STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
APPEAL NO: 2022AP937

LEGEND LAKE PROPERTY OWNERS ASSOCIATION, INC.,

Plaintiff-Appellant,

v.

GUY KESHENA and
THE MENOMINEE INDIAN TRIBE OF WISCONSIN,

Defendants-Respondents.

Appeal from the Circuit Court for Menominee County,
Case No. 2018-CV-0007
The Honorable Katherine Sloma, Presiding

REPLY BRIEF OF PLAINTIFF-APPELLANT LEGEND LAKE PROPERTY OWNERS ASSOCIATION, INC.

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INTRODUCTION

Mr. Keshena and the Tribe acknowledge the circuit court's decision was erroneous in that it dismissed the case on jurisdictional grounds but did so with prejudice. Furthermore, the circuit court also erred as Mr. Keshena and the Tribe do not enjoy sovereign immunity from the Association's declaratory judgment claim, and the Menomoniee Restoration Act (the "Act") does not preempt the Restrictive Covenants recorded on the Properties. Therefore, the circuit court's contrary decision must be vacated.

ARGUMENT

I. THE CIRCUIT COURT'S DISMISSAL ON BOTH JURISDICTIONAL AND PREEMPTION GROUNDS IS ERRONEOUS.

A. Summary of Argument.

The circuit court's decision to dismiss the case on its merits, with prejudice, on preemption grounds when it determined it lacked jurisdiction over the Tribe and Mr. Keshena was erroneous.

B. The Circuit Court Erred When Determining It Lacked Jurisdiction and Entering Judgment on the Merits on Preemption.

The Tribe agrees the circuit court's dismissal for lack of jurisdiction should have been without prejudice. (Resp'ts Br. at 11-12.) Consequently, if this Court determines the circuit court lacked jurisdiction (it did not), the

parties agree it was an error for the circuit court to also dismiss the case "on its merits" with prejudice, and enter judgment accordingly. (R.163:3-4, App.349-350.) Once the circuit court concluded sovereign immunity applied and it lacked jurisdiction, it should have gone no further. *See Meyers v. Oneida Tribe of Indians of Wis.*, 836 F.3d 818, 822 (7th Cir. 2016) ("[N]o matter whether we give sovereign immunity the label 'jurisdictional' or not, it is nevertheless a 'threshold ground[] for denying audience to a case on the merits.'")

Irreconcilably, the Tribe nonetheless argues this Court should now decide the case on the merits on the grounds of judicial economy. The Tribe argues because it is unknown "what the future holds" this Court should decide the preemption question even if the circuit court lacked jurisdiction. But, that would be an error for two reasons.

First, as a practical matter, a court cannot dismiss a case on jurisdictional grounds and also decide the case on its merits where it lacked jurisdiction to decide the case. *See e.g., Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing

the fact and dismissing the cause."). The same holds true for an appellate court. *See Meyers*, 836 F.3d at 822-23.

Second, appellate courts do not issue such advisory opinions. *See, e.g.*, *Smith v. Town of Pershing*, 10 Wis. 2d 352, 357, 102 N.W.2d 765 (1960); *State v. Witkowski*, 163 Wis. 2d 985, 988, 473 N.W.2d 512 (Ct. App. 1991). Instead, "an appellate court should decide cases on the narrowest possible grounds." *See, e.g.*, *Maryland Arms Ltd. P'ship v. Connell*, 2010 WI 64, ¶ 48, 326 Wis. 2d 300, 786 N.W.2d 15.

If this Court agrees the circuit court lacked jurisdiction, then the circuit court's decision and judgment on the merits on preemption grounds must be vacated. *See Matter of Commitment of S.L.L.*, 2019 WI 66, ¶ 13, 387 Wis. 2d 333, 929 N.W.2d 140 ("Personal jurisdiction" embodies the court's power over a party, without which it can enter no valid judgment.").

II. THE TRIBE AND MR. KESHENA DO NOT ENJOY SOVEREIGN IMMUNITY.

A. Summary of Argument.

Mr. Keshena and the Tribe do not enjoy sovereign immunity because (1) the proceeding is *in rem* and suit is allowed under the Act; (2) alternatively, the immovable property exception applies; and (3) to the extent immunity does apply, it has been waived.

