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

REPLY 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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CORRECTION OF MISSTATEMENTS

Lake of the Torches (Torches) authored several misstatements in its response brief. The most egregious of these is Torches' contention that Mr. Harris received a "full and fair trial in the Lac du Flambeau Tribal Court on the merits of his claim." Torches' Brief, p.1. The uncontroverted facts are that Mr. Harris suffered a horrific injury while working for Torches under a policy that promised workers compensation benefits. Workers compensation benefits are to be paid to every employee injured while performing service growing out of and incidental to his or her employment. Wis. Stat. §102.03. And while a properly terminated employee[1] may not be eligible for payment of temporary total disability payments after termination, there can be no legal justification for denying medical expenses and permanent partial disability, regardless of employment status.

Additional misstatements abound. First, Torches state "[u]nder the terms of Torches' workers compensation policies, (Harris's refusal to return to work) resulted in termination of Harris's employment ***and benefits***. Torches' Brief, p.1 [emphasis supplied]. There is nothing within the Torches Workers Compensation Policy that remotely suggests that compensation for medical bills and permanent partial disability is not due an injured employee following termination. R. 16 Ex. A. Of note, Torches thought it of such import to codify the policy in a handbook, but when the time came to implement the policy, it conveniently ignored its own policy. This, despite assurances from Torches workers compensation adjuster that,

[1] Mr. Harris contends that his termination was not warranted for reasons stated later in this brief.

at a very minimum, all medical expenses would be paid. Exhibit GG Tribal Court record. In the absence of workers compensation coverage, Mr. Harris should otherwise be afforded the same protections any other person would enjoy under the terms of the Gaming Compact: a minimum of $250,000 worth of insurance protection.

Second, Torches states "Torches properly raised its jurisdictional defense at the outset of the Vilas County Circuit Court Proceedings." Torches' Brief, p.1. It did not. Rather, Torches filed a motion for a temporary stay of proceedings pending allocation of jurisdiction together with a motion to transfer jurisdiction. A preamble was included in each motion, stating:

> THE FILING OF THIS MOTION BY LAKE OF THE TORCHES RESORT AND CASINO IS A SPECIAL APPEARANCE BEFORE THE COURTAND THE LAKE OF THE TORCHES RESORT AND CASINO ***RESERVES*** THE RIGHT TO RAISE ALL JURISDICTIONAL OBJECTIONS INCLUDING LACK OF JURISDICTION DUE TO SOVEREIGN IMMUNITY. R. 3 and 4 [Emphasis supplied].

Rather than seeking dismissal by motion pursuant to Wis. Stats., §802.06 Torches "reserved" the right to raise sovereign immunity as a defense. This defense was never formally raised in the trial court, and was specifically waived in the Tribal Court. Tribal Court notes R. 63 Ex. 4. Nor did Torches once raise the defense following Judge Nielsen's order transferring jurisdiction back to Vilas County pursuant to Wis. Stats. §801.54 (3) Wis. Stats. and prior to entry of judgment in favor of Mr. Harris.

Third, Torches suggests that Harris refused to return to work because he

believed the proffered position of host "was not masculine enough." Torches' Brief, p. 8. In reality, Mr. Harris advised his employer that at the time he was ordered back to work, he was on narcotics, causing significant side effects, including the inability to drive, and was told by his occupational therapist that it would not be a good idea to return to work. R. 34 pps. 19 – 24.

Finally, Torches suggest that Harris had no communication with Torches or its workers compensation adjuster for years after termination in December of 2008. Torches' Brief, p. 9. In fact, the record demonstrates that Harris had obtained counsel who presented a full summary of the workers compensation claim by June of 2010. R. 34 p. 81 and Exhibit CC Tribal Court record.

ARGUMENT

I. Torches' failure to invoke sovereign immunity prior to entry of judgment afforded Circuit Court subject matter jurisdiction

A. Circuit Court afforded Torches ample opportunity to invoke sovereign immunity

There can be no doubt that the Circuit Court flagged the issue of sovereign immunity from the very beginning of the proceedings, and that at no time was sovereign immunity invoked prior to entry of judgment. At the very first motion hearing dealing with the jurisdictional transfer, the court made very specific inquiry on the subject.

