

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION**

Lorrie Miner,)	Civil No. 1:08-cv-105
)	
Plaintiff,)	
)	
vs.)	
)	
Standing Rock Sioux Tribe and)	
Standing Rock Tribal Court)	
)	
Defendant.)	

**PLAINTIFF’S CONSOLIDATED MEMORANDUM IN RESPONSE
TO TRIBE’S MOTION FOR JUDGMENT ON THE PLEADINGS AND
MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Plaintiff, Lorrie Miner, filed a declaratory judgment action pursuant to 28 U.S.C. § 2201 requesting that the Court declare that the Tribal Court has jurisdiction to hear her breach of contract, wrongful termination, and Indian Civil Rights Act claims. The Standing Rock Sioux Tribe (“Tribe”) and the Standing Rock Tribal Court (“Tribal Court”) filed a motion for the Court to dismiss Ms. Miner’s declaratory judgment action on the grounds that the federal court lacks jurisdiction. Ms. Miner resists the Tribe’s motion by this response and has moved that this Court grant her requested relief by declaring that the Tribal Court has jurisdiction to hear Ms. Miner’s claims.

The Tribal Court dismissed Ms. Miner’s breach of employment contract claim on the grounds that it was precluded by the Tribe’s sovereign immunity. The Tribal Court also dismissed Ms. Miner’s Indian Civil Rights Act (ICRA) and wrongful termination claims on the grounds that they were barred by the doctrine of *res judicata*. Ms. Miner appealed to the Standing Rock Supreme

Court and it affirmed the Tribal Court's decision. The Tribal Court's determination that it lacked jurisdiction, however, was improper and Ms. Miner moves, pursuant to 28 U.S.C. § 2201 and Rule 56 of the Federal Rules of Civil Procedure, that this Court declare that the Tribal Court has jurisdiction to hear her claims on the grounds that:

1. The Tribe waived its sovereign immunity; and
2. Ms. Miner's claims are not barred by the doctrine of *res judicata*.

Ms. Miner's motion is based on the following memorandum, attachments, and all other documents currently of file with this Court.

FACTUAL BACKGROUND

On September 26, 2001, the voters of the Standing Rock Sioux Reservation voted to retain Lorrie Miner as the Chief Judge of the Standing Rock Tribal Court. Her four-year term began on September 26, 2001. On April 22, 2002, the Standing Rock Sioux Tribe and Ms. Miner entered into an Employment Agreement (the "2002 Agreement") wherein Ms. Miner was to be employed as the Chief Judge of the Tribal Court. (See Employment Agreement attached as Exhibit 1). Under the 2002 Agreement, Ms. Miner was to be paid \$50.00 an hour, receive an annual cost of living increase, and receive certain benefits including paid time off, compensation leave, 401(k) participation, and health insurance. *Id.*

After her four year term was up, the voters of the Standing Rock Sioux Reservation again elected her for a four-year term as the Chief Judge of the Standing Rock Tribal Court. She continued working under the 2002 Agreement. In November of 2005, Ms. Miner was approached by the Tribal Council and informed that it wanted to renegotiate her Employment Agreement. On January 9, 2006, the Tribal Council proposed a twenty percent reduction in Ms. Miner's compensation and

elimination of the cost of living increase. Ms. Miner rejected this offer. On March 3, 2006, the Tribal Council passed two motions which stated:

#10. Motion was made by Joe White Mountain, seconded by Archie Fool Bear, to approve the Tribal Council has met with Judge Miner in an effort to negotiate a contract the Tribe's final offer has been rejected therefore it is moved that the Tribal Council now declares that the negotiations with the Judges are concluded and there are no contracts existing between the said Judge and the Tribe.

#13. Motion was made by Archie Fool Bear, seconded by Joe White Mountain, to approve that individuals performing professional services for the Tribe who do not have an authorized contract by given two (2) weeks notice that they will not be paid for their services after March 17, 2006, further that the Tribal Finance Director is directed to insure that such individuals receive pay for work performed and for leave accrued and to be paid in full for those amounts on or before the close of business on March 17, 2006.

