

ORIGINAL

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DEC 22 2010

FILED

pm 5:00

MICHAEL K. JEANES, Clerk
By U. Zucker
Deputy

Attorneys for Plaintiff
LOREN R. SHIRK

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

LOREN R. SHIRK, an individual,

Plaintiff,

v.

CITY OF CHANDLER, an Arizona
municipality, MICHAEL LANCASTER and
JANE DOE LANCASTER, individually and
as husband and wife, HILARIO
TANAKEYOWMA and JANE DOE
TANAKEYOWMA, individually and as
husband and wife, JOHN AND JANE DOES
1-10, inclusive, BLACK CORPORATIONS 1-
10, inclusive, and WHITE PARTNERSHIP 1-
10, inclusive,

Defendants.

Case No. CV2007-018088

Complaint filed: October 4, 2007

**PLAINTIFF'S MOTION TO SET
ASIDE JUDGMENT PURSUANT TO
ARIZ. R. CIV. PROC. RULE 60(C)
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
SAME**

(Oral Argument Requested)

Pursuant to Arizona Rules of Civil Procedure, Rule 60 (c), Plaintiff LOREN R. SHIRK (hereinafter referred to as "Plaintiff" or "Shirk") hereby moves this Court for an Order setting aside Judgment entered on December 17, 2008 in this matter against Plaintiff and in favor of Defendants MICHAEL LANCASTER and HILARIO and MICHELLE TANAKEYOWMA. This Motion is supported by the following Memorandum of Points and Authorities and accompanying exhibits, as well as all pleadings and papers on file.

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I.

INTRODUCTION

On September 24, 2008, the Court issued a minute entry in this matter, granting a motion to dismiss for lack of subject matter jurisdiction filed on behalf of Defendants MICHAEL LANCASTER and HILARIO and MICHELLE TANAKEYOWMA. In the moving papers, the Defendants represented, "Under no circumstances, however, does Plaintiff have a cause of action against these Defendants in state court," asserting instead sovereign immunity would bar such action. *See* Defendants Hilario and Michelle Tanakeyowma and Michael Lancaster's Motion to Dismiss ("MTD"), Page 2. Specifically, the Defendants argued:

Like the federal government, tribes may only be sued when there has been a valid waiver of sovereign immunity. Sovereign immunity can only be waived in two ways; either there is an express congressional abrogation of immunity or the tribe itself may enact a waiver. In this case there has been no valid waiver of immunity in this case [sic] and therefore the claims against Sergeant Tanakeyowma and Detective Lancaster must be dismissed.

Put differently, a suit against tribe officers in their official capacities is, in essence, suits against the tribe, and such suits are barred by tribal sovereign immunity. So long as Sergeant Tanakeyowma and Detective Lancaster were within the course and scope of their employment and authority at the time of the accident in this case, they are immune from suit.

Tanakeyowma Lancaster MTD, Pages 8-9. (Citations omitted).

Critically, the Court thereafter determined:

In the case at bar, the Court finds that the Gila River Indian Community (GRIC) is a federally recognized tribe which has not waived immunity nor has the immunity been abrogated by Congress. Therefore, if the Defendants were acting in their official capacity and within the scope of their tribal employment, then the Court lacks subject matter jurisdiction over them.

In this vein, Judge Blakey found Officers Lancaster and Tanakeyowma were acting within their official capacity and scope of authority at all times relevant to Plaintiff's Complaint, and dismissed the matter for lack of subject matter jurisdiction. *See Exhibit A* hereto, Minute Entry, Hon. Craig Blakey, dated September 24, 2008. Judgment was entered on December 17, 2008. *See Exhibit B*, Amended Judgment, signed by the Court December 10, 2008 and filed

///

1 (entered) by the Clerk on December 17, 2008. ("IT IS ORDERED, ADJUDGED AND
2 DECREED that Judgment be entered, in Defendants Hilario and Michelle Tanakeyowma and
3 Michael Lancaster's favor, and against Loren R. Shirk for the reason that this court lacks
4 subject matter jurisdiction over the claims asserted by Plaintiff Loren R. Shirk as against
5 Defendants Hilario and Michelle Tanakeyowma and Michael Lancaster").

