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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, by and through Workforce Safety and Insurance, Appellee v. Cherokee Services Group, LLC, Cherokee Nation Government Solutions, LLC, Cherokee Medical Services, LLC, Cherokee Nation Technologies, LLC, Steven Bilby and Hudson Insurance Company, Appellants	)	Supreme Court No. 20200166 District Court No. 2018-cv-01075

APPEAL FROM DISTRICT COURT'S ORDER REVERSING ADMINISTRATIVE LAW JUDGE'S DECISION DATED MAY 13, 2020, THE DISTRICT COURT'S ORDER FOR JUDGMENT DATED MAY 14, 2020, AND THE DISTRICT COURT'S JUDGMENT DATED MAY 14, 2020

APPELLANTS' REPLY BRIEF

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The Appellants submit this reply brief in response to WSI's brief on appeal.

I. WSI's Legal Assertion That Tribal Sovereign Immunity Does Not Extend to the Tribal Business Entities Was Never Raised and Developed Below and Should Not Be Raised for the First Time on Appeal.

¶1 For the first time on appeal WSI now asserts that tribal sovereign immunity does not extend to tribal businesses and entities as an "arm of the tribe." *See* Brief of Appellee North Dakota Workforce Safety and Insurance at ¶ 22. WSI suggests that the "proposition that the businesses 'function as arms of the tribe,' rely upon a determination or stipulation that the tribal business involved was an 'arm of the tribe'" Aplee. Br. ¶ 26.

¶2 This Court has repeatedly held that "if a party fails to properly raise an issue or argument before the district court, the party is precluded from raising that issue or argument on appeal." *Rutherford v. BNSF Railway Co.*, 2009 ND 88, ¶ 28; 765 N.W. 2d 705. Indeed "[i]t is axiomatic that an issue or contention not raised or considered in the lower court cannot be raised for the first time on appeal from judgment." *Id.* ¶13 (citations omitted). *See also Sanders v. Gravel Prods. Inc.*, 2010 ND 218, ¶ 27; 790 N.W.2d 733; *Franciere v. City of Mandan*, 2020 ND 143, ¶ 24; 945 N.W.2d 251.

¶3 This well-grounded rule is even more important in administrative proceedings where the factual records are developed. This Court has clearly held that a "court reviewing an administrative agency decision generally will review only issues raised in the agency proceeding." *Symington v. N.D. Workers Comp. Bureau*, 545 N.W.2d 806, 810 (N.D. 1996) (citations omitted); *see also Hoyem v. N.D. Workers Comp. Bureau*, 1998 ND 86 ¶ 16; 578 N.W.2d 117 (noting "[w]e have often said issues not raised before an administrative agency will not be considered for the first time on appeal." *Id*. (citation omitted)

¶4 In its brief submitted to the Administrative Law Judge ("ALJ") upon completion of the administrative hearing and in response to the Cherokee Entities' argument that the identified tribal business entities were arms of the Tribe and were therefore entitled to sovereign immunity, WSI argued only that "other regulatory laws have been held to apply to tribal activities" and urged the ALJ to "look at the locations of the activity of the entity and identity of the employee involved." (WSI's Post-Hearing Brief at 21) (Doc. Id #41). Nowhere in WSI's brief to the ALJ did WSI suggest that the tribal businesses entities were not arms of the Tribe based on their activities. Instead, WSI solely focused on <u>where</u> the activities of the tribal businesses occurred and, in particular, whether they occurred on tribal land.

¶5 On appeal to the District Court WSI again failed to challenge the fact that the Cherokee Entities are arms of the Tribe. In fact, it conceded that "this case involves activity by entities organized and owned by the Cherokee Nation," but it argued sovereign immunity did not apply because "<u>it is undisputed the activities are occurring not on tribal land.</u>" (Brief of Workforce Safety & Insurance to district court at ¶ 28) (Doc. Id. #53).

¶6 As WSI has failed to raise the issue of whether the tribal business entities are arms of the Tribe in the lower court and administrative hearing, it is precluded from doing so on appeal.

II. The Tribal Business Entities are Entitled to Sovereign Immunity as Arms of the Tribe.

¶7 Even if WSI adequately raised and preserved this issue for appeal, which it did not, the tribal business entities are entitled to sovereign immunity for two separate reasons. First, WSI conceded at the administrative hearing that the tribal business entities were arms of the Tribe. Second, the tribal business entities are in fact arms of the Tribe.

