IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

LOREN R. SHIRK, an individual, Plaintiff/Appellee, v. MICHAEL LANCASTER, and individual; and HILARIO TANAKEYOWMA and MICHELLE TANAKEYOWMA, husband and wife, Defendants/Appellants.	Court of Appeals Division One No. 1 CA-CV 12-0131 Maricopa County Superior Court No. CV2007-018088

APPELLANTS LANCASTER AND TANKEYOWMA'S REPLY BRIEF

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INTRODUCTION

Gila River Indian Community ("GRIC") police officers Lancaster and Tanakeyowma (collectively, "the Officers") urge this Court to reverse the trial court's order granting Plaintiff Loren Shirk's motion to set aside the 2008 judgment in this case. That judgment properly found that the trial court had no subject matter jurisdiction over Plaintiff's garden variety negligence claims because the Officers were shielded by the doctrine of sovereign immunity from suit. Plaintiff never appealed.

Importantly, there is no dispute as to the outcome determinative facts in this case. Plaintiff admits that he is asserting "common law negligence claims." (*See* Answering Brief, "A.B.", at 1). And the issue of whether Plaintiff can assert any federal claims against the Officers has been foreclosed.

Specifically, the GRIC Police Department is operated pursuant to what is commonly known as a self-determination contract or compact[1] between the GRIC and the United States government, through the Bureau of Indian Affairs ("BIA"). In a companion case to this one in which Plaintiff brought a lawsuit against the USA pursuant to the Federal Tort Claims Act, the Arizona Federal District Court held that the Officers' conduct in effectuating the traffic stop that ultimately cause Plaintiff's injuries was conduct that was **not** taken within the scope or in furtherance of the Tribe's[2] 638 Agreement with the federal government. (*See* August 27, 2010 Order in *Shirk v. USA*, *et al.*, Appellants' Appendix (hereinafter "Appendix"), at 99). Based on that finding, the federal court dismissed Plaintiff's lawsuit for lack of jurisdiction. As a matter of issue preclusion, then, the statutory scheme governing formation, administration and operation of 638 agreements –

[1] The terms 638 and self-determination compact, contract, and agreement are used synonymously.

[2] The Gila River Indian Community is interchangeably referred to as "the GRIC," the "Tribe," and the "Community" herein.

which is contained in 25 U.S.C. § 450f(c) – has absolutely no application to this case whatsoever.

After Plaintiff's FTCA lawsuit was dismissed, Plaintiff filed a motion to set aside the judgment in his state case. In fact, the motion to set aside was not filed until two years after the judgment was entered. The request for relief was predicated on the idea that a provision in 25 U.S.C. § 450f(c), the law governing self-determination agreements, effectuated a waiver of the Tribe and the Officers' sovereign immunity. That provision, § 450f(c)(3)(A), requires an insurance carrier insuring a tribe for its contract functions under a self-determination agreement to waive the carrier's own right to disclaim a suit based on sovereign immunity.

Plaintiff concedes that the traffic stop at issue in this case was one the Officers could undertake as a result of *Arizona state law*. Plaintiff likewise concedes, as he must, that the Officers were acting in their capacity as tribal law enforcement officers (versus as federal officers in the event of fulfilling compact functions) at the time of the off-reservation traffic stop. These facts are the same ones that led the federal court to find that the Officers could not be treated as federal employees for the purposes of coverage under the FTCA.

The foregoing facts likewise determine the outcome in this case. Because the Officers were acting in their capacity as tribal police officers at the time of the stop in this case, they are shielded from this lawsuit by operation of the doctrine of sovereign immunity. Indeed, absent an express congressional abrogation of a tribe's sovereign immunity, neither it nor its employees who are acting within the course and scope of their authority as tribal employees may be sued in state court. *See United States v. Oregon*, 657 F.2d 1009, 1013 n. 8 (9th Cir. 1981).

The trial court erred in granting the motion to set aside for several reasons. Most significantly, though it is addressed last in this document and the Officers' Opening Brief, the court's order below turns sovereign immunity analysis on its

head. It essentially allows for a finding of waiver of sovereign immunity by implication. That is not the law as it relates to the Tribe and these Officers' right to claim sovereign immunity.

Procedurally, the trial court abused its discretion by granting Plaintiff's untimely Rule 60(c)(3) motion. It was filed a year and a half too late and the court below could and should have denied it for that reason alone. Finally, even if Plaintiff could properly bring his request for relief pursuant to Rule 60(c)(6), the motion nevertheless should have been denied because Plaintiff provided no extraordinary or unique circumstances justifying relief. Rather, he points to a failure to know of or understand the statute he know claims effectuates a waiver of immunity. But in so doing, he never explains why it took him two years to discover and/or undertand the statute's import or why he did not file a request for relief from judgment earlier.

