

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE  
AT CHATTANOOGA**

**ALEXANDER A. STRATIENKO, M.D.** )  
 )  
 **Plaintiff,** )  
 )  
 v. )  
 )  
 **CHATTANOOGA-HAMILTON COUNTY** )  
 **HOSPITAL AUTHORITY and MEL** )  
 **TWIEST, M.D., individually and in his** )  
 **official capacity as Chief Medical Officer of** )  
 **Chattanooga-Hamilton County Hospital** )  
 **Authority, V. STEPHEN MONROE, JR.,** )  
 **M.D., MITCHELL L. MUTTER, M.D.,** )  
 **DANIEL F. FISHER, M.D., and NITA** )  
 **SHUMAKER, M.D.** )  
 )  
 **Defendants.**

**Civil Action No. 1:07-CV-258**

**COLLIER/SHIRLEY**

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**

Defendant, Van Stephen Monroe, Jr., M.D. (“Dr. Monroe”), by and through counsel and pursuant to Fed. R. Civ. P. 12(b)(6), respectfully submits this memorandum of law in support of his Motion to Dismiss the complaint of Plaintiff Alexander A. Stratienko, M.D. insofar as it applies to him.

**STATEMENT OF FACTS**

As of September 16, 2004, Dr. Monroe and Plaintiff were physicians on the medical staff of Chattanooga-Hamilton County Hospital Authority (“Erlanger”). According to Plaintiff’s Complaint, on that day Plaintiff and Dr. Monroe were involved in an altercation. (See Plaintiff’s Second Amended Complaint, ¶ 19, a copy of which is attached as **Exhibit A** to Defendants’ Motion to Dismiss filed contemporaneously herewith). After an investigation of the incident

conducted by R. Mel Twiest (“Twiest”), who was the Chief Medical Officer of Erlanger at that time, Erlanger’s Medical Executive Committee summarily suspended Plaintiff’s medical staff privileges pending the results of an evaluation of Plaintiff by the Tennessee Medical Foundation (“TMF”). (*Id.*, ¶¶ 20-24 and letter attached as Exhibit 1 to Plaintiff’s Second Amended Complaint). This suspension was documented in a letter dated September 16, 2004 that was delivered by Twiest to Plaintiff on September 17, 2004. (*Id.*) Instead of submitting to an evaluation at the TMF, however, Plaintiff filed a complaint (“Original Complaint”) against Erlanger and Twiest, individually and in his official capacity as Chief Medical Officer of Erlanger, on September 20, 2004, only four days after the incident. (*See* Plaintiff’s Original Complaint, a copy of which is attached as **Exhibit B** to Defendants’ Motion to Dismiss filed contemporaneously herewith).

On October 4, 2007, over three years after the suspension, Plaintiff filed a Second Amended Complaint that added Dr. Monroe as a party for the first time.<sup>1</sup> (*See* Exhibit A, p. 1.) Defendants were not served until October 4, 2007. (*See* Exhibit A, p. 16 (Certificate of Service)).

## ARGUMENT

### A. Standard of Review

The basis of a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is that Plaintiff has failed to state a claim upon which relief can be granted. When deciding on a Rule 12(b)(6) motion, the court “construe[s] the complaint in the light most favorable to the nonmoving party, accept[s] the well-pled factual allegations as true, and determine[s] whether the moving party is

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<sup>1</sup> Plaintiff had previously filed an Amended Complaint that also did not include Dr. Monroe as a party. *See* Plaintiff’s Amended Complaint, attached as **Exhibit C** to Defendant’s Motion to Dismiss filed contemporaneously herewith.

entitled to judgment as a matter of law.” *Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 336 (6<sup>th</sup> Cir. 2007). “The purpose of Rule 12(b)(6) is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true.” *Mayer v. Mylod*, 988 F.2d 635, 638 (6<sup>th</sup> Cir. 1993). Although liberal, this standard of review does require more than the bare assertion of legal conclusions. *In re DeLorean Motor Co.*, 991 F.2d 1236, 1240 (6<sup>th</sup> Cir. 1993). A complaint must contain either direct or inferential allegations of fact with respect to all the material elements necessary to sustain a recovery under some viable legal theory. *Glassner v. R.J. Reynolds Tobacco Co.*, 223 F.3d 343, 346 (6<sup>th</sup> Cir. 2000). “In determining whether to grant a Rule 12(b)(6) motion, the court primarily considers the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case, *and exhibits attached to the complaint*, also may be taken into account.” *Amini v. Oberlin College*, 259 F.3d 493, 502 (6<sup>th</sup> Cir. 2001) (emphasis in original).

