IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Patrick Atkinson, an individual, and The God's Child Project, a North Dakota nonprofit organization, Plaintiffs, v. James McLaughlin and Roberta McLaughlin, Defendants.	Civil No.: A1-03-091 **BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

BACKGROUND

Plaintiff Patrick Atkinson ("Atkinson") founded plaintiff The God's Child Project ("GCP") in 1991 and has served as its executive director since its inception. GCP is a North Dakota non-profit corporation. GCP is a child sponsorship program based in Bismarck, North Dakota and operating in Antigua, Guatemala.

From August 1997 to March 1998, defendants James and Roberta McLaughlin (hereinafter "McLaughlins") volunteered for the GCP in Guatemala. The McLaughlins voluntarily relocated to the country of Guatemala from Albuquerque, New Mexico. While volunteering in Guatemala, the McLaughlins dedicated their time and energy to serving the GCP. In March of 1998, Atkinson dismissed the McLaughlins from their volunteer positions with the GCP. Shortly thereafter, the McLaughlins returned to the United States.

In November 1998, in order to share their personal Guatemalan experience with others, defendant Jim McLaughlin created and published a website (hereinafter "website") entitled the "Friends of Guatemalan Children." This website can currently be accessed at the domain

www.guatemalanchildren.org. The website is home to excerpts from the book *Broken Covenant*, by Charles Sennot, a Newsday article entitled *War for the Children*, and the "Kroll Report" published on August 3, 1990. The website also contains a narrative about defendants' experience with Pat Atkinson as well as some questions for the Board of Directors of the GCP. These were all placed on the website at the time of its original creation. These excerpts and postings were never republished nor altered in any way by the McLaughlins. They all remain in their true, original format.

On July 22, 1999, defendant James McLaughlin sent a letter to the North Dakota Attorney General enclosing a report ("Human Rights Report") from an investigator who interviewed young boys who were in Casa Alianza and Nuestros Ahijados with Patrick Atkinson and who claimed to have been sexually molested by Pat Atkinson.

On July 28, 2003, five (5) years after the website's establishment, plaintiffs commenced the present lawsuit against defendants alleging in Count I (Defamation-Libel); Count II (Defamation-Libel); Count III (Defamation-Slander Per Se; and Count IV (Intentional Interference with Business). The defamatory allegations in Count I pertain primarily to the website. The defamatory allegations in Count II pertain primarily to the Human Rights Report. The defamatory allegations in Count III pertain primarily with benefactors and potential donors of the GCP. Finally, the intentional interference with business allegations in Count IV are all based on and stem from the defamatory allegations already set forth in Counts I, II, and III.

There is a two (2) year statute of limitations in North Dakota for libel and slander. N.D.C.C. 28-01-18(1). Plaintiffs commenced this action almost three (3) years after the allowable two year time frame mandated under the statute of limitations expired. Furthermore,

as is set forth below, the McLaughlins have never republished nor altered any of the original contents on their website in any way nor have they updated the website at any time after July 1, 2001, except for posting an updated listing of the Board of Directors of the GCP in December 2001. As such, the statute of limitations expired prior to plaintiffs commencing the present lawsuit, thus rendering plaintiffs' claims for libel and slander time-barred.

Moreover, plaintiffs' claim for intentional interference with business relations is nothing more than an attempt to circumvent the two (2) year statute of limitations by re-labeling the defamation claims with a different name. Plaintiffs' intentional interference with business relations claim stems from and is predicated on the defamation claims and is nothing more than a defamation claim cleverly couched in terms of intentional interference with business in an attempt to avoid the two (2) year statute of limitations.

As is set forth hereinafter, the single publication rule applies which renders all of plaintiffs' claims time-barred by the applicable statute of limitations. Plaintiff Pat Atkinson was aware of the alleged defamatory accusations as early as June 1998. However, plaintiffs did not commence the present litigation against defendants until July 28, 2003, over five (5) years after becoming aware of the alleged accusations; nearly five (5) years after the creation of the website, and four (4) years after the Human Rights Report was sent to the North Dakota Attorney General.

STATEMENT OF POINTS TO BE ARGUED AND SUPPORTING AUTHORITY

I. The Single Publication Rule Applies Rendering Plaintiffs' Claims Time-Barred By The Applicable Statute of Limitations.