(See Tribal Council Meeting Minutes attached as Exhibit 2). On the same day, the Tribal Council delivered a memo to Ms. Miner which stated:

The purpose of this memorandum is to advise all ***professionals performing services for the tribe without a contract*** that the Tribal Council went on record today, March 3, 2006, to give two weeks notice to all individuals performing professional services for the Tribe who do not have an authorized contract that they will not be paid for their services after March 17, 2006. Further, by this motion the Tribal Finance Director has been directed to ensure that individuals affected by this Council action will receive pay for work performed and for leave accrued and in full for those amounts on or before the close of business March 17, 2006.

(See Memorandum attached as Exhibit 3). On March 17, 2006, Ms. Miner surrendered her keys and Tribal identification.

On April 3, 2006, Ms. Miner filed a lawsuit against Ron His Horse Is Thunder, Archie Fool Bear, Joe White Mountain, Sr., Frank White Bull, Matt Lopez, Henry Harrison, Milton Brown Otter, Joe Strongheart, Sr., and Avis Little Eagle, in their individual capacities. (See Complaint attached as Exhibit 4). On April 6, 2006, the Judges appointed by the Tribal Council to replace Ms. Miner

and others recused themselves from hearing her case because they feared an appearance of impropriety. (See Notice of Recusals attached as Exhibit 5). The Tribal Council then appointed a special judge to hear the case. Ms. Miner moved to have the special judge recused since he was appointed by the Defendants in that suit and therefore he had the appearance of impropriety. On October 3, 2006, Ms. Miner's claims were dismissed with prejudice on the grounds that any judge appointed to hear the case would have the same appearance of impropriety, since all judges needed to be appointed by the Tribal Council. (See Administrative Order for Dismissal attached as Exhibit 6). The Court instructed Ms. Miner to appeal her case to the Standing Rock Supreme Court and ask them to hear her case in the first instance. The Supreme Court held it did not have jurisdiction to hear the case in the first instance, affirmed the Tribal Court's decision, and dismissed Ms. Miner's claims. (See Memorandum Opinion and Order attached as Exhibit 7).

On January 11, 2008, Ms. Miner filed a verified complaint against the Tribe with the Standing Rock Sioux Clerk of Court. (See Verified Complaint attached as Exhibit 8). Ms. Miner, brought several claims against the Tribe including breach of contract, wrongful termination, violation of her due process rights as granted by the Tribe's Constitution and the Indian Civil Rights Act ("ICRA") and discrimination based on her gender. The Tribe answered these charges, raised several issues, and asked the Tribal Court to dismiss the claims. A hearing was held pursuant to 2-103 of the Standing Rock Tribal Code on February 12, 2008. During the hearing, the Tribal Court instructed the parties to brief the issues raised by the Tribe's answer. Both parties submitted briefs and upon reviewing the briefs, the Tribal Court dismissed two of Ms. Miner's claims on the grounds that the claims were precluded by the Tribe's sovereign immunity. (See Memorandum Opinion and Order and Judgment of Dismissal attached as Exhibit 9). The Tribal Court dismissed the two

remaining claims on the grounds that they were barred by the doctrine of *res judicata*. *Id.*

Ms. Miner petitioned the Supreme Court to allow her to appeal two issues:

1. Whether the Tribe waived its sovereign immunity by entering into an employment contract with Ms. Miner.
2. Whether Ms. Miner's claims against the Tribe were precluded by *res judicata*.

The Supreme Court affirmed the Tribal Court's dismissal and determined that the Tribal Court lacked jurisdiction based upon the doctrine of *res judicata*. (See Order attached as Exhibit 10). Ms. Miner has exhausted her tribal court remedies and now asks that this Court declare that the Tribal Court has jurisdiction over her claims and order the Tribal Court to hear her claims and allow her to proceed.

I. The Federal District Court has Jurisdiction to Determine the Scope of the Tribal Court's Jurisdiction.

The Declaratory Judgment Act, codified at 28 U.S.C. § 2201, enables a federal district court to “declare the rights and other legal relations of any interested party seeking such a declaration . . .” The courts discretion under the Act is broad and is understood to “confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants.” *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995). However, a federal court may only allow declaratory relief if the claim raises a federal question. *Gaming World Intern., Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 847 (8th Cir. 2003).

