NO. 36132-9-11

THE COURT OF APPEALS, DIV. II
OF THE STATE OF WASHINGTON

HOLLY M. FOXWORTHY, Appellant

vs.

PUYALLUP TRIBE OF INDIANS ASSOCIATION d/b/a
EMERALD QUEEN CASINO, et al., Respondent

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The petitioner is the plaintiff/appellant below, Holly M. Foxworthy.

II. COURT OF APPEALS DECISION

The Court of Appeals decision that Ms. Foxworthy seeks review is *Foxworthy v. Puyallup Tribe of Indians, et al.*, ____ Wn. App. ___, 169 P.3d 53 (2007) which decision was filed on October 16, 2007. No motion for reconsideration has been filed. A copy of the decision is attached as **Appendix A**.

III. STATEMENT OF THE CASE

The plaintiff Holly Foxworthy alleged in her complaint that the defendant Puyallup Tribe of Indians Association d/b/a Emerald Queen Casino (the Casino) violated RCW 66.44.200(1) when it served alcohol to the defendant William DeWalt. CP 4, 7. Pursuant to this statute, the Casino was prohibited from serving alcohol to persons "apparently under the influence of liquor." RCW 66.44.200(1).[1] Following Mr. DeWalt's consumption of alcohol at the Casino, he drove his vehicle the wrong direction on State Route 705 while having a blood alcohol level at least twice the legal limit in Washington. CP 75-93, 116-117. As a result of his intoxication, he was involved in a motor vehicle accident that caused serious injuries to Ms. Foxworthy. *Id.*

[1] A copy of this statute is attached hereto as **Appendix B**.

The Casino moved to dismiss Ms. Foxworthy's lawsuit asserting tribal immunity. Ms. Foxworthy denied that the Casino was immune from her lawsuit asserting that Congress abrogated tribal immunity from dram shop liability lawsuits when it authorized the sale of liquor in Indian country "only if in conformance with state law." *See* 18 U.S.C. § 1161, CP 114-136.[2] Pierce County Superior Court Judge Serko granted the Casino's motion to dismiss based upon the court's belief that, as a state trial court, it was not in the position to interpret 18 U.S.C. § 1161 and "infer" that Congress intended to abrogate tribal immunity from dram shop liability lawsuits. Nonetheless, the court stated that it was in agreement with most of Ms. Foxworthy's arguments and was confident that its decision on this issue would not be the last word. RP 27. Pursuant to RAP 2.2(d), Judge Serko found no just reason to delay the appeal of this issue. CP 296-297. The Court of Appeals affirmed Judge Serko's decision.

IV. ISSUES PRESENTED FOR REVIEW

1. Did Congress Abrogate Tribal Immunity from Dram Shop Liability Lawsuits When It Authorized the Sale of Liquor in Indian County Only If In Compliance with State Law?

2. Did the Trial Court Err When It Granted the Casino's Motion to Dismiss?

[2]A copy of this statute is attached hereto as **Appendix C**.

V. ARGUMENT FOR REVIEW

Ms. Foxworthy seeks review by the Supreme Court on the grounds that the case involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4).

A. THE ISSUE OF WHETHER CONGRESS ABROGATED TRIBAL IMMUNITY FROM DRAM SHOP LIABILITY LAWSUITS REQUIRES ULTIMATE DETERMINATION

The issue presented to the Court of Appeals was an issue of first impression in the State of Washington. There are only two other published decisions in the entire country that decide the issue. Those two decision were by state courts of appeal in Texas and Arizona. *See Holguin v. Ysleta Del Sur Pueblo,* 954 S.W.2d 843 (Ct. App. of Tex. 1997) and *Filer v. Tohono O'Odam Nation Gaming Enterprise,* 212 Ariz. 167, 129 P.3d 78 (2006). Ms. Foxworthy contends that *Holguin* and *Filer* were wrongly decided for the reasons discussed in Section B below.

There are no United States Supreme Court decisions, no federal circuit courts of appeal decisions and no state supreme court decisions that decide the issue presented here. There are, however, two United States Supreme Court decisions[3] and a Ninth Circuit Court of Appeals decision[4] that strongly support Ms. Foxworthy's position that by enacting 18 U.S.C. § 1161, Congress intended to abrogate tribal sovereign immunity with

[3] *Rice v. Rehner,* 463 U.S. 713, 719, 103 S. Ct. 3291, 3296, 77 L. Ed.2d 961 (1983) and *Kiowa Tribe v. Mfg. Techs, Inc.,* 523 U.S. 751, 756, 118 S. Ct. 1700, 1703, 140 L. Ed.2d 981, 986 (1998).

