IN THE SUPREME COURT

STATE OF ARIZONA

LOREN SHIRK, an individual Plaintiff/Appellant, v. MICHAEL LANCASTER, and individual; and HILARIO TANAKEYOWMA and MICHELLE TANAKEYOWMA, husband and wife, Defendants/Appellees.	No. CV-13-0173-PR Court of Appeals – Div. One No. 1 CA-CV 12-0131 Maricopa County Superior Court No. CV2007-018088

MICHAEL LANCASTER AND HILARIO AND MICHELLE TANAKEYOWMA'S RESPONSE TO PLAINTIFF LOREN SHIRK'S PETITION FOR REVIEW BY THE ARIZONA SUPREME COURT

Erin E. Byrnes, Bar # 021015
UDALL LAW FIRM, LLP
4600 E. Washington St., Suite 300
Phoenix, Arizona 85034
602.606.2111 (telephone)
602.772.4910 (facsimile)
ebyrnes@udalllaw.com

INTRODUCTION

This case raises no issue of statewide importance, but presents opportunity for tremendous mischief and gamesmanship if review is granted. In the memorandum decision that spawned this Petition for Review, the court of Appeals correctly observed that "[a] Rule 60 motion is not a tool simply to present new arguments upon law or facts that existed at the time of the original action." (Mem. Dec. at 10, ¶ 16). If Loren Shirk were to get his way, however, Arizona Rule of Civil Procedure 60(c) would become exactly such a tool. Disappointed litigants could raise new arguments *ad seriatim*, arguing that their opponents failed to identify potential legal arguments for them. This Court should reject Shirk's invitation to obviate the finality of countless judgments in this state and impoverish our adversary system in one fell swoop.

In 2008, Shirk declined to appeal a final judgment that dismissed his claims against Defendants—two tribal police officers—on sovereign immunity grounds. He then waited for two more years before filing a Rule 60(c) motion in which he argued, for the first time, that Defendants' sovereign immunity had been abrogated by 25 U.S.C. § 450f(c) – a 1975 federal statute. Shirk sought to have that final judgment set aside on the grounds that Defendants had failed to bring the statute to his attention in the original action and explain its potential implications.

In reversing the trial court's order setting aside the final judgment, the court of appeals did not reach the merits of whether 25 U.S.C. § 450f(c) actually operates to abrogate Defendants' sovereign immunity. It did not need to do so. Although fraud, misrepresentation, or other misconduct are potential grounds for relief under Rule 60(c)(3), they cannot be raised more than six months after the judgment. *See* ARIZ. R. CIV. P. 60(c)(3) ("The motion shall 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."). The crux of Shirk's Rule 60(c) motion was Defendants' alleged misrepresentation and misconduct, but those claims were time-barred.

Nor was the catch-all relief of Rule 60(c)(6) available to Shirk. Grounds raised under Rule 60(c) are mutually exclusive. Subsection (6) applies only when one of the five other grounds under Rule 60(c) does not provide a basis for setting aside the judgment. Accordingly, if the reason advanced is properly within one of the first five subsections, the claimant cannot prevail unless he establishes "exceptional additional circumstances" demonstrating that relief from a judgment must be granted in the interest of justice. *See Amanti Elec., Inc. v. Engineered Structures, Inc.*, 229 Ariz. 430, 433, ¶ 10, 276 P.3d 499, 502 (App. 2012).

The court of appeals accurately noted that Shirk "could have raised his 25 U.S.C. § 450f(c) sovereign immunity argument in his prior case in superior court."

(Mem. Dec. at 10, ¶ 17). Not only was the law on the books then, it also was specifically cited as a governing statute in both the motion to dismiss and in exhibits thereto. Discovering a new argument based on facts and law that existed when the motion to dismiss was granted is simply not the type of "extraordinary circumstance" that warrants setting aside a judgment.

Although the sovereign immunity of Indian tribes and their employees is a critically important and often complex issue, it is not raised by Shirk's Petition for Review. Instead, the question raised in this case is whether Rule 60(c) should afford relief to those who fail to research the law and decline to appeal adverse judgments. Though sometimes harsh, the answer is and has to be no. Shirk's Petition for Review should be denied.