These Officers are entitled to the protection from suit afforded by sovereign immunity. This Court should reverse the trial court's order granting a set aside, and reinstate the 2008 judgment.

I. BY GRANTING THE MOTION TO SET ASIDE, THE TRIAL COURT ABUSED ITS DISCRETION PROCEDURALLY IN MULTIPLE WAYS.

An abuse of discretion exists where the trial court's action is legally incorrect or where the discretionary act under review is one which reaches an end that is not justified by reason. *City of Phoenix v. Geyler*, 144 Ariz. 323, 332, 697 P.2d 1073 (1985).

The trial court blatantly abused its discretion by granting Plaintiff's motion for set aside below. First, the motion was predicated on a claim that Appellants-Defendants Lancaster and Tanakeyowma (collectively, again, referred to as "the Officers" herein) engaged in fraud or misrepresentation to the trial court and Plaintiff. As such Plaintiff's Motion was brought pursuant to Rule 60(c)(3), which

requires a party to seek relief not later than six months after the entry of the judgment from which relief is sought. Plaintiff's motion was filed more than a year and half after the trial court entered judgment in 2008. His motion to set aside therefore should have been flatly and immediately rejected.

Second, the trial court improperly allowed Plaintiff to circumvent the timeliness requirement embodied in subpart (3) by transmuting his request into one filed pursuant to subpart (6), the Rule's catch-all provision. The latter clause allows a court to grant relief only where none of the five other grounds for providing relief exist and where extraordinary grounds exist supporting relief. Neither of these conditions was met here. In fact, even if Plaintiff's motion had been timely, as is explained in greater detail in Section II below, his substantive arguments regarding why the Officers were not entitled to raise a sovereign immunity defense are so legally unsupportable and flawed that relief should have been denied anyway. Therefore, the trial court's November 11, 2011 minute entry setting aside the prior judgment was a clear abuse of discretion and should be reversed.

A. Despite his protestations to the contrary, Plaintiff's motion to set aside was absolutely predicated on grounds appropriately addressed pursuant to Rule 60(c)(3).

In his Answering Brief, Plaintiff disingenuously contends that his motion to set aside the 2008 judgment was not pursued under Rule 60(c)(3). (*See* A.B. at 17). The truth is belied by the actual content of the motion itself, and by statements contained in Plaintiff's Answering Brief (hereinafter "A.B."). The gravamen of Plaintiff's motion below was that the Officers claimed sovereign immunity from suit in spite of the fact that they were precluded from doing so by operation of a federal statute. More particularly, in Plaintiff's view, Defendants' failure to raise the operative portion of 25 U.S.C. § 450f(c) – which Plaintiff

believes waives the GRIC and its employees' ability to raise sovereign immunity[3] – was directly responsible for a "decision based on fundamental error of fact and law." (*Id.* at 5).

In support of his motion, Plaintiff remarked that "defendants did not address 25 U.S.C. § 450f(c) in any of their moving papers, nor was Plaintiff (or the Court) aware the Tribe's immunity had been abrogated by Congress to this extent." (ROA 49 at 3). Plaintiff continues in this vein, claiming that "Defendants failed to disclose Congress required the Tribe to waive sovereign immunity up to the policy limits of its federally mandated insurance." (ROA 49 at 4). In other words, Plaintiff stops just short of accusing the Officers of intentionally, and fraudulently, claiming sovereign immunity where they were prevented from doing so by federal law. And in so doing, he likewise implies that the Officers were somehow obligated to disclose the statute and its contents to the trial court and Plaintiff.

Plaintiff expands on this notion in the A.B. There, Plaintiff contends Defendants not only failed to make him or the trial court aware of 25 U.S.C. § 450f(c)'s existence and the relevant provision on waiver of an insurance carrier's immunity, but worse, that Defendants failed to *interpret the significance* of the statutory provision for Plaintiff and the trial court. According to Plaintiff,

> Appellants here mischaracterize Shirk's argument. (Citation omitted). The grounds upon which Shirk sought relief was not that the Officers failed to disclose the existence or contents of 25 U.S.C. [4]50f(c), but that they failed to advise that Congress had in fact abrogated the Tribe's immunity and authorized claims up to federally funded policy limits.

