IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-16121

BETH A. BODI,

Plaintiff-Appellee,

v.

SHINGLE SPRINGS BAND OF MIWOK INDIANS, et al.,

Defendants-Appellants.

From the United States District Court,
Eastern District of California
Case No. 2:13-cv-01044-LKK-CKD
(Honorable Lawrence K. Karlton)

APPELLANTS' REPLY BRIEF

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[1] Current Chairperson of the Shingle Springs Tribal Health Board, automatically substituted for Brenda Adams, pursuant to Fed. R. App. P. 43(c)(2).

Table of Contents

Table of Authorities

Page(s)

Federal Cases

Federal Statutes

Introduction

When a member of the federally recognized Shingle Springs Band of Miwok Indians ("Tribe") sued in state court to challenge the Tribe's decision that she should no longer serve as an executive official of the Tribe's government, the Tribe removed her federal claims to federal court. The Tribe immediately asked the federal court to dismiss Plaintiff's claims because the Tribe's sovereign immunity bars all claims unless the Tribe has "unequivocally expressed" its consent to suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (citations and quotations omitted); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006). The district court identified no express waiver of the Tribe's immunity to suit; instead, the court erroneously implied a waiver of the Tribe's sovereign immunity defense from its choice to raise the defense in federal court.

Plaintiff's answering brief now seeks to vitiate the bedrock law of tribal sovereign immunity, suggesting that, contrary to decades of precedent, an Indian tribe's sovereign immunity can be lost absent unequivocal consent, and thus, without an express waiver. While conceding Eleventh Amendment immunity—which may be waived impliedly—is a poor analogy for tribal sovereign immunity, Plaintiff asks this Court to follow Eleventh Amendment case law to imply a waiver from the Tribe's removal of this case, even though the Tribe has never expressly consented to Plaintiff's suit. Not surprisingly, the only federal appellate court to

consider this argument has flatly rejected it. *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla.*, 692 F.3d 1200, 1207-08 (11th Cir. 2012).

In the context of recent Supreme Court precedent admonishing against "carving out exceptions" to the broad protections of tribal sovereign immunity (*Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2031 (2014)), bedrock principles of federal Indian law require this Court to reverse and direct the district court to dismiss this action with prejudice.

Argument

I. Under Controlling Precedent Of The Supreme Court And This Court, Any Waiver Of Tribal Sovereign Immunity Must Be Express And Unequivocal.

The Supreme Court has long held that a waiver of tribal sovereign immunity "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58 (citations and quotations omitted); *C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 417-18 (2001). This Court necessarily applies the same principle of controlling law. *Allen*, 464 F.3d at 1047 (holding an Indian tribe's "waivers of tribal sovereign immunity may not be implied" and "that 'a waiver of immunity must be unequivocally expressed'" (quoting *Santa Clara Pueblo*, 436 U.S. at 58)). The U.S. Supreme Court has recently reiterated that the federal courts may not "carv[e] out exceptions" to the

broad protections that sovereign immunity provides federally recognized tribal governments. *Bay Mills Indian Community*, 134 S. Ct. at 2031.

Plaintiff contends, citing *C & L Enterprises*, that *Santa Clara Pueblo*'s requirement of an unequivocally expressed waiver "only applies to whether *Congress* has abrogated tribal immunity." (Answering Brief, p. 13 (emphasis added).) This is incorrect. The Supreme Court's decision in *C & L Enterprises* confirmed that, absent clear congressional abrogation of tribal immunity, the tribe must expressly consent to suit to effect a waiver of its immunity. *C & L Enters.*, 532 U.S. 411, 417-18, 420 (holding that tribe "*expressly* waive[d] tribal immunity from a suit" where it "agreed, by *express* contract, to adhere to certain dispute resolution procedures," including enforcement of an arbitration award in state court (emphases added)). Thus, following *C & L Enterprises*, this Court, like other Circuits, continues to apply the *Santa Clara Pueblo* rule that a tribe's waiver of its sovereign immunity must be "unequivocally expressed." *Allen*, 464 F.3d at 1047 (following *Santa Clara Pueblo* and recognizing that, "[i]n *C & L Enterprises*, the Supreme Court held that the tribe waived its immunity by *expressly* agreeing to arbitration of disputes and to 'enforcement of arbitral awards "in any court having jurisdiction thereof"'" (citing 532 U.S. at 414) (emphasis added)); *Cayuga Indian Nation of N.Y. v. Seneca Cnty., N.Y.*, 761 F.3d 218, 221 n.1 (2d Cir. 2014) ("[T]o relinquish its immunity, a tribe's waiver must be 'clear,'" . . ., and thus it "'cannot