[4] *Fort Belknap Indian Community of the Foprt Belknap Indian Reservation v. Mazurek,* 43 F.3d 428, 436 (1994).

respect to dram shop liability lawsuits brought by private individuals. More specifically, Ms. Foxworthy believes that, if and when the United States Supreme Court decides this issue, it will infer such intent. Ms. Foxworthy respectfully requests that this court accept review because this case involves an issue of public interest that should be decided by the Supreme Court.

B. THE *HOLGIN* AND *FILER* DECISIONS WRONGLY DECIDED THE ISSUE PRESENTED TO THE COURT OF APPEALS

The *Holgin* and *Filer* courts correctly held that these states' dram shop liability laws fall with the Congressional waiver of immunity created by 18 U.S.C. § 1161. *Holguin*, 954 S.W.2d at 848-849; *Filer,* 129 P.3d at 80-91. In so holding the *Holguin* court recognized that in *Rice* "no *explicit* waiver of [tribal] immunity was necessary for specific instances of state alcohol laws to conclude that Congress has allowed for state regulation of the use and distribution of alcohol." *Holguin*, 954 S.W.2d at 849 (emphasis added). The *Holguin* court *also* recognized that, in *Rice,* the Supreme Court "repudiated the theory that 18 U.S.C. § 1161 confers the 'right' of alcohol regulation on the states without conferring the 'remedy' of enforcement." *Holguin,* 954 S.W.2d at 850.

As the *Holguin* court further stated, "[w]ith respect to alcohol policy, the Supreme Court has concluded that Indian tribes are preempted from asserting a regulatory interest. It is difficult to imagine a stronger expression of the states' control over alcohol policy, or a stronger

expression of the waiver of tribal immunity." *Holguin*, 954 S.W.2d at 850. Accordingly, the *Holguin* court concluded that the dram shop liability law of Texas falls within the Congressional waiver of tribal sovereign immunity. *Holguin*, 954 S.W.2d at 854. Similarly, the *Filer* court concluded that Arizona's dram shop liability law falls within the permissible scope of regulation by the State of Arizona. *Filer*, 129 P.3d at 82.

The *Filer* and *Holguin* courts, however, concluded that a state's interest in *enforcing* such laws does not extent to private lawsuits for money damages. This is where the *Filer* and *Holguin* courts erred.

The *Holguin* court's rationale was twofold: (1) "federal courts have not resolved whether actions for money damages brought to enforce alcohol-related laws fall within the waiver of immunity described by the United States Supreme Court in *Rice v. Rehner*;" and (2) "the police power of the state cannot be delegated to private persons." *Holguin*, 954 S.W.2d at 854. The first rationale is flawed because the fact that federal courts have simply not yet decided the issue is hardly support for the *Holguin* court's conclusion. And the second rationale is inconsistent with long-established precedent. In 1918, the United States Supreme Court decided that a dram shop statute permitting persons injured by an intoxicated person to sue the dram shop owner is a law passed under the legitimate police power of the state to regulate traffic in intoxicating liquors and prevent their evil consequences. *Eiger v. Garrity*, 246 U.S. 97,

38 S. Ct. 298, 62 L. Ed. 596 (1918).[5] Allowing state courts to exercise jurisdiction over private dram shop liability lawsuits is one vitally important way in which states utilize their broad police powers to enforce their dram shop liability laws.

The *Filer* court essentially relied upon the same rationale as the *Holguin* court, and, in addition, it relied upon the *result* reached by the Supreme Court in *Kiowa Tribe.* The *Filer* court did acknowledge, however, that its decision was a "close one" and hastened to add that its conclusion was "arguably . . divorced from the realities of the modern world, in which on-reservation . . . alcohol sales have become commonplace." *Filer*, 129 P.3d at 79, 84. The *Filer* court's reliance upon the *result* in *Kiowa Tribe* is misplaced because *Kiowa Tribe* did not involve a tort lawsuit, much less a case involving over service of alcohol. The *language* in *Kiowa Tribe,* however, does support Ms. Foxworthy's position in this case as discussed in subsection 2 below. The Court of Appeals similarly failed to recognize the critical language in the *Kiowa Tribe* case that would apply to a tort case such as is involved here.

