# STATE OF MICHIGAN

# COURT OF APPEALS

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| STAR TICKETS,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>October 22, 2015 |
| v | No. 322371<br>Oakland Circuit Court |
| CHUMASH CASINO RESORT,<br><br>Defendant-Appellant. | LC No. 2014-138263-CB |

Before: GLEICHER, P.J., and SAWYER and MURPHY, JJ.

PER CURIAM.

Defendant Chumash Casino Resort (CCR) appeals the trial court's order denying CCR's motion for summary disposition under MCR 2.116(C)(4) and (7) with respect to a breach of contract action brought by plaintiff Star Tickets, an entertainment ticketing company, arising out of an alleged agreement making plaintiff the exclusive ticketing agent relative to acts and performances at CCR's establishment in California. CCR is owned and operated by the Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation (the Tribe), and the trial court rejected CCR's argument that plaintiff's suit was barred on the basis of tribal sovereign immunity. We affirm.

On April 1, 2009, a "USER AGREEMENT" (the agreement) was executed, with plaintiff's president signing on behalf of plaintiff and Leah Carrasco ostensibly signing on behalf of CCR.[1] According to plaintiff's complaint, although the agreement was not executed until April 2009, the parties had actually operated under the terms of the agreement since 2006. The

[1] One of the issues in this case concerns Carrasco's authority to execute the agreement on behalf of and to bind CCR and the Tribe. The agreement itself did not identify Carrasco's position or status in relationship to CCR or the Tribe. A January 2009 email from Carrasco to plaintiff indicated that she was a Players Club Manager for CCR. At that time, Carrasco signed a W-9 tax form on behalf of CCR and sent it to plaintiff as requested. A December 2010 email from Carrasco to plaintiff concerning information about particular scheduled performances, e.g., Penn & Teller, identified Carrasco as a Slot Marketing/Promotions Manager for CCR. According to an affidavit executed by the Tribal Chairman, Carrasco was, at the time she signed the agreement, "employed by [CCR] in the position of marketing assistant."

agreement provided that it was effective for an initial four-year term, commencing on November 9, 2006, and ending on November 8, 2010, subject to automatic renewal for successive four-year terms unless either party notified the other party in writing, within a specified timeframe, of an intention not to renew. The agreement authorized plaintiff "to act as [CCR's] exclusive ticketing agent for the sale of all tickets made available to the public to attend each and every [p]erformance[,]" which encompassed sporting events and other entertainment acts sponsored or promoted by CCR with respect to which CCR had "authority to sell tickets to the public." The agreement contained provisions regarding the fees and charges to be paid by CCR to plaintiff in exchange for plaintiff's services. Under the heading of "Applicable Law," the agreement provided:

> This Agreement shall be governed by, and construed in accordance with, the laws of the State of Michigan. Each party agrees that this Agreement, and each of its terms and provisions, may be enforced against any party hereto in any court of competent jurisdiction within the County of Kent,[2] State of Michigan, and each party hereto fully consents to and submits to the personal jurisdiction of the State of Michigan for that purpose.

In an affidavit executed by plaintiff's vice-president of finance, she averred that CCR had received – from ticket sales generated under the terms of the agreement – $1,524,371 in 2009, $1,520,787 in 2010, $1,620,249 in 2011, $1,306,161 in 2012, and $1,082,685 in 2013, and that CCR "began using someone other than [plaintiff] as its ticket vendor during 2013." She further asserted "that over a period of years, [plaintiff] would provide [CCR] with a detailed breakdown of the proceeds as well as the fees earned by [plaintiff] from each performance held at the Casino." In a financial document submitted by plaintiff, it indicated that plaintiff had collected the following fees from CCR under the terms of the agreement: $136,549 in 2008; $148,898 in 2009; $146,071 in 2010; $144,688 in 2011; and $33,313 in 2012. In March 2012 emails from a CCR employee to plaintiff, the employee asked for information regarding "how much our customers ha[d] paid in convenience and handling fees since 2008," and she subsequently indicated that the "information will be used for management[']s general knowledge of fees charged."

