In the State of Wisconsin Court of Appeals District III

BENJAMIN D. HARRIS,

Plaintiff-Appellant,

v.

LAKE OF THE TORCHES RESORT & CASINO,

Defendant-Respondent.

On Appeal from the Circuit Court of Vilas County, Wisconsin,
Civil Division, No. 11-CV-000188.
The Honorable **Neal A. Nielson III**, Presiding Judge.

BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANT-RESPONDENT LAKE OF THE TORCHES RESORT & CASINO

ANDREW ADAMS III (WI #1052371)
(*Counsel of Record*)
JESSICA INTERMILL (MN #0346287)
(*Admitted pro hac vice*)
JESSIE STOMSKI SEIM (MN #0388973)
(*Admitted pro hac vice*)
WILLIAM SZOTKOWSKI (MN #161937)
(*Admitted pro hac vice*)
HOGEN ADAMS PLLC
1935 West County Road, B2, Suite 460
St. Paul, Minnesota 55113
(651) 842-9100

Attorneys for Defendant-Respondent

Table of Contents

Table of Authorities

Cases

Constitutions

Statutes

Other Authorities

Statement Re. Oral Argument & Publication

Defendant-Respondent Lake of the Torches Resort & Casino believes that oral argument is appropriate and necessary in light of the general complexity of Indian law and attendant sovereign-immunity issues, and the unique procedural history this case presents. Lake of the Torches does not believe that publication is appropriate because the issues Plaintiff-Appellant Harris has raised in his appeal are disposed of by the application of published Wisconsin cases and well-settled principles of federal Indian law.

Statement of the Case

I. Nature of the case

Plaintiff-Appellant Benjamin Harris injured himself on the Lac du Flambeau Band of Lake Superior Chippewa's (the "Tribe") Reservation while employed by the Tribe at the restaurant of Defendant-Respondent Lake of the Torches Resort & Casino ("Torches" or the "Casino"). Following the terms of its worker's compensation plan, Torches paid Harris full and fair compensation until he refused to return to the light-duty work his medical provider had determined he was capable of. Under the terms of Torches' worker's compensation policies, this resulted in termination of Harris's employment and benefits. Harris did not challenge termination of his employment or benefits. He did not seek any compensation from Torches until years later when he decided to initiate legal proceedings.

In this appeal, Harris asks the Court to ignore the fact that he was afforded a full and fair trial in the Lac du Flambeau Tribal Court on the merits of his claim. It was only *after* the Tribal Court issued a valid and binding judgment that the issue of whether Torches waived its sovereign immunity from Harris's claims in *state* court became dispositive. But Torches properly raised its jurisdictional defense at the outset of the Vilas County Circuit Court ("Vilas County") proceedings. Throughout the proceedings, it never waived that defense.

This Court should affirm Vilas County's vacatur of the void judgment against Torches because Torches is immune from this suit. Alternatively, this Court can also affirm Vilas County's vacatur on the grounds that it improperly purported to invalidate the Tribal Court's judgment in violation of federal law, and through improper application of Wis. Stat. § 806.245 ("Indian tribal documents: full faith and credit") and the Ninth Judicial District Tribal/State Protocol.[1]

II. Statement of facts relevant to issues on appeal

A. Tribal actors and authority

1. The Tribe

The Tribe "is a self-governing, federally recognized Indian nation that exercises sovereign authority over its members and its territory."[2] It "performs a wide variety of governmental services and exercises broad civil regulatory authority within the reservation."[3]

---

[1] R.61 at Ex. G (Tribal/State Protocol for the Judicial Allocation of Jurisdiction between the Bad River Band of the Lake Superior Indians, Forest County Potawatomi Community, Ho-Chunk Nation, Lac du Flambeau Band of Lake Superior Chippewa Indians, Sokaogon Chippewa Community (Mole Lake), Stockbridge-Munsee Band of the Mohicans and the Ninth Judicial District of Wisconsin ("Tribal/State Protocol" or "Protocol")).

[2] *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Zeuske*, 145 F. Supp. 2d 969, 971 (W.D. Wis. 2000)).

[3] *Id.*

2. Lake of the Torches

The Tribe owns the Lake of the Torches Economic Development Corporation (the "Corporation"), which is chartered under the Tribe's Constitution.[4] The Corporation owns and operates the Casino[5] on its reservation near Lac du Flambeau, Wisconsin.[6] Torches is the Tribe's primary source of governmental revenue.[7] Without the income generated by Torches, the Tribal government cannot operate or provide services to its members.[8] The Corporation operates the Eagle's Nest Restaurant located at the Casino.[9]

3. The Tribal/State Gaming Compact

The Tribe's gaming activities at Torches are strictly governed by the Indian Gaming Regulatory Act ("IGRA").[10] IGRA is one in a long line of federal laws designed to protect Indian tribes from outsiders seeking to profit at their expense.[11]

---

[4] Supplemental Appendix ("SA.") at 5 (Tribe's Constitution, Article VI, Section 1(o)), *available at* http://www.ldftribe.com/Courts/BYLAWS.pdf). The Court may take judicial notice of the Tribe's governing documents because they are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Sisson v. Hansen Storage Co.*, 2008 WI App 111,¶ 10, 313 Wis.2d 411, 424, 756 N.W.2d 667, 674 (citing Wis. Stat. § 902.01(2)(b)).

[5] *Wells Fargo Bank, N.A. v. Torches Econ. Dev. Corp.*, 677 F. Supp. 2d 1056, 1057 (W.D. Wis. 2010).

[6] *Wells Fargo Bank. N.A. v. Torches Econ. Dev. Corp.*, 658 F.3d 684, 688 (7th Cir. 2011).

[7] *Tiller's Guide to Indian Country: Economic profiles of American Indian Reservations*, 1044 (Veronica E. Velarde Tiller ed., 2005) ("[Torches] serve[s] as the tribe's largest employer and source of tribal revenues.").

[8] *See* Record ("R.") 28 at 8:17–21; *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2043, 188 L. Ed. 2d 1071 (2014) (Sotomayor, J., concurring).

[9] *See* R.34 at 11:10–12.

[10] 25 U.S.C. §§ 2701–2721.

[11] *See Wells Fargo*, 658 F.3d at 687.

Under IGRA, the Tribe and Wisconsin entered into the Lac Du Flambeau Band of Lake Superior Chippewa Indians and the State of Wisconsin Gaming Compact of 1992[12] (the "Compact"), which "govern[s] the conduct of gaming activities."[13]

Paragraph XIX states:

> 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 damages.
>
> 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.[14]

Section XXIII.E of the Compact states that:

> Nothing contained herein shall be construed to waive the immunity of the Tribe or the State, except for suits arising under the terms of this Compact. This waiver does not extend to other claims brought to enforce other obligations that do not arise under the Compact or to claims brought by parties other than the State and the Tribe.[15]

4. Tribal Court

The Lac du Flambeau Tribal Council, the Tribe's governing body, created the Tribal Court under the Tribe's Constitution.[16] The Tribal Court has:

[12] Harris's Appendix ("App.") at 126–199.
[13] 25 U.S.C. § 2710(d)(3)(A).
[14] App.162.
[15] App.187.
[16] R.61 at Ex. B, Ch. 80.102; SA.10–13 (Article X).

> original jurisdiction over all cases and controversies, both criminal and civil, in law or in equity, arising under the Constitution, laws, customs, and traditions of the Lac du Flambeau Band of Lake Superior Ojibwe, . . . and cases in which the Tribe, or its officials and employees shall be a party. This grant of jurisdiction shall not be construed as a waiver of the Tribe's sovereign immunity.[17]

The Tribal Court has operated since 1983.[18] Vilas County, which issued the decision on appeal, and the Tribal Court enjoy a good working relationship.[19] Judge Nielsen noted in this case that Vilas County "is a very busy court, and we would be significantly more so if it were not for the efforts of the Tribal Court to assume jurisdiction in many areas . . . [T]he benefit [Vilas County] receives from the Tribe's exercise of jurisdiction and establishment of a viable Tribal Court is appreciated and welcomed."[20] All litigants in Tribal Court are entitled to appeal adverse decisions to the Lac du Flambeau Court of Appeals ("Tribal Court of Appeals").[21]

5. Torches' worker's compensation system

Torches maintains a comprehensive system whereby the Tribe pays medical expenses and lost wages for on-the-job injuries suffered by Tribal and

---

[17] SA.11 (Article X, Section 3).
[18] R.61 at Ex. B, vi.
[19] *See* R.28 at 5:4–21.
[20] *Id. See also*, *id.* at 4:8–13 (Vilas County stating that "Indian tribes, as we know, are sovereign nations, and a fundamental principle of sovereignty is the ability to govern one's own affairs. In this regard the existence of Tribal Courts are extraordinarily important to the self-determination of Indian people.").
[21] R.61 at Ex. B, Ch. 80.203(1).

