STATE OF WISCONSIN COURT OF APPEALS DISTRICT III

APPEAL NO. 2014 AP 1692

BENJAMIN D. HARRIS,

Plaintiff - Appellant

vs.

LAKE OF THE TORCHES RESORT & CASINO,

Defendant - Respondent

APPELLATE BRIEF OF BENJAMIN D. HARRIS
Plaintiff – Appellant

Appeal from Case # 2011 CV 188
the Honorable Neal A. Nielsen, III
Vilas County Circuit Court Judge, presiding.

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STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Oral Argument. Pursuant to §809.22 (b), Stats., the Appellant requests oral argument to more fully develop the theories and legal authorities in this case.

Publication. This appeal involves an issue that has not been specifically addressed by the courts and would clarify the law, therefore the Appellant requests publication of the decision issued in this matter.

ISSUES ON REVIEW

Did the Circuit Court err in vacating its Order for Judgment and Judgment awarding damages to Mr. Harris in its post-judgment finding that it lacked subject matter jurisdiction based upon Lake of the Torches post-judgment claim of sovereign immunity?

TRIAL COURT ANSWER:

The Circuit Court determined that it lacked subject matter jurisdiction because the defense of sovereign immunity was properly raised by Lake of the Torches after entry of judgment.

INTRODUCTION

How is it just in any sense of the word that Lake of the Torches can use a claim of sovereign immunity to shield itself from responsibility to a man like Ben Harris? A person it employed. A laboring man. Not a lawyer or University professor who has lost one hundred percent effective use of his dominant hand in the work place related accident. Five-and-a-half years later he has received virtually nothing for the serious injury.

This decision was a very hard one to reach because beyond all these lofty ideals lies a real person, Benjamin Harris who has suffered a real and significant injury. What must a person in his position think of this judicial system?

As a Circuit Judge, I have taken an oath to uphold the Constitution of United States as well as the Constitution of the State of Wisconsin and in this case I truly can not do both. Mr. Harris has a right without a remedy.

I have been a practicing lawyer or a judge now for more than 32 years, and I have striven in all that time to find real justice for the parties before me or for the clients a represented. Over my career there have been highs and lows, but I truly have never felt more disillusioned by my profession then I am today. This case shatters the very notion of justice.

Transcript of bench decision, May 29, 2014, the Honorable Neal A. Nielsen, III, R. 76:16-17.

Fortunately, in this case, there is a remedy to correct this injustice.

STATEMENT OF THE CASE

This is an appeal of the decision by the Circuit Court that granted Lake of the Torches' motion to vacate a judgment previously entered in favor of Mr. Harris and dismissing Mr. Harris's action. This decision ended a long, circuitous and torturous excursion through the Wisconsin Circuit and Lac du Flambeau Tribal Court systems.

The complaint in this action was filed on June 13, 2011 setting forth claims for damages on behalf of Mr. Harris arising from injuries sustained on October 12, 2008. R. 2. On October 26, 2011, the Circuit Court granted Torches' motion to stay and transfer the proceedings to Tribal Court. R. 10. After two failed appearances by tribal counsel at scheduling conferences, numerous requests by Mr. Harris for a scheduling order and establishment of a date for trial and an intervening motion to the Circuit Court for transfer of proceedings, the Tribal Court held a hearing on June 20, 2012, where it accepted jurisdiction on the basis of Torches' waiver of sovereign immunity. R. 16 Ex B. The case was tried before the Tribal Court on August 6, 2012. R. 24. Between August 6, 2012 and July 17, 2013, Mr. Harris made over a dozen contacts with the Tribal Court, seeking a decision. R. 63 Ex. 7. On July 17, 2013, Mr. Harris filed a motion with the Circuit Court requesting that the case be transferred back to the Circuit Court R. 13. On August 7, 2013, the Tribal Court entered a decision. R. 66 Ex F. Mr. Harris filed a Notice of Appeal with the Tribal Appellate Court on August 20, 2013, to preserve

his right's in the event the Circuit Court refused to re-assume jurisdiction over the case. On October 1, 2013, the Circuit Court granted the motion to transfer. R 22. The order provided that the Tribal Court decision be filed under seal, so as not to influence the Circuit Court's judgment on the merits of the motion. R. 22: 2.

