IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MUSCOGEE CREEK NATION, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Civil Action Number:
	)	2:12-cv-01079-MHT-CSC
POARCH BAND OF CREEK INDIANS, *et al.*,	)	
	)	
	)	
Defendants.	)	
	)	

BRIEF IN SUPPORT OF INDIVIDUAL DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT

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INTRODUCTION

In the recently filed Second Amended Complaint (SAC, Doc. 190), Plaintiff Mekko Thompson (Plaintiff Thompson) added a new claim of outrage against nine defendants, past and present members of the Poarch Band of Creek Indians' (PBCI) Tribal Council who are now sued for the first time in their individual capacities (the Individual Defendants). The Individual Defendants move to dismiss this claim pursuant to Federal Rule 12(b)(6) on several grounds. First, the claim must be dismissed because Plaintiff Thompson's allegations only involve the Individual Defendants' legislative activities as members of the PBCI Tribal Council, and the claim is thus barred by legislative immunity. Second, the SAC fails to adequately allege all of the necessary elements of an outrage claim. Third, because the outrage claim against the newly-named Individual Defendants does not relate back to the filing of the original Complaint for statute of limitations purposes, it is untimely. The outrage claim against the Individual Defendants should be dismissed for any and all of these reasons.

BACKGROUND

A thorough and detailed description of the relevant facts is set forth in the concurrently filed Brief in Support of Tribal Defendants' Motion to Dismiss and will not be repeated here. Only a handful of the facts alleged in the SAC are relevant to the issue at hand.[1]

PBCI acquired the property at issue in this litigation in 1980, in the face of its imminent commercial development by third parties. SAC ¶ 61; SAC Ex. A, Doc. 190-3, at 5.[2] To fund its acquisition of the property, PBCI used a combination of federal preservation grant funds and a

[1] While the Individual Defendants vehemently dispute many of the allegations and characterizations of putative facts in the SAC, they will treat those allegations and characterizations as accurate for purposes of this filing as they would be required to do in the context of a motion to dismiss.

[2] All pin cites to previously filed documents are to the ECF generated page number.

donation from the previous private landowner. SAC ¶ 61. When it acquired the property, PBCI agreed to a written protective covenant to preserve the property for 20 years. *Id.* ¶ 62. PBCI also contemporaneously indicated that "[p]rior to any type of development of the property a scientifically sound archaeological program will be conducted …." Doc. 190-3 at 4. The 20-year protective covenant expired in 2000. SAC ¶ 79. After the expiration of the 20-year protective covenant, PBCI arranged for professional archaeologists affiliated with Auburn University to conduct Phase III archaeological excavations on the property prior to its potential development. *Id.* ¶¶ 100-01. Some of the cultural items, including human remains, excavated from the property are still in storage. *Id.* ¶ 121.

The Plaintiffs, Muscogee (Creek) Nation, Hickory Ground Tribal Town, and Plaintiff Thompson, allege that the PBCI first notified them of excavation on the property in 2006, at which point the Plaintiffs and the PBCI began a prolonged dialogue about the excavation and the proper treatment of excavated material. *Id.* ¶¶ 137, 139. The Plaintiffs further allege that they visited and spoke with representatives of PBCI and Auburn University in 2006 regarding human remains and associated funerary objects that had been excavated from the property. *Id.* ¶ 142; *see also* Doc. 95-11 at 2 (indicating that a meeting took place in Wetumpka, Alabama on May 9, 2006). PBCI oversaw the reinternment of excavated remains and funerary objects in 2012. SAC ¶ 150. The Plaintiffs filed suit against PBCI, the PCI Gaming Authority, several tribal officers in their official capacities, and numerous other defendants, but not the Individual Defendants, on December 12, 2012. *See* Doc. 1. The Plaintiffs allege that construction of PBCI's hotel and gaming facility took place from 2012-2014. *See* SAC ¶ 132; *see also* Doc. 124-1; Doc. 159 at 5, 11. They do not allege that any wrongful excavation or construction activity has taken place on the property since 2014.

