

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2007-018088

11/30/2011

HONORABLE EILEEN S. WILLETT

CLERK OF THE COURT  
J. Rutledge  
Deputy

LOREN R SHIRK

TRINETTE S SACHRISON

v.

MICHAEL LANCASTER, et al.

ERIN BYRNES

**UNDER ADVISEMENT RULING**

On November 4, 2011, the Court heard oral argument on Plaintiff's Motion to Set Aside Judgment Pursuant to Rule 60(c), A.R.C.P., filed December 20, 2010. The matter was fully briefed and amicus curiae briefs from Gila River Indian Community and the United States of America were also considered and briefed.

The Court finds pursuant to Rule 60(c)(6), A.R.C.P. that Plaintiff has met his burden of proving "any other reason justifying relief from the operation of judgment." For reasons set forth below, this Court vacates judgment entered December 17, 2008. The Tribe has waived its sovereign immunity defense up to its federally mandated liability policy limits and has a duty to defend the Defendants as a matter of law in this State action.

**FACTS AS ALLEGED**

On October 19, 2006, while traveling eastbound on his motorcycle through the intersection of Ocotillo Road and Arizona Ave, Plaintiff Loren R. Shirk was struck by a vehicle

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driven by Leshedrick Sanford. As a consequence of this accident, on October 4, 2007, Plaintiff filed a lawsuit against Defendants Hilario Tanakeyowma and Michael Lancaster. Plaintiff alleges in his complaint that Defendants, two Arizona Peace Officer Standards Training (“AZ POST”) certified law enforcement officers of the Gila River Indian Community Police Department, were negligent.

Defendants were returning home from a training class in Tucson on the day of the accident. Nearing home, they had noticed Sanford driving erratically, activated their emergency lights, and prepared to approach Sanford’s vehicle while he was stopped at the red light at the intersection where the accident eventually occurred. However, as Defendants exited their police vehicle to make contact with Sanford, Sanford accelerated and entered the intersection, striking Plaintiff’s motorcycle and ejecting Plaintiff. Plaintiff alleges significant injuries as a result of this accident. The accident occurred outside of the Gila River Indian Community’s geographical boundaries.

PROCEDURAL HISTORY

Plaintiff filed a lawsuit against Defendants in the Maricopa County Superior Court on October 4, 2007. On January 28, 2008, Defendants filed a Motion to Dismiss, seeking to dismiss Plaintiff’s Complaint for lack of subject matter jurisdiction. The Motion was fully briefed.

After hearing oral argument, the Honorable A. Craig Blakey II determined that the Maricopa County Superior Court lacked subject matter jurisdiction over the claim asserted by Plaintiff against Defendants. Relying upon the doctrine of sovereign immunity and the doctrine’s extension to tribal employees acting in their official capacity and within the scope of their authority, the Court held that Plaintiff was limited to suing Defendants in either federal or tribal court. The Court relied upon facts which indicated that Defendants were acting in their official capacity and within the scope of their authority as Gila River Police Officers. Specifically, at the time of Plaintiff’s accident, Defendants were on duty and being paid in their capacities as Gila River Police Officers. They were returning to the tribal community from a mandatory training attended for the Gila River Police Department’s benefit. The Officers were traveling in an official Gila River Police Department vehicle.

The Court granted Defendants’ Motion to Dismiss on September 24, 2008 by Minute Entry filed September 24, 2008. Judgment was formally entered in Defendants’ favor on December 17, 2008.

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On August 27, 2009, Plaintiff filed a separate lawsuit against the United States of America in the United States District Court, District of Arizona, seeking damages for Defendants' conduct. U.S.A. filed a Motion to Dismiss on April 7, 2010, seeking to dismiss Plaintiff's claim for lack of subject matter jurisdiction. Oral argument regarding U.S.A.'s Motion to Dismiss occurred on August 26, 2010, and United States District Court granted U.S.A.'s Motion to Dismiss on August 27, 2010. The District Court determined it also lacked subject matter jurisdiction over the claim asserted by Plaintiff against Defendants. Shirk v. United States of America, CV-09-01786-PHX-NVW, at \*11 (D. Ariz. 2010).

