.Supp.2d 256, 266 (E.D.Pa. 2009); Padalino v. Standard Fire Ins. Co., 616 F.Supp.2d 538, 547 (E.D.Pa. 2008); Farm Credit Leasing Svcs. v. Ferguson Packaging Mach., Inc., No. 07-1900, 2007 WL 4276841, at *6 (E.D.Pa. Dec. 3, 2007) ("in all cases some event must trigger the plaintiff's obligation to investigate); Harmelin, 2007 WL 2702638, at *9.

diligence requirement as opposed to an all vigilance one, and reasonable diligence as described in Fine is the appropriate formulation." Id. (citing Fine 870 A.2d at 858) (internal citations omitted). Thus, "a party is not under an absolute duty to discover the cause of his injury." Crouse, 745 A.2d at 611. See also Drelles, 881 A.2d at 834 (same).

Finally, "[p]ursuant to the application of the discovery rule, the point at which the complaining party should reasonably be aware that he has suffered an injury is a factual issue best determined by the collective judgment, wisdom and experience of the jurors." Crouse, 745 A.2d at 611 (internal quotations omitted). "[O]nly where the facts are so clear that reasonable minds *cannot differ* may the commencement of the limitations period be determined as a matter of law." Id. See also Fine, 870 A.2d at 858-59 ("Since this question involves a factual determination as to whether a party was able, in the exercise of reasonable diligence, to know of his injury and its cause, ordinarily, a jury is to decide it. Where, however, reasonable minds would not differ in finding that a party knew or should have known on the exercise of reasonable diligence of his injury and its cause, the court determines that the discovery rule does not apply ..."); Wilson, 964 A.2d at 362 ("Fine also reflects that the determination concerning the plaintiff's awareness of the injury and its cause is fact intensive, and therefore, ordinarily is a question of fact for a jury to decide. However, courts may resolve the matter at the summary judgment stage where reasonable minds could not differ ...").

All of these principles are persuasively displayed in the Pennsylvania Supreme Court's Opinion in Crouse, where the Court affirmed (1) that there is no "all-vigilance" formulation, but only a "reasonable diligence" standard, (2) that the discovery rule applies unless and until the plaintiff has "some reason to awaken inquiry and direct

diligence" toward an investigation of whether he had been injured, and (3) that even where there arguably exists some reason to "awaken inquiry," it is for a jury to decide whether the plaintiff acted reasonably in pursuing his post-awakening investigation. In Crouse, an operator of a steel forge brought a promissory estoppel claim against a steel manufacturer from which it had purchased a steel forge, based on the manufacturer's alleged breach of its commitment to provide specified amounts of work. The transaction and the promise occurred in early 1987, and there was a four (4) year statute of limitations. In June 1987, the plaintiff's lenders began to pressure it because the forge was not doing enough business. In November 1987, the plaintiff wrote to his lender and explained that he was behind in payments because the defendant had not provided the promised work. However, the defendants continued to state that the business was forthcoming. The plaintiff filed suit in 1992.

At trial, the court denied the defendant's motion for a non-suit based upon the statute of limitations. The Superior Court reversed, finding that the statute of limitations had expired, and the discovery rule was inapplicable. On appeal, the Supreme Court reversed. Although the Court acknowledged that the plaintiff advised a lender in December 1997 that he had not received the promised work, it also found that the plaintiff could have believed that negotiations were ongoing and the promise would be kept. Thus, the Superior Court's determination constituted an improper factual determination that usurped the province of the jury. The Supreme Court also found that the trial court had erred by making such a determination, instead of letting a jury decide:

> Under these circumstances, where there were factual and credibility determinations to be made regarding Crouse's reasonable diligence in discovering whether Cyclops was in breach of promises relied on, the issue as to when Crouse

> knew or should have known of the breach should have gone to the jury. It is not part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried. Thus, the trial judge, who was himself uncertain about the propriety of his own judgment call, mistook a factual finding for a legal conclusion and usurped the province of the jury. The credibility of evidence on both sides of the matter of whether Crouse exercised reasonable diligence in determining whether Cyclops intended to honor its promises ... and therefore whether he knew or should have known of the breach before the end of 1988 – was a factual determination for the jury. We therefore hold that the Superior Court erred in reweighing the factual finding of the trial judge instead of remanding to the jury the factual issue of when the statute of limitations began. Crouse, 745 A.2d at 612-13.[3]