Churchill v. N.J., 876 A.2d 311 (N.J. Super. Ct. App. Div. 2005)

Firth v. N.Y., 775 N.E.2d 463 (N.Y. 2002)

Lane v. Strang Comm.Co., 297 F. Supp.2d 897 (N.D. Miss. 2003)

McCandliss v. Cox Enter., Inc., 593 S.E.2d 856 (Ga. Ct. App. 2004)

Mitan v. Davis, 243 F. Supp.2d 719 (W.D. Ky. 2003)

Swafford v. Memphis Individual Practice Ass'n, 1998 WL 281935 (Tenn. Ct. App. June 2, 1998)

Traditional Cat Assn., Inc. v. Gilbreath, 118 Cal. App. 4th 392 (Cal. Ct. App. 2004)

Van Buskirk v. N.Y. Time Co., 325 F.3d 87 (2nd Cir. 2003)

II. Republication, An Exception To The Single Publication Rule, Never Occurred, Thus Plaintiffs' Claims Are Time-Barred.

Churchill v. N.J., 876 A.2d 311 (N.J. Super. Ct. App. Div. 2005)

Firth v. N.Y., 775 N.E.2d 463 (N.Y. 2002)

Firth v. N.Y., 306 A.D.2d 666, 667 (N.Y. App. Div. 2003)

Lehman v. Discovery Comm. Inc., 332 F. Supp.2d 534, 538 (E.D.N.Y. 2004)

Mitan v. Davis, 243 F. Supp.2d 719 (W.D. Ky. 2003)

III. Plaintiffs' Claim For Intentional Interference With Business Is Nothing More Than A Cleverly Labeled Claim For Defamation.

Hall v. United States, 274 F.2d 69, 71 (10th Cir. 1959)

Hubbard v. State, 163 N.W.2d 904, 908 (Iowa 1969)

In re Blewett, 14 B.R. 840 (9th Cir. 1981)

In re Cremidas' Estate, 14 F.R.D. 15 (D.C. Alaska 1953)

Mutual Creamery Ins. Co. v. Iowa Mut. Ins. Co., 427 F.2d 504 (8th Cir. 1970)

Ritchie v. United Mine Workers of America, 410 F.2d 827 (6th Cir. 1969)

Sellers v. Brown, 633 F.2d 106, 108 (8th Cir. 1980)

United States v. Sheehan Properties, Inc., 285 F.Supp. 608, 612 (D. Minn. 1968)

United States v. White County Bridge Comm'r, 275 F.2d 529 (7th Cir. 1960)

Velocity Express Corp. v. Bayview Capital Partners, LP, 2002 WL 980502 (D. Minn.)

5 Wright & Miller, Federal Practice and Procedure, § 1286, p. 383.

SUMMARY JUDGMENT PRINCIPLES

This motion is made pursuant to Rule 56 of the Federal Rules of Civil Procedure, which provides, in pertinent part, that:

> Judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P 56(c). Summary judgment is properly regarded not as a disfavored procedural shortcut, but rather, as an integral part of the Federal Rules, which are designed to secure the just, speedy and inexpensive determination of every action. Postscript Enterprises v. City of Bridgeton, 905 F.2d. 223, 225 (9th Cir. 1990). Essentially, summary judgment is designed to remove factually unsubstantial cases from the overcrowded district court docket. Smith v. Marcantonio, 910 F.2d 500, 596 (8th Cir. 1990).

When a party asserts a defense that hinges on an applicable statute of limitations, summary judgment is appropriately sought so long as there is no "genuine issue as to any material fact in connection with such statute." Wolf v. Preferred Risk Life Ins. Co., 728 F.2d 1304, 1306 (10th Cir. 1984). For example, if there is not a "'viable issue of fact' as to when the limitation [period] began," then summary judgment should be granted in favor of the movant. Id.

at 1306-07. Furthermore, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986).

To overcome summary judgment, an adverse party responding to the motion must set forth specific facts showing there is a genuine issue for trial. Powers v. Dole, 782 F.2d 689, 694 (7th Cir. 1986). That party, the non-movant, may not rest on mere allegations or denials of his pleadings. Id. Similarly, a contention that an issue of fact exists is insufficient to raise a factual issue. Id. The mere existence of a scintilla of evidence in support of the non-moving party's position will be insufficient; there must be evidence on which the jury could reasonably find for the non-moving party. Anderson, 477 U.S. at 252.

