

Case No. 17-024
IN THE YUMA INDIAN NATION SUPREME COURT

YUMA INDIAN NATION
Plaintiff—Appellee
v.
THOMAS SMITH & CAROL SMITH
Defendants—Appellants

APPELLEES' BRIEF
APPEAL FROM THE TRIAL COURT
FOR THE YUMA INDIAN NATION TRIBAL COURT

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CASE No. 17-024
ORAL ARGUMENT REQUESTED

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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 Proceedings

The Yuma Indian Nation filed suit against Thomas and Carol Smith in Yuma Indian Nation Tribal Court for breach of contract, in violation of fiduciary duties and violation of duties of confidentiality. The Smiths filed special appearances and identical motions to dismiss the YIN suit based on lack of personal jurisdiction and lack of subject matter jurisdiction, and in the alternative, for the trial court to stay the suit while the Smiths pursue a ruling in Arizona federal court as to whether the tribal court has jurisdiction over them. The trial court denied both motions.

Claiming to continue under their special appearances, the Smiths filed answers denying the YIN claims and counterclaimed against the Nation for monies due under their contracts and for defamation for impugning their professional skills. Moreover, 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 allege the same claims against the third-party defendants as they alleged against the Yuma Indian Nation.

The trial court dismissed all of the Smiths counterclaims against the Yuma Indian Nation and claims against the third-party defendants due to sovereign immunity.

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

Statement of the Facts

In 2007, the Yuma Indian Nation (“YIN”) of Arizona signed a contract with Thomas Smith, a certified financial planner and accountant. The contract was signed in Phoenix, Arizona where Thomas Smith works and resides. By signing the contract, Thomas Smith agree to provide the Yuma Indian Nation financial advice on an as-needed basis regarding economic development issues. In addition, the contract required Thomas Smith to maintain absolute confidentiality in any and all tribal communications and economic development plans.

From 2007 to 2017, Thomas Smith provided the Yuma Indian Nation with financial advice on multiple economic development issues. Communications made from Thomas Smith to Tribal Council members and several tribal chairs varied from the exchange of emails and telephone calls on a nearly daily occurrence.

In 2009, the Tribal Council created the YIN Economic Development Corporation (“EDC”) as a wholly owned subsidiary of the Yuma Indian Nation to “assist in the

development of successful economic endeavors, of any legal type or business, on the reservation and in southwestern Arizona.” As required, the EDC keeps detailed corporate and financial records, and submits them on a quarterly basis to the Tribal Council for review and approval. The Tribal Council mandated in the corporate charter that the EDC, its board, and all employees are protected by tribal sovereign immunity to the fullest extent of the law.

After the Yuma Indian Nation created the EDC, Thomas Smith primarily communicated with Fred Captain, the EDC CEO, and Molly Bluejacket, EDC employee/accountant. Along with these communication exchanges, Thomas Smith prepared and submitted to the YIN Tribal Council written reports on a quarterly basis and presented these reports in person at the Tribal Council meetings on the reservation.

In 2010, with the written permission of the Tribal Council, Thomas Smith signed a contract with his sister, Carol Smith. As a licensed stockbroker, Carol Smith works and resides in Portland, Oregon. The contract of Carol Smith is identical to Thomas Smith’s contract that he signed with the Yuma Indian Nation in 2007. In fact, Carol Smith’s contract includes the provision that both parties are required to comply with the YIN-Thomas contract. Thomas Smith, the EDC, and the YIN retained Carol Smith for advice regarding stocks, bonds, and securities issues.

Carol Smith provides advice directly to her brother by telephone, email, postal services, and delivery services. She submits monthly billing to the EDC CEO, Fred Captain, and the EDC mails her payments. Carol Smith visited the YIN reservation along with Thomas Smith on occasions. Further, Thomas Smith forwards many of her communications and advice on various issues to the Tribal Council, the EDC CEO and EDC accountant.

In 2016, the EDC began investigating the possibility of engaging in marijuana cultivation and sales. The EDC conferred with Thomas Smith on this issue several times. Subsequently, Thomas informed the Arizona Attorney General of the YIN's plans. The Attorney General then wrote the YIN and EDC a cease and desist letter regarding the development of recreational marijuana operations.

