ORIGINAL

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

GRAHAM B. SPANIER, Plaintiff, v. LOUIS J. FREEH and FREEH SPORKIN & SULLIVAN, LLP, Defendants.	:	Docket No. 2013-2707

OPPOSITION OF DEFENDANTS TO PLAINTIFF'S MOTION TO JOIN ADDITIONAL PARTIES

Defendants Louis J. Freeh and Freeh, Sporkin & Sullivan, LLP ("FSS") oppose the Motion for Leave to Join Additional Parties filed by Plaintiff Graham B. Spanier. Joinder of Plaintiff's claims against Freeh Group International Solutions LLP ("FGIS") and The Pennsylvania State University ("Penn State" or "PSU") is not proper for several reasons.

First, Plaintiff's claim against proposed defendant FGIS is barred by the statute of limitations. This purported claim consists of the allegation that in April

2012 Louis Freeh gave unspecified, presumably false negative information to government officials considering Spanier for employment, and that as a result, he was denied employment. As such, Plaintiff's claim for tortious interference against FGIS is nothing more than a defamation claim dressed in a different form and, under *Evans v. Philadelphia Newspapers, Inc.*, 601 A.2d 330 (Pa. Super. 1991), such a tortious interference claim is subject to the one year defamation statute of limitations. Because Spanier admits in paragraphs 256 and 262 of his Proposed Complaint that he learned of this alleged interference in October 2013, his claim is plainly time-barred, and joinder would be futile. *Hoare v. Bell Telephone Co. of Pa.*, 500 A.2d 1112, 1113-14 (Pa. 1985) (joinder properly denied where the statute of limitations on proposed claim against party to be joined has expired).

Second, Plaintiff's breach of contract claims against The Pennsylvania State University arise out of distinct sets of facts that have no relation to Plaintiff's claims against Freeh and FSS. The issues involved in both claims are different, different witnesses will be called, different defenses apply, and different evidence is required to prove each set of claims. Plaintiff's defamation claims will involve questions of motive and whether the Freeh Report is false or was issued recklessly, while Plaintiff's breach of contract claims will turn on the language of the contract, the legal effect of the words in the contract, and the interpretation of statements

wholly unrelated to the Freeh Report by individuals unrelated to Freeh or FSS, or to the preparation of the Report. *Richner v. McCance*, 13 A.3d 950, 959-60 (Pa. Super. 2011) (joinder properly denied where contract claim presented issues that were separate and distinct from issue presented by tort claim). Joinder of Plaintiff's fundamentally separate contract claims against PSU would unnecessarily complicate this litigation.

Finally, Plaintiff's claims for breach of the non-disparagement clause in his separation agreement with PSU (the "Separation Agreement") should not be joined for the independent reason that joinder of these claims would result in the likelihood of jury confusion and prejudice to Defendants. These claims, like Plaintiff's defamation claims against Freeh and FSS, are premised upon negative statements made about Plaintiff. But these two sets of claims are governed by radically different legal standards and burdens of proof. The standard applicable to the claims for breach of the non-disparagement clause requires Plaintiff to show by a preponderance of the evidence that PSU breached a duty to take steps to prevent "negative" comments about Plaintiff. In contrast, Plaintiff's defamation claims requires proof by clear and convincing evidence that Freeh and FSS made defamatory statements about Plaintiff, and that the statements were made with actual malice. Resolving these two claims involves the application of drastically different legal frameworks and burdens of proof. Requiring a jury to

simultaneously consider both claims poses a grave risk that the jury would improperly conflate the two standards, to the detriment of Freeh and FSS. *Pittsburgh Parking Garages v. Urban Redevelopment Auth. of Pittsburgh*, 88 A.2d 780, 781 (Pa. 1952) (holding joinder inappropriate where "a joinder would complicate the action and possibly confuse the jury").

COUNTERSTATEMENT OF THE QUESTION INVOLVED

1. Should Plaintiff be permitted to join an additional party as a defendant where Plaintiff has been aware of the substance of his claim against that defendant for years and where the Plaintiff's claim is barred by the statute of limitations?

   Suggested Answer: No.

2. Should Plaintiff be permitted to join an additional party as a defendant where joinder would result in prejudice to the existing defendants and the risk of jury confusion, and where Plaintiff's claims do not arise out of the same set of transactions or occurrences?

   Suggested Answer: No.

ARGUMENT

A. FGIS Should Not be Joined as a Defendant Because Plaintiff's Claim Against FGIS Is Time-Barred

Plaintiff seeks to join FGIS as an additional defendant and to add a claim for "Tortious Interference with Prospective Contractual/Business Relations" against both Louis Freeh and FGIS. Spanier asserts that Freeh made a statement to a federal official that "impugn[ed] Dr. Spanier's fitness for federal employment," Compl. ¶ 354, and that in doing so he "interfer[ed]" with Spanier's "prospective

relations that were reasonably certain to occur but for Freeh's tortious act." Compl. ¶¶ 355, 357.

To support this assertion, Spanier alleges that Freeh sent an email from his FGIS email account in April 2012 stating that "we have done our job notifying the Federal prosecutors regarding the latest information," Compl. ¶ 259, and infers that this elliptical statement means that Freeh gave some unspecified negative information regarding Spanier to the federal officials who allegedly were considering offering Spanier a job. Spanier alleges that he first gained knowledge of this correspondence on October 7, 2013. Compl. ¶¶ 256, 262, 264. Aside from the fact that Spanier fails to allege sufficiently that Freeh was acting in his role as a member of FGIS, Spanier's claim against FGIS is barred by the applicable statute of limitations, and joinder thus is inappropriate.

Under Pennsylvania law, where the statute of limitations on a claim against a party has expired, joinder should be denied. *Hoare*, 500 A.2d at 1113-14; *see also, e.g., Liba v. Colony Square Builders*, 41 Pa. D. & C.3d 666, 669-70 (Com. Pl. Allegheny Cnty. 1983) ("The power of the courts to order joinder of additional parties is limited by the applicable statute of limitations.") (citation omitted). Further, the Supreme Court has held that where a tortious interference claim sounds in defamation, the one year defamation statute of limitations governs that claim. This is so because "where the underlying wrong which the complaint

alleges is defamation by publication of a libelous report, and the claim of injury set out in each count springs from the act of publication, the [plaintiff] should not be able to circumvent the statute of limitations by merely terming the claim tortious interference when in essence it is one of defamation, subject to a one year limitation of action." *Evans*, 601 A.2d at 333; *see also Pro Golf Mfg., Inc. v. Tribune Review Newspaper Co.*, 809 A.2d 243, 246 (Pa. 2002) (tort of commercial disparagement is governed by one-year statute of limitations for defamation); *Faulls v. Proctor & Gamble Paper Products Co.*, 21 Pa. D. & C.4th 116, 119-20 (Com. Pl. Wyoming Cnty. 1993) (applying one year statute of limitations to claims for intentional interference with contract, conspiracy, and invasion of privacy).

For example, in *Hurst v. Beck*, the plaintiff brought a claim for tortious interference alleging that the defendant made statements about the plaintiff that resulted in the rejection of the plaintiff's job application. The court applied the one year defamation statute of limitations to the plaintiff's claim, finding that each of the actions of which the plaintiff complained "arise[s] out of the alleged defamatory statements," and that the "'gravamen' of plaintiff's complaint is that the [defendant's] conduct was detrimental because of its defamatory character." *Hurst v. Beck*, No. CIV. A. 91-2492, 1992 WL 396592, at *5 (E.D. Pa. Dec. 17, 1992), attached as Ex. 1. Thus, the court held that the plaintiff's claim was subject to the defamation statute of limitations and thus was time-barred. *See also*

McClenaghan v. Turi, 567 F. App'x 150, 156 (3d Cir. 2014), attached as Ex. 2 ("Because Appellants' claim[s] for tortious interference [are] based upon the alleged false and defamatory character of the communication complained of, Appellants cannot circumvent the defamation statute of limitations by repackaging the same claims under a tortious interference theory.") (citation and quotation omitted).

Judge Nealon of the Court of Common Pleas of Lackawanna County has similarly held that where a plaintiff alleges that a defendant's statement was false and resulted in the denial of an employment opportunity, that claim is governed by the one year defamation statute of limitations. *Pittsman v. Perrone*, No. 11-cv-1236 (Com. Pl. Lackawanna Cnty. Apr. 11, 2013) at 1, 16, attached as Ex. 3 (holding that "Plaintiff's binding judicial admissions reflect that the gist of his tortious interference claim is defendants' alleged defamatory acts" and thus "the tortious interference action is clearly barred by the one-year statute of limitations").

Here, the basis of Spanier's tortious interference claim consists of statements Freeh purportedly made to government officials that damaged Spanier's reputation and resulted in his rejection for a government position. Accordingly, Spanier's claim arises from an allegedly "libelous report," and the damages of which he complains "spring[] from the act of publication." Because Spanier's claim for

"tortious interference" is in essence one for defamation, Pennsylvania's one year defamation statute of limitations applies, and because Spanier alleges that he first learned of the alleged communication between Freeh and federal officials on October 7, 2013, *see* Compl. ¶¶ 257, 262, 264, the statute of limitations for this claim expired, at the very latest, on October 7, 2014. Thus, Spanier has no viable claim on which to join FGIS. Joinder would be futile, and should be denied. *Hoare*, 500 A.2d at 1113-14.

B. Plaintiff's Contract Claims Against PSU Do Not Arise from the Same Transaction or Occurrence as Do Plaintiff's Claims Against Freeh and FSS

Plaintiff's Proposed Complaint asserts breach of contract claims having nothing to do with his claims against Freeh and FSS. *See* Proposed Compl. Counts VI-XII. Spanier claims that PSU breached its agreement with Plaintiff by failing to permit him to teach courses at PSU, failing to provide him with administrative support, failing to prevent PSU trustees from making negative comments about Spanier, and failing to pay certain expenses. *See* Proposed Compl. ¶¶ 273-281. None of these allegations bear any relationship whatsoever to his claims against Freeh, much less do they arise out of the "same transaction, occurrence, or series of transactions or occurrences."

Pennsylvania Rule of Civil Procedure 2229(b) permits a plaintiff to join two or more defendants against whom the plaintiff asserts "any right to relief jointly,

severally, separately or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences if any common question of law or fact affecting the liabilities of all such persons will arise in the action." Because the rule requires a plaintiff to show that "(1) the liabilities of the defendants arise from a common factual background, and (2) a common question of law or fact affecting the liabilities of the defendants will arise in the action, . . . the right to join defendants in one proceeding under Rule 2229(b) is by no means absolute." *Richner*, 13 A.3d at 959-60.

Here, joinder of pure breach of contract claims against PSU with the defamation claims against Freeh and FSS does not meet the Rule 2229 standard. A review of Plaintiff's Proposed Complaint confirms that the breach of contract claims Spanier attempts to join against PSU are fundamentally distinct from the defamation claims asserted against Freeh and FSS. The paragraphs of the Proposed Complaint addressing Spanier's contract claims focus on the scope of the obligations imposed by the Separation Agreement Spanier entered into with PSU in mid-November 2011, a week *before* Freeh and FSS were retained by PSU. *See, e.g.*, Proposed Compl. ¶¶ 88-92. Spanier's claims against Freeh, in contrast, center around Freeh's and FSS's independent investigation during the end of 2011 and first half of 2012 of events occurring in the aftermath of the Sandusky scandal. *See, e.g.*, Proposed Compl. ¶¶ 105-30.

Spanier nonetheless contends that the two sets of claims are related because Spanier's breach of contract claims include allegations that PSU failed to prevent trustees and other PSU officials from making negative statements about Spanier. *See, e.g.*, Pl.'s Mot. to Join Add'l Parties at 13-14. But even if such allegations appear to be akin to a claim for defamation, they likewise revolve around the interpretation of the Separation Agreement, which pre-dates Freeh's and FSS's involvement, and whether statements by certain trustees breached the agreement. Whether those negative statements are in fact true or false have no bearing on Spanier's breach of contract claim.

