

Osage Nation Gaming Enterprise's ("Enterprise") sovereign immunity (without congressional approval) to the Osage Nation Courts. Whether or not a contract contains an explicit waiver of sovereign immunity is an issue of law that this Court can consider, but without the contract, this Court is unable to decide this issue. The former Principal Chief and the former Board members, however, have not waived their immunity from unconsented suit and Appellant has failed to provide proof of such waiver. Accordingly, the Court affirms the Trial Court's dismissal as to the former Principal Chief, James Gray and to Appellees Slamans, Oberly and Pease. The only remaining issue is whether the employment contract contains an express waiver of the Enterprise's sovereign immunity.

BACKGROUND

Appellant Leonhart entered into an employment contract with the Enterprise to serve as Chief Financial Officer in or around 2007. He served in that capacity until the Board terminated the contract in 2008. In 2009, Appellant Leonhart filed an action against Appellees in Osage County District Court. That suit was voluntarily dismissed without prejudice in 2010. In 2011, Leonhart filed the same cause of action against the same parties in Osage Nation Trial Court. The Osage Nation Trial Court dismissed the Appellant's cause of action for lack of subject matter jurisdiction in 2013 based on sovereign immunity. This appeal followed and this Court remanded the matter to the Trial Court to amend its order of dismissal to include findings of fact and conclusions of law.

In 2014, the Trial Court issued its amended opinion after the matter was transferred from Presiding Judge Stepson to Associate Judge Herbert. Judge Herbert determined that Osage Nation Congress had not provided a clear and explicit waiver of the Appellees' sovereign immunity. Although a copy of the contract between Appellant Leonhart and the Osage Nation

Gaming Enterprise was not included in the record on appeal despite having been referenced as an exhibit to a pleading, the Trial Court found that the contract, even if it contained the “magic language”, could not contradict Osage Nation law.

The Court ordered the parties to file their respective briefs in its scheduling order dated March 24, 2014. After requesting two continuances, Leonhart filed a motion on June 23, 2014 to remand to the Trial Court to review the employment contract. The Appellees filed a motion in opposition on August 4, 2014, stating that remand was unnecessary because the Trial Court’s Amended Order accurately stated Osage law and a review of the employment agreement was unnecessary.

STANDARD OF REVIEW

“Jurisdictional findings . . . are questions of law. The Court finds it is appropriate, therefore, to review such questions *de novo*, with no presumption of accuracy or correctness afforded to the conclusions of the trial court.” *In re Gray*, SPC-2008-01 at 4. As we have in past cases, we look to Osage law first, “considering each provision as it relates to the others and giving each word its plain meaning when read in context to avoid absurd and inconsistent results.” *Red Corn v. Red Eagle*, SPC-2013-01 (2013). If Osage law is silent, we will turn to other sources to advise us, but always within the context of the unique characteristics of the Osage Nation’s sovereign status.

DISCUSSION

A. The Osage Nation law unambiguously recognizes the doctrine of sovereign immunity.

There is no dispute that the Osage Nation has taken careful steps to preserve its sovereign immunity from unconsented suit, starting with Article XIX of the Osage Nation Constitution, which states:

[T]he Osage Nation and all administrative offices, departments, agencies, and instrumentalities of the Osage Nation shall be immune from suit or process in any forum except to the extent that the Osage Nation Congress expressly waives its sovereign immunity. The Osage Nation's sovereign immunity shall extend to officials and employees of the Osage Nation when acting within the scope of their duties and authority.

The plain language requires Congress to expressly waive immunity. An express waiver contains language that reflects a knowing and intentional decision or agreement to be sued in a court of law. The waiver may also specify a jurisdiction, forum, scope of discovery, type of action and/or available remedies.

Osage law further codifies the Nation's immunity in all aspects of governance. *See, e.g.*, 3 ONC § 1-109 (Civil Procedure Code); 5 ONC § 1-107(A) (Trial Court and Supreme Court); 20 ONC § 3 (Liquor Control); 15 ONC § 8-109 (Open Records). These provisions reserve the Nation's immunity and contain either express limited waivers of immunity or express authorization to waive immunity in limited circumstances, both of which would be acceptable methods of expressly waiving sovereign immunity.

B. Osage Nation law limits the Board's authority to waive the Enterprise's immunity.

The Trial Court found that the Enterprise is a wholly owned enterprise of the Osage Nation and Appellees acted in their official capacities at all times. (*Amended Opinion of the Trial Court*, at 2-3.). As an entity of the Osage Nation, the Enterprise is immune from suit unless Congress expressly waives its immunity. Its officials, including the individual Appellees, are similarly immune from suit without a waiver of immunity.