With respect to the Tribe, it is a federally-recognized Indian tribe by the Department of the Interior, occupying a reservation in Santa Barbara County, California, along with owning and operating CCR within the reservation under a tribal-state gaming compact. As averred by the Tribal Chairman in his affidavit: the Tribe operates under Articles of Organization; the Tribe's "governing body . . . is the General Council, made up of all adult members of the Tribe over the age of 21"; and, the "General Council . . . elects a Chairman and a four member Business Council that . . . conduct[s] tribal business on a day-to-day basis." In 2002, the General Council approved the Santa Ynez Band of Mission Indians Ordinance No. 13, titled the Chumash Casino and Resort Enterprise Ordinance (EO). The "Enterprise" means the "[CCR] Enterprise, an unincorporated business wholly owned by the Tribe and established by [the Enterprise]

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[2] The lawsuit was filed in Oakland Circuit Court. In plaintiff's complaint, it indicated that it had offices and operated in both Oakland and Kent County. CCR has not raised any challenge regarding the proper venue for plaintiff's action.

Ordinance." EO, § 2. The general purpose of the Enterprise includes developing, managing, and operating "Enterprise Business for the Tribe . . . ." EO, § 3. The "Enterprise Business" is a reference to "all class II and class III gaming . . . and all hotel business conducted by or on behalf of and owned by the Enterprise, the Tribe and any other Tribal Party." EO, § 2.[3] The "Enterprise" is "governed by the Enterprise Board" and is "an instrumentality of the Tribe through which the Enterprise Business shall . . . be conducted." EO, § 4(a).[4]

In EO, § 5, the Tribe addressed the issues of sovereign immunity and waiver of sovereign immunity. EO, § 5(a), provides, in general, that "[t]he Enterprise shall have and enjoy the Tribe's sovereign immunity from unconsented suits and other legal process and claims[.]" EO, § 5(b), indicates that no waiver of sovereign immunity will be permitted, recognized, or construed unless "(i) the waiver is in writing and expressly states that such waiver shall permit recourse and enforcement . . .; and (ii) the waiver is duly approved by the Enterprise Board." This provision, i.e., EO, § 5(b), is also expressly made subject to EO, § 7(i),[5] which empowers the "Enterprise, acting through the Enterprise Board and authorized officers, employees and agents of the Enterprise" to "waive sovereign immunity of the Enterprise from unconsented suit or other legal proceedings" subject to EO, § 8. And EO, § 8, provides that the Enterprise shall not "waive or purport to waive the sovereign immunity of the Tribe or any Tribal Party, except as expressly authorized in Section 7(i) with respect to the Enterprise[,]" absent "written authorization from the General Council, or if permitted by the Articles of Organization, the Business Council."

The multiple cross references and exceptions in the various provisions of the EO do make for a confusing maze in attempting to discern what exactly must be done in order to accomplish an acceptable waiver of sovereign immunity. At a minimum, however, it appears that a waiver of sovereign immunity must be authorized and approved by the Enterprise Board or, perhaps, authorized Enterprise officers, agents, or employees. Plaintiff did not argue below, nor argues in its appellate brief, that a waiver of tribal sovereign immunity, as envisioned by and consistent with the EO, was accomplished with respect to CCR or the Tribe's business relationship with plaintiff.[6] The Tribal Chairman averred in his affidavit that the Enterprise Board never authorized Carrasco to sign the agreement, that the Board never authorized her to waive

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[3] We note that the Tribe was already engaged in gaming operations under different authority when the EO was enacted. EO, § 1(a).

[4] The "[m]embers of the Enterprise Board shall at all times consist of those persons who are members of the Business Council." EO, § 9.

[5] EO, § 5(b), begins by stating that it applies, "[e]xcept as provided in Section 7(i)."

[6] At oral argument, plaintiff proffered a new argument, contending that Carrasco was an authorized Enterprise officer, agent, or employee for purposes of EO, § 7(i), and therefore her execution of the agreement satisfied the requirements of the EO with respect to a waiver of sovereign immunity. It is not quite clear from the EO, assuming Carrasco was indeed an authorized Enterprise agent under EO, § 7(i), whether the Enterprise Board or the General or Business Council still needed to approve the agreement and waiver. Ultimately, it is unnecessary for us to resolve plaintiff's unpreserved argument and any ambiguities in the agreement, and we shall proceed on the basis that the requirements of the EO were not satisfied.

sovereign immunity, that the Board never approved the agreement, and that the Enterprise Board never approved or authorized any waiver of sovereign immunity. The Tribal Chairman stated that Carrasco had no authority whatsoever, from the Enterprise Board or any other tribal entity or official, to approve the agreement or waive sovereign immunity.

Plaintiff's vice-president of sales averred in his affidavit as follows:

> Throughout the period of my employment until the latter part of 2013, both [plaintiff] and [CCR] dealt with each other in accordance with the terms of the User Agreement. To the best of my knowledge, understanding and belief, no representative of [CCR] ever indicated to any representative of [plaintiff] that the User Agreement had to be ratified by the Board of Directors . . . or any other person or entity, or that employees of [CCR] with whom we dealt and who provided instructions and information to us were not authorized to act on behalf of [CCR]. During that time, no representative of [CCR] indicated that [CCR] believed that the User Agreement was void or unenforceable, or that [CCR] was exercising its right to provide notice of its intent not to renew the User Agreement.

In January 2014, plaintiff filed suit against CCR, alleging breach of contract. Plaintiff asserted that CCR, upon request, refused to honor the terms of the agreement and that CCR notified plaintiff that it did not intend to allow plaintiff to further act as CCR's ticketing agent for performances at the casino. In lieu of filing an answer, CCR filed a motion for summary disposition under MCR 2.116(C)(4) and (7), arguing that the lawsuit was barred by sovereign immunity. The trial court denied the motion for summary disposition, ruling that the agreement contained language sufficient to constitute a waiver of sovereign immunity, and that, despite the claim that Carrasco lacked authority to execute a waiver of sovereign immunity, CCR performed and operated under the contract, "receiving millions of dollars under its terms." CCR proceeded to file this appeal pursuant to a claim of appeal.[7]

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[7] Initially, we raise an issue sua sponte with respect to our jurisdiction. CCR filed a claim of appeal or an appeal of right, not an application for leave to appeal. See MCR 7.203(A) and (B). This is an interlocutory appeal, given that the denial of CCR's motion for summary disposition allows plaintiff's breach of contract claim to go forward. MCR 7.203(A)(1) provides, in part, that this Court "has jurisdiction of an appeal of right filed by an aggrieved party from . . . [a] final judgment or final order of the circuit court . . . as defined in MCR 7.202(6) . . . ." And MCR 7.202(6)(a)(v), the only potentially applicable subrule, provides that a final judgment or order includes "an order denying *governmental immunity* to a *governmental party*, including a governmental agency, official, or employee under MCR 2.116(C)(7) or an order denying a motion for summary disposition under MCR 2.116(C)(10) based on a claim of *governmental immunity*." (Emphasis added.) Here, CCR argued that it was protected from suit by *tribal sovereign immunity*. "Although the concepts of 'sovereign immunity' and 'governmental immunity' are related, they have distinct origins and histories[,]" and they " 'are not synonymous.' " *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 596; 363 NW2d 641 (1984) (citation omitted). In *Odom v Wayne Co*, 482 Mich 459, 478; 760 NW2d 217 (2008), our Supreme Court observed that "[s]overeign immunity as it applied to the king in English

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Bates Assoc, LLC v 132 Assoc, LLC*, 290 Mich App 52, 55 n 1; 799 NW2d 177 (2010). We similarly review de novo questions regarding the existence, construction, and application of a contract. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005); *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003); *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). The determination concerning the applicability of immunity is a question of law, which is also subject to de novo review. *Snead v John Carlo, Inc*, 294 Mich App 343, 354; 813 NW2d 294 (2011). The *Snead* panel further stated:

> Under MCR 2.116(C)(7), an order granting a motion for summary disposition in favor of a defendant is proper when the plaintiff's claim is barred because of immunity granted by law. The moving party may submit affidavits, depositions, admissions, or other documentary evidence in support of the motion if substantively admissible. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. This Court must consider the documentary evidence submitted for purposes of a motion brought under MCR 2.116(C)(7) relative to . . . immunity in a light most favorable to the nonmoving party. If there is no relevant factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. If, however, a pertinent factual dispute exists, summary disposition is not appropriate. [Citations, quotation marks, and ellipses omitted.]