> THE COURT: And so my question is the issue of sovereign immunity something that is jurisdictional or is it more in the nature of an affirmative defense. So maybe you can adjust that for me.[2]
>
> MR. LESIEUR: …I don't see it as an affirmative defense, I would see it as reserving the right to raise that at some later point… But at this point we would like to -- I am just stating for the record that I would like to reserve it.[3]

Moreover, Torches' counsel stated "...if our (Tribal) Court's unwilling to hear it, and unable to hear it… I have no problem coming back here."[4] The Tribal Court, after nearly a year finally "heard it," but after another year, despite entreaty after entreaty, refused to rule. The trial court, which maintained concurrent jurisdiction at all times during the stay, appropriately lifted the stay in the interests of justice[5], and accepted tribal counsel's offer. Thereafter, there was no declaration of the defense of sovereign immunity prior to entry of judgment. And while Torches claims no benefit of counsel because their original counsel was disbarred during this time frame, the Circuit Court insisted upon sending notice directly to tribal offices, providing Torches notice of and opportunity to appear, object and file submissions. Torches retained counsel who actually appeared telephonically during the oral ruling.

B. Circuit Court correctly accepted notice of Torches' waiver of sovereign immunity in Tribal Court.

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[2] R. 30 p.4: 6 – 9.
[3] R. 30 p.4: 12 – 19.
[4] R. 30 p.31: 4 – 5.
[5] Wis. Stat. §801.54 (3) states: At any time during which jurisdiction of the court continues over the parties to the proceedings, the court may, on motion and notice to the parties, subsequently modify the stay order and take any further action in the proceeding as the interests of justice require.

There can be no doubt that Torches waived sovereign immunity in the Tribal Court. The Tribal Court's own notes reflect this. First, at the June 12, 2012 hearing, in response to the court's inquiry on the subject, the Tribal Court's notes (concededly cryptic) reflect the following statements of counsel: ""no where else to go, therefore waive… brought up the issue with Mr. Gueke (sic) and Chairman due process, not intend involve sovereign immunity, not involved… afford employee due process hearing in this case." R. 63 Ex. 4. The August 9, 2012 hearing notes record tribal counsel as stating: "could have invoked sovereign immunity." R. 63 Ex. 5.

Torches' argument that the waiver in Tribal Court is limited to that forum completely ignores the fact that these two courts shared concurrent jurisdiction over the proceedings. None of the cases cited in support of this contention involve instances of concurrent jurisdiction regulated under Wis. Stat. §801.54. Pursuant to the express provisions of Wis. Stat. §801.54 (3), when it became apparent that it was necessary in the interests of justice that Vilas County Circuit Court reassume jurisdiction, it was so ordered. In furtherance of the legislative directive that the court should "take any further action in the proceeding as the interests of justice require," the Circuit Court utilized the record of all proceedings before the Tribal Court, ***including the waiver of sovereign immunity***. Wis. Stat. §801.54 most certainly contemplates this process, given the nature of concurrent jurisdiction and the potential for matters to be transferred to and from either forum.

The waiver in this instance was unequivocal. If Torches has any defense, it should be directed against its attorney if counsel overstepped his authority. Torches waived immunity in a court of record and its actions have caused a meritorious claimant to expend extraordinary time and expense to seek justice, only to be subject to a post-judgment springing of an odious trap.

C. Circuit court erred in concluding that the post-judgment assertion of sovereign immunity mandated vacation of judgment.

The Circuit Court's rational for concluding that it had no alternative but to vacate its judgment was premised on a fundamental error of law, to wit: that existence of a *right* to invoke sovereign immunity automatically deprives the court of subject matter jurisdiction. In this regard, the court stated: "[s]ubject matter jurisdiction can neither be conferred by the parties consent, nor waived by the parties, and may be challenged at any stage in the proceedings." The Circuit Court was simply wrong. It is well settled that the defense of sovereign immunity may be waived. *Lister v. Board of Regents of University Wisconsin System* 72 Wis.2d 282, 240 N.W.2d 610 (1976). The facts and circumstances in these proceedings show that Torches never raised the defense; rather, the defense was explicitly waived. It is apparent that the Circuit Court disdained the result it reached, and but for the misapplication of law, would have reached the opposite result. This error of law should and must be corrected and the judgment reinstated.

II. The rank injustice demonstrated in this case cries out for reversal of the court-created law of tribal sovereign immunity.

There is a growing recognition in the United States Supreme Court, albeit the minority view but nonetheless unquestionably persuasive, that the law of sovereign immunity should be significantly altered. The case at hand is the poster child for this premise – a Gordian knot of substantive and procedural complexities culminating in, as Judge Nielsen so aptly recognized, a shattering of "the very notion of justice." Transcript of bench decision, May 29, 2014, the Honorable Neal A. Nielsen, III, R. 76: 16.

The Supreme Court's latest opportunity to address the issue came earlier this year in *Michigan v. Bay Mills Indian Cmty,* 134 S. Ct. 2024, 188 L. Ed. 1071 (2014). The stirring dissent authored by Justice Thomas and joined by Justices Scalia, Ginsburg and Alito maintained that sovereign immunity afforded to tribes under *Kiowa Tribe of Oklahoma v. Mfg. Techs, Inc*[6] has led to extensive, severe and insufferable injustices. The dissenters find these injustices so intolerable as to warrant a departure from the rule of *stare decisis* in order to correct the *Kiowa* blunder.

