

**No. 212**

**IN THE SUPREME COURT OF THE UNITED STATES**

**YUMA INDIAN NATION,**

**Plaintiff/Appellee,**

**v.**

**THOMAS SMITH & CAROL SMITH,**

**Defendants/Appellants.**

**BRIEF FOR THE APPELLANTS**

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## **Questions Presented**

1. Whether the Yuma Indian Nation courts have personal and subject matter jurisdiction over Thomas Smith and Carol Smith, or in the alternative, whether the trial court should stay this suit while the Smiths seek a ruling in the Arizona federal district court.
2. Whether sovereign immunity, or any other form of immunity, protects the Yuma Indian Nation, the YIN Economic Development Corporation, and/or the EDC CEO and accountant from the Smiths' claims.

## **Statement of the Case**

### **Statement of the Facts**

Thomas Smith, a certified financial planner and accountant signed a contract with the Yuma Indian Nation (“YIN”), located in southwest Arizona, in 2007 to provide the Nation with financial advice. This contract provided that all disputes that arose from the contract was to be litigated in a court of competent jurisdiction. It also required Mr. Smith to maintain confidentiality regarding tribal communications and economic development plans. This contract was signed by the parties at Mr. Smith’s office in Phoenix, Arizona, which is outside the sovereign territory of the YIN. In 2009, YIN created the Economic Development Corporation (“EDC”) to promote the prosperity of the Nation and its citizens.

In 2010, Thomas Smith signed a contract with his sister Carol Smith with the written permission of the YIN’s Tribal Council. The contract was identical to the one Mr. Smith signed with the YIN in 2007 and both parties are required to comply with the YIN-Thomas Smith contract.

In 2016, the EDC wanted to engage in marijuana cultivation and sales. Although it is legal under Arizona State law for medical use, attempts to make recreational use legal failed. The EDC wanted to enact a tribal ordinance making marijuana cultivation and use on the reservation legal for any and all purposes. After quietly pursuing this development, the EDC conferred with Thomas Smith. Thomas and Carol Smith were personally opposed to involvement in the marijuana business for moral reasons. Mr. Smith informed his acquaintance, the Arizona Attorney General, of the Nation's plans. Shortly after, the Attorney General wrote the Nation and EDC a cease and desist letter regarding the development of recreational marijuana operations.

### **Statement of the Proceedings**

The Tribal Council and EDC filed suit against the Smiths for breach of contract, violation of fiduciary duties, and violation of their duties of confidentiality. The Smiths wanted to dismiss the YIN suit based on lack of personal jurisdiction and lack of subject matter jurisdiction. The trial court denied both motions. Thomas and Carol Smith filed answers denying the YIN claims and counter-claimed against the Nation for monies due under their contracts and for defamation for impugning their professional skills.

The Smiths also impleaded the EDC, and the EDC's CEO Fred Captain and accountant Molly Bluejacket in their official and individual capacities. The Smiths made the same claims against the third-party defendants as they had made against the YIN.

### **Summary of Argument**

The Arizona federal district court should have personal and subject matter jurisdiction over Thomas Smith and Carol Smith. They signed identical contracts with the Yuma Indian Nation indicating that any disputes that arose from the contract were to be litigated in a court

of competent jurisdiction. Although this was solely tribal activity, the federal government is allowed to oversee and make executive decisions about actions on federally owned land.

The Yuma Indian Nation, the YIN Economic Development Corporation and Molly Bluejacket do not have sovereign immunity, because the YIN were not protected by immunity when it signed the contract with Thomas Smith in Phoenix, Arizona. The contract was signed outside the boundaries of the reservation. By engaging in federally prohibited marijuana cultivation, the Yuma Indian Nation waived its sovereign immunity.

## **Argument**

### **Personal Jurisdiction Issue**

The trial court should stay the suit while the Smiths seek a ruling in the Arizona federal district court because the tribe signed a contract at Thomas Smith's office in Phoenix, agreed to litigate disputes arising from the contract in a court of competent jurisdiction, and engaged in an illegal activity on federally-owned Indian land. In Williams v. Lee, "Arizona courts are free to exercise jurisdiction over civil suits by non-Indians against Indians though the action arises on an Indian reservation."<sup>1</sup> The Yuma Indian Nation wanted to enact a tribal ordinance making marijuana cultivation and use on the Indian reservation. Because of where the action arose, the Arizona federal district court would be an appropriate venue for the Smiths and the Yuma Indian Nation.

