

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

ARTHUR ALAN WOLK,)	
)	09-CV-4001
Plaintiff,)	
)	
vs.)	Philadelphia, PA
)	June 24, 2010
WALTER K. OLSON, ET AL.,)	
)	
Defendants.)	

TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE HONORABLE MARY A. MCLAUGHLIN,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	ANDREW J. DEFALCO, ESQUIRE PAUL R. ROSEN, ESQUIRE Spector, Gadon & Rosen, P.C. Seven Penn Center 7 th Floor 1635 Market Street Philadelphia, Pennsylvania 19103
For the Defendants:	SIOBHAN K. COLE, ESQUIRE MICHAEL N. ONUFRAK, ESQUIRE White and Williams, LLP 1650 Market Street One Liberty Place Suite 1800 Philadelphia, Pennsylvania 19103
Audio Operator:	RAYMOND WOLF
Transcribed by:	DIANA DOMAN TRANSCRIBING P. O. Box 129 Gibbsboro, New Jersey 08026 Off: (856) 435-7172 Fax: (856) 435-7124 E-mail: dianadoman@comcast.net

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

I N D E XARGUMENT:

By: Mr. Onufrak 4, 30, 70

By: Mr. Rosen 10, 41

1 (The following was held in open court at 9:30 a.m.)

2 CLERK: -- the Honorable Mary A. McLaughlin
3 presiding.

4 THE COURT: Good morning everyone. Please be seated.
5 Nice to sell you all again. Although I had hoped that we could
6 resolve it, but obviously that didn't happen. So, it's always
7 nice to see you. Is this Mr. Wolk?

8 COUNSEL: It is, Your Honor.

9 COUNSEL: Yes, it is, Your Honor.

10 THE COURT: Oh, I thought I recognized you.

11 MR. WOLK: Yes.

12 THE COURT: Good morning, sir.

13 MR. WOLK: How are you, Your Honor?

14 THE COURT: I didn't know whether you were going to
15 be here. Nice to see you.

16 MR. WOLK: Same here.

17 THE COURT: Okay. Mr. Rosen, of course, I know.
18 And, who's the gentleman in the middle again? I know I met you
19 before, sir.

20 MR. DEFALCO: Andrew DeFalco, Your Honor.

21 THE COURT: Say your last name for me.

22 MR. DEFALCO: Andrew DeFalco.

23 THE COURT: DeFalco. Very good. And, of course, Mr.
24 Onufrak and I are old friends. I mean -- I don't mean. You
25 know, I'm kidding. I only mean that in the courtroom. And, --

1 and, who is with you, sir?

2 MR. ONUFRAK: This is Soibhan K. Cole, Your Honor.

3 THE COURT: And, good morning to you, ma'am.

4 MS. COLE: Good morning.

5 THE COURT: Okay. All right, counsel. Of course,
6 I've read the papers and -- and the cases. It's interesting --
7 this whole issue of the discovery rule is, I find, very
8 interesting, so I have enjoyed it. And, of course, the -- the
9 failure to state a claim, you know, is always interesting in
10 defamation cases.

11 So, Mr. Onufrak, it is your motion. Why don't we do
12 the statute of limitations first, you know, and then the -- the
13 failure to state a claim. And, why don't we just start sort of
14 first with does the discovery rule apply in this kind of a -- I
15 guess what some of the cases are calling -- the cases that Mr.
16 Rosen doesn't like -- media public defamation.

17 So, do you want to start on that? And, you can stay
18 there, come to the podium, wherever you want to be.

19 MR. ONUFRAK: Your Honor, I think it's very clear
20 that the discovery rule does not apply in a media publication.
21 So, if it were a book, I think it would be an easy decision for
22 the Court --

23 THE COURT: But, are there Pennsylvania state cases
24 on books -- I mean, you know, on anything that would -- that
25 would support that?

1 MR. ONUFRAK: Your Honor, the -- the two District
2 Court opinions we cited from --

3 THE COURT: Oh, yes. Uh-huh.

4 MR. ONUFRAK: -- from 1995 and 1999, the
5 Bradford case, which was by Judge Dalzell, and the Barrett
6 case, which was by Judge Van Antwerpen, I think analyze that
7 pretty thorough. And, they clearly drew a distinction between
8 a media publication on the one hand and a conversation or a --
9 a statement of some kind on the other.

10 When a book is written or a magazine is published or
11 a newspaper article appears or a web blog goes on the internet,
12 there's -- there's no dispute about when the publication
13 occurred. So, there -- the discovery rule cannot apply.

14 THE COURT: Well, I -- am, I'm not saying I -- I
15 disagree with you and -- or that it doesn't make sense. But, I
16 guess what I'm just trying to note is -- is there -- and, I
17 know -- I read those two cases, then I read the Smith case, and
18 then Judge Fullam has a recent case that I can't pronounce the
19 name of which -- that appear to conclude as you urge this Court
20 to conclude.

21 But, I was just wondering, are there any Pennsylvania
22 -- I mean, of course, -- and, I know Crouse -- what is it Fine
23 Crouse -- I've read those as well. But, is there any
24 Pennsylvania case that -- that sort of acknowledges that? And,
25 I'm not saying there isn't. I'm -- I'm just wondering -- that

1 acknowledges that the discovery rule doesn't apply in every
2 case. Mr. Rosen says it applies in every case.

3 MR. ONUFRAK: I don't think there's any way it
4 applies to every case, every statute of limitations, as he
5 urges the Court to do based on medical malpractice cases
6 essentially, although one is a promissory estoppel case.

7 THE COURT: Uh-huh.

8 MR. ONUFRAK: None are libel and slander cases.

9 THE COURT: Uh-huh.

10 MR. ONUFRAK: I don't think there is a case that is
11 as clear as -- as, you know, what Your Honor is -- is seeking.
12 But, if the Court reads Bradford and Barrett together, -- and,
13 then there is a new case, Your Honor, which I don't know if the
14 Court found, which was decided on May 14th, 2010. This is
15 Giordano, G-I-O-R-D-A-N-O, v. Claudio, C-L-A-U-D-I-O. It's
16 another District Court opinion by Judge Padova.

17 Here you had Temple University professors in a
18 dispute over the authorship of a paper. And, one of them --
19 there are many, many claims back and forth and there were
20 counterclaims. One of them claimed that an e-mail sent by a --
21 a fellow professor named Tanaka to the committee that was
22 investigating the authorship libeled one party.

23 Judge Padova did not dismiss the case under Rule
24 12B(6) and held that the discovery rule might apply. And, the
25 reason I think he did that is because the Tanaka e-mail was

1 just that. It was an e-mail which is more akin to a
2 conversation or an oral statement that a web blog that went out
3 to the entire world on the internet. So, that case
4 procedurally is against our position today but, as a practical
5 matter, illustrates the analysis that the District Courts
6 undertake.

7 So, that distinction has to be upheld for the statute
8 of limitations to have any meaning. If you look at the facts
9 that are alleged in the complaint, Mr. Wolk alleges that
10 Overlawyered.com was a very popular website. It was reviewed
11 all the time, 9,000 people a day went on it. Potential clients
12 went on it. Many lawyers who might refer him cases went on it.

13 Furthermore, he alleges that Mr. Olson, who
14 administered the website, and Mr. Frank, who actually wrote the
15 blog, that they might have a grudge against him, that they had
16 written against him before. So, even if the discovery rule did
17 apply, if the standard is reasonable diligence -- Mr. Rosen
18 went to great lengths in his brief to say it's not all
19 pervasive diligence. So, let's assume it's reasonable
20 diligence.

21 But, if the standard were reasonable diligence,
22 certainly Mr. Wolk would have monitored this very important
23 blogging website which had wronged him before from time to
24 time. And, as the Court knows, you can set up on the internet
25 little reminders --

1 THE COURT: Well, actually, I don't. But, that's all
2 right.

3 MR. ONUFRAK: But, I mean, --

4 THE COURT: I'll accept that one can.

5 MR. ONUFRAK: Mr. Wolk seemingly was not on the
6 internet before April 2009. I mean, that's -- that's what he
7 would have the Court believe. And, you know, let's -- leaving
8 the issue of plausibility aside, let's accept that that's
9 generally true, that he wasn't well versed in the internet. He
10 put all these facts in his complaint.

11 And, if -- if you take them at face value, as you
12 must, and then apply the law, the law -- the law most strongly
13 in his favor, he -- he had a duty to be on guard.

14 THE COURT: Uh-huh.

15 MR. ONUFRAK: This is more than two years after this
16 -- this was on the internet available for everyone.
17 Apparently, no one brought it to his attention in the meantime.

18 Your Honor, I would also point out that it was widely
19 reported in the media and was on the front page of The Legal a
20 month or two ago that Mr. Wolk represented a client in Common
21 Pleas Court and won an \$89M verdict. So, although we're not
22 reaching the issue of damages today, and I don't -- probably we
23 never will -- or won't for a long time -- it's difficult to say
24 what -- what impact this really -- really would have had.

25 But, --

1 THE COURT: Uh-huh.

2 MR. ONUFRAK: -- that -- that's our position on --

3 THE COURT: Right.

4 MR. ONUFRAK: -- the discovery rule. If you'd like
5 me to go further, I will.

6 THE COURT: Well, -- no, that -- that's fine. And, I
7 -- obviously I understand that that's your position. I guess
8 I'm just going back again to the -- to the first question of
9 whether the discovery rule should apply. I have not done this,
10 and I'm wondering if either of you have.

11 What I'm wondering is there -- obviously it's
12 Pennsylvania law that I'm going to follow. But, is there --
13 are there any Courts around the country, other than our
14 District Courts that are dealing with this question of, you
15 know, media public defamation to see whether they're applying a
16 discovery rule or whether they're taking, you know, the blanket
17 rule that -- that apparently some of our -- our Judges have
18 done?

19 MR. ONUFRAK: Not that I'm aware of, Your Honor.
20 We --

21 THE COURT: Okay.

22 MR. ONUFRAK: We concentrated only on the
23 Pennsylvania law in the brief. But, --

24 THE COURT: Sure, understandable.

25 MR. ONUFRAK: -- we could look that up if --

1 THE COURT: No, it's -- that's fine. That's
2 understandable. Okay. Well, let me -- Mr. Rosen, let me hear
3 from you, sir, especially on this first question of whether the
4 discovery rule applies in a case like this where you're talking
5 about this widespread internet dissemination.

6 MR. ROSEN: All right, Your Honor. We have to first
7 look at the period of time, 1998, 1999, when the two cases
8 plaintiff is rely -- defendants are relying on was enacted.
9 When you read through Judge Dalzell's opinion, he first takes
10 the position that the discovery rule doesn't apply anyway,
11 except in medical mal cases.

12 THE COURT: Uh-huh.

13 MR. ROSEN: And, in fact, the case right after him
14 that relies on him actually says we don't apply the discovery
15 rule to anything except personal injury torts. So, the mind
16 set of the Judge opening that -- those cases up made it
17 absolutely clear that they're not even dealing with the
18 discovery rule.

