CHAPTER 10

CONTRACTS

This chapter surveys several areas of contract law as interpreted and applied by Indian nations. In large measure, tribal courts tend to adapt and apply Anglo-American contract common law to contract disputes. Many Indian nations have not adopted comprehensive contract law codes, nor do many tribal courts have an extensive body of common law decisions upon which to rely. As a result, tribal courts resolve most contract disputes in accordance with the law of the state in which the tribe is located. More and more, however, parties to contracts under the jurisdiction of tribal courts have begun to agree on choice of law provisions that detail which law the tribal court should apply in adjudicating contract disputes.

This chapter also details a few areas in which tribal customary and traditional contract law peeks through the veneer of Anglo-American contract law. In some cases — almost always cases exclusively involving tribal member parties — customary contract law directly affects the outcomes. Usually, in such cases the contract in question arises from an agreement between Indians that involves a uniquely cultural agreement, such as a family agreement.

Moreover, this chapter details the kind of contract disputes that arise either exclusively or more often in Indian country than outside of it. Contracts involving Indian nations as sovereigns are also featured, with the complicated questions of sovereign immunity interwoven repeatedly into the cases.

A. CONTRACT DOCTRINES UNDER TRIBAL LAW

1. CONTRACT FORMATION

MALATERRE v. ST. CLAIRE

Turtle Mountain Band of Chippewa Indians Appellate Court, No. 05-007
(January 19, 2006)

Before: Acting Chief Justice MONIQUE VONDALL-RIEKE, and Justices JERILYN DECOTEAU and MATTHEW L.M. FLETCHER*

**Disclosure:* The author of this book participated in the case as a sitting appellate judge and wrote the opinion.

By Justice FLETCHER for a unanimous Court.

I. Procedural History and Facts

On June 30, 2004, Appellant Cindy Malaterre sued Bermilia St. Claire and the Estate of Alex St. Claire, Bermilia's deceased husband. All parties are enrolled members of the Turtle Mountain Band of Chippewa Indians and resided within the exterior boundaries of the Turtle Mountain Band's reservation centered around Belcourt, North Dakota. Since the filing of this suit, Bermilia St. Claire has walked on and the Estate of Bermilia St. Claire is substituted in her place as the Appellee.

Cindy Malaterre and her husband at that time, Todd St. Claire, lived in a Mutual Help home beginning in 1996. . . . Alex and Bermilia St. Claire were Todd's parents and Cindy's in-laws. . . . Alex and Bermilia lived in an older home, purchased in 1993. . . . In 2000, Alex St. Claire was severely injured in an automobile accident and became disabled. . . . Alex and Bermilia's home was of insufficient size to accommodate Alex's disability. . . .

On April 2, 2001, Cindy and Todd executed a letter stating that they "would like to gift" their home to Alex and Bermilia. . . . Alex and Bermilia then moved into Cindy and Todd's home; Cindy and Todd moved into Alex and Bermilia's home. . . . Cindy alleged and the Estate's counsel conceded at oral argument that the arrangement amounted to a "trade." . . . This last fact is consistent with the lower court's findings as well. . . .

In 2003, Cindy and Todd divorced. *See* Tribal Court's Order, Findings of Fact and Conclusions of Law at ¶9; *St. Claire v. Malaterre St. Claire*, Order for Dissolution of Marriage, No. 03-5106 (Turtle Mountain Band Tribal Court, Oct. 9, 2003). In the hearing before the lower court in this matter, Cindy testified — and the Tribal Court found — that Todd St. Claire had used violence or the threat of violence to force Cindy to enter into the "trade." *See* Tribal Court's Order, Findings of Fact and Conclusions of Law at ¶14; Civil Court Hearing, Testimony of Cindy Malaterre (Nov. 12, 2004).

In her complaint, Cindy Mataterre sought to have the house in which she and Todd St. Claire lived returned to her possession. . . . The lower court, per Judge Shirley Cain, heard testimony on this matter on November 11, 2004. Judge Cain found that Cindy and Todd had "gifted" their home to Alex and Bermilia for the purpose of allowing Alex to reside in a home that was handicap-accessible. . . . Judge Cain further found that Alex and Bermilia "gifted" their home to Cindy and Todd "in return." . . .

II. Standard of Review

This Court reviews the findings of fact made by the trial court with a great deal of deference. As this Court stated long ago, "[D]etermination of fact issues is primarily the responsibility of the trial court, the appellate court being responsible only for ascertaining that a factual conclusion is reasonably supported by the evidence." *Laducer v. Laducer*, Memorandum Decision, at 3-4 (TMAC 1990). If "substantial evidence [exists] to support the trial court's finding," then this Court must uphold those findings of fact. *Id.* at 4. . . .

Conversely, this Court will review the conclusions of law made by the tribal court without similar deference but instead under a *de novo* standard.

See Turtle Mountain Judicial Board v. Turtle Mountain Band of Chippewa Indians, No. 04-007, at 10 (TMAC 2005) (citing *LaFountaine-Gladue v. Ojibwe Indian School*, No. 94-004, at 3 (TMAC 1996)); *General Motors Acceptance Corp. v. Mathiason*, No. 05-002, at 4-5 (TMAC 2005). We "gran[t] no special deference to the tribal court's conclusions of law." *Turtle Mountain Judicial Board, supra*, at 10.

III. Discussion

A. The "Trade" of Homes

Given the deferential standard of review that constrains this Court's review of the findings of fact by the tribal court, we affirm the tribal court's determination that a contract had been formed between the two families resulting in the "trade" of the two homes. As a general matter, whether a contract has been formed is a question of fact. *E.g., Colville Tribal Enterprise Corp. v. Orr*, No. 98-008, 1998.NACC.0000009, at ¶19 (Colville Confederated Tribes Court of Appeals 1998) (holding that whether an implied contract has been formed is a question of fact); *Hood v. Bordy*, No. 07-90, 1991.NANN.000005, at ¶28 (Navajo Nation Supreme Court 1991) (holding that the tribal court's findings that an oral contract had been formed were conclusive). Under tribal law, a contract may be written or oral. *See* Turtle Mountain Band Tribal Code §7.0602. The tribal court, after taking testimony from the parties and several others in this matter, found as a matter of fact that Todd and Cindy had "gifted" their home in 2001 to Alex and Bermilia. . . . Alex and Bermilia "gifted" their home "in return" to Todd and Cindy. . . . This mutual "gifting" of homes meets the requirement under tribal law that the consideration must "resul[t] in a benefit to the promisor or a detriment to the promisee," Turtle Mountain Band Tribal Code §7.0502, and that it "must be of some legal value," *id*. at §7.0503. Moreover, a written instrument signed by Todd and Cindy provided evidence of the mutual "gifting" sufficient to generate a presumption that a contract existed. *See id*. at §7.0505. As a result, a "trade" was consummated, a contract was formed, and this Court affirms the determination of the tribal court that ownership of the homes was transferred.

We are mindful that there is no writing that demonstrates the "gifting" of Alex and Bermilia's home to Cindy and Todd. We note that the Tribal Code adopts the Anglo-American notion of the Statute of Frauds for real estate transactions, but with the exception that the tribal court retains the power "to compel specific performance of any agreement for the sale of real estate in case of part performance thereof." Turtle Mountain Band Tribal Code §7.06.03(3) But we are influenced by the fact that, in many tribal cultures, "[n]either writing, nor consideration, nor witnesses is required." Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part II of II)*, 46 Am. J. Comp. L. 509, 548 (1998). Moreover, "[i]n a culture in which so much rests on oral tradition, a given word weighs much more than in a culture that writes. Therefore, an oral pledge is valid, even without consideration." *Id*. at 548 n. 90. Here, we are comforted that the "trade" of these homes is consistent with the relationship of the parties at the time of the transaction. *See generally id*. at 547

("Tribal people tend to form long-run relationships. . . . Long-run relationships build trust and reliance among the parties."); *see also* Petition/Complaint at ¶9 (alleging that Cindy Malaterre agreed to transfer her home to the St. Claires "in good faith"). Moreover, we agree with the implicit finding of the tribal court that affirming the existence of a contract will work no fraud or deceit on either party. *See* Turtle Mountain Band Tribal Code §7.0604 (implying that prevention of "fraud or deceit" were purposes of enacting a Statute of Frauds). As a result, as a matter of law, we hold that the fact that there is no complete writing proving the existence of a contract is not a bar to the finding of the formation of the contract by the tribal court.

The finding of fact by the tribal court that Cindy Malaterre "gifted" her marriage home to the St. Claires under duress gives this Court a great deal of consternation, but after a great deal of consideration, this finding does not alter our conclusion. Under tribal law, "duress" and "undue influence," which we hold includes without limitation physical violence or the threat of physical violence, are factors sufficient to render a contract voidable. *See* Turtle Mountain Band Tribal Code §§7.0302(1), (3). *Cf. Lewis v. Mashantucket Pequot Gaming Commission*, No. 97-117, 1997.NAMP.0000016, at ¶42-43 (Mashantucket Pequot Tribal Court 1997) (holding that a resignation of employment may be found to be involuntary if made under duress). The tribal court found that Cindy "gifted" her home "under duress by her ex-husband, Todd St. Claire," . . . and that "during her marriage to Todd St. Claire, Cindy Malaterre was a victim of domestic violence." . . . We are not satisfied that the tribal court took this fact into consideration when making the finding of fact that a contract had been formed. However, we decline to reverse the tribal court's ruling and rely upon the failure of counsel to appeal the "duress" issue by raising it in the appellant's brief. As a corollary, we note that Cindy Malaterre never alleged duress in her original complaint. *See* Petition/Complaint at ¶9 (alleging that Cindy Malaterre agreed to transfer her home to the St. Claires "in good faith"). As we have held elsewhere, the failure to raise this issue in the appellate brief operates to waive the question. *See Turtle Mountain Judicial Board, supra*, at 16. . . .

C. Order for Cindy Malaterre's Payment of $1000 to the Estate

We vacate the tribal court's order for Cindy Malaterre to make $1000 in payments on the home in which she currently resides before ownership may be finally transferred to her name. Tribal Judge Carey Vicenti (Jicarilla Apache) has stated that, in the tribal common law of contracts, "[r]epairing the relationship between the parties is the primary legal goal." Cooter & Fikentscher, *supra*, at 549 (quoting Carey Vicenti). Money damages are not a favored remedy. *See id*. at 547-49 (noting that specific performance is a more appropriate remedy, where possible). We note here that the tribal court ordered that Cindy may stay in her current residence but that she must pay $1000 to the St. Claire Estate. . . .

The origin of the $1000 payment is unclear from the record. The November 11, 2004, hearing is silent as to the origin of this obligation. The only document in the record noting a $1000 obligation is a Warranty Deed purporting to convey Cindy Malaterre's current residence to Richard L. Gourneau. . . . It is

not clear from the record why Cindy Malaterre should be obligated to pay $1000 to the Estate. As a result, we vacate this portion of the Order. . . .

NOTES

1. The Turtle Mountain Band of Chippewa Indians enacted a code explicitly circumventing the statute of frauds, a well-known common law rule codified by virtually all American jurisdictions that requires a contract relating to land to be in writing. What are the reasons for requiring contracts relating to land to be in writing? Are those reasons applicable to tribal communities? Why or why not?
2. In *Phillips v. Dusty's Auto Sales*, 1997 Mont. Salish & Kootenai Tribe LEXIS 1 (Confederated Salish & Kootenai Tribes Court of Appeals 1997), the court confronted a claim by the buyer of a used truck who attempted to return the truck to the dealership after 20 days, asserting various contract defenses, including that the dealership breached an oral contract. The court, per Judge Cynthia Ford, a University of Montana law professor, wrote:

> Oral contracts, like written contracts, are valid and enforceable if and only if there is consideration for them. In this case, there is conflicting evidence about whether Dusty in fact promised to refund plaintiff's money. Even if he had made this promise, and even if it had been in writing (which both parties agree is not the case), Dusty's statement does not rise to the level of an enforceable contract because there was no consideration for it. Dusty did not get anything from plaintiff, nor did plaintiff promise to do anything in the future in exchange for Dusty's statement. Further, nothing in the sales documents or the law required Dusty to refund plaintiff's money. Dusty's statement, if made, was nothing more than a gratuitous remark, which he was legally free to honor or not. Dusty made no contract at the time Phillips brought the Jeep back in. Thus, as Judge Lozar correctly observed, "Plaintiff's contention that Defendant breached an oral contract to satisfy Plaintiff is without merit."

