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COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS DISTRICT III

Keith Ellington,

Plaintiff-Respondent,

v.

Michelle Haskins,

Defendant-Respondent,

The Lac Courte Oreilles Band of Lake Superior Chippewa Indians,

Appellant 2024AP002017

Circuit Court Case No. 2023CV000120

BRIEF OF THE LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, APPELLANT.

ON APPEAL FROM THE CIRCUIT COURT FOR SAWYER COUNTY, THE HONORABLE JUDGE STELLA, PRESIDING.

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STATEMENT OF THE ISSUES

The Plaintiff-Respondent, Keith Ellington, has filed a claim for unjust enrichment against the Defendant-Respondent, Michelle Haskins in Sawyer County Circuit Court. The Defendant-Respondent, Michelle Haskins, is an enrolled citizen of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians. The Lac Courte Oreilles Band of Lake Superior Chippewa Indians ("Tribe") holds a valid Residential Lease of Tribally Owned Trust Land between the Tribe, the "lessor" and Michelle Haskins, the "lessee." As the lessor of the leased premises, located on 13217 W. Gurno Lake Rd., Hayward, WI 54843, the Tribe has entered into a Bureau of Indian Affairs approved contract in which the lessee shall have and hold the leased premises for a term of fifty years. After fifty years, the leased premises and all improvements that remain on the leased premises are returned to the Tribe. The Tribe has adopted tribal laws to regulate certain activities within the boundaries of the Reservation and has adopted laws to assist in protecting the property of the Tribe. The Tribe asserts it has a right to intervene to protect its interest pursuant to Wis. Stat. §803.09(1).

STATEMENT OF ORAL ARGUMENT

Oral argument would be of minimal value in this case and does not justify additional costs by the parties or the court.

STANDARD OF REVIEW

Interpretation of statutes and application of legal principles are reviewed de novo, when there are no undisputed facts. *Nationstar Mortg. LLC v. Stafsholt,* 2018 WI 21, ¶ 23, 380 Wis. 2d 284, 296-97, 908 N.W.2d 784, 790; see also *Wisconsin DOR v. Hogan,* 198 Wis.2d 792, 802, 543 N.W.2d 825 (Ct. App. 1995). Questions of law are reviewed independently of the determinations rendered by the circuit court. *Yacht Club at Sister Bay Condo. Ass'n, Inc. V. Vill. Of Sister Bay,* 2019 WI 4, ¶ 18, 385 Wis. 2d 158, 922 N.W.2d 95, 99; see also *Metropolitan Assocs. v City of Milwaukee,* 2018 WI 4, ¶ 24, 379 Wis. 2d 141, 905 N.W.2d 784. Sawyer County Circuit Court's denial of the Tribe's Motion to Intervene should be reviewed de novo as there is no genuine material issue of fact being argued but rather a legal question as to whether the Tribe was improperly denied its right to intervene in this matter pursuant to Wis. Stat. §803.09(1). *M&I Marshall & Ilsley Bank v. Urquhart Cos,* 2005 WI App, 225, 287 Wis. 2d 623, 706 N.W. 335, 04-2743.

STATEMENT OF THE CASE

1. The Plaintiff-Respondent, Keith Ellington, is not an enrolled member of any Tribe. (App. P. 8).
2. The Defendant-Respondent, Michelle Haskins, is an enrolled member of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians. (App. P. 6).
3. The Plaintiff-Respondent and the Defendant-Respondent, entered into a consensual romantic/co-habiting relationship in or around 1998. The Parties never married. (App. P. 3).
4. The Defendant-Respondent, Michelle Haskins, has entered into a valid lease for the property located at 13217 W. Gurno Lake Rd., Hayward, WI 54843 with the Tribe on or around April 16, 2007. (App. P. 21).
5. The Defendant-Respondent's lease for the leased premises was voted on and approved by the Tribal Governing Board pursuant to Lac Courte Oreilles Tribal Code of Law (LCOTCL) PRP.10.3.190 in Tribal Governing Board Resolution No. 07-32. (App. P. 35).
6. The Defendant-Respondent's lease for the leased premises was approved by the Bureau of Indian Affairs Superintendent on June 27, 2007, pursuant to LCOTCL PRP.10.3.200. (App. P. 27).
7. The Parties lived together in the leased premises from approximately 2007 to 2022, at which time the Defendant remained in the lease property as the lease was in her name and such a lease is unable to transferred to a non-tribal member.
8. On October 12, 2023, the Plaintiff-Respondent filed an unjust enrichment claim against the Defendant-Respondent in Sawyer County Circuit Court, requesting a money judgement with judgment amount to be determined in 23-CV-120. (App. P. 1 & 3).
9. On January 29, 2024, the Defendant-Respondent, with the assistance of counsel, filed for a *Motion for Discretionary Transfer of a Civil Action to Tribal Court.* (App. P. 6).

