

Case No 17-024

YUMA INDIAN NATION SUPREME COURT

YUMA INDIAN NATION,

Plaintiff/Appelle,

v.

THOMAS SMITH & CAROL SMITH,

Defendant/Appellants

Interlocutory Appeal to the Yuma Indian Nation Supreme Court from Yuma Trial Court

BRIEF OF APPELLANTS

Team No. 286

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I. QUESTIONS PRESENTED

A. Personal Jurisdiction

Can the tribe establish that the defendants had the requisite minimal contacts, where asserting personal jurisdiction over the foreign defendants would comply with *Int'l Shoe*?

B. Subject Matter Jurisdiction and Exhaustion

Does the tribe have subject matter jurisdiction over the conduct of non-Indians, that occurred outside of the reservation? Is exhaustion a requirement, or should the YIN Supreme Court allow the stay to move to federal court to decide on the jurisdictional question?

C. Sovereign Immunity

Have the YIN waived sovereign immunity, by establishing the EDC as an arm of the tribe, and in the corporate charter placing a waiver of sovereign immunity, when they stated they consented to "sue or be sued?"

II. STATEMENT OF THE CASE

A. Statement of the Proceedings

The Plaintiff and Appellee *Yuma Indian Nation* brought the original action under Title 2 of the adopted "Winnebago Tribal Code" against *Thomas Smith & Carol Smith* the defendants and now Appellants.

The original claims filed by the *Yuma Indian Nation* against *Thomas Smith & Carol Smith* were for breach of contract, violation of fiduciary duties, and violation of the Smiths' supposed duties of confidentiality.

The Smiths filed special appearances and identical motions to dismiss the Yuma Indian Nation (YIN) based on lack of personal jurisdiction and lack of subject matter jurisdiction, and in the alternative asked the Tribal Trial Court to stay the proceedings while the Smiths pursued a ruling in Arizona federal district court as to whether the Tribal Court has jurisdiction over them. The Tribal Trial Court denied both motions.

Under special appearance, the Smiths filed answers denying the YIN claims and counterclaimed against the YIN for monies due under the contracts they had with YIN and for defamation. The Smiths also impleaded the Economic Development Corporation (EDC) and Fred Captain the CEO of the EDC and Molly Bluejacket an accountant for the EDC in their official and individual capacities. The Smiths made the same claims against the third-party defendants as they made against the YIN.

The Tribal Trial Court dismissed all of the Smiths' counterclaims against the YIN and the third-party defendants based on sovereign immunity.

The Smiths filed an interlocutory appeal to the Yuma Indian Nation Supreme Court requesting the Court decide these issues and issue a writ of mandamus ordering the trial court to stay this suit.

The Yuma Nation Supreme Court has granted our interlocutory appeal based on two issues: 1) Does the Yuma Nation Courts have personal and subject matter jurisdiction over the Smiths or in the alternative, weather the trial court should stay the proceedings until the Arizona federal court rules on the Smiths' claims; 2) Does sovereign immunity or any type of immunity apply to the YIN, the EDC, the CEO and the accountant?

B. Statement of the Facts

Thomas and Carol Smith are brother and sister, and neither are of Native American descent, for purposes of litigation. Thomas is resident of the state of Arizona and Carol is a resident of the state of Oregon. Thomas is a certified financial planner and accountant, and Carol is a licensed stockbroker. In 2007 Thomas signed a contract with YIN, agreeing to provide financial advice to them on an as needed basis regarding economic development issues. The contract was signed off reservation at Thomas' office in Phoenix, Arizona. The contract contained a confidentiality provision and provided that any and all disputes arising from the contract be litigated in a court of competent jurisdiction. In 2010, Carol signed an identical contract that Thomas signed with the YIN, but her contract was with Thomas, not the YIN. The purpose behind the Thomas-Carol contract was for Carol to be able to provide Thomas, the EDC, and the YIN advice regarding stocks, bonds, and securities issues.

