UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 11-35625

MARCELLA JONES, a minor, by her mother and next friend Helena Beebe,

Plaintiff – Appellant,

v.

JAQUELINE PETER, a minor,

Third-party-defendant counter-claimant – Appellant,

CITY OF QUINHAGAK,

Defendant-third-party-plaintiff – Appellee.

REPLY BRIEF OF APPELLANTS

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ARGUMENT

I. The City's Arguments, If Accepted, Would Mean That J.P. Has No Remedy At All for Her Injuries

The City of Quinhagak ("City") argues that it should not be subject to suit by J.P. and M.J. ("Plaintiffs"). For the reasons discussed in Plaintiffs' appeal brief and in this reply brief, those arguments are unpersuasive. But this point must not be lost in this case: *If the City prevails in its arguments, J.P. will have no remedy at all against any party for her injuries.*

The City argues that J.P. had an "adequate remedy" in this case under the Federal Tort Claims Act ("FTCA"), but that she failed to "diligently pursue" that remedy.[1] However, the City fails to address the obvious inequity of that position. Before filing suit, J.P. had no realistic way of knowing the following: that Derrick Johnson would be deemed by the United States to be a federal employee, by virtue of the Native Village of Kwinhagak ("NVK") allocating a portion of a federal grant under the Indian Self-Determination and Education Assistance Act ("ISDEAA") to fund Johnson's position; that the United States would substitute for Johnson and remove the case to federal court under the ISDEAA and the FTCA; that the minor-tolling provision of Alaska law would accordingly not apply to her

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[1] Appellee's Brief at 24.

claims; and that in the Ninth Circuit the two-year limitation period for FTCA claims is held jurisdictional, and there is no equitable tolling of the limitation period under circumstances like those present here.[2]

The City criticizes J.P. for not employing an attorney to ascertain her rights before the running of the two-year limitation period for the FTCA.[3] But that begs the question whether she had a duty to do so. Under Alaska law, J.P. could reasonably assume that she had until her 20th birthday to contact an attorney to consider bringing suit for her damages against Johnson.[4] Here, it made sense for her to wait, to see what degree of recovery and what long-term symptoms she would have from her concussion.

Once the City sued J.P. as a third-party defendant – which was before her 20th birthday but more than two years after the crash – she decided to retain an attorney to defend that claim. After discussion with the undersigned counsel, J.P. decided to bring suit then for her injuries. It was only at that time that J.P. learned that she could not bring suit against Johnson (or now, against the United States) because of the strict two-year

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2 *Marley v. United States*, 567 F.3d 1030 (9th Cir. 2009).

3 Appellee's Brief at 24 n.19.

4 AS 09.10.140(a).

limitation for FTCA suits in this Circuit. How could J.P. be expected to know before contacting an attorney that her claim against Johnson would be treated as a claim against the United States under the FTCA (with its strict limitation period), when it took the United States itself two tries, and fourteen months altogether, to make that determination itself?[5]

The Third Circuit Court of Appeals decision in *Santos ex rel. Beato v. United States*,[6] supports J.P., not the City. Quoting from an earlier decision of the Third Circuit, the *Santos* court held that equitable tolling of a FTCA claim can apply in that circuit when a minor plaintiff has "been prevented from filing in a timely manner due to sufficiently inequitable circumstances."[7] There, the court held that the plaintiff's belief that his claim was governed by the minor-tolling provision of Pennsylvania law "was far from a baseless assumption," given the appearance of the defendant's clinic and the fact that it was not readily apparent that the

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[5] ER 186, 198, 195, 54, 48. *See* Appellants' Brief at 32 n. 86 & 87.

[6] 559 F.3d 189 (3rd Cir. 2009), cited by the Appellee's Brief at 24 n.19.

[7] 559 F.3d at 197.

clinic's doctors would be deemed federal employees.[8] Similarly, J.P.'s belief here that her claim against Johnson would be governed by the minor-tolling provision of Alaska law was far from a baseless assumption, given that it was not apparent to J.P. – again, it was not even apparent to the United States – that Johnson would be deemed a federal employee. In *Santos*, the court wrote: "As a practical matter, York Health's federal status, if not covert, was at least oblique."[9] The same must be said of Johnson's status.

Given, however, the unavailablity of equitable tolling of FTCA claims in the Ninth Circuit, the FTCA cannot be seen as an adequate substitute for J.P.'s claims against the City. Instead, she is left only with her remedy against the City. But if the City can now be dismissed because J.P. at one time had an "adequate remedy" against Johnson (now, the United States) under the FTCA, she will be deprived of any remedy at all. This would be manifestly unfair to J.P.[10]

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[8] *Id.* at 200-01.

[9] *Id.* at 202.

[10] Likewise, dismissal of M.J.'s claims against the City would be unfair to her. Although she did retain an attorney and file a claim against Johnson within two years of the accident, and she has now settled that claim with the United States, she should not be deprived of her remedies against the City.