In fact, the Superior Court has specifically held that contract and tort claims are not appropriately joined even when there is some overlapping factual matter relevant to both claims. For example, in *Richner*, the Court held that the plaintiff was not entitled to join an underinsured motor vehicle claim against his parents' insurer with his tort claim against the driver allegedly responsible for the automobile accident. The Court observed that:

> [W]hile in an attenuated sense, [Plaintiff's] tort action against [the driver] and the coverage issue with [insurer] Erie both "arise" from the automobile accident . . . in fact [Plaintiff's] dispute with Erie arises from the formation of the insurance contract between [Plaintiff's] parents and Erie. More specifically, the dispute arises from interpretation of the [insurance contract] language . . . ***[Plaintiff's] tort claims . . . including all questions of duty, breach of duty, causation, and damages, will be resolved through reference to what occurred during and***

> ***after the automobile accident. The respective rights and obligations of [Plaintiff] and Erie, in contrast, will derive entirely from the language of the [] provisions of the Erie insurance contract.***

Richner, 13 A.3d at 960 (emphasis added). Because the issues involved in the contract claim were separate and distinct from the tort claim, the Court held that joinder was inappropriate. *See also Stokes v. Loyal Order of Moose Lodge No. 696*, 466 A.2d 1341, 1345 (Pa. 1983) ("The complaint against appellee was based on wife plaintiff's fall on appellee's premises. The complaint to join appellant was based on appellant's alleged obligation to insure and defend appellee. We find that this was a distinct transaction and that the complaints did not arise out of the same transaction or occurrence.").

Similarly, as in *Richner*, Spanier's claims against PSU will entail issues related to the formation and language of the contract and whether certain comments from parties other than Freeh or FSS support a claim against PSU under that language. *Compare Richner*, 13 A.3d at 960. In contrast, Spanier's claims against Freeh involve state of mind, motive, whether the Freeh Report was false or issued recklessly, and statements by Freeh after its release. These issues do not overlap with the allegations pled in support of Spanier's contract claims, and the two claims should not be joined.

Nor have Freeh and FSS "effectively conceded" that joinder of PSU is proper. *See* Pl.'s Supplemental Submission at 3. No one disputes that Spanier's

claims against Freeh and FSS "arise out of" the Sandusky sexual abuse matter. But Spanier's claims against PSU do not; simply because they are pled against PSU does not make them related to the Sandusky scandal. Motive is not an element of a breach of contract claim, and the circumstances of the Sandusky scandal are irrelevant to Plaintiff's breach of contract claim.[1] Plaintiff's statement that "Defendants repeatedly and emphatically emphasized that the claims against Freeh/FSS and the putative claims against PSU all arise out of the same series of occurrences and the same operative facts," *id.* at 4, is simply not correct. Rather, Defendants' point was, and remains, that Spanier's defamation claims against Freeh and FSS are similar to those in prior Sandusky-related cases. Plaintiff's contract claims against PSU, however, are not.

C. Plaintiff's Claims Against PSU Based on Breach of the Non-Disparagement Clause Should Not Be Joined For the Independent Reason that Joinder Would Prejudice Defendants

Adding claims for breach of the non-disparagement clause in the Separation Agreement would result in the likelihood of jury confusion and prejudice to Freeh and FSS, and joinder of these claims should be denied for this independent reason as well.

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[1] To the extent there is any overlap whatsoever, Plaintiff's claims should not be joined because of the risk of jury confusion resulting from the necessity to apply two radically different legal standards to the two sets of claims. *See infra* Section C.

A distinct—and more lenient—standard applies to Spanier's claims against PSU for breach of the non-disparagement clause, while Spanier's claims against Freeh and FSS are subject to the heightened standard required of defamation claims. In order to prove his claims against Freeh and FSS, Spanier will need to show that Freeh and FSS made statements that were knowingly false, and that Freeh and FSS published those statements with actual malice. *Weaver v. Lancaster Newspapers, Inc.*, 926 A.2d 899, 903 (Pa. 2007). In contrast, Spanier must show only that PSU breached an obligation to refrain from, and to use "reasonable efforts" to cause the Board of Trustees to refrain from, making "negative comments" about him. *See* Ex. D to Proposed Compl. at ¶ 13. Furthermore, Plaintiff must prove that Freeh and FSS made defamatory statements with actual malice by "***clear and convincing evidence***." *Fitzpatrick v. Philadelphia Newspapers, Inc.*, 567 A.2d 684, 686 (Pa. Super. 1989) (emphasis added). In contrast, Plaintiff need only prove his claims against PSU by a preponderance of the evidence.

These standards of proof are dramatically different, and a jury would need to apply these two contrasting standards simultaneously in rendering a verdict. The danger that the jury would improperly conflate the "negative comment" standard with the heightened standard for defamation claims would potentially result in prejudice to Freeh and FSS if joinder Plaintiff's non-disparagement claims against

PSU is permitted. *See Pittsburgh Parking Garages*, 88 A.2d at 781 (holding joinder inappropriate where "a joinder would complicate the action and possibly confuse the jury"); *Kalker v. Moyer*, 921 A.2d 21, 23 (Pa. Super. 2007) (holding that joinder is improper where "there are two different actions involving totally different theories of liability, so there is no common question of fact that predominates," and joinder would result in prejudice to defendant); *Solomon v. Boston Old Colony Ins. Co.*, 52 Pa. D. & C.2d 641, 643 (Com. Pl. Dauphin Cnty. 1971) (severing claims where "prejudice to defendant would result from confusion of the triable issues in the case in the minds of the jury and the different problems of evidence and proof arising out of plaintiff's joinder of separate and distinct claims").

Because joining such claims results in confusion of the issues and the risk that the trier of fact would apply an inappropriately low standard to Plaintiff's defamation claims against Freeh and FSS, joinder should be denied.

CONCLUSION

Joining FGIS and PSU in this action would needlessly complicate this litigation. Joinder of FGIS would be futile, because these claims clearly are barred by the statute of limitations on their face. Plaintiff's claims against PSU do not have any relation to Plaintiff's claims against Freeh and FSS, and adding these claims to this action would only result in confusion and inefficiency. Moreover,

because of the different legal standards and burdens of proof applicable to the claims against Freeh and FSS and to those against PSU, joining Plaintiff's non-disparagement claims would present a grave risk of jury confusion, to the detriment of Freeh and FSS. In contrast, Spanier, who waited for four years to assert his breach of contract claims against PSU, would suffer no prejudice as a result of bringing these claims in a separate action. For the foregoing reasons, Spanier's Motion to Join Additional Parties should be denied.

Respectfully submitted,

Dated: October 5, 2015

Robert C. Heim (Pa. 15758)
Michael L. Kichline (Pa. 62293)
William T. McEnroe (Pa. 308821)
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104-2808
(215) 994-4000 (phone)
(215) 994-2222 (facsimile)

Lisa M. Welsh (Pa. 307382)
Miller, Kistler & Campbell
720 South Atherton Street, Suite 201
State College, PA 16801-4669
(814) 234-1500 (phone)
(814) 234-1549 (facsimile)

Attorneys for Defendants Louis J. Freeh and Freeh Sporkin & Sullivan, LLP

EXHIBIT 1

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Wendy R. HURST, M.D.
v.
William W. BECK, Jr., M.D., et al.

Civ. A. No. 91–2492. | Dec. 17, 1992.

Attorneys and Law Firms

Giuliana F. Robertson, David E. Landau, Michael D. Shaffer, Hoyle, Morris & Kerr, Philadelphia, Pa., for plaintiffs.

John B. Langel, David S. Fryman, Suzanne E. Turner, Ballard, Spahr, Andrews and Ingersoll, Charisse R. Lillie, Ballard, Spahr, Andrews & Ingersoll, Philadelphia, Pa., for defendants.

MEMORANDUM AND ORDER

HUTTON, District Judge.

*1 Presently before the Court is defendant Theodore Tsaltas, M.D.'s ("Dr. Tsaltas") Motion for Summary Judgment on Counts I, II, IV, and VI, defendant Pennsylvania Hospital's Motion for Summary Judgment on Count III and VI, defendant William W. Beck, M.D.'s ("Dr. Beck") Motion for Summary Judgment on Count VI, plaintiff Wendy R. Hurst, M.D.'s ("Dr. Hurst") response and the defendants' reply.

I. FACTS AND PROCEDURAL DEVELOPMENTS

The present action seeks relief against the plaintiff Hurst's former employer, the defendant Pennsylvania Hospital, and two physicians, Dr. William W. Beck, Director of the Department of Obstetrics and Gynecology's residency program, and Dr. Theodore Tsaltas, an attending physician. [1] Dr. Hurst claims that both the hospital and the two named physicians gave the Avery Medical Center of Connecticut references about her that were both defamatory and based upon information contained in the plaintiff's confidential personnel file. Based upon this information, the Avery Center declined to hire Dr. Hurst.

The plaintiff and her husband, Dr. Richard Levine, initiated this action on April 17, 1991. They also filed suit against the Avery Center in the United States District Court for the District of Connecticut. The Connecticut suit has subsequently settled. After filing an amended complaint on June 14, 1991, with this Court, the plaintiff was granted leave to file the present Second Amended Complaint. [2] On November 2, 1992, the defendants filed the present Motion for Summary Judgment.

II. DISCUSSION

A. *The Applicable Law*

When a federal Court sits in diversity it must apply the substantive law of the forum state. *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 78 (1938). Under the Rules of Decision Act, 28 U.S.C. § 1652 (1988 & Supp.1992), "the laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." *Id.*

The United States Supreme Court has held that the judicial decisions of the state courts are "laws" of the states within the meaning of the above statute. *Erie R.R. Co.,* 304 U.S. at 78. The federal courts are to follow the decisions of the Supreme Court of the state where they have spoken. *See, Commissioner of Internal Revenue v. Estate of Bosch,* 387 U.S. 429, 465 (1967). In addition, " 'an intermediate appellate state court ... is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.' " *Id.* (quoting *West v. American Tel. & Tel. Co.,* 311 U.S. 223, 237 (1940)).

B. *The Standard For Summary Judgment*

The purpose of summary judgment is to avoid a pointless trial in cases where it is unnecessary and would only cause delay and expense. *Goodman v. Mead Johnson & Co.,* 534 F.2d 566, 573 (3d Cir.1976), *cert. denied,* 429 U.S. 1038 (1977). When considering a motion for summary judgment, this Court shall grant such motion "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). When reviewing a motion for summary judgment, this Court will

resolve all reasonable doubts and inferences in favor of the nonmoving party. *Arnold Pontiac—GMC, Inc. v. General Motors Corp.*, 700 F.Supp. 838, 840 (W.D.Pa.1988).

***2** The inquiry into whether a "genuine issue" of material fact exists has been defined by the Supreme Court as whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "As to materiality, the substantive law will identify which facts are material." *Id.*

The Supreme Court articulated the allocation of burdens between a moving and nonmoving party in a motion for summary judgment in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The Court held that the movant had the initial burden of showing the court the absence of a genuine issue of material fact, but that this did not require the movant to support the motion with affidavits or other materials that negated the opponent's claim. *Id.* at 323. The Court also held that Rule 56(e) requires the nonmoving party to "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Id.* at 324 (quoting Fed.R.Civ.P. 56(e)).

The Supreme Court further elaborated on the type of evidence that the nonmoving party is required to adduce in order to withstand a motion for summary judgment:

> We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred [a genuine issue of material fact].

Id. Although all three defendants filed one Motion for Summary Judgment, the grounds upon which each defendant seeks relief are distinct. The Court will review each in turn.

C. Defendant Tsaltas's Motion for Summary Judgment

Defendant Tsaltas argues that he is entitled to summary judgment because all of the plaintiff's claims against him are barred by the statute of limitations. Before moving to the merits of Dr. Tsaltas's claims, however, the Court must first review both the timing and legal standard by which Dr. Tsaltas was made a party in this case. As the previous discussion indicated, Dr. Tsaltas was not brought into this action until this Court granted the plaintiff's Motion to file the Second Amended Complaint, naming Dr. Tsaltas, on August 3, 1992.

