SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS

COURT OF APPEALS

Linda and Stanley Lesperance v. Sault Ste. Marie Tribe of Chippewa Indians

APP-16-01

Decided July 14, 2016

BEFORE: DIETZ, FINCH, JUMP, LEHMAN, and WARNER Appellate Judges.

DISCUSSION AND ORDER

Warner, Appellate Judge, who is joined by Appellate Judges Dietz, Finch, Jump, and Lehman.

For the reasons spelled out below, the decision of the tribal court is affirmed.

Facts and Procedural History

On April 14, 2011, Appellant Linda Lesperance tripped over a threshold at the Midjim Convenience Store in St. Ignace, Michigan, and suffered injuries. The Appellants sought to recover damages from the Appellee for her injuries. Tribal Code Section 85.106(2) requires that the injured person must serve a notice on the Tribe of the occurrence of the injury and the defect within 120 days from the time the injury occurred. Specifically, the Tribal Code requires that "[t]he notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant. The notice shall be served on the Tribal Secretary, 523 Ashmun Street, Sault Ste. Marie, Michigan 49783, either personally or by certified mail, return receipt requested."

Within 120 days of the injury Appellants did have contacts with Patti Simi of the Tribe's Insurance Department, but Appellants did not file notice upon the Tribal Secretary by personal service or certified mail within 120 days.[1] Contacts with Ms. Simi continued until May 2012. On June 22, 2011, Ms. Simi received a letter from Mr. Lesperance including information about medical problems and visits and also included a specific request for payment for pain and suffering and future medical bills. On May 3, 2013, more than two years after the incident, Ms. Simi received a Claim for Damages and accompanying documentation from Attorney Baron on behalf of the Appellants. On December 6, 2013, Appellants filed a complaint against the Appellee seeking damages for personal injury based on the Tribal Tort Claims Ordinance. The complaint averred that the Appellee's property had a defect in the threshold, that the Appellee had actual or constructive knowledge of the threshold defect, and that the Appellee had created the defective and dangerous condition that caused Appellant's injuries. Appellants sought judgment in the amount of $1.926 million.

[1] As Appellee argues there was no attempt at notice to the Tribal Secretary, not even defective notice. Lesperance v. Sault Ste. Marie Tribe of Chippewa Indians, APP-16-01, Defendant-Appellee's Brief on Appeal, 25 (Feb. 24, 2016).

On June 2, 2015, Appellee moved for judgment on the pleadings or summary judgment, arguing that the Appellants had failed to provide a timely written notice as requested by Tribal Code Section 85.106. Also, Appellee argued that tribal sovereignty had not been waived for loss of consortium claims. Appellants agreed as to the loss of consortium claim, but argued that they had substantially complied with the notice requirements of the Tribal Code. Specifically, Appellants argued that the letter sent to and received by the Insurance Department on June 22, 2011 satisfied the pre-suit notice requirements, that the defective notice was timely, that the error did not result in any prejudice to the Appellee, and that the Appellants are entitled to access to the Court.

The tribal court held oral argument on the motion on October 23, 2015. On December 15, 2015, the tribal court held that the Appellants failed to file notice of the injury and defect within 120 days of the date of the injury, with the Tribal Secretary, in the manner required by the Tribal Code. As a result, the court held that the Appellants' claims were barred by the plain language of the Code and dismissed the case. In reaching its decision, the tribal court explained that "the notice was not served on the Tribal Secretary by personal service or certified mail, but rather sent to Ms. Simi by regular first-class mail," and, therefore, the Appellants did not comply with the requirements of the Tribal Code. The tribal court went on to explain that "[n]ot only does § 85.106(2) clearly spell out what the notice must contain and where it must be sent and in what matter, the Code also mandates strict adherence to the procedures within the Chapter."[2]

The tribal court goes on to cite Tribal Code Section 85.104(1), which provides "[t]he sovereign immunity of the Tribe is hereby waived for tort claims brought in accordance with this Chapter. This waiver is subject to all of the restrictions, limitations and procedures set forth in this Chapter. This Chapter is to be strictly construed, and all procedures, restrictions and limitations are to be adhered to strictly. No waiver of any kind is made beyond the scope or outside the limitations and restrictions of this Chapter." As mentioned above, Appellants argued that even if the pre-suit notice was defective, it was timely and the Appellee was not prejudiced, and, as a result, Appellants' claim should survive. However, the tribal court explained that "reliance on the case law cited by the Plaintiffs is misplaced in this circumstance. Those cases involved private lawsuits and did not involve waivers of sovereign or governmental immunity." The tribal court cites to the *Nguyen v. Spirit Mountain Casino,* No. 04-06-022 (Confederated Tribes of the Grand Ronde Community Tribal Court 2004) decision to support the assertion that failure to comply with the Tribal Code cannot be overlooked. Further, the tribal court explained that, because Tribal Code Section 85.104(1) requires that the Tribal Code be strictly complied with, the tribal court could not create an "actual prejudice" factor within the statute. "The Plaintiffs are asking the Court to do what it cannot here, that is forgive non-compliance with the strict notice requirements under the Code or 'engraft an actual prejudice requirement or otherwise reduce the obligation to comply fully with statutory notice requirements.'"[3]

On January 7, 2016, Appellants filed a notice of appeal from the tribal court's decision with this Court. In their notice of appeal, Appellants argued that the tribal court's ruling conflicts with

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[2] Linda and Stanley Lesperance v. Sault Ste. Marie Tribe of Chippewa Indians, Order, T-14-01, 3 (Dec. 15, 2015).
[3] *Id.* at 4 (citing *McCahan v. Brennan*, 822 N.W.2d 747, 492 Mich. 730 (2012)).

federal application of equitable tolling. On May 9, 2016, this Court heard oral argument on Appellants' appeal. Both parties were represented by counsel.

Jurisdiction and Standard of Review

Under Tribal Code Section 82.109, this Court possesses exclusive jurisdiction to review the decisions of the tribal court below. The appeal is properly before this Court because it is an appeal from a final decision of the tribal court.[4] Neither party appears to allege that the tribal court made a factual error. Because this appeal involves a conclusion of law, this Court's standard of review is *de novo*.[5]

Discussion

On appeal, there are three fundamental questions presented by this case. First, is tribal sovereign immunity jurisdictional? Second, if the question of tribal sovereign immunity goes to the statute of limitations, have Appellants met their burden under the existing law? And, finally, is there a constitutional due process concern raised by this case? Each of these questions is raised and answered in turn below.