In 2009 the YIN created the YIN Economic Development Corporation. The EDC was funded by an initial investment of \$10,000,000 (ten million dollars) from the YIN. The purpose of the EDC is to "create and assist in the development of successful economic endeavors, of any legal type or business, on the reservation, and in southwestern Arizona." The YIN created the EDC per their tribal commercial code in accordance with Title 11 of the adopted tribal code of the "Winnebago Tribe." The commercial code authorizes the YIN to create and charter public and private corporations to operate businesses on and off the reservation. The EDC is a wholly owned subsidiary of the YIN and considered an "arm-of-the-tribe." The EDC is operated by its own board of directors consisting of five (5) people. The initial board was appointed by the YIN tribal Council and new directors are elected by the current directors by a majority vote. The board must contain three (3) YIN tribal members and two (2) non-Indian

or citizens of other tribes. The YIN tribal Council retains the right to remove any member for any reason with a 75% majority Council vote.

The EDC is authorized to buy and sell property in fee simple title on and off the reservation and are also able to sue and be sued. No debts of the EDC can encumber, or implicate in any way, the assets of the YIN. The EDC does not possess the power to lend or borrow money in the name of or on behalf of the YIN, nor can it grant or permit any liens or interests of any kind to attach to the assets of YIN. The EDC is required to submit quarterly reports to the Tribal Council for review and approval. The EDC pays fifty percent (50%) of its net profits to the YIN general fund on an annual basis. To date, the EDC has paid \$2,000,000 (two million dollars) into the YIN general fund.

The EDC charter provides for a tribal preference in its hiring practice and it also states that its board, and all employees, are protected by tribal sovereign immunity to the fullest extent of the law. The council included the sovereign immunity language in the EDC charter to protect the YIN and the EDC from any unconsented litigation.

Thomas began his contractual relationship directly with the YIN in 2007. Thomas communicated with Tribal Council members and various tribal chairs almost on a daily basis prior to the creation of the EDC. Once the EDC was formed in 2009, Thomas' communications were primarily focused with Fred Captain, the CEO of the EDC and Molly Bluejacket an employee/accountant with the EDC. Thomas also prepared and submitted written quarterly reports to the YIN Tribal Council and presented these reports in person on reservation at Tribal Council meetings.

Carol on the other hand, communicated directly with her brother Thomas, providing her advice via email, telephone, postal and other delivery service. Thomas, on occasion, would

forward her communication to the YIN Tribal Council, Fred Captain, and Molly Bluejacket. Carol submitted monthly bills via email to Fred Captain and the EDC would mail Carol payment. While on vacation in Phoenix, Carol has visited the YIN reservation twice.

In 2016, the EDC began to look into the possibility of cultivating and selling marijuana. Medical marijuana is currently legal in the state of Arizona, but recreational use is not; both are prohibited federally. The EDC solicited the YIN Tribal Council to pass an ordinance making the cultivation and use of marijuana on the reservation legal for any and all purposes. The Tribal Council passed such an ordinance. The EDC began to look into the development of a marijuana operation and consulted with Thomas Smith many times in that regard. Thomas, for his own personal reasons, did not want to be involved in assisting in the development of the Tribal marijuana business. Thomas informed an acquaintance of his, the Arizona State Attorney General of the EDC plans. The Attorney General then sent the YIN and the EDC a cease and desist letter regarding its plans for the marijuana operation.

III. SUMMARY OF ARGUMENT

The tribe has claimed that there is both personal jurisdiction and subject matter jurisdiction over this cause of action. Furthermore, the court has held that the tribe is immune to suit through the doctrine of sovereign immunity.

Section A outlines why the court erred when it decided that there is personal jurisdiction. Section B outlines two points, Section B(1) concerns subject matter jurisdiction, namely that the tribal court system, in asserting jurisdiction over this claim, was violative of federal law because they adjudicated claims against conduct of non-Indians that occurred

outside of their regulatory jurisdiction. Section B(2) addresses that there is no requirement for exhaustion and that the Supreme Court should stay the case and allow the federal court to rule on the jurisdictional issues, because ruling to the contrary only serves to cause undue delay of a trial on the merits. Section C addresses why the trial court should not have held that the EDC, and YIN were immune to suit in this case.

IV. ARGUMENT

To exercise its inherent civil authority over a defendant, a tribal court must have both subject matter jurisdiction, consisting of regulatory and adjudicative jurisdiction—and personal jurisdiction.