In granting the plaintiff's Motion this Court first addressed the question of whether the complaint against Dr. Tsaltas would "relate back" to the original filing of April 17, 1991, as provided for under Fed.R.Civ.P. 15(c). The amended version of Rule 15(c) provides:

> An amendment of a pleading relates back to the date of the original pleading when
>
> ***3** (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(j) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the proper party.

Id. In addition, Fed.R.Civ.P. 4(j) requires that service of the summons and complaint be made within 120 days of the filing of the complaint or longer if good cause can be shown by the plaintiff. *Skoczylas v. Federal Bureau of Prisons*, 961 F.2d 543, 545–46 (5th Cir.1992).

This Court was concerned about the relation back requirements because the Third Circuit has held that changing the name of a John Doe party to the proper party is a change of a party and the amendment will relate back only if the requirements of Rule 15(c) are met. *Varlack v. SWC*

Caribbean, Inc., 550 F.2d 171, 174 (3d Cir.1977). The Court found that under the standard of Fed.R.Civ.P. 12(b)(6), plaintiff had met her burden of proving that Dr. Tsaltas had inferentially received the required notice under Rule 15(c). (Memorandum and Order, Aug. 3, 1992, at 8–9).

However, in reaching the decision that plaintiff had satisfied her burden of proof respecting Rule 15(c)(2) and (3), this Court held:

> In allowing the amendment, the Court does not foreclose the defendant's ability to raise the statute of limitation as a defense, because the Court has not made a factual finding regarding when the defendant received notice. The Court has used the facts as the plaintiff has provided them, because the futility argument is essentially a motion to dismiss and the same standards would apply. After discovery has been completed and there is a factual record upon which the Court can determine when Dr. Tsaltas received notice of the action, the Court can revisit the statute of limitations in a motion for summary judgment. In addition, the defendant will also be able to raise all of the other defenses which he asserts are available such as failure to exhaust administrative remedies under Title VII.

(Memorandum and Order at 10). Dr. Tsaltas's Motion for Summary Judgment essentially re-raises the Rule 15(c) notice argument that this Court rejected under the Rule 12(b)(6) standard.

The foregoing discussion on Rule 15(c) is relevant to Dr. Tsaltas's Motion for Summary Judgment because his primary basis for relief is the statute of limitations under Pennsylvania substantive law. Dr. Tsaltas's theory for Summary Judgment on Counts I (defamation), II (Intentional Interference with Contractual Relations), IV (Intentional Interference with Prospective Contractual Relations) and Count VI (Discrimination on the Basis of Sex and Pregnancy), is that his entry into the case does not date back to April 17, 1991. Therefore, he is entitled to Summary Judgment on Counts I, II, IV and VI of the Complaint because they each have a statute of limitations less than one year. The following discussion of Pennsylvania state substantive law on the relationship between defamation and intentional interference with contractual relations makes clear why Dr. Tsaltas argues that his claims do not relate back under Rule 15(c).

***4** Under Pennsylvania law, defamation related torts have a one year statute of limitations. 42 Pa.Con.Stat. § 5523 (Supp.1992). The defamation statute of limitations is distinct from the otherwise applicable general two year statute of limitations for other causes of actions. Title 42 Pa.Con.Stat. § 5524, the two year limitation, provides in relevant part:

> Two Year Limitation
>
> The following actions and proceedings must be commenced within two years:
>
> (7) Any other action or proceeding to recover damages for injury to person or property which is founded on negligent, intentional, or otherwise tortious conduct or any other action or proceeding sounding in trespass, including deceit or fraud, except an action or proceeding subject to another limitation specified in this subchapter.

42 Pa.Con.Stat. § 5524(7). In separating defamation from other tort claims, the legislature expressed a clear intention to keep the statute of limitations for defamation shorter than other tort causes of action. In discussing why the Pennsylvania legislature made such a distinction, the Superior Court stated in *Evans v. Philadelphia Newspapers, Inc.*, 601 A.2d 330 (Pa.Super.Ct.1991):

> It is therefore clear that a longstanding policy exists in Pennsylvania to allow defendants in defamation cases an opportunity to make a prompt investigation of claims made against them while the evidence is still fresh in the minds of prospective witnesses. This is especially necessary for cases involving slander because the actual content of the statement could quickly fade from the minds of witnesses.

Id. at 333.

In *Evans* the Pennsylvania Superior Court held that while defamation is a separate and distinct action from tortious interference with contract, a trial court must first make a threshold determination whether the tortious interference claims existed solely because of the defamatory statements.

Id. at 333–34. If the trial court finds that there is no independent basis for the tortious interference claims, absent defamatory statements, the court must apply the one year statute of limitations to *both* claims for relief. *Id.*

In *Evans* the Superior Court held that a cause of action for tortious interference and libel, arising out of incorrect statements that the newspaper printed about the Philadelphia African–American Community, existed only because of the false statements. The court reasoned that because the injury to contract relationships arose only out of the defamatory statements, the tortious interference with contract claim was subject to the one year statute of limitations for libel and held:

> Accordingly, the one year statute of limitation for defamation cannot be circumvented by cloaking such a cause of action in other legal raiment.

Id.

As support for its decision to leave the two torts separate, but apply the shorter statute of limitations to interference claims based on false statements, the court stated:

> *5 without such a rule, any plaintiff having a claim for defamation concerning his business practices would be able to avoid the one year statute of limitations by simply designating the defamatory statement either disparagement or tortious interference, which have longer limitation periods.

Id. (citing *Wild v. Rarig,* 234 N.W.2d 775, 793 (Minn.1975), *cert. denied,* 424 U.S. 902 (1976)) (other citations omitted). The *Evans* decision instructs that the trial court must make its own independent determination, as a matter of law, whether the separate cause of action for tortious interference is separate and unique from the defamatory statements or exists entirely because of the statements. *Id.* at 335. If this Court concludes that the tortious interference with contract claim owes its existence solely to the defamatory statements, then the Court must apply the one year statute of limitations. [3]

This Court's review of the record indicates that the one year statute of limitation is appropriate for both the defamation claim (§ 5523(1)) and the tortious interference with contract claim. *See Evans,* 601 A.2d at 334–35. According to the Second Amended Complaint, Dr. Tsaltas made the defamatory comments "during the first two weeks of May, 1990." *Id.* at ¶ 21. Under § 5523(1), plaintiff would have had to file her complaint for defamation by May, 1991. Similarly, all of the tortious interference claims flow directly from the defamatory statements.

Plaintiff Hurst urges this Court to find that Dr. Tsaltas's reading of her personnel file, disclosing her CREOG residents scores, relating to the Avery Center that certain other physicians did not like to work with Dr. Hurst, and that the Avery Center should contact Dr. Beck, all constitute separate conduct beyond defamation and therefore is a separate tort. (Plaintiff's Memorandum at 15–16). Accordingly, this Court should then apply the two year statute of limitations. The Court finds, however, that each of these actions arise out of the alleged defamatory statements. While each of the foregoing actions might have had an impact on the plaintiff's business, the "gravamen" of plaintiff's complaint is that the foregoing conduct was detrimental because of its defamatory character. *Evans,* 601 A.2d at 333. This Court, consistent with *Evans,* will not "circumvent the statute of limitations by cloaking such a cause of action in other legal raiment." *Id.* at 334. Accordingly, this Court holds that the tortious interference with contract claims are controlled by the one year statute of limitations.

Herein lies the significance of whether the Second Amended Complaint "relates back" under Fed.R.Civ.P. 15(c). If the Second Amended Complaint, substituting Dr. Tsaltas's for Dr. Doe, does not relate back to the original filing on April 17, 1991, then the defamation count *and* the tortious interference with contract counts are time barred. *Varlack v. SWC Caribbean, Inc.,* 550 F.2d 171, 174 (3d Cir.1977) (Rule 15(c) requirements must be complied with for relation back); *Evans,* 601 A.2d at 333. If the Second Amended Complaint does relate back then the Court must reach the merits of Dr. Hurst's complaint.

*6 The affidavits and the plaintiff's own admissions at 15–16 indicate that summary judgment must be granted in Dr. Tsaltas's favor on Count I for defamation. In this Court's Memorandum and Order of August 3, 1992, the Court granted plaintiff's Motion to Amend the Complaint and stated:

> In the present case, Dr. Tsaltas and Dr. Beck were both members of the Obstetrics and Gynecology Department at Pennsylvania Hospital. While the Court cannot determine as a

> matter of law that the relationship of the parties provided actual notice, the relationship does provide an inference which discovery could bear out. This inference is that due to the size of the department and the fact that both doctors supervised the plaintiff, and only one was sued, Dr. Tsaltas did receive some notice of the pending action.

(Memorandum and Order at 8). The Court determined that under Rule 12(b)(6) the Court would not consider Dr. Tsaltas's affidavit or any other evidence "beyond the pleadings." *Id.* at 8–9.

Through discovery, Dr. Tsaltas has provided the Court with both an affidavit that he lacked knowledge of Dr. Hurst's suit and his deposition testimony is consistent with that representation. (*See* Tsaltas' Deposition, Defendant's Exhibits C (affidavit) and D (deposition) at 137–38, had no knowledge of suit's nature as he and Dr. Beck were not close or "conversational colleagues."). Dr. Tsaltas has provided sufficient evidence to rebut the reasonable inference that this Court suggested in its Memorandum and Order of August 3, 1992.

Under Fed.R.Civ.P. 56(c), it is now the plaintiff's affirmative obligation to provide evidence that Dr. Tsaltas had notice within the 120 day period. *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); Fed.R.Civ.P. 56(e). This evidence need not be sufficient to prevail at trial, but must create a colorable dispute of fact that would preclude summary judgment. It is not sufficient under Fed.R.Civ.P. 56 to rely on the pleadings or the inference they produce under the standard of Rule 12(b)(6).

The Court finds that the plaintiff has failed to produce any evidence that Dr. Tsaltas had notice of this action within the 120 days that Rule 4(j) requires.[4] In fact, the plaintiff's own position in response to the Motion for Summary Judgment suggests that plaintiff has abandoned this theory. At pages 17 and 21 of the plaintiff's response, she argues:

> Moreover, Dr. Tsaltas received notice of these claims when Dr. Hurst filed her complaint in the Tsaltas action within the two year statute of limitations applicable to these torts.

Id. at 21. This abandonment of the argument that Dr. Tsaltas had notice within one year, coupled with his sworn affidavit (Defendant's Exhibit C), indicate that plaintiff has not found in discovery the information necessary to support notice that the Court granted her under 12(b)(6). Accordingly, Dr. Tsaltas's Motion for Summary Judgment on all Counts is GRANTED.[5]

D. *Defendant Pennsylvania Hospital's Motion for Summary Judgment on Counts III and VI*

*7 Pennsylvania Hospital Moves for Summary Judgment on Counts III (Breach of Implied Covenants of Good Faith and Fair Dealing) and Count VI (Discrimination on the Basis of Sex and Pregnancy). Because both Counts raise material issues of fact that are still in dispute, Pennsylvania Hospital's Motion for Summary Judgment is DENIED.

1. *Implied Duties of Good Faith and Fair Dealing*

The plaintiff argues that she had a fixed term of employment with Pennsylvania Hospital, memorialized by four successive one year appointment letters to the residency program. (*See e.g.,* Plaintiff's Exhibits B and D (residence appointment letters)). It is the plaintiff's theory, under the Pennsylvania Superior Court case of *Somers v. Somers,* 613 A.2d 1211 (Pa.Super.Ct.1992), that claims of good faith and fair dealing apply to every contract, including employment contracts. *Id.* at 1213.