In the Complaint filed in 2012, Plaintiff Thompson named the then-current members of the PBCI Tribal Council as defendants in their official capacities, seeking declaratory and injunctive relief for alleged violations of several federal laws. Plaintiff Thompson brought no outrage claim, did not sue anyone in an individual capacity, and did not seek monetary damages until the Second Amended Complaint, filed on March 9, 2020.[3] SAC ¶ 24. The SAC contains no allegations of discrete, individual conduct by the Individual Defendants. Rather, the SAC adds former and present "members of the Poarch Tribal Council" in their individual capacities and alleges only that they have ordered or authorized certain activity. SAC ¶¶ 24, 223, 226. In briefing in connection with his request for leave to file the SAC, Plaintiff Thompson further elaborated on the nature of the allegations against the Individual Defendants by saying that those who remain on the PBCI Tribal Council possess, by voting majority, the "power to stop the continuing outrageous, *ultra vires* conduct, but have chosen not to." Doc. 179 at 10 (citing to Tribal Council's constitutional powers and majority voting requirements).

STANDARD FOR MOTION TO DISMISS

When deciding a motion to dismiss, the court generally assumes the facts set forth in the complaint to be true for purposes of the motion and construes them in the plaintiff's favor. *See Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 406 F. Supp. 3d 1258, 1268 (M.D. Ala. 2019) (citations omitted). To survive a motion to dismiss, the complaint must set forth allegations establishing a claim to relief that is "plausible on its face." *Id.* at 1275 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The allegations "must be enough to raise a right to relief above the speculative level;" the use of "mere labels and conclusions … will not do." *Twombly*,

[3] The Plaintiffs initially sought leave to file the SAC on June 5, 2019, *see* Doc. 159, but treating the SAC as if it were filed on that date would not alter the analysis set forth herein.

550 U.S. at 555. "Crucially … the court need not accept as true 'conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts.'" *Coral Ridge*, 406 F. Supp. 3d at 1268 (quoting *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002)).

ARGUMENT

Plaintiff Thompson fails to state a claim on which relief can be granted against the Individual Defendants for three principal reasons. First, because all of the acts alleged arise from the collective action of the Individual Defendants undertaken in exercise of their legislative authority as members of PBCI's Tribal Council, the outrage claim is barred by the doctrine of legislative immunity. Second, the Individual Defendants' alleged conduct is not sufficiently extreme and outrageous to support a claim of outrage. Third, the outrage claim is barred by the statute of limitations because Plaintiff Thompson cannot meet the requirements of Federal Rule of Civil Procedure 15(c) governing the relation back of claims, and the SAC has not alleged any tortious conduct by the Individual Defendants within the two-year statute of limitations for outrage. The Court should dismiss the Individual Defendants from this case.

I. The outrage claim is barred by legislative immunity.

The outrage claim is barred because the Individual Defendants are protected by legislative immunity. Plaintiff Thompson's allegations of outrage stem from the collective action of the Council Members undertaken in the exercise of their legislative authority as members of PBCI's governing Tribal Council. "The principle that legislators are absolutely immune from liability for their legislative activities has long been recognized in Anglo-American law." *Bogan v. Scott-Harris*, 523 U.S. 44, 48 (1998). Legislative immunity is broad-sweeping, and applies to both claims for damages and claims for declaratory and injunctive relief. *Hous. Inv'rs, Inc. v. City of Clanton*, 68 F. Supp. 2d 1287, 1295 (M.D. Ala. 1999); *see also Cmty. House, Inc. v. City of Boise*,

623 F.3d 945, 959 (9th Cir. 2010) (citing *Supreme Court of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 732-733 (1980)). "Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." *Bogan*, 523 U.S. at 54. Legislative immunity applies to members of a tribal government, including each of the Individual Defendants. *Runs After v. United States*, 766 F.2d 347, 354 (8th Cir. 1985) (tribal council members enjoy "absolute legislative immunity"); *Grand Canyon Skywalk Dev., LLC v. Hualapai Indian Tribe of Ariz.*, 966 F. Supp. 2d 876, 885-86 (D. Ariz. 2013) (holding same).

