

UNITED STATES DISTRICT COURT

for the

Western District of Michigan

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LINDA L. LESPERANCE,

Plaintiff,

v

SAULT STE. MARIE TRIBE  
OF CHIPPEWA INDIANS,

Defendant.

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**PETITION TO VACATE  
TRIBAL APPELLATE  
COURT DECISION**

Civil Case No.: \_\_\_\_\_

COMES NOW PLAINTIFF, Linda L. Lesperance, through her undersigned attorney, and hereby files this Petition against DEFENDANT, Sault Ste. Marie Tribe of Chippewa Indians, and states as follows:

**Jurisdiction**

1. PLAINTIFF, Linda L. Lesperance (hereinafter "Plaintiff"), is a resident of Menominee County, Michigan.

2. DEFENDANT, Sault Ste. Marie Tribe of Chippewa Indians (hereinafter "Defendant"), is a federally recognized sovereign tribe located within the Western United States District.

3. Plaintiff invokes as the basis for federal jurisdiction 28 USC § 1331, which provides that a Federal District Court "shall have original jurisdiction of all civil actions arising under the Constitution, laws, or

treaties of the United States.” The Tribal Code requires that “in all civil cases the Tribal Court shall apply the laws of the Tribe, any laws of the United States that may apply, . . .” Ch. 81.105(1).

4. Plaintiff files this Petition to vacate the Sault Ste. Marie Tribe of Chippewa Indians Court of Appeals’ ruling dated July 16, 2016 (Exhibit A), affirming the Tribal Court’s Summary Judgment Order dated December 15, 2015 (Exhibit B) dismissing Plaintiff’s Complaint against Defendant for lack of jurisdiction.

5. Plaintiff’s remedies available to Plaintiff before the Tribe under the Tribe’s Tort Claims process authorized by Tribal law have been exhausted.

6. The Tribal Court of Appeals and lower tribal court failed to properly apply and/or interpret the United States Constitution, federal case law and its own Tribal Tort Claims Ordinance, and declarations, therefore denying Plaintiff due process of law and access to the court system.

7. The facts of Plaintiff’s case, as a matter of law, mandated the application of the doctrine of equitable estoppel. The Tribal Court of Appeals (a) erred in its interpretation and refused to apply federal case law applying equitable estoppel and waiver to cases involving waivers of sovereign or governmental immunity on grounds that these federal decisions did not include an Indian tribe as a party, and therefore were inapplicable, United States v Kwai Fun Wong, 575 U.S. 1 (2015); (b) erroneously assumed facts.

not in evidence to support its ruling; (c) erred as a matter of law in finding that Plaintiff failed to file a claim with Defendant; and (d) erred in ruling that tribal sovereign immunity waiver does not include the presentment of pre-suit claim notice rules, nor the application of equitable estoppel. Glarner v United States of America, Department of Veterans Administration, 30 F.3d 697 (6<sup>th</sup> Cir. 1994)

### **Factual Background - Liability**

8. On April 14, 2011, Plaintiff was entering the MidJim Convenience Store in Sault Ste. Marie, Michigan owned by Defendant, when her foot caught upon a threshold that was protruding from the floor in a defective fashion, causing Plaintiff to fall forward, thereby suffering serious and permanent injuries.

9. The threshold was not a single piece threshold as required by Code from at least 2005 to 2014, but of two (2) separate pieces, independent thresholds, as opposed to the required one (1) continuous piece. The thresholds were uneven, not level, protruded from the floor, and created an unsafe and dangerous condition. Defendant's employees who worked at the MidJim Convenience Store knew of the defective thresholds for at least one (1) year prior to the injuries incurred by Plaintiff. As seen in Defendant's video tape, Plaintiff's left toe caught on the door threshold, prevented her left foot from moving further and initiated her trip and fall. Plaintiff fell in a

leftward rotation, hitting her head on the wall that separated the second set of entry doors at the north end of the foyer.

10. On the date in question and for a period of at least one (1) year, two (2) thresholds abutted against each other on the door and were not only too high without a proper slope, the tops of each were different. One had ridges on it, and the other did not. Screws were missing on the threshold as indicated by the hole on the top of the threshold. Employees who knew of the condition of the double threshold found it easier to sweep the floor out of the other door where there was no double threshold. The threshold had a history of debris underneath, including salt, dirt off people's shoes, and pebbles.

