United States Court of Appeals

for the

Eleventh Circuit

Case No. 08-11012

DEAN SENECA,

Plaintiff-Appellant,

– v. –

UNITED STATES OF AMERICA,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

REPLY BRIEF FOR PLAINTIFF-APPELLANT DEAN SENECA

ALISA PITTMAN CLEEK
ELARBEE, THOMPSON, SAPP & WILSON, LLP
229 Peachtree Street, N.E.
800 International Tower
Atlanta, Georgia 30303-1614
(404) 659-6700

WILLIAM CHEN, ESQ.
ADMITTED *PRO HAC VICE*
JAECKLE FLEISCHMANN & MUGEL, LLP
12 Fountain Plaza
Buffalo, New York 14202
(716) 856-0600

Attorneys for Plaintiff-Appellant Dean Seneca

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INTRODUCTION

Appellant Dean Seneca (Seneca) respectfully requests that this Court vacate the order of the district court substituting the United States for the original defendants United South and Eastern Tribes, Inc. (USET), James T. Martin (Martin), Brenda E. Shore (Shore), and Lisa Berrios (Berrios), and determine that Seneca's claims against the original defendants did not arise out of their performance of a self determination contract. Ultimately, substitution of the United States hinges on whether the original defendants were acting within the scope of USET's self determination contract with Indian Health Services (IHS) to operate a Health Information Office Program (SDC) in the IHS Nashville area; that is, whether a function of USET under the SDC was to testify and critique the performance of, and to make budget recommendations to, CDC and ATSDR at the two U.S. Department of Health and Human Services (HHS) Budget Consultation Sessions (Budget Consultation Sessions) in 2006. CDC and ATSDR, along with IHS, comprise a portion of the operating divisions of HHS. The Budget Consultation Sessions is one way federal policy towards the AI/AN population is shaped pursuant to the Federal Government's Tribal Consultation Policy.

In addition, Seneca asserts that the certification is deficient, requiring the original defendants to challenge the

Government's denial of certification. USET's current SDC is not properly supported by resolutions from its Tribal members. Seneca has provided sufficient notice of his FTCA claims.

Seneca has met his evidentiary burden to overcome the Government's *prima facie* evidence in favor of certification. The Government has failed to meet their burden to show that the original defendants were performing under its SDC at the time Seneca's claims arose. As a result, this Court should vacate the Order of the district court and allow Seneca to continue his action against the original defendants.

Because this is a situation where the substitution of the government would lead to the dismissal of Seneca's action as an exception to FTCA coverage under 28 U.S.C. §2680, there is a heightened need for review of the certification process. *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 427 (1995); *Matsushita Electric Company v. Zeigler*, 158 F.3d 1167, 1170 (11th Cir. 1998).

ARGUMENT

Point I

The Government Has Failed To Show That Seneca's Claims Arose From USET's Performance Of Its Self Determination Contract

The Government argues that the district court correctly held that Seneca failed to show by a preponderance of the

evidence that USET was not performing under its SDC at the time his claims arose. The Government makes three arguments in favor of substitution. Appellee's Brief, Section II (B), p. 22-28. It should be pointed out that the Government fails to cite any legal authority in support of substitution, the logic of their arguments is flawed, and their interpretation of the SDC is based on a strained reading.

A. Seneca Does Not Concede That His Claims Arose Out Of USET's Performance Under The SDC

The Government's first argument is flawed and does not lead to the conclusion they want this Court to adopt. The Government alleges that Seneca conceded his claims against USET arose out of their performance of the SDC. Their whole first argument is based on this alleged concession. But their argument falls apart because this premise is faulty. As an initial matter, this first point is not part of the district court's holding and was not raised by the Government below, and the argument should not be advanced on appeal. *Dohrmann v. United States*, 442 F.3d 1279, 1282 (11th Cir. 2006).

The Government's citation in support of Seneca's alleged concession is unfounded. They cite to the "Purpose" section of the SDC. Appellee's Brief, p. 23. But, the SDC sheds no light at all on Seneca's thoughts and beliefs.

