

IN THE COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

FILED APR 28 1997

CARRIE L. SVENDAHL
CLERK OF COURT
STATE OF MINNESOTA

COUNTY OF SCOTT

Patricia Kostelnik,

Plaintiff,

Court File No. 064-96

vs.

Little Six, Inc., d/b/a
Mystic Lake Casino,

Defendant.

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER FOR JUDGMENT.

The above-entitled matter came on for Hearing before the Honorable Judge Grey Eagle, Judge of Tribal Court of the Shakopee Mdewakanton Sioux (Dakota) Community, on January 6, 1997 and the hearing was concluded on January 10, 1997. This matter is before the Court based on the complaint the Plaintiff, Patricia Kostelnik, seeking damages for personal injury alleged to have occurred at Mystic Lake Casino on April 27, 1993 to which Little Six Inc., d/b/a/ Mystic Lake Casino answered denying said complaint. The Plaintiff, Patricia Kostelnik was represented by attorney David O'Connor, O'Connor & O'Connor, 1500 Capital Center, 386 North Wabasha Street, St. Paul, Minnesota 55102-1317. The Defendant, Little Six, Inc. d/b/a/ Mystic Lake Casino was represented by Barbara R. Hatch and Daniel J. Trudeau, King & Hatch, P.A., 1500 Landmark Towers, 345 St. Peter Street, St. Paul, Minnesota 55102. Based upon the evidence presented, the arguments of counsel, the entire record and file, and the proceedings herein, Judge Grey Eagle makes the following:

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JURISDICTIONAL STATEMENT

The Shakopee Mdewakanton Sioux (Dakota) Tribal Court having heard the above captioned case in accordance with the Shakopee Mdewakanton Sioux (Dakota) Community Tort Claims Ordinance Section 6. Jurisdiction which provides "The Shakopee Mdewakanton Sioux (Dakota) Tribal Court shall have original and exclusive jurisdiction to hear claims brought pursuant to this Ordinance, subject to the terms of the Ordinance, and all claims not brought in the Shakopee Mdewakanton Sioux (Dakota) Tribal Court shall be deemed invalid." The Ordinance was duly adopted on November 12, 1996 by an affirmative vote of the General Council for Resolution No. 11-12-96-001.

This matter is brought pursuant to the Ordinance and therefore subject to scope of the Ordinance including the limited waiver of sovereign immunity, liability of the Community only to the extent over those matters covered by insurance policy as expressly provided in the Ordinance and to the enumerated, statute of limitations, limits, exclusions, defenses, and procedural language and conditions contained therein.

The Court upon an examination of Section 9. Statute of Limitations, of the Ordinance which provides "The statute of limitations for all claims brought against the Community is two (2) years and the right to bring a claim against the Community shall begin to accrue on the date of the act or omission giving rise to the claim, or on the date a reasonable person under the same or similar circumstances would have known of the injury, loss or other damages incurred as a consequence of the act or omission of the employee of the Community.", has determined that although the act complained of occurred on April 27, 1993 and the Plaintiff did not file her action until February 6,

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1996 which upon initial inspection appears to have exceeded the two (2) year statute of limitations requirement which was not an issue in this case however the Court in review of the file has determined the matter needs analysis and findings and as such issues the following:

1. The defendant did in their answer dated March 1, 1996 at paragraph # 13 state "that this answering defendant alleges that the plaintiff's claim is barred by the applicable period of limitations."

2. The defendant raised a general statute of limitations defense prior to the adoption of the Tort Claims Ordinance which was not adopted until after the claim had been filed in the Tribal Court.

3 . The claim was filed February 6, 1996 and the Tort Claims Ordinance was not enacted according to the Court record until November 12, 1996.

4. The general rule is that once an Ordinance is adopted that Ordinance is in effect from the date of enactment forward, however the Court determines for this matter the Ordinance is applicable.

5. No subsequent motions for dismissal were filed with the Court on the issue of whether the claim should be dismissed based on the statute of limitations language contained in the Ordinance.

6. The parties to this action proceeded to adjudicate this matter without further mention of the statute of limitations issues.