Failure to Comply with Tribal Code

The tribal court below determined that Appellants failed to comply with the applicable Tribal Code provisions. Two Tribal Code provisions are particularly relevant to the present dispute. Tribal Code Section 85.106 speaks to torts claims arising from the Appellee's "obligation to repair and maintain public buildings under its control when open for use by the public," and, therefore, this provision is applicable to the present controversy. Tribal Code Section 85.106(2) provides:[6]

> As a condition to any recovery for injuries sustained by reason of any dangerous or defective public building, the injured person, within 120 days from the time the injury occurred, shall serve a notice on the Tribe of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant. The notice shall be served on the Tribal Secretary, 523 Ashmun Street, Sault Ste. Marie, Michigan 49783, either personally or by certified mail, return receipt requested.

Appellants do not argue that they complied with the exact requirements of Tribal Code Section 85.106(2), as they did not serve notice and the required information on the Tribal Secretary within 120 days of the incident. Although Appellants corresponded and e-mailed with a tribal

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[4] Tribal Code Section 82.111.

[5] Tribal Code Section 82.124(5).

[6] It is notable that the Tribe is not acting in a foreign or alien way by placing limitations on when such torts claims against it can be brought. Other sovereigns place limitations on torts claims. For example, "[i]n order for a person to file a tort claim under the FTCA, it is required that he 1) give written notice of a claim sufficient to enable the agency to investigate the claim and 2) place a value (or 'sum certain') on the claim." Glarner v. United States of America, Department of Veterans Administration, 30 F.3d 697, 700 (1994) (citations omitted).

insurance representatives, Ms. Simi,[7] no claim for damages and accompanying documentation was presented to the Secretary of the Tribe until May 2, 2013, when Appellants' attorney submitted their claim. This was 752 days after the alleged incident, and more than 632 days past the 120 day notice period expressed in Tribal Code Section 85.106. Appellants argue that they substantially complied and make other legal assertions, which will be addressed below.

Tribal Code Section 85.104 addresses the extent of Appellee's waiver of sovereign immunity and consent to suit. Specifically, Tribal Code Section 85.104(1) provides:

> The sovereign immunity of the Tribe is hereby waived for tort claims brought in accordance with this Chapter. This waiver is subject to all of the restrictions, limitations and procedures set forth in this Chapter. This Chapter is to be strictly construed, and all procedures, restrictions and limitations are to be adhered to strictly. No waiver of any kind is made beyond the scope or outside the limitations and restrictions of this Chapter.

The Tribal Code therefore very clearly delineates when tribal sovereign immunity is waived for torts claims involving tribal buildings, Tribal Code Section 85.106, and that such a waiver is to be strictly construed and limited to the restrictions and limitations spelled out in the Code. By way of analogy, the Tribe's desire to strictly construe its waiver of sovereign immunity appears to be consistent with how the Michigan Supreme Court has read the State of Michigan's tort liability. In *Robinson v. City of Detroit,* the Michigan Supreme Court held that "Michigan strictly construes statutes imposing liability on the state in derogation of the common-law rule of sovereign immunity. ...This Court has repeatedly acknowledged that governmental immunity legislation 'evidences a clear legislative judgment that public and private tortfeasors should be treated differently.'"[8] So, such a strict construction is not "foreign" or "alien" to Appellants.

Read together, it appears that Appellee only waives its sovereign immunity under the specific conditions laid forth under Tribal Code Section 85.106, and that the Code does not make allowance for "substantial compliance." Based on a reading of the Tribal Code, therefore, it appears that the Tribal Court's decision was correct. However, as mentioned above, Appellants make additional arguments, which will be considered below.

Tribal Sovereign Immunity

Before considering Appellants additional legal arguments, however, it is helpful to start with a basic understanding of tribal sovereign immunity, as the doctrine is at the heart of this case. As the U.S. Supreme Court explained, tribal sovereign immunity "is a necessary corollary to Indian sovereignty and self-governance."[9] The Sault Ste. Marie Tribe of Chippewa Indians is a federally recognized sovereign Tribe.[10] Since 1977, the U.S. Supreme Court has considered the scope of tribal sovereign immunity several times, and repeatedly upheld the doctrine.[11] Most

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[7] The Tribe's Secretary is Joanne Carr, and not Patti Simi.
[8] 613 N.W.2d 307, 318 (2000).
[9] Three Affiliated Tribe of the Ft. Berthold Reservation v. Wold Eng'g, P.C., 476 U.S. 877, 890 (1986).
[10] 81 Fed. Reg. 26826, 26829 (May 4, 2016).
[11] *See e.g.* C&L Enters. v. Citizen Band of Potawatomi Indian Tribe, 532 U.S. 411 (2001); Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751 (1998); Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe, 498 U.S. 505

recently, the Court considered whether tribal sovereign immunity applied to activities of a tribe beyond its reservation in *Michigan v. Bay Mills Indian Community*, 572 U.S. __ (2014), and it again upheld the application of tribal sovereign immunity in that case. Tribes may waive their sovereign immunity if done so explicitly, but the waiver is limited to the purpose for which the tribe agrees to waive its immunity.[12] As a result, courts have consistently held that an unequivocal, express waiver of tribal sovereign immunity must exist before a court can exercise jurisdiction over a tribe.[13] The U.S. Supreme Court has repeatedly indicated that Congress is the governmental branch that should determine when to abrogate tribal sovereign immunity, as Congress is in a better position "to weigh and accommodate the competing policy concerns and reliance interests."[14]

Tribal sovereign immunity applies both to claims for damages, as well as claims for injunctive and declaratory relief.[15] Following the Court's decision in *Kiowa Tribe v. Manufacturing Technologies, Inc.*, whether the tribe is engaged in a commercial activity is irrelevant in determining the application of tribal sovereign immunity.[16] The Court indicated that its decision in *Ex Parte Young* can extend to the activities of individual tribal officials under the appropriate circumstances.[17] Such claims, however, would be barred unless the tribal officials' activities were not colorably within the authority delegated by the tribe.[18]

In cases involving tort victims, the U.S. Supreme Court has expressed concern that, where victims are unaware that they are dealing with a tribe, they could be severely injured by the application of tribal sovereign immunity. In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, the Court explained that "[i]n this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims."[19] Despite these concerns, however, the Court still ultimately decided that Congress should be the entity to determine when tribal sovereign immunity is waived.

