ARIZONA COURT OF APPEALS

DIVISION ONE

ALAN SINGER, Plaintiff/Appellant v. JAMES PALMER a.k.a. JONATHAN JAMES PALMER, and MONDEX CORPORATION, Defendants/Appellees	No. 1 CA-CV 18-0707 Mohave County Superior Court Case No. B8015CV201804044

PLAINTIFF/APPELLANT'S REPLY BRIEF

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ALAN SINGER,	)	No. 1 CA-CV 18-0707
Plaintiff/Appellant	)	Mohave County Superior Court
	)	Case No. B8015CV201804044
v.	)	
JAMES PALMER a.k.a.	)	
JONATHAN JAMES PALMER,	)	
and	)	
MONDEX CORPORATION,	)	
Defendants/Appellees	)	

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INTRODUCTION

The Court is faced with a question of first impression: whether personal service of process by a process server registered in Arizona upon a non-Indian on tribal land is valid.

Defendants were served at Scottsdale Community College just before defendant Palmer delivered a lecture there. The college is on Community land under a ninety nine year lease. The college is funded by County and Arizona state tax payers and the college is patrolled by the Maricopa Community Colleges Police Department. On the same reservation, there is a casino, a Walmart, a baseball stadium for spring training, and other commercial ventures, as well as portions of Highway 101.

Defendants claim that (1) service is void because the process server should have obtained permission from the tribal court to effect service and should also have filed for comity (Answering Brief, pps. 3-5); and (2) that Arizona has no authority to extend the application of its laws to an Indian reservation (Answering Brief, pps. 5-7). Both contentions are incorrect .

None of the parties are Indians, and none of the disputed transactions occurred on tribal land. Community law delineates the jurisdiction of the tribal court. The tribe simply has no subject matter jurisdiction, only the state does. See

Code of Ordinances Section 4-1(b) and (d) attached as part of Appellant's Request for Judicial Notice.

THERE IS NO REASON TO NARROW THE HOLDING OF *ZAMAN* BEYOND ITS CLEAR LANGUAGE

The Arizona Supreme Court stated two decades ago that state civil process may run on tribal land when defendants are non-Indians. *State v. Zaman* (1999) 984 P.2d 528, 194 Ariz. 442. Defendants erroneously claim that the Arizona Supreme Court "carved out" an exception to tribal "sovereignty" allowing *only* deputy sheriffs to serve process on tribal land, but not process servers (Answering Brief, p. 6, 7). Defendants provide no rationale for restricting the holding of *Zaman* in such an irrational manner, when the scope and language of Zaman is so expansive.

"It is not necessary in every case that civil litigants employ the county sheriff to serve process on non-Indians on tribal lands, though such service is legally valid under the Arizona Rules of Civil Procedure. The Rules provide alternative means by which to accomplish service without the need to send the sheriff or his deputies onto the reservation. **These include service by private process server pursuant to Rules 4(d) and (e)...**" [Emphasis added], *Zaman* at p.

531, ¶ 19 concurrence by Justice McGregor and special concurrence by Justice Jones.

In the lone dissent, Justice Feldman stated: "Process could also have been served... by *a registered private process server...*" *Zaman* at p. 533, ¶ 25.

The Arizona Supreme Court unanimously agreed that Arizona had jurisdiction over defendant, who was a non-Indian. The sole unsettled issue in *Zaman* appeared to be serving defendants without generating "needless friction with the tribe." According to the *Zaman* court, service by a registered process server clearly fits this bill.

Despite all the bluster, defendants have been unable to point to *any* legal authority indicating *why* service of process by a registered process server would be invalid, when service by a deputy sheriff would be valid. They cannot argue from existing law. There is simply no reason to decide the rationale of *Zaman* to only deputy sheriffs and not to an Arizona registered process servers. See also *Organized Village of Kake v. Egan* (1962) 369 U.S. 60 ; see also William C. Canby, Jr., *American Indian Law* 151 (2d ed. 1988) ("State courts have jurisdiction over suits by non-Indians against non-Indians... State court process may be served in Indian country in connection with such a suit.").

FAILING TO APPLY *ZAMAN* WOULD LIKELY UPSET THE FINALITY OF ARIZONA JUDGMENTS

Plaintiff/Appellant is far from alone in believing that service of process by a private process server on non-Indians on tribal land is valid. For example, in West Mesa Justice Court, a mobile home park located on the same reservation served eviction notices upon its tenants employing private process servers. The non-Indian defendants were evicted. No one questioned jurisdiction.

Cold Stone Creamery has an agent for service of process on Community land. Process servers do not stop to get tribal approval to serve complaints.

In the two cases that Appellant had litigated in Arizona, all defendants (non-Indians) were served by registered process servers on tribal land (I #10, p.6). The case was removed to federal court where it was heard by the Hon. David G. Campbell. No one challenged the service. The case settled after prolonged litigation.

An adverse ruling would result in the reversal of hundreds, if not thousands, of court rulings and endless rounds of new round of litigation.

So much for finality of judgments.

THE CASES CITED BY APPELLEES ARE INAPPOSITE

Appellees inaccurately claim that service of process must be conducted by a sheriff's deputy because tribal land is sovereign. Answering Brief, p. 5, 6. This does not follow, and no rationale is offered for this incorrect assertion.

It is undisputed that the state court has no civil jurisdiction over Indians, only non-Indians. Professor Robert Laurence (1982) *10 Indian Law Review* 257 stated the problem clearly:

"*No subject matter jurisdiction,* a defect that may not be waived and which may be raised by the trial or appellate court *sua sponte.*"

Not a single opinion cited by Appellees on pps. 5-6 involved a non-Indian defendant. [1] They are therefore inapposite. All of the defendants were tribal members, the transactions occurred on reservation land, and clearly the state courts were without jurisdiction. The United States Supreme Court has been held for *over a century* that a state may not exercise civil subject matter jurisdiction over Indians on the reservation. See *Langford v. Monteith* (1880)102 U.S. 145 (1880); *Williams v. Lee* (1959) 358 U.S. 217.

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[1] Appellees merely copied and pasted ¶ 5 of *Bradley v. Deloria*, 587 N. W. 2d 591 (1998, S.D.).

Zaman is therefore not an outlier and the Arizona Court did not irrationally carve out an exception for deputy sheriffs as Defendants/Appellees claim. *Zaman* clearly enunciates the rule and forms binding precedent. Its reasoning has been followed by a subsequent United States Supreme Court case, which is also binding precedent. *Nevada v. Hicks* (2001) 533 U.S. 353.

As such, it is unlikely that Zaman will be reversed or modified anytime soon.

DEFENDANTS' MERITLESS CONTENTION PLAINTIFF HAD TO COMPLY WITH TRIBAL COURT RULES WAS DECIDED ADVERSELY TO THEM LONG AGO

Defendant/Appellees falsely claimed that Plaintiff/Appellant should have complied with the Community Rules of Civil Procedure.

The contention that a plaintiff had to employ a process server approved by the tribe, when serving a non-Indian, was expressly argued at the court of Appeals in *State v. Zaman* (1998) 190 Ariz. 208, 946 P.2d 459. The Supreme Court vacated that decision, and explained its reasoning in *State v. Zaman* (1999)984 P.2d 528, 194 Ariz. 442. That decision is binding on all Arizona courts.

As stated in *State v. Zaman*(1999), the Arizona superior court clearly had subject matter jurisdiction over non-Indian defendants, while the tribal court did

not. "Proceedings in the Superior Court of Arizona are governed by the Arizona Rules of Civil Procedure, not that of the procedural rules of the Community." *Zaman*, at p. 530, ¶ 14.

Furthermore, the tribal rules refer to rule 5-11 which clarifies that a process server approved by the tribe may only serve complaints filed in tribal court.

The same argument also applies to the notion that Plaintiff should have applied for comity. "Comity" means the discretionary process by which the Court might recognize and give *effect* to a **judgment** of another tribal, state or federal Court. "Comity is a doctrine that could have been considered if the tribal court had subject matter jurisdiction." *State v. Zaman*, 984 P.2d at p. 530 ¶ 16.

Moreover, the Arizona case had just been initiated. It was very far away from being a judgment.

Finally, Defendants/appellees cannot cherry pick the provisions of the tribal rules that they choose to follow. For example, only an "Advocate" approved by the tribal court (and not by the Arizona Bar) may represent others in most civil cases, and not an attorney certified by the State Bar of Arizona or another state bar association. As provided in § 4-4 of the Code, attorneys are prohibited from practicing before the Court in most civil cases." Appellant's Request for Judicial Notice, Rules of Civil Procedure, at p. 1.

DEFENDANTS ARE NOT ENTITLED TO ATTORNEYS' FEES UNDER A.R.S. § 12-341.01(A) OR A.R.S. § 12-349

1. **An appellate panel has already denied defendants' attorneys fees.**

Defendant Mondex attempted to seek attorneys' fees in the prior appeal, No. 1 CA-CV 18-0346.

The appellate panel refused to grant Appellees attorneys' fees. An appellate court's determination of a legal issue is binding both on the trial court on remand and upon a subsequent appeal given the same case and substantially the same facts.

2. Defendants are not entitled to attorneys fees under § 12-341.01(A) because the contract (created by defendants) does not contain an attorneys' fee provision

Defendants claim entitlement to attorneys fees based upon contract, but the contract does not provide for attorneys' fees.

A.R.S. § 12-341.01(A) is inapplicable by its terms if it conflicts with an express contractual provision governing the recovery of attorney's fees." *Geller v. Lesk* (2012) 285 P.3d 972, 285 P.3d 972. Rather than being completely supplanted by any attorney fee provision in the parties' contract, the statute, consistent with its plain language applies to "any contested action arises out of

contract" to the extent that it does not conflict with the contract.

A copy of the contract is attached for the convenience of the court as part of the appendix.

Moreover, Appellant offered to negotiate a settlement for both outstanding cases on March 13, 2019, and on March 21, 2019. On March 22, 2019, Defendant/Appellee Palmer replied that he was not interested in negotiating any settlement.

3. Defendants are not entitled to an attorneys' fee provision under A.R.S. § 12-349 because they admitted, in the superior court, that this action was not frivolous. (I #11, p. 5).

SUMMARY

A court may acquire personal jurisdiction over a defendants in a variety of ways: (1) consent; (2) physical presence within the state; and (3) causing effects in the forum state.

Defendants implicitly consented to Arizona by their choice of law in the contract that they drafted. Both defendants were properly served within the State of Arizona.

CONCLUSION

Plaintiff/Appellant respectfully asks that the Court reverse and remand this case to the Superior Court for further proceedings.

Dated this 26th day of June, 2019.

By: Alan Singer

Alan Singer

Plaintiff/Appellant/*In Pro Se*

CERTIFICATE OF COMPLIANCE

This Certificate of Compliance concerns a brief and is submitted pursuant to Arizona Rules of Civil Appellate procedure.

The Undersigned certifies that this brief to which this certificate is attached uses Times New Roman font with a type size of at lerast 14 points, is double-spaced and contains 1755 words.

The document to which this certificate is attached does not exceed the word limit that is set by Rule 14.

By: 

Alan Singer

CERTIFICATE OF SERVICE AND PAPER FILING

The undersigned, Alan Singer, Plaintiff/Appellant/*In Pro Se*, delivered an **ORIGINAL** and one (1) **TRUE COPY** of his Reply Brief to a third-party commercial carrier, on this 26th day of June, 2019 for delivery, via UPS to:

Clerk of the Court

Arizona Court of Appeals

Division One

1501 W. Washington Street

Phoenix, Arizona 85007

and Plaintiff/Appellant, mailed two (2) **TRUE COPIES** of his Reply Brief, via U.S. Mail, on this 26th day of June, 2019 to:

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