B. Tribal Immunity Does Not Apply to *In Rem* Proceedings Which are Authorized under the Act.

The Tribe argues the Association cannot circumvent immunity by characterizing the suit as *in rem* when, according to the Tribe, it is a suit to take the Tribe's property. That position misconstrues the nature of the case. This case is an *in rem* proceeding that asserts jurisdiction over the property, rather than the individual. (Opening Br. at 32 ("The Association does not seek to take ownership or possession to the Properties. Rather, the relief sought is a declaration that the Restrictive Covenants . . . are valid and enforceable.") The Tribe relies upon *Wisconsin Department of Natural Resources v. Timber & Wood Products*, 2018 WI App 6, 379 Wis. 2d 690, 906 N.W.2d 707, but fails to respond to the Association's arguments that both the facts and holding are distinguishable from the present case. (*Id.* at 31-32.) Moreover, *Timber & Wood Products* did not decide whether tribal immunity applies to an *in rem* proceeding that does not involve the taking of property.

Furthermore, the Tribe misunderstands the Association's reliance on other state courts that have held immunity does not apply to *in rem* proceedings. First, the Tribe inaccurately suggests that the Association relies upon *Lundgren v. Upper Skagit Indian Tribe*, 187 Wash. 2d 857, 389 P.3d

569 (2017). Nowhere in its Opening Brief does the Association rely upon that decision. In fact, the Association acknowledges the decision was vacated and remanded – leaving open the question of *in rem* jurisdiction. (Opening Br. at 33-34.)

Next, the Tribe tries to characterize those other state courts' decisions as having relied solely upon *County of Yakima v. Confederate Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992). But, that's not true. Those courts also relied upon other authorities to hold tribal immunity does not apply to *in rem* proceedings, regardless of *Yakima*. (Opening Br. at 34-35.)

Finally, the Tribe argues the Act does not authorize suits against the Tribe. While true the Act does not use the phrase "waives immunity," Congress has specifically authorized suit under the Act. Meaning, no waiver is necessary. *See C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 414 (2001) (reaffirming a tribe is subject to suit if "Congress has authorized the suit *or* the tribe has waived its immunity.")

The Act states: "Such property shall be subject to all valid existing rights . . . and any other obligations." (App.354.) And, further states: "The land transferred . . . shall be subject to foreclosure or sale pursuant to the terms of any valid existing obligation in accordance with the laws of the State

of Wisconsin." (*Id.*) Both these clauses beg the question the Tribe neglects to answer – *if, under the Act, the land acquired is subject to valid existing rights and obligations, and in accordance with the laws of the State of Wisconsin can be foreclosed upon and sold, how are those existing rights and obligations determined to be valid and enforced?* The only logical answer is through declaratory judgment – the precise claim the Association brings in this case.

C. The Immovable Property Exception Applies to Bar the Tribe's Defense.

Should this Court determine (1) the Association's suit is not *in rem*, or (2) Congress has not authorized suit under the Act, then for reasons stated in the Association's Opening Brief this Court should hold the immovable property exception bars the Tribe's immunity defense.[1] Similar to the question of whether sovereign immunity applies to *in rem* proceedings, whether the immovable property exception bars immunity is also

[1] The Tribe equates the immovable property exception to *in rem* proceedings. While certainly related, the case law confirms these legal doctrines are separate from one another when considering sovereign immunity.

unanswered. *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1654 (2018).

The circuit court erred by failing to consider whether this common-law exception applies to the Tribe's common-law immunity.[2] *Lundgren*, 138 S. Ct. at 1662 ("Tribal immunity is 'a judicial doctrine' that is not mandated by the Constitution.") Similarly, the Tribe also fails in its response to provide any discussion of the exception as the Association outlined. For the reasons stated in the Association's Opening Brief, this Court should take heed of the United States Supreme Court, and either remand for the circuit court to consider in the first instance or follow the guidance of Justice Clarence Thomas and conclude the immovable property exception "plainly extends to tribal immunity, as it does to every other form of sovereign immunity." *Lundgren*, 138 S. Ct. at 1657. (Opening Br. at 35-41.)

D. Even if Tribal Immunity Applied, it was Waived.

When Mr. Keshena acquired the Properties on behalf of the Tribe, the Tribe agreed to waive immunity under the Restrictive Covenants.[3] (R.1:17,

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[2] The Tribe cites 28 U.S.C. § 1605(a)(4) as if the Association relies upon it. The Association does not, as that statute only applies to foreign sovereigns, not tribes.

[3] The Tribe also agreed to exclusive forum provisions. (R.1:17, App.017.)