The Court affirmed this decision to defer to Congress in *Michigan v. Bay Mills Indian Community*.[20] However, in footnote 8 of the Court's decision, the Court explained:

(1991); Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C., 476 U.S. 877 (1986); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Puyallup Tribe v. Dep't Game, 433 U.S. 165 (1977).

[12] Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe, 498 U.S. 505, 509-510 (1991); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); United States v. United States Fidelity & Guaranty Company, 309 U.S. 506 (1940).

[13] Puyallup Tribe v. Washington Department of Game, 433 U.S. 165, 172-173 (1977); Maynard v. Narragansett Indian Tribe, 984 F.2d 14 (1st Cir. 1993); Shermoen v. United States, 982 F.2d 1312 (9th Cir. 1992), *cert. denied* 509 U.S. 903 (1993); Lincoln v. Saginaw Chippewa Indian Tribe of Michigan, 967 F.Supp. 966 (E.D. Mich 1997), *aff'd* 156 F.3d 1230; and Cameron v. Bay Mills Indian Community, 843 F. Supp. 334 (W.D. Mich. 1994).

[14] Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 759 (1998).

[15] *See e.g.* Imperial Granite Co. v. Pala Band of Mission Indians, 940 F.2d 1269, 1271 (9th Cir. 1991).

[16] 523 U.S. 751 (1998).

[17] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978); Michigan v. Bay Mills Indian Community, 134 S.Ct. 2024 (2014).

[18] *See e.g.* Burrell v. Armijo, 603 F.3d 825, 832-834 (10th Cir. 2010).

[19] Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 758 (1998).

[20] 134 S.Ct. 2024 (2014).

> Adhering to *stare decisis* is particularly appropriate here given that the State, as we have shown, has many alternative remedies: It has no need to sue the Tribe to right the wrong it alleges. … We need not consider whether the situation would be different if no alternative remedies were available.[21]

In *Michigan v. Bay Mills Indian Community*, the Court determined that the State of Michigan had several options available to it that would allow it to seek appropriate recourse without the extreme remedy of waiving tribal sovereign immunity. For example, as is relevant to this case, the Court explained that "Michigan could bring suit against tribal officials or employees (rather than the Tribe itself) …tribal immunity does not bar such a suit for injunctive relieve against *individuals*, including tribal officers, responsible for unlawful conduct."[22]

The foregoing overview of tribal sovereign immunity is helpful to the determination of this matter for several reasons. First, Appellee clearly possesses tribal sovereign immunity as a federally recognized Tribe, and the U.S. Supreme Court has consistently reaffirmed tribal sovereign immunity, as recently as 2014. Second, Appellants do not argue that Congress has waived Appellee's sovereign immunity, and, therefore, the Court will focus on the extent of Appellee's waiver of its sovereign immunity. Absent an express waiver of tribal sovereign immunity, the doctrine applies.

And, finally, this is not a case where this Court should decline to apply tribal sovereign immunity because torts victims are involved. First, unlike in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* and *Michigan v. Bay Mills Indian Community*, this is not a case where Appellee has declined to waive its sovereign immunity. Tribal Code Section 85.106 waives the Tribe's sovereign immunity in torts claims, when the requirements of that Code provision are met. Accordingly, Appellants had the opportunity to avail themselves of a remedy, but failed to follow the appropriate steps to do so, as discussed above. Additionally, even if it were determined that the rationale of *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* and *Michigan v. Bay Mills Indian Community* should apply, the U.S. Supreme Court has repeatedly emphasized that it will defer to Congress, and Congress has, to date, declined to waive tribal sovereign immunity in cases involving torts claimants. Further, unlike the situation envisioned by the Court in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, the present situation is not one where the Appellants were unaware that they were dealing with a Tribe. The record, as Appellants themselves concede, is replete with instances where Appellants interacted with the Tribe's Insurance Department prior to expiration of the 120 day notice period required under Tribal Code. And, finally, like the State of Michigan in *Michigan v. Bay Mills Indian Community*, this is not a case where Appellants were without other recourse. First, as already mentioned, they could have complied with the 120 day notice requirement under the Tribal Code. Second, as suggested in *Michigan v. Bay Mills Indian Community*, they could have brought their claims against individual officials of the Tribe. And, finally, given the lack of separation of powers within the Tribe, Appellants are welcome to appeal to the Tribe's Board of Directors for compensation. Accordingly, although this matter involves a tort claim, it does not appear to be a situation where tribal sovereign immunity should be waived to accommodate the claim.

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[21] *Id.* at n. 8.
[22] *Id.* at 13 (citation omitted).

Tribal Sovereign Immunity is a Jurisdictional Question

As to the specific arguments made by the parties in their briefs and at oral argument, the Court begins with the question of whether sovereign immunity is a jurisdictional question.[23] If yes, then, the tribal court's determination that summary judgment was appropriate given the court's lack of jurisdiction should be upheld. If no, then, Appellants may be correct that summary judgment was not appropriate. Specifically, Appellants argue that failure to give pre-suit notification was not jurisdictional and, as a result, dismissal may be inappropriate.

As an initial starting point, the parties are reminded that the Tribe has developed a hierarchy of laws applicable to disputes. At Tribal Code Section 81.105, the Code explains that:

> (1) In all civil cases the Tribal Court shall apply the laws of the Tribe, any laws of the United States that may apply,
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> (2) In the absence of applicable federal or tribal law, the law of the State of Michigan.
>
> (3) The Tribal Court shall apply the law of any jurisdiction which the parties have agreed upon in a choice of law provision of a contract.

Tribal law therefore specifies that this Court must consider tribal and federal law before turning to the law of the State of Michigan.

As described above, the Tribal Code treats the question of whether tribal sovereign immunity applies as a jurisdictional question. This conclusion is further buttressed by Tribal Code Section 81.103, which specifies that "[t]he Tribal Court shall have jurisdiction of actions: (1) Except as otherwise provided by federal law and unless waived in accordance with Tribal Code Chapter 44, where the defendant is: (a) The Sault Ste. Marie Tribe of Chippewa Indians. ...." (emphasis added). This is further evidence that tribal law treats the application of tribal sovereign immunity as a jurisdictional question. Accordingly, on the basis of tribal law alone, this Court concludes that the waiver of sovereign immunity is jurisdictional and there is no need to turn to the laws of other sovereigns.