Worse still, by making that conclusory statement, the Government attempts to mislead this Court into believing that Seneca concedes this point. Contrary to the Government's contention, Seneca does not concede this point. This is the very crux of Seneca's argument against substitution. Appellant's Brief Sec. VII(D). Additionally, this issue should be resolved in Seneca's favor as the Government failed even to assert that USET's testimony was related to the subject matter of the SDC. Appellee's Brief, Statement of Facts, p. 3-6. The Government's argument falls apart because Seneca showed that he does not concede USET was acting under its SDC.

The Government then alleges that Seneca concedes the purpose of the Budget Consultation Sessions is as stated by the Government in its Brief. Not only does Seneca concede it but he strongly asserts it. USET was nominated to present testimony by the National Congress of American Indians (NCAI). (D-27, ¶13). They testified on behalf of the entire AI/AN population to critique the performance of CDC and ATSDR, and to propose budget recommendations based on the priority of health issues of the AI/AN population for the upcoming fiscal year. (D-27, Exhibit D, p.1 & Exhibit E, p.1) The district court made this finding of fact, (D-34, p.8), which is subject to a clearly erroneous standard of review. *Nadler v. Mann*, 951 F.2d 301, 305 (11th Cir. 1992). Further, Martin stated that his testimony was being

presented on a government-to-government level. (D-27, Exhibit D, p.2 & Exhibit E, p. 2).

Being selected by a private organization to testify on behalf of the AI/AN population on a government-to-government level is well outside the boundaries of USET's duties pursuant to the SDC, under which its authority to act was limited to the IHS Nashville Area and only on behalf of its member Tribes.

The limitation of USET's authority is based on a plain reading of the clear terms of the SDC. Appellant's Brief Sec. VII(D). While ambiguities in contracts should be resolved in the favor of Indians, the court should not strain to find one. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 505-506 (1986); *Babbitt v. Oglala Tribal Public Safety Department*, 194 F.3d 1374, 1379 (Fed. Cir. 1999) The language of an agreement shall be interpreted according to its "natural and ordinary significance." *United States v. Choctaw Nation*, 179 U.S. 494, 531 (1900); *Oglala Tribal Public Safety Department, supra*. Shore even acknowledges USET's limited authority by stating that, under the SDC, USET is acting as the Area Indian Health Board in the IHS Nashville area. (D-33.1, ¶7), as does the Government (Appellee's Brief, p. 23).

Seneca has met his burden and overcome the Government's certification by showing that USET acted outside of the SDC by

testifying. The Government's argument is flawed. This Court should grant Seneca's request for relief.

B. Tribal Consultation Is Not Within Category Of Administrative Functions

The Government next argues that USET's testimonies fell within the duties associated with administrative functions that are concurrently contracted for, along with the main program functions, in a self determination contract.

It is respectfully submitted that the Government has misconstrued the meaning of administrative functions and has created ambiguity where none exists. *See, Catawba Indian Tribe, supra; Oglala Tribal Public Safety Department, supra.* An agreement shall be interpreted according to its "natural and ordinary significance." *Choctaw Nation, supra; Oglala Tribal Public Safety Department, supra.*

The district court found that USET's testimonies are "key administrative functions because it furthers the substantive goals and programs HHS delegated to USET," and therefore they are entitled to immunity (D-34, p.9). The district court claims that this is the correct interpretation based on the policy of resolving ambiguities in the Indian's favor.

The only program that HHS, through IHS, transferred to USET is the Health Information Office Program. Following the district court's reasoning, USET's critique of CDC and ATSDR

furthers the goal of the IHS Health Information Office Program.

This interpretation leads to a result that is confusing. USET was not addressing issues faced by IHS at the Budget Consultation Sessions. Importantly, USET's testimony would have no impact or influence whatsoever on IHS's budget. Hence, USET's testimony could not further the goals of the IHS Health Information Office Program.

Also, the Federal courts have held that the phrase administrative functions includes functions associated with the overhead costs in managing a Federal program. *Shoshone-Bannock Tribes v. Thompson*, 279 F.3d 660, 663 (9th Cir. 2001); Appellant's Brief, p. 22-25. Here, engaging in Tribal Consultation by testifying at the Budget Consultation Sessions and overhead functions in operating a program are the exact polar opposites. It is not conceivable that creating federal policy for the entire AI/AN population can be put into the same category with duties as mundane as purchasing liability insurance. *Thompson v. Cherokee Nation of Oklahoma*, 334 F.3d 1075, 1080-1081 (Fed. Cir. 2003).

