No. 23-2316

In the United States Court of Appeals for the Fourth Circuit

WILLIAM PETERSON, III,

Plaintiff – Appellant,

v.

HARRAH'S NC CASINO COMPANY, LLC
CAESARS ENTERTAINMENT, INC.,

Defendants – Appellees.

On appeal from the United States District Court
for the Western District of North Carolina
No. 1:23-cv-00036, Hon. Max O. Cogburn, Jr.

APPELLANT'S REPLY BRIEF

Daniel Gray Leland (MN #389027)
LELAND CONNERS PLC
60 South Sixth Street, Suite 2800
Minneapolis, MN 55402
(612) 255-2255
dan@lelandconners.com

Jake Snider (NC #46416)
WIMER SNIDER PC
349 Haywood Road
Asheville, NC 28806
(828) 350-9799
jsnider@ashevillelegal.com

Attorneys for Plaintiff - Appellant
WILLIAM PETERSON, III

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SUMMARY OF THE ARGUMENT

Harrah's requests that the Fourth Circuit make a radical departure from settled case law about joinder and for the Fourth Circuit to ignore plain statutory language. Harrah's argument for such an extreme request is to rely on a few unpublished district court decisions and *res ipse dixit*. Boiled down, Harrah's argument is:

- The Circuit should ignore the statutory definitions of "employer" under the FMLA and USERRA;
- The Circuit should flip United States Supreme Court precedent—precedent applied in every other equivalent context—on its head in this case.

While never explicitly stated, Harrah's requests that the Fourth Circuit adopt a new rule of legal analysis. Harrah's position is that when a company can point to a tribal entity as a possible joint tortfeasor, all traditional rules of joint and several liability no longer apply. Harrah's argument is not based on Rule 19. Harrah's makes no public-policy argument as to why the Fourth Circuit should cast aside long-established precedent.

It is Harrah's that is looking for an exception to established law. Peterson requests that this Court and the district courts below apply simple, well-established principles and definitions. The District Court seemingly took the position that this situation is unique as it involves a Tribal entity that is not named in the Complaint. But the general principles and rules still apply. The adage is true: there is no

reason to reinvent the wheel; or, in this case, to create new case law and precedent. The application of Rule 19 in this case is not complicated. It is expressly commented on in the advisory committee notes to Rule 19 that were written nearly 60 years ago: "a tortfeasor with the usual 'joint and several' liability is merely a permissive party to an action against another with like liability." The United States Supreme Court confirmed the same in 1990, writing: "[I]t is not necessary for all joint tortfeasors to be name as defendants in a single lawsuit." *Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990).

There is no reason for the Fourth Circuit to depart from this simple application of black letter law. Affirmation of the district court's decision would run contrary to precedent and would apply a joint and several liability standard inconsistent with its sister circuits. The decision of the district court should be reversed.

ARGUMENT

I. Harrah's Was Peterson's Employer

Harrah's conclusorily argues "Appellant was an employee of the Tribe, and was not an employee of [Harrah's]." (Doc. 16 at 15.) Under the FMLA and USERRA an employee can have more than one "employer" under the statutory definitions. This is not a novel concept and one routinely recognized by the courts.

The law is well settled in this matter. *See Quintana v. City of Alexandria*, No. 16-1630 (4th Cir. 2017); (Doc. 14 at pp. 20–21, 27–29.)

Respondent's argument is focused on the (limited) control TCGE exercised over the employment relationship, while ignoring the obvious and direct control Harrah's controlled over Peterson's employment. What Respondent does not address is how it is possible for Harrah's to not be considered Peterson's employer when:

- The FMLA plainly defines an "employer" as including "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer . . . ." 29 U.S.C. § 2611(4)(A)(iii).

- USERRA plainly defines an employer as "any person, institution, organization, or other entity that . . . has control over employment opportunities including—a person, institution, organization or other entity to whom the employer has delegated the performance of employment-related responsibilities . . . ." 38 U.S.C. § 4303(4).

  and

- Harrah's has the "exclusive responsibility and authority to direct the selection, hiring, training, control and discharge of all employees." (JA 51, JA 69–71, JA 120–JA185.)[1]

[1] Harrah's takes issue with Peterson citing a publicly available Management Agreement between Harrah's and the TCGE (*See* Resps' Br. N. 1.) Notably, Harrah's has never suggested that the information and its application is wrong. At this stage of the proceeding Peterson was never afforded the opportunity to engage in discovery and can only rely on publicly available documents.