be implied but must be unequivocally expressed . . . .'" (quoting *C & L Enters.*, 532 U.S. at 417-18 and *Santa Clara Pueblo*, 436 U.S. at 58)); *Contour Spa at the Hard Rock, Inc.*, 692 F.3d at 1208 (holding that "a waiver of tribal sovereign immunity cannot be implied on the basis of a tribe's actions; rather, it must be unequivocally expressed" (citations omitted)); *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 685 (8th Cir. 2011) ("A waiver of sovereign immunity may not be implied, but must be unequivocally expressed by either the Tribe or Congress." (citation omitted)).

Consistent with this standard, this Court has concluded that a tribe's litigation conduct "constitutes *express* consent . . . only if, when entering into the suit, the Tribe explicitly consents to be bound by the resolution of the dispute ordered by the court." *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 757 F.2d 1047, 1054 n.7 (9th Cir. 1985), *rev'd on other grounds*, 474 U.S. 9 (1985) (emphasis added; citations omitted) (holding that initiation of suit does not unequivocally express consent to counterclaim); *see also Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994) (holding tribe's voluntary participation in administrative proceedings "is not the express and unequivocal waiver of tribal immunity that we require in this circuit"); *accord Kalispel Tribe of Indians v. Spokane Raceway Park, Inc.*, 357 Fed. Appx. 117, 119 (9th Cir. 2009) (affirming order dismissing counterclaims because the tribe "made no express and

unequivocal waiver to its immunity from those claims" (citing *United States v. James*, 980 F.2d 1314, 1319 (9th Cir.1992))). Thus, whether a purported waiver of tribal sovereign immunity is based on contractual consent to suit or litigation conduct, the issue is the same: Did the Tribe expressly and equivocally consent to suit on the claims against it? Undeniably here, the answer to this question is "No."

II. Neither the District Court, Nor Plaintiff, Identified Any Express Waiver Of The Tribe's Immunity.

The district court identified no express waiver of the Tribe's immunity to Plaintiff's claims, concluding instead that waiver could be implied: "*[T]he implication of a removal* is that, no, we're not satisfied to be in state courts because we intend to litigate." (E.R. 30:15-21 (emphasis added); *see* E.R. 21:12-20.) Plaintiff's Answering Brief likewise identifies no action by which the Tribe expressly consented to the adjudication of Plaintiff's claims against it. Instead, Plaintiff rests her waiver argument on Tribal Defendants' "choice to air *their sovereign immunity defense* in federal court . . . ." (Answering Brief, pp. 1-2 (emphasis added).)

It is absolutely correct that, faced with a state court suit to which it had not consented, the Tribe chose a congressionally authorized federal forum to immediately seek dismissal on the basis of its immunity to the unconsented suit. It is equally correct—and undisputed—that the Tribe has at no time, and in no forum,

"explicitly consent[ed] to be bound by the resolution of" Plaintiff's claims against it (*Chemehuevi Indian Tribe*, 757 F.2d at 1053 n.7), let alone "unequivocally expressed" consent to any such suit. *Santa Clara Pueblo*, 436 U.S. at 58. Consistent with established law governing tribal sovereign immunity and its effective waiver, the only federal appellate court to address the issue held that a tribe's removal to federal court does not amount to an unequivocally expressed waiver of its sovereign immunity because such an act "in no way consent[s] to be sued on *any* of the claims in this case in *any* forum." *Contour Spa*, 692 F.3d at 1208 (emphasis in original).