First, absent any consideration at this stage of our analysis regarding Carrasco's authority and the presumed lack of compliance with EO measures pertaining to the waiver of sovereign immunity, we hold that the pertinent language in the agreement constituted a clear and

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common law and statutorily created governmental immunity that is currently applicable to the state as a sovereign government are 'characteristic[s] of government.' " (Citations omitted; alteration in original.) "Indian tribes are sovereigns." *Blatchford v Native Village of Noatak*, 501 US 775, 780; 111 S Ct 2578; 115 L Ed 2d 686 (1991). The United States Supreme Court has also "distinguished *state* sovereign immunity from *tribal* sovereign immunity[.]" *Kiowa Tribe of Oklahoma v Mfg Technologies, Inc*, 523 US 751, 756; 118 S Ct 1700; 140 L Ed 2d 981 (1998) (emphasis added). "Like foreign sovereign immunity, tribal immunity is a matter of federal law[,]" and "[a]lthough the Court has taken the lead in drawing the bounds of tribal immunity, Congress, subject to constitutional limitations, can alter its limits through explicit legislation." *Id.* at 759. The purpose behind MCR 7.202(6)(a)(v) would seem to be equally applicable to a denial of summary disposition to an Indian tribe claiming sovereign immunity, and any attempt to create or recognize a distinction might run afoul of constitutional protections and federal law. While posing an intriguing question, we ultimately decline to determine whether an order denying summary disposition on the basis of tribal sovereign immunity constitutes "an order denying governmental immunity to a governmental party," MCR 7.202(6)(a)(v), for purposes of being defined as a "final order" that would trigger an appeal of right under MCR 7.203(A)(1). *Assuming* that the trial court's order was not a "final order," and in the exercise of our discretion and the interest of judicial economy, we shall treat CCR's claim of appeal as an application for leave, grant leave, and now proceed to address the substantive issues. *Rains v Rains*, 301 Mich App 313, 320 n 2; 836 NW2d 709 (2013).

unequivocal waiver of tribal sovereign immunity. In *Bates*, 290 Mich App at 56-57, this Court, citing precedent from the United States Supreme Court, set forth some guiding principles applicable to the instant dispute:

> As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. This immunity applies to a tribe's commercial contracts, whether made on or off of an Indian reservation. To relinquish its immunity, a tribe's waiver must be clear. Likewise, a waiver cannot be implied and must be unequivocally expressed. [Citations, quotation marks, and alteration brackets omitted.]

Congress has not authorized plaintiff's lawsuit; therefore, our focus is on whether there was a waiver of sovereign immunity. In *C & L Enterprises, Inc v Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 US 411, 415; 121 S Ct 1589; 149 L Ed 2d 623 (2001), the contractual language at issue provided that any claims or disputes between the plaintiff contractor and the defendant Indian tribe arising out of a roofing contract shall be resolved in arbitration, with the arbitrator's award being final and subject to entry as a judgment in any court having jurisdiction. The United States Supreme Court held that because the defendant Indian tribe had clearly consented to arbitration and to the enforcement of any arbitral award in court, the tribe had waived its sovereign immunity. *Id.* at 423. The Court noted that it was unnecessary for a contractual provision to make explicit reference to the term "sovereign immunity" to effectuate a valid waiver of sovereign immunity. *Id.* at 420-421.

Here, the agreement, while not specifically referencing sovereign immunity, indicated that it was enforceable against any party in any court of competent jurisdiction within Kent County, Michigan, that the parties consented and submitted to the personal jurisdiction of Michigan for purposes of enforcing the agreement, and that the agreement was governed by the laws of Michigan. The language clearly, unambiguously, and unequivocally reflected a waiver of sovereign immunity, going beyond the arbitration provision in *C & L Enterprises* by expressly approving of and allowing litigation in a court of disputes arising from the agreement. The concept of immunity, sovereign or otherwise, is entirely undermined by the agreement's language dictating the enforceability of the agreement in a court of law.

CCR argues that *C & L Enterprises* is distinguishable from the case at bar, because the Supreme Court relied on the fact that the defendant Indian tribe had tendered the form contract, whereas here plaintiff had prepared the contract. Although the Supreme Court mentioned that the tribe had proposed, prepared, and tendered the contract, we find no language in the opinion indicating or suggesting that this fact had any ultimate bearing on the Court's holding that the relevant contractual provision constituted a clear waiver of sovereign immunity. *C & L Enterprises*, 532 US at 420-423. The Supreme Court, in alluding to the tribe's tendering of the contract, was merely commenting on principles related to ambiguous adhesion contracts before concluding that the contract was not ambiguous on the issue of waiver, nor foisted upon the tribe. *Id.* at 423. We are also addressing a clear and unambiguous waiver of sovereign immunity, and there is no indication of unequal bargaining power or that CCR was forced into the agreement. We thus find CCR's argument unavailing.

