UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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

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

Plaintiff Arthur Alan Wolk, Esquire, by and through his attorneys, respectfully submits the following Sur-Reply in further opposition to the Motion to Dismiss Pursuant to Rule 12 (b) (6) of the Defendants. In support thereof, Plaintiff avers as follows:

I. THE AUTHORITY FROM OTHER JURISDICTIONS CITED BY THE DEFENDANTS IS INCONSISTENT WITH PENNSYLVANIA LAW

As this Court acknowledged during oral argument, this Court is bound by the rulings of the Pennsylvania Supreme Court (and Pennsylvania statutes) on this discovery rule issue, and is **not** bound by other rulings by the Pennsylvania federal courts, or by the rulings of the supreme courts of other states. Because the Pennsylvania Supreme Court has ruled, unequivocally and without exception, that the discovery rule in Pennsylvania is a creature of **statute** that applies to **all** statutes of limitation, this Court is not free to disregard that authority, and must apply the discovery rule here.

There is no doubt that some Courts, including Barrett, Bradford and the decisions from California, Utah, Massachusetts, New Jersey, the District of Columbia, Tennessee,

Alaska and Illinois that were cited in the Defendant's reply, have held that the discovery rule does not apply to "mass media" libel cases. However, all of the cases cited and relied upon by the Defendants have one thing in common: the discovery rule in those cases arose out of the **common law**, and not a **statute**.

Unlike the common law, mass-media discovery rule cases relied upon by the Defendants (including Barrett and Bradford, which were decided prior to the Supreme Court's decisions in Fine, Crouse and Wilson), Pennsylvania's discovery rule arises from a statute rather than the common law. "Although the discovery rule evolved out of the common law, it is now appropriately regarded as an application of statutory construction arising out of the interpretation of the concept of the 'accrual' of causes of action" described in 42 Pa.C.S.A. § 5502 (a). Wilson v. El-Daief, M.D., 964 A.2d 354, 362 (Pa. 2009). 42 Pa.C.S.A. § 5502 (a) provides in relevant part:

> **§ 5502. Method of computing periods of limitation generally**
>
> (**a) General rule.--**The time within which a matter must be commenced under this chapter shall be computed … from the time the cause of action accrued, the criminal offense was committed or the right of appeal arose.

Because the Supreme Court has ruled that the discovery rule is an "application of statutory construction," it must, *per se*, apply equally to *all* statutes of limitation for actions "commenced under this chapter," including 42 Pa.C.S.A. § 5523 relating to libel and slander. Consistent with this interpretation, the Pennsylvania Supreme Court has stated that the discovery rule applies to **all** Pennsylvania statutes of limitation:

> [T]he discovery rule applies to toll the statute of limitations in **any** case where a party neither knows nor reasonably should have known of his injury and its cause at the time his right to institute suit arises.

Fine v. Checcio, 870 A.2d 850, 860 (Pa. 2005).

The distinction between a **statutory** discovery rule (such as Pennsylvania's) and a **common law** discovery rule (such as those at issue in the cases cited by the Defendant) is self-evident, and is critical to the court's determination here. Where the discovery rule is a common law device, a state supreme court has the power to make the discovery rule applicable to some cases, but not to others. However, where the discovery rule is a creature of statute, and the statute applies equally to all statutes of limitation (as is the case here), only the legislature has the authority to create an exception. The Pennsylvania legislature has not created such an exception. Because the Pennsylvania Supreme Court has not and cannot do so (and in fact, stated in Fine and Wilson that the opposite is true – that the discovery rule applies to "any case"), this Court cannot create a judicial exception to 42 Pa.C.S.A. § 5502 (a) that does not appear in the statute itself, and cannot overturn the express holding of the Pennsylvania Supreme Court on this issue.

In sum, just like Barrett and Bradford, the out-of-state cases relied upon by the Defendants have no relevance here. Pennsylvania's discovery rule arises from a statute that is equally applicable to all Pennsylvania's statute of limitations, and the Pennsylvania legislature has not created an exception for libel and slander cases. Further, the Pennsylvania Supreme Court has stated, unequivocally, that the "discovery" rule applies to **all** cases, across the board. To hold differently would be to assume that the Pennsylvania Supreme Court did not choose its words carefully – which this Court should not do. As the Pennsylvania Supreme Court has stated that the discovery rule applies to all statutes of limitation, this Court is bound by that ruling. Accordingly, this Court must apply the discovery rule in this case.

II. THIS CASE DOES NOT INVOLVE "MASS MEDIA"

Although it is largely irrelevant in this case due to the fact that Pennsylvania's discovery rule applies as a matter of law, it should also be noted that the cases relied upon by the Defendants are also distinguishable on a different basis. All of the libel cases relied upon by Defendants are so-called "mass media" cases where the defamation arose from printed-on-paper periodicals. The point of these cases is that the publication (such as the "Star" magazine in Bradford, the third-largest publication in the United States, or local newspapers with wide circulation in the community) is so widespread and pervasive that the Plaintiff could not turn his head without being informed of the defamation.

This case is, as a factual matter, wholly unlike those cases. This case involves a blog. While there is no question this blog it is accessible upon an internet search, it is still a far different medium from a newspaper or a "Star" magazine. Much of the damage Wolk sustained arises not from the receipt of the defamatory publication to regular readers of "Óverlawyered" (whoever they are), but instead arises because many times a potential client, in investigating Wolk (perhaps months or years after the publication) for the purpose of potentially retaining him, would "Google" him and, at that point, see the "Overlawyered" article of which Wolk was unaware.

Thus, the reasoning employed in the so-called "mass media" cases does not apply to this case. Wolk could not walk to his corner newstand, pick up a newspaper and read of the defamation. Wolk could not look at a supermarket magazine isle and see his picture. While "Overlawyered" does claim to have a substantial following, the primary harm from the defamation in this case is caused not by the initial publication, but by the fact that the website, while **not** being readily available on the street-corner, appears on a

"Google" search to defame the Plaintiff to potential clients who would be dissuaded from retaining him. Wolk himself, however, had no reason to perform such a Google search on himself. Thus, the defamation in this case is different in-kind than the so-called "mass media" publications. The interent, and this blog, are a different medium, the harm is different in kind than that which arises from print media, and the two should not be treated in the same manner.

III. CONCLUSION

For any and all of the foregoing reasons, as set forth more fully in the Plaintiff's mail brief, Plaintiff Arthur Alan Wolk respectfully requests that this Court deny the Defendants' Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12 (b) (6) in its entirety, and grant such other and further relief as the Court deems appropriate.

Respectfully Submitted,

SPECTOR GADON & ROSEN, P.C.

By:_____AJD 3101_____

Paul R. Rosen, Esquire
Andrew J. DeFalco, Esquire
1635 Market Street, 7th Floor
Philadelphia, Pennsylvania 19103
(215) 241-8888 (Main)
(215) 241-8844 (Fax)
Counsel for Plaintiff

Date: July 15, 2010

CERTIFICATION OF SERVICE

I hereby certify that service of a true and correct copy of the enclosed Sur-reply was made on this date, to the following counsel by United States Mail, as well as by electronic mail:

Michael N. Onufrak, Esquire
Siobhan K. Cole, Esquire
White & Williams, LLP
1650 Market Street
One Liberty Place, Suite 1800
Philadelphia, PA 19103-7395

By: AJD 3101

Date: July 15, 2010