In ruling on a motion for summary judgment, the court cannot assess the credibility of the evidence presented on the motion. Agosto v. Immigration and Naturalization Serv., 436 U.S. 748 (1978). If a non-moving party fails to offer a showing sufficiently establishing an element essential to that party's case and on which that party must carry the burden of proof at trial, summary judgment is proper. Samuels v. Wilder, 871 F.2d. 1346, 1349 (7th Cir. 1989). Furthermore, even if a court resolves all factual disputes in favor of a non-moving party, it may still find summary judgment is correct as a matter of law. Ross v. Franzen, 777 F.2d 1216, 1222 (7th Cir. 1985).

LAW AND ARGUMENT

This case has been brought under the jurisdiction of this Court via diversity of citizenship. 28 U.S.C. 1332. As a result, the applicable statute of limitations is governed by

North Dakota state law, as statute of limitations are deemed substantive rather than procedural laws. See Paracelsus Healthcare Corp. v. Philips Med. Sys., Nederland, B.V., 384 F.3d 492, 495 (8th Cir. 2004). Under North Dakota law, claims for defamation (libel and slander) are subject to a two (2) year statute of limitations. See N.D.C.C. 28-01-18(1). Thus, a claim for defamation "must be commenced within two years after the claim for relief has accrued." Id.

In this case, plaintiffs' claims for libel and slander stem from the creation and publication of the website on the Internet in November 1998, as well as the Human Rights Report that was sent to the North Dakota Attorney General in July 1999. (Pls' Amended Compl., ¶¶ 30-52). Plaintiffs' claim for interference with business relations is predicated solely on the alleged defamatory statements published on the website and contained in the Human Rights Repot. (Pls' Amended Compl., ¶¶ 53-59). It is wholly undisputed that plaintiffs did not commence this action until July 28, 2003, nearly five (5) years after the alleged defamatory website was created, (See Compl. filed on July 28, 2003), and four (4) years after the Human Rights Report was sent to the Attorney General. Moreover, plaintiff Pat Atkinson has already testified that he was aware of the alleged defamatory accusations which he claims is contained in the original website as early as June 1998. Pat Atkinson further testified that he became aware of the defendants' website in November 1998.

As is set forth below, based on North Dakota's statute of limitations governing actions for defamation, all of the claims set forth in plaintiffs' complaint are time-barred as a matter of law.

I. The Single Publication Rule Applies Rendering Plaintiffs' Claims Barred By The Applicable Statute of Limitations.

It has only been recently that the courts have entered into the realm of cyberspace to address the issue of defamation and the World Wide Web. However, despite the new birth of such an issue, a clear majority rule has emerged as a result of the influx of this so-called "website defamation." It is virtually unanimous amongst the numerous jurisdictions which have addressed the issue, that the single publication rule, with respect to the statute of limitations, applies to cyber-defamation. See Churchill v. N.J., 876 A.2d 311, 316 (N.J. Super. Ct. App. Div. 2005); Traditional Cat Assn., Inc. v. Gilbreath, 118 Cal. App. 4th 392, 399 (Cal. Ct. App. 2004); McCandliss v. Cox Enter., Inc., 593 S.E.2d 856, 858 (Ga. Ct. App. 2004); Van Buskirk v. N.Y. Time Co., 325 F.3d 87, 89-90 (2nd Cir. 2003); Mitan v. Davis, 243 F. Supp.2d 719, 721-22 (W.D. Ky. 2003); Lane v. Strang Comm.Co., 297 F. Supp.2d 897, 899 (N.D. Miss. 2003); Firth v. N.Y., 775 N.E.2d 463, 466 (N.Y. 2002).

In fact, there is only one unpublished decision, Swafford v. Memphis Individual Practice Ass'n, 1998 WL 281935 (Tenn. Ct. App. June 2, 1998), that disagrees and applies the multiple publication rule. See Churchill, 876 A.2d at 318. However, the Swafford opinion is clearly distinguishable and has limited application to publications on the Internet because the information in Swafford was restricted to "a specified group of certified health care entities, was made available ***only*** upon request and was maintained [solely] in the National Practitioner Data Base," all of which is completely different from displaying information to the public on the World Wide Web. See id. (Emphasis added).

