

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

MUSCOGEE CREEK NATION, *et al.*,

Plaintiffs,

VS.

POARCH BAND OF CREEK INDIANS, *et al.*,

Defendants.

Civil Action Number:  
2:12-cv-01079-MHT-CSC

**INDIVIDUAL DEFENDANTS' REPLY AND MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS SECOND AMENDED COMPLAINT**

## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
ARGUMENT .....	1
I. The Allegations as pled do not support a claim for outrage. ....	1
A. The Second Amended Complaint (SAC) does not give the Individual Defendants fair notice of the claim. ....	1
B. The alleged conduct does not rise to the level of outrage.....	2
C. Case law does not support a claim for outrage on the facts alleged. ....	3
II. The outrage claim is barred by legislative immunity. ....	5
A. Dismissal would not be premature. ....	6
B. Legislative immunity attached to the alleged conduct. ....	7
III. Plaintiff Thompson’s outrage claim is time-barred.....	9
A. Plaintiff Thompson’s outrage claim does not relate back because he cannot satisfy Rule 15(c)(1)(C). ....	9
B. Plaintiff Thompson alleges no outrageous acts by the Individual Defendants within the two-year limitations period. ....	13
CONCLUSION.....	15

## **TABLE OF AUTHORITIES**

### **Cases**

<i>Am. Rd. Serv. Co. v. Inmon</i> , 394 So. 2d 361 (Ala. 1980) .....	2, 3
<i>Auto. Alignment &amp; Body Serv., Inc. v. State Farm Mut. Auto. Ins. Co.</i> , 953 F.3d 707 (11th Cir. 2020) .....	2
<i>Bogan v. Scott-Harris</i> , 523 U.S. 44 (1998) .....	7, 8
<i>Callens v. Jefferson County Nursing Home</i> , 769 So. 2d 273 (Ala. 2000) .....	10
<i>Cates v. Taylor</i> , 428 So. 2d 637 (Ala. 1983) .....	4, 5
<i>Cnty. House, Inc. v. City of Boise</i> , 623 F.3d 945 (9th Cir. 2010) .....	7
<i>Colvin v. McDougall</i> , 62 F.3d 1316 (11th Cir. 1995) .....	9, 10
<i>Continental Cas. Ins. Co. v. McDonald</i> , 568 So. 2d 1208 (Ala. 1990) .....	14, 15
<i>Eastland v. U. S. Servicemen’s Fund</i> , 421 U.S. 491, 95 S. Ct. 1813, 44 L. Ed. 2d 324 (1975) .....	7
<i>Erickson v. Pardus</i> , 551 U.S. 89 (2007) .....	1
<i>Garrett v. Raytheon Co.</i> , 368 So. 2d 516 (Ala. 1979) .....	13
<i>Grand Canyon Skywalk Dev., LLC v. Hualapai Indian Tribe of Ariz.</i> , 966 F. Supp. 2d 876 (D. Ariz. 2013) .....	6
<i>Gravel v. United States</i> , 408 U.S. 606 (1972) .....	8
<i>Gray Brown-Serv. Mortuary, Inc. v. Lloyd</i> , 729 So. 2d 280 (Ala. 1999) .....	4
<i>Hill v. Shelander</i> , 924 F.2d 1370 (7th Cir. 1991) .....	12

<i>Hous. Inv'rs, Inc. v. City of Clanton</i> , 68 F. Supp. 2d 1287 (M.D. Ala. 1999) .....	7
<i>Itel Capital Corp. v. Cups Coal Co., Inc.</i> , 707 F.2d 1253 (11th Cir. 1983) .....	12
<i>Levite Undertakers Co. v. Griggs</i> , 495 So. 2d 63 (Ala. 1986) .....	4
<i>Ling v. Herrod</i> , 445 F. Supp. 2d 892 (W.D. Tenn. 2006) .....	10
<i>Lopez v. Bonanza.com, Inc.</i> , 2019 WL 5199431 (S.D.N.Y. Sept. 30, 2019) .....	2
<i>Lovelace v. O'Hara</i> , 985 F.2d 847 (6th Cir. 1993) .....	10
<i>Moon v. Harco Drugs, Inc.</i> , 435 So. 2d 218 (Ala. 1983) .....	13, 14
<i>Potts v. Hayes</i> , 771 So. 2d 462 (Ala. 2000) .....	2
<i>Powers v. Graff</i> , 148 F.3d 1223 (11th Cir. 1998) .....	12
<i>Rendall-Speranza v. Nassim</i> , 107 F.3d 913 (D.C. Cir. 1997) .....	10
<i>Robinson v. Clipse</i> , 602 F.3d 605 (4th Cir. 2010) .....	10, 12
<i>Rosales v. Dutschke</i> , 279 F. Supp. 3d 1084 (E.D. Cal. 2017), <i>aff'd</i> , 787 F. App'x 406 (9th Cir. 2019) .....	2, 8
<i>Runs After v. United States</i> , 766 F.2d 347 (8th Cir. 1985) .....	6
<i>Sanders-Burns v. City of Plano</i> , 594 F.3d 366 (5th Cir. 2010) .....	12
<i>Scott v. Taylor</i> , 405 F.3d 1251 (11th Cir. 2005) .....	7
<i>Smith v. Paladino</i> , 317 F. Supp. 2d 884 (W.D. Ark. 2004) .....	10