Again, we turn to Osage law to determine whether Congress waived Appellees' immunity or authorized Appellees to waive their immunity. We find no express waiver of the Enterprise's immunity by Congress. In fact, Title 14, section 12-104(B) of the Osage Nation

Codes expressly asserts the Enterprise's immunity: "For all purposes, including but not limited to civil jurisdiction, regulatory jurisdiction, and taxation, the Enterprise is an instrumentality of the Osage Nation, with all the privileges and immunities of the Osage Nation."

Congress, however, has authorized the Board to waive the Enterprise's immunity under specific conditions. *See* 14 ONC § 12-105(C)(8) ("The Board may consent to sue and be sued in *its enterprise name only* by resolution duly adopted by the Board.") (emphasis added); *Id.* at 12-105(D)(g) (authorizing a waiver of the "Enterprise's sovereign immunity from suit in any court *other than the courts of the Osage Nation* without the approval of the Osage Nation Congress by resolution.") (emphasis added). The language in these cited provisions unambiguously authorizes the Board to waive the Enterprise's immunity in the Osage Nation Courts without congressional approval.

The Board's authority to waive immunity is limited to the Enterprise name only by resolution and only as to actions in the Osage Nation Courts. All other waivers require express congressional approval. Osage law further directs the Board to work with the Osage Nation Gaming Commission to "develop standard contract terms for inclusion *in all its contracts and agreements . . . [p]roviding limitations on the waiver of the Enterprise's sovereign immunity from suit*" in accordance with Osage law. 12 ONC § 12-105(C)(10) (emphasis added). When considered as a whole, these acts of Congress authorize the Board to waive the Enterprise's immunity in the Osage Nation Courts by contract.

If the Board waived the Enterprise's immunity in the employment contract with Leonhart, then that waiver must be express and unambiguous. Implied waivers are not authorized under Osage law. We cannot determine the scope of any purported waiver, if one exists, without the contract itself.

C. Whether the employment contract contains an express waiver of immunity is a question of law that does not require remand to the Trial Court.

Leonhart's motion to remand to the Trial Court did not raise any issues not properly before us. The Trial Court concluded that Osage law only authorizes express waivers of sovereign immunity; an analysis as to whether a waiver was implied was unnecessary given the Trial Court's conclusions. Even if a waiver of immunity could be implied, such a waiver would be invalid under Osage law.

Whether an express waiver exists is a matter of law for this Court to consider. It is well-settled that the "interpretation of an unambiguous contract is a question of law for the court" rather than a question for the trier of fact. *Dillard & Sons Constr., Inc. v. Burnup & Sims Comtec., Inc.*, 51 F.3d 910, 914 (1995). It is also a question of law as to whether an ambiguity exists. *Id.* It is, therefore, appropriate for this Court to review the contract to determine if an express waiver of the Enterprise's immunity in the Osage Nation Courts exists.

D. There are no express congressional waivers of the individual Appellees' sovereign immunity.

The individual Appellees would only be subject to suit if Congress expressly waived their immunity. No such resolution was presented or alleged. In the absence of an express waiver from Congress, the individual Appellees lack the authority to waive their immunity from suit in this matter even if one existed in an employment contract. For these reasons, Appellees Gray, Slamans, Oberly and Pease are immune from suit.

IT IS ORDERED

(1) The Trial Court's Amended Opinion as to Appellees Gray, Slamans, Oberly and Pease is AFFIRMED. Appellant's claims are dismissed as to the individual Appellees.

(2) The Appellant's motion to remand to the Trial Court is DENIED.

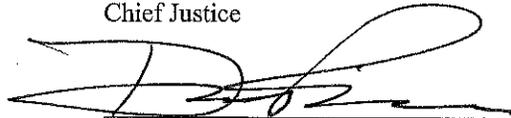
(3) Both parties shall file with this Court a copy of Leonhart's employment contract and separate briefs as to whether the contract's language is an express waiver of the Enterprise's immunity in the Osage Nation Courts. These briefs shall not to exceed 15 pages, double-spaced on 8-1/2 by 11-inch white paper with one inch margins on all sides. The font shall be 12 point Times New Roman. The parties shall attach as an appendix all supporting documents to their brief, which shall contain copies of all documents cited in the brief, including, but not limited to, all cases and statutes. Briefs and appendices shall contain a table of contents and an index of authorities and shall be bound in any reasonable manner. The parties shall file four (4) hard copies of their briefs and appendices with the Supreme Court Clerk. The parties may file their briefs in accordance with the Court's electronic filing rule, but must still file the required number of originals with the Supreme Court within the time period designated by the rule.

The parties shall file a copy of the employment contract and their briefs on or before the close of business (4:30 p.m. Central) on March 24, 2015.

ORDERED this 24th day of February, 2015.



Meredith D. Drent
Chief Justice



Drew Pierce
Associate Justice