

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
LUFKIN DIVISION

BURREL JONES

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CIVIL ACTION 9:20-CV-00063

VS.

ALABAMA-COUSHATTA TRIBE OF  
TEXAS AND NASKILA GAMING

**PLAINTIFF'S FIRST AMENDED COMPLAINT**

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**STATUTES**

The Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act,  
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TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, BURREL JONES (Plaintiff), in the above entitled and numbered cause, complaining of and against Defendants, ALABAMA-COUSHATTA TRIBE OF TEXAS and NASKILA GAMING (Defendants), and for cause of action would respectfully show unto the Court and Jury the following:

### **I. PARTIES**

1. Plaintiff, BURREL JONES, is an individual who resides in Houston, Texas.
2. Defendant, ALABAMA-COUSHATTA TRIBE OF TEXAS (“the Tribe”), is a federally recognized Indian Tribe that owns and operates an unincorporated casino, Defendant, NASKILA GAMING (“the Casino”), on tribal lands in Livingston, Texas.

### **II. JURISDICTION & VENUE**

#### **Declaratory Judgment Action**

3. Plaintiff’s declaratory judgment action is brought pursuant to the Declaratory Judgment Act (DJA), 28 U.S.C. §§2201, 2202. The Court has federal question jurisdiction pursuant to 28 U.S.C. §1331 over this declaratory judgment action because said action arises under the laws of the United States, namely (1) the First Amendment of the United States Constitution and (2) The Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, 101 Stat. 666 (Aug. 18, 1987) (“the Restoration Act”).
4. This Court has jurisdiction over Plaintiff’s declaratory judgment action because the question of whether the Restoration Act’s grant of sovereign immunity on the Tribe infringes upon Plaintiff’s First-Amendment right to petition is a federal question per 28 U.S.C. § 1331. Not only does it concern a federally established right (the right to file a lawsuit) but it also concerns a piece

of legislation passed by Congress, namely, the Restoration Act. On that basis, this court possesses subject-matter jurisdiction over Plaintiff's DJA claim.

5. Further, this Court has federal-question jurisdiction over Plaintiff's declaratory judgment action because the United States Court of Appeals for the Fifth Circuit has agreed that "[t]he question whether an Indian tribe retains the power to compel a non-Indian...to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under [28 U.S.C.] § 1331." *Comstock Oil & Gas Inc. v. Alabama & Coushatta Indian Tribes of Texas*, 261 F.3d 567, 572 (5th Cir. 2001).

6. Finally, this Court has subject-matter jurisdiction over Plaintiff's declaratory judgment action because sovereign immunity does not apply to claims made against Defendants for declaratory relief. Even though tribes are generally given sovereign immunity by the Restoration Act, there are certain circumstances in which tribes are not immune from suit. One such circumstance is when claims for declaratory or equitable relief are made against tribes in federal court. *Comstock Oil & Gas Inc. v. Alabama & Coushatta Indian Tribes of Texas*, 261 F.3d 567, 572 (5th Cir. 2001) (tribal sovereign immunity does not extend to suits for declaratory or injunctive relief). Because Plaintiff's declaratory judgment action seeks declaratory relief, Defendants do not enjoy immunity from such action, and this Court has jurisdiction over it.

#### **Premises Liability Claim**

7. In addition, the Court may exercise supplemental jurisdiction for Plaintiff's premises liability claim pursuant to 28 U.S.C. §1367 because this Court has original jurisdiction over the declaratory judgment action, and the declaratory judgment action and the premises liability claim both derive from a common nucleus of operative facts.

#### **Venue**

8. Venue for both claims is proper in this Judicial District pursuant to 28 U.S.C. § 1391(b), because the events giving rise to the claims occurred within this Judicial District.