Plaintiff Thompson makes sweeping allegations that the Council Members "order[ed]" and "authorized" certain acts related to the property (SAC ¶¶ 223, 226), but does not allege that any Individual Defendant committed any outrageous act alone or outside the context of collective, legislative action of PCBI's Tribal Council.[4] In fact, in support of their motion for leave to amend their Complaint to add the outrage claim, the Plaintiffs attempted to justify the addition of individual capacity claims by arguing that the Individual Defendants who remain on the PCBI Tribal Council possess, by voting majority, the "power to stop the continuing outrageous, *ultra vires* conduct, but have chosen not to." Doc. 179 at 10 (citing to Tribal Council's constitutional powers and majority voting requirements). That argument reveals that Plaintiff Thompson's claims against the Individual Defendants derive not from their individual actions, but rather from their collective authority to take legislative action on behalf of the Tribe, specifically through a majority vote of the PBCI Tribal Council. *Housing Investors*, 68 F. Supp. 2d at 1295-96 (finding that

[4] The Plaintiffs allege that Individual Defendants Stephanie Bryan and Buford Rolin, current and former chairpersons of the PBCI Tribal Council, respectively, sent letters to the Plaintiffs regarding the Tribe's actions. SAC ¶¶ 153, 158, 168. The Plaintiffs also allege that Individual Defendant Eddie Tullis, former chairman of the PBCI Tribal Council, testified regarding a bill governing disbursement of Indian Commission Claims awards. *Id.* ¶¶ 70-71. But none of these acts relate to or give rise to the outrage claim.

members of a city council and planning commission were entitled to legislative immunity for voting to reject a proposed housing project). Because the Individual Defendants' alleged actions (or inactions) giving rise to the outrage claim are plainly legislative in nature, they are entitled to legislative immunity, and Plaintiff Thompson's outrage claim should be dismissed.

II. Plaintiff Thompson fails to state a claim for outrage.

Even if the outrage claim was not barred by legislative immunity, Plaintiff Thompson has not sufficiently alleged all of the elements of outrage for each Individual Defendant. The independent "tort of outrage is a very limited cause of action that is available only in the most egregious circumstances." *Thomas v. BSE Indus. Contractors, Inc.*, 624 So. 2d 1041, 1044 (Ala. 1993). A tort of outrage requires: "(1) that the defendant's conduct was intentional or reckless; (2) that the conduct was extreme or outrageous; and (3) that it caused emotional distress so severe that no reasonable person could be expected to endure it." *Sykes v. Payton*, 441 F. Supp. 2d 1220, 1222 (M.D. Ala. 2006). To satisfy the second element, "the conduct must be 'so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society.'" *Id.* (citation omitted). Plaintiff Thompson has failed to allege the requisite intent and, in any event, the Individual Defendants' conduct is not sufficiently extreme and outrageous to support a claim of outrage.

To satisfy the first element, Plaintiff Thompson would have to allege that the conduct of each Individual Defendant was intentional or reckless. As a threshold matter, and as discussed in Section I *supra*, while Plaintiff Thompson broadly asserts that the Individual Defendants collectively committed outrageous acts intentionally, *see, e.g.*, SAC ¶ 223, he fails to articulate what each Individual Defendant actually did. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (holding that, to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim [for] relief that is plausible on its face.'" (citation omitted). Without even

identifying the discrete, allegedly outrageous acts that each Individual Defendant committed, Plaintiff Thompson certainly cannot sufficiently allege that each of them possessed the requisite mental state for committing an act of outrage. This alone prevents Plaintiff Thompson from stating a claim for outrage.