(A.B. at 20 n. 9). This contention is flawed in a basic and significant way. At its heart, Plaintiff's argument relies upon an unstated assumption that his

[3] As is discussed in detail below, Plaintiff urges this interpretation of the statute even though the provision Plaintiff relies on speaks only to an insurance carrier providing coverage to the tribe for limited functions – namely pursuant to a self-determination agreement authorized and governed by 25 U.S.C. § 450f(c). In other words, Plaintiff's interpretation of 25 U.S.C. § 450f(c) flies in the face of the plain language of that section.

interpretation of the waiver provision in § 450f(c) is the only correct interpretation to be had. Otherwise, Defendants cannot be said to have had any duty to disclose that "Congress had . . . abrogated the Tribe's immunity …." Defendants have always maintained that the statute has no relevance to this case and accordingly, they had no obligation to raise this issue.[4]

In any event, given the grounds Plaintiff had for seeking relief – the alleged fraud/misrepresentation by the Officers – it is indisputable that Plaintiff had to seek relief under Rule 60(c)(3).[5] This Court held long ago that to succeed in setting aside a judgment, one must make a specific showing satisfying one of the six grounds for relief identified in the Rule. *See Sloan v. Florida-Vanderbilt Dev. Corp.*, 22 Ariz. App. 572, 576, 529 P.2d 726, 730 (1974). And in so describing the operation of Rule 60(c), this Court likewise noted that the six clauses of the Rule are "mutually exclusive." *Sloan*, 22 Ariz. App. at 577, 529 P.2d at 731. In other words, a party having grounds to seek relief under Rule 60(c)(3) cannot seek relief under other subparts of the Rule based on the same grounds.

To obtain relief, Plaintiff not only had to identify specific grounds satisfying one of the grounds for relief, he likewise had to timely seek relief. Rule 60(c) requires that a "motion shall be filed within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment . . . was entered . . . ." Rule 60(c), ARIZ. R. CIV. P. Thus, to be timely, Plaintiff's motion had to be filed within six months of the entry of judgment, which occurred on December 17, 2008. (*See* ROA 47). Plaintiff did not file the motion to set aside until December 2010, nearly two years to the day after judgment was entered. (ROA 49).

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[4] Additionally, to the extent there was any obligation to make the trial court or Plaintiff aware of the statute's existence, the Officers satisfied that obligation because they cited the statute in the pleadings on the motion to dismiss they filed. Furthermore, the exhibits to that motion cited the statute.

[5] Even if Plaintiff had not cited subpart (3) himself (*see* ROA 49 at 4), it should have been apparent to the trial court that this was the prong of the Rule governing Plaintiff's request for set aside.

In his original filing, Plaintiff tried to render his request for relief timely by pointing to the fact that one month after his FTCA claim was dismissed, his attorneys sent a letter to the GRIC's Deputy General Counsel, Thomas Murphy, and "advis[ed] the Tribe of their intention to re-open the underlying state court case against [the Officers] in light of 25 U.S.C. § 450f(c)." (ROA 49 at 6). In his Answering Brief, Plaintiff continues to try to cover up his deficiency, claiming the motion to set aside was timely because it was filed "within three months of notifying GRIC's counsel of his intention to doing the same." (A.B. at 21 n. 11).

This argument assiduously misses the point. Whether Plaintiff's motion was timely for the purposes of Rule 60(c)(3)'s six-month requirement is calculated from the time judgment was entered, not from the time Plaintiff's counsel notified the Tribe's attorney of the intent to file that motion. *See* Rule 60(c)(3), ARIZ. R. CIV. P. (motions brought pursuant to clauses (1), (2), or (3) must be filed "not more than six months after the judgment or order was entered or proceeding was taken").

Because Plaintiff's motion was extremely untimely, the trial court erred in granting Plaintiff relief. *See Andrew R. v. Arizona Dep't. of Econ. Sec.*, 223 Ariz. 453, 457-58, 460-61, ¶ 25, 224 P.2d 950, 954-55, 957-58 (App. 2010) (trial court erred in granting a Rule 60(c)(3) motion for relief from judgment where filed more than six months after judgment was entered); *see also In re Estate of Travers*, 192 Ariz. 333, 336, 965 P.2d 67, 70 (App. 1998) (holding that the trial court erred in extending the time to file a Rule 60(c)(3) motion beyond the prescribed six months). This Court should therefore reverse the order setting aside the judgment.

1. Plaintiff should not have been permitted to avoid the timeliness requirement of subpart (3) by invoking Rule 60(c)(6).

Plaintiff was well-aware that because his motion was governed by Rule 60(c)(3), he had to seek relief within six months of the entry of judgment. (*See* ROA 49 at 4). And though he cited subpart (3) up front as one of the grounds for

relief, because he feared dismissal for untimeliness, Plaintiff sought to obscure the applicable six-month time limit by jumbling together the "reasonableness" requirements of clauses (3) and (6). In his motion, Plaintiff noted:

> 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 . . .' Rule 60(c) 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.'

(ROA at 4). Thus, while Plaintiff blatantly acknowledged in the opening paragraph of his argument to set aside that he seeks relief based on alleged fraud or misrepresentation by the Officers, he nevertheless tries to evade the six month filing deadline by pointing to the trial court's ability to "accomplish justice" under subpart (6). (ROA 49 at 4).