II. The Court Must Accept Plaintiffs' Evidence That Johnson Was Enforcing A City Curfew Ordinance At the Time of the Accident

The City asks this Court to affirm the district court on the alternative ground that Johnson was not enforcing a City curfew ordinance at all, but was instead only enforcing a NVK curfew ordinance. The logic of the City's argument is as follows: The City's 1983 curfew ordinance was expressly or impliedly repealed by the City's 1991 curfew ordinance; the City's 1991 curfew ordinance was thereafter abandoned by the City when NVK adopted a tribal curfew ordinance in 1996; and therefore Johnson was only enforcing NVK's tribal ordinance at the time of the four-wheeler accident.[11]

Plaintiffs present both direct and circumstantial evidence supporting their argument that Johnson was enforcing the City's curfew ordinance at the time that he picked up Plaintiffs on his four-wheeler. Under the applicable burden of proof, the district court was required to accept that evidence as true.[12]

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[11] Appellee's Brief at 25-30.

[12] The City argues that the district court reversed its ruling denying the City's second motion for summary judgment when that court decided to dismiss Plaintiffs' claims against the City. Appellee's Brief at 27. However, the district court did not expressly do so, and it did not discuss the applicable facts and law on this point. ER 6. In any event, this matter is to be reviewed *de novo* by this Court.

A. Burden of Proof

In *Anderson v. Liberty Lobby, Inc.*[13] the United States Supreme Court stated:

> Credibility determinations . . . are jury functions, not those of a judge . . . ruling on a motion for summary judgment. . . . The evidence of the nonmovant is to be believed.[14]

Following *Anderson*, this Court, in *McLaughlin v. Liu*[15] reversed the district court, which had granted summary judgment against a nonmovant:

> Liu does not ask that inferences be drawn in his favor, but that his testimony be taken as true. To this he is clearly entitled under *Anderson* ("The evidence of the nonmovant is to be believed," 477 U.S. at 255, 106 S.Ct. At 1513) and a host of other decisions. Summary judgment cannot be justified in the fact of such evidence.[16]

In *McLaughlin*, this Court made clear that the district courts cannot enter summary judgment against a nonmovant who has provided an affidavit or other direct evidence that contradicts that of the movant. Quoting from its

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13 477 U.S. 242 (1986).

14 *Id.* at 255.

15 849 F.2d 1205 (9th Cir. 1988).

16 *Id.* at 1208.

earlier decision in *T.W. Electrical Service v. Pacific Electrical Contractors Ass'n*,[17] this Court in *McLauglin* drew a distinction between direct evidence, such as affidavits and answers to requests for admission, which if presented by the nonmovant must be accepted as true, and inferences from circumstantial evidence, which if presented by the nonmovant must be accepted as true only if they are reasonable.

First, this Court in *McLauglin* addressed direct evidence:

> [T]he judge does not weigh conflicting evidence with respect to a disputed material fact. . . . *Nor does the judge make credibility determinations with respect to statements made in affidavits, answers to interrogatories, admissions, or depositions*. . . . These determinations are within the province of the factfinder at trial. Therefore, at summary judgment, the judge must view the evidence in the light most favorable to the nonmoving party: *if direct evidence produced by the moving party conflicts with direct evidence produced by the nonmoving party, the judge must assume the truth of the evidence set forth by then nonmoving party with respect to that fact*.[18]

Then, this Court in *McLaughlin* addressed inferences from circumstantial evidence:

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[17] 809 F.2d 626 (9th Cir. 1987).

[18] *McLaughlin*, 849 F.2d at 1208; *T.W. Elec. Serv.*, 809 F.2d at 630-31 (citations omitted in *McLauglin*) (emphasis added).

> Inferences must also be drawn in the light most favorable to the nonmoving party. . . . Inferences may be drawn from underlying facts that are not in dispute, such as background or contextual facts . . ., and from underlying facts on which there is conflicting direct evidence but which the judge must assume may be resolved at trial in favor of the nonmoving party. Assuming the existence of these underlying facts, however, an inference as to another material fact may be drawn in favor of the nonmoving party only if it is "rational" or "reasonable" and otherwise permissible under the governing substantive law.[19]

This Court in *McLaughlin* concluded:

> *If the nonmoving party produces direct evidence of a material fact, the court may not assess the credibility of this evidence or weigh against it any conflicting evidence presented by the moving party. The nonmoving party's evidence must be taken as true.* Inferences from the nonmoving party's "specific facts" as to other material facts, however, may be drawn only if they are reasonable in view of other undisputed background or contextual facts and only if such inferences are otherwise permissible under the governing substantive law. This inquiry ensures that a "genuine" issue of material fact exists for the factfinder to resolve at trial.[20]

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[19] *McLaughlin*, 849 F.2d at 1208-09; *T.W. Elec. Serv.*, 809 F.2d at 631 (citations omitted in *McLauglin*).