10. On March 12, 2024, the Defendant-Respondent, with the assistance of counsel, filed a *Defendant's Brief in Support of Motion for Discretionary Transfer of Civil Action to Tribal Court*. (App. P. 7).
11. This Court denied the *Motion to Transfer* on March 19, 2024, and a written *Order* was signed on March 20, 2024. (App. P. 61).
12. The Tribal Governing Board approved Resolution 2024-53, directing the Tribe's legal department to intervene in this matter as the Tribal Governing Board believes the Tribe has a legal interest in the outcome of this matter.
13. Further, the Tribal Governing Board directed the Tribe's legal department to motion to this Court to intervene in this matter and request a discretionary transfer this case to the Tribal Court as the Tribe has adopted specific laws and regulations that govern Residential Leases of the Bureau of Indian Affairs.
14. On May 3, 2024, attorney Dena Welden on behalf of the Tribe filed a *Notice of Appearance* and *Notice of Motion & Motion to Intervene and Motion for Discretionary Transfer of Civil Action to Tribal Court*. (App. P. 62).
15. A motion hearing was held based on the filings by the Tribe on June 24, 2024. The Court declined to allow the *Tribe's Motion to Intervene and Motion for Discretionary Transfer of Civil Action to Tribal Court.* (App. P. 65 & P. 89-90).
16. The Court executed a signed *Order* denying the *Motion to Intervene and Motion to Transfer* on September 13, 2024. (App. P. 65).
17. The Tribe appeals the *Order* denying the *Motion to Intervene*. (App. P. 93).

ARGUMENT

The Lac Courte Oreilles Band of Lake Superior Chippewa Indians ("Tribe") has a right to intervene in this matter pursuant to Wis. Stat. §803.09(1). According to the statutes, a party requesting to intervene whether by right or by permissive intervention must meet the following criteria:

(1) The motion to intervene must be timely;

(2) The Party must claim an interest sufficiently related to the subject of the action;

(3) The Party must show that the disposition of the action may impair or impede the party's ability to protect that interest; and

(4) The existing parties must not adequately represent the movant's interest.

The Tribe contends that the above criteria have been met. Therefore, the Tribe's *Motion to Intervene* should be granted to adequately address the Tribe's property and its interests. The Tribe's involvement in this matter would contribute a more comprehensive resolution of the issues being litigated here. Permitting intervention would ensure that any order reached by the trial court would not be in contravention to tribal or federal law. Failure to recognize the laws and practices of the Tribe would hinder any judgment or resolution that may occur.

I. THE TRIBE'S MOTION TO INTERVENE WAS TIMELY SUBMITTED.

Timeliness, as considered by Wis. Stat. §803.09(1) is not defined by statute. Nor is there a clear-cut timeline in the caselaw that determines timely versus untimely. Instead, timeliness is based upon the facts and circumstances of each case. *Olivarez v. Unitrin Property & Casualty Insurance Co.* 2006 WI App 189, 296 Wis. 2d 337, 723 N.W.2d 131, 05-02471. The case law in certain circumstances even allows post-judgment motions for interventions depending on the circumstances. *Id.* Here, whether the motion is timely is dependent upon the facts and circumstances of the case.

The Plaintiff-Respondent, Keith Ellington filed this case in Sawyer County Circuit Court about a year ago. (App. P. 1& 3). The Defendant-Respondent, Michelle Haskins, filed a motion to transfer the case to the Lac Courte Oreilles Tribal Court in January of 2024. (App. P. 6). The motion was denied. (App. P. 61).