Following the transfer back to the Circuit Court, the Court, recognizing that there was no easy method to resolve the case given: 1) contrary to the Torches employee handbook's statement that employees would be afforded protection under a workers compensation policy of insurance, no such policy existed, and 2) there is no Workers Compensation provisions in tribal law or custom, and 3) the parties had already conducted a full trial of the issues before the Tribal Court, the Court implemented a procedure applying the State Workers Compensation Law to the facts established at the Tribal Court trial. R. 31. After review of the record of the Tribal Court trial, the Circuit Court, in an oral decision of January 14, 2014, awarded damages to Mr. Harris in the amount of $197,152.98. R. 31. The Judgment was entered on January 21, 2014. R. 25. Torches filed a motion to vacate the judgment on February 7, 2014. R. 37. Torches filed a Notice of Appeal of the judgment on February 21, 2014, to preserve its appellate rights pending the decision on the motion to vacate.[1] The Circuit Court, on May 29, 2014, issued its order vacating the January 21, 2014 judgment and dismissing the case. R.76. This appeal ensued.

[1] Appeal No. 2014 AP 527, District III Court of Appeals, voluntarily dismissed pursuant to Rule 809.18 on July 7, 2014.

STATEMENT OF FACTS

Mr. Harris, 55, is a high school graduate of North Community High School in North Minneapolis, MN. He attended trade school in Rosemount, MN, wherein he earned a certificate in drywall taping and heavy equipment. R. 34 8-9. Mr. Harris was hired for work as a back-up/prep cook in the Eagle's Nest Restaurant at Lake of the Torches Casino in 2007. R. 34 11. On October 13, 2008, he was running a 175-pound Hobart Industrial Mixer, mashing potatoes. Approximately two weeks earlier, he had informed his employer that the mixer was "acting weird" and "wasn't performing like it should." R. 34: 14-15. While the machine was off, Mr. Harris reached his right hand into the mixer to grab the mixing paddle, when the machine engaged, causing a lever to crush his right hand. R. 34: 14. Mr. Harris reported the incident to his employer, continued to attempt to work on the date of injury and several days thereafter, but the pain and inability to effectively use the hand prompted Mr. Harris to seek medical attention. On Monday, October 20, 2008, Mr. Harris went to the Emergency Room at Howard Young Medical Center. He was diagnosed with mal-alignment at the second carpal metacarpal joint in his right hand and fitted for a cast on his right, dominant hand to protect it while it healed. R. 34: 17.

Between December 5, 2008 and December 17, 2008, Mr. Harris attended physical therapy at Howard Young Medical Center. R. 35, Trial Ex. L.[2] Since the physical therapy was not bringing the results he desired, he attended physical occupational therapy at Excel Rehab & Spine Center from December 18, 2008 through February 3, 2009, for a total of 10 treatments. R.34: 23, R. 35 Trial Ex. J. This still did not resolve the pain in Mr. Harris's hand, and in December, therapist Mary Jane Keller, opined that despite being motivated, Mr. Harris could not work. R. 35, Trial Ex. J. Mr. Harris went back to the emergency room at Howard Young Medical Center on March 1, 2009 to seek further assistance for his chronic right hand pain. R. 35, Trial Ex. L.

On July 10, 2009, Mr. Harris saw Marshfield Clinic rheumatologist, Dr. Martina Ziegenbein, for swelling, and between July and October 2009, Mr. Harris was prescribed a Medrol dosepak, oxycodone, hydrocodone, Vicodin, Percocet and a fentanyl patch. During that time, Mr. Harris was still unable to work. R. Between September 2009 and May 2010, Mr. Harris went to New Hope Crystal Medical Clinic and saw PA-C Mary Anderson and Dr. Nancy Miller, seeking help for his joint pain. R. 35, Trial Ex. G&H.