ISSUES PRESENTED FOR REVIEW

Did the court of appeals properly reinstate the judgment dismissing Plaintiff's claims where Plaintiff's Rule 60(c) motion raised solely fraud, misrepresentation, and misconduct claims and was brought well in excess of the six-month deadline for setting aside a judgment on such grounds?

MATERIAL FACTS

This case stems from an off-reservation traffic accident in which Plaintiff Loren Shirk was seriously injured. Two Gila River Indian Community ("GRIC")[1]

[1] The Community is interchangeably referred to herein as the "GRIC," the "Community," and the "Tribe."

police officers – Michael Lancaster and Hilario Tanakeyowma (the "Officers") were returning from mandatory training in Tucson when they noticed a vehicle speeding and weaving. (IR[2] 1 at ¶¶17-18; *see also* App.[3] at 17, ¶14 and 21, ¶14). The Officers initiated a stop of the vehicle at a red light. (IR 1 at ¶¶20-21). As the Officers turned on their vehicle's emergency lights, the driver of the other vehicle – Leshedrick Sanford – punched his gas pedal, ran the red light, and collided with Shirk. (IR 1 at ¶¶ 22-23).

Shirk sued the Officers in state court on common law negligence claims and alleged that the Officers' employer was vicariously liable. (IR 1 at ¶¶26-31). Accordingly, the issue of the Officers' employer at the time of the attempted stop has been of central, critical importance in this case.

The Officers moved to dismiss, arguing that the trial court lacked subject matter jurisdiction over Shirk's claims based on sovereign immunity. (IR 14; *see also* App. at 8-13). The Officers argued that they were acting in their capacity as GRIC police officers at the time of the traffic stop (and not, as will be explained in further detail below, as federal employees) and were thus shielded from Shirk's lawsuit by the Tribe's sovereign immunity. (App. at 8-13; IR 21 at 2-3).

---

[2] "IR" refers to the Index of Record on appeal.

[3] "App." refers to Appellants' Lancaster and Tanakyewoma's Separate Appendix in support of their Response to the Petition for Review.

The Officers' motion explained that the GRIC Police Department operates pursuant to an agreement between the federal government and the Community. That agreement, entered pursuant to 25 U.S.C. §450 *et seq.*, is typically called a self-determination, or "638," contract.[4] The Officers attached copies of the Community's original 638 agreement (and successive iterations, along with GRIC Resolutions approving the agreements) to their motion. (App. at 48-105). Both the motion and its attachments cite to various provisions of 25 U.S.C. § 450, *et seq.* (App. at 6-7, 52-56, 73, 80, 87, 90, 92-94).

That statute – the Indian Self-Determination and Education Assistance Act ("ISDEA") – authorizes tribes to contract with the federal government to assume operational responsibility for governmental programs historically run by the federal government for the benefit of tribes. *See* 25 U.S.C. §450(2) (1975) ("The ISDEA advances the federal policy of fostering Indian self-determination by giving Indian tribes control over the administration of federal programs benefitting Indians.").

The 1990 amendments to the ISDEA and their implementing regulations provide that tribal employees who perform work in furtherance of self-determination contracts are deemed federal employees for lawsuits arising out of

[4] These agreements are colloquially referred to as "638 agreements after the law's pre-codification title – Public Law 93-638. In this Response, the terms "638 compact" or "contract," "self-determination compact" or "contract," and "self-governance compact" or "contract" are used synonymously.

that work. *See* 25 U.S.C. § 450f(c) Note and 25 C.F.R. § 900.186(a). Thus, a plaintiff may bring a Federal Tort Claims Act ("FTCA") claim against the federal government if that individual suffers an injury caused by a tribal employee acting pursuant to an ISDEA contract. *See Snyder v. Navajo Nation*, 382 F.3d 8892, 896-97 (9th Cir. 2004).

In their motion to dismiss, the Officers expressly argued that while they were not susceptible to suit in state court, if their acts in stopping Sanford were deemed to be in furtherance of the 638 agreement, they would be treated as *federal* employees and might, therefore, be subject to a suit in federal court pursuant to the FTCA. (App. at 6-9). On September 24, 2008, the trial court granted the Officers' motion and dismissed all claims against them. That court held that, at the time of the stop, the Officers were acting as employees of the GRIC and were therefore enjoyed sovereign immunity from suit. (IR 38 at 2).

