

UNITED STATES DISTRICT COURT

for the

Western District of Michigan

LINDA L. LESPERANCE,

Plaintiff,

Civil Case No.: 2:16-cv-00232

v

SAULT STE. MARIE TRIBE
OF CHIPPEWA INDIANS,

Defendant.

Hon. Robert J. Jonker
United States District Judge

**PLAINTIFF LINDA L. LESPERANCE'S BRIEF IN SUPPORT OF HER
MOTION FOR JUDGMENT ON THE PLEADINGS;**

**REPLY TO DEFENDANT SAULT STE. MARIE TRIBE
OF CHIPPEWA INDIANS MOTION TO DISMISS AND
MOTION FOR JUDGMENT ON THE PLEADINGS;**

AND

REQUEST FOR ORAL ARGUMENT

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I. INTRODUCTION

This matter comes before the Court on Plaintiff's Petition to Vacate the Sault Ste. Marie Chippewa Indian Tribal Court of Appeals' ruling affirming the Tribal Court's Summary Judgment Order dismissing Linda Lesperance's Complaint against Defendant for lack of jurisdiction.

The Tribal Court and Tribal Court of Appeals rulings strictly construing the Tribe's claim processing and time bar rules as jurisdictional are contrary to the equitable dictates of the Tribe's Constitution, legislative history, and federal common law. Once sovereign immunity was waived by Defendant, Defendant's pre-suit notice requirements are rebuttably preserved subject to equitable tolling.

Linda Lesperance has pursued her rights diligently; equitable principles require Plaintiff have access to the Tribal Court to hear the merits of Plaintiff's case.

Accordingly, this Court should vacate the Tribal Court of Appeals Order and enter an order instructing the Tribal Court to hear on the merits Plaintiff's Complaint for Damages.

II. STATEMENT OF FACTS

A. Plaintiff, Seriously Injured, is Contacted by the Tribe's Insurance Customer Representative

On April 14, 2011, Plaintiff was injured at the MidJim Convenience Store, suffering multiple fractures to her neck, back and wrists, in addition to other injuries.

On April 18, 2011, Plaintiff and her husband spoke with by Patti Simi (hereinafter "Simi"), insurance representative of Defendant's insurance department (Ex A., Affidavits of Stanley Lesperance dated June 23, 2015 and October 14, 2015), (Ex. B, Affidavit of Linda Lesperance dated October 14, 2015).¹ Simi informed Plaintiff and her husband that she would be assisting them with their needs resulting from the incident, including the payment of medical bills and out of pocket expenses.² Simi called their home on April 22, 2011, April 23, 2011, April 28, 2011, May 3, 2011, May 6, 2011 and May 31, 2011, when Plaintiff and her husband discussed Plaintiff's injuries and their case. *Id.* Plaintiff continued to receive telephone calls and emails on a regular basis from Simi to check on the status of Plaintiff's injuries. On or about

¹ All of the exhibits referenced herein were items appearing in the record of the case before the Tribal Court and the Tribal Court of Appeals. Thus, this Court may consider these exhibits in deciding Plaintiff's motion. *Barany-Snyder v. Weiner*, 539 F.3d 327, 332 (6th Cir. 2008).

² Ms. Simi's deposition contradicts Defendant's initial statement of facts that on April 14, 2011 Stanley Lesperance called Patti Simi. Q: "Mr. Lesperance has provided this affidavit to the Tribal Court and says in paragraph 3 that when they were contacted by you, that you informed them you would be assisting them with their needs resulting from the incident, including the payment of medical bills and out of pocket expenses. Now I think you already told us that, correct? Sir, yes. So what he says is correct? Yes." (Ex. C, Deposition of Patti Simi, p. 18)

April 28, 2011, Simi requested Plaintiff forward to her some of Plaintiff's doctor bills she had received to date. On May 6, 2011, Plaintiff sent to Simi her doctor bills along with a hand written list of appointments and doctor visits, and what each visit was for. Simi also informed Plaintiff that Defendant would take care of all of her medical bills and they "shouldn't worry about them." *Id.* Simi gave Linda Lesperance, age 63, and her husband, Stanley, age 74, the impression that Defendant couldn't do enough for Plaintiff and her husband, and that they would take care of everything. *Id.* Plaintiff believed Simi and trusted her, having never dealt with an insurance adjuster for injuries in any accidents in the past. *Id.* Plaintiff kept Simi informed as to the progress of her medical treatment. *Id.* In all their conversations, Simi showed compassion for Plaintiff's injuries and would ask about Linda's pain and suffering. *Id.*

Simi asked Stanley Lesperance, on May 3, 2011, to prepare a letter (i.e., demand package) requesting a specific sum of money for Linda's pain and suffering, medical bills, past and future, and the like. Plaintiff and Stanley Lesperance kept track of the dates they spoke to Simi. (Ex. B, Aff. of L. Lesperance). Simi advised that she was working on the case and asked several times about Plaintiff's pain level. *Id.* Without question, Plaintiff trusted Simi with the handling of her claim. *Id.* Plaintiff and her husband felt they were safe in their dealings with Defendant. *Id.* Plaintiff and Simi were

on a first name basis. *Id.* Plaintiff described Simi as being as nice and as sweet as your “great-grandmother.” *Id.*

At no time was Plaintiff informed by Simi that there was a procedure for pre-suit notification to Defendant for her claim. *Id.* Neither Plaintiff nor her husband, Stanley, had any knowledge that the Tribal Code contained a pre-suit notice requirement, much less that the Code even existed. *Id.* Stanley Lesperance complied with the May 3, 2011 request of Simi and mailed a settlement package to Simi detailing the facts of the accident, a chronological list of Plaintiff’s doctor visits, a summary of Plaintiff’s pain and suffering, photographs, and a dollar amount for pain and suffering (Ex. D, Claim Package). Simi advised Plaintiff that the Tribe would either “reward it or counteroffer,” and stated again that she was working on the case, and asked several times about Linda’s pain level. (Ex. A). “I again wrote this letter as Linda was not able to write. At the time this letter was written and sent, we were unaware of the prognosis of Linda’s future treatment and were not in possession of any written reports stating the degree of any temporary or permanent impairment, prognosis, or diminished earning capacity.” *Id.*

At no time were the Lesperances ever notified, in writing or verbally, by Simi or any other representative of Defendant, that their notice of injury/claim was procedurally incorrect, insufficient, or denied, *Id.*, until Defendant filed its Answer and Affirmative Defenses to Plaintiff’s original lawsuit.