[2] It is our understanding that the entire Lac du Flambeau Tribal Court record was returned to the Vilas County Clerk of Court in one large box once the circuit court reasserted its jurisdiction over the case. Once this appeal was initiated, the Vilas County Clerk of Court transmitted that box to the Court of Appeals in the exact condition in which it was received, marked as "Document No." 35. Accordingly, there are no specific page numbers or markings within Record No. 35. If this Court needs more specific citations to the Tribal Court record, we would ask this Court to provide guidance on how it would like the Tribal Court record to be paginated, and we could then travel to Madison, inspect the record, and assure proper pagination.

On October 6, 2009, Mr. Harris went to see Dr. Mark Fischer at Northwest Orthopedic Surgeons. On November 20, 2009, Dr. Mark Fischer recommended surgery but suggested that Mr. Harris try a steroid injection first. When the injection did not create the desired results, Mr. Harris once again returned to Northwest Orthopedic Surgeons on January 13, 2010, and surgery was ordered. R. 35, Trial Ex. F. Dr. Fischer conducted his first fusion surgery on March 17, 2010. It was determined that there was an obvious defect in the cartilage, particularly in the flexion area. A prosthesis was ordered and was placed in the metacarpal and the proximal phalanx. The same orthoplasty procedure was followed in the middle finger. A crack in the proximal phalanx of the middle finger was identified just prior to implantation. R. 35, Trial Ex. F.

On March 30, 2010, Mr. Harris was still experiencing moderate pain. He went to see a hand therapist who made an outrigger type splint. On April 19, 2010, it was estimated by Nancy Miller, MD, in a Practitioner's Report on Accident or Industrial Disease in Lieu of Testimony that Mr. Harris would have a 40-50% permanent disability of the right hand with a poor prognosis. R. 35, Trial Ex. X. On September 1, 2010, Dr. Fischer indicated that Mr. Harris needed permanent work restrictions. R. 35, Trial Ex. V. On September 24, 2010, Dr. Joseph Sicora opined that Mr. Harris had 100 percent disability to the right hand and would not be able to perform any employment in the future. R. 35, Trial Ex. W. Unfortunately, pain continued and on November 26, 2011, Dr. Fischer revisited the arthroplasty surgery and conducted a fusion of the index and middle finger

metacarpal phalangeal joints – Mr. Harris's second surgery. He was splinted for six weeks with increasing pain and swelling. Radiographs demonstrated a delayed union. Therefore, Mr. Harris underwent a third surgery – a revision fixation of the middle and index fingers on January 25, 2012.

In the summer of 2012, Mr. Harris engaged in occupational therapy at Eagle River Memorial Hospital. By the fall of 2012, pain related to the hardware persisted and Mr. Harris underwent a fourth surgery consisting of a partial hardware removal of the right middle and right index finger on September 26, 2012. Because of persistent rotatory deformity following the surgeries, he underwent his fifth surgery – an osteotomy with rotational correction on April 5, 2013. His sixth and final revision was June 14, 2013. R. 63 Ex. 1

As a result of the work-related injury, Mr. Harris has a complete loss of motion in the index and middle carpophalangeal joints and diminished range of motion at the proximal interphalangeal and carpophalangeal joints of both fingers. Dr. Fischer had released Mr. Harris as of July 30, 2013 with lifting and repetitive grasping restrictions from the date of the original injury forward. R.

STANDARD OF REVIEW

The issues to be decided in this case involve a determination of whether the Lac du Flambeau waived their sovereign immunity. This involves a *de novo* review. *See Rosebud Sioux Tribe v. Val-U Constr. Co.,* 50 F.3d 560, 562 (8th Cir.), *cert. denied,* 516 U.S. 819, 116 S.Ct. 78, 133 L.Ed.2d 37 (1995). The questions of law involved are to be decided without deference to the trial court.

