

**WD 70832
(16th Cir. Case No. 0816-04217)**

**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT
AT KANSAS CITY, MISSOURI**

SAMUEL K. LIPARI,

Plaintiff/Appellant,

vs.

LATHROP & GAGE LLP, ET AL.,

Defendant/Respondent.

**APPEAL FROM THE CIRCUIT COURT OF
THE SIXTEENTH JUDICIAL CIRCUIT
THE HONORABLE MICHAEL MANNERS, JUDGE**

**BRIEF OF RESPONDENT
LATHROP & GAGE LLP**

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INTRODUCTION

This case is related to the Court's disposition of two earlier appeals of this case WD70001 and WD70534 both of which were dismissed because they were premature and the Court lacked jurisdiction.

The Trial Court entered judgment for Lathrop & Gage LLP on its Motion for Judgment on the Pleadings on November 12, 2008. The judgment was entered approximately eight months after the case was filed.

Plaintiff/Appellant Samuel Lipari's appeal of the judgment on the pleadings is meritless. He makes no sound argument that the Trial Court erred in concluding that the Petition failed to state facts establishing a cause of action against Lathrop & Gage. Any other alleged errors of the Trial Court are immaterial or not preserved.

JURISDICTIONAL STATEMENT

Plaintiff/Appellant Samuel Lipari ("Lipari"), identified as the assignee of a dissolved corporation, Medical Supply Chain, Inc., filed a Petition against, among many others, Defendant-Respondent Lathrop & Gage, L.C.¹ ("Lathrop & Gage"). The Trial Court entered judgment in favor of Lathrop & Gage on December 29,

¹ On January 1, 2009, Lathrop & Gage, L.C. converted to a limited liability partnership and is now known as Lathrop & Gage LLP.

2008. Appl.Append. at 3. The last defendant in the case was dismissed for want of prosecution on March 27, 2009. App.Supp.LF at 732.²

This appeal is not within the exclusive jurisdiction of the Missouri Supreme Court and therefore falls within the jurisdiction of the Missouri Court of Appeals, Western District under Article V §3 of the Missouri Constitution and Missouri Revised Statute § 477.050.

STATEMENT OF FACTS

A. Prior and Concurrent Cases

In Appellant's brief, Lipari details his view of the many other cases and proceedings that both preceded and proceeded concurrently with this case. Lathrop & Gage was not a party in any of the prior cases or in any of the cases that are being litigated concurrently with this case. Additionally, Lathrop & Gage did not serve as counsel in the prior or concurrently litigated cases brought by or on behalf of Lipari or Medical Supply Chain, Inc.

² The Legal File prepared and filed by Lipari consists of eight volumes. The first four were prepared in connection with a prior appeal of this case, WD 7001 and are numbered 1-681 and the second four volumes are numbered 1-743. Because the materials within the eight volumes are not numbered consecutively, Lathrop therefore refers to the Legal File as "LF" when citing to the first four volumes and "Appl.Supp. LF" when referring to the second four volumes.

B. This Case

Suit was filed on February 25, 2008. Lathrop & Gage answered on May 9, 2008. Appl.Supp. LF 127-146. Lipari did not file a pleading in response to the Answer of Lathrop & Gage. The allegations in the Petition directed specifically against Lathrop & Gage are stated in paragraphs 482-502 (LF 88-90) 553-554 (LF 98-99), 560, 562 (LF 99-100), and 582 (LF 103). These statements are not contained with any substantive counts, but the Petition purports to incorporate them in the substantive Counts. He plead alleged conduct by Lathrop on pages 94-97 of the Petition, within unnumbered paragraphs that are part of his Count 1 for Anti-Trust violations. LF 105, 108. In addition, the Petition contains hundreds of references to “defendants” without specifying which defendant. LF 1-119.