[20] *McLaughlin*, 849 F.2d at 1209; *T.W. Elec. Serv.*, 809 F.2d at 631-32 (citations omitted in *McLauglin*) (emphasis added).

In *Leslie v. Grupo ICA*,[21] a federal district court granted summary judgment even though the nonmovant had submitted an affidavit with his opposition. Citing *McLaughlin*, this Court in *Leslie* reversed, holding that it was error to grant summary judgment in that circumstance:

> Although we can understand the district court's disbelief of Leslie's assertions in his deposition and sworn declaration, such disbelief cannot support summary judgment.[22]

In sum, if a nonmovant submits direct evidence, in the form of an affidavit, answers to interrogatories or requests for admission, or a deposition, the district court must accept that evidence as true for purposes of summary judgment. If a nonmovant submits circumstantial evidence, the district court must accept it as true if reasonable.

Here, Plaintiffs present both direct and circumstantial evidence supporting their argument that Johnson was enforcing the City's curfew ordinance when Plaintiffs were injured. Summary judgment accordingly could not be granted against Plaintiffs on grounds that Johnson was not enforcing a City curfew ordinance.

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21 198 F.3d 1152 (9th Cir. 1999).

22 *Id.* at 1159.

B. Affidavit of Thomas Brown

Thomas Brown stated the following in his affidavit: "I was the chief of Police of the Native Village of Quinhagak, Alaska ("NVK"), on August 3, 2006," which was the date of the four-wheeler accident.[23] Brown then states in his affidavit: "At that time, the police officers of NVK were responsible for enforcing all ordinances, *including the curfew ordinances, of both NVK and the City of Quinhagak*."[24] This is direct evidence that must be believed, under *Anderson, McLaughlin* and *Leslie*.

The City argues that Brown's affidavit should be disregarded because of its brevity.[25] However, that affidavit recited the basis for Brown's first-hand knowledge – that he was the Chief of Police of NVK at the time of the four-wheeler accident. And Brown's affidavit recited that Johnson – over whom Brown was the direct supervisor -- was responsible for enforcing both City and NVK curfew ordinances. It is noteworthy that the City could have deposed Brown, but chose not to do so. This affidavit satisfies the requirements of Fed. R. Civ. P. 56.

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[23] ER 148.

[24] *Id.* (emphasis added).

[25] Appellee's Brief at 28.

Taylor v. List, cited by the City, is readily distinguishable.[26] There, this Court rejected an affidavit because it stated expressly that it was based merely on "information and belief," and therefore it was not based on personal knowledge. In contrast, Brown's affidavit does *not* state that it is based merely on "information and belief," and the Court should presume that it *was* based on personal knowledge. All inferences of fact must be resolved in favor of the nonmovant for summary judgment.[27]

Likewise, in *Columbia Pictures v. Professional Real Estate Investors*, this Court rejected a declaration because it stated expressly that it was based merely on what the declarant "believed," and therefore it was not based on personal knowledge.[28] Again, in contrast, it must be presumed that Brown's affidavit was based on personal knowledge, as all inferences regarding this affidavit must be resolved in favor of the Plaintiffs.

To accept the City's argument that Brown's affidavit should be disregarded would be to require the magic words "based on personal knowledge" be expressly stated in all affidavits and declarations. This

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[26] 880 F.2d 1040, 1045 n.3 (9th Cir. 1991), cited in the Appellee's Brief at 28.

[27] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).

[28] 944 F.2d 1525, 1529 (9th Cir. 1991).

would elevate form over substance, and is not the law. Instead, affidavits and declarations are accepted where, as here, there is a basis for concluding that they are made on personal knowledge.[29] And in making that determination, all reasonable inferences must be drawn in favor of Plaintiffs, as the nonmovants.

C. Johnson's Response to Request for Admission

Derrick Johnson himself supports Plaintiffs' position that he was enforcing the City's curfew ordinance when he picked up Plaintiffs on his four-wheeler. In response to the City's written requests for admission, Johnson stated, "If *city laws* were about drunkenness, assault, breaking and entering, property damage, *curfew*, then *I was authorized to enforce them*."[30] Again, this is direct evidence that must be believed, under *Anderson*, *McLaughlin* and *Leslie*.

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[29] *See, e.g. Schroeder v. McDonald*, 55 F.3d 454, 460 (9th Cir. 1995) (personal knowledge can be demonstrated by facts admissible in evidence in a verified complaint); *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 267 (9th Cir. 1991) (district court had to make factual determination that an affidavit contradicting prior deposition testimony was actually a "sham" before it could find that the affidavit could not be used to create an issue of fact precluding summary judgment).

[30] ER 152.

The City argues that Johnson was not trained in, and thus had limited knowledge of, the City's ordinances.[31] It must be presumed, however, that Johnson was instructed by Brown, NVK's Chief of Police, to enforce both City and NVK curfew ordinances, as indicated in Brown's affidavit. Again, it is noteworthy that the City could have deposed Johnson, but chose not to do so.