“It is well established that the scope of tribal court jurisdiction is a matter of federal law.” *Gaming World*, 317 F.3d at 848. This Court recently held that “the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a ‘federal question’ under 1331.” *Amerind Risk Management Corporation v. Malaterre et. al.*, Case No. 4:07-cv-059 citing *Nat'l*

Farmers Union Ins. Companies v. Crow Tribe of Indians, 471 U.S. 845, 853 (1985). Typically, parties seeking a declaratory judgment are trying to avoid the Tribal Court's jurisdiction – in this case, Ms. Miner is seeking to invoke the Tribal Court's jurisdiction. Nonetheless, her request for declaratory relief should be allowed because it implicates a federal question - jurisdiction of a tribal court to hear a claim brought pursuant to the ICRA. 25 U.S.C. § 1301-03.

Ms. Miner was wrongfully terminated from her position as the Chief Judge of the Standing Rock Tribal Court. The Tribe had adopted laws governing the removal of Tribal Court Judges, yet it failed to follow these procedures when it terminated Ms. Miner. By failing to follow its own laws, the Tribe violated her rights under the Tribe's Constitution and the ICRA.

Ms. Miner initially brought a suit against individual Tribal Council members, including the Tribal Chairman. The judge appointed to hear the case was appointed by the Tribal Chairman. To avoid the appearance of impartiality, the Tribal Court held that it could not hear the case and instructed Ms. Miner to appeal to the Standing Rock Supreme Court to hear the case in the first instance. The Standing Rock Supreme Court affirmed the Tribal Court's ruling that it could not impartially preside over Ms. Miner's claims but the Supreme Court refused to hear the case on the grounds that it did not have jurisdiction to hear her claims in the first instance. The Supreme Court dismissed Ms. Miner's claims against the individual Tribal Council members and the Tribal Chairman.

Subsequently, the Tribe held an election and the members of the Tribe elected Judge William Zuger as the Chief Judge. Since Judge Zuger was elected rather than appointed (by the very individual being sued), the appearance of impropriety and impartiality was removed. Ms. Miner filed an action against the Tribe alleging some of the same claims that were included in her first

action and some additional claims including a claim under ICRA. Judge Zuger determined that the Tribal Court did not have jurisdiction to hear her claims because they were barred by the doctrine of *res judicata*. He also held that two of her claims were barred because the Tribe had sovereign immunity.

In its Motion for Judgment on the Pleadings, the Tribe argues that the District Court lacks jurisdiction to issue a declaratory judgment in this matter. In support of its motion, the Tribe relies upon the United States Supreme Court's decision in *Santa Clara Pueblo v. Martinez* wherein the Court stated that absent a request for *habeas corpus* relief, federal courts do not have jurisdiction over ICRA claims.

In *Santa Clara*, an individual brought suit directly in federal court seeking declaratory and injunctive relief pursuant to ICRA. *Santa Clara*, 136 U.S. at 52. While the Supreme Court held that the federal court does not have jurisdiction to hear ICRA claims absent a *habeas* request, but it also held that **ICRA claims should be heard by the Tribal Court.** *Id.* at 65.

Tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply. Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.

Id. at 65.

Unlike the plaintiff in *Santa Clara*, Ms. Miner is not asking the federal court to provide her with relief under ICRA – she is merely asking that she be allowed to **enforce her rights under ICRA in Tribal Court.** Ms. Miner's ICRA claim has never been heard in Tribal Court because the Tribal Court determined it did not have jurisdiction. Whether a tribal court has jurisdiction must be

answered by reference to federal law hence it is a ‘federal question’ under 1331. See *Nat’l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 853 (1985).

Ms. Miner’s request for a declaratory judgment pertaining to jurisdiction is in line with the purpose behind the ICRA. As the Supreme Court noted in *Santa Clara*, “a central purpose of the ICRA . . . was to secur[e] for the American Indian the broad constitutional rights afforded to other Americans, and thereby to protect individual Indians from arbitrary and unjust actions of tribal governments.” *Santa Clara*, 436 U.S. at 60-61 internal citations omitted. Failure to allow Ms. Miner to pursue her claims in Tribal Court, or any other forum, frustrates the purpose of the ICRA and perpetrates a further injustice upon Ms. Miner because it effectively allows the Tribe to avoid following its own laws without any redress for an aggrieved party. Essentially, Ms. Miner has rights under the ICRA but she has been foreclosed from seeking a remedy in Tribal Court – the only forum available to her under the current state of the law.¹ Her claims under ICRA clearly implicate a federal question and should be heard by the Tribal Court.