Plaintiff Thompson also must allege that the conduct of each Individual Defendant was extreme or outrageous. In Alabama, conduct has reached the level of tortious outrage only in three circumstances: "(1) wrongful conduct in the family-burial context, *Whitt v. Hulsey*, 519 So.2d 901 (Ala. 1987); (2) barbaric methods employed to coerce an insurance settlement, *National Sec. Fire & Cas. Co. v. Bowen*, 447 So.2d 133 (Ala. 1983); and (3) egregious sexual harassment, *Busby v. Truswal Sys. Corp.*, 551 So.2d 322 (Ala. 1989)." *Little v. Robinson*, 72 So. 3d 1168, 1172 (Ala. 2011). The conduct alleged here, causing the archeological excavation and analysis of the remains of unidentified historic individuals and artifacts, does not fall into any of these categories and does not rise to the level required to maintain a claim for tortious outrage. Indeed, a contrary holding would effectively outlaw the practice of archeology in the State of Alabama.

Plaintiff Thompson no doubt intends to liken the Individual Defendants' alleged conduct to that found in cases holding that acts associated with family burials may sometimes constitute tortious outrage. He cannot do so. Plaintiff Thompson alleges desecration—in the form of scientific excavation, study, and storage—of unidentified archaeological findings on land that belongs to PBCI, not destruction of a family cemetery plot or desecration of a recently deceased person's remains such as has been found to constitute outrage. *See, e.g., Gray Brown-Serv. Mortuary, Inc. v. Lloyd*, 729 So. 2d 280 (Ala. 1999) (affirming a jury's finding of outrage where funeral-home employees disinterred the plaintiff's wife's remains, removed them from her casket, destroying it in the process, poured caustic chemical on the body, and reinterred the remains in a

fouled crypt); *Whitt*, 519 So. 2d at 902 (upholding a jury verdict of outrage where the defendant bulldozed part of a fenced family burial plot on neighboring property); *Levite Undertakers Co. v. Griggs*, 495 So. 2d 63 (Ala. 1986) (affirming jury finding of outrage where undertaker wrongfully retained remains of plaintiff's husband to force payment of funeral expenses). The Individual Defendants are unaware of any case finding outrageous conduct in the context of the archeological excavation and study of the remains of unknown individuals. Accordingly, Plaintiff Thompson's allegations do not rise to the level of outrage under Alabama law.

Even if the exhumation and analysis of the archeological remains was sufficiently egregious to support a claim of outrage, Plaintiff Thompson's claim still would fail. While Plaintiff Thompson makes broad accusations that the Individual Defendants collectively ordered and authorized exhumation of sacred items, he does not allege that any single defendant directly participated in the actual exhumation, specifically ordered or directed any exhumation, or ordered or directed in the method that were used to study and store excavated materials. *Accord Hughes v. City of Montgomery*, 2013 WL 146397, at *2 (M.D. Ala. Jan. 14, 2013) (dismissing outrage claim for failing to sufficiently plead that defendants were liable for alleged conduct). By failing to allege sufficient facts that would allow the Court to make a reasonable inference as to liability, if any, for each Individual Defendant, Plaintiff Thompson fails to properly satisfy the second element of an outrage claim as to any of them.

Finally, the tort of outrage must cause "emotional distress so severe that no reasonable person could be expected to endure it." *Sykes*, 441 F. Supp. 2d at 1222. In order to be actionable, alleged conduct "must go beyond all bounds of decency and, basically, bring tears to the eyes of a thick-skinned person." *Johnson v. Fed. Express Corp.*, 147 F. Supp. 2d 1268, 1277 (M.D. Ala. 2001). The archeological excavation and study of a historic site, even including human remains

found there, simply does not rise to this level. Plaintiff Thompson alleges that he has suffered "abject pain, sorrow, anguish, torment, suffering, helplessness, grief, and anger." SAC ¶ 225. While this may be subjectively true, the proper standard is that of an objective reasonable person. The archeological removal and study of unidentified remains and artifacts is not substantially "severe" from an objective standpoint. As such, Plaintiff Thompson's allegations do not establish the tort of outrage.