19 Then they just -- without dealing with the discovery
20 rule, they then look at the actual facts of the case. And,
21 Judge Dalzell's opinion, which everybody relies upon, is just
22 compelling as a matter of fact and equity that this woman
23 shouldn't be able to bring the case.

24 She's on the front page of The National Star, 1200
25 pounds, lost 900 pounds, quoted extensively in the Star and

1 it's distributed to every single solitary place in her
2 neighborhood. She said she had it on the 8th of August and
3 waited 367 days before she brought the claim.

4 Your Honor, I'm not necessarily certain that it was
5 the media issue that drove that case. What was driving that
6 case is when does it start? What drove that case is the
7 uniform rule of publications. And, what Dalzell was dealing
8 with -- I don't mean to call him by short -- but, what Judge
9 Dalzell was dealing with is when do we start the actual
10 statute?

11 THE COURT: Right. There was a big chunk of it.
12 But, he did then go on --

13 MR. ROSEN: Then he then goes into media, yes.

14 THE COURT: Yeah.

15 MR. ROSEN: And, he says that, under these
16 circumstances, with media, the Pennsylvania Supreme Court would
17 hold --

18 THE COURT: Uh-huh.

19 MR. ROSEN: -- this way. So, when you look at those
20 cases, we don't look at those cases in an internet setting. We
21 look at those cases in an actual newspaper and then a book sent
22 in to somebody's home area.

23 And, when we look at those cases, you have to look at
24 them in the context, because they didn't really have any
25 Supreme Court Pennsylvania cases to rely on. None of them

1 cited to one Supreme Court case except the cases that said at
2 that time that it doesn't apply.

3 And, then they use the Pennsylvania Supreme Court
4 cases, the -- what I would call all vigilance standard. So,
5 they apply a standard that is no longer the standard in
6 Pennsylvania, they apply the fact that the discovery rule
7 doesn't apply, and then they don't have any Pennsylvania cases
8 support it. Without me going into it -- and, I can go into it
9 at length -- but, that's generally what they say.

10 Then you get the Pennsylvania Supreme Court coming in
11 and starting brand new on the discovery rule with the first
12 case of Crouse. Crouse is the open door to the case of we
13 don't do and reject all vigilance where a person has to go out
14 and look for it, has to be -- something has to be done.

15 And, they come up with a theory called the awakening
16 theory. Something has to awaken you. And, I think that, if
17 you read -- if you read the comp -- the Crouse case, it just --
18 it has to be something that opens the door.

19 And, in Crouse, the Court says, "Reasonable diligence
20 is precisely that, a reasonable effort to discover the cause of
21 an injury after the facts and circumstances present the case.
22 The Court has long held there are a few facts which diligence
23 cannot discover. But there must be some reason to awaken
24 inquiry and direct diligence in the channel in which it will be
25 successful. This is what is meant by reasonable diligence."

1 The Supreme Court pronounces the awakening theory in
2 2000 -- in the year 2000. The Pennsylvania Supreme Court says
3 awaken. Then you have to take -- and, what does awaken theory
4 mean? Awaken theory means it has to be brought to your
5 attention.

6 Now, you have a blog on the internet of one million
7 pieces. And, Mr. Wolk has made it absolutely clear that he
8 doesn't look at himself. A lot of people -- I don't look at
9 myself in Google. A lot of people don't look at Google.

10 He comes back from a seminar where a Judge says
11 juries look at Google, go look at it. He looks at it and goes,
12 oh, my God. And, Your Honor, I brought the Google search so
13 the Court can see exactly what we're talking about. I'm going
14 to hand it up.

15 THE COURT: Sure. (Pause). Thank you.

16 MR. ROSEN: Now, here's a Google search, Arthur Alan
17 Wolk. And, you'll see the third thing down -- the third one
18 down, "Teledyne Industries by Ted Frank, April 6, 2007."

19 THE COURT: Uh-huh.

20 MR. ROSEN: "Judge writes scathing opinion about an
21 attorney", okay?

22 THE COURT: Uh-huh.

23 MR. ROSEN: Now, the Judge writing a scathing opinion
24 about the attorney isn't the content of the Frank article.
25 That's the content of the Herrmann article that he's reporting

1 on. But, when you open up the door and read the article, it's
2 scathing about Arthur Wolk independent of Teledyne.

3 But, before I get to that -- because you asked to the
4 statute of limitations, so I'm not going to go into content.

5 THE COURT: Uh-huh.

6 MR. ROSEN: But, this is what he learns. He doesn't
7 wait one minute after he learns -- he is awake, Your Honor. He
8 met the Crouse test, which is repeated again in Fine and
9 repeated again in Wilson. And, he says, at that moment, you're
10 going to be sued, get that off the internet. And, he writes to
11 them within days. And, the letter that is attached to our
12 complaint -- he just got awake -- awake -- but, he just got up
13 and realized that it's there.

14 Now, at that moment in time, does he exercise
15 diligence? Within a week. Within a -- he sends the letter
16 out. A Mr. DeForest, who is in Teledyne, gets a copy of these
17 letters. And, he's the defense counsel, and he writes to the
18 owner of the company saying Mr. Wolk did nothing wrong, and
19 here's the certification in Teledyne that he is clean, that we
20 warrant it, that he did nothing unethical. And, they still
21 keep it up.

22 So, what's going on here is that Wolk has followed
23 the Pennsylvania law. The question is is that the law that
24 should apply to all cases or just to some hybrid group? It
25 doesn't apply -- it applies to media if you get a newspaper in

1 your -- in your door, and it applies to books. Does it apply
2 to a blog that -- I mean, the question is are we going to start
3 to pick and choose?

4 And, the Supreme Court of Pennsylvania has answered
5 that question. The Supreme Court has said, -- I'm going to
6 point you out in Fine -- "Today we hold it is not relevant to
7 the discovery rule's application whether or not the prescribed
8 period has expired. The discovery rule applies to toll the
9 statute of limitations in any case."

10 THE COURT: Uh-huh.

11 MR. ROSEN: And, that's repeated by the Supreme Court
12 in Wilson. And, the reason they say that, Your Honor, is
13 because the statute uses the word "accrued" -- the very statute
14 uses the word "accrued". And, they are saying that the
15 discovery rule applies in any case because it's a creature not
16 of common law, but it's a statutory interpretation.

17 And, under those circumstances, anybody relying on
18 the statute of limitations of Pennsylvania gets the discovery
19 rule as a matter of law. And, it not only said that, but it is
20 -- it is repeated in Wilson, which actually gets rid of the all
21 -- actually -- both -- from Crouse, Fine, and Wilson -- they
22 all get rid of the all vigilance rule. They say there must be
23 an awakening event.

24 They then say, -- and, I'm reading from the last
25 Supreme Court on this -- "Some of these inconsistencies are

1 readily resolved. Most cases apply a reasonable diligent
2 requirement as opposed to an all vigilance one. And,
3 reasonable diligence as described in Fine is the approved
4 formulation and the appropriate test.

5 "Although the discovery rule evolved out of the
6 common law, it is now appropriate regarded as an application of
7 statutory construction arising out of the interpretation of the
8 concept of accrual in a cause of action." The Court then goes
9 on to say that it applies to every case relying on the statute.

10 THE COURT: Mr. Rosen, if it had been ten years that
11 had gone by and Mr. Wolk first saw it, would -- would it still
12 be the same result?

13 MR. ROSEN: Your Honor, I don't think that you can
14 apply equities that -- you have to give that to the jury. Both
15 Wilson, Fine, and Crouse -- Crouse reversed a Superior Court
16 that took it away from the jury. Fine made it mandatory for a
17 jury. Your question is not for you.

18 THE COURT: Uh-huh.

19 MR. ROSEN: A jury would then say was his
20 reasonableness correct for ten years not to know about it?
21 They would hear the facts of Mr. Wolk, they would hear why he
22 waited ten years, and a jury would determine if both Wilson,
23 Fine, and Crouse --

24 THE COURT: Uh-huh.

25 MR. ROSEN: -- mandate a jury to determine that,

1 unless no reasonable mind could disagree --

2 THE COURT: Right. I'm -- I'm looking -- I guess
3 this is Fine actually. Mr. Onufrak cited -- or quoted from a
4 portion of it. And, I guess a couple things. I -- I hear you,
5 and I have read those cases, and I'll read them again. But, --
6 and, I guess this is Fine that I'm reading from.

7 "As the discovery rule has developed, the salient
8 point giving rise to its application is the inability of the
9 injured, despite the exercise of reasonable diligence to know
10 that he's injured." I mean, the -- obviously the typical med
11 mal --

12 MR. ROSEN: Of course.

13 THE COURT: -- they don't know that he's -- someone
14 doesn't know, but they've --

15 MR. ROSEN: Well, there's a lot of --

16 THE COURT: -- that the doctor --

17 MR. ROSEN: -- those typicals.

18 THE COURT: -- committed medical malpractice.

19 MR. ROSEN: I mean, I agree that it's a malpractice.
20 Yes, you might not know a sponge was in your stomach. But,
21 the --

22 THE COURT: Sure.

23 MR. ROSEN: But, the point is promissory estoppel
24 cases it's been applied to.

25 THE COURT: Oh, clearly. And, -- and, Courts -- in

1 fact, one of the Courts that Mr. Onufrak relies on
2 distinguishes -- I guess it's Smith, is it?

3 MR. ROSEN: Smith.

4 THE COURT: Yeah, that talks about a situation where
5 it's a private conversation that would not have been overheard
6 by the victim of the defamation. But, I guess the question
7 becomes, if you start -- if this whole discovery rule came
8 about because of latent injuries, doesn't Mr. Onufrak have a
9 good point as does Judge Dalzell and Judge -- is it Buckwalter
10 -- who was the other Judge?

11 MR. ROSEN: Van Art --

12 THE COURT: Van Antwerpen.

13 MR. ROSEN: Antwerpen.

14 THE COURT: Antwerpen -- that -- that it really --
15 you know, it's not sort of analytically, theoretically really
16 applicable when you've got a media kind of public alleged
17 defamation that we have here that -- the discovery rule came
18 about to solve a very different issue from what we have here.

19 MR. ROSEN: Well, the only problem is that you're
20 reaching a hypothetical that is totally outside the facts of
21 this case in order to come to the question as to whether or not
22 you should apply the law.

23 THE COURT: Uh-huh.

24 MR. ROSEN: The law has been pronounced by three
25 Supreme Court cases that --

1 THE COURT: Well, -- but, none of them were a media
2 case, and they do --

3 MR. ROSEN: No, Your Honor.

4 THE COURT: -- say other things.

5 MR. ROSEN: It doesn't matter that they weren't --
6 they -- if that were case, --

7 THE COURT: Uh-huh.

8 MR. ROSEN: -- if they -- if we have to wait until
9 the Supreme Court decides media, then -- then the Court cannot
10 rule against our client by putting into play cases that didn't
11 -- that had a different test at that time at the Supreme Court,
12 which was all vigilance.

13 THE COURT: Uh-huh.

14 MR. ROSEN: And, --

15 THE COURT: Well, those other case -- let me just say
16 one thing. Those other cases are not binding on me. They're
17 only as persuasive -- if they're persuasive, I may follow them.
18 But, they're not binding obviously. There's other District
19 Court cases. And, of course, the Supreme Court cases are.

20 But, even taking them as they are, the question is do
21 they really -- and, I'm asking -- you know, I mean, I'm open to
22 both sides. Do they really foreclose this -- me from finding
23 that the discovery rule is inapplicable? And, you obviously
24 think they do because, at some point they say each case or
25 every case.

1 MR. ROSEN: You have to apply the awaken theory.

2 THE COURT: Uh-huh.

3 MR. ROSEN: You have to apply what Fine held,
4 Wilson held, and Crouse held that there's got to be some event.
5 Now, if it comes out during the deposition of Mr. Wolk that
6 there was something that would have brought that to his
7 attention, they could come in here on summary judgment.

8 THE COURT: Uh-huh.

9 MR. ROSEN: The fact of the matter is a motion to
10 dismiss -- no case cited ever touched a motion to dismiss.
11 Every one was on a full factual record. Bradford, Barrett,
12 Smith -- every case, even the cases at the Supreme -- of -- in
13 Pennsylvania were on a full record, not preliminary objections
14 or motions to dismiss.

15 This Court is at a point in time where theory
16 shouldn't be applied unless no reasonable mind could disagree.

17 THE COURT: Uh-huh.

18 MR. ROSEN: The Court is in a situation where it has
19 no choice but to allow this case to develop. That doesn't take
20 Mr. Onufrak out of the picture. If he wants to try and come
21 back in at a later time and say I took Mr. Wolk's deposition
22 and, after taking it, he admitted that, you know something, he
23 should have followed -- he knew these people were critical of
24 him. He should have looked and saw what was going on.

25 And, his response to us to that is I never look at my

1 computer for any of that stuff. I don't follow blogs. It's
2 not my respon -- then the Court has to determine whether or not
3 that's a fair response to take him out of the case if the
4 Supreme Court hasn't ruled that it's all cases in the interim.

5 THE COURT: Uh-huh.

6 MR. ROSEN: The point is that, when you look at the
7 Supreme Court ruling, it says every statute of limitations gets
8 this criteria of reasonable awaken theory --

9 THE COURT: Uh-huh.

10 MR. ROSEN: -- pronounced in Crouse, followed in
11 Fine, and followed again in Wilson. Since the Supreme Court
12 has not made an exception, this Court shouldn't create an
13 exception which the Supreme Court hasn't created based on cases
14 that didn't have that theory in it at that time and are age
15 old.

16 THE COURT: Uh-huh.

17 MR. ROSEN: On top of which this is a blog. Your
18 Honor, we're not talking about Star magazine on the front page.
19 Everyone in the book -- they're talking about the person was
20 quoted. In the Bradford case, she gave interviews. There was
21 nothing in this case to awaken Mr. Wolk.

22 If they called him and said what happened here, if
23 they had called his client, if they had called Teledyne's
24 lawyers, if they had called anybody that -- to get the accuracy
25 of those facts, hey, we got a problem, because maybe they would

1 have told him.

2 But, they sat in silence and stealth and just put
3 this on a blog out there to a group of their subscribers who
4 are anti-Wolk. They're not going to call -- oh, guess what,
5 Arthur -- yes, we got something to nail you with on a motion to
6 disqualify, and I'm warning you about it. They're sitting
7 waiting to use it against him.

8 Their subscribers are not on his side of the fence.
9 It's the defense industry. They're not here --

10 THE COURT: All right.

11 MR. ROSEN: -- to help Arthur. Okay. So, the fact
12 of the matter is it's a blog. Now, you're going to apply law
13 that went to a newspaper to every thing in her district where
14 she was absolutely aware of and a news -- and a book where they
15 were quoted to a situation where he had no knowledge. And,
16 that's the facts in the complaint.

17 THE COURT: Uh-huh.

18 MR. ROSEN: And, if those facts are the facts that
19 are in this complaint at this time, the Court must accept it
20 and must say at this point in time this Court cannot say that
21 the Supreme Court is applying the statute to everything except
22 a newspaper or an internet case.

23 THE COURT: Uh-huh.

24 MR. ROSEN: If the Court is going to push it into
25 internet, it's going to have to push it into a blog situation

1 in which everyone is now responsible to do the all vigilance
2 test. If you apply this, you've just changed the law in
3 Pennsylvania.

4 Mr. Wolk then has to sit at home every day and put up
5 -- and search the internet to see if anybody is writing about
6 his cases or himself, because you just changed the law. It
7 isn't something that awakens him. He must now be all vigilant.

8 THE COURT: But, I guess I'm back to my question of
9 how many --

10 MR. ROSEN: I can't get you off that question?

11 THE COURT: I'm so sorry. I'm back to the question
12 of how many --

13 MR. ROSEN: Just kidding.

14 THE COURT: You know, if it's ten years --

15 MR. ROSEN: Right.

16 THE COURT: I mean, is there any limit -- because you
17 said, no matter what it is, you have to give it to the jury.
18 And, I understand you're saying that on -- what we have here
19 isn't enough -- in this complaint -- you know, what Mr. Onufrak
20 relies on. But, is there no limit, as a matter of law, to say,
21 hey, after ten years, we're not going to -- this case cannot
22 continue on.

23 MR. ROSEN: I'm going to tell you, Your Honor, that
24 -- I remember reading before coming in here there -- under the
25 old cases -- under the old all vigilance, there was a child

1 that sued for sexual harassment after the statute of
2 limitations had expired, after she was 18.

3 And, the Court applied the all vigilance -- because
4 that was 15 or 20 years out, and applied the all vigilance
5 rule. I think that's Dalrymple, which --

6 THE COURT: Oh, the Dalrymple --

7 MR. ROSEN: -- and applied -- applied the statute to
8 take her rights away because that was the Pennsylvania Supreme
9 Court at that time.

10 I can't tell you that there isn't a factual situation
11 that would allow that. If Wolk was out of the country for five
12 years and came back and found this out and wanted to run for
13 office, whether or not he could bring the claim. What I'm
14 saying is I think that those cases are fact intensive. And, I
15 don't want to say that there is a mandatory period --

16 THE COURT: Uh-huh.

17 MR. ROSEN: -- that automatically should be applied.
18 I think that there might be grounds that a person wasn't aware
19 of it. I'm not talking about the Coma (phonetic) cases. What
20 I'm saying is that there might be factual situations.

21 THE COURT: Well, of course. I mean, somebody could
22 not ever go to a blog and not be aware of it for ten years. I
23 mean, that would -- I mean, --

24 MR. ROSEN: Your Honor, I'm going to --

25 THE COURT: -- I'm sure there are people who don't do

1 blogs, --

2 MR. ROSEN: When we --

3 THE COURT: -- who don't look at the internet.

4 MR. ROSEN: When we tried the AFSCME case years ago,
5 it was on the front page of every newspaper in America for
6 weeks. And, when we picked a jury, the first even jurors never
7 heard of AFSCME. I mean, like, the fact of the matter is that
8 there are many people that are not triggered that way.

9 THE COURT: Uh-huh.

10 MR. ROSEN: And, the Supreme Court has made it clear,
11 in my judgment, that you apply the test that is an awakening
12 test. It is unfair to somebody who didn't sleep in their
13 rights, but as a normal person going about their normal day to
14 day life and not awakened. And, they did apply it in -- in
15 estoppel cases, they did apply it personal injury cases, but
16 they said it was the statute that called for it, not the case.

17 If they had said we treat a personal injury case that
18 they wouldn't have discovered the sponge, all right, we got an
19 argument here. But, that's not the language of the cases.

20 THE COURT: Uh-huh.

21 MR. ROSEN: The language of the cases are culled on
22 the statute itself. Once you say accrual and once we adopt
23 Fine and Crouse of the awakening theory, if you are awakened,
24 your duty is to disclose it, to do it.

25 THE COURT: Uh-huh.

1 MR. ROSEN: Now, their -- in this -- in all the cases
2 that have happened before this, every one of those people
3 learned about it within the statutory period. I mean, like,
4 whether you got Bradford -- they all learned about it, but then
5 they sat on their rights. In fact, even Smith, in that
6 conversation learned about it six months before the statute
7 expired.

8 THE COURT: Uh-huh.

9 MR. ROSEN: In those cases, they still apply the
10 discovery rule to the jury. I mean, like, -- but, the point is
11 Mr. Wolk never learned about it --

12 THE COURT: Wasn't he awakened by -- wasn't there
13 some prior history between Mr. Wolk and --

14 MR. ROSEN: Yes, we --

15 THE COURT: -- either these authors or the blog or
16 something?

17 MR. ROSEN: No. Let me just --

18 THE COURT: No? What is --

19 MR. ROSEN: -- say what the prior history was.

20 THE COURT: Yeah, what are -- what do you allege --

21 MR. ROSEN: In our complaint --

22 THE COURT: -- in your complaint?

23 MR. ROSEN: In our complaint, --

24 THE COURT: Yeah. Right.

25 MR. ROSEN: -- Mr. Wolk, in 2000 -- I believe it was

1 2002 --

2 THE COURT: Uh-huh.

3 MR. ROSEN: -- found out that someone wrote about him
4 -- because he was called to comment -- wrote about him.

5 THE COURT: Yes.

6 MR. ROSEN: And, he sued them in defamation and
7 extracted from them an apology and a retraction.

8 THE COURT: Uh-huh.

9 MR. ROSEN: And, they published a -- an apology and a
10 retraction. And, we cite to it in our complaint --

11 THE COURT: Right.

12 MR. ROSEN: -- at page 6 in paragraph 25. This was
13 where Wolk had secured a \$480M verdict against Cessna. And,
14 then the -- this AVweb wrote this highly critical article of
15 Arthur Wolk, and he sued them for defamation. In settlement of
16 the suit for defamation, he paid a char -- Wolk didn't want any
17 money. They made a payment to charity --

18 THE COURT: Uh-huh.

19 MR. ROSEN: -- and a full retraction and an apology.
20 And, he -- they had to send it to his clients. Walter Olson,
21 the owner of Over --

22 THE COURT: Overlawyered.

23 MR. ROSEN: -- Overlawyered -- or one of the people
24 -- said what happened to free speech here? And, they were
25 highly critical of Wolk extracting an apology --

1 THE COURT: From somebody else.

2 MR. ROSEN: -- from somebody else and wrote about it.
3 And, they wrote about it in 2 -- in -- on September 20th, 2002,
4 and they're critical of Mr. Wolk. Look, he'll just sue anyone,
5 you know, --

6 THE COURT: Uh-huh.

7 MR. ROSEN: -- and get an apology. Where do these
8 people have the -- the right under the First Amendment to say
9 what they want to say and so forth. But, what I'm saying is it
10 shows that -- they end it watch out for these type of lawyers,
11 you know what I mean, like --

12 THE COURT: Uh-huh.

13 MR. ROSEN: So, they're critical of Mr. Wolk in the
14 settlement of another case with respect to obtaining a public
15 apology. Now, that doesn't make Mr. Wolk in any form have to
16 sit around for the next six to eight years seeing what's on
17 their blog. They have a subscription, and they send it to him.