Shirk *did not* appeal the trial court's dismissal of his state law claims. Instead, nearly a full year after dismissal of his state law case, he filed a federal lawsuit against the Officers under the FTCA. The United States ("USA"), which substituted in as the primary defendant (as required by the FTCA),[5] filed a motion to dismiss, claiming that when the Officers stopped Sanford, they were not carrying out law enforcement tasks defined in the GRIC's Self-Governance Compact.

[5] *See* 28 U.S.C. § 2679(d) and 42 U.S.C. § 233(c).

Rather, the USA maintained, the stop could not have been in furtherance of the GRIC's obligations under its Self-Governance Compact because the stop (1) occurred off-reservation and (2) involved enforcement of state[6] – rather than federal or tribal – law.

In an order issued April 27, 2010, the federal court agreed. Just as its state counterpart had, the federal court acknowledged that the issue of jurisdiction turned on the question of whether the "Officers ... , employees of the GRIC Police Department, qualify as 'federal employees' acting 'in the course of their employment' for purposes of the FTCA." *Shirk v. United States*, CV-09-01786-PHX-NVW, 2010 WL 3419757, *4 (D. Ariz. Aug. 27, 2010). The court ruled because the traffic stop occurred off-reservation this was "alone enough to place the officers' conduct outside the scope of the Contract." *Id.* Even if the stop's location was insufficient to defeat federal jurisdiction, the court continued, because the "[O]fficers were not attempting to enforce either federal or tribal law" at the time of the stop, their conduct could not have been in performance of 638 Contract duties. Accordingly, the Officers could not be properly be deemed federal employees for the purposes of FTCA coverage. *Id.* at *5-7.

[6] The law enforcement portion of the Tribe's Self-Governance Compact requires all GRIC police officers to be AZ POST-certified. AZ POST is the Arizona Peace Officer Standards and Training Board. *See* A.R.S. §41-1821. Pursuant to statute, all AZ POST-certified officers have authority to enforce Arizona law anywhere within the state. A.R.S. §13-3874(A). The officer's original appointing authority retains liability, however, for any officer misconduct in enforcing state law outside his/her original jurisdiction. A.R.S. §13-3874(B).

In December 2010, more than two years after the trial court granted dismisal, Shirk filed a motion to set aside the superior court judgment contending that the Officers had improperly claimed sovereign immunity in the original action. (App. at Relying on an argument raised by the USA in the federal case, Shirk alleged that a portion of 25 U.S.C. §450f(c) – the statute that governs 638 contracts – waived the GRIC's, and therefore its police officers', ability to defend claims through invocation of sovereign immunity. According to Shirk, "Defendants failed to disclose Congress required the Tribe to waive sovereign immunity up to the policy limits of its federally mandated insurance." (App. at 109-11).

Expressly invoking Rule 60(c)(3), Shirk's motion claimed that the Officers' failure to "bring 25 U.S.C. §450f(c) to the attention of the Court [] result[ed] in a decision based on fundamental error of fact and law." (App. at 111). And, although simultaneously seeking relief under subpart (6), the motion failed to enumerate any "extraordinary circumstances of hardship or injustice" beyond what is contemplated in subparts (1) through (5). Nonetheless, the trial court granted the motion to set aside holding that Shirk had satisfied Rule 60(c)(6). The trial court based its ruling on Shirk having demonstrated "any other reason justifying relief from the operation of judgment" without more.

In finding that the Officers were not entitled to invoke sovereign immunity, the trial court relied on 25 U.S.C. §450f(c)(1) and (3), which provide in relevant part:

> (c) Liability insurance; waiver of defense
>
> (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.
>
> . . .
>
> (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 waiver 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 waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage or limits of the policy of insurance.

25 U.S.C. §450f(c)(1) and (3) (emphasis added).

Though the federal court had already ruled the Officers' conduct giving rise to Shirk's claims was outside the scope of any law enforcement activity authorized by the Community's 638 agreement, the trial court revisited this issue and found the Officers' "activities ... fall within the intent of 25 U.S.C. § 450f(c)."

