IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LAC COURTE OREILLES BAND OF
LAKE SUPERIOR CHIPPEWA INDIANS
OF WISCONSIN, RED CLIFF BAND OF
LAKE SUPERIOR CHIPPEWA INDIANS
and SAKAOGON CHIPPEWA COMMUNITY
(MOLE LAKE BAND OF LAKE SUPERIOR
CHIPPEWA INDIANS),

ORDER

Plaintiffs,

02-C-0553-C

v.

UNITED STATES OF AMERICA,
U.S. DEPARTMENT OF THE INTERIOR,
THE HONORABLE GALE NORTON,
Secretary of the Department of the Interior,
and JAMES H. McDIVITT, Deputy Assistant
Secretary/Indian Affairs,

Defendants,

and

JAMES E. DOYLE, Governor of the State of Wisconsin,
and THE STATE OF WISCONSIN,

Defendant-Intervenors.

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On April 22, 2003, I granted defendants' and defendant-intervenors' cross-motions

for judgment on the pleadings and denied plaintiffs' cross-motion for judgment on the pleadings and their conditional motion for leave to file a second amended complaint. The clerk of court entered judgment on April 24, 2003. Now plaintiffs have moved to vacate the judgment pursuant to Fed. R. Civ. P. 59(e), arguing that the court erred when it denied their conditional motion to file a second amended complaint. (The conditional event was a ruling by this court that the gubernatorial concurrence is constitutional, which came to pass when I granted defendants' and defendant-intervenors' motions for judgment on the pleadings.) As a result, plaintiffs argue, the court failed to consider their argument that the Secretary of the Department of Interior neglected to perform her statutory duties under 25 U.S.C. § 2719(b)(1)(A) when she failed to evaluate the basis for the governor's non-concurrence.

As to the substance of their so-called "conditional" motion to file a second amended complaint, plaintiffs still do not see the logical infirmity of arguing that a complaint need not plead legal theories while at the same time arguing that they need to amend their complaint "to put the parties and the Court on notice that the already-alleged facts, in light of defendants' new position with respect to the interpretation of the statute at issue, give rise to a legal theory not addressed in the pending motions for judgment on the pleadings, a theory that may become ripe depending on how those motions are resolved." Plts.' Reply in Supp. of Plts.' Cond. Mot. to File Second Am. Cpt., dkt. #31, at 3. In other words, plaintiffs wanted this court to allow them to amend their complaint to plead a new legal

theory even though they concede that a complaint need not plead legal theories.

Although it is true that plaintiffs need not plead legal theories in a complaint, see Bennett v. Schmidt, 153 F.3d 516, 518 (7th Cir. 1998), plaintiffs must *argue* legal theories in their briefs. Plaintiffs cannot remain silent about an alternative legal theory when a dispositive motion is before the court and then ask the court "conditionally" to amend the complaint to include the unspoken theory if they lose. As is well established, "[a]rguments not developed in any meaningful way are waived." Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc., 181 F.3d 799, 808 (7th Cir. 1999).

Plaintiffs argue that a motion for judgment on the pleadings is subject to a motion to dismiss standard rather than the summary judgment standard. In other words, to succeed on their motion for judgment on the pleadings, defendants and defendant-intervenors had to show that the factual allegations do not support *any* legal theory that could entitle plaintiffs to relief. Although plaintiffs' general assertion might well be true in some instances, it is not in this case. The parties sought to dispose of their dispute on the basis of the underlying substantive merits and as a matter of law. See Alexander v. City of Chicago, 994 F.2d 333, 336 (7th Cir. 1993) (treating motion for judgment on the pleadings like motion for summary judgment when parties seek "to dispose of the case on the basis of the underlying substantive merits"); see also Wright & Miller, 5A Federal Practice and Procedure Civil 2d § 1369 ("Both the summary judgment procedure and the motion for

judgment on the pleading are concerned with the substance of the parties' claims and defenses and are directed towards a final judgment on the merits. Indeed, the standard applied by the court appears to be identical under both motions."). Thus, for all intents and purposes, the parties' cross-motions for judgment on the pleadings could have been labeled cross-motions for summary judgment.