18 THE COURT: Uh-huh.

19 MR. ROSEN: And, they send it to people that are
20 subscribers. He's not a subscriber. The fact of the matter is
21 it's also clear that Mr. Wolk wasn't aware of Olson's blog in
22 2002. We found out about this as part of --

23 THE COURT: Right.

24 MR. ROSEN: -- the case -- I mean, in doing our
25 research going forward looking for malice. This isn't

1 something he was aware of at that time. It -- he -- we put it
2 in our complaint because we looked up these people as to why
3 they're writing on Mr. Wolk.

4 THE COURT: Oh, I see. So, this is --

5 MR. ROSEN: This is something --

6 THE COURT: -- something that you --

7 MR. ROSEN: -- we learned --

8 THE COURT: After the fact.

9 MR. ROSEN: -- after -- way after the fact.

10 THE COURT: I see.

11 MR. ROSEN: We -- but, we -- we have to put it in for
12 the malice standard --

13 THE COURT: Uh-huh.

14 MR. ROSEN: -- and for the fact that they are
15 supported by the aircraft industry, and the fact that they are
16 coming after Wolk and writing to their constituents that are
17 against Wolk. We just put it in. There was nothing in this
18 complaint that indicated that we had any knowledge of this blog
19 in 2002.

20 THE COURT: So, -- so, Mr. Wolk had knowledge of the
21 person he -- that entity that he sued, --

22 MR. ROSEN: Yes.

23 THE COURT: -- but not --

24 MR. ROSEN: AVweb.

25 THE COURT: -- Mr. Olson.

1 MR. ROSEN: Correct.

2 THE COURT: Okay. All right. Okay. Let me hear
3 from Mr. Onufrak on -- on all these issues. And, -- oh, I'm
4 sorry, Mr. Rosen.

5 MR. ROSEN: Yeah -- no, I -- yes, he --

6 THE COURT: I'll get back to you.

7 MR. ROSEN: He came after AVweb for what they wrote
8 about him.

9 THE COURT: Gotcha.

10 MR. ROSEN: Yes.

11 THE COURT: No, I understand.

12 MR. ROSEN: Yes.

13 THE COURT: I hear you. Mr. Onufrak, you have the
14 floor, sir. Talk to me about those three Supreme Court cases.
15 Are you asking me to not follow them?

16 MR. ONUFRAK: No, Your Honor.

17 THE COURT: Okay.

18 MR. ONUFRAK: Those cases --

19 THE COURT: Tell me about it.

20 MR. ONUFRAK: -- simply are -- are not applicable to
21 a libel and slander case. They're -- they're medical
22 malpractice cases. And, I think even Mr. Rosen would concede
23 -- I think he did concede -- that, you know, that's one --
24 those kinds of cases are where the discovery rule has emanated
25 from in Pennsylvania jurisprudence.

1 THE COURT: But, doesn't one of them use the language
2 that Mr. Rosen is referring to of every or each --

3 MR. ONUFRAK: Well, it --

4 THE COURT: Every, I guess.

5 MR. ONUFRAK: -- it does -- it does say all cases.

6 THE COURT: Uh-huh.

7 MR. ONUFRAK: But, I think what it means is all
8 malpractice cases.

9 THE COURT: Uh-huh.

10 MR. ONUFRAK: It doesn't mean every case that's, you
11 know, ever -- ever going to be in Pennsylvania. I think the
12 reasoning of the two District Court Judges, Judge Van Antwerpen
13 and Dalzell from the nineties -- and, it seems to be echoed by
14 Judge Padova in the recent cases --

15 THE COURT: Uh-huh.

16 MR. ONUFRAK: -- is very clear. If it's a media
17 publication, it's -- it's one year no matter what. If it were
18 a conversation, an e-mail, if there was whispering around the
19 Union League that Mr. Wolk had been in this Teledyne litigation
20 and he didn't hear about it for six months, or if it was a
21 private letter, like this Tanaka e-mail in Judge Padova's case
22 only went to a committee, and then maybe there had to be a FOIA
23 request to get it out or a -- a petition to that committee to
24 get it out or even discovery in the case.

25 And, this Tanaka e-mail is actually on an amended

1 counterclaim. In other words, if the case itself had been
2 pending for a couple of years and naturally one year passed in
3 the meantime.

4 If there was an allegation in the complaint that
5 somehow Walter Olson and Ted Frank had hid this or that it had
6 gone to a -- a select e-mail group to -- to get at Arthur Alan
7 Wolk -- if it went to the aviation attorneys, if -- if it went
8 -- as apparently it did in one of the other defamation cases
9 Mr. Wolk filed -- where it went to all defense counsel who
10 would face off -- but, there -- there's no allegation like
11 that.

12 To establish the harm to Mr. Wolk they had -- they
13 admit it was worldwide, it was a media, it was known to
14 everyone, apparently everyone except Mr. Wolk. Your Honor, if
15 you look at paragraph 25 on page 6, which Mr. Rosen was quoting
16 from --

17 THE COURT: Okay. Just bear with me. I have it
18 here. Let me get it. (Pause).

19 MR. ONUFRAK: As I said, paragraph 25 --

20 THE COURT: 25.

21 MR. ONUFRAK: -- on page 6.

22 THE COURT: Okay. I'm with you.

23 MR. ONUFRAK: It says, "Wolk has been a favorite
24 target of criticism and ridicule from Overlawyered.com." Now,
25 Mr. Rosen says, well, that's not really true, they put that in

1 later to satisfy the actual malice standard. But, leaving that
2 aside, it then goes on to recite a very complicated resolution
3 of another Wolk libel suit against a website, AVweb, which
4 apparently concluded in 2002 since Walter Olson wrote a blog
5 about it in 2002.

6 Now, I'm certainly willing to accept Mr. Rosen's
7 representation that the 2002 blog wasn't known to him when he
8 drafted the complaint until recently. However, paragraph 25
9 proves that Mr. Wolk knew about the internet and had the habit
10 of looking at websites that might bring up his name -- in this
11 case, AVweb -- since he had a law suit settled that Walter
12 Olson commented on in 2002.

13 Your Honor, these statutes of limitations have to
14 have some meaning. One year for libel cases is -- is pretty
15 standard in most states, and it's been the -- the statute of
16 limitations -- a short statute of limitations in Pennsylvania
17 for a long time.

18 I think maybe one reason underlying it is if -- if
19 you haven't heard about it in a year, how bad could it really
20 be and could it be actionable anyway? And, this distinction
21 that the other District Courts have made over the years -- some
22 before these Supreme Court cases, which were medical
23 malpractice cases in the main, and at least one after -- is --
24 is a consistent distinction that this Court must maintain.

25 THE COURT: Uh-huh. Now, Mr. Rosen states -- and, I

1 -- I think he's correct -- that, if the discovery rule does
2 apply, I have not been faced, have I, or presented with a case
3 that found it in applicable on a motion to dismiss? In other
4 words, ruled as a matter of law on a motion to dismiss that the
5 discovery rule, although applicable, was not met in that
6 particular case.

7 MR. ONUFRAK: Your Honor, it's true that the District
8 Court decisions which we rely on from the nineties are summary
9 judgment cases. He's -- he's right about that. But, it's also
10 true that these are unique facts that, you know, have been
11 pleaded in this case. And, it seems very clear that, if these
12 facts are accepted, that there's just no question that, with
13 reasonable diligence, he -- he could have discovered it --

14 THE COURT: Just tick them off for me -- don't --
15 don't read everything, but just tick off what the facts are
16 that you believe are sufficient. This -- this paragraph 25?

17 MR. ONUFRAK: Yes.

18 THE COURT: Okay.

19 MR. ONUFRAK: It -- it --

20 THE COURT: It's pretty much paragraph 25?

21 MR. ONUFRAK: Yes.

22 THE COURT: Okay.

23 MR. ONUFRAK: And, -- and, also he has a long history
24 of suing to protect his rights through defamation actions, --

25 THE COURT: Uh-huh.

1 MR. ONUFRAK: -- not the least of which was the
2 Teledyne case, --

3 THE COURT: Uh-huh.

4 MR. ONUFRAK: -- which is what Ted Frank was blogging
5 about to being with.

6 THE COURT: Uh-huh. Uh-huh.

7 MR. ONUFRAK: So, if -- and, also what Mr. Rosen said
8 -- that, as soon as he found it -- found out about it in this
9 case, he -- he threatened to sue.

10 THE COURT: Uh-huh.

11 MR. ONUFRAK: So, there's question he's a vigilant
12 man, that he has a lot of resources at his disposal, and that,
13 if he had just Googled himself once in a while, he would have
14 known about it. There's no allegation that we tried to hide
15 it, or that it was private, or that it was in the nature of a
16 conversation.

17 Your Honor, we're under Iqbal and Twombly now.

18 THE COURT: We're going to go to the fail -- oh,
19 we're still doing the statute of limitations?

20 MR. ONUFRAK: Well, I was going to segue to that.
21 But, --

22 THE COURT: That's fine.

23 MR. ONUFRAK: But, I --

24 THE COURT: No, go ahead. I'm -- I'm -- my questions
25 have been answered.

1 MR. ONUFRAK: So, you know, the standard, contrary to
2 what Mr. Rosen has said, is -- is whether or not some of these
3 allegations are plausible. So, the allegation that, you know,
4 Ted Frank, is a shill for -- and Walter Olson is a shill for
5 the aviation industry and so forth -- you know, those do not
6 have to be accepted by the Court. The one thing that I have
7 always --

8 THE COURT: But, I don't know who they are. I mean,
9 I -- I never heard of them before I got the complaint. So, I
10 don't -- I don't know whether they're implausible or plausible,
11 because I don't know them. So, how does that cut? I mean, --

12 MR. ONUFRAK: Well, if the publication on its face is
13 -- is merely on behalf of Overlawyered.com, --

14 THE COURT: Uh-huh.

15 MR. ONUFRAK: -- it -- it has no endorsement by the
16 aviation industry, nor anything to do with it. One of Mr.
17 Wolk's other defamation cases, which is referred to in
18 paragraph 25, was against an aviation blog, AVweb. This --
19 this Overlawyered.com has nothing to do with it.

20 He goes to great lengths to say that these gentlemen,
21 Olson and Frank, are critical of the legal system. That's
22 really the crux of the blog. It was critical not of Mr. Wolk,
23 but of Judge Carnes for having not scrutinized this settlement
24 more closely. But, I -- I just wanted to say one word about --

25 THE COURT: Sure.

1 MR. ONUFRAK: -- Iqbal and Twombly. And, I know the
2 Court is very familiar with those cases.

3 THE COURT: We all are, yes.

4 MR. ONUFRAK: Yes. But, I really think what drove
5 the Supreme Court in both of those cases was letting a case
6 survive a motion to dismiss when it really did not look like a
7 plausible case. And, then for the discovery hounds to be
8 unloosed.

