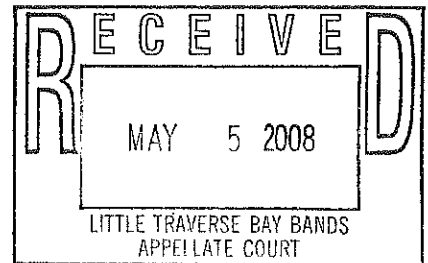


**LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS
APPELLATE COURT**



Albert Carey,
Plaintiff-Appellant,

v.

Victories Casino, John Espinosa,
Harlan Eckholm, and Susan Keller,
Defendants-Appellees.

Appellate Case #A-005-0507
Tribal Court Case #C-062-1005
CJ Singel, J Anthony, J Genia

**DECISION AFFIRMING THE DISMISSAL OF APPELLEES VICTORIES
CASINO AND KELLER AND REVERSING THE DISMISSAL
OF APPELLEES ESPINOSA AND ECKHOLM**

I. Summary of the Appeal

Appellant Carey appeals the Tribal Court's dismissal of his claims against Victories Casino and individuals Espinosa, Eckholm and Keller. For the reasons discussed below, this Court affirms the Tribal Court's dismissal of Victories Casino and Keller. However, the Court reverses the dismissal of Espinosa and Eckholm and remands the case to the Tribal Court for further proceedings consistent with this decision.

A. Factual Summary

This is the second time that this Court has had an opportunity to address an appeal in this wrongful termination case. Appellant Carey was formerly an employee of Appellee Victories Casino. Carey was verbally informed by Harlan Eckholm that his employment was terminated on September 21, 2005, for sexual harassment, insubordination, violation of employee procedures, slander of upper management, and release of in-house confidential information.

Carey believes that the real reason he was terminated was that he reported to a Tribal Council member that the Casino was losing revenue by paying out too much money in its rewards program because upper management had failed to adequately test the rewards program system.

According to the Victories Casino Employee Handbook, Carey had the right to request a

hearing before the Employee Review Board (ERB) to appeal his termination if he followed the procedures in the Handbook's grievance policy.

Carey requested a hearing before the ERB and when he arrived for it he was asked to sign a confidentiality form and agree to limitations regarding his use of witnesses and legal representatives. Carey refused to sign the confidentiality form and agree to the limitations on his use of witnesses and legal representatives because he was concerned doing so would deprive him of his civil rights. As a result of Carey's decision, the hearing did not proceed.

Because the ERB hearing ended prematurely, Carey alleges that he has never been informed of the nature of any evidence that the Casino had to support its stated reasons for terminating his employment. Carey commenced this action in Tribal Court by filing a Notice of Appeal of the Casino's decision to terminate his employment.

B. Procedural History

On October 5, 2005, Carey filed a complaint with the Tribal Court against Victories Casino alleging wrongful termination. Among other claims, Carey alleged that he was wrongfully terminated because he was not given any verbal or written warnings of inappropriate conduct and he was never shown any written documentation to support the Casino's decision to terminate his employment. Carey also alleged that his civil rights were violated because he was required to sign a confidentiality agreement as a precondition of receiving an ERB hearing and that he would not have been able to have witnesses or anyone else with him at the hearing had it taken place. The Tribal Court later allowed Carey to amend his complaint to add a whistle blower claim and to add individual defendants Espinosa and Eckholm. The Clerk of Court mailed a copy of the case file to the two new defendants, but Carey never formally served them.

On April 20, 2006, the Tribal Court granted the Casino's motion for summary judgment and dismissed the case based upon the sovereign immunity of the Casino and the failure to state a claim against Espinosa and Eckholm. Carey appealed the dismissal of his suit on May 18, 2006, but he failed

to identify a legal basis for his appeal and to file proof of service on the other parties. Carey then obtained leave from the Appellate Court to file an amended petition to appeal.

Carey actually filed two amended petitions that taken together challenged the Tribal Court's determinations that his right to due process was not violated when he was terminated and that he had failed to establish the elements of a whistle blower claim. On March 27, 2007, the Appellate Court upheld the dismissal of the complaint against the Casino but remanded the claims against Espinosa and Eckholm to the Tribal Court in order to allow Carey to remedy what was determined to be defective service of a complaint upon them. *Carey v. Victories Casino et al.*, A-004-0606 (LTBB App. Ct. March 27, 2007) (*Carey I*). Carey was given 14 days from the entry of the decision to file a new complaint. *Id.* A-004-0606 at 11.