III. The outrage claim is time barred.

Even if Plaintiff Thompson had alleged the elements of a viable outrage claim that was not barred by legislative immunity, any such claim would be untimely. Prior to the SAC, the Plaintiffs have never asserted an outrage claim or any other claim against the Individual Defendants. Because Plaintiff Thompson cannot meet the standards of Federal Rule 15(c), specifically that the Individual Defendants should have known back in 2012 that they would have been sued then but for a mistake regarding their identities, the outrage claim does not relate back and is long since barred by the statute of limitations.[5] Moreover, Plaintiff Thompson has failed to allege any conduct by each or any of the Individual Defendants within the limitations period that would give rise to a claim of outrage. Therefore, the continuing tort doctrine does not revive the outrage claim.

[5] The law is unsettled as to whether Alabama rules or the Federal Rules of Civil Procedure govern relation back in cases like this one, where the Plaintiffs seek to bring a purely state law claim pursuant to this Court's supplemental jurisdiction. *See, e.g., Estate of Rowell v. Walker Baptist Med. Ctr.*, 290 F.R.D. 549, 561 (N.D. Ala. 2013) ("Eleventh Circuit authority on whether relation back is governed by federal or state law in federal court is presently unsettled …."). That question need not be resolved, however, as Alabama's Rule 15(c)—the rule governing relation back of amendments changing parties or the naming of a party and the only rule that could potentially provide for the relation back of the SAC's proposed outrage claim—is modeled after its federal counterpart, and the outcome is the same regardless of which rule the Court applies. *See Ex parte Profit Boost Mktg., Inc.*, 254 So. 3d 862, 869 (Ala. 2017) (assessing Federal Rule 15(c) case law in addressing a question under Ala. Rule 15(c)).

A. *The outrage claim does not relate back.*

When, as here, a plaintiff amends a complaint to add a defendant, but does so after the running of the statute of limitations, Rule 15(c) "controls whether the amended complaint may 'relate back' to the filing of the original complaint and thereby escape a timeliness objection." *Powers v. Graff*, 148 F.3d 1223, 1225 (11th Cir. 1998) (citation omitted). The Rule allows relation back for amendments changing the party only if within 120 days of the original filing of the Complaint the party brought in by amendment:

> (i) received such notice of the action that it will not be prejudiced in defending on the merits; **and** (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

Fed. R. Civ. P. 15(c)(1)(C) (emphasis added).

The Eleventh Circuit has held that the purpose of "Rule 15(c) is to permit amended complaints to relate back to original filings for statute of limitations purposes when the amended complaint is 'correcting a mistake about the identity of the defendant.'" *Powers*, 148 F.3d at 1226 (citation omitted). That is not the case here. Rather than correcting his misidentification of a defendant to a claim set forth in or contemplated by the initial complaint, Plaintiff Thompson seeks to add an entirely new claim—common law outrage—against the Individual Defendants. The relation back doctrine is flatly inapplicable under these circumstances. *See Wells v. HBO & Co.*, 813 F. Supp. 1561, 1567 (N.D. Ga. 1992) (denying motion to amend to add officers of corporate defendant when the plaintiff knew the identity of the officers from the outset); *see also Stewart v. Bureaus Inv. Grp., LLC*, 309 F.R.D. 654, 659-61 (M.D. Ala. 2015) ("[T]he relation-back doctrine does not apply in instances where a plaintiff attempts to join entirely new defendants in addition to existing defendants.").