¹ The Supreme Court’s decision in *Santa Clara* has been criticized in subsequent cases because “it frustrates the ICRA’s purpose of “protect(ing) individual Indians from arbitrary and unjust actions of tribal governments,” and in this case it renders the rights provided by the ICRA meaningless. *Shortbull v. Looking Elk*, 677 F.2d 645, 650 (8th Cir. 1982) citing *Santa Clara*, 436 at 73 (J. White, dissenting). As Justice White pointed out in his dissent in *Santa Clara*:

[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. The fact that a statute is merely declarative and does not expressly provide for a cause of action to enforce its terms does not, of course, prevent a federal court from fashioning an effective equitable remedy, for “[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies. . . . Given Congress’ concern about the deprivations of Indian rights by tribal authorities, I cannot believe, as does the majority, that it desired the enforcement of these rights to be left up to the very tribal authorities alleged to have violated them. In the case of the Santa Clara Pueblo, for example, both legislative and judicial powers are vested in the same body, the Pueblo Council. See App. 3-5. To suggest that this tribal body is the “appropriate” forum for the adjudication of alleged violations of the ICRA is to ignore both reality and Congress’ desire to provide a means of redress to Indians aggrieved by their tribal leaders.

Santa Clara, 436 U.S. at 74-76.

II. The Tribal Court has Jurisdiction to hear Mr. Miner's Claims.

If the Court determines it has jurisdiction over Mr. Miner's request for declaratory relief, it should declare that the Tribal Court has jurisdiction to hear her claims. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.Pro. Rule 56. The parties in this case do not dispute the underlying facts to this action, hence the determination of jurisdiction is a purely legal question and appropriate for summary judgment.

A. The Tribe waived sovereign immunity when it entered into an employment contract with Ms. Miner.

Section 1-108 of the Standing Rock Sioux Tribal Code provides:

The Tribe shall be immune from suit, except to permit garnishment of Tribal employee wages in accordance with Title II, Section 2-211 of the Code.

The U.S. Supreme Court has also recognized an Indian tribe's sovereignty:

Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But "without congressional authorization," the "Indian Nations are exempt from suit."

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (citations omitted). A tribe may waive immunity but the waiver must be unequivocally expressed. *Id.* at 59.

Tribal courts have identified several circumstances under which a tribe's sovereign immunity can be waived. *Gwin v. Four Bears Casino and Lodge*, 30 I.L.R. 6120. In *Gwin v. Four Bears Casino and Lodge*, the Tribal Court ruled that the tribe can waive its sovereign immunity by enacting policies and procedures governing the removal of employees. Tribal courts have also found waivers of tribal sovereign immunity for claims arising from the breach of employment contracts. See

Martin v. Hopi Tribe, No. AP-004-95 (Appellate Ct. of the Hopi Tribe, 1996) (finding that the Hopi Tribe's Personnel Policies and Procedures Manual waived tribal sovereign immunity from suit because it provided employees with a grievance policy); *Gwin v. Four Bears Casino and Lodge*, 30 I.L.R. 6120 (holding that the tribe can waive its sovereign immunity by enacting policies and procedures governing the removal of employees).

In this case, the Tribe is accused of failing to abide by its employment contract with Ms. Miner and failing to comply with several provisions of the Standing Rock Tribal Code which governed Ms. Miner's employment. The Standing Rock Tribal Code contains many provisions governing the employment of tribal judges. Each tribal judge is elected for a four year term and can only be removed for cause. Standing Rock Tribal Code §1-304(c). Pursuant to §18-103(f) the tribe must negotiate a contract with the elected judges "setting forth the terms of employment." If the tribe wishes to remove a judge from office, it must follow the procedure discussed in §1-307 of the code. Section 1-307 provides:

Upon written charges of specific misconduct in office or physical or medical inability to carry out the duties of office made by any member of the Tribal Council, adopted by a two-thirds vote of those voting at a meeting of the Tribal Council at which a quorum is present, the Council may initiate proceedings to remove a Judge or Justice from office. "Misconduct," as used in this section, shall mean:

- (a) conviction of a felony, or a misdemeanor involving dishonesty or acts offensive to the morals of the community;
- (b) repeated abusive or clearly incompetent performance of duties in office, or repeated failure to perform the duties of office.