### III. INTRODUCTION

9. Controversy surrounding the Tribe's operation of a casino on its reservation has persisted in this Court, on and off, for about twenty years. In 2001, the Tribe opened the Alabama-Coushatta Entertainment Center on its lands.<sup>1</sup> Shortly thereafter, the State discovered that the gaming activities being offered at that casino violated Texas law.<sup>2</sup> The State then sought to have the casino shut down.<sup>3</sup>

10. In *Alabama-Coushatta Tribes of Texas v. Texas*, 208 F. Supp. 2d 670, 674 (E.D. Tex. 2002), this Court granted the State a permanent injunction enjoining the Tribe from offering or promoting gaming activities which violate Texas law. The Fifth Circuit affirmed this Court's decision the following year.

11. Thereafter, the Tribe ceased operation of any such casino on its land for fourteen years, but eventually opened the Casino in 2016.<sup>4</sup> Upon inspection of the Casino by the State shortly after it opened, the State discovered that electronic bingo and other activities being offered there violated Texas law.<sup>5</sup> After the State moved to hold the Tribe in contempt for violating this Court's permanent injunction, the Tribe brought action against the State in *Texas v. Alabama Coushatta Tribe of Texas*, 298 F. Supp. 3d 909 (E.D. Tex. 2018), *aff'd*, 918 F.3d 440 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 855 (2020).

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<sup>1</sup> Emily Foxhall, *Alabama-Coushatta tribe fights for a gaming center - again*, HOUS. CHRON., (last updated Feb. 27, 2018, 9:12 AM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Alabama-Coushatta-fight-for-the-right-to-a-gaming-12707848.php>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

**12.** Such games which Defendants may have been offering at that time, and which they are offering now, upon information and belief, include: “Total Meltdown,” “Jackpot Inferno,” “Myths & Legends,” “Moby Dick,” “Aces & Hogs,” “Mr. Martini,” “Lion’s Share Double Jackpot,” “Lightning Zap,” “Smokin’ Hot Dice,” “Golden Wins,” “Gems Double Jackpot,” “Pac-Man,” “Cabinet of Curiosities,” “Pac-Man Wild Edition,” “Gold Dragon Red Dragon,” “Fu Panda,” “Fu Nan Fu Nu,” “Willie Nelson Whiskey River,” “Willie Nelson Shotgun Willie,” “Jade Wins,” “Double Wolf,” “Super 10X Wild Gambler,” “New Money,” “Coin Slinger” and “Arctic Cash.”<sup>6</sup>

**13.** In *Texas v. Alabama-Coushatta Tribe of Texas*, 298 F. Supp. 3d 909, the Tribe sought declaratory and injunctive relief to allow the Tribe to govern its gaming activities under the Indian Gaming Regulatory Act (IGRA), as opposed to governance thereof by the State under the RA. *Id.* The Tribe also sought injunctive relief from this Court’s permanent injunction. *Id.* The State argued that the RA federalizes Texas gaming laws, and therefore the RA and Texas’ gaming laws govern the Tribe’s gaming activities. *Id.* at 916. The State further argued that the operation of electronic bingo games offered by the Casino definitely violated Texas Penal Code § 47.01, and likely violated six other provisions of the Texas Penal Code, including §§ 47.02, 47.03(a)(1), (5), 47.04(a) and 47.06(a), (c). *Id.* The Tribe argued that because the electronic bingo qualified as a “Class II gaming” activity under the IGRA, the RA and Texas’ laws did not apply. *Id.* This Court ruled for the State, holding that the RA and Texas’ gaming laws apply to the Tribe’s gaming activities, and upholding the injunction. *Id.* at 925.

**14.** Shortly after disposition of *Texas v. Alabama-Coushatta Tribe of Texas*, 298 F. Supp. 3d 909, the Tribe appealed this Court’s decision to the Fifth Circuit. On appeal, in *Texas v. Alabama-Coushatta Tribe of Texas*, 918 F.3d 440 (5th Cir. 2019), the circuit court both affirmed this Court’s

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<sup>6</sup> *Id.*



ruling that the RA and Texas' gaming laws, as opposed to the IGRA, govern the Tribe's gaming activities, as well as upheld this Court's injunction. The Supreme Court of the United States (SCOTUS) subsequently denied the Tribe's petition for writ of certiorari.