<i>Sunkyoung International, Inc. v. Anderson Land &amp; Livesock Co.</i> , 828 F.2d 1245 (8th Cir. 1987) .....	12
<i>Supreme Court of Va. v. Consumers Union of U.S., Inc.</i> , 446 U.S. 719 (1980).....	7
<i>Tenney v. Brandhove</i> , 341 U.S. 367 (1951).....	7
<i>Tohono O’odham Nation v. Ducey</i> , CV-15-01135-PHX-DGC, 2016 WL 3402391 (D. Ariz. June 21, 2016) .....	6
<i>U.S.A. Oil, Inc. v. Smith</i> , 415 So. 2d 1098 (Ala. Civ. App. 1982), <i>writ denied sub nom. Ex parte Smith</i> , 415 So. 2d 1102 (Ala. 1982).....	3
<i>Whitehair v. Highland Memory Gardens, Inc.</i> , 174 W. Va. 458, 327 S.E.2d 438 (1985).....	5
<i>Whitt v. Hulsey</i> , 519 So. 2d 901 (Ala. 1987) .....	3
<i>Wisconsin v. Baker</i> , 464 F. Supp. 1377 (W.D. Wis. 1978) .....	6
<b>Rules</b>	
Ala. R. Civ. P. 15(c)(2) .....	11
Fed. R. Civ. P. 15(c)(1)(B).....	11
Fed. R. Civ. P. 15(c)(1)(C).....	9, 11
<b>Regulations</b>	
Ala. Code § 6-2-38(l).....	9

Plaintiff Thompson's response to the Individual Defendants' Motion to Dismiss fails to rebut any of the three identified grounds for dismissal of his outrage claim. First, despite alleging that Stephanie Bryan, Robert McGhee, Sandy Hollinger, Keith Martin, Arthur Mothershed, Garvis Sells, Eddie Tullis, Buford Rolin, and David Gehman—nine current or former members of the Poarch Band of Creek Indians' (PBCI) Tribal Council—are liable in their individual capacities for allegedly outrageous conduct, Plaintiff Thompson has largely failed to identify with any specificity actions allegedly taken by each individual. Second, Plaintiff Thompson has failed to overcome the Individual Defendants' legislative immunity, nor does he persuasively argue that dismissal on the basis of that immunity would be premature. Indeed, dismissal is both warranted and appropriate at this stage to spare the Individual Defendants from the burden of further litigation, as the protection intends. Finally, Plaintiff Thompson cannot avoid the fact that his outrage claim is barred by the two-year statute of limitations and subject to neither the relation-back doctrine nor the continuing tort theory. Plaintiff Thompson's claim for outrage should be dismissed.

## ARGUMENT

### **I. The Allegations as pled do not support a claim for outrage.**

#### **A. The Second Amended Complaint (SAC) does not give the Individual Defendants fair notice of the claim.**

As Plaintiff Thompson concedes, his statement of the outrage claim must “give the defendant fair notice of what the ... claim is and the grounds upon which it rests.” Doc. 211 at 14 (quoting *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)).<sup>1</sup> He argues, however, that “[t]here is no obligation to plead the facts showing the Individual Defendants' intent with specificity.” *Id.* at 20. While the Individual Defendants do not assert that Plaintiff Thompson must “prove all of the elements of his outrage claim” at this stage, Doc. 211 at 12, he must nonetheless plead the allegations in a manner sufficient to give each Individual Defendant fair notice of the basis for the claim. Plaintiff Thompson has failed in this requirement. With two exceptions, Plaintiff Thompson

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<sup>1</sup> Pin-cites to the record are to the ECF generated page numbers atop each page.

only makes general allegations against the Individual Defendants collectively. *See, e.g.*, SAC ¶ 223.

Without specifying what acts each of the Individual Defendants allegedly committed, the Complaint is not sufficient to give the Individual Defendants fair notice of the claim.<sup>2</sup> *See, e.g., Auto. Alignment & Body Serv., Inc. v. State Farm Mut. Auto. Ins. Co.*, 953 F.3d 707, 731-33 (11th Cir. 2020); *Lopez v. Bonanza.com, Inc.*, 2019 WL 5199431, at \*10 n.20 (S.D.N.Y. Sept. 30, 2019) (citing several cases); *Rosales v. Dutschke*, 279 F. Supp. 3d 1084, 1091 (E.D. Cal. 2017), *aff'd*, 787 F. App'x 406 (9th Cir. 2019). Therefore, the outrage claim should be dismissed.