On November 12, 2008, Lathrop & Gage filed its Motion for Judgment on the Pleadings. Appl.Supp. LF at 92. (Motion for Judgment on the Pleadings) and 75 (Suggestions in Support of Motion for Judgment on the Pleadings). Apart from published opinions, Lathrop & Gage did not attach or refer to any matters outside of the Plaintiff’s Petition or the attachments to Plaintiff’s Petition. *Id.* Lipari responded on November 17, 2008. Appl.Supp. LF at 316. In his response, Lipari referenced and attached 206 pages of materials that were outside the scope of his Petition. Appl.Supp. LF at 109-315.³

³ The attachments precede the Response in the Supplemental Legal File.

In his Response Lipari did not request additional time within which to conduct discovery, indicate that he needed additional time to prepare his response, or request leave to amend his Petition. Appl.Supp. LF at 316. Lathrop & Gage filed its Reply In Support of Motion for Judgment On the Pleadings on November 24, 2008. Appl.Supp. LF at 344.

In its Reply, Lathrop & Gage did not refer to or attach any materials that were outside of those plead by Plaintiff in his Petition or attached to his Petition. When the Trial Court entered its Judgment on the Pleadings on December 29, 2008, it did not reference or state that it was relying upon any materials beyond the Petition or the attachments to the Petition. Appl.Append. at 3.

Lipari sought leave to amend his Petition. The Trial Court ordered Lipari to provide his proposed First Amended Petition to the Court. Order, Appl.Supp. LF at 432-33. The Trial Court denied Lipari's Motion for Leave to File his First Amended Petition on March 23, 2009. Appl.Append at 4-5. Lipari sought to file Second and Third Amended Petitions. Those Motions were denied. Order, Appl.Supp. LF Append. at 527 and Appl.Supp. LF at 729.

On March 27, 2009, the Trial Court entered its order dismissing the claims against the last party, unserved Defendant Robert Zollars. Appl.Supp. LF at 732. Lipari this appeal on April 6, 2009.

ARGUMENT

I. The Trial Court Properly Granted Lathrop & Gage's Motion for Judgment on the Pleadings. (Responds to Point 4)⁴

The Trial Court properly granted judgment to Lathrop & Gage on Lipari's Petition because the Petition failed to state facts which stated a cause of action against Lathrop & Gage upon which relief could be granted. Lipari does not make a rational argument as to why the Trial Court erred in holding that his cryptic, verbose, convoluted, and confusing Petition stated a factual basis for a legal claims against Lathrop & Gage. He does not explain how the facts that he plead, even if viewed in a light most favorable to his claims, could result in a judgment against Lathrop & Gage.

Lipari's point 4 is limited to procedural issues questioning the timing of the Motion for Judgment and attempting to construct an argument the Trial Court treated the Motion for Judgment as a summary judgment motion. Appl.Brief at 33-35. The Motion for Judgment was filed and considered at an appropriate time. The Trial Court did not evidently review or rely upon materials outside of the

⁴ Appellant's Points 1 and 2 address issues not raised in Lathrop & Gage's Motion for Judgment and do not articulate any claim of error with regard to the Court's order of December 29, 2008 granting judgment in favor of Lathrop & Gage on its Motion.

Petition but if it did it only did so because they were introduced by the Lipari. Lipari cannot complain about error he invited.

This Court could choose to affirm on the basis that Lipari has not complied with the Missouri Rules of Appellate Procedure. His statement of facts, and his Points Relied on fail to conform to Mo.S.Ct.R. 84.04(c) and Mo.S.Ct.R. 84.04(d).

A. Standard of Review

This Court reviews *de novo* an appeal from a judgment on the pleadings. The standard for a judgment on the pleadings under Mo.S.Ct.R. 55.27(b) is similar to the standard applied to a movant on a motion to dismiss. “If the pleadings from their face demonstrate that the moving party is entitled to judgment as a matter of law, then the Trial Court is justified in granting a motion for judgment on the pleadings.” *Kraus v. Hy-Vee, Inc.*, 147 S.W.3d 907, 920 (Mo.Ct.App. 2004).