In addition to the above direct evidence, there is ample reasonable and reliable circumstantial evidence that Johnson was enforcing a City curfew ordinance. That evidence follows.

D. Deposition Testimony of M.J.

The fact that Johnson was enforcing the City's 1983 curfew ordinance is supported by the deposition testimony of M.J. There, she testified that the consequence of being cited for violation of curfew in Quinhagak is "[c]ommunity work or something, or helping out elders with their chores."[32] Only the City's 1983 curfew ordinance provides for community service as its penalty. That ordinance states: "Repeat violations will be punishable by community service work." Neither the City's 1991 curfew ordinance

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[31] Appellee's Brief at 27.

[32] ER 157.

nor the NVK curfew ordinance provide for a penalty of community service work.[33] M.J.'s testimony is reasonable and reliable circumstantial evidence of Johnson's enforcement of the City's 1983 curfew ordinance, which must be believed here.

The City argues that M.J.'s testimony was not based on personal knowledge.[34] Again, the contrary inference, in favor of Plaintiffs as the nonmovants, must be drawn here. M.J. had grown up in Quinhagak, and she must be presumed to know from personal knowledge what penalties her friends received for curfew violations. Again, it is noteworthy that the City had the opportunity to examine M.J. more fully on this subject in her deposition, but it chose not to do so. The City cannot be heard now to argue that M.J.'s testimony on this subject is somehow ineffective or inadmissible.

E. The MOAs

The City's claim that its curfew ordinance was abandoned by it because the NVK tribal court did not enforce violations of City law.[35] This argument is refuted by the terms of the 2005 Memorandum of Agreement

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[33] ER 138, 101.

[34] Appellee's Brief at 29.

[35] Appellee's Brief at 11.

("MOA") between the City and NVK.[36] There, the City contracted with NVK to "to enforce all municipal laws, and ordinances in the same capacity as Village Police Officer's [sic] or City Police."[37] How could NVK enforce all municipal laws, as it contracted to do in the MOA, if its tribal court refuses to enforce them?

Further, there appears to be no jurisdictional bar to the tribal court enforcing the City's curfew ordinance. Under the 1996 MOA, NVK specifically contracted to negotiate further with the City regarding "an agreement with the Native Village of Kwinhagak Tribal Court and NVK to enforce mutually acceptable city Ordinances in Tribal Court."[38]

F. City Funding of Tribal Police

Pursuant to the MOA, the City and NVK prepared a yearly consolidated budget. The budget for FY 2007, in effect at the time of the accident, shows that the City contributed $54,998 of its funds to NVK for Tribal Police.[39] This was apparently supplemented by an additional payment

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[36] ER 113.

[37] ER 115.

[38] ER 107.

[39] ER 171.

by the City of $7,731.83.[40] These payments were collectively the largest sources of funding for that purpose. It would be anomalous for the City to be the major source of funding for police services, but to impliedly repeal or drop City ordinances from its books.

G. NVK Could Not Enforce Its Tribal Curfew Ordinance Against J.P.

There is no "Indian country" in Alaska, except where reservations have been created.[41] Quinhagak is not in Indian country. Under these circumstances, it is unclear whether NVK can adopt a criminal code, including a curfew, and enforce it against M.J., who was a tribal member of NVK.[42] But it is clear that NVK could not adopt a criminal code, including

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[40] ER 180. The City argues that this payment of $7,431.83 was duplicative of, rather than in addition to, the City's contribution of $54,998. Appellee's Brief at 4. However, the payment of $54,998 was for a one year period from 07/01/06 to 06/30/07, while the payment of $7,431.83 appears to have been an additional payment for a one-month period from 08/01/06 to 08/31/06. The City also claims that the additional payment of $47,929.35 for the period from 07/01/06 to 06/30/07 was from NVK, rather than the City. Appellee's Brief at 4. However, the district court found otherwise. ER 37-38.

[41] *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998).

[42] *See John v. Baker*, 982 P.2d 738, 751-59 (Alaska 1999). See also C. Johnson, A Comity of Errors: *Why John v. Baker Is Only a Tentative First Step In the Right Direction*, 18 Alaska Law Review 1 (2001); D. Blurton, *John v. Baker and the Jurisdiction of Tribal Sovereigns Without Territorial Reach*, 22 Alaska Law Review 1, 17-25 (2003); G.

a curfew, and enforce it against J.P., who was not a tribal member of NVK.[43] This left only the City's curfew ordinance that Johnson could have enforced against J.P.[44] This supports the inference that Johnson was enforcing the City's ordinance against both J.P. and M.J.

Strommer & S. Osborne, *"Indian County" and the Nature and Scope of Tribal Self-Government in Alaska*, 22 Alaska Law Review 1, 17-18 (2005) ("Strommer & Osborne").