All charges shall be in writing and served on the Judge or Justice personally, or by certified or registered mail, return receipt requested, as promptly as possible after adoption by the Tribal Council and not less than ten nor more than twenty days prior to the date of hearing before the Tribal Council on the charges. The Council in its discretion may direct that the Judge or Justice shall be suspended from duty for not

to exceed twenty days between the time charges are authorized and the date of hearing on the charges. A Judge or Justice so charged shall be given an opportunity to answer by written or oral presentation before the Council, to have the charges proven only by sworn testimony of witnesses and documentary evidence, to have the right to cross-examine witnesses and to present his own witness, and to have the right to be represented by counsel at his own expense at the hearing. After hearing, or default, a Judge or Justice may be removed by a vote of two-thirds of those voting taken by secret ballot at a meeting of the Tribal Council at which a quorum is present. The decision of the Tribal Council shall be final.

By entering into a contract with Ms. Miner and providing her with a statutorily created procedure governing her removal, the Tribe waived its sovereign immunity. The tribe entered into a contract with Ms. Miner on April 22, 2002. The contract provided that if the Judge was retained in the 2005 election the contract could be extended or renegotiated "as agreed upon by the parties." After Ms. Miner was re-elected in 2005, she continued to be compensated pursuant to the April 22 agreement. In January 2006, the tribe proposed a new contract and Ms. Miner did not agree to the terms. The tribe continued to pay Ms. Miner under the April 22 agreement until March 17, 2006 at which time the Tribe informed her it would no longer pay her for her services. By failing to negotiate in good faith, the Tribe failed to comply with its laws and terminated Ms. Miner in violation of its Tribal Code.

If the Tribe is allowed to cloak itself in immunity and avoid liability for its actions then the ability for tribes to make their own laws and be governed by them would be completely meaningless. The Tribe's own code which requires that it follow certain procedures to remove a judge coupled with the employment contract entered into by both the Tribe and Ms. Miner evidence the Tribe's waiver of sovereign immunity.

B. Ms. Miner's claims are not precluded by the doctrine of *res judicata*.

Courts use a three prong test to determine if *res judicata* applies. The test prohibits a claim on the grounds of *res judicata*:

1. If the prior judgment was rendered by a court of competent jurisdiction;
2. If the prior judgment was a final judgment on the merits; and
3. If the same cause of action and the same parties or their privies were involved in both cases.

Banks v. International Union Electronic, Elec. et al., 390 F.3d 1049, 1052 (8th Cir. 2004). There was not a final judgment on the merits in the previous proceeding and that the action involves the same parties or their privies.

A claim can only be precluded if a judgment that is valid, final, and on the merits has been entered. 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure §4435. See also *Hughes v. U.S.*, 71 U.S. 232, 237 (1866). “In identifying claims previously adjudicated in order to apply the doctrine [*res judicata*], a court may consider only the record of that prior action.” 46 Am. Jur.2d Judgments §452.

The prior case filed by Ms. Miner against various tribal officials in their official capacity was dismissed with prejudice. However, it was not decided on its merits. Rather, the Tribal Court Judges determined that they could not hear the case without the appearance of impropriety because they were appointed by the very individuals whom the case was against. As the appointed Tribal Court judge ruled in the previous case:

The undersigned had also deemed himself, and other sitting judges, to be disqualified from hearing either case on the merits, and recused himself from any adjudication on the merits.