Plaintiff Thompson maintained in support of his motion for leave to file the SAC that the requirements of Rule 15(c)(1)(C) are met because the Individual Defendants were named in their

official capacities in the original Complaint and thus on notice of the litigation. This argument completely disregards the second half of the Rule. For relation back to occur, a newly-added defendant must have had reason to believe at the time of the original complaint that he was omitted due to mistaken identity. The Eleventh Circuit explained the importance of this aspect of Rule 15(c) in *Powers*, a case in a similar posture to this one. There, the plaintiff filed claims against a corporation based on alleged wrongdoing by the company and its brokers for manipulation of the market for certain securities. *Powers*, 148 F.3d at 1225. After the running of the statute of limitations, the plaintiff sought to add individual control persons. The plaintiff relied upon *Itel Capital Corp. v. Cups Coal Co.*, 707 F.2d 1253 (11th Cir. 1983), to argue that the amended complaint should relate back. *Powers*, 148 F.3d at 1226. The Eleventh Circuit disagreed, explaining that "*Itel* established no general rules about suits originally filed against a corporation where the plaintiff later attempts to add corporate control persons or owners as individual defendants." *Id.* The Court further explained that the purpose of Rule 15 does not support relation back in "cases where the newly added defendants were known to the plaintiff before the running of the statute of limitations and where the potential defendants should not necessarily have known that, absent a mistake by the plaintiff, they would have been sued." *Id.* The Court further pointed out that the plaintiff in *Powers* knew that the added defendants could be proper parties and that "[t]he same law and circumstances would give Defendants no reason to believe that they were omitted from the original complaint on account of mistake as opposed to some kind of strategic choice by Plaintiffs." *Id.* at 1227, n.8; *see also Krupski v. Cost Crociere S.P.A.*, 560 U.S. 538, 541 (2010) (holding that "relation back under Rule 15(c)(1)(C) depends on what the party to be added knew or should have known").

The same is true here. Plaintiff Thompson obviously knew of the Individual Defendants' identities when he filed the original Complaint because he named them in their official capacities. And yet, he failed to add them in their individual capacities and omitted a claim of outrage altogether. This was a strategic choice not a mistake in identity. And the Individual Defendants had no reason to suspect otherwise, because the original complaint sought only injunctive and declaratory relief that could not be entered against them in their individual capacities (but were potentially available in official capacity claims). Only in the newly-minted outrage claim did Plaintiff Thompson first assert any claim for monetary relief that would not have been available in his original, official capacity action.

As *Powers* makes clear, Rule 15(c) is intended to allow the correction of mistakes; it does *not* apply where, as here, the plaintiff knew the identity of a potential defendant at the time of the initial complaint, but chose, for whatever reason, not to sue that potential defendant. *See also Stewart*, 309 F.R.D. at 661-62; *Nobles v. Rural Cmty. Ins. Servs.*, 303 F. Supp. 2d 1279, 1286-87 (M.D. Ala. 2004) (Thompson, J.) (denying motion to amend because their "'mistake' was a mistake in legal judgment not a mistake in the naming of the party"); *Wells*, 813 F. Supp. at 1567 ("[E]ven the most liberal interpretation of 'mistake' cannot include a deliberate decision not to sue a party whose identity plaintiff knew from the outset."). Having alleged official capacity claims against each of the Individual Defendants in the initial complaint in this case, *see* Doc. 1, Plaintiff Thompson cannot deny knowledge of their identity. Moreover, just like the corporate control defendants in *Powers*, the Individual Defendants had no reason to suspect that they were not named individually due to a mistake as to their identity, as opposed to it being a strategic choice by Plaintiff Thompson to seek only declaratory and injunctive relief. Having made a deliberate

decision not to name the known Individual Defendants in their individual capacities in 2012, Plaintiff Thompson cannot now claim that his newly adopted legal theory relates back to that date.

B. *The outrage claim against the Council Members is time barred.*

Whether it relates back or not, the outrage claim is time barred. Under Alabama law, a claim for outrage must be brought within two years. *See, e.g.*, Ala. Code § 6-2-38(l); *Strange v. Travelers Indem. Co.*, 915 F. Supp. 2d 1243, 1244 (N.D. Ala. 2012) ("Alabama, which recognizes the tort of outrage under severely limited circumstances, has a two-year statute of limitations for the tort."). A claim for outrage accrues "at the moment the plaintiff actually suffers … distress by becoming aware of the distress-inducing information or conduct." *Holloway v. Am. Media, Inc.*, 947 F. Supp. 2d 1252, 1270 (N.D. Ala. 2013). According to the SAC, the Plaintiffs became aware of the allegedly outrageous conduct—the excavation of remains from PBCI's Wetumpka property—in 2006, so any claim for outrage first accrued at that time. *See* SAC ¶ 137.