[43] In enacting the Indian Civil Rights Act ("ICRA"), Congress legislatively overruled *Duro v. Reina*, 110 S.Ct. 2053 (1990), which had held that tribes lack criminal jurisdiction over nonmembers. The ICRA, however, applies only to Indian country. *Means v. Navajo Nation*, 432 F.3d 924, 931 (9th Cir. 2005) ("it is settled law that, pursuant to the 1990 amendment to the Indian Civil Rights Act, an Indian tribe may exercise inherent sovereign judicial power in criminal cases against nonmember Indians for crimes committed *on the tribe's reservation*" (emphasis added)). *See also John v. Baker*, *supra* at 759 ("Because *the tribe only has subject matter jurisdiction over the internal disputes of tribal members*, it has the authority to determine custody only of children who are members or eligible for membership." (emphasis added)); *South Dakota v. Bourland*, 508 U.S. 679, 695 n.15 (1993) ("tribal sovereignty over nonmembers cannot survive without express congressional delegation, and is therefore not inherent"); Stommer & Osborne at 18 ("In April 2004, the Supreme Court affirmed a tribe's inherent power to exercise criminal jurisdiction over all Indians, not just tribal members, within its territory. [*United States v. Lara*, 541 193, 210 (2004)]. *This authority over all Indians is perhaps limited to Indian country."* (emphasis added)).

[44] The City argues that NVK could enforce its tribal curfew against J.P. because she was the daughter of a NVK tribal member and she could accordingly become a member herself. Appellee's Brief at 54. It is undisputed, however, that J.P. was in fact not a member of NVK, and the City provides no authority supporting its novel argument.

The City argues that NVK has the inherent authority of tribal self-governance. But the assertion of criminal tribal jurisdiction over nonmembers is not an inherent right of self-governance. The City argues that it has the power under *United States v. Lara*[45] to exercise criminal jurisdiction over J.P.[46] But that case construed the Indian Civil Rights Act, which applies only to Indian country.

Finally, the City cites several Alaska statutes in support of its argument that curfew violations are not criminal offenses.[47] These statutes, however, do not support that conclusion. The NVK tribal code states that the tribal court shall "[l]evy fines" or "[i]mpose sentences that fit the violation."[48] This code plainly purports to be criminal in nature.

H. The City's Curfew Ordinance Was Not Repealed Or Abandoned

As noted above, the City argues that its 1983 curfew ordinance was expressly or impliedly repealed and replaced by a 1991 City curfew

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[45] 541 U.S. 193, 199 (2004).

[46] Appellee's Brief at 55.

[47] AS 29.25.070-.072, AS 29.35.085, AS 11.81.250(6), and AS 11.81.900(b)(63). Appellee's Brief at 55.

[48] ER 101.

ordinance, and that the City in turn abandoned that ordinance when NVK adopted a tribal curfew ordinance.[49] In support of this argument, the City presents a number of self-serving affidavits and exhibits. For purposes of summary judgment, the district court must instead accept the contrary evidence, summarized above, that Plaintiffs present.

The City argues that its 1983 curfew ordinance[50] was repealed, expressly or by implication, by its 1988 or its 1991 curfew ordinances.[51] However, it is undisputed that at the time of the four-wheeler accident, the 1983 ordinance was still on the City's books, and there is no evidence that it had ever been expressly repealed or superseded by any subsequent City ordinance. [52]

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[49] The City argued below that the NVK tribal curfew ordinance itself occupied the field and preempted the City's curfew ordinance. The district court correctly rejected that argument. ER 27-34. The City does not renew that argument here, and it must be deemed abandoned by the City. Appellee's Brief at 27. Instead, the City argues here that it abandoned and impliedly repealed its curfew ordinance when NVK adopted its ordinance.

[50] Ordinance No. 82-14; 13.82.14. ER 154.

[51] Appellee's Brief at 12-14, 25-30.

[52] ER 146.

The City cannot locate its 1988 ordinance, so neither the parties nor the Court are aware of its provisions.[53] There is accordingly no basis for concluding the 1983 ordinance was repealed or replaced by the 1988 ordinance.

The City's 1991 ordinance does not expressly state that it supersedes the 1983 ordinance. Instead, the 1991 ordinance states that it supersedes the 1988 ordinance, but it is silent regarding its effect on the 1983 ordinance.[54]

Further, the 1991 ordinance cannot be read to impliedly repeal the 1983 ordinance. The 1983 ordinance provides for non-monetary punishment, in the form of restriction of school activities and community service.[55] The 1991 ordinance provided for monetary penalties. These two types of penalties are complementary, not in conflict. The fact that the 1991 ordinance imposes a one-hour earlier curfew for grammar students than the City's ordinance during vacations does not cause them to be in "actual conflict." Compliance with both is not an impossibility, as they do not

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[53] *Id.*

[54] Ordinance 91-08. ER 138.