Therefore the Court concludes that the Defendants in this action determined the secondary language of Section 9. of the Ordinance to be applicable which would allow a claim to have accrued once a

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reasonable person under the same or similar circumstances would have known of the injury, loss or other damages incurred as a consequence of the act or omission of the employee of the Community. The Plaintiff during the year of 1993 beginning in April through December of that same year had continuing medical attention and so discovery of her alleged source of injury could reasonably be presumed to be after December 1993 into early 1994. The Plaintiff did file her claim in early 1996 on February 6, 1996 which is arguably within two (2) years in which a reasonable person under continuing medical care might at some point discover an alleged source of her injury. This case is in the opinion of the Court unique in that regard. Generally the cause and effect of act or omission resulting in injury should be relatively easy to detect. The medical testimony elicited in this matter pointed to the fact that the source of an injury such as the Plaintiff's is one that is not so easily detectable. The Court therefore concludes that the decision of the parties to adjudicate this matter on the merits of the case to be proper and within the jurisdiction authorized by the Ordinance. The Ordinance is deemed to have been applicable in this case since the alleged cause of action arose with the two (2) year statute of limitations or as in the case at hand within two (2) years of the time a reasonable person might discover injury or harm.

The Court upon an examination of all the records, files and proceedings herein finds jurisdiction over this matter to be proper and lawful as provided for in the Ordinance.

FINDINGS OF FACT

1. Plaintiff, Patricia Kostelnik, whose date of birth is October 25, 1936, was seated at the right end of a row of machines on the main floor of the Mystic Lake Casino near an area known as "bank 20" on April 27, 1993.

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2. During at least a portion of the evening hours of April 27, 1993, Ms. Kostelnik was seated on a chair affixed to a slot machine.

3. The slot machine at which Ms. Kostelnik was seated was located at the right hand end of a bank of four slot machines.

4. The location on the casino floor of the slot machine at which Ms. Kostelnik was seated was designated by Mr. Fairbanks on Defendant's Exhibit 41.

5. Sometime between 10:30 p.m. and 11:20 p.m. on April 27, 1993, a money cart being escorted by two Mystic Lake employees came in contact with the back of the slot machine chair on which Ms. Kostelnik was seated.

6. Ms. Kostelnik did not see the money cart prior to the time at which it came in contact with her chair, and therefore cannot state the speed of the money cart prior to the time of the contact and cannot state anything as to the conduct of the operator of the money chart prior to the contact.

7. At the time of this contact between the money cart and Ms. Kostelnik's chair, the front end of the money cart was being pulled by Mystic Lake employee Troy Akerman and the back end of the money cart was being pushed by Mystic Lake employee Chris Fairbanks.

8. At the time of this contact between the money cart and Ms. Kostelnik's chair, Ms. Kostelnik was seated squarely on the chair, with both of her feet placed squarely in front of her, flat on the metal base of the chair, pointing toward the slot machine.

9. At the time of the contact Mr. Fairbanks and Mr. Akerman were maneuvering the cart at a normal walking speed of less than one mile per hour.

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10. The only contact between the money cart and Ms. Kostelnik's chair occurred when the middle portion of the cart brushed against the back of Ms. Kostelnik's chair.

11. At no time did any portion of the money cart come in contact with, land upon, cut or scratch Ms. Kostelnik's foot.

12. Following this contact, Mr. Fairbank's looked at Ms. Kostelnik and excused himself. When Mr. Fairbank's looked at Ms. Kostelnik, she did not appear to be in any distress and she continued to play the slot machine.

13. Following this contact, Ms. Kostelnik did not say anything to either of the Mystic Lake employees.

14. The contact between the money cart and the back of the chair was approximately .6 g's, producing approximately the same feeling as an elevator coming to a stop.

15. Following the contact between the money cart and Ms. Kostelnik's chair, another Mystic Lake employee called for a Mystic Lake EMT.

16. Mark Barrie, then a Mystic Lake EMT and security officer, responded to the call.

17. When Mr. Barrie arrived on the scene, Ms. Kostelnik as still playing the slot machine, exhibiting no obvious signs of distress.

18. Mr. Barrie performed a primary survey of Ms. Kostelnik in the location of the slot machine by asking her what had happened and examining her looking for signs of injury.

19. As a part of his primary survey, Mr. Barrie specifically examined Ms. Kostelnik's feet.

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20. Based upon his primary survey, Mr. Barrie found no obvious signs of injury, and specifically saw no cut, laceration, scratch or blood on her right foot.

21. Mr. Barrie took Ms. Kostelnik to the Mystic Lake first aid room and performed a secondary survey, which included another examination of Ms. Kostelnik's neck, right foot and right ankle.

22. As a part of secondary survey, Mr. Barrie took off Ms. Kostelnik's right shoe and sock.

23. Mr. Barrie did not observe any cut, laceration, scratch or other bleeding injury to Ms. Kostelnik's right foot or ankle.