Plaintiff tries to distinguish federal precedent holding that even a tribe's initiation of litigation does not express its consent to be sued, by asserting that in each case cited (*see* Opening Brief, pp. 18-20) "the tribes could enforce their rights only by initiating litigation," whereas here "Tribal Defendants could just as easily have asserted sovereign immunity in state court." (Answering Brief, p. 23.) Plaintiff misses the point. The Tribe in no way initiated litigation here, at all, much less expressly consented to adjudication of Plaintiff's claims in any forum. Facing unconsented suit alleging federal claims in state court, the Tribe immediately elected to raise its sovereign immunity defense to that suit in federal court, as federal law permits. 28 U.S.C. § 1441(c). Indeed, without relinquishing its immunity, the Tribe could have instead filed a preemptive federal suit for

declaratory relief to protect its sovereignty. *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509-10 (1991) (rejecting argument that Indian tribe's decision to file suit in federal court to restrain the state from imposing taxes beyond its jurisdiction waived immunity to compulsory counterclaims to assess those taxes). By choosing a congressionally authorized federal forum for Plaintiff's unconsented suit, the Tribe in no way expressly consented to be sued by Plaintiff at all.

Because any waiver of tribal immunity must be unequivocally expressed, and because it is undisputed that the Tribe has in no way expressed its consent to any court's adjudication of Plaintiff's claims, the inquiry is over. The Tribe's immunity simply bars Plaintiff's claims, compelling dismissal.

III. Case Law Permitting Implied Waiver Of Eleventh Amendment Immunity Has No Bearing On The Requirement That Tribal Sovereign Immunity Remains Intact Unless Expressly Waived.

Plaintiff, like the district court, has acknowledged that principles bearing on Eleventh Amendment immunity do not resolve whether removal waives tribal sovereign immunity. (Answering Brief, pp. 16-18 (acknowledging that Eleventh Amendment immunity case law "is distinguishable," that "tribal sovereign immunity is *sui generis*," and that "Principles From State . . . Sovereign Immunity Do Not Resolve" the issue before this Court).) Indeed, any analogy to Eleventh Amendment immunity is inherently misleading because that body of law permits

courts to imply waivers from conduct short of express consent. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239-40 (1985) (holding that Eleventh Amendment immunity, unlike tribal sovereign immunity, may be waived by implication).

Thus, Plaintiff's suggestion that *a state's* removal of a case to federal court is a "volitional" or "voluntary" act from which a court may imply an Eleventh Amendment immunity waiver (Answering Brief, p. 16) is irrelevant to whether an Indian tribe's removal expressly and unequivocally relinquishes tribal sovereign immunity. *Contour Spa*, 692 F.3d at 1208 ("It is clear that the Indian tribe [filing a federal claim to enjoin state taxation in *Potawatomi*] had *voluntarily invoked* the jurisdiction of the federal courts, yet did not waive its sovereign immunity against related counterclaims by doing so." (emphasis added)). Indeed, the Supreme Court expressly distinguished the law governing the waiver of *tribal* sovereign immunity when concluding a *state's* removal waived its Eleventh Amendment immunity. *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613, 623 (2002) (distinguishing *Potawatomi* case law regarding "protect[ing] an Indian tribe," as inapposite to its decision that a state waives immunity by removing a case from the state's own courts to federal court); *see also In re Greene*, 980 F.2d 590, 595 (9th Cir. 1992) (noting limits on state sovereign immunity as compared to tribal sovereign immunity).

IV. No Sound Basis Exists To Deprive Indian Tribes Of A Federal Forum To Raise Sovereign Immunity Defenses To Federal Claims.

As the Eleventh Circuit has recognized, there is simply "no sound basis in law or logic" to force an Indian tribe to relinquish its right to remove to a federal forum in order to preserve an immunity defense. *Contour Spa*, 692 F.3d at 1207. A significant congressional policy favors permitting Indian tribes, like any other parties, to remove to federal court any federal claims against them, whether or not they possess a potential immunity defense. 28 U.S.C. § 1441(c). When the federal defense of tribal sovereign immunity is at issue, the policy favoring federal court disposition is even stronger. *Contour Spa*, 692 F.3d. at 1207. Preserving a tribe's right to choose a federal forum in this circumstance not only generally furthers the development of a uniform body of federal sovereign immunity case law, it also allows federal courts to decide in the first instance whether any given federal statute under which a tribe faces suit abrogates tribal sovereign immunity. *Id.* at 1207-10. The Tribe's immunity remains intact absent *express* consent to suit. Therefore, the district court's and Plaintiff's efforts to second-guess the strategic value of the Tribe's removal are irrelevant to whether the Tribe has waived its sovereign immunity, and in any event, cannot transform an implied waiver into an express one.