9 And, in the Twombly case, it was going to be a class
10 against all -- all the phone companies. And, the amount of
11 electronic discovery that would have taken place going back
12 many, many years for many different companies was -- was going
13 to be millions and millions of dollars. And, -- and, the Court
14 just wouldn't allow that case to go ahead -- I think, for that
15 reason, or that -- certainly that was one of the reasons --
16 without more evidence up front in the -- in the complaint.

17 If you look at Justice Stevens' dissent, he wanted
18 the Court somehow just to allow them to take the deposition of
19 the CEO who made a statement before a committee or in the
20 newspaper that a certain business practice, you know, might be
21 smart. But, it would be good for competition, and he didn't
22 want that.

23 Even Justice Stevens was not going to allow that case
24 to go forward when it -- it looked like it was such -- in such
25 great doubt not plausible. He would only have allowed that

1 much discovery.

2 And, then in the Iqbal case, the problems with
3 discovery would have been national security and so forth. Here
4 the discovery problems would not be insubstantial. I don't
5 mean to suggest they were beyond the scale of those cases.

6 But, we're going to have to get the record in the
7 Teledyne case. And, I'm sure there's attorney client issues
8 there. There's protective order issues there. There is
9 attorneys who were sued at other law firms all over the place.
10 And, that's -- that's going to be a major project.

11 Then we're going to have to look at the underlying
12 Taylor case. And, there's going to be attorney client issues
13 there. There's -- that document originally was sealed and, of
14 course, was unsealed for the Teledyne case. And, you know,
15 that's an airplane crash where there's mounds and mounds of
16 discovery.

17 And, as you know, Mr. Wolk, when he has been accused
18 -- well, when he was sanctioned by the Court, he passed the
19 buck to an associate in this office. And, that person, you
20 know, may have to be found and deposed.

21 So, it's not an insubstantial amount of discovery
22 that -- that's going to take place on a case that is clearly
23 time barred and on a case that comes from a very short blog
24 commenting fairly on an important issue of public concern,
25 which is how Courts resolve litigation.

1 The other thing I want the Court to know is that this
2 case originally was filed as a summons action in -- in May of
3 2009. With the summons came deposition notices for David
4 Nieporent, Ted Frank, and Walter Olson with voluminous document
5 requests to take place in Mr. Rosen's office a few days later.

6 When I got the case, fortunately I was able to work
7 out a stipulation with Mr. Rosen. And, those -- that discovery
8 was put on hold, and we brought the issue before Judge
9 Jacqueline Allen. And, that raised the interesting issue could
10 -- under what circumstances can there be discovery when the
11 summons is filed, but not the complaint.

12 And, that was briefed, and Judge Allen ruled in favor
13 of the defendants on that case. So, the discovery did not go
14 forward.

15 The complaint was then filed, and that was -- started
16 the time table for removal, and the case was removed.
17 Immediately, after it was removed -- or, I think, even before
18 -- we got the same deposition notices, interrogatories,
19 document requests. We then filed a petition to stay discovery.
20 A pretrial conference was held. The motion to dismiss was
21 held. Discov -- settlement was attempted, but was not
22 successful.

23 So, if you look at how the case has gone so far
24 discovery wise, -- which, you know, none has taken place, but
25 you can see what -- what they're looking for. And, you combine

1 that with Exhibit B, which is Mr. Wolk's threatening e-mail to
2 Ted Frank, you can see what the plaintiffs really want, which
3 is to intimidate, just to teach them a lesson, which is to stop
4 them from doing it again.

5 They only want -- this is really the case today is to
6 get by this motion to dismiss so that they can take discovery
7 and so that they can -- I can think of no other word -- torment
8 these individuals.

9 And, I think, while it's not akin to the reasoning
10 behind Iqbal and Twombly, it's a similar concern that this
11 Court should bear in mind. There's going to be a lot of
12 discovery, which Mr. Wolk is not going to like, which I don't
13 relish doing. But, those two very big cases are going to have
14 to be unraveled and discovery is going to have to be taken.

15 THE COURT: Let me -- let me ask you. Couldn't we
16 have discovery on the statute of limitations argument only? I
17 mean, what -- what would that entail? That would entail much
18 less discovery, I assume.

19 MR. ONUFRAK: Deposing Mr. Wolk.

20 THE COURT: Mr. Rosen, what do you think of that?
21 And, then we could at least deal with that and, you know, avoid
22 full scale discovery in a situation where -- again, I have --
23 you know, I don't know what the answer is going to be -- but
24 where it may not ultimately be necessary if the statute has
25 been exceeded.

1 MR. ROSEN: I'm going to comment -- first, I -- I'm
2 going to answer that question.

3 THE COURT: Sure.

4 MR. ROSEN: But, I have to just respond a moment.

5 THE COURT: Oh, of course you can, yeah.

6 MR. ROSEN: I -- you asked counsel whether or not the
7 holdings in Fine, Crouse, and Wilson apply only to -- apply to
8 all cases. He says, no, only personal injury cases. You know,
9 Crouse was a contract case.

10 THE COURT: Uh-huh.

11 MR. ROSEN: Breach of contract, promissory estoppel.
12 I want you to -- I want to read to Your Honor two things. In
13 Fine, he lays out the law in Pennsylvania. And, he lays it out
14 on page -- which is page 9 of the opinion, but page 850 of the
15 cite. And, he talks about here's the law in Pennsylvania on
16 statute of limitations. "A Pennsylvania cause of action arises
17 when the plaintiff could, at first, maintained the action as a
18 successful action", citing history.

19 Then we have stated that "The statute of limitations
20 begins to run as soon as the right to institute and maintain
21 the suit arises." Then he says, "Mistake, misunderstanding, or
22 a lack of knowledge in themselves do not toll the running of
23 the statute.

24 "Once a cause of action has accrued and the
25 prescribed statutory has run, and injured party is barred from

1 bringing the suit. There are exceptions that act to toll the
2 running of the statute of limitations. One, the discovery rule
3 and the doctrine of fraudulent concealment are such exceptions.
4 As both are implicated in this appeal, we will discuss them
5 seriatim."

6 It takes the statutory theory that the statute of
7 limitations in all of Pennsylvania is governed by these
8 criteria and applies the discovery rule to the statute of
9 limitations generally throughout Pennsylvania, and then says
10 it's the awaken test, one.

11 Two, I want to reply to the complaint. He asked you
12 to look at paragraph 25. But, -- I had it in front of me a
13 second ago, and I want you to look at paragraph 26. "Thus,
14 despite AVweb's admission that the facts it printed were
15 inaccurate, Overlawyered.com took it upon itself to criticize
16 AVweb's retraction in Wolk.

17 "This only demonstrates the animosity and malice
18 directed towards Wolk by Olson, Frank, Nieporent, and
19 Overlawyered. We are citing it not for the fact of -- the fact
20 that he's aware of it and monitors it, but to the fact that
21 this is the way they conduct themselves, not to anything else."

22 Mr. Wolk -- if -- whenever we get to discovery --
23 and, I'm not --

24 THE COURT: Uh-huh.

25 MR. ROSEN: We'll talk about how someone sent him

1 that art -- that website, and it woke -- and awoken him in
2 accordance with the law. But, it doesn't indicate that we were
3 doing anything at all to watch that.

4 Let's talk about Twombly for a moment. There is no
5 such law that, if people don't like the discovery that's about
6 to happen after you file, Judges should throw it out on motions
7 to dismiss. That's just -- just no law.

8 THE COURT: Uh-huh.

9 MR. ROSEN: If that's the case, we would have no
10 cases. The fact of the matter is, if discovery undertakes
11 here, it would undertake it fine. However, here --

12 THE COURT: I'm sorry, Mr. Rosen. I have a jury
13 deliberating, --

14 MR. ROSEN: Oh, good.

15 THE COURT: -- and this is my deputy. So, just let
16 me --

17 MR. ROSEN: No, that --

18 THE COURT: -- take one moment to --

19 MR. ROSEN: No problem.

20 THE COURT: -- hear what's going on.

21 (Pause).

22 THE COURT: Counsel, I have a verdict in this case.
23 It's a civil rights case -- it's a civil case. But, I would
24 like to take the verdict. The jury has, you know, --

25 MR. ROSEN: Sure.

1 THE COURT: -- been here for a day and a half or so
2 -- well, more than a day and a half, --

3 MR. ROSEN: Can we --

4 THE COURT: -- all week.

5 MR. ROSEN: -- leave our stuff on the table?

6 THE COURT: Sure. You can leave your stuff on the
7 table. If you don't mind just stepping back, --

8 MR. ROSEN: No problem.

9 THE COURT: -- we'll get the lawyers in. That's
10 fine. Nobody will -- will look at them. We'll get the lawyers
11 in, and then I'll take that verdict. Thank you.

12 MR. ROSEN: Not a problem.

13 THE COURT: Thank you very much.

14 (Recess from 10:19 a.m. until 10:35 a.m.)

15 THE COURT: -- funny how it is always a big deal to
16 take a verdict in any case, you know. It's amazing. All
17 right, everybody.

18 MR. ROSEN: All right. I -- I will fin -- I will
19 continue, Your Honor.

20 THE COURT: Of course.

21 MR. ROSEN: All right.

22 THE COURT: Go ahead, Mr. --

23 MR. ROSEN: Let me --

24 THE COURT: -- Rosen.

25 MR. ROSEN: What I wanted to do -- I was on -- before

1 -- in answering your question, I just wanted to continue at
2 least responding before we got into that discovery issue.

3 THE COURT: Sure.

4 MR. ROSEN: One thing that I -- that was important to
5 point out is that, when I -- I also read from Fine with respect
6 to the fact of the standard in all statute of limitations
7 cases, and that it's been confirmed in Wilson and Crouse.
8 Crouse also holds -- after it talks about the awakening of the
9 injury (sic) and the direct diligence to channel in which it
10 would be successful -- which are the facts that are in our
11 complaint, how he was awakened.

12 It's important to note that the complaint points out
13 that he never heard of Overlawyered.com until he went on his
14 Google. And, he only went on his Google because he went to a
15 seminar and did that. So, those are the facts at this point in
16 time.

17 THE COURT: Uh-huh.

18 MR. ROSEN: Crouse also says, "Although reasonable
19 diligence is an objective rather than subjective standard, it
20 is sufficiently flexible to take into account the differences
21 between persons and their capacity to meet certain situations
22 and the circumstances confronting them at the time in question.

23 "A plaintiff's actions must be evaluated, therefore,
24 to determine whether he exhibited those qualities of attention,
25 knowledge, intelligence, and judgment, which society requires

1 of its members for the protection of their own interests and
2 the interests of others. In other words, a party is not under
3 an absolute duty to discover the cause of his injury.

4 "Instead, he must exercise only the level of
5 diligence that a reasonable man would employ under the facts
6 and circumstances presented in a particular case." And, then
7 he goes on to say, "an awakening event brings that."