Finally, a motion to dismiss under Rule 12(b)(6) may be used to raise a statute of limitations defense “when it is apparent from the face of the complaint that the time limit for bringing the claim has passed.” *Hoover v. Langston Equip. Assocs., Inc.*, 958 F.2d 742, 744 (6<sup>th</sup> Cir. 1992).

**B. Plaintiff “discovered” Dr. Monroe’s alleged actions and the basis for any alleged causes of action no later than September 17, 2004.**

Plaintiff’s own Original Complaint states that on September 17, 2004, he received a letter notifying him that his clinical privileges at Erlanger had been suspended. (See Original Complaint, ¶ 6.) That letter refers to Plaintiff’s assault on Dr. Monroe as the basis for the suspension. (See Exhibit 1 to Plaintiff’s Original Complaint.) Accordingly, regardless of Plaintiff’s claims that he did not know of the other physician defendants’ involvement until after

depositions began, on September 17, 2004 Plaintiff clearly did know of the alleged bases for his claims against Dr. Monroe. Even in Plaintiff's Response to the Motion to Dismiss of Mutter, Fisher, and Shumaker [Doc. No. 210], Plaintiff has not even presented any substantiated evidence of any actionable conduct by Dr. Monroe since September 17, 2004. Therefore, Plaintiff's claims, if any, against Dr. Monroe accrued no later than September 17, 2004.

**C. Plaintiff's Original Complaint did not toll the applicable statutes of limitations as to Defendant Dr. Monroe and the Second Amended Complaint that added him as a party does not relate back to the Original Complaint.**

Plaintiff's Original Complaint did not toll the applicable statutes of limitations as to Dr. Monroe. In Tennessee, statutes of limitations protect defendants separately; in other words, a lawsuit filed against one or more defendants does not prevent the statute of limitations from continuing to run in favor of other potential defendants who have not been named in the lawsuit. *See, e.g., Haynes v. Locks*, 711 F.Supp. 901 (E.D. Tenn. 1989); *see also 18 Tennessee Jurisprudence*, Limitation of Actions § 21, p. 86 ("The general rule is that the statute of limitations protects defendants separately, so that the filing of a suit against one or more defendants will not preserve the right to proceed against another defendant after the expiration of the statute."). In *Haynes*, the plaintiff was injured while operating a pneumatic press and, just before the expiration of the applicable statute of limitations, filed a lawsuit against two defendants who the plaintiff believed had manufactured the press. *Haynes*, 711 F.Supp. at 902. However, both defendants claimed that they did not manufacture the press and named three other parties as the correct manufacturers of the machine and its parts. *Id.* Because the statute of limitations had run by that point, however, the plaintiff was not allowed to proceed against these new parties. *Id.* at 902-04.

Therefore, because Plaintiff's Original Complaint did not name Dr. Monroe, the applicable statutes of limitations continued to run. Consequently, the statutes of limitations regarding these defendants started running on September 17, 2004, the date Plaintiff was notified of the summary suspension.<sup>2</sup>

Additionally, the Second Amended Complaint that added Dr. Monroe as a defendant to the lawsuit does not relate back to the Original Complaint.<sup>3</sup> Adding a new party to a complaint creates a new cause of action and there is no relation back to the date of the filing of the original complaint for statute of limitations purposes. *Jenkins v. Carruth*, 583 F. Supp. 613, 615 (E.D. Tenn. 1982), *Aff'd*, 734 F.2d 14 (6<sup>th</sup> Cir. 1984)). Tennessee Rules of Civil Procedure 15.03 states in pertinent part that the addition of a party to a lawsuit only relates back if the new party

(1) 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 (2) 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 party.

Tenn. R. Civ. P. 15.03.