Ball v. District No. 4, Area Bd., 117 Wis.2d 529, 537, 345 N.W.2d 389,394 (1984).

ARGUMENT

I. The Lac du Flambeau Tribe of Lake Superior Chippewa Indians waived sovereign immunity in the present case by entering into the Gaming Compact of 1992 between the Tribe and the State of Wisconsin.

A. Under the Compact, the Tribe waived defense of sovereign immunity in Wisconsin Circuit Court for personal injury actions.

The Lac du Flambeau Tribe of Lake Superior Chippewa Indians (Tribe) entered into a Compact with the State of Wisconsin, allowing for the operation of the Lake of the Torches Casino. The Compact was negotiated and signed under the auspices of The Indian Gaming Regulatory Act, Public Law 100-497, 25 U.S.C. 2701, *et. seq.*

> Enacted as Public Law (P.L.) 100-497 on October 17, 1988, IGRA provides that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." The Act is consistent with a principal goal of federal Indian policy: the promotion of tribal economic development, tribal self-sufficiency, and strong tribal government. The Act is also viewed as responsive to the interest many Indian tribes have in using gambling as a means to economic development. In order to provide clearer standards and regulations for the conduct of gaming on Indian lands, IGRA specifies what types of gaming are subject to what types of jurisdiction, defines on what lands Indian gaming may be operated, and establishes the requirements for compacts between Indian tribes and the states…
>
> The purpose of the state-tribal compact is to govern Class III gaming activities on Indian lands and may include provisions relating to: (a) the application of criminal and civil laws of the tribe and the state to the licensing and regulation of the gaming activities; (b) the allocation of criminal and civil jurisdiction between the state and the tribe; (c) the assessment by the state of amounts necessary to defray the costs of regulation; (d) standards for the operation of gaming activities; (e) remedies for breach of contract; and (f) any other subjects directly related to the operation of gaming activities.

Tribal Gaming in Wisconsin, Wisconsin Legislative Fiscal Bureau January 2011 http://legis.wisconsin.gov/lfb/publications/InformationalPapers/Documents/2013/88_Tribal Gaming in Wisconsin.pdf Emphasis supplied.

Section XIX of the 1992 Gaming Compact states:

> XIX. LIABILITY FOR DAMAGE TO PERSONS OR PROPERTY
>
> A. During the term of this Compact, the Tribe shall maintain public liability insurance with limits of not less than $250,000 for any one person and $4,000,000 for any one occurrence for personal injury, and $2,000,000 for any one occurrence for property damage.
>
> B. The Tribe's insurance policy shall include an endorsement providing that the insurer may not invoke tribal sovereign immunity up to the limits of the policy required under subsec. A. Gaming Compact of 1992, Appendix pgs. 1 - __.

The 1992 Compact was amended twice, first in 1998 and again in 2008. Both of the amendments extended the term of the Compact; neither amendment affected the provisions of Section XIX (1998 Amendment – Appendix pgs. ___ - ____; 1998 Amendment – Appendix pgs. ___ - ____.

Clearly, the terms of Section XIX of the 1992 Compact subjected the Tribe to an action in Wisconsin Circuit Court for claims arising from a personal injury.

B. In the absence of Workers Compensation Law, a claim for damages associated with a workplace injury suffered by an employee is nothing more than a common law personal injury tort claim.

The parties initially treated this matter as a worker's compensation claim. Lake of the Torches maintained an employees handbook setting forth policies for its employees. The policy provided that Torches would maintain a policy of workers compensation insurance for its employees. R.23: Ex. Q. The "program is designed to provide assistance to individuals who are injured . . . as a

result of their employment." R.23: Ex. Q: 1. Specifically, the program was to provide for the following:

- Lost Time Benefits Program for the duration of the work-related injury leave R.23: Ex. Q: 1;
- Lost time benefits assistance R.23: Ex. Q: 1);
- Reasonable steps to return the individual to duty, temporarily restricted if necessary, in a comparable position for which he or she is qualified and able to perform the essential functions with or without reasonable accommodations; R.23: Ex. Q: 1;
- Assistance which requires medical, surgical or hospital treatment; R.23: Ex. Q: 1.;
- Reimbursement of reasonable expenses for bona fide injuries; R.23: Ex. Q: 2.;
- If released unconditionally, reassigning a worker to a job he or she had prior to his or her injury or to work as closely related as possible to his or her previous job; R.23: Ex. Q: 4.;
- If work is not available within restrictions, kept on leave of absence until work within restrictions are available or receipt of all compensation and awards have been payable to him or her; R.23: Ex. Q: 4; and
- Comply with all applicable parts of the ADA and the FMLA R.23: Ex. Q: 6.

For a period of months after Mr. Harris's accident, the matter was treated in all respects as a workers compensation claim, handled by the Tribe's workers compensation adjuster, Crawford and Company. Based upon this belief, and being unable to resolve the claim with Crawford, Mr. Harris filed the action in Vilas County Circuit Court. R. 2. It was only after commencement of suit that it was revealed that the Tribe was self-insured for workers compensation claims. R. 7 Ex A.

Shortly after the turn of last century, a movement towards enactment of workers' compensation laws. This movement was bolstered by the reality, existent at the time, that the only source of compensation for any injured employee was through the courts. In order to successfully gain any compensation for medical bills or lost wages, employees had to prove the employer was negligent. Employers were armed with powerful common law defenses, such as assumption of risk, contributory negligence and the fellow servant rule to fend off employee suits. Further, employers were nearly always in a much better economic position in the court system.

In response to rising recognition of these inequities, the State of Wisconsin enacted the Nation's first state constitutional Workmen's Compensation Act (now Worker's Compensation) guaranteeing injury compensation as a legal right on May 3, 1911, to be administered by the Industrial Commission. The

constitutionality of the Act was upheld by the Wisconsin Supreme Court in *Borgnis v. Falk*, 147 Wis. 327133 N.W. 209 (1911). In *Borgnis*, the Court well and truly summarized the rationale that settled the social debate favoring this important legislation:

> For all the essential purposes of this discussion, it may truly be said that this is the law which is before us, and the question is simply whether there is any vital part of it which the Legislature may not enact because the Constitution forbids it. It is matter of common knowledge that this law forms the legislative response to an emphatic, if not a peremptory, public demand. It was admitted by lawyers, as well as laymen, that the personal injury action brought by the employé against his employer to recover damages for injuries sustained by reason of the negligence of the employer had wholly failed to meet or remedy a great economic and social problem which modern industrialism has forced upon us, namely, the problem of who shall make pecuniary recompense for the toll of suffering and death which that industrialism levies and must continue to levy upon the civilized world. This problem is distinctly a modern problem. In the days of manual labor, the small shop, with few employés, and the stagecoach, there was no such problem, or, if there was, it was almost negligible. Accidents there were in those days, and distressing ones; but they were relatively few, and the employé who exercised any reasonable degree of care was comparatively secure from injury. There was no army of injured and dying, with constantly swelling ranks marching with halting step and dimming eyes to the great hereafter. This is what we have with us now, thanks to the wonderful material progress of our age, and this is what we shall have with us for many a day to come. Legislate as we may in the line of stringent requirements for safety devices or the abolition of employers' common–law defenses, the army of the injured will still increase, and the price of our manufacturing greatness will still have to be paid in human blood and tears. To speak of the common–law personal injury action as a remedy for this problem is to jest with serious subjects, to give a stone to one who asks for bread. The terrible economic waste, the overwhelming temptation to the commission of perjury, and the relatively small proportion of the sums recovered which comes to the injured parties in such actions, condemn them as wholly inadequate to meet the difficulty. *Borgnis*, *supra* at 215.