Casino employees.[22] The Tribe is self-insured,[23] and utilizes a third-party worker's compensation system administrator, Crawford & Company ("Crawford").[24] Torches and Crawford implement the Tribe's written protocols independent of the state's worker's compensation system.[25]

When Harris was injured, the terms of the worker's compensation system were set forth in Torches' Personnel Policies Handbook.[26] The Tribe has since passed a Workers' Compensation Code that codified the previous protocols and set forth the process whereby workers can challenge a benefit determination.[27]

B. Harris's consensual employment relationship with the Tribe

1. Harris's employment at Torches

Harris voluntarily entered into an employment relationship with a Tribal entity on Tribal lands. He worked as a prep cook in the Eagle's Nest Restaurant at Torches on the Tribe's reservation.[28] Torches provided Harris with a Personnel Policies Handbook, the document that governed his employment relationship.[29] It included a Worker's Compensation Policy and its Return-to-Work Program.[30] On

---

[22] R.5 at 2, ¶ 7.
[23] *Id.*; R.7 at 8. As Vilas County noted, "[t]here is nothing that prohibits the Tribe from self-insuring in Workman's Compensation." R.29 at 9:22–23.
[24] *See* R.34 at 57:17–18, 58:1–2.
[25] *Id.* at 48:14–16.
[26] *Id.* at 13:7–11; R.66 at Exs. B & C.
[27] Tribal Code Chapter 93 (*available at* http://www.ldftribe.com/Court%20Ordinances.php). The Court may take judicial notice of this information. *See* n. 3, *supra*.
[28] R.34 at 11:5–12.
[29] R.66 at Ex. A.
[30] R.34 at 13:7–11; R.66 at Exs. B & C.

September 10, 2007, Harris signed an Acknowledgement Form demonstrating his understanding that the policies "are not an employment contract," and that he was an at-will employee."[31]

2. Harris's injury

On October 13, 2008, Harris injured his hand on the job.[32] Torches followed its written policy and paid Harris lost wages from on or about October 13, 2008 to December 5, 2008.[33] It also paid all of Harris's medical expenses during that time.[34]

3. Harris refused to return to temporary light work at the Eagle's Nest Restaurant

Torches Safety Manager Mark Wilke is responsible for administering Torches' worker's compensation policy.[35] On or about December 4, 2008, Wilke received a Return-to-Work Form from Harris's doctor stating that Harris could return to light-duty work.[36] On December 5, 2008, Wilke contacted Harris to discuss returning to temporary light work in the restaurant pursuant to the applicable policy.[37]

---

[31] R.66 at Ex. A.
[32] R.34 at 14:13–20.
[33] *See id.* at 42:9–15.
[34] *Id.*
[35] R.34 at 43:19–23.
[36] *Id.* at 54:11–23, 55:1–15; R.65 at Ex. D.
[37] R.34 at 56:11–14.

Wilke informed Harris that he would need to report to temporary light duty as a host in the dining room.[38] Wilke explained that the hosting duties would meet the medical restrictions of Harris's most recent provider report.[39] Wilke advised Harris that he would not have to use his injured hand, that the restaurant would make all necessary accommodations,[40] and that Harris would be able to receive 100% of his pre-injury paycheck for his hosting duties.[41]

Harris told Wilke that he would not return to work because Harris believed that the hosting position was not masculine enough.[42] Harris never mentioned to Wilke that he was on narcotic medication that could hinder his ability to work as a host.[43] Wilke told Harris that his failure to show up for hosting duties "would negate entitlements of any further lost time benefits under [Torches'] Worker's Compensation Program as of December 6, 2008."[44]

Wilke followed the conversation with a letter to Harris, further advising that:

---

[38] *Id.* at 55:1–15.
[39] *Id.* at 55:14–15.
[40] *Id.* at 57:1–14.
[41] *Id.* at 56:17–23.
[42] *Id.* at 57:5–7. *See also*, R.32 at 10:4–9; 23:8–11.
[43] R.34 at 78:13–20. While Harris testified that he did explain his narcotic use complications to Wilke, neither the Tribal Court nor Vilas County found his testimony to be credible or dispositive. *See* R.32 at 17:21–25, 18:1–7, 23:7–16.
[44] R.34 at 55:17–19.

> [f]ailure to report for your scheduled shift at 8:00 a.m. on December 6, 2008 as instructed has resulted in the no-call/no-show. Therefore, your actions will be subject to the Torches Resort Casino personnel policies handbook.[45]

Harris did not report for work on December 6. As forewarned, Harris's refusal to accept temporary hosting duties resulted in termination of his lost-wages benefits[46] as well as termination of his employment at the Eagle's Nest Restaurant.[47]

Although Harris went on to get further medical treatment for his hand in 2008, Harris did not advise Torches of these treatments, and did not attempt to obtain any additional benefits from Torches.[48] In fact, Harris had no further communications with Torches or Crawford until years later, shortly before initiating litigation.[49] Harris acknowledges that neither Torches nor the Tribe acted in bad faith.[50]

III. Procedural status of the case leading up to appeal

A. Harris sued Torches in state court

On June 13, 2011, Harris brought suit against Torches and Crawford[51] in Vilas County on a claim for worker's-compensation-related damages.[52] Harris's

---

[45] *Id.* at 55:21–22; 56:1; R.66 at Ex. E.
[46] R.66 at Ex. E.
[47] *Id.*
[48] R.34 at 83:5–19; R.32 at 23:14–25, 24:1–8.
[49] R.32 at 23:14–25, 24:1–8.
[50] *Id.* at 24:14–17.
[51] Harris dismissed Crawford from the case. R.8 at 1.
[52] R.2 at 3.

complaint also asserted that Torches breached an employment agreement.[53]

On July 8, 2011, Torches appeared specially, filing a motion for temporary stay of proceedings so that Vilas County and the Tribal Court could allocate jurisdiction over the case pursuant to the Tribal/State Protocol.[54] The filing asserted that Torches "enjoys the sovereign immunity of the Tribe[,]"[55] "reserve[ed] the right to raise all jurisdictional objections including a lack of jurisdiction due to sovereign immunity[,]"[56] and asserted that Tribal Court was the appropriate forum for the dispute between a tribal employer and a tribal employee related to activities occurring on the Tribe's Reservation.[57]

On July 19, 2011, Torches filed a motion to transfer jurisdiction to the Tribal Court under Wisconsin Statute section 801.54[58] by special appearance, and it asserted that Torches "as a tribal business which is owned and operated by the Lac du Flambeau Band of Lake Superior enjoys the sovereign immunity of the Lac du Flambeau Band of Lake Superior[.]"[59] It also "reserve[ed] the right to raise all jurisdictional objections including a lack of jurisdiction due to sovereign immunity."[60] Similar to its first filing, this motion advised that the Tribal Court

---

[53] *Id.* at ¶ 9.
[54] R.3 at 1.
[55] *Id.* at 4.
[56] *Id.* at 1.
[57] *Id.* at 4, ¶ 10.
[58] R.4 at 1.
[59] *Id.* at 2. *See also id.* at 5 (the "Casino enjoys the sovereign immunity of the Tribe").
[60] *Id.* at 1.

had jurisdiction over the Harris dispute.[61]

On July 26, 2011, by special appearance, Torches answered Harris's Vilas-County complaint and expressly lodged the affirmative defense "[t]hat the Defendant enjoys the sovereign immunity of the Tribe and [Vilas County] lacks jurisdiction over the Defendant."[62]

At the hearing on Torches' Wisconsin Statute section 801.54 motion to transfer, Torches' attorney asserted and preserved the Tribe's sovereign immunity from Harris's state-court claims numerous times:

- "[F]irst of all I'm governmentally mandated to say that this is a special appearance, and [Torches] is going to reserve all jurisdictional objections, including, but not limited to the in—the invocation of sovereign immunity."[63]
- "As far as jurisdictional [sovereign immunity], I don't have the authority to waive that. And that's often an issue, I mean, who really has the authority to waive that. But at this point we would like to, I am just stating for the record that I would like to reserve it."[64]
- "I am trying to maintain the sovereign immunity thing. Which I, you know, I don't have authority to waive."[65]

At the same hearing, Vilas County Judge Nielsen similarly acknowledged that Torches properly raised and had not waived its sovereign-immunity jurisdictional defense:

- "[S]overeign immunity is plead as an affirmative defense in the Defendant's

[61] *Id.* at 2–5.
[62] R.5 at 1, 3.
[63] R.30 at 3:17–23; 4:11–19; 19:14–18.
[64] *Id.* at 4:14–19.
[65] *Id.* at 19:15–16.

answer[.]"[66]

- "[T]he Court does not take the filing of your motion as, itself, a waiver of the claim of sovereign immunities."[67]
- "I do note the Tribe's reservation of claims to jurisdiction. And I do note the Tribe's claim to assertion of Tribal sovereignty."[68]
- "The Tribe is, in all likelihood, immune from suit under these facts in the Circuit Courts of Wisconsin."[69]

Vilas County granted Torches' motion to transfer the matter to Tribal Court on October 26, 2011.[70]

B. Upon transfer, the Tribal Court conducted a full trial

The Tribal Court proceeded to a full evidentiary trial on August 9, 2012.[71] Harris claimed, through his attorneys, that during unrecorded portions of the Tribal Court proceedings, Torches' attorney indicated that the Tribe was waiving its sovereign immunity so that the parties could proceed with the Tribal Court trial.[72] There is no independent record of such statements.[73]

---

[66] R.29 at 4:19–20.
[67] R.30 at 4:21–22.
[68] *Id.* at 34:13–15.
[69] R.29 at 9:24–25.
[70] *See* R.30 at 36:8-10.
[71] R.34.
[72] R.14 (Harris's attorney asserting that at the Tribal Court pre-trial hearing and first hearing, Attorney LeSeiur conceded that Harris was entitled to a hearing on his claim); R.15 (Harris's attorney asserting that Attorney LeSeiur told the Tribal Court during closing argument at trial that the Tribe could have asserted sovereign immunity, but instead chose to give Harris his day in court); R.19 at Ex. A (Harris's attorney asserting that Attorney LeSeiur told the Tribal Court during closing argument that Torches "could've invoked sovereign immunity but chose not to [because it] wanted to give Ben due process & fairness."); R.31 at 9:21–25, 10:1–4; R.31 at 9:21–25, 10:1–4.
[73] R.32 at 4:23–25; 5:5–10.

The Tribal Court entered judgment against Harris on August 2, 2013.[74] It determined that: (1) Torches' Personnel Policies Handbook did not create a contract and Harris was an at-will employee; (2) Harris refused to return to work when offered temporary light work duty, in contravention of the policy; and (3) Harris sought medical attention without the knowledge or permission of his employer in contravention of the policy.[75] These findings supported the Tribal Court's denial of all relief Harris requested.[76]

Harris filed a notice of appeal with the Tribal Court of Appeals on August 20, 2013.[77] The Tribal Court of Appeals convened a three-panel judge lead by retired Vilas County Judge Mohr.[78] After Harris noticed his appeal, Tribal Court Judge Smith submitted to the Tribal Court of Appeals his position that Harris voluntarily waived his Tribal Court Code Chapter 80.203(I) appellate rights as part of a negotiated stipulation.[79] Harris responded in writing and advised the Tribal Court of Appeals of his intent to abandon the appeal in favor of Vilas County proceedings.[80]

---

[74] R.66 at Ex. F.
[75] *Id.* at 4.
[76] *Id.*
[77] R.38 at Ex. D.
[78] *See id.* at Ex. E.
[79] *Id.* at Ex. H.
[80] *Id.* at Ex. F.

C. Harris sought to resume Vilas County action

Shortly before the Tribal Court issued its judgment, on July 17, 2013 Harris filed a motion in Vilas County seeking to "transfer" jurisdiction back to Vilas County, and divest the Tribal Court of jurisdiction over the dispute.[81] He argued "transfer" was appropriate because the Tribal Court had not yet issued a decision.[82]

1. Vilas County held that Torches waived its sovereign immunity from Harris's claims in Tribal Court, which allowed him to proceed in State court

On August 29, 2014—even though the Tribal Court had already issued its August 2, 2013 judgment against Harris—Vilas County held a hearing to announce its ruling on Harris's motion to "transfer" the case back to Vilas County.[83] In its ruling, Vilas County expressly recognized that Torches had properly asserted and preserved its sovereign immunity from the Vilas County proceeding.[84] Vilas County further "recognized the likely merits of the claim for sovereign immunity."[85]

---

[81] R.13. Harris's motion was improper. Wis. Stat. § 801.54(3) allows a circuit court to lift a previously-imposed stay in its own case; it does not allow circuit courts to "transfer" tribal jurisdiction back to the circuit court, effectively robbing the tribal court of jurisdiction over its case. Wis. Stat. § 801.54(3).
[82] R.13 at 2.
[83] R.28.
[84] *See id.* at 7:5–7.
[85] *Id.* at 7:12–13.

Nevertheless, it went on to find that Torches waived its sovereign immunity from Harris's claim in Vilas County[86] because: (1) Torches did not raise sovereign immunity as a defense *in Tribal Court*; (2) Torches proceeded through trial *in Tribal Court*; and (3) Torches' attorney allegedly represented during the proceedings *in Tribal Court* that Torches had waived its sovereign immunity *in Tribal Court* so that Harris could proceed to trial before the *Tribal Court*.[87]

2. Vilas County "invalidated" the Tribal Court judgment

At the same hearing, Vilas County addressed "the five hundred pound gorilla in the room"[88]—the judgment of a separate sovereign. Although Torches did not ask Vilas County to afford the Tribal Court judgment full faith, Harris used Wisconsin Statute section 806.245 as a sword, asking Vilas County to "render[] the judgment invalid."[89] Vilas County accepted Harris's invitation, and purported to invalidate the separate sovereign's judgment based on two sections of Wisconsin Statute section 806.245.[90]

---

[86] *Id.* at 22:11–14.
[87] *Id.* at 21:24–25, 22:1–7; R.31 at 6:23–24.
[88] R.31 at 13:16–17.
[89] R.28 at 20:6–15; R.22 ("The decision issued by Judge Smith in the Lac du Flambeau Tribal Court Case Number 11-CV-114 is invalid and unenforceable, pursuant to Wis. Stat. § 806.245.").
[90] R.28 at 14:24–25; 15:1–4.

First, Vilas County found that "[t]he judgment was [not] procured in compliance with procedures required by the rending court,"[91] namely Tribal Court Code Chapter 80.104(1)(d).[92] That law provides (with certain exceptions not relevant here) that a standing trial judge shall be disqualified and a judge *pro tem* appointed in any case in which the Tribe or arm of the Tribe is a party, and the opposing party is a nonmember.[93] Because Tribal Court Judge Smith did not disqualify himself from Harris's case, Vilas County reasoned, the Tribal Court failed to comply with its own procedures.[94] What Vilas County did not consider was that the Tribe did not enact Chapter 80.104(1)(d) until well after Harris's trial. Indeed, Harris never moved to disqualify Judge Smith in the Tribal Court proceedings—no doubt because the provision did not then exist.

Second, Vilas County held that the Tribal Court judgment was not "reviewable by a superior court"[95] because Tribal Court Judge Smith purportedly prohibited Harris from appealing the matter.[96] In reality, Tribal Court Judge Smith did not and could not cut off Harris's right to appeal to the Tribal Court of

---

[91] Wis. Stat. § 806.245(4)(e).
[92] R.61 at Ex. B, Ch. 80.104(1)(d).
[93] R.28 at 17:1–18, 20:8–11.
[94] *Id.*
[95] Wis. Stat. § 806.245(3)(c).
[96] R.28 at 14:22–25, 15:1–2 ("Plaintiff's counsel have represented to the Court that Judge Smith's ruling indicates that it is a final judgment of the Tribal Court, not subject to appeal. And based on that, this Court needs to look at the issue about whether or not to afford that judgment full faith and credit under 806.245.").

Appeals. And Harris *did* file a notice of appeal with the Tribal Court of Appeals on August 20, 2013.[97] Although Vilas County found no other parts of the Wisconsin State section 806.245 lacking, Vilas County declared the Tribal Court's judgment "invalid and unenforceable, pursuant to Wis. Stat. § 806.245."[98]

3. Vilas County issued its own judgment in favor of Harris

Having "invalidated" the Tribal Court's judgment, Vilas County undertook its own review of the entire Tribal Court record.[99] It entered a second judgment in the case, this time in favor of Harris in the amount of $200,428.25 for post-employment medical expenses.[100]

When Harris asked Vilas County to reassert jurisdiction and during that Court's later proceeding to judgment, Torches' attorney did not attend hearings or respond—and indeed could not respond—because his license to practice law in Wisconsin courts was suspended.[101] This non-participation, however, was not an intentional or knowing act by Torches or the Tribe.[102] When Torches and Tribal leadership became aware that Vilas County had issued a second, conflicting judgment, Torches immediately retained licensed counsel to represent it in Vilas

---

[97] R.38 at Ex. D.
[98] R.22 at 1.
[99] R.25.
[100] *Id.*; R.32 at 13:13–25, 14:1–11.
[101] R.31 at 3:21–23; R.28 at 13:9–10 (Vilas County noting that "there is still no one representing the interests of the Tribe here[.]").
[102] R.68 at ¶ 2; R.69 at ¶ 2.