However, even if the Tribe's laws were not clear on this point, tribal law from other tribes is also helpful in determining questions of tribal law.[24] Accordingly, this Court, on occasion, will take into consideration the decisions of other tribal courts. In this context, *Nguyen v. Spirit Mountain Casino, et al.* from the Tribal Court of the Confederated Tribes of the Grand Ronde Community of Oregon is helpful, as the tribal court there dealt with arguments very similar to the ones presented here.[25] In *Nguyen*, the plaintiff slipped, fell, and was injured in the bathroom of a tribal casino. As a result of injuries sustained, she brought claims against the Spirit Mountain

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[23] Note that the primary issue facing the Court is not whether Appellee waived its tribal sovereignty at all, but whether Appellants failure to comply with the requirements of waiving tribal sovereign immunity under Tribal Code Section 85.106 is a jurisdictional bar precluding their claim. Appellants cite *Hudson v. Hoh Indian Tribe*, HOH-CIV-4/91-015 (May 28, 1992) to support their assertion that tribal sovereign immunity has been waived. This case, however, dealt with whether or not the Tribe had even waived its sovereign immunity, not whether waivers of tribal sovereign immunity present jurisdictional questions. And, therefore, this case is not applicable to the present matter.

[24] Tribal Code Section 81.105(2).

[25] C-04-06-022 (Nov. 1, 2004).

Casino, Spirit Mountain Gaming, Inc. (SMGII), the Grand Ronde Gaming Commission, and the Confederated Tribes of the Grand Ronde Community of Oregon. The tribal court dismissed the claims against all four defendants, but for different reasons. For purposes of the present matter, the tribal court's analysis is helpful in regard to plaintiff's claim that, even though she did not meet the requirements of the tribal code when serving SMGII, she substantially complied with the notice requirements under Oregon by giving notice to agents of SMGII.[26] In this regard, her arguments are very similar to the arguments presented by Appellants, as discussed below, who argued that they substantially complied as required under Michigan law. The tribal court, however, rejected these arguments, explaining that "[p]rinciples of agency and of imputed knowledge do not apply here because the [tribal] Ordinance is clear, more specific, and more demanding."[27] "The Tribal Tort Claims Ordinance makes the giving of timely and proper notice of the claim a prerequisite to the filing of any Court action."[28] Further, the tribal court explains that:

> Those provisions [tribal ordinance] could not be much clearer or more emphatic. Giving timely written notice under the Ordinance is an absolute prerequisite to bringing a tort case in Tribal Court. ... There is nothing ambiguous or uncertain about that requirement and, by the Ordinance's own terms, the Court has no authority or discretion to overlook a litigant's failure to comply with the notice requirements. ... if there were any ambiguity about the notice provisions, the Ordinance also emphasizes that those provisions are part of a limited waiver of sovereign immunity that is to be strictly and narrowly construed."[29]

Like the present matter, in *Nguyen*, the Confederated Tribes of the Grand Ronde Community of Oregon had in place specific notification requirements that had to be complied with before tribal sovereign immunity would be waived. The plaintiff in *Nguyen* failed to comply with these requirements, and, instead, argued substantial compliance under state and federal law. The tribal court, however, rejected these arguments given the specificity of the tribal law and requirement that the tribal sovereign immunity provision was to be narrowly construed. In other words, the Confederated Tribes of the Grand Ronde Community of Oregon has tribal ordinance provisions very similar to the Sault Ste. Marie Tribal of Chippewa Indians' Tribal Code Sections 85.104 and 85.106, and the tribal court there treated the waiver of tribal sovereign immunity as a jurisdictional issue. Therefore, the tribal law of other tribes supports the conclusion that whether there is a waiver of tribal sovereign immunity is a jurisdictional question.

In addition to tribal law, this Court can also consider federal law before the law of the State of Michigan under Tribal Code Section 81.105(2). As mentioned above, several federal courts have held that an express waiver of sovereign immunity must exist before a court can exercise jurisdiction over a tribe.[30] Further, in *Lincoln v. Saginaw Chippewa Indian Tribe of Michigan*,

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[26] *Id.* at 2-3.
[27] *Id.* at 3-4.
[28] *Id.* at 4.
[29] *Id.* at 5.
[30] Puyallup Tribe v. Washington Department of Game, 433 U.S. 165, 172-173 (1977); Maynard v. Narragansett Indian Tribe, 984 F.2d 14 (1st Cir. 1993); Shermoen v. United States, 982 F.2d 1312 (9th Cir. 1992), *cert. denied* 509 U.S. 903 (1993); Lincoln v. Saginaw Chippewa Indian Tribe of Michigan, 967 F.Supp. 966 (E.D. Mich 1997), *aff'd* 156 F.3d 1230; and Cameron v. Bay Mills Indian Community, 843 F. Supp. 334 (W.D. Mich. 1994).

the U.S. District Court for the Eastern District of Michigan held that, where the Tribe was entitled to sovereign immunity, the federal district court lacked jurisdiction to hear the case.[31] Notably, the U.S. Court of Appeals for the Sixth Circuit affirmed the Eastern District of Michigan's decision.[32]

Further, even federal decisions relied on by Appellants support this conclusion. In *United States v. Kwai Fun Wong*, the Supreme Court ultimately found that the statute of limitations in the Federal Tort Claims Act was not jurisdictional, because the language in the Act was "mundane" and there was no evidence to suggest that Congress intended anything other than a time bar.[33] However, the Court explained that an alternative result would be reached should Congress use more extraordinary language and speak to the jurisdiction of the courts.[34] Under *Kwai Fun Wong*, then, a time bar may be jurisdictional where the language is extraordinary and the jurisdiction of courts is considered. This is exactly the case in Tribal Code Section 85.104. At Tribal Code Section 85.104(1), the language is emphatic that no deviations shall be allowed, as the "Chapter is to be strictly construed" and "no waiver of any kind" is allowed. Also, Section 85.104(2) goes on to specify that "[t]he Tribal Court shall have jurisdiction over all claims arising under this Chapter." The Code therefore uses both exceptional, emphatic language and speaks specifically to the tribal court's jurisdiction, which, under *Kwai Fun Wong* supports the conclusion that this code provision is jurisdictional. Accordingly, federal law supports the conclusion that the application of tribal sovereign immunity is a jurisdictional question.

