IN THE COURT OF APPEAL

SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA

DIVISION SIX

GENE STROUD,	)	
	)	No. 1249954
Plaintiff and Appellant,	)	03-28-08
	)	B-206934
Vs.	)	
	)	
TONY ARMENTA,	)	
	)	
Defendant and Respondent.	)	

APPEAL FROM THE SUPERIOR COURT OF SANTA BARBARA COUNTY'S

DISMISSAL ORDER

THE HONORABLE RODNEY S. MELVILLE, ASSIGNED JUDGE PRESIDING

APPELLANT'S OPENING BRIEF

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Santa Barbara, CA 93110

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I. SUMMARY OF FACTS

Plaintiff/Appellant was employed in the cardroom of the Chumash Gambling Casino in Santa Ynez, California owned and operated by The Santa Ynez Band of Chumash, a recognized Indian tribe.

While working there he had several conversations with the Defendant/Respondent Tony Armenta who also worked in the cardroom as a supervisor. These conversations were about establishing a private non-Indian owned cardroom on the central California coast in Pismo Beach or vicinity. Defendant/Respondent expressed a strong desire to be a partner or investor in that business opportunity. Over time Plaintiff/Appellant obtained a long-term lease on a premises in Pismo Beach he would call the Gold Rush Casino.

Subsequently Plaintiff left the employment at the Chumash Casino and applied for a private cardroom license to be issued by the State of California.

Originally Plaintiff/Appellant had intended to include Defendant/Respondent as a partner or investor in this business, however when Defendant/Respondent was accused of widespread acts of sexual discrimination at the casino and was terminated, Plaintiff/Appellant disassociated himself from those plans.

Some time later Plaintiff/Appellant learned that during the licensing process and after he had rebuffed Defendant/Respondent, State Gambling Control Commission personnel contacted Defendant/Respondent in the course of a background check. Defendant/Respondent made false and defamatory statements about Plaintiff/Appellant for purposes of preventing him from getting his license. Plaintiff/Appellant suspected this was done vindictively and also because Defendant/Respondent was seeking to mis-appropriate this business opportunity for himself and was working with another non-

Indian cardroom operator with a cardroom business in San Luis Obispo and Defendant/Appellant was acting with malice and was knowingly and maliciously making these false and defamatory statements about Plaintiff/Appellant to prevent him from obtaining the license that was critical to the operation of his cardroom business.

These false and defamatory and unprivileged statements were also made to other non-Indian employees of the Chumash Casino.

Defendant/Respondent is the brother of the tribal chairman Vincent Armenta. Plaintiff/Appellant has not, to this day, been able to obtain his State license because of these false and defamatory statements made by Respondent and has been significantly damaged in his person and personal reputation and prevented him from opening his proposed business in the Pismo Beach area.

II. SUMMARY OF PRIOR PROCEEDINGS BELOW

[All references to the Clerk's Transcript will be by the initials CT in brackets, followed by the page number. All references to the Reporter's Transcript will be by the initials RT in brackets, followed by the page and line numbers.]

On or about the 7th of November 2007 Plaintiff/Appellant (hereinafter simply Appellant) filed a simple verified four count complaint against Defendant/Respondent (hereinafter simply Respondent). In his complaint he alleged four causes of action against the individual defendant Tony Armenta. There were unnamed Doe Defendants, none of whom were tribal members or the tribe or any of its businesses. [CT 00001-00011].

After Respondent was served, on or about the 19th of December 2007, the attorneys for the Chumash tribe[1] filed a Motion to Quash Service of the Summons and complaint and dismiss Appellant complaint based on the claim of a lack of jurisdiction because of tribal legal immunity. [CT 00013]. That Motion included a factual declaration from Respondent's brother, the tribal chairman Vincent Armenta [CT 00015-CT00018]. The Motion also contained a factual declaration submitted by Respondent [CT 00019-00020].

The sole basis of this motion was the claim that the lawsuit against the individual Respondent Tony Armenta was barred by the defense of the tribe's sovereign or legal immunity a common law doctrine providing that Indian tribes are immune from unconsented lawsuit. [CT 00025-00027] and therefore the trial court lacked jurisdiction to proceed further. Appellant opposed this Motion. [CT 00091-00104].

[1] Although the tribe is not a defendant, the tribe's attorneys made the motion on behalf of the named individual Tony Armenta.

At a brief hearing on 29 January 2008, the court granted the Motion and dismissed Appellant's action out of hand. [RT 2, line 5 to 3, line 18] and directed Respondent's counsel to prepare an order of dismissal. [CT 00115-00116] [RT]. This Appeal followed. [CT 00118-00119].