11. Defendant's full time safety officer participated, along with the MidJim store manager, in covering up the existence of the threshold and its condition. Without ever conducting an inspection, the safety manager would have the cashier sign a safety report (filled out prior to his entrance into the convenience store), with a pre-checked section list that the cashier was required by her boss to sign. The report indicated the premises were in a safe condition and failed to disclose any defect in the threshold.

12. Defendant violated the State of Michigan Building Code, §1008.1.6, the ASTM Standard S1637, the American Disabilities Act, Section 4.5 of the ADA Accessibility Guidelines, and National Fire Protection Association Code 101B, code means of egress for buildings.

### **Damages**

13. Plaintiff was diagnosed with severe head trauma, non-displaced fracture of her left wrist, acute fracture to her right wrist, a non-displaced fracture of her C-2 vertebrae along with a compression fracture of her L-2 vertebrae, a T-12 compression fracture and five (5) stitches above her left eye, leaving a significant scar. Plaintiff has undergone numerous ablation procedures to her spine, decompression nerve lumbar microsurgery, facet blocks, vertebroplasty (the placement of a cement-like square in the spine to provide support), wrist surgery, and has a sixty percent (60%) impairment rating to her body as a whole. Plaintiff's trip and fall severely aggravated Plaintiff's previous existing condition known as DISH disease.

14. Plaintiff continues to be treated by the Ascend Pain Institute and has further incurred economic damages, including necessary remodeling of her home to allow her to manipulate and to move around her residence, loss of household services, prescription and medical expenses.

15. Plaintiff has suffered non-economic damages including, but not limited to, pain and suffering, loss of enjoyment of life, scarring and disfigurement, permanent impairment and disability, mental pain and anguish, and physical pain and anguish. The Tribal Code limits non-economic damages to no more than seventy-five percent (75%) of the non-economic damages allowable in the Michigan Medical Malpractice Statute.

16. Defendant's installation and faulty maintenance of the door threshold at the entrance to the MidJim Convenience Store was the

proximate cause of Plaintiff's trip and fall, and subsequent injuries. Defendant, pursuant to the Tribal Code, is responsible and owes Plaintiff due and just compensation.

**Tribal Waiver of Sovereign Immunity**

17. Defendant waived sovereign immunity for tort claims brought against the Tribe. Waiver of Sovereign Immunity and Consent to Suit, Ch. 85.104.

Public Buildings, Ch. 85.106

"The Tribe has an obligation to repair and maintain public buildings under its control when open for use by the public. The Tribe is liable for personal injury and property damage resulting from a dangerous or defective condition of a public building owned or occupied by the Tribe if the Tribe had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition. Knowledge of the dangerous and defective condition of the public building and time to repair the same shall be conclusively presumed when such defect existed so as to be readily apparent to an ordinarily observant person for a period of 90 days or longer before the injury took place.

(2) As a condition to any recovery for injuries sustained by reason of any dangerous or defective public building, the injured person, within 120 days from the time the injury occurred, shall serve a notice on the Tribe of the occurrence of the injury and the defect."

18. A tort claim against the Tribe under this Chapter shall be forever barred unless it is presented in writing to the Tribe within 180 days after such claim accrues, or unless the action is begun within 180 days after

the date of mailing, by certified or registered mail, of notice of final denial of the claim by the Tribe. Tribal Code Ch. 85.110.

19. On April 14, 2011, the same day as the incident occurred, Defendant set up a claim file and prepared an incident report.

20. On April 18, 2011, Plaintiff and her husband, Stanley Lesperance, were called and spoke with Patti Simi, who represented herself as the customer service representative of Defendant's insurance department. Ms. Simi called Plaintiff at her home on April 22, 2011, April 23, 2011, May 3, 2011, May 31, 2011, during which time Plaintiff and her husband discussed with Ms. Simi Plaintiff's injuries and their case.

21. Ms. Simi informed Plaintiff that Defendant would take care of all her medical bills and that Plaintiff should not worry about them.

22. Ms. Simi advised Plaintiff that Defendant would handle this claim and that Defendant would take care of everything.

23. The relationship between Simi and Plaintiff developed such that Plaintiff believed and trusted Ms. Simi, having never dealt with an insurance adjuster for injuries from any accidents in the past.