Because the Smiths breached their contract, violating their fiduciary duties and violating their duties of confidentiality, the Tribal Council filed in tribal court. Defendants filed motions to dismiss for lack of subject matter and personal jurisdiction which the trial court denied. Defendants now appeal the ruling on the motions, and in the alternative, for a stay until Arizona federal district court rules on the issues.

Personal Jurisdiction

In order to hear a case in tribal court, the court must have personal jurisdiction over the defendants. Under the adopted Yuma Tribal Code, the Yuma Indian Nation Trial Court has personal jurisdiction over “[a]ny person transacts, conducts, or performs any business or activity within the reservation, either in person or by an agent or representative, for any civil cause of action or contract or in quasi contract or by promissory estoppel or alleging fraud.” Title 1, Article 1 Winnebago Tribal Court Rules. 1-104(2)(a).

In addition to the tribal code, a court may exercise personal jurisdiction over a defendant where a defendant has sufficient minimum contacts with the forum court such that the suit 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, 90 L.Ed. 95 (1945). In *International Shoe*, defendant was an out-of-state company that employed salesmen within the state of

Washington. Washington sued defendant to recover unpaid unemployment taxes for the state. Defendant claimed the state of Washington had no personal jurisdiction over him. The court held that the defendant established certain minimum contacts with the state of Washington to satisfy personal jurisdiction. More so, the contacts made are not just continuous and systematic activities but also those that give rise to the liabilities sued on. Id. at 317.

Furthermore, Thomas Smith established sufficient minimum contacts required to satisfy personal jurisdiction. Thomas Smith made daily communications with the Yuma Indian Nation. He presented reports in person at Council meetings on the reservation. He was contracted to give financial advice for the tribe located within the tribal jurisdictional boundaries. Though he resided in Phoenix, Thomas Smith worked with the Tribal Council, the EDC, and its employees on the reservation regularly. By the Yuma Indian Nation tribal court rule Title 1 Article 1, the Yuma Indian Nation Tribal Court has jurisdiction over Thomas Smith because of his contracted business performance that he supplied the tribe.* Accordingly, his business activity occurred within the reservation by nature of his contract. For his financial advice, Thomas Smith was being paid by the tribe located on the reservation. He worked alongside the Tribal Council, EDC and its employees. He also made presentations at the Tribal Council meetings on the reservation.

For these reasons, Thomas Smith established the sufficient minimum contacts necessary for the Yuma Indian Nation tribal court to obtain personal jurisdiction over him through his business communications and activities made with the Yuma Indian Nation on and off the reservation.

The Yuma Indian Nation Tribal Court also has personal jurisdiction on Carol Smith. Carol Smith signed a contract with the tribe that is identical to Thomas Smith's contract. Her contractual obligations included supplying advice regarding stock, bonds, and securities issues while maintaining confidentiality of any and all communications made with the tribe. As the facts detail, she billed the EDC monthly and the EDC paid her for the services she provided. While Carol Smith has met the sufficient minimum contacts required for personal jurisdiction, the contract and the activities from that contract gave rise to the liabilities brought on this suit.

Under the tribal code, the Yuma Indian Nation tribal court can obtain personal jurisdiction from contractual business activities not only in person, but through an agent as well. Though she provided advice to Thomas Smith for him to forward to the Tribal Council, EDC CEO, and EDC accountant, Carol Smith sustained regular communications with the tribe through her brother, acting as an agent for her. This falls under the tribal code's personal jurisdiction statute. Title 1, Article 1 Winnebago Tribal Court Rules. 1-104(2)(a).

For these reasons, Carol Smith established the sufficient minimum contacts necessary for the Yuma Indian Nation tribal court to obtain personal jurisdiction over her through her business communications and activities made with the Yuma Indian Nation on and off the reservation.

Subject Matter Jurisdiction

Tribal Courts have long had exclusive jurisdiction over a suit by any person against a tribal member for a claim arising in Indian country. *Williams v. Lee*, 358 U.S. 217 (1959).

Indian tribes have long been recognized as “distinct, independent political communities”. *Worcester v. Georgia*, 6 Pet. 515, 559 (1832). With such distinction, tribes may exercise many of the powers of self-government. *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978). Unfortunately, tribes no longer possess full attributes of inherent sovereignty. “The sovereignty that the Indian tribes retain is of a unique and limited character.” *Id.* at 323.