County.[103]

D. Torches sought to vacate the Vilas County judgment

On February 7, 2014, about two weeks after Vilas County issued its judgment, new counsel for Torches filed a Wis. Stat. § 806.07(1) motion to vacate, asserting that Torches never waived its sovereign immunity from Harris's claims in Vilas County.[104] Torches further asserted, *inter alia*, that Vilas County improperly purported to invalidate the Tribal Court judgment in violation of the governing federal infringement and pre-emption tests; that it improperly applied Wisconsin worker's compensation law to Harris's claims; that it improperly applied Wisconsin Statute section 806.245 to "invalidate" the Tribal Court judgment; and that when it reassumed jurisdiction over the case before it, it failed to follow the controlling Tribal/State Protocol.[105]

On May 29, 2014, Vilas County granted Torches' motion to vacate.[106] Vilas County found that in the early stages of the proceedings Torches raised sovereign immunity as a jurisdictional defense,[107] and that the Court had recognized that Torches had a valid sovereign immunity defense to Harris's claims in Wisconsin state court.[108] It further found that Torches did not subsequently waive its

---

[103] R.37.
[104] *Id.*; R.53.
[105] R.53.
[106] App.101–123.
[107] App.109:9–13.
[108] App.109:13–23, 110:3–13.

sovereign immunity from Harris's claims by participating in the Tribal Court proceedings, through alleged representations made by the Tribe's counsel that Torches intended to waive sovereign immunity in Tribal Court, or through non-participation in portions of the later proceedings in Vilas County.[109]

On June 6, 2014, Vilas County's written order held that "[t]he January 21, 2014 judgment issued by the Court is void pursuant to Wis. Stat. §806.01(1)(d) based on the Court's findings that it lacked subject matter jurisdiction over [Torches] due to its sovereign immunity from suit."[110]

Argument

I. This Court reviews Vilas County Court's vacatur *de novo*

Whether an Indian tribe has waived its sovereign immunity from suit is a legal question reviewed *de novo*.[111] For mixed questions of law and fact, this Court is "bound by a trial court's factual findings unless they are clearly erroneous."[112]

II. Torches is immune from this suit

Torches is an arm of the Tribe, and both possess sovereign immunity from lawsuits absent a valid waiver of immunity. Torches did not waive its sovereign immunity from Harris's claims in state court, so Vilas County properly vacated its judgment against Torches.

---

[109] App.112:9–11, 112:25, 113:1–11, 113:22–25, 114:1–6.
[110] R.71.
[111] *C & B Invs. v. Wis. Winnebago Health Dept.*, 198 Wis.2d 105, 108, 542 N.W.2d 168, 168 (1995).
[112] *Richards v. Land Star Grp., Inc.*, 224 Wis. 2d 829, 846, 593 N.W.2d 103, 110 (Ct. App. 1999).

A. Tribal sovereign immunity is a jurisdictional bar to claims against Indian tribes and their business arms

Indian tribes are "separate sovereigns pre-existing the Constitution."[113] Among the core aspects of sovereignty that tribes possess "is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'"[114] The Supreme Court of the United States has "time and again treated the 'doctrine of tribal immunity [as] settled law' and dismissed any suit against a tribe absent congressional authorization (or a waiver)."[115] "The sovereign immunity of the tribe extends to its business arms" such as Torches.[116]

"Tribal sovereign immunity is a matter of subject matter jurisdiction[,]"[117] and "[l]ike foreign sovereign immunity, 'tribal immunity is a matter of federal law and is not subject to diminution by the States.'"[118] Wisconsin "state courts have

---

[113] *Bay Mills*, 134 S.Ct. at 2030 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978)).
[114] *Id.* at 2030 (quoting *Santa Clara Pueblo*, 436 U.S. at 58).
[115] *Id.* at 2030–31 (quoting *Kiowa Tribe of Okla. v. Mfg Techs, Inc.*, 523 U.S. 751, 756, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998)).
[116] *C & B Invs.*, 198 Wis.2d at 108 (citations omitted).
[117] *E.F.W. v. St. Stephen's Indian High Sch.*, 264 F.3d 1297, 1302 (10th Cir. 2001); *MM&A Productions, LLC v. Yavapai-Apache Nation*, 316 P.3d 1248 (Ariz. Ct. App. 2014) (affirming lower court's dismissal of case for lack of subject matter jurisdiction because the tribe did not waive its sovereign immunity).
[118] *Koscielak v. Stockbridge-Munsee Cmty.*, 2012 WI App 30, ¶ 7, 340 Wis.2d 409, 414, 811 N.W.2d 451, 454 (quoting *Kiowa*, 523 U.S. at 756). *See also Landreman v. Martin*, 191 Wis.2d 787, 803, 530 N.W.2d 62, 68 (Ct. App. 1995) ("The United States Supreme Court recognizes a deeply rooted policy of allowing Indians to be free from state jurisdiction and control.") (citation omitted).

repeatedly acknowledged the doctrine, applying it where appropriate to bar suits in state court against tribal sovereigns."[119]

B. A waiver of tribal sovereign immunity must be clear and unequivocal, and it cannot be implied by silence

"Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe."[120] In particular, "[a] waiver of this immunity cannot be implied but must be unequivocally expressed."[121] That is, "a surrender of sovereign immunity by a nation must be advertent."[122]

The Supreme Court of the United States has consistently held that "[a] waiver of sovereign immunity must be strictly construed in favor of the sovereign."[123] This year, and despite criticism of the doctrine, the Supreme Court reaffirmed the strength of tribal sovereign immunity that precludes suit in the absence of congressional action or a tribal waiver.[124]

---

[119] *Koscielak*, 2012 WI App 30, ¶ 7 (citations omitted).
[120] *Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.*, 433 U.S.165, 172, 97 S.Ct. 2616, 2621, 53 L.Ed.2d 667 (1977); *Koscielak*, 2012 WI App 30, ¶ 8.
[121] *C & B Invs.*, 198 Wis.2d at 108.
[122] *Id.* at 112.
[123] *E.g. Orff v. United States*, 545 U.S. 596, 601–02, 125 S.Ct. 2606, 2610, 162 L.Ed.2d 544 (2005) (citing *Dept't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 261, 119 S.Ct. 687, 142 L.Ed.2d 718 (1991)).
[124] *Bay Mills*, 134 S.Ct. at 2030–31.

C. The Compact does not waive the Tribe's sovereign immunity from Harris's claim

The Compact states outright that it affords no waiver to any third-party claims. Even without this language, though, Harris's claims fall outside of the public-liability-insurance-policy provision he hangs his waiver argument on.

1. The Compact does not waive the Tribe's sovereign immunity from *any* third-party claims

The Compact expressly states that it does not waive either the Tribe's or the State's sovereign immunity from claims brought by third parties:

> Nothing contained herein shall be construed to waive the immunity of the Tribe or the State, except for suits arising under the terms of this Compact. This waiver does not extend to other claims brought to enforce other obligations that do not arise under the Compact or to claims brought by parties other than the State and the Tribe. [125]

Harris neglects this Compact language wholesale, but it squarely disposes of his argument that the Compact waives the Tribe's sovereign immunity from his claim. Any contrary ruling would improperly render this bargained-for provision surplussage (and subject the State to unwarranted third-party suits).[126]

Furthermore, the Compact language Harris quotes as "clearly . . . subject[ing] the Tribe to an action in Wisconsin Circuit Court for claims arising from a personal injury"[127] does nothing of the sort. Section XIX of the Compact

---

[125] App.162 (§ XIX A & B).
[126] *Stanhope v. Brown County*, 90 Wis.2d 823, 848, 280 N.W.2d 711, 722 (1979) ("[A] construction which gives reasonable meaning to every provision of a contract is preferable to one leaving part of the language useless or meaningless.").
[127] Harris's Br. at 9.

states that the Tribe will maintain "public liability insurance" for personal injury, and that "[t]he 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[.]"[128]