A. The Tribe Does Not Meet the "Minimal Contacts" Standard to Exercise Personal Jurisdiction over Thomas and Carol.

The YIN has adopted the Winnebago tribe civil procedure code, which establishes that they will exercise jurisdiction over any person or subject matter, so long as it is within the Constitutional power of the tribe, complies with ICRA or is not prohibited by federal law. (Winn. Tribe C. 2-102). To comply with ICRA, personal jurisdiction can be established through a showing of passing the minimal contacts test, and any other limitations would be found in federal case law relating to the minimal contacts test from *Int'l Shoe*.

Due process requires that a nonresident defendant have minimum contacts with the forum, and they are of such a nature that the exercise of personal jurisdiction does not offend traditional notions of fair play and substantial justice. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945). For personal jurisdiction to be constitutional, a plaintiff needs to show either (1) the defendant has substantial, or continuous and systematic contacts

with the forum (general jurisdiction), or (2) there is a close nexus between the defendant's forum contacts and the cause of action, where the defendant should know, or should have known their conduct would give rise to a cause of action (specific jurisdiction). *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 839 (9th Cir. 1986).

1. The Tribe does Not Have General Jurisdiction.

General jurisdiction exists over a defendant who has substantial, or continuous and systematic business contacts, such that it would not be unreasonable to subject the defendant to its jurisdiction. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445, 72 S. Ct. 413, 418 (1952). The amount and type of business contacts, which must be carried on to make it reasonable and just for subjecting the defendant to general jurisdiction, is to be decided on a case by case basis. *Health Mgmt. Professionals v. Diversified Bus. Enters.*, 882 F. Supp. 795, 797 (S.D. Ind. 1995).

In *Perkins*, the defendant was a foreign corporation whose principle place of business was in the Philippines, so the issue was whether the state of Ohio could establish personal jurisdiction over the corporation. The court reasoned that they could because the CEO of the corporation was living in Ohio, and operating the foreign corporation out of Ohio. It was not enough that he was physically in the state, there needed to be more, because the corporation was outside of the state. The court listed all the activities the CEO engaged in on behalf of the corporation, such as business meetings, banking, stock transfers, paying bills, paying salaries, buying machinery, and concluded that those activities combined with the physical presence of the CEO was sufficient for Ohio to establish constitutional general jurisdiction over the foreign defendant corporation.

Unlike *Perkins*, both Thomas and Carol Smith do not have sufficient continuous and systematic contacts with the tribe. The YIN will assert that Thomas and Carol should be subjected to general jurisdiction under *Perkins*. The type of activity that the court accepted in *Perkins* was ongoing, and constant. Thomas did have constant contacts with the tribe, probably enough to satisfy that he was engaged in continuous and systematic business contact with the tribe. Being a foreigner of the forum, he did not engage in those activities from within the forum; like in *Perkins*, contact was made from his office outside of the tribe's regulatory jurisdiction and within the state's jurisdiction. Thomas only entered the reservation on a quarterly basis, when he would present his reports to the tribal council after having emailed those reports to them. The tribe cannot reasonably assert general jurisdiction over Thomas for entering the reservation four times per year just because he sends emails and business communications to them regularly. Even if the court finds that there are sufficient minimal contacts here, they still have to analyze whether it is reasonable to hale him into their court.

The tribe's position, regarding general jurisdiction over Carol is even weaker. She lives and works in Portland, Oregon. Carol signed her contract with Thomas, and although has the same obligations as Thomas to the tribe, her contractual relationship is with Thomas, and not the tribe. Carol provides her advice to Thomas who then forwards the advice to the tribe and has only visited the reservation twice, although she does submit bills to the tribe. Carol's contacts with the tribe can hardly be considered as continuous and substantial, and she has no continuous physical presence within the tribe's regulatory jurisdiction. It would be highly unreasonable for the tribe to assert general jurisdiction over Carol when she has only been there twice and forwards her regular advice and communications to Thomas. Her only true continuous connection to the tribe is her billing them.

2. The Tribe Does Not have Specific Jurisdiction.

The Ninth Circuit uses a three-factor test to determine whether a court has specific jurisdiction over a nonresident defendant: "(1) the nonresident defendant must do some act or consummate some transaction with the forum state or perform some act by which it purposely avails itself of the privilege of conducting activities in the forum state, thereby invoking the benefits and protection of its laws; (2) the claim must arise out of or result from the defendant's forum-related activity; and/or (3) the exercise of jurisdiction must be reasonable." *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004).