Further, Title 2 Article 1 (2-102) allows for the Tribal Court to exercise jurisdiction over “...any person or subject matter on any basis consistent with the Constitution of the Tribe, the Indian Civil Rights Act of 1968, as amended, any specific restrictions or prohibitions contained in federal law.” However, federal law has placed specific limitations on civil authority of tribes.

Tribes cannot exercise civil jurisdiction over non-Indians on non-Indian fee lands within the tribe’s boundaries. *Montana v. United States*, 450 U.S. 544, 564, 101 S. Ct. 1245, 1258, 67 L. Ed. 2d 493 (1981). In *Montana*, the Crow Indians enacted a resolution that prohibited all non-Indians from fishing or hunting on the reservation, whether or not the non-Indians owned land in fee simple. The court held that “...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, and so cannot survive without express congressional delegation.” *Id.* at 564. However, the court in *Montana* stated two exceptions. The first exception allows tribes to exercise civil authority over activities of nonmembers who enter consensual relationships with the tribe or its members, as through commercial dealings. *Id.* at 565. The second exception allows a tribe to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct

effect on the political integrity, the economic security, or the health or welfare of the tribe. *Id.* at 566.

In the present case, the Smiths had a consensual business contract for financial advisement. The Smiths contracted with the Tribal Council, EDC, EDC CEO and EDC accountant to help develop the tribe's economic development plans. The Smiths built their relationship with the tribe by signing a business contract with the tribe, maintaining regular communications entities on the reservation, and presented reports of their work within tribal boundaries. Because the Smiths willingly entered a consensual relationship with the tribe through its commercial contract, the first exception to the Montana rule applies.

While the defendants may argue that they resided off the reservation or that the breach occurred off the reservation, neither of these arguments hold merit. While the Montana rule involved regulation of fee lands, it did not specifically limit the Montana rationale to fee land disputes. A-1 Contractors v. Strate, 76 F.3d 930, 937 (8th Cir. 1996), aff'd, 520 U.S. 438, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997). In *Strate*, a non-Indian and her Indian children were involved in an accident on the reservation with a non-Indian owned construction subcontractor. The suit was brought in tribal court. Though the accident happened within tribal boundaries, the right-of-way granted by the tribe to the state become equivalent to fee land. The appellee's argued that Montana rule indicated that tribes retain "unrestricted territorial civil jurisdiction..." *Id.* at 936. The court ruled that "any attempt to limit the rationale of Montana and Brendale to fee land jurisdictional issues is both unconvincing and unsupported by the language...." *Id.* at 938. The court references that tribal courts have power to exercise civil jurisdiction in conflicts *affecting the interests of the Indians on Indian lands*. *Id.* at 938 [Emphasis added]. While *Strate* seemed to narrow the *Montana* scope, the

court interpreted that civil jurisdiction is not limited to territorial boundaries but rather if the conduct affects the Indians on the reservation. Though Thomas and Carol Smith reached out to a friend and disclosed confidential information about the tribe's economic development plans, the breach of contract affected the Yuma Indian Nation and its tribal members on the reservation.

The tribal code 2-102 frameworks jurisdiction in civil actions. This jurisdiction has the limitations from federal law as outlined by the Montana rule and its exceptions. Because the defendants had a contractual relationship with the tribe through commercial dealings along with the cause of action affecting the tribe on Indian land, the Yuma Indian Tribal Court has subject matter jurisdiction to hear the suit.

Stay Suit until Arizona Federal District Court Ruling

The defendants argue that the tribal court should grant a stay until the Arizona Federal District court can make a ruling on subject matter jurisdiction. However, the trial court is correct in denying their motions to dismiss because the defendant's failed to exhaust their remedies in the tribal judicial court. Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians, 471 U.S. 845, 853, 105 S. Ct. 2447, 2452, 85 L. Ed. 2d 818 (1985) In *National Farmers*, the school district and insurer sought a preliminary injunction preventing the injured schoolboy from executing on judgment taken in tribal court. Id. at 845. The injunction was brought in federal court, arguing that the issue was a federal question. Id. at 845. The district court held that the tribal court had no jurisdiction over a civil action against a non-Indian. Id. at 845. However, the Court of Appeals reversed, ruling that "[e]xhaustion of Tribal Court remedies is required, however, before petitioners' claim may be entertained by

the District Court. Id. at 845. As in our present case, the defendants have yet to seek remedies available in tribal court. Thus, Thomas Smith and Carol Smith have not exhausted tribal court remedies. Until the defendants do so, it is premature for a federal district court to consider any relief. Id. at 845-846.