This language requires the Tribe's insurance policy[129] to include a promise by the *insurer* that the *insurer* will not attempt to escape liability under the terms of the policy by asserting sovereign immunity.[130] Section XIX does not address the *Tribe*'s sovereign immunity from state-court suits or liability for personal-injury claims, let alone waive its immunity. Such silence cannot effect the clear, unequivocal waiver the law requires.[131] Rather, the Compact's only clear expression concerning the Tribe's sovereign immunity is to preserve the defense.[132]

---

[128] App.162 (§ XIX A & B) (emphasis added). The same language appears in *every* other Wisconsin/tribal gaming compact. *Indian Gaming*, Wis. Dep't of Agric., http://www.doa.state.wi.us/divisions/gaming/indian-gaming (last visited Nov. 12, 2014).
[129] The insurance policy referenced in the Compact is not in the record.
[130] This language prohibiting the Tribe's insurer from independently invoking tribal immunity as a liability defense makes sense in the context of Wisconsin's statutory scheme, which allows plaintiffs to recover against insurers in direct actions without first obtaining a judgment against the insured. Wis. Stat. § 632.24. But "[t]he fact that a third party can sue an insurer [under the direct action statute] without first recovering judgment against the insured defendant, does not enlarge the coverage afforded by such policy or determine the insurer's liability thereunder . . . . In other words, an insurer is not liable unless its insured is." *Koscielak*, 2012 WI App 30, ¶ 21 (internal citations and quotations omitted). Where "[t]he Tribe is not obligated to pay anything because it is protected by tribal immunity[,]" the insurer is then also not liable to pay under the insurance policy, unless it agrees to waive the defense of sovereign immunity. *Id.*
[131] *See C & B Invs.*, 198 Wis.2d at 108.
[132] App.187 (§ XXIII.E).

2. Even if the Compact waived the Tribe's sovereign immunity, Harris's claim falls outside of that waiver

If the Compact does waive immunity from third-party suit (it does not), then strictly construing the language of the compact as the law requires,[133] it only allows suit by the public for personal injury related to gaming activities. This suit meets none of these circumstances.

a. The Compact only requires liability insurance for personal injury related to Class III gaming activities, not an employee's injury in the Casino's restaurant

In *Taylor v. St. Croix Chippewa Indians of Wisconsin*, the Wisconsin Supreme Court analyzed the public-liability-insurance requirement of the St. Croix Chippewa Indians of Wisconsin's gaming compact—a provision identical to the Compact language at issue here—and considered whether the required policy should cover injuries sustained by an employee during the gaming-funded construction of a tribal youth center.[134] The *Taylor* Court first noted that "[c]learly, the intent of the parties in entering into the gaming compact was to regulate St. Croix's class III gaming activities."[135] It continued:

> It follows logically that the gaming compact required St. Croix to maintain liability insurance only with respect to its gaming activities. To require St. Croix to maintain liability insurance with respect to other non-gaming activities would obviously reach beyond the purpose and intent of the gaming compact.

---

[133] *See Sossamon v. Texas*, 131 S.Ct. 1651, 1658, 179 L.Ed.2d 700 (2011).
[134] *Taylor v. St. Croix Chippewa Indians of Wis.*, 229 Wis.2d 688, 693–94, 599 N.W.2d 924, 926–27 (Ct. App. 1999).
[135] *Id.* at 694.

> Wisconsin has no reason or authority to impose an obligation on the tribe to maintain liability insurance for anything beyond its gaming activities.[136]

Thus, tribes with that compact language (*i.e.* all Wisconsin tribes) must maintain insurance to address personal injuries that occur during gaming activities. The employee's construction injuries fell outside of the mandated policy's scope.[137]

Similarly here, Harris sustained his injuries while working as a cook in the Eagle's Nest Restaurant.[138] Although the restaurant is located at the Casino, it is wholly separate from the Casino's gaming operations. The United States Supreme Court has recently made clear that under IGRA, "'class III gaming activity' refers to the gambling that goes on in a casino," not ancillary activities.[139] Harris can offer no facts that connect his employment at the restaurant serving food at the Casino to the conduct of Class III gaming activities at issue in the Compact and the mandated *public*[140] liability insurance policy. This offers yet another basis to discard Harris's Compact-based argument.

---

[136] *Id.* at 694–95.
[137] *Id.* at 695. Because the *Taylor* Court held that the employee's injuries fell outside of the scope of the insurance policy required by the compact, it did not address the issues of whether the insurance policy required reformation or the plaintiff's contention that St. Croix had expressly waived its sovereign immunity as a "self-insurer" under the compact. *Id.*
[138] R.34 at 11:10–12, 14:13–20.
[139] *Bay Mills*, 134 S.Ct. at 2027 (citing 25 U.S.C. §§ 2710(d)(3)(C)(i), (d)(9)). *See also id.* at 2032 ("'[C]lass III gaming activity' means just what it sounds like—the stuff involved in playing class III games . . . . For example . . . . each roll of the dice and spin of the wheel.").
[140] Harris was also not a member of the public. Rather, as an employee, Harris was an agent of Torches. *See* Restatement of Agency: Agency Defined § 1.01 cmt. c (2006) ("The elements of common-law agency are present in the relationships between employer and employee[.]").

b. Harris brought a worker's-compensation claim, not a personal-injury claim

"[T]he plaintiff is the master of the complaint[,]"[141] and Harris authored his state-court action as a worker's-compensation claim, not a personal-injury claim.[142] Throughout the action, Harris asked Vilas County to decide his claim under Wisconsin's Worker's Compensation law.[143] Indeed, to Vilas County, "this [wa]s an action that sounds in Workman's Compensation[.]"[144]

Pursuant to the law that Harris sought relief under, "[t]he right to the recovery of compensation under [Wisconsin's Worker's Compensation Law] shall be the exclusive remedy against the employer[.]"[145] Furthermore, as Harris concedes, Torches and Harris both addressed his injury and the payment of his benefits under Torches' worker's-compensation policies and procedures.[146]

---

[141] *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398–99, 107 S.Ct. 2425, 2433, 96 L. Ed. 2d 318 (1987).

[142] R.2 at 3. Of course, Harris's assertion that Wisconsin's worker's compensation law applies here is incorrect. "Because worker's compensation is a matter left to the states, Indian tribes are not subject to these schemes, regardless of whether they are compulsory for every other employer in the state." *Aasen-Robles v. Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 2003 WI App 224, ¶ 22 n. 7, 267 Wis.2d 333, 346, 671 N.W.2d 709, 715.

[143] R.64 at 1 ("Wisconsin's worker's compensation principles should govern this case."); R.63 at 29 ("This Court properly used Wisconsin's worker's compensation law as a method for calculating the relief for which Ben was entitled for his work-related injury"). *See also*, R.2 at 3; R.7 at 2; R.23 at 3–4, 8, 11, 14; R.28 at 26:22–25; R.52 *in passim*; R.63 at 30–31.

[144] R.30 at 3:11-12. *See also*, Harris's Brief at 13 (acknowledging that Vilas County "appl[ied] principals of Wisconsin's worker's Compensation law [in] decid[ing] the case in Harris's favor.").

[145] Wis. Stat. § 102.03(2).

[146] Harris's Br. at 9–11.

Harris's attempt to recast his claim now as a "personal injury" claim is a doomed, 11th-hour attempt to fit within a sovereign-immunity waiver that does not exist.

III. Torches timely asserted its sovereign immunity from Harris's claims in state court, and did not ever waive that defense

Harris emphatically states that "[a]bsent 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."[147] Having established that the Tribe and Torches *did not* submit to the jurisdiction of the Wisconsin courts under the Compact, the remaining question, as Harris has posed it, is whether Torches raised a sovereign-immunity defense "in the early stages of the proceedings."[148] The answer to that question is unequivocally "yes."[149]

A. Torches raised its sovereign-immunity defense at the very beginning of the Vilas County case

Torches timely filed its answer as a special appearance at the very outset of this case. There, Torches affirmatively asserted "[t]hat the Defendant enjoys the sovereign immunity of the Tribe and Court lacks jurisdiction over the

---

[147] *Id.* at 14.
[148] *Id.* at 15.
[149] Accordingly, the Court does not need to reach the other issue Harris poses regarding whether a sovereign can raise a sovereign-immunity defense for the first time after judgment. *But see Kohler Co. v. Dep't of Indus., Labor & Human Relations*, 81 Wis.2d 11, 25, 259 N.W.2d 695, 701 (1977) ("When a court or other judicial body acts in excess of its jurisdiction, its orders or judgments are void and may be challenged at any time.").

Defendant."[150] Vilas County acknowledged shortly thereafter that "sovereign immunity is plead as an affirmative defense in the Defendant's answer[.]"[151] In fact, Torches also asserted or preserved its defense at least *eight* other times in the early stages of the proceedings.[152] Furthermore, Vilas County repeatedly acknowledged Torches' immunity defense, including that "[s]overeign immunity [] was raised at the first instance."[153]

Harris's unsupported statement 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[,]"[154] is demonstrably false.

B. Torches did not subsequently waive its sovereign immunity from Harris's claim in state court

Despite recognizing that there is "no doubt" that Torches is immune from Harris's lawsuit but-for the waiver he alleges within the Compact,[155] Harris includes three single-sentence throw-away suggestions that the Court find a different waiver of Torches' immunity. Harris supposes that Torches waived its sovereign immunity from this suit by: (1) participating in the Tribal Court

---

[150] R.5 at 3.
[151] R.29 at 4:19–20.
[152] *See infra* at Statement of the Case § III.A.
[153] R.76 at 20:17–18; R.28 at 21:16–23; R.31 at 6:10–11. *See also*, *infra* at Statement of the Case at § III.A.
[154] Harris's Br. at 14–15.
[155] *Id.* at 14.

proceedings where its attorney allegedly stated that Torches would not assert its sovereign immunity in Tribal Court; (2) not re-raising immunity again in the second round of proceedings in Vilas County; and (3) Crawford's years-ago statement that Torches would pay Harris's medical expenses.[156] Because Harris does not analyze or provide authority for these positions, he has waived argument and this Court need not address them.[157] Regardless, none of these circumstances waived Torches' sovereign immunity from Harris's state-court claims.

1. Any waiver of sovereign immunity in Tribal Court did not waive immunity from Harris's claims in state court

Torches emphatically raised and preserved its sovereign immunity from Harris's claims in Vilas County, stating that the case should proceed in Tribal Court. Vilas County initially agreed. Today, Harris points to alleged (but off-the-record) statements by Torches' attorney that Torches waived its sovereign immunity from Harris's claims *in tribal court*. Even assuming that the alleged statements occurred, there is simply no evidence—let alone the requisite clear and

---

[156] *Id.* at 15–16.

[157] *League of Women Voters v. Madison Cmty Found.*, 2005 WI App 239, ¶ 19, 288 Wis.2d 128, 140, 707 N.W.2d 285, 291 (appellant "must present developed arguments if it desires this court to address them."); *State v. Freer*, 2010 WI App 9, ¶ 26 n.5, 323 Wis.2d 29, 43 n.5, 779 N.W.2d 12, 18 n.5 (2009) (failure to develop an argument in appellant's brief-in-chief waived the argument).

unequivocal evidence—that the Tribe[158] waived immunity from Harris's claims in *state court*. There is likewise no legal authority for Harris's proposition that a waiver of sovereign immunity from claims brought in one forum creates a waiver from claims brought anywhere.[159]

The Supreme Court has held repeatedly that "a waiver of sovereign immunity 'will be strictly construed, in terms of its scope, in favor of the sovereign.'"[160] The highest court has stated that, "for example, a State's consent to suit in its own courts is not a waiver of its immunity from suit in federal court."[161] Likewise, "when a sovereign tribe waives its immunity from suit, it may also choose the forum in which the resulting litigation will occur[.]"[162] Torches' purported waiver of sovereign immunity in Tribal Court, if it occurred, is limited to *that* court and does not afford *state* jurisdiction.

---

[158] Furthermore, there is no evidence that the Tribe's governing entity—the Tribal Council—authorized those statements or any waiver of sovereign immunity at all. As Vilas County acknowledged, "Attorney LeSieur [] told us on day one that he did not have the authority to waive sovereign immunity on behalf of the tribe." R.76 at 20: 21–24. *Accord U.S. v. U.S. Fid. & Guar. Corp.*, 309 U.S. 506, 513, 60 S.Ct. 653, 84 L.Ed. 894 (1940); *Mo. River Servs., Inc. v. Omaha Tribe of Neb.,* 267 F.3d 848, 852 (8th Cir. 2001).

[159] If Harris's argument carried the day, then a party's waiver of a personal-jurisdiction objection in Minnesota's state court would waive that party's personal-jurisdiction objection in all other state courts. Clearly, such a rule is absurd.

[160] *Sossamon*, 131 S.Ct. at 1658 (quoting *Lane v. Peña*, 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996)).

[161] *Id.* (citing *College Sav. Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 676, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999)). "Similarly, a waiver of sovereign immunity to other types of relief does not waive immunity to damages[.]" *Id.*

[162] *Doe v. Santa Clara Pueblo*, 2007-NMSC-008, 141 N.M. 269, 276, 154 P.3d 644, 651 (citing *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001)).

2. Torches was justified in raising immunity *again* after the Vilas County judgment

Harris also supposes that Torches' failure to appear for certain portions of the continued Vilas County proceedings, which occurred after the Tribal Court entered judgment but before Vilas County issued a contradictory judgment, waived Torches' sovereign immunity from state-court proceedings. Again, Harris cites no authority for the proposition that the absence of conduct implies a waiver of sovereign immunity.

But the Supreme Court of the United States emphasizes that a waiver of tribal sovereign immunity must be clear and unequivocal.[163] It is difficult to conceive how any failure to act could be either. Moreover, uncontroverted record evidence demonstrates that Torches' non-participation was not an intentional, knowing act.[164] Thus, it cannot manifest an "advertent" [165] waiver.

When Vilas County revived its proceedings, the attorney who had represented the Tribe could not appear on the Tribe's behalf.[166] Furthermore, the Tribe had a legal and binding judgment in its favor from Tribal Court, and so did not expect the need to defend the case again in a second turn. Once the Tribal

---

[163] *Santa Clara Pueblo*, 436 U.S. at 58 ("It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." (quotations omitted)).
[164] R.68 at ¶ 2; R.69 at ¶ 2.
[165] *C & B Investments*, 198 Wis.2d at 112.
[166] R.31 at 3:21–23; R.28 at 13:9–10 (Vilas County noting that "there is still no one representing the interests of the Tribe here[.]").

leadership became aware of the second, contradictory judgment from Vilas County, Torches immediately retained licensed counsel and brought its motion to vacate.[167] It acted promptly and reasonably under the circumstances.

3. Crawford could not waive Torches' sovereign immunity

Harris also hints that Crawford's promise to pay Harris's bills means Torches waived its sovereign immunity this suit.[168] But Harris cites no authority that Crawford can waive Torches' immunity. And yet again, the law is contrary.[169] Moreover, an affirmative commitment to do something does not carry with it an implicit waiver of sovereign immunity.[170] If it did, sovereigns would waive immunity in every contract, regardless of whether it contained a waiver or not. This is not the law.[171]

IV. Additional, alternative grounds support affirmance of Vilas County's decision to vacate its judgment

Because sovereign immunity blocked this suit, that issue easily disposes of this appeal. But below, Torches raised several other grounds for vacating the Vilas

---

[167] R.37.
[168] Harris's Brief at 15.
[169] *See, e.g.*, *United States v. N.Y. Rayon Imp. Co.*, 329 U.S. 654, 660, 67 S.Ct. 601, 604, 91 L.Ed. 577 (1947) (General Accounting Office lacked authority to waive United States' immunity); *U.S. Fidelity & Guar. Corp.*, 309 U.S. at 513 (1940) (attorney lacked authority to waive tribe's immunity).
[170] *See, e.g.*, *Kiowa*, 523 U.S. at 760 (holding that Indian tribes enjoy sovereign immunity from civil suits on contracts that do not contain a waiver, including the contract at issue where the tribe affirmatively agreed to note obligations).
[171] *Id.*

County judgment, including: (1) Vilas County's judgment against Torches violated the federal infringement and pre-emption tests; and (2) Vilas County erred in using Wisconsin Statute section 806.245 as an offensive weapon to invalidate the Tribal Court judgment, and instead should have followed the applicable Tribal/State Protocol.[172] Each of these errors gives this Court an independent basis to affirm Vilas County's decision to vacate its judgment.[173]

A. Vilas County's attempt to invalidate the Tribal Court decision and issuance of a second, contradictory judgment infringed on the Tribe's governance rights and was pre-empted by federal law

Controlling law recognizes that "Indian tribes generally are not subject to the laws of the state wherein their territory resides."[174] Against the "deeply rooted" federal policy "of leaving Indians free from state jurisdiction and control[,]"[175] "there are two independent but related barriers to the state's exercise of jurisdiction on reservations[:]" infringement and preemption.[176]

---

[172] R.61 at Ex. G.
[173] *Doe v. Gen. Motors Acceptance Corp.*, 2001 WI App 199, ¶ 7, 247 Wis.2d 564, 569, 635 N.W.2d 7, 10 ("A respondent may advance on appeal, and we may consider, any basis for sustaining the trial court's order or judgment.").
[174] *Aasen-Robles*, 2003 WI App 224, ¶ 22 n.7.
[175] *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 168, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973) (citation omitted).
[176] *St. Germaine v. Chapman*, 178 Wis.2d 869, 872, 505 N.W.2d 450, 451 (Ct. App. 1993) (internal quotation and citation omitted).