24. Plaintiff kept Simi informed as to the progress of her medical treatment, including Plaintiff's treatment with Dr. Douglas Yeatman, who performed vertebroplasties (concrete plates between the vertebrae), rhizotomies (burning of nerves surrounding vertebrae) and nerve blocks. Plaintiff also kept Ms. Simi advised of her progress with her fractured wrists.

25. In all of their conversations, Ms. Simi always showed compassion for Plaintiff's injuries and asked about her pain and suffering.

26. Over time, Plaintiff kept Ms. Simi posted on everything that was being done to her as a result of the MidJim store incident.

27. On May 4, 2011, Plaintiff and her husband were asked by Ms. Simi to prepare a document outlining the incident and Plaintiff's injuries, and what Plaintiff thought would be fair compensation for pain and suffering. Ms. Simi advised Plaintiff and her husband that Defendant would either reward it or make a counteroffer, and stated again that she was working on the case and asked several times about Plaintiff's pain level.

28. Plaintiff's husband, pursuant to this specific request of Defendant's representative, Ms. Simi, mailed a claim letter and package detailing the facts of the incident, a chronological list of Plaintiff's doctor visits, a descriptive summary of Plaintiff's pain and suffering, and photographs. The offer to settle included a description of Plaintiff's difficulties and pain due to the incident, along with specific descriptions as to her complaints and a list of those recreational activities; i.e., gardening, jewelry making and crocheting, which she is no longer able to perform. Plaintiff asked for a specific amount of money, and waited for a response.

29. Without knowledge that the Tribe had enacted a Tribal Code waiving sovereign immunity thereby creating in Plaintiff a right to file a suit against the Tribe, Plaintiff followed the instructions and requests of



Defendant's employee, an insurance adjuster, and filed on June 21, 2011 with said insurance adjuster, and not the Tribal secretary, a written claim package which satisfied the 120 day notice and 180 day claim requirements. Ms. Simi gave Plaintiff's claim package to Simi's supervisor, who forwarded the claim to the Tribe's in-house counsel.

30. As they were directed, Plaintiff, with her husband's assistance, sent the claim package to Defendant's insurance representative, Ms. Simi.

31. At no time were Linda or Stanley Lesperance ever notified, verbally or in writing, that their notice of injury/claim was procedurally incorrect, insufficient, or denied.

32. In the Tribal court's ruling, Tribal Judge Fabry acknowledged that the June 2011 letter was received within the 120 day deadline, and did detail how and where the injury occurred, the types of injuries sustained, and specifically asked for payment of \$45,000.00 - \$50,000.00 to cover past and future pain and medical expenses.

33. However, the Tribal Court ultimately ruled against Plaintiff for her failure to serve notice of her claim upon the Tribal Secretary. The Tribal Secretary's office is in the same building as Patti Simi's, Defendant's insurance representative. Ironically, had Plaintiff served the Tribal Secretary, Plaintiff's claim package would have been forwarded to the insurance department and in-house counsel. Only the cover page of the claim notice is copied and filed in the Tribal Secretary's office.

34. In addition to the first 120 day pre-suit notice is the second pre-suit notice described in the Tribal Code, § 85.110 "Limitations of Actions," and § 85.111 "Disposition of Claim Prerequisite to Suit." Basically, the Tribal Code sets out four (4) separate scenarios before a claimant may elect to file suit against the Tribe. First, a tort claim must be filed against the Tribe within one hundred eighty (180) days of the accrual of the claim. § 85.110. The second deadline is that the claimant's "action" (lawsuit), is to be filed within one hundred (180) days of the date of mailing, by certified or registered mail, of notice of final denial of claim by the Tribe. Third, in an effort to give time for the claimant and the Tribe to work toward a settlement and dispose of the case in a reasonable and inexpensive manner, the Code affirmatively dictates that an action not be instituted upon a claim unless the claimant has first presented the claim to the Tribe, and the claim has been fully and finally denied by the Tribe in writing sent by certified or registered mail. After denial, the Code describes a fourth scenario.

"The failure of the Tribe to make final disposition of a claim within 180 days after it is filed shall at the option of the claimant any time thereafter be deemed a final denial of the claim for purposes of this Chapter." (85.110).

The Code fails to place a time limit upon which an action must be filed in the Tribal Court against the Tribe after 180 days have lapsed and no denial of the claim has been issued.