Similarly, in Padalino, Judge Davis of this Court refused to grant a motion to dismiss based upon the statute of limitations because reasonable minds could differ on whether the plaintiffs had reasonable cause to "awaken inquiry" into the fact that the flood insurance policies they purchased did not cover their land. The plaintiffs purchased flood insurance to cover two properties in September 2004, and their broker represented that the insurance would cover the properties. A flood occurred in September 2006. Thereafter, the plaintiffs sought coverage from their insurer, but coverage was denied because the properties were in a flood plain. In 2008, plaintiffs filed suit against the broker, alleging, *inter alia*, fraud and negligence. Defendants moved to dismiss on statute of limitations grounds, contending the discovery rule was inapplicable. Judge Davis denied the motion, explaining: "we cannot accept [defendant's] argument at this stage of the proceedings," and that it could not hold on a motion to dismiss that the

[3] Importantly, in his dissenting opinion in Crouse, Justice Saylor disagreed with the Supreme Court's wholesale adoption of the "discovery rule" to apply to all causes of action in Pennsylvania, finding that the discovery rule should only apply to torts, and not to promissory estoppel claims. Crouse, 745 A.2d at 613, fn. 1 (Saylor, J. Dissenting). Of course, in Wilson, the Supreme Court re-affirmed that the "discovery rule" was a rule of statutory construction relating to when a cause of action "accrues" under 42 Pa.C.S.A. § 5502 (a), and therefore, the discovery rule is applicable to all Pennsylvania statutes of limitation. Wilson, 964 A.2d at 363

plaintiffs knew or should have known that the defendants misrepresented the validity of the policies. In his reasoning, the Court noted that the plaintiffs contended that they were assured by the defendants that their properties were insurable, and taking those allegations as true, reasonable minds could differ as to whether it was unreasonable for the plaintiffs to trust those representations. Judge Davis explained further:

> Reasonable minds could find that, by relying on Defendants as sophisticated parties involved in the insurance business, Plaintiffs had no reason to conduct their own due diligence into the insurability of their properties under federal law. Without a reason to "awaken inquiry," one could find that it was reasonable for Plaintiffs to fail to discover Defendants' alleged misrepresentations until their claims were denied in 2007 ... Because we cannot find that Plaintiffs' should have discovered their injury and its cause with reasonable diligence at the time their policies were issued, we cannot hold as a matter of law that the discovery rule does not toll the statute of limitations in this case. Padalino, 616 F.Supp. 2d at 548.

Applying these principles, this Court cannot grant the Defendants' Motions to Dismiss.

2. Because The Discovery Rule Applies In This Case, The Court Must Deny The Defendants' Motion To Dismiss On Statute Of Limitations Grounds

Applying the teaching of Crouse, Fine, and Wilson, as well as Padalino, it is clear that the Court cannot grant the Defendants' Motion to Dismiss on statute of limitations grounds, because the discovery rule is applicable. Factually, this Court must accept as true the following. The defamatory Frank Article was disseminated on the Overlawyered website on April 8, 2007. Overlawyered then sent out subsequent mailings that contained the defamatory Frank Article. Overlawyered is supposedly viewed by approximately 9,000 viewers per day. It is believed that the Frank Article remained on the front "page" of Overlawyered for approximately one month, and was then placed into an "archive" on

the Overlawyered site. Prior to April 2009, Wolk had never heard of Overlawyered, had never read any Overlawyered publication, and had no information that would have awakened his inquiry into whether he was defamed. Also prior to April 2009, Wolk had not done any "Google" searches on himself to determine whether there were any defamatory articles on the worldwide web concerning Wolk. Wolk discovered the defamatory article in April 2009 when he performed, for the first time, a "Google" search on himself upon the recommendation of certain judges at a CLE.

Applying these facts to the law discussed above, it is clear that at this stage of the litigation, the Court cannot hold with certainty that reasonable minds would not find that Wolk had no reason to conduct his own due diligence and discover the defamatory Wolk article. First, as discussed above, Pennsylvania's discovery rule is a rule of statutory construction that applies to **all** Pennsylvania's statutes of limitation, and the accrual thereof. Wilson, 964 A.2d at 363; Fine, 870 A.2d at 860. Thus, the discovery rule is applicable, as a matter of law, to the within defamation action.