(See Exhibit 6). The Court went on to conclude, in that case, that the situation presented a “logical imperative and a conundrum for this Court” and dismissed the case with prejudice so that Ms. Miner could appeal to the Supreme Court which was the “only possible judicial authority on this Reservation which can act without running afoul of the plaintiffs’ objection” because the Supreme Court judges all predated the Tribal Council. *Id.* The Supreme Court subsequently ruled that it did not have jurisdiction to hear the merits of the case for the first time on appeal and upheld the dismissal. (See Exhibit 7). Since every Judicial officer concluded that they could not hear the case on its merits, the case has never been decided on its merits and hence the present action against the Tribe is not precluded.²

In Ms. Miner’s current case against the Tribe, the Tribal Court ruled that Ms. Miner’s previous case had been decided “on the merits” and held that it did not have jurisdiction to hear her current complaint because it was barred by the doctrine of *res judicata*. The previous case, however, was never decided at all. It was dismissed because the Tribal Judges and Supreme Court believed that they did not have the authority to fairly try the case on the merits. **The merits of the case have never been considered or examined.** As the Tribal Court pointed out in its decision, the requirement that a case be decided on its merits is to guarantee “the right once to be heard on the substance of [the party’s] claim.” *Saylor v. Lindsley*, 391 F.2d 965, 968 (2nd Cir. 1968). Ms. Miner has never had the substance of her claims addressed in any tribal forum. There simply has been no decision on the merits of her case.

² The situation with the Judges has since changed. The presently sitting Judges have been duly elected by the voters of the Tribe. Because they no longer have a perceived link to the Tribal Council, the appearance of impropriety has been lifted.

The dismissal of the prior suit was similar to a dismissal based on jurisdictional grounds because the court essentially determined that it did not have the authority to hear the case. The Federal Rules of Civil Procedure, Rule 41(b) states that “any dismissal not under this rule--except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19--operates as an adjudication on the merits.”

Civil Rule 41(b) provides that a dismissal for lack of jurisdiction or improper venue does not operate as an adjudication upon the merits. This provision means only that the dismissal permits a second action on the same claim that corrects the deficiency found in the first action. The judgment remains effective to preclude relitigation of the precise issue of jurisdiction or venue that led to the initial dismissal. Similar effects attend dismissals that rest on matters closely related to jurisdiction, such as justiciability or a requirement of prior resort to an administrative agency. Discretionary refusals to exercise admitted jurisdiction on such grounds as abstention or forum non conveniens follow the same rules. For the most part, the only difficulties of application arise from the need to use care in characterizing the actual basis of the first judgment.

* * *

The most direct reason [for the rule] is that jurisdictional dismissals ordinarily preclude any decision on the substance of the claims presented, and often occur before any substantial effort must be invested in litigating the first action. Jurisdictional doctrine is occasionally so tangled, moreover, that it may seem unfair to forfeit a claim simply because a litigant has proved wrong in the first choice of a forum. Such reasons as these are sufficient to justify the general rule, but they do not account for all of the related consequences.

18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure §4436.

The dismissal of the prior claim filed by Ms. Miner was not a final dismissal on the merits. Ms. Miner brought the prior action against several tribal members acting in their individual capacities. One of those individuals was Ron His Horse is Thunder, the Tribal Chairman. Under the Tribal Rules, Ron His Horse is Thunder had the duty to appoint judges left by the vacancy created when Ms. Miner and the other judges were terminated. See Rule 1-302 of the Standing Rock

Sioux Tribal Code. Ms. Miner did not believe that the Judges appointed by Mr. His Horse is Thunder could be impartial when he was one of the individually named defendants. Ms. Miner no longer has that concern because the Judges now in place have been elected by the members of the tribe and Mr. His Horse is Thunder is no longer named as a party. Ms. Miner's case has never been heard and therefore has not been decided on the merits and is not barred by *res judicata*.

The Tribe previously argued that Ms. Miner's claims were barred by the doctrine of *res judicata* because:

1. A critical issue concerning the case was adjudicated properly in the first action Ms. Miner brought against the individual tribal council members and therefore it doesn't matter that the merits of the case were not reached; and
2. Ms. Miner's previous complaint was dismissed for reasons not included in Rule 41(b)'s exceptions to 'on the merits,' hence it was a judgment 'on the merits.'

Neither of these arguments is apt.

