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

ORDER

AND NOW, this _____day of _____, 2010, upon consideration of Plaintiff Arthur Alan Wolk's Motion for Relief From the August 2, 2010 Order Pursuant to Federal Rules of Civil Procedure 60(b)(2),(3) and (6), it is hereby ORDERED and DECREED that the motion is DENIED.

BY THE COURT:

_____
McLaughlin, J.

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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

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR RELIEF FROM THE AUGUST 2, 2010 ORDER PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 60(b)(2), (3) AND (6)

INTRODUCTION

Wolk instituted this action for defamation and related torts based upon an article that was written by Defendant Frank and posted to Overlawyered.com on April 8, 2007. After nearly fifteen months of contentious litigation, including numerous motions, briefing, oral argument and unfruitful settlement discussions, this Court dismissed Wolk's claims as time barred. Wolk appealed this Court's decision and that appeal is currently pending before the Third Circuit.

Upon the filing of Wolk's appeal, this Court was divested of all but very limited jurisdiction to act in this case. Nevertheless, as a supplemental alternative to that appeal, Wolk now asks this Court to grant him relief, under Federal Rule of Civil Procedure 60(b), from the Order dismissing his claims. As is more fully discussed below, the Federal Rules of Civil Procedure provide defined and specific channels through which Wolk may pursue his claims and he must be required to abide by them. Applying those rules, this Court cannot grant Wolk's

motion because the theory he seeks leave to present is not new evidence and even if it were, it would not change the outcome of this Court's decision dismissing Wolk's claims.

Moreover, it would be manifestly unjust to allow Wolk to endlessly re-litigate the same claims against Overlawyered simply because he has the demonstrated desire and resources to do so. The unfortunate state of affairs that now plagues all parties and counsel, as well as this Court, the Third Circuit, and possibly the Pennsylvania Supreme Court, was created and escalated by Wolk, and it must now be firmly shepherded to a just and rational end by the Courts.

What Wolk seeks is extraordinary relief. He cannot have it though, because there are no extraordinary circumstances. Despite Wolk's wild allegations to the contrary, nothing was concealed from Wolk, there was no fraud on the Court, and no one is conspiring to stalk Wolk or ruin his career. Ted Frank wrote a one page article, on Wolk's conduct in litigation in the federal courts, more than three and a half years ago. The article was not defamatory of a public figure like Wolk and Defendant Frank was within his First Amendment rights to publish it. Nevertheless, Wolk sued him for it, and by doing so, drew more attention to the Frank Article than it ever would have gotten otherwise. Wolk lost that lawsuit and now he is trying to make others pay for the mistake he made by instituting the lawsuit in the first place.

Wolk's attempts simply cannot work, however, because the Defendants committed no wrongful acts. The Defendants argued a point of law and won. Wolk appealed that victory and the Third Circuit can decide whether it was correctly earned. That is Wolk's only remedy in this case and he must be confined to it. For all of these reasons the Overlawyered Defendants respectfully request that this Court deny Wolk's motion outright and allow the Third Circuit to bring this case to an expeditious conclusion.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO GRANT PLAINTIFF'S MOTION

Because this Court was divested of jurisdiction over this case when Wolk filed his Notice of Appeal, this Court may consider and deny Wolk's current motion, but cannot grant it. "The timely filing of a notice of appeal is an event of jurisdictional significance, immediately conferring jurisdiction on a Court of Appeals and divesting a district court of its control over those aspects of the case involved in the appeal." Advanced Elec., Inc., v. Courtright, 283 Fed.App'x. 959, 963, 2008 WL 2600725 at *4 (3d Cir. 2008) (citing Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58, 103 S.Ct. 400 (1982); United States v. Leppo, 634 F.2d 101, 104 (3d Cir. 1980). "'Divest' means what it says-the power to act, in all but a limited number of circumstances, has been taken away and placed elsewhere." Advanced Elec., 2008 WL at *4.