Pennsylvania Hospital urges this Court to reject Dr. Hurst's claim as a matter of law because there is no *express* statement in the employment contract that obligates Pennsylvania Hospital to act with good faith. *Baker v. Lafayette College,* 504 A.2d 255 (Pa.Super.Ct.1986) (adopting requirement of good faith), *aff'd,* 532 A.2d 399 (Pa.1987). In *Baker* the Pennsylvania Superior Court held that Lafayette College was obliged to undertake its published tenure review policy with good faith as the duty of good faith review was implicit in the contract. 504 A.2d at 255. Pennsylvania Hospital argues that based on *Baker* there must be an express undertaking in the employment contract, to review the applicant, before a requirement of good faith can be read into the contract.

This Court, however, finds the latter interpretation of the good faith requirement in *Somers* to be a more accurate representation of Pennsylvania law. In *Somers* the Superior Court, after reviewing *Baker,* held that a duty of good faith and fair dealing may arise either under an express contractual

provision or under the Pennsylvania doctrine of "necessary implication" where there is no express obligation in the contract. *Somers,* 613 A.2d at 1214 (citing *Frickert v. Deiter Bros. Fuel Co., Inc.,* 347 A.2d 701 (Pa.1975); *Slater v. Pearle Vision Center, Inc.,* 546 A.2d 676 (Pa.Super.Ct.1988)). The *Somers's* court described the doctrine as:

> In the absence of an express provision, the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made and to refrain from doing anything that would destroy or injure the other party's right to receive the fruits of the contract.

613 A.2d at 1214 (citing *Frickert,* 347 A.2d at 708).

Further, when this Court reviewed the doctrine of "necessary implication" in *Paul J. Muller Assoc., Inc. v. Transamerica Occidental Life Insur. Co.,* No. 90–3128, 1992 WL 111283 (E.D.Pa. May 15, 1992) (Hutton, J.), it reached the same conclusion as the *Somers* court, namely that the law implies an agreement to effectuate the benefits of the parties' bargain. In *Muller* this Court stated:

> ***8** Where an obligation is within the contemplation of the parties at the time of contracting or the obligation is necessary to carry out the intentions of the parties, the court may imply that obligation.

Muller, at *2 (citing *Slater v. Pearle Vision Center, Inc.,* 546 A.2d 676, 679 (Pa.Super.1988); *Diamon v. Penn Mutual Fire Ins. Co.,* 372 A.2d 1218, 1226 (Pa.Super.1977)). In footnote 2 of the *Muller* opinion this Court stated:

> Analysis of the *Diamon* case and the *Slater* case indicate that the doctrine of necessary implication and the doctrine of good faith and fair dealing are based upon the same language in prior Pennsylvania Supreme Court opinions.

Muller, at *2, n. 2.

Under Dr. Hurst's theory, she entered the residence program with the express purpose of obtaining references and ultimately obtaining a full time position as a practicing gynecologist. This Court concludes that the question of whether future employment is a material term of Dr. Hurst's entering the Pennsylvania Hospital residence program, is a question of fact that precludes summary judgment. If Dr. Hurst entered the contract with the intention of obtaining references, and this practice is "necessarily implicated" in such a contract, this Court cannot enter summary judgment. *See Somers* 613 A.2d at 1214 (good faith will vary from one contract to another). Accordingly, the defendant's Motion for Summary Judgment on Count III is DENIED.

2. *Equitable Relief Under Title VII*

Pennsylvania Hospital next moves for Summary Judgment on Count VI, discrimination based on sex and pregnancy, pursuant to Title VII, 42 U.S.C. § 2000e–2 (Supp.1992). Pennsylvania Hospital argues that Title VII affords only equitable relief. *Hurst v. Beck,* 771 F.Supp. 118, 123 (E.D.Pa.1991) (citing 42 U.S.C. § 2000e–5(g)). It is Pennsylvania Hospital's theory that Dr. Hurst is no longer an employee, and therefore the hospital is not in a position to offer her any form of "equitable relief." (Defendant's Memorandum at 20). Dr. Hurst responds that she is seeking the equitable relief of "front pay" (the money she would have received from the Avery Center). (Plaintiff's Memorandum at 35). [6]

Title 42 U.S.C. § 2000e–5(g) (Supp.1992) provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall

> not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

***9** 42 U.S.C. § 2000e–5(g)(1). This provision allows the district court broad discretion in fashioning an equitable remedy once the plaintiff proves an allegation of unlawful employment discrimination. *Green v. USX Corp.,* 843 F.2d 1511, 1531 n. 17 (3d Cir.1988), *vacated on other grounds,* 490 U.S. 1103 (1989).

Defendant Pennsylvania Hospital moves for Summary Judgment on the grounds that the plaintiff has no equitable remedy available to her under the statute. In support of its position, Pennsylvania Hospital urges this Court to follow the Fourth Circuit's 1992 case of *Polsby v. Chase,* 970 F.2d 1360 (4th Cir.1992). The *Polsby* court held that in the Fourth Circuit there is no equitable claim for "front pay" from the previous employer because such a calculation would be "too speculative" as a matter of law. *Id.* at 1366. The Fourth Circuit stated:

> Although a situation may arise where fashioning equitable relief presents no problems, the better solution is to allow the ex-employee to seek either state or other federal law remedies against the *former* employer or the same Title VII remedies against the *prospective* employer who based its decision not to employ the ex-employee on the fact that she sought Title VII relief from a prior employer.

Id. (citations and footnote omitted).

This Court concludes, however, that the equitable remedy of "front pay" is the law of the Third Circuit. *Green* 843 F.2d at 1531; *Goss v. Exxon,* 747 F.2d 885 (3d Cir.1984); *Beck v. Hurst,* 771 F.Supp. 118, 123 (E.D.Pa.1991). As this Court stated in its earlier opinion:

> Awarding front pay is within the discretion of the court, *Dillon v. Coles,* 746 F.2d 998, 1006 (3d Cir.1984), and is an alternative to the remedy of reinstatement. *See Ezold v. Wolf, Block, Schorr and Solis–Cohen,* 758 F.Supp. 303, 306 (E.D.Pa.1991). Front pay is an equitable award for a reasonable future period required for the victim to reestablish her rightful place in the job market.

771 F.Supp. at 123. Nothing in the *Polsby* case persuades this Court that "front pay" should not continue to be the law within the Third Circuit. The plain language of 42 U.S.C. § 2000e–5(g)(1) states "back pay ... or any other equitable relief as the court deems appropriate." Absent a decision from the Third Circuit that excludes "front pay" as an appropriate equitable remedy under § 2000e–5, this Court will continue to follow *Goss* and consider "front pay" as a potential remedy. Accordingly, Pennsylvania Hospital's Motion for Summary Judgment on Count VI, on the theory that no equitable relief is available to Dr. Hurst, is DENIED.

E. *Dr. Beck's Motion for Summary Judgment on Count VI*

Dr. Beck's argument in favor of Summary Judgment on Count VI is identical to Pennsylvania Hospital's. As stated above, this Court rejects the argument that plaintiff Hurst is without any potential equitable remedy under Title VII. Therefore, Dr. Beck's Motion for Summary Judgment on Count VI is DENIED for the reasons stated above.

F. *Motion to Strike Jury Trial for Title VII Claims.*

***10** Finally, the defendants move this Court to strike Dr. Hurst's claim for a jury trial on her Title VII claims. The Supreme Court has firmly established that there is no right to a jury trial for Title VII claims. *Lehman v. Nakshian,* 453 U.S. 156 (1981); *United States v. Burke,* 112 S.Ct. 1867 (1991). The equitable nature of Title VII claims makes their resolution the sole province of the Court and not the jury. *See Lehman,* 453 U.S. at 164. Accordingly, the defendants' Motion to Strike Plaintiff's Demand for a Jury is GRANTED on Count VI of the Second Amended Complaint.

An appropriate Order follows.

ORDER

AND NOW, this 16th day of December, 1992, upon consideration of the Defendants' Motion for Partial Summary

Judgment and the Plaintiff's response thereto, IT IS HEREBY ORDERED that the Defendants' Motion is GRANTED in part and DENIED in part.

IT IS FURTHER ORDERED that:

(1) Judgment is entered in favor of Defendant Dr. Theodore Tsaltas on Counts I, II, IV, and VI and against the Plaintiff Dr. Wendy R. Hurst;

(2) Dr. Theodore Tsaltas is DISMISSED from this action;

(3) Defendant Pennsylvania Hospital's Motion for Summary Judgment on Counts III and VI is DENIED; and

(4) Defendant Dr. William W. Beck's Motion for Summary Judgment on Count VI is DENIED.

1 Both the original complaint and the amended complaint named Dr. John Doe, rather than Dr. Theodore Tsaltas, as the third defendant. By Memorandum and Order date August 3, 1992, this Court allowed plaintiff Hurst to file her Second Amended Complaint substituting Dr. Tsaltas for Dr. Doe under Fed.R.Civ.P. 15(c).

2 The Second Amended Complaint seeks the following relief: Count I (defamation); Count II (Intentional Interference with Contractual Relations); Count III (Breach of Implied Covenants of Good Faith and Fair Dealing); Count IV (Intentional Interference with Prospective Contractual Relations); and Count VI (Discrimination on the Basis of Sex and Pregnancy). By Order dated July 16, 1992, in Civil Action No. 92–2845, the Court dismissed Count III against Tsaltas and by Order dated August 15, 1992, this Court dismissed Count V against all defendants (Intentional Infliction of Emotional Distress). *Hurst v. Beck,* 771 F.Supp. 118, 123 (E.D.Pa.1991).

3 This Court rejects the plaintiff's argument that *Loughrey v. Landon,* 381 F.Supp. 884, 886 (E.D.Pa.1974) controls as opposed to *Evans.* In *Loughrey,* the district court held that slander and tortious interference were two distinct causes of action and applied the longer statute of limitations. However, this Court sitting in diversity must apply the substantive law of the forum state as it exists today, not as it was in 1974. Although not a Pennsylvania Supreme Court decision, *Evans* serves as an accurate predictor of Pennsylvania law. *See Commissioner of Internal Revenue v. Estate of Bosch,* 387 U.S. 429, 465 (1967) (use appellate courts to predict state law). Finally, the *Evans* court rejected the same argument that the plaintiff advances, namely that two separate statutes of limitations apply.

4 The Defendants' Reply Brief cites eighteen depositions that have taken place since May 4, 1992. (Defendants' Reply Brief at 3 n. 2). All but two of the depositions are of other practicing physicians. Despite this discovery material, the plaintiff has been unable to show any colorable evidence that would preclude summary judgment on the question of notice.

5 Similarly, plaintiff Hurst had to have filed her Title VII complaint within 90 days of the Equal Employment Opportunity Commission's ("EEOC") issuance of the right-to-sue letter. 42 U.S.C. § 2000e–5(f)(1) (Supp.1992). Because Dr. Tsaltas did not receive notice until 1992, plaintiff Hurst failed to commence her Title VII suit against Dr. Tsaltas within the appropriate statute of limitations.

6 Dr. Hurst concedes in her brief that she is not seeking reinstatement or other similar equitable relief from Pennsylvania Hospital under 42 U.S.C. § 2000e–5(g). (Memorandum at 35).

All Citations

Not Reported in F.Supp., 1992 WL 396592

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EXHIBIT 2

567 Fed.Appx. 150
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally
governing citation of judicial decisions issued
on or after Jan. 1, 2007. See also Third Circuit
LAR, App. I, IOP 5.7. (Find CTA3 App. I, IOP 5.7)
United States Court of Appeals,
Third Circuit.

Robert McCLENAGHAN; Nina Heller, Appellants
v.
Melissa TURI; Guy Turi, h/w; Ziara Bierig, Nee Arden; Ben Bierig, h/w; Laboratory Corporation of America Holdings and Subsidiaries and Affiliates, Collectively known as "LabCorp"; Patricia Sprague; Kevin Krutner; The Do Good Charitable Foundation, a/k/a and/or d/b/a guatadopt.com.

No. 13–1971. | Submitted Under Third Circuit L.A.R. 34.1(a) March 20, 2014. | Filed: May 28, 2014.

Synopsis

Background: Owners of Internet-based adoption agency filed suit claiming defamation, trade libel, and intentional interference with contractual relations by publishers of disgruntled Internet posts about agency. After jury trial, The United States District Court for the Eastern District of Pennsylvania, Petrese B. Tucker, J., entered judgment in favor of publishers based on statute of limitations grounds. Owners appealed.

