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IN THE SUPREME COURT
STATE OF ARIZONA

HWAL'BAY BA:J ENTERPRISES, INC., Petitioner, v. THE HONORABLE LEE F. JANTZEN, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MOHAVE, Respondent Judge, SARA and WILLIAM FOX, Real Parties in Interest.	**Case No. CV-19-0123-PR** Arizona Court of Appeals Case No. 1 CA-SA 19-0059 Mohave County Superior Court Case No. CV2018-00428 Hon. Lee F. Jantzen

SUPPLEMENTAL BRIEF OF REAL PARTIES IN INTEREST SARA AND WILLIAM FOX

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1. When the Hualapai Tribe made GCRC, it created a strong, independent corporation with uniquely sole control of its day-to-day operations. That corporation is not entitled to claim tribal immunity in the present case.

A tribal corporation acting as an arm of the tribe gets the same tribal immunity as the tribe itself. *Dine Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*, 932 F.3d 843, 856 (9th Cir. 2019). "Arm-of-the-tribe immunity," however, "must not become a doctrine of form over substance." *People ex rel. Owen v. Miami Nation Enterprises*, 386 P.3d 357, 375 (Cal. 2016).

The burden of proof to demonstrate tribal sovereign immunity as an arm of a tribe is on the party seeking that immunity. *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 176 (4th Cir. 2019). That burden rests on GCRC.

The purpose of inquiring into immunity is to uncover "whether the entity acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe." *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006). Perhaps the most decisive factor in determining if a tribally-created entity can assert tribal immunity is the amount of control the tribe exercises, including the "degree to which the tribe actually, not just nominally, directs the entity's activities." *Owen*, 386 P.3d at 371.

Courts consider "not only the legal or organizational relationship between the tribe and the entity, but also the practical operation of the entity in relation to

the tribe." *Id*. at 365. When, as here, there is evidence a tribe "exercises little or no control or oversight," that factor "weighs against immunity." *Id*. at 373.

GCRC's Bylaws have a unique Section 2.03 that bars all tribal interference in any aspect or facet of GCRC's day-to-day operations:

> **2.03 <u>Non-interference</u>.** The Board and officers [of GCRC] have the authority to run the day-to-day operations of GCRC. The shareholder [the Hualapai Tribe] shall not interfere with or give orders or instructions to the officers or employees of GCRC with regard to the day-to-day operations of GCRC.

(App081 at § 2.03).

What harmed Sara Fox were the inept day-to-day operations that GCRC and its two river-raft employees conducted. But the Tribe disavowed any authority to run those day-to-day operations. It renounced any right to interfere with or give any orders or instructions to GCRC or to any of its officers or employees about any of GCRC's day-to-day operations. That included Sara Fox's disastrous raft trip.

The Hualapai Tribe's refutation of any right to run, interfere with, or give orders or instructions to any of GCRC's officers or employees about GCRC's day-to-day operations precludes any basis for immunity. Those day-to-day operations are solely a matter for GCRC's officers and employees to handle. And they are therefore solely liable for the consequences of their negligence.

In the "economic context" of GCRC's day-to-day operations, finding any tribal immunity for GCRC would harm Sara Fox and other tort victims "who are

unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter." *Kiowa Tribe of Okla. v. Mfg. Technologies, Inc.*, 523 U.S. 751, 758 (1998).

At a minimum, the absence of day-to-day control, as evidenced by § 2.03 of GCRC's Bylaws, necessitates discovery to confirm if the Tribe is indeed not exercising any sort of control over GCRC and its employees in the conduct of GCRC's day-to-day operations. *Gibbs v. Plain Green, LLC*, 331 F.Supp.3d 518, 531-32 (E.D. Va. 2018), *app. dis.*, 2018 WL 7223994 (4th Cir. Sept. 13, 2018) (Trial court allows discovery concerning tribal management and the degree of control over tribally-established lending entities.).

The renunciation of control over the day-to-day operations of GCRC and its employees is consistent with its true corporate independence. Among other things:

(1) GCRC's board of directors is separate from the tribal government. (App072 at § 5.1). *Dixon v. Picopa Construction Co.*, 160 Ariz. 251, 256 (1989).

(2) The stated intent for the corporation was that "control and operation" of GCRC would be "vested" in its board of directors. (App075 at § 5.16).

(3) GCRC's Board has sole responsibility for "continuous supervision of the performance of GCRC." (App075 at § 5.16D).

(4) GCRC's Board has the power to "do everything necessary, proper, advisable, or convenient to accomplish" its corporate purposes. (App075 at § 5.16).

(5) GCRC's Board has the sole right to determine what powers and duties its officers can exercise. (App076 at § 6.1).

(6) There is no stated requirement that GCRC's Board Members must be members of tribal government or even members of the Tribe. (App076 at § 6.1).

(7) GCRC's Board has full responsibility for managing and supervising all corporate activities, businesses, and operations, including borrowing money, making investment decisions, selecting managers, and making contracts and other commitments. (App075 at §§ 5.16C and 5.16D).