**15.** Despite the fact that this Court's injunction was upheld and remains in effect, the Tribe continued operating and, upon information and belief, still operates the Casino as a casino, offering and promoting gaming activities in violation of Texas' gaming laws and the RA.

#### **IV. FACTUAL ALLEGATIONS**

##### **A. Plaintiff Suffered Severe Injury at the Casino.**

**16.** Plaintiff would show that this lawsuit has become necessary as a result of personal injuries which he sustained on or about October 13, 2019, when he went to the Casino, located at 540 State Park Road 56, Livingston, Texas, 77351. Plaintiff was an invitee of the Casino because he went there as a patron, which was mutually beneficial to all parties.

**17.** Since it opened, the Tribe and/or the Casino heavily advertised the very gaming activities enjoined by this Court via its permanent injunction, in and around Harris County where Plaintiff resides. The Tribe and/or the Casino advertised the activities in radio ads, on billboards, and through other media. The Tribe's and/or the Casino's advertising efforts reached Plaintiff, who was enticed by them, thereafter deciding to visit the Casino with his wife.

**18.** After Plaintiff had finished playing games at the Casino, he made his way to the staircase which leads from its elevated front door to ground level. The staircase is about five steps high, twenty feet across, and split into three separate sections by six wooden support beams; two on either end of the top of the staircase, and four across the bottom. The beams at the top of the staircase are both aligned with a beam at the bottom, and both sets of aligned beams are connected by an ungainly wooden railing. The two inner beams at the bottom of the staircase are not aligned

with any beams at the top but are connected to the top step by similar railings. The beams at the top and across the bottom of the staircase, and by extension the attached railings, are distanced horizontally from one another such that the railings are out of reach of someone using the middle section of the stairs.

**19.** Plaintiff began descending the middle section of the staircase, lost his footing at the top and, because the railing which he could have used to catch himself was out of reach, tumbled airborne down the staircase, coming to a rest at ground level. Plaintiff lost consciousness and suffered injuries to several areas of his body, including his shoulder, arm and wrist.

**20.** Plaintiff was transported by ambulance to a medical facility in Livingston, TX, where he underwent X-rays and was given pain medication. He was then transferred by ambulance to a hospital in Houston, Texas, where he underwent further testing and was diagnosed with an open displaced right humeral fracture and right radial nerve palsy. Both injuries required open surgery. As a result of the fall, Plaintiff also suffered impaired cognition and communication, impaired functional mobility and ADLs, impaired safety awareness, impulsivity, nausea, emesis and left medial leg pruritus. Plaintiff was kept at the hospital for almost a week. Plaintiff was then transferred by ambulance to a clinic in Houston, Texas for further monitoring and therapy, where he stayed for a week. Plaintiff continues to receive medical treatment for the severe injuries he suffered.

**B. The Tribe Has No Functioning Tribal Court Within Which Plaintiff Can Adjudicate His Tort Claims.**

**21.** About one month after his injuries occurred, counsel for Plaintiff (Counsel) filed an insurance claim with Defendant's insurer, "Tribal First" (the Insurer). The Insurer denied any negligence and liability for the accident, as well as Plaintiff's insurance claim. Counsel subsequently contacted the Court Clerk (the Clerk) for the Tribe's tribal court, who committed to

sending Counsel materials and instructions for filing a claim with the court. The Clerk ultimately did not send Counsel the materials and instructions, so Counsel contacted the Clerk again. In their second conversation, the Clerk claimed that Defendant was not subject to suit in the tribal court. Clerk referred Counsel to Tribe's Deputy Administrator (the Administrator) for more information.

**22.** Counsel independently conducted further research in order to gather more information about filing a claim with the tribal court. Counsel discovered that, although the Tribe was listed as having a tribal court on the Tribal Court Clearinghouse (the Clearinghouse) website, the hyperlink for the tribal court's website located on the Clearinghouse website repeatedly produced an error message instead of leading to any functioning website. The tribal court website is still inaccessible and unfindable, and as far as Counsel can tell, does not exist.

**23.** Counsel then contacted the Administrator, who claimed that a tort remedy for Plaintiff's injuries did not exist under the Tribe's laws. She further claimed that because the Casino was operating as a "Class II gaming" facility (under the Indian Gaming Regulatory Act (IGRA)), a Tribal-State Compact does not exist.

**24.** The Administrator attempted to redirect Counsel to the Insurer. Counsel informed the Administrator that he had already contacted the Insurer, that the conversation resulted in a dispute between them, and that Counsel sought to present the case to a tribunal to settle the dispute. The Administrator failed to address Counsel's concern, instead alleging that both the Casino and the Tribe "had sovereignty," and that there was no way to seek remedy for Plaintiff's injuries in tribal court. Counsel finally concluded, upon information and belief, that because there was no way to gather information about filing in tribal court, the tribal court was either dysfunctional or non-existent.

25. Following Counsel’s conversation with the Administrator, the Insurer contacted Counsel in an attempt to deter Counsel from any further contact with Defendant and the Tribe regarding the matter. In light of the foregoing, Plaintiff has been left without an operational tribal court in which to adjudicate his premises liability claim and, therefore, no mechanism for obtaining relief. Plaintiff therefore has no other choice but to seek relief from this Court.

## V. ARGUMENTS AND AUTHORITIES

### A. **Plaintiff Can Bring His Premises Liability Claim in Federal and/or State Court Because, Under the Circumstances, the Restoration Act Violates His Constitutional Right to Petition.**

26. Plaintiff incorporates by reference and re-alleges paragraphs 1 through 25.

27. The First Amendment of the Constitution provides that “Congress shall make no law... abridging... the right of the people... to petition the Government for a redress of grievances.” U.S. Const. amend. I. This is known as the “Petition Clause.” The Petition Clause’s legal effect is twofold: it (1) grants individuals the “right to petition,” and (2) prohibits the federal government from passing a law which infringes that right.

28. It has been established that the right to petition includes the right of an individual for the redress of grievances. *Eggenberger v. W. Albany Tp.*, 820 F.3d 938, 943 (8th Cir. 2016). This “right to sue” provides individuals with a means of adjudicating damages that they may suffer at the hands of others. The right to sue is frustrated in a case where, like this one, the facts and the statute constitute a violation of constitutional rights. In this case, Plaintiff’s First Amendment right to sue is infringed upon by the practical effect of the Restoration Act.

29. The Restoration Act, passed by Congress in 1987, restored the Tribe’s rights and privileges, including its sovereign immunity from most suits. Effectively, this grant of sovereign immunity

confines all actions against the Tribe to its own tribal court, thereby rendering suit against the Tribe in federal courts or state courts unavailable to would-be plaintiffs.

**30.** However, the Restoration Act's grant of sovereign immunity on tribes unconstitutionally infringes on potential plaintiffs' right to sue in situations where the tribe against whom a plaintiff wants to bring suit has no operational, functioning tribal court to hear the claim that the plaintiff wants to bring in court. In the present case, Plaintiff finds himself in this very kind of situation having fallen through the constitutional cracks. The Restoration Act grants sovereign immunity to the Alabama-Coushatta Tribe of Texas, preventing Plaintiff from bringing his premises liability suit against the tribe in federal court and state court. However, the tribe does not have a functioning tribal court in which Plaintiff can alternatively file suit to litigate his premises liability cause of action. Consequently, the Restoration Act's sovereign immunity grant to the Tribe, which has no active tort-claims tribal court bars Plaintiff from exercising his constitutional right to petition under the First Amendment.