6 The Defendants, however, raised sovereign immunity despite 25 U.S.C. §450f (c), a
7 Congressional statute (of which Plaintiff and the Court were obviously unaware), mandating
8 federally funded liability insurance and expressly waiving the Tribe's defense of sovereign
9 immunity up to the limits of the policy.

10 25 U.S.C. § 450f (c) provides:

11 (c) Liability insurance; waiver of defense

12 (1) Beginning in 1990, the Secretary shall be responsible for obtaining or
13 providing liability insurance or equivalent coverage, on the most cost-effective
14 basis, for Indian tribes, tribal organizations, and tribal contractors carrying out
15 contracts, grant agreements and cooperative agreements pursuant to this
subchapter. In obtaining or providing such coverage, the Secretary shall take into
consideration the extent to which liability under such contracts or agreements are
covered by the Federal Tort Claims Act.

16 (3)(A) Any policy of insurance obtained or provided by the Secretary pursuant to
17 this subsection shall contain a provision that the insurance carrier shall waive any
18 right it may have to raise as a defense the sovereign immunity of an Indian tribe
19 from suit, but that such waiver shall extend only to claims the amount and nature
20 of which are within the coverage and limits of the policy and shall not authorize
or empower such insurance carrier to waive or otherwise limit the tribe's
sovereign immunity outside or beyond the coverage or limits of the policy of
insurance.

21 (B) No waiver of the sovereign immunity of an Indian tribe pursuant to this
22 paragraph shall include a waiver to the extent of any potential liability for interest
prior to judgment or for punitive damages or for any other limitation on liability
imposed by the law of the State in which the alleged injury occurs.

23 As evidenced, the Defendants did not address 25 U.S.C. § 450f (c) in any of their moving
24 papers, nor was Plaintiff (or the Court) aware the Tribe's immunity had been abrogated by
25 Congress to this extent. Consequently, Plaintiff respectfully requests the Judgment dismissing
26 the action against Defendants Michael Lancaster and Hilario and Michelle Tanakeyowma for
27 lack of subject matter jurisdiction be set aside pursuant to Rule 60(c) on this ground, and the
28 matter reinstated as to these Defendants.

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II.

ARGUMENT

A. General Principles Under Ariz. R. Civ. Proc. Rule 60(c)

Pursuant to Ariz. R. Civ. Proc. Rule 60 (c):

On motion and upon such terms as are just the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: ... (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party... or (6) any other reason justifying relief from operation of judgment.

While a motion must be filed within a reasonable time, "and for reasons (1), (2) and (3) not more than six months after the judgment or order was entered or proceeding was taken," Rule 60 (c)(6) does not limit the power of a court "to entertain an independent action to relieve a party from a judgment, order or proceeding" or "to set aside a judgment for fraud upon the court." Stated differently, Rule 60 (c)(6) gives courts ample power to vacate judgments, whenever such action is appropriate to accomplish justice. *Arizona Dept. of Economic Security v. Mahoney*, 24 Ariz.App. 534, 540 P.2d 153 (1975); *Sloan v. Florida-Vanderbilt Development Corp.*, 22 Ariz. App. 572, 529 P.2d 726 (1974)("[W]e are mindful that part 6 of rule 60(c) does not confer a discretionary dispensing power upon the trial court to grant relief on the basis of reasons enumerated in the preceding parts; instead, part 6 is a residual clause which reserves to the court power to do justice in a particular case when relief is not available under other parts").

B. Defendants Failed To Disclose Congress Required The Tribe To Waive Sovereign Immunity Up To The Policy Limits Of Its Federally Mandated Insurance

Plaintiff has now learned that prior to 1990, the Interior Department funded liability insurance for tribes with 638 contracts. In 1990, Congress extended coverage of the FTCA to certain claims arising from law enforcement contracts. 25 U.S.C. § 450f Note; PL 101-512, SEC.314. Congress still required tribes to carry federally funded liability insurance for claims not covered by the FTCA, and required contracting tribes to waive sovereign immunity up to the limits of the insurance policy.