“Mere conclusions of the pleader not supported by factual allegations are disregarded in determining whether a petition states a cause of action on which relief can be granted.” *Lick Creek Sewer Systems, Inc. v. Bank of Bourbon*, 747 S.W.2d 317, 322 (Mo.Ct.App. 1998). Although a motion for judgment on the pleadings admits the truth of well pleaded facts, it does not admit the truth of conclusions of law and matters that are not well pleaded. *Grove v. Sutcliffe*, 916 S.W.2d 825, 828 (Mo.Ct.App. 1995); *Holt v. Story*, 642 S.W.2d 394, 395-96 (Mo. Ct. App. 1982).

B. The Timing of the Motion was Appropriate

Lathrop & Gage brought its Motion after it filed its Answer just short of a year before the time set for trial (November 2, 2009)⁵. Lipari never filed any pleading in response or reply to the Answer. “Unless the court orders a reply, to an answer or third-party answer, the pleadings close after the last of the following pleadings in the case have been filed: answer, reply to a counterclaim, answer to a cross-claim, and third-party answer.” See Moore’s Federal Practice 3D § 12.38 construing Fed.R.Civ.P. 12(c) upon which Rule 55.27(b) is clearly patterned. As between Lathrop & Gage and Lipari (the only parties addressed by the Motion for Judgment on the Pleadings), the pleadings were closed when Lathrop & Gage filed its Answer. Lipari’s reliance upon *Habahbeh v. Beruti*, 100 S.W.2d 3d 851 (Mo. Ct.App. 2003) for the proposition that the presence of the unserved defendant Mr. Zollars kept the pleadings “open” is misplaced. The *Habahbeh* case does not address Rule 55.27(b). It holds that an unserved defendant prevents the appellate court from obtaining jurisdiction.

What is more, Lipari’s complaint (Appl.Brief at 33) that the Court granted judgment “before trial” is completely contrary to the rule. The very language of Rule 55.27(b) requires that it be brought “within such time as not to delay the

⁵ The Case Management Order is not included in the Legal File. The trial setting is noted on the case.net docket included in the Legal File. Appl.Supp. LF at 114.

trial.” Mo.S.Ct.R. 55.27(b). Lipari’s citation to Rule Mo.S.Ct.R. 55.27(a) (Appl.Brief at 35) for the argument that the Motion was untimely because it was beyond thirty (30) days of service is incorrect because Lathrop & Gage’s Motion was brought under 55.27(b) which does not contain a 30 day requirement. It requires that the Motion be brought after the pleadings are closed and so as not to delay the trial.

This case is also different than *Pennell v. Polen*, 611 S.W.2d 323 (Mo. Ct. App. 1980)(Appl.Brief at 32, 34). Lathrop & Gage’s Motion for Judgment was brought on November 24, 2008, almost a year before the case was set for trial. It was not brought on the day set for trial or even shortly before trial. Lipari had propounded discovery and received Lathrop & Gage’s responses. He did not seek any additional discovery and never indicated to the Trial Court what additional discovery he would have conducted that would have bolstered the conclusions of his Petition. Lipari does not explain how he might have been prejudiced by Lathrop & Gage’s failure to conduct formal discovery. Appl.Brief at 34. The fact that Lathrop & Gage denied the allegations of Lipari (Appl.Brief at 33, 36) did not create material issues of fact because the Court is required in ruling on the Motion for Judgment to assume the well pleaded facts (and not mere conclusions) are true.

C. If the Trial Court Converted the Motion to a Summary Judgment Motion it was Invited to do so by Lipari and he Cannot now Complain.