Having concluded that the agreement contained a clear waiver of sovereign immunity, we next confront CCR's argument that any alleged waiver of sovereign immunity would infringe on the Tribe's exclusive right to make its own laws and to be ruled by those laws, given that the

waiver was not made in accordance with the procedures outlined in the EO. In *Bates*, the Indian tribe had argued that a purported waiver of sovereign immunity contained in a settlement agreement was invalid because it was not supported by a resolution of the tribe's board of directors as required by tribal code. *Bates*, 290 Mich at 59.[8] The *Bates* panel first observed that the United States Supreme Court had not yet addressed this precise issue and had "not required anything other than clear, unequivocal language for a valid waiver." *Id.* (citations omitted). This Court then rejected the tribe's reliance on *Memphis Biofuels, LLC v Chickasaw Nation Indus, Inc*, 585 F3d 917 (CA 6, 2009), noting that it was not bound by the decision, nor persuaded by its analysis. *Bates*, 290 Mich App at 59. *Memphis Biofuels* would seem to support CCR's argument in this case, considering that the Sixth Circuit found no waiver of tribal sovereign immunity because a charter-required approval by the tribal board of a contractual provision waiving sovereign immunity had not been obtained, despite clear waiver language in the contract and a belief by the other party that board approval had been obtained. *Memphis Biofuels*, 585 F3d at 918-919, 922; see also *Bates*, 290 Mich App at 59-60. The *Bates* panel did find persuasive the decision in *Smith v Hopland Band of Pomo Indians*, 95 Cal App 4th 1; 115 Cal Rptr 2d 455 (2002). *Bates*, 290 Mich App at 60-62. This Court characterized and described the California case as follows:

> The court rejected the tribe's argument that the effect of the sovereign-immunity ordinance was to require the enactment of an ordinance or resolution specifically waiving sovereign immunity notwithstanding that the tribe had authorized one of its officials to execute the contracts and notwithstanding the tribe's subsequent approval of the contracts. The court stated that the tribe's argument assumed that the court must apply the tribal sovereign-immunity ordinance to determine that the otherwise binding contracts were ineffective to waive sovereign immunity because the explicit waiver was made by contract rather than by ordinance or resolution. In rejecting that argument, the court reiterated many of the reasons previously discussed, but also ruled that federal law rather than tribal law was applicable to resolve this question and that, if the court did not refer to federal law, it would not apply tribal law because the contracts specified that they were to be governed by California law. The court thus determined that the tribe, through its chairperson and subsequent resolution by the tribal council, had executed contracts that clearly and explicitly waived the tribe's sovereign immunity. [*Bates*, 290 Mich App at 61-62 (citations omitted).]

Turning to its facts, the *Bates* panel first observed that the person who entered into the settlement agreement on behalf of the Indian tribe was clearly authorized to do so, as he was the tribe's CFO,[9] that the settlement agreement specifically provided that it would be governed by Michigan law, and that there was no indication that the non-Indian party to the contract "was aware that a tribal resolution was necessary . . . to waive sovereign immunity." *Id.* at 62-63. The Court then stated:

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[8] The parties' settlement agreement in *Bates* specifically incorporated a provision waiving sovereign immunity that had been contained in an underlying sales agreement. *Bates*, 290 Mich App at 55-56.

[9] We will next address the issue concerning Carrasco's authority to execute the agreement.

> During the months following the execution of the settlement agreement, neither the Tribe nor the Tribe's attorney represented that the agreement was invalid, and $49,000 was paid to Bates [the non-Indian party] pursuant to the agreement. Not until after Bates filed its complaint did the Tribe contend that the settlement agreement was unenforceable. These factors show that the Tribe was aware of the settlement negotiations and authorized [its CFO] to execute the agreement despite the waivers of sovereign immunity and tribal-court jurisdiction contained therein. [*Id.* at 63.]

This Court held that the circumstances of the case supported the trial court's ruling that the Indian tribe had waived its sovereign immunity, especially in light of the conduct of the parties and the clear and unequivocal waiver. *Id.* at 64.