B. The alleged conduct does not rise to the level of outrage.

Of the two specific acts alleged against any Individual Defendants, the first is a 2012 letter sent by then-PBCI Chair Buford Rolin to Plaintiff Thompson and the Muscogee Creek Nation (MCN) Principal Chief stating that the PBCI council members hoped to “work together regarding re-interment” and asking Plaintiff Thompson and the Principal Chief to let the Council know if they would like to join for the reburial. SAC ¶¶ 153 - 58. The second specific action alleged is the mailing of a 2013 letter by then-PBCI Chair Stephanie Bryan to “tribal leaders nationwide” that Plaintiff Thompson alleges contains false statements and misrepresentations. SAC ¶¶ 168 - 178, Ex. P. Even taken as true, neither of these actions is extreme enough to pass the threshold for outrage.

The tort of outrage is “an extremely limited cause of action” in Alabama. *Potts v. Hayes*, 771 So. 2d 462, 465 (Ala. 2000); *see* Doc. 205 at 11-14 To be actionable, 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.” *Am. Rd. Serv. Co. v. Inmon*, 394 So. 2d at 361, 365 (Ala. 1980). It must also “intentionally or recklessly cause[] sever emotional distress to another” such that “no reasonable person could be expected to endure.” *Id.*

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<sup>2</sup> Plaintiff Thompson’s reliance on allegations of collective conduct in lieu of identifying specific acts by each Individual Defendant underscores that the Individual Defendants acted collectively within the sphere of their legislative duties and are protected by legislative immunity. *See infra* Part II.

The Individual Defendants do not dispute that Plaintiff Thompson may have been subjectively distressed by events related to PBCI's archaeological excavation. But the standard for the tort of outrage is an objective one; whether an individual was *subjectively* impacted does not determine whether those actions rise to the level necessary to plead a plausible claim of outrage. *See Am. Rd. Serv. Co.*, 394 So. 2d at 368 (acknowledging that while a termination of employment may have been "a humiliating experience for him personally," the employer's behavior did not rise to the level of outrage); *U.S.A. Oil, Inc. v. Smith*, 415 So. 2d 1098, 1101 (Ala. Civ. App. 1982), *writ denied sub nom. Ex parte Smith*, 415 So. 2d 1102 (Ala. 1982) (concluding that, though appellee "apparently did suffer some distress, it was not so 'severe' as to support recovery for the tort of outrage"). Here, the only specifically alleged conduct by any Individual Defendants—Buford Rolin sending a letter inviting Plaintiff Thompson to join the reburial, and Chairman Stephanie Bryan mailing a letter defending the actions of her Tribe—simply do not rise to the level of being "beyond all bounds of decency." And even taking collectively alleged conduct into account, the Individual Defendants alleged "ordering," in their capacities as elected officials of the tribal government, of an archaeological excavation by professional archeologists from Auburn University does not qualify as conduct "atrocious and utterly intolerable in a civilized society." *Am. Rd. Serv. Co.*, 394 So. 2d at 365. These allegations cannot support a claim of outrage.

C. Case law does not support a claim for outrage on the facts alleged.

Plaintiff Thompson cites to a number of cases ostensibly showing that he has sufficiently pled a claim for outrage. These cases are not analogous. For example, Plaintiff Thompson cites *Whitt v. Hulsey*, 519 So. 2d 901 (Ala. 1987), as the "[m]ost relevant of the Alabama precedent." Doc. 211 at 21. But in *Whitt*, the cemetery that the defendant bulldozed contained tombstones, which are obvious markers of the identity and location of the deceased. And in that case, witnesses could identify with specificity which individuals' remains were disturbed. *Whitt*, 519 So.2d at 905 ("[T]he tombstone of Emma Ellis, which was in the third row, stood all by itself, was gone . . . . The tombstone of little Hulda had a large chunk broken out of it."). In this case, although Plaintiff Thompson disputes that the remains at issue are "unknown individuals," he concedes that he



cannot identify any with specificity. Doc. 211 at 26 (“Regardless of whether he might or might not know all of their names currently, he knows that they are his ancestors ....”). Plaintiff Thompson does not allege with any specificity the identity of his descendants who were allegedly disturbed by the Auburn-led archaeological excavation. This distinguishes *Whitt* and other cases involving family burial plots.

Further, despite Plaintiff’s assertion that the facts in *Gray Brown-Serv. Mortuary, Inc. v. Lloyd*, 729 So. 2d 280 (Ala. 1999), are “hauntingly familiar,” Doc. 211 at 17, they are actually quite different. In *Lloyd*, a funeral home flagrantly mishandled the burial and subsequent interment of the plaintiff’s deceased wife. Specifically, after the funeral home received complaints of an odor of decaying human remains coming from the mausoleum where plaintiff’s wife was buried, funeral home employees worked to pry open the casket with a crowbar, tossed a caustic chemical on remains, and re-entombed the body after binding the casket with duct tape. *Gray Brown-Serv.*, 729 So.2d at 283. Later, funeral home employees reentered the crypt, removed most of the remains, and placed them in a body bag, leaving some remains in original casket, which they then tossed into the woods and later buried in another location. *Id.* The scientific and professionally supervised archaeological excavation at issue here cannot reasonably be compared to the willful and cruel destruction of the plaintiff’s wife’s remains in *Lloyd*.