**31.** In light of the foregoing, this Court should declare that the Restoration Act's grant of sovereign immunity on the Tribe unconstitutionally infringes on Plaintiff's right to petition against the Tribe given its lack of a functioning tribal court. The Court should also therefore strike the Restoration Act's grant of sovereign immunity with regard to Plaintiff's premises liability claim against the Tribe and/or the Casino in federal court (via supplemental jurisdiction) or in state court.

**B. In the Interest of Justice, the Court Should Not Uphold the Tribe's Sovereign Immunity Given the Circumstances of This Case.**

**32.** Serious questions regarding equity arise when, as in this case, a tribe has no active court to hear the kinds of claims a plaintiff wants to make against that tribe. As such, courts that have been faced with facts similar to those in the case at bar have held that a defendant tribe's use of the sovereign immunity defense does not apply where justice requires that immunity not be upheld.

33. In *Wilkes v. PCI Gaming Auth.*, 287 So. 3d 330 (Ala. 2017), the Supreme Court of Alabama held that the doctrine of tribal sovereign immunity did not apply to shield an Indian tribe from tort claims brought by non-tribal plaintiffs. The plaintiffs in *Wilkes* originally brought suit for negligence against the casino in state court seeking damages after sustaining injuries in a head-on automobile collision with an employee of the casino. *Id.* The casino argued that the state court did not have jurisdiction over the claim because the casino was supposedly protected by its tribe's sovereign immunity. *Id.*

34. The Supreme Court of Alabama held that the tribe was subject to suit for the negligence claims because it was not entitled to tribal sovereign immunity because upholding the tribe's sovereign immunity would be contrary to the interests of justice in a situation such as the one in the *Wilkes* case where "[plaintiffs] [would] have no way to obtain relief if the doctrine of tribal sovereign immunity [was] applied to bar their lawsuit." *Id.* at 334.

35. The risk of being deprived a mechanism for obtaining relief that the plaintiffs in *Wilkes* faced is the same risk that Plaintiff now faces in the case at bar. The Tribe has no currently operating tribal court in which Plaintiff could bring suit for his premises liability claim against the Tribe and/or the Casino. Therefore, Plaintiff would have no way to obtain relief for his premises liability claim if this Court were to uphold the Tribe's claim of sovereign immunity. As such, in the interests of equity and justice, this Court should follow the precedent set by the *Wilkes* court and not uphold the Tribe's claim of sovereign immunity over Plaintiff's tort claim

## **VI. CAUSES OF ACTION**

### **A. Declaratory Judgment and Declaratory Relief'**

36. Plaintiff incorporates by reference and re-alleges paragraphs 1 through 35.

37. This action seeks a declaratory judgment that:

**a.** the Restoration Act, or in the alternative, the provision thereof that grants the Tribe sovereign immunity:

(i) violates Plaintiff's right to petition under the First Amendment of the U.S. Constitution due to the lack of an active Alabama-Coushatta tribal court in which Plaintiff can bring his premises liability claim; and

(ii) is therefore unconstitutional; and

**b.** Plaintiff is not barred by sovereign immunity from bringing his premises liability claim against the Tribe and/or the Casino in federal court or state court.