Plaintiff's suggestion that a tribal sovereign immunity defense may just as easily be resolved in state court (Answering Brief, pp. 19-21) ignores the fact that, even where a sovereign immunity defense succeeds to limit or bar certain claims, it may not terminate the litigation. *See, e.g., Namekagon Dev. Co. v. Bois Forte Res. Hous. Auth.*, 517 F.2d 508, 509-10 (8th Cir. 1975) (concluding tribe waived its immunity as to particular sources of funds but not as to others). Also, an immunity defense can turn on complicated factual issues or novel legal issues, such that an Indian tribe sued in state court cannot be sure whether it will ultimately face suit on the merits of the claim. A rule destroying immunity for any suit removed to federal court would effectively require any tribe possessing a legally uncertain immunity defense, or an immunity defense only partially barring the claims against it, to irretrievably relinquish its right to have federal claims against it decided in federal court. Although Plaintiff minimizes the "possibly misguided decisions" of certain state courts (Answering Brief, pp. 19-21), there is simply "no sound basis in law or logic for forcing an Indian tribe to make this choice." *Contour Spa*, 692 F.3d at 1207.

Congress has expressed its intent to provide all defendants the option to avail themselves of the "experience, solicitude, and hope of uniformity that a federal forum offers on federal issues," whether or not an adequate state forum exists. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308,

312 (2005) (citing 28 U.S.C. § 1331 and § 1441). Departing from bedrock precedent to imply a waiver of tribal sovereign immunity from the exercise of the right to remove federal claims contravenes Congress's intent and "jealous regard" for tribal sovereignty. *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986).

V. There Is No Reason To Remand For Further Proceedings On Plaintiff's FMLA Claim Because The Tribe's Immunity Bars It.

The absence of an express waiver of sovereign immunity ends the inquiry. On that ground alone, this case must be dismissed. If, however, contrary to established federal Indian law principles, this case were allowed to proceed, the Tribe would have yet another defense to Plaintiff's Family and Medical Leave Act claim: the FMLA does not apply to intratribal disputes. *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985). The inapplicability of a federal statute to an intramural tribal dispute is a separate defense, independent of the issue of whether an Indian tribe's immunity bars suit. *Fla. Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1128-35 (11th Cir. 1999) ("[W]hether an Indian tribe is *subject* to a statute and whether the tribe may be *sued* for violating the statute are two entirely different questions." (citing *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 755 (1998)) (emphasis in original)); *accord NLRB v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995,

1002 (9th Cir. 2003) (analyzing whether general federal statute applied to entity with a nexus to an Indian tribe, but emphasizing "the question of sovereign immunity . . . is different from whether a statute applies"); *see also EEOC v. Karuk Tribe Hous. Auth.*, 260 F. 3d 1071, 1080-81 (9th Cir. 2001) (refusing to apply ADEA to housing tribal authority based on *Coeur d'Alene* rule where tribal entity did not possess immunity to suit brought by federal agency).

The Tribe had only raised the FMLA inapplicability defense in its Opening Brief out of an abundance of caution. Specifically, the district court order had appeared to conflate the Tribe's immunity defense with its defense based on the FMLA's inapplicability to this intramural dispute, and so its order could have been construed as erroneously concluding the intramural defense depended on the existence of sovereign immunity.[2] (E.R. 23:12-24:10.)

[2] Notably, the case law can be confusing as decisions evaluating a federal statute's inapplicability to intramural disputes typically involve suits by the United States, against which tribes possess no immunity. For that reason, such cases often do not explain that the analysis of an "intramural defense" is only necessary because the tribe's immunity is lacking. *See, e.g.*, *Coeur d'Alene Tribal Farm*, 751 F.2d at 1116 (evaluating applicability of Occupational Safety and Health Act in suit by Secretary of Labor against a tribal entity, but not specifically mentioning that tribal sovereign immunity does not bar suits by federal officials). On the other hand, because a tribe's immunity operates as a distinct jurisdictional bar to private suits like Plaintiff's, sovereign immunity obviates the need for courts to consider whether a generally applicable federal statute applies to an intramural dispute. *See, e.g.*, *Chayoon v. Chao*, 355 F.3d 141, 143 (2nd Cir. 2004).