In addition to the plethora of case law supporting the single publication rule, North

Dakota also looks favorably upon the rule as it has been expressly codified via legislative enactment of the Uniform Single Publication Act. N.D.C.C. § 14-02-10. The Uniform Single Publication Act provides, in pertinent part:

> No person shall have more than one claim for relief for damages for ***libel or slander*** or invasion of privacy ***or any other tort*** founded upon any single publication or exhibition or utterance, such as any one edition of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture.
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> * * *

N.D.C.C. § 14-02-10. (Emphasis added).

It is well settled that when a plaintiff seeks to impose liability predicated on the supposed falsity of a communication in an accessible publication, the statutory period commences when the information is first generally accessible. Shively v. Bozanich, 31 Cal. 4th 1230, 1250-51 (2003).

Under the single publication rule, "publication generally is said to occur on the first general distribution of the publication to the public." Traditional Cat Assn., Inc., 118 Cal. App. 4th at 401. "***[A] cause of action accrues and the period of limitations commences regardless of when the plaintiff secured a copy or became aware of the publication.***" Id. (Emphasis added). Simply stated, the statute of limitations clock begins to tick and a cause of action accrues right at the very moment a person posts, or in other words publishes, information on the Internet. Id. The plaintiff is presumed to have constructive knowledge upon the first publication, even if that first publication was online. Traditional Cat Association, 118 Cal. App. 4th at 401; Cusano v. Klein, 264 F.3d 936, 949. See also Firth, 775 N.E.2d at 465; Van Buskirk, 325 F.3d at 89. The single publication rule is not contingent upon when a person actually discovers the allegedly harmful

information nor does it matter how many times a website receives a "hit." See id. As stated above, the only thing of significance is the date on which the material was actually posted on the Web. See id.

The single publication rule is rightfully welcomed by courts considering a defamation claim because:

> [1] it prevents the constant tolling of the statute of limitations, [which is in line with the idea behind having a] short statute of limitations period for defamation; [2] it allows ease of management whereby all the damages suffered by a plaintiff are consolidated in a single case, thereby preventing potential harassment of defendants through a multiplicity of suits and [3] it is more consistent with modern practices of mass production and widespread distribution of printed information.

Churchill, 876 A.2d at 316. Additionally, the application of the single publication rule allows for the "open dissemination of information and ideas over the Internet, which is, of course, its greatest beneficial promise." Firth, 775 N.E.2d at 466.

Applying the single publication rule to the case at hand, plaintiffs' claims are clearly time-barred as a matter of law. The alleged defamatory website entitled, "The Friends of Guatemalan Children," was posted on the World Wide Web by defendant James McLaughlin in November 1998, a fact that is wholly undisputed. (Affidavit James McLaughlin, p. 1, ¶ 3). The Human Rights Report sent to the Attorney General in July 1999 contains the same or similar allegations set forth on the website. As indicated above, plaintiffs' claims accrue, and the period of limitations begins to run, at the very moment Jim McLaughlin posted the information on the Internet, which was in November 1998. Moreover, Pat Atkinson admitted in his deposition that he first became aware of the website and its alleged defamatory content in November 1998. (Depo. Pat Atkinson, p. 33, ll. 17-24). There is simply no dispute that the website was created

and the material thereon was first published to the public, including Pat Atkinson, in November 1998.

Plaintiffs' claims began to accrue the very moment the website was first published in November 1998. However, despite the website being first published and easily accessible in November 1998, and Pat Atkinson seeing it and being fully aware of the existence and content of the website at that time, plaintiffs did not commence this lawsuit until July 28, 2003. That is nearly five (5) years after the website was published. Again, Pat Atkinson testified that he became aware of the alleged defamatory accusations made by defendants as early as June 1998, before the website was ever created. The Human Rights Report was sent to the Attorney General on July 22, 1999. The Human Rights Report merely sets forth the same alleged accusations of sexual abuse and misconduct allegedly published on the website. Moreover, as stated above, the statute of limitations for plaintiffs' claim based on the filing of the Human Rights Report with the North Dakota Attorney General's office (an accessible public office), in Count II of their Amended Complaint, commenced when the report was filed in the Attorney General's office in July 1999, as the report was first generally accessible to the public at that time and plaintiffs would have constructive knowledge of the report and its filing. See Shively and Traditional Cat Association, Inc., supra. Still, plaintiffs did not commence this lawsuit until four (4) years after the Human Rights Report.