24. At no time did Ms. Kostelnik ever tell Mr. Barrie that the money cart had run over, landed upon, cut or scratched her foot.

25. Mr. Barrie did not place an ace bandage upon Ms. Kostelnik's right foot.

26. The ambulance run sheet (Defense Exhibit 5) describes Ms. Kostelnik's complaint of injury, as well as the results of their physical examination of Ms. Kostelnik, and does not document the presence of any cut, laceration, scratch or other bleeding injury to Ms. Kostelnik's right foot.

27. The emergency room records from St. Francis Hospital also detail Ms. Kostelnik's complaint of injury, as well as the results of their physical examination, and does not document any cut, laceration, scratch or other bleeding injury to Ms. Kostelnik's right foot.

28. X-rays taken of Ms. Kostelnik's right foot in the St. Francis Emergency room does not show the presence of an ace bandage on the right foot or ankle.

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29. Following the date of the accident, Ms. Kostelnik did not observe any pussing in the area of her right foot.

30. Ms. Kostelnik had suffered from a history of neck pain, the treatment for which dated back to 1982.

31. Over the eleven (11) years from that initial treatment to the date of the accident at Mystic Lake, Ms. Kostelnik had received numerous treatments for her neck from both orthopedic surgeons and physical therapist, as reflected in Defense Exhibits 8 through 24.

32. Prior to April 27, 1993, Ms. Kostelnik was diagnosed as having a degenerative condition in her neck at the C5-C6 level of her cervical spine.

33. Ms. Kostelnik reported to medical personnel at the Ramsey county Mental Health Clinic on April 19, 1993, that she had suffered from neck pain which caused her to be "in bed" for four days beginning on April 14, 1993. See Defense Exhibit 25.

34. When Ms. Kostelnik returned to the Ramsey County Mental Health Clinic on May 10, 1993, she reported to the medical personnel the accident which occurred at Mystic Lake Casino on April 27, 1993, and did not mention any injury to or infection of her right foot as a result of that accident. See Defense Exhibit 7.

35. In June, 1993 Ms. Kostelnik was diagnosed as having vertebral osteomyelitis caused by a staph infection in her neck at the C5-C6 level.

36. Ms. Kostelnik was predisposed to developing vertebral osteomyelitis given her age and the degenerative condition of her neck which existed prior to April 27, 1993.

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37. In the majority of cases of vertebral osteomyelitis, the exact mechanism by which the staph infection enters the body cannot be determined.

38. If a staph infection enters the body through a cut or soft tissue injury, the person would develop an infection in the area of this cut or soft tissue injury which would produce obvious signs of an infection, including pussing.

39. Ms. Kostelnik's complaint of neck pain beginning on or about April 14, 1993 is consistent with the development of her vertebral osteomyelitis as of that date.

CONCLUSIONS OF LAW

1. That the mere fact of an accident is not alone sufficient evidence to establish negligence, and Ms. Kostelnik has not sustained her burden of proof in showing that the employees of Mystic Lake Casino failed to exercise reasonable care when operating the money cart at the time of the accident of April 27, 1993.

2. That Little Six, Inc. d/b/a Mystic Lake Casino was not negligent with respect to the accident involving Ms. Kostelnik which occurred on April 27, 1993.

3. That Ms. Kostelnik did not suffer an injury to her foot as a result of the accident which occurred at Mystic Lake Casino on April 27, 1993.

4. That Ms. Kostelnik did not suffer an injury to her neck as a result of the accident which occurred at Mystic Lake Casino on April 27, 1993.

5. That Ms. Kostelnik's vertebral osteomyelitis, which is real and the Court is truly sympathetic to Ms. Kostelnik's pain and suffering; her injury; and medical condition were not caused by the accident which occurred at the Mystic Lake Casino on April 27, 1993.

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6. Ms. Kostelnik has not met her burden of proof that she sustained any injury as a result of the accident which happened at Mystic Lake Casino on April 27, 1993.

ORDER FOR JUDGMENT

IT IS HEREBY ORDERED,

1. That the Plaintiff take nothing by her Complaint;
2. That the Complaint is dismissed with prejudice; and
3. That the Defendant, Little Six, Inc. d/b/a/ Mystic Lake Casino is entitled to recover its costs and disbursements.

Dated:

BY THE COURT,



Robert A. Grey Eagle, Tribal Court Judge