**Denial of Due Process**

35. With the enactment of the Sault Tribal Code, the Tribal Court is mandated first to apply in civil cases, the laws of the Tribe, any laws of the United States that may apply, and in the absence of applicable federal or tribal law, the laws of the State of Michigan. Tribal Code Ch. 81.105.

36. Further, the Sault Tribal Code rules governing appeals require the appellate court apply the substantive law of the Tribe, as well as “applicable federal law.” Tribal Code Ch. 82.108(4).

37. Once sovereign immunity was waived by the Tribe, the Tribe’s pre-suit notice requirements are thus subject to the rule of federal common law in compliance with the principles of the United States Constitution.

38. The Tribal Appellate Court’s finding that its Tribal Tort Claims Ordinance claim processing rules and time bars deprived the Tribal Court of authority to hear Plaintiff’s case failed to adhere to the constitutional principles of Irwin v Department of Veterans Affairs, 498 U.S. 89 (1991), Glarner, and Wong.

39. Irwin, Glarner, and Wong all held that federal common law expanded equitable due process to all private and sovereign immunity governing cases.

40. The Tribal Appellate Court denied Plaintiff due process when it rejected Irwin, Glarner and Wong for failing to discuss either “tribal sovereign immunity or tribes,” and finding their holdings limited to the

federal government. The Tribal and Appellate Courts found that none of the non-tribal federal or state cases relied upon by Plaintiff were authority to support Plaintiff's case, yet the Tribal Courts had little difficulty citing Michigan non-tribal cases, McCahan v Brennan, 822 N.W.2d, 747; 492 Mich. 720 (2012); Robinson v City of Detroit, 613 N.W.2d 307, 318 (2000), as support for its strict construction of its tribal pre-suit code, the same type of construction and application rejected by the Wong Court.

41. It is evident in the two lower court opinions that the Tribe refused to concede that Plaintiff's document of June 21, 2011 was a claim. While the Tribal Court never addressed the issue of equitable estoppel, the Appellate Court found that equitable due process was not applicable to the present case.

42. Indeed, Defendant's entire case rests upon the dispositive questions of (a) whether or not Plaintiff's claim package offering to settle and proof of damages amounted to a "claim," which Defendant received in a timely fashion, and (b) is the Tribe equitably estopped from denying proper receipt of Plaintiff's claim.

43. The Tribal Appellate Court's rebuttal to Plaintiff's factual statement that her case complied with the Glarner five factors determining the application of equitable due process is a clear example of Defendant's denial of Plaintiff's due process rights. In its ruling, the Appellate Court rejected Plaintiff's assertion that she lacked both actual and constructive

knowledge of the filing requirement under Tribal Code § 85.104. (App. Ruling, p. 13) The Court's finding that the Tribal Code was available to anyone at the Tribal website within the 120 day notice is unsupported by the record and contrary to any evidence presented before the lower court or the Appellate Court. Had said argument been presented at the lower Court, Plaintiff would have rebutted same with testimony from Plaintiff's counsel and the Tribe's in-house counsel, who both found that at the time Plaintiff hired her undersigned attorney, one (1) year after the incident, the Tribal Tort Claims Ordinance Code was not online at or before said time. Defendant's counsel would testify that they were hiring someone to assist them in placing the Code onto their website. The Appellate Court's "public notice" of the internet lacked any finding of fact to support this reasoning.

44. The Tribal Appellate Court next ruled that Linda Lesperance failed to actually ever submit a claim until one was submitted by their attorney is, again, contrary to the evidence and ruling before the lower court and the June 21, 2011 claim filed by Plaintiff with Defendant's adjuster, and not the tribal secretary.

45. The Appellate Court's conclusion that Plaintiff made no effort to review the Tribal Code fails to take into account the conduct of its own Tribal employees, who agreed to take care of Plaintiff, her needs following the incident, and guided Plaintiff in submitting her claim, the demand package.

46. The Appellate Court then criticized Plaintiff for failing to inquire whether her claim (previously known as a letter and still not a claim) had been correctly filed with the insurance department. (App. Ruling, p 13). This conclusion is, again, unsupported by the record, was not argued before the Tribal Court, nor referred to in the briefs of Defendant. Plaintiff had no reason to believe her actions were anything other than the correct procedure when it was requested by Defendant. Again, Plaintiff's Michigan cases on point supported Plaintiff's case of estoppel, but were not authoritative or persuasive due to their non-tribal facts.