III. ISSUES ON APPEAL

A. Does the legal immunity of an Indian tribe to generally bar unconsented lawsuits by non-Indians extend to individual tribal members or employees of tribal businesses when the acts alleged against the employee in such a lawsuit filed in State Court, are acts or torts, that are not within the express or implied scope of that tribal authority or that employees duties and thus are actionable as ultra vires acts?

B. When a Motion to Quash the summons and complaint and to dismiss a pending lawsuit against an individual is brought by the Defendant on the claim it is barred by the common law ***tribal immunity doctrine***, doesn't the due process of law guaranteeing the right to bring civil suits at common law in Art. 7th of the U.S. Constitution require the trial court to conduct a preliminary hearing and make essential factual determinations before outright dismissing the case on the basis that the individual defendant was just "working for a protected Indian tribe" and is therefore able to automatically be entitled to immunity for everything he does regardless of legality?

IV. SUMMARY OF ARGUMENTS ON APPEAL

The complaint filed by Appellant in state court below alleges conduct by the individual Defendant/Respondent here, which is clearly not within the scope of Respondent's duties as a cardroom manager and though those duties may include furnishing information to employees of the State Gambling Control Commission from time to time, they do not include giving false and defamatory information for the purpose of mis-appropriating a private business opportunity for Respondent's own personal benefit and for vindictive retaliation against Appellant for not offering Respondent the opportunity to participate in the proposed non-Indian business venture.

B. In a case where an individual defendant asserts that a lawsuit brought against them in state court individually, is barred and the Defendant is protected by common law ***tribal legal immunity from lawsuit***.. The burden is upon that individual defendant to establish sufficient credible facts to bring their conduct within the ambit of tribal immunity. Minimum constitutional rights to due process of law and the right to bring common law civil suit dictates the trial court must conduct an evidentiary hearing and possibly even allow limited discovery before simply dismissing the action based on an unsupported generic claim of Indian tribal immunity particularly where a defendant has filed factual declarations in defense which do not establish the conduct is protected. This is particularly true when the conduct alleged in the complaint was not any conduct or mis-conduct authorized or within the express or implied scope of trial authority and the trial court is obligated to treat all the allegations as true and as fact until at least a preliminary factual determination can be made. To do otherwise is a denial of due process of law not outweighed by the vague claim of tribal immunity.

DISCUSSION:

The Supreme Court has expressed its opinion that the common law doctrine giving Indian tribes legal immunity from unconsented lawsuits particularly in the operation of public business enterprises, is a legal anachronism created by court decisions going back to 1921. In upholding the doctrine, a majority of the court opined in dicta - over three dissents, that a change in this court created doctrine would better be corrected by the actions of Congress perhaps by an amendment to the Foreign Sovereign Immunity Act to include the elimination of any such immunity for tribes doing business publicly. Justice Stevens, in his pointed dissent, put the issue succinctly.

> "Why should an Indian tribe have greater immunity than the United States, all the several states and every foreign sovereign nation?"

See Kiowa Tribe of Oklahoma v. Manufacturing Technologies Inc. [1998] 523 U.S. 751, 118 S.Ct. 1700.

Appellant does not here attack the continued existence of the doctrine on this appeal, even in the operation of a businesses enterprise open to the public and employing non-Indian workers. The tribe was not named in the complaint filed and Appellant did not allege the tribe had any vicarious liability for the tortuous actions of the Respondent Tony Armenta.

Rather the first question here is to what extent the tortuous actions of Respondent were somehow authorized by or were engaged in for, or for the benefit of the tribe now invoking its immunity to protect Respondent and thus bar any and every action of Appellant herein.

It is well settled that although the immunity of an Indian tribe can be extended to individual tribal members and officers under certain circumstances it does not extend to any acts that are outside of the scope of any authority of the tribe or are illegal or unconstitutional. See Boisclair v. Superior Court [1990] 81 Cal.3d 1140, 276 Cal.Rptr. 62, 801 P.2d 305. See also Larsen v. Domestic & Foreign Commerce Corp. [1949] 337 U.S. 682, 691 [93 L.Ed. 1628, 1636], 69 S.Ct. 1457 and also LeBlanc v. Shirley [USDC Tex. 1984] 598 F.Supp. 747.

In the present case, in addition to alleging that Respondent made false and defamatory statements as Appellant alleged in the third cause of action, Appellant alleged in the First Cause of Action below, that Respondent individually committed the tort of interfering with a prospective business advantage of Appellants and in the Second Cause of Action that Respondent is liable for the tort of negligent interference with an economic and business opportunity belonging to Appellant. In the Fourth Cause of Action Appellant alleged that Respondent as an individual violated Appellant's Civil Rights guaranteed by the United States Constitution and as set out in 42 USC 1983, by using his position and authority to injure Appellant and deprive him of his Civil Rights under the color of law, that is Federal Indian common law, granting Indian tribes a categorical legal immunity.

Assuming for the sake of argument Respondent could make false, damaging and defamatory statements about Appellant and do so with impunity, because it was covered by a broad immunity for Indian tribes or all employees for acts done in the course and authority of the tribe or its business, that authority does not extend to a tribal officer or employee who seeks to mis-appropriate a business opportunity of a non-Indian for

himself and when challenged be able to claim he is protected by the tribe's legal immunity. The tribe never authorized Respondent to appropriate others business opportunities in the name of the tribe. That is evidenced by the two factual declarations of Respondent [CT 00019-00020] and his brother the tribal chairman [CT 00015-00018].

The trial court erroneously concluded from these deficient factual declarations that Respondent could not only make false and defamatory statements about Appellant with immunity in conversations he had with the State Gambling Control Commission, but also whenever he saw fit he could misappropriate a business opportunity that he fortuitously became aware of, even when he was not at work at the time. Then assert, as Respondent did below when sued for that tort, claim he was protected by tribal legal immunity.

It was error for the trial court to give that broad a reading of tribal immunity, amounting to an absolute immunity for any and all tortuous conduct, and in particular to then extend to any employee the absolute immunity to do anything they wanted and then defeat all lawsuits that were filed, by merely claiming they were protected by the tribal immunity doctrine, or claiming whatever they did was done ***"for the tribe"*** or ***authorized by the tribe***.

This broad of an interpretation of the common law of Indian tribal immunity doctrine is misplaced and erroneous. See the discussion in Trudgeon v. Fantasy Spring Casino [1990] 71 Cal.App. 4th 632, 635-636, [84 Cal.Rptr.2d 65, 67] and also Turner v. Martire [2000] 82 Cal.App. 4th 1042, 99 Cal.Rptr. 587.

B. **APPELLANT WAS ENTITLED TO SOME KIND OF DUE PROCESS REQUIRING THE TRIAL COURT TO MAKE A PRELIMINARY FACTUAL DETERMINATION UPON WHICH ANY INDIVIDUAL EMPLOYEES CLAIM OF *TRIBAL* IMMUNITY IS BASED.**

—Dismissal without a trial or hearing on the merits of a claim is the harshest result in any case and is generally disfavored. Where a non-Indian individual Plaintiff sues an individual employee of an Indian business, then for purpose of a dismissal motion, the trial court must assume the operative facts alleged in that verified complaint are true and factual. Davids v. Coyhis [U.S.D.C. Wis. 1994] 869 F.Supp. 1401, 1410.

In the present case Appellant alleged that Respondent used his tribal position to further his own personal interests wholly unrelated to any of his tribal duties or anything remotely connected to the authority and duties he was engaged in for the tribe. There is nothing in the factual declarations of Respondent Tony Armenta [CT 00019] or the declarations of his brother Vincent Armenta, the tribal chairman [CT 00019-00020] to indicate the tribe had authorized Respondent to mis-appropriate the business opportunities of others make false and defamatory statements or that this was any part of his "duties and work responsibilities" for the tribe. Nor could such scope of authority be reasonably implied as any part of his job duties as the casino card room manager. It may well be that employees of the Chumash Casino have periodic contact with employees of the State Gambling Control Commission as set out in the two declarations submitted but that periodic contact is not authority from the tribe to say anything one wants to say, and more importantly, to say false and defamatory things in order to mis-appropriate a business opportunity, which is entirely a motive independent of anything related to the

tribe and purely a personal unjust enrichment and done to further a conspiracy with another non-Indian to appropriate a business opportunity belonging to Appellant. As set out above nothing in the two factual declarations submitted by Respondent and upon which the trial court relied even implicitly suggests such tortuous conduct is part of the duties and responsibility of Respondent while he was working for the Chumash Tribal Casino.

It is well settled that a non-Indian citizen has the legal right to sue an Indian tribal member for torts they may have committed. See Bryan v. Itasca County, Minn. [1976] 426 U.S. 373, [96 S.Ct. 2103], 48 L.Ed.2d 710. This is emphatically true in California which is one of the few states that retained jurisdiction over civil suits involving Indians. See Title 28 U.S.C. 1360. Some of the present court decisions have determined that Indian tribal legal immunity as clearly not an absolute and complete immunity. See for example Blatchford v. Native Village of Noatak [1991] 501 U.S. 775, 115 L.Ed.2d 686, 111 S.Ct. 2578 and Krystal Energy [9th Circ. 2004] 187 F.3d 1174.