[55] ER 154. Again, M.J. testified that community service was the punishment administered for curfew violation. ER 157. This strongly supports Plaintiffs' argument that the 1983 ordinance was still being enforced at the time of the four-wheeler accident.

require inconsistent conduct.[56] Further, the 1983 ordinance does not stand as an obstacle to the purposes of the 1991 ordinance.[57] The 1991 ordinance does not evidence an "obvious intent" to occupy the field. Accordingly, the Alaska cases cited by the City in support of its argument for implied repeal are inapposite.[58] In any event, there can be no conflict as applied here, as Plaintiffs were out past the curfews of both ordinances.

The City's argument founders as well on the next claim in its logic: that the City effectively abandoned its curfew ordinances, and the City's ordinances effectively ceased to be enforced by NVK police, when the NVK tribal curfew ordinance was adopted in 1996.[59] First, it is undisputed that the City did not expressly repeal its curfew ordinances in 1996. So, the City is left with the argument that its curfew ordinances were effectively abandoned by course of conduct. The City presents self-serving affidavits and exhibits in support of that argument, but these are refuted by Plaintiffs' evidence,

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[56] *See Village of Deerfield v. Greenberg*, 550 N.E. 2d 12, 14-15 (Ill. App. 1990) (a municipality's curfew ordinance did not conflict with a more lenient state curfew statute where the legislature indicated an intent to permit local curfew ordinances).

[57] *Id.*

[58] Appellee's Brief at 25-26.

[59] NVK Tribal Ordinance Number 96-04-02. ER 101.

discussed above. For purposes of this appeal, Plaintiffs' evidence must be accepted. The Court must assume that Johnson was enforcing a City curfew ordinance at the time of the four-wheeler accident.

III. Enforcement Of the City's Curfew Ordinance Was A Nondelegable Duty

The City argues that even if Johnson was enforcing a City curfew ordinance at the time of the accident, that enforcement was not a nondelegable duty.[60] The City's arguments are unpersuasive.

The City argues that since it is a second-class city under Alaska law, it had no duty to provide police protection. And, the City argues, since it had no duty, its exercise of police protection services cannot be nondelegable.[61] That, however, is not the law.

The City had the authority under state law to provide police protection services, even thought it did not have the obligation to do so.[62] Alaska Statute 29.35.010(7) expressly granted to all municipalities, including second class cities, the power to "enforce an ordinance and to prescribe a

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[60] Appellee's Brief at 19-24.

[61] *Id.* at 21.

[62] The district court below concurred when it ruled initially on this matter. ER 45.

penalty for violation of an ordinance." Thus, there was a delegation of police power from the State of Alaska to the City. Once the City undertook to provide those police protection services, it had a duty to do so nonnegligently. And once the City undertook to provide those services to enforce its ordinances, it could not delegate that function and thereby avoid liability for their negligent performance. In *Jackson v. Power,* the Alaska Supreme Court stated that although a municipality had no duty to construct streets, once it did so it had a nondelegable duty to keep them in repair.[63] Likewise here, although the City had no duty to provide police protection services, once it did so it had a nondelegable duty to do so nonnegligently.

The City cites several Alaska cases in support of its argument that the nondelegable duty rule should be construed narrowly to not apply here.[64] However, the City's cases deal with application of the nondelegable duty rule to private entities, not municipalities. As the district court correctly held when it ruled initially on this matter, nothing implicates public safety more obviously than the use of police power to enforce public safety ordinances."[65]

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[63] 743 P.2d 1376, 1383 (Alaska 1987).

[64] Appellee's Brief at 21-22.

[65] ER 44.

The City argues that the nondelegable duty rule should not apply to it because Village Police Officers receive less training than other police officers in Alaska.[66] Although that may be a factor in determining the appropriate duty of care in a particular case, it can hardly serve as a basis for abrogating altogether the nondelegable duty rule.

IV. Johnson's Immunity Does Not Preclude the Liability of the City

The City argues that it is entitled to invoke Johnson's personal immunity, as a tribal employee or under the FTCA, as a defense to Plaintiffs' claims.[67] This argument is without merit.

The City cites a number of cases holding that where vicarious liability is asserted against an employer under *respondeat superior*, the employer may rely on the employee's personal immunity defenses. However, none of the City's cases deal with a claim of liability against a municipality based on the nondelegable duty rule.

The nondelegable duty rule is not based on *respondeat superior*, under which the employer stands in the shoes of the employee, as a matter of law. Instead, the nondelegable duty rule is based on the judicially created

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[66] Appellee's Brief at 23.

[67] *Id.* at 30-35.

policy of nondelegability of essential functions.[68] The person charged with a nondelegable duty does not stand in the shoes of his contractor, entitled to all defenses available to him, as with *respondeat superior*. Instead, the person so charged is liable whenever his contractor is negligent, and the person charged with the nondelegable duty is not entitled to the personal defenses available to the contractor.[69]

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[68] *See Jackson v. Power*, 743 P.2d 1376 (Alaska 1987) (court distinguished between *respondeat superior*, which it declined to apply, and the nondelegable duty rule, which it did apply); *California Assn. of Health Facilities v. Department of Health Services*, 940 P.2d 323, 330 (Cal. 1997) ("For the sake of doctrinal clarity, we shall in the remainder of this opinion refer to a licensee's liability for its employees in a regulatory enforcement proceeding as the principle of the licensee's 'nondelegable duty,' and shall reserve the term 'respondeat superior' to apply only to an employer's *tort* liability for its employees." (emphasis in original)).