The relevant provisions of 25 U.S.C. § 450f (c) are cited above. The legislative history of the 1990 amendment is as explicit as the current statute:

1 Under current law, a self-determination contract with a tribal organization
2 operates to actually relieve the United States of the liability which it had under the
3 [FTCA] before the contract was executed. In its place, the tribe is required to
4 waive its immunity from suit up to the policy limits of its insurance.

5 1987 WL 61567 *27; S.Rep. No. 274, 100th Cong., 1st Sess. 1987, 1988 U.S.C.C.A.N. 2620,
6 S.Rep. 100-274 (Leg. Hist.) *1.

7 Accordingly, Section 450f(c)(1) requires the government to obtain liability insurance for
8 tribes carrying out self-determination or 638 contracts. In exchange for insurance coverage, the
9 tribe agrees to waive its sovereign immunity with respect to suits arising out of the tribe's
10 performance of its contractual duties. *Walton v. Pueblo*, 443 F.3d 1274, 1279 (10th Cir. 2006);
11 *Demontiney v. United States*, 255 F.3d 801, 813 (9th Cir. 2001) (25 U.S.C. §450f(c) mandates
12 the government provide liability insurance for tribes in self determination contracts and
13 provides a limited waiver of tribal sovereign immunity).

14 Simply put, the Defendants, here, did not bring 25 U.S.C. §450f(c) to the attention of the
15 Court, resulting in a decision based on fundamental error of fact and law. That is, the GRIC's
16 insurance carrier had a duty to defend these Officers and the Tribe was expressly forbidden
17 from asserting sovereign immunity up to the policy limits. 25 U.S.C. § 450f (c)(3).

18 **C. Plaintiff Has Not Delayed In Seeking Rule 60(c) Relief In the State Court Action**

19 Notably, on September 22, 2008, prior to the state court's dismissal of this action,
20 Plaintiff submitted a claim pursuant to 28 U.S.C. §1346(b) and 28 U.S.C. §2671, *et seq.*, i.e. the
21 Federal Torts Claim Act, to the United States Department of the Interior, Bureau of Indian
22 Affairs (collectively "USA"), satisfying the jurisdictional prerequisite of 28 U.S.C. §2675(a).
23 By March 22, 2009, USA had neither accepted nor rejected the claim. Accordingly, Plaintiff
24 elected to consider the failure to act as a final denial of the claim pursuant to 28 U.S.C.
25 §2675(a), and filed suit in the United States District Court, District of Arizona, on August 27,
26 2009.¹ USA moved to dismiss the action on April 7, 2010. The motion was heard on August
27 26, 2010.

28 ¹ *Loren R. Shirk v. United States of America*, CV 1901786-NVW.

1 During the hearing on USA's motion, the following exchange took place with the Court:
2 THE COURT: All right. And what happened in the state case that you filed? You filed
3 against the officers and did- - was tribal immunity invoked to defeat the claim?

4 MR. ROSE: That is correct, Your Honor.

5 THE COURT: Well, Mr. Johns argues that, in fact, the remedy here is the federally
6 recognized insurance that waives that. I take it you simply were not aware of that at the
7 time of the state proceeding.

8 MR. ROSE: That is correct, Your Honor.

9 * * *

10 THE COURT: Well, if the government is right and the waiver for the Federal Torts
11 Claim Act does not fit here, then it looks like you may have a situation in which- - I
12 assume it was the insurers for the officers through the tribe improperly invoked tribal
13 sovereign immunity in violation of the tribe's contracts. And if that is the case, have
14 you- - I mean, playing this chess game a few moves ahead, have you thought about going
15 back to state court under Arizona Rule 60 (c) to reopen that judgment based on- - I mean,
16 you can benignly call it mistake or malevolently call it fraud on the grounds that what
17 they did is just plain wrong, and you had excusable neglect for not knowing about that
18 contractual waiver of sovereign immunity.