8 Now, with that as the background, the three cases
9 also held, in determining whether or not a statute of
10 limitations exists or doesn't exist under the discovery rule,
11 -- not whether a person missed a deadline --

12 THE COURT: Uh-huh.

13 MR. ROSEN: -- but under the discovery rule, it is a
14 jury question. You have to determine credibility, facts,
15 circumstances as a reasonable person. It is a jury question.

16 THE COURT: Except it does say that sometimes it's a
17 matter of --

18 MR. ROSEN: Well, Your Honor, --

19 THE COURT: Yeah.

20 MR. ROSEN: -- if reasonable minds --

21 THE COURT: Yeah.

22 MR. ROSEN: -- couldn't disagree --

23 THE COURT: Yeah, yeah.

24 MR. ROSEN: I will -- I will accept that.

25 THE COURT: Sure.

1 MR. ROSEN: If reasonable minds could --

2 THE COURT: Which is always the issue thought,
3 right, --

4 MR. ROSEN: -- disagree --

5 THE COURT: -- I mean, on whether something is a jury
6 question.

7 MR. ROSEN: But, they're -- we're going to be dealing
8 in issues that -- that really are an issue of Mr. Wolk's
9 intelligence, his ability to determine something, his
10 reasonableness, should he have watched it, should he have gone
11 on the blog, what kind of computer person is he? Those
12 questions are questions really, Your Honor, that are not Court
13 driven. They're jury driven.

14 And, in fact, Wilson, Crouse, and Fine specifically
15 say, "Fine also rejects the determination concerning the
16 plaintiff's awareness of the injury and its cause of -- is fact
17 intensive and, therefore, is a question for the jury to
18 decide." Wilson says it, Crouse says it, and Fine says it.

19 So that assume for a moment that the Court wants to
20 take discovery -- and, I'm going to --

21 THE COURT: Uh-huh.

22 MR. ROSEN: It doesn't pay, because we're going to
23 have to give it to the jury anyway when we're in the discovery
24 rule, one.

25 THE COURT: Uh-huh.

1 MR. ROSEN: Two, and more important than anything
2 else, this -- the second Mr. Wolk learned about this -- the
3 moment he learned about it, he was all over them. They cited
4 to his letter, take this off the internet, I didn't -- I wasn't
5 sanctioned, I wasn't -- I was never -- all those facts he says
6 are fact intensive.

7 He carbon copies Teledyne lawyers on that letter.
8 Teledyne's lawyers then write back to Overlawyered.com. And,
9 when writing back to Overlawyered.com, they point out, "Dear
10 Mr. Coleman, I have been receiving copies of various e-mails
11 between Mr. Arthur Wolk and you and your client regarding a web
12 article entitled "Arthur Alan Wolk, Teledyne Industries".

13 "Although I was not involved in the underlying Taylor
14 case in the Northern Dis -- I represented the various Teledyne
15 related entities in the suit of Arthur Wolk versus Teledyne
16 Industries in the Eastern District of Pennsylvania." Your
17 Honor, that's the case that Mr. Herrmann cited to that started
18 this whole article, okay?

19 THE COURT: Uh-huh.

20 MR. ROSEN: And, then he says, "This is to confirm
21 that, as part of the resolution of that suit in the Eastern
22 District of Pennsylvania", -- that was the one before Judge
23 Shapiro where she let out those two -- she let out Baker &
24 Botts and the lawyer who sent the order only to their clients.

25 THE COURT: I don't know it, but I --

1 MR. ROSEN: Okay.

2 THE COURT: -- I understand.

3 MR. ROSEN: Okay. It says, "Mr. Wolk and my clients
4 agree that, in the event any claims or challenges of
5 unprofessional conduct are made against Mr. Wolk based, in
6 whole or in part, on the Taylor decision" -- which is what this
7 article does -- "or his actions in the Taylor case," -- which
8 is what this article does -- "Mr. Wolk may state that he and
9 Teledyne related entities, who are my clients, agreed without
10 any party admitting any fault or liability to move forward as
11 if the Taylor decisions had never been issued and do not agree
12 that the Taylor decisions or Mr. Wolk's actions in the Taylor
13 case would support a basis for disqualification or any negative
14 action against Mr. Wolk in response to such claims or challenge
15 -- or challenges of unprofessional conduct in -- in the
16 negative action against Mr. Wolk in response to such claims or
17 challenges of unprofessional conduct in the foregoing
18 situations of claims or challenges as part of the Taylor
19 decisions if anything is made against Mr. Wolk."

20 Now, attached is the stipulation from the -- from
21 Judge Shapiro's case, which was allowed to make public --

22 THE COURT: Okay.

23 MR. ROSEN: -- which was signed by every lawyer that
24 appeared before Judge Carnes, including Baker & Botts who were
25 let out on summary judgment and the other lawyer. Every single

1 solitary lawyer certified that Mr. Wolk was not sanctioned --
2 had no sanctional conduct, did nothing wrong, no violation of
3 ethics, no unprofessional conduct in connection with his entire
4 conduct, which is contrary to the exact article documenting
5 that that article is placing Overlawyered on notice that
6 they're putting out information about Arthur Wolk that is
7 false.

8 THE COURT: Uh-huh.

9 MR. ROSEN: They get this, Your Honor, on April 16th,
10 2009. We file May -- May 2009. The article is still up.
11 Every day that --

12 THE COURT: Is the article still up?

13 MR. ROSEN: On the web. They will not take it down.

14 MR. DEFALCO: That was done yesterday.

15 MR. ROSEN: This was done yesterday.

16 THE COURT: Oh, that -- I was -- for some reason I
17 thought it was earlier.

18 MR. ROSEN: No, it -- we had one -- I showed -- I had
19 one earlier. But, --

20 THE COURT: Okay.

21 MR. ROSEN: -- this is the way it appears. So, while
22 they're saying let's do some discovery or the Court is
23 suggesting -- we are being tormented every day by them by false
24 information on the web that my client sold out his client in
25 connection with getting a lower settlement for the client so he

1 could profit in his pocket in doing additional work.

2 Whatever that fact is out there is being -- we've
3 placed in the complaint, yes, he had a \$90M verdict because
4 he's quality.

5 THE COURT: Okay.

6 MR. ROSEN: That's an old inventory case. Right now
7 that -- about 13 years old. But, it's inventory. He goes to
8 trial on inventory. Of course, he's quality. But, the fact of
9 the matter is we placed in our complaint the fact that there's
10 been accidents in which he had the case and then, all of a
11 sudden, it went to another lawyer, because there isn't a lawyer
12 in America that's fighting for Arthur for a case that isn't
13 putting it in front of him and say -- here's a -- here's an
14 article about how Arthur sold out his client, took less of a
15 settlement to protect himself, and not even a Federal Judge
16 will look into it. How can you trust this guy? I mean,
17 like, --

18 THE COURT: Uh-huh.

19 MR. ROSEN: -- the fact of the matter is he's facing
20 that every day. So, every day of delay we try to resolve this.
21 And, as the Court is -- the only resolution we wanted was it
22 off the internet. The fact of the matter is we didn't settle.

23 THE COURT: Uh-huh.

24 MR. ROSEN: We're going to trial. We want a -- we
25 want expedited discovery. Everything they want, we can do.

1 THE COURT: Uh-huh.

2 MR. ROSEN: -- We're not afraid of the discovery.
3 The fact of the matter is the discovery doesn't help us resolve
4 the issue of statute of limitations. If you follow
5 Pennsylvania law, it's a jury question. If you follow
6 Pennsylvania law, it applies to all statutory cases under the
7 Pennsylvania statute.

8 The fact is that, if they want to go to summary
9 judgment on the case at the end and they want to try this
10 again, let them go. But, we've got to get this case going.

11 THE COURT: Uh-huh.

12 MR. ROSEN: We can't delay it. If you do just
13 discovery on the statute, it doesn't help. It'll only get to
14 the -- whether or not you, as a matter of law, will decide
15 credibility issues on Arthur Wolk. That's not going to happen
16 under the law. It goes to the jury.

17 So, as far as I'm concerned, the only thing that
18 matters is that this Court decide this motion to dismiss,
19 resolve it, and let's go. And, the fact that they're going to
20 have to do discovery -- they should have thought about it when
21 we -- in connec -- before we got here.

22 This will be an expensive case. And, it's not Arthur
23 Wolk tormenting them. He wants the facts. He wants it off the
24 web. And, as the Court can see, we can't get that issue in
25 this case. We can only get damages.

1 THE COURT: Uh-huh.

2 MR. ROSEN: We can't ask this Court to order them to
3 withdraw. So, the fact is that they have kept it on since
4 April 16th. It's been a -- it's been two -- '09 -- it's been
5 one year and two months that he has had this on -- on the web,
6 and it's time for it to come off.

7 THE COURT: Uh-huh.

8 MR. ROSEN: And, so our response to this, Your Honor,
9 is that there's only one way to deal with this. Let's bite the
10 bullet. If the Court is gonna want to establish law, it's --
11 this is --

12 THE COURT: Uh-huh.

13 MR. ROSEN: -- the time to establish it. If the
14 Court determines that this case is not going to follow
15 Pennsylvania Supreme Court in a diversity case, let's find out.

16 THE COURT: Uh-huh.

17 MR. ROSEN: And, if the Court says I'm going to do it
18 and let's get going --

19 THE COURT: Uh-huh.

20 MR. ROSEN: -- and you can raise all that you raise
21 -- and motions for summary judgment at the end, let's go. But,
22 I don't want to do pieces of discovery. If you take Wolk's
23 testimony -- I didn't take all of their testimony.

24 THE COURT: Uh-huh.

25 MR. ROSEN: Who did they talk to? How would Wolk

1 have found out about this? Where did they publish it? Who are
2 their readers? Where did their money come from? How -- I
3 would have to take it all anyway.

4 So, the only question we're going to come out with is
5 is it true or is it false? If they're saying it's true, what
6 have you got?

7 THE COURT: Uh-huh. Okay.

8 MR. ROSEN: We know it's false. I went on a little
9 too long. I'm sorry.

10 THE COURT: No, no, no, not at all. Not at all.

11 MR. ROSEN: That --

12 THE COURT: No, not at all.

13 MR. ROSEN: But, I know that that was not this issue.

14 THE COURT: Right.

15 MR. ROSEN: I do not want to do partial discovery,
16 Your Honor.

17 THE COURT: I understand. Just one comment though on
18 what you said about my determining Mr. Wolk's credibility. I
19 would not be doing that at all. I mean, if they took his
20 deposition and he said A, B, C, --

21 MR. ROSEN: Oh, of course.

22 THE COURT: -- I would just accept that.

23 MR. ROSEN: I understand.

24 THE COURT: Yeah. And, then we would go from there.

25 MR. ROSEN: But, on the determination of what facts

1 he has and what reasonable judgments he made --

2 THE COURT: No, it's on the reasonable judgment thing
3 that you would like --

4 MR. ROSEN: Yes.

5 THE COURT: -- you say that you're --

6 MR. ROSEN: And, that --

7 THE COURT: I understand.

8 MR. ROSEN: And, that is a jury question.

9 THE COURT: Yes.

10 MR. ROSEN: When I say credibility, they may say,
11 look, he said this, but anybody knows that a reasonable person,
12 under these circumstances, would do that. There is no question
13 they're saying it now with the complaint --

14 THE COURT: Uh-huh.

15 MR. ROSEN: -- where we have --

16 THE COURT: Uh-huh.

17 MR. ROSEN: -- it's cold -- we set forth awakening.
18 Mr. Wolk is a person of diligence. He's looked for -- they've
19 already said that. That's a jury question to begin with. They
20 can't get it now. And, we have a right to go forward. And, I
21 know you might want to hear the issue of opinion on the other
22 sections of this. But, I just wanted to deal with the statute
23 of limitations.