Put differently, Plaintiff inappropriately shoehorned his request to set aside the judgment into Rule 60(c)(6). The trial court should have seen this effort for what it was and denied the motion. Indeed, a party may not "rely on subsection (6) to circumvent the timeliness requirement" of the other subsections. *Andrew R.*, 223 Ariz. at 459, ¶ 4, 224 P.2d at 956 (citing *Travers*, 192 Ariz. at 336-37, 965 P.2d at 70-71)).

Instead, the trial court went along with Plaintiff and ultimately granted his request for relief from judgment. Tellingly, the trial court does not refer to the subpart of Rule 60(c) upon which its findings are based. But it is clear from the text of the November 2011 Under Advisement Ruling that the Court relied not on subpart (3) of the Rule, but instead on subpart (6). This was an abuse of discretion, given the Rule's language, and the authority from this Court providing that a party may not use the latter to avoid the former's timeliness requirements.

B. Plaintiff did not meet the substantive requirements for relief under Rule 60(c)(6).

Even if Plaintiff did properly invoke Rule 60(c)(6), the trial court

nevertheless abused its discretion in granting the motion to set aside because Plaintiff did not meet the requirements for relief thereunder. Plaintiff had to meet two requirements. First, he needed to show the "reason for setting aside the [judgment] must not be one of the reasons set forth in the five preceding clauses." *Edsall v. Superior Court In and For Pima County*, 143 Ariz. 240, 243, 693 P.2d 895, 898 (1984) (citing *Webb v. Erickson*, 134 Ariz. 182, 186, 655 P.2 6, 10 (1982)). Second, to obtain relief under subpart (6), "the facts must go beyond the factors enumerated in clauses 1 through 5 and raise extraordinary circumstances of hardship or injustice . . . ." *Edsall*, 143 Ariz. at 243, 693 P.2d at 898 (internal quotation marks and citation omitted).

Plaintiff met neither of these conditions. Initially, as discussed already, his motion to set aside was predicated on an allegation that the Officers perpetrated a fraud or misrepresentation by claiming sovereign immunity when they should not have. The catch-all provision of Rule 60(c)(6) *only* applies when one of the five other mutually exclusive grounds for relief under the Rule does not provide a basis for setting aside the judgment. *Panzino v. City of Phoenix,* 196 Ariz. 442, ¶ 12, 999 P.2d 198, 202 (2000); *see also Fry v. Garcia*, 213 Ariz. 70, 73, 138 P.3d 1197, 1200 (App. 2006).

1. Plaintiff's authority to the contrary is unavailing.

Plaintiff points the Court to the recent decision in *Amanti Electric Inc. v. Engineered Structures, Inc.*, 229 Ariz. 430, 276 P.2d 499 (App. 2012) and says that recently decided case excuses his failure to meet the timeliness requirements embodied in Rule 60(c)(3). The issue in *Amanti* was whether the plaintiff was precluded from seeking relief under clause (6) of Rule 60(c), where the plaintiff also had colorable claims for relief under clauses (1) and (3). The parties there entered a settlement agreement pursuant to which defendant Engineered Structures agreed to pay monies owed on a contract and in exchange for release of all claims

existing as of execution of the agreement. *Amanti*, 229 Ariz. at 431, 276 P.2d at 500. Thereafter, Amanti attempted to deposit defendant's settlement check, but the bank rejected it due to a stop-payment order issued by the defendant. Amanti then sought to set aside the judgment in the case, based on alleged fraud, misconduct and misrepresentations. *Id.* Amanti also claimed that it was entitled to relief because of excusable neglect. In sum, Amanti sought relief because the defendant had issued the stop-payment order around the same time the parties were negotiating and finalized the settlement agreement. *Id.*

The trial court denied relief under clause (6), finding it could not consider relief thereunder because Amanti had colorable claims to relief under the other two clauses, but had failed to timely file for relief from the judgment. *Id.* Division Two of this Court reversed and remanded. *Id.* at 432, 276 P.2d at 502. In so doing, it acknowledged the "general validity" of the principle that the various clauses of Rule 60(c) are mutually exclusive. *Id.* It did not, as Plaintiff suggests, overrule that general principal. Rather, the *Amanti* court merely verified that where there are exceptional circumstances *in addition to* those enumerated in the other subparts of the Rule, a court may consider whether Rule 60(c)(6)'s equitable thrust entitles a party to relief. *Id.*

The *Amanti* court pointed to the following as justifying relief and demonstrating that extraordinary circumstances existed meriting further review: the defendant's failure to disclose its stop-payment order, the plaintiff's reasonable belief that once the agreement was entered, no further action was required to protect its right to recover, and the unilateral windfall the defendant would enjoy due to the stop-payment. *Id.* The same type of circumstances do not exist in this case.