47. The Appellate Court's final and most obvious Glarner ruling unsupported by any evidence is its conclusion that Defendant has suffered substantial potential prejudice due to the delay in the case from its inception to the present. The record will reflect that no fewer than seventeen (17) depositions of Tribal employees and witnesses were taken and transcribed, and pictures and video of the defective area and accident itself were preserved. This last example of the Appellate Court's ruling exemplify the Tribe's theme throughout the Tribal Court's ruling that the Tribe committed no wrong, the federal and state law does not apply to the Tribe, and Plaintiff is not entitled equitable relief.

48. Long before Irwin and Wong were decided by the United States Supreme Court, cases such as Love v Pullman, 44 U.S. 522 (1972) reversed refusal to deny access to our courts and granted due process when a plaintiff

failed to submit a written and signed statement by registered mail to the appropriate state or local agency. Our court system's long history of refusing to find a jurisdictional defect subject to dismissal with prejudice in a defective pre-suit notice continued in Zipes v Transworld Airlines, 455 U.S. 385 (1982), followed by Wong some thirty-three (33) years later.

#### **Sault Tribe's Legislative Intent**

49. The Sault Tribe's legislative intent predates and wisely seeks the justice expounded in Irwin, Glerner and Wong's equitable requirements. First, the Tribal Code declares the purpose and authority of Chapter 85 is to "provide for a limited remedy for personal injury caused by tortious actions of Tribal employees, and to provide a limited waiver of sovereign immunity to accomplish this purpose." Chapter 85.101 Purpose and Authority. Second, the Sault Tribe has also inaugurated a Sault Tribe insurance department, one component of which is "an appropriate, effective and affordable mechanism to compensate for personal injury caused by the tortious actions of its Tribal officers, employees, or other acting on behalf of the Tribe." Chapter 85.102(3).

50. Defendant's insurance department employee's conduct was neither appropriate nor effective in assisting Plaintiff in receiving compensation for her personal injuries caused by the tortious actions of the Tribal employees.

51. Defendant promised to pay for all Plaintiff's medical bills, gained Plaintiff's trust, then kept silent Plaintiff's need to serve the notice and claim on their Tribal secretary to preserve her rights.

52. The Sault Ste. Marie Tribe of Chippewa Indians Tribal Court's Mission Statement speaks loudly as to its legislative intent when it created the Tribal and Appellate Courts, first established by board resolution in 1977.

"The Mission of the Sault Ste. Marie Chippewa Tribal Court is to provide equitable and expedient resolution of conflict by the impartial administration of justice to ensure a safe community through strengthening our families and reducing crime."

53. Even the Tribal board, who enacted the Tribal Appellate Code, recognized that strict adherence to the Tribal Code need not always deprive a party of relief. The Code provides grounds for granting late appeals, allowing the court of appeals, at its discretion, to grant leave to appeal from any order when "there is merit in the grounds for appeal and that late filing was not due to appellant's negligence." Chapter 82.113(5).

54. The Tribe's legislative dictates call for an appropriate and equitable remedy to compensate victims hurt by the tortious actions of their Tribal employees.

55. Yet, punishing Plaintiff for following the instructions of Defendant's representative to file her claim with the representative, and not the Tribal secretary (when Defendant's employee remained silent), surely is not an equitable, appropriate or lawful means of dispensing justice, either by Tribal, federal, or state law.



56. Plaintiff's pursuit of a lawsuit brought attention to an unsafe condition created by Defendant's employees at its convenience store, thus contributing to "ensuring a safe community," the Tribe's mission.


57. Once the Tribe waived its sovereign immunity for claims from injuries caused by the negligence of its employees in its building, its strict adherence to pre-suit notice requirements must stand the test of due process. To deny Plaintiff access to the Tribal Court would unlawfully deprive Plaintiff her right to due process and compensation for injuries she will endure for life.

WHEREFORE, due process requires this Court reverse the Tribal Appellate Court and find that the Tribe is equitably estopped from denying it received service of Plaintiff's notice and claim, and remand this case to the Sault Tribal Court for a trial on the merits.

Respectfully Submitted:

Dated: October 20<sup>th</sup>, 2016

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