[5] *See also*, *Flaherty v. Murphy*, 126 N.E. 553 (Ill. 1920); *O'Connor v. Rathje*, 12 N.E.2d 878 (Ill. 1937); *Gibbons v. Cannaven*, 66 N.E.2d 370 (Ill. 1946); *Pierce v. Albanese*, 129 A.2d 606 (Conn. 1957); *Berge v. Harris*, 170 N.W.2d 621 (Ia. 1969); *Graham v. General U.S. Grant Post No.*, 239 N.E.2d 856 (Ill. 1968).

1. *Rice* Supports the Conclusion that Congress Intended for States to Enforce Dram Shop Liability Laws Consistent with Their Broad Police Power

Although 18 U.S.C. § 1161 contains no *express* waiver of tribal immunity, the Supreme Court in *Rice* concluded that it could *infer* such a Congressional intent because of (1) the *absence* of a tradition of tribal self-determination in this *narrow* area and (2) the *strong interest of states* in regulating alcohol on reservations. *Rice*, 463 U. S. at 719-723, 103 S. Ct. at 3296-3298.

In recognizing the absence of a tradition of tribal self-determination in this area, the Supreme Court emphasized that "[t]he colonists regulated Indian liquor trading before this Nation was formed, and Congress exercised its authority over these transactions as early as 1802. *Rice*, 436 U.S. at 722, 103 S. Ct. at 3297. "Congress imposed *complete* prohibition by 1832, and these prohibitions are still in effect subject to suspension condition on compliance with state law and tribal ordinance." *Rice*, 436 U.S. at 722, 103 S. Ct. at 32979. Quite simply, the Supreme Court found that the usual assumptions with respect to tribal immunity do not apply in the narrow context of liquor regulation. *Rice*, 436 U.S. at 723, 103 S. Ct. at 3298.

In recognizing the strong interest of states, the Supreme Court in *Rice* did not place any limits upon the broad police power of states to enforce regulations related to liquor sales and distribution. *See Rice*, 436 U.S. at 719-723, 3296-3298. Quite to the contrary, the Supreme Court

recognized that liquor sold on Indian lands can have "spillover" effects on state citizens, and therefore states' interest in regulating alcohol on reservation is especially strong. *Rice,* 463, U.S. at 723-724, 103 S. Ct. at 3298. Although the *Rice* decision does not decide the issue presented here, it strongly supports Ms. Foxworthy's position that Congress intended for states to enforce dram shop liability laws consistent with their broad police powers, which includes allowing state courts to exercise jurisdiction over dram shop liability lawsuits brought by private individuals.

2. The *Language* in *Kiowa Tribe* Case Supports the Conclusion that Congress Intended to Waive Tribal Sovereign Immunity for Dram Shop Liability Lawsuits

The *Kiowa Tribe* case involved a private company's lawsuit against a tribal entity to enforce a promissory note. According to the company, the tribe executed and delivered the note beyond the tribe's land, and the note obligated the tribe to make its payments beyond the tribe's lands. The company alleged that the tribe was subject to suit for breaches of contract involving off-reservation commercial conduct. The 6-3 majority in *Kiowa Tribe* disagreed holding that "[t]ribes enjoy immunity from suits *on contracts*, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Kiowa Tribe,* 523 U.S. at 760, 118 S.Ct. at 1705.

In so holding, the Supreme Court relied upon the fact that Congress had not abrogated tribal immunity as an "overarching rule." The Supreme Court acknowledged, however, that the doctrine of tribal

immunity "developed almost by accident" and did not originate in a reasoned statement of doctrine. *Kiowa Tribe*, 523 U.S. at 756-757, 118 S.Ct. at 1703-1704. In fact, the Supreme court commented that the case in which the doctrine originated provided no more than "a slender reed" of support for the doctrine. *Kiowa Tribe*, 523 U.S. at 757, 118 S.Ct. at 1704. The Supreme Court further stated:

> There are reasons to doubt the wisdom of perpetuating the [tribal immunity] doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. That is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians . . . . ***In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or have no choice in the matter, as in the case of tort victims.***

Kiowa Tribe, 523 U.S. at 758, 118 S.Ct. at 1704) (emphasis added). The Supreme Court recognized that, although *Congress* can alter the bounds of tribal immunity through explicit legislation, the *Court* "has taken the lead in drawing the bounds of tribal immunity." *Kiowa Tribe*, 523 U.S. at 759, 118 S.Ct. at 1705.