The Tribal Secretary's office is in the same building as Simi's.³ When a notice or claim is filed with the Secretary, only the cover page of a claim/notice is copied by the Tribal Secretary and filed in the Secretary's office. Ironically, had Plaintiff served the Tribal Secretary, Plaintiff's claim package would have been forwarded to the insurance department and a copy to the Tribe's legal department. (Ex. C, p. 12, and Ex E., p. 8). Simi confirmed that Plaintiff's claim package would have been forwarded to in-house counsel from her office, as well. *Id.*

From June 2011 until May 2012, the Lesperances maintained contact with Simi, keeping Simi updated on Plaintiff's medical progress, including, but not limited to, Plaintiff and Simi making arrangements for Plaintiff to be examined at Johns Hopkins University. In May, 2012, Plaintiff retained her undersigned attorney. Contrary to the Tribal Court of Appeals finding of fact unsupported by any evidence proffered by either party, the Tribal Code was not accessible to Plaintiff on the internet in 2011 through September 19, 2012. On September 19, 2012, the Tribe's Insurance Manager emailed the Tort Ordinance with a link to the remainder of the Tribal Code. (Ex F, email from Holly Haapala). Plaintiff's claim, filed on June 22, 2011, was never objected to nor denied any time after its filing with Defendant. Another claim was filed through Plaintiff's counsel on May 2, 2013, providing therein substantial additional documentation of Plaintiff's injuries in conformance with the Code's requirement. Ch. 85.113(2).

³ Joanne Carr is the Tribal Secretary. Ex. E., Deposition of Joanne Carr, p. 4-5.

B. Tribal Court Rejects Federal Common Law and Finds Jurisdictional its Claims Processing and Time Bar Rules

The Tribal Court acknowledged that Plaintiff's June 22, 2011 claim was received within the 120 day deadline, did detail how and where the injury occurred, the types of injury sustained, and specifically asked for payment of \$45,000.00-\$50,000.00 to cover past and future pain, and medical expenses. (Ex. G, Tribal Court Order). However, since the notice was not served on the Tribal Secretary by personal service or certified mail, but rather sent to Simi by regular first class mail as instructed by Simi, the Tribal Court ruled against Plaintiff.

Plaintiff filed suit against Defendant in December 2013 seeking recovery for her injuries resulting from the negligent condition of the MidJim Convenience Store threshold. (Ex. H, Plaintiff's Complaint). Defendant answered the Complaint, denied liability and raised various affirmative defenses. On June 2, 2015, approximately eighteen (18) months after suit was filed, Defendant filed a Motion for Judgment on the Pleadings/Summary Judgment on grounds that the Lesperances failed to file a written notice or claim in a timely fashion with the Tribal Secretary.

The Tribal Court's opinion never discussed or entered a finding on Plaintiff's argument that the Tribe was equitably estopped and waived its right to object to Plaintiff's procedural error. The Tribal Court agreed that Defendant voluntarily waived its immunity and subjected itself to liability, but that Defendant may place conditions or limitations on its liability as part

of its immunity. The Court's opinion applied the rulings of a Tribal court and state court decisions, and rejected the long history of federal common law as it applied to non-jurisdictional procedures which applied to private and government parties.

Plaintiff's argument that the documents and exhibits filed with Simi, pursuant to her request, was a claim for damages was also further absent from discussion in the Tribal Court's and Tribal Court of Appeals' decisions.

Finally, the Tribal Court erroneously found that Plaintiff cited cases that were only "private lawsuits and did not involve waivers of sovereign or governmental immunity." (Ex. G, p. 4). Plaintiff was ultimately denied a trial when the Court found that her violation of Defendant's claim processing rule, service upon their secretary, deprived the Tribal Court of the authority to hear her case, a strict construction of pre-suit requirements rejected since 1970, beginning with *Love v Pullman, Co.*, 404 U.S. 522 (1972), *Irwin v Department of Veteran's Affairs*, 498 U.S. 89 (1991), *Glarner v United States of America, Department of Veterans Administration*, 30 F.3d 697 (6th Cir. 1994), *United States v Kwai Fun Wong*, 575 U.S. 1 (2015).⁴ (Although not in

⁴ The 2015 *Wong* court combined two Federal Tort Claims Act (FTCA) actions. Kwai Fun Wong asserted a false imprisonment action against the Immigration and Naturalization Service in 1999, but filed her FTCA suit late due to her inability to amend a non-FTCA complaint to include the tort action within the six month required period. Marlene June presented a tort claim against the Federal Highway Administration for wrongful death in 2012, five years after the accident and discovery that the FHWA had approved installation of a median barrier, knowing it had concealed its failure to conduct a proper crash test. The Supreme Court affirmed the Ninth Circuit's application of equitable tolling in *Wong*, and ordered

Plaintiffs' briefs, *Irwin*, *Glarner* and *Wong* citations were filed before oral arguments and discussed at length).

C. The Tribe's Legislative Intent Supports *Irwin's* Rebuttable Presumption

The Sault Tribe's legislative intent follows *Irwin's*, *Glarner's*, and *Wong's* equitable requirements.

First, the Sault Ste. Marie Tribe of Chippewa Indians Tribal Court Mission Statement speaks loudly as to its legislative intent when it created the tribal court and court of appeals, 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."

Second, 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 for a limited waiver of sovereign immunity to accomplish this purpose." §85.101 Purpose and Authority.

Next, the Sault Tribe has also inaugurated a Sault Tribe Insurance Department Program, one component of which is "an appropriate, effective and affordable mechanism to compensate for personal injury caused by the tortious actions of Tribal officers, employees, or others acting on behalf of the Tribe." §85.102(3). (Emphasis added). Plaintiff submits that Defendant's

the District Court in *June* to decide whether, on the facts of her case, June was entitled to equitable tolling.

insurance department employee's conduct was not appropriate, nor effective, in assisting Linda Lesperance in receiving compensation for her personal injuries caused by the tortious actions of the Tribe's employees. Defendant promised to pay for all of Plaintiff's medical bills, gained Plaintiff's trust, then kept silent Plaintiff's need to serve the notice and claim on the Tribal Secretary.

Plaintiff appealed the dismissal of Plaintiff's lawsuit to the Tribal Court of Appeals, and the Court of Appeals erroneously affirmed the Tribal Court's ruling.

Defendant waived sovereign immunity for tort claims brought against the Tribe with the enactment of its Tribal Code, Ch. 85.104. Linda Lesperance, who was injured in a public building, claims liability under the Tribe's public buildings statute:

"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.”

In addition to the 120 day notice on the Tribe of the occurrence of the injury and the defect, the Tribal Code also requires:

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(1). (Emphasis added).