To Plaintiff's credit, she concedes the Tribe's defense of sovereign immunity is an issue distinct from whether a generally applicable federal statute applies to an intratribal dispute. (Answering Brief, p. 24.) Also, Plaintiff does not argue the FMLA effects a waiver, or dispute the authorities holding the FMLA effects no waiver of tribal immunity, which remains intact to bar Plaintiff's private suit against the Tribe. (Opening Brief, p. 26.) *See Chayoon v. Chao*, 355 F.3d 141, 143 (2nd Cir. 2004) (holding the tribe's sovereign immunity barred federal suit because "[t]he FMLA makes no reference to the 'amenity of Indian tribes to suit'" (quoting *Fla. Paraplegic Ass'n*, 166 F.3d at 1133));[3] *see also Myers v. Seneca Niagara Casino*, 488 F. Supp. 2d 166, 169 (N.D.N.Y. 2006) ("Congress has not expressly abrogated the sovereignty of Indian Nations in the FMLA . . . [and] the only other way a Nation may be sued under the FMLA is if the Nation itself *expressly* and *clearly* waived and relinquished its immunity from suit." (emphasis in original)); *Mullally v. Havasu Landing Casino*, No. EDCV 07-1626-VAP (JCRx), 2008 U.S. Dist. LEXIS 40565, at **6-7 (C.D. Cal. Mar. 3, 2008) (finding immunity barred FMLA suit against tribal casino because "Congress has

[3] Plaintiff's suggestion that "*Chayoon* noted that the potential applicability of the immunity has to be made on a case-by-case basis . . . ." (Answering Brief, p. 28) finds no support in the Second Circuit's decision, which squarely held the tribe's immunity barred plaintiff's claims because neither the tribe nor Congress had authorized the suit. 355 F.3d at 143.

not abrogated tribal sovereign immunity for violations of the Family and Medical Leave Act" (citing *Chayoon*, 355 F.3d at 143)).

Accordingly, because the Tribe's sovereign immunity is distinct from the FMLA's applicability, neither this Court nor the district court need reach the issue of whether the FMLA applies to this intramural dispute. The Tribe's immunity simply deprives the federal courts of jurisdiction over each of Plaintiff's claims, including her FMLA claim, all of which must be dismissed on this ground, with prejudice.

In sum, although the district court's order left intact the Tribe's independent defense based on the inapplicability of FMLA to this intramural dispute, the Tribe's immunity bars Plaintiff's suit completely and leaves nothing for the district court to do on remand but dismiss with prejudice the suit against the Tribal Defendants.

Conclusion

At no time and in no forum have Tribal Defendants expressly consented to Plaintiff's suit. Rather, at every opportunity, Tribal Defendants have continually asserted that the Tribe's immunity bars Plaintiff's suit. Plaintiff can identify no express waiver of the Tribe's immunity, let alone the "unequivocally expressed" waiver federal law requires (*Allen*, 464 F.3d at 1047 (quoting *Santa Clara Pueblo*, 436 U.S. at 58)), and no federal court may "carv[e] out exceptions" to this bedrock

principle. *Bay Mills Indian Community*, 134 S. Ct. at 2031. Thus, Tribal Defendants respectfully request that this Court reverse, and direct the district court to dismiss this action with prejudice.

Respectfully submitted,

DATED: March 11, 2015

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Certificate Of Compliance

The undersigned certifies that, according to the word count provided by Microsoft Word 2010, the body of the foregoing brief contains 3,419 words, exclusive of those parts excluded by Fed. R. App. P. 32(a)(7)(B)(iii), which is less than the 7,000 words permitted by Fed. R. App. P. 32(a)(7)(B). The text of the brief is in 14-point Times New Roman, which is proportionately spaced. *See* Fed. R. App. P. 32(a)(5), (6).

/s/ Paula M. Yost

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 March 11, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed on March 11, 2015, at Oakland, California.

/s/ Paula M. Yost

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