The 3 member dissent is even more critical of the doctrine, stating as follows:

> [W]e have treated the doctrine of sovereign immunity from judicial jurisdiction as settled law, but in none of our cases have we applied the doctrine to purely off-

> reservation conduct. Despite the broad language used in prior cases, it is quote wrong for the court to suggest that it is merely following precedent, for *we have simply never considered whether a tribe is immune from a suit that has no meaningful nexus to the tribe's land or its sovereign functions*.[6]

Kiowa Tribe, 523 U.S. at 764; 118 S.Ct. at 1707. The dissent further stated:

> In the absence of any congressional statute or treating defining the Indian tribes' sovereign immunity, the creation of a federal common-law "default" rule of immunity might in theory be justified by federal interests. By setting such a rule, however, the Court is not deferring to Congress or exercising "caution" . . . rather, it is creating law. The Court fails to identify federal interests supporting its extension of sovereign immunity—indeed, it all but concedes that the present doctrine lacks such justification, . . . and completely ignores the State's interests.
> . . .
>
> Second, the rule is strikingly anomalous. Why should an Indian tribe enjoy broader immunity than the States, the Federal Government, and foreign nations? As a matter of national policy, the United States has waived its immunity from tort liability and from liability arising out of its commercial activities. . . . Congress has also decided in the Foreign Sovereign Immunities Act of 1976 that foreign states may be sued in federal and state courts for claims based upon commercial activities carried on in the United States, or such activities elsewhere that have a "direct effect in the United States." . . . And a State may be sued in the courts of another State. . . .(citations omitted).
> . . .

[6] Given the complete absence of tribal independence or self-determination in the narrow area of alcohol use and distribution, Ms. Foxworthy's lawsuit has "no meaningful nexus" to the Puyallup Tribe's land or its sovereign functions.

> Third, the rule is unjust. ***This is especially so with respect to tort victims who have no opportunity to negotiate for a waiver of sovereign immunity***.

Kiowa Tribe, 523 U.S. at 765, 118 S.Ct. at 1708 (dissenting op.).

The *result* in *Kiowa Tribe* is not controlling here because the facts in *Kiowa Tribe* did not involve a claim that a tribal entity violated a state statute regulating the sale of alcohol – a statute with which the tribal entity was required to comply pursuant to 18 U.S.C. § 1161. Nonetheless, the language used by the Supreme Court in *Kiowa Tribe* strongly suggests that if the United States Supreme Court were to decide the issue presented here, it would conclude that Congress intended to waive tribal immunity with respect to dram shop liability lawsuits brought in state court by private individuals.

3. *Fort Belknap* Supports the Conclusion that Congress Intended for States to Enforce Dram Shop Liability Laws Consistent with Their Broad Police Powers

State courts *generally* have *no* criminal jurisdiction over Indians for criminal acts committed on Indian reservations. *Fort Belknap Indian Community of the Fort Belknap Indian Reservation v. Mazurek,* 43 F.3d 428, 436 (1994). In *Fort Belknap,* the Ninth Circuit held, however, that pursuant to 18 U.S.C. § 1161, Congress granted state courts criminal jurisdiction over Indians for violations of state liquor regulations. *Fort Belknap*, 43 F.3d at 432. In so holding, the Ninth Circuit stated: "All the reasoning of *Rice* indicates that states should have concurrent jurisdiction to bring criminal prosecutions in this *narrow context*." *Fort Belknap*, 43

F.3d at 434 (emphasis added).

The Ninth Circuit acknowledged that giving states criminal jurisdiction would "concededly be an even more significant infringement on tribal self-government than mere regulation of liquor transactions." Nonetheless, the Ninth Circuit concluded that, "[g]iven the unique context of liquor regulation and enforcement, it would not be a severe erosion of tribal sovereignty to interpret § 1161 as authorizing the prosecutions if Indians in state court for liquor violations on reservations." *Fort Belknap,* 43 F.3d at 434. "Although criminal enforcement is necessarily intrusive, it is *one method* by which Montana enforces its liquor laws." *Fort Belknap,* 43 F.3d at 434-435 (emphasis added).