Here, the undisputed facts are extremely more compelling than in *Bates.* The documentary evidence revealed that the parties had operated under the agreement for several years, communicating regularly in relation to performances, ticket sales, and fees, that CCR had received at least $7 million dollars in revenue generated by ticket sales handled and managed by plaintiff pursuant to the agreement, that plaintiff had collected over $600,000 in charges and fees from CCR under the agreement, and that plaintiff had not been informed of any EO requirements.[10] CCR's attempt to now disavow the agreement and the waiver of sovereign immunity contained in the agreement on the basis of noncompliance with the EO borders on the absurd. Under the circumstances, CCR, the Tribe, and the various tribal councils and boards were certainly fully aware of the agreement and the relationship with plaintiff, where they had accepted and reaped the benefits of the agreement for several years. We note that in no averment in the Tribal Chairman's extensive affidavit did he assert that CCR or the Tribe was unaware of the agreement or the ongoing performances by the parties under the agreement. Nor did he claim that plaintiff had been made aware of the EO's requirements. *Bates* fully supports our holding that any failures in complying with the EO in regard to waiver of sovereign immunity do not warrant rejecting the application of the clear waiver of sovereign immunity found in the parties' agreement. And all of CCR's arguments to the contrary are simply unpersuasive and unavailing.

Our colleague in the dissenting-concurring opinion maintains that the tribe in *Bates* had conceded that it waived sovereign immunity even though the tribe had not passed a specific resolution pertaining to waiver, but then changed its stance in a lower court motion for reconsideration and on appeal. Therefore, according to the dissent-concurrence, *Bates* is fully distinguishable and the rejection of *Memphis Biofuels* by the *Bates* panel constituted obiter dictum. The dissent-concurrence finds *Memphis Biofuels* persuasive, and as mentioned earlier, *Memphis Biofuels* lends some support for CCR's position. We respectfully conclude that the dissent-concurrence misconstrues *Bates.*

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[10] Plaintiff's vice-president of sales stated in his affidavit that plaintiff's personnel "dealt with representatives and employees of the Casino on many matters arising out of or relating to the User Agreement." In a May 2010 email between plaintiff's employees, a reference was made to Carrasco's request to "write a renewal contract with the items that we'd discussed during our meeting . . . ." CCR provided no evidence countering plaintiff's evidence showing regular ongoing interactions between plaintiff and CCR's personnel regarding the agreement.

In *Bates*, the tribe and Bates Associates, LLC ("Bates"), entered into agreements pursuant to which Bates assigned the tribe Bates's right to purchase a parking garage near the tribe's casino, with the tribe agreeing to make significant repairs to the garage and giving Bates an option to purchase the garage for $1 at any point within seven years of the agreements. *Bates*, 290 Mich App at 54. The agreements were comprised of a "sale agreement" and an "option agreement," and the sale agreement contained a specific waiver of immunity. *Id.* at 55. Subsequently, Bates exercised the option to buy the garage, "but title to the garage was not delivered within the seven-year option period, and the parties disputed the extent of repairs needed to render the garage in good condition." *Id.* at 54. The parties ultimately reached a settlement agreement requiring title to be passed to Bates and for the tribe to pay Bates $2.2 million in four installments. *Id.* The "settlement agreement specifically incorporated the waiver of sovereign immunity provided in . . . the[] sale agreement." *Id.* at 55. Thereafter, the tribe failed to make the installment payments and refused to give Bates title to the garage. *Id.* at 54. Bates then filed suit, alleging breach of the *settlement* agreement. *Id.* As noted earlier, the tribe argued that the waiver of sovereign immunity in the *settlement* agreement was invalid, given that it was not supported by a resolution of the tribe's board of directors as required by tribal code. *Id.* at 59. As indicated later in this Court's opinion, "although there was no tribal resolution specifically pertaining to the waiver[] of sovereign immunity . . . in the *settlement* agreement, the [t]ribe conceded in the trial court that there was a tribal resolution . . . pertaining to the *sale* agreement[.]" *Id.* at 63 (emphasis added). This Court noted that the tribe had "asserted in the trial court that it had waived it sovereign immunity . . . with respect to the *sale* agreement and *option* agreement." *Id.* (emphasis added). The Court then observed that the tribe "argued for the first time in its motion for reconsideration in the trial court that the resolution did not waive sovereign immunity with respect to the *sale* agreement or the *option* agreement," renewing that argument on appeal. *Id.* (emphasis added). The *Bates* panel concluded that the tribe waived any argument that the waiver in the sale agreement or option agreement was invalid due to lack of a tribal resolution. *Id.* at 64.