1. Vilas County infringed upon the Tribe's ability to make its own laws and be ruled by them

Under the infringement test, state authority must not unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them."[177] Vilas County's actions in this case infringed upon the Tribe's ability to make its own laws and be ruled by them as follows:

- The Tribe created the Tribal Court under its organic Constitution[178] and it authorized the Tribal Court to decide disputes (including disputes concerning non-members) that occur within its territory.[179] If a circuit court can simply purport to take that jurisdiction away from a tribal court, the State could render the creation of the Tribal Court (a law-making body of the Tribe itself) and the Tribe's grant of jurisdiction to it empty.[180]
- A court judgment is an adjudication of law. Vilas County's refusal to acknowledge the Tribal Court's judgment against Harris eviscerates the Tribal Court's application of Tribal law to a Tribal dispute, and so infringes on the Tribe's authority to govern its own affairs.
- By purporting to decide questions of Tribal law concerning a litigant's appellate rights in the Tribal Courts and judicial recusal obligations in the Tribal Courts, Vilas County usurped the function of the Tribal Court of Appeals and infringed on the Tribe's right to make its own laws and be ruled by them.
- Vilas County applied its own law and decision-timing expectations to a reservation affair, and in so doing sat in unauthorized appellate review over the Tribal Court, purported to usurp the duties of the Tribal Court of Appeals, and ran afoul of directly contrary controlling authority.[181] State courts cannot simply apply their views of what is "acceptable" to another forum that operates under different laws, rules, resources, and cultural expectations, and judge whether the tribal court is doing a "good enough" job not to be invaded

---

[177] *White Mountain Apache Tribe v. Bracker*, 448 U.S 136, 142–43, 100 S.Ct. 2578, 2583, 65 L.Ed.2d 665 (1980) (internal quotation and citations omitted).
[178] SA.10–13 (Article X).
[179] SA.11 (Article X, Section 3).
[180] *Contra Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians (Teague III)*, 2003 WI 118, ¶ 25, 665 N.W.2d 899 ("State circuit courts . . . have *no authority* to limit, modify or control the power of the tribal court or vice versa." (emphasis added)).
[181] *Aasen-Robles*, 2003 WI App 224, ¶ 22 n.7.

by a state court.[182]

- In reaching its judgment that Torches should pay Harris for medical expenses incurred after his employ at Torches (and without any knowledge of or communication with his former employer), Vilas County applied *Wisconsin* worker's-compensation law concerning payment rights after termination of employment. This not only infringed upon the Tribe's right to make its own laws and be ruled by them, but also disregarded directly contrary Wisconsin authority.[183]

The Wisconsin Supreme Court has cautioned against such unlawful intrusions.[184] And with good reason. With each of these incursions, Vilas County stepped over the line into the governance of a separate sovereign nation in violation of federal law.

2. Federal law preempts Vilas County's judgment against Torches

Under the related but distinct preemption test, "[s]tate jurisdiction is pre-empted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority."[185] Here, the federal, tribal, and state interests in tribal self-governance and the development of tribal courts without state intervention outweigh any countervailing state interest.

---

[182] *Teague III*, 2003 WI 118, ¶ 25; *see also John v. Baker*, 982 P.2d 738, 763–64 (Alaska 1999).
[183] *Aasen-Robles*, 2003 WI App 224, ¶ 22 n.7.
[184] *Teague III*, 2003 WI 118 at ¶ 25.
[185] *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216, 107 S.Ct. 1083, 94 L.Ed.2d. 244 (1987) (citation omitted).

The federal interests in this case are strong and concrete, and mirror the Tribe's:

- In numerous statutes, the United States has reaffirmed its commitment to tribal self-governance.[186] Forced state-court jurisdiction over a Tribal employer for a tribal employee's on-reservation injury in a case governed by Tribal law is necessarily incompatible with the federal commitment to tribal self-governance.

- The federal government has specifically recognized that "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments" and that "Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights[.]"[187] Vilas County's attempt to supplant the Tribal Court's judgment concerning an on-reservation controversy with its own judgment disregards the federal interest in tribal-court adjudication of on-reservation disputes.

- The U.S. government has repeatedly expressed its commitment to the development of tribal-court systems.[188] Enlistment of state authority to block Tribal Court adjudication of this on-reservation dispute violates this federal interest and the Tribal interest it protects.

Wisconsin *shares* this interest in allowing tribal adjudication of on-reservation claims without state interference. The Wisconsin Supreme Court has made clear that, "[s]tate circuit courts . . . have no authority to limit, modify or control the power of the tribal court or vice versa."[189] And this Court upheld Vilas County's

---

[186] *E.g., Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 14, 107 S.Ct. 971, 975, 94 L.Ed.2d 10 (1987) (describing the federal commitment to tribal self-governance and citing 25 U.S.C. §§ 450, 450a (Indian Self-Determination and Education Assistance Act); 25 U.S.C. §§ 476–479 (Indian Reorganization Act); 25 U.S.C. §§ 1301–1341 (Indian Civil Rights Act)).
[187] 25 U.S.C. § 3601(5) & (6).
[188] *E.g., id.* (describing "the Federal Government's longstanding policy of encouraging tribal self-government[]" and tribal courts' "vital role" in effectuating that self-governance) (citing examples).
[189] *Teague III*, 2003 WI 118, ¶ 25.

refusal of an earlier plaintiff's request "essentially asking the court to overturn the decision of a sovereign nation."[190] Indeed, Vilas County itself "appreciate[s] and welcome[s]" the Tribal Court's adjudication of on-reservation disputes, as it lessens the burden on the Vilas County docket.[191]

Harris claims that that the Tribal, federal, and State interests identified by Torches are outweighed by Wisconsin's interest in protecting State constitutional rights of its citizens.[192] But Wisconsin's Constitution does not apply on the Lac du Flambeau Reservation,[193] and Wisconsin has no interest in attempting to apply that law on-reservation given its commitment to tribal self-governance.

Federal, Tribal, and State interests *all* favor allowing the Tribe to exercise its right of self-governance and bolstering the Tribal Court by allowing it to decide the questions before it without State intervention. If Wisconsin Statute section 806.245 allows a state court to ignore or second-guess a tribal court's already-entered order, opine on open questions of Tribal law, issue its own judgment, and

---

[190] *Mills v. Vilas County Bd. of Adjustments*, 2003 WI App 66, ¶ 20, 261 Wis.2d 598, 610, 660 N.W.2d 705.
[191] R.28 at 5:4–21.
[192] Harris's Br. at 13; R.63 at 17.
[193] *Koscielak*, 2012 WI App 30, ¶ 18, 340 Wis.2d 409, 420–21, 811 N.W.2d 451. Even if the section Harris relies on (Article I, section 9) did apply, it does not confer legal rights and instead protects against a party having to "purchase" justice. *Mulder v. Acme-Cleveland Corp.*, 95 Wis.2d 173, 189–90, 290 N.W.2d 276, 284 (1980). Harris has raised no such claim.

essentially overturn the decision of a sovereign nation[194] then "in th[is] specific context, the exercise of state authority . . . violate[d] federal law."[195]

B. Vilas County erred in applying Wisconsin's tribal full-faith-and-credit statute to "invalidate" the Tribal Court's judgment and instead it should have followed the Tribal/State Protocol

In an unprecedented move, Vilas County misused Wisconsin Statute section 806.245 as a sword to invalidate the judgment of the Lac du Flambeau Tribal Court.[196] Moreover, Vilas County erred in its ruling upon two of the statutory factors. It compounded the injury by not coordinating with the Tribal Court under controlling Protocol.