A. WSI Conceded the Tribal Business Entities Were Arms of the Tribe.

¶8 At the administrative hearing WSI provided the testimony of Sarah Feist, an Employer Compliance Specialist and Collection Supervisor. (Hr'g Tr. at 69) (Doc Id #40). Feist was in charge of this matter and conducted the investigation into the tribal business entities. *See* id. 69-98 (Doc. Id. #40). Feist testified as follows:

> Q. And as part of your analysis as part of the Cherokee Nation entities, were you aware that these entities were owned by a tribe?
>
> A. Yes, I was aware of it. That was part of the reason why I was preparing documents to bring that down to legal counsel.

(Id. at 94-95) (Doc. Id. #40)

Then the following colloquy took place and Feist testified:

> Q. You don't dispute in any way that each of these subsidiary entities is a wholly owned tribal entity that acts as an arm of the tribe itself?
>
> A. Do I dispute that?
>
> Q. Yes.
>
> A. No, I do not.

(Id. at 96-97) (emphasis added) (Doc. Id. #40).

¶9 On appeal WSI now suggests that there must be a "determination" or "stipulation" that the Cherokee Entities acted as arms of the Tribe. But, to be clear, there was a stipulation when the WSI representative in charge of the review and investigation conceded under oath that the issue was not in dispute. Further, if WSI had not conceded this fact the Cherokee Entities could have provided additional evidence and arguments on the issue, and specific findings of fact could have been made addressing the issue. There was no reason for the ALJ to make such a specific determination where WSI never raised the issue and, indeed, conceded, at the hearing, that the Cherokee Entities act as arms of the Tribe.

B. The Cherokee Entities are Arms of the Tribe.

¶10 In an analogous case, the Oklahoma Court of Civil Appeals addressed the exact question of whether the Cherokee Nation Enterprise, as a tribal business entity, was entitled to sovereign immunity. The court concluded the "trial court held that the Respondent Cherokee Nation Enterprises (Employer) is an entity of the sovereign Cherokee Nation which has enacted its own workers' compensation laws, and that Respondent Hudson Insurance Company had issued a policy of workers' compensation insurance pursuant to tribal law. The trial court found Employer was entitled to immunity as a sovereign tribe with its own workers' compensation protections and therefore dismissed (claimants) claim. We sustain." *See Pales v. Cherokee Nation Enterprises*, 216 P.3d 309, 310 (Okla. Ct. App. 2009).

¶11 In addition to the fact that courts have recognized and held that the tribal business entities are entitled to sovereign immunity as arms of the Tribe, the facts in the case support the exact same determination. The Cherokee Entities presented significant testimony on this matter.

¶12 Chad Harsha, an Assistant Attorney General for the Cherokee Nation, testified at the administrative hearing. He testified that the Cherokee Nation is a federally recognized tribe. (Hr'g Tr. at 100) (Doc. Id. #40). The Cherokee Nation has over 330,000 members and is currently the largest federally recognized Indian tribe in the United States. (Id. at 101) (Doc. Id. #40). The "Cherokee Nation operates business enterprises with the primary purpose of creating jobs for Cherokee citizens and generating revenue for the tribal government to offer services to Cherokee citizens. The primary business entity through which they do that is Cherokee Nation Businesses, which is a company that is wholly

owned by the Cherokee Nation, with the Tribal Council essentially serving as the sole shareholder." (Id. at 102) (Doc. Id. #40).

¶13 He elaborated "CNB is operated by a board of directors and the individual directors are appointed by the Cherokee Nation tribal council upon concurrence of the Cherokee Nation Principal Chief and they serve three-year terms." (Hr'g Tr. at 103) (Doc. Id. #40). He testified that each of the entities addressed in WSI's order are "entities that are owned by Cherokee Nation Businesses that were formed under the Cherokee Nation Limited Liability Act." (Id. at 103) (Doc. Id. #40)

¶14 Carey Calvert, the Director of Risk Management and an attorney for Cherokee Nation Businesses also testified at the administrative hearing. She testified that CNB and its entities employ approximately 11,000 individuals. Their total fiscal revenue exceeds $1 billion per year. (Hr'g Tr. at 115) (Doc. Id. #40). Calvert noted that the primary purpose of Cherokee Nation Businesses is to employ Cherokee citizens. She testified:

> We are interested in making money, obviously, but the primary purpose for that is to reinvest that in the Cherokee Nation because we think that part of a – in order to maintain our sovereignty, we have to be able to pay for ourselves, so the Cherokee Nation has an interest in generating income that's then poured back into the tribe. Approximately 50 percent of our profits will go back into the Cherokee Nation and we'll use – the Cherokee Nation will use those to build health clinics for our citizens or anyone else that wants to use them in the area. We built four brand-new health clinics in northeastern Oklahoma within the last several years.

(Id. at 116) (Doc. Id. #40).

Calvert also testified that part of the funds are used for the education of Cherokee citizens, including donations to public schools within the state of Oklahoma. (Id.) Calvert testified the funds generated from the Cherokee Entities "absolutely" play an integral part in the Cherokee Nations self-governance. (Id. at 117) (Doc. Id. #40).