Several of the other cases cited by Plaintiff can also be distinguished because they involve the reckless destruction or mishandling of the remains of a specific, identifiable decedent. In *Levite Undertakers Co. v. Griggs*, 495 So. 2d 63 (Ala. 1986), the surviving spouse and children of the decedent brought an outrage claim after the undertaker refused to turn over remains of the decedent until the undertaker received payment for services. *Id.* at 64. And, as noted by the Plaintiff, although the Court in that case affirmed summary judgment on the outrage claim, there is no discussion or analysis of that claim.

Nor does *Cates v. Taylor*, 428 So. 2d 637 (Ala. 1983), support Plaintiff Thompson’s position. *Cates* involved the mishandling of plaintiff’s father’s remains. The plaintiff alleged that defendants interfered with his father’s burial by refusing to allow the father to be buried in a

cemetery lot that the defendants had previously offered for that purpose. *Id.* at 638. Notably, the defendants made this refusal just 30 minutes before the funeral. In finding that the allegations supported a claim for outrage, the court explained that “[a] funeral is an observance laced with sorrow and personal grief. Defendants’ alleged actions, including waiting until 30 minutes before the graveside services so as to disrupt the funeral . . . fit the requirement of an act ‘beyond all possible bounds of decency’ and . . . ‘atrocious and utterly intolerable.’” *Id.* at 640. Here, no such abrupt interruption of the grief process is alleged. The facts of *Cates* bear almost no resemblance to those at bar.

Finally, although it is not necessary to distinguish the multitude of cases cited by Plaintiff which are outside of this jurisdiction, it is worth addressing Plaintiff’s claim that *Whitehair v. Highland Memory Gardens, Inc.*, 174 W. Va. 458, 459, 327 S.E.2d 438, 439 (1985) is “particularly instructive as persuasive precedent.” Doc. 211 at 23. In *Whitehair*, the plaintiff brought suit for the alleged mishandling and loss of several bodies during exhumation and reburial when a cemetery was relocated due to highway construction. 174 W. Va. at 460. However, as with the Alabama cases discussed above, *Whitehair* involved assertions with respect to specific, identified family members of the plaintiff—*i.e.*, the mishandling of remains of her sister, two aunts, cousin, uncle and father. *Id.* Again, these facts can be differentiated from Plaintiff Thompson’s claim because they involve the desecration of specific, identifiable family members, which objectively rises to the level of being “beyond all bounds of decency.” PBCI’s hiring of professional archeologists from Auburn University to conduct a scientific study of its own land prior to development, by any objective measure, is simply not the same as recklessly or intentionally destroying a cemetery where the location and identity of remains is marked by headstones or other markers.

None of the cases that Plaintiff Thompson cites support a claim for outrage as alleged, and the claim should be dismissed.

## **II. The outrage claim is barred by legislative immunity.**

All of the Individual Defendants are entitled to legislative immunity from Plaintiff Thompson’s outrage claim. *See* Doc. 205 at 9-11. Plaintiff Thompson asserts legislative immunity

does not attach to the conduct at issue and that dismissal on that basis would be premature in any event. Doc. 211 at 29 - 36. However, because it is apparent from the SAC that the Individual Defendants' alleged conduct is covered by their immunity, dismissal at this stage is both appropriate and necessary.

A. Dismissal would not be premature.

Plaintiff Thompson claims that dismissal at this stage would be premature because dismissal “is not advisable where the law on an issue is not settled, as is the case regarding the question of legislative immunity for Tribal Council members.” *Id.* at 29. Although, as Plaintiff notes, the Eleventh Circuit has not directly addressed whether the legislative privilege applies to tribal councils, other courts that have considered the issue have concluded that it does. *Tohono O’odham Nation v. Ducey*, CV-15-01135-PHX-DGC, 2016 WL 3402391, at \*3 (D. Ariz. June 21, 2016) (“Although there does not appear to be any case law addressing the question, the Court concludes that the legislative privilege also applies to tribal legislative bodies.”); *Runs After v. United States*, 766 F.2d 347, 354 (8th Cir. 1985) (“[I]ndividual members of the Tribal Council . . . enjoy absolute legislative immunity . . . for official actions taken when acting in a legislative capacity.”); *Grand Canyon Skywalk Dev., LLC v. Hualapai Indian Tribe of Ariz.*, 966 F. Supp. 2d 876, 885-86 (D. Ariz. 2013) (“[T]o the extent the complaint names Tribal Council members for their role in passing the takings ordinance and resolution, they have legislative immunity.”). Indeed, the only case cited by Plaintiff Thompson in which a court did *not* apply legislative immunity is *Wisconsin v. Baker*, 464 F. Supp. 1377, 1387 (W.D. Wis. 1978), and in that case the Court’s analysis was based upon the nature of the action in question (*i.e.*, enforcement of a law), not on whether the privilege applied to the Tribe’s governing body. As legislative immunity has repeatedly been applied to tribal governing bodies, there is no reason to dispute that the privilege would attach here, too.