The district court misconstrued the meaning of administrative functions to include Tribal Consultation in an attempt to resolve ambiguities in favor of Indians. However, no ambiguity exists and it is clear that formulating Federal policy

cannot be confused with functions associated with overhead costs. As a result, Seneca is entitled to the relief requested.

It must be pointed out that in order to make this argument, the Government must necessarily concede that testifying at the Budget Consultation Sessions is not a program function and falls outside the scope of the SDC. Regardless, it is respectfully submitted that Seneca has shown USET's testimony is not a program function nor is it an administrative function.

C. The Government's Interpretation Of The SDC Is Based On A Strained Reading

Finally, the Government argues that the phrase "to facilitate consultation" contained in the SDC's Scope of Work provision, is broad enough to encompass tattling on Seneca to his supervisor. Again, this result can only be arrived at through a strained reading of the SDC. The proper meaning of the phrase calls for USET to handle the logistics of meeting planning.

Further, it is incorrect for the Government to presuppose the truth of USET's allegations in their letters to Seneca's supervisor. USET's statements form the basis of Seneca's libel action. There has been no judicial determination of the truth of USET's statements. But the Government uses the statements as if they were facts. An example that casts doubt on the truthfulness of USET's allegations involves their concern that

Seneca was pushing his personal agenda and allegedly supported by an email regarding Dine College. Appellant's Brief, p. 22.

Next, the Government argues that the phrase "to facilitate consultation" is broad enough to encompass USET's testimonies at the Budget Consultation Sessions as one of USET's duties under the SDC. Seneca submits that the district court strained to find an ambiguity in the SDC in order to arrive at its holding, where there was none to be found.

A plain reading of the clear language of the "Purposes" section and Scope of Work provision of the SDC shows that USET is only authorized to act in the IHS Nashville area and only on behalf of its member Tribes serving as a link between its 25 members and the IHS Nashville area office.

On the other hand, as the district court found, USET engaged in consultation to shape federal AI/AN health policy on behalf of over 560 AI/AN tribes and organizations. USET performs functions beyond the operation of the Health Information Office Program and wears many hats. (D-33.1, ¶7). While representing the AI/AN population, USET was not wearing its SDC hat. USET was acting beyond the scope of the SDC.

In addition, the district court's holding goes against the clear meaning of the ISDEAA. As a result of treaties between Indian tribes and the Federal Government, the Government agreed to provide health care to the AI/AN population. (D-27,

Exhibit E, p. 2, Historical Summary). Congress then enacted laws requiring the Federal Government to provide, inter alia, health services to the AI/AN population. Appellee's Brief, p. 19. Even the Government concedes that the purpose of the ISDEAA was to give Indian tribes "control over the administration of *federal programs* benefitting Indians" (emphasis added). Appellee's Brief, p. 9. The AI/AN tribes essentially take over the operation of a federal government program. *Oglala Tribal Public Safety Department, supra* at 1376. Because an Indian tribe performs a federal function under a self determination contract, they are entitled to Federal Tort Claim Act (FTCA) coverage *FGS Contractors v. Carlow*, 64 F.3d 1230, 1234 (8th Cir. 1995. It is clear that by entering into the SDC, USET steps into the shoes of the Federal government for the limited purpose of operating the Health Information Office Program.

It must be pointed out that under no circumstances whatsoever will IHS ever be required to critique and make funding proposals to a fellow operating division of HHS, such as CDC and ATSDR. Since IHS will never undertake this function, It is impossible for this to be a function contracted for under the SDC. Further, Martin's declaration that his testimonies at the Budget Consultation Sessions were on a government-to-government basis (D-27, Exhibit D, p.2 & Exhibit E, p. 2) shows he was acting outside the SDC as IHS is an agency of the Federal

Government and could never be a sovereign entity interacting with the Federal Government on a government-to-government basis. By acting beyond the capabilities of IHS, USET is operating outside the SDC.