While the initial accrual date is not necessarily dispositive, because outrage sometimes can be a continuing tort under Alabama law, *see Cont'l. Cas. Ins. Co. v. McDonald*, 567 So. 2d 1208, 1216 (Ala. 1990), that is of no help to Plaintiff Thompson here. Even assuming, *arguendo*, that Plaintiff Thompson has alleged facts supporting a continuing tort theory, Alabama continuing tort law still requires that a claim be brought within two years of the last outrageous act. *See Mardis v. Robbins Tire & Rubber Co.*, 669 So. 2d 885, 888 (Ala. 1995); *McMillian v. Johnson*, 1994 WL 904652, at *18 (M.D. Ala. Feb. 18, 1994). Because Plaintiff Thompson sought leave to file the SAC on June 5, 2019, he could not base a timely outrage claim on conduct occurring prior to June 5, 2017.[6] Plaintiff Thompson alleges no such conduct. On the contrary, the conduct alleged in

[6] This assumes the limitations period goes back to the date that Plaintiff Thompson sought leave to file the SAC. If calculated from the actual filing date, only conduct after March 9, 2018 would be covered.

support of the outrage claim pertains to the excavation of remains and funerary objects prior to and during the construction of the Tribe's hotel and gaming facility—conduct that allegedly concluded by 2014 at the latest. *See* SAC ¶¶ 132, 223-39; *see also, e.g.*, Doc. 124-1; Doc. 159 at 10 (noting that the outrage claim is asserted "against the individuals who served as Poarch officials *at the time the excavation and construction took place*" rather than against the current Tribal Council members (emphasis added)); Doc. 159 at 5 (noting that the archaeological excavation "concluded in 2011"); Doc. 159 at 11 (alleging that construction at the site continued through at least 2014, but no further); Doc. 179 at 9. Accordingly, even under a continuing tort theory, the absolute latest that Plaintiff Thompson possibly could have brought a viable outrage claim arising out of excavation or construction activity on the property was some time in 2016.

That Plaintiff Thompson continues to be distraught over actions taken outside of the limitations period, *see* SAC ¶¶ 225, 233, does not suffice to make his claim viable or timely. *See, e.g.*, *Jennings v. City of Huntsville*, 677 So. 2d 228, 230 (Ala. 1996). Otherwise, any plaintiff with a permanent injury would have an evergreen right of action. The continuing tort doctrine operates when wrongful conduct is ongoing, not when the harm for concluded conduct lingers. It does not apply here. [7]

CONCLUSION

Plaintiff Thompson's effort to obtain money damages against the Individual Defendants in their personal capacities for their collective actions as members of the PBCI Tribal Council fails for multiple reasons. It is barred by legislative immunity. It is not supported by sufficient

[7] To the extent Plaintiff Thompson relies upon any more recent activity to support his outrage claim, including the continued storage of remains alleged in passing in ¶ 226 of the SAC, he fails to allege any conduct by any Individual Defendant related to that activity. In any event, the allegedly improper storage of archeological artifacts does not rise to the requisite level of extreme and outrageous conduct under Alabama law.

allegations, particularly as to each Individual Defendant's conduct, to satisfy the elements of outrage under Alabama law. And it is hopelessly time barred. Each of these problems constitutes a separate and sufficient ground for the Court to dismiss the outrage claim under Rule 12(b)(6) and to dismiss the Individual Defendants from this case.

Respectfully submitted this 23rd day of April, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of April, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the parties entitled to receive notice.

/s/*Mark H. Reeves*
Mark H. Reeves