Dismissal on the basis of immunity should be granted as early as possible. As repeatedly recognized by the United States Supreme Court, “a private civil action, whether for an injunction or damages, creates a distraction and forces [legislators] to divert their time, energy, and attention

from their legislative tasks to defend the litigation.” *Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 733 (1980) (citation omitted); *Eastland v. U. S. Servicemen’s Fund*, 421 U.S. 491, 503, 95 S. Ct. 1813, 1821, 44 L. Ed. 2d 324 (1975). Legislative immunity “would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury’s speculation as to motives.” *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951); *see also Scott v. Taylor*, 405 F.3d 1251, 1256 (11th Cir. 2005) (finding legislative immunity applicable and explaining that, even where appellants would not be subject to a judgment and would not bear the cost of their own defense, “they would still face the not inconsiderable inconveniences and distractions of a trial”).

Because the purpose of legislative immunity is “to free legislators from such worries and distractions,” *Scott*, 405 F.3d at 1256, it would be inconsistent with that purpose to require defendants to be dragged through litigation and the discovery process where it is evident from the pleadings that they are immune from suit. As the Individual Defendants in this case are cloaked in legislative immunity, there is no reason to delay in freeing them from the burdens of litigation. The outrage claim should be dismissed.

B. Legislative immunity attached to the alleged conduct.

Plaintiff Thompson asserts that legislative immunity does not apply to the Individual Defendants, arguing that Court must “analyze the precise nature of the Individual Defendants’ actions to determine whether they constitute legislative acts.” Doc. 211 at 32. However, the Court’s analysis here need not extend beyond review of the SAC for it to conclude that the Individual Defendants are entitled to immunity. The legislative immunity protection is long-recognized and very broad. *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.*, 446 U.S. at 732-33). Whether an act is “legislative” for purposes of immunity depends upon the nature of the act. *Bogan v. Scott-Harris*, 523 U.S. 44, 45 (1998). And, as Plaintiff Thompson acknowledges, resolutions and voting are elements of the legislative process which are cloaked in

immunity. Doc. 211 at 32 (citing *Gravel v. United States*, 408 U.S. 606, 625, 627 (1972); *Bogan*, 523 U.S. at 55 (holding acts of voting for an ordinance to be “quintessentially legislative.”)).

The Individual Defendants are past or present members of the PBCI Tribal Council. Pursuant to the PBCI Constitution, the PBCI Tribal Council is the legislative body of the Tribe. PBCI Constitution, § 2-1-1(a) (“Pursuant to the Constitution of the Poarch Band of Creek Indians, the legislative body of the Poarch Band of Creek Indians shall be the Tribal Council.”).<sup>3</sup> The Tribal Council legislates by memorializing final Council decisions in approved motions, ordinances, and Tribal Council Resolutions. *Id.* §§ 2-2-1(a), 2-2-1(g). Official actions such as those alleged by Plaintiff Thompson, including the passage of resolutions or motions or other votes by Tribal Council to take collective action, are precisely the type of activity covered by legislative immunity.

Thus, the conduct and subsequent harm alleged by Plaintiff Thompson arose from the collective action of PBCI’s Council Members in the exercise of their legislative authority.

With the two exceptions addressed above, Plaintiff Thompson fails to allege any actions by any Individual Defendants that were not collective actions taken in their legislative capacities. The outrage claim is based on the Individual Defendants’ alleged role in collectively arranging for an archaeological excavation of the site at issue, with Plaintiff Thompson broadly contending that the Individual Defendants “intentionally and outrageously caused the desecration of Hickory Ground” by “order[ing]” and “authoriz[ing]” certain actions. SAC ¶¶ 223, 226. These allegations are made against the Individual Defendants collectively, and Plaintiff Thompson does not allege specific conduct by each Individual Defendant sufficient to show that they participated in the “desecration.” Accordingly, the Court simply has no basis to find that the Individual Defendants are not legislatively immune. *See Dutschke*, 279 F. Supp. 3d at 1091 (holding that where plaintiffs alleged a violation of NAGPRA against tribal employees but did not specify which defendants excavated and removed the human remains, the tribal defendants were immune because that

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<sup>3</sup> The PBCI Constitution and Tribal Code are publicly available online at: *Tribal Constitution*, Poarch Band of Indians, [https://library.municode.com/tribes\\_and\\_tribal\\_nations/poarch\\_band\\_of\\_creek\\_indians/codes/code\\_of\\_ordinances?nodeId=TRCO](https://library.municode.com/tribes_and_tribal_nations/poarch_band_of_creek_indians/codes/code_of_ordinances?nodeId=TRCO) (last visited, Sept. 3, 2020).

immunity “hinges on the nature of their specific conduct, [and] plaintiffs must allege more before the court can assume on a motion to dismiss that [the defendants] excavated or removed any familial remains, and thus are not immune”).