[69] *See, e.g.*, *Gazo v. Stamford*, 765 A.2d 505, 563 (Conn. 2001) ("[T]he nondelegable duty doctrine means that a party may contract out the performance of a nondelegable duty, but may not contract out his ultimate legal responsibility."). Some courts go further, holding that a nondelegable duty is based on direct liability and is not even a species of vicarious liability. In *Saiz v. Belen Sch. Dist.*, 827 P.2d 102 (N.M. 1992), the court wrote:

> [T]he establishment of liability under a nondelegable duty does not give rise to vicarious liability. Under vicarious liability, one person, although entirely innocent of any wrongdoing and *without regard to duty*, is nonetheless held responsible for harm caused by the wrongful act of another.... We reject any coupling of the concept of vicarious liability and nondelegable duty.
>
> ....

Here, the City is liable simply if Johnson was negligent, regardless of what personal defenses he may have. To hold otherwise would be to allow municipalities to delegate their essential governmental duties to tribes or other immune entities, and then rely on their immunity whenever a tort is committed in the name of the municipality.

IV. Imposing Liability On the City Will Not Result In Additional Liability for the United States

The City argues that if it is found liable to Plaintiffs under the nondelegable duty rule, the City should be indemnified by the United States for that liability. This is so, the City argues, because the City would be entitled to indemnification from Johnson; and since the United States stands in his shoes, the City argues, it should likewise be entitled to indemnification from the United States.[70]

> The liability for a nondelegable duty that we impose directly upon the employer of an independent contractor is grounded in a special public policy to protect third persons in an area of inherent danger and to encourage conscientious adherence to standards of safety where injury likely will result in the absence of precautions. The test of liability is the presence or absence of reasonable precautions; and direct liability is not dependent upon any apportionment to an employer of his or her concurrent negligence in failure to ensure that an independent contractor takes necessary precautions.

Id. at 114-15 (emphasis added).

[70] Appellee's Brief at 35-44.

Although this issue is peripheral to the question presently before this Court -- did the district court err in dismissing Plaintiffs' claims against the City? – it is relevant to whether, if this Court reverses the district court, the case should then be remanded to state court. Accordingly, Plaintiffs will briefly address it here.

Plaintiffs agree that the City would be entitled to claim indemnity against Johnson himself, subject, however, to whatever personal immunity defenses he might have.[71] Plaintiffs disagree, however, that the City is entitled to claim indemnity against the United States. The United States substituted for Johnson because it is vicariously liable for Johnson's negligence, as if it were Johnson's employer. The ISDEAA provides, in pertinent part, that employees of tribes acting under an ISDEAA grant "are deemed *employees of the Bureau or Service* while acting within the scope of their employment in carrying out the contract or agreement."[72] This federal statute does not provide, as the City now argues, that the United States is deemed to stand in Johnson's shoes *for all purposes*, as if the United States itself was an employee of NVK. Instead, the United States is deemed merely

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[71] *See Domke v. Alyeska*, 137 P.3d 295, 308 (Alaska 2006); Alaska Civil Pattern Jury Instructions 23.01A and 23.02.

[72] 25 U.S.C. §450f note.

to be Johnson's employer, liable under the vicarious liability principles of *respondeat superior*.

The City and the United States are thus each independently and vicariously liable for Johnson's negligence. The City is liable under the nondelegable duty rule – which is really a rule of nondelegation – and the United States is liable under the ISDEAA, and through it the FTCA. Neither the City nor the United States were actively "at fault"; both were "innocent" in the sense that the employer of a negligent employee is "innocent." In fact, the United States was more "innocent" than the City: while the United States is liable only by operation of these federal statutes due to its funding of NVK, and by NVK's application of some of those funds to pay for Johnson's salary, the City is liable because it chose to delegate to NVK, as its contractor, the vital governmental function of police protection. The City could have chosen to not delegate this function, or it could have chosen to exercise some degree of control over Johnson's hiring, training, and supervision, but it decided not to do so.

Contrary to the City's argument, the United States does not stand in Johnson's shoes for all purposes, as if it were the employee itself. Although the City may have a right of indemnity against Johnson individually for his tortuous conduct, subject to his personal immunity defenses, the City has no

correlative right of indemnity against the United States, which is merely his statutorily presumed employer. None of the cases or authority cited by the City hold otherwise. Instead, they deal with indemnification of a vicariously liable employer or principal by the actively negligent employee or agent. They do not deal with indemnification of one vicariously liable entity by another vicariously liable entity. Further, the cases under the FTCA, holding that the United States waives sovereign immunity to permit indemnity or contribution under state law, have no application here, where the United States role is only that of a "deemed employer" under the ISDEAA. Alaska law would not impose a duty of indemnity on the United States, since it was not the City's employee.