“At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts.” Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 17, 107 S. Ct. 971, 977, 94 L. Ed. 2d 10 (1987). In LaPlante, the Tribal Court made an initial determination that it had jurisdiction over an insurance dispute. Id. at 17. Iowa Mutual had not yet obtained appellate review. Id. at 17. The court held that tribal courts had not had a full opportunity to evaluate the claim and federal courts should not intervene. Id. at 17. Thomas Smith and Carol Smith must first appellate review before seeking federal review.

The trial court should not grant the stay until federal review until the defendants exhaust tribal remedies. Because Thomas Smith and Carol Smith have failed to do so, the stay is premature.

SOVEREIGN IMMUNITY

At the core of the issue’s in this case rests the inherent foundation of the solid and enduring principle that native tribes constitute separate nations that exercise “inherent sovereign authority.” Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla., 498 U.S. 505, 509 (1991). This principle exists because indigenous tribal people are “separate sovereigns pre-existing the Constitution.” Santa Clara Pueblo v. Martinez, 436 U.S.

49, 56 (1978). Along with their sovereignty comes the “common-law immunity from suit traditionally enjoyed by sovereign powers.” *Id.* at 58. As such, there are two possible ways for tribal governments to lose this sovereign immunity. The two options include congressional action or an act by the tribal government that waives the privilege. The 9th Circuit in Pub. Serv. Co. of Colorado v. Shoshone-Bannock Tribes, 30 F.3d 1203, 1206 (9th Cir. 1994) cautioned that courts should “tread lightly in the absence of clear indications of legislative intent when determining whether a particular federal statute waives tribal sovereign immunity.” *Id.* citing Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community, 991 F.2d 458, 462 (8th Cir.1993) quoting Santa Clara Pueblo v. Martinez at 98.

Alternatively, tribal governments may waive sovereign immunity through their actions. For example, the 10th Circuit held the Kickapoo Tribe did not waive sovereign immunity by agreeing to comply with Title VII of the Civil Rights Act of 1964 in Nonomantube v. Kickapoo Tribe in Kansas, 631 F. 3d 1150 (10th Cir. 2011). The Court expounded the “Tribe's sovereign immunity from suit remains intact unless the Tribe has clearly and unequivocally waived its sovereign immunity...”. Nanomantube v. Kickapoo Tribe in Kansas at 1152. Conversely, the Potawatomi Nation did waive sovereign immunity – as held by the Supreme Court in C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411 - when the Tribe entered into an arbitration agreement with enforcement “in any court having jurisdiction thereof.” The contract subjected the Tribe to resolution of disputes by applying American Arbitration Association Rules, which were to be enforced in federal or state courts. Thus, agreeing to comply with the arbitration agreement also acquiesced to the Tribes subjugation to the arbitration rules

and implies a waiver of sovereign immunity. As there is no indication of Congressional action that would remove sovereign immunity of the Yuma Indian Nation, the first analysis in regards to the sovereign immunities claims must focus on whether or not the YIN waived sovereign immunity themselves.

The Yuma Indian Nation has not expressly waived their sovereign immunity. This is identifiable in a number of locations throughout the dispute. First, the EDC itself was created using the “its inherent sovereign powers” of the tribe. Yuma Indian Nation, Plaintiff/Appellee v. Thomas Smith & Carol Smith, Defendants/Appellants, Case No. 17-024 at page 1. Further, the YIN provided a provision in the EDC charter indicated their intent to reserve sovereign immunity for “the EDC, its board, and all employees...to the fullest extent of the law.” Id. at 2. Moreover, the YIN would have to waive their sovereign immunity powers by utilizing a resolution by the Tribal Council. This is due to the actions taken by the Tribal Council in 2005 when they adopted titles 1, 2, and 11 of the Winnebago Tribe of Nebraska. Section 1-919 provides for this requirement and mandates that such a waiver must specifically refer to their intent and without doing so the “Tribe shall be immune from suit in any civil actions.” Section 1-919 Code of the Winnebago Tribe of Nebraska. Additionally, the YIN have not waived sovereign immunity through their contracting activity. While the Supreme Court in C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma held the Tribe had waived sovereign immunity through their contract which included the arbitration clause and its enforcement provisions, the distinction from the case at bar is distinctly distinguishable. The Potawatomi Nation waived their immunity not as a result of adopting a contract with language outlining the process to resolve disputes, but because the process bargained for acquiesced to the arbitration rules, which the Tribe agreed

to be governed by as well as enforced in federal and state courts. Here, the YIN – in their contract with both Smith party’s – agreed to subject themselves to a resolution of potential disputes through “litigat[ion] in a court of competent jurisdiction.” Yuma Indian Nation, Plaintiff/Appellee v. Thomas Smith & Carol Smith, Defendants/Appellants, Case No. 17-024 at 1. This is distinguishable from Potawatomi because the YIN did not agree to subject themselves to any particular set of rules, and did not indicate that any disputes would result in enforcement by a waiver of their sovereign immunities. They simply agreed to resolve the dispute in a competent court, which in this case was the tribal court system. The Supreme Court in Potawatomi cited their previous decision in Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla., 498 U.S. 505, 509 (1991) which outlines “to relinquish its immunity, a tribe's waiver must be clear.” Here, there is not only a lack of a “clear” intent to waive sovereign immunity, there is existential evidence in both the YIN governing documents as well as the Smith contracts of undeniable intent of the Tribe to retain their sovereign immunity. As such, the trial court’s decision to dismiss the Smith claims against the YIN was correct.

Sovereign Immunity for the YIN Economic Development Corporation

While the principle of sovereign immunity protects Tribal Governments from suit, it also has the ability to protect related entities. In determining the extension of sovereign immunity to related entities the Court should apply the ‘Arm of the Tribe’ factors outlined by the 9th Circuit in White v. Univ. of California, 765 F.3d 1010 (9th Cir. 2014).¹

¹ The 9th Circuit recently reaffirmed their commitment to the White factors in United States ex rel. Cain v. Salish Kootenai Coll., Inc., 862 F.3d 939 (9th Cir. 2017).

“In determining whether an entity is entitled to sovereign immunity as an ‘arm of the tribe,’ [the Court] examine[s] several factors including: ‘(1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities.’ ” White v. Univ. of California, 765 F.3d 1010, 1025 (9th Cir. 2014) citing Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino and Resort, 629 F.3d 1173, 1187 (10th Cir. 2010).

Applying the ‘Arm of the Tribe’ Factors

- (1) The method of creation of the economic entities

The YIN Tribal Government had the opportunity – like any entity – to incorporate their Economic Development Corporation (EDC) under Arizona corporate law. Contrary, the YIN chose to create the EDC under the 2009 Tribal Commercial Code. This code allowed the Tribe to create and charter public and private corporations operating business enterprises both on and off of the reservation, and was created utilizing the Tribes “inherent sovereign powers”. See Yuma Indian Nation, Plaintiff/Appellee v. Thomas Smith & Carol Smith, Defendants/Appellants, Case No. 17-024 at page 1. In White v. Univ. of California, the court determined the arm of the tribe entity “did not waive its sovereign immunity by filing suit against the University in the Southern District of California or by incorporating under California law.” Id. Additionally, the Tribe’s involved created the entity by resolution which the Court determined was pursuant to their “power derived directly from the Tribes' sovereign authority” Id. Here, the YIN actions of incorporating under their own tribal code would lean further than White towards retaining sovereign immunity under the creation factor. Additionally, it is documented that the YIN EDC was created to the same powers

approved of by the Court in *White*. As a result of the before mentioned creation details, the YIN expressed their intention of reserving their sovereign powers and in doing so the first *White* factor leans heavily towards the YIN EDC retaining sovereign immunity.

- (2) Purpose

The *White* court viewed the arm of the tribe entity as having a tribal purpose when the entity's purpose was to "to recover remains and educate the public". *Id.* Here, the YIN EDC was designed to "to create and assist in the development of successful economic endeavors, of any legal type or business, on the reservation and in southwestern Arizona." See YIN EDC Charter. While at first glance the charter may not appear to directly indicate a tribal purpose, the EDC most certainly exists to do so. This is evidenced by the charter provision requiring "fifty percent of all EDC net profits ... to be paid to the YIN general fund on an annual basis." *Yuma Indian Nation, Plaintiff/Appellee v. Thomas Smith & Carol Smith, Defendants/Appellants*, Case No. 17-024 at 2. Additionally, "[t]he charter requires the EDC to apply tribal preference in hiring employees and contracting with outside entities. The EDC has employed an average of 25 tribal citizens full-time every year since its creation in 2009." *Id.* The preceding portions of the charter indicate a clear purpose of advancing tribal economic interest by providing jobs to tribal members, as well as providing an opportunity to provide income for the Tribe's general fund. This clear indication of a tribal purpose also weighs more heavily than the *White* case's purpose of "[recovering] remains and educat[ing] the public" which was determined to be a legitimate tribal purpose.

- (3) Structure, ownership, and management, including the amount of control the tribe has over the entities

In White v. Univ. of California the arm of the tribe entity's governing board was "comprised solely of tribal members, who act on its behalf ... [with] representatives ... appointed by each tribe." Id. The White case's arm of the tribe entity processes were "defined and accepted by the Tribes". See Id. These facts align nicely with the YIN EDC structure. The YIN EDC Board will always consist of 3 tribal members, and the YIN retain an at will removal authority process designed to protect the YIN's ownership and management interests. The facts from this case weigh similarly to the application in White, and as such should be treated similarly and weigh in favor of retaining sovereign immunity as an arm of the tribe given the YIN power and position within the EDC.

- (4) The tribe's intent with respect to the sharing of its sovereign immunity

The YIN's desire to share sovereign immunity quite arguably could not be more intentionally drafted. The Tribe did this by placing a provision in the charter outlining their intent that "the EDC, its board, and all employees are protected by tribal sovereign immunity to the fullest extent of the law." Yuma Indian Nation, Plaintiff/Appellee v. Thomas Smith & Carol Smith, Defendants/Appellants, Case No. 17-024 at 1. Moreover, the Tribe expounded their intent for doing so by stating in the charter their purpose was "to protect the [EDC] and the Nation from unconsented litigation and to assist in the success of the EDC's endeavors." Id. To waive sovereign immunity the Supreme Court has outlined a standard of a "clear waiver", here the fact pattern suggest quite the opposite - clear indication of the Tribe's intent to share sovereign immunity with the EDC. See White v. Univ. of California, at 1023 citing Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla. at 509. Accordingly, this factor also weighs overwhelmingly in favor of tribal sovereignty and the EDC.

- (5) The financial relationship between the tribe and the entities.

In White v. Univ. of California the court ruled the arm of the tribe entity was entitled the extension of the Tribes sovereign immunity and the facts of that case presented a situation where the entity was “funded exclusively by the Tribes.” Id. The financial relationship between the tribe and the entity is important, and again the facts from the case at bar fall in line with the fact pattern in White. Here, the EDC was funded by a “one-time ten million dollar loan from the Nation’s general fund.” Yuma Indian Nation, Plaintiff/Appellee v. Thomas Smith & Carol Smith, Defendants/Appellants, Case No. 17-024 at 1. Further, the EDC is required to “keep detailed corporate and financial records and submit them on a quarterly basis to the Tribal Council for review and approval which shows a definitively strong and enduring relationship between the Tribe and the EDC.” Id. Moreover, any contention that the YIN’s loan of ten million dollars was simply an investment that was not intended to build a sufficient relationship to sustain an arm of the tribe challenge is quickly put to rest when further analysis of the charter indicates “fifty percent of all EDC net profits are to be paid to the YIN general fund on an annual basis.” Id. at 2. If the relationship was simply one of lender-lender and an investment, the fifty percent transfer requirement from the EDC to the YIN would be limited to the terms of a loan repayment (which they are not). Accordingly, since all 5 White factors weigh overwhelmingly in favor of the YIN and EDC sovereign immunity was correctly interpreted to protect both the Tribe (YIN) and its arm of the tribe entity (EDC).