[Holding:] The Court of Appeals, Vanaskie, Circuit Judge, held that jury instructions incorrectly stated law regarding statute of limitations for defamation claim.

Vacated and remanded.

West Headnotes (2)

[1] **Limitation of Actions**
- Torts

Limitation of Actions
- Libel and slander

Under Pennsylvania law, the relevant triggering event for the statute of limitations in a defamation action is the publication of the defamatory communication by the defendant, not the point in time when the plaintiff first learns of the communication, and the publication of each communication constitutes a separate, potentially-tortious act, governed by its own statute of limitations. 42 Pa.C.S.A. §§ 5523, 8341(b).

2 Cases that cite this headnote

[2] **Federal Courts**
- Applicability to issues and evidence

Jury instructions that incorrectly stated law regarding statute of limitations for defamation claim based on Internet posts criticizing Internet-based adoption agency was reversible error, since instructions impermissibly precluded jury from considering posts that were not time barred. 42 Pa.C.S.A. §§ 5523, 8341(b).

1 Cases that cite this headnote

*151 On Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil No. 5-09-cv-05497), District Judge: Honorable Petrese B. Tucker.

Attorneys and Law Firms

Denise A. Kuestner, Esq., Henry I. Langsam, Esq., Edward L. McCandless, Esq., Langsam Stevens Silver & Hollaender, Philadelphia, PA, for Appellants.

James L. Barlow, Esq., Susan J. Wiener, Esq., Wynn McGarry, King of Prussia, PA, Candidus K. Dougherty, Esq., Swartz Campbell, Philadelphia, PA, Joseph G. McHale, Esq., George E. Saba, Jr., Esq., Swartz, Campbell & Detweiler, Allentown, PA, Jordan A. Gilmore, Esq., Salisbury, MD, Adam M. Share, Esq., Frank A. Dante, Esq., Kevin M. Passerini, Esq., Blank Rome, Philadelphia, PA, Samera S. Ludwig, Esq., Maura M. McIntyre, Esq., Ethan E. Trull, Esq., Ungaretti & Harris, Chicago, IL, Shane Haselbarth,

Esq., John S. Tucci, Jr., Esq., Marshall, Dennehey, Warner, Coleman & Goggin, Philadelphia, PA, Steven D. Janel, Esq., Pennington, NJ, for Appellee.

Before: CHAGARES, GREENAWAY, JR., and VANASKIE, Circuit Judges.

OPINION

VANASKIE, Circuit Judge.

Appellants Robert McClenaghan and Nina Heller ran an internet-based adoption agency, Main Street Adoptions. In their telling, after years of success in placing foreign-born children with American families, they suffered an unanticipated setback in early 2008 when the Guatemalan government effectively ceased all international adoptions from that country. Some couples who sought to adopt Guatemalan children using Main Street Adoptions during this period were left with a different impression—that the agency had knowingly preyed on couples desperate to adopt from Guatemala, stringing them along to believe that their adoption was moving forward and scamming them out of money in the process. Those who felt duped took to online message boards and consumer complaint websites, such as ripoffreport.com, to commiserate and warn others.

Appellants brought this defamation, trade libel, and intentional interference with contractual relations action on November 18, 2009, seeking damages from various defendants who had published disgruntled internet posts about Main Street Adoptions. This appeal concerns the statute of limitations for defamation claims under Pennsylvania law, which we recently examined at length in our decision in *In re Phila. Newspapers, LLC,* 690 F.3d 161, 173--75 (3d Cir.2012). Because the District Court's instructions to the jury did not reflect that, under Pennsylvania law, each internet post could constitute a separate tortious act, governed by the applicable one-year statute of limitations, we will vacate the judgment in part and remand for further proceedings.

I.

In early 2007, Appellee Melissa Turi, along with her husband Guy Turi, contacted Main Street Adoptions seeking to adopt a child from Guatemala. Although the parties disagree as to why several attempts at adoption fell through, neither party disputes that Turi was not left a satisfied customer. In early 2008, Turi began to air her grievances by posting ***152** adverse information about Main Street Adoptions on various locations on the internet. Some of Turi's posts were published on publicly-accessible websites that a person searching the internet for information about Main Street Adoptions might come across after a simple search. Other posts were published in a private Yahoo Group consisting of parents seeking to adopt. The content of such posts was not searchable by non-members.

According to Appellants, negative internet posts, including those made by Turi, caused Main Street Adoptions harm in the marketplace, forcing them to close in July 2009. Appellants brought suit against Turi and others who had published negative internet posts about Main Street Adoptions on November 18, 2009. The private Yahoo Group messages were not referenced in the complaint. According to his trial testimony, McClenaghan did not discover these posts until he joined the Yahoo Group in 2011. The complaint was never amended to include these posts.

During trial, Turi's lawyer moved to exclude any internet posts that were published more than a year prior to the filing of the complaint, arguing that they were excluded under Pennsylvania's statute of limitations on defamation actions and thus irrelevant and prejudicial. In response, Appellants' lawyer argued that because the statute of limitations was an affirmative defense, all the posts attributed to Turi should be admitted and the jury should determine which posts had been published before November 18, 2008. Appellants' counsel also argued that even posts barred by the statute of limitations could be relevant to showing Turi's state of mind when she was alleged to have published later posts within the limitations period. The District Court allowed pre-November 18, 2008 posts to be introduced, but noted that it would give the jurors an instruction asking whether the defense had established that the statute of limitations barred posts made before November 18, 2008.

Appellants' counsel also argued that the discovery rule should toll the statute of limitations for the claims relating to posts that were published on the private Yahoo Group. Noting that the Yahoo Group rules prohibited adoption providers from becoming members or viewing content, Appellants' counsel alleged that the statute of limitations on the Yahoo Group posts should not have begun to run until 2011, when McClenaghan joined the Yahoo Group after the closure of Main Street Adoptions. The District Court determined as a matter of law that the discovery rule did not apply, as "the

parties ... had almost the same information before November #08" that they would later discover once joining the Yahoo Group. Supp.App. 15.

Finally, Appellants' counsel requested that the District Court instruct the jurors that claims for interference with contractual relations were subject to a two-year statute of limitations. The District Court declined to do so, reasoning that the claims for contractual interference were premised on "the same alleged defamatory statements," and therefore "the one-year statute of limitations of defamation also applies to those claims." App. 104.

The District Court submitted the case to the jury on special verdict questions. The first question on the Verdict Sheet asked the jurors, "Do you find that Plaintiffs Robert McClenaghan and Nina Heller had knowledge of the allegedly defamatory statements posted by Defendant Melissa Turi in April 2008?" App. 155. Jurors were instructed that if they answered that question in the affirmative, then "the foreperson should sign and date this form and return it to the Courtroom." *Id.* Appellants' ***153** counsel objected to the charge, arguing that under Pennsylvania law "each new statement is independently actionable," with its own statute of limitations. App. 101. The District Court disagreed, concluding "if they knew in 2008, they had a year from say April of 2008 to bring the action." *Id.*

Consistent with this ruling, the District Court instructed the jurors:

> It is undisputed in this case that Plaintiffs' lawsuit was filed on November 18, 2009. The law requires that certain civil lawsuits be commenced within a certain prescribed period of time. The Plaintiffs' claims for defamation are subject to a one-year statute of limitations. The Plaintiffs' claim for trade libel is also subject to the one-year statute of limitations.
>
> Because the Plaintiffs' claim[s] for contractual interference are based on the same alleged defamatory statements, the one-year statute of limitations of defamation also applies to those claims. Accordingly, in order to find in favor of the Plaintiffs on any of their claims, you must determine that the Plaintiffs' lawsuit was initiated and filed with the court within one year of the time period when Plaintiffs had knowledge that the Defendant, Melissa Turi, posted allegedly defamatory statements on the internet.
>
> If you find that the Plaintiffs had knowledge of the alleged defamatory statements in April 2008, then all of Plaintiffs' claims are time barred and you must find in favor of the Defendant. If you find that the Plaintiffs did not have knowledge of the allegedly defamatory statements until November of 2008, then Plaintiffs' claims are not time barred and may be considered.

App. 104–05.

The jurors answered the statute of limitations question on the verdict form in the affirmative, finding that Appellants had knowledge of the purportedly defamatory internet posts in April 2008. The jury therefore did not reach the second and third questions, concerning whether Turi's statements had been defamatory and, if so, whether they had been truthful.

II.

The District Court had jurisdiction pursuant to 28 U.S.C. § 1332. We have jurisdiction pursuant to 28 U.S.C. § 1291.

A.

Appellants first argue that the jury charge was incorrect because it barred consideration of any claim based upon posts published by Turi after April of 2008. Appellants point to three posts introduced at trial that had been published less than a year before the complaint was filed. One of these, a post made on scamalert.com on November 28, 2008, appears to be a word-for-word copy of a post published on ripoffreport.com on April 8, 2008, outside of the limitations period. Another post was published within the private Yahoo Group on December 16, 2008 and described Main Street Adoptions as "a very criminal agency." App. 126. Finally, Appellants allege Turi published a March 12, 2009 post on complaintsboard.com, which professed that she had "lost over 30,000 in a bate in switch [sic] baby scam" orchestrated by Main Street Adoptions. App. 125.

"The statute of limitations for defamation claims is one year from the date of publication." *In re Phila. Newspapers,* 690 F.3d 161, 174 (3d Cir.2012) (citing 42 Pa. Cons.Stat. § 5523). Like many other states, Pennsylvania has adopted the "single publication rule," whereby:

> [n]o person shall have more than one cause of action for damages for libel or ***154** 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.

42 Pa. Cons.Stat. § 8341(b). Pennsylvania established this rule in response to the concern that a contrary rule would render any statute of limitations "meaningless in that an action could be filed any time a defamatory article was read, no matter the time lag between the actual printing of the article and the reading of the article by a third party." *Graham v. Today's Spirit,* 503 Pa. 52, 468 A.2d 454, 457 (1983). Although "Pennsylvania courts have not considered whether the single publication rule applies to Internet publication[,]" we recently predicted that Pennsylvania courts would extend the rule to "publicly accessible material on the Internet...." *In re Philadelphia Newspapers,* 690 F.3d at 174. We noted that courts in many other single publication rule jurisdictions had already done so. *Id.*

[1] The District Court's charge to the jury on the statute of limitations instructed that if they found that "the plaintiffs had knowledge of the alleged defamatory statements in April, 2008, then *all* of plaintiffs' claims are time barred and you must find in favor of the defendant."[1] App. 153–54 (emphasis added). The relevant triggering event for the statute of limitations in a defamation action under Pennsylvania law, however, is the *publication* of the defamatory communication by the defendant, not the point in time when the plaintiff first learns of the communication. *See Dominiak v. Nat'l Enquirer,* 439 Pa. 222, 266 A.2d 626, 629 (1970). The publication of each communication constitutes a separate, potentially-tortious act, governed by its own statute of limitations. *See Graham,* 468 A.2d at 457 (noting that a newspaper would "commit[ ] a tortious act" each time it publishes a single defamatory article, giving rise to "separate causes of action").

1 In determining whether the jury charge stated the correct legal standard, we exercise plenary review. *United States v. Coyle,* 63 F.3d 1239, 1245 (3d Cir.1995).

[2] The jury instruction was therefore an incorrect statement of the law. That the instruction was erroneous, however, does not end our inquiry. "[A] mistake in a jury instruction constitutes reversible error only if it fails to fairly and adequately present the issues in the case without confusing or misleading the jury." *Donlin v. Philips Lighting N. Am. Corp.,* 581 F.3d 73, 79 (3d Cir.2009) (internal quotation omitted). In this case, the jury instructions impermissibly precluded the jury from considering the posts made within one year of the filing of the lawsuit.

