

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

BURREL JONES

§
§
§
§
§
§
§
§
§
§

CIVIL ACTION 9:20-cv-00063

VS.

ALABAMA-COUSHATTA TRIBE OF
TEXAS AND NASKILA GAMING

**PLAINTIFF’S OBJECTION TO REPORT AND RECOMMENDATION
GRANTING DEFENDANTS’ SUPPLEMENTAL MOTION TO DISMISS**

1. Plaintiff Burrel Jones (hereinafter “Plaintiff”) files this objection to the Report and Recommendation by this Court’s magistrate judge to dismiss Plaintiff’s premises liability and declaratory relief claims. Pursuant to Federal Rule of Civil Procedure 72(b), when a party’s claim is referred to a magistrate judge to hear and decide, the party may serve and file objections to the magistrate’s order within 14 days of being served a copy. FED. R. CIV. P. 72(b). By timely filing an objection, the filing party preserves its ability to assign as error a defect in the magistrate judge’s order. *Id.*

**Plaintiff Objects to the Recommendation to Grant
Defendants’ Motion to Dismiss Plaintiff’s Premises Liability Claim**

2. Contrary to the Report and Recommendation, this Court can and should exercise supplemental jurisdiction over Plaintiff’s premises liability claim. The Court should follow the example of *Wilkes v. PCI Gaming Auth.*, 287 So. 3d 330 (Ala. 2017), a case very similar factually to the case at bar. In *Wilkes*, the Supreme Court of Alabama declined to apply the court-made doctrine of tribal sovereign immunity 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.* 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 since 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.

3. 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 present case. Despite Defendants' claims to the contrary, the Alabama-Coushatta Tribe of Texas has no currently operating tribal court in which Plaintiff could bring suit for his premises liability claim against Defendants. 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.

4. As Justice Clarence Thomas explained, "the doctrine of tribal sovereign immunity as articulated by the Supreme Court in [*Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998)] lacks "substantive justification" and the majority's reasons for continuing to uphold the doctrine —deference to Congress, stare decisis, etc.—are insufficient in light of that lack of a justification, and the "unfairness and conflict it has engendered" *Id.* at 335 (citing *Mich. V. Bay Mills Indian Cmty.*, 572 U.S.782, (2014) (Thomas, J., dissenting)). As such, in the interests of equity and justice, this Court can and should follow the precedent set by the *Wilkes* court and not uphold Defendants' claim of sovereign immunity over Plaintiff's tort claim. With sovereign immunity set aside, there would be no reason for the Court to decline to exercise supplemental

jurisdiction over Plaintiff's premises liability claim. Plaintiff therefore objects to the Report and Recommendation granting Defendants' Motion to Dismiss Plaintiff's premises liability claim.

**Plaintiff Objects to the Recommendation to Grant
Defendants' Motion to Dismiss Plaintiff's Declaratory Relief Claims**

5. After first recommending that the Court deny Defendants' Motion to Dismiss Plaintiff's claim for declaratory relief, the Court's magistrate judge gave Defendants another opportunity to move to dismiss based on different arguments than the ones Defendants presented in their first two Motions to Dismiss. Now, after Defendants have gotten a third chance to make new arguments as to why Plaintiff's declaratory judgment action should be dismissed, the magistrate reverses course and now recommends that this Court also dismiss Plaintiff's declaratory actions. Consequently, Plaintiff also objects to this most recent recommendation to dismiss Plaintiff's declaratory relief claims.

6. As the Fifth Circuit has reiterated in multiple cases, Indian tribes are not immune from suits for declaratory relief. *See Comstock Oil & Gas Inc. v. Alabama & Coushatta Indian Tribes of Texas*, 261 F.3d 567, 572 (5th Cir. 2001); *TTEA v. Ysleta del Sur Pueblo*, 181 F. 3d 676, 680 (5th Cir. 1999). As the Tribe admits in its first Motion to Dismiss, the *TTEA* Court acknowledged that "actions seeking declaratory and injunctive relief" could proceed" against the Indian tribe in that case. Thus, the Tribe in the present case acknowledges what well-established case law already elucidates: the Tribe is not able to hide behind the shield of sovereign immunity to protect itself from declaratory-relief suits in federal court.