On April 9, 2007, one day prior to the expiration of the 14 day window, Carey filed a new wrongful termination complaint, but without an original certificate of service, naming as defendants the Casino, Espinosa, Eckholm, and a new individual, Susan Keller. After filing the complaint, Carey's counsel walked over to the office of counsel for the Casino, Espinosa, and Eckholm and personally delivered four copies of the new complaint. Because counsel was not in the office, his assistant contacted him by phone and he accepted service for Espinosa and Eckholm but not Keller.

The Tribal Court dismissed Carey's case on April 16, 2007, for failure to file an original certificate of service with his complaint within the 14 days allowed by the Appellate Court in *Carey I*. Carey's counsel then had the tribal police serve Keller with the complaint, summons and the Tribal Court's order of dismissal on April 19, 2007. Carey filed a motion for reconsideration which was denied by the Tribal Court on May 3, 2007. Carey filed this appeal shortly thereafter. The Court believes that the various defendants fall into three distinct factual categories and will address each category in succession.

II. Victories Casino

In *Carey I*, this Court was confronted with the threshold issue of whether Carey can even

maintain a wrongful termination action against Victories Casino. In that case, the Appellate Court held that Carey's claims against the Casino were barred by sovereign immunity. *Carey I*, A-004-0606 at 7-8. That decision is now binding precedent and Carey is barred from litigating the same issue again.

Our Court's appellate rules state that "[d]ecisions of the Tribal Appellate Court shall be binding precedent for the Tribe." LTBB Appellate Rule 7.503(D). Furthermore, in other jurisdictions, the law of the case doctrine provides that an appellate court's determination of a legal issue is binding on both the trial court on remand and an appellate court on a subsequent appeal given the same case and substantially the same facts. *Hinds v. McNair*, 413 N.E.2d 586, 607 (Ind. Ct. App. 1980)(citing *Fair Share Organization v. Mitnick*, 245 Ind. 324, 198 N.E.2d 765 (1964), cert. denied, 379 U.S. 843 (1964)). The law of the case doctrine ensures that earlier decisions of the appellate courts are enforced, and its operation promotes stability and predictability in the law. We therefore adopt the law of the case doctrine as part of the Tribe's common law.

As noted above, the threshold legal issue faced by the Appellate Court in *Carey I* was whether sovereign immunity barred Carey's suit against the Casino. That is the same legal issue which we must address here. In addition, this is the same case on appeal with substantially, if not exactly, the same facts relative to the Casino's sovereignty immunity. Consistent with our decision in *Carey I* and with our appellate rules and the law of the case doctrine, we hold that Carey's claim against Victories is barred by sovereign immunity.

Moreover, the Court notes that it was very specific in *Carey I* regarding which defendants Appellant Carey was being afforded an opportunity to file a new complaint against. The Appellate Court remanded the case to the Tribal Court "with instructions that Appellant Carey shall have a second chance to properly initiate his suit by effecting appropriate service of process on **Eckholm** and **Espinosa**." *Carey I*, A-004-0606 at 11 (emphasis added). The Appellate Court never authorized Carey to file a new complaint against Victories Casino and he was, thusly, barred from doing so on remand.

III. Espinosa and Eckholm

We next turn to the Tribal Court's dismissal of individual defendants Espinosa and Eckholm. As noted previously, the *Carey I* Court remanded the case against both of these defendants in order to allow Carey a second opportunity to properly serve them and initiate his lawsuit against them. *Carey I*, A-004-0606 at 11. The Court also gave Carey 14 days in which to accomplish this. *Id.* at 11. Carey filed a new complaint with the Tribal Court 13 days later, on April 9, 2007. The filing did not include an original certificate of service. On that same day, counsel for Carey personally delivered four copies of the complaint to the office of counsel for Espinosa and Eckholm. Because counsel for Espinosa and Eckholm was not in, his assistant called him and he agreed to accept service for Espinosa and Eckholm.

