

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

C.E.S. V.A.S. and H.M.S., Minors, by their legal
guardians Timothy P. Donn and Anne
L. Donn,

Plaintiffs,

Case No. 1:15-cv-982
Hon. JANET T. NEFF

HON. LARRY J. NELSON, in his official
capacity as a Leelanau County Family Court
Judge, MATTHEW W. FEIL, in his official
capacity as Tribal Prosecutor for the Grand
Traverse Band of Ottawa and Chippewa
Indians, and HELEN COOK, in her official
capacity as Supervisor of Anishinaabek
Family Services for the Grand Traverse Band
of Ottawa and Chippewa Indians,

Defendants.

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DEFENDANT LARRY J. NELSON'S BRIEF IN SUPPORT OF HIS RESPONSE TO
PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

STATE OF PROCEDURAL FACTS

On March 19, 2015, the Michigan Court of Appeals reversed Defendant Honorable Larry J. Nelson's decision denying the request of the Grand Traverse Band of Ottawa and Chippewa Indians to transfer to Tribal Court the *In re* SPEARS Leelanau County Circuit Court, Family Division, case pursuant to MCL 712B.1 et. seq. The Michigan Court of Appeals determined that statute only permits a circuit court to deny a transfer request in two instances. The Appellate Court held Defendant Nelson improperly construed the statute to give it greater authority to deny a transfer. Thereafter, Plaintiffs filed an application to leave to appeal the Michigan Court of Appeals decision to the Michigan Supreme Court. On June 5, 2015 the Michigan Supreme Court denied the Plaintiffs' application.

On July 1, 2015, a hearing was held in the Leelanau County Circuit Court, Family Division, on a Plaintiffs' subsequent Motion to Deny Transfer of the proceedings to the Grand Traverse Band of Ottawa and Chippewa Indians Tribal Court. In that subsequent pleading the Plaintiffs raised additional arguments against any transfer; namely, they challenged the constitutionality of MCL 712B.1. In addition, the Plaintiffs requested a stay of the proceedings. Defendant Honorable Larry J. Nelson dismissed the Motion to Deny Transfer to Tribal Court. However, Defendant Nelson did grant the Plaintiffs' request for an Order of Stay Proceedings, pursuant to MCR 7.209(E)(1), so they could pursue their appellate remedies. Defendant Nelson indicated:

"I feel that there are very serious issues before us including the fact that the children have been with the Donns since—five years this month, I believe. So, I believe they should have the right to pursue any appellate process at this and the Court will enter an order to that effect."

Hearing Transcript P. 13, Attachment A.

On September 14, 2015, the Michigan Court of Appeals vacated Defendant Nelson's order granting the stay of proceedings. Attachment B. On September 21, 2015, Defendant Larry J. Nelson signed the order transferring the case to Tribal Court, Attachment C. On September 22, 2015, Defendant Matthew W. Feil picked up the file from the Leelanau County Circuit Court, Family Division.

ARGUMENT

Defendant Honorable Larry J. Nelson, does not object to this Court granting Plaintiffs' Motion for a Preliminary Injunction in the above entitled matter. Defendant Nelson transferred the case to the Grand Traverse Band of Ottawa and Chippewa Indians Tribal after the Michigan Court of Appeals vacated his order granting the Plaintiffs' Motion for Stay on September 14, 2015. Defendant Nelson takes no position on the question of whether the Plaintiffs have met the requirements under Fed. R. Civ. P. 65 that the temporary restraining order, issued by this Court on September 29, 2015, should be converted into a preliminary injunction for the pendency of this matter. However, now that Defendant Larry J. Nelson has signed the transfer order sending the case to the Grand Traverse Band of Ottawa and Chippewa Indians' Tribal Court, the question which he respectfully raises is what can he be presently enjoined from doing?

The Plaintiffs herein rely on the doctrine established in *Ex Parte Young*, 209 U.S. 123; 28 S Ct 441; 52 L Ed 714 (1908), to avoid the issue of sovereign immunity. Here the Plaintiffs are seeking an injunction against the enforcement of the September 21, 2015 order transferring the case to Tribal Court, as well as other actions which may be allegedly undertaken by the other named Defendants. In *Young*, supra, the Minnesota's Attorney General had a duty to enforce his state's legislation, specifically the rates charged to railroads travelling across the state of Minnesota which the United States Supreme Court determined provided a sufficient nexus to

make the Minnesota's Attorney General a proper party for injunctive relief to prevent the enforcement of the state law on constitutional grounds. Since Defendant Larry J. Nelson has transferred the case to Tribal Court he is no longer engaged in any action to prevent the enforcement of MCL 712.B1, et. seq; the challenged state law, in this matter. Once he signed the transfer order, Defendant Nelson has neither the authority nor duty to undertake any further action in this matter. Therefore, there is no connection between the enforcement of the statute and Defendant Larry J. Nelson.

Defendant Larry J. Nelson intends to reassert this argument as well as the absolute immunity he is accorded under actions involving 43 U.S.C. Section 1983 in his answer to the Plaintiffs' Complaint as well as in his affirmative defenses allowed under Fed. R. Civ. P. 12.

WHEREFORE, Defendant Honorable Larry J. Nelson does not object to this Court granting a preliminary injunction pursuant to Fe. R. Civ. P. 65.

Dated: October 13, 2015

_____/s/
Joseph T. Hubbell (P41996)
Attorney for Defendant