App.017.) The Tribe attempts to invalidate this waiver by characterizing the Restrictive Covenants as an adhesion contract.[4] However, the Tribe cites no authority that such agreements are construed in that manner. And, even if construed that way, adhesion contracts are generally found to be valid. *See Wis. Auto Title Loans, Inc. v. Jones*, 2006 WI 53, ¶ 53, 290 Wis. 2d 514, 714 N.W.2d 155. Moreover, the Tribe has already conceded its choice to acquire the Properties with the Restrictive Covenants was done intentionally, voluntarily, and with knowledge of the clear waiver of immunity. (R.20:56 at 20-22, App.257.)

The Tribe also argues the waiver was not authorized by the Tribe's Constitution. But, that argument is self-serving and illusory. Article III of the Tribe's Constitution authorizes the Tribal Legislature to "be vested with all executive and legislative powers of the Tribe"; meaning, the Tribal Legislature grants itself powers under the Tribe's Constitution. Here, the Tribe's Legislature authorized Mr. Keshena to acquire the Properties on its behalf, pursuant to the authority granted by the constitution. (*See* App.062;

[4] The Tribe attempts to distinguish the United States Supreme Court's decision in *C&L Enterprises*. But, as discussed (Opening Br. at 43-44), the waiver language in the Restrictive Covenants is even stronger than the facts presented and held by the United States Supreme Court to be a waiver in *C&L Enterprises*.

App.064.) Regardless of whether the Tribe's Constitution specifically allowed for Mr. Keshena to waive immunity, the Tribe authorized him to acquire Properties on its behalf subject to the conditions on those Properties, which included the waiver of the Tribe's immunity – an act the Tribe itself may agree to do.

Finally, to the extent Mr. Keshena was unable to waive the Tribe's immunity (even despite the Tribe conceding he is its agent), he himself is subject to suit because the Association's claim involves the determination of rights of property owned by him. (Opening Br. at 46-48.) Irrespective of the Act's procedure for acquiring land, Mr. Keshena acquired title to the Properties. A determination of the validity of existing rights and obligations under that title has been brought.

III. THE ACT DOES NOT PREEMPT THE RESTRICTIVE COVENANTS.

A. Summary of the Argument.

The Act expressly allows the Restrictive Covenants, and to the extent certain provisions of the Restrictive Covenants may conflict with the Act's express language, such provisions are severable. The circuit court erred concluding the Restrictive Covenants are preempted.

B. The Restrictive Covenants are Valid Existing Rights that Contain Enforceable Obligations.

Concerning preemption, the Tribe focuses its attention solely on the Properties being taken into trust and exemption from taxation. Tellingly, however, the Tribe omits any discussion (or admission) that both the Act and the Restrictive Covenants contain other express language regarding "existing rights" and "other obligations." The Tribe does so for a reason – because the Act's language weakens its position as the Act specifically allows rights and obligations to run with the land, even if the land is later transferred into trust. (App.354.) As discussed, the terms "valid existing rights" and "any other obligations" are certainly broad enough to, and do, encompass the Restrictive Covenants.[5] (*See* Opening Br. at 49-52.)

Importantly, in every preemption case, it is the purpose of Congress that is the "ultimate touchstone." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). Congress "expresses its intentions through statutory text," such that "the text of a law controls over purported legislative intentions unmoored from any

[5] For example, Article 1.B.(5) of the Restrictive Covenants contain an obligation to pay all dues and assessments that may be levied by the Association under duly adopted bylaws and resolutions. (App.014.)

statutory text." *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2496 (2022). In short, the text controls over all else, and courts are to presume that "the legislature says what it means and means what it says." *Id.* Here, Congress has done just that.[6] There is no doubt Congress has expressly stated in the Act that land, such as the Properties, "shall be subject to all valid existing rights including, but not limited to, liens, outstanding taxes, (local, State, and Federal), mortgages, and any other obligations" and "shall be subject to foreclosure or sale pursuant to the terms of any valid existing obligation in accordance with the laws of the State of Wisconsin." (App.354.) Plainly, the text demonstrates the Restrictive Covenants remain effective, and that is all this Court must examine. *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) ("Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous.").