19 See **Exhibit C**, Excerpts of Reporter's Transcript, dated August 26, 2010.

20 The following day, on August 27, 2010, the district court granted USA's motion to
21 dismiss, finding Plaintiff's claim against the tribal officers was not covered by the FTCA and
22 terminated the action.² Shortly thereafter, on or about September 27, 2010, Plaintiff's counsel
23 contacted General Counsel for the GRIC, advising the Tribe of their intention to re-open the
24 underlying state court case against Officers Lancaster and Tanakeyowma in light of 25 U.S.C. §
25 450f (c). **Exhibit E**.

26 ///

27
28 ² Plaintiff filed a Notice of Appeal on October 27, 2010. The Appeal has been stayed,
pending the outcome of the present motion. **Exhibit D**.

1 It is well settled laches may not be attributed to a party for mere delay in assertion of a
2 claim; rather, the delay must be unreasonable under the circumstances and result in prejudice to
3 the other party sufficient to justify denial of relief. *Flynn v. Rogers*, 172 Ariz. 62, 66, 834 P.2d
4 148, 152 (1992). That is, the mere lapse of time, unaccompanied by some circumstances
5 affording evidence of a presumption that the right is abandoned, is not laches. *See generally*
6 *Jerger v. Rubin*, 106 Ariz. 114, 117, 471 P.2d 726, 729 (1970).

7 In the instant case, the assertion of laches would be ill-conceived as Plaintiff has not
8 been lax in pursuing his rights. Nor would prejudice result in granting the requested relief.
9 Indeed, GRIC's General Counsel, Thomas Murphy, defended Officers Lancaster and
10 Tanakeyowma in depositions conducted in the federal case and has been provided all pleadings
11 in that action.

12 **III.**

13 **CONCLUSION**

14 Based on the foregoing, Plaintiff respectfully requests the December 17, 2008 Judgment,
15 granting Defendants MICHAEL LANCASTER and HILARIO and MICHELLE
16 TANAKEYOWMA's motion to dismiss for lack of subject matter jurisdiction, be set aside
17 pursuant to Ariz. R. Civ. Proc. Rule 60(c), and the matter re-instated against these Defendants in
18 all respects.

19 RESPECTFULLY SUBMITTED this 21st day of December, 2010.

20 **KAYE, ROSE & PARTNERS, LLP**

21
22 By: 

23 Trinitte S. Sachrison
24 402 West Broadway, Suite 1300
San Diego, California 92101
Attorney for Plaintiff

25 ORIGINAL of the foregoing filed this
26 this 21st day of December, 2010, with:

27 Clerk of the Court
MARICOPA COUNTY SUPERIOR COURT
28 201 W. Jefferson
Phoenix, Arizona 85003

1 COPY of the foregoing delivered this 21st day
of December, 2010, to:

2 The Honorable A. Craig Blakey
3 Maricopa County Superior Court
4 201 West Jefferson
Phoenix, Arizona 85003

5 Copy of the forgoing sent via first class mail this
21st day of December, 2010, to:

6 Mark D. Zukowski, Esq.
7 JONES, SKELTON & HOCHULI, P.L.C.
8 2901 N. Central Avenue, Suite 800
Phoenix, Arizona 85012

9 Thomas L. Murphy, Esq.
10 Gila River Indian Community
525 W. Gu uKi
11 P.O. Box 97
Sacaton, AZ 85247-1627

12 By: 

Laura Blake

Exhibit A

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2007-018088

09/24/2008

HONORABLE A. CRAIG BLAKEY II

CLERK OF THE COURT
L. Gilbert
Deputy

LOREN R SHIRK

TRINETTE S SACHRISON

v.

CHANDLER CITY, et al.

ROBERT GRASSO JR.

MARK D ZUKOWSKI

MINUTE ENTRY

This matter has been under advisement on Defendants Hilario and Michelle Tanakeyowma and Michael Lancaster's ("Defendants") Motion to Dismiss. Having considered the parties' memoranda as well as the oral arguments of counsel, the Court issues the following ruling.

The issue presented before the Court is whether or not the Court has subject matter jurisdiction over Plaintiff's claims against Defendants. When a "court's subject matter jurisdiction is challenged pursuant to Rule 12(b)(1), the court may take evidence and resolve factual dispute essential to its disposition of the motion." Gatecliff v. Great Republican Life Ins. Co., 154 Ariz. 502, 506 (App. 1987). Accordingly, the Court will consider all exhibits and affidavits submitted in support of the parties' pleadings without converting the motion into one for summary judgment. Id.; ARIZ.R.CIV.P. Rule 12(b)(1).

