

IN THE CIRCUIT COURT FOR WASHINGTON COUNTY  
AT JONESBOROUGH, TENNESSEE

DAN NICOLAU,  
Plaintiff

v.

CITIZENS COMMISSION ON HUMAN  
RIGHTS, et al,  
Defendants

Civil Action No. 39401

Filed 15 day of  
Nov 20 19 at \_\_\_\_\_  
3:20 o'clock PM

Brenda Downes, Clerk

ORDER DISMISSING PLAINTIFF'S COMPLAINT

This case originated in the Chancery Court for Washington County. The Complaint was filed February 26, 2019. An Amended Complaint was filed on July 30, 2019. On August 14, 2019, the defendants filed their Motion to Dismiss Plaintiff's Amended Complaint based upon *Tennessee Rules of Civil Procedure*, Rule 12.02(6) (for failure to state a claim upon which relief can be granted) and also upon Rule 12.02(2) (lack of personal jurisdiction). Defendants' motions were argued before Chancellor John C. Rambo on October 1, 2019. After hearing the arguments the Chancery Court concluded that it did not have concurrent jurisdiction under *T.C.A.* §16-11-102 and transferred the matter to the Washington County Circuit Court. The parties subsequently agreed for the undersigned judge to review the transcript of the arguments made on October 1, 2019, and then rule on defendants' motions.

Plaintiff's lawsuit is an action for defamation against two mental health "watchdog organizations". Plaintiff sued defendants for publishing news articles about

the plaintiff's misconduct which resulted in his receiving professional discipline and subsequent criminal charges.

In their Motion to Dismiss, the defendants raise the applicable one-year statute of limitations that governs actions for libel (*T.C.A.* §28-3-104(a)(1)(A)), and argue that plaintiff's action was commenced on February 26, 2019, well over one (1) year after publication by defendants of the October 2017 article at issue.

In addition, defendants raise the defense of lack of personal jurisdiction over defendant Citizens Commission on Human Rights.

#### LEGAL STANDARD

A motion to dismiss a complaint for failure to state a claim upon which relief may be granted, pursuant to rule 12.02(6) of the *Tennessee Rules of Civil Procedure*, asserts that the allegations in the complaint, accepted as true, fail to establish a cause of action for which relief can be granted. *Conley v State*, 141 S.W.3d 591, 594 (Tenn. 2004). If the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief, a defendant's motion to dismiss must be granted. *Crews v. Buckman Labs*, 78 S.W.3d 852, 857 (Tenn. 2002).

Defendants have raised the applicable statute of limitations as a bar to plaintiff's claim. A complaint is subject to dismissal under Rule 12.02(6) for failure to state a claim if an affirmative defense clearly and unequivocally appears on the face of the complaint. *See: Anthony v. Tidwell*, 560 S.W.2d 908, 909 (Tenn. 1977). Plaintiff's cause of action is for libel. Tennessee law imposes a one-year statute of limitations for

libelous defamation. *T.C.A. §28-3-104(a)(1)(A)*.

### CONCLUSION

From a review of plaintiff's Complaint, the alleged libelous defamation occurred in October 2017, when defendants "published" articles on the Internet about plaintiff, his "professional discipline" he had received, and his subsequent criminal charges and convictions. Plaintiff's Complaint was not filed until February 26, 2019.

Plaintiff, in response to defendants' affirmative defense that the statute of limitations had expired before plaintiff filed suit, argues that he did not become aware of the publication until January 21, 2019. However, the "discovery rule" does not apply in defamation cases. *Quality Auto Parts Co. v. Bluff City Buick Co.*, 876 S.W.2d 818, 821 (Tenn.1994). [There is an exception to this rule for "inherently undiscoverable nature" of a publication, but that exception is not applicable here. *See: Ali v. Moore*, 984 S.W.2d 224, 228 (Tenn. Ct. App. 1998).]

Plaintiff also argues that the defendants' publication of the allegedly defamatory remarks and comments, by being continually available on the Internet, constitutes a "continuing defamation", which would toll the running of the statute of limitations. However, Tennessee does not recognize the concept of "continuing defamation". *Applewhite v. Memphis State University*, 495 S.W.2d 190, 193-194 (Tenn. 1973).

Based on the untimely filing of his claim, the Court finds and concludes that plaintiff's Amended Complaint fails to state a claim upon which relief may be granted and should be dismissed. The remaining grounds for dismissal raised by the

defendants, including the lack of personal jurisdiction over defendant Citizens Commission on Human Rights, are moot and not addressed in this Opinion.

#### ATTORNEY'S FEES AND COSTS

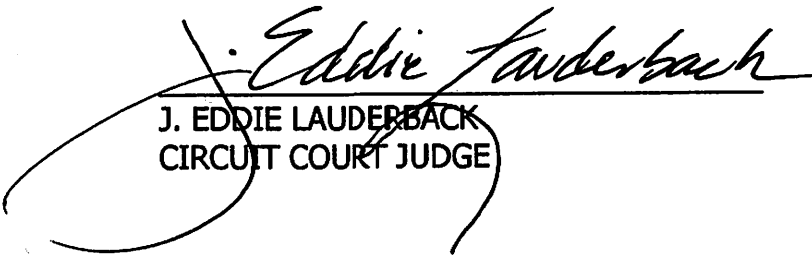
Defendants have requested their attorney's fees and costs. *T.C.A. §20-12-110(c)* provides:

" . . . where a trial court grants a motion to dismiss pursuant to Rule 12 of the *Tennessee Rules of Civil Procedure* for failure to state a claim upon which relief may be granted, the court shall award the party or parties against whom the dismissed claims were pending at the time the successful motion to dismiss was granted the costs and reasonable and necessary attorney's fees incurred in the proceedings as a consequence of the dismissed claims by that party or parties. (emphasis supplied.)

Subsection (c)(3) states that "the award of costs and attorney's fees pursuant to this section shall be stayed until a final decision which is not subject to appeal is rendered". Therefore, this Court will not rule on defendants' request for costs and attorney's fees until such time as "a final decision not subject to appeal has been rendered". Once that occurs, defendants may file a Motion for Award of Attorney's Fees and Costs supported by affidavit and complying with *Tenn. Sup. Ct. Rule 8, R.P.C. 1.5 (See Local Rule 1.03(K))*, at which time the Court will rule upon the attorney fee request.

Clerk, mail a copy to all counsel of record.

ENTER pursuant to *T.R.Civ.P. 58*.

  
J. EDDIE LAUDERBACK  
CIRCUIT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been sent to all parties or to their attorneys of record in the manner prescribed by Rule 58, *Tennessee Rules of Civil Procedure*, as indicated below:

By sending said document through the United States Postal Service, addressed to:

Richard Kennedy, Esq.  
P. O. Box 357  
Wise, VA 24293

Daniel A. Horwitz, Esq.  
1803 Broadway, Suite 531  
Nashville, TN 37203

- By sending the document via facsimile to:
- By sending the document via electronic mail to:
- By causing the foregoing to be hand-delivered to counsel of record at the following address:

This 15 day of November, 2019.

BRENDA DOWNES, Circuit Court Clerk

By 