STATE OF MICHIGAN

COURT OF APPEALS

KEWEENAW BAY INDIAN COMMUNITY and KEWEENAW BAY INDIAN TRIBAL COUNCIL,

Plaintiffs,

and

WAYNE SWARTZ, WILLIAM EMERY, ANN DURANT, TERRIE DENOMIE, AMY SAINT ARNOLD, ROSEMARY HAATAJA, MICHAEL LAFERNIER, ISADORE MISEGAN, RICHARD SHALIFOE, and PAULINE KNAPP-SPRUCE,

Appellants,

v

ALAN W. CLARKE,

Defendant-Appellee.

UNPUBLISHED
January 11, 2000

No. 214015
Baraga Circuit Court
LC No. 97-004338-CZ

Before: Griffin, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Appellants Wayne Swartz, William Emery, Anne Durant, Terri Denomie, Amy Saint Arnold, Rosemary Haataja, Michael Lafernier, Isadore Misegan, Richard Shalifoe and Pauline Knapp-Spruce appeal as of right from an order granting defendant summary disposition in this defamation case. We affirm.

On May 29, 1997, the Keweenaw Bay Indian Community (KBIC) and the Keweenaw Bay Indian Community Tribal Council (Tribal Council) filed suit against defendant, an attorney representing a dissident faction of KBIC known as "Fight for Justice," for allegedly defaming them when defendant claimed that he had evidence of "widespread corruption" and "links to organized" crime by Tribal Council members and KBIC employees. This defamation purportedly occurred in statements made to a radio station on May 29, 1996.

Defendant moved for summary disposition under MCR 2.116(C)(8) and (10).[1] In response and without leave of the trial court, appellants, ten individuals who were members of the Tribal Council in May 1996, filed on November 10, 1997, an "amended complaint" alleging defamation. Notably, the amended complaint neither listed the original plaintiffs, KBIC or the Tribal Council, as parties to the matter, nor did it list two other council members, KBIC Chairman Fred Dakota and Gary Loonsfoot, Sr.

Defendant moved to strike the amended complaint pursuant to MCR 2.115(B). In his motion, defendant maintained that the amended complaint completely removed the original plaintiffs from the suit, substituted ten new individuals, and changed the factual allegations. Pertinent to this appeal, defendant argued that the amended complaint was barred by the applicable one-year statute of limitations, MCL 600.5805(7); MSA 27A.5805(7), because the amendment adding new parties to the suit did not relate back to the filing of the original complaint.

Following a hearing on defendant's motions to strike the amended complaint and summary disposition, the trial court granted both motions, stating in pertinent part:

> [W]e are effectively changing the nature of the parties by the amended complaint in this case. Therefore, the rule in *Hurt v Michael's Food [Center, Inc*, 220 Mich App 169; 559 NW2d 660 (1996)] would suggest that the amended complaint does not relate back to the date of filing, and therefore, under the statute of limitations which has been cited in the briefs as found in the RJA 600.5805(7) as one year would have run prior to the filing of the amended complaint, and for that reason, allowing the amended complaint would be futile. It would be subject to an immediate, and is now being subject to a claim of – that it should be dismissed on summary disposition because of a running of the statute of limitations.
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> Furthermore, for purposes of our record here, I conclude as well that the amended complaint would be, and I believe is at this time by the defendant subject to the same claim that there is inadequate specificity of a claim against the named plaintiffs, of a wrong committed against the named plaintiffs directly. This would effectively be the C-8 motion for summary disposition under MCR 2.116, because as I've observed earlier, the complaint and amended complaint here alleges that Mr. Hart broadly or perhaps ambiguously asserted corruption on the Tribal Council. There is no claim in the amended complaint that the defendant asserted corruption or links to organized crime by any particular member of the Tribal Council, and most notably the ten named plaintiffs. And I think frankly, it – the plaintiffs here, through their attorneys, have essentially admitted that if Mr. Clarke made that statement and if his reference was to Fred Dakota, who was on the Tribal Council at the time who was subsequently indicted and convicted, that the lawsuit would not and could not be filed for substantive reasons.
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> * * *

> *[T]he motion to strike the amended complaint is granted, and thus, though it hasn't been placed in directly this context here, substantively the suit is dismissed on the basis of summary disposition for statute of limitations reasons* and independently on C-8 grounds for ambiguity in the claim of slander, which of course Michigan law requires being alleged with specificity and great particularity. [Emphasis added.]