The Individual Defendants are immune from suit because the alleged actions underlying Plaintiff Thompson’s outrage claim are legislative in nature. The Plaintiff’s failure to allege specific conduct by the Individual Defendants in any non-legislative capacity underscores this fact. The outrage claim should be dismissed.

### **III. Plaintiff Thompson’s outrage claim is time-barred.**

Outrage claims are governed by a two-year statute of limitations under Alabama law. *See* Ala. Code § 6-2-38(l); Doc. 205 at 18-19. Because none of the allegedly outrageous conduct occurred in the two-year period preceding the filing of the SAC and the outrage claims do not relate back to the December, 2012 filing of the original complaint, the outrage claims must be dismissed as time-barred.

#### **A. Plaintiff Thompson’s outrage claim does not relate back because he cannot satisfy Rule 15(c)(1)(C).**

Prior to the SAC, Plaintiff Thompson had not asserted any claim for outrage, had not sought any monetary relief, and had not asserted any claims at all against any individual capacity defendants. His 2019 assertion of an entirely new claim seeking entirely new relief against entirely new defendants does not relate back to the filing of the original complaint under Federal Rule of Civil Procedure 15(c)(1)(C). *See* Doc. 205 at 14-18.

Plaintiff Thompson asserts that “a mere change in capacity” does not implicate Rule 15(c)(1)(C). *See* Doc. 211 at 42-43. He is wrong. Many courts, including the Eleventh Circuit, apply Rule 15(c)(1)(C) to hold that the statute of limitations does not relate back for claims originally brought against a party in an official capacity and later changed to be in an individual capacity. *See, e.g., Colvin v. McDougall*, 62 F.3d 1316, 1318 (11th Cir. 1995) (denying amendment to sue police officer in his individual capacity after statute of limitations had run when original complaint was brought against him in an official capacity); *Rendall-Speranza v. Nassim*, 107 F.3d

913, 918 - 19 (D.C. Cir. 1997) (collecting cases where a court held there was no relation back of a claim brought against a party in his individual capacity when the original claim was in an official capacity); *Lovelace v. O'Hara*, 985 F.2d 847, 849 (6th Cir. 1993) (denying relation back of the statute of limitations for a claim against a defendant in an individual capacity where originally brought in an official capacity); *Ling v. Herrod*, 445 F. Supp. 2d 892, 895 (W.D. Tenn. 2006) (refusing to allow an amendment because the original complaint clearly stated that the defendant was being sued in his official capacity only and he had no reason to believe he may face liability individually until after the statute of limitations had run); *Smith v. Paladino*, 317 F. Supp. 2d 884, 888 (W.D. Ark. 2004) (denying plaintiff's amendment to add an individual capacity claim against Board member originally named in her official capacity, noting that "numerous courts have held that Rule 15(c) does not allow a plaintiff who sued a state entity in its official capacity to later add an individual-capacity claim").

Change to the capacity of a party triggers Rule 15(c)(1)(C) because that section governs the changing "the naming of the party." Indeed, one of the cases on which Plaintiff Thompson relies explicitly holds that when the naming of a party is changed from an official capacity to an individual capacity, Rule 15(c)(1)(C)'s additional requirements must be satisfied. *Robinson v. Clipse*, 602 F.3d 605, 608 (4th Cir. 2010). Plaintiff Thompson's new tort claim against the Individual Defendants in their individual capacities, filed years after having named them in their official capacities, is significant because it gives rise to personal liability. *See Colvin*, 62 F.3d at 1318 ("We stress as much as we can that the difference between an official capacity suit and an individual capacity suit is a big difference."); *see also Lovelace*, 985 F.2d at 850 ("[T]he distinction between an official capacity and an individual capacity suit is significant."). Disregarding the well-established federal authority on this point, Plaintiff Thompson relies upon *Callens v. Jefferson County Nursing Home*, 769 So. 2d 273 (Ala. 2000), to argue that his untimely claim for outrage should relate back. *Callens* is inapplicable, however, because it did not involve a change in capacity or other change in the naming of a party; the plaintiff merely amended to add claims against parties in the same capacity that they had already been sued. *Id.* at 278. Accordingly, Rule



15(c)(1)(C) did not apply, and the court needed to only consider whether the claims arose out of the conduct, transaction, or occurrence set in the original pleading. *See* Fed. R. Civ. P. 15(c)(1)(B); Ala. R. Civ. P. 15(c)(2).