Historically, "the Court has consistently taken the position that the federal government retains jurisdiction and control over the 'whole intercourse' between the Indian tribes."<sup>2</sup> All and any activity related to the Yuma Indian Nation's plan for engaging in

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<sup>1</sup> Williams v. Lee, 358 U.S. 217, 218, 79 S. Ct. 252, 252 (1959).

<sup>2</sup> Francisco v. State, 113 Ariz. 427, 429, 556 P.2d 1, 3 (1932).

marijuana cultivation and sales is an issue the federal government has control over. As a result, the trial court should stay the suit.

Additionally, “[t]he Court has [also] made it clear that in light of all the relevant statutes and treatises, the states have been allowed by Congress to assume jurisdiction over the Indian lands in question.”<sup>3</sup> The Arizona federal district court is allowed to assume jurisdiction over the Yuma Indian Nation. Even the contract signed by Thomas Smith and the Yuma Indian Nation provided for any and all disputes arising from the contract to be litigated in a court of competent jurisdiction. The Arizona federal district court is deemed to be a competent jurisdiction for the reasons listed above.

According to the Winnebago Tribal Code Title 1 Article 1, the Yuma Indian Nation courts does have personal jurisdiction over Thomas Smith and Carol Smith. Although the tribal court has jurisdiction over “any person who transacts, conducts, or performs any business activity within the [scope of] reservation”, the Smiths are legally allowed to bring this suit to Arizona federal district court. Since Carol Smith is resides and works in Portland, Oregon, and Thomas Smith resides and works in Phoenix, Arizona, it would be more practical and logical to hear the case outside of tribal court.

### **Subject Matter Jurisdiction Issue**

The Yuma Indian Nation courts do not have subject matter jurisdiction over Thomas Smith and Carol Smith. Instead, the trial court should stay the suit while the Smiths seek a ruling in Arizona federal district court. The lawsuit between the Smiths and the Yuma Indian Nation “arose out of transaction in which the contacts with the State of Arizona outside of

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<sup>3</sup> Francisco v. State 113 Ariz. 427, 429, 556 P.2d 1, 3, citing McClanahan v. Arizona State Tax Comm’n 411 U.S. 164, 93 S. Ct. 1257 (1973).

reservation boundaries were both significant and substantial.”<sup>4</sup> In determining whether the contacts were both significant and substantial, the Smiths can argue that informing Arizona Attorney General of the Nation’s plan on federally owned land related to the statewide referendum that failed. As a result, “these substantial contacts vest the trial court with jurisdiction over the Tribe’s lawsuit.”<sup>5</sup>

Additionally, “[i]n Arizona, the general rule is that the state has subject matter jurisdiction to prosecute crimes committed within its territorial borders.”<sup>6</sup> Carol Smith would not have subject matter jurisdiction in tribal court, because she resides in Portland, Oregon. Because of her contacts in Phoenix with her brother, the Arizona federal district court would have subject matter jurisdiction over Carol.

In a case in a different jurisdiction, the court concluded in State ex rel. Flammond v. Flammond that “Montana may not exercise subject matter jurisdiction over transactions arising on Indian reservations unless the transaction entails ‘significant’ or ‘substantial’ contacts with the state outside of reservation boundaries.”<sup>7</sup> This rule has been referred to and cited by other cases in Arizona. In Nenna v. Moreno, the court refers to the exception recognized by Flammond in order to determine whether a court does indeed have subject matter jurisdiction.<sup>8</sup> Since the Yuma Indian Nation were exploring the possibility of marijuana cultivation and recreational use on federal Indian land, it is considered to be a transaction outside of reservation boundaries. A statewide referendum to make marijuana legal for recreational use failed in the fall of 2016 and would still be considered illegal on the

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<sup>4</sup> Navajo Nation v. MacDonald, 180 Ariz. 539, 546, 885 P.2d 1104, 1111 (1994).

<sup>5</sup> Id.

<sup>6</sup> State v. Verdugo, 183 Ariz. 135, 137, 901 P.2d 1165, 1167 (1995).

<sup>7</sup> State ex rel. Flammond v. Flammond, 190 Mont. 350, 352, 621 P.2d 471, 472 (1980).

<sup>8</sup> Nenna v. Moreno, 132 Ariz. 565, 647 P.2d 1163 (1982).



reservation. The federal laws would still apply to the Yuma Indian Nation, who reside on federally owned land. Therefore, the federal laws would apply to Thomas Smith and Carol Smith.