Immunity for EDC CEO Fred Captain and Accountant Molly Bluejacket

Determining the applicability of sovereign immunity for EDC CEO Fred Captain and Accountant Molly Bluejacket (hereafter referred to as “employees”) hinges on the application of the facts based on whether the employees were acting in their individual or official capacities. “In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official’s office and thus the sovereign itself.” Lewis v. Clarke, 581 U.S. ____ at 6 citing Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989); Dugan v. Rank, 372 U. S. 609, 611, 620–622 (1963). “Personal-capacity suits, on the other hand, seek to impose individual liability upon a government officer for actions taken under color of state law.” Hafer v. Melo, 502 U.S. 21, 25. The distinguishing factor is whether or not the sovereign is the real party in interest. *Id.* A defendant in an official capacity action may assert sovereign immunity. Lewis v. Clarke citing Kentucky v. Graham, 473 U. S. 159, 167.

Suits Against the Employees and Sovereign Immunity

Here, the employee’s ability to use sovereign immunity from the suit was dependent upon the EDC possessing sovereign immunity through the tribe. Having argued for the use of such immunity, it is a natural consequence that the employees would have sovereign immunity in their official capacities. Here, the Smith’s are attempting to sue the employees for their acts in their official capacities. This particular strategy is nothing short of a smoke and mirror tactic in the Smith’s actual pursuit of suit against the YIN, and as such is merely a

round about way of bringing suit against the tribe. Accordingly, this type of suit falls under the same type of suit the Supreme Court in Lewis v. Clarke determined “may ... be barred by sovereign immunity.” See Lewis v. Clarke citing Kentucky v. Graham at 159, 165–166.

The Court in Lewis v. Clarke was presented a fact pattern that appears similar to this one, but is strikingly different. In that case a tribal employee was involved in an automobile accident on a Connecticut highway (off reservation), which resulted in a tort claim against the driver individually. The suit was “not a suit against [the driver] in his official capacity [, rather it was] a suit against [the driver] to recover for his personal actions, which “will not require action by the sovereign or disturb the sovereign’s property.”” Lewis v. Clarke citing Larson v. Domestic and Foreign Commerce Corp., 337 U. S. 682, 687 (1949). Further, the court addressed whether the tribal identification policy which would make the tribe responsible for the recovery would invoke sovereign immunity. The Court concluded that in and of itself this fact was insufficient to invoke the sovereign immunity defense even going so far as to say “[w]e have not before treated a lawsuit against an individual employee as one against a state instrumentality, and [the officer] offers no persuasive reason to do so now.” Lewis v. Clarke at 10. This case however does provide such a fact pattern that provides a persuasive reason to depart from this particular application of the rule. This case is different because the employees were acting in their official capacities, which is different from the Clarke case where the employee was engaged in a personal negligent act resulting in a tort claim. Here, the Smith’s are simply looking for another way to file suit on a claim that is inherently impossible due to sovereign immunity. Looking at the claims themselves provides a thorough understanding of this principle. The Smith’s are suing for damages for moneys owed under their contract with the YIN as well as defamation to their professional skills

resulting from the incident. It is clear the employees would have no obligation under the contract issue as the YIN would be the real party in interest, and any damage to the reputation resulting from the official conduct of the employees while working in their official capacities is again just another way at collecting from the tribe due to the indemnification policy. Allowing the Smith's suit against the employees in their individual capacities is simply allowing suit to the real party in interest (the YIN). Further, allowing a claim and remedy to be collected from employees of sovereign governments for their acts on behalf of that sovereign will have tremendous negative policy outcomes including discouraging employment and execution of decisions and actions on behalf of the tribe thus striking a blow to tribal abilities to function as sovereign entities. Thus at best the Smith's claim is a round-about-way of collecting from the tribe as the real party in interest, and at worst such a decision would open a precedent for future litigation whereby claimants may choose to punish employees of tribal governments to foot the bill for claims they are unable to make against the sovereign themselves.

Conclusion

For the above reasons, the Yuma Indian Nation has personal and subject matter jurisdiction of the Smith's and the Court should refuse to stay the suit. Further, as the facts herein comport with the Arm of the Tribe factors, as well as provide a framework for application of sovereign immunity for the tribe, the EDC, and the EDC employees in this case the trial courts decision was correct and sovereign immunity was correctly applied.

Table of Authorities

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