Significantly, the fact that one of the three posts attributed to Turi within the limitations period—the November 28, 2008 scamalert.com post—was identical to a post made outside the limitations period—the April 1, 2008 post on ripoffreport.com—does not foreclose liability on the latter post. Although the content of the two communications was identical, the November 2008 post could be independently actionable as a republication. "Republishing material (for example, the second edition of a book), editing and reissuing material, or placing it in a new form that includes the allegedly defamatory material, resets the statute of limitations." *In re Phila. Newspapers,* 690 F.3d at 174.

In *Graham,* the Pennsylvania Supreme Court confronted the question of whether identical articles published on the same day by two different newspapers constituted a single publication. 468 A.2d at 456. ***155** The Court held that the publication of the article in two distinct newspapers —*Today's Post* and *Today's Spirit*—constituted "two separate causes of action," regardless of the fact that both newspapers had the same publisher. *Id.* at 458. The Court distinguished this case from the situation that the single publication rule was designed to prevent, wherein "a multitude of lawsuits [could be] based on one tortious act," such as one newspaper publishing an article in one edition being held liable for a separate cause of action for each copy of that edition sold. *Id.* at 458. "[I]f the defamatory statement is contained in two separate editions, then two separate causes of action exist." *Id.*

The November 28 post is therefore independently actionable, although it is identical to the April 2008 post, which is barred by the statute of limitations. To be found liable for the November 28 post, however, Turi herself must have been responsible for the republication of the content—it is not enough that the words were originally hers. If Turi's pre-limitations period ripoffreport.com post was copied and pasted on to scamalert.com by someone other than Turi, then Turi cannot be found liable for the republication, as Turi

did not engage in any tortious conduct within the limitations period. On the other hand, if Turi herself "republished" her earlier ripoffreport.com post on scamalert.com, then Turi may be found liable despite the fact that she first posted the words more than a year before defendants brought suit.

The District Court's charge did not reflect that the publication of each post was a separate, potentially-tortious act, governed by its own statute of limitations. Instead, the instructions focused jurors' attention on when Appellants first learned of Turi's allegedly defamatory conduct. This precluded the jury from considering whether those posts published within the limitations period were defamatory. We will therefore vacate the jury's verdict and remand for further proceedings as to the three posts made within a year of November 18, 2009.

B.

Appellants next allege that the discovery rule should toll the statute of limitations on all posts that were published by Turi in the private Yahoo Group.[2] Under the discovery rule, the statute of limitations is tolled "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*, 582 Pa. 253, 870 A.2d 850, 859 (2005). The Yahoo Group posts were only viewable by members who had joined the private group. Appellants claim they were unable to discover the posts within the limitations period, as the group rules precluded them from becoming members while they worked for an adoption agency.

2 Turi urges us to conclude that all of her Yahoo Group posts are statements of fact or opinion, which are non-defamatory as a matter of law. Not having the benefit of full briefing or a ruling from the District Court on this question, we will decline to reach the issue. The District Court should consider this on remand, having already had the benefit of a complete trial.

Appellants' testified at trial that they were aware of the existence of negative online commentary published by Turi about Main Street Adoptions as early as April 2008. Even accepting Appellants' contention they could not have joined the private Yahoo Group while they maintained an adoption agency, they were on notice of the injury to their reputation and its source well before the November 18, 2009 filing of the complaint. Furthermore, ***156** the complaint did not include the Yahoo Group posts, even though Appellants could have joined the Yahoo Group as early as July 2009 when Main Street Adoptions closed. Therefore, this scenario does not present the type of "[w]orthy case [ ] ... pertaining to hard-to-discern injuries" against which the discovery rule was designed to protect. *Wolk v. Olson*, 730 F.Supp.2d 376, 378 (E.D.Pa.2010). We therefore find no error in the District Court's conclusion that, as a matter of law, the discovery rule did not toll the statute of limitations as to the private Yahoo Group posts.

C.

Finally, Appellants contend that the District Court erred in instructing jurors that the one-year statute of limitations for defamation claims applied as well to their intentional interference with prospective contracts claims. The District Court concluded that because "[Appellants'] claim [sic] for contractual interference are based on the same alleged defamatory statements, the one-year statute of limitations of defamation also applies to those claims." App. 104. Appellants maintain that the District Court should have instructed jurors that the intentional interference with contractual relations claims were governed instead by the two-year statute of limitations that can apply to such claims.

In *Evans v. Phila. Newspapers, Inc.*, the Pennsylvania Superior Court addressed the question of "whether a tortious interference claim, which is based upon identical allegations set forth in an accompanying defamation claim, should be considered duplicative and, as such, be barred by the one year statute of limitations applicable to defamation claims." 411 Pa.Super. 244, 601 A.2d 330, 332 (1991). Reasoning that plaintiffs "should not be able to circumvent the statute of limitations by merely terming the claim tortious interference when in essence it is one of defamation," the court concluded that it would "look to the gravamen of the action, not to the label applied to it by plaintiffs." *Id.* at 333. Looking to the gravamen of the action brought by Appellants, we agree with the District Court below that the one-year statute of limitations for defamation actions governs all of Appellants' claims. Because Appellants' "claim[s] for tortious interference [are] based upon the alleged false and defamatory character of the communication complained of," Appellants cannot circumvent the defamation statute of limitations by repackaging the same claims under a tortious interference theory. *Id.* at 334.

III.

For the foregoing reasons, we will affirm in part and vacate in part the judgment entered below, and remand this matter for further proceedings consistent with this opinion.

All Citations

567 Fed.Appx. 150, 42 Media L. Rep. 1821

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EXHIBIT 3

DAVID PITTSMAN,	:	IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
Plaintiff	:	
vs.	:	CIVIL ACTION - LAW
DR. DAVID PERRONE AND REDI-CARE MEDICAL CENTER OF TAYLOR, INC.,	:	
Defendants	:	NO. 11 CV 1233

MEMORANDUM AND ORDER

NEALON, J.

Relying upon the expiration of the one-year statute of limitations under 42 Pa.C.S.A. § 5523(1), the healthcare defendants' motion for summary judgment seeks to dismiss plaintiff's claims for defamation and tortious interference with business relations on the grounds that both causes of action are predicated upon the same operative facts and are, therefore, governed by the same one-year limitations period. Plaintiff's binding judicial admissions reflect that the gist of his tortious interference claim is defendants' alleged defamatory acts of concluding that plaintiff was not physically qualified to operate commercial motor vehicles and communicating that medical diagnosis to his prospective employer. Since plaintiff has not averred an independent, non-defamatory basis for his tortious interference claim, the defamation and tortious interference actions are both subject to the one-year statute of limitations and were clearly time-barred when this suit was filed. Therefore, defendants' motion for summary judgment will be granted.

I. FACTUAL BACKGROUND

On February 23, 2011, Plaintiff, David Pittsman ("Pittsman"), filed this civil action against Defendants, Dr. David Perrone ("Perrone") and Redi-Care Medical Center of Taylor, Inc. ("Redi-Care"), based upon a medical examination that Dr. Perrone conducted of Pittsman in connection with his application for employment with Bolus Freight. Pittsman avers that on February 24, 2009, he "was a licensed over the road truck driver in possession of a Class A driver's license" when he "made application for [a] position as an over the road truck driver with Bolus Freight." (Docket Entry No. 1 at ¶¶ 5-6). At "the request of Chris Burris of Bolus Freight, [Pittsman] reported for a physical examination at Redi-Care...and was examined by Dr. David Perrone." (Id. at ¶ 7). During that examination, "but prior to Dr. Perrone's determination regarding [Pittsman's] ability to perform his duties as an over the road truck driver with a Pennsylvania Class A driver's license, Dr. Perrone made a phone call to Chris Burris regarding [Pittsman's] status." (Id. at ¶ 8). Pittsman has admitted that he was not present during this alleged phone call, nor does he have "first hand knowledge" of what was purportedly discussed at that time. (Deposition of David Pittsman dated 8/13/12 at pp. 113-114).

Pittsman asserts that "[a]fter Dr. Perrone's conversation with Chris Burris of Bolus Freight on February 24, 2009, Dr. Perrone refused to certify [Pittsman] as able to drive a commercial vehicle without a Skill Performance Evaluation ("SPE") certificate indicating

that [Pittsman] did not meet the standards of 49 C.F.R. [§] 391.41."[1] (Docket Entry No. 1 at ¶ 9). Pittsman further contends that another medical group previously certified him for employment as a truck driver without the necessity of an SPE certificate. (Id. at ¶ 10). He maintains that Dr. Perrone's refusal to properly certify him to drive a commercial vehicle resulted in his "inability to secure employment with Bolus Freight" and required him "to seek employment elsewhere" with Crete Carrier/Shaffer Trucking whose closest terminal is located ninety miles from Pittsman's residence. (Id. at ¶¶ 11-12). Pittsman alleges that on March 16, 2009, another physician examined him at the request of Crete Carrier/Shaffer Trucking and "determined that [Pittsman] met the standards of 49 C.F.R. [§] 391.41." (Id. at ¶¶ 13-14).

In his complaint, Pittsman originally advanced three causes of action. Count I entitled "Tortious Interference with Business Relations," avers, in its entirety, that Dr. Perrone "wrongfully interfered with [Pittman's] relationship between [Pittsman] and Bolus Freight in that [Dr. Perrone] and Redi-Care acted intentionally, knowingly, and without justification or privilege to cause Chris Burris and Bolus Freight not to perform the agreement with [Pittsman] to provide employment." (Id. at ¶ 16). In Count II, Pittsman sets forth a claim for "Defamation" and alleges that Dr. Perrone and Redi-Care

[1]The United States Department of Transportation's Federal Motor Carrier Safety Administration ("FMCSA") has promulgated regulations which "establish minimum qualifications for persons who drive commercial motor vehicles as, for, or on behalf of motor carriers." Bailey v. Amerigas Propane, Inc., 2013 WL 1121384, at * 5 (D. Md. 2013). Section 391.41(a)(1)(i) of Title 49 of the Code of Federal Regulations provides that a commercial motor vehicle operator "must not operate a commercial motor vehicle unless he or she is medically certified as physically qualified to do so...." 49 C.F.R. § 391.41(a)(1)(i). Section 391.41(b) states that a person "is physically qualified to drive a commercial motor vehicle" if [s]he does not have a loss or an impairment of an arm, hand, foot, or leg "or has been granted a skill performance evaluation certificate pursuant to § 391.49." 49 C.F.R. §§ 391.41(b)(1) and (2)(ii). 49 C.F.R. § 391.49 sets forth the procedure by which an individual may seek an SPE certificate from the FMCSA. If the SPE certificate is granted by the FMCSA, it "allows the driver to continue driving a commercial vehicle despite being physically unqualified." Bailey, supra.

"knowing the truth of the matters alleged above and intended (*sic*) to injure [Pittsman], deprive him of his good name, and further intending to cause [Pittsman] to be denied employment by Bolus Freight, maliciously, wickedly, and illegally made and published a writing containing scandalous, defamatory, and libelous statements concerning [Pittsman] and his ability to perform his profession as an over the road truck driver, to wit, indicating that [Pittsman] was not physically able to perform his duties as a truck driver without an SPE certificate, knowing that [Pittsman] had been operating as an over the road truck driver with a Class A Pennsylvania Driver License for a period of years prior to his examination by Defendant Perrone and that the prior physicians that examined [Pittsman] did not require the SPE."[2] (Id. at ¶ 18). Pittsman also asserted a cause of action for "corporate liability" in Count III, (Id. at ¶¶ 21-25), but by Order dated July 7, 2011, Judge Vito P. Geroulo dismissed that claim with prejudice. (Docket Entry No. 16). In his sole prayer for relief in support of his tort claims, Pittsman "requests judgment in his favor and against Defendants in an amount in excess of three hundred and fifty thousand dollars ($350,000.00) together with costs."[3] (Docket Entry No. 1 at p. 7).