The first factor in this three-part test depends on whether the conduct in the underlying claim is tortious or contractual. If it is a tortious act in question, then the court will look for a purposeful direction, meaning the court will analyze whether the defendant did some act or transaction with the forum state. If it is contractual, the court will look for a purposeful availment, where the defendant purposefully availed themselves of the privilege of conducting activities in that forum and invoked the benefits and protections of that forum's laws. *Id.* The reasoning is that the defendant has a quid pro quo relationship with the forum, namely that in exchange for the protections those laws afford when executing or performing a contract within the forum, the defendant submits to litigation in that forum. *Id.*

The conduct in question arose from Thomas's and Carol's alleged breach of contract with the YIN. In *Burger King*, the court explained the three factors the court will look at to determine whether a defendant purposefully availed himself to the foreign forum, 1. prior negotiations and contemplated future consequences, 2. terms of the contract and, 3. the parties' actual course of dealing. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479, 105 S. Ct. 2174,

2186 (1985). The purpose of this "purposeful availment" requirement is to prevent the defendant from being subjected to a foreign forum due to random, fortuitous, or attenuated contacts, or because of the conduct of some third party. *Id* at 475, 105 S. Ct. 2174, 2184.

Carol's contacts with the forum in relation to her contract are attenuated at best as she has visited the reservation twice. Her regular contact regarding her contractual obligations mostly occurs between herself and Thomas and furthermore, her contract is technically with Thomas, not the tribe, although the tribe will argue that the terms of the contract state that they have a stake in it because her obligations to them are the same as Thomas'. But, that is just one factor in the test. Nothing in the record shows that she had any negotiations with the tribe in drafting this contract, although the provision that she has to comply with the "YIN-Thomas" contract might show that there was some contemplation concerning who her obligations were to, and who would be harmed, and seek redress should she breach. But, the course of dealing only demonstrates a miniscule amount of contacts between herself and the tribe, she submitted only monthly bills to them and the rest was interaction she had with Thomas. Lastly, the actual alleged conduct that gave rise to this controversy was between Thomas and the attorney general, Carol simply disagreed with the marijuana grow operation.

Thomas, on the other hand, has a harder hill to climb. He had a contractual relationship with the tribe for over ten years. His course of dealing with the tribe was communicating with the tribe on a daily basis, through emails and telephone calls to individual tribe members concerning financial advice per the contract, and he visited the reservation on a quarterly basis to present his quarterly report to the council. The problem the tribe has, though, is their forum selection clause is not specific. It does not let Thomas know that if he breaches the confidentiality agreement, he will be subject to the tribal court and it states he will be subject

to "any court of competent jurisdiction." This might be strong enough for the courts to rule against specific jurisdiction over Thomas. Had the tribe wanted to ensure he was haled into their court, they should have specified that any and all disputes be litigated in their court, but they did not choose specify this in the contract.

The third factor is a reasonableness test, where the court will look at numerous factors and balance all seven of them, where none of them are by themselves dispositive. These factors are: (1) extent of the defendant's purposeful interjection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum. *Id* at 476-77, 105 S. Ct. 2174, 2184.

The first factor is in the tribe's favor. Thomas was under contract to be the tribe's financial advisor, which has a direct impact on how the tribal council goes about investing money on behalf of the tribe. The second factor likely goes in Thomas and Carol's favor because although Thomas resides in Phoenix, close in proximity, and Carol lives in Oregon, which is quite far from the tribe. Distance is not the only burdening factor. There is also the fact that the very people who brought the controversy to court will be the benefactors of a beneficial outcome and also the people who decide the controversy on the merits. Therefore there is a prejudicial burden on the defendants, and not just to the merits, but prejudicial in a conflict of interest manner. This factor weighs very heavily in favor of the defendants. The sovereignty of the tribe is in conflict, because if they cannot assert jurisdiction over Thomas and Carol, the very interest at the core has to deal with the tribe's finances, and the tribe's ability

to run its government is implicated by making proper financial decisions, so this factor weighs in favor of the tribe. The next factor does as well, because the tribe has a substantial interest in litigating this in their forum, but it also plays into the "conflict of interest" brought forward earlier. The tribe will also state that the most efficient judicial resolution, and best forum, would be to litigate in their forum, but this is simply not true, because this is clearly not the proper forum for this claim, and when the lower tribal court decided that this was the proper jurisdiction, they caused undue delay, because as will later be discussed in the subject matter analysis, there is no way the court could have found they had any regulatory jurisdiction over either defendant. The better forum in which this matter can be decided is the 9th district federal court, because there will be a neutral judge and the ends of justice would be better served in a federal court. Even if the federal court finds in favor of the tribe, there would be no conflict of interest influencing the judgment.