Based on the foregoing, both tribal law and federal law support a determination that whether or not tribal sovereign immunity applies is a jurisdictional question. Appellants, however, in their brief and at oral argument, rely primarily on the law of the State of Michigan in arguing that the provisions at Tribal Code Section 85.104 constitute notice and not jurisdiction provisions. Specifically, Appellants argue that "Appellee's argument that its statute of limitations provisions are jurisdictional indicates its failure to appreciate the differences between a statute of limitations and a pre-suit notice provision."[35] To support this conclusion, Appellants rely on several decisions from Michigan courts.[36]

Appellants' reliance on these cases fails for several reasons. First, Appellants do not provide any explanation for why, given the requirements of Tribal Code Section 81.105, this Court should consider the law of the State of Michigan before tribal and federal law, which taken together clearly demonstrate that the application of tribal sovereign immunity is a jurisdictional question.

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[31] 967 F.Supp. 966, 966 (1997) ("Defendant is correct in asserting that this court lacks jurisdiction to hear this dispute because the Tribe is entitled to sovereign immunity.").

[32] Lincoln v. Saginaw Chippewa Indian Tribe of Michigan, 156 F.3d 1230 (6th Cir. 1998).

[33] 135 S.Ct. 1625, 1632 (2015). This decision is not binding on this Court, as the matters raised did not discussion tribal sovereign immunity nor tribes and the Court intended that the decision be limited to the federal government. However, the analysis presented in the decision is still helpful in deciding the present controversy.

[34] *Id.*

[35] Lesperance v. Sault Ste. Marie Tribe of Chippewa Indians, Plaintiff-Appellant's Reply Brief, APP-16-01, 5 (March 21, 2016).

[36] Dozier v. State Farm Mutual Automobile Insurance Comp., 95 Mich. App. 121 (1980); Bigelow v. Walraven, 392 Mich. 566 (1974); Davis v. Farmers Ins. Group, 86 Mich. App. 45 (1978); Brown v. Owosso, 126 Mich. 91 (1901); Roberts v. Mecosta County General Hospital, 240 Mich. App. 175 (2000); Germaine v. City of Muskegon, 105 Mich. 213 (1895); Neal v. Oakwood Hospital Corp., 226 Mich. App. 701 (1997).

Second, none of the Michigan cases relied on by Appellants speak to the application of tribal sovereign immunity. *Dozier v. State Farm Mutual Automobile Insurance Company,*[37] *Davis v. Farmers Insurance Group of Companies,*[38] *Roberts v. Mecosta County General Hospital,*[39] *Neal v. Oakwood Hospital Corp.,*[40] and *DeCosta v. Gossage*[41] all involved private companies or individuals (two insurance companies, two hospitals, and an eye doctor and his clinic respectively), not sovereigns, and there is no discussion of tribal sovereign immunity in any of these cases. Further, even those cases cites by Appellants involving sovereigns (e.g. municipalities) failed to discuss whether the application of tribal sovereign immunity is a jurisdictional question.[42] Moreover, none of the Michigan cases relied on by Appellants involve interpretation of a tribal code provision or tribal sovereign immunity,[43] such as in the present matter. Like the plaintiff in *Nguyen*, Appellants fundamentally confuse what may be the requirements of state law with the requirements of tribal and federal law.

Appellants do not solely rely on the law of the State of Michigan, however, for this argument. Without providing any legal support for their conclusion, Appellants assert that "[t]he Tribe's argument that its Code requirement that the secretary be served with a notice of injury and claim is jurisdiction is not supported by case law and directly conflicts with the U.S. Supreme Court's decisions in Wong, Irwin, Glarner, and Perez."[44] *Glarner* is discussed at length below, and there is no reason to repeat that analysis here other than to say that the *Glarner* decision does not support Appellants' argument, as equitable tolling is not applicable to this case, and, even if it did, the *Glarner* factors do not apply in Appellants' favor. Similarly, the U.S. Supreme Court's decision in *Irwin* is of no assistance to Appellants here. First, the *Irwin* decision fails to discuss either tribal sovereign immunity or tribes.[45] Second, the *Irwin* Court repeatedly limits its holding to the federal government, and there is nothing in the opinion to suggest that the Court intended

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[37] 95 Mich. App. 121 (1980).
[38] 86 Mich. App. 45 (1978).
[39] 240 Mich. App. 175 (2000).
[40] 226 Mich. App. 701 (1997).
[41] 486 Mich. 116 (2010). The *DeCosta* case cites to a decision from the Florida Supreme Court, which Appellants also rely on – *Patry v. Capps*, 633 So.2d 9 (Fla. 1994). *Patry*, however, is a medical malpractice case that involves neither a tribe nor application of tribal sovereign immunity. As a result, the case is unhelpful to resolving the present matter.
[42] In *Bigelow v. Walraven*, the Supreme Court of Michigan considers default judgment requirements as opposed to statute of limitations, and not tribal sovereign immunity. 392 Mich. 566 (1974). Similarly, *Brown v. Owosso*, 126 Mich. 91 (1901) and *Germaine v. City of Muskegon*, 105 Mich. 213 (1895) do not involve tribes and fail to discuss whether tribal sovereign immunity is a jurisdictional question.
[43] The origins of tribal sovereignty differ from state or municipality sovereignty. And, therefore, even if Appellants had tried to argue that the rational of cases involving state sovereigns parallels case law involving tribal sovereignty, such an argument would not be persuasive. Unlike state sovereignty, "[t]he doctrine of tribal sovereign immunity is rooted in federal common law and reflects the federal Constitution's treatment of Indian tribes as governments in the Indian commerce clause." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 7.05[1][a] (Lexis Nexis 2012). For a discussion of the origins of tribal sovereignty and how tribes differ from states, see COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 4.01[1][a-b] (Lexis Nexis 2012). Also, the Supreme Court has generally held that the laws of the states have no force or effect in Indian country, unless Congress acts to allow for the application of state law. Worcester v. Georgia, 31 U.S. 515 (1832).
[44] Lesperance v. Sault Ste. Marie Tribe of Chippewa Indians, Plaintiff-Appellant's Reply Brief, APP-16-01, 10-11 (March 21, 2016).
[45] 498 U.S. 89 (1990).

the decision to be expanded to tribes.[46] Like in *Irwin*, the Court's analysis in *United States v. Kwai Fun Wong*, is not applicable to the present controversy, as the case does not address tribes or tribal sovereign immunity and its holding is limited to the federal government.[47] *Perez* was decided before the Court's decision in *Kwai Fun Wong*, so the Court's decision in *Kwai Fun Wong* would be preferable to *Perez*. Like *Kwai Fun Wong*, *Perez* is also not applicable to the present controversy given it does not apply to tribes or tribal sovereign immunity and the court only contemplated application to the federal government.[48] Also, unlike the present matter, the plaintiff in *Perez* filed a complaint in court before the applicable time period ran on her claim, but the claim was defective. Here, Appellants failed to file any claim until almost 2 years past the applicable time period. And, finally, Appellants also cite *Erickson v. Pollack*, but, this is a case involving a medical malpractice suit against a private entity and the case does not discuss tribes, tribal sovereign immunity nor application to sovereign entities.[49] As a result, none of the federal cases relied on by Appellants are applicable to the present controversy. Additionally, even if this Court were to find these cases persuasive, it would defer to the more specific federal cases discussed above that speak directly to waivers of tribal sovereign immunity and tribal law.