Second, pursuant to the discovery rule, a Pennsylvania statute of limitations will be tolled until a plaintiff is given "some reason to awaken inquiry and direct diligence" to inform himself of the facts upon which his right to recovery is premised, at which time the running of the statute of limitations is triggered. Fine, 870 A.2d at 859. In this case, it cannot be disputed (for purposes of this motion) that Wolk had absolutely no knowledge of the defamatory Frank Article, or of the existence of the Overlawyered website, prior to April 2009. The Defendants do not, and cannot, point to any fact that would establish that Wolk was given any reason to awaken his inquiry and direct his diligence to discover any cause of action, prior to April 2009. As such, Wolk could not

have had any duty to discover the Frank Article, and his injury caused thereby, until, at the earliest, April 2009. After his discovery in April 2009, Wolk immediately contacted Overlawyered and asked them to delete the article, and initiated this lawsuit in May 2009. Given that there is absolutely nothing to indicate to the contrary, reasonable minds could plainly believe that Wolk had no reason to "awaken inquiry" until April 2009. Thus, reasonable minds could (and should) find that it was reasonable for the Plaintiff to fail to discover the Frank Article and his injury until April 2009.

In this connection, and as discussed more fully below, the Defendants' sole contention is that, regardless of whether Wolk had **any** reason to awaken inquiry, Wolk was obligated to take affirmative precautions to discover the existence of defamatory articles against him, even though he had no reason to suspect any such activity. In other words, the Defendants rely upon an "all vigilance" standard, and assert that because it was technically possible for Wolk to have performed an investigation, Wolk was bound to perform such an investigation. Of course, this argument was rejected squarely by the Pennsylvania Supreme Court in Wilson. Wilson, 964 A.2d at 362-63. Because the Pennsylvania Supreme Court has expressly rejected the Defendants' sole argument, this Court should reject the Defendants' Motion to Dismiss.

Finally, and even assuming *arguendo* that the Defendants could point to any fact which might have awakened Wolk's inquiry into whether he had been defamed (which they have not done and cannot do), it is clear that such a question as to the reasonableness of Wolk's conduct is one that is particularly reserved for the jury. Quite simply, reasonable minds could believe that Wolk acted properly in not performing internet searches on himself to determine whether any cyberspace entity had written a defamatory

article about him, Wolk was not required to act before he had reason to "awaken inquiry" in April 2009, and in light of this, the question of the applicability of the discovery rule "is a factual issue best determined by the collective judgment, wisdom and experience of the jurors." Crouse, 745 A.2d at 611.

In sum, the discovery rule is plainly applicable, generally, to defamation actions such as the instant case. Pursuant to Pennsylvania's discovery rule, the applicable statute of limitations is tolled until Wolk had reason to "awaken inquiry," which in this case occurred no sooner than April 2009. The Pennsylvania Supreme Court has soundly and explicitly rejected the "all vigilance" paradigm advanced by the Defendants. Finally, the issue of the discovery rule in this case must be one reserved for the jury, and is an inappropriate issue for disposition at this stage. For all of these reasons, this Court should deny the Defendants' Motion to Dismiss on statute of limitations grounds.

3. Barrett and Bradford Contravene Pennsylvania Law

In support of their Motion, Defendants' rely exclusively on Barrett and Bradford, two cases decided in the 1990's, prior to the Pennsylvania Supreme Court's decisions in Wilson, Fine and Crouse. As a result, Barrett and Bradford are wholly inconsistent with present Pennsylvania law, and are therefore inapposite. For example:

> 1. Barrett and Bradford hold that Pennsylvania's discovery rule is inapplicable to print libel claims involving large-scale advertisement and sale, when Wilson, Fine and Crouse make it clear that the discovery rule is applicable to all Pennsylvania statutes of limitation;
>
> 2. Barrett and Bradford apply an "all vigilance" standard, and reason that because the defamatory communications *could* have been discovered, the plaintiff had an affirmative duty to discover them – but this "all vigilance" standard was expressly rejected by the Pennsylvania Supreme Court in Wilson; and