As stated above, North Dakota has a two (2) year statute of limitations governing defamation claims. Plaintiffs simply failed to commence their lawsuit within the requisite time frame. In order to be considered timely under the statute of limitations, plaintiffs' claims for defamation must have been commenced no later than November 2000. Thus, since the two-year

statute of limitations for defamation has expired in this matter, plaintiffs' claims for slander and libel against the McLaughlins must be dismissed as a matter of law.

II. Republication, An Exception To The Single Publication Rule, Never Occurred, Thus Plaintiffs' Claims Are Barred.

It has been recognized that the single publication rule provides more than adequate protection for a plaintiff since there is a republication exception to the rule, which would allow the statute of limitations to renew if the requirements are met. Traditional Cat Assn., Inc., 118 Cal. App. 4th at 401. Defendants anticipate that plaintiffs will likely argue that defendants somehow republished the website, thus creating a new tort for statute of limitations purposes.

Republication "occurs upon a separate aggregate publication from the original, on a different occasion . . . ." Id. In order to justify labeling an original Internet posting as republished, the "subsequent publication must have been posted with the intention of reaching a new audience and it must have actually reached that new audience." Firth v. N.Y., 306 A.D.2d 666, 667 (N.Y. App. Div. 2003). For example, when a person moves an original posting from one Internet site bearing a unique address, to another Internet site bearing an entirely new address, this may constitute reaching a new audience. Id. Furthermore, the new audience requirement can be interpreted to mean that an alleged defamatory piece is only considered republished when it is placed in "a new form or edited in a new form." Mitan; 243 F. Supp.2d at 722. In other words, when there has been a "modification to the original publication." Lehman v. Discovery Comm. Inc., 332 F. Supp.2d 534, 538 (E.D.N.Y. 2004).

The rationale behind such rule is that "many [w]ebsites are in a constant state of change with information posted sequentially on a frequent basis, [thus], finding republication with every

minor alteration to a website would either discourage the placement of information on the Internet or slow the exchange of such information, reducing the Internet's unique advantages." Churchill, 876 A.2d at 317.

In Churchill, the defendant the State Commission of Investigation ("SCI") – a governmental entity of the State of New Jersey – published an alleged defamatory report of the plaintiffs via the Internet on April 26, 2001. 876 A.2d at 314. As a result of this report, the plaintiffs filed a complaint for defamation on April 24, 2003. Id. However, that filing was two years after the original publication and one year after the allowable time-frame established under New Jersey's statute of limitations. Id. Therefore, the court applied the single publication rule and dismissed the plaintiff's claims based on the one-year statute of limitations. Id. On appeal, however, plaintiffs "contend that the single publication rule did not bar their defamation claim because the SCI's website (but apparently not the report) was updated on several occasions." Id. at 315. The appellate court rejected this contention and held that the updates and modifications to the SCI's website were "merely technical changes . . . and they in no way altered the *substance or form of the report*." Id. at 319 (emphasis added).

The Churchill case is similar to the matter at hand in that the defendants may have updated or modified the website with minor changes, but they in no way altered the substance or the form of the original postings placed on the Internet in November 1998. In fact, James McLaughlin specifically states in his affidavit that after the original publication of the website in November 1998, he has never republished in any manner the excerpts from the book *Broken Covenant*; the article from Newsday; or the "Kroll Report," all of which were placed on the website in November 1998. (Affidavit James McLaughlin, p. 1, ¶ 4). Furthermore, the website's

domain address, www.guatemalanchildren.org, has remained the same since its publication and has never been relocated to a new directory. (Affidavit James McLaughlin, p. 1, ¶ 3). Thus, no new audience has ever been reached by the defendants' website.

The only modifications the alleged defamatory website has endured since its original publication are the additions of 1) the article regarding the arrest of Henry Boyer in Guatemala; 2) a federal court decision concerning John Wetterer; and 3) an updated listing of the Board of Directors of the Gods Child Project (Affidavit James McLaughlin, p. 2, ¶ 5). However, the first and second additions were both made sometime before July 1, 2001, and the third addition was made in December 2001. (Affidavit James McLaughlin, p. 2, ¶ 5; Affidavit Carl A. Muehlenweg, p. 2, ¶ 8). Moreover, all three of these additions consisted of merely minor changes to the website as a whole and did not alter the substance or form of the original postings back in November 1998. (Affidavit James McLaughlin, p. 2, ¶ 5).