### **Immunity Issue**

The Yuma Indian Nation is not entitled to immunity from the suit brought by the Smiths because the tribe has waived its immunity by signing a contract outside the boundaries of the reservation, by agreeing in that contract to litigate any and all disputes arising from the contract in a court of competent jurisdiction, and by engaging in illegal activity on federally-owned reservation land. According to Kiowa Tribe v. Mfg. Techs.<sup>9</sup>, “[a]s 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.” However, the Court has further clarified “an Indian tribe's sovereign immunity may be limited by . . . tribal conduct,” and required “such actions [to] be clear and unequivocal in their import [but] there is no requirement that talismanic phrases be employed. Thus, an effective limitation on tribal sovereign immunity need not use magic words.”<sup>10</sup> The Supreme Court then held this court should follow the lead of the United States Supreme Court and apply Arizona State law, rather than YIN tribal law to resolve the contract dispute between YIN and Mr. and Ms. Smith.

Because the contract between the Smiths and the YIN was signed outside of reservation territory, only limited the court in which any issues could be litigated to that of a “competent” jurisdiction, and only required confidentiality in regard to economic

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<sup>9</sup> 523 U.S. 751, 754 (1998)

<sup>10</sup> Narragansett Indian Tribe v. Rhode Island, 449 F.3d 16, 25 (1st Cir. 2006) citing, C&L Enters. v. Citizen Band Potawatomi Indian Tribe, 532 U.S. 411, 418, 420-421 (2001).

development plans, this court should find the Yuma Indian Nation is not immune from a suit seeking payment for work completed by a certified professional whose reputation the Yuma Indian Nation has since maligned.

The contract for services to the YIN was signed outside the confines of the reservation. In Mescalero Apache Tribe v. Jones, the Court held “tribal activities conducted outside the reservation present different considerations. ‘State authority over Indians is yet more extensive over activities . . . not on any reservation’” and allowed New Mexico to impose a tax on income the tribe received from a ski resort the tribe operated outside of its reservation land.<sup>11</sup> Since the contract between the YIN and Mr. Smith was signed at Mr. Smith’s office which is in Phoenix and outside of the YIN reservation, the “activity” that created the relationship between Mr. Smith and the YIN was an activity which took place not on any reservation. Because the creation of the relationship occurred outside the reservation, there is a possibility the Court will apply State law to this issue. If State law is used in this case, then tribal sovereign immunity will not protect the YIN from suit because “when a tribe asserts its sovereignty, it is claiming, ‘in essence, that it is not subject to state laws . . . *at all.*’”<sup>12</sup> In New Mexico v. Mescalero Apache Tribe, the Court further reasoned “[W]e have held that tribes have the power to . . . undertake and regulate economic activity *within* the reservation.”<sup>13</sup> (emphasis added). Additionally, since the YIN has adopted the Winnebago Tribe of Nebraska Code as its own law, the YIN has set forth “In any dispute not covered by the Tribal Constitution, Tribal statute, or Tribal common law, the Court may apply any laws

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<sup>11</sup> Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973).

<sup>12</sup> Aroostook Band of Micmacs v. Ryan, 404 F.3d 48, 68 (1st Cir. 2005).

<sup>13</sup> New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 335-36 (1983).

of the United States or any states therein, and any regulation of the Department of Interior which may be of general or specific applicability.”<sup>14</sup>

The Supreme Court has considered whether the doctrine of sovereign immunity should even remain effective law. In Kiowa Tribe v. Mfg. Techs. the Court questioned the “wisdom of perpetuating the doctrine” of sovereign immunity.<sup>15</sup> It found sovereign immunity to be excessive considering the economic stability and prosperity of many tribes. One specific reason the Court gave for doubting the propriety of continuing sovereign immunity was because, in today’s “economic context, immunity [could] harm those . . . who do not know of tribal immunity.”<sup>16</sup> Mr. and Ms. Smith may not have had any knowledge of the claimed immunity from suit of the Yuma Indian Nation. Since Mr. Smith was only ever contracted to provide financial advice on an as-needed basis, he may not have been privy to all the agreements and conditions the Yuma Indian Nation intended to “do business under.” Because sovereign immunity seems to be unclear and potentially harmful to individuals, like Mr. Smith, who agree to work with tribal government in some capacity but are not aware of the existence of the doctrine of sovereign immunity or of its effect on the contract they may sign with the tribe, the Court should finally take the necessary steps to do away with the doctrine of sovereign immunity to avoid further harm to Mr. and Ms. Smith or others like them who assist tribal governments in some way.