For the foregoing reasons, Appellants' argument that waiver of tribal sovereign immunity is not a jurisdictional question is rejected. The tribal court must have a valid waiver of tribal sovereign immunity before it may assert jurisdiction over a matter, and, in the present matter, there was no waiver of tribal sovereign immunity given Appellants failed to comply with Tribal Code Section 85.106.

Equitable Tolling is Not Applicable to the Present Case

Appellants also argue that the 120 day time limit for filing a claim against the Tribe under Tribal Code Section 85.106(2) should be equitably tolled to allow their claim. For this argument, Appellants primarily rely on *Glarner v. United States of America, Department of Veterans Administration*, 30 F.3d 697 (6th Cir. 1994).

In *Glarner*, a veteran filed a medical malpractice action under the Federal Tort Claim Act (FTCA) against the Veterans Administration (VA), but his initial claim failed to meet the filing requirements under the FTCA. He brought his first claim in 1989, but did not correctly file per the applicable regulations until 1992 and the statute of limitations under the FTCA is two years. The U.S. Court of Appeals for the Sixth Circuit held that equitable tolling applied, because the VA failed in its duty under 38 C.F.R. § 14.604(a) to provide Glarner with the required form to be completed to file a FTCA action. Glarner was not notified of the requirement to fill out the form until May 1992, and, therefore, the court concluded that the two year statute of limitations started to run at that time and he correctly filed within the tolled time period when he submitted the correct form in November 1992. The court identified five factors that should apply when deciding whether to apply the doctrine of equitable tolling: "(1) lack of actual notice of the filing requirement; (2) lack of constructive knowledge of the filing requirement; (3) diligence in

[46] *Id.* at 95-96.
[47] 135 S.Ct. 1625, 1633, 1638 (2015).
[48] 167 F.3d 913 (5th Cir. 1999).
[49] 110 F.Supp.2d 582 (E.D. Mich. 2000).

pursuing one's rights; (4) absence of prejudice to the defendant; and (5) a plaintiff's reasonableness in remaining ignorant of the notice requirement."[50]

Appellants argue that they:

> had lack of actual notice of the filing requirement, lack of constructive knowledge of the filing requirement, diligently pursued their rights to settle with the Tribe by filing a notice and claim within a timely manner, and no prejudice whatsoever has been suggested on the part of the Tribe by the Lesperance's [sic] filing of their notice and claim, not with their Tribal Secretary, but with the Tribe's insurance employee. Finally, the Lesperances remained ignorant of the notice requirement after placing their trust in the Tribe's customer service representative, whose promises were not fulfilled.[51]

Despite Appellants' arguments to the contrary, however, application of the equitable tolling doctrine is not appropriate in this case for several reasons. First, the *Glarner* case involves application of the doctrine of equitable tolling to the FTCA, not to a Tribe or a tribal waiver of sovereign immunity. Appellants assert that Appellee has agreed to follow federal law on this point, but fail to provide any support for this statement.[52] It is unclear whether Appellants believe the FTCA applies to Appellee, but enactment of Tribal Code Section 85.104 and 85.106 directly negate the contention that Appellee has agreed to be bound by the FTCA or federal law on this point. As discussed earlier and repeatedly upheld by the U.S. Supreme Court,[53] federally recognized tribes, such as Appellee, retain the right to determine whether and when to waive their sovereign immunity, unless Congress explicitly acts to waive tribal sovereign immunity. Appellants do not argue the Congress waived Appellee's tribal sovereign immunity by applying the provisions of the FTCA or doctrine of equitable tolling to Appellee. Accordingly, the *Glarner* decision is inapplicable to the present controversy.

The *Glarner* decision is also distinguishable from the present controversy, as it did not involve a jurisdictional question. As discussed above, the question of whether a tribe's sovereign immunity is waived, is a jurisdictional question. However, in *Glarner*, the court relied on

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[50] 30 F.3d 697, 702 (6th Cir. 1994).

[51] Lesperance v. Sault Ste. Marie Tribe of Chippewa Indians, Plaintiff-Appellant's Reply Brief, APP-16-01, 13 (March 21, 2016).

[52] *Id.* ("Federal law, which the Appellee has agreed to follow, does not interpret nor suggest this Court follow the argument and ruling of the lower court."). Appellants may be confused by the reference to federal law in Tribal Code Section 81.105 and think that this reference means all federal law is applicable to Appellee. This interpretation of Tribal Code Section 81.105 would be wrong. First, the reference to federal law is to "any laws of the United States that may apply." This refers to federal law applicable to tribes. There is nothing in the federal cases cited by Appellants that the federal courts intended for their decisions to apply to tribes. An alternative reading would be directly contrary to the holding of the U.S. Supreme Court in *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998) and *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (2014) that waivers of tribal sovereign immunity by the federal government must come from Congress and be explicit. And, finally, Tribal Code Section 81.105 specifies that the laws of the Tribe should be applied first, and the tribal code, as discussed below, very specifically forbids waivers from the code provisions when considering tribal sovereignty under Tribal Code Section 85.104.

[53] Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751 (1998); Michigan v. Bay Mills Indian Community, 134 S.Ct. 2024 (2014).

precedent holding that the statute of limitations provision of the FTCA was not jurisdictional.[54] The *Glarner* case therefore is inapplicable here, as it addresses neither tribal sovereign immunity nor a jurisdictional question.

Further, the court's rationale for applying the doctrine of equitable tolling in *Glarner* is not applicable in the present matter. The court in *Glarner* explained that the application of the doctrine was appropriate under the facts presented in that case because "the VA failed in a legal duty to Glarner. The VA received Glarner's negligence complaint while he was still a patient at the hospital. According to 38 C.F.R. § 14.604(a), it had a duty to provide Glarner with an SF95...."[55] Unlike the duty of the VA under 38 C.F.R. § 14.604(a) to veterans of the United States, Appellants do not argue that Appellee had any legal duty under tribal law to provide them a copy of specific filing requirements (although one is available online). As a result, the fact that led the court to apply the doctrine of equitable tolling in *Glarner*, the existence of a legal duty under 38 C.F.R. § 14.604(a), does not apply in this case.