The Tribe previously relied on *Canady v. Allstate Insurance Company*, to argue that it does not matter whether or not the merits of the prior case were reached as long as a "critical issue" concerning the case was adjudicated properly. *Canady*, 282 F.3d 1005 (8th Cir. 2002). However, Ms. Miner's case is distinguishable from *Canady* in many respects. *Canady* began as a federal class action lawsuit against several insurance companies. *Id.* at 1010. It was dismissed because the plaintiffs' definition of neighborhood was overbroad, the plaintiffs' claims failed to fulfill the commonality and typicality requirements of the class action rule and the plaintiffs did not have standing to bring a lawsuit against multiple insurance companies unless they alleged a conspiracy. *Id.* at 1011. After the case was dismissed, the plaintiffs filed a state class action lawsuit against several of the same insurance companies. *Id.* The insurance companies removed the case to federal

court. *Id.* at 1015. The federal court ruled that while the merits had not been reached in the first *Canady* decision, critical issues concerning the case had been adjudicated properly hence barring relitigation in *Canady 2*. *Id.* The issues presented in *Canady 1* did not differ from the issues in *Canady 2*. See *Id.* The court concluded that the plaintiffs did not overcome the problems that caused the dismissal in *Canady 1*, thus the issues could not be relitigated, and dismissal was appropriate.

This case differs from *Canady 1* and *2*. Ms. Miner's previous claims were originally dismissed because the court could not provide an impartial judge to preside over her claims. It was not dismissed because there was a fundamental flaw in her claim that could not pass legal muster. Unlike the Court in *Canady 1*, the Court in did not address her claims, the substance of her claims, or the legal grounds for her claims.

In Ms. Miner's previous action, the Tribal Court Judge **recused himself from any adjudication on the merits**. (See Exhibit 6). He went on to dismiss Ms. Miner's claims with prejudice so she could appeal to the Supreme Court which was the "only possible judicial authority on this Reservation which can act without running afoul of the plaintiffs' objection" because the Supreme Court judges all predated the Tribal Council. *Id.* The Supreme Court ruled that it did not have the jurisdiction to hear the merits for the first time on appeal and upheld the dismissal. (See Exhibit 7). None of the Judicial officers that issued a decision in Ms. Miner's previous action, either at the tribal court level or the appellate level, discussed the issues raised by Ms. Miner's complaint and their decision to dismiss the case was not based on any of the allegations or legal claims included in her complaint.

The Tribe's second argument was based upon the use of the phrase 'on the merits' in Rule 41(b) of the Federal Rules of Civil Procedure. The Tribe argues that Ms. Miner's previous claims were dismissed for reasons not included in Rule 41(b)'s exceptions to 'on the merits,' hence it was a judgment 'on the merits.' Rule 41(b) states:

[A]ny dismissal not under this rule--except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19--operates as an adjudication on the merits.

Based upon the Rule's usage of the phrase 'on the merits,' the Tribe argued that only judgments based on improper venue, lack of jurisdiction, or failure to join a party under Rule 19 are not on the merits – further, the Tribe argued that all other judgments are on the merits including the Tribal Court's dismissal of Ms. Miner's previous action.

The same argument used by the Tribe in this case was rejected by the Eighth Circuit *en banc* in *McCarney v. Ford Motor Company*. See *McCarney v. Ford Motor Company*, 657 F.2d 230 (8th Cir. 1981). In *McCarney 1* and 2, Ford Motor Company was sued for actions that the plaintiffs believed constituted unfair business practices. *Id.* at 231. The Court dismissed *McCarney 1* with prejudice on the grounds that the plaintiff, Robert McCarney, lacked standing as an individual. *Id.* Mr. McCarney filed another suit against Ford alleging new theories of relief but based on the same facts as *McCarney 1*. *Id.* at 232. Ford moved to have *McCarney 2* dismissed based on the doctrine of *res judicata*. *Id.* The Eighth Circuit rejected Ford's arguments and allowed *McCarney 2* to progress. *Id.* at 235.

Ford argued since a dismissal based on standing was not one of the exceptions to the phrase 'on the merits' recognized by Rule 41(b) then it wasn't a decision "on the merits" and *McCarney 2* was barred by *res judicata*. *Id.* at 234. The Court rejected this argument and held that a dismissal

for standing was quasi-jurisdictional and hence included in the Rule's use of the phrase 'on the merits.' *Id.* The decision was quasi-jurisdictional because it "eschew[ed] evaluation on the merits." *Id.* at 233. Like jurisdiction, standing is a precursor to the justiciability of the case on the merits. *Id.*

As the Eighth Circuit recognized, its interpretation of Rule 41(b) was in line with the Supreme Court's decision in *Costello v. U.S.*

[T]he Supreme Court has held that the term jurisdiction and rule 41(b) should not be interpreted in a rigid and narrow manner. The [Supreme] Court stated that 41(b) did not change the common law principle that if the first suit was * * * disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit.