7. As such, in the present case, the Court has jurisdiction over Plaintiff's declaratory relief claims and they should proceed. Whether the Court should ultimately grant the declaratory relief that Plaintiff seeks and/or exercise supplemental jurisdiction over Plaintiff's premises-liability claim are legal questions that the Court will have to decide based on the unique legal and factual

circumstances of this case. However, there is no legal basis under binding Fifth-Circuit precedent to suggest that Plaintiff lacks standing to even *seek* declaratory relief in federal court against the Tribe.

8. Since sovereign immunity does not bar Plaintiff’s declaratory judgment action, Plaintiff need only show that there is a basis for the Court to exercise original jurisdiction over Plaintiff’s declaratory judgment action. The federal question statute, 28 U.S.C. § 1331, provides federal district courts with “original jurisdiction of all civil actions arising under the Constitutions, laws, or treaties of the United States.” 28 U.S.C. § 1331; *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 328 (5th Cir. 2008). Furthermore, federal district courts have jurisdiction over cases that involve federal questions arising under the Constitution of the United States. *See ex parte Young* 209 US 123, 145 (1908).

9. The declaratory-judgment action that Plaintiff brings before this Court is rooted in the Constitution and laws of the United States. The First Amendment of the U.S. Constitution declares 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. In addition, the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act (hereinafter “Restoration Act”) is a congressionally passed law that, according to Section 103 of the Act, restored “all rights and privileges of the tribe...under any...authority of the United States,” (including common-law sovereign immunity). Finally, as Plaintiff laid out in his First Amended Complaint, the Tribe had no tribal court in which Plaintiff could litigate his premises liability claim. *See* Dkt. No. 12, p. 6-8.

10. The Restoration Act’s restoration of common-law immunity by way of the restoration of “all rights and privileges” to the Tribe, as well as the Tribe’s failure to have a tribal court in which

Plaintiff could seek redress for his injury claims, violates Plaintiff's constitutional right to petition. 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. Consequently, Plaintiff's petitioning to this Court for a declaratory judgment regarding whether a congressionally passed statute and the tribe's failure to have an operating tribal court in which Plaintiff could seek relief violate his rights create precisely the kind of federal question that allows the Court to exercise original jurisdiction over this matter pursuant to 28 U.S.C. § 1331.

11. Because the doctrine of sovereign immunity does not protect Defendants from declaratory-judgment actions in the Fifth Circuit, and because Plaintiff's declaratory-judgment action raises a federal question, the Court has subject-matter jurisdiction over Plaintiff's Complaint for declaratory relief. Defendants' Motion to Dismiss based on the idea that this Court does not have jurisdiction to hear Plaintiff's declaratory-relief claims should be denied. Plaintiff therefore also objects the Report and Recommendation's advice to grant Defendants' Motion to Dismiss Plaintiff's claims for declaratory relief.

PRAYER

For these reasons, Plaintiff respectfully requests that this Court set aside the magistrate's Report and Recommendation to dismiss Plaintiff's claims and deny Defendants' Motion to Dismiss as amended and supplemented in its entirety.

Respectfully submitted,

KOLODNY LAW FIRM, PLLC



Rashon Murrill
State Bar of Texas: 24110622
1011 Augusta Dr., Suite 111
Houston, Texas 77057
Telephone: (713) 532-4474
Facsimile: (713) 785-0597
Email: rmurrill@fko-law.com

**ATTORNEY FOR PLAINTIFF
BURREL JONES**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon all counsel of record herein in accordance with the Federal Rules of Civil Procedure on December 23, 2020.

Via Electronic Service

Danny S. Ashby
Texas Bar No. 01370960
Justin Roel Chapa
Texas Bar No. 24074019
MORGAN, LEWIS & BOCKIUS LLP
1717 Main Street, Suite 3200
Dallas, Texas 75201
(214) 466-4000 Telephone
(214) 466-4001 Facsimile
danny.ashby@morganlewis.com
justin.chapa@morganlewis.com

Frederick R. Petti
Texas Bar No. 24071915
PETTI & BRIONES, PLLC
8160 East Butherus Drive, Suite 1
Scottsdale, Arizona 85260
fpetti@pettibriones.com

**ATTORNEY FOR DEFENDANT
ALABAMA-COUSHATTA TRIBE
OF TEXAS AND NASKILA GAMING**



Rashon Murrill