Next, even if this Court were to determine that the doctrine of equitable tolling may be applied to situations such as the one presented by this case, the five factors laid out by the Sixth Circuit must be met before application of the doctrine is warranted. Appellants assert that they meet all five factors, but they fail to provide any support for these conclusions. Given Appellants are arguing for an expansion of tribal law to include such an extreme equitable remedy that is in direct contravention to Tribal Code Section 85.104, it is their burden to demonstrate that they have met the requirements of such an expansion. As to the first two factors, Appellants assert that they lacked both actual and constructive knowledge of the filing requirement under Tribal Code Section 85.104. The Tribal Code, however, is available online to anyone at http://www.saulttribe.com/government/tribal-code. Appellants fail to make any argument as to why they were unable to access the tribal code requirements. In *Glarner*, Mr. Glarner actually did submit a claim to the VA, but failed to use the correct form, but, here, Appellants failed to ever actually make a claim until one was submitted by their attorney years later. There is no argument that they were not able to access the tribal code. In fact, based on the record, it appears that they made no such effort to review the tribal code, which goes to the fifth *Glarner* factor. Given the tribal code was publicly and easily available to Appellants online, it seems unreasonable for them to remain ignorant of the requirements of Tribal Code Section 85.106. Additionally, as to the third *Glarner* factor, there is nothing in the record to indicate that Appellants inquired as to whether their complaint had been correctly filed with the Insurance Department, rather they presumed as much. The record suggests that they were not diligent in pursuing their claim against Appellee. And, finally, the potential prejudice to Appellee is substantial given it has now been years since the accident leading to the present case. It may be exceptionally difficult, if not impossible, for Appellee to adequately defend itself given the loss of potential evidence (e.g. witness testimony, pictures of the allegedly defective area, etc.). For these reasons, Appellants have failed to demonstrate that the *Glarner* factors are applicable to the present controversy.

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[54] 30 F.3d at 701 (citing *Schmidt v. United States*, 498 U.S. 1077, 111 S.Ct. 944, 112 L.Ed. 2d 1033 (1991), *vacating* 901 F.2d 680 (8th Cir. 1990).

[55] *Id. See also* Perez v. United States, 167 F.3d 913, 918 (1999) (holding in part that application of the doctrine of equitable tolling was appropriate given the National Guard failed to comply with its statutory duty to provide instructions on how to bring a claim and the necessary forms to bring such a claim).

And, again, even if the doctrine of equitable tolling were applicable in cases such as the present controversy, a presumption of application of the doctrine can be rebutted. In *Glarner*, the court acknowledged a case, *Dean v. Veterans Admin. Regional Office*, 943 F.2d 667 (6th Cir. 1991), *vacated and remanded on other grounds*, 503 U.S. 902, 112 S.Ct. 1255, 117 L.Ed. 2d 486 (1992), that found that 5 U.S.C. § 7703(b)(2) could not be equitably tolled because "in enacting § 7703(b)(2), Congress rebutted the presumption of equitable tolling [based on the specific language of that statute]."[56] Similarly, Appellee rebutted any presumption that the doctrine of equitable tolling applies by enacting Tribal Code Section 85.104, which provides

> The sovereign immunity of the Tribe is hereby waived for tort claims brought in accordance with this Chapter. This waiver is subject to all of the restrictions, limitations and procedures set forth in this Chapter. This Chapter is to be **strictly construed**, and all procedures, restrictions and limitations are to be adhered to strictly. **No waiver of any kind** is made beyond the scope or outside the limitations and restrictions of this Chapter. (emphasis added)

By stating that the waiver of tribal sovereign immunity is to be strictly construed and no waiver of any kind is allowed, Tribal Code Section 85.104 precludes application of the doctrine of equitable tolling, which would expand the scope of Tribal Code Section 85.106 beyond the 120 day limit. Just like Congress' actions in *Dean*, here the Tribe has acted through Tribal Code Section 85.104 to rebut any presumption that the doctrine of equitable tolling should apply.

And, finally, even if this Court were to find that the doctrine of equitable tolling applied, the *Glarner* factors had been met, and the Tribe had not rebutted any presumption of equitable tolling, Appellants' arguments still would not have been persuasive. In *Glarner*, the court explained that the statute of limitations remained tolled until Mr. Glarner became aware of the need to file the specific form, SF95.[57] Accordingly, reading *Glarner* in the light most favorable to Appellants, they should have known of the need to file a complaint in compliance with Tribal Code Section 85.106 by May 29, 2012 at the absolute latest. This was the date that their attorney notified Ms. Simi that he represented Appellants.[58] An attorney can certainly be expected to know the applicable legal requirements, and, as their representative, Mr. Baron's knowledge can be imputed to Appellants as of May 29, 2012.[59] Therefore, even assuming equitable tolling did apply, the 120 day time period started to run as of May 29, 2012, and would have expired around September 18, 2012. Appellants, however, did not supply a claim for damages and accompanying documentation to the Secretary of the Tribe per the requirements of Tribal Code Section 85.106 until May 3, 2013,[60] almost one full year (339 days) or almost 3 times the 120

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[56] 30 F.3d at 701. *See also* Perez v. United States, 167 F.3d 913, 916 (1999) (explaining that "the availability of equitable tolling is a question of congressional intent."). Therefore, in determining whether a court should apply the doctrine of equitable tolling, it must consider the intent of the applicable legislative body. Via Tribal Code Section 85.104, the Tribe's legislative body, the Board of Directors, clearly evidenced an intent that the tribal courts not deviate from the requirements laid out in Chapter 85.

[57] *Id.* at 702.

[58] *Lesperance v. Sault Ste. Marie Tribe of Chippewa Indians*, Defendant-Appellee's Brief on Appeal, APP-16-01, 1 (Feb. 24, 2016) (citing Affidavit of Patti Simi at ¶¶ 7-10).

[59] This is consistent with general principles of American law, as "each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" Link v. Wabash Co., 370 U.S. 626, 634 (1962) (quoting Smith v. Ayer, 101 U.S. 320, 326 (1880)).