Ultimately, the dispute and litigation in *Bates* concerned enforcement of the *settlement* agreement and the waiver contained therein, not the *sale* or *option* agreement, and there is no language in the *Bates* opinion suggesting that the tribe passed a resolution waiving immunity with respect to the *settlement* agreement or that the tribe had asserted in the trial court that it had waived immunity with regard to the *settlement* agreement. Indeed, had that been the case, the panel in *Bates* would have had no need to proceed with its extensive analysis and the discussion of *Memphis Biofuels* and *Smith.* The rejection of application of *Memphis Biofuels* was not obiter dictum; far from it. As noted by the dissent-concurrence, the *Bates* panel also distinguished *Memphis Biofuels*, stating that, "[u]nlike in *Memphis Biofuels*, there is no indication that Bates was aware that a tribal resolution was necessary for the [t]ribe to waive its sovereign immunity[.]" *Bates*, 290 Mich App at 62-63. Here, similarly, CCR did not counter plaintiff's evidence that plaintiff was wholly unaware of the need for approval of the agreement and waiver under the EO.

In sum, it is not a matter of us finding *Memphis Biofuels* persuasive or unpersuasive. Instead, the fact of significance is that the *Bates* panel rejected application of *Memphis Biofuels.* And this Court's decision in *Bates* constitutes controlling authority under MCR 7.215(J)(1), and we are bound by its analysis.

Finally, with respect to Carrasco and her authority to execute the agreement in the first instance, we hold that the doctrine of ratification, as recognized under Michigan *as well as*

*federal law*, dictates that CCR is bound by and adopted the agreement and the waiver provision therein, even if Carrasco lacked specific authority to sign the particular agreement. In *Wexford Twp v Seeley*, 196 Mich 634, 640; 163 NW 16 (1917), our Supreme Court stated:

> "Ratification takes place when one person adopts a contract made for him, or in his name, which is not binding on him because the one who made it was not duly authorized to do so. Ratification is a question of fact; and, in the great majority of instances, turns on the conduct of the principal in relation to the alleged contract or the subject of it, from which his purpose and intention thereabout may be reasonably inferred. And, generally, deliberate and repeated acts of the principal, with a knowledge of the facts, that are consistent with an intention to adopt the contract, or inconsistent with a contrary intention, are sufficient evidence of ratification." [Citations omitted.]

Ratification of a contract may be express or implied and can be shown by the parties' various dealings, so long as there was knowledge of the material facts relating to the contract. *Old Mtg & Fin Co v Pasadena Land Co*, 241 Mich 426, 436; 216 NW 922 (1928); *Apfelblat v Nat'l Bank Wyandotte-Taylor*, 158 Mich App 258, 262; 404 NW2d 725 (1987); see also *Barrow v Detroit Election Comm*, 305 Mich App 649, 504; 854 NW2d 489 (2014) (recognizing that the doctrine has been applied in the context of municipal corporations ratifying the unauthorized acts and contracts of its agents or officers when the corporations could legally have authorized the acts or contracts in the first instance). The doctrine of ratification has also been recognized under federal common-law. See, e.g., *Janowsky v United States*, 133 F3d 888, 891-892 (CA Fed, 1998) (indicating that the government may ratify and be bound by its agents' unauthorized prior promises or agreements by accepting benefits flowing from the promises or agreements).

Assuming that Carrasco was not specifically authorized to execute the agreement, and recognizing that there is no argument that she was not, in general, a CCR agent, CCR effectively ratified the agreement on the basis of its conduct over the years in accepting the benefits of the agreement, paying plaintiff for its fees, and regularly interacting with plaintiff with respect to carrying out the agreement. The communications and financial dealings between the parties' personnel and employees reflected that CCR had full knowledge of the facts and agreement. The documentary evidence established, absent a genuine issue of material fact, deliberate and repeated acts of the principal, CCR or the Tribe, that were consistent with an intention to adopt the agreement, or inconsistent with a contrary intention, sufficing to show ratification of the agreement. Accordingly, CCR became bound by the agreement and the waiver of tribal sovereign immunity, and thus the trial court properly denied CCR's motion for summary disposition.

Affirmed. Having fully prevailed on appeal, plaintiff is awarded taxable costs pursuant to MCR 7.219.

/s/ David H. Sawyer
/s/ William B. Murphy