### **B. Premises Liability**

**38.** Plaintiff incorporates and by reference re-alleges paragraphs 1 through 37.

**39.** At the time of the accident made the basis of this claim:

**a.** Plaintiff, who entered the Casino for the mutual benefit of all parties and was given an invitation to enter, was an invitee at the Casino. As a result, the Tribe and/or the Casino, owed a duty of reasonable care to Plaintiff at the time of the incident made the basis of this claim;

**b.** The Tribe and/or the Casino had actual or constructive knowledge of an unreasonably dangerous condition on the premises in the form of improper design of the staircase at the Casino, in that:

**i.** the staircase is too wide; and/or

**ii.** the railings on either side of the staircase are unreachable from a majority of its traversable area;

- c. The **(i)** width of the staircase and/or the **(ii)** unreachable railings posed an unreasonable risk of harm to Plaintiff because it/they increased the likelihood that Plaintiff would fall down the stairs and suffer injury;
- d. The Tribe and/or the Casino breached their duty by:
  - i. failing to maintain a reasonably safe premise;
  - ii. failing to have a properly designed staircase on the premises;
  - iii. failing to warn about **(1)** the width of the staircase and/or **(2)** the unreachability of the railings thereon;
  - iv. knowingly disregarding the inherent dangers of **(1)** a wide staircase and/or **(2)** unreachable railings thereon;
  - v. recklessly disregarding the safety of Plaintiff; and
  - vi. other acts deemed negligent; and
- e. The Tribe and/or the Casino failure to use such care proximately caused Plaintiff's injuries.

**40.** As a result of said occurrence, Plaintiff suffered a severely broken wrist and nerve damage, both of which required open surgery. Such occurrence resulted in not only physical pain, but also mental anguish and other medical problems, such as impaired cognition and communication, impaired functional mobility and ADLs, impaired safety awareness, impulsivity, nausea, emesis and left medial leg pruritus. In all reasonable probability, Plaintiff's physical pain, physical impairment, and mental anguish will continue indefinitely. Plaintiff has incurred and will further incur pharmaceutical and medical expenses in connection with his injuries.

## **VII. DAMAGES**

**41.** Plaintiff incorporates by reference and re-alleges paragraphs 1 through 40.



**42.** As a direct and proximate result of Defendants' conduct, Plaintiff suffered the following injuries and damages:

- a. Reasonable and necessary medical expenses incurred in the past, and, in all reasonable medical probability, reasonable and necessary medical expenses to be incurred in the future;
- b. Physical pain and suffering in the past, and, in all reasonable probability, physical pain and suffering the future;
- c. Mental anguish in the past and, in all reasonable probability, mental anguish in the future;
- d. Physical disfigurement in the past and, in all reasonable probability, physical disfigurement in the future;
- e. Physical impairment in the past and, in all reasonable probability, physical impairment in the future;
- f. Loss of earnings in the past, and, in all reasonable probability, earning capacity lost in the future; and
- g. Loss of personal property.

#### **VIII. JURY DEMAND**

**43.** With respect to Plaintiff's premises liability claim, Plaintiff demands trial by jury. A jury fee was paid contemporaneously with the filing of Plaintiff's Original Complaint.

#### **IX. PRAYERS FOR RELIEF**

##### **A. Declaratory Judgment and Declaratory Relief**

**44.** WHEREFORE, Plaintiff, BURREL JONES, prays that this Honorable Court render a declaratory judgment granting Plaintiff the following declaratory relief:

- a. That the Restoration Act, or the provision thereof that grants the Tribe sovereign immunity, unconstitutionally violates Plaintiff's right to petition under the First Amendment of the Constitution given the lack of an active operating Alabama-Coushatta tribal court in which Plaintiff could bring his premises liability claim; and

**b.** Plaintiff is not barred by sovereign immunity from bringing his premises liability claim against the Tribe and/or the Casino in federal court or state court.

**B. Premises Liability**

**45.** Plaintiff further prays that, after trial on the merits, he have judgment against Defendants, Alabama-Coushatta Tribe Of Texas and/or Naskila Gaming, for the following:

- a.** Sum in excess of the minimum jurisdictional limits of this Honorable Court;
- b.** Actual damages;
- c.** Pre-judgment interest and post-judgment interest at the maximum legal rate;
- d.** Costs of court; and
- e.** Any and all further relief, be it general or special, at law or in equity, to which Plaintiff may show himself justly entitled.

Respectfully submitted,

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