As the court in Churchill stated, "many [w]ebsites are in a constant state of change, with information posted sequentially on a frequent basis, [thus], finding republication with every minor alteration to a website would either discourage the placement of information on the Internet or slow the exchange of such information, reducing the Internet's unique advantages." 876 A.2d at 317.

As state above, the additions of the article and the federal court decision, along with an updated listing of the Board of Directors, were only minor alterations. Moreover, it is wholly undisputed that both the additions of both the Henry Boyer article and the Wetterer court decision occurred on or before July 1, 2001. Since the complaint was filed on July 28, 2003, this date does not fall within the two-year period of limitations for defamation claims. Accordingly,

even if republication was found by including these two updates, the latest the plaintiffs could have filed their claim was on July 1, 2003. Therefore, since 1) the website was not republished; and 2) the last time it had been substantively modified was on or before July 1, 2001, plaintiffs' complaint is time-barred by the applicable statute of limitations. Moreover, there is no dispute that the Human Rights Report was sent to the Attorney General in July 1999. The Human Rights Report only sets forth the same alleged accusations of sexual abuse that are found in the website.

As such, defendants respectfully request that this Court grant them summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure dismissing plaintiffs' claims for defamation against the defendants as a matter of law.

III. Plaintiffs' Claim For Interference With Business Is Nothing More Than A Defamation Claim Cleverly Relabeled To Avoid The Two Year Statute Of Limitations.

Plaintiffs' claim for interference with business is nothing more than a defamation claim cleverly couched as a separate claim in an attempt to circumvent the two year defamation statute of limitations. Plaintiffs' claim for interference with business is predicated solely on the alleged defamatory conduct from the website. The factual allegations set forth in plaintiffs' intentional interference with business claim are identical to the factual allegations set forth in plaintiffs' defamation claims.

It is axiomatic that the court "must look beyond the facial allegations of the complaint to determine the true nature of the suit." Sellers v. Brown, 633 F.2 106, 108 (8th Cir. 1980). Pleadings must be judged by substance, rather than form. See Mutual Creamery Ins. Co. v. Iowa Mut. Ins. Co., 427 F.2d 504 (8th Cir. 1970). "The court looks to the substance of the allegations in Count 1, rather than their form, to determine the true nature of the claim." Velocity Express

Corp. v. Bayview Capital Partners, LP, 2002 WL 980502 (D.Minn). "[T]he court may look beyond the literal language in the complaint to ascertain the true nature of the asserted cause of action." United States v. Sheehan Properties, Inc., 285 F.Supp. 608, 612 (D. Minn. 1968). "The designation of counts in the complaint is not controlling of the interpretations to be placed on the claims." Ritchie v. United Mine Workers of America, 410 F.2d 827 (6th Cir. 1969). "A pleading is to be judged by its substance rather than by its form or label." In re Blewett, 14 B.R. 840 (9th Cir. 1981)(citing 5 Wright & Miller, Federal Practice and Procedure, § 1286, p. 383). "Pleadings are to be judged by their substance, not their form or label." United States v. White County Bridge Comm'r, 275 F.2d 529 (7th Cir. 1960). "The court must then look beyond the literal meaning of the language to ascertain the real cause of complaint." Hubbard v. State, 163 N.W.2d 904, 908 (Iowa 1969) citing Hall v. United States, 274 F.2d 69, 71 (10th Cir. 1959). "The district court will consider the substance of a pleading, rather than its label, in determining its character." In re Cremidas' Estate, 14 F.R.D. 15 (D.C. Alaska 1953).

The general rule is that a party cannot escape the statute of limitations by giving the claim another label when the gravamen of the claim is an alleged injurious falsehood. Strick v. Superior Court, (1983) 143 Cal. App. 3d 916; Sports Unlimited, Inc. v. Lankford Enterprises, Inc., (10th Cir. 2002) 272 F.3d 996; Riddell Sports, Inc. v. Brooks, (S.D.N.Y. 1995) 872 F.Supp. 73; Evans v. Philadelphia Newspapers, (1991) 411 PA Super. 244, 601A 2d 330. This is derivative of the general principle that one cannot evade defamation defenses (e.g. truth, the absence of malice, privilege, of and concerning requirement) by giving a different label to a liable or slander claim. A & B – Elevator Company v. Columbus/Cent. Ohio Bldg. & Const. Trades Council, (1995) 73 Ohio St. 2d 1, 651, N.E.2d 1283; Brown & Williamson Tobacco

Corp. v. Jacobson, (7th Cir. 1983) 713 F.2d 262, 273-74; Blatty v. New York Times Co. (1986) 42 Cal. 3d 1033.