In the absence of statutory Workers Compensation Law, redress for a workplace injury can be found only in common law personal injury tort law. The Tribe had no statute establishing worker's compensation. R. 7 Ex. B. Accordingly, the Tribe, having waived sovereign immunity objections regarding actions for

personal injury, was at all times subject to the jurisdiction of the Circuit Court. The Circuit Court erred in dismissing this action, and was mistaken in concluding that it lacked subject matter jurisdiction.

C. Faced with a most unusual procedural situation, the Circuit Court fashioned a remedy that promoted justice.

After the trial before the Tribal Court, despite numerous entreaties by Mr. Harris over nearly a year, no decision was forthcoming. Thus, the Circuit Court granted a motion to transfer the case back and accepted the case for disposition. The court was completely within its right to reassert its jurisdiction, if for no other reason than to further the compelling State interest on behalf of it's citizens guaranteed in Article I, section 9 of the Wisconsin Constitution:

> Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws.

The Court, at this juncture, was in uncharted territory. There was a record of a trial in a forum that had no worker's compensation law. Another trial on the merits would be a waste of judicial resources. Faced with this dilemma, the Court resolved to decide the matter based upon a review of the record and trial briefs from the parties. Neither party objected. The Court reviewed the record, and applying principals of Wisconsin Worker's Compensation law, decided the case in favor of Mr. Harris.

> Pomeroy's *Equity Jurisprudence* explains that "the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of

> every case and the complex relations of all the parties." 1 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 109 at 141 (5th ed. 1941). Further, "equitable remedies also differ from the legal ones in the manner of their administration," which should be "natural and flexible." *Id.* § 113 at 150.
>
> Wisconsin cases have recognized that once a court has determined that equitable relief is appropriate, it has wide latitude to fashion the remedy based on the equities of the case. *See Town of Fond du Lac v. City of Fond du Lac,* 22 Wis.2d 525, 531–32, 126 N.W.2d 206 (1964); *American Medical Servs. Inc. v. Mutual Fed. Savings & Loan,* 52 Wis.2d 198, 205, 188 N.W.2d 529 (1971) ("The court of equity has always had a traditional power to adapt its remedies to the exigencies and the needs of the case; that was one of the great virtues and reasons for the existence of courts of equity.") Ash Park, LLC v. Alexander & Bishop, LTD, 324 Wis.2d 703, 783 N.W. 2d 294 (2010) at 735.

The Court fashioned a procedure and remedy that was fair and appropriate. A trial court has broad discretion to determine the appropriate award of damages in a given case, not to be overturned unless clearly erroneous. *Three and One Co. v. Geilfuss,* 178 Wis.2d 400, 504 N.W.2d 393 (Ct. App. 1993). Mr. Harris is entitled to the long fought for judgment entered on his behalf.

II. Objection to subject matter jurisdiction must be raised prior to judgment or it is waived.

Absent submission to jurisdiction of the Wisconsin Courts under the Compact, there is no doubt that the Tribe would have had every right to dismissal of the subject action, if sovereign immunity was raised in a timely fashion.

> It is well settled that Native American tribes possess the common-law immunity from suit traditionally enjoyed by sovereign powers.

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 S. CT. 1670, 1676 (1978). But the question of **when** this defense must be raised - whether the defense must be raised prior to judgment or be waived, appears to be a case of first impression in the State of Wisconsin.

Reference to the statutes would lead one to conclude that the defense must be raised in the early stages of the proceedings. Ch. 802, Wis. Stats., *Civil Procedure – Pleadings, Motions and* ***Pretrial*** *Practice,* in §802.06 provides:

> (2) (a) Every defense, in law or fact, except the defense of improper venue, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or 3rd-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
>
> 2. Lack of jurisdiction over the subject matter.
>
> (2) (b) A motion making any of the defenses in par. (a) 1. to 10. shall be made before pleading if a further pleading is permitted.