24 THE COURT: Yeah. And, isn't the -- isn't that -- as
25 Mr. Onufrak says in his reply, is it the one question -- the

1 question that's asked that's -- that's your primary dispute
2 here with -- with what this article says?

3 MR. ROSEN: No.

4 THE COURT: Okay. Go ahead. Why don't you respond
5 to that.

6 MR. ROSEN: Let me just -- if the Court would -- if
7 the Court would take out the article for just a second. It's
8 attached --

9 THE COURT: Sure.

10 MR. ROSEN: -- as Exhibit A to the complaint.

11 THE COURT: Of course. Okay. Where is it?

12 MR. ROSEN: All right.

13 THE COURT: Here we go. (Pause). Hold on, hold on.
14 (Pause). Well, I apologize. I don't know that I -- I'm
15 finding it easily, Mr. Rosen. Do you have a copy?

16 MR. ROSEN: I can hand up my complaint.

17 THE COURT: Would you hand up --

18 MR. ROSEN: It's attached to my complaint.

19 THE COURT: -- a copy? Yeah.

20 MR. ROSEN: Yeah.

21 THE COURT: I have a copy of your complaint, but
22 there's nothing attached to my copy.

23 MR. ONUFRAK: I have one.

24 MR. ROSEN: Oh, okay.

25 THE COURT: Thanks, Mr. Onufrak. (Pause). Thank

1 you. All right. Yes. Okay.

2 MR. ROSEN: All right. Now, we first start with --
3 you see it says, "Judge writes scathing opinion."

4 THE COURT: Uh-huh.

5 MR. ROSEN: "Opponent attorney mails opinion to
6 client. Losing attorney sues the other attorney for
7 defamation. No dice. But, even this ludicrous suit does not
8 result in sanctions. Beck/Herrmann." Do you see that?

9 THE COURT: Yes.

10 MR. ROSEN: This is the Beck/Herrmann article.

11 THE COURT: Okay.

12 MR. ROSEN: This is the article -- the Beck/Herrmann
13 article. I handed it up because --

14 THE COURT: Uh-huh.

15 MR. ROSEN: -- it's commenting on Beck/Herrmann.

16 THE COURT: Yes.

17 MR. ONUFRAK: I'll take a copy of that, if you have
18 it.

19 MR. ROSEN: I don't -- you know something, I -- I
20 only printed one -- I have -- I'll give you --

21 MR. ONUFRAK: Okay.

22 MR. ROSEN: The reason I'm handing up the
23 Beck/Herrmann article is because the commentary is, "But, even
24 this ludicrous suit does not result in sanctions."

25 THE COURT: Uh-huh.

1 MR. ROSEN: We have not complaint with the
2 Beck/Herrmann article. The Beck/Herrmann article is writing
3 about a suit before Judge Shapiro --

4 THE COURT: Uh-huh.

5 MR. ROSEN: -- in which two defendants were let out,
6 which is Baker & Botts and another one -- another gentleman,
7 who mailed the opinion to their clients only. This is a
8 situation where a Court set forth an order and opinion highly
9 critical of Mr. Wolk, and it turned out she was wrong. It
10 wasn't Mr. Wolk. But, the fact of the matter is all the
11 lawyers that were at that table are the Teledyne lawyers that
12 signed the agreement --

13 THE COURT: That you showed me.

14 MR. ROSEN: -- that I showed you. They all knew that
15 the order --

16 THE COURT: Uh-huh.

17 MR. ROSEN: -- that was a sanctionable order wasn't
18 Mr. Wolk. It was his firm, but it wasn't Mr. Wolk.

19 THE COURT: Right.

20 MR. ROSEN: The highly publicized nature of it was
21 Wolk did this, and he had nothing to do with it.

22 THE COURT: Uh-huh.

23 MR. ROSEN: So, what happened is a defamation suit
24 was brought against the Teledyne parties who distributed it to
25 the defense bar, okay? And, the Court found that those cases

1 go forward. If they knew the order was false, there's a case
2 in Pennsylvania, the Bucketto (phonetic) case, where it's
3 limited defamation, that the press can know something. But, if
4 it's given to the press and you know it's false, you have a
5 claim.

6 Well, the Court allowed the case to go forward
7 against Mr. DeForest, who wrote that letter to them, and all
8 the defendants who sent it to persons other than their clients.
9 Now, that case resolved with a settlement in which a retraction
10 of that order was published, --

11 THE COURT: Uh-huh.

12 MR. ROSEN: -- and you saw it. Then this article
13 goes on to say, "Beck and Herrmann miss however an especially
14 interesting subplot." So, we now talk about a subplot, --

15 THE COURT: Uh-huh.

16 MR. ROSEN: -- something that wasn't disclosed.
17 Something that was hidden, --

18 THE COURT: Uh-huh.

19 MR. ROSEN: -- a subplot not reflected in Beck and
20 Herrmann's order.

21 THE COURT: Uh-huh.

22 MR. ROSEN: But, it's not a subplot about Judge
23 Shapiro's case. It's a subplot of the other case. And, he
24 points out, "Wolk settled the underlying case, Taylor v.
25 Teledyne, on the condition that the order criticizing be

1 vacated."

2 THE COURT: Was that -- was that --

3 MR. ROSEN: False.

4 THE COURT: -- false according to you? Okay.

5 MR. ROSEN: False.

6 THE COURT: Okay.

7 MR. ROSEN: In fact, it's knowingly false because, if
8 it had been true, the lawyers that sent this letter and
9 certified Wolk did nothing wrong --

10 THE COURT: Uh-huh.

11 MR. ROSEN: -- couldn't have signed that.

12 THE COURT: Okay. Okay.

13 MR. ROSEN: Also, Wolk will prove it's false. But,
14 we've test -- we set forth in our complaint it's false. So,
15 the opening statement that he settled on the condition that the
16 order criticizing him be vaca -- there -- that is not -- that
17 does not show. He will prove that it was settled before, and
18 the clients approved it.

19 THE COURT: Okay.

20 MR. ROSEN: "Did Wolk client suffer from a reduced
21 settlement so that his attorney could have the order used
22 against him in other settlement that vacated the order?" Look
23 at that question, Your Honor.

24 THE COURT: Uh-huh.

25 MR. ROSEN: That -- you asked that question -- you

1 asked that question as an accusation. And, we've cited to
2 cases that -- the Petulla case in Pennsylvania and other cases
3 -- the --

4 MR. DEFALCO: Valjet.

5 MR. ROSEN: -- the -- it's the -- no, not -- besides
6 Valjet. I'm going to -- I can get to the cases. But, the case
7 that I'm talking about is the case which was Capozzi v. Lucas,
8 in which a lawyer sent out to his membership -- you know, the
9 same type of a letter that we have here --

10 THE COURT: Uh-huh.

11 MR. ROSEN: -- criticizing an opposing lawyer who was
12 getting fees in a contingency fee case. And, in that, he put a
13 sentence in there that said, "If the Court finds that he
14 exceeded his billing authority in the contingency fee case, all
15 of you could sue him for your money back."

16 Now, that was a statement based on the record, based
17 on the fact that, if a Court acts and it acts improperly or
18 properly, a person who is a lawyer could be sued by this
19 gentleman's client. The fact of the matter is the Court found
20 in that case that that was defamation per se because it accused
21 a lawyer of -- or inferred to a lawyer that it was billing
22 practices that were being done wrong to his clients. And, that
23 goes to his professional reputation.

24 Now, this asks the question is -- did Wolk's client
25 suffer from a reduced settlement so that his attorney could

1 avoid having that order used against him in other litigation.
2 That question, Your Honor, is the question he's going to
3 answer. And, he answers it in the affirmative.

4 Read down -- and, I'm going to take you down further.
5 "The discovery violation complained about is apparently a
6 repeat occurrence. False. The District Court permitted a
7 settlement that vacated the order. But, it's only reported
8 inquiry into whether Wolk did not suffer from a conflict of
9 interest and was adequately protecting his client's rights was
10 Wolk's representation to the Court that his client was all
11 right with the case."

12 Now they're saying that, as far as they're concerned,
13 Wolk told the Court a lie given that the first sentence was he
14 obtained a reduced sentence on the condition of approving the
15 settlement. Now he's saying that Wolk misrepresented to the
16 Court that fact.

17 Then it says -- look at the next sentence. "That
18 begs the question whether the client was fully aware of the
19 conflict of interest if, as it seems to be the case" -- he
20 actually reports a fact that, as it seems to be the case, the
21 people can determine, from reading the facts of the case that
22 he, did that the client wasn't aware.

23 Now, if I'm showing this to a client, I'm saying,
24 look, it appears to be the case that the client wasn't aware of
25 the conflict and North Carol -- and the Georgia Court didn't do

1 enough. So, what Mr. Onufrak is saying to this Court --

2 THE COURT: Uh-huh.

3 MR. ROSEN: -- is that they're criticizing the
4 Georgia Court. Yes. They're criticizing the Georgia Court for
5 not catching Wolk cheating his client. They're not criticizing
6 the Georgia Court for what it did. They're criticizing that,
7 in this case, it -- it didn't do enough to catch a thief, a
8 person who sells out his client, who violates every
9 professional conduct known to man by taking a personal benefit
10 at the sacrifice of the client.

11 Every one of those facts are false. The settlement
12 in this case was -- was by a Master appointed by the Court in a
13 settlement proceeding that's in the record, if they had looked.
14 The Settlement Master comes in with a decision to settle the
15 case at a certain price.

16 That price that the Master recommended -- Wolk
17 obtained more. So that the value of that settlement -- Wolk
18 obtained more than the Court appointed Master, in addition to
19 the fact that the client knew that Wolk had this order against
20 him and wanted to have it because Wolk didn't believe it was
21 right, and the client was fully informed.

22 Now, when you have an article criticizing a lawyer
23 and accusing the lawyer of selling out his client for his own
24 personal business so that he can get more business in other
25 cases later to get rid of the -- a bad order, and he says in

1 that opinion -- in that -- in that article that begs the
2 question of whether the client was fully aware of the conflict
3 if, as it seems to be the case.

4 It doesn't take a rocket scientist to see that he's
5 saying the client was sold out, the Court didn't do anything
6 about it. And, had it done something about it, Wolk would have
7 been sanctioned further, the settlement would have -- the
8 client would have gotten money.