The Ninth Circuit acknowledged that the state of Montana has "an unquestionable interest in the liquor traffic that occurs within its borders." If 18 U.S.C. § 1161 were to be interpreted as permitting only state licensing of liquor transactions on Indian reservations, but not the power to enforce the same, states would be powerless to effectuate the intent of Congress that such liquor transactions be in conformity with state law. *Fort Belknap,* 43 F. 3d at 434. The Court further stated:

> We find the district court's attempt to limit *Rice* unpersuasive because its opinion gave § 1161 an unjustifiably narrow reading. The *Rice* Court broadly found that Indian Tribes have *no sovereignty interest and no self-government interest in liquor regulation.* The Court further found that Congress affirmatively authorized state regulation. The district court's reading of *Rice* would give the states no power at all, but merely allow the federal government to enforce state law. This interpretation of § 1161 was rejected in *Rice.*

Fort Belknap, 43 F.3d at 435.

Interpreting § 1161 as authorizing state courts to exercise *civil* jurisdiction over dram shop liability lawsuits involving tribal entities is *less* intrusive on tribal self-government than criminal prosecutions of tribal members in state courts, *or* state regulatory actions. Thus, by analogy, the *Fort Belknap* decision supports Ms. Foxworthy's position that Congress intended for state courts to exercise civil jurisdiction over dram shop liability lawsuits.

C. THE ISSUE PRESENTED HERE IS OF SUBSTANTIAL PUBLIC INTEREST

Whether or not tribal entities in the State of Washington are immune from tort liability for over serving alcohol is an issue of substantial public interest. The State of Washington has issued current liquor licenses to the following tribal entities in Washington: Nisqually Red Win Casino in Olympia, Chewelah Casino in Chewelah, Two Rivers Casino in Davenport, Nooksack River Casino in Deming, Nooksack's Northwood Crossing Casino in Lynden, Suquamish Clearwater Casino & Hotel in Suquamish, Kiana Lodge in Poulsbo, Quil Ceda Creek Casino in Marsville, Tulalip Casino in Marysville, The Lucky Dog Casino in Shelton, 7 Bays Marina in Davenport, Swinomish Northern Lights Casino in Anacortes, The Point Casino in Kingston, Puyallup Emerald Queen Casino at I-5 in Tacoma, Emerald Queen Casino in Fife, Mountain Home Lodge in Leavenworth, and Northern Quest Casino in Airway Heights. The liquor licenses granted to these entities licenses allow the service of

alcohol on site.[7]

If these tribal entities are not liable in state court for injuries caused to third parties by drunken drivers who consume alcohol at their establishments in violation of RCW 66.44.200(1), the entities will not have adequate incentive to comply with the statute. An administrative action pursuant to RCW 66.44.200(3) does not provide serious enough consequences to deter future violations. Consequently, in order for states to be able to adequately protect the public from the substantial harm that results when individuals are over served alcohol and then drive on our state's roads and highways, state courts must be allowed to exercise jurisdiction over private lawsuits brought by individuals.

The protection of Washington citizens, and visitors to this state, from drunk drivers is an issue of substantial public interest. To deter drunk driving, this state has enacted not only statutes that punish drunk drivers, but also a dram shop statute that punishes a dram shop owner who over serves alcohol. For the dram shop statute to be effective, however, state courts must be able to exercise jurisdiction over dram shop liability lawsuits brought by private individuals. By imposing civil liability upon dram shop owners who violate RCW 66.44.200(1), the state not only deters the dram shop owner from violating of the statute, but also provides restitution to the victim when a dram shop owner fails to comply and a third party, such as Ms. Foxworthy, is injured.

[7] *See* **Appendix D** attached hereto.

VI. CONCLUSION

Based upon the foregoing, Ms. Foxworthy respectfully requests that the Washington State Supreme Court accept review of the decision of the Court of Appeals affirming the decision of Pierce County Superior Court dismissing her lawsuit against the Emerald Queen Casino on the grounds of tribal sovereign immunity. The issue of whether Congress abrogated tribal immunity for dram shop liability lawsuits is of substantial public interest and requires ultimate determination by a higher court.

DATED this ___ day of November, 2007.

DAVIES PEARSON, P.C.

_____

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CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of November, 2007, I caused a copy of the original of **Petition for Review** to be delivered to the below listed at their respective addresses:

VIA EMAIL & LEGAL MESSENGER

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DATED this ____ day of November, 2007.

SARAH TICHY
Legal Assistant to Carol J. Cooper

APPENDIX A

APPENDIX B

APPENDIX C

APPENDIX D