   Phillips, 1997 Mont. Salish & Kootenai Tribe LEXIS 1, at *8-9.
3. In *Ho-Chunk Nation v. B&K Builders, Inc.*, 3 Am. Tribal Law 381 (Ho-Chunk Tribal Court 2001), the court declined to apply customary law that would have required the court to find the existence of a contract even where the tribal signatory to the contract was not authorized to execute the contract:

> The plaintiff contended in its pleadings that "[t]he Ho-Chunk Nation Trial Court has subject matter jurisdiction to resolve contract disputes," citing the case of *Ho-Chunk Nation v. Ross Olsen*, [2 Am. Tribal Law 299 (2000)] for that proposition. . . . In *Olsen*, the Court consulted the Ho-Chunk Nation Traditional Court . . . to ascertain "whether Ho-Chunk Nation custom and tradition recognized agreements analogous to the modern day 'contract.' " *Olsen* [2 Am. Tribal Law at 307]. The Traditional Court responded by relating that "according to the Ho-Chunk Nation's traditions and customs, once an agreement for the performance of services or production of goods is made, the parties have a duty to fulfill their obligations," meaning "that it was wrong for one party to keep a benefit obtained from an agreement without providing the agreed upon compensation." . . . While the Traditional

> Court has acknowledged this fundamental concept, it has not extended this pronouncement to include causes of action such as promissory estoppel. *See Maureen Arnett v. Ho-Chunk Nation Department of Administration*, CV 00-60 (HCN Tr. Ct., Jan. 8, 2001) at 16-18. . . .
>
> Unlike the case at bar, the issue of whether the signatory to the contract had properly delegated authority was not before the Court in *Olsen*. This concern, also, did not arise in several contract disputes involving private parties wherein the Court based its relief upon the above traditional principle. . . .
>
> The constitutional documents require proper delegations of authority for entering into contractual arrangements, and the Court cannot waive these requirements. The plaintiff, as a result of its potential errors, advocates setting aside the provisions agreed upon by the defendants through the contracting process in favor of the Court establishing the substantive rights of the parties under custom and tradition. The Court has never attempted to apply custom and tradition for purposes of interpreting an agreement when one of the parties lacked the authority to enter into the agreement in the first instance. Such a practice would prove fundamentally unfair to the party having no reason to doubt the authority of the signatory. Moreover, custom and tradition would not address the dispositive issues identified above. The relevant constitutional provisions provide authoritative guidance in rendering this decision.

B&K Builders, 3 Am. Tribal Law at 391-92.

2. PAROL EVIDENCE RULE

Southern Puget Sound Intertribal Housing Authority v. Johnson

Shoalwater Bay Appellate Court, No. SHO-CIV 6/80-434, 1 NICS App. 29 (September 24, 1988)

Before: Shoalwater Bay Appellate Court; Chief Justice Elbridge Coochise, Justice Emma Dulik and Justice Rosemary J. Irvin. . . .

The appellant was sued by the appellee for unlawful tenancy under a Mutual Help and Occupancy Agreement[*] executed between the parties and dated June 12, 1985. . . .

I.

The Parol Evidence Rule Does Not Apply to Proceedings in Shoalwater Bay Tribal Court

During the course of the trial, Judge LaFountaine refused to hear the testimony of twelve witnesses whom the defendant proffered to establish the circumstances and intentions of the parties at the time of signing the Mutual Help and Occupancy Agreement. The witnesses were offered to establish circumstances and intentions surrounding the execution of similar

[*]. *Author's Note:* — A "mutual help and occupancy agreement" is a sort of rent-to-own lease agreement created by federal housing regulations decades ago in an effort to create generous terms that would increase the likelihood that impoverished American Indians on reservation lands could become homeowners. These agreements have largely fallen out of favor since the enactment of the Native American Housing Assistance and Self Determination Act of 1996.

contractual agreements with the appellee. The Court excluded the testimony of all witnesses except the defendants, basing its decision on the Parol Evidence Rule.

Paramount to other concerns in the conducting of any trial in tribal court is the concern that any party to a proceeding be given a hearing and a fair hearing. Traditionally, anyone who had something to say regarding a matter in controversy would have the opportunity to have their say prior to a decision being rendered by the tribal elders. It is fundamental to tribal culture that parties to a conflict be allowed to have their say without legal doctrines being unfairly imposed to limit this right. Tribal Courts do not exist to enforce the letter of the law as much as they do to serve tribal people with a forum for a fair hearing and a just adjudication, one in which they may run their own case, within reasonable limits, with or without an attorney.

The Parol Evidence Rule is not, and never has been a rule of the Shoalwater Bay Tribe. The Parol Evidence Rule is a rule of substantive law of the State of Washington. The Tribal Court erred in applying the Rule and applying it as a rule of evidence to exclude witnesses.

The Parol Evidence Rule, as traditionally stated in Washington, provides:

> [P]arol or extrinsic evidence is not admissible to add to, subtract from, vary, or contradict written instruments which are contractual in nature and which are valid, complete, unambiguous, and not affected by accident, fraud, or mistake. . . . It is not a rule of evidence but one of substantive law.

Enrich v. Connell, 105 Wn. 2d 551, 555, 556, 716 P.2d 863 (1986).

> However the parol evidence rule only applies to a writing intended by the parties as an "integration" of their agreement; *i.e.*, a writing intended as a final expression of the terms of the agreement. . . . In making this preliminary determination of whether the parties intended the written document to be an integration of their agreement, which is a question of fact, the trial court must hear all relevant, extrinsic evidence, oral or written.

Enrich v. Connell, supra.

First, there is no requirement that the parol evidence rule be given credence in the Shoalwater Bay Tribal Court. Insomuch as it is used, it is advisory only. Secondly, even if used as advisory and applied to a matter pending in tribal court, it is considered by the Washington state court to be a rule of substantive law and not of evidence. Applied according to the rule in Washington state court, it cannot be used to cut off testimony which is relevant to a preliminary determination as to whether the parties to an agreement intended the written document to be an integration of their agreement. . . .

III.

. . . The following findings of the Trial Court [are vacated.] . . .

2) After considerable discussion, the trial court ruled that only one of witnesses, Anita Blake, could testify for the defendant. . . .
3) The court ruled that it would allow testimony concerning the interpretation of Section 5.4 of the Agreement, but would not allow cumulative testimony. . . .

THEREFORE IT IS HEREBY ORDERED: This matter is remanded to the Trial Court for retrial on all issues with the following instructions:

There is to be no limit on the number of witnesses who testify for or against the appellant until it can be shown that their testimony is repetitive and cumulative.

Further, the trial judge is not to take a party's word, representing himself pro se, as to whether potential witnesses will testify to the same information. The Court is to make an independent determination from the witnesses as to whether the proffered testimony will be repetitive and cumulative.

NOTES

1. In *Fletcher v. Grand Traverse Band Tribal Council*, 2004 WL 5714967 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Court 2004),* the court applied state law in refusing to consider evidence relating to alleged promises made to an employee of the Band:

> This Court holds that it cannot consider evidence relating to promises made to the Plaintiff prior to her entering into the [employment contract] as such evidence is inadmissible under the parol evidence rule. The parol evidence rule provides that, when two parties have made a contract and have expressed it in a writing which they both have agreed to as being a complete and accurate integration of that contract, extrinsic evidence of antecedent and contemporaneous understandings and negotiations is inadmissible for the purpose of varying or contradicting the writing. . . . Parol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous. . . .
>
> This Court holds that paragraph 5.F. of the [employment contract] controls and is applicable to the Plaintiff's employment relationship with the Tribe. Therefore, as there is no dispute that Plaintiff was given 30 days' notice of her termination pursuant to paragraph 5.F. of the MSA, Plaintiff's claims based on a just cause employment relationship must fail.

Fletcher, 2004 WL 5714967, at *8.

2. In *Kirn v. Indian Credit Corp.*, 1989.NAFP.0000012 (Fort Peck Court of Appeals 1989), the appellate court reversed a trial court decision to apply the parol evidence rule to a tort claim, noting that the case had involved a switch in trial judges below:

> The tribal court did not appear to understand the difference between contract remedies and tort remedies after the substitution of Judge Vance for Judge Boyd. As appellant advised the tribal court, contract actions arise simply out of contracts either oral or written between parties. Parties can sue under a contract when the other party breaches the agreement. Furthermore, the remedies are limited and as a rule emotional damages are not recoverable in a contract action and many types of evidentiary rules govern the evidence that is introduced which includes the parol evidence rule.

**Disclosure:* The plaintiff in this matter is a close relative of the author.

> Appellants further advised the tribal court the tort action allows plaintiff much broader relief. The plaintiff in a tort action needs only show the defendant owed a duty of care to the plaintiff and that plaintiff breached that duty. Tort actions are generally utilized to provide relief to plaintiffs who have suffered personal or economic injuries. In a tort action, a plaintiff may recover emotional damages and the evidentiary rules such as the parol evidence would not apply. Appellants have attempted to establish the ICC, as the Kirn's primary lender, owed a duty of care that would include not providing "bad checks" to its debtors and that it breached that duty.

Kirn, 1989.NAFP.0000012, at ¶¶75-76.

3. IMPLIED CONTRACTS

Colville Tribal Enterprise Corp. v. Orr

Colville Confederated Tribes Court of Appeals, No. AP98-008,
26 Indian L. Rep. 6005, 1998.NACC.0000009 (December 4, 1998)

Before Chief Justice Dupris, Justice Stewart and Justice Bonga
Per Curiam. . . .

Standards of Review

There are two issues before this Court for review: (1) did the Trial Court err by failing to find that sovereign immunity barred the instant action?; and (2) did the Trial Court err by finding that an implied contract existed between the parties?

The implied contract issue necessitates a review of the factual findings of the Trial Court, *i.e.* do the facts support the legal conclusion that an implied contract existed between the parties[?] The accepted standard of review by this Court of findings of fact is the "clearly erroneous" standard. *See CCT v. Nadene Naff*, [APCvF93-12001 to 003], 2 CTCR 08, p. 2, [2 CCAR 50], 22 ILR 6032 (1995), *Wiley v. CCT et al.*, [AP93-16237], 2 CTCR 9, p. 6, [2 CCAR 60], 22 ILR 6059 (1995), and *Palmer v. Millard et al.*, [AP94-005], 2 CTCR 14, p. 5, [3 CCAR 27, 23 ILR 6094] (1996). The sovereign immunity issue is a question of law, which requires a de novo review. *Id.*

[The court concludes that the Tribes have not waived sovereign immunity for this claim, and that the petitioner has not demonstrated that any of the possible waivers of immunity apply.]

Implied Contract

Even though we have held that the doctrine of sovereign immunity bars Orr's action for damages, the issue of whether there existed an implied contract between the parties, which is enforceable under the Tribes' Civil Rights Statute, still must be addressed. Orr brought the action under, inter alia, the CTC Chapter 1-5. We must inquire whether the facts in the record support a conclusion that Orr had an implied clause in his employment contract with CTEC which provided for a 180-day notice of termination as the Trial Court found. Further, if there is a right to 180-day notice or hearing, what is it based on?

We review the Trial Court's findings under a clearly erroneous standard to determine if the findings support a legal conclusion that an implied contract existed between the parties that included a 180-day notice of termination term. *See Naff, supra* at 2; *Wiley, et al.*, at 6; and *Palmer v. Millard et al.*, at 5. "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that mistake has been committed." . . .

The first inquiry is: what are the relevant facts in this case? The Trial Court's Findings of Facts show the following:

1) Roy Orr, a member of the Colville Tribes, served on the Board of Directors for CTEC between 1993 and March of 1995, at which time he was hired by CTEC as General Manager for the CTEC Gaming Division. . . .
2) In August 1995, Orr was promoted to a vice president position for CTEC, and negotiated a proposed contract with the then–Chief Executive Officer (hereinafter CEO) Clay Antiquoia. . . .
3) The Board of CTEC, who had approval authority, would not give final approval to Orr's proposed contract because the Board did not approve the six-month termination compensation clause in the proposed contract. . . .
4) The termination clause in question was included in two (2) officer contracts, but not in three (3) others, including Orr's. . . .
5) Neither Orr, three (3) of the Board members, nor the current CEO, Wendell George, were aware of a Board resolution setting out a contract format to use in negotiating contracts with officers; the format included a six-month termination clause similar to the one at issue in this case. . . .
6) Orr continually worked as a vice president of CTEC until his termination in April of 1997. . . .
7) Orr did not receive termination compensation or a hearing before the Board of Directors regarding his termination. . . .

Neither party has assigned error to these findings, so they become the accepted facts on appeal. *Johnson v. Whitman*, 463 P.2d 207, 209 (1969).

The record shows the following relevant facts not included in the Findings, but not disputed by the parties:

1) Orr was on the CTEC Board of Directors when the Francis Somday case went to Court, after which time the CTEC Board rewrote its Policies and Procedures Manual (Manual) to foreclose any other at-will employee from arguing his contract was modified by the Manual. . . .
2) Orr was aware that the "changes in the [M]anual were to make it crystal clear that officer level employees were at-will employees of CTEC. . . ."
3) Orr understood that the CEO could not bind CTEC on an employment contract, and that the CTEC Board had the final approval authority. . . .

Two Types of Implied Contract

There are two kinds of implied contracts, implied in fact and implied in law (quasi-contract). "Contracts implied in fact arise from facts and circumstances

showing a mutual consent and intention to contract. . . . Quasi-contracts arise from an implied legal duty or obligation, and are not based on a contract between the parties or any consent or agreement." . . .

The Trial Court's legal conclusions do not identify which type of implied contract it concluded existed in this case, so we have analyzed both types and, based on the following opinion, we hold neither type of implied contract existed.

I. Implied in Fact

Fundamental contract law makes no distinction between the essential elements of an implied contract and an express contract. The difference is in the "mode of proof." Both require an analysis of the intentions of the parties to the transaction, and a showing of a meeting of minds between the parties. . . . The Court must assess the parties' acts and conduct viewed in the light of surrounding circumstances in order to ascertain a mutual assent to terms of a implied contract. . . .