When appeal is taken from a final and therefore, appealable order, the district court is without power to act, save for limited circumstances. In deciding whether a Rule 60(b) motion is one such limited circumstance, the Third Circuit, in Venen v. Sweet, definitively held that it is not. 758 F.2d 117, 123 (3d Cir. 1985). The Venen Court went on to explain, however, that what a district court ***does*** have the power to do, without permission of the appellate court, is to both entertain and deny a Rule 60(b) motion. Id. If, however, after entertaining a Rule 60(b) motion a district court is inclined to grant the motion, the district court should certify its inclination to the appellate court which can then entertain a motion to remand the case. Once remanded, the district court will have power to grant the motion, but not before. Id. (citing Main Line Fed. Sav. and Loan Ass'n v. Tri-Kell, 721 F.2d 904, 906 (3d Cir. 1983); Comm. of Puerto Rico v. SS Zoe Colocotroni, 601 F.2d 39 (1st Cir. 1979), *cert. denied*, 450 U.S. 912, 101 S.Ct. 1350, 67 L.Ed.2d 336 (1981); Pioneer Ins. Co. v. Gelt, 558 F.2d 1303 (8th Cir. 1977); Lairsey v. Advance

Abrasives Co., 542 F.2d 928 (5th Cir. 1976); First Nat'l Bank of Salem, Ohio v. Hirsch, 535 F.2d 343 (6th Cir. 1976). See also 7 J. Moore, Moore's Federal Practice, § 60.30 [2] (1983 rev.).

Wolk is not entitled to relief under any of the provisions of Rule 60(b) and this court should deny his Motion outright. "The movant under Rule 60(b) bears a heavy burden, which requires more than a showing of the potential significance of the new evidence. We view Rule 60(b) motions as extraordinary relief which should be granted only where extraordinary justifying circumstances are present." Bohus, 950 F.2d at 930 (citing Plisco v. Union R. Co., 379 F.2d 15, 17 (3d Cir. 1967) *cert. denied*, 389 U.S. 1014, 88 S.Ct. 590 (1967); Moolenar v. Gov't of the Virgin Islands, 822 F.2d 1342, 1346 (3d Cir. 1987) (internal citations omitted).

In May 2008, a software upgrade was applied to Overlawyered.com. Wolk believes this upgrade was extraordinary. It was not. It was maintenance. As even the most limited user of technology is aware, technological devices and the software that run them periodically become outdated and need to be upgraded. That is all that happened to the Overlawyered website in 2008. There was no scheme to launch the Frank Article to the forefront of cyber space as soon as the statute of limitations ran, and the availability of the Frank Article did not change. The software upgrade was applied to the entire website and affected every single post on Overlawyered.com uniformly.

This software upgrade was not focused upon while Defendants' Motion to Dismiss was pending because it never occurred to anyone, including Wolk or his former attorneys, that such an upgrade was of any relevance. Indeed, the Overlawyered Defendants still maintain that the software upgrade is wholly irrelevant to Wolk's claims. It does not amount to republication and it was not fraudulently concealed.

Despite all of Wolk's wild allegations to the contrary, nothing was hidden from Wolk, there were no misrepresentations to the Court, and the Defendants are not stalking Wolk. There

are no extraordinary circumstances here, there is only a software upgrade. Therefore, Wolk is not entitled to relief under any of the provisions of Rule 60(b) and this Court should deny his motion outright.

II. WOLK'S MOTION CANNOT BE ENTERTAINED UNDER RULE 60(b)(2) BECAUSE HIS NEWLY ADVANCED THEORY IS NOT NEW EVIDENCE

The only new information presented by Wolk's motion is his legal theory that a software upgrade applied to Overlawyered.com in May 2008, constituted a republication of the Frank Article. Putting aside for the moment that this argument is flawed and legally untenable, it still does not constitute "evidence". Evidence is any species of proof, or probative matter, legally presented at the trial of an issue, by the act of witnesses, records, documents, concrete objects, etc., for the purpose of inducing belief in the mind of the court as to their contention. United States v. Cimera, 459 F.3d 452, 459-460 (3d Cir. 2006). By contrast, an observation or a conclusion or an appreciation of the significance of that proof, is not evidence. Id. For example, in United States v. Cimera, the court held that relevant physical markings on the backs of checks, which represented account numbers, were evidence, but a theory regarding their significance was not. Id. Here, Wolk does not, and cannot, claim that the updated URL for the Frank Article is new evidence. In fact, Wolk admits that the updated URL was present on the bottom of the printed version of the Frank Article that Wolk attached to his complaint. Similarly, Wolk does not, and cannot, allege that Overlawyered.com's use of tags is new evidence, because that too is included on the printed Frank Article. What Wolk alleges to be "new evidence" is his, or rather his so-called expert's, "stunning discovery" regarding the significance of those marks. As stated by the Court in Cimera, however, a theory or appreciation of the significance of an item of proof is not evidence. Id.