Harrah's refusal to address the statutory definitions of "employer" speaks to the infirmity of its position.

Harrah's ignores that in *Yashenko v. Harrah's NC Casino Co.* the Fourth Circuit acknowledged that the very same entity that is the Respondent here was an "employer" under the FMLA. *Yashenko*, 446 F.3d 541, 545–51 (4th Cir. 2006). Because Harrah's cannot in good faith argue that Harrah's does not meet the statutory definitions of "employer" under the statutes it is forced to simply conclude, without analysis, that Harrah's was not Peterson's "employer."

Harrah's takes issue with Peterson's interpretation of *Yashenko* stating that Peterson argues for a "conclusion that is nowhere in the opinion." (Doc. 16 at 11.) But Harrah's fails to provide any analysis of *Yashenko* at all—a case that specifically *did not* apply a Rule 19 analysis to an FMLA claim against the same employer. The "conclusion that is nowhere in the opinion" is Harrah's position: that Rule 19 compulsory joinder should apply to an FMLA claim. In *Yashenko* compulsory joinder *was not* applied by the Fourth Circuit. Harrah's argues that a Rule 19 analysis should be applied despite the *Yashenko* opinion specifically *not* engaging in that analysis.

There is no reason, and Harrah's offers none, that the Fourth Circuit should ignore the plain statutory definition of "employer" under the FMLA and USERRA.

II. Harrah's Argues for a Significant Departure from Precedent

As set forth in Peterson's opening brief, the United States Supreme Court has stated "[i]t has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit," and in *Temple v. Synthes Corp.* that "it [was] error to label joint tortfeasors as indispensable parties under Rule 19(b) and to dismiss [a] lawsuit with prejudice" as a result. *Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990); (*see* Doc. 14 at 27–29.)

Harrah's claims that Peterson's arguments about well-established principles of joint and several liability are somehow inapplicable and are "irrelevant." (Doc. 16 at 11–13, 19.) Harrah's states that Peterson's arguments relating to the applicability of joint and several liability "spill much ink" or are "tortured." (Doc. 16 at 18, 25.) But Harrah's never argues why long-established principles of joint and several liability should be uprooted. The best argument Harrah's musters is that the cases Peterson relies on are not expressly about joint and several liability in the context of FMLA or USERRA—despite being based on the same or equivalent statutory language. (Doc. 16 at 17.)

Joint and several liability does not require compulsory joinder. (*See* Doc. 14 at 14, 20–22.) That is black letter law and there is no compelling argument for the Fourth Circuit to depart from *well over* 60 years of established precedent. In 1966 the Advisory Committee to Rule 19 stated that the amendments to the rule was

consistent with the "*settled authorities* holding that a tortfeasor with the usual 'joint and several' liability is merely a permissive party to an action against another with like liability." Fed. R. Civ. P. 19 *advisory cmte. notes (emphasis added)*.

The District Court's decision found to the contrary. Harrah's argues to the contrary. Notably, Harrah's does not set forth any substantive legal argument about why the traditional principles of joint and several liability do not apply: Harrah's does not address Supreme Court precedent, the commentary to Rule 19, or the case law that routinely follows that black letter law. Harrah's can only argue that it is "irrelevant" or "tortured." That is not a basis for the Fourth Circuit to affirm the district court's decision and to make a radical departure from law established for well-over a half-century.

This Circuit did not change or alter this black letter law in *Yashenko*. The *Yashenko* decision was, and should be, limited to situations that fall under the first step of Rule 19: (1) whether or not the court can accord complete relief among the existing parties; or (2) relief would "leave" a party to double, multiple, or inconsistent obligations.

For reasons set forth at length in his opening brief, Peterson does not contest that compulsory joinder is, and should be required, in cases contesting tribal preference hiring policies, consistent with *Yashenko v. Harrah's NC Casino Co.*, 446 F.3d 541 (4th Cir. 2006) and *Dawavendewa v. Salt River Project Agricultural*

Improvement & Power District, 276 F.3d 1150 (9th Cir. 2002.) Those are cases that should require joinder because decisions in those cases could invalidate contract terms made by a tribe; cases about tribal preference hiring policies that go the core of tribal identity and sovereignty. That's not the situation here. Harrah's being required to comply with the FMLA or USERRA does not invalidate a contract term between the TCGE and Harrah's. The decision of the District Court must be reversed.