REVIEW SHOULD *NOT* BE GRANTED

Contrary to Shirk's assertion, this case does not present a "legal issue of first impression." (PR at 1). Rather, it involves the rote question of whether Rule 60 relief was properly granted below in the absence of a timely motion under clause (3) or proof of extraordinary circumstances of the sort triggering the catch-all relief available in subpart (6). Thus, this case does not present any issue of statewide importance meriting this Court granting review.

I. PLAINTIFF COULD HAVE RAISED THE STATUTORY WAIVER OF SOVEREIGN IMMUNITY WHILE HIS STATE LAW CASE WAS PENDING.

Review should be denied because, as the appellate court properly held, Shirk could have raised the issue of whether 25 U.S.C. § 450f(c) constituted an abrogation of the GRIC's sovereign immunity *at the time* the motion to dismiss was pending below. (Mem. Dec. at 10). The Officers' motion to dismiss challenged whether the trial court had subject matter jurisdiction over Shirk's claims. Whether the state court could exercise jurisdiction over Shirk's claims was entirely dependent on whether GRIC or the federal government was acting as the Officers' employer at the time of the traffic stop.

There is a long-standing general rule that tribes possess the "common-law immunity from suit traditionally enjoyed by sovereign powers." *See Santa Clara Pueblo v. Martinez*, 436 U.S 49, 58 (1978). And, a tribe's immunity ordinarily extends to tribal employees, so long as those employees' conduct is within the

course and scope of their authority. *United States v. Oregon*, 657 F.2d 1009, 1013 n.8 (9th Cir. 1982) (tribal officials are shielded by sovereign immunity "when acting in their official capacity and within the scope of authority"); *see also Lineen v. Gila River Indian Comm.*, 276 F.3d 489, 492 (9th Cir. 2002) (noting that tribal sovereign immunity is extended tribal employees because a suit against those employees is, in essence, a suit against the tribe itself). Thus, absent congressional abrogation or tribal consent to suit, neither state nor federal courts have jurisdiction over claims against an Indian tribe. *Santa Clara*, 436 U.S. at 58-59; *see also Dawavendewa v. Salt River Project Agr. Imp. and Power Dist.*, 267 F.3d 1150, 1159 (9th Cir. 2002). The Officers' motion to dismiss and assertion of sovereign immunity as defeating the court's subject matter jurisdiction put the issue of any possible waiver of that immunity front and center.

Indeed, once the Officers raised the sovereign immunity defense, Plaintiff's burden to establish subject matter jurisdiction ripened. *See Planned Parenthood of Arizona, Inc. v. Betlach*, 899 F.Supp.2d 868, 888 (D. Ariz. 2012). In order to overcome immunity and affirmatively establish the existence of subject matter jurisdiction, Shirk had to show an unequivocal and express waiver or congressional abrogation of the GRIC's immunity. *Filer v. Tohono O'odham Nation Gaming Enterpr.*, 212 Ariz. 167, 172, 129 P.3d 78, 83 (App. 2006). Given the foregoing, the time for Plaintiff to raise and prove his theory that 25 U.S.C. § 450f(c) applies

to this case to waive the GRIC, and therefore its Officers', sovereign immunity defense to lawsuits was during dismissal proceedings below.

For the first time in the PR, however, Shirk contends that he could not make his statutory waiver argument during those proceedings because "the legal consequences of the existence of liability insurance only became known after the federal court determined the FTCA did not apply." (PR at 9). Put differently, Shirk now contends that the "legal issue of contractual waiver ... would only have [had] significance if the FTCA did not apply," and therefore his statutory waiver argument could not have been made at the time the trial court heard and decided the motion to dismiss. (PR at 11).

As a threshold matter, the Court should disregard this new theory as waived due to Shirk's failure to raise it previously. *See Stokes v. Stokes*, 143 Ariz. 590, 592, 694 P.2d 1204, 1206 (App. 1984) ("Normally, an appealing party may not urge as grounds for reversal a theory which he failed to present below."). Substantively, Shirk's argument on this issue completely misses the mark and should be seen for what it is – a weak attempt to shift the focus away from his failure to raise the issue when he could, or appeal the judgment.