The final order incorporating the trial court's oral opinion indicates that defendant's motion to strike appellants' amended complaint was granted "*because the statute of limitations has run.*"

As a preliminary matter, we note that dismissal on the basis of a failure to file a claim within the appropriate statute of limitations is properly raised on a motion for summary disposition pursuant to MCR 2.116(C)(7), not a motion to strike a complaint under MCR 2.115(B). See *Employers Mutual Casualty Co v Petroleum Equipment, Inc*., 190 Mich App 57, 62-63; 475 NW2d 418 (1991). MCR 2.115(B) provides:

> On motion by a party or on the court's own initiative, the court may strike from a pleading redundant, immaterial, impertinent, scandalous, or indecent matter, or may strike all or part of a pleading not drawn in conformity with these rules.

This court rule is designed to test the formal, not legal, sufficiency of the pleadings:

> It is reasonably clear that the language in question is not an invitation to use the motion to strike to test the legal sufficiency of the pleadings, although that was once one of the functions of the motion (under a differently worded rule). There are two bases for this conclusion. First, Federal Rule of Civil Procedure 12(f), upon which the MCR 2.115(B) was based, was amended in 1948 to add a provision for striking "any insufficient defense." Although the drafters of GCR 1963, 115.2, predecessor to MCR 2.115(B), were aware of the amendment, they omitted the language in question from the Michigan rule. Second, it is MCR 2.116 (formerly GCR 1963, 116 and 117) that serves the function of testing the sufficiency of the pleadings, and allowing MCR 2.115(B) to do so as well would be superfluous.
>
> Although there are occasional cases in which it appears that a court approved the use of a motion to strike to challenge the legal sufficiency of the pleadings, such cases have involved pleadings with obvious formal defects. In other words, while the legal sufficiency of the pleadings is to be tested by a motion for summary disposition under MCR 2.116, the formal sufficiency of the pleadings may be tested by a motion under MCR 2.115(B). . . .
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> If a motion is labeled a motion to strike but attacks the substantive rather than the formal sufficiency of pleadings, it should be considered as simply mislabeled and treated as a motion made under MCR 2.116. If this is done, the requirements of MCR

> 2.116 should, of course, be applied. [Dean & Longhofer, Michigan Court Rules Practice, (4th ed), § 2115.4, p 346 (1998).]

See also *Butler v Detroit Automobile Inter-Insurance Exchange*, 121 Mich App 727, 736; 329 NW2d 781 (1982).

In this case, the parties' arguments and the trial court's oral ruling on defendant's motion to strike indicate that while there was some ambivalence in terminology, the motion to strike was essentially treated as one for summary disposition pursuant to MCR 2.116(C)(7). "A mistake in labels is not fatal." *Id.* Consequently, we will review the trial court's order granting defendant's motion to strike as an order granting summary disposition under MCR 2.116(C)(7).

When reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(7), this Court accepts the plaintiff's well-pleaded allegations as true and construes them in the plaintiff's favor. *Kuebler v Equitable Life Assurance Society of the US*, 219 Mich App 1, 5; 555 NW2d 496 (1996). If there are no facts in dispute, the issue whether the claim is statutorily barred is one of law for the court that is reviewed de novo. *Id.*; *Stabley v Huron-Clinton Metropolitan Park Authority*, 228 Mich App 363, 365; 579 NW2d 374 (1998).

Addressing the merits of the present matter, the determinative issue is whether the relation-back doctrine set forth in MCR 2.118(D) applies to the amended complaint to bring it within the statute of limitations. The trial court, following *Hurt v Michael's Food Center, Inc*, 220 Mich App 169; 559 NW2d 660 (1996), concluded that the relation-back doctrine did not apply because appellants used the amended complaint in an attempt to add new parties to this action. We agree.

MCR 2.118(D) provides:

> Except to demand a trial by jury under MCR 2.508, an amendment relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading.