> In sum, any number of Indian tribes across the country have emerged as substantial and successful competitors in interstate and international commerce, both within and beyond Indian lands. As long as tribal immunity remains out of sync with this reality, it will continue to invite problems, including *de facto* deregulation of highly regulated activities; unfairness to tort victims; and increasingly fractious relations with States and individuals alike. The growing

[6] 523 U.S. 751, 140 L. Ed. 981 (1998).

> harms wrought by *Kiowa*'s unjustifiable rule fully justify overruling it. *Id.* at 2052.

The dissent acknowledges the reality that commerce generated by Indian casino gaming in the modern era only serves to exacerbate these inevitable problems, undermining a State's interests in protecting the health, safety, welfare and constitutional rights of its own citizens.

> As the commercial activity of tribes has proliferated, the conflict and inequities brought on by blanket tribal immunity have also increased. Tribal immunity significantly limits, and often extinguishes, the States' ability to protect their citizens and enforce the law against tribal businesses. *Id.* at 2051.

Indeed, all tribes, by law are required to protect the health safety and welfare of all patrons ***and employees*** and provide for them a system of insurance and liabilities[7] and to guarantee equal protection and due process of the law to all.[8] Torches failed on all counts in the case at bar.

Justice Thomas recognized that there is a proper place for assertion of sovereign immunity – in the sovereign's own court – but this right should not extend to the courts of another sovereign.

> This basis for immunity—the only substantive basis the majority invokes—is unobjectionable when a tribe raises immunity as a defense in its own courts. We have long recognized that in the sovereign's own courts, "the sovereign's power to determine the jurisdiction of its own courts and to define the substantive legal rights of its citizens adequately explains the lesser authority to define its own immunity." *Kiowa, supra,* at 760, 118 S.Ct. 1700 (Stevens, J., dissenting) (citing *Kawananakoa v. Polyblank,* 205 U.S. 349, 353, 27 S.Ct. 526, 51 L.Ed. 834 (1907)). But this notion cannot support a tribe's claim of immunity in the courts

[7] 25 CFR § 291.4 (9) All proposals for a Class III gaming license must include "[p]olicies and procedures that protect the health and safety of patrons and employees and that address insurance and liability issues

[8] Indian Civil Rights Act 25 U.S.C. § 1302 (a) (8)

> of another sovereign—either a State (as in *Kiowa*) or the United States (as here). Sovereign immunity is not a freestanding "right" that applies of its own force when a sovereign faces suit in the courts of another. *Republic of Austria v. Altmann,* 541 U.S. 677, 688, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004). Rather, "[t]he sovereign's claim to immunity in the courts of a second sovereign ... normally depends on the second sovereign's law." *Kiowa, supra,* at 760–761, 118 S.Ct. 1700 (Stevens, J., dissenting); see, *e.g., Altmann, supra,* at 711, 124 S.Ct. 2240 (BREYER, J., concurring) (application of foreign sovereign immunity "is a matter, not of legal right, but of 'grace and comity' ").[1] In short, to the extent an Indian tribe may claim immunity in federal or state court, it is because federal or state law provides it, not merely because the tribe is sovereign. Outside of Tribal Courts, the majority's inherent-immunity argument is hardly persuasive. *Id.* at 2046 - 2047.

Each of the dissent's foreboding predictions (*de facto* deregulation of highly regulated activities [here Workers Compensation], unfairness to tort victims [in the absence of a Workers Compensation law] and extinguishment of the States' ability to protect their citizens and enforce the law against tribal businesses) have been visited upon Mr. Harris should the decision of the Circuit Court be upheld here. For the very reasons present in this case, Justice Thomas articulated that the time has come to correct the Court's mistake.

> In *Kiowa,* this Court adopted a rule without a reason: a sweeping immunity from suit untethered from commercial realities and the usual justifications for immunity, premised on the misguided notion that only Congress can place sensible limits on a doctrine we created. The decision was mistaken then, and the Court's decision to reaffirm it in the face of the unfairness and conflict it has engendered is doubly so. *Id.* at 2055.

CONCLUSION

The Circuit Court vacated its judgment based solely on the mistaken assumption that it lacked subject matter jurisdiction. 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. Moreover, the time has arrived for the defense of tribal sovereign immunity to be abolished in Wisconsin.

Dated this 1st day of December 2014.

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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:

> Proportional font serif: 13 point characters per inch; minimum leading of 2 points; 1.5-inch margin on left side and 1-inch margins on the other 3 sides. The length of this brief is 2,962 words.

Dated this 2d day of December 2014.

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

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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 2d day of December 2014.

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