No Alaska cases deal with the question before this Court. However, *Vertecs Corporation v. Reichhold Chemicals* [73] is instructive, even though it was decided before enactment of the tort reform statutes in Alaska, which adopted pure comparative fault.[74] *Vertecs* held that a principal may obtain indemnity from an agent committing a wrong that results in harm to a third party, provided that the indemnitee is innocent.[75] The court rejected

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[73] 661 P.2d 619 (Alaska 1983).

[74] AS 09.17.080.

[75] 661 P.2d at 621.

indemnity, however, where the indemnitee was at fault, even if only passively or secondarily so.[76] Likewise, the logic of *Vertecs* would deny indemnity claimed against another innocent party. Here, where the United States is "innocent," equitable or implied indemnity of the City by the United States should not be granted.

VI. M.J.'s Acceptance of the Offer of Judgment of the United States Does Not Bar Her Claim Against the City or Moot Her Appeal

The City argues that because M.J. accepted the offer of judgment of the United States during the pendency of this appeal,[77] she is precluded from seeking additional recovery from the City.[78] The City is incorrect.

At the time of the offer and its acceptance, M.J. had two claims: One against the City (which was then on appeal before this Court) and one against the United States (which remained pending before the district court). The United States had earlier admitted that it was vicariously liable to M.J. for Johnson's negligence under the ISDEAA and the FTCA, but it disputed

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[76] *Id.* at 621-25.

[77] ER 48-51.

[78] Appellee's Brief at 44-50. Obviously this argument applies only to M.J., and not to J.P.

the amount of her damages. M.J.'s claim against the City was that it was liable to her for Johnson's negligence under the nondelegable duty rule.

Neither the United States' offer of judgment nor M.J.'s acceptance of it stated that those parties intended to discharge M.J.'s claims against the City, and obviously they did not intend to do so. Instead, the offer and acceptance stated only that the United States would allow judgment against it and in favor of M.J. in the amount of $150,000. The offer and acceptance left unaffected M.J.'s remaining claims against the City.

First, the City misstates the law in Alaska. In *Alaska Airlines, Inc. v. Sweat*, the Alaska Supreme Court cited with approval cases in other jurisdictions holding that "release of the agent does not release the master at common law where: (1) the document expressly so provides, or (2) the document is entitled 'covenant not to sue' (as opposed to a 'release'), or (3) *the intent of the parties otherwise indicates no intent to release the master or principal.*"[79] Here, as noted, the parties to the offer and acceptance did not intend to release M.J.'s claims against the City as well.

But there is a further flaw to the City's argument: M.J. did not accept an offer of judgment from Johnson himself, but from the United States, which was deemed by federal law merely to be his employer. Because the

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[79] 568 P.2d 916, 928 (Alaska 1977) (emphasis added).

United States was not the underlying tortfeasor, the City is not vicariously liable for the negligence of the United States. Thus, besides not correctly stating the law in Alaska, the cases cited by the City are distinguishable on their facts, as they deal with the effect on an employer of a settlement with the tortfeasor-employee. In contrast, M.J.'s settlement with one vicariously liable defendant (the United States) did not bar or preclude her remaining claim against another vicariously liable defendant (the City).

Further, as argued above, the City's liability under the nondelegable duty rule is not derivative of Johnson. Thus, the City is not entitled to assert any personal immunity defenses he may have. *A fortiori*, M.J.'s claim against the City is not derivative of the United States, which is an innocent party further removed from the tort. Accordingly, M.J.'s settlement with the United States did not affect her remaining claim against the City.

Instead, the United States and the City are liable jointly and severally to M.J. for her injuries.[80] The release of one joint tortfeasor in Alaska does not release the other tortfeasor unless both are specifically named in the release.[81] Where only one joint tortfeasor settles, the other tortfeasor remains

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[80] *See, e.g.*, *Sowinski v. Walker*, 198 P.3d 1134, 1050-51 (Alaska 2009) (although Alaska has adopted pure comparative fault, joint and several liability remains applicable under "exceptional statutes").

[81] *Young v. State*, 455 P.2d 889, 893 (Alaska 1969).

liable but is entitled to offset its liability by the settlement amount, to prevent a double recovery to the Plaintiff.[82] Applying these principles here, if Plaintiffs prevail on appeal, the City will be entitled on remand to an offset of $150,000 for M.J.'s claim against it. The City, however, is not entitled to outright dismissal of M.J.'s claims against it simply by virtue of her settlement with the United States.

[82] *Petrolane Incorporated v. Robles*, 154 P.3d 1014, 1019-20 (Alaska 2007).

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,981 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(ii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14 point Times New Roman.

s/ Russell L.Winner

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 25, 2012.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that one of the participants in the case is not a registered CM/ECF user. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non CM/ECF participant: Myron Angstman.

s/ Russell L. Winner