The case proceeded as follows. Defendants and defendant-intervenors each moved for judgment on the pleadings, arguing the legal theories that plaintiffs pleaded explicitly in their complaint. See Am. Cpt., dkt. #1 (complaint alleged only constitutional and breach of trust violations). In response, plaintiffs said nothing as to their new, alternative legal theory. In fact, plaintiffs unambiguously disclaimed this theory early in the lawsuit during a judicial hearing, see Dfts.' Resp., dkt. #38, Exh. 1, July 19, 2001 Hearing, at 15 ("This case involves a challenge to what Congress did. It is not a challenge to what the Department of Interior has done; it is not a challenge, in fact, to what the Governor has or has not done."). Moreover, plaintiffs filed their own motion for judgment on the pleadings in which they argued the *same* legal theories asserted in their complaint and argued by defendants and defendant-intervenors. In light of plaintiffs' complaint, briefs and assertions in court, it is impossible to imagine how defendants or defendant-intervenors could have known of plaintiffs' alternative legal theory short of telepathy. See Moro v. Shell Oil Co., 91 F.3d 872, 876 (7th Cir. 1996) ("[Rule 59] does not provide a vehicle for a party to undo its own

procedural failures, and it certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment.").

Although plaintiffs contend that a motion for *partial* judgment on the pleadings is permissible, they fail to explain how this contention is relevant to this case. Plaintiffs did not move for a *partial* judgment on the pleadings; they moved for a total judgment. Finally, plaintiffs argue that "both the proposed second amended complaint and *plaintiffs' response to defendants' motion for judgment on the pleadings* explicitly set forth this claim for relief. See Proposed Amended Complaint ¶ 13, 61-64; Plaintiffs' Combined Response/Reply Brief at 51-55." Plt.'s Reply in Supp. of Rule 59 Mot., dkt. #39, at 5 (emphasis added). In other words, plaintiffs assert that they raised their new legal theory while briefing the cross-motions for judgment on the pleadings, the dispositive motion before the court. This is incorrect.

Plaintiffs submitted (1) a reply brief in support of their motion for judgment on the pleadings and a response brief in opposition to defendants' and defendant-intervenors' motion for judgment on the pleadings and (2) a brief in support of their conditional motion to amend the complaint. Plaintiffs assert that on pages 51 to 55 of their "combined response/reply brief," they raised this new legal theory. However, these pages are captioned "**ARGUMENT IN SUPPORT OF PLAINTIFFS' CONDITIONAL MOTION TO**

AMEND THE COMPLAINT." Although plaintiffs submitted both briefs under the same cover, they packaged their arguments as to each motion separately. In fact, when the combined brief was docketed, it was issued two docket numbers, #22 and #23. Plaintiffs never raised their new legal theory in support, response or reply to any motion for judgment on the pleadings. Instead, plaintiffs raised this theory in their brief in support of their conditional motion to amend the complaint, which effectively was an attempt to do an end run around the prohibition against asserting a new legal claim in a reply brief. See United States v. Turner, 203 F.3d 1010, 1019 (7th Cir. 2000) (arguments raised for first time in reply brief are waived); James v. Sheahan, 137 F.3d 1003, 1008 (7th Cir. 1998) (same). The fact that plaintiffs filed a motion to amend the complaint conditioned on their losing the dispositive motion should say something about the merits of this motion in and of itself.

Because nothing in plaintiffs' Rule 59 motion convinces me that I erred in denying either their cross-motion for judgment on the pleadings or their conditional motion for leave to file a second amended complaint, their motion to vacate the judgment will be denied.

ORDER

IT IS ORDERED that plaintiffs' motion to vacate the judgment pursuant to Fed. R. Civ. P. 59(e) is DENIED.

Entered this 14th day of July, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge