

**UNITED STATES DISTRICT COURT**

**for the**

**Western District of Michigan**

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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

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

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**STATEMENT OF THE QUESTION PRESENTED**

**Whether or not this Court should vacate the Tribal Court of Appeals' decision and grant Linda Lesperance access to the Tribal Court and due process enumerated by the Tribal Constitution, Federal Law and Equity Jurisprudence.**

### **STANDARD OF REVIEW**

Under Federal Rules of Civil Procedure 12(b)(6), for a motion to dismiss to be granted, there must be no set of facts which would entitle the plaintiff to recover. *Glarner v United States of America, Department of Veterans Administration*, 30 F.3d 697 (6<sup>th</sup> Cir. 1994). Matters outside the pleadings are not to be considered, and all well pleaded facts must be taken as true. *Id.*

Questions of subject matter jurisdiction are reviewed *de novo*. *Douglas v Hugh A. Stallings, M.D., Inc.*, 870 F.2d 1242 (7<sup>th</sup> Cir. 1989).

### **COUNTER STATEMENT OF FACTS**

The Tribe claims that Lesperance's due process claim was inadequately raised and right of access to the court claim was not raised at all in the Tribal Courts. (Defendant's Response Brief in Opposition to Plaintiff's Motion for Judgment on the Pleadings, pg. v, 25).

Defendant claims that Plaintiff has abandoned her constitutional right of access to the court claim. In fact, in the first assertion of error on the part of the Tribal Court, Lesperance states:

“Whether the Tribal Court should have applied the equitable estoppel, waiver, or tolling doctrine principles required by *Irwin*, *Wong*, and *Glarner*, to Appellee's pre-suit notices prior to dismissing with prejudice Appellant's Complaint. (Ex. Q Appellant's Opening Brief, p. 2).

Appellant's Argument I before the Tribal Court of Appeals asserted that the Tribal Court failed to apply the federal principles of equitable tolling, waiver, and estoppel as mandated by the Supreme Court and Sixth Circuit in *Glarner*, *Irwin v Department of Veterans Affairs*, 498 U.S. 89 (1991), and *United States v Kwai Fun Wong*, 575 U.S. 1 (2015). (Ex Q, p. 7). Defendant's claim that the right of access claim was not raised at all before the Tribal Court or Tribal Court of Appeals is without foundation. Lesperance's brief clearly, in its Argument I, enumerated the findings of *Irwin*, *Glarner*, and *Wong*, wherein the federal common law governing “equitable due process” to private cases was expanded to sovereign immunity government cases. (Ex. Q, p. 7). Appellant argued that the Tribal Court erred

in its refusal to apply federal law, and grant Plaintiff access to the Court and due process. (Ex. Q, p. 8)

Plaintiff's due process and right to access claims do not assert that the Tribal Code's claims processing rules or time bars violate federal law or are unconstitutional.

Defendant wrongfully asserts that for the first time Plaintiff asserted before this Court that she was denied a right of access to the courts to petition for redress. (Defendant's Response Brief in Opposition to Plaintiff's Motion for Judgment on the Pleadings, p. 25). Plaintiff, in the issues before the Tribal Court, asserts the question of whether or not the Plaintiff is entitled to access to the Tribal Court. (Ex. R, Plaintiffs' Answer to Defendant's Motion for Summary Judgment, Argument III, p. 11-16). Defendant erroneously alleges that Plaintiff failed to plead a denial of access theory in her Petition filed in this Court.

**"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 and access to the court system."** (emphasis added). (Plaintiff's Petition to Vacate Tribal Appellate Court Decision, p. 2).

Defendant's argument that Plaintiff did not mention Article VIII of the Tribal Constitution or include allegations regarding a denial of access to the court is, again, unsupported by the record. Appellant's Opening Brief before the Tribal Court of Appeals:

“With the enactment of the Sault Tribal Code, the Tribal Court is mandated first to apply in civil cases, the laws of the Tribe and ‘any laws of the United States that may apply;’ then in the absence of federal or Tribal law, the law of the State of Michigan.” (Ex. Q, p. 8-10).

The Tribal Constitution and its Bill of Rights are certainly part of the “laws of the Tribe.” Plaintiff did raise in the Tribal Court and Tribal Court of Appeals her denial of access theory, thus the exhaustion doctrine does not apply.

The Tribe asserted before the Tribal Court of Appeals that Lesperance’s due process claim was “not properly preserved by being supported in the briefs or oral argument with persuasive legal analysis. The cases relied on related to equitable tolling and not due process.” (Defendant’s Response Brief in Opposition to Plaintiff’s Motion for Judgment on the Pleadings, p. 26). Tribal Code § 82.125 provides in part:

“In deciding an appeal, the Court of Appeals shall consider issues in accordance with the following requirements:

- (1) Unless a miscarriage would result, the Court of Appeals will not consider issues that were not raised before the Tribal Court.
  - (2) An issue raised before the Tribal Court, but not argued either by brief or orally, shall not be reviewed by the Court of Appeals.”
- (Ex. I, Court of Appeals decision, p. 16, PageID.619)

The Court of Appeals then proceeds to justify the rejection of Appellant’s due process argument with its previous finding that *Irwin*, *Glarner*, *Perez*<sup>1</sup> and *Kwai Fun Wong* were not applicable to Tribes and did not discuss equitable due process. However, *Irwin* intended on its ruling addressing “the general question of whether principles of equitable tolling,

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<sup>1</sup> *Perez v United States of America*, 167 F.3d 913 (5<sup>th</sup> Cir. 1999).

waiver, and estoppel apply against the government when it involves a statutory filing deadline.” *Id.*, p. 94. Plaintiff, in her Sur-Reply Brief to the Tribal Court, argued that pre-suit notices were consistently treated differently than failure to file a lawsuit in timely manner. (Ex. S, p. 7-13).

Just as the Tribe has enacted its remedial statute, Chapter 85, Justice Stevens argued, in his dissent, citing *Zipes v Transworld Airlines, Inc.*, 455 U.S. 385, 397-398, 102 S.Ct. 1127, 1134-1135, 71 L.Ed.2d 234 (1982) (also cited by Plaintiff in the Tribal Court), for the proposition that a remedial statute should be construed in favor of those whom the legislation was designed to protect. See *Burnett v New York Central R. Co.*, 380 U.S. 424, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965) (plaintiff timely filed complaint in wrong court); *Herb v Pitcairn*, 325 U.S. 77, 65 S.Ct. 954, 89 L.Ed. 1483 (1945) (same); *American Pipe & Construction Co. v Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed. 2d 713 (1974) (plaintiff's timely filing of a defective class action tolled the limitations period as to the individual claims of purported class members). See also *Glus v Brooklyn Eastern Dist. Terminal*, 359 U.S. 231, 760, 3 L.Ed.2d 770 (1959) (adversary's misrepresentation cause plaintiff to let filing period lapse); *Holmberg v Armbrecht*, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743 (1946) (same).

The Supreme Court in *Zipes* found that the time requirement for filing an unfair labor practice charge under the National Labor Relations Act, 29 U.S.C. §151-169 (NLRA) operates as a statute of limitations subject to

recognized *equitable doctrines* and not as a restriction to jurisdiction of the National Labor Relations Board (NLRB). (emphasis added). *Zipes*, p. 403.

The *Wong* court recognized equitable considerations were to be considered to support extending a prescribed time period. *Wong*, p. 5. *Wong* ruled time limits are just time limits, nothing more. *Id.* at 9. Even though time limits govern litigation against the government, a court can toll them on equitable grounds. *Id.* Claims processing rules are not jurisdictional. *Id.*

The Tribe submits that the modification of procedural rules are provided by the legislative process. (Defendant's Response Brief in Opposition to Plaintiff's Motion for Judgment on the Pleadings, p. 27). The Tribe's reliance upon *Douglas*, a medical malpractice case, is surely a reversal of Defendant's position that non-tribal cases hold little or no persuasive authority. Plaintiff does not seek a modification of the Tribe's procedural rules.

### **CONCLUSION**

The Tribe's Mission Statement guides litigants in applying equity to all cases before the Court. In the absence of equity jurisprudence, the Tribal Code requires the application of the laws of the United States. Linda Lesperance's case is a classic example of equitable estoppel. Lesperance's fulfillment of the five (5) *Glarnner* factors overcomes the Tribe's rebuttal of equitable due process.

Equity jurisprudence mandates the vacating of the Tribal Court of Appeals' ruling. Otherwise, Plaintiff's constitutionally protected "life, liberty, or property" will be denied without due process of law.

Plaintiff respectfully requests this Court deny Defendant's Motion to Dismiss and Motion for Judgment on the Pleadings, and grant Plaintiff her Motion for Judgment on the Pleadings.

Respectfully Submitted:

Dated: Feb 1, 2017

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