So, if a claim is not denied after 180 days, either the plaintiff may sue, or wait indefinitely. The Tribe places no time limits under these circumstances. Presenting the claim, like the notice provision, is described in Ch. 85.112(2):

“(2) The claim shall be presented personally or by certified mail, return receipt requested, to Sault Ste. Marie Tribe of Chippewa Indians Board of Directors Secretary, 523 Ashmun Street, Sault Ste. Marie, MI 49783.”

D. Plaintiff's Letter and Demand Package of June 22, 2011 Was a Claim Timely Filed with the Tribe, Albeit Not Served On Its Tribal Secretary, Without Prejudice to the Tribe

At the heart of the erroneous finding of the Tribal Court and Tribal Court of Appeals is the refusal of the Tribe or its Courts to agree that Plaintiff timely filed a *claim* upon the Tribe's insurance employee as instructed by the Tribe, and not the Tribal secretary as stated in its Code. Plaintiff's letter and demand package is a “claim” by any definition, as it seeks damages for a specific amount of money as a result of Plaintiff's

injuries incurred when she tripped on the Tribe's dangerous threshold. A claim is:

"claim, n. 1. The aggregate of operative facts giving rise to a right enforceable by a court <the plane crash led to dozens of wrongful death claims>. 2. The assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional <the spouse's claim to half of the lottery winnings>. 3. A demand for money or property to which one asserts a right <an insurance claim>." Black's Law Dictionary 7th Ed 1999.

III. ARGUMENT I

A. Sovereign Immunity the Tribe Waived for Tort Claims Includes Non-Jurisdictional Claim Processing Rules and Time Bars Rebuttably Presumed Subject to Equitable Tolling

The Tribal Court and Tribal Court of Appeals erroneously ruled that its waiver of sovereign immunity for tort claims, such as Plaintiff's case for injuries in Defendant's public building, is not waived as to the Tribe's claim processing and time bar rules.

The United States Supreme Court (Supreme Court) set out the framework for deciding the applicability of equitable tolling and suits against the government in *Irwin*. Noting that time requirements and lawsuits between private litigants are customarily subject to equitable tolling, *Irwin* held that the same rebuttable presumption of equitable tolling applicable to suits against private defendants shall also apply to suits against governments, including the United States.

The essence of Defendant's arguments are that its Presentation of Claim statute, Ch. 85.112, a claim processing rule, is a jurisdictional provision that, if not followed, deprives its Tribal court of the authority or jurisdiction to hear the case of Linda Lesperance. More specifically, Defendants claim that its procedures require notice on the Tribe within 120 days of the injury is to be served on its Tribal secretary, is jurisdictional, and not a non-jurisdictional claim processing requirement or time bar.

The Supreme Court has clarified in recent years that the term “jurisdictional” refers to a court’s judicatory authority and a tribunal’s power to hear a case. *Wong v Beebe*, 732 F.3d. 1030 (9th Cir. 2013) citing *Reed Elsevier, Inc. v Muchnick*, 559 U.S. 154, 160-61 (2010). When a government, as in this case the Tribe, opts to forbid equitable tolling, the government and the Tribe must clear a high bar to establish that a statute of limitations or a claims processing rule is jurisdictional. *U.S. v Wong*, pg 6.

In recent years, the Supreme Court has repeatedly held that procedural rules, including time bars, “cabin a court’s power only if Congress has clearly stated as much.” *Id.* p. 6 (citing *Sebelius v Auburn Regional Medical Center*, 568 U.S. ___, 133 S.Ct. 817, 184 L.Ed.2d 627 (2013)). Absent a clear statement from Congress, courts are to treat the rules as non-jurisdictional. *Id.* *U.S. v Wong* citing *Auburn Reg’l Med. Ctr* (quoting *Arbaugh v Y & H Corp.*, 546 U.S. 500, 515 (2006)). The consequences of labeling a particular statutory requirement “jurisdictional” are “drastic.” *Gonzalez v Thaler*, 132 S.Ct. 641, 648. Traditional tools of statutory construction must plainly show that the Congress or, in this case, the Tribal Board, imbued a procedural bar with jurisdictional consequences. In applying the clear statement rule, most time bars are rarely non-jurisdictional.⁵ The Supreme Court time and again describes filing deadlines as quintessential claim processing rules, which “seek to promote the orderly progress of

⁵ *Auburn Reg’l*, 568 US at 7 (noting the rarity of jurisdictional time limits)

litigation” but do not deprive the court of authority to hear a case.⁶ “Even when the time limit is important (most are) and even when it is framed in mandatory terms (again, most are); indeed, that it is so ‘however emphatic[ally]’ expressed those terms may be.”⁷

Claim processing rules are rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times. *Henderson*, 131, S.Ct. at 1203. *U.S. v Wong* ruled that Congress must do something special, beyond setting an exception free deadline to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it, as must the Tribe. Neither the text, the context, nor the legislative history of the Tribe help the Tribe’s argument that its Tribal Board meant to enact something other than a standard time bar.

Nowhere in its Ch. 85.104 waiver of sovereign immunity and consent to suit does the Tribe use the word “jurisdiction” when it requires that all procedures are to be adhered to strictly. On the contrary, paragraph (2) states:

“The Tribe consents to suit in the Tribal Court for suits based on tort claims under this Chapter. The Tribe does not consent to suit in any other forum for such claims and specifically preserves and retains its sovereign immunity to any tort suit in any other forum. The Tribal Court shall have jurisdiction over all claims arising under this Chapter.”

⁶ *Henderson v Shinseki*, 562 US 428, 435 (2011); *Scarborough v Principi*, 541 US 401, 413 (2004).

⁷ *Henderson*, 562 US at 439 (quoting *Union Pac R.R. Co. v Locomotive Eng’rs*, 558 U.S. 67, 81 (2009))

Next, in its public buildings provisions, Ch. 85.106, the Tribe once again requires notice as a condition of any recovery, yet does not speak in jurisdictional terms or refer in any way to the jurisdiction of its Tribal Court. See *U.S. v Wong* at 8. Again, there is no Supreme Court mandated language in the Tribe's Limitations of Actions, see Ch. 85.110:

“a tort claim against the Tribe in this chapter shall be forever barred unless it is presented in writing 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.”

