

POKAGON BAND OF POTAWATOMI INDIANS

TRIBAL COURT

TRENA JONES,
Plaintiff

Case No. 08-343-CV

-vs-

Honorable David M. Peterson

FOUR WINDS CASINO RESORT,
POKAGON BAND OF POTAWATOMI
INDIANS, GAMING ENTERPRISE
and/or POKAGON GAMING AUTHORITY,
a chartered instrumentality of the
Pokagon Band of Potawatomi Indians,
Defendants

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OPINION AND ORDER

Introduction

Plaintiff, a patron at Four Winds Casino, filed suit against numerous defendants alleging that she suffered serious injuries resulting from Defendants negligently failing to remove ice from the casino entrance and failed to provide an ingress that was safe resulting in a fall.

Basic Facts and Procedural Background

Plaintiff's Complaint alleging Defendants were negligent in their failure to remove ice from the Four Winds Casino entrance was filed August 29, 2008. The Complaint alleges that on February 29, 2008, Plaintiff fell and suffered serious permanent injuries.

Defendants filed their Answer to the Complaint on or about October 16, 2008, after being granted an extension of time within which to answer.

On December 2, 2008, a telephone status conference was held with the Court and both Plaintiff's and Defendants' attorneys and a Scheduling Order issued. An Amended Complaint and Answer were subsequently filed. Motions and briefs for summary disposition with corresponding response has been filed. Oral arguments have been held, the Court has read all the pleadings and performed independent research and files this Opinion and Order.

Applicable Law

Section 11 of the Tort Claims Ordinance provides as follows:

Any Claim brought under this Ordinance shall be determined by the Tribal Court in accordance with the law of the Band and the principles of law applicable to similar claims arising under the laws of the State of Michigan if not inconsistent with any express provision of this Ordinance or other laws of the Band.

Motion for Summary Disposition

Defendants have moved for summary disposition on three grounds:

1. The Pokagon Band neither possessed nor controlled the premises. At the hearing on the Defendants' motion both attorneys stipulated to dismiss Four Winds Casino and the Pokagon Band of Potawatomi Indians Gaming Enterprise leaving only the Pokagon Gaming Authority as a Defendant.
2. Plaintiff failed to comply with the notice requirement contained in Section 9 of the Pokagon Band of Potawatomi Indians Tort Claims Ordinance.

3. Plaintiff failed to file her claim within the 180-day statute of limitations contained in Section 10 of the Pokagon Band of Potawatomi Indians Tort Claims Ordinance.

Discussion and Analysis

1. Stipulation as to Parties.

Defendant Pokagon Band of Potawatomi Indians has moved for dismissal claiming it neither owned nor possessed the premises when the Plaintiff's alleged injuries occurred. The Affidavit of John Miller, the President and CEO of the Pokagon Gaming Authority declares that at the time of the alleged incident the Pokagon Band of Potawatomi Indians neither owned nor possessed the casino where Plaintiff allegedly fell.

The attorneys stipulated on the record in Open Court that the Four Winds Casino Resort and the Pokagon Band of Potawatomi Indians Gaming Enterprise shall be dismissed as party Defendants.

2. Pre-Suit Notice.

Section 9 of the Pokagon Band of Potawatomi Indians Tort Claims Ordinance provides as follows:

- A. No claim may be brought under this Ordinance unless written notice of the claim is served upon the Gaming Enterprise by certified mail, return receipt requested within 120 days after the claim accrues.
- B. The notice shall contain the following:
 1. The name and address of the claimant and the name and address of the claimant's attorney, if any;
 2. A concise statement of the factual basis of the Claim, including the date, time, place, and circumstances of the act, omission, or condition complained of;

3. The name of any Gaming Enterprise Employee involved, if known;
4. A concise statement of the nature and the extent of the Injury claimed to have been suffered;
5. A statement of the amount of monetary damages that is being requested;
6. When the Claim is one for death by negligent act or omission, the notice may be presented by the personal representative, surviving spouse, or next of kin of the deceased.

C. All Claims filed under this Ordinance must include proof of compliance with this section.

Plaintiff claims that the letter dated March 17, 2008, substantially complies with Section 9 above and that a liberal construction of the notice requirement is favored to avoid penalizing an inexperienced layman from a technical defect. Plaintiff relies on the Berrien County case of *Lawson v the City of Niles, 2009 MI-0112.142*.

The Defendants claim the notice has failed to provide the details necessary to constitute adequate notice. Specifically, Defendants assert that the letter does not contain the following: the time, location, circumstances or nature of injury, and is, therefore, defective.

The persuasive cases regarding notice requirements are *Rowland v Washtenaw County Road Commission, 477 Mich 197 (2007)* and *Marc Chambers v Wayne County Airport Authority, Court of Appeals unpublished June 5, 2008, No. 277900*.