Furthermore, Wolk's alleged evidence is not "new." Wolk admits that he was at all times in possession of the updated URL for the Frank Article, and as evidenced by the printed copy of

the Frank Article attached to his complaint, Wolk also possessed evidence that Overlawyered.com, like innumerable other blogs, employed tags. The simple fact that he did not realize, or rather develop a theory regarding, the significance of this evidence, does not make it new. "Evidence is not newly discovered if it was actually known or could have been known by the diligence of [a party] or his counsel." Id. at 461 (citing United States v. Bujese, 371 F.2d 120, 125 (3d Cir. 1967) (internal quotations omitted).

As the Cimera Court further held, "where the defendant had possession of the evidence at the time of trial, his failure to realize its relevance will not render that evidence 'newly discovered.'" Id. at 460 (citing United States v. Olender, 338 F.3d 629, 635-36 (6th Cir.2003) (concluding that new legal theories or interpretations of the significance of evidence does not constitute "newly discovered evidence"); United States v. Rodriguez-Marrero, 390 F.3d 1, 29 (1st Cir. 2004) (holding that a police report in defense counsel's possession was not "newly discovered"); United States v. Jaramillo, 42 F.3d 920, 925 (5th Cir. 1995) (holding that translation of transcript already in evidence was not "newly discovered" and explaining that "evidence is not considered 'newly discovered' where a defendant is in possession of evidence before trial but does not realize its relevance")).

In support of his contention that his new ***theory*** of ***old evidence*** now constitutes "new evidence," Wolk argues that (1) the Overlawyered Defendants knew that the actual "publication date" of the Frank Article was May 13, 2008, (2) that the Overlawyered Defendants concealed that "fact" from both Wolk and the Court, and (3) it is only now that his so-called "forensic expert" could have discovered that "fact". This argument also fails. As will be further discussed below, it is only ***Wolk's contention*** that the 2008 software upgrade to Overlawyered.com constituted a republication of the Frank Article; it is not a fact. Furthermore, the Overlawyered Defendants were not capable of concealing Wolk's theorized "republication" from him, because

they did not, and do not, share this legally untenable theory. Therefore, the only vaguely legitimate element of Wolk's three part argument is that he could not have discovered the 2008 software upgrade without the help of an expert. As explained below, however, discovery of the software upgrade did not require an expert. The upgrade was publicly announced in blog posts on Overlawyered itself. Despite this fact, even if it were true that Wolk needed an expert to discover the upgrade, courts are clear that subsequent discoveries by experts that could have been made during the pendency of the action do not constitute new evidence.

"The movant under Rule 60(b) bears a heavy burden, which requires more than a showing of the potential significance of the new evidence. We view Rule 60(b) motions as extraordinary relief which should be granted only where extraordinary justifying circumstances are present." Bohus, 950 F.2d at 930 (citing Plisco v. Union R. Co., 379 F.2d 15, 17 (3d Cir. 1967) *cert. denied*, 389 U.S. 1014, 88 S.Ct. 590 (1967); Moolenar v. Gov't of the Virgin Islands, 822 F.2d 1342, 1346 (3d Cir. 1987) (internal citations omitted).

"Under Rule 60(b)(2), the term 'newly discovered evidence' refers to 'evidence of facts in existence at the time of trial of which the aggrieved party was excusably ignorant.' A party is entitled to new trial only if such evidence is (1) material and not merely cumulative, (2) could not have been discovered prior to trial through the exercise of reasonable diligence, *and* (3) would probably have changed the outcome of the trial." Bohus, 950 F.2d at 930. (citing Stridiron v. Stridiron, 698 F.2d 204, 207 (3d Cir. 1983); Ulloa v. City of Philadelphia, 692 F.Supp. 481, 483 (E.D. Pa. 1988)) (internal quotations omitted)(emphasis original).