2. Plaintiff failed to demonstrate extraordinary circumstances exist justifying relief.

Here, the trial court concluded, without explanation, that "to allow the judgment to stand under these circumstances would be unjust." (11/30/2011 Under Advisement Ruling, Appendix at 7). The "circumstances" that the trial court points to are apparently that Plaintiff has a "viable cause of action," and that he allegedly "pursued relief in all available forums with diligence." (*Id.*). Even if both of these facts were true – which the Officers vociferously deny – they would not constitute "extraordinary circumstances" like those outlined in *Amanti*.

In his Answering Brief, Plaintiff contends the record at the trial court evidenced "a combination of factors that created a unique and extraordinary situation warranting [granting] Shirk equitable relief." (A.B. at 20). Per Plaintiff, those facts include the following:

- That Plaintiff diligently prosecuted his claim from the time of the dismissal of the original action in December 2008 to the "prompt filing" of the Rule 60(c) motion *after the FTCA* action was denied";
- That he demonstrated no prejudice would be suffered by the Officers if the judgment were set aside and the case reinstated; and
- That he exhausted all remedies, but had not received a day in court.

(*Id.* at 21) (emphasis added).

First, none of these "facts" are accurate. Plaintiff did not diligently pursue his claim in this court. When the judgment was entered, Plaintiff did not file an appeal. Doing so would have constituted diligently and actively pursuing his claim. Similarly, filing an appeal would have been the proper means of raising the issue Plaintiff sought to raise in his Rule 60(c) motion and which he finally now has before the Court. Moreover, Plaintiff never once has tried to explain why a two year lapse between the time when the judgment was entered and when he finally filed the motion to set aside was justified.[6] Perhaps the reason he has not

[6] Plaintiff does imply that he was somehow encouraged to pursue an FTCA claim by the trial court because, according to Plaintiff, in dismissing the state claims, that court found that "the Officers were federal employees covered under the Federal Tort Claims Act [ ]." (A.B. at 1). This is completely false. The trial court never held that the Officers were acting in furtherance of the GRIC Law

offered an explanation is obvious – there is none.

On the issue of prejudice, Plaintiff has presented nothing to substantiate his claim that the Officers will suffer no prejudice as a result of having to defend against claims that arise from an accident that occurred six years ago. In his original motion to set aside, Plaintiff assured the trial court that "[no] prejudice [would] result in granting the requested relief." (ROA 49 at 7). He does not explain his basis for this assertion. At oral argument on the motion to set aside, defense counsel explained that the Officers would indeed suffer prejudice if a set aside were granted. (*See* Transcript of Oral Argument, November 11, 2011, at 55). Specifically, counsel raised issues related to the age of the case, and expected difficulties with witnesses' memory and with discovery generally. (*Id.*). More significantly, the Officers' addressed the problems the set aside poses with their right to repose in their Opening Brief, noting that the trial court's granting of Plaintiff's motion has eviscerated any finality the Officers thought they had. *See Sloan,* 22 Ariz. App. at 574, 529 P.2d at 728 (holding that "a judgment must at some point in time achieve finality").

The Officers' contention regarding the prejudice they will suffer if forced to defend this case have gone unanswered. So too have the Tribe's concerns about its exposure in administering its 638 agreements with the federal government remained unaddressed.

Finally, Plaintiff's point regarding exhaustion of remedies is really nothing more than an appeal to sympathy. In essence, it is Plaintiff's way of telling this Court that he was injured as a result of this accident and that someone must be

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Enforcement Program Compact at the time of the subject accident. In fact, the trial court couldn't even entertain that issue because it lacks jurisdiction to do so. Furthermore, Plaintiff's flippant contention that "the Tribe prevailed" on its motion to dismiss should not be ignored. As the GRIC points out in its Amicus Brief, it was never a party to this action. Yet the trial court's under advisement ruling binds the GRIC, finding the Tribe waived sovereign immunity and that it is obligated to defend the Officers in the reinstated state case. (*See* 11/30/11 Under Advisement Ruling, Appendix at 3).

made to answer for it, regardless of sovereign immunity, regardless of liability. While Plaintiff has unquestionably suffered greatly as a result of the subject accident, that alone does not form a legal basis for setting aside the judgment.

Thus, because Plaintiff has utterly failed to establish extraordinary circumstances justifying relief under Rule 60(c)(6), the trial court's order of December 20, 2011 should be reversed and the prior 2008 judgment reinstated.

II. THE TRIAL COURT'S INTERPRETATION OF 25 U.S.C. § 450F(C) WAS LEGALLY INCORRECT AND CONSTITUTES REVERSIBLE ERROR.

Regardless of the rubric of analysis this Court wishes to apply to the issue,[7] in order for the trial court's ruling to stand, it must be legally supportable. At base, the trial court must be correct that Congress unequivocally intended 25 U.S.C. § 450f(c)(3) to waive the Officers' ability to raise a sovereign immunity defense in this case. This Court's reviews the trial court's finding that immunity was waived *de novo. See United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992).