The *Rowland* case basically provides and stands for the proposition that "...the court must enforce the statute as written regarding a straight forward clear unambiguous and not Constitutionally suspect notice requirement." The court quoted *Robertson v DaimlerChrysler Corp, 465 Mich 732, 748 (2002)*: "The legislature is presumed to have

intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written.” The *Rowland* court went on to say: “...The statute requires notice to be given as directed, and notice is adequate if it is served within 120 days and otherwise complies with the requirements of the statute, i.e. it specifies the exact location and nature of the defect, the injury sustained, and the names of the witnesses known at the time by the claimant, no matter how much prejudice is actually suffered. Conversely, the notice provision is not satisfied if notice is served more than 120 days after the accident even if there is no prejudice.”

In the *Rowland* case the plaintiff claimed the defendant was not prejudiced by an insufficient notice and the court ruled that even if the defendant was not prejudiced, the notice requirement must be met.

The unpublished *Chambers* case cited the *Rowland* case and held the plaintiff did not serve notice as required by the statute and whether the defendant was actually prejudiced by any failure to comply with the statutory notice requirement is immaterial to whether the claim is barred.

There can be no doubt that compliance with the Pokagon Tort Claims Ordinance notice provision is mandatory, and that failure to do so precludes the Plaintiff from recovering for her injuries.

“Even though the court should be convinced that some other meaning was really intended by the lawmaking power, and even though the literal interpretation should defeat the very purpose of the enactment, still the explicit declaration of the legislature is the law,

and the courts must not depart from it. *Noble v McNerney*, 160 Mich App 586, 613 (1988), citing *Becker v Detroit Savings Bank*, 269 Mich 432, 436 (1934).

The duty of the courts is to interpret statutes as we find them. *Melia v Employment Security Comm*, 346 Mich 544, 561; 78 NW 2d 273 (1956). A plain and unambiguous statute is to be applied, and not interpreted since such a statute speaks for itself. *Lansing v Lansing Twp*, 356 Mich 641; 649; 97 NW 2d 804 (1959). The courts may not speculate as to the probable intent of the Legislature beyond the words employed in the act. *id.* Ordinary words are to be given their plain and ordinary meaning. *Carter Metropolitan Christian Methodist Episcopal Church v Liquor Control Comm*, 107 Mich App 22, 28; 308 NW 2d 677 (1981); *Winiacki v Wolf*, 147 Mich App 742, 744-745; 383 NW 2d 119 (1985).

3. **Statute of Limitations.**

Defendant next moves for a dismissal because the Plaintiff failed to comply with Section 10 of the Pokagon Band of Potawatomi Indians Tort Claims Ordinance which provides as follows: "All claims shall be filed with the Tribal Court within 180 days of the date on which the claim accrued."

Plaintiff urges the Court to rule that the Complaint was timely filed by application of equitable/judicial tolling. Plaintiff cites *Ward v Rooney-Gandy*, 265 Mich App 515 (2005), which provides: "While equitable tolling applies principally to situations in which a defendant actively misleads a plaintiff about the cause of action or in which the plaintiff is prevented in some extraordinary way from asserting his rights, the doctrine does not require wrongful conduct by a defendant...an element of equitable tolling is that a plaintiff must exercise reasonable diligence in investigating and bringing his claim.

The Plaintiff further cites *Bryant v Oakpointe Villa Nursing Center, Inc.*, 471 Mich 411 (2004), which granted judicial tolling because of confusion about the legal nature of a medical malpractice claim. The Defendant points out that there had been a longstanding confusion regarding medical malpractice cases and that the Plaintiff had not failed to preserve her rights.

In this case, it does not appear that the Plaintiff actively pursued her judicial remedies by filing a defective pleading during the statutory period or that she was misled or in any way tricked by misconduct of the Defendants. The Plaintiff merely missed the deadline set by the Tort Claims Ordinance requiring the filing of her claim within 180 days of its accrual.

Indeed, there has been no claim or showing by the Plaintiff that any of the Defendants actively misled the Plaintiff or that the Defendants prevented the Plaintiff from exercising her rights.

Conclusion

It is the opinion of the Court that the Defendants' Motion for Summary Disposition is granted and the Plaintiff's case is dismissed based upon the above applicable law and for the following reasons:

1. By stipulation of the attorneys in Open Court the Four Winds Casino Resort and the Pokagon Band of Potawatomi Indians Gaming Enterprise are dismissed as party defendants.
2. The notice requirement found at Section 9 of the Tort Claims Ordinance has not been met nor has there been substantial compliance with the notice provision. This Court has no authority to overrule the legislative action for

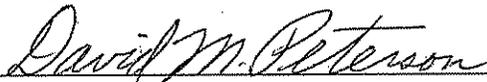
which there is a rational basis which is to facilitate meaningful investigations regarding the conditions at the time of injury and allowing quick repair or remediation so as to preclude other accidents.

3. This Court does not have authority or discretion to waive the 180 day filing deadline required by Section 10 of the Tort Claims Ordinance. Plaintiff has failed to convince this Court that there were extraordinary circumstances or any type of misconduct that would prevent Plaintiff from timely filing her claim nor that Defendant in any way misled the Plaintiff in the institution of her claim.

ORDER

For the above reasons, the Plaintiff's claim is dismissed.

Dated: February 17, 2009



David M. Peterson, Tribal Judge