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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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

ORDER

AND NOW, this _________day of July, 2010, upon consideration of Defendants' Motion For Leave to File Supplemental Brief in Support of Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6), it is hereby ORDERED that said Motion is granted. It is further ORDERED that the Clerk of Court shall file the brief attached to Defendants' motion as Exhibit A.

BY THE COURT

____
McLaughlin, J.

Dockets.Justia.com

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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

MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF
IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Defendants Walter K. Olson, Theodore H. Frank, Esquire, David M. Nieporent, Esquire, The Overlawyered Group and Overlawyered.com, (collectively "Defendants"), by and through their attorneys, White and Williams LLP, hereby move this Court for leave to file a supplemental brief in support of Defendants' Motion to Dismiss. Defendants request this leave in order to respond to the Court's inquiry, during oral argument on June 24, 2010, as to the existence of authority from other jurisdictions on the applicability of the discovery rule in defamation actions. Defendants believe that the decisions cited in the attached supplemental brief are instructive on this key issue, and ask that the Court give them due consideration in rendering its decision.

WHEREFORE, for the foregoing reasons, Defendants respectfully request that this Court grant Defendants leave to file the Supplemental Brief in Support of their Motion to Dismiss Pursuant to Rule 12(b)(6), attached hereto as Exhibit "A".

Respectfully submitted,

WHITE AND WILLIAMS LLP

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Attorneys for Defendants
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Theodore H. Frank, Esquire, David M. Nieporent, Esquire, The Overlawyered Group, and Overlawyered.com

Dated: July 7, 2010

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION

Defendants Walter K. Olson, Theodore H. Frank, Esquire, David M. Nieporent, Esquire, The Overlawyered Group and Overlawyered.com, (collectively "Defendants"), by and through their attorneys, White and Williams LLP, hereby move this Court for leave to file a supplemental brief in support of Defendants' Motion to Dismiss. Defendants request this leave in order to respond to the Court's inquiry, during oral argument on June 24, 2010, as to the existence of authority from other jurisdictions on the applicability of the discovery rule in defamation actions. Defendants believe that the decisions cited in the attached supplemental brief are instructive on this key issue, and ask that the Court give them due consideration in rendering its decision.

II. ARGUMENT

Upon a motion made by a party, a court may permit a party to serve a supplemental brief. *See* Rule 7.1(c) of the Local Rules of Civil Procedure for the Eastern District; Rock v. Voshell, 2006 WL 1409734 (E.D.Pa. May 18, 2006); Sphere Drake, P.L.C. v. 101 Variety, Inc., 35 F.Supp.2d 421, 433 (E.D. Pa. 1999); Houck v. Stephens, 1992 WL 97908, n.1 (E.D.Pa. May 5, 1992). *See also*, In re Reading Broadcasting, Inc., 2008 WL 3540212, 2 (E.D. Pa. August 8,

2008). As a general rule, leave to file additional briefs has been given when the filing helped the court in its consideration of the issues before it. *See* McNiff v. Asset Management Specialists, 337 F. Supp. 2d 685, 687 n.1 (E. D. Pa. 2004)(reply brief was appropriate where it was "helpful to [the] determination of the issues in [the] matter."); SmithKline Beecham Corp. v. Apotex Corp., 383 F. Supp. 2d 686, 688 (E. D. Pa. 2004).

In this case, good cause exists for the filing of Defendants' Supplemental Brief, as the Court specifically inquired as to the existence of case law in other jurisdictions dealing with the applicability of the discovery rule to defamation cases. Defendants' Supplemental Brief, attached hereto as Exhibit "A", responds to the Court's request and Defendants believe it will assist the Court with the application of the pertinent law to the facts of this case.

III. CONCLUSION

For all the reasons set forth above, Defendants respectfully requests that this Honorable Court enter an Order granting Defendants' Motion For Leave to File a Supplemental Brief and directing the Clerk of this Court to file the Supplemental Brief attached hereto as Exhibit "A".

Respectfully submitted,
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Dated: July 7, 2010

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Walter K. Olson,
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EXHIBIT “A”

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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

SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

IV. INTRODUCTION

On June 24, 2010, this Court heard oral argument on Defendants' pending Motion to Dismiss Pursuant to Rule 12(b)(6). During that argument, the Court inquired of counsel for Defendants, whether authority exists, either from the Pennsylvania Supreme Court or another jurisdiction's high court, which dictates the inapplicability of the discovery rule to defamation actions based upon published statements. Although an exhaustive review of Pennsylvania defamation cases did not reveal any further Pennsylvania authority on this topic, multiple other jurisdictions definitively have answered the precise question the Court inquired about. In light of the Court's specific request for such guidance, a brief review of these cases follows.

V. ARGUMENT

A. The Discovery Rule Does Not Apply to Defamation Claims Based Upon Written Statements Widely Circulated at the Moment of Publication

In their Memorandum of Law in Support of the Motion to Dismiss, Defendants relied on this Court's decisions in Barrett v. Catacombs Press, 64 F. Supp. 2d 440, 444 (E.D.Pa. 1999), Bradford v. American Media Operations, Inc., 882 F. Supp. 1508, 1519 (E.D.Pa. 1995) and Smith v. IMG Worldwide, Inc., 437 F. Supp. 2d 297, 306 (E.D.Pa. 2006) for the proposition that where, as here, defamation claims are based on written statements, widely circulated at the moment of publication, the discovery rule does not apply.