Although there is no evidence or indication that the Trial Court reviewed or considered information beyond the Petition or attachments (and thereby converted the Motion to a Summary Judgment proceeding), any external matters were provided by Lipari and not by Lathrop & Gage. To the extent external matters were considered, they were invited by Lipari, and he acquiesced to any use of the materials. *Keim v. Big Bass, Inc.*, 949 S.W.2d 122 (Mo. Ct. App. 1997)(non-moving party acquiesced in Trial Court treating Motion for Judgment on the Pleadings as a summary judgment motion). Additionally, as *Keim* makes clear, the procedures provided by Mo.S.Ct.R 74.04 are to ensure that the parties and the courts understand the specific basis of the motion. *Keim*, 949 S.W.2d. Lipari does not allege here that the Trial Court failed to understand his argument. There is no evidence that the Trial Court did not understand his arguments.

Additionally, in the Trial Court, Lipari did not seek additional time to prepare a response to the Motion for Judgment and did not state in his response that he failed to understand the specific basis of the motion. Lipari's Point Four does not make any substantive arguments regarding the propriety of the judgment on the pleadings.

As part of this Argument, but not clearly within the 4th Point Relied Upon, Lipari argues that the Trial Court erred (while entering Judgment for Lathrop &

Gage) in failing to set a date within which Plaintiff was to amend his Petition. Appl.Brief at 36 (citing Mo.S.Ct.R. 67.05). Rule 67.05 does not on its face address amendment after a Judgment on the pleadings and therefore does not clearly apply in this circumstance. Additionally, later, on March 2, 2009, the Trial Court did specify a time for Plaintiff to provide his proposed First Amended Petition. Appl.Supp. LF at 432-433. Therefore, the Trial Court did not err but if it did any error was harmless because Lipari was given an opportunity to cure by being offered an opportunity to provide his proposed First Amended Petition. The Trial Court also did not err because it properly exercised its discretion to deny the amendment. *Saigh v. Anheuser-Bush*, 396 S.W.2d 9 (Mo.Ct.App. 1965) cert. denied 384 U.S. 942 (1966).

The Motion for Judgment on the Pleadings was timely and properly considered and the Trial Court did not err in granting judgment to Lathrop & Gage.

D. Conclusion

For the foregoing reasons, the Court should affirm the Judgment of the Circuit Court of the Sixteenth Judicial Circuit in favor of Lathrop & Gage LLP on Plaintiff's Petition.

II. The Trial Court Did Not Err in Denying Appellant’s Motion for Leave to File an Amended Petition Because the First Amended Petition was Never Provided to the Court and Because None of the Proposed Amendments Would Have Cured the Deficiencies In the Original Petition (Responds to Point 5).

A. Standard of Review

The Appellate Court reviews a Trial Court’s order denying a request to amend a Petition under an abuse of discretion standard. *Consumers Oil Co. v. American National Bank*, 713 S.W.2d 598, 600 (Mo.Ct.App. 1986).

B. The Trial Court Properly Exercised its Discretion

The Trial Court did not abuse its discretion in denying Lipari leave to amend his Petition. Lipari has not included the First Amended Petition in the Legal File for the review of this Court. Consequently he has waived any complaint about the Court’s order.

What is more, the first time Lipari sought to amend his Petition was after all the defendants that had been served were dismissed or had judgment granted in their favor. Appl.Supp. LF at 395. He filed the Motion, but never provided the Trial Court with his proposed First Amended Petition. Order, Appl.Supp. LF at 432-433. Instead of complying with the Court’s Order to provide the proposed First Amended Petition he sought to provide a Second Amended Petition that was not the same. Order, Appl.Supp. LF at 443. The Trial Court was justified in refusing to grant leave because Lipari refused to comply with its Order. There is

no record or evidence in support of his claim that Lipari failed to receive the Court's Order requiring him to attach the proposed First Amended Petition as he appears to argue. Appl.Brief at 40.⁶ Amendment is not required when it would be meritless or would not cure the legal problems created by the original. *Moore v. Firststar Bank*, 96 S.W.3d 898, 904 (Mo.Ct.App. 2003); *Stewart Title v. WKC Restaurant Ventures, Inc.*, 961 S.W.2d 874, 899 (Mo.Ct.App. 1998) (no abuse to deny leave to amend to state affirmative defenses that would be legally insufficient).