A case applying this rule to procedural facts that are remarkably similar to this case is *Rainey Brothers Construction Co. v. Memphis & Shelby County Board of Adjustment*, 821 S.W.2d 938 (Tenn. Ct. App. 1995). In *Rainey Brothers*, the plaintiff named the Shelby County

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<sup>2</sup> September 16, 2004 is the date of the letter informing Plaintiff of the suspension, but according to the complaint the letter was not delivered to the Plaintiff until September 17, 2004. Construing the complaint in the light most favorable to Plaintiff dictates that September 17, 2004 be used. *See Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6<sup>th</sup> Cir. 2007) ("In reviewing a motion to dismiss, we construe the complaint in the light most favorable to the plaintiff ...").

<sup>3</sup> Because the amendment adding these Defendants to this lawsuit was made prior to the removal of the case to this Court, Tennessee's relation-back rules will apply. *See Pac. Employers Ins. Co. v. Sav-A-Lot of Winchester*, 291 F.3d 392, 399-400 (6<sup>th</sup> Cir. 2002) (applying state court relation-back rules where complaint amended in state court prior to removal); *see also* 3 James W. Moore, et al., *Moore's Federal Practice*, amended and Supplemental Pleadings, § 15.20[], p. 15-129 (3d ed. 2007).

Board of Adjustment (“Board”) as a party in one of several original lawsuits. *Id.* at 940. Years later, the plaintiff sought to add each of the members of the Board, individually, as defendants. *Id.* Neither the trial court nor the appellate court allowed these individuals to be named individually in the lawsuit. *Id.* at 940-41. Citing the requirements of Tenn. R.Civ. P. 15.03, the appellate court stated:

[I]t is reasonable to assume that the members of the Board were aware of [the action] brought by [the plaintiff] before they were made parties to the actions pursuant to the . . . amended complaint[]. However, Rule 15.03 requires more than merely that a potential new defendant be aware of the existence of the action prior to being made a party. The second requirement is that each potential new party must have known that but for a misnomer or mistake concerning his or her identity, the action would have been brought against him or her. []Furthermore, it has been held that the plaintiff has the burden of showing that the failure to name the new defendants in the original complaint resulted from a mistake concerning the identity of the proper parties. [] A mistake within the meaning of Rule 15.03 does not exist simply because the party who may be liable for conduct alleged in the original complaint was omitted as a party defendant. [] The circumstances of the case before us do not satisfy the second requirement.

*Id.* at 941 (citations omitted). Because the addition of the Board members as defendants would not relate back to the initial filing date, the statutes of limitations had expired as to the Board members such that they could not be named in an individual basis in the lawsuit. *Id.* Similarly, the Second Amended Complaint adding Dr. Monroe to the instant lawsuit does not relate back to the date of the Original Complaint.

It should also be noted that Plaintiff never asserted the omission of Dr. Monroe was due to mistake. Because Rule 15.03 requires the omission of parties from the original complaint be the result of a mistake, there is no basis for the Second Amended Complaint to relate back.

Additionally, a statute of limitations is not tolled while a plaintiff attempts to identify the correct defendants. *Haynes*, 711 F.Supp. at 903. In *Haynes*, the plaintiff had conducted an

investigation in order to determine which parties to sue, and she claimed that her “due diligence should prevent the statute of limitations from running. *Id.* at 902. The court, however, noted that the element of due diligence only comes into play when a plaintiff is attempting to discover the causal connection between a product and an injury, and not when a plaintiff is merely attempting to determine which parties to sue. *Id.* As a result, the court held that the statute of limitations was not tolled “while the plaintiff was attempting to identify the correct defendants.” *Id.* at 903. Similarly, to the extent Plaintiff argues he attempted to identify the correct defendants in the instant case, such an argument is irrelevant because those actions did not toll the applicable statutes of limitations.

**D. Plaintiff’s claims are barred as to Dr. Monroe because the applicable statutes of limitations have expired.**

The statutes of limitations started running on September 17, 2004 when Dr. Stratienco received his summary suspension. Dr. Monroe was not made a party to this lawsuit until October 4, 2007, which is over three years after Plaintiff’s suspension. As a result, the claims asserted by Plaintiff against Dr. Monnroe have expired. Specifically, the claims asserted by Plaintiff and their applicable statute of limitations are as follows:

*1. Constitutional Claims (Equal Protection, Due Process)*

Civil rights claims have a one-year statute of limitations in Tennessee. T.C.A. § 28-3-104; *see also Kessler v. Bd. of Regents*, 738 F.2d 751, 754 (1984) (*citing Wright v. Tennessee*, 628 F.2d 949, 951 (6<sup>th</sup> Cir. 1980)) (“It is undisputed . . . that a one-year statute of limitations applies to civil rights cases in Tennessee.”). Therefore, Plaintiff’s Constitutional claims in Paragraphs 2(a), 27, and 28 of the Second Amended Complaint have long since expired.