As explained above, much of what Wolk seeks to admit through this motion is not evidence. The only arguable evidence of fact in existence at the time of the Motion to Dismiss Wolk now presents is his alleged expert's "forensic analysis" of Overlawyered.com, which showed the "fact" of the 2008 software upgrade. As is fully discussed below, a software upgrade

is not material, does not constitute republication and would not have changed the outcome of Defendants' Motion to Dismiss. However, even if it did, Wolk is still not entitled to relief under 60(b)(2) because Wolk's alleged expert could have performed a forensic analysis of Overlawyered.com during the pendency of Wolk's claims just as easily as she did now. Therefore, Wolk cannot satisfy the requirement under Rule 60(b)(2) that any new evidence presented could not have been discovered prior to trial through the exercise of reasonable diligence.

Furthermore, in Ulloa v. City of Philadelphia, the Court held that where all of the information necessary for an expert to perform an analysis was in existence at the time of trial, there could be no relief under Rule 60(b)(2) where the petitioner hired an expert after trial. 692 F. Supp. 481, 485 (E.D. Pa. 1988). There the Court found, "[t]he issue here is whether there was evidence in existence at the time of trial that the petitioner was unable after due diligence to discover in time to move for a new trial. The fact that petitioner was able to obtain an expert to substantiate a theory of his case not originally argued only reinforces the conclusion that such arguments could have been made at the time of trial and are not appropriate on a Rule(60(b)(2) motion." Id; See also United States of America v. Dalide, 316 F.3d 611, 622 (6th Cir. 2003) (noting that a 60(b) petitioner who was in possession of the necessary evidence and "could have easily employed the methods that he ultimately used," and "could have hired the same or similarly qualified experts" was not entitled to relief.)

Here, there is no doubt that Wolk was always in possession of all of the evidence he needed for an expert to perform a forensic analysis of Overlawyered.com. Wolk had the URL of the Frank Article and he had evidence of the tags attached to the Frank Article. Moreover, Wolk had access to any expert money could buy, and any qualified expert on the mechanics of contemporary blogging would have advised him of the availability of archive.org (the "Wayback

Machine"-available for anyone to use over the Internet) as a method of establishing how information was displayed on a blog at earlier points in its history, as well as the propensity of most contemporary blogging software to deposit material written earlier at new URLs.

Furthermore, there was plenty of time for Wolk to do so. Wolk filed this suit on May 13, 2009, and it was dismissed on August 2, 2010. As evidenced by statements in Wolk's 60(b) Motion and the Affidavit of Christine DeGraff, it only took Ms. DeGraff approximately 1 month to perform her analysis. (See Motion at Page 3 stating that Ms. DeGraff was hired in October, 2010; Affidavit at Page 9, dated November 30, 2010). Therefore, the fact that neither Wolk nor his counsel thought to hire an expert during the near fifteen months his case was pending, does not now entitle him to extraordinary relief under Rule 60(b). Wolk was not justifiably ignorant and he did not exercise due diligence.[1]

III. WOLK'S MOTION CANNOT BE ENTERTAINED UNDER RULE 60(b)(2) BECAUSE HIS ALLEGED "NEW EVIDENCE" WOULD NOT CHANGE THE OUTCOME OF THIS COURT'S DISMISSAL

A. Wolk's theory that the Frank Article was republished does not affect this court's dismissal on statute of limitations grounds.

A software upgrade does not amount to a republication for purposes of the statute of limitations in a defamation claim. Therefore, even if Wolk did have proper "new evidence" his motion must still be denied because his new evidence is not material and would not change the outcome of the Motion to Dismiss. The statute of limitations on a defamation claim begins to run from the time of publication. Graham v. Today's Spirit, 503 Pa. 52, 57-58, 468 A.2d 454, 457 (Pa. 1983); Dominiak v. Nat'l Enquirer, 439 Pa. 222, 226, 266 A.2d 626, 628-629 (Pa.

[1] In the unlikely event this Court deems it necessary to consider Wolk's motion, Defendants seek leave to take Expert discovery, including the deposition of Ms. DeGraff, regarding her qualifications and the reliability of the analysis she employed, time to hire a competing expert; and the right to question Wolk and DeGraff at an evidentiary hearing before the Court.

1970). Furthermore, Pennsylvania has adopted the Uniform Single Publication Act. 42 Pa.C.S.A. § 8341(b). The Single Publication Act states,

> No person shall have more than one cause of action for damages for libel or slander, or invasion of privacy, or any other tort founded upon any single publication, or exhibition, or utterance, such as any one edition of a newspaper, or book, or magazine, or any one presentation to an audience, or any one broadcast over radio or television, or any one exhibition of a motion picture.

Id. The single publication rule is an exception to the general rule that each communication of a defamatory statement by the same defamer is a separate and distinct publication, for which a separate cause of action arises. Keeton v. Hustler Magazine, 465 U.S. 770, 774, n.3 (1984). "Under the single publication rule, 'any one edition of a book or newspaper, or any one radio, television broadcast, exhibition of a motion picture or similar aggregate communication is a single publication.'" Pendergrass v. ChoicePoint Inc., No. 08-188, 2008 WL 5188782, at *3 (E.D. Pa. Dec. 10, 2008) (quoting Graham v. Today's Spirit, 503 Pa. 52, 468 A.2d 454, 457 (Pa. 1983); Restatement (Second) of Torts § 577A(3)). The single publication rule applies equally to internet publications. Id.

In his current motion, Wolk argues that a 2008 software upgrade to Overlawyered.com republished the Frank Article, thereby restarting the statute of limitations and rendering the Single Publication rule inapplicable. Specifically, what Wolk alleges is that by adopting the improved software, which caused archived old posts to appear at new URLs (Uniform Resource Locators, a.k.a. web addresses) Overlawyered republished the Frank Article and every other post in its history, restarting the statute of limitations on all of them. Wolk is wrong for several reasons.

First, nearly all blogs today are published by way of the use of blogging software, (otherwise known as blogging "platforms"), which are designed to facilitate the creation and

management of weblogs. Blog "posts" consist of a discrete quantity of writing or other material added to a weblog, typically with a title and date. Posts no longer current enough to appear on the front page of a weblog are often referred to as archival content, or archives. Blogging software ordinarily assigns a distinctive URL to each archival post. When blogging software is changed or upgraded, however, the URLs attached to these archival posts are often modified slightly. It is not the case that a whole new website is created. By way of analogy, a modification to a URL is more akin to moving a book to a different shelf than it is publishing a revised version, as Wolk suggests. Furthermore, blogs maintain a type of ever-moving ordered listing of their posts such that each time a new post is added, the older posts move down the line and appear at a different location. For example, as of December 8, 2010, Overlawyered included a copy of the Frank Article as part of the content displayed on the page: http://overlawyered.com/page/293/. As more posts are added to Overlawyered, the Frank Article will be displayed on other pages including, http://overlawyered.com/page/294/ and http://overlawyered.com/page/295/.

According to Wolk's theories, each of these will constitute a new republication and each will restart the statute of limitations in his favor. Like his earlier failed theories about the discovery rule, Wolk's new theories if taken seriously would destroy the statute of limitations for most online publications, because most, if not all, employ publication technology that according to Wolk's theory constitutes constant republication. Likewise, online publishers would not be able to adopt software upgrades because, according to Wolk, even modest improvements in search engine optimization, typical of software upgrades, would continuously toll the statute of limitations.

The second flaw in Wolk's argument is that it is squarely at odds with the decisions of numerous courts that have dealt with the interplay of Internet publications, statutes of limitation

and the single publication rule. For example, in Van Buskirk v. The New York Times, the court held that the single publication rule applies to Internet publications, and the statute of limitations on the plaintiff's claims began to run the day the defamatory material was published online. The Van Buskirk court noted that Internet publication was a modern method of mass publication. 325 F.3d 87 (2d Cir. 2003). Similarly, in Mitan v. Davis, the court applied the single publication rule to statements published on the Internet noting, "[it] is no different from one published in a book or newspaper." 243 F.Supp.2d 719 (W.D. Ky. 2003).