Filing deadlines are quintessential claim processing rules, and even as important and mandatory such rules may be, they should not be given the jurisdictional brand. *Henderson*, at 1203. Again, there appears no clear statement of the Tribe's intent in the event the 180 day rule is not complied with. Further, nothing in Ch. 85.110, Limitations of Action, mentions the authority of the Tribal Court. Ch. 85.110 text speaks only to a claim's timeliness, not to a court's power. *U.S. v Wong*, p. 7. Defendant argues the language of the Tribe, “shall be forever barred,” is mandatory. The Supreme Court has consistently found it of little consequence.⁸

The Court of Appeals ruled that the Code's language should be viewed as emphatic, i.e., “forever” barred, but again, it does not matter nor remove the Tribal Court of jurisdiction. What matters instead is that the Tribal Code's time bar and claim processing rules are not speaking in jurisdictional terms or in any way referring to the jurisdiction of the Tribal Court. *Arbaugh*,

⁸ See *U.S. v Wong*, p.11 fn 7.

546 U.S. at 515 (quoting *Zipes v Transworld Airlines, Inc.*, 455 US 385, 394 (1982)). The Tribal Code fails to define the Tribe's jurisdiction over tort claims generally, address the Tribe's authority to hear untimely suits, or in any way "cabin its usual equitable powers." The Tribal Tort Claims Ordinance "reads like an ordinary, run of the mill statute of limitations," spelling out a litigants filing obligations without restricting a court's authority. *U.S. v Wong*, citing *Holland v Florida*, 560 U.S. 631, 647 (2010).

With the intent of claim processing rules to promote the orderly progress of litigation and to allow the defendant time to analyze and settle a case, the Tribe enacted Ch. 85.111, which tells a plaintiff that they cannot file suit unless it has first been presented to the Tribe and finally denied by the Tribe in writing, sent by certified or registered mail. Lacking from Ch. 85.111 is a clear statement that an action is forbidden or that the Tribal Court lacks authority or jurisdiction. There is no statute of limitations in the event the Tribe denies a claim, only the option given to the plaintiff to assume it is denied if the Tribe fails to make final disposition of a claim within 180 days after it is filed. In other words, no penalty when timely notice is given.

The Tribal Court of Appeals rejected as non-persuasive Plaintiff's reliance upon *Irwin* and *Wong* on grounds they did not deal with an Indian Tribe and involved different statutes than the Tribal Code. (Ex. I, Court of Appeals Opinion) The Court of Appeals also rejected the application of

Glarner, accepting the Tribe's argument that restrictions and limitations were jurisdictional.⁹ Defendant describes its Tribal Code as exclusively "indicating" that the restrictions limitations are jurisdictional, just the kind of language the Supreme Court found to be lacking of that "clear statement" to include a jurisdictional filing deadline. The Code is absent consequential language necessary to take it beyond the "indicating" designation. Defendant argues that because the Tribal Code uses the words "strictly construed" and "subject to all restrictions, limitations, and procedures," that its claim processing rules and time bars, including words such as "forever," supply the missing link with regard to declaration of an inflexible rule. *Wong v Beebe*. The language of the Tribal Code under its presentation of claim provision, limitations of action provision, waiver of sovereign immunity consent to suit provision, and public buildings provision do not in terms order courts to do anything, including dismiss any untimely claims. *Wong v U.S.* at 1037-38.

B. Interpretation of the Law is the Role of the Courts

The Tribal Court and Court of Appeals ruled that (a) the *Irwin* Court's reasoning does not help Plaintiff because of the Tribal Code's restrictive language, and (b) said language does not empower the court to "engraft a judicial gloss onto the limitations and restrictions set forth in the Code." (Ex. G and I). The Court of Appeals and Defendant have concluded that *Irwin*,

⁹ Assuming arguendo, Plaintiff is correct and *Irwin* and *Wong* apply, the Court of Appeals later addresses the five factors in *Glarner*.

Glarner and *Wong*'s equitable application of the law is tantamount to engrafting a judicial gloss, or as is more commonly known as a judicial interpretation of the law, that which is the role of the courts. To be sure, *Irwin*'s presumption is rebuttable. However, Defendant is wrong in its reliance on *Brockamp* to support of its argument.¹⁰ Defendant's assertion that *Brockamp* would not apply equitable tolling as a time limitation, or that unusually emphatic words are precedent ignores the case's factual distinction with Plaintiff's case. *Brockamp* emphasized that "tax law," the subject matter of the statute of limitations, "is not normally characterized by case specific exceptions reflecting individual equities," given the more than "200 million tax returns" and "more than 90 million refunds" processed each year. *Id.* at 352.¹¹

The Tribe next asserts that Plaintiff must show that she has been induced or tricked by her adversary's misconduct into allowing a filing deadline to pass, citing *Irwin* as support. Again, the Tribal Court opinion is absent a finding for Plaintiff or Defendant on the question of: was the Plaintiff induced into allowing a filing deadline to pass by the Tribe's insurance employee. The *Irwin* Court established that time bars in suits between private parties and governments are presumptively subject to equitable tolling. That means a court usually may pause the running of a

¹⁰ *U.S. v Brockamp*, 519 U.S. 347; 117 S.Ct. 849; 136 L.Ed.2d 4258 (1997)

¹¹ Defendant also cites as authority *Burnett v New York Central R.R. Co.*, 380 U.S. 424; 85 S.Ct. 1050 (1965), where equitable tolling was permitted, and yet asserts that Plaintiff failed to give notice and to make a claim at all is not supported by the facts and Tribal Court's opinion.

limitations statute in private or government litigation when a party “has pursued his rights diligently but some extraordinary circumstance” prevents him from meeting a deadline. *U.S. v Wong*, p. 4. Plaintiff was induced by the Tribe’s conduct into trusting the Tribe to handle her case in a fair and adequate manner. The facts of Plaintiff’s case support equitable application.

Defendant asserts in its motion that the “Tribal Court of Appeals determined that the phone calls, letter and emails between the Plaintiff and Simi did not amount to a claim.” Defendant’s interpretation of the Court of Appeals ruling conflicts with the Tribal Court’s finding of fact. “Although Appellant corresponded and emailed with a Tribal insurance representative, Ms. Simi, no claim for damages and accompanying documentation was presented to the secretary of the Tribe.” (Ex. I). The Tribal Court never found that Plaintiff failed to file a claim with the Tribe, only that Plaintiff’s claim for damages and accompanying documentation was not presented to the secretary of the Tribe until May 3, 2013, when Plaintiff’s attorney submitted a more complete claim.