III. The Departure from Precedent Argued for by Harrah's Has Wide Ranging Ramifications

A decision in this case has effects far beyond Peterson and his unlawful termination. A decision in this case has wide ranging ramifications.

A decision agreeing with Harrah's argument that it was not an "employer" effectively nullifies the statutory definition of "employer" under the FMLA and USERRA. It would be a direct challenge to the statute and the implementing regulations. Peterson submits that there is no compelling reason, and neither Respondent or the district court argue there is a legally substantive reason, to not follow the plain language of "employer" according to the statutes.

A decision finding that all potential joint tortfeasors must be named in a lawsuit or the lawsuit will be dismissed has massive implications. It would invalidate basic principles that were understood and well-established at the time of

the 1966 amendments to Rule 19 and that were expressly addressed by the Supreme Court in *Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990).

This Court should consider the following hypothetical fact pattern:

- The FMLA's definition of "employer" is so broad as to include "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer . . . ." 29 U.S.C. § 2611(4)(A)(iii).
- A company is sued by a former employee for FMLA violations.
- The company argues that its former Human Resources Director is jointly and severally liable under the FMLA and must be named in the Complaint.
- The former Human Resources Director is unable to be located and served.
- The plaintiff's complaint is dismissed because the Human Resources Director was unable to be served.

Under all traditional principles the plaintiff's complaint should not be dismissed. But that is the natural extension of Respondent's argument and consistent with the district court's decision. Or consider the same hypothetical, but:

- The Human Resources Director is dead.

Under all traditional principles the plaintiff's complaint should not be dismissed. But that is the natural extension of Respondent's argument and consistent with the district court's decision.

If the Court considers these hypotheticals too apples to oranges than consider same hypothetical, but:

- The Human Resources Director is a foreign national operating in foreign country.

  or

- The Human Resources Director is a foreign diplomat, or a spouse of a foreign diplomat, with diplomatic immunity.

  and

- The company argues that the Human Resources Director is jointly and severally liable.

Under all traditional principles the plaintiff's complaint should not be dismissed. But that is the natural extension of Respondents' argument and consistent with the district court's decision. Under Respondents' argument, and consistent with the district court's decision, the former employee's complaint would be dismissed. There is no question that decision would be unjust and an inaccurate application of the law. It is no different here.

Harrah's position is that if a person or entity can point to a tribal entity as a possible joint tortfeasor a civil case must be dismissed. The district court bought this argument: the district court adopted a definition that there are "true" or "real" employers—a distinction made out of whole cloth by Harrah's and adopted without analysis in cases in the United States District Court for the Western District of North Carolina—which trumps the definition of employer set forth by

statutes and trumps long-established principles of joint and several liability. This case law cannot stand and must be reversed.

CONCLUSION

The district court's decision represents a radical departure from all traditional understandings of joint and several liability. The rule requested by Harrah's is that joint and several liability does not attach when a party can point to tribal entity and claim that the tribal entity is jointly and severally liable, therefore the entire claim must fail. There is no basis for this argument and there is no reason for the Fourth Circuit to create this new rule. The decision of the district court must be reversed.

Respectfully submitted,

Dated: June 11, 2024.

LELAND CONNERS PLC

/s/ Daniel Gray Leland
Daniel Gray Leland (MN Bar No. 389027)
60 South Sixth Street, Suite 2800
Minneapolis, MN 55402
Telephone: (612) 255-2255
Email: dan@lelandconners.com

WIMER SNIDER, P.C.

/s/ Jake Snider
Jake Snider (NC Bar No. 46416)
349 Haywood Road
Asheville, NC 28806
Telephone: (828) 350-9799
Email: jsnider@ashevillelegal.com

Attorneys for Plaintiff

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 23-2316 **Caption:** William Peterson, III v. Harrah's NC Casino Co., LLC

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Party Name William Peterson, III

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Dated: June 11, 2024 By: /s/ Jake A. Snider