The Tribe's Residential Lease allows the Lessee to utilize the property and land for a maximum term of fifty years. As such, the term of the Defendant-Respondent's interest in this property is limited, unlike the Tribe who owns the land in perpetuity. The Tribe acted promptly to intervene when it learned that the laws and regulations that govern the Residential Lease and the property interests were not to be considered due to the denial of the transfer to the Lac Courte Oreilles Tribal Court. (App. P. 61 & 65). The Tribe's interest in this land is not being asserted or defended by either Party. The *Notice of Appearance* with the associated motion submitted only a few weeks later shows that the Tribe determined quickly and early in the litigation that intervention was necessary to protect its interests. (App. P. 62). To date, there have been minimal court filings in this matter outside of the motion practice between the Parties and Tribe. To the Tribe's knowledge, discovery has not been exchanged between the parties, there is no scheduling order, and there is no trial date set. The Tribe responded promptly to timely intervene in this matter.

II. THE TRIBE HAS AN INTEREST IN ANY DIVISION OF PROPERTY THAT MAY INVOLVE TRIBAL PROPERTY ON TRIBAL TRUST LAND AND AN ORDER TO THE CONTRARY MAY BE AGAINST TRIBAL AND FEDERAL LAW.

Although the Plaintiff in this matter is requesting a money judgment, as indicated in the Summons, the money judgment could take the form of a lien and or seizure against the property, stating "A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure

of property." (App. P. 1-2). A lien or seizure of any property of the Tribe's would inherently mean the Tribe has a property interest in the outcome of this case. Any attempt to put a lien or seize property on tribal trust land will require following both Tribal and federal processes. There exist significant barriers to alienation of tribal property and property on trust land both in the tribal and federal contexts.

A. An Order from the Sawyer County Circuit Court may be contrary to Tribal Law.

The Tribe, as a sovereign, possesses the inherent authority to make its own laws and to be governed by them. It has adopted tribal laws to govern activity on the Reservation and has established its own court system. The ed Constitution and Bylaws of the Lac Courte Oreilles Band of Lake Super, Article 5 §1(g) &(q). The Tribe, specifically, has adopted the Lac Courte Oreilles Tribal Code of Law (LCOTCL) TCT.2 as the Tribe's civil procedure ordinance. (App. P. 36). Further, the Tribe adopted Section PRP.10 Leasing Code in 2023, which was adopted into tribal law after the Tribe had received federal permission to regulate its own leases pursuant to the Helping Expedite and Advance Responsible Tribal Homeowners Act of 2012 ("HEARTH Act"), 15 U.S.C. §415. (App. P. 40). The enactment of this code was a meaningful step towards tribal self-governance and self-determination as the Act allows Tribes to govern the leases of lands held in trust by the United States Government and to ensure and protect the long-term interests of the Tribe's land. PRP.10.1.040 (a)-(e); see also 25 CFR 162. (App. P. 41). Disallowing the Tribe to intervene in this matter ignores the jurisdiction of the Tribe, the sovereign authority of the Tribe, and the federal government's active efforts to increase tribal self-governance and self-determination.

The Tribe does acknowledge full faith and comity pursuant to TCT.2.10.020; however, an Order from the Sawyer County Circuit Court regarding tribal property and tribal interests may not comply with tribal law.

The PRP.10 contemplates what happens with permanent structures and permanent improvements on the property upon the termination, expiration, or cancellation of the Residential Lease. (App. P. 40-60). If the permanent improvements were authorized by the Tribe, the Tribe disallow allow their removal, and the permanent structures would become property of the Tribe. PRP.10.3.120(e). (App. P. 55). If the improvements were not authorized by the Tribe, the Tribe may consider such unauthorized improvements as a violation of the Residential Lease and an enforcement action may be taken by the Tribe. PRP.10.5.010. The Tribe is not mandated to allow removal of the improvements to the property as the PRP.10.3.120(f) states "[i]f improvements shall be removed…" which further indicates permission from the Tribe to remove said property. As such, the Tribe's involvement in this case is necessary.

