

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIAM CROSS, JR.,

Plaintiff,

v.

CASE NO. 19-CV-11326
HON. ARTHUR J. TARNOW

KEWADIN CASINOS GAMING
AUTHORITY, a political subdivision
of the SAULT STE. MARIE TRIBE
OF CHIPPEWA INDIANS, a/k/a
SAULT STE. MARIE TRIBAL
GAMING AUTHORITY,

MAGISTRATE JUDGE
STEPHANIE DAWKINS DAVIS

Defendant.

WILLIAM CROSS'S SURREPLY BRIEF

In its reply, the Authority argues that its mere assertion of the federal common law doctrine of tribal sovereign immunity as a defense to Cross's claims is sufficient to confer subject matter jurisdiction under 28 U.S.C. 1331. (Defendant's Reply at 6-7). However, this argument is not supported by the cases cited by the Authority. In *Grable & Sons Metal Products, Inc v. Darue Engineering & Manufacturing*, 545 U.S. 308; 125 S.Ct. 2363 (2005), the Supreme Court held that federal subject matter jurisdiction existed where a state law claim necessarily raised a federal issue, actually

disputed and substantial, which a federal forum could entertain without disturbing any congressionally-approved balance of federal and state judicial responsibilities. *Id.*, at 314. However, *Grable* did not dispense with the longstanding rule, established in *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149; 29 S.Ct. 42 (1908), that whether a cause of action arises under federal law for jurisdictional purposes must be determined by what necessarily appears on the face of the plaintiff's complaint and not by anticipated defenses based in federal law. The *Grable* Court held that the substantial and disputed issue of federal law in *that* case (i.e. whether the plaintiff had received proper notice of federal tax foreclosure) was sufficient to confer federal subject matter jurisdiction, because whether the required notice had been given was an essential element of the plaintiff's state law claim, and therefore necessarily appeared on the face of the plaintiff's complaint in satisfaction of the well-pleaded complaint rule. *Grable* at 314-15.

Defendant's reliance on *Michigan v. Bay Mills Indian Community*, 695 F.3d 406 (6th Cir. 2009) is equally misplaced. In *Bay Mills*, the Sixth Circuit held state law claims that "implicated significant federal issues" were sufficient to "arise" under federal law and thus trigger federal jurisdiction. *Bay Mills* at 413. However, this outcome turned on the fact that each of the

plaintiff's claims necessarily presented the disputed question of federal law "on its face." *Id.* In contrast, neither of Cross's state law claims necessarily presents a disputed question of federal law on its face. It is well-settled that an immunity defense sounding in federal law does not, by itself, transform a state law claim into one that arises under federal law. *Gully v. First National Bank*, 299 U.S. 109; 57 S.Ct. 96 (1936). Additionally, the Supreme Court has explicitly held that the possible existence of a tribal sovereign immunity defense to a state law claim does not, by itself, create federal subject matter jurisdiction. *Okla. Tax Comm'n v. Graham*, 489 U.S. 838, 841; 109 S.Ct. 1519, 1521 (1989).

Defendant's argument that federal subject matter jurisdiction must exist because the Authority might suffer an adverse ruling in state court is unsupported by any authority and should be deemed abandoned. The fact that state courts are presumptively competent to interpret federal law is a longstanding and fundamental aspect of our federal system. See *e.g.*, *Clafin v. Houseman*, 93 U.S. 130, 136-37 (1876); *Haywood v. Drown*, 556 U.S. 729, 734-36; 129 S. Ct. 2108, 2114 (2009). Under our federal system, it is equally clear that a Michigan state court is not bound by precedent

from the Sixth Circuit¹, and the fact that a Michigan state court might decline to apply that precedent does not alone create subject matter jurisdiction.² To the extent that the Authority fears that a Michigan court might misapply the federal common law of tribal sovereignty, the Authority is free to appeal that ruling and ultimately seek review by the United States Supreme Court.

It is worth noting that the Authority does not deny the facts stated in Cross's affidavit (which accompanied Cross's principal brief in response to the Court's order to show cause). The Authority does not deny that Cross received the Contract from the Office of the Chairman of the Tribe and Authority. Nor does the Authority deny that Cross did not participate in the drafting of the Contract. So, too, the Authority does not deny that it received funds from the activities Cross engaged in under the Contract. The Authority should be required to litigate Cross's claims in the Wayne County Circuit Court, under Michigan law, which is precisely what the parties

¹ The decision relied on by the Authority is *Memphis Biofuels, LLC v. Chickasaw Nation Indus, Inc.*, 585 F.3d 917 (6th Cir. 2009).

² See, e.g., *Bates Associates, LLC v. 132 Associates, LLC*, 290 Mich App 52; 799 NW2d 177 (2010); and *Star Tickets v. Chumash Casino Resort*, 2015 WL 6438110 (Mich. Ct. App. 2015) (Ex. A).

agreed to do long ago, and an order of remand should be issued by the Court to achieve that result.³

PAYNE, BRODER & FOSSEE, P.C.

/s/ Andrew J. Broder

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Dated: July 8, 2019

CERTIFICATION OF SERVICE

The undersigned hereby certifies that on July 8, 2019 she filed William Cross's Surreply Brief with the Clerk of the Court via the electronic filing system which will send notification of such filing to all counsel of record.

/s/ Kelly R. Narring

Kelly R. Narring

³ It is interesting to see that, in the Tribal Code relied on by the Authority, there are multiple provisions discussing the benefits realized by the Tribe and its members from commercial transactions and the reluctance of potential business partners to enter into contracts unless Tribal sovereign immunity is waived. Yet the Tribe argues here that Cross had no right to rely on the Tribe's agreement to litigate Contract claims in the Wayne County Circuit Court under Michigan law. Such a position is beyond disingenuous.