Orr, who is asserting the existence of an implied contract, has the burden of proving ". . . each fact essential thereto, including the existence of a mutual intention. Where circumstantial evidence is relied on, the circumstances must be such as to make it reasonably certain that the parties intended and did enter into the alleged contract." . . .

In the instant case Orr initially negotiated his employment contract as a Vice President of CTEC with Clay Antiquoia. He and Antiquoia had mutual expectations that the contract would be approved. Mutual expectations do not amount to mutual assent.

Proving that a term was being negotiated is not proof of the mutual assent to the terms by the contracting parties. It is just proof that the parties were negotiating terms. . . .

Orr knew the contract was not final until approved by the Board of Directors. Reluctance of the Board, the final decision maker, to agree to a clause for 180-day severance, plus the actions of the Board not to finalize the contract based on the clause, show lack of intent of one of the parties to the contract. Orr's reliance on the willingness of both CEOs, Antiquoia and George, is misplaced. He knew neither CEO had final authority to finalize and approve his proposed employment contract.

Orr accepted the position of Vice President for a set salary and benefits, and with a knowledge, as a past Board member, that officers were at-will unless their contracts specifically provided other terms.

The Board of Directors did not offer Orr the contract term of a 180-day termination clause. "An acceptance of an offer must always be identical with the terms of the offer or there is no meeting of the minds and no contract." . . . "If the person who is seeking assent to a term knows or has reason to know that the other party does not intend his actions as expressions of a fixed purpose until a further action is taken, he has not made an offer." . . .

In assessing what the intent of the parties is, we must look at what their outward expressions and acts were, not what the unexpressed intent may have been. . . . In this case, the record is very clear that the Board of Directors did not

intend to give Orr a 180-day termination clause. This is supported by the Trial Court's Findings and the testimony of Orr himself.

Upon a review on the entire evidence we are left with the definite and firm conviction that mistake has been committed; there was no implied-in-fact contract between the parties regarding the 180-day termination clause.

II. Implied in Law, or Quasi-Contract

"[Q]uasi-contracts arise from an implied legal duty or obligation, and are not based on a contract between the parties or any consent or agreement." . . . In order to show a quasi-contract in this case, it must be shown that CTEC had a legal duty or obligation to provide Orr with a 180-day termination clause. Orr argues that he had a due process right to such notice, or at least a hearing before the Board of Directors; these are the only arguments made that could be germane to a quasi-contract theory.

Orr argues that CEO George and another officer (Knapton) each had a 180-day termination notice, and their contracts were approved after Orr's was submitted to the Board for approval. The Findings also indicate that the termination clause in question was not included in two (2) other officers' contracts besides Orr's. . . .

A showing that two (2) out of five (5) officer contracts had the sought-after termination clause does not prove that CTEC legally had to treat everyone equitably and put it in every contract of an officer. It supports CTEC's argument that it is discretionary with the Board of Directors whether to include such a clause in its contracts.

Orr has not met his burden of showing CTEC had a legal obligation or duty to him to give him a 180-day termination clause in his contract. There is no showing of a violation of due process by the Board. Orr knew what his status was when he accepted the Vice President position.

Upon a review on the entire evidence we are left with the definite and firm conviction that mistake has been committed; there was no implied-in-law contract between the parties regarding the 180-day termination clause.

The general law is when an employment contract is not definite as to duration it is considered terminable-at-will. . . . Cf. . . . *Office of Navajo Labor Relations v. West World*, 21 [Indian L. Rep.] 6070, 6071 (Nav. Sup. Ct. Apr. 18, 1994).

We are sure the parties in this case did not start out with the intent to sever relationships. Orr was receiving a good salary (about $90,000.00), so CTEC must have valued his services when he was hired. Where did the communications fail? Who can say. There was a change in the CEO; there was a change in the Board make-up. Becoming a successful business corporation for a tribe is a double-edged sword; how does the Tribe balance what is good in maintaining its tribal identity with competing in a non-Indian business world? This is also true for tribal members, like Orr, who ask for the respect as a tribal member and a high-level job as a businessman in CTEC. The one side gives way to the other in times like this.

Orr knew the rules of the game. He knew the Board of Directors intended to create an at-will status for officers when he became an officer. He knew the

Board had the final say in approving officer contracts, and they did not approve his with the 180-day notice termination clause. Nothing in the record supports any other theory. . . .

NOTES

1. Tribal government and enterprise employers draft employee manuals with an eye to preempting implied contract claims. In *Willis v. Mohegan Tribal Gaming Authority*, 7 Am. Tribal Law 492 (Mohegan Gaming Trial Court 2008), the court noted:

> On Count One, plaintiff alleges that the defendant's conduct in denying his request for a board of review is a violation of its Board of Review Policy. . . .
>
> . . . However, the Handbook expressly states that "It is not intended to, nor does it, constitute an expressed or implied contract or promise of continued employment or that any policy or benefit described in it will continue or will not be changed." *Employee Handbook*, p. 2.

Willis, 7 Am. Tribal Law at 493.

2. Concomitantly, tribal *contractual* waivers of sovereign immunity may not be invoked through the allegation of an implied contract. In *Wilson v. Mashantucket Pequot Gaming Enterprise*, 3 Mash. Rep. 440, 2002 WL 34243999 (Mashantucket Pequot Tribal Court 2002), the court noted:

> Tribal law requires the existence of a written contract for the Court's jurisdiction over a contract to be properly invoked. *See* XII M.P.T.L. ch. 1, §3. . . . Plaintiff claims that an implied contract was created when he and Defendant signed the Employee Handbook. In order to prevail in a breach of implied covenant of good faith and fair dealing, however, Plaintiff must be able to prove that a written contract exists between him and Defendant that expressly waives the sovereign immunity of the Tribe. *See* [*Sawyer v. Mashantucket Pequot Tribal Nation*, 3 Mash. Rep. 413, 417 (Mash. Pequot Tribal Court 1999)]; *see also*, I M.P.T.L. ch. 1, §2(b). Plaintiff does not allege the existence of a written contract with Defendant, nor does he point to a contractual provision upon which to base his claim. Accordingly, the Court lacks jurisdiction to hear this claim, and Count 1 is dismissed.

Wilson, 3 Mash. Rep. at 443-44.

4. CONTRACT BREACH

Pablo v. Confederated Salish & Kootenai Tribes

Confederated Salish and Kootenai Tribes Court of Appeals, No. 92-CV-170-AP, 1994 Mont. Salish & Kootenai Tribes LEXIS 7 (April 20, 1994)

Peregoy, Chair, Civil Appellate Panel:

Introduction

This appeal arises out of a dispute over a contract for educational leave and future employment between Joseph Pablo and the Confederated Salish and Kootenai Tribes. . . .

I. Factual Background

Joseph Pablo is a member of the Confederated Salish and Kootenai Tribes of the Flathead Reservation. . . .

Pablo began working for the Tribes as director of the Family Counseling Unit of the Family Assistance Division. . . . Pablo was appointed program manager of [Tribal Social Services] in January of 1990.

[During Pablo's tenure as] program manager of TSS, . . . there was no indication of the existence of personnel problems, and employee turnover was low. While TSS was subject to a critical federal review during his employment as program manager, Pablo succeeded in rectifying the problems identified in the program review.

In May of 1991, Anna Whiting-Sorrell, acting on behalf of department head Swaney, rated Pablo's overall job performance as program manager of TSS as "outstanding." Whiting-Sorrell found that "Mr. Pablo has taken the Social Service Program and brought it through a very difficult time in both morale and funding. For that he needs to be commended."

Pablo believed that he and the Tribes would mutually benefit and provide better services to the TSS clientele if he held a master's degree. . . . During the summer of 1991, with the encouragement and support of department head Swaney, Pablo received approval from the Tribal Council for a leave of absence to begin studies for an MSW at Eastern Washington University (EWU). The MSW degree is a two-year program which includes one year of on-campus course work and a one-year "practicum" of supervised work experience.

Pablo and the Tribes entered into a "Contract for Leave of Absence, Future Employment and Repayment of Educational Loan." The terms of the contract provided Pablo would be given a nine-month leave of absence for the 1991-92 academic year to complete course work, with a minimum "B" average. The Tribes were to loan him $8,000 at the rate of 7% interest, secured by real property owned by Pablo in Arlee. Upon returning from the educational leave, Pablo was to have resumed his duties and responsibilities as program manager of TSS. The contract required him to complete the MSW program by June 1993, and essentially provided that if Pablo thereafter worked for the Tribes for two years, the loan would be forgiven at the rate of $4,000 plus interest per year. It further provided that if Pablo did not complete the degree, or if he left his employment before the expiration of the two-year loan forgiveness period, either by choice or by termination for specific cause, he would be required to repay the loan. If he would be terminated for other than cause, the Tribes were required to repay the loan. The contract also provided that the prevailing party in litigation would be entitled to reasonable attorney fees and court costs. Finally, the Tribal Court was mandated to be the forum for any cause of action arising under the contract. The document was signed by Michael T. Pablo, Chairman of the Tribal Council, Joseph E. Dupuis, Executive Secretary of the Tribal Council, and Pablo.

. . . [Alcohol and Substance Abuse Prevention] administrator Whiting-Sorrell was to oversee TSS, as well as her own program. . . . In September 1991, Pablo commenced graduate study at EWU, four months after Whiting-Sorrell rated his performance "outstanding" as program manager of TSS.

Whiting-Sorrell volunteered to serve as program director of Tribal Social Services during Pablo's educational leave, although she had no education or experience in social work. She testified that she "took a lackadaisical approach" to her responsibilities when Pablo left, and that she had an "unrealistic" idea of the time required to supervise TSS. It took five months for Whiting-Sorrell to fully implement Pablo's interim management plan. A tribal social worker testified that TSS operations were "chaotic" and "troublesome" during Whiting-Sorrell's tenure, largely as a result of high turnover and changes she made. The social worker also felt that Whiting-Sorrell's lack of background for social work supervision rendered the management of TSS "difficult" for her. Another TSS employee testified that the general working atmosphere at TSS was "out of control" during the period Pablo was on educational leave, including "supervisors not knowing who is supervising who," and directives to secretaries to "write-up" social workers for perceived work deficiencies. . . .

Based upon her involvement with TSS during January 1992, Whiting-Sorrell perceived TSS to be experiencing certain managerial problems. . . .

In response, Executive Secretary Dupuis and managers Swaney and Whiting-Sorrell decided to institute a "transition" period upon Pablo's return to TSS. During this period, Whiting-Sorrell was to function as program manager of TSS, rather than Pablo. . . .

While his rate of pay remained the same as that prior to the "transition" period, Pablo eventually realized he had been effectively stripped of his authority and responsibility as program manager of TSS. . . . Instead, his duties and responsibilities became limited to those of lead social worker, although he was never given an amended job description to reflect such.

On June 30, 1992, Whiting-Sorrell issued Pablo a written reprimand for being "unavailable" to staff on a day that he was home with the flu, notwithstanding that he had called the office early the same day and stated he would be out for at least half of the day. On July 9, 1992, Kimberly Swaney, TSS office manager, issued a memorandum reprimanding Pablo for allegedly creating "undue stress" and "low morale" among the TSS staff, although she had no authority over Pablo. On July 22, Kim Swaney issued a second memorandum reprimanding Pablo, this time for alleged improper management of client files. Ms. Swaney sent copies of both memos to Whiting-Sorrell.

On July 23, Pablo notified Bearhead Swaney in writing that he was not content with his position under the transition structure of TSS. . . . In two discussions, Pablo informed Swaney that he wanted his position as program manager restored. Mr. Swaney declined, verbally citing unspecified "shortcomings" in Pablo's ability to administer TSS.

On July 24, Kim Swaney issued a third memorandum of reprimand to Pablo, directing him to submit a report to her that was apparently due in Tribal Court a few days thereafter. However, the memo indicated Pablo had earlier informed Ms. Swaney that the report had not been completed because the court hearing had been rescheduled. Notwithstanding this explanation, Ms. Swaney demanded that Pablo submit the report in the time frame she imposed, claiming that unnamed support staff members were under "undue stress" because the report had not been completed.

On July 29, 1992, Whiting-Sorrell issued Pablo another disciplinary memorandum, including the threat of termination, for missing a court hearing. . . . The record indicates . . . that the judge ultimately excused Mr. Pablo for his absence.

Pablo believed these memos constituted attempts to provide documentation for his firing. He further believed he no longer had the support of his supervisors for completion of the MSW. . . .

With one month remaining to finalize and begin his practicum, Pablo felt compelled to resign and develop a new practicum with another agency. He submitted his resignation on July 30, 1992, and began anew his efforts to develop a practicum that would lead to the award of the MSW degree. He subsequently worked out a practicum with the Western Montana Regional Mental Health Center, which EWU approved. The court takes judicial notice that Pablo successfully completed his practicum and was awarded the MSW degree by Eastern Washington University in mid-June of 1993, according to schedule. . . .

The trial court awarded Pablo damages for breach of the educational leave and future employment contract. With regard to such damages, the court ruled:

> Damages in a breach of contract situation are limited to those contemplated by the parties at the time the contract was entered, including any amount which would place the injured party in the same position he would have been had the contract been performed.[4]

Under this ruling, the court ordered the Tribes to pay Pablo's $8,000 student loan, plus interest.

On appeal, Pablo seeks additional damages. . . . Pablo also asks us to overturn the trial court's ruling that he was not constructively discharged. He further asks this court to find that the contract at issue contained an implied covenant of good faith and fair dealing, and to rule that the Tribes breached the covenant.

In a cross-appeal, the Tribes . . . contend that they did not materially breach the contract with Pablo, and that Pablo consented to and accepted any modification to the contract that may have occurred.

II. Discussion

. . .

C. Material Breach of Contract

The educational and future employment contract at issue provided, in significant part, that Pablo would resume his position as the program manager of Tribal Social Services immediately upon return from his educational leave. The trial court found that Pablo[ ]

> did not return to the position of Director of Social Services for the Confederated Salish and Kootenai Tribes when his employment with Defendants was reinstated in June of 1992, but instead was placed in a position with duties and

4. *See Pablo v. Confederated Salish and Kootenai Tribes*, No. CV-170-92, Tribal Court of the Confederated Salish and Kootenai Tribes, Memorandum and Order, July 14, 1993 at 11.

> responsibilities normally associated with a lead social worker and was under the supervision of Anna Whiting Sorrell. (Citations omitted.)

While the Tribes do not challenge this finding or the conclusion that they breached the contract, they claim on appeal that the trial court's findings do not support a "material breach." Without citing any legal authority, they argue that because they only intended to deprive Pablo of his contractually guaranteed position on a temporary basis, the deprivation was not material. This argument is frivolous.

In determining whether a breach of contract is material, the significant circumstances must be considered. These include the extent to which the injured party will be deprived of a reasonably expected benefit; the extent to which the injured party can be adequately compensated for the lost benefit; the extent to which the party in breach has already partly performed or made preparations for performance; the likelihood that the party in breach will "cure" its failure to perform; and the extent to which the behavior of the party in breach meets standards of good faith and fair dealing. RESTATEMENT (SECOND) OF CONTRACTS, §275, . . . at 188 (1982). . . .

Returning to the position of program manager of TSS after his educational leave comprised the core of the "future employment" contract between Pablo and the Tribes. The record indicates that Pablo would not have taken an educational leave in the absence of binding, enforceable assurances that he would be able to return to his job. The evidence further indicates it was necessary for Pablo to function as program manager of TSS in order to complete the requirements for the practicum he had negotiated with EWU, and that the practicum was a necessary prerequisite to obtaining the MSW degree — all conditions necessary for Pablo to meet his contractual obligations. Accordingly, Pablo reasonably expected to return to his former job, and the deprivation of this contractually promised benefit, even if "temporary," was of sufficient duration to effectively repudiate the agreement. In short, the provision guaranteeing Pablo his job could not have been of more central importance to the contract, or more material.

Further, the evidence shows that the Tribes declined to cure their breach after several opportunities to return Pablo to his job, and that there was a substantial likelihood that the breach would have continued for at least the remainder of Pablo's educational program — which was the motivating factor for the parties to enter into the contract in the first place. The likelihood that the Tribes would not perform their end of the bargain by returning Pablo to his job in time to complete his negotiated, planned practicum further supports a ruling that the Tribes' breach of contract was material. The trial court correctly held that deprivation of this core contractual benefit constituted a compensable and, therefore, material breach. The Tribes have cited no plausible reason to disturb this sound ruling and we discern none. It is therefore affirmed.

D. Waiver of Breach of Contract

In this appeal the Tribes do not contest the trial court's ruling that they breached their contract with Pablo by unilaterally modifying its terms when they refused to allow him to return to work as the director of TSS. However, the Tribes contend Pablo waived his right to damages for the breach on the basis

that he had knowledge of the modification, and for 34 days continued to perform and receive benefits under the contract. We disagree.

While a material breach does not automatically end a contract, it gives the injured party a choice between canceling the contract and continuing it. . . . If the injured party elects to terminate the contract and acts accordingly, both parties are relieved of further obligations. If the injured party ends the contract "within a reasonable time after becoming aware of the facts," he will not be held to have waived the breach. Nor will a waiver be found where the injured party unsuccessfully attempts to persuade the breaching promisor to reject his repudiation and proceed honorably in the performance of his agreement. . . .

Here, Pablo returned from his educational leave with the intent of carrying out his obligations under the contract, *i.e.*, performing as program manager of TSS, completing his practicum and obtaining his advanced degree, and using his education and experience to further serve the Tribes. He learned of the so-called "transition" period a few days after he returned to work. Soon thereafter Pablo informed department head Swaney that he desired to return to his promised position, as specified in the contract. This was the first of several opportunities Pablo gave the Tribes to cure their breach.

Several weeks later, Pablo again notified Bearhead Swaney, this time in writing, that he was not content with his position under the transition structure of TSS; that he intended to discuss the matter with Executive Secretary Dupuis; and that he would resign if he was not restored to his position of program manager of TSS. Pablo's memo followed two contemporaneous discussions with Mr. Swaney where Pablo again told him he wanted his position as program manager restored. . . . Swaney refused to honor the Tribes' contractual promise. Pablo thus fully realized than he had been effectively stripped of his authority and responsibility as program manager of TSS, and that the tribal management structure had no intention of returning him to his position for the foreseeable future, if at all. One week after this final consultation with the supervisory triumvirate, Pablo resigned.

Under the circumstances, Pablo terminated the contract within a reasonable time after becoming aware of the relevant facts, *i.e.*, that the Tribes had breached the agreement, and that it was futile to attempt to continue to get them to make good on their promise. Accordingly, we hold that Pablo did not waive the Tribes' breach of contract. . . .

E. Constructive Discharge

On appeal, Pablo challenges the trial court's findings of fact and conclusion of law which form the basis of the ruling that he was not constructively discharged. . . .

We thus turn to the question whether, in light of the totality of the circumstances, a reasonable person in Joe Pablo's position would have found the working conditions at TSS so intolerable or discriminatory that he or she would have felt compelled to resign. In this inquiry we are guided by the general rule that a "single isolated instance" of employment discrimination is insufficient as a matter of law to support a finding of constructive discharge. . . . Instead, a plaintiff alleging constructive discharge must show some "aggravating factors," such as a continuous pattern of discriminatory treatment, or a series of other intolerable working conditions. . . .

The evidence in this case shows that when the proper legal standard is applied, the working conditions imposed on Pablo after he returned from educational leave meet the test for constructive discharge. . . .

In the six weeks between his return from his educational leave and his resignation, Pablo was confronted with numerous incidents, conditions and requirements which we conclude a reasonable employee in his shoes would have found "so difficult or unpleasant," or sufficiently intolerable, to compel resignation. Most significantly, the Tribes refused to return him to his former position of program manager of TSS, a violation of the express terms of the educational leave and future employment contract. He thus was unilaterally stripped of the supervisory and administrative authority he had previously held, and for which he was trained. This occurred in a context where his previous job performance as program manager of TSS was rated as "outstanding" by essentially the same people who denied him his contractually promised position. Against this backdrop, Pablo was, in effect, demoted to the position of lead social worker, although he was never given a job description notifying him what his actual new duties and responsibilities would be. The record indicates that the position of lead social worker lacked the authority and responsibility to undertake the tasks Pablo had negotiated with Eastern Washington University for completion of his work practicum with the Tribes — a requirement for the MSW degree, as discussed below. In short, Pablo reasonably believed that his demotion would effectively prevent him from completing his practicum, his degree, and his contractual obligations.

Upon reviewing the entire evidence, we are firmly convinced that it was necessary for Pablo to function as program manager of TSS in order to complete the requirements of his practicum. Pablo's uncontradicted testimony to this effect is corroborated by the documentary record. . . . Accordingly, finding of fact number 17 is clearly erroneous, and is therefore set aside in its entirety. . . .

In addition to breaching the employment contract, the Tribes violated Ordinance 69B, their own Personnel Rules, Regulations, and Procedures Manual, when they effectively demoted Pablo. [The Manual] requires Department Head Swaney, in relevant part, "to insure that the performance of each employee is evaluated":

> C. As the need arises, *i.e.*, when an employee changes positions or when performance problems are occurring and there is a need to document specific areas which need improvement. Ordinance 69B at 25.

If, in fact, department head Swaney believed there were serious administrative problems warranting a transition period before Pablo was returned to his full responsibilities as program manager at TSS, he was required by tribal law to conduct a written performance appraisal of Pablo. . . . At no time during his employment was Pablo given notice of the specific reasons for his demotion. . . . Pablo was thus denied the opportunity to respond to the alleged problems which led to his demotion, the transition period, and ultimately to his resignation.

In addition to the above, other aggravating factors contributed to the intolerable working conditions which the Tribes imposed on Pablo after he returned from educational leave. He was required to answer to an interim manager who

had no training in social work, and who disciplined and threatened to suspend and/or terminate him for what the record indicates are ostensibly pretextual or picayune reasons. He was further reprimanded on two occasions by an employee who had no authority over him, and whom Pablo had previously supervised. He was excluded from program manager meetings, and found that other government officials external to TSS were equally confused about his role. Some fellow staff members felt the atmosphere at TSS to be uncertain, chaotic and fearful, and shared Pablo's belief that he would be fired or forced to quit. . . .

Considering the totality of circumstances, as we must, the number and nature of "aggravating factors" between the time of Pablo's return from educational leave and his resignation created a pattern of intolerable working conditions sufficient to establish constructive discharge. . . . Considering the totality of the circumstances, Pablo's resignation was reasonable and constitutes constructive discharge. We hold accordingly, . . . that Pablo's resignation was voluntary. . . .

G. Damages

. . . Pablo suffered a loss of $28,338 in salary and wages during the contract period as a result of the Tribes' actions. In addition to tendering this amount to Pablo, the Tribes shall pay the interest on the $9,300 personal loan Pablo was forced to take out to complete his second year MSW, for such would not have been necessary but for the Tribes' breach of contract and constructive discharge. Of course, since we awarded Pablo lost salary and wages for the Tribes' violations of the contract, he is liable for the princip[al] of the $9,300 personal loan. Pursuant to Rule 14 of the CS&KT Tribal Appellate Rules, Interest on Judgments, the Tribes shall pay Pablo interest on the judgment of $28,338, at the maximum rate allowed by law, commencing on July 14, 1993, the day the lower court entered its judgment in this case, and continuing to the day payment is tendered. Pursuant to Rule 15, Tribal Appellate Rules, Costs on Appeal, costs associated with this appeal are hereby awarded to Pablo. . . .

NOTES

1. In *HCN Treasury Dept. v. Corvettes on the Isthmus*, 7 Am. Tribal Law 78 (Ho-Chunk Nation Supreme Court 2007), the court affirmed a trial court ruling that there was no subject matter jurisdiction over a contract breach claim because the tribal agent had no authority to enter into a contract, there was no signed contract, and no positive law to apply:

> This case comes to the Court as a contract dispute but with an important twist. . . . Remarkably, the contract in dispute is a rather routine one between a Hotel and Convention Center to rent space in the appellant's place of business in the ordinary course of business.
>
> The problem with this simple recitation of the issue is that there is no signed contract. Both parties proceeded on the basis that they thought they had the authority to enter into contracts. . . .
>
> . . . [T]he appellant posits that this is not a case in law, *i.e.*, a suit for damages, but rather a suit in equity. It claims this is an oral contract yet

> fails to cite the law, custom or tradition which gives the Court's of this Nation subject matter jurisdiction.
>
> . . . The problem the Court notes is that this is a confusion of principles. The appellant has sued for breach of contract but desires a remedy in equity, quantum meruit, which is measured in monetary terms, damages. This is still fundamentally a legal remedy which requires the Court's to have substantive law to apply. It is said that equity does not assist a party with unclean hands. In other words, a party who creates the problem should not be able to claim foul for its own misdeeds.
>
> . . . [The facts leave] the Court without a clear indication that there was a meeting of the minds as to the substance of the contract. Both sides claimed the other was in breach at least to some of the terms, none of which were memorialized in writing.

HCN Treasury Dept., 7 Am. Tribal Law at 79-80. The court added that the tribal legislature had an opportunity to correct this problem by adopting commercial codes:

> This problem is of the Nation's own making and can be solved by having the HCN Legislature enact a commercial code that explicitly and not implicitly delegates authority to enter into contracts to sub-entities of the Nation. While the appellant cites a parade of horribles that any person can refuse to pay the Nation and get away with it, this is highly overblown given that the Nation has operated for nearly 13 years under the current Constitution with no such litany of broken contracts evident. It is not for the Court[]s to make positive law. It can recognize custom and tradition as a basis of law, but given the fact that Ho-Chunk people did not develop an advanced commercial system which gave clear rules on what to do in case of a breach leaves this Court with little recourse. The HCN Constitution is explicit in giving the authority to make laws to the HCN Legislature. The Courts cannot exceed the authority which created them.

HCN Treasury Dept., 7 Am. Tribal Law at 80.

2. In *Tribal Credit Program of Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Bell*, 7 Am. Tribal Law 10 (Confederated Salish and Kootenai Tribes Court of Appeals 2007), the court held that the foreclosure action against a mortgagor who succeeded in the interest of her deceased parents was a breach of contract:

> This issue arises from the modification freely entered into by Tribal Credit and [defendant], whereby $200 every two weeks was deducted from her pay as a Tribal employee and applied in equal measure to each of the four loans then outstanding. [Defendant] performed her part of the bargain for over four years until Tribal Credit unilaterally commenced foreclosure proceedings. We hold that the [defendant was] not in default, that Tribal Credit breached the agreement thereby excusing the further performance of the [defendant]. . . .
>
> However, it would not be equitable to excuse the debt entirely. To do so would unjustly enrich the [defendant]. . . .
>
> We must also consider the effect of plaintiff's failure to respond to Michel's reasonable efforts to determine the status of her father's loan accounts. . . . Upon written request for good cause by an interested party, including the holder of an interest in the mortgaged real estate, a mortgagee has a

> duty to disclose in writing within a reasonable time, the terms and status of the underlying obligation. Failure to respond gives rise to liability for damages. . . .
>
> We hold that plaintiff failed to sustain its burden of proof for foreclosure. We further hold that credit should be given for the sum of $79,203.19, which the record shows without contradiction that [defendant] paid on the two notes still in contention. However, she must account for the value of the benefit conferred upon her[.] . . . [W]e do not consider it equitable to permit plaintiff to recover interest after plaintiff had a reasonable time to respond to Melissa's status request. Also, even though the maintenance of insurance was not plaintiff's obligation, we do not consider it equitable to permit plaintiff to be reimbursed for insurance premiums when they made no move to recover the benefit.

Tribal Credit Program, 7 Am. Tribal Law at 18-20.

3. In *Loyal Shawnee Cultural Center, Inc. v. Peace Pipe, Inc.*, 6 Am. Tribal Law 71 (Cherokee Nation Supreme Court 2006), the court applied the federal Rule 19 of the Federal Rules of Civil Procedure in holding that the Shawnee Tribe of Indians was merely a "necessary" party, and not an "indispensable" party that would require dismissal in a contract breach action:

> Rule 19 of the Federal Rules of Civil Procedure has a two tier test to determine whether the Trial Court has discretion in ordering the joinder of a third party. If the Trial Court finds that the Shawnee Tribe of Indians is an indispensable party for determination of the issues between the [parties], then the Court would be compelled to order the joinder of the Shawnee Tribe of Indians; or, if the Court finds that the joinder of the Shawnee Tribe of Indians may be necessary to avoid a second proceeding to determine issues between the Plaintiff/Appellant and Shawnee Tribe of Indians concerning the same subject matter, then the Trial Court has discretion in the orderly administration of his cases, to determine the joinder of third parties.

Loyal Shawnee Cultural Center, 6 Am. Tribal Law at 71.

4. Like federal and state courts, tribal courts typically do not find that a tribe waives its immunity from suit by filing counterclaims to a breach of contract action. In *Novak Construction Co., Inc. v. Grand Traverse Band of Ottawa and Chippewa Indians*, 2001 WL 36194389 (Grand Traverse Band of Ottawa and Chippewa Indians Court of Appeals 2001), the court wrote:

> A second, equitable, argument is that the Tribe's filing a Counter-Claim over the same contract is a waiver of the defense of sovereign immunity since the tribe has brought itself into the court by its own consent. A third argument is that the Tribal Constitution grants this court the authority to hear cases "arising under the Constitution" and that the Tribal Council's entering into a contract is granted under Article V, Section 2; therefore granting jurisdiction of the Appeals Court. However, there are no authorities cited for those novel interpretations. This action clearly refers to a contract action so that it cannot involve reviewing legislative acts. It "arises" under the contract, not under the Constitution.
>
> Finally, the argument is that the Tribe is equitably estopped from asserting sovereign immunity if it is allowed to bring claims against the Plaintiffs/Counter Defendant/Appellants. This while removing their right to defend

or pursue their own claims which involve breach of the same contract rights that the Tribe relies on. . . .

The other arguments of the fundamental unfairness to leave a party with no remedy while allowing a government the authority to counter sue are denied as without a basis in law. This is evident in most jurisdictions as an attribute of sovereignty. With very limited exceptions, the federal government may sue a citizen for violation of a contract while that government enjoys sovereign immunity except where it has agreed to waive it. The state of Michigan has enacted legislation with a similarly harsh result to bar a suit in its courts by an unregistered, out-of-state contractor doing business in Michigan (a non-citizen of the sovereign) or by a non-licensed residential contractor (a citizen), yet Michigan may bring suit, or allow, an action against either one in spite of their own lack of a forum for a remedy. Those contractors could avoid the harsh results by taking action to avoid these results before entering into their contracts, just as the Plaintiff/Appellant could have done here, but failed to do anything in advance.

State and federal Statutes of Limitation regularly time-bar all remedies by individuals, but not for the government. Governments must make decisions that leave persons without a remedy while they remain subject to counterclaims in many areas. Most seem unfair to the person affected. There are many wrongs that do not have a right to a remedy in areas beyond sovereign immunity. . . .

Novak Const., 2001 WL 36194389, at *1-3.

B. CONTRACT DISPUTE RESOLUTION

1. ARBITRATION

Confederated Tribes of Grand Ronde v. Strategic Wealth Management, Inc.

Confederated Tribes of the Grand Ronde Community of Oregon Tribal Court, No. C-04-08-003, 6 Am. Tribal Law 126, 32 Indian Law Rep. 6148 (August 5, 2005)

The opinion of the court was delivered by: Suzanne Ojibway Townsend, Acting Tribal Court Judge . . .

I. Issue Presented

Petitioner, the Confederated Tribes of the Grand Ronde Community of Oregon ("the Tribe" or "Petitioner") asks the Court to vacate or modify the award of $1,723,191.10 it was ordered to pay to Respondents Strategic Wealth Management ("SWM"), Patrick Sizemore, Paradigm Financial Service, Inc. ("Paradigm") and Mark Sizemore. This award represents attorney fees and costs to be paid to Respondents as prevailing parties, and is part of the Final Award dated August 13, 2004, in American Arbitration Association (AAA) Case No. 75 Y 181 00066 03JRJ, Confederated Tribes of the Grand Ronde Community of Oregon, Claimant and Strategic Wealth Management, Inc.,

Patrick Sizemore, Paradigm Financial Services, Inc., and Mark Sizemore, Respondents. . . .

II. Background

The parties do not dispute the relevant facts concerning their history and prior relationship.

In 1992, the Tribe selected Respondent SWM to provide financial and investment advice and services to the Tribe. The decision to hire SWM was made by the Grand Ronde Tribal Council at a meeting on January 8, 1992. The minutes from that meeting provide in relevant part as follows:

> [The Tribal Controller] suggested the Council consider selecting a portfolio method of investing funds whereby the money would be invested in a number of different areas (i.e., stock market, C.D.'s). Resolution No. 002-92. Following further explanation, [Councilman Ray McKnight] moved to adopt a resolution to authorize moving the Tribal funds from the Bureau of Indian Affairs to private money managers to insure better earnings and more accountability of the funds. [Councilwoman Kathryn Harrison] seconded the motion. Motion carried by a vote of 7 yes, 0 no and 0 abstentions.

. . . Resolution No. 002-92, which was approved by Tribal Council at the January 8, 1992, meeting, provides as follows:

> NOW, THEREFORE BE IT RESOLVED, that the Tribal Council for the Confederated Tribes of the Grand Ronde Community of Oregon hereby adopts the Tribal Trust Fund Investment Policy and authorizes the Tribal Chairman, Executive Officer, Finance Officer and one other Tribal Council member designated by the Tribal Chairman to execute the investment policy agreement with Strategic Wealth Management and to make tactical allocations as necessary throughout the life of this agreement.

On January 9, 1992, the Tribe and Respondent SWM entered into an Investment Advisory Agreement ("1992 Agreement") the terms of which provides that SWM would provide financial advice, training, consulting and investment services to the Tribal Council and to other Tribal managers and executives. . . .

The 1992 Agreement did not contain an attorney fees clause authorizing an award of fees to a prevailing party in subsequent actions under the Agreement.

Section 11(i) of the 1992 Agreement is a "choice of laws" provision that provides as follows:

> The validity of this Agreement and of any of its terms or provisions, as well as the rights and duties of the parties hereunder shall be governed by the laws of the State of Washington.

Section 11(h) of the 1992 Agreement provides as follows:

> All controversies which may arise between Client and Advisor concerning any transaction or the construction, performance or breach of this or any other agreements (sic) between them whether entered into prior, on, or subsequent to the date hereof, shall be determined by arbitration. Arbitration is final and binding on the parties. The parties are waiving their right to seek remedies in

> court, including the right to jury trial. Pre-arbitration discovery is generally more limited than and different from court proceedings. The arbitrator's award is not required to include factual findings or legal reasoning and any party's right to appeal or to seek modification of rulings by the arbitrators is strictly limited. The panel of arbitrators will typically include a minority of arbitrators who were or are affiliated with the securities industry. Any arbitration shall be in accordance with the rules then applying of the American Arbitration Association, New York Stock Exchange or the National Association of Securities Dealers, at Client's election. If Client fails to make this election within five days of receipt of a written request, then he authorized Advisor to make this election. The award of the arbitrators or of the majority of them, shall be final and judgment (sic) upon the reward (sic) rendered may be entered into any court State or Federal, having jurisdiction. Client specifically agrees that at least one of the arbitrators must be knowledgeable to (sic) the type of securities transactions in his account or knowledgeable as to any investment recommended or effected (sic) on his behalf.

Patrick Sizemore provided the bulk of the initial services under the 1992 Agreement. Significant services were provided by SWM (through its President, Patrick Sizemore) on the Reservation by way of meetings, conferences, training sessions, financial updates, accounting reports and communications, both in person and by letter. . . .

In 1998, SWM presented a group of loans to the Tribe that had been brokered by Respondent Paradigm. Mark Sizemore, a brother of Patrick Sizemore was the President of Paradigm. Thereafter, the Tribe invested in at least 27 loans that had been brokered by Paradigm. Paradigm received brokerage fees on each loan, paid by the Tribe.

Disputes arose between the Tribe and SWM, and between the Tribe and Patrick Sizemore, Mark Sizemore and Paradigm. The Tribe combined its claims against all Respondents and filed suit in Multnomah County Circuit Court in *Confederated Tribes of the Grand Ronde Community of Oregon v. Strategic Wealth Management Inc., et al.*, Case No. 01-00-11623. The Tribe alleged claims against all Respondents under the Oregon Securities Act and for common law breach of fiduciary duty, fraud, negligent misrepresentation and breach of contract. The Tribe's claims involved both the 1992 Agreement with SWM and certain later agreements and dealings involving investment advice and related activities provided by SWM and the other Respondents. . . .

On or about February 3, 2003, the Tribe filed a Demand for Arbitration with the American Arbitration Association ("AAA"). Three AAA arbitrators were assigned to hear the Tribe's claims. Over the Tribe's objections as to the location, the arbitration hearings were held in Seattle, Washington over several days in March and April, 2004. The Final Award was issued on August 13, 2004.

The Final Award denied all of the Tribe's claims against all Respondents. The Final Award further included an affirmative award of attorney fees and costs against the Tribe in the following amounts:

> In favor of Respondents SWM and Patrick Sizemore:
>
> $1,273,395.00 in attorney fees,
> $158,007.00 in costs;
> $39,621.79 in arbitrator compensation costs

In favor of Respondents Paradigm and Mark Sizemore:

$145,375.00 in attorney fees,
$6,485.00 in costs;
$1,250.00 in AAA expenses;
$99,057.41 in arbitrator compensation costs.

In their Final Award, the arbitrators noted that the 1992 Agreement did not contain an attorney fees provision. However, the arbitrators reasoned that because the AAA rules in effect at the time of the arbitration authorized the arbitrators to "grant any remedy or relief that the arbitrator deems just and equitable within the scope of the agreement of the parties," they were authorized to look beyond the agreement to the Oregon Securities Law. The arbitrators found authority for the award of attorney fees and costs in the prevailing party "fee shifting" provisions of Oregon Securities Law, general Oregon law concerning the award of attorney fees and costs, and AAA Rules. . . .

The Tribe objected to Respondents' applications for attorney fees and costs in the arbitration proceeding on the basis that the Tribe had not waived its sovereign immunity with respect to such an affirmative award. In response, the arbitrators determined that the Tribe had waived its immunity from suit generally with respect to SWM in the 1992 Agreement and that such a general waiver encompassed an award of attorney fees and costs. The arbitration panel determined that the Tribe had also waived its sovereign immunity with respect to Patrick Sizemore individually, even though he was not a signatory to the 1992 Agreement. The panel noted that the Multnomah County Circuit Court had compelled arbitration of the Tribe's claims against both SWM and Patrick Sizemore under the 1992 Agreement, and thus applied that decision as the "law of the case."

With respect to Respondents Paradigm and Mark Sizemore, the arbitrators acknowledged that these Respondents were not signatories of the 1992 Agreement, or to any other contract binding the Tribe to arbitration. However, the arbitrators determined that the Stipulation and later Multnomah County Circuit Court Order implementing that stipulation constituted a waiver of the Tribe's sovereign immunity. . . .

III. Analysis

A. Jurisdiction

. . .

1. Personal Jurisdiction

a. Tribal Code

Section 310(d)(1)(A) of the Tribal Court Ordinance describes this Court's jurisdiction in relevant part as follows:

> [A]ll civil actions where there are sufficient contacts with the Grand Ronde Reservation upon which to base jurisdiction consistent with the Constitution and laws of the Tribe and the United States. It is the intent of this paragraph to authorize the broadest exercise of jurisdiction consistent with these limitations. Without limiting the foregoing, the Court

> shall have jurisdiction over the following matters: proceedings involving . . .
>
> contracts to which the Tribe is a party; . . .

We first note that nothing in the Tribal Court Ordinances limits this Court's jurisdiction to those contracts, such as the 1992 Agreement, that are in writing. And, the Tribal Court Ordinance does not limit the Court's jurisdiction to only those activities that involve a contract, formal or otherwise. Rather, the Ordinance sets out a very broad jurisdictional provision that encompasses "all civil actions where there are sufficient contacts with the Grand Ronde Reservation upon which to base jurisdiction consistent with the Constitution and laws of the Tribe and the United States."

We find nothing in the laws of the Tribe or the Tribal Constitution to prohibit this Court from taking personal jurisdiction over Respondents in this matter; indeed based on the facts described above, taking jurisdiction over Respondents is fully consistent with the provisions of the Tribal Court Ordinance. . . .

2. Subject Matter Jurisdiction

Subject matter jurisdiction is defined as a "court's power to hear and determine cases of the general class or category to which the proceedings in question belong; the power to deal with the general subject involved in the action." BLACK'S LAW DICTIONARY (6th Ed.)

The authority of the Grand Ronde Tribal Court is set forth in the Tribe's Tribal Code. Tribal Court Ordinance Section 310(d)(1)(A) gives this Court subject matter jurisdiction over:

> [A]ll civil actions where there are sufficient contacts with the Grand Ronde Reservation upon which to base jurisdiction consistent with the Constitution and laws of the Tribe and the United States. It is the intent of this paragraph to authorize the broadest exercise of jurisdiction consistent with these limitations. Without limiting the foregoing, the Court shall have jurisdiction over the following matters: proceedings involving . . .
>
> contracts to which the Tribe is a party; . . .

Despite Respondents' desire to characterize the parties' dispute as limited to the arbitration proceeding itself, the issues before this Court all revolve around the 1992 Agreement, the later contracts, written or oral, under which the various Respondents provided services to the Tribe, and the various consensual services the Respondents provided to the Tribe on the Tribe's reservation.

Respondent also raised an issue under the provision of the 1992 Agreement which provides that judgment on the arbitration award "may be entered into any court, State or Federal, having jurisdiction." Absent language that clearly designates a certain forum as the exclusive forum, such a clause is not mandatory, and does not exclude another court. . . .

As noted above, all Respondents had significant relations with the Tribe such that this Court may extend personal jurisdiction over them in this action. Nothing in the contracts between the parties provides for jurisdiction

exclusively in another court. The Tribal Court ordinance thus provides this Court with subject matter jurisdiction in this matter.

B. Sovereign Immunity

The concept of sovereign immunity derives from the common-law concept that the sovereign cannot be sued without its consent. *Nevada v. Hall*, 440 U.S. 410, 414-415 (1979). Indian Tribes enjoy sovereign immunity from suit similar to that enjoyed by the United States. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978); *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 512; 60 S. Ct. 653, 656, 84 L. Ed. 894 (1940). Sovereign immunity shields tribes from suits for monetary damages, and its purpose is to protect the Tribe's assets from loss through litigation. *Cogo v. Central Council of the Tlingit & Haida Indians*, 465 F. Supp. 1286, 1288 (D. Alaska 1979). Only Congress or the Tribe itself may waive the Tribe's immunity from suit. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998).

As this Court has previously opined, tribal sovereign immunity is "rooted in the unique historical relationship between Indian tribes and United States government: Indian tribes are immune from suit because they are sovereigns predating the United States Constitution and because such immunity is necessary to preserve their autonomous political existence." *Guardipee*, Case No. C-91-002-LJM at 2-4. . . .

An Indian Tribe is not subject to suit in state court for either on- or off-reservation commercial conduct unless Congress or the Tribe has expressly waived the Tribe's immunity from suit. *Kiowa*, 523 U.S. at 760. As Respondents point out, it is not necessary that specific words waiving the Tribe's immunity be included in a waiver. *See C&L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001). Still, such a waiver of sovereign immunity must be unequivocally expressed and it is to be narrowly construed. *Santa Clara Pueblo*, 436 U.S. at 58; *United States v. Testan*, 424 U.S. 392, 399, 96 S. Ct. 948, 37 L. Ed. 2d 114 (1976). . . .

Finally, a voluntary waiver of sovereign immunity by an Indian tribe does not waive the Tribe's immunity for cross-claims or counter-claims. *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. at 511-12; *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). And, a general waiver of sovereign immunity may not be construed to extend to attorney fees unless the sovereign has clearly indicated that it does. *Fitzgerald v. United States Civil Service Commission*, 554 F.2d 1186, 1189 (D.C. Cir. 1977) (holding that a general provision in the Veteran's Preference Act allowing the Veterans Commission "to take corrective action" was not a sufficiently express waiver of sovereign immunity to allow for the award of prevailing party attorney fees). . . .

Based on the history described above, it is clear that absent either a general waiver of immunity with respect to prevailing party attorney fees and costs under an applicable Tribal code provision or a clear specific waiver by the Tribe in a specific contract, the Tribe may not be assessed attorney fees and costs in any contractual dispute. For purposes of a waiver of sovereign immunity, this

Court finds that if the Tribe did not specifically waive its immunity from an award of prevailing party attorney fees and costs, then there is no jurisdiction for a court to enforce such an award, either under the Oregon Securities Law or any other Oregon or federal law. This analysis is consistent both with the purposes of the sovereign immunity doctrine, with the long line of jurisprudence interpreting that doctrine and with the "American Rule" that recovery of prevailing party fees is not implicit, but must be found in either statute or contract. *See Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975).

As discussed below, only Congress and the Tribe itself may waive the Tribe's immunity from suit. Respondents do not argue that Congress has waived the Tribe's immunity from suit. This Court, then, looks to the facts presented to determine whether the Grand Ronde Tribal Council expressed, clearly and unequivocally, its legislative intent to waive its sovereign immunity with respect to an affirmative award of prevailing party attorney fees and costs.

1. SWM and Patrick Sizemore

Respondents contend that, with respect to SWM and its President, Patrick Sizemore, the Tribe waived its sovereign immunity when it entered into the 1992 Agreement. The Court looks to both the specific provisions of that Agreement and the history surrounding its adoption to determine legislative intent.

As noted above, the arbitration clause contained in the 1992 Agreement does not contain an attorney fees provision. The arbitration clause provided only that

> [a]ny arbitration shall be in accordance with the rules then applying of the American Arbitration Association, New York Stock Exchange or the National Association of Securities Dealers, at Client's election.

At the time the 1992 Agreement was signed, the AAA rules did not provide for an affirmative award of attorney fees. Despite the fact that neither the underlying contract nor the AAA rules referred to in the contract contained a fee shifting provision with respect to prevailing party attorney fees and costs at the time the Grand Ronde Tribal Council issued its Resolution approving the 1992 Agreement, Respondents urge the Court to imply such a waiver from the language in the 1992 Agreement requiring "all controversies" to be submitted to arbitration. In the alternative, Respondents suggest that the Court look outside the 1992 Agreement to AAA rules put in place after the 1992 Agreement was signed, or to the Tribe's use of Oregon securities laws to find a basis for the waiver.

With respect to an implied waiver, Respondents suggest a very expansive interpretation, arguing that because the arbitration provision in the 1992 Agreement requires the parties to arbitrate "all controversies" that may arise between Client and Advisor concerning "any transaction or the construction, performance or breach of this or any other agreement between them," then any claim Respondents have with the Tribe necessarily provides Respondents with a potential recovery against the Tribe's treasury. This Court declines to interpret the arbitration provision in the 1992 Agreement so broadly. To do so would fly in the face of traditional rules of statutory construction, which

require courts to strive above all else to interpret the intent of the legislature. . . .

As noted above, Respondent SWM drafted the 1992 Agreement and presented it to the Tribe. It is thus proper for this Court to construe the contract in the light most favorable to the Tribe. A more reasonable interpretation of the 1992 Agreement's arbitration clause would limit the scope of the waiver to any claims arising directly under the contract for its breach, and perhaps to any claims necessarily or closely related to a breach of the Agreement. This interpretation does not necessarily or even incidentally include prevailing party attorney fees. Indeed, absent an attorney fee recovery clause in a statute or contract, recovery of attorney fees is generally not available. . . .

Respondents also point to the holding in *C&L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001), arguing that it is controlling here. In that case, the Citizen Band Potawatomi Indian Tribe of Oklahoma signed a construction contract with C&L Enterprises that included an arbitration clause. After arbitration, an award was rendered in favor of C&L Enterprises in an amount that included damages and attorney fees. On appeal, the U.S. Supreme Court determined that the agreement the Potawatomi Indian Tribe had signed constituted a clear consent to arbitration and that such a consent constituted a clear waiver of the Tribe's sovereign immunity from suit by C&L Industries, and also, by way of the choice of laws provision in the contract, constituted a consent to the enforcement of arbitral awards in Oklahoma State Court. Because the underlying arbitration award in *C&L Enterprises* included an award of attorney fees and costs, Respondents urge the Court to conclude that the holding is dispositive here.

This Court finds no indication that the court in *C&L Enterprises* considered the scope of the Tribe's waiver of sovereign immunity, and in particular the issue of whether the Tribe's waiver was broad enough to include an affirmative award of attorney fees and costs against the Tribe. Neither does the Court find anything in the holding to indicate that the decision altered longstanding requirements that a waiver of sovereign immunity must be clear and unequivocally expressed.

Although the arbitral award reviewed by the Court in *C&L Enterprises* included an award of attorney fees and costs against the Tribe, the propriety of the attorney fee award was not explicitly addressed, nor does it appear that the Tribe specifically raised the issue of attorney fees and costs as a separate issue. Rather, the Court more generally concluded that under the specific circumstances and with respect to the specific language of the contract before the Court, the Tribe had "clearly consented to arbitration and to the enforcement of arbitral awards in Oklahoma State Court . . ." and the matter was remanded back to State court for further proceedings. *C&L Enterprises*, 532 U.S. at 423. The holding in *C&L Enterprises* is thus of little assistance regarding the question whether a Tribe waives immunity for an affirmative award of attorney fees merely by entering into a contract with an arbitration clause.

And, even if the holding in *C&L Enterprises* applies such that the underlying arbitration clause constitutes a clear waiver of the Tribe's immunity with respect to its agreement to arbitrate and to have the arbitration award enforced

in any court having jurisdiction to do so (a determination this Court need not and does not make), it would not follow that the arbitration clause is also an express waiver of the Tribe's immunity with respect to prevailing party fees and costs (or pre-judgment interest).

With respect to Respondents' contention that the Tribe waived its immunity for an award of attorney fees because the AAA rules had changed by the time the Tribe filed its suit and was ordered to arbitration, this Court finds little merit in that argument. It might be reasonable to interpret the arbitration provision as evidence of the Tribe's intent to be bound by any procedural rules that the AAA had in place at the time a claim under the agreement was arbitrated. However, the interpretation Respondents urge goes well beyond that. To interpret the Tribal Council's legislative action as intending to allow the scope of its waiver of immunity (and thus the degree of risk at which the public treasury was placed) to be substantively altered at will by later actions of an outside party is an interpretation this Court finds untenable. Such a broad construction of the Tribal Council's intent would defeat the very protections intended by the doctrine of sovereign immunity.

And, even if Respondents are correct that the Tribe agreed to be bound by any future changes to the AAA rules, it would not necessarily follow that the Tribe's agreement would provide authority for an arbitral award of prevailing party fees. This is so because under AAA rules, arbitrators would still require a statutory or contractual basis upon which to base such an award. . . . This authority would be found only in the parties' underlying contract (which it is not in this instance) or, in this case, in Oregon Securities Law.

Thus, the question becomes whether the Tribe waived its sovereign immunity with respect to an affirmative award of prevailing party attorney fees, simply by bringing suit under Oregon Securities Law. In answer to this question, cases interpreting waivers of sovereign immunity in the context of counterclaims and cross claims are more on point.

As discussed above, the United States Supreme Court has held that the United States is immune from cross-claims, except where Congress has consented to their consideration. *United States v. U.S. Fidelity and Guaranty Co.*, 309 U.S. at 512. And, with respect to counterclaims against a sovereign where immunity has not been waived, a claimant is limited in his recovery to amounts in recoupment. *Bull v. U.S.*, 295 U.S. 247, 262, 55 S. Ct. 695, 79 L. Ed. 1421 (1935). A claim for attorney fees is not in the nature of a recoupment, but is rather affirmative relief. *See Woelffer v. Happy States of American, Inc.*, 626 F. Supp. 499, 503 (N.D. Ill. 1985); *U.S. ex rel. Dept. of Fish and Game v. Montrose*, 788 F. Supp. 1485, 1495 (C.D. Cal. 1992). Absent an express waiver of sovereign immunity with respect to attorney fees against the plaintiff sovereign, such an award would constitute an impermissible affirmative judgment against the sovereign. . . . And, as noted above, a general waiver of sovereign immunity does not extend to cover attorney fees unless the Tribe makes such a waiver express. . . .

To summarize: Nothing in the arbitration provision or any other contract between the Tribe and SWM demonstrated an unequivocal and express waiver of sovereign immunity with respect to an affirmative award of prevailing party attorney fees and costs against the Tribe. And, nothing in the evidence

presented to this Court demonstrates that the Grand Ronde Tribal Council either discussed or anticipated that it was authorizing a contract that would place it at risk for attorney fees and costs should it arbitrate claims under the 1992 Agreement. Nothing the Tribe did by way of filing its suit in Multnomah County Circuit Court can be said to constitute a waiver with respect to an affirmative award of attorney fees and costs.

In the absence of any facts to demonstrate the intent of the Tribal Council to waive its immunity with respect to the recovery of prevailing party attorney fees and costs, it would be improper for this Court to imply a waiver that was nowhere expressed by the Tribal Council, either explicitly or implicitly.

2. Paradigm and Mark Sizemore

Respondents point to the 2002 Stipulation wherein the Tribe agreed to arbitrate its claims against these Respondents as providing the requisite wavier of sovereign immunity. This reliance is misplaced.

In order to decide this case, it is not necessary for this Court to determine whether or not the attorney for the Tribe had specific authority to enter into the stipulation and to arbitrate the Tribe's claims against Respondents Paradigm and Mark Sizemore. This is so because the issue here is not the waiver with respect to the agreement to arbitrate; rather, the issue is the scope of the waiver, if any. In this instance, the Court concludes, as above, that even assuming the Tribe waived its immunity with respect to the agreement to arbitrate, there is nothing in the record to demonstrate that the scope of such a waiver covered an affirmative award of prevailing party fees and costs. . . .

Since 1994, the Grand Ronde Tribal Code has provided as follows:

> The Tribal Council retains the exclusive authority to waive the sovereign immunity of the Tribe including the Tribal Council members, Tribal Officer, Tribal Attorney, Tribal staff and committee members from suit. Any such waiver must be expressly and specifically authorized by Tribal Council Resolution.

Tribal Government Organization and Procedures Ordinance, Tribal Code Section 210(c)(2).

No evidence has been provided to the Court that the Tribe's legislative body — i.e., the Tribal Council — clearly and expressly waived the Tribe's immunity from suit with respect to Paradigm and Mark Sizemore's affirmative recovery of prevailing party attorney fees. . . .

Respondents raise additional defense, including:

C. Waiver and Estoppel

A claim of sovereign immunity is a "jurisdictional prerequisite which may be asserted at any state of the proceedings." . . .

The Tribe is not subject to claims of waiver or estoppel when it raises the defense of sovereign immunity. . . .

IV. Summary

This Court need not look to the specific provisions of either the Federal Arbitration Act or the Oregon Arbitration Act ("Arbitration Acts") in order to make its determination. It is not the case, as Respondents contend, that if the

arbitrators simply "got it wrong" on the legal issue of the waiver of sovereign immunity, then Petitioner is limited to the specific and limited review provisions of the Arbitration Acts for its remedy. Because sovereign immunity is jurisdictional it may be raised at any point in a proceeding. When reviewing an arbitration award in the context of a claim of sovereign immunity, the court is not limited in its review, but reviews the issue of jurisdiction issue de novo. *Missouri River Services, Inc. v. Omaha Tribe of Neb.*, 267 F.3d 801, 852 (8th Cir. 2001).

Upon its de novo review of the limited question of whether the Tribe waived its sovereign immunity with respect to the affirmative award of prevailing party attorney fees and costs, this Court finds that the Tribe did not waive its sovereign immunity in any of the agreements it entered into with Respondents, nor did the Tribe waive its immunity when it chose to file suit under the Oregon Securities Laws or when it stipulated to arbitrate its claims with Respondents Paradigm and Mark Sizemore.

Because the Tribe did not waive its sovereign immunity with respect to an award of prevailing party attorney fees and costs, the arbitrators had no authority to award prevailing party fees and costs. By doing so, the arbitrators went beyond the terms of the agreement under which the arbitration occurred. Absent a waiver of sovereign immunity, a court has no jurisdiction to enforce such an award.

While this result may strike some as unfair, the Court notes that the doctrine of sovereign immunity has been in existence since the inception of the United States. The Court further points out that all Respondents are savvy businessmen with long histories of business dealings in Indian Country. Even if equity were a defense to the exercise of a sovereign's immunity from suit, which it is not in this case, these Respondents were in a better position than most both to recognize and to take action to reduce the risks associated with doing business with a Tribal Sovereign.

V. Conclusion

The Court concludes that the arbitration panel did not have authority to award attorney fees and costs against the Tribe because the Tribe did not waive its sovereign immunity with respect to such an award. By awarding attorney fees and costs against the Tribe, the arbitration panel thus exceeded the scope of its authority. For that reason, there is no jurisdiction for the enforcement of that award. That portion of the Final Award in American Arbitration Association Case No. 75 Y 181 00066 03JRJ, Confederated Tribes of the Grand Ronde Community of Oregon, Claimant and Strategic Wealth Management, Inc., Patrick Sizemore, Paradigm Financial Services, Inc., and Mark Sizemore, Respondents assessing attorney fees and costs against the Tribe is void and is hereby vacated.

NOTES

1. When an Indian tribe engages in commercial business operations both on and off the reservation, the tribal courts resolving the disputes that arise out of these transactions employ intertribal common law to resolve them.

Confederated Tribes of Grand Ronde v. Strategic Wealth Management, Inc. is a good example of a circumstance where tribal law adopted Anglo-American legal constructs as a means of adaptation to modern transactional and business needs. The underlying contract (a contract relating to financial and investment services) and the arbitration clause, coupled with its incorporation of tribal sovereign immunity, were all Anglo-American legal constructs utilized by the Tribes. The tribal code provisions establishing subject matter jurisdiction mirrored federal rules in significant ways. The federal common law allowing for tribal court jurisdiction over the nonmembers and the defenses raised by SWM were all Anglo-American legal constructs. The tribal court relied upon its own authority for the background policy relating to tribal sovereign immunity and many federal court cases for much of the remainder of the issues. All of this was intertribal common law.

Patrick Sizemore, president of SWM, and Mark Sizemore, president of Paradigm, were brothers who worked for years in Indian country, tailoring their businesses to tribal clients. They represented themselves and their businesses as being able to bridge the gap between on-reservation tribal capital and off-reservation business investment opportunities — experts in both finance and investment, and in relevant federal Indian law. The question of tribal sovereign immunity should not have been a surprise when they negotiated their contract with the Tribes.

2. The tribal appellate court affirmed the tribal court's decision in *First Specialty Ins. Co. v. Confederated Tribes of the Grand Ronde Community of Ore.*, No. A-05-09-001 (Grand Ronde App., Oct. 31, 2006), available at http://turtletalk.files.wordpress.com/2007/11/exh-11-tct-coa-opinion.pdf. A federal court affirmed that the Grand Ronde tribal court could assert jurisdiction over the Sizemores' claims. *See First Specialty Ins. Co. v. Confederated Tribes of the Grand Ronde Community of Ore.*, No. 07-05-KI (D. Or., Nov. 2, 2007).

3. In *Grand Traverse Band of Ottawa and Chippewa Indians v. C.H. Smith Co., Inc.*, 2002 WL 34487861 (Grand Traverse Band of Ottawa and Chippewa Tribal Court 2002), the court rejected the efforts of the Band to avoid arbitration by unilaterally voiding a construction contract:

> It is clear that the contract entered into between the parties contains a provision to arbitrate "*all claims, disputes, and other matters in question between OWNER and CONTRACTOR arising out of or relating to the Contract Documents or the breach thereof. . . .*" . . . This provision clearly and expressly relates to ***all* claims, disputes and others matters in question which relate to the contract between the parties**. The Complaint and Counterclaim solely and only allege claims that relate to the contract between Plaintiff and Defendant. Both parties allege breach of contract. . . .
>
> The issue is whether Plaintiff can unilaterally void the contract and thus avoid the agreement to arbitrate. . . .
>
> Both the Complaint and Counterclaims allege breach of contract. It is clear that all of claims made by Plaintiff relate to the contract. Similarly, it is clear that all of the counterclaims made by Defendant relate to the contract. Furthermore, it is clear that the parties agreed to resolve all such claims by arbitration.
>
> *C.H. Smith Co.*, 2002 WL 34487861, at *2.

4. Arbitration clauses in contracts with Indian nations may operate to waive the immunity of the tribe in tribal court, similar to the United States Supreme Court's decision in *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001).

In *Ho-Chunk Nation v. B&K Builders, Inc.*, 3 Am. Tribal Law 381 (Ho-Chunk Tribal Court 2001), the court found a waiver in a construction contract arbitration clause:

> The similarities existing between the Architectural Agreement and contract documents analyzed in [*C&L Enterprises*] make such judgment controlling. . . . In *Potawatomi*, the U.S. Supreme Court found that an arbitration clause represented a "clear" waiver of tribal sovereign immunity from suit, . . . based upon the following factors: 1) the arbitration clause contained a general enforcement provision, . . . 2) an incorporated contract document contained an enforcement provision with a designation of judicial forum, . . . 3) a choice of law provision referenced the applicable law of the place of the construction site, . . . 4) the applicable law designated state courts for enforcement of arbitral awards, . . . and 5) the authority of the official(s) executing the contract was not an issue of concern. . . .
>
> Likewise, the Architectural Agreement includes an arbitration clause with a general enforcement provision, indicating that "judgment may be entered upon [the arbitral award] in accordance with applicable law in any court having jurisdiction thereof." . . . The Architectural Agreement then identifies the applicable law as "the law of the principal place of business of the Architect. . . ." . . . Wisconsin law provides that "any party to the arbitration may apply to the court in and for the county within which such award was made for an order confirming the award." WIS. STAT. §788.09. Therefore, the plaintiff would need to arbitrate the contractual dispute as the Architectural Agreement contains a clear waiver of sovereign immunity. . . .

B&K Builders, 3 Am. Tribal Law at 390.

5. Some tribal courts might find that boilerplate arbitration clauses violate tribal common law and refuse to enforce them as "unconscionable." For example, in *Green Tree Servicing, Inc. v. Duncan*, 7 Am. Tribal Law 633 (Navajo Nation Supreme Court 2008), the court refused to enforce a binding arbitration clause involving the foreclosure of a tribal citizen's home:

> The lengthy arbitration clause in the contract states "[a]ll claims and controversies arising from or relating to this [c]ontract . . . shall be resolved by binding arbitration by one arbitrator selected by Assignee [Green Tree] with consent of the Buyer(s) [Duncan]." It further states that "[t]he parties agree and understand that they choose arbitration instead of litigation to resolve disputes." In all capital letters, it further states that "THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY ASSIGNEE (AS PROVIDED HEREIN)." . . . In other words, Duncan agreed to waive her right to file any court action and to instead arbitrate any dispute with Green Tree, and waived her right to a jury completely, but agreed to allow Green Tree to file a court action to repossess the mobile home.
>
> The question is whether such an agreement is enforceable under Navajo law. Green Tree submits that under Navajo law words are sacred. This Court

has upheld contracts if the language is clear and the parties voluntarily entered into the agreement. *See, e.g., Smith v. Navajo Nation Dept. of Head Start*, No. SC-CV-50-04, 6 Am. Tribal Law 683, 686-87, 2005 WL 6235868 at *2-3 (Nav. Sup. Ct. 2005). However, despite the clarity of language, the Court has also stricken agreements if they violate Navajo public policy expressed in our statutory law or in *Diné bi beenahaz'áanii. See Allstate Indemnity Co. v. Blackgoat*, No. SC-CV-15-01, 6 Am. Tribal 637, 642, 2005 WL 6235869 at *3-4 (Nav. Sup. Ct. 2005) (striking liability cap in insurance contract for purposes of pre-judgment interest as violative of Navajo principle of nályéél); *see also Smith*, No. SC-CV-50-04, 6 Am. Tribal Law at 686-87, 2005 WL 6235868 at *2-3 (stating test).

To discern Navajo public policy, the Court turns first to several provisions of the Navajo Nation Code. . . . Section 2-302(A) of the Navajo Uniform Commercial Code . . . states that if a court determines whether a contract, or any part of it, is "unconscionable," it is empowered (1) to refuse enforcement of the entire contract, (2) to enforce the remainder of the contract without the unconscionable clause or clauses, or (3) [to] limit the application of any clause to avoid an unjust result. The basic test is whether, "in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." . . . The concept of unconscionability "recognizes that in some cases the lack of bargaining power of one party compared to that of the other party will result in an oppressive contract." . . . Similarly, the Navajo Nation Unfair Consumer Practices Act discusses the concept of "unconscionable trade practice," which also considers the difference in understanding and bargaining power, and prohibits acts that result in unfair transactions. . . .

The Navajo Nation Code also includes provisions encouraging arbitration. The recently enacted Navajo Nation Arbitration Act authorizes the use of arbitration clauses. . . . The Act then balances the value of arbitration agreements with the value of fairness, and states that not all agreements to arbitrate are enforceable in the Navajo Nation.

There are also Fundamental Law principles that inform Navajo public policy on arbitration agreements in mobile home contracts. The Navajo maxim of *házhó'ógó* mandates "more than the mere provision of an English form stating certain rights . . . and requires a patient, respectful discussion . . . before a waiver is effective." *Eriacho v. Ramah District Court*, No. SC-CV-61-04, 6 Am. Tribal Law 624, 629-30, 2005 WL 6235849 at *3-4 (Nav. Sup. Ct. 2005). *Házhó'ógó* requires a meaningful notice and explanation of a right before a waiver of that right is effective. *Id. Házhó'ógó* is not man-made law, but rather a fundamental tenet informing us how we must approach each other as individuals. *Navajo Nation v. Rodriguez*, No. SC-CR-03-04, 5 Am. Tribal Law 473, 478, 2004 WL 5658107 at *5 (Nav. Sup. Ct. 2004). It is "an underlying principle in everyday dealings with relatives and other individuals." *Id.* Though primarily discussed previously in the criminal context, *házhó'ógó* equally applies in civil situations. *See Kesoli v. Anderson Security Agency*, No. SC-CV-01-05, slip op. at 6 (Nav. Sup. Ct. October 12, 2005).

Several other principles are relevant. In a recent case, the Court discussed the Navajo concept of *nábináheezlágo be t'áá lahji algha' deet'a*, which is, finality is established when all participants agree that all of the concerns or issues

have been comprehensively resolved in the agreement. *Casaus v. Diné College*, No. SC-CV-48-05, 7 Am. Tribal Law 509, 512-13, 2007 WL 5917128 at *3-4 (Nav. Sup. Ct. 2007). It is also said that in the process of "talking things out," or meeting the Navajo common law procedural requirement that everything must be talked over, *see Navajo Nation v. Crockett*, 7 Nav. R. 237, 241 (Nav. Sup. Ct. 1996), there is a requirement of *ííshjání ádooniił*, that is, making something clear or obvious. *See Phillips v. Navajo Housing Authority*, No. SC-CV-13-05, 6 Am. Tribal Law 708, 711-12, 2005 WL 6236356 at *3-4 (Nav. Sup. Ct. 2005) (applying Navajo concept *ofííshjání ádooniił* to require clear intent to retroactively grant sovereign immunity to Navajo Housing Authority); *Yazzie v. Thompson*, No. SC-CV-69-04, 6 Am. Tribal Law 672, 674, 2005 WL 6235970 at *2 (Nav. Sup. Ct. 2005) (same for Court rules on fees in domestic violence cases); *Rough Rock Community School v. Navajo Nation*, 7 Nav. R. 168, 174 (Nav. Sup. Ct. 1995) (same for qualifications of school board candidates). Navajo decision-making is practical and pragmatic, and the result of "talking things out" is a clear plan. *Rough Rock Community School v. Navajo Nation*, 7 Nav. R. 168, 174 (Nav. Sup. Ct. 1995). When faced with important matters, it is inappropriate to rush to conclusion or to push a decision without explanation and consideration to those involved. *Áádóó na'nile'dii éi dooda*, that is, delicate matters and things of importance must not be approached recklessly, carelessly, or with indifference to consequences. *Rodriguez*, No. SC-CR-03-04, 5 Am. Tribal Law at 478, 2004 WL 5658107 at *5. This is *házhó'ógó*. *Id*. If things are not done *házhó'ógó*, it is said that it is done *t'aa bizaka*.

An arbitration clause must be set in the manner of *házhó'ógó* (standard of care), so as to make a clause *ííshjání ádooniił* (clear and obvious), therefore it will [ ] be made *t'aa na'nile'dii* (not recklessly, carelessly or with indifference to consequences) resulting in making the arbitration clause *nábináheezlágo be t'áá lahjį algha' deet'a* ([a] comprehensive agreement). This was shown in *Eriacho*, wherein the Navajo Nation argued that the explanation of right to a jury trial was not necessary due to Ms. Eriacho's apparent education level. *See* No. SC-CV-61-04, 6 Am. Tribal Law at 630 n. 2, 2005 WL 6235849 at *3-4 n. 2. In response, this Court rejected "any rule that conditions the respectful explanation of rights under Navajo due process on subjective assumption concerning the defendant. This right exists for all defendants in our system." *Id*.

Finally, these principles must be applied in the context of the importance of a home in Navajo thought. This Court has noted that a home is not just a dwelling, but a place at the center of Navajo life. *Fort Defiance Housing Corp. v. Lowe*, No. SC-CV-32-03, 5 Am. Tribal Law 394, 398, 2004 WL 5658062 at *2 (Nav. Sup. Ct. 2004). Based on this principle, the Court scrutinizes procedures to make sure they protect a home owner's ability to maintain a healthy home and family. *See id*.; *Phillips*, No. SC-CV-13-05, 6 Am. Tribal Law at 711-12, 2005 WL 6236356 at *3-4.

Considering all of these principles together, the Court holds that the specific arbitration clause in the financing contract is unenforceable. . . . This case ultimately concerns the repossession of a mobile home, and the ability to keep the home may depend on the availability of a home owner's counterclaims against a finance company seeking to take the home. The requirement that Duncan engage in arbitration instead of filing counterclaims in an action brought by Green Tree in a Navajo district court greatly burdens her ability to defend herself. She must figure out the arbitration process, spend potentially significant amounts of money and travel off the

Nation to participate. Importantly, Green Tree is under no similar obligation; under the agreement it may file a Navajo court action to assert its rights, and is protected from defending counterclaims. The burden is then only one way. The effect of this grossly unequal position is not clearly explained in the clause. An arbitration clause in a mobile home finance contract cannot be enforced if the contract does not contain clear and specific language explaining that the Navajo consumer understands that he or she is surrendering his or her rights to bring claims in a Navajo court, but nonetheless is allowing claims against him or her to compel surrender of the home.

Green Tree Servicing, 7 Am. Tribal Law at 639-42.

2. SUITS AGAINST TRIBAL BUSINESSES — WAIVERS OF SOVEREIGN IMMUNITY

World Extreme Cage Fighting, LLC v. Mohegan Tribal Gaming Authority

Mohegan Gaming Disputes Tribal Court, No. GDTC-CV-03-133-TBW, 2004.NAMG.0000001 (January 20, 2004)

The opinion of the court was delivered by: Wilson, J.

Introduction.

This action is brought in Two Counts seeking damages for an alleged breach of contract. . . . [T]he Plaintiff alleges that it and the Defendant, doing business at The Mohegan Sun Casino, entered into an agreement wherein it was agreed that the Plaintiff would present a live cagefighting event at the Defendant's arena, and that the Defendant breached the contract to the damage of the Plaintiff. . . .

Discussion.

It is agreed that the Defendant is a legal entity of The Mohegan Tribe of Indians of Connecticut, a federally recognized Indian Tribe. As such, the Tribe and its operating entities such as the Defendant, Mohegan Tribal Gaming Authority, are not subject to suit (even in a State Court or in this Court) — even for breach of contract involving commercial conduct — unless Congress has authorized the suit or the Tribe has waived its immunity. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 750 . . . (1998). It is agreed that Congress has not authorized the suit. The issue is whether the Tribe has waived its immunity.

This case concerns a written agreement, prepared by the Defendant, and presented to and signed by both parties. The agreement concerns a commercial event. The contract was entered into, was to be performed in, and was to be governed by the laws of the Mohegan Reservation of Connecticut. . . . Paragraph 20 also provides that this court "shall have exclusive jurisdiction of any and all matters pertaining to the construction of this agreement, disputes under this agreement, and enforcement of this agreement. Mohegan Sun [The Defendant] and WEC [The Plaintiff] hereby consent to such exclusive jurisdiction."

Paragraph 17 provides: "Equity. Each party recognizes that the rights granted hereunder are personal, valuable and unique and that a breach of any of the material provisions hereof will cause the other irreparable harm which may not be adequately compensated at law and each shall be entitled to equitable relief, including, without limitation, a preliminary injunction, to prevent such breach in addition to whatever actual damages may be had at law."

The Plaintiff relies on the two quoted paragraphs in support of its argument that the Defendant has waived its immunity. The Defendant, *contra*, contends that a waiver of sovereign immunity must be express and that the quoted provisions are not express enough, *in haec verba*, to waive immunity. The Defendant contends that paragraph 17 authorizes only an action in equity, with damages incidental thereto. This court does not agree. Paragraph 17, to the contrary, expressly recognizes and assumes the existence of a remedy at law, *i.e.*, to recover damages, and provides for equitable relief incidental thereto, or "in addition to." This in itself is an express waiver.

In addition, paragraph 20 provides that this court shall have exclusive jurisdiction over all matters pertaining to the contract, and the Defendant expressly consents to such exclusive jurisdiction. To what end is such recognition and consent to be employed, but for suits such as this? By such "consent" the Defendant voluntarily yielded to such an end; it acquiesced thereto; it agreed to it; it submitted; in short, it waived its immunity, expressly. . . .

The Defendant apparently argues that there is not any waiver of sovereign immunity unless there is a statement such as: "The Tribe will not assert the defense of sovereign immunity if sued for breach of contract." The U.S. Supreme Court has unanimously rejected such an argument. In *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 121 S. Ct. 1589 (2001), the court held that an agreement to arbitrate constituted a "clear waiver" of sovereign immunity, and that by such agreement to arbitrate, the tribe "plainly" consented to suit. The court said that arbitration clause "has a real world objective." 121 S. Ct. at 1596. So, in this case, to the real world end, the contract specifically authorizes judicial enforcement of the Plaintiff's rights in this action, in this court.

Based on the foregoing, this court is not required to apply the common law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it. The rule is inapposite because the contract is not ambiguous. "Nor did the Tribe find itself holding the short end of an adhesion contract stick: The Tribe proposed and prepared the contract; [W.E.C] . . . foisted no form on a quiescent Tribe." (*C&L Enterprises v. Potawatomi Tribe*, op. cit. at 1597).

For the reasons stated, it is concluded that under the agreement the Defendant proposed and signed, the Defendant clearly consented to suit in this court and thereby waived its sovereign immunity from this suit. As to Count One, therefore, the Defendant's Motion to Dismiss is denied. As to Count Two, based on an "implied" contract, by definition there is no "express" waiver of any immunity, and the Motion to Dismiss is therefore granted as to Count Two.

NOTES

1. The court here suggests that the holdings of the United States Supreme Court virtually control the outcome in this case; specifically, the court seems to hold that *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001), circumscribes its discretion on questions of tribal sovereign immunity. *C&L Enterprises* held that a boilerplate construction contract that included a provision allowing for disputes to be resolved in arbitration, and enforced in state court, constituted a waiver of sovereign immunity. Why does the tribal court adopt the views of that Court on the question of implied waivers of tribal sovereign immunity? Or does it?
2. Moreover, is this contract the kind of question that is susceptible to a holding that the terms of the contract amount to a waiver?
3. Some tribes have peremptorily waived sovereign immunity in so-called proprietary contracts, as in the case of the Grand Traverse Band of Ottawa and Chippewa Indians:

> (a) Notwithstanding any other provisions of the Chapter, 15 GTBC §218, the Tribe hereby waives its sovereign immunity, as well as the sovereign immunity of the Grand Traverse Band Economic Corporation, for any contract claim brought in accordance with this section, provided:
>
> (1) The claim arises from an express, written contract signed by all parties to the contract;
>
> (2) The claim is brought by a party to the contract or a party expressly made a third-party beneficiary under the terms of the contract;
>
> (3) The contract was entered into by the Grand Traverse Band Economic Development Corporation or a Tribal Business Enterprise, as defined in 15 GTBC Chapter 2, Part 1, subordinate to the Grand Traverse Band Economic Development Corporation; and
>
> (4) The contract was entered into in the performance of a proprietary function, which means any activity conducted primarily for the purpose of producing a pecuniary profit for the Tribe, the Grand Traverse Band Economic Development Corporation, or a Tribal Business Enterprise excluding, however, any activity normally supported by a government unit by taxes or fees.
>
> (b) Notwithstanding 15 GTBC §202, the Tribe may not be subjected to suit under this section for:
>
> . . .
>
> (5) Any suit based upon a contract that contains provisions concerning sovereign immunity and consent to suit. For any such contract, the contractual provisions relating to sovereign immunity supersede the application of this section.
>
> (c) The waiver extends solely to funds contained in the Grand Traverse Band Economic Development Corporation accounts, as defined in 15 GTBC §266.
>
> (d) The waiver of sovereign immunity contained in this section does not apply to any claim unless notice of the claim has been presented to the Tribe in writing within 180 days after such claim accrues, or within 90 days after

> the claim has been discovered or should have been discovered in the exercise of reasonable diligence, whichever is later. Notice must be served personally, by certified mail, return receipt requested, or by any other courier or delivery service for which a return receipt is obtained, upon the Tribal Council Secretary, Grand Traverse Band of Ottawa and Chippewa Indians, 2605 N. West Bayshore Drive, Peshawbestown, Michigan 49682. The notice must identify the contract upon which the complaint is based, the nature of the claim, and the relief requested. Service of a suit based upon the claim satisfies the notice requirement.
>
> (e) The Tribe and the Grand Traverse Band Economic Development Corporation consent to suit in any court of competence jurisdiction for suits based upon contract claims arising under this section; provided, that this consent does not preclude objections to venue, *forum non conveniens*, or subject matter jurisdiction.

6 Grand Traverse Band Code §208 (2003). *See also* Sault Ste. Marie Tribe of Chippewa Indians Tribal Code §44.108 (1995) (enacting virtually the same waiver).