Docket No. 15-36003

In the

United States Court of Appeals

for the

Ninth Circuit

GLENN EAGLEMAN, et al.

Plaintiffs-Appellants,

v.

ROCKY BOYS CHIPPEWA-CREE TRIBAL BUSINESS COMMITTEE OR COUNCIL, Richard Morsette, Chairman, et al.,

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the District of Montana (Great Falls), Case No. 4:14-cv-00073-BMM · Honorable Brian M. Morris

REPLY BRIEF OF APPELLANTS

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I. SUMMARY OF REPLY TO ANSWER

A. Jurisdiction – The tribal appellate court based all of its rulings on tribal sovereign immunity. Eaglemans raised due process arguments in the tribal appellate court because they were elements of the tribal trial court decision to dismiss. However, the tribal appellate court denied relief based only on the federal question of tribal sovereign immunity. The tribal due process issues were not decided in the tribal court system.

Under the doctrine of exhaustion of tribal remedies issues should be adjudicated in tribal court before a federal court acts. All tribal remedies were exhausted as to the issues brought to district court.

Judicial efficiency requires that Eagleman's claims proceed together.

B. The "Sue and Be Sued" Clause is a Clear Waiver – Enough disagreement exists among the federal circuits for this court to make its own decision on the issue. The logic and equity of the 9th Circuit's *Marceau* opinions (withdrawn on other grounds) should prevail.

HUD attempted to close the Tribal sovereign immunity liability loophole in its regulations which require CCHA and the Chippewa Cree health clinic to waive immunity as to coverage. The district court did not notice the regulations and incorporate them into its decision per Federal Rule of Evidence 201.

C. Immunity of Tribal Officials – Eagleman's counsel's statement on the source of funds to pay claims apply only to the tribal resources at risk within the Ordinance itself. This was apparently misconstrued by the district court to be all of the resources available. If insurance coverage is taken into account, then the resources of CCHA are protected. Therefore, the application of *Maxwell* to guide the decision was an error. Application of *Burrell* will support reversal.

II. ARGUMENT

A. Jurisdiction is Proper in Federal Court.

1. The decision of the tribal appellate court was based solely on the question of tribal sovereign immunity.

The parties agree that original jurisdiction is in the tribal court. It is well settled law that tribal sovereign immunity is a federal question. In each of the four issues presented on appeal to the tribal appellate court, that court based its' decision on tribal sovereign immunity. (SER1: 47-59) Issue 3 of the tribal appeal involved a tribal statute that incorporated tribal sovereign immunity. (SER1: 58) However, that incorporation cannot convert Tribal sovereign immunity to an entirely tribal due process issue and thereby magically remove tribal sovereignty and this case from federal review.[1] [2]

[1] CCHA and others raised this issue in Defendants Motion to Dismiss in district court. (SER:75-76)

[2] The tribal court system must, with few exceptions, rule on due process violations based on tribal law before this court can rule on any issues brought

2. Appellants Exhausted Their Tribal Remedies as to All Issues Before the District Court.

Exhaustion was complete as to tribal remedies on all the issues brought to district court. CCHA argues lack of jurisdiction here because Glenn Eagleman did not resolve a minor part of the overall tribal case against a claim left unresolved in tribal court against an individual with no sovereign immunity. Appellees Answer Brief, pp. 19-21. The tribal appellate court severed that matter from this case when it remanded Glenn's specific allegations against Mike Morsette[3] back to tribal court. (SER1: 59-62) Eaglemans took care to contact CCHA and the Rocky Boys tribe regarding exhaustion of remedies at the tribal level. (FER1: 1-2 and 20-21) None of Appellees objected or responded on the issue of exhaustion.

CCHA misapplies *Alvarez* to find that Eaglemans failed to exhaust their remedies or did not meet the exceptions to exhaustion in *Iowa Mutual*. *Alvarez v. Tracy, 773 F.3d 1101, 1014-15 (9th Cir. 2014)* citing *Iowa Mutual Insurance Company v. Plante*, 480 U.S. 9, 16 n. 8 (1987). "A party's failure to exhaust, however, does not deprive the federal courts of subject matter jurisdiction over the claims." *Alvarez v. Tracy* at 1015, citation omitted. Alvarez appealed several criminal convictions on various grounds, including the Indian Civil Rights Act

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under ICRA or any other federal law or question. *Alvarez v. Tracy*, 773 F.3d 1011, 1012-17 (9th Cir., 2014).

[3] Also mistakenly referred to as Mike Rosette in other documents.

(ICRA). 25 U.S.C. § 1303. But Alvarez did not leave claims behind. He left behind remedies that he did not know he had and could have used. *Alvarez* at 1023 - 1037.[4]

Here, only appellant Glenn Eagleman is affected by the severed claim. Answer, pp. 19-21. Only Glenn was damaged by Morsette's failure to properly dispose of debris from the explosion on Glenn's assigned land. App. Br., pp. 1-2.

It is judicially more efficient to decide all of the Eaglemans' federal claims on substantially identical issues in one proceeding. Fed. R. Civ. Pro. 54(b). There is no exhaustion issue as to either Celesia or Theresa's claims for relief in district court. But even if the court lacks jurisdiction as to Glenn, Celesia and Theresa should be allowed to proceed. Id, and see *Brooks v. District Hosp. Partners, L.P.*, 606 F.3d 800, 805-806 (D.C. Cir. 2010).