However, in *Employers Mutual, supra* at 63, this Court recognized an exception to the broadly worded court rule:

> Although an amendment generally relates back to the date of the original filing if the new claim asserted arises out of the conduct, transaction, or occurrence set forth in the original pleading, MCR 2.118(D), *the relation-back doctrine does not extend to the addition of new parties*. [Emphasis added.]

See also *Thomas v Process Equipment Corp*, 154 Mich App 78, 84-85; 397 NW2d 224 (1986); *Browder v International Fidelity Ins Co*, 98 Mich App 358, 361; 296 NW2d 60 (1980), aff'd 413 Mich 603; 321 NW2d 668 (1982).

Subsequently, in *Hurt*, this Court applied the rule set forth in *Employers Mutual* and disallowed application of the relation-back rule to the addition of a new party plaintiff. In *Hurt*, two men held for allegedly shoplifting a jar of peanut butter sued a grocery store for false imprisonment and other claims. The original plaintiff, Hurt, was released without being charged. The amended plaintiff, Hicks, was charged but the charges were later dropped. The complaint was amended to add Hicks as a party-plaintiff after the statute of limitations had run on the false imprisonment claim. Despite identical false imprisonment claims arising out of the same circumstances, the *Hurt* Court found, albeit reluctantly, that the amended plaintiff's claim was time barred and could not relate back to the filing of the original complaint:

> Pursuant to Administrative Order No. 1996-4, we are constrained to follow *Employers Mutual* and affirm the circuit court's ruling barring plaintiff Hicks' false imprisonment claim as untimely because the relation-back rule does not extend to the addition of a new party. However, were it not for the administrative order, we would follow *Hayes-Albion Corp v Whiting Corp*, 184 Mich App 410; 459 NW2d 47 (1990), and hold that the relation-back rule extends to the addition of a new party.[2] [*Id.* at 179.]

It is significant to note that in the wake of the *Hurt* decision, "[t]he judges of this Court having been polled pursuant to Administrative Order No. 1996-4, and the result of the poll being a majority of the judges oppose convening a special panel, it is ordered that a special panel shall not be convened." *Hurt v Michael's Food Center, Inc*, 220 Mich App 805; 566 NW2d 3 (1997). Our Supreme Court subsequently denied leave to appeal and reconsideration in *Hurt*. See 456 Mich 900; 575 NW2d 554 (1998). Thus, the principle reiterated in *Hurt* -- that the relation-back rule of MCR 2.118(D) does not apply to the addition of a new party -- ultimately controls the outcome of the present case.

Quoting *Stamp v Mill Street Inn*, 152 Mich App 290, 298-299; 393 NW2d 614 (1986), a case which preceded the *Hurt* decision, appellants nonetheless argue that "amendment of pleadings may be allowed to change the identity of a party plaintiff where the plaintiff originally brought an action in the wrong capacity and the new plaintiff may be allowed to take advantage of the former action if the original plaintiff had, in any capacity, either before or after the commencement of the action, an interest in the subject matter of the controversy." Appellants allege that there are no "new" plaintiffs in this case; they argue that in response to defendant's motion for summary disposition, appellants amended their complaint, dropped the claims of the original plaintiff KBIC and proceeded in their individual capacities instead of their official capacity as the Tribal Council.

However, as the trial court recognized,[3] the proffered amendment was not merely a ministerial change in name, designation, or capacity, but rather a replacement of the original plaintiffs with completely distinct parties. The original plaintiffs were a governmental entity, KBIC, and its governing body, the Tribal Council. However, the amended plaintiffs are not even all the individual members of the governing body. Although twelve individuals constitute the Tribal Council, only ten attempted to sue as individual plaintiffs. Notably, the amended complaint does not name the KBIC chairman, Fred Dakota, the most likely focal point of defendant's allegedly defamatory statements, as a party-plaintiff. As a member of the Tribal Council, Dakota's June 1997 federal bribery and tax evasion convictions

stemming from kickbacks taken from a slot machine manufacturer would be instrumental to a determination of the validity of the slander claim by the original plaintiffs. His selective removal from the amended complaint changes the entire nature of the case and belies appellants' argument that the Tribal Council and the ten individuals named as amended plaintiffs are one and the same.

