IN THE DISTRICT COURT OF THE CHEROKEE NATION

CHEROKEE NATION EDUCATION CORPORATION, d/b/a CHEROKEE NATION FOUNDATION, **Plaintiff,** **v.** **KIMBERLIE GILLILAND,** **Defendant.**	**Case No. CV-16-397**

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CHEROKEE NATION
DISTRICT COURT
KRISTI MONCOOYEA
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DEFENDANT'S REPLY IN SUPPORT OF
<u>MOTION TO DISMISS EMBEZZLEMENT AND CONVERSION CLAIMS</u>

Defendant Kimberlie Gilliland ("Gilliland") submits this reply to Plaintiff Cherokee Nation Education Corporation's ("CNEC") brief in opposition to Gilliland's motion to dismiss.

I. <u>THE STATUTE OF LIMITATIONS BARS CNEC'S EMBEZZLEMENT AND CONVERSION CLAIMS</u>

A. <u>The Purpose Underlying A Statute Of Limitations</u>

"Statutes of limitations are primarily designed to assure fairness to defendants." *Turgeau v. Admin. Review Bd.*, 446 F.3d 1052, 1058 (10th Cir. 2006) (*quoting Burnett v. NY Cent. R.R.*, 380 U.S. 424, 428 (1965)). Statutes of limitations are designed to protect a defendant who might otherwise be compromised in defending a claim that has grown stale as a direct result of a person who has negligently failed to pursue his rights. *E.g., Watkins v. Cent. State Griffin Mem'l Hosp.*, 377 P.3d 124, 132, 2016 OK 71, ¶ 29. "The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Turgeau*, 446 F.2d at 1058 (*quoting Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 554 (1974)).

Here, all the acts CNEC alleges in the petition occurred on or before July 13, 2013. CNEC further alleges that the independent audit on which it bases its claims was released on April 24, 2014. CNEC has offered no explanation as to why it waited over two years after its claims accrued to assert its embezzlement and conversion claims against Gilliland.

B. The Statute Of Limitations In Effect At The Time An Action Was Filed Controls

Gilliland was not able to find, and CNEC does not cite, any constitutional, statutory or common law authority from the Cherokee Nation on this point. This Court may therefore look to applicable decisions from federal and state courts. 12 CNCA § 3.

Both federal and state courts have held that the statute of limitations in effect when an action was filed controls. *E.g., Patterson v. Gaines*, 47 U.S. 550, 601-02 (1848); *United States v. Flores*, 135 F.3d 1000, 1004 (5th Cir. 1998); *Sheffel v. Cities Serv. Oil Co.*, 1950 OK 234, ¶ 0 (syl. 2), 222 P.2d 1024, 1024 (syl. 2). The statute of limitations in effect on July 27, 2016 when CNEC filed this action was the two-year statute of limitations set forth in 12 CNCA § 12.

C. The Two-Year Statute Of Limitations In 12 CNCA § 12 Controls CNEC's Embezzlement And Conversion Claims

When CNEC commenced this action on July 27, 2016, 12 CNCA § 12 provided, in relevant part, as follows:

> Judgment shall not be rendered for the recovery of any claim or demand for trespass upon real property, **taking, detaining or injuring personal property, including Actions for the specific recovery of personal property, for injury to the rights of others,** and for relief on the ground of fraud, except as provided in the preceding sections, in any suit brought before the Courts of this Nation unless such suit be instituted for the recovery thereof, as required by law, with two (2) years next after the time at which the cause of Action shall have been accrued to the person bringing the same, or to the person through whom he claims.

12 CNCA § 12 (emphasis added). CNEC's conversion claim and, to the extent it even exists, CNEC's civil embezzlement claim,[1] clearly fall within § 12. Indeed, CNEC concedes in its response that this statute applies to tortious acts by third parties, including actions for conversion or for the recovery of personal property. *See* CNEC Opposition at 2.

The two-year statute of limitations in 12 CNCA § 12 which was in effect when CNEC filed this action therefore controls CNEC's conversion claim and, to the extent it exists at all, CNEC's civil embezzlement claim.

D. <u>The Comprehensive Access To Justice Act Of 2016 Cannot Apply Retroactively To Save CNEC's Conversion And Embezzlement Claims</u>

CNEC concedes in its response that the Comprehensive Access to Justice Act of 2016 (the "CAJA") did not become effective until August 12, 2016, and thus after CNEC filed this action. CNEC does not dispute that when it filed this action, the two-year statute of limitations in 12 CNCA had long since expired. CNEC, nonetheless, argues that this Court should retroactively apply the CAJA to revive CNEC's time-barred conversion and civil embezzlement claims. CNEC is incorrect.

Once again, Gilliland could not find, and CNEC has not cited, any constitutional, statutory or common law authority from the Nation which would allow revival of a claim by amendment to the statute of limitations once the claim was barred by the existing statute. This Court may therefore look to applicable decisions from federal and state courts addressing this issue as well. 12 CNCA § 3.

[1] The Nation's Criminal Code does provide that embezzlement by a public officer of the Nation is a criminal offense. *See* 21CNCA §§ 341, 359. However, Gilliland has not found, and CNEC has not cited, any authority from the Nation recognizing a civil claim for embezzlement. Absent such specific recognition of such a civil cause of action, this Court should not create one. *E.g., Morrison v. Anadarko Petroleum Corp.*, 2010 WL 2721397 at *3 (W.D. Okla. Jul. 6, 2010); *McKnight v. Linn Operating, Inc.*, 2010 WL 9039794 at *4 (W.D. Okla. Apr. 1, 2010).

Once a claim is time-barred by an applicable statute of limitations, a defendant possesses a vested right to insist that no subsequent legislative change can revive a claim which has already been barred by the existing statute of limitations. *E.g., Ellington v. Horwitz Enterprises*, 2003 OK 37, ¶ 6, 68 P.3d 983, 984; *accord, State ex rel. Umelu v. Edwards*, 963 S.W.2d 670, 671-72 (Mo. App. 1997); *Markey v. Robert Hall Clothes of Paterson, Inc.*, 99 A.2d 552, 554 (N.J. 1953); *State v. Lusk*, 37 P.3d 1103, 1110 (Utah 2001); *Borello v. U.S. Oil Co.*, 388 N.W.2d 140, 148 (Wis. 1986).

Most courts addressing the issue have held that legislation which attempts to revive previously time-barred claims interfere with a defendant's vested rights and thus violate due process. *State ex rel. Hove v. Doese*, 501 N.W.2d 366, 369 (S.D. 1993); *see Falgout v. Dealers Truck Equip. Co.*, 748 So.2d 399, 407 (La. 1999) ("When a party acquires a right, either to sue for a cause of action or to defend himself against one, that right becomes a vested property right and is protected by the due process guarantees."); *Doe v. Crooks*, 613 S.E.2d 536, 538 (S.C. 2005) (allowing new statute of limitations to operate to revive a limitations period that has already expired would violate a defendant's due process rights).[2]

As a result, unless the legislature specifically indicates otherwise, a change in the statute of limitations cannot apply retroactively to revive a time-barred claim. *E.g., In re WorldCom, Inc. Sec. Litig.*, 2004 WL 1435356 at *6 (S.D.N.Y. June 28, 2004); *Magnolia Petroleum Co. v. Watkins*, 1936 OK 372, ¶ 12, 57 P.2d 622, 625 (*quoting Theis v. Bd. of Cnty. Comm'rs of Beaver Cnty.*, 1908 OK 201, ¶ 18, 97 P.3d 973, 977)); *State ex rel. Headrick v. Melson*, 1994 OK CIV

[2] The Nation's Constitution provides that "the Cherokee Nation shall not deprive any person of life, liberty or property without due process of law... ." Const., Art. III, § 3. The Constitution also requires the Supreme Court to promulgate procedural rules to insure every litigant appearing before it "receives due process of law and impartial justice" and requires the Tribal Council to enact rules of procedure for the District Courts "which shall insure that all litigants receive due process of law and impartial justice." *Id.*, Art. VIII, §§ 4, 6. The concept of due process which courts outside the Nation have found prohibit legislative action to revive time-barred claims is thus deeply ingrained in the Nation's Constitution. But even if it were not, the Indian Civil Right Act prohibits the Nation from "depriv[ing] any person of liberty or property without due process of law." 25 U.S.C. § 1302(a)(8).

APP 28, ¶ 8, 871 P.2d 449, 450-51. Courts have uniformly held that a statute of limitations will not be construed to revive a cause of action which was barred at the time of its passage. *E.g.*, *Magnolia Petroleum*, 1936 OK 372, ¶ 12, 57 P.2d at 625 ("[O]ther courts have uniformly held that a statute of limitations will not be so construed as to affect a cause of action barred at the time of its passage."); *Hall v. Summit Contractors, Inc.*, 158 S.W.3d 185, 188 (Ark. 2004) ("[W]e have long taken the view, along with a majority of the other states, that the legislature cannot expand a statute of limitation so as to revive a cause of action already barred."); *Overmiller v. D.E. Horn & Co.*, 159 A.2d 245, 248 (Pa. 1960) ("It is accepted, almost without exception or qualification, that after an action has become barred by an existing statute of limitations, no subsequent legislation will remove the bar or revive the action.").[3]

There is nothing in the CAJA expressing the Council's intent that it apply retroactively. Indeed, in enacting the CAJA, the Council expressly provided, "The provisions of this Act shall become effective thirty (30) days from and after the date of its passage and approval." Legislative Act 16-16, § 7. As CNEC concedes in its brief, the CAJA did not take effect until August 12, 2016 (CNEC Opposition at § 3). The CAJA can therefore not retroactively revive CNEC's conversion and civil embezzlement claims which were already time-barred by the existing statute of limitations on July 27, 2016 when CNEC filed this action.

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[3] *Accord, Middleton v. City of Chicago*, 578 F.3d 655, 663 (7th Cir. 2009); *Berman v. Blount Parrish & Co.*, 525 F.3d 1057, 1058 (11th Cir. 2008); *In re WorldCom*, 2004 WL 1435356 at *6-7; *Reeves v. State*, 288 S.W.3d 577, 581 (Ark. 2008); *Aguilera v. Heiman*, 95 Cal. Rptr. 3d 18, 23 (Cal. App. 2009); *M.E.H. v. L.H.*, 685 N.E.2d 335, 339 (Ill. 1997); *Skolak v. Skolak*, 895 N.E.2d 1241, 1243 (Ind. App. 2008); *Frideres v. Schiltz*, 540 N.W. 261, 267 (Iowa 1995); *Brooks v. Univ. of Louisville Hosp.*, 33 S.W.3d 526, 530 (Ky. 2000); *Falgout*, 748 So.2d at 407; *Dahms v. Osteopathic Hosp. of Maine*, 782 A.2d 774, 776 (Me. 2001); *Anderson v. Div. of Child Support Enforcement*, 995 S.W.2d 546, 549 (Mo. Ct. App. 1999); *State ex rel. Umelu*, 963 S.W.2d at 671-72; *Harris v. Omaha Housing Auth.*, 698 N.W.2d 58, 64 (Neb. 2005); *Markey*, 99 A.2d at 554; *Gillespie v. Am. Motors Corp.*, 277 S.E.2d 100, 101 (N.C. Ct. App. 1981); *Crooks*, 613 S.E.2d at 538; *State ex rel. Hove*, 501 N.W.2d at 370; *In re A.D.*, 73 S.W.3d 244, 248 (Tex. 2002); *Lusk*, 37 P.3d at 1109-10; *Borello*, 388 N.W.2d at 147-48.

II. THE TWO-YEAR STATUTE OF LIMITATIONS IN 12 CNAC § 12 BARS CNEC'S PUNITIVE DAMAGE CLAIM

There is no provision in either the Nation's Constitution or its Code which would allow for punitive damages in breach of contract claims. Absent such authority, punitive damages may not be awarded in an action based on a breach of contract. *E.g., Phillips Machinery Co. v. LeBlond, Inc.*, 494 F. Supp. 318, 325 (N.D. Okla. 1980); *McCullough Tool Co. v. Scherbatskoy*, 283 F. Supp. 486, 491 (N.D. Okla. 1968); *Fox v. Overton*, 1975 OK 57, ¶ 10, 534 P.2d 679, 681.

Any claim CNEC has for punitive damages must therefore be based upon its conversion and civil embezzlement claims, both of which sound in tort. Since those claims were barred by the applicable statute of limitations when CNEC filed this action, any claim CNEC has for punitive damages is similarly barred.

III. GILLILAND HAS NOT SOUGHT TO DISMISS CNEC'S FIDUCIARY DUTY CLAIMS

CNEC argues at length in its response that its fiduciary duty claim is based on a written employment contract and therefore falls within the five-year statute of limitations which was set forth in 12 CNCA § 14. This argument misses the point. Gilliland has not claimed that CNEC's fiduciary duty claim is time-barred nor sought to dismiss CNEC fiduciary duty claims. CNEC's argument that such claims are not time-barred is irrelevant.

CONCLUSION

CNEC's conversion claim and its claim (to the extent it exists at all) for civil embezzlement were time-barred by the two-year statute of limitation in 12 CNCA § 12, the statute of limitations which was in existence when CNEC filed this action. In enacting the CAJA, the Council did not evidence any intent that it apply retroactively to claims which were already time-barred. Indeed, the Council expressly provided that the CAJA would not become effective until after its approval which did not come until August 13, 2016. CNEC's conversion and civil embezzlement claims are therefore time-barred and should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this 29 day of November 2016, a true and correct copy of the above and foregoing instrument was sent via e-mail and U.S. Mail, with proper postage thereon fully paid, to:

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