A. Sovereign immunity is the rule, not the exception.

As discussed in the Opening Brief, this Court's analysis of the availability of sovereign immunity as a defense must start from the standpoint that a tribal officer's ability to invoke sovereign immunity in defense to a common law negligence claim in state court is the rule, not the exception. This is because, as a general rule, and as a matter of federal law, "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived immunity." *Linneen v. Gila River Indian Comm.*, 276 F.3d 489, 492 (9th Cir. 2002).

[7] Plaintiff complains about how the Officers cast this issue in their Opening Brief. More particularly, the Officers argue that the trial court erred in setting aside the judgment pursuant to Rule 60(c) because Plaintiff lacks a meritorious claim, citing *Bickerstaff v. Denny's Restaurant, Inc*. in support of that proposition. 141 Ariz. 629, 631, 688 P.2d 637, 639 (1984). Plaintiff claims *Bickerstaff* was overruled by *Panzano*, *infra,* but he is mistaken.

Additionally, "this immunity extends to tribal officials when acting in their official capacity and within the scope of their authority." *U.S. v. Oregon*, 657 F.2d at 1013 n. 8 ; *see also Filer v. Tohono O'odham Gaming Enterprise*, 212 Ariz. 167, 170, 129 P.3d 78, 81 (App. 2006).

Generally, then, tribal immunity exists unless abrogated by Congress or waived by the Tribe. *See Okla. Tax Comm'n v. Citizen Band Potowatami Indian Tribe*, 489 U.S. 505, at 509 (1991). "A Congressional waiver of tribal immunity must be unequivocal and explicit." *Val/Del*, *Inc. v. Superior Court*, 145 Ariz. 558, 560, 73 P.2d 502, 504 (App. 1985).

A. 25 U.S.C. § 450f(c) has no application to this case; nor does its waiver provision.

The parties have spilled a lot of ink over the issue of just what the waiver provision contained in 25 U.S.C. § 450f(c)(3) actually means. The fact is, it doesn't matter. The only reason § 450f(c) would have any bearing on this case would be if the Officers' conduct were found to been taken within the course and scope of their activities under the Tribe's 638 compact for law enforcement with the federal government for the provision of law enforcement services. The Arizona Federal District Court has already resolved this issue and any reconsideration is precluded.

More specifically, in dismissing Plaintiff's FTCA claim against the USA, the federal court found that the off-reservation stop of Leshedrick Sanford, who caused the accident that injured Plaintiff, occurred off-reservation, the stop involved conduct outside the scope of the 638 contract. (08/27/10 Order in *Shirk v. USA*, Appendix at 100). Furthermore, the court held that because the Officers were enforcing state law at the time, there conduct was not within the scope of the compact because the scope of work there only provided for enforcement of federal and tribal law. (*Id.*). Thus, because the federal court found the Officers' conduct

to be outside the GRIC law enforcement self-determination agreement, any statute whose application is limited to governing those agreements clearly would have no application to this case given that it is nothing more than a common law negligence case.

1. Section 450f(c) establishes the means for entering a self-governance agreement with the federal government and for the agreement's administration.

The statutory provision at issue is part of the Indian Self-Determination and Educational Assistance Act ("ISDEAA") and is entitled "Self-determination contracts." The provisions of § 450f set forth the manner in which a tribe can contract with the federal government to assume the "programs, functions, services or activities" that are ordinarily otherwise performed by the Department of Interior and/or Department of Health and Human Services on behalf of tribes. *See* 25 U.S.C. § 450f(a)(1)(E). Section 450f(c),"Liability insurance; waiver of defense," provides as follows:

> (1) Beginning in 1990, the Secretary shall be responsible for obtaining or providing liability insurance or equivalent coverage, on the most cost-effective basis, for Indian tribes, tribal organizations, and tribal contractors carrying out 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.
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> . . .
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> (3)(A)Any policy of insurance obtained or provided by the Secretary pursuant to this subsection shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit, but that such wavier shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waiver or otherwise limit the tribe's sovereign immunity . . . .

Provision (3)(A) does not meet the test for a congressional abrogation of the Tribe or the Officers' sovereign immunity from suit.

/ / /

a. Section 450f(c) is not a valid congressional waiver.

A congressional abrogation "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S 49, at 58-59 (1978). The clear language of § 450f(c) reveals it is limited in multiple ways and that it is not a waiver of a tribe or its employees' sovereign immunity from suit. First and foremost, as alluded to above, the waiver provisions relate only to insurance coverage that *may exist*, if secured by the Secretary, to cover tribal employees who are engaged in carrying out contracts, grant agreements, or other agreements that are authorized and issued pursuant to the ISDEAA. The coverage of any insurance policy at issue would be for functions traditionally performed by the federal government. For that reason, the Secretary is directed to take the extent of FTCA coverage into account. As the GRIC correctly points out in its Amicus Brief, by amending the ISDEAA 1987 and extending FTCA coverage to all tribal employees performing functions under a self-determination (or "638") compact, Congress intended to supplant the previous requirement that a tribe itself obtain insurance for liability that might arise from performance of those same functions. (GRIC Amicus Brief at 26-33).