Though the court might find that sufficient minimal contacts are found between Thomas and the tribe, the court will also find that it would be unreasonable to make Thomas submit to the jurisdiction of the tribe because there is an alternative forum and there is a conflict of interest in allowing the tribe to decide the claim on the merits against Thomas. Carol, on the other hand, has not established minimal contacts, nor availed herself of the laws of the tribe, so it would be highly unreasonable to find that there is personal jurisdiction over her.

B. The Tribal Court Asserting Jurisdiction over Conduct Off Reservation by Non-Indians is Expressly Violative of Federal Law, because the Tribe has No Regulatory Authority over non-Indians Outside of Indian Country, therefore *Montana* does Not Apply, and there is No Exhaustion Requirement.

1. The Tribe Cannot Assert Subject Matter Jurisdiction over Thomas and Carol.

The tribal courts of YIN do not have subject matter jurisdiction over this cause of action, and therefore are not a proper court of competent jurisdiction. Though the federal government has a substantial interest in promoting tribal self-government and preserving tribal sovereignty, neither interest is impeded because the tribe cannot assert jurisdiction over the conduct of non-Indians off their reservation, and therefore outside of their regulatory jurisdiction.

To exercise its inherent civil authority over a defendant, a tribal court must have subject matter jurisdiction consisting of regulatory and adjudicative jurisdiction, where the court looks to what extent the rule from *Montana* limits these powers. *Water Wheel Camp Rec. Area, Inc. v. Larance*, 642 F.3d 802, 809 (9th Cir. 2011). Beyond what is expressly delegated to the tribes through congress, exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes. *Montana v. United States*, 450 U.S. 544, 564, 101 S. Ct. 1245, 1257 (1981). Tribes may regulate through taxation, licensing, or other means, the activities of non-members within their reservations, even on non-Indian fee lands, who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements, when that conduct threatens or has some direct effect on the political integrity, economic security, or the health and welfare of the tribe. *Id* at 565, 101 S. Ct. 1245, 1258.

a. The YIN Claims *Montana* Applies.

The YIN argues that there is ample reason for the tribe to assert jurisdiction over Thomas and Carol. They consented to tribal jurisdiction when they entered into a consensual

business contract with them, and the contract stipulated any dispute arising from the contract was to be tried in any court of competent jurisdiction. Furthermore, they arguably performed part of their contractual obligation on the reservation. And, finally, when Thomas alerted the attorney general, the attorney general wrote a letter for the tribe to cease and desist their marijuana operations, which the tribe claims had a direct impact on their economic security because this revenue raising avenue was closed.

b. *Montana* Exceptions do Not Apply to Non-Indian Conduct Off Reservation.

If the *Montana* exceptions applied, the tribe would concededly have a strong case for jurisdiction. But, the reality is that *Montana* exceptions do not apply here. Even if they did, Thomas and Carol have a stronger case for there being no subject matter jurisdiction than the contractors had in *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S. Ct. 1404 (1997), where the court found that the tribe had no jurisdiction. In *Strate*, a contracting company entered into a contract with the tribe. The company was a non-member, and they got into an accident with another non-member within the reservation, but on a highway that was leased and maintained by the state. The court found that there could be no subject matter jurisdiction because the conduct that gave rise to the controversy involved non-members and happened on land that the state had regulatory authority of through a consensual lease with the tribe.

Like in *Strate*, though the tribe has an interest and the actions do have some impact on the tribe, the conduct that gave rise to this controversy did not occur within the regulatory boundary of the tribe. Thomas performed most of his contractual duties in his office in Phoenix, while Carol did so in Oregon. The contract was executed in Phoenix as well. Thomas only entered the reservation four times per year to make a presentation to the tribal council

concerning his report, and Carol only visited the reservation twice. The alleged breach of fiduciary duty and contract also occurred off the reservation, when Thomas spoke to the attorney general. There is no conduct the tribe can point to which they can state with definitive precision that they have regulatory jurisdiction over, and thus, per *Montana*, do not have adjudicative jurisdiction.