Dr. Perrone and Redi-Care have filed a motion for summary judgment seeking to

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[2] The defamatory "writing" that Dr. Perrone apparently published is the "Medical Examination Report for Commercial Driver Fitness Determination" dated February 24, 2009, which is attached to the complaint. That report reflects that Pittsman completed a "Health History" in which he identified a physical limitation of "weakness to left hand d[ue] to stroke at birth." (Docket Entry No. 1, Exhibit A at p. 2). Dr. Perrone's physical examination of Pittsman revealed left sided "hemiparesis" and "some weakness of hand & foot." (Id. at p. 1). His stated diagnosis in the report was "D.O.T.P.E. [Department of Transportation Physical Examination] Fail," and his note reflects that Pittsman was "given SPE packet." (Id.).

[3] Pursuant to Pa.R.C.P. 1021(b), any pleading demanding relief for unliquidated damages may not seek judgment in a specific sum. Larry Pitt & Associates v. Long, 716 A.2d 695, 703 n. 9 (Pa. Cmwlth. 1998). Pa.R.C.P. 1021(c) dictates that in those counties having rules governing compulsory arbitration, the plaintiff must aver whether the amount of damages sought is above or below the jurisdictional amount for compulsory arbitration under the applicable local rule. *See* Flynn v. Casa DiBertacchi Corp., 449 Pa. Super. 606, 618-619, 674 A.2d 1099, 1105 (1996). Under Local Rule 1301(a)(2), the compulsory arbitration limit in Lackawanna County is $50,000.00. *See* Lacka. Co. R.C.P. 1301(a)(2).

dismiss Pittsman's defamation claim as time-barred by the one-year limitations period in 42 Pa.C.S. § 5523(1). (Docket Entry No. 24 at ¶¶ 8-9). The movants argue that since Pittsman's claim for tortious interference with business relations is premised upon the same defamatory conduct that allegedly occurred on February 24, 2009, Count II of the complaint should also be dismissed based upon the same one-year statute of limitations. (Id. at ¶¶ 10-15). Pittsman's brief in opposition to the motion for summary judgment only addresses the tortious interference with business relations claim, and posits that his "tortious interference claim is not based directly upon the defamation claim and, therefore, the two year statute of limitations applies" to that cause of action. (Docket Entry No. 26 at p. 4). Following the completion of oral argument on February 26, 2013, the motion for summary judgment was submitted for a decision.

II. DISCUSSION

(A) STANDARD OF REVIEW

"Summary judgment is appropriate if a plaintiff's cause of action is barred by the statute of limitations." Matharu v. Muir, 29 A.3d 375, 381 (Pa. Super. 2011); Fraynert v. Delaware and Hudson Railway Company, Inc., 2013 WL 551711, at * 5 (Lacka. Co. 2013). To secure summary judgment, the moving party bears the burden of proving that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Stimmler v. Chestnut Hill Hospital, 602 Pa. 539, 554, 981 A.2d 145, 154 (2009). In making that determination, the court must view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Rock v.

Rangos, 61 A.3d 239, 250 (Pa. Super. 2013); Sedor v. Community Medical Center, 16 Pa. D. & C. 5th 193, 202 (Lacka. Co. 2010).

(B) DEFAMATION CLAIM

Dr. Perrone and Redi-Care first seek to dismiss Pittsman's defamation claim premised upon "scandalous, defamatory, and libelous statements concerning [Pittsman] and his ability to perform his profession as an over the road truck driver." (Docket Entry No. 25 at p. 4 (quoting Plaintiff's Complaint at ¶ 18)). The movants argue that any such claim is clearly barred by the one-year limitations period for libel and slander actions. (Docket Entry No. 25 at p. 4). As noted above, Pittsman's responsive brief does not address the timeliness of his cause of action for defamation.

Defamation "is the tort of detracting from a person's reputation, or injuring a person's character, fame, or reputation, by false and malicious statements." Cogley v. Duncan, 32 A.2d 1288, 1289 n. 1 (Pa. Super. 2011); Davis v. PPL Sustainable Energy Fund, 2011 WL 7272291, at * 6 (Lacka. Co. 2011). Libel involves the malicious publication of written or printed material which tends to blacken a person's reputation or expose the person to public hatred, contempt or ridicule. Sobel v. Wingard, 366 Pa. Super. 482, 486, 531 A.2d 520, 522 (1987); Koldjeski v. Colombo, 2009 WL 5124027, at * 3 (Lacka. Co. 2009). Slander consists of spoken words that are "intended to lower the view of the target of the communication in the community or...to deter third persons from associating with the target." Reardon v. Allegheny College, 926 A.2d 477, 484 (Pa. Super. 2007), *app. denied*, 596 Pa. 755, 947 A.2d 738 (2008).

Pittsman's complaint appears to aver actions for slander (the telephone conversation with Mr. Burris) and libel (the medical report that was transmitted to Bolus Freight) which allegedly occurred on February 24, 2009.[4] Pittsman alleges that "prior to Dr. Perrone's determination regarding [Pittsman's] ability to perform his duties as an over the road truck driver with a Pennsylvania Class A driver's license, Dr. Perrone made a phone call to Chris Burris regarding [Pittsman's] status." (Docket Entry No. 1 at ¶ 8). According to Pittsman, "[a]fter Dr. Perrone's conversation with Chris Burris of Bolus Freight on February 24, 2009, Dr. Perrone refused to certify [Pittsman] as able to drive a commercial vehicle without a Skill Performance Evaluation ("SPE") certificate indicating that [Pittsman] did not meet the standards of 49 C.F.R. [§] 391.41." (Id. at ¶ 9).

In his defamation count, Pittsman identifies the defamatory communication as Dr. Perrone's oral and written statements "that [Pittsman] was not physically able to perform his duties as a truck driver without a[n] SPE certificate...." (Id. at ¶ 18). Although not distinctly averred, it is presumed that Pittsman contends that Dr. Perrone advised Chris Burris by telephone that Pittsman was physically unable to work as a commercial motor vehicle operator without an SPE certificate. *See* Jaindl v. Mohr, 432 Pa. Super. 220, 229, 637 A.2d 1353, 1358 (1994) (defamation complaint must, on its face, identify specifically what defamatory statements were made, and to whom those statements were made), *aff'd*, 541 Pa. 163, 661 A.2d 1362 (1995). For purposes of addressing the instant motion for summary judgment, it will be assumed that the defamation being asserted by Pittsman

[4] The only materials that have been submitted as the summary judgment record are Pittsman's complaint and pages 113 to 114 of his deposition in which he conceded that his sole interaction with Dr. Perrone and Redi-Care took place on February 24, 2009. (Docket Entry No. 24, Exhibits A and B). No other discovery materials or exhibits have been submitted for review.

consists of Dr. Perrone's determination that Pittsman was physically incapable of operating a commercial vehicle absent an SPE certificate, and his alleged communication of that diagnosis to Mr. Burris at Bolus Freight.

The only incidents which could conceivably serve as the basis for alleged defamation occurred on February 24, 2009. (Id. at ¶¶ 5-6, 8-9, 18). Pittsman does not contend that on February 24, 2009, he was unaware of the allegedly false and defamatory determination and concomitant publication of that diagnosis on that date, or the harm that they ostensibly caused him. *See* Gallucci v. Phillips & Jacobs, Inc., 418 Pa. Super. 306, 313-314, 614 A.2d 284, 288 (1992) (discussing application of discovery rule to defamation action), *app. denied*, 533 Pa. 660, 625 A.2d 1193 (1993). Under Section 5523(1) of the Judicial Code, 42 Pa.C.S.A., the statute of limitations applicable to libel and slander claims is one year. Pro Golf Manufacturing, Inc. v. Tribune Review Newspaper Company, 570 Pa. 242, 247, 809 A.2d 243, 246 (2002); Brennan v. Durso, 2011 WL 2262484, at * 3 (Lacka. Co. 2011). The one-year limitation under Section 5523(1) begins to run on the date of the publication of the defamatory matter. In re Philadelphia Newspapers, LLC, 690 F.3d 161, 174 (3d Cir. 2012), *cert. dismissed*, 133 S.Ct. 1001 (U.S. 2013); Bellas v. WVHCS Retention Company, 2012 WL 3961227, at * 6 (M.D. Pa. 2012).

The alleged defamatory publication at issue occurred on February 24, 2009. It is undisputed that Pittsman did not commence this litigation until February 23, 2011, almost two years after the date of the alleged defamatory diagnosis and communication and his awareness of that purported defamation. (Docket Entry No. 1). Pittsman's defamation

claim was clearly time-barred as of the date that this suit was filed, and as a result, the motion for summary judgment seeking to dismiss that cause of action will be granted.

(C) TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS

Pittsman has also asserted a cause of action for "tortious interference with business relations," which is set forth in a single paragraph that reads:

> Defendant, Dr. David Perrone, wrongfully interfered with [Pittsman's] relationship between [Pittsman] and Bolus Freight in that Defendants Dr. David Perrone and Redi-Care acted intentionally, knowingly, and without justification or privilege to cause Chris Burris and Bolus Freight not to perform the agreement with [Pittsman] to provide employment.

(Docket Entry No. 1 at ¶ 16). Pittsman does not aver whether he is alleging tortious interference with an existing contractual relationship, as opposed to a prospective business relation. The elements of a claim for tortious interference with an existing business relationship are: (1) the existence of a contractual relationship; (2) an intent by the defendant to harm the plaintiff by interfering with that relationship; (3) the absence of privilege or justification for such interference; and (4) actual damage resulting from the defendant's improper conduct. Haun v. Community Health Systems, Inc., 14 A.3d 120, 124 (Pa. Super. 2011); Pachucy v. Nutrition, Inc., 9 Pa. D. & C. 5th105, 112-113 (Lacka. Co. 2009). The tort of intentional interference with a prospective contractual relationship requires proof of: (1) a prospective, rather than an existing, relationship between the plaintiff and a third party; (2) the purpose or intent to harm the plaintiff by preventing the relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) actual damage resulting from the defendant's conduct. Foster v. UPMC South Side Hospital, 2 A.3d 655, 665 (Pa. Super. 2010), *app. denied*, 608 Pa. 647,

12 A.3d 371 (2010); Pachucy, supra, at 113. Since Pittsman had merely submitted an application for employment with Bolus Freight, he presumably is asserting a claim for tortious interference with a prospective contractual relationship.

Based upon the holding in Evans v. Philadelphia Newspapers, Inc., 411 Pa. Super. 244, 601 A.2d 330 (1991), Dr. Perrone and Redi-Care seek to dismiss Pittsman's claim for tortious interference with business relations as time-barred by the one-year statute of limitations. Dr. Perrone and Redi-Care maintain that the "underlying wrong," which serves as the basis for Pittsman's tortious interference claim, is Dr. Perrone's alleged defamatory diagnosis, and publication of the same, to Chris Burris and Bolus Freight on February 24, 2009. (Docket Entry No. 25 at p. 5). They argue that Evans prevents Pittsman from attempting to circumvent the one-year limitation period by labeling his cause of action as tortious interference when, in essence, it is simply a defamation claim. (Id.). Pittsman counters that "Dr. Perrone's refusal to certify" him under 49 C.F.R. § 391.41 "was an independent act" constituting tortious interference, and that "Dr. Perrone's subsequent act in reporting his actions regarding the physical examination to Bolus Freight and their representative is not the gravamen of the tortious interference claim in [Pittsman's] Complaint." (Docket Entry No. 26 at p. 3).

In Evans, the plaintiff sued a newspaper and its reporters for defamation and tortious interference with business relations after they published an article about the plaintiff and his youth training program which allegedly was defamatory. Evans, 411 Pa. Super. at 245-246, 601 A.2d at 331. Following the publication of the article, the author "allegedly repeated the false statements orally to students, parents and sponsors of the program," as a result of which "enrollment and funding of [the youth training program]

dropped, causing considerable financial burden to [plaintiffs]." Id. at 246, 601 A.2d at 332. The trial court concluded that the tortious interference and defamation claims were both governed and barred by the one-year statute of limitations since both causes of action were premised upon the same defamatory communications. Id.