The concept that the individual members of a governing body are distinct parties from the governing body itself finds support by analogy. As explained in *Environair, Inc v Steelcase, Inc*, 190 Mich App 289, 292; 475 NW2d 366 (1991):

> In Michigan, the law treats a corporation as entirely separate from its shareholders, even where one person owns all the corporate stock. . . . Generally, a suit to enforce corporate rights or to redress or prevent injury to the corporation, whether arising out of *contract or tort*, must be brought in the name of the corporation and not that of a stockholder, officer, or employee. [Citations omitted. Emphasis in original]

Moreover, slander is a personal tort with different required elements depending on whether the plaintiff is an entity or an individual. Although a corporation "may successfully assert a cause of action for defamation if it operates for profit 'and the matter tends to prejudice it in the conduct of its business or to deter others from dealing with it. . . ,'" *Northland Wheels Roller Skating Center, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 328; 539 NW2d 774 (1995) [citation omitted], "a corporation is not defamed by communications defamatory of its officers, agents or stockholders unless they also reflect discredit on the method by which the corporation conducts its business." 3 Restatement Torts, 2d, § 561, comment (b) on clause (a), p 159. Thus, a claim of slander by the original plaintiffs, KBIC and the Tribal Council, based on a speech made in connection with the investigation and subsequent conviction of the tribal chairman for criminal activity related to the official business of the tribe is a very different claim than that of other council members in their individual capacities based on the same speech. Consequently, appellants' argument that less than all individual members of the Tribal Council are the same parties as the KBIC and its Council is without merit.

There is a one-year period of limitation for the present action alleging libel or slander. MCL 600.5805(7); MSA 27A.5805(7). The period of limitation begins to run at the time a cause of action accrues and an action must be commenced within the time allotted. MCL 600.5805(1); MSA 27A.5805(1); *Meek v Michigan Bell Telephone Co*, 193 Mich App 340, 343-344; 483 NW2d 407 (1991). A claim accrues at the time an actor commits the alleged wrong and all the elements of a claim exist in order to bring a complaint. MCL 600.5827; MSA 27A.5827; *Lemmerman v Fealk*, 449 Mich 56, 63-64; 534 NW2d 695 (1995).

In this case, because defendant allegedly defamed the original plaintiffs on May 29, 1996, they timely filed their complaint by May 29, 1997, the last day of the limitation period. However, appellants' November 10, 1997, attempt to amend the complaint clearly fell outside the one-year period of limitation by approximately 5 1/2 months. Because the statute of limitations has run as to the amended plaintiffs and the relation-back doctrine does not apply to the addition of new parties, *Employers Mutual* and *Hurt*, *supra*, the trial court properly granted summary disposition in favor of defendant.

Our ruling with regard to the statute of limitations issue effectively renders it unnecessary to address the remaining grounds on which summary disposition was granted.

Affirmed.

/s/ Richard Allen Griffin
/s/ David H. Sawyer

[1] In his motion for summary disposition, defendant argued that because KBIC and the Tribal Council were governmental entities, they could not sue for libel or slander; even assuming that plaintiffs could sue, they had failed to plead a cause of action with the required specificity.

[2] The *Hayes-Albion* Court held, *supra* at 418, that:

> [W]here the original plaintiff had, in any capacity, an interest in the subject matter of the controversy, the defendant had notice of the interest of the person sought to be added as a plaintiff, and the new plaintiff's claim arises out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, then a new plaintiff may be added and the defendant is not permitted to invoke a limitations defense.

[3] In ruling on defendant's motions, the trial court noted:

> I think that has some significance because while the amended complaint names ten individual human beings [who] were members of the Tribal Council at the time, the assertions in the amended complaint, just like the original one, was to the effect that the defendant, Mr. Clarke, stated on May 29th that he had evidence in his possession of widespread corruption and links to organized crime, quote, on the Tribal Council, end quote. The assertion in the amended complaint, like the original complaint, was not to the effect, notably not to the effect that Mr. Clarke said there was corruption or links to crime on the part of every member of the Tribal Council or particular members of the Tribal Council, but simply on the Tribal Council.