Even if the Tribe grants permission for property to be removed from the property, the Tribe still must grant permission for the Plaintiff to enter the property for its removal. The Sawyer County Circuit Court cannot mandate that the Tribe allow individuals onto trust land, even for a limited purpose. See *State v. Lemieux,* 110 Wis. 2d 128, 327 N.W.2d 669 (1983) (arguing that state jurisdiction may be limited due to treaty rights as established under the Supremacy Clause, U.S. Constitution art. VI, cl. 2), *Menominee Tribe v. United States*, 391 U.S. 404, 411-12n. 12 (1968) ("the exercise of rights on reservation lands guaranteed to the tribe by the Federal Government would not be subject to state regulation, at least in absence of a cession by Congress"). It has been stated in this filing and in the motions presented by the Parties that the Tribe has the authority to exclude anyone from the Reservation as well as the leased premises. (App. P. 8, 20, 63, 66-89). This fact is presented, not to blatantly disallow the Plaintiff-Respondent, a designee, an agent, or even an appraiser, to enter the property, but to demonstrate how tribal law and federal law could interfere with the execution of a judgment or resolution of this case, if those laws were not properly considered.

The Sawyer County Court indicated that the hiring of an appraiser may be necessary in this case, in appraise the residence, improvements, and property at 13217W Gurno Hayward, Wisconsin, 54843. (App. P. 66-89). In general, any request for an

appraiser to enter the Reservation for valuation of any property or land requires approval from the Lac Courte Oreilles Land Management Division. In this instance, this property is governed by PRP.10. Pursuant to PRP.10.3.140(a)(1) "the Fair Market Lease Value shall be determined by an appraisal or equivalent procedure performed by the Tribe." (App. P. 56-57). The Tribe in this matter, is to perform the appraisal and or to hire an appraiser of the Tribe's choosing. Not only does the Tribe have to allow the appraisal to occur and to mandate the Tribe to perform the appraisal, the Tribe further has to approve a methodology that is in the "Best Interests of the Tribe." PRP.10.3.140(b). The tribal code requires that the Tribe to conduct its valuation because the Tribe may be harmed if a third party improperly values tribal trust land.

The Plaintiff may counter with the holding of *Jacobs v. Jacobs* which held that a Court Order requiring a wife to pay husband a sum of money in a marriage property division Order that involved a tribal residential lease did not violate federal law and the application of state domestic relations laws did not infringe upon the right of the Tribe to establish and maintain tribal self-government. *Jacobs v. Jacobs*, 138 Wis.2d 19 (1987). *Jacobs* does not control here, as the facts differ substantially in the matter at hand. First, the parties in *Jacobs* entered into a valid land lease with the Stockbridge Munsee Band, the Parties were married, and both were enrolled tribal members. The Parties sought a divorce and a property division order in circuit court. At the time of the property division, the Stockbridge Munsee Band lacked a tribal code or tribal court at the time of the divorce proceedings. Therefore, the Parties sought a divorce and property division through state circuit court. In the matter at hand, the Parties are non-married individuals and this case is not a matter of marital property division. Most importantly, the Lac Courte Oreilles Band enacted tribal laws and established a tribal court subject to a tribal civil procedure code, LCOTCL TCT.2, and a leasing ordinance LCOTCL PRP.10. Since the Tribe has enacted land leasing and civil procedure codes, ignoring them will be an inappropriate regulation by the State of Wisconsin of activity on the Reservation. *County of Vilas v. Chapman*, 122 Wis. 2d 211, 214-15, 361 N.W.2d 699, 701(1985) (stating that because the Lac du Flambeau Band did not have a traffic code,

the State could regulate traffic laws within the boundaries of the Lac du Flambeau Reservation). The Defendant and the Tribe have provided and cited sections of the Tribe's law and thus have provided adequate evidence of tribal law. *Bailey v. Hagen*, 25 Wis.2d 386, 390-91, 130, N.W. 2d, 773, 775—76 (1964) (stating that the Party alleging existence of an alternative law or foreign law, has the burden of proof). Again, the Tribe asserts that its interests in this matter require the granting of the Tribe's *Motion to Intervene*.

B. An Order from this Court may violate Federal Laws.

At the initial motion hearing, the Defendant's *Motion for Transfer* was denied. However, the Court found concurrent jurisdiction pursuant to Wis. Stat. §801.54. (App. P. 61). This means that the Court acknowledged that the actions and individuals in this matter may be subject to tribal laws. Further, concurrent jurisdiction also represents the finding of the Tribe's legislative authority, adjudicatory authority, and enforcement authority with respect to tribally-owned trust land subject to federal leasing statutes. The Tribe's property is further protected from interference by the State of Wisconsin as it is protected pursuant to 18 U.S.C. §1162(b) (commonly known as PL 280) which states that "[n[othing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property… belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States." The Tribe fears that without its interests being heard, the Court could violate the Tribe's right to regulate its real and personal property. Simply put, the state laws regarding leases does not contemplate or consider the interests of lands held in trust by the United States and the limitations associated with entering into such leases. The Plaintiff-Respondent's requested relief of a lien or seizure against tribal property may also be a direct violation of federal law.

