

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

(1) THE ABSENTEE SHAWNEE §
TRIBE OF OKLAHOMA and (2) §
THUNDERBIRD ENTERTAINMENT §
CENTER, INC. §

Plaintiffs §

v. §

Case: CIV-09-91-F §

(1) THE HONORABLE DOUGLAS §
COMBS, DISTRICT COURT OF §
POTTAWATOMIE COUNTY, §
OKLAHOMA, (2) SHATONA BITTLE §

Defendants. §

DEFENDANT SHATONA BITTLE'S MOTION TO DISMISS

COMES NOW the Defendant, Shatona Bittle (hereinafter "Bittle") and moves to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). In support of this Motion, Bittle would show the Court as follows:

STATEMENT OF THE CASE

As set forth in Co-Defendant, Honorable Doug Combs Motion to Dismiss and Brief in Support, most of the operative facts are set out in the Plaintiff's, The Absentee Shawnee Tribe (hereinafter "Tribe") and Thunderbird Entertainment Center, Inc. (hereinafter "TEC"). However, certain additional items need to be addressed.

On April 30, 2004, Bittle was traveling westbound on State Highway 9 going to Little Axe School where she worked as a school teacher. At approximately 7:15 a.m., the vehicle driven by Valentine Bahe and owned by Val Tsosie, went left of center into Ms. Bittle's lane of travel and struck Ms. Bittle's vehicle head on. As a result of this

collision, Ms. Bittle suffered significant orthopedic injuries and had medical bills exceeding \$130,000. Bahe was killed in the collision. The evidence will show that Bahe was intoxicated while he was driving. Defendant Bittle filed suit against the Tribe and TEC alleging Bahe and Tsosie became intoxicated while at the Plaintiffs casino. Bittle filed this cause of action for negligence and as a dram shop case based on Oklahoma Law, Title 37 O.S. § 501 et seq. The Tribe and TEC filed motions to dismiss in state and tribal courts asserting sovereign immunity and asserting that they were immune from suit. It is important to note that the collision between Bahe and Bittle occurred on State Highway 9 and not on Indian tribal lands.

On August 1, 2006, Honorable Doug Combs entered an order granting the Tribe and TEC's motion to dismiss for lack of jurisdiction holding:

1. The Absentee Shawnee Tribe of Oklahoma and Thunderbird Entertainment Center, Inc. had not expressly waived tribal sovereign immunity by applying for and accepting a State license to sell and distribute alcoholic beverages in accordance with the Oklahoma Alcoholic Beverage Control Act, 37 O.S. § 501, et seq.
2. Neither Oklahoma common law nor the Oklahoma Alcoholic Beverage Control Act allow private enforcement of the regulations set forth in the 37 O.S. § 527 against the Absentee Shawnee Tribe of Oklahoma and Thunderbird Entertainment Center.
3. The Absentee Shawnee Tribe of Oklahoma did not clearly or expressly waive tribal sovereign immunity by adopting its own Alcohol Regulation Statute, namely Section 1-08.10, which provides that "Tribal licensee's are subject to all of the enumerated prohibited acts contained in 37 O.S. § 537 and failure of the operator to observe state law will subject said licensee to federal prosecution under 18 U.S.C. § 1161.

It is important to know that the order signed by Judge Combs was drafted by counsel for the Tribe and TEC and counsel for Bittle. The Tribe and TEC wanted this specific language in the Order. The issues set forth in the order were addressed by the Oklahoma Court of Appeals and the Oklahoma Supreme Court and are now before this court.

Bittle appealed the Trial Court ruling on September 8, 2006 and the Oklahoma Court of Civil Appeals affirmed the district court ruling on March 23, 2007. On April 11, 2007, Bittle filed a Petition for Writ of Certiorari seeking review of the Court of Civil Appeal's decision.

On February 5, 2008, the Oklahoma Supreme Court issued its opinion vacating the opinion of the Oklahoma Court of Civil Appeals, reversing the dismissal order of Judge Combs, and remanding the case for further proceeding. The Supreme Court addressed each of the issues which the Plaintiff is seeking an injunction and declaratory judgment action for. Specifically finding:

1. We conclude that § 1161 was intended to remove federal discrimination that resulted from the imposition of liquor prohibition on Native Americans. Congress was well aware that the Indians never enjoyed a tradition of tribal self-government insofar as liquor transactions were concerned. Congress was also aware that the states exercised concurrent authority insofar as prohibiting liquor transactions was concerned. By enacting § 1161, Congress intended to delegate a portion of its authority to the tribes as well as the States, so as to fill the void that would be created by the absence of the discriminatory federal prohibition. Congress did not intend to make tribal members "super citizens" who could trade in a traditionally regulated substance free from all but self-imposed regulations. See 678 F.2d at 1352 (Goodwin, J., dissenting). Rather, we believe that in enacting §1161, Congress intended to recognize that Native Americans are not

‘weak and defenseless,’ and are capable of making personal decisions about alcohol consumption without special assistance from the Federal Government. Application of the state licensing scheme does not ‘impair a right granted or reserved by federal law.’ *Kake Village, supra*, 369 U.S., at 75, 82 S.Ct., at 571. On the contrary, such application of state law is ‘specifically authorized by . . . Congress . . . and [does] not interfere with federal policies concerning the reservations.’ *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685, 687, n. 3, 85 S.Ct. 1242, 1243, n. 3, 14 L.Ed.2d 165 (1965).

463 U.S. at 733-734, 103 S.Ct at 3303-3304 (footnote omitted).

¶22 We are confident that application of the doctrine of tribal sovereign immunity in this case would indeed make the Tribe a ‘super citizen’ that can trade in heavily-regulated alcoholic beverages, free from all but self-imposed regulation.

. . .

Rice v. Rehner very clearly ruled that Indians did not have the inherent attributes of sovereignty to regulate in the area of alcoholic beverages. It is the sovereignty that gives rise to the immunity from private suit in order to protect the dignity of the sovereign. *Rice v. Rehner* concluded that the Indians there had no tribal immunity from state alcoholic beverage law. Accordingly, *Rice v. Rehner* supports the exercise of this state’s adjudicatory power of this private suit. *Bittle v. Bahe, et al.*, 192 P.3d 810, 819 2008 OK 10 (Okla. 2008).

2. ¶37 Consistent with *Rice v. Rehner*, we reject the Tribe’s argument that §1161 does not authorize the state courts to exercise jurisdiction over the Tribe because the statute does not expressly state, in plain and precise words, that an Indian tribe shall be subject to state court jurisdiction. The words ‘laws of the State’ in §1161 are comprehensive and under *Rice v. Rehner*, include state authority over alcoholic beverages whether it is legislative, executive, or adjudicative in nature.

¶38 Here, the state statute imposes a duty on a mixed beverage license holder not to serve alcohol beverages to an intoxicated person and our extant jurisprudence recognizes the right of an individual injured by the breach of that statutory duty to maintain a negligence action against the dram shop. This state law remedy is consistent with *Eiger v. Garrity*. It is consistent with federal principles that those for whom a statutory duty is imposed are entitled to recover damage caused by the breach of the statutory duty and that the denial of a remedy is the exception rather than the rule. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 374-375, n. 52 & 53, 102 S.Ct. 1825, 1937, n. 52 & 53, 72 L.Ed.2d 182 (1982). This state law remedy to recover money damages furthers the legitimate objectives of the state's liquor laws. We reject the Tribe's argument that dram shop liability should be excluded from the words 'laws of the State' in §1611. *Id.* at 823.

3. ¶45 In summary, the Oklahoma Alcoholic Beverage Control Act is a comprehensive scheme to regulate alcoholic beverages within this state enacted by the Legislature through the exercise of its police power and taxation power. The Act provides for enforcement through the exercise of the executive power of specific state agencies and through the exercise of the judicial power over cognizable controversies, criminal and civil. Accordingly, the Oklahoma Alcoholic Beverage Act subjects holders of licenses issued pursuant to that Act to the criminal and civil jurisdiction of the state courts. *Id.* at 825 and 826.
4. ¶53 In 1986, *Brigance* recognized dram shop liability sounding in tort for the negligent serving of alcoholic beverages to an intoxicated person. Since 1986, the alcoholic beverage statutes have been amended several times, particularly sections 537, 528, and 538.21. None of the amendments undermine *Brigance*. The common law negligence remedy to recover for dram shop liability is no less a part of Oklahoma's law than is the administrative and criminal adjudicatory processes established by the Legislature to assure the public safety under the Act. We find that the distinction placed by the Tribe on Oklahoma's methods of promoting its public policies is

unconvincing. **Thunderbird casino agreed to be bound by the laws of this state and thereby waived any immunity it may have had to suit in the Oklahoma courts including a common law negligence action for dram shop liability.** (Emphasis added). *Id.* at 827.

IX. Conclusion

¶54 *Rice v. Rehner* concluded that there is no tradition of tribal sovereign immunity in the area of alcoholic beverage regulation and that Congress, in 18 U.S.C. §1161, authorized the states and the Indian tribes to regulate alcoholic beverages. While *Rice v. Rehner* teaches there is no immunity from suit to be abrogated, §1161 abrogates any tribal immunity from suit in the area of alcoholic beverage laws. *Manufacturing Technologies* recognized that tribal sovereign immunity is a matter of federal law, and under the above federal law, the Tribe has no sovereign tribal immunity from Plaintiff's negligence action.

¶55 The Tribe, doing business under the name of Thunderbird Entertainment Center, Inc., owns and operates a casino. It chose to also become an alcohol vendor at its casino. It applied for and obtained a state license to sell liquor by the drink at the casino under the laws of the State of Oklahoma. Oklahoma's alcoholic beverage laws protect the public, as in this case, the public traveling along the busy highways. Many tribal casinos are located on or near our busy highways. The nexus between the serving of liquor by the drink at the casinos and the traveling public compels us to reject the Tribe's claim of legal irresponsibility for serving liquor to obviously intoxicated casino patrons. Like any other state-licensed commercial vendor operating a bar and serving alcoholic beverages for consumption on the premises, the Tribe is subject to the criminal and civil jurisdiction of the state courts and may be haled into state court to answer allegations that it furnished alcoholic beverages to a noticeably intoxicated customer. *Id.* at 827 and 828.

The Supreme Court holding that the Tribe and TEC waived sovereign immunity is fatal to their attempt at an injunction, restraining order, and declaratory judgment. The Tribe and TEC did not appeal the final order of the Oklahoma Supreme Court to the United States Supreme Court. By filing this injunction, restraining order and declaratory judgment in federal court, the Tribe is attempting to collaterally attack the final judgment of the Oklahoma Supreme Court and re-litigate issues and claims that have already been decided by the Oklahoma Supreme Court.

ARGUMENT AND AUTHORITY

PROPOSITION I

This Court lacks jurisdiction to overturn the decision of the Oklahoma Supreme Court.

1. As set forth by the Co-Defendant Honorable Judge Doug Combs, Title 28 U.S.C.A. § 1738 mandates that full faith and credit be given to state court judgments. Section 1738, paragraph 3 states:

Such Acts, records, and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory, or Possession from which they are taken.

The judgment rendered by the Oklahoma Supreme Court against the Plaintiff is a final decision of Oklahoma's highest court and this Court is required to provide it full faith and credit. The Tribe and TEC attempt to utilize this court as an appellate court because they are unhappy with the decision rendered by the Oklahoma Supreme Court. As stated by the Co-Defendant, the only way to challenge a final decision of the Oklahoma

Supreme Court is by way of certiorari to the United States Supreme Court as set forth in 28 U.S.C. § 1257. The Tenth Circuit has held:

A federal district court does not have the authority to review final judgments of a state court in judicial proceedings; such review may be had only in the United States Supreme Court. 28 U.S.C. Sec. 1257 (1982).

. . .

Federal district courts do not have jurisdiction 'over challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional.' Feldman, 460 U.S. at 486, 103 S.Ct. at 1317. *Van Sickle v. Holloway*, 791 F.2d 1431, 1436 (CA 10 (Colo.) 1986)

The 10th Circuit in *Van Sickle* clearly stated review of a State Supreme Court Judgment may only be had in the U.S. Supreme Court."

The Oklahoma Supreme Court's decision in ***Bittle v. Bahe, et al***, was a final decision of Oklahoma's highest court, and became a final order. Therefore, this Court is required to grant it full faith and credit and that final order by the Oklahoma Supreme Court is not subject to collateral attack in federal district court. Therefore, Defendant, Shatona Bittle, respectfully requests this Court grant this Motion to Dismiss the Plaintiffs Petition and cause of action.

PROPOSITION II

The Plaintiff's claims are barred by collateral estoppel and *res judicata*.

In ***B. Willis CPA, Inc. v. BNSF Railway Corporation***, 531 F.3d 1282, 1301 (10th Cir. 2008), the 10th Circuit recognized,

Further, Oklahoma law recognizes the 'well established rule that where two actions involving the same issues, between the same parties, are pending at the same time in

different courts, a final judgment in one will be *res judicata*, or a bar in the other.’” **Hixson v. Cook**, 1962 Okla. 273, 379 P.2d 677, 684 (Okla. 1962).

. . .

Although the issue (collateral estoppel), and claim (*res judicata*) preclusion doctrines are often used interchangeably because they are closely related and both promote the same general public policy concerns’ . . . in this case, issue preclusion is the most relevant preclusion doctrine.

In accordance with the doctrine of issue preclusion (previously known as collateral estoppel), once a court has decided an issue of fact or law necessary to its judgment, the same parties or their privies may not relitigate that issue in a suit brought upon a different claim. . . To invoke issue preclusion, ‘there need not be a prior adjudication on merits (as is often the case with *res judicata*) but only a final determination of a material issue common to both cases. . .’ Further, the doctrine of issue preclusion ‘may not be invoked if the party against whom the earlier decision is interposed did not have a full and fair opportunity to litigate the critical issue in the previous case.’ *Id* at 1301.

The Tribe and TEC’s Complaint seeks the following relief:

- a. Issue a preliminary injunction against Defendants enjoining the prosecution of *Bittle v. Bahe, et al.*, District Court of Pottawatomie County, case no. CJ-2005-1249.
- b. Issue a permanent injunction against Defendants enjoining the prosecution of *Bittle v. Bahe, et al.*, District Court of Pottawatomie County, case no. CJ-2005-1249.
- c. Issue an Order declaring that the District Court of Pottawatomie County, Oklahoma lacks personal and subject matter jurisdiction over *Bittle v. Bahe, et al.*, District Court of Pottawatomie County, case no. CJ-2005-1249.

- d. Issue an Order declaring that neither 18 U.S.C. § 1161 nor 37 Okla. Stat 2001, §§501, *et seq.*, contain a clear, express, and/or unequivocal waiver of tribal sovereign immunity.
- e. Issue an Order declaring that neither the Absentee Tribe nor TEC have waived tribal sovereign immunity by applying for and accepting a license from the Oklahoma ABLE Commission to sell and distribute alcoholic beverages.
- f. Issue an Order declaring that neither the Absentee Tribe nor TEC have waived tribal sovereign immunity by agreeing to be bound by and comply with the Oklahoma Beverage Control Act.
- g. Issue an Order declaring that Oklahoma Courts do not have civil adjudicatory jurisdiction over private common law negligence actions arising from alleged violations of 37 Okla. Stat. 2001 §§501, *et seq.*
- h. Issue an Order declaring that the Absentee Shawnee Tribe of Oklahoma tribal court has exclusive jurisdiction over claims asserted against it or its economic enterprises in accordance with its Alcohol Regulations, its Governmental Tort Claims Act, and its Dram Shop Liability statute.
- i. Enter judgment for Plaintiffs.
- j. Award attorneys fees and costs of suit.
- k. Grant any other relief it deems appropriate.

A clear reading of the ***Bittle v. Bahe*** decision shows that the Oklahoma Supreme Court addressed each of these arguments. On page 3 thru 6 of this brief, the findings and conclusions of the Oklahoma Supreme Court are set out. Each element the Tribe and TEC are asking for was addressed by the Oklahoma Supreme Court.

This case is similar to ***Kickapoo Tribe v. Radar***, 822 F.2d 1493 (CA 10 1987). In ***Kickapoo Tribe***, the State of Oklahoma, Department of Human Services terminated

the parental rights of a Kickapoo Tribe member to his children who are of Indian decent. After much litigation, the Kickapoo Tribe attempted to intervene in these State court proceedings pursuant to 25 U.S.C. §1911 (C) and attempted to transfer the case to the Indian Tribal Court so it could place the child in accordance with Kickapoo custom and pursuant to the Indian Child Welfare Act. *Id.* at 1496. In the state trial court, the state trial court denied the Kickapoo Tribe's Petition to Intervene. Rather than appeal the state trial court judgment to the state court of appeals and the state supreme court, the Kickapoo Tribe filed a lawsuit in the United States District Court for the Western District and alleged violations of the due process clause, the Indian Child Welfare Act, and the Indian Religious Freedom Act. In the federal case, the Kickapoo Tribe sought declaratory and injunctive relief. The federal district court ruled that the Indian Child Welfare Act applied to the adoption case.

The Department of Human Services appealed to the 10th Circuit. The 10th Circuit found:

On appeal, the Defendants-Appellants contend that there was an order denying the Kickapoo Tribes petition to intervene, that the order was appealable, and that no appeal was attempted after the state court ruling denying intervention.

. . .

The petition for intervention of the Tribe had relied on the Indian Child Welfare Act. In the district court, the brief of the Department and the Department Defendants for summary judgment argued that the provisions of 28 U.S.C. § 1738 on full faith and credit being given to state court proceedings, and *res judicata* principals, bar the Tribe's reassertion of the ICWA. We agree. *Id.* at 1500.

The Court looked to ***Kiowa Tribe of Oklahoma v. Lewis***, 777 F.2d 587 (10th Cir 1985), where the Court held that a Kansas court's determination that the ICWA did not apply to a particular adoption proceeding was binding on the federal courts unless it was so fundamentally flawed as to be denied recognition under 28 U.S.C. §1738. *Id* at 1301. The Court found:

The Supreme Court has held 'that Section 1738 requires a federal court to look first to state preclusion law in determining the preclusive effects of a state court judgment.' ***Thournir v. Myer***, 803 F.2d 1093, 1094 (10th Cir 1986) (quoting ***Marrese v. American Academy of Orthopedic Surgeons***, 470 U.S. 373, 381, 105 Supr. Crt. 1327, 1332, 84 Lawyers Ed.2d 274 (1985)).

The Oklahoma Courts invoke the doctrine of *res judicata* when the following criteria are satisfied:

1. identity of the subject matter of the claim;
2. identity of the cause of action;
3. identity of persons and parties to the action; and
4. identity of quality or capacity in persons to be affected.

Marshall v. Amos, 442 P.2d 500, 504 (Okla. 1968).

Based on this criteria and the Kiowa Tribe case, the 10th Circuit Court found that all four criteria for preclusion were met and that the Oklahoma Courts would consider the Tribes suit barred by *res judicata*. *Id.* at 1501.

In the case at hand, the Tribe and TEC are attempting to collaterally attack the Oklahoma Supreme Court decision. In this case, we have all four elements of *res judicata*, ie. 1. identity of the subject matter; 2. identity of the cause of action; 3. identity of persons and parties to the action; and 4. identity of quality or capacity in persons to

be affected. Based on the foregoing, Defendant Bittle respectfully requests the Court grant this Motion to Dismiss and dismiss the Tribe and TEC's Complaint with prejudice.

PROPOSITION III

The Anti-Injunction Act

Defendant Bittle adopts and incorporates Proposition II of Co-Defendant Honorable Judge Doug Combs asserting the Anti-injunction Act prevents this Court from enjoining the pending state action.

PROPOSITION IV

The Declaratory Judgment Act cannot be used in violation of the Anti-Injunction Act and 28 U.S.C. §1738

Defendant Bittle adopts and incorporates Co-Defendant Honorable Judge Doug Combs' Proposition III, A and B.

CONCLUSION

Tribe and TEC have fully litigated their claims at the State Court level and are bound by those decisions. If the Courts do not grant the State Supreme Court decision full faith and credit, Indian Tribes and casinos will run to the Federal Courts every time they are sued under a dram shop theory and attempt to have the Federal Court enjoin the state court from exercising jurisdiction. The Tribe and TEC should not be allowed a second chance on issues that have been fully briefed and ruled upon in the State Courts. Defendant Bittle requests the Court grant this Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2009, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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