

Brenda Toineeta Pipestem, Associate Justice
Keith Harper, Associate Justice
Matthew L.M. Fletcher, Associate Justice (*pro tem*)

Per Curiam

This matter comes before this Court on an interlocutory appeal from a March 28, 2008 decision of the tribal court that the Poarch Band of Creek Indians (PPBCI) waived its immunity from suit when it entered into agreements with AlaComp Workers' Compensation Self Insured Fund and a motion to dismiss this appeal for lack of appellate jurisdiction. We hold that (1) we have jurisdiction over this appeal based on the collateral order doctrine and (2) that the PBCI did not waive its immunity from this suit and, accordingly, the tribal court lacked jurisdiction over plaintiff Bill English's claim. The tribal court's decision to the contrary is therefore **REVERSED**. This matter is remanded to the tribal court with instructions to dismiss the action with prejudice.

I. Appellee's Motion to Dismiss on the Basis of Jurisdiction

As an initial matter, we must address whether this Court has jurisdiction over this appeal. Mr. English has filed a motion to dismiss contending that the Poarch Band's appeal is interlocutory and thus barred. The Poarch Band argues in response that this Court should adopt the collateral order doctrine enunciated by the Supreme Court in *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949). We note that the Poarch Band of Creek Indians appellate rules are silent on this question. For the reasons set forth below, we agree with the Poarch Band, and find jurisdiction over this appeal.

Although a matter of first impression in this Court, several other tribal courts have assessed whether to adopt the federal collateral order doctrine and for sound and sensible reasons of judicial economy have agreed to do so. The collateral order doctrine is intended as a common sense exception to the rule that finality is normally a necessary (but not sufficient) condition for an appeal where there are orders that meet the following three criteria: (1) the lower court's decision is conclusive and final on the issue at hand, (2) the decision resolves important questions completely separate from the merits, and (3) failure of the appellate court to intervene would effectively render unreviewable on appeal from final judgment in the underlying action. *See, e.g., Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S.Ct. 1992, 1995-96 (1994).

Numerous tribal courts have adopted the doctrine especially in the area of sovereign immunity. For example, the Fort Peck Court of Appeals adopted the doctrine by noting the critical protection that sovereign immunity provides Indian tribes in *Fort Peck Sioux Council v. Fort Peck Tribes*, No. 370, 2003 Mont. Fort Peck Tribe LEXIS 1 (Fort Peck Court of Appeals 2003). There, the court noted: “[Indian tribes] are protected from unconsented lawsuits which drain their treasuries, interfere with daily governmental operations and handicap their ability to provide necessary services to their people.” *Id.* at 16. If the sovereign enjoys immunity from a suit then it would incur harm by being forced to defend itself against the action.

Similarly, the Crow Court of Appeals in *One Hundred Eight Employees of the Crow Tribe of Indians v. Crow Tribe of Indians*, No. 89-320, 2001.NACT.0000001 (Crow Court of Appeals 2001), adopted the collateral order doctrine, reasoning:

The logic behind appellate jurisdiction lying in these cases is that an “essential attribute” of the immunity is “an entitlement not to stand trial.” *Mitchell v. Forsyth*, [472 U.S. 511, 525 (1985)]. Requiring a sovereign to defend a case through trial, without allowing it to immediately appeal, would destroy this sovereign right “to be free from the ‘crippling interference’ of litigation.” [*Marx v. Government of Guam*, 866 F.2d 294, 296 (9th Cir. 1989).] Thus, a lower court’s denial of a motion to dismiss is, in effect, a “final” order with respect to sovereign’s immunity against standing trial, and because the damage to the sovereign can never be undone, it is effectively unreviewable on appeal from a final judgment following trial.

Id., 2001.NACT.00000001, at ¶ 51 (brackets added; other citations omitted).

We find these cases persuasive and adopt the doctrine where, as here, the issue is whether the tribal government has not expressly consented to any waiver of immunity for an entire range of cases. We leave open for another day the question of whether the collateral order doctrine might apply where the tribe has expressly consented to a limited waiver of immunity and it calls on the court to assess whether the particular case fits within the ambit of the immunity waiver. *See, e.g., Kalantari v. Spirit Mountain Gaming, Inc.*, No. A-04-03-003, 2005.NAGR.00000002, at ¶20 (Tribal Court for the Confederated Tribes of the Grand Ronde Community of Oregon) (refusing to apply the doctrine where the tribe consented to a limited waiver).

Because we find the sensible rule of analyzing orders as “final” where they meet the *Cohen* criteria applicable to the Poarch Band court and further we find that this case raises such a matter, we hold that we have jurisdiction over this appeal. We now turn to the merits of the appeal.