2. Exhaustion is Not Required, Because a Tribe Cannot Lawfully Assert Their Adjudicative Jurisdiction over Non-Indian Defendants Who Engaged in Conduct that gave Rise to a Cause of Action Outside of the Reservation.

Tribal Self-Government is not implicated in this case, because the Tribal Court does not have subject matter jurisdiction over the actions of a non-Indian when those actions did not happen within their regulatory jurisdiction (See *Montana*, exceptions only apply to activity by non-members *within their reservations*). Normally, before a federal court will hear a claim to stay a case for determining jurisdictional issues, there is a requirement that the claimant exhaust all remedies within the tribal court system, but even if the tribe finds jurisdiction, it is still reviewable. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16, 107 S. Ct. 971, 976 (1987). This requirement has been reduced to a strong presumption standard, and a few exceptions have been accepted by the courts, (1) when an assertion of tribal jurisdiction is motivated by a desire to harass the defendant, (2) is conducted in bad faith, (3) where the action is patently violative of express jurisdictional prohibitions, and (4) where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction. *Nevada v. Hicks*, 196 F.3d 1020, 1030 (9th Cir. 1999).

Our case falls within the third exception, because per *Montana*, where a tribal court does not have regulatory authority, they cannot have adjudicative authority. Quite simply, the conduct occurred outside the tribe's territory. The YIN Supreme Court should nullify the lower court's ruling and allow Thomas and Carol to seek a judgment in federal court concerning jurisdiction. It would only serve to cause undue delay by having the Supreme Court uphold the lower court's judgment, and ruling that the tribe has subject matter jurisdiction, because regardless of how the YIN Supreme Court rules, the federal court will eventually find that there was no subject matter jurisdiction in the original proceeding.

C. Sovereign Immunity

1. Origins of Inherent Tribal Sovereignty.

Sovereignty is an inherent concept that all federally recognized tribes in the United States possess, unless they voluntarily give it up or Congress abrogates it. Tribal sovereignty is not granted by the United States by treaty or statute, but exists as a result of Indian Tribes predating the United States.¹ The United States Constitution recognizes the sovereignty of the tribes in what is known as the “Indian Commerce Clause” found in Article I section 8 clause 3, “Congress will have the power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” (U.S. Const. art. I, § 8, cl. 3). The concept was first recognized by the Supreme Court of the United States in what is now commonly referred to as the Marshall Trilogy of cases. Chief Justice John Marshall outlined the basics in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) recognizing tribal sovereignty, but as “domestic nations.” In *Worcester v. Georgia*, 31 U.S. 515 (1832), the Cherokee acknowledged they were under the

¹ Cases and Materials on Federal Indian Law, 7th Ed. Getches, Wilkinson, Williams, Fletcher & Carpenter, page 416

protection of the United States, but that did not divest them of their ability of self-government or their capacity to enter into treaties or compacts.² The YIN is a domestic sovereign nation.

2. Sovereign Immunity Might Apply to the Yuma Indian Nation but not to the Economic Development Corporation nor to its Officers and Employees.

Sovereign immunity is a legal doctrine that refers to the fact that a government cannot be sued without its consent.³ The Supreme Court’s acknowledgement of Tribal Sovereign Immunity dates back to 1850 in the case of *Parks v. Ross*, where the court recognized that as a tribal leader of the Cherokee Nation, John Ross could not be sued in Federal court. *Parks v. Ross*, 52 U.S. 362 (1950). The YIN, EDC, Fred Captain, and Molly Bluejacket are all asserting “sovereign immunity” as a means to dismiss the claims against them. The YIN trial court has agreed with them. The trial court has erred.

As stated above in section IV, A, the YIN adopted the Winnebago Code. Title 2 article 1 section 2-111, titled “Laws applicable to civil actions.” It states,

In all civil cases, the Tribal Court shall apply:

- A. The Constitution, statutes, and common law of the Tribe not prohibited by applicable federal law, and, if none, then
- B. The federal law including federal common law, and, if none, then
- C. The laws of any state or other jurisdiction which the Court finds to be compatible with the public policy and needs of the Tribe. 2. No federal or state law shall be applied to a civil action pursuant to paragraphs (B) and (C) of subsection (1) of this Section if such law is inconsistent with the laws of the Tribe or the public policy of the Tribe. 3. Where any doubt arises as to the customs and usages of the Tribe, the Court, either on its own motion or the motion of any party, may subpoena and request the advice of elders and counselors familiar with those customs and usages.