Additionally, the waiver provision is expressly limited in its application to the insurance carrier extending coverage for activities performed pursuant to a 638 contract. Section 450f(c)(3)(A) sets up a requirement that the insurance carrier issuing a policy to cover functions a tribe might engage in pursuant to a self-determination agreement agree, on the face of the policy, that it will waive *its right* to raise sovereign immunity as a defense.

b. Ninth Circuit precedent supports the Officers' interpretation of the statute.

The Officers' interpretation of the statutory waiver in § 450f(c)(3)(A) is consistent with the cases considering it from the Ninth Circuit. And because tribal

sovereign immunity is a matter of federal law and not subject to diminution by the states, that authority governs. *See Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998).

The Ninth Circuit's decision in *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989) is instructive. The plaintiffs in the *Evans* matter were non-Indians who had been arrested by Blackfeet Tribal Police officers for allegedly violating a tribal order. *Evans*, 869 F.2d at 1343-44. The Evans' sued both the tribe and its officers. *Id.* at 1343. At the trial court, the defendants moved to dismiss based on sovereign immunity. *Evans v. Littlebird*, 656 F.Supp. 872, 873 (D. Mont. 1987). The district court agreed that the Evans' claims were barred by sovereign immunity and, in so doing, rejected the plaintiffs' claim that 25 U.S.C. § 450f(c) waived sovereign immunity of the Tribe. *Littlebird*, 656 F.Supp. at 876.

On this issue, the trial court held that § 450f(c)'s language is explicit – "A tribe *may* be required to obtain a liability insurance policy to cover any damages emanating from the tribe's performance of its duties under a contract authorized by section 102 [codified as § 450f]. The caveat of subsection (c) requires that any such liability shall expressly preclude the insurer from defeating a claim covered by the policy by an invocation of the tribe's sovereign immunity." *Id.* But the court continued, noting that "the waiver of sovereign immunity contemplated by the express language of section 102(c) cannot be equated with a congressional waiver of a tribe's immunity from suit in federal court." *Id.* at 876-77.

The Ninth Circuit agreed with the lower court's analysis of how § 450f(c) should be interpreted and applied. Notably, the Ninth Circuit held that while it is true the statute required a tribe to obtain liability insurance as a prerequisite to obtaining a 638 contract, section 450f(c)'s waiver provision "clearly addresses, as is evident in the caveat of that subsection, the **rights and limitations of the insurance carrier, not the Tribe**." *Evans*, 869 F.22d at 1346 (emphasis added).

According to the Ninth Circuit, then, 25 U.S.C. § 450f(c) "expressly precludes the *insurer* from defeating a claim covered by the policy by an invocation of the tribe's sovereign immunity." *Id.* at 1346 (emphasis in original).

c. Plaintiff's interpretation of § 450f(c) is illogical and unsupported.

Plaintiff rejects the Officers', and the Ninth Circuit's, interpretation of § 450f(c) and instead contends that this subchapter requires the GRIC to maintain liability insurance for claims **not covered by the FTCA**. (*See* A.B. at 25). This is completely inconsistent with the clear language of the statute, with the DOI's own rules governing administration of 638 contracts, and with case law involving tort claims against tribes and their employees that arise outside the scope of a 638 contract.

First, the law itself says nothing about providing coverage for any function occurring outside the confines of the Compact. The statutory provision requiring the Secretary to procure insurance is clearly tethered to performance of functions pursuant to the Compact. And another portion of the statute solidifies tribal sovereign immunity from claims not arising from performance of a compact, providing that "[n]othing in this subchapter shall be construed as – (1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe." *See* 25 U.S.C. § 450n.

The notion that 25 U.S.C. § 450f(c)'s insurance requirements and waiver apply outside the context of self-determination agreements is also contradicted by the federal regulations implementing the statute. Specifically, 25 C.F.R. § 900.204 addresses liability for tort claims arising out of performance of tasks undertaken pursuant to a 638 agreement. That section provides:

> **§900.204 Is FTCA the exclusive remedy for a non-medical related tort claim arising out of performance of a self-determination contract?**

> Yes. Except as explained in § 900.183(b), no claim may be filed against a self-determination contractor or employee based upon performance of non-medical related functions under a self-determination contract. Claims of this type must be filed against the United States under FTCA.