The doctrine of sovereign immunity extends to federally recognized tribes which may not be sued absent an express and unequivocal waiver of immunity by the tribe or the abrogation of tribal immunity by Congress. Dawavendewa v. Salt River Project Agr. Imp. and Power Dist., 276 F.3d 1150, 1159 (9th Cir. 2002). Tribal immunity extends to tribal employees "as long as their alleged misconduct occurred while they were acting in their official capacity and within the

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2007-018088

09/24/2008

scope of their authority.” Filer v. Tohono O’Odham Nation Gaming Enterprise, 212 Ariz. 167, 174 (App. 2006).

In the case at bar, the Court finds that the Gila River Indian Community (“GRIC”) is a federally recognized tribe which has not waived immunity nor has the immunity been abrogated by Congress. Therefore, if the Defendants were acting in their official capacity and within the scope of their tribal employment, then the Court lacks subject matter jurisdiction over them.

The record reveals that Defendants were employed as police officers by the GRIC. As part of their employment, Defendants were required to maintain their Arizona Peace Officer and Standards Training (“AZPOST”) certification by meeting continuing education requirements. On the day of the alleged incident, Defendants were instructed by the GRIC police chief to attend an AZPOST continuing education class. Defendants used an official GRIC police vehicle for this purpose.

As Defendants were returning from their continuing education class to the tribal community, their police chief instructed them to assist Chandler police officers at the scene of an accident in the city of Chandler. Defendants followed these instructions. After leaving the scene to resume their return to the GRIC, Defendants noticed a car driving erratically. Pursuant to their authority to enforce the law anywhere in Arizona, Defendants elected to stop the driver. However, as Defendants were approaching the vehicle, the driver attempted to flee the scene and collided with Plaintiff.

Based on the foregoing, the Court finds that Defendants were acting within their official capacity and scope of authority at all times relevant to Plaintiff’s Complaint. Defendants were at all pertinent times on duty and being paid in their capacities as GRIC police officers. Moreover, they were returning to the tribal community, in their official GRIC vehicle, after conducting mandatory AZPOST training class for the benefit of the GRIC.

Plaintiff contends that because Defendants were acting under the color of state law and on state property, they were acting as agents of the City of Chandler Police Department. However, this argument is undermined by A.R.S. § 13-3874(B) which provides, in pertinent part, that “[n]either the state nor any political subdivision shall be liable for any acts or failure to act by any such Indian police officer.” Thus, Plaintiff is limited to suing these officers in either Federal or Tribal Court. Accordingly, as the Court lacks subject matter jurisdiction over the claims asserted against Defendants,

IT IS ORDERED granting Defendants’ Motion to Dismiss.

Exhibit B

COPY

Mark D. Zukowski, Bar #006734
Erin E. Byrnes, Bar #021015
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2901 North Central Avenue, Suite 800
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mzukowski@jshfirm.com
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Attorneys for Defendants Lancaster and
Tanakeyowma

FILED

12-17-08 4:00pm
MICHAEL K. JEANES, C.

By L. Gilbert
L. Gilbert, Deputy

SUPERIOR COURT OF THE STATE OF ARIZONA
COUNTY OF MARICOPA

LOREN R. SHIRK, an individual,

Plaintiff,

v.

CITY OF CHANDLER, an Arizona
municipality; MICHAEL LANCASTER and
JANE DOE LANCASTER, individually and
as husband and wife; HILARIO
TANAKEYOWMA and JANE DOE
TANAKEYOWMA, individually and as
husband and wife; JOHN AND JANE DOES
1-10, inclusive; BLACK CORPORATIONS 1-
10, inclusive; and WHITE PARTNERSHIP 1-
10, inclusive,

Defendants.