II. The Merits of the Appeal

A. The Claim

Bill English allegedly suffered an injury in the scope of his employment with Magnolia Branch Wildlife Reserve, a tribally-chartered subsidiary enterprise of Creek Indian Enterprises, the economic development arm of the Poarch Band of Creek Indians, a federally recognized tribe. After Mr. English filed a claim with the Alabama Workers' Compensation Self-Insurance Fund (AIACOMP), the Tribe's workers' compensation fund, he received a letter on February 1, 2007 from Business Insurance Group, LLP (B.I.G.), the administrator for AIACOMP, denying his claim for workers' compensation benefits. On April 5, 2007, Mr. English filed a complaint in tribal court against the Tribe. The Tribe moved to dismiss the claim on the grounds that the tribal court lacked subject matter jurisdiction, given that the Tribe had not waived its immunity from suit.

The tribal court denied the Tribe's motion in relevant part. For the following reasons, we reverse.

B. Discussion

Under settled Poarch Band law, the Poarch Band retains immunity from suit in tribal court absent a waiver of immunity by the tribe. We have referred to this immunity as "absolute." *Williams v. Riverside Entertainment Center*, No. SC-07-01, at 2 (Poarch Band of Creek Indians Tribal Supreme Court 2007); *see also Powell v. Tallapoosa Entertainment Center*, No. CV-06-55, at 2 (Poarch Band of Creek Indians Tribal Court 2007) ("As an Indian Tribe, the Poarch Band of Creek Indians enjoys absolute sovereign immunity from suit."). This immunity from suit derives from the "inherent and aboriginal sovereignty" that the People of the Poarch Band of Creek Indians acknowledged and

reserved in ratifying the tribal constitution. *See* POARCH BAND OF CREEK INDIANS CONST., preamble (June 1, 1985) (“We, the members of the Poarch Band of Creek Indians, acknowledging the powers of inherent and aboriginal tribal sovereignty, and exercising the right of self-determination ... hereby adopt this Constitution and our Tribal Government....”); *Powell, supra*, at 1 (“In the Tribal Constitution, the Tribe specifically has reserved its sovereign immunity.”). Enterprises of the Tribe, such as the Magnolia Branch Wildlife Reserve, also enjoy this immunity from suit. *See Williams, supra*, at 2; *Powell, supra*, at 2.

We have also noted that “[t]he only exceptions to sovereign immunity are where (1) the Tribe has waived its immunity or (2) Congress has abrogated the Tribe’s immunity with regard to the particular matter at issue.” *Williams, supra*, at 2; *Powell, supra*, at 2. In the instant matter, there is no allegation that Congress has abrogated the immunity of the Tribe, nor is there an allegation that the Tribe, through an authorized entity, has expressly waived its immunity. As such, we turn to whether the Tribe has impliedly waived its immunity.

The tribal court read the United States Supreme Court’s decision in *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001) as permitting implied immunity waiver. In that case, the Citizen Potawatomi Nation had entered into a standard form agreement with a construction contractor that provided for all disputes under the agreement to be resolved in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. *See id.* at 419. Moreover, the agreement provided that any award entered against the Nation could be enforced in Oklahoma state courts. *See id.*

The tribal court, relying almost exclusively on *C & L Enterprises* concluded that the agreement between the Tribe, doing business as Creek Indian Enterprises, and AlaComp served to waive the immunity of the Tribe from suit for claims arising out the agreement. *See English v. Poarch Band of Creek Indians*, No. CV-2007-58, at 10-12 (Poarch Band of Creek Indians Tribal Court 2007).

We find, however, that the tribal court read *C & L Enterprises* far too broadly. Unlike this case, in *C & L Enterprises* there was a direct assent to enforcement in state court that the United States Supreme Court interpreted as an applicable waiver. Here, neither the tribal court nor appellee has cited such a provision.

The Poarch Creek Tribe entered into a Participation Agreement with ALACOMP to provide workers' compensation coverage to its business enterprise employees through a third-party administrator. The Participation Agreement, unlike the arbitration agreement in *C & L Enterprises*, contains only a choice of law provision. There is no provision for judicial enforcement of awards. Accordingly, we hold *C & L Enterprises* to be inapposite as it does not apply to circumstances where, as here, there is no action which can be fairly construed as a consent to suit.

In sum, we hold that waivers of tribal sovereign immunity by the Tribe may not be implied in this circumstance and refuse to adopt and extend *C & L Enterprises*. The mere purchase of insurance does not operate as a waiver of tribal sovereign immunity. Tribal sovereign immunity is an important aspect of the sovereignty of the Poarch Band of Creek Indians, and we decline affirmance of a baseless finding of waiver of this immunity absent express language. Indeed, Poarch Band law requires nothing less and indeed dictates that "[t]he sovereign immunity of the Poarch Band of Creek Indians is not

waived by any section, part, word, or phrase contained in this Tribal Code or amendments thereto.” *Cf.* POARCH BAND OF CREEK INDIANS TRIBAL CODE § 1-1-1. Under these circumstances, we think it crystal clear that the trial court erred in finding that the tribe’s immunity was waived. Accordingly, we reverse and remand with direction to the tribal court to dismiss, with prejudice, Mr. English’s claim for want of jurisdiction.

REVERSED AND REMANDED.