25 C.F.R. §900.204.

Finally, cases analyzing tribes and their officers' susceptibility to lawsuits involving common law based negligence claims come down in favor of immunity. For instance in *Linneen v. the Gila River Indian Community, supra*, the Ninth Circuit rejected the claim that a GRIC police officer can be sued for acts taken in his official capacity as a tribal police officer that occurred *on the reservation*. The plaintiffs in the case were non-Indians who took their dogs for a walk within the confines of the GRIC. *Linneen*, 276 F.3d at 491. A Bureau of Indian Affairs officer spotted the couple and a police officer with the Community was dispatched to investigate. When the tribal officer reached the scene, he got out of his truck, drew his gun, and ordered the husband to put his hands on his head. *Id.* He then searched the Linneens vehicle and detained them for three hours. *Id.* The Linneens filed a lawsuit in Federal District Court against the officer, the GRIC, the USA, the Department of Interior, and the BIA.

The trial court dismissed for lack of jurisdiction due to the GRIC's and the officer's sovereign immunity. *Id.* at 491-92. Noting that the Linneens suit arose from the tribal officer's "alleged misconduct during his official duties as a tribal ranger on the Community's land," the court concluded that "Congress has not abrogated tribal sovereign immunity for such acts committed on tribal land by a tribal officer." *Id.* at 492. This suit was decided after the adoption and implementation of the 1987 amendments to the ISDEAA. Accordingly, if Plaintiff's interpretation of § 450f(c) were accurate, the *Linneen* court could have employed the waiver provision of § 450f(c)(3)(A) to allow the plaintiffs' case to go forward. This did not occur, however.

The Arizona Supreme Court has made similar findings. In *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 443 P.2d 421 (1968) (in banc), the court held that state courts lack jurisdiction over an Indian tribe that allegedly committed a tort while engaged in a business enterprise within the state, but off-reservation.

Morgan involved a wrongful death claim brought by the decedent's estate against the Colorado River Indian Tribe ("CRIT"). The decedent was swimming in an area adjacent to a marina park owned and operated by the CRIT when she was struck and killed by a boat operated by a group of high school kids. *Morgan*, 203 Ariz. at 426, 443 P.2d at 422. The estate asserted a negligence claim against the tribe, alleging its failure to rope off or properly mark the area used by patrons of the marina contributed to the death. *Id.* The trial court granted the CRIT's motion to dismiss for lack of jurisdiction based on sovereign immunity. The appellate court reversed, and the Supreme Court ultimately reinstated the dismissal. In so doing, the Court recognized the "impressive body of law . . . recognizing the immunity of Indian tribes from suit." *Id.* at 427, 443 P.2d at 443 (citations omitted). Relying on that body of law, the Supreme Court held that Arizona state courts may not exercise jurisdiction over an Indian tribe that has committed a tort within the state, and outside the boundaries of its reservation, absent the tribe or Congress's consent. *Id.* at 427-28, 443 P.2d at 443-44. Thus, regardless of whether a common law negligence claim arises from an incident that occurred on or off-reservation, if the conduct giving rise to the claim is conduct taken within a tribal employee's scope of employment with the tribe, the tribal employee may not be sued, due to the operation of tribal sovereign immunity.

These precedents are clear and should guide this Court in its reversal of the trial court's decision below.

III. CONCLUSION:

A trial court abuses its discretion on a Rule 60(c) motion when it acts arbitrarily or makes decisions not supported by fact or law. *See Norwest Bank (Minnesota), N.A. v. Symington*, 197 Ariz. 181, 184, 3 P.3d 1101, 1104 (App. 2000) (citing *Geyler*, 144 Ariz. at 328-29, 697 P.2d at 1078-79)). As should be clear from the foregoing, the trial court's November 2011 Under Advisement Ruling was both arbitrary and not supported by law.

Most importantly, the decision finds a waiver of the GRIC and the Officers' sovereign immunity based on vagaries – holding that the Officers' off-reservation enforcement of state law is within the "intent" of the Tribe's 638 contract for law enforcement. Accordingly, the trial court went on to hold that the provision of 25 U.S.C. § 450f(c) that requires an *insurance carrier* to forego a sovereign immunity defense to a tort claim stemming from performance of 638 functions also applies to tribes and their employees, even though the statute contains no such language. Ignoring the warning to "tread lightly in the absence of clear indications of legislative intent," the trial court committed reversible error when it found a waiver here. *Santa Clara Pueblo,* 436 U.S. at 60.

Additionally, Plaintiff did not meet any of the procedural prerequisites for setting aside the judgment – regardless of whether his motion is evaluated under Rule 60(c)(3) or (6). Accordingly, the Officers ask this Court to reverse the trial court's order setting aside the judgment in favor of these Officers entered in December 2008.

RESPECTFULLY SUBMITTED this 21st day of September, 2012.

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NOTICE OF ELECTRONIC FILING

Attorneys for Appellants Lancaster and Tanakeyowma hereby give notice that the foregoing Opening Brief was electronically filed this 21st day of September, 2012 using the AZ TurboCourt electronic filing system and was served as indicated in the separate Certificate of Service electronically filed this same date.