NO. 2007-018088

AMENDED JUDGMENT

(Assigned to the Honorable A. Craig
Blakey)

The above-entitled and numbered cause having come on before the Court
for hearing on Defendants Hilario and Michelle Tanakeyowma, and Michael Lancaster's
Motion to Dismiss, and the Court having heard oral argument from the parties on these
Defendants' Motion and granted it on September 24, 2008:

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED
that Judgment be entered, in Defendants Hilario and Michelle Tanakeyowma and Michael
Lancaster's favor, and against Plaintiff Loren R. Shirk for the reason that this court lacks

1 subject matter jurisdiction over the claims asserted by Plaintiff Loren R. Shirk as against
2 Defendants Hilario and Michelle Tanakeyowma and Michael Lancaster.

3 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff
4 Loren R. Shirk shall take nothing from these Defendants.

5 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, as the
6 prevailing party in this action, Defendants Tanakeyowma and Lancaster are entitled to
7 recover their taxable costs from Plaintiff in the amount of \$191.

8 DATED this 10th day of December, 2008.

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10 A. CRAIG BLAKEY, II
11 Honorable A. Craig Blakey
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Exhibit C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Loren R. Shirk; Jennifer)	
Rose,)	
Plaintiffs,)	No. CV 09-1786-PHX-NVW
vs.)	
)	
United States of America,)	Phoenix, Arizona
)	August 26, 2010
Defendant.)	1:34 p.m.
)	

BEFORE: THE HONORABLE NEIL V. WAKE
UNITED STATES DISTRICT JUDGE

(Motion Hearing)

Official Court Reporter:
Laurie A. Adams, RMR, CRR
Sandra Day O'Connor U.S. Courthouse, Suite 312
401 West Washington Street, SPC 43
Phoenix, Arizona 85003-2151
(602) 322-7256

Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

EXHIBIT C

1 For the Plaintiff:

2 Kaye Rose & Partners LLP

By: **Bradley M. Rose, Esq.**

3 By: **Trinette Sachrison, Esq.**

1801 Century Park E

4 Suite 1500

Los Angeles, CA 90067

5 For the Defendants:

6 UNITED STATES OF AMERICA

By: **Michael A. Johns, Esq.**

2 Renaissance Square

8 40 N. Central Avenue

Suite 1200

9 Phoenix, AZ 85004

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P R O C E E D I N G S

THE COURTROOM DEPUTY: This is Civil Case 2009-1786,
Loren Shirk, et al., versus United States of America.

This is the time set for a motion hearing. Could
counsel please announce for the record.

13:34:24

MR. JOHNS: Michael Johns for the United States.

MR. ROSE: Bradley Rose on behalf of plaintiff, Loren
Shirk.

MS. SACHRISON: Trinette Sachrison on behalf of the
plaintiff.

13:34:37

THE COURT: Your name again?

MS. SACHRISON: Trinette Sachrison.

THE COURT: Good afternoon, counsel.

I will hear whatever you all want to say. I have a
few questions first.

13:34:50

Mr. Rose, this is not what this motion is about, but
where's the negligence in this case?

MR. ROSE: The negligence, according to our expert,
Your Honor, is when the officers came up behind Mr. Sanford, he
was first in line at the intersection. Standard police
protocol, and it's written within the model code of police
traffic stops, is that you do not turn on your siren and lights
until the light turns green, allowing the car to proceed
through the intersection. And you are supposed to stop the car
on the other side of the intersection.

13:35:10

13:35:30

1 When they did it in the manner that they did, the man
2 had been traveling at a high rate of speed. They knew there
3 was something amiss with him by the way he was traveling. They
4 hit the siren, he saw them behind him, he took off in a state
5 of panic and that was improper police practice.

13:35:49

6 THE COURT: All right. And what happened in the state
7 case that you filed? You filed that case against the officers
8 and did -- was tribal sovereign immunity invoked to defeat that
9 claim?

10 MR. ROSE: That is correct, Your Honor.

13:36:10

11 THE COURT: Well, Mr. Johns argues that, in fact, the
12 remedy here is the federally required insurance that waives
13 that. I take it that you simply were not aware of that at the
14 time of state proceeding. Is that the case?