Further, in The Traditional Cat Ass'n Inc. v. Gilbreath, which was a defamation case based upon a statement in a blog, the court held that the single publication rule applies to statements published on Internet sites. The Gilbreath Court stated,

> [c]ommunications posted on Web sites may be viewed by thousands, if not millions, over an expansive geographic area for an indefinite period of time. Thus a multiple publication rule would implicate an even greater potential for endless retriggering of the statute of limitations, multiplicity of suits and harassment of defendants. Inevitably, there would be a serious inhibitory effect on the open, pervasive dissemination of information and ideas over the Internet, which is, of course, its greatest beneficial promise.

118 Cal. App. 4th 392, 13 Cal. Rptr. 3d 353, 362 (Cal. Dist. Ct. App., May 6, 2004)(citations omitted). See also Long v. The Walt Disney Co., 10 Cal. Rptr. 3d 836 (Cal. Dist. Ct. App. Mar. 9, 2004); Churchill v. New Jersey, 378 N.J. Super. 471, 876 A.2d 311 (N.J. Super. Ct. App. Div. 2005); In re Davis, 347 BR 607 (W.D. Ky. 2006) ("The mere act of editing a website to add unrelated content does not constitute republication of unrelated defamatory material that is posted on the same website. Similarly, mere technical changes to a website such as changing the way an item of information is accessed is not republication."); Nationwide Bi-Weekly Admin., Inc. v. Belo, 512 F.3d 137 (5th Cir. 2007).

As the wealth of authority above demonstrates, the courts in this country recognize that the Internet is an important form of mass media and it requires the same free press protections as traditional forms. Overlawyered.com is no different than the publications in the cases cited above and it is entitled to the same protections. The software Overlawyered uses is common as was the upgrade it underwent. As in the cases cited above, the statute of limitations on Wolk's defamation claims began to run on the day the Frank Article was published. That date was April 8, 2007.

In dismissing Wolk's claims as time barred, this Court held that the discovery rule did not apply to toll the statute of limitations on Wolk's claims. Now, Wolk asks this Court to find that the single publication rule does not apply and the statute was re-started in May, 2008. In order to accept Wolk's argument, however, that a standard software upgrade can constitute a republication capable of tolling the statute of limitations, this Court would have to disagree with all of the ground breaking decisions above.

Therefore, even if this Court were to agree with Wolk that his forensic analysis and theory regarding republication constituted new evidence, that alleged new evidence still cannot support a Rule 60(b)(2) motion, because it cannot change this Court's decision dismissing Wolk's claims.

B. Wolk's claims are barred by the First Amendment regardless of the date of publication.

The Frank Article is neither false nor defamatory, making it further impossible for Wolk to prove that his new theory would change the ultimate disposition of his case. The First Amendment to the United States Constitution provides that "Congress shall make no law.. abridging the freedom of speech, or of the press…." Indeed, the United States Supreme Court has long recognized "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement,

caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S. Ct. 710, 721 (1964).

The article at issue in this case is precisely the type of speech that the federal Constitution shields from censorship or attack. The Frank Article in question accurately communicated to the public the conclusions of a writer in a matter of public concern. By publishing the blog, the Overlawyered Defendants were acting pursuant to their constitutionally safeguarded and mandated role in a democratic society, a role that this Court should protect against baseless challenges such as the one at issue here. Under federal law, defamation actions against mass media defendants, like bloggers, and libel plaintiffs, including public figures such as Wolk, "must show the falsity of the statements at issue in order to prevail." Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986). The court is charged with discerning defamatory meaning.

Words are defamatory only if they "tend[] to blacken a person's reputation or expose him to public hatred, contempt or ridicule or injure him in his business or profession." Agriss v. Roadway Express, Inc., 334 Pa. Super. 295, 305, 483 A.2d 456, 461 (1984). Therefore, in conducting an inquiry into whether a publication is defamatory, a court must "consider the full context of the article to determine 'the effect the article is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate.'" Id. (quoting Corabi v. Curtis Publ'g Co., 441 Pa. 432, 447, 273 A.2d 899, 901 (1971)).