Because Rule 15(c)(1)(C) applies here, Plaintiff Thompson is entitled to relation back only if he can show that, within the initial Rule 4(m) service period, the Individual Defendants: (1) had notice of the action and will not be prejudiced; *and* (2) should have known that the action was brought against them individually but for a mistake in their identities. Fed. R. Civ. P. 15(c)(1)(C). With respect to notice, Plaintiff Thompson suggests that the Individual Defendants' general knowledge of the lawsuit suffices to satisfy the notice requirement of Rule 15(c)(1)(C). But the Rule requires not only general knowledge of the lawsuit, but also notice of capacity in which the party is being sued. *See, e.g., Colvin*, 62 F.3d at 1318-19; *Lovelace*, 985 F.2d at 850-51. Plaintiff Thompson's previous complaints only asserted official capacity claims for declaratory and injunctive relief for alleged violations of federal statutes. SAC ¶ 234. The prior pleadings contained no tort claims or claims for emotional distress and sought no money damages. It was only after the statute of limitations on outrage had run that Plaintiff Thompson asserted the tort claim and sought to hold the Individual Defendants personally liable for monetary damages. SAC ¶ 234-35. During the statute of limitations and 4(m) service period, the Individual Defendants had no notice or reason to believe that Plaintiff Thompson intended to hold them personally liable for money damages. Absent such notice, Rule 15(c)(1)(C) is not satisfied.

Likewise, Plaintiff Thompson cannot show that the Individual Defendants should have known that the action was brought against them but for a mistake in their identities. It is clear that Plaintiff Thompson knew of the Individual Defendants' identities all along. Indeed, as he points out in his Opposition Brief, he named each and every one of them in an official capacity in the original Complaint seeking declaratory and injunctive relief—relief that is consistent with the official capacity claims. There was no “misnomer,” as Plaintiff Thompson now claims. He simply made a strategic decision to only bring official capacity claims and not to seek tort liability against



the Individual Defendants. Then, after the statute of limitations had run, he changed his mind. This was not a mistake in identity.

Plaintiff Thompson relies heavily on *Itel Capital Corp. v. Cups Coal Co., Inc.*, 707 F.2d 1253 (11th Cir. 1983), an outlier case where the Court made a factual finding that the owner of a defendant corporation should have known he would be named when the complaint was filed but for a mistake by the plaintiff. *Id.* at 1258. The Eleventh Circuit has since limited *Itel* to its facts, explaining that the decision establishes “no general rule” and further clarifying that the purpose of Rule 15(c) does not support cases where the defendants were known to plaintiff at the time of the original filing. *See Powers v. Graff*, 148 F.3d 1223, 1226 (11th Cir. 1998). The out-of-Circuit cases Plaintiff Thompson that relies upon, involved similar factual findings that the defendant knew that a mistake was made and that a claim should have been brought against him individually. *See Robinson*, 602 F.3d at 610 (finding that the newly named defendant “knew within the limitation period that he was the party [plaintiff] intended to sue” because he was served and answered the amended complaint changing the claim to an individual capacity one within the Rule 4(m) period); *Sanders-Burns v. City of Plano*, 594 F.3d 366, 380 (5th Cir. 2010) (finding that plaintiff made individual claims in the original complaint but “mistakenly” named defendant in his official capacity, as opposed to having made a strategic decision).

In *Sunkyoung International, Inc. v. Anderson Land & Livesock Co.*, 828 F.2d 1245 (8th Cir. 1987), another case cited by Plaintiff Thompson, the Court explained that it could only allow relation back because the change in capacity “did not open them to the imposition of additional liability.” *Id.* at 1252. That is simply not the case here. On the contrary, Plaintiff Thompson is seeking to impose additional liability against the Individual Defendants in the form of a new claim seeking monetary damages. Plaintiff Thompson also relies heavily upon *Hill v. Shelandier*, 924 F.2d 1370 (7th Cir. 1991), but in that case the Court made a factual finding that the original complaint “when ‘read in its entirety’ plainly shows that an individual capacity suit was intended.” *Id.* at 1374. In contrast here, a reading of the original and first amended complaints makes clear

that no individual claims were brought, only claims in an official capacity, with corresponding relief applicable to the official capacity claims. No tort claims for outrage or damages were pled.

Plaintiff Thompson suggests that the fact that the defendants named in their official capacity invoked sovereign immunity somehow indicates that the Individual Defendants believed that they were being sued individually. Doc. 211 at 48. That argument is precisely backwards. The assertion that the “tribal officials retain sovereign immunity when acting in their official capacity,” Doc. 76 at 10, actually demonstrates that the tribal officials understood that they were being sued in their *official* capacities. This case does not involve a misnomer or other mistake. Plaintiff Thompson made an intentional, strategic decision not to sue the Individual Defendants personally and then changed his mind when it was too late. For all these reasons, the outrage claim does not relate back under Rule 15(c)(1)(C).

B. Plaintiff Thompson alleges no outrageous acts by the Individual Defendants within the two-year limitations period.

Plaintiff Thompson’s putative outrage claim is time-barred because it accrued well over two years prior to the filing of the SAC. *See* Doc. 205 at 18-19. Plaintiff Thompson’s effort to avoid the time bar by claiming to assert a continuing tort fails because he has not alleged that the Individual Defendants committed the requisite tortious acts within the statutory period.