On appeal, the Superior Court phrased the issue of first impression as "whether a tortious interference claim, which is based upon identical allegations set forth in an accompanying defamation claim, should be considered duplicative and, as such, be barred by the one-year statute of limitations applicable to defamation claims." Id. at 247-248, 601 A.2d at 332. Recognizing that claims of defamation and tortious interference may constitute separate causes of action, the Evans court nonetheless reasoned:

> In a situation such as this, however, where the underlying wrong which the complaint alleges is defamation by publication of a libelous report, and the claim of injury set out in each count springs from the act of publication, the Appellants should not be able to circumvent the statute of limitations by merely terming the claim tortious interference when in essence it is one of defamation, subject to a one-year limitation of action. In such a situation, we will look to the gravamen of the action, not to the label applied to it by plaintiffs.

Id. at 249, 601 A.2d at 333. In upholding the dismissal of the tortious interference claim based upon the expiration of the one-year limitations period, the Superior Court "conclude[d] that since Appellants' claim for tortious interference is based upon the alleged false and defamatory character of the communication complained of, and it is indistinguishable from the claims of libel and slander, the same one-year limitation period should apply to both." Id. at 252, 601 A.2d at 334-335.

The issue of which limitations period applies to a particular cause of action is a question of law. Burger v. Blair Medical Associates, Inc., 600 Pa. 194, 201, 964 A.2d 374, 378 (2009) (holding that elements of action for breach of physician-patient

confidentiality do not sufficiently overlap with those of an invasion-of-privacy claim, and that if the facts underlying the former claim are sufficiently distinguishable from those supporting the latter cause of action, the breach of confidentiality action is governed by the catch-all two-year limitations period). "To prevent parties from avoiding the one (1) year statute of limitations on defamation claims, where a claim for interference with contractual relations is predicated upon allegedly defamatory statements, the one (1) year statute of limitations for defamation applies." DeAngelo Brothers, Inc. v. Platte River Insurance Company, 2010 WL 2635983, at * 7 (M.D. Pa. 2010) (citing Evans supra). The determination of the applicable limitations period depends upon whether the tortious interference claim is grounded upon the same conduct which serves as the basis for the defamation action. *Compare* Westwood-Booth v. Davy-Loewy, Ltd., 1999 WL 219897, at * 5 (E.D. Pa. 1999) (tortious interference claim subject to one-year statute of limitations since it stemmed from defendant's criticism of "plaintiff for engaging an operative with KGB ties."), and Tucker v. MTS, Inc., 1998 WL 67527, at * 3 (E.D. Pa. 1998) (applying one-year limitations period to intentional infliction of emotional distress claim, after finding "[t]here is no independent basis for Tucker's emotional distress claim - - the claim exists solely because of various defendants' roles in disseminating allegedly defamatory statements (Shakur's lyrics) and various defendants' allegedly derogatory actions (the filing of the California Actions and Tucker's publicized arrest)."), *aff'd*, 229 F.3d 1139 (3d Cir. 2000), *cert. denied*, 531 U.S. 1078 (2001), *with* Manning v. Flannery, 2012 WL 1111188, at * 12-18 (W.D.Pa. 2012) (tortious interference claim not governed by one-year limitation since it did not hinge upon any defamatory statements), and Rolite, Inc. v. Wheelabrator Environmental Systems, Inc., 958 F. Supp. 992, 1011 (E.D. Pa. 1997) (one-

year limitations period not applicable to tortious interference action which was "based primarily upon unfair competition rather than on defamation.").

In a factually analogous scenario, the federal district court in Hurst v. Beck, 1992 WL 396592 (E.D. Pa. 1992) held that the one-year statute of limitations applied to the tortious interference with contract claims of a plaintiff who was denied employment following the defendants' communication of defamatory information to the prospective employer. In Hurst, a physician who sought employment with Avery Medical Center of Connecticut sued her former hospital employer and two of its department heads who "gave the Avery Medical Center of Connecticut references about her that were both defamatory and based upon information contained in the plaintiff's confidential personnel file." Id. at * 1. Dr. Hurst alleged that "[b]ased upon this information, the Avery Center declined to hire Dr. Hurst." Id. In arguing that her tortious interference claim was not subsumed by her defamation action, Dr. Hurst asserted that defendant's "reading of her personnel file, disclosing her CREOG residents scores, relating to the Avery Center that certain other physicians did not like to work with Dr. Hurst, and that the Avery Center should contact Dr. Beck, all constitute separate conduct beyond defamation and therefore is a separate tort." Id. at * 5. However, the district court disagreed and concluded that "[w]hile each of the foregoing actions might have had an impact on the plaintiff's business, the 'gravamen' of plaintiff's complaint is that the foregoing conduct was detrimental because of its defamatory character." Id. Thus, it held "that the tortious interference with contract claims are controlled by the one-year statute of limitations." Id.

In contrast, the Superior Court in Maverick Steel Company, LLC v. Dick Corporation/Barton Malow, 54 A.3d 352 (Pa. Super. 2012), *app. denied*, No. 540 WAL

2012 (Pa. April 9, 2013) applied the two-year statute of limitations to a tortious interference claim that was founded upon an independent, non-defamatory course of conduct. The commercial defendant in Maverick Steel issued a default notice and sought coverage from its structural steel subcontractor's surety based upon defendant's claim that the subcontractor's delays in performance had jeopardized a stadium construction project. Id. at 353. In a series of subsequent letters and meetings, defendant reportedly attempted to extort money from the surety in an effort to subsidize the cost of the stadium project. Defendant's demands to the surety were "based on [the subcontractor's] financial status and its claim for cost overruns - - not on [the subcontractor's] failure to perform in a timely manner." Id. at 356. Neither of the post-default notice letters authored by defendant "contain[ed] any defamatory statements; however, they suggest that [defendant] was targeting [the surety] as a source of funds for the structural steel work." Id. at 357.

The subcontractor asserted that defendant had committed trade libel by falsely claiming that the subcontractor was chargeable with delays in performance and, therefore, in default. Additionally, based upon defendant's subsequent actions in attempting to extort funds for the construction project, the surety terminated its relationship with the subcontractor "on projects other than the Stadium Project." Id. at 354. As a consequence, the subcontractor lost its contractual relationship on other projects, and for that reason, it also advanced a tortious interference action. Id.

The Superior Court noted that "[t]he record contains additional evidence of non-defamatory facts on which Maverick based its interference claim." Id. at 357. Hence, it "conclude[d] that the gravamen of Maverick's claim was that [defendant] intentionally and wrongfully engaged in a course of conduct and communications...which were

designed to extract money from [the surety] and resulted in the premature termination of [the subcontractor's] relationship with its surety." Id. Therefore, it held that the tortious interference "claim as presented is separate and distinct from libel or slander," such that "Maverick's interference claim was subject to the two-year statute of limitations set forth in 42 Pa.C.S.A. § 5524." Id. at 357-358.

In the case *sub judice*, Pittsman has not alleged any wrongful conduct by Dr. Perrone and Redi-Care other than their determination that Pittsman was not physically qualified to operate a commercial vehicle without the SPE certificate, and their supposed communication of that conclusion to Mr. Burris and Bolus Freight. Those two matters serve as the sole grounds for Pittsman's defamation claim, as well as his tortious interference claim. Pittsman has not identified any other non-defamatory conduct or statement by Dr. Perrone or Redi-Care upon which he bases his cause of action for tortious interference. Inasmuch as "the underlying wrong which the complaint alleges is defamation," and Pittsman's tortious interference claim "springs from the act" of defamation, the same one-year statute of limitations governs both causes of action. *See* Evans, 411 Pa. Super. at 249, 601 A.2d at 333.

Pittsman attempts to avoid application of the one-year limitations period by asserting that Dr. Perrone first concluded that Pittsman required an SPE certificate and later communicated that diagnosis to Bolus Freight. (Docket Entry No. 26 at p. 3). However, in his verified pleading, Pittsman attests that Dr. Perrone contacted Mr. Burris "prior to Dr. Perrone's determination regarding [Pittsman's] ability to perform his duties as an over the road truck driver," and that "[a]fter Dr. Perrone's conversation with Chris Burris of Bolus Freight on February 24, 2009, Dr. Perrone refused to certify [Pittsman] as

able to drive a commercial vehicle without a Skill Performance Evaluation...." (Docket Entry No. 1 at ¶¶ 8-9). Pittsman's factual statements in his complaint are "judicial admissions and are binding" on him, and are "considered conclusive in the cause of action in which they are made." Cogley, 32 A.3d at 1292 (quoting John B. Conomos, Inc. v. Sun Company, 831 A.2d 696, 712-713 (Pa. Super. 2003), *app. denied*, 577 Pa. 697, 845 A.2d 818 (2004)). Pittsman is bound by those factual representations set forth in his verified pleading, and may not attempt to retract them in his brief. *See* Volk v. Unemployment Compensation Bd. of Review, 49 A.3d 38, 47 (Pa. Cmwlth. 2012) ("Claimant's explanation that he did not attend the hearing in his appeal because he did not receive notice of the hearing would be similar to a favorable statement made by an attorney in an appeal or brief, which is neither evidence nor a judicial admission on which a factual finding could be made."). Furthermore, Pittsman's proffered reversal of the factual chronology does not alter the ultimate conclusion that his tortious interference claim is entirely dependent upon the alleged defamatory diagnosis and communication. Accordingly, the tortious interference action is clearly barred by the one-year statute of limitations, and the motion for summary judgment will also be granted as to the tortious interference claim.

DAVID PITTSMAN,	:	IN THE COURT OF COMMON PLEAS
	:	OF LACKAWANNA COUNTY
Plaintiff	:	
vs.	:	CIVIL ACTION - LAW
DR. DAVID PERRONE AND REDI-CARE MEDICAL CENTER OF TAYLOR, INC.,	:	
Defendants	:	NO. 11 CV 1235

ORDER

AND NOW, this 11th day of April, 2013, upon consideration of the "Motion for Summary Judgment of Defendants, Dr. David Perrone and Redi-Care Medical Center of Taylor, Inc.," the memoranda of law and exhibits submitted by the parties, and the oral argument of counsel, and based upon the reasoning set forth in the foregoing Memorandum, it is hereby ORDERED and DECREED that:

1. Defendants' motion for summary judgment is GRANTED; and

2. The Clerk of Judicial Records is directed to enter judgment in favor of Defendants, Dr. David Perrone and Redi-Care Medical Center of Taylor, Inc., and against Plaintiff, David Pittsman, in the above-captioned matter.

BY THE COURT:

Terrence R. Nealon J.

Terrence R. Nealon

cc: *Written notice of the entry of the foregoing Memorandum and Order has been provided to each party pursuant to Pa. R. Civ. P. 236 (a) and (d) by transmitting time-stamped copies via electronic mail to:*

Kevin J. Fitzgerald, Esquire — lawofficefitz@aol.com
2521 N. Main Avenue
Scranton, PA 18508
Counsel for Plaintiff

Neil E. Wenner, Esquire — Neil@theperrylawfirm.com
The Perry Law Firm, LLC
Suite 740
87 South Commerce Way
Bethlehem, PA 18017
Counsel for Defendants

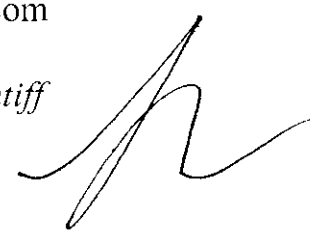
CERTIFICATE OF SERVICE

I, Lisa M. Welsh, hereby certify that I caused to be served on October 5, 2015, a true and correct copy of the foregoing Memorandum by first-class mail upon the following:

Kathleen V. Yurchak
GOODALL & YURCHAK P.C.
328 South Atherton Street
State College, PA 16801
(814) 237-4100
(814) 237-1497 (fax)
yurchak@centrelaw.com

Thomas A. Clare
Elizabeth M. Locke
Andrew C. Phillips
CLARE LOCKE LLP
902 Prince Street
Alexandria, VA 22314
(202) 628-7400
tom@clarelocke.com
libby@clarelocke.com
andy@clarelocke.com

Attorneys for Plaintiff



Lisa M. Welsh