2. *Breach of Contract Claim*

The applicable statute of limitations for Plaintiff's contract claim is based on the gravamen of the complaint. *Vance v. Schulder*, 547 S.W.2d 927, 931 (Tenn. 1977). The major criterion in determining the gravamen of the action is the kind of damage alleged. *Keller v. Colgems-EMI Music, Inc.*, 924 S.W.2d 357, 360 (Tenn. Ct. App. 1996) (citing *Harvest Corp. v. Ernst & Whinney*, 610 S.W.2d 727, 729 (Tenn. Ct. App. 1980)). When a plaintiff alleges that a defendant has breached a contract in a way that causes injury to the personal or real property of the plaintiff, the three-year limitation of T.C.A. § 28-3-105 applies. *Cumberland & Ohio Co. of Tex. v. First Am. Nat'l Bank*, 936 F.2d 846, 848 (6<sup>th</sup> Cir. 1991); *Pinkerton & Laws Co. v. Nashville Flying serv., Inc.*, 402 S.W.2d 861, 862 (Tenn. 1966) ("Whether an action for the recovery of damages for injuries to personal or real property results from a breach of contract is immaterial."); see also 22 Steven W. Feldman, *Tennessee Practice*, contract Law and Practice, § 12:78, at p. 596 (2006) ("[I]f the gravamen of plaintiff's cause of action is injury to property, the applicable statute should be the three year period of T.C.A. § 28-3-105, even where the defendant's conduct has breached a contract").

In this case, Plaintiff alleges that, by summarily suspending Plaintiff's medical staff privileges, Defendants damaged his professional practice and his ability to continue his occupation as a physician. Indeed, Plaintiff's Complaint states that "Defendants' suspension of Plaintiff's Medical Staff privileges has damaged Plaintiff's medical practice and reputation, resulting in financial loss to Plaintiff," and that the suspension has allegedly harmed his client base. (See Exhibit A, ¶¶ 35, 44.)

Tennessee has long recognized occupations, employment, labor, and the basic right to work as property interests. *Ladd v. Roane Hosiery, Inc.*, 556 S.W.2d 758, 760 (Tenn. 1977)

(“An individual has a property interest in his labor . . .”); *Carruthers Ready-Mix, Inc. v. Cement Masons Local Union No. 520*, 779 F.2d 320, 324 (6<sup>th</sup> Cir. 1985) (“[E]very man has the right of property in his own labor. . .”); *Sanford-Day Iron-Works v. Enter. Foundry & Machine Co.*, 198 S.W. 258, 259 (Tenn. 1917) (“‘Property’ . . . in its broader and truer sense includes one’s business . . .”); *Harvey v. Martin*, 714 F.2d 650, 651-52 (6<sup>th</sup> Cir. 1983) (evaluating an employment contract as a property right for statute of limitations purposes).<sup>4</sup> Because the gravamen of Plaintiff’s complaint is injury to property, the applicable statute of limitations for his breach of contract claim is three years. Thus, the statute of limitations for Plaintiff’s breach of contract claims expired before Dr. Monroe was named as a defendant.

### 3. *Interference With Contractual/Business Relationships or Prospective Economic Relationships*

Torts involving economic damage to property, as opposed to personal injury torts, have statutes of limitations of three years. T.C.A. § 28-3-105(1). Additionally, Tennessee has explicitly recognized the statute of limitations for interference with a contract and for interference with a business as three years. *See, e.g., Tigg v. Pirelli Tire Corp.*, 232 S.W.3d 28, 31 n.1 (Tenn. 2007) (noting that the tort of interference with a contract has a statute of limitations of three years according to T.C.A. § 28-3-105(1)); *Harvey*, 714 F.2d at 652 (“[C]laims for interference with property and contractual rights are governed by the three year statute of limitations prescribed by T.C.A. § 28-3-105 . . .”); *Carruthers*, 779 F.2d at 324 (“We have held, and Tennessee law confirms, that the three-year limitations period of Tenn. Code

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<sup>4</sup> There is a six-year statute of limitations applicable to breach of contract claims that is applied only when the *whole* basis for recovery is sought on a contract. *Bland v. Smith*, 277 S.W.2d 377, 379 (Tenn. 1955); *see also* 18 *Tennessee Jurisprudence*, Limitations of Actions, § 13 (1982). Given Plaintiff’s assertion of numerous claims based on a variety of different recoveries, such obviously is not the case here.