Under Alabama law, a statute of limitations begins to run in favor of the party liable from the time the cause of action accrues. *Moon v. Harco Drugs, Inc.*, 435 So. 2d 218, 220 (Ala. 1983) (citing *Garrett v. Raytheon Co.*, 368 So. 2d 516, 518-19 (Ala. 1979)). A cause of action accrues when injury occurs, and the statute of limitations begins to run whether or not the full amount of damages is apparent at the time of the first legal injury. *Id.* at 220. Here, according to the SAC, the Plaintiff Thompson became aware of the excavation of remains no later than 2006, so any claim accrued at or before that time. *See* SAC ¶ 137. Plaintiff Thompson filed his outrage claim in 2019. The claim is thus barred by the two statute of limitations for outrage.

Plaintiff Thompson erroneously argues that he has timely asserted a continuing tort. For a continuing tort theory to apply, Plaintiff Thompson would have had to allege that the Individual

Defendants committed “repeated wrongs.” *Moon*, 435 So. 2d at 220. Here, there is no allegation of repeated tortious acts by the Individual Defendants that could be termed a “continuous tort.” *Id.* (holding that the statute of limitations barred plaintiffs’ claims because “[n]othing in the facts alleged . . . supports their claims that [defendant] committed repeated acts of negligence which could be termed a ‘continuous tort’ and which would extend the statutory limitations period.”).

Even if the allegations could be considered a continuous tort, Alabama law requires that Plaintiff Thompson must have alleged that each Individual Defendant engaged in tortious conduct prior to the expiration of the two-year statute of limitations.<sup>4</sup> See Doc. 211 at 29 (“[T]he statute of limitations begins to run upon the Individual Defendants’ last tortious act.”); *Continental Cas. Ins. Co. v. McDonald*, 568 So. 2d 1208, 1216 (Ala. 1990) (explaining the continuing tort “arising from continuing dealings between the parties, will not be barred until two years *after the last tortious act by the defendant*”) (emphasis added). Therefore, in *McDonald*, a case Plaintiff Thompson principally relies upon, the court applied the continuing tort concept because the tortious conduct “was continuing even up to the time the action was filed.” 567 So. 2d at 1217. That is simply not the case here.

Plaintiff Thompson baldly asserts that “conduct” continued up to and continuing past the filing of the SAC, but he fails to identify a single tortious act by any Individual Defendant occurring within the statutory period. He alleges only that the Individual Defendants “intentionally and outrageously caused the desecration of Hickory Ground” by “order[ing]” and “authoriz[ing]” its excavation. SAC ¶¶ 223, 226. At the same time, he concedes that construction activities continued only “until 2014,” making that the absolute latest date of any purported tortious act by any Individual Defendants. Doc. 211, 40 of 51. Plaintiff Thompson makes no allegations regarding any Individual Defendants’ conduct occurring thereafter.<sup>5</sup> He makes only a vague allegation that

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<sup>4</sup> Again, Plaintiff Thompson’s collective allegations are a problem. Even if he alleged that one individual defendant committed a tortious act within the relevant time period—which he has not—that could not support a continuing tort theory against the other eight Individual Defendants.

<sup>5</sup> The only specific allegations of any conduct by particular Individual Defendants occurred in 2012 and 2013, SAC at 35, ¶¶ 153 - 58, 168 - 78, well outside the two-year limitations period.

the harm caused by Individual Defendants' prior conduct continues until "**Poarch** is required to take remedial measures," not Individual Defendants. SAC ¶ 233. Similarly, all of the allegations regarding reinternment of remains do not allege tortious conduct by Individuals Defendants, but rather by Poarch. SAC ¶ 120 ("[U]pon information and belief, **Poarch** directed the cultural items from the Hickory Ground site be stored in a manner that has caused and is continuing to cause damage further damage to the items.").

Moreover, *McDonald* does not hold that the statute of limitations turns on the plaintiff having suffered additional emotional distress during the statute of limitations, as Plaintiff Thompson suggests. Doc. 311, 36 of 51. Rather, it holds that in the context of a continuing tort, the statute of limitations is determined by the defendant's last tortious act. *Id.* at 1216. Plaintiff Thompsons' extensive references to allegations about his continued distress are thus irrelevant. Without allegations of tortious conduct by the Individual Defendants within the statutory timeframe, Plaintiff Thompson's outrage claim fails.

### CONCLUSION

Insufficiency of the allegations as pled, legislative immunity, and the statute of limitations each and together are fatal to Plaintiff Thompson's outrage claim. As he has failed to state a claim upon which relief can be granted against the Individual Defendants, the Court should dismiss the outrage claim.

Respectfully submitted this 4<sup>th</sup> day of September, 2020.

s/Mark H. Reeves

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 4th day of September 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 following:

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