[60] *Id.* (citing Affidavit of Patti Simi at ¶ 11; May 2, 2013 Claim for Damages).

day period after they had knowledge of the filing requirements. As a result, even using the most liberal of interpretations in favor of Appellants, they failed to meet the filing requirements of Tribal Code 85.106 even assuming the doctrine of equitable tolling applied to this matter (which it does not).

This conclusion is consistent with the U.S. Supreme Court's analysis in *Irwin v. Department of Veterans Affairs*.[61] In *Irwin*, a former employee of the VA claimed he was wrongfully terminated because of his race and physical handicap in violation of Title VII of the Civil Rights Act of 1964. The VA dismissed his claim and the Equal Employment Opportunity Commission (EEOC) affirmed the VA's decision. The EEOC sent both the plaintiff and his lawyer a letter explaining that he had 30 days to appeal the decision. At the time the EEOC letter was received at the attorney's office, the attorney was out of the country. As a result, the appeal of the EEOC's decision was ultimately filed 44 days after notice was received by the attorney's office (or 14 days late). The plaintiff argued that the failure to file in a timely manner should be excused because his lawyer was out of the country at the time that his office received the notice. Ultimately, however, the U.S. Supreme Court determined that "the principles of equitable tolling ... do not extend to what is at best a garden variety claim of excusable neglect."[62] The Court reached this conclusion by explaining that "[f]ederal courts have typically extended equitable relief only sparingly," and, "[w]e [the Supreme Court] have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."[63] Similar to *Irwin*, the present controversy involves a situation where Appellants failed to "exercise due diligence in preserving" their legal rights, as their attorney did not file under Tribal Code Section 85.106 within 120 days of taking on the Lesperances as clients. This is, therefore, "a garden variety claim of excusable neglect," which does not justify the extreme remedy of applying the doctrine of equitable tolling.

For the foregoing reasons, Appellants argument that the doctrine of equitable tolling should apply to expand the period of filing a proper claim until Tribal Code Section 85.106 is rejected.

Appellants have failed to articulate a Persuasive Argument Regarding Constitutional Due Process

Finally, Appellants argue that principles of equitable due process should apply to the present matter allowing them to bring their claim. As explained, below, however, this argument is unpersuasive.

First, Appellee argues that Appellants' argument regarding due process should be rejected for failure to raise it before the trial court below. Tribal Code Section 82.125 provides, in relevant part:

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[61] 498 U.S. 89 (1990). As explained above, *Irwin* is not binding on this Court given the U.S. Supreme Court limited it's holding to the federal government, and the case did not involve tribal sovereign immunity. However, the *Irwin* Court's holding on this point is helpful.

[62] *Id.* at 458.

[63] *Id.* at 457-458. *See also* Perez v. United States, 167 F.3d 913 (1999) (holding that the plaintiff was actively pursuing her claim, as she filed a complaint against the defendant before the expiration of the applicable time period even though the complaint was defective). In the present controversy, Appellants failed to exercise due diligence by not filing any complaint with a court until well after the expiration of the 120 day period (under any reading of the applicable time period).

In deciding an appeal, the Court of Appeals shall consider issues in accordance with the following requirements:

(1) Unless a miscarriage of justice would result, the Court of Appeals will not consider issues that were not raised before the Tribal Court.

(2) An issue raised before the Tribal Court, but not argued either by brief or orally, shall not be reviewed by the Court of Appeals....

As Appellee points out, this Tribal Code provision is consistent with the decisions of other federal and state courts, which have held that issues not properly preserved on appeal will not be considered.[64]

Appellants have certainly used the term "due process" in front of this Court and in their briefs. However, based on the briefs and oral arguments, it is unclear what they mean by equitable due process, what cases they rely on for this argument, or even how the argument is applicable to the present case. In their final reply brief, they assert that they have previously made this argument, but, in doing so, rely mostly on cases used for their equitable tolling argument and two others that do not discuss the contours of equitable due process. Accordingly, this Court determines that any argument as to the application of equitable due process is unclear at best, and certainly not justified in the briefs or oral argument with persuasive legal analysis.

Even assuming, however, that Appellants had successfully preserved this argument as to due process, their argument as to equitable due process is unavailing. First, Appellants primarily rely on *Irwin, Glarner, Perez,* and *Kwai Fun Wong*, to support their equitable due process argument.[65] As discussed above, these cases are not applicable to the present matter. Moreover, these cases do not discuss equitable due process, but rather elaborate on the principle of equitable tolling. Appellants also cite to *Hughes v. United States of America*, 263 F.3d 272 (3rd Cir. 2001) and *Zipes v. Trans World Airlines*, 455 U.S. 385 (1982). Neither of these cases are helpful to the present controversy. *Hughes* focuses on equitable tolling and not equitable due process. Also, the case involves neither a tribe nor questions of tribal sovereign immunity. Similarly, *Zipes* does not involve either a tribe or tribal sovereign immunity, and, the passage relied on by Appellants in their brief actually focuses on the analysis in *Irwin*, which is discussed and rejected above. Accordingly, based on the case law relied on Appellants for this argument, it is unclear what Appellants mean by due process or how it is applicable to a tribe, such as Appellee, as none of the cases relied upon speak to either.

This Court could speculate that Appellants are trying to assert that they have been deprived of their due process rights. The Indian Civil Rights Act does apply the protections of the Due Process Amendment to tribes, but, due process as applied to tribes, may differ from due process under the U.S. Constitution.[66] Accordingly, even if Appellants had made a coherent argument, the cases relied upon at best describe federal protections, and not due process protections applicable to tribes through the Indian Civil Rights Act.

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[64] Armstrong v. City of Melvindale, 432 F.3d 695, 700 (6th Cir. 2006); Mitcham v. Detroit, 355 Mich. 182, 203 (1959).

[65] Lesperance v. Sault Ste. Marie Tribe of Chippewa Indians, APP-16-01, Plaintiff-Appellant's Reply Brief, 3-4 (March 21, 2016).

[66] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 14.03[2][b][iv] (Lexis Nexis 2012).

And, finally, Appellants fail to explain how they have been deprived of their due process rights. Tribal Code Section 85.106 provides them with a clear process to follow when pursuing this type of claim against Appellee. Accordingly, this is not a case where the Appellee has failed to provide a process.

For these reasons, Appellants argument as to equitable due process is rejected.

ORDER

For the foregoing reasons, the arguments of Appellants are rejected, and the tribal court's decision is affirmed.

It is SO ORDERED.