9 Under those circumstances, we have given the legion
10 -- and, I can't go into the law in the Supreme Court cases
11 that, when you dis -- don't disclose all the facts and you ask
12 a question and don't disclose all the facts, if the facts that
13 you -- that weren't disclosed were made available and it proves
14 the statement false, it's defamation per se.

15 If it's -- you can't rely on opinion when, in fact,
16 the Third Circuit has said you can only rely on opinion when
17 all the facts are set forth. We've set forth that position to
18 the Court in -- just a second. I'm just going to tell you the
19 case to read, Your Honor.

20 THE COURT: Oh, Mr. Rosen, if it's in your brief,
21 that's fine.

22 MR. ROSEN: Oh, it is.

23 THE COURT: Yeah. Unless it's something new, don't
24 worry about it.

25 MR. ROSEN: Oh, no. No, it -- it's not. It's not.

1 It's right here.

2 THE COURT: Okay.

3 MR. ROSEN: There's three cases, Your Honor, --

4 THE COURT: Uh-huh.

5 MR. ROSEN: -- that are all on that. The Third
6 Circuit in Redco v. C.B.S., --

7 THE COURT: Uh-huh.

8 MR. ROSEN: -- that makes it clear -- "If the
9 disclosed facts are true and the opinion is defamatory, a
10 listener may choose to accept or reject the opinion on the
11 basis of an independent evaluation of the facts. However, if
12 the opinion is stated in a manner that implies or draws upon
13 unstated facts for its basis, the listener is unable to make an
14 evaluation of the soundness of the opinion and defamation will
15 lie. And, the only way that -- that it won't be is if the
16 undisclosed information is made available and proves it's
17 false." And, that is from Milkovich, Your Honor, which is the
18 Supreme Court case.

19 We also have the Third Circuit cited in Petulla. The
20 Petulla opinion lays it right -- all out on opinions where they
21 make it clear that you can't put something in an opinion to get
22 out of defamation. You just can't do it. You can't say it's
23 my opinion John Jones is a liar.

24 And, I -- I'd point out an -- an indication to you.
25 If I make a statement in my opinion he's a Nazi anti-Semite,

1 but the facts I'm relying on is he's German, -- I mean, I think
2 that it would be clear that somebody would have a different
3 opinion. But, if the facts I'm relying on is that he's
4 marching in a -- with a Swastika with a group of people that
5 are screaming kill the Jews, I think someone would believe that
6 opinion.

7 So, what you leave out is the key to the statement.
8 What they left out in this article are the facts. The facts is
9 that the client was aware, that the Judge and everybody else
10 knew that the case was -- well, I'm going to get it into a
11 better -- into a better posture.

12 It left out the whole fact that this -- this
13 settlement was designed by an independent mediator, and he
14 obtained more; the client knew about it. In addition, everyone
15 that was there was aware about it and that he did nothing wrong
16 in the order to begin with because it was false to begin with.
17 It would have been vacated anyway -- anyway whether or not he
18 settled or not.

19 THE COURT: Uh-huh.

20 MR. ROSEN: So, those cas -- those facts are left to
21 the reader to find that out when the actual article says, "As
22 it appears to be the case, he sold out his client." Now, it is
23 our judgment, Your Honor, that this passes every single test.
24 They have raised New York Times v. Sullivan. I mean, like, --
25 Your Honor, we know this is a -- this is a --

1 THE COURT: Public figure.

2 MR. ROSEN: -- public figure.

3 THE COURT: Yeah.

4 MR. ROSEN: And, once there's a defamation of a
5 public figure, there's no First Amendment.

6 THE COURT: Uh-huh.

7 MR. ROSEN: And, there's just no -- there's no right
8 to a First Amendment. This isn't a fair reading of a record
9 because there's nowhere in the record where the client -- where
10 anybody says the client wasn't aware of the fact of this
11 settlement.

12 There's nowhere in the record where the Judge could
13 have -- could have sanctioned Arthur Wolk if she knew all the
14 facts anyway. And, the criticism of the Judge is unfounded
15 because it couldn't have found out the protection of the client
16 who didn't need any protection because it was -- it was aware.

17 So, under those circumstances, Your Honor, I think
18 that -- that there is no question that the article on its face,
19 to any normal person reading this is, is a defamation and that
20 -- you know, you know something if it smells like -- I mean,
21 you know defamation when you see it like you know pornography
22 when you -- this -- there's no question, when you look at it,
23 when Arthur Wolk looked at it, when his competitors looked at
24 it.

25 They have got a sales tool to prevent Arthur Wolk

1 from getting new cases. And, this is why we went to great
2 extents to immediately sue and get it redacted -- get it removed.

3 THE COURT: Uh-huh.

4 MR. ROSEN: I -- I do want you to know that, in
5 Petulla and citing from Milkovich and from the -- and from the
6 Third Circuit, it says as follows. "This doesn't mean that
7 there is a wholesale defamation exemption for anything that
8 might be labeled opinion. Expressions of opinion may imply an
9 assertion of an objective fact.

10 "A defamatory communication may thus consist of a
11 statement in the form of an opinion and is actionable as
12 defamation if it implies an allegation of undisclosed
13 defamatory facts as the basis therefor," which is exactly what
14 this -- this blog does.

15 "Although there may be no such thing as a false
16 opinion, an opinion which is unfounded reveals its lack of
17 merit when the opinion holder discloses factual basis. If the
18 disclosed facts are true and the opinion is defamatory, a
19 listener may choose to accept or reject the proffered opinion
20 on the basis of independent evaluation of the facts.

21 "However, if the opinion is stated in a manner that
22 implies that it draws upon unstated facts for its basis, the
23 listener is unable to make an evaluation of the soundness of
24 opinion." Then, citing to Milkovich, it says that, "If the
25 opinion has undisclosed facts and an ordinary person reading it

1 would determine that, on those undisclosed facts, it's reason
2 to believe the person wouldn't have written that unless those
3 were the facts, it's defamation."

4 THE COURT: Okay.

5 MR. ROSEN: I -- the Court is aware Redco and
6 Milkovich and all -- and the Third Circuit case, Your Honor,
7 you know is Gurowski (phonetic) I think I -- I said it -- he
8 wants me to tell you that, if we bring out the facts --

9 THE COURT: Uh-huh.

10 MR. ROSEN: -- and it proves -- the un -- undisclosed
11 facts when put against the opinion -- put against the blog,
12 proves its falsity, defamation exists --

13 THE COURT: Okay.

14 MR. ROSEN: -- as a matter of law.

15 THE COURT: All right. Thank you very much. Mr.
16 Onufrak?

17 MR. ONUFRAK: Your Honor, may I just address the
18 Frank blog --

19 THE COURT: Of course.

20 MR. ONUFRAK: -- for a moment.

21 THE COURT: Of course.

22 MR. ONUFRAK: You know, Mr. Rosen has gone through it
23 in some detail. It -- it contains two citations -- two Federal
24 Court opinions which are of public record and easily findable,
25 at least if you have a subscription to Westlaw or --

1 THE COURT: Uh-huh.

2 MR. ONUFRAK: -- or Lexis. Both of those opinions
3 are enti -- are attached to our motion, and the Court can take
4 notice of them because they're referred to in the article and
5 they're of the public record.

6 So, in the Taylor case, Judge Carnes' opinion at 338
7 F. Supp. 2d, 1323, which was affirmed and that its cited to by
8 Mr. Frank (sic) here, it says, on page 5 of the exhibit,
9 Exhibit C, "The Court determined that plaintiffs counsel had
10 intentionally disobeyed the orders and directives of the Court
11 and the federal rules governing discovery, and the Court
12 excluded certain expert testimony proffered by plaintiffs as a
13 result of this violation." And, as the Court knows, that's a
14 bad situation for the plaintiff's counsel to be in.

15 Judge Carnes went on to say, "In support of these
16 sanctions, the Court issued very critical comments about the
17 conduct of plaintiff's counsel, Arthur Wolk, the respondent in
18 this contempt application." On the next page, the Court
19 commented how strenuously Mr. Wolk objected to the motion and
20 said that he felt "The Court had unfairly singled him out by
21 name in the omnibus discovery order inasmuch as Wolk cast
22 responsibility on an associate in his firm for the handling of
23 discovery in the case and denied his own involvement in any
24 discovery violations, should any violations have occurred."

25 Judge Carnes said, "The Court had reasonably

1 understood Wolk to be the attorney responsible for any
2 discovery violations because he had entered an appearance and
3 was lead counsel in the case, because he was the named partner
4 of the law firm handling the case, and, most significantly,
5 because he was the only attorney for plaintiffs who spoke at
6 the discovery conference, and the Court had previously convened
7 discovery -- that the Court had previously convened concerning
8 the ongoing discovery disputes."

9 Now, I suppose it is the case that Mr. Wolk has been
10 very successful in his career against the aviation industry.
11 And, the Court is already aware that the omnibus discovery
12 order had been circulated by defense counsel among the defense
13 bar. And, Mr. Rosen has gone to great length to say that this
14 could affect Mr. Wolk adversely.

15 So, against that background, what Mr. Frank had
16 blogged, among other things, was "That begs the question
17 whether the client was fully aware of the conflict of
18 interest." Your Honor, can it be denied that Mr. Wolk had a
19 conflict of interest?

20 This mishandling of this case, these sanctions,
21 getting the expert kicked out, is now being circulated among
22 the defense bar of the aviation industry. And, a sophisticated
23 plaintiff might not want Mr. Wolk to represent him just for
24 that reason.

25 What Mr. Frank blogged is, "That begs the question

1 whether the client was fully aware of the conflict of interest
2 if, as seems to be the case, the Northern District of Georgia
3 failed to do so." That is, to make -- I mean, I envisioned
4 what Mr. Frank was advocating is like one of your colloquies
5 where you --

6 THE COURT: Uh-huh.

7 MR. ONUFRAK: -- ask the criminal defendant do you
8 know this, do you know that. But, the Northern District of
9 Georgia, as far as Mr. Frank knew, had not conducted such a
10 colloquy to make sure that the plaintiff knew.

11 He then says, "One really wishes Courts would do more
12 to protect fiduciaries" -- this is a death case, obviously --
13 "of plaintiffs attorneys before signing off on settlements."
14 Now, that's a fair comment on an important issue of public
15 concern, and Mr. Frank had the right to make it.

16 THE COURT: Okay. Thank you very much. Okay,
17 counsel, I will take both of these under advisement. Thank you
18 so much for your argument -- I appreciate it -- and your -- and
19 your briefs. Excellent, everything. So, why don't we adjourn
20 this. Could I just see counsel just in the hallway for about
21 two minutes? Thank you.

22 (Proceedings concluded at 11:07 a.m.)

23 * * * * *

24

25

C E R T I F I C A T I O N

I, Frances L. Maristch, court approved transcriber,
certify that the foregoing is a correct transcript from the
official electronic sound recording of the proceedings in the
above-entitled matter.

July 1, 2010

DATE

FRANCES L. MARISTCH

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25