The record demonstrates that rather than invoking the defense of immunity by pleading, motion or otherwise, the Tribe knowingly declined the opportunity to raise the defense at any time before judgment. Shortly after the injury, the Tribe's agent, company, Crawford and Company, wrote a letter to Ben on December 9, 2008, expressly promising to "continue paying [his] medical bills as they relate to this injury". R. 63 Ex. 12. The Tribe agreed to proceed through a non-tribal forum – the Vilas County Circuit Court – when it filed the motion to transfer under Wis. Stat. § 801.54 instead of asserting sovereign immunity. The Tribe expressly waived sovereign immunity on the record in Tribal Court: first, at a hearing on June 12, 2012, when the Tribe's counsel represented that he had discussed the issue of sovereign immunity with Torches' CEO and the Tribal Chairman. R. (63 Ex's. 3 & 4), and later, during the trial in Tribal Court on August 9, 2012, when counsel again reiterated that the Tribe could have invoked sovereign immunity but instead was intent to give Mr. Harris his due process and his day in court (R. 63

Ex's 3, 5 & 6). During the hearings held in Vilas County Circuit Court on August 20, 2013, August 29, 2013, October 23, 2013, and January 14, 2014, Torches acted consistent with this waiver by not objecting to the transfer back to Circuit Court, not contesting the decision on the merits, and not asserting sovereign immunity.

The trial court, well aware of these facts, made no reference to nor attempted to reconcile the provisions of 802.06 Wis. Stats. to these facts. Instead, the trial court made clear its notion that an objection to subject matter jurisdiction could be made at any time. The trial court explicitly rejected the notion that "it's too late" to enter objection to subject matter jurisdiction after judgment. R. 76 pgs. 12-14. In support of this conclusion (that the defense can be raised at any time), the court cited justice Kennedy's concurrence in *Wisconsin Department of Corrections versus Schacht*, 524 US 381 (1982), and *In the Interest of HNT* 125 Wisconsin 2d 242, 371 N.W. 395 (Ct App 1985) (subject matter jurisdiction can neither be conferred by the parties, nor consent no waived by the parties, and may be challenged at any stage in the proceedings). R. 76 p.14.

A closer examination of the cited cases does not lead to this bright line conclusion. *Schacht* involved an Eleventh Amendment case – whether certain claims raised in Federal Court were barred, subject only to jurisdiction in the state court. The state raised the Eleventh Amendment defense to certain issues before judgment, thus the objection was upheld as to those issues (the court allowed the issues not barred to proceed in Federal Court). The decision does not address what

the result would have been if the objections were raised post-judgment. But the trial court seized upon the concurring opinion, wherein Justice Kennedy noted:

> Given the latitude accorded the States in raising the immunity at a late stage, however, a rule of waiver may not be all that obvious. The Court has said the Eleventh Amendment bar may be asserted for the first time on appeal, so a State which is sued in federal court does not waive the Eleventh Amendment simply by appearing and defending on the merits. *394 See *Florida Dept. of State v. Treasure Salvors, Inc.,* 458 U.S. 670, 683, n. 18, 102 S.Ct. 3304, 3314, (plurality opinion).
>
> **I have my doubts about the propriety of this rule. In permitting the belated assertion of the Eleventh Amendment bar, we allow States to proceed to judgment without facing any real risk of adverse consequences. Should the State prevail, the plaintiff would be bound by principles of res judicata. If the State were to lose, however, it could void the entire judgment simply by asserting its immunity on appeal.** *Schacht, supra* at 394 [Emphasis supplied].

Further, the Court of Appeals, in *HNT* (which involved issues associated with collateral estoppel rather than a potential waiver for failure to timely raise objection to subject matter jurisdiction in a single case) recognized that the issue of waiver of objection, if not timely raised, is not settled in Wisconsin. In analyzing the question of the appropriate standard, the Court noted:

> The Restatement (Second) of Judgments, § 12 (1982), provides:
>
> Contesting Subject Matter Jurisdiction
>
> When a court has rendered a judgment in a contested action, the judgment precludes **398 the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation except if:
>
> (1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or
>
> (2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or
>
> (3) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject matter jurisdiction.