The Court in Kiowa Tribe also weighted the fact that no other part of the US government or even other foreign nations is as-protected from being hauled into court as tribal sovereign immunity makes most Native American tribes. The Court then concluded

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<sup>14</sup> Winnebago Tribe of Nebraska Code § 1-104.

<sup>15</sup> Kiowa Tribe v. Mfg. Techs., 523 U.S. 751, 758 (1998).

<sup>16</sup> Id.

“[t]he fact that the States surrendered aspects of their sovereignty when they joined the Union does not even arguably present a legitimate basis for concluding that the Indian tribes retained -- or, indeed, ever had -- any sovereign immunity for off-reservation commercial conduct.”<sup>17</sup>

The Yuma Indian Nation should be held accountable under the laws of the United States for defamation because the Yuma Indian Nation is “within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States, or of the States of the Union.”<sup>18</sup> The Court further clarified “Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers ‘inconsistent with their status.’”<sup>19</sup> In Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., the Supreme Court held “[t]he First Amendment does not protect the speech of a non-media party, when its actions create slander and/or libel against another private party.”<sup>20</sup> Because the YIN is not a media party, the YIN was not protected by the First Amendment when it made defamatory remarks against the Smiths. Further, “The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . .”<sup>21</sup> Because protecting the reputations of individuals is primarily the province of States, sovereign immunity does not apply to protect the YIN from defamation charges on behalf of

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<sup>17</sup> Kiowa Tribe v. Mfg. Techs., 523 U.S. 751, 765 (1998)

<sup>18</sup> Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211 (1978), quoting United States v. Kagama, 118 U.S. 375, 379 (1886)

<sup>19</sup> Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978), quoting Oliphant v. Schlie, 544 F. 2d 1007, 1009 (9th Cir. 1976).

<sup>20</sup> 472 U.S. 749 (1985).

<sup>21</sup> Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749, 758 (1985) citing Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (concurring opinion).

the Smiths.<sup>22</sup>

Growing and selling weed is a right expressly terminated by Congress in the federal Controlled Substances Act, and federal law is the source of Native American rights. “Tribal immunity is a matter of federal law and is not subject to diminution by the States.”<sup>23</sup> If the Yuma Indian Nation wants to have their rights governed by federal law (i.e. if they want to be given sovereign immunity), then their growing and selling marijuana should also be governed by federal law, and their activity is illegal.<sup>24</sup>

Mr. Smith’s duty to maintain confidentiality between him and the Yuma Indian Nation is significantly diminished when the court considers the activity for which Mr. Smith broke confidentiality and reported the Yuma Indian Nation’s plans to cultivate marijuana is an illegal activity. Mr. Smith is immune from punishment for violating any fiduciary duty he owed to the Yuma Indian Nation because he had a higher duty to report the criminal activities of his client, in this case, the Yuma Indian Nation. According to the Restatement (Third) of Agency §8.05(2) states that an agent has a duty “not to use or communicate confidential information of the principal for the agent’s own purposes or those of a third party.” The comment to this section, however, states:

an agent's duty of confidentiality is not absolute. An agent may reveal otherwise privileged information to protect a superior interest of the agent or a third party. Thus, an agent may reveal to law-enforcement authorities that the principal is committing or is about to commit a crime. An agent's privilege to reveal such information also protects the agent's revelation to a private party who is being or will be harmed by the principal's illegal conduct.<sup>25</sup>

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<sup>22</sup> See Kiowa Tribe v. Mfg. Techs., 523 U.S. 751, 756 (1998) citing Three Affiliated Tribes of Fort Berthold Reservation v. World Engineering, P.C., 476 U.S. 877, 891 (1986); Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 154 (1980).

<sup>23</sup> *Id.*

<sup>24</sup> See The Federal Controlled Substances Act, codified at 21 U.S.C. § 812(c) classifying marijuana as an illegal, Schedule I drug.

<sup>25</sup> Restatement (Third) of Agency §8.05(2), cmt. 3.

Because the legal community has recognized a general exception of reporting clients' imminent or already-occurring unlawful activity to the fiduciary duty of confidentiality, the Court should hold Mr. Smith immune from punishment for reporting the illegal activity being engaged in by the Yuma Indian Nation in cultivating marijuana on federally-owned land.

### **Conclusion**

Ultimately, Thomas Smith and Carol Smith have personal and subject matter jurisdiction in Arizona federal district court. The YIN is not entitled to sovereign immunity, because it has waived that immunity by executing an agreement including a stipulation to litigate any disputes outside of its sovereign territory.