⁶ Although described by Lipari as an action of the Trial Court, the February 24, 2009 Order he cites on page 40 was entered by this Court. Appl.Supp. LF at 426. The Court's reference in the February 24 Order to "pending motions" does not address the Motion for Leave to File the First Amended Petition in the Trial Court but rather addresses Lipari's "Motion for Remand" filed in this Court in that appeal. Lipari plainly received the Trial Court's March 2, 2009 Order requiring him to provide his proposed First Amended Petition because he refers to the Order explicitly in his "Second Motion for Leave To Amend the Original Petition for Relief. Appl.Supp. LF at 443, n.1.

Lipari's proposed First Amended Petition is not part properly part of the Legal File.⁷ If the Court nevertheless decides to review it (or the other proposed Amended pleadings) the Court will find that the Proposed First Amended Petition does not cure any of the problems with the Petition and certainly not those relating to Lathrop & Gage. The Trial Court did not err in refusing leave to file the Amended Petitions.

⁷ The diskette served with the Appellant's Brief includes a version of the proposed First Amended Petition. It does not bear a file stamp or clerk's certificate. Plaintiff has waived any claims with respect to the Order. *Krastanoff v. Williams*, 231 S.W.3d 205 (Mo.Ct.App. 2007)(appellant's duty to compile legal file including records, proceedings and evidence necessary to the determination of the questions presented on appeal); *Mills v. Loethen*, 158 S.W.3d 257 (Mo.Ct. App. 2005)(appellant must present appellate court with sufficient record to assess the validity of a point on appeal); *Weinshenker v. Wienshenker*, 177 S.W.3d 859 (Mo.Ct.App. 2005)(appeal dismissed because appellant failed to provide essential pleadings and documents filed on the trial court on which challenged awards were based); *Jaggie v. Attaran*, 70 S.W.3d 595 (Mo.Ct.App. 2002)(appeal dismissed for failure to provide proper legal file and record).

C. Conclusion

This Court should affirm the Court's Order denying leave to amend the Petitions.

III. The Trial Court did not Err in Granting the Motion for Judgment on the Pleadings because Plaintiff's Petition Failed to State a Cause of Action Upon Which Relief can be Granted because the Conclusions Pleaded by the Petition did not State a Cognizable Claim against Lathrop & Gage or to the Extent any Facts were Stated they were Barred by Applicable Limitations Periods as Shown on the Face of the Petition and its Attachments. Responds to Points 3, 6 and 10.

A. Standard of Review

This Court reviews *de novo* an appeal from a judgment on the pleadings. The standard for a judgment on the pleadings under Mo.S.Ct.R. 55.27(b) is similar to the standard applied to a movant on a motion to dismiss. "If the pleadings from their face demonstrate that the moving party is entitled to judgment as a matter of law, then the Trial Court is justified in granting a motion for judgment on the pleadings." *Kraus v. Hy-Vee, Inc.*, 147 S.W.3d 907, 920 (Mo.Ct. App. 2004).

B. Plaintiff's Petition Did Not State a Cause of Action Against Lathrop & Gage for Anti-Trust.

The Petition did not state a cause of action against Lathrop & Gage for violation of Missouri's antitrust laws.⁸ The Petition did not state facts that Lathrop & Gage had market control and did not state facts that defined the relevant market or how a law firm could dominate a medical supply market. Lathrop & Gage was entitled to judgment because the Petition only recited the elements of the antitrust claim and then alleged a violation of them, and that is not sufficient to succeed on a claim. *See Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F.Supp.2d 1316, 1327 (D. Kan. 2006) appeal dismissed 508 F.3d, 572 (10th Cir. 2007); *TV Comm. Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1027 (9th Cir. 1992) ("Although the modern pleading requirements are quite liberal, a plaintiff must do more than cite relevant antitrust language to state a claim for relief."); *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 221 (4th Cir. 1994) ("[I]n order to adequately allege an antitrust conspiracy, the pleader must 'provide, whenever possible, some details of the time, place and alleged effect of the conspiracy; it is not enough merely to state that a conspiracy has taken place.'"); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 913-14 (5th Cir. 1952) ("[A] general allegation of conspiracy, without a statement of the facts

⁸ Lipari does not raise any arguments regarding his purported claims of tortious interference or *prima facie* tort and they are therefore waived.

constituting the conspiracy to restrain trade, its object and accomplishment, is but an allegation of a legal conclusion, which is insufficient to constitute a cause of action.”); *see also Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007) (holding that an antitrust complaint must contain enough facts that, when taken as true, show a plausible right to recovery). Even if assumed to be true for purposes of ruling on the Motion the “conclusory facts” pled by Lipari does not state a claim against Lathrop & Gage for violation of Missouri’s antitrust laws.

Additionally, any claim that Lathrop & Gage was liable for those injuries was barred by the internal statute of limitations because Lipari also alleged that the conduct took place, at the latest, in 2002. Petition at Appendix One, pp. 1-5; LF 120-125.⁹

C. Plaintiff did not Plead Facts Establishing a Violation of the Noerr-Pennington Immunity Doctrine.

Appellant’s Brief does not identify any facts, either under a Point Relied Upon or in the Statement of Facts identifying the conduct of Lathrop & Gage that

⁹ There is no cause of action within Mo.Rev.Stat. § 416.031 for tortiously interfering with “property rights” arising from antitrust violations, which is what Lipari has literally attempted to plead. Even if such a right existed, the harm occurred when the property rights were violated, which, according to Lipari’s pleadings, was more than five years ago.

he alleges is a “sham petition” that would preclude application of the Noerr-Pennington immunity doctrine to avoid Lipari’s claims.

The Appellant’s Brief does not identify the paragraphs in the Petition that establish a violation of the Missouri Anti-trust statute by Lathrop & Gage. Even if he did, his own pleadings also invoke the Noerr-Pennington immunity doctrine and therefore the “facts” do not state a cause of action. The Petition simply alleges actions to petition the government or with respect to Mr. Vratil, actually participating in government as a member of the Kansas Senate.

The cases cited by Appellant *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986) and *In Re IBP Confidential Business Documents Litigation*, 755 F.2d 1300, 1313 (8th Cir. 1985) are not pertinent. The Petition does not allege facts that Lathrop & Gage engaged in “threats, intimidation, coercion, or other unlawful acts” that had an anti-competitive purpose directed at Medical Supply Chain or Lipari. *Central Telecommunications*, 800 F.2d. at 723. In the case *In Re IBP*, the court reversed in part, a judgment in favor of a former officer of a company holding the defendant’s responses to a governmental inquiry qualified for immunity because they were made in opposition to government inquiry about certain alleged business practices. *IBP* does not hold that the type of conduct of Lathrop & Gage alleged in Plaintiff’s Petition, even if true would constitute an exception to the Noerr-Pennington immunity doctrine.

What is more, Plaintiff did not plead facts (or conclusions) like those alleged in *In Re Burlington Northern, Inc.*, 822 F.2d 518 (8th Cir. 1987). He did not allege that Lathrop & Gage was involved, directly or indirectly in prior litigation (against Lipari or anyone) and used the prior litigation for anti-competitive purposes. The Petition did not allege that Lathrop & Gage filed pleadings in some other case that were not merely baseless, but were aimed at interfering with Lipari's business by, for example, sapping his financial resources or distracting his attention. Thus, *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180 (9th Cir. 2005)(Appl.Brief at 30) is not pertinent. Even if *Freeman* were pertinent, it affirms the right of a party to defend itself in a lawsuit. *Id.* at 1183.

D. Conclusion

This Court should affirm the Court's Order denying leave to amend the Petitions.

IV. The Trial Court Did Not Commit Any Other Errors Because Its Actions Were Within Its Discretion And Even If Any Errors Were Made They Were Not Prejudicial (Responds To Points 7, 8 And 9).

A. Standard of Review, Point 7.

The Appellate Court reviews Orders relating to discovery under an abuse of discretion review. *State ex rel. Justice v. O'Malley*, 36 S.W.3d 9 (Mo.Ct.App. 2000).

B. The Trial Court Did Not Err in Requiring Mr. Lipari to follow the rules and forms of licensed attorneys. (Point 7)

The Trial Court did not err in granting the Motion (brought by Defendants other than Lathrop & Gage) instructing Lipari to serve pleadings and correspondence upon counsel and not the individual clients. Appl.Brief at 48; Appl.Supp. LF at 524. Lipari, though appearing pro se is bound by the same standards and rules of procedure as a party represented by a licensed attorney. *Dressel v. Dressel*, 221 S.W.3d 475 (Mo.Ct.App. 2007); *Gossett v. Gossett*, 98 S.W.3d 899, 900 (Mo.Ct.App. 2003). Moreover, the Order was a rational means of controlling and managing the process before the court and fully within the trial court's discretion. Lipari does not point to any specific communication he was entitled to make, but did not make as a result of the Court's Order. The communications he was making (sending discovery requests to individuals and entities already represented by counsel) did not further any business between the parties and would not encourage facilitation of settlement or avoid protracted litigation. Finally, even if the Order was made in error, it did not have any bearing on the results in this case. It was entered on March 23, 2009 (Appl.Supp LF at 524) and the case was dismissed on March 27, 2009. Appl.Supp. LF at 732.

C. The Trial Court Did Not Err in Denying Plaintiff's Motions Directed to the Answer of Lathrop & Gage. (Points 8 and 9)

1. Standard of Review.

The Court reviews actions regarding a denial of a Motion to Strike or Motion to Make More Definite and Certain under an abuse of discretion standard. *State ex rel Harvey v. Wells*, 955 S.W.2d 546 (Mo. 1997).

The Trial Court did not err in denying Plaintiff's Motion to Make Lathrop's Answer More Definite and Certain or to Strike Affirmative Defenses. Lipari fails to articulate how the Court's Order, even if in error, caused him any prejudice and it is therefore not a basis for reversal.

The Judgment on the Pleadings entered in favor of Lathrop & Gage was based on Lipari's failure to articulate a cause of action on the face of his Petition. A dismissal upon statute of limitations is proper when it is clear from the face of the petition the action is time barred. *Pate v. Pate*, 128 S.W.3d 873 (Mo.Ct.App. 2004). The answer of Lathrop & Gage contained as much factual detail as the plaintiff's claims against Lathrop & Gage. Therefore, the intention of requiring fact pleadings was fully met. *Lone Star Indus., Inc. v. Howell Trucking, Inc.*, 199 S.W.3d 900 (Mo.Ct.App. 2006) (pleading was sufficient to inform parties of issues). No ambiguity in the affirmative defenses or denials contained in Lathrop & Gage's Answer are identified in the Appellant's brief that that had any bearing on the Trial Court's ruling. He does not state where or how he was confused by

the answer or affirmatives defenses. The Trial Court did not err. Any error was harmless because it was not prejudicial.

CONCLUSION

For the foregoing reasons, the Court should affirm the Order of Judgment entered on December 29, 2008 and the Order of Dismissal on March 27, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the Brief, together with a copy of the Brief on diskette, by First Class United States Mail, Postage Prepaid, on the Appellants' counsel of record this 19th day of August, 2009:

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06
AND WESTERN DISTRICT RULE XLI

This brief complies with type-volume limitation of Rule 84.06 and Western District Rule XLI because this brief contains 403 lines and 4,638 words as counted by Microsoft Word 2002, excluding the parts of the brief exempted by Rule 84.06(b)(1). This brief complies with the typeface and the type style requirements of Rule 84.06 because this brief has been prepared in a proportionally styled typeface using Microsoft Word 2002 in 13-point font size and Times New Roman type style.

The diskettes filed with the Court and served on opposing counsel have been scanned for viruses and are virus-free.

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