1. Wisconsin Statute section 806.245 cannot "invalidate" a tribal court judgment

Even if a state court could nullify a tribal court's order (and under both federal[197] and Wisconsin[198] law, it can't), Wisconsin's "Indian tribal documents; full faith and credit" statute only addresses how a Wisconsin tribunal will treat a tribal court's order within Wisconsin courts.[199] Parties move for full faith and credit of a foreign judgment when they wish to enlist the state court's jurisdiction

---

[194] *Kroner v. Oneida Seven Generations Corp.*, 2012 WI 88, ¶ 98, 342 Wis.2d 626, 668, 819 N.W.2d 264 (Roggensack, J. concurring) ("[T]here is no state authority to overturn a tribal court decision, even when that decision is clearly wrong under state law.").
[195] *St. Germaine*, 505 N.W.2d at 451.
[196] R.22.
[197] *Supra*, § IV.A.
[198] *Teague III*, 2003 WI 118, ¶ 25
[199] Wis. Stat. § 806.245(1).

in enforcing it.[200] State courts understandably measure the foreign judgment against Wisconsin criteria before placing the State's imprimatur on the foreign judgment.[201] But Torches never sought that imprimatur.

Wisconsin Statute section 806.245 rightly does not purport to have *any* effect on the Tribal Court's treatment of its own order.[202] Torches could not locate a single other case where a court used the statute to affirmatively invalidate a tribal court's judgment when no litigant asked the Wisconsin court to adopt the judgment as its own.

2. Vilas County erred in its Wisconsin Statute section 806.245 analysis

Vilas County relied on two misapplications of Tribal law for its incorrect Wisconsin Statute section 806.245 determination,[203] neither of which support the invalidation of the Tribal Court's judgment.

a. Judge Smith did not need to recuse himself

The Tribe amended Tribal Court Code § 80.104(1)(b) and required certain judicial recusals *after* Harris's case had all but concluded. It was an error for Vilas County to reject the Tribal Court's judgment based on Judge Smith's failure to apply Tribal law that did not exist.

---

[200] *See e.g.*, *Conquistador Hotel Corp. v. Fortino*, 99 Wis.2d 16, 21, 298 N.W.2d 236, 238–39 (Ct. App. 1980).
[201] Wis. Stat. § 806.245.
[202] *Id.*
[203] R.28 at 17:9–25; 18:1–6.

More importantly, whether Tribal law required Judge Smith to recuse himself (it did not) is a matter of Tribal law not fit for determination by a State court, and Harris *never* sought disqualification of Judge Smith under this rule thereby waiving the objection. Instead, he begged Vilas County to read bad faith into Judge Smith's decision. But there is no evidence that Judge Smith was biased against Harris, and courts may not presume bad faith.[204]

b. All litigants in the Lac du Flambeau Tribal Court have an appeal right, as Harris did here

Vilas County determined that Harris lacked an appeal right in Tribal Court. It reached this conclusion from Harris's argument that when the trial judge expressed his understanding that Harris had agreed to waive his appellate rights,[205] that judge cut off Harris's appeal right. But Harris in fact commenced an appeal,[206] and Tribal law does not afford trial-court judges the ability to unilaterally dictate whether a litigant does or does not have the right of appeal. That right is provided by—and protected by—the Lac du Flambeau Judicial Code.[207]

---

[204] *See Duncan Energy Co. v. Three Affiliated Tribes of Ft. Berthold Reservation*, 27 F.3d 1294, 1301 (8th Cir. 1994). ("Absent any indication of bias, we will not presume the Tribal Court to be anything other than competent and impartial."). *See also*, R.28 at 18:15–16 (Vilas County stating that "I find [Judge Smith] to be an honorable and ethical person.").
[205] *Id.* at 18:1–6, 20:8–11.
[206] R.63 at 26–27 (acknowledging that Harris filed his Tribal Court appeal "[t]o preserve any appeal rights" (and to determine whether those appellate rights existed)).
[207] R.61 at Ex. B, Tribal Code Ch. 80.203(1).

Moreover, the Tribal Court of Appeals (led by retired Vilas County Judge Mohr) did not just take Judge Smith's word for it that Harris waived his appellate right; it sought clarification from the parties on whether Harris did indeed voluntarily waive his right to appeal.[208] That issue was still open when Harris advised that he would not pursue his Tribal Court of Appeals case any longer because of his efforts in Vilas County.[209]

3. Instead of purporting to invalidate the Tribal Court's judgment, Vilas County should have followed the Tribal/State Protocol

Under Wis. Stat. § 801.54, this Court properly transferred the action *to* the Tribal Court.[210] But that statute, by its terms, does not allow a circuit court to reverse the transfer to reclaim the action *from* the Tribal Court.[211] Nor could it.

As the Wisconsin Supreme Court has recognized, "[s]tate circuit courts . . . have *no authority* to limit, modify or control the power of the tribal court or vice versa."[212] Instead, to protect the state's interests, Wisconsin Statute section 801.54

---

[208] R.38 at Ex. E.
[209] *Id.* at Ex. F.
[210] Wis. Stat. § 801.54, 2008 cmt. ("The purpose of this rule is to enable circuit courts *to* transfer civil actions to tribal courts in Wisconsin as efficiently as possible where appropriate.") (emphasis added).
[211] Wis. Stat. § 801.54 ("Discretionary transfer of civil actions *to* tribal court.") (emphasis added); *id.* at § 801.54(2) ("[T]he circuit court may . . . cause such action to be transferred *to* the tribal court.") (emphasis added).
[212] *Teague III*, 2003 WI 118, ¶ 25 (emphasis added). *Teague III* was the final decision in a series of cases that also included *Teague v. Bad River Band of Chippewa Indians (Teague I)*, 229 Wis.2d 581, 599 N.W.2d 911 (Wis. Ct. App. 1999) and *Teague v. Bad River Band of Chippewa Indians (Teague II)*, 2000 WI 79, 236 Wis.2d 384, 612 N.W.2d 709.

requires the circuit court to enter a stay of its proceedings (rather than dismissing the state action) and to maintain jurisdiction over its own action for a period of five years.[213]

Wisconsin Statute section 801.54 allowed Vilas County to "modify the stay order and take any further action *in [its] proceeding* as the interests of justice require."[214] But because the state court has no power to direct the second action in tribal court,[215] those further actions necessarily only affect *the proceeding in the state court*. Lifting the state-court stay could not *stop* the Tribal Court action; it could only put the state-court action in competition with the tribal-court action.

When that circumstance occurs, Wisconsin law requires that "the circuit court and tribal court confer for purposes of allocating jurisdiction between the two sovereigns."[216] The Tribal/State Protocol specifically addresses this situation.[217] If Vilas County had followed the Protocol, none of the Protocol factors (or those enumerated in Justice Abrahamson's majority *Teague III* opinion[218]) would have favored allocating jurisdiction to state court.[219] Thus, the Protocol was specifically designed to prevent the exact circumstance of conflicting

---

[213] Wis. Stat. § 801.54(3).
[214] *Id*. (emphasis added).
[215] *Teague III*, 2003 WI 118, ¶ 25.
[216] *Teague II*, 2000 WI 79, ¶ 37. *Accord Teague III*, 2003 WI 118, ¶ 58 (in cases of concurrent jurisdiction, tribal and circuit courts should "consult with the other, and as a matter of comity decide which court should proceed.").
[217] R.61 at Ex. G.
[218] *Teague III*, 2003 WI 118, ¶ 69–71.
[219] *See* R.53 at 9 n. 40.

judgments that occurred here. Vilas County's revival of the original action but failure to follow the Protocol renders the fact that is has entered judgment on the merits an error.

Conclusion

At all times during this proceeding, Torches' sovereign immunity protected it from this suit. It timely asserted its jurisdictional defense in the Vilas County proceedings and it did not waive its sovereign immunity either through the Compact or through any other implied conduct. Vilas County thus correctly vacated the void judgment it issued against Torches, and this Court should affirm that decision. Alternatively, this Court should affirm because Vilas County's judgment violated federal law and misapplied Wisconsin state law.

Dated: November 17, 2014

HOGEN ADAMS PLLC

Andrew Adams III (WI #1052371)
Jessica Intermill (MN # 0346287), pro hac vice
Jessie Stomski (MN #0388973), pro hac vice
William Szotkowski (MN # 161937), pro hac vice
Hogen Adams PLLC
1935 W. County Rd B2, Suite 460
St. Paul, MN 55113
Phone: 651-842-9100
Facsimile: 651-842-9102
Email: aadams@hogenadams.com
jintermill@hogenadams.com
jseim@hogenadams.com
bszotkowski@hogenadams.com

Attorneys for Defendant-Respondent
Lake of the Torches Resort & Casino

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,939 words.

Date: November 17, 2014

Andrew Adams III

CERTIFICATION REGARDING ELECTRONIC BRIEF

I certify that I have submitted an electronic copy of this brief which complies with the requirements Wisconsin Statute Section 809.19(12). 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 the opposing party.

Date: November 17, 2014

Andrew Adams III