

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

BURREL JONES,

Plaintiff,

v.

ALABAMA-COUSHATTA TRIBE OF
TEXAS AND NASKILA GAMING,

Defendants.

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No. 9:20-CV-63

**DEFENDANTS’ RESPONSE TO PLAINTIFF’S OBJECTIONS TO
REPORT AND RECOMMENDATION [DE 33] (“SUPPLEMENTAL R&R”)**

Plaintiff objects [DE 34] (the “Objection”) to the Magistrate Judge’s Supplemental R&R for adhering to federal precedent holding (1) that tribal sovereign immunity bars tort claims like Plaintiff’s, (2) that the application of sovereign immunity does not violate the First Amendment, and (3) that declaratory claims must be dismissed when courts lack the authority to grant the requested relief. The Objection offers no authority contrary to the latter two rules, and points to only a single state court case contrary to the first—which has been rejected by the only federal court to consider it.¹ The Objection (at ¶ 4) essentially concedes the correctness of the Supplemental R&R by arguing that Plaintiff’s tort claim could survive if sovereign immunity were “set aside” and by citing a dissent by Justice Thomas that expressly acknowledges that Supreme Court majorities have “continu[ed] to uphold the doctrine” of tribal sovereign immunity notwithstanding the consequences identified by Plaintiff.

¹ The Supplemental R&R addresses Plaintiff’s two-part claim for declaratory relief. The Objection (at ¶¶ 2–4) in part addresses Plaintiff’s premises-liability claim, as to which Judge Hawthorn recommended dismissal in his original Report and Recommendation [DE 25] (“First R&R”). Plaintiff previously lodged objections to that R&R [DE 27], and Defendants filed a response in support of Judge Hawthorn’s dismissal recommendation [DE 29].

Defendants respectfully request that the Court apply federal precedent, overrule the Objection, and dismiss Plaintiff's claims in their entirety. Plaintiff asserts two, duplicative claims against Defendants: a premises-liability claim seeking to recover for Plaintiff's alleged slip-and-fall injuries sustained at the bingo facility on the Tribe's reservation, and a claim seeking a declaration that Plaintiff has the right to bring that premises-liability claim. *See* First Am. Compl. ("FAC") ¶¶ 36–40 [DE 12]; Supp. R&R at 2. As Judge Hawthorn concluded, these claims each lack merit as a matter of law.

Tribal sovereign immunity indisputably bars tort claims against Defendants. *See, e.g.*, Supp. R&R at 4–5 (collecting cases). Plaintiff affirmatively pleads that Defendants have sovereign immunity, FAC ¶¶ 4,6, but nonetheless urges the Court to follow the Alabama Supreme Court's approach in *Wilkes v. PCI Gaming Authority*, 287 So. 3d 330 (Ala. 2017), which declined to extend sovereign immunity to certain tort claims brought against tribal defendants arising out of an off-reservation automobile accident. Over the course of this case, Plaintiff has not provided a single federal authority that has taken an approach similar to that in *Wilkes*. Federal courts—including those in this District—unanimously have rejected attempts to subject Indian tribes to tort liability for on-reservation conduct. *See* Mot. to Dismiss at 13–15 [DE 18] (collecting cases); Reply at 4 [DE 21] (same); *see also* First R&R [DE 25] at 5–6 (same); *Tribal Smokeshop, Inc. v. Alabama-Coushatta Tribes of Tex.*, 72 F. Supp. 2d 717, 718–20 (E.D. Tex. 1999) (rejecting argument that tort claims survive tribal sovereign immunity).

Plaintiff's declaratory-relief claim fails for similar reasons, whether viewed from the perspective of subject-matter jurisdiction or claim viability. Indeed, one part of that claim is indistinguishable from a tort claim, seeking a declaration only that tribal sovereign immunity does not apply to Plaintiff's premises-liability claim. Supp. R&R at 6. The other part of the claim seeks

the same ultimate relief but interposes the intermediate question of whether the application of tribal sovereign immunity violates Plaintiff's First Amendment right to petition. *Id.* at 4–6.

The Supplemental R&R correctly concludes that Plaintiff's First Amendment theory cannot salvage Plaintiff's attempt to obtain a declaration that he can assert a tort claim against Defendants. As the Objection itself notes, courts analyze the viability of declaratory-relief claims “based on the unique legal and factual circumstances of the case.” Obj. ¶ 7; *see also Orix Credit Alliance, Inc. v. Wolfe*, 212 F.3d 891, 895 (5th Cir. 2000). That Plaintiff labels his claim as one for “Declaratory Judgment and Declaratory Relief” in no way prevents the Court from examining the substance of that claim and determining whether it is redressable. *See* R&R at 4–6.

Plaintiff has not been prevented from petitioning a court here. Sovereign-immunity principles simply require that the outcome of Plaintiff's petition is dismissal—regardless of where it is filed—because ultimately it seeks only to recover tort damages from Defendants, who Plaintiff admits have sovereignty. The application of sovereign immunity does not violate the right to petition. *Id.* To hold otherwise would allow any plaintiff with a foreclosed tort claim to avoid sovereign immunity by recasting the claim as one for declaratory relief under the First Amendment, subjecting sovereigns to the very litigation that immunity is meant to foreclose.² *See* Supp. Mot. to Dismiss at 3–6 [DE 30]; Reply In Support at 2–6 [DE 32].

Because that result would defy precedent and the law on sovereign immunity, Defendants respectfully ask that the Court dismiss Plaintiff's claims with prejudice.

² The Objection does not actually contest the Supplemental R&R's conclusion (at 5–6) that sovereign immunity does not violate the First Amendment. The Objection instead argues (at ¶¶ 8–10) that the federal nature of the Restoration Act and the ostensible presence of a First Amendment issue gives the court federal-question jurisdiction under 28 U.S.C. § 1331. That issue is not—and has never been—disputed.

Dated: January 5, 2021

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing *Response to Plaintiff's Objections to Report and Recommendation* was served upon the counsel listed below through the Court's CM/ECF system on January 5, 2021:

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