Id. at 234 (internal citations omitted); see *Costello v. United States*, 365 U.S. 265, 285-86 (1961).

The Tribe's argument regarding the definition of 'on the merits' would result in the very thing the Supreme Court warned against - a rigid and narrow interpretation of the rule. The doctrine of *res judicata* was meant to prevent individuals from having a new trial on an issue already tried. It was not meant to prevent an individual from getting her day in court or to prevent "the right once to be heard on the substance of [the party's] claim." See *Saylor v. Lindsley*, 391 F.2d 965 (2d. Cir. 1968).

The dismissal of Ms. Miner's previous action was similar to a dismissal based on jurisdictional grounds because the court essentially determined that it did not have the authority to hear the case. Ms. Miner has not had her day in court. The issues presented were never addressed. The Tribal Court did not address them because they could not provide her with an impartial judge and the Supreme Court did not address them because they concluded they did not have jurisdiction over the matter. As previously stated, the situation with the Tribal Judges has changed. The

presently sitting Judges have been duly elected by the voters of the Tribe and do not have the appearance of impropriety that existed when they were appointed by the very individuals being sued. Also, there is no need for the Supreme Court to hear the case in the first instance because the Tribal Court now has the ability to do so fairly.

In order for a judgment to be final on the merits, it must be based on the legal or factual issues raised in the complaint.

A judgment is an adjudication on the merits for purposes of claim preclusion if it determines the respective rights and liabilities of the parties based on the ultimate facts determining the right of recovery, or if it is based on legal rights as distinguished from mere matters of practice, procedure, jurisdiction, or forum . . . To qualify as a decision on the merits, the prior judgment must have reached real and substantial grounds of action and must have assessed the relative merits of the claims asserted in the complaint.

21A Fed. Proc., L.Ed. § 51:247. See also *Torres v. Rebarchak*, 814 F.2d 1219 (7th Cir. 1987); *Federal Deposit Ins. Corp. v. Urbanizadora Altomar, Inc.*, 716 F. Supp. 701 (D.P.R. 1989); *Peduto v. City of North Wildwood*, 696 F. Supp. 1004 (D.N.J. 1988), order aff'd, 878 F.2d 725 (3d Cir. 1989); *Schwartz v. W.S.*, 745 F.Supp 1132 (D. Md. 1990), aff'd, 976 F.2d 213 (4th Cir. 1992). A judgment based entirely on procedural issues is not an adjudication on the merits. *Id.* Even Blacks Law Dictionary 8th Ed. defines 'merits' as "[t]he elements or grounds of a claim or defense; the substantive considerations to be taken into account in deciding a case, as opposed to extraneous or technical points, esp. of procedure." And, it defines 'on the merits' as "[judgment] delivered after the court has heard and evaluated the evidence and the parties' substantive arguments."

As previously stated, all Judicial officers that issued orders in Ms. Miner's previous action recognized that their decision was NOT based on the merits. The Tribal Court concluded that it could not provide an unbiased judge to hear the case on the merits and the Supreme Court concluded

that it did not have jurisdiction to hear the case on its merits. Ms. Miner's previous action was not decided on the merits and therefore cannot act as a bar to her current action.

CONCLUSION

Ms. Miner was an elected official and as an elected official had rights secured to her by the Tribal Code. The Tribe did not follow the code and impermissibly terminated her employment. She respectfully requests that the Court allow her claims against the Tribe to continue by declaring that the Tribal Court has jurisdiction over her breach of contract, wrongful termination, and ICRA claims.

Dated this 2nd day of January, 2009

PEARCE & DURICK,

By /s/ Tiffany L. Johnson
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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of January, 2009, the foregoing document, **PLAINTIFF'S CONSOLIDATED MEMORANDUM IN RESPONSE TO TRIBE'S MOTION FOR JUDGMENT ON THE PLEADINGS AND MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**, was filed electronically with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing (NEF) to the following:

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Dated this 2nd day of January, 2009.

/s/ Tiffany L. Johnson