Ann. § 28-3-105 applies to common law actions for inducement of breach of contract and unlawful interference with a business”). Thus, Plaintiff’s cause of action for tortious interference with a contract or prospective economic relationships expired before it was asserted against Dr. Monroe.

4. *Conspiracy*

The above-described three-year rule for torts involving economic damage to property applies to civil conspiracy causes of action. T.C.A. § 28-3-105(1); *Budget Rent-A-Car of Knoxville, Inc. v. Car Servs., Inc.*, 469 S.W.2d 360, 362 (Tenn. 1971) (“Conspiracy is a tort and is subject to the running of the statute of three years.”). Thus, the result is the same for the civil conspiracy cause of action as to Dr. Monroe.

5. *Defamation*

Although it is not clear from the complaint whether Plaintiff is asserting libel, which has a statute of limitations of one year per T.C.A. § 28-3-104(a)(1), or slander, which has a statute of limitations of six months per T.C.A. § 28-3-103, either claim expired long before Plaintiff moved to add Dr. Monroe to this action.

6. *Antitrust Claims*

The above-described three-year rule for torts involving economic damage to property also applies to antitrust claims in Tennessee. T.C.A. § 28-3-105(1); *see also State ex rel. Leech v. Levi Strauss & Co.*, No. 79-711-III, 1980 WL 4696 (Tenn. Ch. Ct. Sep. 25, 1980) (“Although anti-trust actions are based upon statutes, it has been universally held that private anti-trust suits are actions sounding in tort. . . . This private anti-trust suit . . . is an action for injuries to personal

property and is subject to the three year statute of limitation in [T.C.A. § 28-3-105].”). Therefore, the result is the same for Plaintiff’s antitrust claims as to Dr. Monroe.

**E. The law recognizes no exception to the running of statutes of limitations that extend the statutes of limitations in this case.**

Plaintiff does not allege any facts in his Second Amended Complaint that provide for any exception to the statutes of limitations. Tennessee courts have held that, “[a]s a general rule, all acts of limitation operate inflexibly and upon principle, regardless of particular cases of hardship.” *Gray v. Darby*, 8 Tenn. 396, 1825 WL 420 at \*9 (1825); *Tennessee Jurisprudence, supra*, § 33, p. 109. Additionally, courts may not interpolate into a statute of limitations other exceptions than those made by the General Assembly. *Christian v. John*, 76 S.W. 906, 907 (Tenn. 1903); *Phillips v. Memphis Furniture Mfg. Co.*, 79 S.W.2d 576, 578 (Tenn. 1935) (“The general rule that the courts are without power to add other exceptions in statutes to those made by the Legislature applies to statutes of limitation . . .”); *Tennessee Jurisprudence, supra*. The Tennessee Legislature has not created an exception that prevents the applicable statutes of limitations from running in favor of Dr. Monroe.

### CONCLUSION

For over three years, Plaintiff sat on his rights to sue Dr. Monroe. Plaintiff became aware of the Defendant's involvement in the facts surrounding this action before he even filed the Original Complaint. Consequently, the statutes of limitations have expired on all claims against Dr. Monroe. For the foregoing reasons, Dr. Monroe respectfully requests this Honorable Court to dismiss with prejudice Plaintiff’s complaint insofar as it applies to him. Dr. Monroe further requests that the costs of this action be taxed against Plaintiff, and that he be awarded all other costs to which this Honorable Court determines he is entitled.

Respectfully submitted,

CHAMBLISS, BAHNER & STOPHEL, P.C.

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### **CERTIFICATE OF SERVICE**

I do hereby certify that the foregoing pleading has been filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail and/or facsimile or hand delivery. Parties may access this filing through the Court's electronic filing system.

This 22nd day of August 2008.

CHAMBLISS, BAHNER & STOPHEL, P.C.

By: /s/ Nathaniel S. Goggans  
J. Bartlett Quinn  
Nathaniel S. Goggans