Obviously if an Indian tribe is not possessed of absolute immunity, which it is not, then such an immunity cannot be extended to either its officers or its employees. The rule of the Larsen v. Domestic & Foreign Commerce Corp. 337 U.S. 682, 691 supra establishing ultra vires acts and not a grounds to invoke the immunity defense has been held to be a rule of law that is applied to Indian tribes. See Tenneco Oil v. Sac. Fox Tribe of Indians of Okl. [10th Circ. 1984] 725 F.2d 572, 574. See also Boisclair v. Superior Court [1990] 51 Cal.3d 1140, 276 Cal.Rptr. 62, 801 P.2d 305.

As set out earlier, where an employee is acting outside of their scope of authority covered by the tribal legal immunity doctrine it is ultra vires conduct and is actionable by any non-Indian who is damaged by that unprotected conduct.

In any case where an individual employee of an Indian tribe or its businesses raises the claim they cannot be sued and the State Court has no jurisdiction to entertain a suit because they are protected by the tribe's legal immunity, then the minimum due process required by Articles 7th, 9th and 14th of the Amendments to the United States Constitution require at least a preliminary factual determination to ascertain whether that conduct is an ultra vires act or is reasonably with the scope of authority of the tribe or given to that individual employee or is unlawful, unconstitutional and unprotected by the common law Indian immunity doctrine.

Otherwise the right of a citizen to bring a civil suit at common law as guaranteed by the 7th Amendment could be abridged by the court created doctrine of Indian tribal immunity created in the 20th century for entirely different purposes. See Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc. 523 U.S. 75 supra.

These principals of due process require at least some kind of preliminary evidentiary inquiry where an individual employee seeks to invoke tribal immunity to himself as a bar to any civil liability for conduct well beyond any duty or authority for an Indian tribe. A mere unsupported Motion to Quash a complaint, based on inadequate factual information, cannot substantiate a dismissal out of hand. For example, an employee whose tribal duties take them to a hardware store a protected action to pick up merchandise that is no longer protected by tribal immunity if he punches out the cashier. Similarly if a parking valet's duty is to retrieve a customer's car on reservation lands he is

not protected by tribal immunity if he intentionally runs down a customer. Quite obviously his duty includes the protected acts of parking and retrieving cars, not assaulting anyone.

In this case, as set out above, factual declarations submitted here asserting that in the course of tribal employment Respondent periodically talks with employees of the State's Gambling Control Commission dos not include authority to tell lies for the purpose of mis-appropriating a business opportunity and to further a conspiracy with another non-Indian card club owner to prevent Appellant from opening a competing business.

Therefore in cases such as this, basic due process of law requires at least a preliminary evidentiary hearing to determine certain basic facts not the least of which is what the Respondents duties and authority was for the tribe and whether it included lying to employees of the State Gambling Control Commission for the purpose of mis-appropriating a business opportunity or conspiracy to block Appellant from obtaining a critical state license. Appellants would argue here that the latter are clearly ultra vires acts notwithstanding they may have occurred while in the employment of, or connected to, an Indian tribe and its businesses.

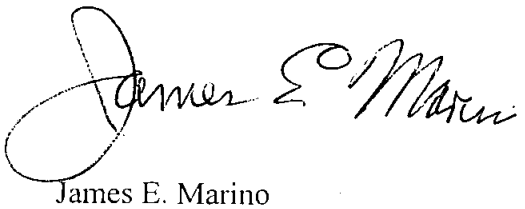
CONCLUSION:

The trial court erred in dismissing Plaintiff/Appellant's complaint out of hand in response to a generic Motion to Quash unsupported by facts and grant a dismissal based on Indian Tribal immunity from unconsented lawsuit where the lawsuit was not one against the tribe and the factual declarations were woefully inadequate to demonstrate the

conduct alleged in the complaint was, or could possibly be, within the scope of any tribal authority or legitimate duties.

The trial court should have opened up limited discovery and held an evidentiary hearing much in the way permitted by our courts when a dismissal motion is made on the basis the complaint on file is a S.L.A.P.P. case.

Respectfully submitted,



James E. Marino

CERTIFICATE OF WORD COUNT

I certify that the Microsoft Word software program used to compose and print this document contains, exclusive of the caption, tables, certificate and proof of service, approximately 3,169 words.

Date: 15 December 2008

James E. Marino

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Cal Rules of Court, Rule 8.208)

There are no interested entities or persons to list in this certificate (Cal. Rules of Court, rule 8.208(d)(3)).

Dated: 15 December 2008

James E. Marino

PROOF OF SERVICE

I am, and was at the time of the service hereinafter mentioned, over 18 years of age and not a party to the above-entitled action. My business address is 1026 Camino del Rio, Santa Barbara, California 93110. I am employed in the County of Santa Barbara.

On 15 December 2008, I served the within **APPELLANT'S OPENING BRIEF**, on the following, by placing a true copy in the United States Mail, postage prepaid and addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on 15 December 2008.

James E. Marino

ATTACHMENT TO THE PROOF OF SERVICE

The Honorable Rodney J. Melville Judge
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