C. Linda Lesperance is Entitled to Equitable Relief

On June 12, 2012 Plaintiff requested liability evidence, which was not received until July 7, 2014.¹² Plaintiff requested from Defendant video footage and photographs of the Plaintiff’s trip and fall, and the threshold before it was replaced. Plaintiff’s investigation of the convenience store entry took place after the repair of the premises. Plaintiff asserts that her claim did

¹² Ex. J, Letter from Plaintiff’s counsel to Defendant’s counsel dated June 12, 2012.

not accrue due to her inability to prove any fault on the part of the Tribe. Further, Nevertheless, Plaintiff's filing *pro se* of her demand package in a timely manner, but with the wrong person as instructed by the Tribe, prevented Plaintiff from complying with the time bar and claim processing rules. Plaintiff justifiably relied upon the representations of Defendant, to her detriment.

“In applying equitable tolling, courts follow a tradition in which courts of equity have sought to ‘relieve hardships which, from time to time, arise from a hard and fast adherence’ to more absolute legal rules, which if strictly applied, threaten the ‘evils of archaic rigidity.’ “ *Holland*, 130 S.Ct. at 2563 (quoting *Hazel – Atlas Glass Co. v Hartford-Empire Co.*, 322 US 238, 248 (1944)). Thus, the equitable tolling doctrine enables courts to meet new situations that demand equitable intervention, and to accord all the relief necessary to correct particular injustices. *Id.*

IV. ARGUMENT II

A. Linda Lesperance Pursued Her Rights Diligently But Extraordinary Circumstances Stood in Her Way

Long settled equitable tolling principles instruct that generally a plaintiff seeking equitable tolling or relief carries the burden of establishing two (2) elements:

1. That he/she has been pursuing his or her rights diligently, and
2. That some extraordinary circumstances stood in her way.

U.S. v Wong, at p. 4.

As to the first element, the standard for reasonable diligence does not require an overzealous or extreme pursuit of any and every avenue of relief. *Wong v U.S.* at 1052. It requires the effort that a reasonable person might be expected to deliver under her particular circumstances. *Id.*¹³ Central to the analysis is whether the plaintiff was “without any fault” in pursuing her claim. *Wong v Beebe*, citing *Fed. Election Comm’n v Williams*, 104 F.3d 237, 240 (9th Cir. 1996).

With regard to the second requirement, a garden variety claim of excusable neglect, such as simple miscalculation that leaves a lawyer to miss a filing deadline, does not warrant equitable tolling. *Holland*, 130 S.Ct. at 2564. Instead, a litigant must show that extraordinary circumstances were the cause of her untimeliness and made it impossible to file the [document] on time. Accordingly, equitable tolling is typically granted when litigants are

¹³ In *Wong v Beebe*, the 9th Circuit’s opinion, affirmed by the Supreme Court in *U.S. v Wong*, cites *Doe v Busby*, 661 F.3d 1001, 1015 (9th Cir. 2011).

unable to file timely documents as a result of external circumstances beyond their control.

In the case at bar, Plaintiff timely filed a notice and claim within the 120 and 180 day requirements as she was instructed, however, Linda Lesperance and her husband were unduly influenced into believing the Tribe would take care of them and their claim. In May of 2012, more than one year after the date of the incident, Plaintiff received a Seventy-five Thousand Dollars (\$75,000.00) medical bill from her doctor, who advised Plaintiff he was no longer taking Medicare. Not until that time did Plaintiff discover the Tribe's promise of paying their medical bills was broken.

B. Tribal Court of Appeals' Analysis of Plaintiff's Remedies Against the Tribe is Flawed or Unrealistic

The Tribal Court of Appeals opined that Plaintiff "could have brought her claim against the individual officials of the Tribe," relying on *Michigan v Bay Mills Indian Community*, 134 S.Ct. 2024 (2014). Although the Tribal Court of Appeals cited *Bay Mills* as authority for its opinion, and relevant to the case at bar, such could not be farther from reasonable analysis. In *Bay Mills*, suit was brought by the State of Michigan to stop the construction of a casino, the type of action that lends itself to an injunction or restraining order. Tribal officials or employees of the Tribe were allegedly violating their contract with the State of Michigan to build casinos outside of the parameters of their agreement. Injunctions and restraining orders are actions used to enforce contracts and prevent damages or suffering, actions in equity, not

law. There are no facts or law to support an injunction or restraining order in a typical suit, much less the case at bar.

Second, the Court of Appeals ruling that given the lack of separation of powers within the Tribe, “Appellants are welcome to appeal to the Tribe’s Board of Directors for compensation.” Absent from the Tribal Code or Appellate rules is a path to the Tribal Board as an appeal from the Tribal Court of Appeals, the Tribe’s highest court.¹⁴

Third, the Court of Appeals rules that Plaintiff’s tort claim is not a situation where “Tribal sovereign immunity should be waived to accommodate the claim.” The Court of Appeals misses the point. The Supreme Court has made it clear that procedural requirements, such as time limitations and claim processing rules, represent non-jurisdictional text which do not govern a court’s judicatory authority. Non-jurisdictional claim processing requirements remain subject to rebuttable presumption in favor of equitable tolling or relief. Defendant fails to meet its burden of rebutting the presumption.

C. Court of Appeals’ Analysis of *Glarner* as it Applies to Plaintiff is Fraught with Unsupported Assumptions of Fact

The *Glarner* court identified five (5) factors that should apply when deciding whether to apply the doctrine of equitable tolling:

“(1) lack of actual notice of the filing requirement;

¹⁴ Attached Ex. K is the Board’s counsel’s advisement that the Tribe’s Board is not amendable to discuss Plaintiff’s claim, and a statement that Plaintiff has exhausted her Tribal remedies.

- (2) lack of constructive knowledge of the filing requirement;
- (3) diligence in pursuing one's rights;
- (4) absence of prejudice to the defendant; and
- (5) a plaintiff's reasonableness in remaining ignorant of the notice requirement." *Glarner*, p. 702.

The Court of Appeals basis for its *Glarner* analysis lacks support of the record and assumed facts not in evidence.¹⁵ First, the Court of Appeals inured to Linda Lesperance the ability to find online the Sault Tribe's Tort Ordinance and Code prior to August 14, 2011, 120 days post incident (Ex. I). No testimony, affidavits or depositions support this assumption, other than the exchange of emails between Plaintiff and Simi. Plaintiff's counsel's first contact with the Tribe occurred when counsel emailed a notice of representation dated May 29, 2012 to the Tribe's insurance representative, Simi. (Ex. M, email to Simi). Between May 29, 2012 and June 12, 2012, Plaintiff's counsel and Courtney Kachur (hereinafter "Kachur"), the Tribe's in-house counsel, spoke about the Plaintiff's claim and the existence of the Tribal Code. (Ex. L). Kachur advised that the Code could not be obtained online and that they had hired an employee from Chicago who, when this person arrived, they believed would rectify their website issues. *Id.* Plaintiff's counsel then sent to Kachur, on June 12, 2012, a request for the exchange of documents prior to suit so the parties could properly evaluate their cases. *Id.*

¹⁵ In order to rebut the Court of Appeals' unsupported findings, Plaintiff submits a new affidavit from Plaintiff's counsel, Ex. L, Affidavit of Arthur Baron.

Plaintiff's counsel received no cooperation from Kachur, nor a response to Plaintiff's counsel's June 12 letter. *Id.* From June 12 through September 13, 2012, Kachur sent no documents, and more importantly, no Tribal Code for Plaintiff's counsel to review. *Id.* Having not received any cooperation from the Tribe, either for documents or their Code, Plaintiff's counsel requested to schedule a telephone conference with Kachur to discuss the Plaintiff's case. *Id.* This request was sent on September 12, 2012 at 3:16 p.m. by email. *Id.* Shortly thereafter both counsel agreed that the telephone conference would occur at 10:00 a.m. on September 19, 2012. *Id.*

Plaintiff's counsel, attempting to spur the Tribe into discussing a possible settlement, prepared a draft complaint and forwarded said draft complaint to Kachur on September 13, 2012 at 1:26 p.m. by email, for Kachur's review prior to the telephone conference scheduled for the following week. *Id.* Plaintiff's counsel, in said email, advised Kachur that Plaintiff's counsel had requested impairment ratings from Plaintiff's doctors and once they were received, they would be forwarded for Defendant's review. *Id.*

Plaintiff's counsel finally received the Tort Ordinance from the Tribe's insurance manager eight (8) minutes before the 10:00 a.m. EST telephone conference of September 19th. Wednesday, September 19, 2012 at 9:00 a.m. CDT was the first time Plaintiff's counsel became aware that there were pre-suit notice requirements. *Id.* After the telephone conference with Kachur, Plaintiff's counsel examined the Tort Ordinance and Plaintiff's paperwork to

discover that Plaintiff's notice and claim package was not served on the Tribal Secretary. *Id.* Plaintiff's counsel called Kachur to discuss the Tribe's position in regard to the lack of service on their Tribal Secretary. *Id.* The response from Kachur to Plaintiff's counsel was "we won't object as long as you don't ask for too much money." *Id.*

Chapter 85.101. Purpose and Authority of the Tribal Tort Claims Ordinance reads:

"This chapter is enacted under the authority contained in Article VII, § 1(d)(g)(k)(m)(n) of the Tribal Constitution."

After reviewing the Tribal Code in depth, Plaintiff's counsel contacted Kachur, again, to discuss the Tribe's position on the claims and statute of limitations ordinance. *Id.* Both counsel agreed that the Tribe's Code carried no punishment for failure to file suit prior to denial of a plaintiff's claim. *Id.* In conjunction with that, the attorneys discussed Ch. 85.113, Evidence Presented with Claim, which required that:

- (2) "In support of a claim for personal injury not involving death, including pain and suffering, the claimant *shall* submit the following evidence or information:
 - (a) A written report by his attending physician or dentist setting forth the nature and extent of the injury, nature and extent of treatment, any degree of temporary or permanent disability, the prognosis, period of hospitalization, and any diminished earning capacity. In addition, the claimant may be required to submit to a physical or mental examination by a physician employed by the Tribe.
 - (b) Itemized bills for medical, dental, and hospital expenses incurred, or itemized receipts of payment for such expenses.
 - (c) If the prognosis reveals the necessity of future treatment, a statement of expected expenses for such treatment.

(f) Any other evidence or information which may have a bearing on either the responsibility of the Tribe for the personal injury or the damages claimed.”
(Emphasis added).

Neither Plaintiff nor her counsel had the medical documentation required of Ch. 85.113, nor any proof of liability on September 19, 2012. Plaintiff began preparing a new claim package with documents necessary to achieve reasonable settlement. After compiling what appeared to be a mandated prerequisite of evidence to be presented with a claim in the Tribal Code, Plaintiff’s counsel filed a new claim on May 3, 2013 and served said claim on the Tribal Secretary. *Id.* Six (6) months later, after receiving no denial or response from the Tribe, Plaintiff filed a complaint with the Tribal Court.

Second, the Court of Appeals ruled that Plaintiff failed to ever actually make a claim until one was filed with the Tribal Secretary by her attorney. This conclusion of the Court of Appeals is unsupported by the record and contradicted by the Tribal Court’s specific ruling that Plaintiff did file a notice and demand package timely, but not with the Tribal Secretary. (Ex. G, p. 3).

The third *Glarnner* factor, diligence in pursuing one’s rights, evoked a critical analysis from the Court of Appeals, who blamed Plaintiffs for not determining their “complaint” had been correctly filed with the insurance

department.¹⁶ The Court of Appeals states that the record “suggests that they were not diligent in pursuing their claim against Appellee.” (See Ex. I, p. 13). Plaintiff provided the claim as requested and believed the Tribe’s promise to either pay what was asked for by Plaintiff or counteroffer the Lesperance’s offer to settle. The Tribe’s criticism of Plaintiff for not determining whether their complaint had been correctly filed with the insurance department is a clear indication that the Tribe sees no problem misleading its injured persons who believe the Tribe would handle their claim with promises they would not keep. The Tribe’s insurance department employee, a 17 year veteran in insurance (Ex. C, p. 4), took advantage, through her silence, of Plaintiff’s naivety, inexperience, and *pro se* representation. Plaintiff waited for the Tribe’s counteroffer or acceptance of Plaintiff’s offer, while Defendant allowed the 120 and 180 day periods to elapse. Plaintiff discovered her medical bills were not paid as promised, then hired her undersigned counsel. (Ex. B).

D. The Court of Appeals’ Ruling of Substantial Potential Prejudice to the Tribe is Unsupported by the Record

The Court of Appeals asserts that the potential prejudice to the Tribe is “substantial, given it is now been years since the accident leading to the present case. It may be exceptionally difficult, if not impossible, for Appellee to adequately defend itself given the loss of potential evidence. (e.g., witness testimony, pictures of the allegedly defective area, etc.)” Plaintiff, before the Tribal Court, argued that the acknowledged receipt of timely written notice

¹⁶ In its continued effort not to classify Plaintiff’s demand package as a “claim,” the Court of Appeals refers to Plaintiff’s claim as a “complaint.” p. 13

on Defendant of the occurrence of the injury and the claim resulted in no prejudice to Defendant is sufficient notice under the Tribal Code.¹⁷

Irwin, which applied to governments a rebuttable presumption of equitable treatment of non-jurisdictional matters, made relevant and authoritative private cases where pre-suit procedural compliance is a factor. Just as the Tribal Code has a pre-suit notification, the State of Michigan, as do many states, has a pre-suit requirement in medical malpractice and other statutory actions. *Ericson v Pollack*, 110 F. Supp.2d 582 (E.D. Mich. 2000), *Estate of Gawel v Schatten*, 109 F. Supp.2d 719 (E.D. Mich. 2000), *DeCosta v Gossage*, 486 Mich. 116, 782 N.W.2d 734 (Mich. 2010). The Courts have consistently denied a defendant's motion to dismiss for lack of subject matter jurisdiction when the pre-suit notice, although in error or defective, is timely received by the defendant, the defendant was not prejudiced, and no substantial right of any party was affected. *Id. DeCosta* at p. 9. [Plaintiffs' mailing notice to the wrong address contrary to statute found to be a minor technical defect in the proceedings because defendant actually received the notice of intent (NOI)]. The period of limitations is tolled despite defects contained therein. *Id. DeCosta* at p. 11.

¹⁷ Ex. N, Plaintiffs Answer to Defendant's Motion for Summary Judgment, pg 7. Defendant's refusal to turn over Defendant's video tape and pictures of the accident scene continued after Plaintiff filed suit in December, 2013. Not until July of 2014, the Tribal Court granted Plaintiff an Order Compelling Discovery, did the Tribe finally answer its interrogatories, request for production and provide Plaintiff with evidence of the Tribe's wrongdoing. The Court of Appeals' findings are without support. The parties were discussing the possibility of mediation and a date for trial when Defendant filed its Motion to Dismiss for Lack of Subject Matter Jurisdiction.

“Because the NOI was promptly forwarded and defendants actually received it, no substantial right of defendants was affected.” *Id.* at 740.

At the time Defendant filed its Motion for Summary Disposition before the Tribal Court in May of 2015, the parties had taken seventeen (17) depositions, collected from Defendant and took numerous photos of the scene, received Defendant’s video of the scene, both at the time of the accident and immediately thereafter, collected photos of the Plaintiff’s injuries, accumulated voluminous amounts of Plaintiff’s medical records, and hired and received opinions from safety experts and economists.

Plaintiff has met the five *Glarnner* factors successfully, and her equitable burden, thereby requiring Plaintiff receive access to the Court and a trial on the merits.

E. Tribe is Guilty of Gross Negligence

Employees that worked at the Convenience Store knew of the condition of the double threshold and found it easier to sweep the floor out of the other door where there was no double threshold. (Ex. O, Deposition of Stephanie Miles, p. 8). The threshold had a history of debris stuck underneath including salt, dirt off people’s shoes and pebbles. *Id.* p. 17-23.

Defendant’s full time safety officer participated, along with the MidJim store manager, in covering up the existence of the threshold and its condition. *Id.* p. 10-17. Without ever conducting an inspection, the safety inspector would have the cashier sign a safety report (filled out prior to his entrance

into the convenience store), with a pre-checked section that the cashier was required by her boss to sign. *Id.* p. 12-17.

F. Right of Access to the Tribal Court to Petition for Redress is Protected by Article VIII, Bill of Rights of the Sault Ste. Marie Tribe of Chippewa Indians Constitution and the United States Constitution

Defendant argues that its claims processing rules and time bar rules, Ch. 85, are not subject to judicial review and interpretation because the rules are clear and to be strictly construed. The Tribal Code does not exist in a vacuum. The Tribal Code, Ch. 81.105, states that in all civil cases the Tribal Court shall apply the laws of the Tribe, any laws of the United States that may apply, and in the absence of applicable Tribal law, the law of the State of Michigan. Certainly, the highest written law of the Tribe is its Constitution, which includes, under Article VIII, the Tribe's Bill of Rights. With the intent that the members of the Tribe not be denied any of the rights and guarantees enjoyed by citizens under the Constitution of the United States, the Bill of Rights enumerates those rights and guarantees, "including but not limited to . . . the right to petition for action or the redress for grievances, and due process of law." (Ex. P, Constitution and ByLaws of the Sault Ste. Marie Tribe of Chippewa Indians). While the basis for jurisdiction against the Tribe in the case at bar is the Tribe's waiver of sovereign immunity, this waiver of sovereign immunity grants the right of access to the Tribal court, which is one aspect of the right of petition. *Yvonne Hudson v Ho Indian Tribe d/b/a*

The Ho Tribal Business Committee, 2 NICS App. 160 (May 1992) citing *California Motor Transport v Trucking Unlimited*, 404 U.S. 508, 510 (1972).

The Tribe's insistence that the Tribal law is the only law that needs to be followed, using strict adherence principles, ignores the Tribe's obligation under its own Constitution, the United States Constitution, and the Indian Civil Rights Act, to accord the same protections to Linda Lesperance as are given to members of the Tribe and other non-members. In *Hudson*, even though the Tribal members sued the Tribe for a cause of action to which sovereign immunity had not been waived by the Tribe, the Tribal court found that the Tribal Constitution's First Amendment rights and the United States Constitution required access to the courts and the right to petition. The right to access under the First Amendment and the Indian Civil Rights Act, 25 USC § 1302(a)(8), served as a limitation upon any sovereign immunity that the Ho Tribe could possess. *Id.* See *Johnson v Lower Elwha Tribal Community*, 484 F.2d 200, 202 (1973); *Daly v United States*, 483 F.2d 700, 705 (1973) cited by *Hudson* Court.

Other courts have also recognized the rights of an individual to file a lawsuit as an expression of the constitutional guaranty of the right to petition. *Id.* Civil suit against the government is one form of a petition for redress. *Id.*

Article II of the Tribe's Constitution, Territory and Jurisdiction, anticipates that the Tribe's jurisdiction will be in question, and so its Tribal Board included:

"The jurisdiction of the Tribe shall extend to all of the lands of the Tribe to the extent not inconsistent with Federal law, . . ."

Federal common law, including *Wong*, *Glarner*, and *Irwin*, is not consistent with Defendant's argument that its claim processing rules and time bar rules are jurisdictional deprivations of the Tribe's court authority.

The Tribal Board of Directors is permitted to exercise the power to promulgate and enforce ordinances governing the conduct of persons within the jurisdiction of the Tribe, to establish a reservation court and define its duties and powers.¹⁸ Defendant's rationale that the federal cases cited by Plaintiff are not applicable because they do not address a fact situation including a Tribe is inconsistent with *Irwin* and *Wong*. Thus, we have before this Court, a case of first impression. The Tribal Constitution enumerates therein its adherence to the laws of the United States, and federal common law represents the judicial branch of the laws of the United States. Defendant argues that its Tribal law is applicable and needs no further interpretation, thereby excluding the application of federal law. Ch. 81 of the Tribal Code, Civil Jurisdiction Procedure, is persuasive in supporting Plaintiff's argument.