The District Court found that a contract was reached between the Department of Interior's Bureau of Indian Affairs ("BIA") and Gila River Indian Community ("GRIC") wherein Gila River agreed to provide its own law enforcement services within the Gila River Reservation's boundaries. Plaintiff filed his claim seeking to hold the United States liable for Defendants' conduct under the Federal Tort Claims Act ("FTCA"). However, the District Court found that the FTCA only applies to federal employees acting in the course of their employment, a condition the Court decided that was not satisfied under the circumstances involved in Plaintiff's cause of action. Specifically, as the contract between Gila River and BIA intended Gila River Police Officers to be considered federal employees only when providing law enforcement services within the Gila River Reservation's boundaries, the Court held the Defendants' conduct to be outside of the Gila River Reservation's boundaries, in response to a violation of state law, thereby affording Plaintiff with no jurisdiction to bring a claim under FTCA against the United States.

The District Court's decision is on appeal in the Ninth Circuit, with briefing stayed pending this Court's decision on Reconsideration of the Motion to Set Aside Judgment.

Returning to the Maricopa County Superior Court, Plaintiff filed a Motion to Set Aside Judgment pursuant to Ariz.R.Civ.Proc. Rule 60(c) on December 21, 2010. Determining Plaintiff's Motion to Set Aside Judgment to be untimely and without merit, this Judge denied the Motion on February 18, 2011.

Plaintiff filed a Motion for Reconsideration on February 28, 2011. Through a Minute Entry issued on March 21, 2011, the Court set forth a timeline for Defendants' Response and Plaintiff's Reply to Plaintiff's Motion for Reconsideration. Both Gila River Indian Community and U.S.A. were granted leave to file Amicus Curiae briefs. Responsive briefing was scheduled and oral argument was heard November 4, 2011.

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THE LAW

In 1998, the Gila River Indian Community (“GRIC”) and Bureau of Indian Affairs (“BIA”) entered a contract for law enforcement services, known as a “638 contract”, pursuant to the Indian Self-Determination and Education Assistance Act. 25 U.S.C.A. §450-450n (ISDEAA). Thereafter, in 2003 the BIA and GRIC entered into a Compact of Self-Governance for law enforcement services.

The 638 contract provided that tribal officers would enforce federal, state, and tribal law for offenses that occur within Indian Country. Thereafter the Tribe and Federal Government entered a Compact through which the Federal Tort Claims Act provided insurance coverage for Community employees performing functions enumerated under various tribal funding agreements which included the GRIC Law Enforcement Program. The BIA further entered a Deputation Agreement with GRIC and issued Special Law Enforcement Commissions (SLECs) to GRIC officers. Defendant Tanakeyowma received his SLEC prior to the incident in question. Defendant Lancaster received his SLEC after the incident. The liability or immunity of SLEC officers is determined by the Deputation Agreement itself.

The Deputation Agreement expressly stated that SLEC officers are deemed employees of the Department of the Interior and Covered by the FTCA only when carrying out their duties regarding law applicable within Indian Country. The GRIC approved the Deputation Agreement by Resolution (GR-98-06).

That GRIC has sovereign power to enforce the law within Indian Country is undisputed. However, A.R.S. §13-3874(A) allows qualified tribal officers to exercise law enforcement powers on Arizona state land. Such GRIC officers are AZ POST certified. In addition, the Defendant officers as citizens had express legal authority pursuant to A.R.S. § 13-3884 and 13-3889 to effect a DUI arrest off Indian Country. That the Defendants had authority to initiate the traffic stop in question is also undisputed.

Prior to 1990 the Department of the Interior funded liability insurance for tribes who held 638 contracts. Subsequent thereto, Congress through FTCA continued to extend coverage for claims arising out of law enforcement contracts. However, Congress also required tribes to carry liability insurance for claims not covered by FTCA as well, requiring the contracting tribes to

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waive sovereign immunity up to the limits of the liability insurance policy. See, 25 U.S.C. § 450f(c).

In this case, the GRIC officers were acting in the course and scope of their employment, but off the geographical boundaries of Indian Country. The Federal Tort Claim Act does not apply. Their activities instead fall within the intent of 25 U.S.C. § 450f(c). To the amount of GRIC liability coverage for the Defendants' law enforcement activities off Indian Country not covered by FTCA, the GRIC has waived its Sovereign Immunity to suit in Arizona. The Court finds persuasive the U.S.A.'s Amicus Brief legal analysis. The Tribe has waived its Sovereign Immunity for the activities of the Defendant Officers in this case.

IT IS THEREFORE ORDERED granting the Plaintiff's Motion to Set Aside Judgment Pursuant to Rule 60(c), A.R.C.P. Plaintiff has a viable cause of action in State Court. Plaintiff has pursued relief in all available forums with diligence. To allow the judgment to stand under these circumstances would be unjust. Defendants are not prejudiced by allowing the state action to proceed on its merits.

ALERT: Effective September 1, 2011, the Arizona Supreme Court Administrative Order 2011-87 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.