15 MR. ROSE: That is correct, Your Honor. I obviously
16 have a different point of view as well but --

13:36:27

17 THE COURT: What's your point of view?

18 MR. ROSE: That might be a nice cross claim or
19 indemnity claim by the United States against the tribe, but I
20 think that Mr. Shirk has a viable cause of action under the
21 Federal Tort Claims Act against the Bureau of Indian Affairs.

13:36:39

22 THE COURT: Well, if the government is right and the
23 waiver for the Federal Tort Claims Act does not fit here, then
24 it looks like you may be in a situation in which -- I assume it
25 was the insurers for the officers through the tribe improperly

13:37:02

1 invoked tribal sovereign immunity in violation of the tribe's
2 contracts. And if that's the case, have you -- I mean, playing
3 this chess game a few moves ahead, have you thought about going
4 back to state court under Arizona Rule 60(c) to reopen that
5 judgment based on -- I mean, you can benignly call it mistake 13:37:27
6 or malevolently call it fraud on the grounds that what they did
7 is just plain wrong, and you had excusable neglect for not
8 knowing about that contractual waiver of sovereign immunity.

9 MR. ROSE: I understand that, Your Honor. And we have
10 looked into that issue but are here today. 13:37:47

11 THE COURT: I understand you are not giving anything
12 up.

13 MR. ROSE: Okay.

14 THE COURT: But --

15 MR. ROSE: I'm aware of it now, and we have considered 13:37:55
16 that as one possible outcome of the proceedings before this
17 Court.

18 THE COURT: Well, this is, like many sovereign
19 immunity cases, a difficult case because the first premise of
20 sovereign immunity is that justice shall be defeated. And then 13:38:12
21 you go to the exceptions where justice is permitted. And it
22 becomes a very technical matter as to whether justice has been
23 permitted in particular rather than defeated in general.

24 MR. ROSE: When you apprised me during the last
25 hearing that every case law that I would read in this matter 13:38:37

1 all the fun out of our job, at least my job.

2 THE COURT: This is a case that calls either for the
3 insurance company to step up or for the Court of Appeals to
4 step up.

5 So anyway, thank you, counsel. The motion is taken
6 under advisement.

14:16:44

7 (Proceeding concluded at 2:16 p.m.)

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C E R T I F I C A T E

I, LAURIE A. ADAMS, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 10th day of December, 2010.

s/Laurie A. Adams

Laurie A. Adams, RMR, CRR

Exhibit D

FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEC 14 2010

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

LOREN R. SHIRK and JENNIFER ROSE,
individually and as husband and wife,

Plaintiffs - Appellants,

v.

UNITED STATES OF AMERICA, on
behalf of its agency, Department of
Interior, Bureau of Indian Affairs,

Defendant - Appellee.

No. 10-17443

D.C. No. 2:09-cv-01786-NVW
District of Arizona,
Phoenix

ORDER

On December 10, 2010, a telephone conference was held with Circuit Mediator Margaret A. Corrigan. Trinetta S. Sachrison, Esq. participated on behalf of appellants; Michael A. Johns, Esq. participated on behalf of appellee.

The court will initiate a further conference by telephone on March 15, 2011, at 10:00 a.m. **Pacific Time** (11:00 Mountain Time).

The briefing schedule previously set by the court is vacated.

Counsel are requested to contact the Circuit Mediator should circumstances develop that warrant further discussions prior to the next scheduled conference.

FOR THE COURT

By: Margaret A. Corrigan
Circuit Mediator

Laura Blake

From: ca9_ecfnoticing@ca9.uscourts.gov
Sent: Tuesday, December 14, 2010 8:50 AM
To: Laura Blake
Subject: 10-17443 Loren Shirk, et al v. USA "Mediation Order Filed"

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United States Court of Appeals for the Ninth Circuit

Notice of Docket Activity

The following transaction was entered on 12/14/2010 at 8:50:22 AM PST and filed on 12/14/2010

Case Name: Loren Shirk, et al v. USA

Case Number: 10-17443

Document(s): Document(s)

Docket Text:

Filed order MEDIATION (MAC): On December 10, 2010, a telephone conference was held with Circuit Mediator Margaret A. Corrigan. Trinette S. Sachrison, Esq. participated on behalf of appellants; Michael A. Johns, Esq. participated on behalf of appellee. The court will initiate a further conference by telephone on March 15, 2011, at 10:00 a.m. Pacific Time (11:00 Mountain Time). The briefing schedule previously set by the court is vacated. Counsel are requested to contact the Circuit Mediator should circumstances develop that warrant further discussions prior to the next scheduled conference. [7579453] (WL)

The following document(s) are associated with this transaction:

Document Description: Main Document

Original Filename: 10-17443.pdf

Electronic Document Stamp:

[STAMP acecfStamp_ID=1106763461 [Date=12/14/2010] [FileNumber=7579453-0]

[1114825873f867b457b83f9a99b40b7a05ac612093380c8cddab56f278d4ce1e9e1c0146d4e145d0019f99fecbc01cfac1aa3c21180da8a4bfc3fb18d371d653]]

Notice will be electronically mailed to:

Mr. Johns, Michael A.

Rose, Bradley Michael, Counsel

Ms. Sachrison, Trinette Shawna, Attorney

The following information is for the use of court personnel:

DOCKET ENTRY ID: 7579453

RELIEF(S) DOCKETED:

to set further pre-briefing conference

to vacate briefing schedule

DOCKET PART(S) ADDED: 7394667, 7394668, 7394669

Exhibit E

KAYE, ROSE & PARTNERS, LLP
ATTORNEYS AT LAW

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September 27, 2010

SENT VIA FACSIMILE (520-562-6769) and FIRST CLASS MAIL

Thomas L. Murphy
Gila River Indian Community
525 W. Gu uKi
P.O. Box 97
Sacaton, AZ 85247-1627

Re: *Loren R. Shirk and Jennifer Rose v. United States of America*
United States District Court Case No. 2:09-CV-01786-NVW

Dear Mr. Murphy:

I trust you are now in receipt of the Court's Order granting the United States' Motion to Dismiss the above entitled action for lack of subject matter jurisdiction. Needless to say, we disagree with the position taken by the district court and have received approval from our client to appeal and seek a reversal of same.

Of equal if not greater importance, our client has also approved re-opening the state court case and bringing an action directly against the Gila River Indian Community. As Judge Wake correctly pointed out, the motion is likely to be granted due to the misrepresentations made in the underlying case concerning the Tribe's sovereign immunity; *to wit*, failure to disclose the waiver of immunity for negligence resulting in personal injury up to the limits of the insurance the Tribe is required to maintain under the compact. We are prepared to file a Rule 60 motion as both the district court and the U.S. Attorney have not only instructed but encouraged.

The bottom line, however, is that we represent a family that has gone through emotional turmoil and financial harm by the significant injury to their father, husband and "bread winner." The purpose of this suit is not to seek retribution or parade any perceived injustice through the court system, but merely to garner financial assistance for this family that is quickly becoming financially insolvent. To that end, we write to advise that we have encouraged our clients to be willing to discuss a reasonable settlement, given the present posture of the case.

EXHIBIT E

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Thomas L. Murphy
September 27, 2010
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With that said, we write to suggest an attempt at reaching an amicable resolution. With filing deadlines quickly approaching it behooves us to do this sooner rather than later. Please advise whether the Tribe would engage in this course of action instead of undertaking further litigation.

We look forward to your earliest response.

Very Truly Yours,

KAYE, ROSE & PARTNERS, LLP

A handwritten signature in cursive script, appearing to read "Trinette S. Sachrison".

Trinette S. Sachrison

TSS/lb

cc: Bradley M. Rosé, Esq.

 Laura Blake

From: Laura Blake
Sent: Tuesday, September 28, 2010 9:52 AM
To: 'Thomas.Murphy@gric.nsn.us'
Cc: Trinette S. Sachrison; Bradley M. Rose
Subject: LOREN R. SHIRK
Attachments: SHIRK ATTORNEY MURPHY CORRESPONDENCE.pdf

Mr. Murphy, Please see correspondence of September 27, 2010 attached. Our attempts to provide you with the attached correspondence via facsimile have been unsuccessful.

Laura Blake
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