¶15 Thus, the evidence presented at the administrative hearing clearly supports a finding that the Cherokee Entities are entitled to sovereign immunity as arms of the Tribe. The only reason that the ALJ did not make such a specific finding is that WSI did not contest the issue at the hearing.

III. WSI is Incorrect in Arguing that Tribal Immunity Only Extends to Activity Occurring on Tribal Land.

¶16 On appeal WSI continues to assert that it is authorized to exercise jurisdiction over the Cherokee Entities because they were operating off of tribal land. WSI's position relies on irrelevant authorities and directly contradicts Supreme Court precedent. It should be rejected.

¶17 First, WSI continues to rely extensively on authorities that do not even address sovereign immunity. For example, WSI cites *Workforce Safety & Insurance v. JFK Raingutters & Frank Whitecalfe,* 2007 ND 80; 733 N.W.2d 248. JFK Raingutters was a North Dakota limited liability company owned by a tribal member. It was not owned by the tribe and, accordingly, was not even arguably entitled to sovereign immunity. Thus, not surprisingly, this Court's analysis did not address tribal sovereign immunity in any way. WSI's continued reliance on this case that has nothing to do with sovereign immunity is difficult to understand.

¶18 Similarly, WSI continues to discuss at length *Montana v. United States,* 450 U.S. 554 (US 1981) and *Williams v. Lee,* 358 U.S. 217 (1959). Neither is relevant here. WSI claims the Cherokee Entities argued below that "the first prong of *Montana* applies to a consensual relationship involving 'commercial dealings.'" See Aplee Br. at ¶32. This statement is completely inaccurate. The Cherokee Entities never relied on either case. The *Montana* case examined tribal court jurisdiction over non-consenting non-member

defendants. That has nothing to with the issues in this appeal or case. *Williams v. Lee* related to state court jurisdiction over activities occurring on tribal lands and whether exercising that jurisdiction would infringe on the tribe's rights. Neither of these cases addressed, or quite frankly, had anything to do with the scope of tribal sovereign immunity, which is what is involved in this appeal.

¶19 Second, it is well established that sovereign immunity applies to commercial activities occurring off tribal land. The origin, nature and scope of tribal sovereign immunity was addressed in the Cherokee Entities' initial brief and will not be reiterated in detail here. WSI's continued suggestion that tribal sovereign immunity is tied to activities occurring on tribal land is directly contrary to established case law. "Tribal immunity extends to subdivisions of a tribe, and even bars suits arising from a tribe's commercial activities." *See Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1292 (10th Cir. 2008) (*citing Kiowa Tribe of Okla.v. Mfg. Techs., Inc*., 523 U.S. 751, 759 (1998). Indeed, the "applicability of tribal sovereign immunity does not depend on whether the activities giving rise to the litigation occurred on or off tribal land." *See Somerlott v. Cherokee Nation Distributors, Inc.,* 686 F.3d 1144, 1148 (10th Cir. 2012) (*citing Kiowa Tribe*, 523 U.S. at 754). "While the Supreme Court has expressed misgivings about recognizing tribal immunity in the commercial context, the Court has also held that the doctrine 'is settled law' and that it is not judiciary's place to restrict its application." *See Native Am. Distrib*, 546 F.3d at 1293 (*citing Kiowa Tribe*, 523 U.S. at 756-59).

¶20 In fact, the United States Supreme Court has consistently reiterated this holding: "Equally important here, we declined in *Kiowa* to make any exception for suits arising from a tribe's commercial activities, even when they take place off Indian lands. In that

case, a private party sued tribe in state court for defaulting on a promissory note. The plaintiff asked this Court to confine tribal immunity to suits involving conduct on 'reservations or to noncommercial activities. We said no." *Mich. v. Bay Mill Indian Community*, 572 U.S. 782 (2014) (emphasis added).

¶21 The position argued by WSI to restrict or limit tribal sovereign immunity to conduct on tribal lands has been specifically, explicitly, and repeatedly rejected by the United States Supreme Court. The Court should similarly reject it here.

CONCLUSION

¶22 For the reasons outlined above, the Appellants request the district court order be reversed and the Cherokee Entities sovereign immunity be recognized and the Administrative Law Judge's ruling be upheld.

CERTIFICATE OF COMPLIANCE

¶23 The undersigned certifies the above brief is in compliance with N.D.R. App. P. 32(a)(8)(A) and the total number of pages in the brief, excluding this Certificate of Compliance and the service document, and this certification of compliance totals 12 pages.

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CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2020, a true and correct copy of the foregoing Appellants' Reply Brief was served on the following by email.

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