The Tribe has been unable to locate which federal regulations allows a private citizen to place a lien or seize property on tribal trust land. Using the Wisconsin Statutes to regulate and govern activity within the boundaries of the Lac Courte Oreilles

Reservation, activity that is already regulated by the Tribe and the federal government, further interferes with the Tribe's right to self-governance. *Rice v. Rehner*, 463 U.S. 713,718,103 S. Ct. 3291, 3295, 77 L.Ed.2d 961(1983) (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S. Ct. 1267, 1270, 36 Ld.2d 114 (1973). Disallowing the Tribe to intervene in this matter further interferes with the Tribe's authority that was granted by the federal government.

The Tribe has an interest in land that is held in trust by the United States for the Tribe. The inherent sovereign authority of the Tribe to manage and lease its interests in land held in trust is threatened and directly affected by a tribal member and a non-tribal member claiming any equity in interest on the land that ultimately belongs to the Tribe. It is the Tribe's belief that had the *Motion for Discretionary Transfer* been granted and the case transferred to the Lac Courte Oreilles Tribal Court, the Tribe would have been in the proper position to assert its interests and its inherent sovereign authority through the Tribal Court's application of tribal and federal laws to the facts in this matter.

III. THE TRIBE'S INTERESTS, AS A SOVEREIGN NATION, ARE NOT BEING REPRESENTED BY THE PLAINTIFF OR DEFENDANT IN THIS MATTER.

The Tribe's property interests are not being represented by either the Plaintiff-Respondent or the Defendant-Respondent in this litigation and the Tribe's involvement is imperative for the Tribe's perpetual interests in the land to be adequately considered by the Court.

Keith Ellington, is not an enrolled tribal member of the Lac Courte Oreilles Band. As a non-tribal member, Mr. Ellington is not allowed to enter a into a land-lease with the Tribe. Mr. Ellington, by requesting a money judgment which may take the form of a lien or seizure according to the Summons, is actively working against the Tribe and its interests.

Michelle Haskins is an enrolled tribal member. She has entered into a valid fifty-year lease with the Tribe. At the end of fifty years, or earlier as determined between the Tribe, the Residential Lease shall expire, and the property shall return to the Tribe. The Tribe may use the land, and any improvements thereon to lease to another tribal member, or it may tear down the improvements, or it may turn the property into a business, or otherwise repurpose the land for agriculture, among many other possible actions. The Tribe retains a perpetual interest in the land, regardless of how the land is currently used. No other Party in this case has an interest in the land for longer than fifty-years. The Tribe, as a sovereign nation, requests this Court to allow for the Tribe's intervention to protect its property interests.

CONCLUSION

It is imperative that this Court over-rule the denial of the Tribe's *Motion to Intervene* and allow the Tribe to be a party in this legal action. Intervention by the Tribe will allow the Court and the Parties to be abreast of the federal and tribal laws that require consideration in any judgment or resolution that involves tribal property and the Tribe's interest of tribal trust land. Because the Tribe's intervention in this matter is prior to any judgment or resolution, the Tribe's intervention in this matter is timely. The Tribe's interest, as the perpetual owner of the leased premises must be considered as neither the Plaintiff-Respondent nor the Defendant-Respondent has any perpetual interest in the leased premises. The Tribe is in a unique position in this matter as the Tribe has adopted tribal codes and laws that govern leased tribal property. Here, allowing the State of Wisconsin to interpret the Tribe's Residential Lease through state law is in direct contrast to the goal and purpose of 18 U.S.C. 1162(b), U.S. Const. art. VI, cl.2, the Hearth Act, and the Tribe's PRP.10.

Dated December 23, 2024

Electronically signed by Dena Welden

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. The length of the brief is 3,780 words and 15 pages.

Dated December 23, 2024.

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