> Comment a to this section of the Restatement goes on to address the competing policies which exist on this question: finality of judgments and orders versus their validity. The comment observes:
> The problem poses a sharp conflict of basic policies. The principle of finality has its strongest justification where the parties have had full opportunity to litigate a controversy, especially if they have actually contested both the tribunal's jurisdiction and issues concerning the merits. Yet the principle of finality rests on the premise that the proceeding had the sanction of law, expressed in the rules of subject matter jurisdiction. As long as the possibility exists of making error in a determination of the question of subject matter jurisdiction, *248 the principles of finality and validity cannot be perfectly accommodated. Questions of subject matter jurisdiction must be justiciable if the legal rules governing competency are to be given effect; some tribunal must determine them, either the court in which the action is commenced or some other court of referral. If the question is decided erroneously, and a judgment is allowed to stand in the face of the fact that the court lacked subject matter jurisdiction, then the principle of validity is compromised. On the other hand, if the judgment remains indefinitely subject to attack for a defect of jurisdiction, then the principle of finality is compromised.
> Id. comment a at 116. As the comment notes, the trial court must select between the two doctrines. The traditional doctrine gives greater emphasis to the principle of validity while the modern rule gives the principle of finality greater weight. *HNT, supra* at 298.

The circumstances and equities involved in this case overwhelmingly echo Justice Kennedy's concerns (if the [Tribe] were to lose, it could void the entire judgment simply by asserting its immunity [after judgment]) – which is precisely what occurred here. Given the roadblocks to justice thrown in Mr. Harris's path by action and inaction of the Tribe at every turn of the proceedings, this Court should apply the modern rule, giving the principal of finality greater weight based upon the vagaries of this case. Indeed, extending the rationale of the trial court, at what point would the Tribe be barred from raising its objection – during this appeal? In a Petition for Review to the Supreme Court should Harris prevail? After a negative decision by the Wisconsin Supreme Court? Before the Supreme Court of the United States? "[A]t some point, lawsuits must come to an end, because unending

litigation is itself an injustice."[3] This day, the day this brief is filed with the Court of Appeals, marks the 6th anniversary of the horrendous injury suffered by Mr. Harris. Judge Nielsen correctly noted that this case shatters the very notion of justice. Justice can and should be restored.

CONCLUSION

The Tribe waived any defense of sovereign immunity relating to Mr. Harris's action when it gained the right to conduct gaming activities at Lake of the Torches Casino in the Gaming Compact 1992. The trial court properly considered the evidence adduced at a trial and rendered a reasoned decision, one tailored to do justice in this matter. The Tribe never brought a motion to halt the proceedings in Circuit Court on the basis of lack of subject matter jurisdiction. The judgment should stand. Therefore, this Court should reverse the Circuit Court's order setting aside the judgment, and remand this case for purposes of entry of the original judgment. In the alternative, this Court should find that the Tribe waived the defense of subject matter jurisdiction, either through the Compact or waiver in the trial court, and remand the matter to the Circuit Court for further proceedings based upon the Court's decision.

[3] David Peeples, *Trial Court Jurisdiction and Control Over Judgments,* 17 St. Mary's L.J. 367, 368 (1968).

Dated this 13th day of October 2014.

ARENZ, MOLTER, MACY, RIFFLE & LARSON, S.C.

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c), Stats., for a brief produced using the following font:

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Counsel for Plaintiff-Appellant

STATE OF WISCONSIN COURT OF APPEALS DISTRICT III

APPEAL NO. 2014 AP 1692

BENJAMIN D. HARRIS,

Plaintiff - Appellant

vs.

LAKE OF THE TORCHES RESORT & CASINO,

Defendant - Respondent

CERTIFICATION REGARDING ELECTRONIC BRIEF
PURSUANT TO SECTION 809.19(12)(f), STATS.

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of section 809.19(12), Stats.

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.
A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 13th day of October 2014.

ARENZ, MOLTER, MACY, RIFFLE & LARSON, S.C.

s/ H. Stanley Riffle

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