Consider what Shirk knew when the motion to dismiss was filed. At that time, the Officers' motion itself put Plaintiff on notice of the following relevant facts: (1) that the GRIC Police Department operates as a 638 contract entity; (2)

that the ISDEA governs administration of the GRIC's 638 agreement (and in so doing, cited specifically to 25 U.S.C. § 450, *et seq.*); and (3) that if the traffic stop was done in furtherance of the Compact, the Officers would be treated as federal employees and Plaintiff's claims could be pursued under the FTCA. Copies of the GRIC's original and successive 638 documents were appended to the motion to dismiss. These documents likewise cited the ISDEA and its subparts more than fifteen times. (*See* App. 52-56, 73, 80, 87, 90, 92-94, 99-100, 104).

The motion to dismiss therefore provided Plaintiff a roadmap of jurisdiction for his vicarious liability claim. As later affirmed by both the state and federal courts, the jurisdictional issue hinged on which entity was serving as the Officers' employer at the time Shirk was injured. Upon receipt of the Officers' motion, Shirk had all the information he needed to research the ISDEA and discover any relevant waivers effectuated therein. That he chose not to investigate the statute or raise it at the time of the motion to dismiss is not excusable by his late-made argument that he could not know the statute's import until his FTCA claim had failed. Plaintiff improperly sought to use Rule 60 to present new arguments on facts and law that existed at the time of dismissal. (Mem. Dec. at 10-11 (citing *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 577 (10th Cir. 1996) (parenthetical omitted); *Panzino*, 196 Ariz. at 445 n.1, ¶5, 99 P.2d at 201 n.1 (parenthetical omitted)).

Because Shirk could have raised the alleged statutory waiver the dismissal phase, and because the gravamen of his motion to set aside was the Officers' failure to disclose the relevant statutory provision to him then, Shirk's motion to set aside was untimely under Rule 60(c)(3). The court of appeals' decision to reverse the grant of set aside was therefore proper and should stand.

II. PLAINTIFF'S DID NOT RAISE ANY EXTRAORDINARY ISSUE WARRANTING RELIEF.

To obtain relief under Rule 60(c)(6), Plaintiff had to show extraordinary, unique or compelling reasons justifying relief. *See Park v. Strick*, 137 Ariz. 100, 105, 669 P.2d 78, 83 (1983). Neither Shirk's conscious litigation choice to pursue a lawsuit in one forum versus the other, nor his counsel's failure to exercise due diligence in researching the ISDEA's relevant provisions to determine their import constitutes an extraordinary reason for granting relief. *See Panzino v. City of Phoenix*, 196 Ariz. 442, 448, 999 P.2d 198, 204 (2000) (holding that permitting relief from judgments due to an attorney's actions undermines the "undeniable public policy that recognizes the finality of judgments and discourages mutiplicitious litigation").

In seeking review of the appellate court's decision, Shirk implies that he's been denied his day in court. (*See* PR at 1). But this isn't so. Substantively, the argument that Shirk is trying to press regarding abrogation of sovereign immunity is simply wrong. The Officers were and are immune from Shirk's common law

negligence claims. But even if the superior court's judgment was erroneous, Shirk had an opportunity to challenge it on appeal and declined to do so. Shirk's right to his day in court is countermanded by the strong public policy interest that "requires an end to litigation." *Panzino*, 196 Ariz. at 448, ¶ 18, 999 P.2d at 204 (2000). As this Court observed, "even erroneous final judgments must be honored in order to continue the well-ordered functioning of the judicial process." *Id.* (quotations and citations omitted).

Shirk's failure to provide extraordinary reasons for granting Rule 60(c)(6) relief merited reversal of the trial court's decision and reinstatement of the judgment of dismissal. The court of appeals was correct and its memorandum decision should be left undisturbed.

CONCLUSION

For the foregoing reasons, the Petition for Review should be denied.

DATED this 31st day of July, 2013.

UDALL LAW FIRM, LLP

By /s/ Erin E. Byrnes
Erin E. Byrnes
Attorneys for Defendants/Appellees

NOTICE OF ELECTRONIC FILING

Erin E. Byrnes hereby gives notice that the foregoing Notice of Change of Firm Affiliation was electronically filed this 31st day of July, 2013 using the AZ TurboCourt electronic filing system and was served as indicated in the separate Certificate of Service electronically filed this same date.