The Tribal Court dismissed Carey's suit against all defendants because of his counsel's failure to file an original certificate of service with his new complaint. This Court has previously stressed the importance of proper service of a summons and complaint on a defendant. In *Carey I*, we explained that requirements "for service of process for a summons and complaint serve an important purpose because they ensure that a defendant has been informed that a lawsuit has been filed in Tribal Court and that they must submit a response." *Carey I*, A-004-0606 at 10.

Espinosa and Eckholm were originally unrepresented defendants while *Carey I* was before the Tribal Court. Counsel for the Casino filed a notice of appearance on their behalf while that case was on appeal to this Court. (See Notice of Appearance, dated December 5, 2006.) In the notice of appearance, counsel asked Carey and the Tribal Court to "[p]lease send all further correspondence regarding this matter to my office." *Id.* That is exactly what Carey did when filing his new complaint after remand.

The *Carey I* Court's interest in ensuring that defendants receive proper service of process so that they know that a lawsuit has been filed and that they must respond reflects not only procedural concerns, but traditional Odawa notions of fairness as well. Indeed, the Court stated it would be inherently "unfair to allow a lawsuit to proceed against [Espinosa and Eckholm] without their

knowledge of its existence.” *Carey I*, A-004-0606 at 10 (emphasis added).

As to the issue of notice that a lawsuit had been filed, the record before us indicates that Espinosa and Eckholm have been represented by counsel since before our Decision in *Carey I*. Because they were defendants in *Carey I*, Espinosa and Eckholm knew that the suit against them had been remanded and that Carey had 14 days to file a new complaint. In addition, their counsel received copies of the new complaint by personal service on the day it was filed. Counsel, by telephone, also stated he accepted service for Espinosa and Eckholm.

Unlike in *Carey I*, the record here shows that Espinosa and Eckholm received actual notice of Carey's new complaint through their counsel. The procedural defect at issue in this case is Carey's failure to file an original certificate of service with the Tribal Court. Balancing the equities between dismissing Carey's suit against Espinosa and Eckholm for failing to file an original certificate of service versus allowing the suit to proceed against them when no certificate was filed but they received actual notice of the complaint, we believe it would be unfair to allow the suit to be dismissed.

Moreover, the Court notes that LTBBRCP I(2)(a) allows the Tribal Court to disregard any technical error or failure to comply with the Rules of Civil Procedure that does not affect the substantive rights of parties. We believe that this Rule is further indication that both the Tribal Court and this Court should take into account not only written decisions, statutes, and procedures, but traditional Odawa values such as fairness as well.

We conclude that it would be unfair to uphold the dismissal of Carey's suit against Espinosa and Eckholm for failure to file an original certificate of service with the Tribal Court where the record indicates that they received actual notice of the suit against them.

The Court cautions future litigants that they should not rely upon this portion of this Decision to disregard or be uninformed of the procedures for practice before the Tribal Court or Appellate Court. Our conclusion as to Espinosa and Eckholm is specifically limited to the very unique factual situation in the record before us, as detailed in this portion of this Decision.

IV. Keller

We next consider Carey's appeal of the Tribal Court's dismissal of the complaint against Keller. The complaint against Keller was first introduced by Carey following the remand to the Tribal Court. This addition of Keller as a new defendant on remand is outside the scope of this Court's order remanding the case. The Appellate Court's order specifically stated that "the appeal should be remanded to the Tribal Court rather than dismissed, with instructions that Appellant Carey shall have a second chance to properly initiate his suit by effecting appropriate service of process on **Eckholm** and **Espinosa**." *Carey I*, A-004-0606 at 11 (emphasis added) This Court reiterated its order by also stating that "the Appellate Court hereby REMANDS the appeal against **Eckholm** and **Espinosa** to the Tribal Court for further proceedings in accordance with this Decision." *Id.* By including Keller as a new defendant, Carey exceeded the scope of the remand order.

V. Conclusion

In conclusion, the Appellate Court AFFIRMS the dismissal of the complaint against Victories Casino and Keller. Furthermore, the Court REVERSES the dismissal of the complaint against Espinosa and Eckholm and REMANDS the case to the Tribal Court for further proceedings consistent with this Decision.

May 5, 2008

Decided and Approved by a Unanimous Court

Chief Appellate Justice Wenona T. Singel