Eighth Circuit case law is an agreement. See Beverly Hills Food Land, Inc. v. United Food & Commercial Workers Union, (8th Cir. 1994) 39 F.3d 191, 196 (malice required for defamation claims must also be shown in a tortuous interference claim). See also Rykowsky v. Dickinson Public School District No. 1, 508 N.W.2d 348, 351-2 (1983) (independent action for intentional infliction of emotional distress does not lie where gravamen of complaint sounds in defamation). In Rykowsky, the North Dakota Supreme Court stated that the successful invocation of a defamation privilege will preclude a cause of action for intentional infliction of emotional distress if the sole basis for the latter cause of action is the defamatory publication. Id. at 352. The Court also noted that a claim for intentional infliction of emotional distress, based upon the same factual underpinnings as a defamation claim for which the privilege applies, is also barred by the reach of the absolute privilege. Id. at 352.

Therefore, the North Dakota Supreme Court, the Eighth Circuit Court of Appeals, and the great weight of authority provides that when the gravamen, factual basis or substance of a claim is defamation, a party cannot escape the defamation statute of limitations by giving the claim another label.

In this case, plaintiffs allege intentional interference with business in Count IV of the amended complaint as follows:

> 56. Defendants ***conspired together and with third parties*** to intentionally and improperly interfere ***with Plaintiffs' business expectations*** by, among other things, ***publishing defamatory statements about Plaintiffs on the Website, publishing false, unprivileged, and defamatory releases regarding Patrick Atkinson***, paying for the authorship of an publishing of

a ***false and defamatory "human rights" report*** concerning Patrick Atkinson, and contacting ***interstate business associates (contributors and volunteers)*** of Plaintiffs.

* * *

(Amended Compl.) (Emphasis added). In Count I of the amended complaint (Defamation – Libel) plaintiffs allege:

31. The McLaughlins, ***working together and in concert, authored and published false and unprivileged articles and statements about Plaintiffs on the Website*** and ***emailed such false statements to Plaintiffs' supporters and benefactors worldwide***.

32. The ***Website publication contains multiple false and unprivileged statements***.

* * *

35. As a result, the Website publication as a whole, and particular statements contained therein, are false and defamatory of Plaintiffs.

* * *

38. Defendants' ***defamatory publications injured Plaintiffs in their respective occupation, trade, business, and profession.***

* * *

(Amended Compl.) (Emphasis added). Likewise, Count II of the amended complaint (Defamation – Libel) contains similar allegations:

41. The McLaughlins, ***working together and in concert, paid for the authorship of and published a false, unprivileged, and defamatory "human rights" report*** concerning Patrick Atkinson.

42. The ***false report contains multiple false, unprivileged, and defamatory statements.***

* * *

44. Defendants' defamatory publication ***injured Plaintiffs in their respective occupation, trade, business, and profession***.

(Amended Compl.) (Emphasis added). Finally, even the allegations contained in Count III of the amended complaint (Defamation – Slander Per Se) are similar:

> 47. The McLaughlins, ***working together and in concert, published false and unprivileged statements about Plaintiff to key benefactors of and potential donors*** to GOD'S CHILD.
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> 48. The ***statements were defamatory*** of Plaintiffs by, among other things, accusing Atkinson of committing a crime and other wrongful conduct.
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> 51. Defendants' defamatory publications ***injured Plaintiffs in their respective occupation, trade, business, and profession***.
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> * * *

(Amended Compl.) (Emphasis added).

Analyzing plaintiffs' claim for intentional interference with business in terms of is substance, rather than its label, it is clear that plaintiffs have done nothing more than re-allege the defamation claims set forth in Counts I, II and III. In particular, Counts I, II and III, all allege that defendants have: 1) acted together and in concert to, 2) defame plaintiffs by publishing false and defamatory statements concerning the plaintiffs, and 3) that as a result of defendants' claimed defamatory statements, plaintiffs have been injured in their respective businesses.