² Id. at page 417

³ Cornell Law, https://www.law.cornell.edu/wex/sovereign_immunity

The YIN tribal code addresses immunity in a number of places. Winn. Tribe C. title 2, article 1, section 106 states, “Nothing in this Act shall be construed to be a waiver of the sovereign immunity of the Tribe, its officers, employees, agents, or political subdivisions or to be a consent to any suit beyond the limits now or hereafter specifically stated by Tribal law.” By this section the YIN is retaining its sovereign immunity unless waived. Also in Winn. Tribe C. 2-401-2, under capacity to sue and be sued the adopted code states,

Except as otherwise provided by law, every person, corporation, partnership, or incorporated association shall have the capacity to sue or be sued in its own name in the Courts of the Tribe, and service may be had upon unincorporated associations and partnership as provided in Section 2-317(3) of this Act, upon a managing or general partner, or upon an officer of an unincorporated association.

This section applies to the EDC, Fred Captain, and Molly Bluejacket.

Further investigation into the YIN code related to tribal businesses provides for corporations wholly owned by the tribe, which the EDC is. Winn C. 11-061 states,

The provisions of Sections 11-1001 through 11-1091 shall apply to all corporations incorporated under this Code and wholly owned, directly or indirectly, by the Tribe and shall override any other provisions in this Code to the contrary. In the case of Tribal corporations wholly owned, directly or indirectly, by the Tribe, all provisions of this Code are subject to the provisions of Sections 11-1001 through 11-1091.

Under Title 11 article 11 section 1003 titled “Special powers, privileges and immunities of corporations wholly owned by the Tribe” the code states,

Subdivision 1. Scope. The special powers, privileges and immunities described in this Section shall be available only to a corporation wholly owned, directly or indirectly, by the Tribe.

Subdivision 3. Sovereign immunity. The sovereign immunity of the Tribe is hereby conferred on all Tribal corporations wholly owned, directly or indirectly, by the Tribe. A corporation wholly owned, directly or indirectly, by the Tribe shall have the power to sue and is authorized to consent to be sued in the Court, and in all other courts of competent jurisdiction, provided, however, that:

a. no such consent to suit shall be effective against the corporation unless such consent is:

1. explicit,
2. contained in a written contract or commercial document to which the corporation is a party, and

3. specifically approved by the board of directors of the corporation, and
 - b. any recovery against such corporation shall be limited to the assets of the corporation. Any consent to suit may be limited to the Court or courts in which suit may be brought, to the matters that may be made the subject of the suit and to the assets or revenues of the corporation against which any judgment may be executed.

The YIN has not directly consented to be sued. It has, thru the EDC, its wholly owned corporation, agreed to “sue and be sued.” Does that consent by the EDC pass back thru to the YIN? Maybe. From a logical point of view, if the EDC is considered an “arm-of-the-tribe” then the tribe should not be able to shield itself from the actions that its “arm” takes or agrees to take. The corporate charter of the EDC professes to shield the EDC, its board, and all its employees by the tribe’s sovereign immunity to the fullest extent of the law. The fullest extent of the law would mean the immunity could be waived by consent or by Congress’ abrogation through its plenary power. Congress has not abrogated the YIN sovereign immunity, but the YIN may have waived it through its “arm,” the EDC. In an effort to limit its exposure, Title 11 section 161 subdivision 26 of the adopted “Winnebago” code states, “Consent to suit by a corporation shall in no way extend to the Tribe, nor shall a consent to suit by a corporation in any way be deemed a waiver of any of the rights, privileges and immunities of the Tribe.” The only way to reconcile the YIN code with the EDC waiver, is to recognize that the EDC is not actually an “arm-of-the-tribe”, but just a mere tribal corporation, effectively, an entity of its own accord that happens to be wholly owned by the tribe. If it is truly an “arm-of-the-tribe” then YIN code contradicts itself. It can’t, on one hand, grant waiver and then, on the other, say that if it does, it actually doesn’t really mean it was granted.

There is no question that the EDC has waived its immunity when it agreed to “sue and be sued.” A “sue and be sued” clause effectively waives immunity, and has made the Indian Corporation amenable to a state court in any action in which the court would otherwise have

jurisdiction. *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community*, 138 Ariz. 378, 385 (Ct. App. 1983).