To the extent the Court may have doubts, legislative history confirms this intent. Indeed, an early draft demonstrates that Congress initially contemplated allowing the land to transfer free from all encumbrances. *See*

[6] Relying on *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), the Tribe continues to argue that *McGirt* reaffirmed the policy "of leaving Indians free from State jurisdiction and control" and that courts may not second guess Congress. However, *McGirt* was a disestablishment/diminishment case that made no holding on immunity or preemption, and, recently, was clarified in *Castro-Huerta*.

118 Cong. Rec. H 3390-93 (April 20, 1972). Then contained in Section 9, the Act provided:

> The Secretary is hereby authorized, in his discretion, to acquire for inclusion in the Menominee Reservation through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without the Menominee Indian Reservation . . . The Secretary is further authorized to receive . . . voluntarily executed deeds to such land as the Tribe or person may own *in fee simple free from all encumbrances*.

Id. at 205 (emphasis added). Congress, however, flatly rejected this draft, instead enacting the language that expressly preserves any valid existing rights and obligations. Clearly, then, it was Congress' intent that obligations, such as restrictive covenants, shall continue to run with the land and remain enforceable.

To the extent the Tribe argues that taxation and fee status is preempted by federal law under the Act's language, the Restrictive Covenants contain a valid severability clause. (*See* Art. 3 (App.016) ("If any provision or clause . . . is held to be invalid or inoperative by a court of competent jurisdiction, then such clause or provision shall be severed herefrom without affecting any other provision or clause of these Restrictive Covenants, the balance of which shall remain in full force and effect . . . ."). Therefore, should the Court agree that federal law preempts certain provisions, the Court should nonetheless hold that the remainder are not preempted, and therefore, are

valid and enforceable pursuant to the severability clause.[7] *E.g.*, *Dawson v. Goldammer*, 2006 WI App 158, ¶¶ 8-20, 295 Wis. 2d 728, 722 N.W.2d 106.

Finally, to the extent the Tribe argues *Baylake Bank v. TCGC, LLC*, No. 08-C-608, 2008 WL 4525009 (E.D. Wis. Oct. 1, 2008), is not controlling or persuasive, it misunderstands the Association's main point. Namely, that courts typically construe preemption principles to leave private agreements, such as the Restrictive Covenants, unaffected. *Id.* at *7-8; App.360-361. There is also a presumption against preemption in areas of law traditionally reserved to the States, such as property law and jurisdiction. (*See* Opening Br. at n.15.) Clarifying jurisdiction under *McGirt*, the United States Supreme Court in *Castro-Huerta* confirmed:

> [T]he Constitution allows a State to exercise jurisdiction in Indian country. Indian country is part of the State, not separate from the State. To be sure, under this Court's precedents, federal law may preempt that state jurisdiction in certain circumstances. But otherwise, as a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country.

142 S. Ct. at 2493.

Similarly, here, the Act says "nothing whatsoever . . . about how private entities go about creating property rights, even when those rights may

[7] Because the circuit court dismissed the case on jurisdictional and preemption grounds, it could not and did not consider the severability issue.

have collateral effects on other parties who would otherwise be able to invoke the federal system." *Cf. Baylake Bank*, 2008 WL 4525009, at *8, App.360-61. *See also ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454–55 (7th Cir. 1996) ("[C]ourts usually read preemption clauses to leave private contracts unaffected.") And, certainly, the Act expressly permits rights and obligations to run with the land and reserves *in rem* suits in accordance with the laws of the State of Wisconsin. This Court should adhere to well-established guidance, and hold the Act does not preempt the Restrictive Covenants.

CONCLUSION

The circuit court erred when entering judgment on the merits based on sovereign immunity and preemption grounds. Sovereign immunity does not apply to Mr. Keshena or the Tribe, and if it does, it was waived.[8] Additionally, the Restrictive Covenants are not preempted by the Menominee Restoration Act.

The circuit court's judgment should be vacated, its decision reversed, and the case remanded for further proceedings.

[8] Alternatively, if the Court concludes there is sovereign immunity, the Court should still remand with directions to vacate the decision and judgment on preemption. Under well-established rules of procedure, the circuit court should not decide a case on the merits while at the same time finding it lacked jurisdiction. Such a case should be dismissed without prejudice.

Respectfully submitted this 20th day of December, 2022.

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CERTIFICATION

I hereby certify that this Reply Brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 2,992 words.

Dated this 20th day of December, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2022, I personally caused copies of the Reply Brief of Plaintiff-Appellant, Legend Lake Property Owners Association, Inc., to be served on counsel via the court's e-filing system.

Dated this 20th day of December, 2022.

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