Celesia and Theresa are not involved in Glenn's complaints against Morsette in the tribal court Complaint. The other two appellants should not have to wait until Glenn's property damage matter is decided in tribal court to have their cases adjudicated in federal court. In order to avoid a jurisdictional ruling on this point, they would have had to file a separate complaint. Or, Glenn would have had to dismiss his case against Morsette in order to move forward on appeal with the

[4] Dissent by Kozinski, J.

other two injured parties. This would be both a waste of court resources and an unjustice to the Eaglemans.

B. The "Sue and Be Sued" Clause in the Tribal Ordinance 3-63 Is an Express Waiver of Tribal Sovereign Immunity.

1. Ninth Circuit Court Experience and the *Marceau* Opinions Provide a Logical and Equitable Result.

That a tribe or an arm of the tribe may "sue and be sued" is sufficiently clear and unambiguous in itself. If the district court is upheld, Eaglemans will be denied any remedy for their personal property losses or personal injuries. If this court follows guidance from *Marceau* and other 9th Circuit lower courts since 1978, including the Navajo Nation Supreme Court and the *Parker* court, an unjust loophole in the law will be closed and the law will be clarified. *Navajo Housing Authority v. Howard Dana and Associates,* 5 Nav. R. 157 (Nav. Sup. Ct. 07/03/1987) and *Parker Drilling Company v. Metlaka Indian Community,* 451 F.Supp 1127 (D. Alaska 1978).

Otherwise Eaglemans and future injured parties will be deprived of their day in court by semantics or failure to utter magic words. And, indeed, how were Celesia, (age 16) or Theresa, living in their uncle and father's home, understand that they had no remedy for the negligence of CCHA or others if they did not personally have a contractual agreement with CCHA and the other Appellees?

2. Insurance Coverage Should Be Added to the Funding Available under the Tribal Ordinance.

At the district court hearing counsel took the court's question about funding sources too literally, and limited his response to the resources available to pay claims under Ordinance 3-63. Answer, p. 42, citing to SER1:22. It is impossible to attach other tribal resources beyond that allowed in the Ordinance.

However, CCHA was mandated by federal regulation to carry insurance coverage and the carrier of the insurance was required to waive tribal sovereign immunity as a defense to suit. (FER1: 14-15) The court should take judicial notice of CCHA's federally mandated insurance coverage, which includes a requirement for a waiver of tribal sovereign immunity.[5] F. R. Evid. 201.

> "As entities of a self-determination tribe, (App'l. Brf., p 8.) any carrier of insurance for CCH or CCHA "shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit, ... *25 U.S.C. § 450f (c)(3)(A).*
>
> Under Indian Health Service regulations, the Chippewa Cree Health Authority (CCHA) must "(e) Keep in force adequate liability insurance ... for each such policy the carrier shall waive any right to raise [sovereign immunity] as a defense . . . but such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy . . . " *42 C.F.R. 136.105.* And, since both CCH and CCHA self-insure, as participants in risk management pools, (i.e., self-insure) they are carriers. They . . . waived the right to raise sovereign immunity, . . . as a condition of participating in programs regulated under the above authorities."

(FER1: 14-15)

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[5] This issue was raised in the tribal appellate court in the document cited.

C. Individual Defendants Are Not Shielded by Tribal Immunity as Individuals.

1. CCHA Minimizes the Available Funds by Pretending Insurance Coverage Does Not Exist.

CCHA has minimized tribal resources and insurance argue that Maxwell is applicable here. Answer, pp. 42-44. Tribal resources are, in fact, limited by Ordinance 3-63, and therefore it is impossible to extract more funds from the tribe or tribal resources than the Ordinance will allow.

However, as discussed above, mandatory insurance coverage and a waiver of tribal sovereign immunity is required and was previously mentioned in the record. (FER1:14-15) CCHA and other Appellees are well aware of their own insurance coverage, yet pretend that it does not exist. Therefore *Maxwell* is not the best analogy.

Because recovery would first operate against the insurance coverage the district court should have applied *Burrell*. Susan Hay, Thela Billy, and Una Ford would then have been found to have acted outside their authority. Likewise, remand is necessary for the district court to correctly evaluate the amount of insurance coverage against the actual claims before determining the actual risk to tribal resources.

III. CONCLUSION

Eaglemans request that this Court find that it has jurisdiction over all of the issues presented and, (1) reverse those portions of the Opinion and Judgment of the District Court that the sue and be sued clause in Rocky Boy's Chippewa Cree Tribal Ordinance 3-63 did not waive the tribal sovereign immunity of CCHA, and (2) that the named tribal officials were shielded by tribal sovereign immunity, and (3) remand this case to the District Court for re-decision, together with such other and further relief to Eaglemans as this Court deems just and proper.

In the alternative, the judgment appealed from should be reversed, and the Eaglemans granted leave to amend to cure any deficiencies in the district court complaint, together with such other and further relief to them as this Court deems just and proper.

Dated: September 19, 2016

Respectfully Submitted,

s/ Mark Mackin
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Attorney for Appellants,
Glenn Eagleman, Theresa Small
and Celesia Eagleman

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 1,788 words.

Dated: September 19, 2016

Respectfully Submitted,

s/ Mark Mackin
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Attorney for Appellants,
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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2016, 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.

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.

s/ Kirstin E. Largent