Also, if USET was required to testify pursuant to the SDC, they would be required to testify at the Budget Consultation Sessions every year. But they do not.

The Court should vacate the district court's Order substituting the Federal Government for the original defendants.

Point II

The Silence Of The Government Is Deafening

Again the silence of the Government in providing any evidence in support of substitution is deafening. They have not provided any evidence in support of substitution outside of the Certification. While the Certification may be prima facie evidence of substitution, once the substitution is challenged, the trial court is required to review the issue de novo. Once certification is challenged, all of the supporting materials submitted in support of certification lose all probative value on the issue of substitution unless the reason(s) for certification is provided. *Maron v. United States*, 126 F.3d 317, 323 (4th Cir. 1997).

That is the situation here. The Certification does not provide a single reason in support of substitution. (D-20). Both the Certification and the Declaration of Daretia Hawkins (D-22.2) fail to state that the USET employees were performing under the SDC at the time Mr. Seneca's claims arose. The Certification lacks probative value.

In response to Seneca's challenge of certification and substitution, the Government only provided the affidavits of Shore and Martin, even though the Government should have gathered evidence before issuing the certification. The Government and the contractor are required to prepare a "comprehensive, accurate, and unbiased report of the incident" in order for the Government to evaluate properly whether FTCA coverage should be extended. 25 C.F.R. §900.188(c). Further, the Federal Agency must submit a report to the U.S. Attorney "fully addressing" whether the person acting in the scope of employment or is a covered person. 28 C.F.R. §15.3. The Government failed to provide any shred of evidence that it was supposed to have in its possession.

Point III

USET Is Not Entitled To FTCA Protection

The Government argues that the U.S. Attorney's certification was sufficient to trigger substitution of the

United States for the originally-named individual defendants. However, regardless of the sufficiency of the certification, the United States should not have been substituted as a defendant for the corporate defendant USET. Federal Tort Claims Act coverage is not available for corporations. *Adams v. United States*, 420 F.3d 1049 (9th Cir. 2005). There, the U.S. Department of the Interior, Bureau of Land Management contracted with two companies to apply herbicide onto land they managed. The plaintiffs began an action against the two companies as well as the United States, for damages allegedly caused by the improper application of the herbicide. The two companies requested certification by the United States under the FTCA.

The 9th Circuit held that the corporations were not entitled to immunity through the certification process of 28 U.S.C. §2679. Only federal employees are entitled to FTCA protection. 28 U.S.C. §2679(d). Federal employees include "persons acting on behalf of a federal agency." 28 U.S.C. §2671. But, a federal agency does not include any contractor with the United States. 28 U.S.C. §2671. At the very least, Seneca's action against USET should be permitted to proceed.

CONCLUSION

Appellant Dean Seneca respectfully requests that this Court grant the relief he requested. He satisfied his burden

and overcame the Certification. The Government failed to meet their burden. This Court should vacate the Order of the district court and determine that USET acted outside the scope of the SDC. Seneca should be permitted to continue his action against the original defendants.

Dated: June 27, 2008

JAECKLE FLEISCHMANN & MUGEL, LLP

By: _____
William Chen, Esq.
Attorneys for Appellant Dean Seneca
12 Fountain Plaza
Buffalo, New York 14202
Tel. (716) 856-0600
Fax (716) 856-0432
Email: *wchen@jaeckle.com*

To:

Thomas K. Kahn, Clerk
c/o Brenda Wiegmann
United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Lynn D. Thesing, Esq.
Assistant U.S. Attorney
600 Richard B. Russell Bldg.
75 Spring Street, SW
Atlanta, Georgia 30303

CERTIFICATE OF COMPLIANCE

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By: _____
WILLIAM CHEN, ESQ.
ADMITTED PRO HOC VICE

863697

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On

deponent served the within**: Reply Brief for Plaintiff-Appellant Dean Seneca**

upon:

STEPHEN H. MCCLAIN
U.S. ATTORNEY'S OFFICE – ATLANTA
600 Richard Russell Building
75 Spring Street, S.W.
Atlanta, GA 30303
(404) 581-6150
stephen.mcclain@usdoj.gov

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No. 01WA6050280
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