In response, Wolk claimed that the Pennsylvania Supreme Court's decisions in Wilson v. El-Daief, 964 A.2d 354 (2009), Fine v. Checcio, 582 Pa. 253, 870 A.2d 850 (2005) and Crouse v. Cyclops Industries, 560 Pa. 394, 745 A.2d 606 (2000) rendered the Barrett and Bradford opinions inapplicable, wrongly decided contraventions of Pennsylvania law, and that this Court "erred as a matter of law." (Plaintiff's Brief in Opposition at Pgs. 9, 18-22). Wolk further contends that Wilson, Fine, and Crouse control this Court's decision here, and stand for the proposition that the discovery rule applies to "every case," including those against media-defendants for widely published statements.

The following decisions from the high courts of California, the District of Columbia, Utah, Tennessee, Massachusetts, Alaska, Illinois and New Jersey refute Wolk's interpretation of the scope of the discovery rule's applicability. These cases suggest that the Pennsylvania Supreme Court, if presented with the precise question of the discovery rule's applicability to allegedly defamatory statements published in the media, would not uphold such an application. Therefore, Defendants offer the following for the Court's consideration:

CALIFORNIA

Shively v. Bozanich, 80 P.3d 676, 67931 Cal.4th 1230, 1237(Cal. 2003) (Holding, "there can be no question that the cause of action for defamation accrued and the statute of limitations ran from the date the book was first generally distributed to the public, regardless of the date on which plaintiff actually learned of the existence of the book and read its contents. Uniform authority establishes that the discovery rule does not apply to delay the accrual of a cause of action for a defamation contained in such a publication.")

Hebrew Acad. of San Francisco v. Goldman, 173 P.3d 1004, 42 Ca.4th 883, (Cal. 2007) (Holding, "the discovery rule, which we held in *Shively* does not apply when a book or newspaper is generally distributed to the public, does not apply even when, as in the present case, a publication is given only limited distribution." *reh'g denied* March 19, 2008).

DISTRICT OF COLUMBIA

Mullin v. Washington Free Weekly, Inc., 785 A.2d 296, 297-298 (D.C. 2001) (Holding the statute of limitations for defamation based on remarks in an article in the *Washington City Paper* began to run on the date of publication. "We follow the virtually unanimous rule in this country and hold that the statute began to run on the date of publication" and "decline to [adopt the discovery rule] at least in the case of defamatory statements published in a mass media outlet such as [the] *City Paper*.")

UTAH

Russell v. The Standard Corp., 898 P.2d 264, 264 (Utah 1995) (Holding," an alleged defamation is reasonably discoverable, as a matter of law, at the time it is first published and disseminated in a newspaper which is widely available to the public.")

TENNESSEE

Quality Auto Parts Co., Inc., v. Bluff City Buick Co., Inc., 876 S.W.2d 818, 820-822 (Tenn. 1994) (Finding, "[t]he great majority of courts in other jurisdictions have held that the discovery rule does not alter the general rule that the time period begins to run when the words are uttered," and concluding, "the rationale for declining to apply the discovery rule to defamation statutes of limitations is persuasive…we conclude that the discovery rule does not apply to Tennessee's slander statute of limitations.").

MASSACHUSETTS

Flynn v. Associated Press, 401 Mass. 776, 519 N.E.2d 1304 (Mass. 1988) (Holding, "the discovery rule does not apply to a public libel printed in a newspaper widely available to the public, including the plaintiff.").

ALASKA

McCutcheon v. State of Alaska, 746 P.2d 461, 467 (Alaska 1987) (Holding the discovery rule inapplicable to defamation actions unless the alleged defamation was "inherently undiscoverable," and further finding that the latest a plaintiff "'reasonably should have discovered' the existence of the defamatory statements [was]on the date of the newspaper article reporting them.").

ILLINOIS

Tom Olesker's Exciting World of Fashion, Inc., v. Dun & Bradstreet, Inc., 61 Ill.2d 129, 137-138, 334 N.E.2d 160, 164(Ill. 1975) (Holding the discovery rule applicable in cases involving claimed defamations by credit reporting agencies, but finding these cases readily distinguishable from those " involving alleged defamations through so-called mass-media publication. In claimed libels involving, for example, magazines, books, newspapers, and radio and television programs, the publication has been for public attention and knowledge and the

person commented on, if only in his role as a member of the public, has had access to such published information.").

NEW JERSEY

Lawrence v. Bauer Publishing & Printing LTD., 78 N.J. 371, 375 396 A.2d 569, 571 (N.J. 1979) (Holding the discovery rule inapplicable to libel actions because the legislature, "fixed a precise date on which the limitations period begins to run. Once the date of publication is determined, there is no need for further judicial interpretation.").

VI. CONCLUSION

The facts of the above cited cases are largely analogous to those alleged by Wolk. Namely, that despite the publication through a public media outlet, of the allegedly defamatory statements that form the basis of his claims, Wolk did not become aware of the statements until after the statute of limitations expired. In response to the similar facts presented in each of the above cited cases, numerous state high courts resoundingly held that the discovery rule will not toll the statute of limitations where the defamatory statements were widely, or sometimes even narrowly, published. Therefore, Defendants respectfully renew their request that this Court exercise its right to similarly disagree with Wolk, and hold his claims to be time-barred.

WHEREFORE, Defendants, Walter Olson, Theodore Frank, David Nieporent, The Overlawyered Group and Overlawyered.com respectfully request that this Court grant their Motion Pursuant to Rule 12(b)(6) and dismiss Plaintiff's Complaint with prejudice.

Respectfully submitted,

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Dated: July 7, 2009

CERTIFICATE OF SERVICE

I, Michael N. Onufrak, Esquire, hereby certify that a true and correct copy of the foregoing Motion for Leave to File a Supplemental Brief in Support of Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6), supporting Memorandum of Law, and Exhibits were filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access the filing through the court system.

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Dated: July 7, 2010