"Chapter 81.101 Purpose and Authority. This Chapter is enacted pursuant to Article VII, § 1(g) of the Sault Ste. Marie Tribe of

¹⁸Ex O, Article VII.

Chippewa Indians Constitution and ByLaws. The purpose of this chapter is to define the jurisdiction of the Sault Ste. Marie Chippewa Tribal Court.”

Summary disposition based on any alleged defects in the notice to the Tribe not raised by the Tribe before the filing of Plaintiff's complaint is surely contradictory to the Tribe's Court Mission Statement to provide equitable and expedient resolution of conflict.

The Tribe admits that the doctrine of tribal sovereign immunity is rooted in federal common law and reflects the Federal Constitution's treatment of Indian Tribes as governments in the Indian Commerce Clause.¹⁹

G. The Tribe's Pre-suit Time Requirements and Claim Processing Rules are Subject to Equitable Due Process

Equitable estoppel is defined as:

“A defensive doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way. This doctrine is founded on principles of fraud. The five essential elements for this type of estoppel are

1. that there was a false representation or concealment of material facts,
2. that the representation must have been known to be false by the party making it, or the party must have been negligent in not knowing its falsity,
3. that it was believed to be true by the person to whom it was made,
4. that the party making the representation must have intended that it be acted on, or the person acting on it must have been justified in assuming this intent, and

¹⁹ n.43 Tribal Court of Appeals Opinion citing Cohen's Handbook of Federal Indian Law, § 7.05[1a] (Lexis Nexis 2012).

5. that the party asserting estoppel acted on the representation in a way that will result in substantial prejudice unless the claim of estoppel succeeds.” Black’s Law Dictionary, 7th Ed. (1999).

Satisfying the five elements of equitable estoppel in the case at bar were:

1. Simi’s concealment of material facts, i.e., the Tribal Code’s requirement of filing Plaintiffs’ claim with the secretary;
2. The Tribe’s agent’s knowledge that she was not the proper party who, by accepting Plaintiffs’ claim, preserve the required time periods;
3. Plaintiff believed Defendant’s representation that filing her claim with Defendant’s designated representative was the truth, and not a concealment of the truth;
4. Plaintiffs were justified in assuming Defendant’s representation to Plaintiff that Simi would either accept or counteroffer Plaintiffs’ claim, and at the same time Defendant concealed Plaintiffs’ obligation to file her claim with the Tribal secretary;
5. Plaintiffs’ action on Defendant’s representation results in substantial prejudice unless her claim of estoppel is successful.

H. Government and Private Cases Historically Provide Guidance for the Goal of Finding Due Process and Fair Play

Love v Pullman Co., cited in *Zipes* as announcing the guiding principal for construing the provisions of Title VII; declined to read literally a filing provision of Title VII, and explained that “a technical reading would be particularly inappropriate in a statutory scheme in which layman, unassisted by trained lawyers, initiate the process.” *Id.* at 527. *Love* reversed the holding of the court of appeals which found that the charge of discrimination had not been “filed” with the EEOC by the petitioner in conformity with the pre-suit requirements of the act. Similar to the Tribal Code, Title VII required that the plaintiff submit a written and signed statement by

registered mail to the appropriate state or local authority, *Love*, fn 4 § 706(b), 42 U.S.C. § 2000e-5(b), *Love* rejected the same argument proposed by the Tribe.

“Nothing in this language implies that a state proceeding may not be commenced by an oral complaint; the statute guards against state proceedings that are difficult to commence, not against ones that are easily begun.”²⁰

Defendant’s reliance on *McCahan v Brennan’s*, 419 Mich. 730; 822 N.W.2d 747 (Mich. 2012) rejection of the actual prejudicial requirements fails to pass constitutional muster and seeks a draconian, ridiculous result.²¹ The Supreme Court was clear in its opinion “by holding compliance with the filing period to be not a jurisdictional prerequisite to filing a Title VII suit, but a requirement subject to waiver as well as tolling when equity so requires, we honor the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer.” *Zipes* at 398. *Love* specifically required a “prejudice” when the defendant invoked procedural defects. *Love* at 526. *Love* is still good law today and conflicts with *McCahan*.²²

²⁰ See also *Franks v Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, L.Ed.2d 444 (1976) (failure to file pre-suit administrative charges defect argument rejected); *Electrical Workers v Robbins & Myers, Inc.*, 429 U.S. 229, 240, 97 S.Ct. 441, 50 L.Ed.2d 427 (1976) (pre-suit notice not jurisdictional).

²¹ *Patry v Capps*, 633 So.2d 9, 13 (Fla. 1994) cited by *Ericson v Pollack*, at 587.

²² *McCahan* did not specifically apply the decision retroactively, therefore it is not applicable to the case at bar. *Chevron Oil Company v Huson*, 8212 11, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296, 1972 A.M.C. 20 (1971). Unlike Plaintiff, who filed a claim with Defendant’s representative, Simi, the plaintiff in *McCahan* did not file a claim seeking a specific amount of money within the six (6) month requirement with

Assuming *arguendo*, this Court finds that Plaintiffs filed their claim through their attorney in an untimely manner, the doctrine of equitable tolling mandates Defendant's motion be denied. "[C]ertainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is *per se* an offense against the Fourteenth Amendment." *Zipes* fn 13.

Defendant is estopped from asserting their pre-suit notification argument, knowing its employees lead Plaintiffs into believing and relying on Defendant's concealment of the pre-suit notice service requirement on its "secretary," while representing Defendant's intent to settle Plaintiffs' claim.

anyone from the defending university, nor was the conduct of the government similar to the Tribe's.

V. CONCLUSION

The Tribal Code pre-suit requirements parallel those found in Anglo-Saxon society, where the rights are the same under either legal system. Thus, federal constitutional standards are employed to define the limits of due process protection. Those protections include the rebuttable presumption of equitable tolling. The Tribe's conduct in remaining silent after instructing Plaintiff to file her claim, refusing to give Plaintiff's counsel its Tribal Code in a timely manner, and covering up its building code threshold violations to the detriment of Linda Lesperance, all require this Court reverse and remand with instruction to grant Linda Lesperance a fair trial on the merits.

VI. REQUEST FOR ORAL ARGUMENT

Plaintiff, Linda L. Lesperance, respectfully requests oral argument
before the Court.

Respectfully Submitted:

Dated: December 20, 2016

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