The YIN tribal code allows for the EDC to consent to waiver and recognizes the process to do so. The EDC has done just that. Arizona and Federal case law supports such an action. “Immunity may also be waived, but “a tribe's waiver must be ‘clear.’” *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 121 S. Ct. 1589 (2001). Including the “sue and be sued” clause in the corporate charter of the EDC, with that exact language, cannot be more clear. The EDC has waived immunity.

Fred Captain, the CEO of the EDC and Molly Bluejacket, an accountant employee of the EDC have been sued in both their official and individual capacities. The YIN tribal code Title 11 article 5 section 521 provides for indemnification for employees and officers acting in their “official capacity.” The recently decided U.S. Supreme Court case of *Lewis v. Clarke* addresses the tribal indemnification clause head on. Though the facts in our case are a bit different, for Captain and Bluejacket are named in both their official and individual capacity, whereas Clark was only sued in his individual capacity. The court states,

We hold that, in a suit brought against a tribal employee in his individual capacity, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated. That an employee was acting within the scope of his employment at the time the tort was committed is not, on its own, sufficient to bar a suit against that employee on the basis of tribal sovereign immunity. We hold further that an indemnification provision does not extend a tribe's sovereign immunity where it otherwise would not reach.
Lewis v. Clarke, 137 S. Ct. 1285, 1289 (2017).

The Court goes on to state, “Similarly, lawsuits brought against employees in their official capacity “represent only another way of pleading an action against an entity of which an officer is an agent,” and they may also be barred by sovereign immunity. *Kentucky v. Graham*, 473

U.S. 159, 165, 105 S. Ct. 3099, 3106 (1985).”⁴ Therefore, Captain and Bluejacket fail to be covered by the cloak of immunity, both in their individual and official capacities. If the EDC had not waived its immunity, then Captain and Bluejacket would be covered while named in their official capacities, but that is not what has transpired.

If logic prevails, then the YIN itself is not barred from suit because it’s “arm” waived its immunity. It is evident that the EDC, Fred Captain and Molly Bluejacket are not immune from suit.

V. CONCLUSION

The YIN trial court erred when it agreed to hear the case, and declined the Smith's objections to subject matter jurisdiction and personal jurisdiction. Furthermore, when the trial court decided the tribe was protected by sovereign immunity, it not only erred, but it also demonstrated the point raised in the personal jurisdiction argument, that our clients would be overly burdened through being compelled to submit to the tribe's adjudicative jurisdiction. The tribal court system has no subject matter jurisdiction because all claims they brought arose from conduct that occurred outside of their regulatory jurisdiction. Congress has only expressly given them regulatory authority over non-Indians within Indian Country, and even then, on a limited basis through the *Montana* ruling. And, in *Montana*, the court stated the exceptions that potentially give a tribe adjudicative jurisdiction only apply to conduct by nonmembers within their regulatory jurisdiction, and that only extends as far as authorized by the definition of Indian Country.

To be sure, the YIN Supreme Court is a court of competent jurisdiction for purposes of the forum selection clause in the contract if the tribe can show that Thomas and the attorney

⁴ *Lewis v. Clarke*, 137 S. Ct. 1285, 1289 (2017).

general met within the reservation, instead of his office when Thomas confided in the attorney general the information concerning the tribes desire to start an illegal marijuana operation. Unfortunately, there is nothing to show that Thomas illogically went to the attorney general's office, picked him up, and drove him to the reservation, keeping quiet while on state highways, and Thomas chose to open the faucet of information when they got out of the car and entered the reservation.

Lastly, at the very least, the EDC cannot assert sovereign immunity in this case. They expressly waived sovereign immunity when they inserted the "sue or be sued" clause in their charter. If they were to assert sovereign immunity, it would be extremely detrimental to the tribe because it would be contrary to the very reason those clauses are inserted into charters like the one drafted for the EDC - to give potential investors a sound frame of mind when investing in tribal capital ventures with the knowledge that there is a forum for redress when a mistake is made by the tribe or the investor. Furthermore, by asserting that the EDC is "wholly owned" and an "arm of" the tribe, the tribe cannot separate itself from the EDC for purposes of personal convenience in avoiding litigation.