Likewise, plaintiffs' claim for intentional interference with business alleges, in essence, that defendants have: 1) conspired together and with third parties, to 2) publish false and defamatory statements about Plaintiffs, and 3) that as a result of defendants' defamatory statements, plaintiffs' business opportunities have been interfered with.

Plaintiffs have done nothing more than simply re-allege the same facts in Count IV (Intentional Interference with Business) as plaintiffs alleged in Count I (Defamation – Libel),

Count II (Defamation – Libel), and Count III (Defamation – Slander Per Se), in that in all four Counts plaintiffs allege defendants defamed them and that such claimed defamation resulted in injury to plaintiffs' respective business. As the court noted in Emmelmann v. American Foreign Ins. Co., 2006 WL 861015 (D. Conn.):

> The reiteration of acts previously asserted to support a cause of action in negligence, without more, cannot be transformed into a claim of reckless misconduct by mere nomenclature.
>
> Here, the plaintiffs set forth factual allegations in Counts One and Nine and label them negligent and then set forth the same factual allegations in Counts Eight and Sixteen, with no additional allegations as to the wrongful acts or omissions by American, but label them reckless.

Likewise, in this case, plaintiffs have cleverly attempted to re-label the "defamation" allegations as "intentional interference with business" so as to circumvent the two (2) year statute of limitations for defamation claims in North Dakota. Clearly, when scrutinizing the substance of plaintiffs' so-called "intentional interference with business" claim in Count IV, it becomes apparent that that Count IV is really nothing more than the same defamation claims set forth in Counts I, II, and III of the amended complaint. As such, the two (2) year statute of limitation applies to Count IV of the amended complaint and is time-barred.

CONCLUSION

There are no issues of material fact with respect to North Dakota's two (2) year statute of limitations applicable to plaintiffs' claims. There is absolutely no dispute that the defendants' website was first published on the Internet in November 1998. There has been no republication of the website and the last time the website had been updated or modified substantively was on or before July 1, 2001.

The complaint was not filed with this Court until July 28, 2003. The original publication of the website occurred in November 1998. Plaintiff Pat Atkinson knew of the alleged defamatory accusations that surfaced on defendants' website as early as June 1998. Two minor modifications occurred before July 1, 2001. Even assuming these modifications were substantive, at the very earliest, plaintiffs would have needed to commence this lawsuit on or before July 1, 2003. A third minor modification was made in December 2001 at which time the Board of Directors of the GCP was merely updated. No substantive modifications have been made to the website since before July 1, 2001.

The Human Rights Report was sent to the Attorney General in July 1999 and merely contains the same or similar accusations of sexual abuse and misconduct. Yet, plaintiffs did not commence this action until July 28, 2003. Plaintiffs' claim for intentional interference with business is nothing more than re-labeling the defamation claims, and is, therefore, subject to the two year statute of limitations.

Accordingly, defendants respectfully request that this Court issue its Order granting their motion for summary judgment dismissing all of plaintiffs' claims against them as a matter of law and that judgment of dismissal of plaintiffs' Complaint and claims against defendants, with prejudice, be entered in accordance therewith.

Dated this 25 day of July, 2006.

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COUNTY OF GRAND FORKS)

AFFIDAVIT OF SERVICE
BY MAIL
Case No.: A1-03-091

The undersigned, being first duly sworn, deposes and states that a copy of:

Defendants' Motion for Summary Judgment
Statement of Material, Undisputed Facts
Brief in Support of Defendants' Motion for Summary Judgment
Affidavit of James McLaughlin
Affidavit of Carl A. Muehlenweg

was served on July 25th, 2006, by placing a true and correct copy thereof in an envelope as follows, to-wit:

W. Todd Haggart
Sidney J. Spaeth
Monte L. Rogneby
Vogel Law Firm
200 No 3rd St, Ste 201
Bismarck ND 58502-2097

and depositing the same with prepaid postage in the United States mail at Grand Forks, North Dakota.

To the best of affiant's knowledge, the address above given is the actual post office address of the party intended to be so served. The above documents are mailed in accordance with the provisions of the Federal Rules of Civil Procedure.

Kristi Enoch

SUBSCRIBED AND SWORN to before me this 25th day of July, 2006.

Debra J. Lykken

DEBRA J. LYKKEN
NOTARY PUBLIC
STATE OF NORTH DAKOTA
My Commission Expires: Apr. 4, 2007

Debra J. Lykken, Notary Public
My Commission Expires: 4/4/07