Examining the Frank Article in its full context, it is plain that the article has no defamatory meaning. The article merely reports, in an impartial and straightforward manner, on the happenings in a federal court case involving Wolk. Therefore, even if this Court assumes arguendo, that Wolk's claims were not time-barred, dismissal of Wolk's complaint is still

appropriate because the Frank Article is constitutionally protected, non-actionable, free speech which cannot support a cognizable claim for defamation and his newly developed theory on republication is not capable of changing that fact.

IV. WOLK'S ALLEGATIONS OF FRAUD AND EXTRAORDINARY CIRCUMSTANCES ARE BASELESS AND DO NOT SUPPORT HIS REQUEST FOR RELIEF UNDER RULE 60(b)(3) OR (6)

Wolk's allegations that Defendant and counsel concealed evidence and made fraudulent misrepresentations to this Court are false and cannot support a 60(b) motion. Rule 60(b) motions are extraordinary relief which should be granted only where extraordinary justifying circumstances are present. Bohus, 950 F.2d at 930. To prevail on a 60(b)(3) motion the movant must ***establish*** that the adverse party engaged in fraud or other misconduct, and that this conduct prevented the moving party from fully and fairly presenting his case. Stridiron v. Stridiron, 698 F.2d 204, 207 (3d Cir. 1983) (emphasis added).

Wolk cannot come close to establishing that Overlawyered engaged in any fraud or other misconduct, because there was none. Wolk alleges that Overlawyered concealed evidence that the Frank Article was republished. As is fully explained above, however, Wolk's flawed theory that the Frank Article was published on May 13, 2008 is a theory, not evidence. Overlawyered cannot be held accountable for a failure to develop and disclose that same flawed theory. By contrast, it is a fact that the Frank Article was published on April 8, 2007. Overlawyered stands behind its representations of that fact. They were not wrongful or fraudulent. In addition Wolk's allegation that Overlawyered submitted misleading evidence to the Court is baseless because Overlawyered didn't submit ***any*** evidence to the Court, let alone misleading evidence.

Furthermore, the fact that a software upgrade was performed to Overlawyered.com was not concealed from Wolk or anyone else. To the contrary, it was made public through Overlawyered's numerous posts on that very topic which were readily accessible by Wolk and

his counsel at all relevant times throughout this action. For example, the following posts explain to readers the reasons for the upgrade and the way successive versions of Movable Type resulted in shifts in archival URL locations: http://overlawyered.com/2008/04/redirects-thanks-to-volunteer-andrew-grossman/ (discussing multiple URL formats under Movable Type) http://overlawyered.com/2008/05/wordpress-here-we-come/. This recitation was entirely available to Wolk with reasonable diligence before this Court's dismissal or, for that matter, before he filed suit. Wolk's failure to discover the existing and publicly available evidence he needed to develop his theory does not constitute fraud and it cannot support a Rule 60(b)(3) motion.

Finally, Wolk claims that he is also entitled to relief under Rule 60(b)(6)'s catchall provision. Relief under Rule 60(b)(6) can only be granted in extraordinary circumstances. Ackerman v. United States, 340 U.S. 193, 199-200, 71 S.Ct. 209 (1950). As stated above, there is nothing extraordinary entitling Wolk to relief from his own failure to discover an inconsequential software upgrade. Nothing was concealed from Wolk, there was no fraud on the Court, and no one is conspiring to stalk Wolk or ruin his career. For any one of the innumerable reasons listed above, Wolk is not entitled to relief under Rule 60(b)(6)

CONCLUSION

Wolk is not entitled to the extraordinary relief that Rule 60(b) provides. The theory he seeks leave to present is not evidence, it is not new and it does not change the propriety of this Court's dismissal of his claims. Despite Wolk's allegations to the contrary, nothing was concealed from Wolk and there was no fraud on the Court. Wolk's appeal of the dismissal of his claims is properly before the Third Circuit and only that court can decide whether dismissal was correct. For all of the above stated reasons the Overlawyered Defendants respectfully request that this Court deny Wolk's motion outright and allow the Third Circuit to bring this case to an expeditious conclusion.

Respectfully submitted,

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Dated: December 17, 2010

CERTIFICATE OF SERVICE

I, Michael N. Onufrak, Esquire, hereby certify that a true and correct copy of the foregoing Response in Opposition to Motion for Relief from the August 2, 2010 Order was 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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