(8) GCRC, and not the Tribe, indemnifies its past and present officers and directors for any legal fees, penalties, and judgments against them. (App076 at Art. VII).

(9) GCRC's independence from the Tribe is confirmed by the fact that it can neither expressly nor by implication enter into any agreement on behalf of the Tribe, obligate the Tribe, pledge any credit of the Tribe, or waive any sort of tribal right, privilege, or immunity. (App078 at Art. XIII(A), (B), & (D)).

(10) Under its "Services Agreement" with GCRC, Grand Canyon Custom Tours had the duty to obtain liability insurance to protect GCRC—not to protect the Tribe. That "counsels against a finding" that GCRC is a part of the Tribe. (App136). *Dixon*, 160 Ariz. at 256. After all, buying liability insurance for GCRC "is some evidence" that the Tribe expected the corporation—and not itself—to be liable for the corporation's torts. *Dixon*, 160 Ariz. at 257.

In fact, GCRC's independence is so complete that it can merge, consolidate, reorganize, and recapitalize itself, can recreate itself as a tribal enterprise, or can incorporate under federal law. (App077 at Art. X).

GCRC is not a mere tribal "subordinate economic organization," with "no

separate officers, no separate directors, no separate bank accounts, no separate assets, and no separate property holdings." *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community*, 138 Ariz. 378, 384 (App. 1983). GCRC is a robust corporation with a strong and independent Board having sole control over the whitewater-rafting day-to-day operations of its employees and agents. The Tribe created GCRC—but GCRC is not a puppet "subordinate economic organization" entitled to claim sovereign immunity as an integral part of the Tribe.

2. The tribal-immunity doctrine should be confined to the limits the U.S. Supreme Court has set.

When considering applying tribal sovereign immunity in Arizona state-court lawsuits arising from the personal injury to, or wrongful death of, Arizona residents in activities that occurred within Arizona but outside reservation land, Arizona courts must remember that, in Arizona, "the rule is liability and immunity is the exception." *Stone v. Arizona Highway Comm'n*, 93Ariz. 384, 392 (1963).

In an opinion filed October 3, 2017, well after April 25, 2017, when the U.S. Supreme Court filed *Lewis v. Clarke*, 137 S.Ct. 128 (2017), the Alabama Supreme Court reviewed the development of tribal immunity at the U.S. Supreme Court and suggested that tribal immunity did not shield an Indian tribe from tort claims brought against it by a tortiously injured motorist and passenger who were not tribal members. *Wilkes v. PCI Gaming Authority*, --- So.3d ---, No. 115312, 2017 WL 4385738 (Ala. Oct. 3, 2017), *cert. denied*, 139 S.Ct. 2739 (June 24, 2019).

In *Wilkes*, the tort victims suffered injury in a head-on collision with a tribal-owned vehicle driven by a tribal employee while traveling on a public road not located on any reservation. The motorist and passenger did not voluntarily engage in a transaction with the tribe, had no opportunity to negotiate with the tribe for waiver of immunity, and would have had no way to obtain relief if the doctrine of tribal immunity applied to bar their lawsuit.

The Alabama Supreme Court held that, although "the doctrine of tribal sovereign immunity is generally considered to be settled law, the Supreme Court . . . has recognized that the doctrine is a common-law doctrine that 'developed almost by accident.'" *Wilkes* at *3 (quoting *Kiowa Tribe*, 523 U.S. at 756). Notably, the U.S. Supreme Court denied certiorari over *Wilkes*.

Lacking any treaty or foundational statute, the Supreme Court has been left "to define the limits of tribal sovereign immunity in situations where tribal and non-tribal members interact, although that Court has repeatedly expressed its willingness to defer to Congress should Congress choose to act in this arena. *Wilkes* at *3 (citing *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 800 (2014) (It "is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity.")).

Bay Mills also stated that the Supreme Court never "specifically addressed (nor, so far as we are aware, has Congress) whether immunity should apply in the

ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct." *Bay Mills*, 572 U.S. at 799 n. 8.

The Alabama Supreme Court emphasized the cogency of *Kiowa Tribe*'s comments, which suggested "reasons to doubt the wisdom of perpetuating the doctrine" because tribal immunity, in our present, "interdependent and mobile society," actually "extends beyond what is needed to safeguard tribal self-governance." *Wilkes* at *3 (quoting *Kiowa Tribe*, 523 U.S. at 758). Here, as noted, tribal "immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." *Wilkes* at *3 (quoting *Kiowa Tribe*, 523 U.S. at 758).

Notably, in the dissent in *Kiowa Tribe*, Justice John Paul Stevens (with Justices Clarence Thomas and Ruth Bader Ginsburg concurring) wrote that there was "no federal statute or treaty" providing the Kiowa Tribe with "any immunity from the application of Oklahoma law to its off-reservation commercial activities," nor "should this Court extend the judge-made doctrine of sovereign immunity to pre-empt the authority of the state courts to decide for themselves whether to accord such immunity to Indian tribes as a matter of comity." *Kiowa Tribe* at 760. "Governments, like individuals, should pay their debts and should be held accountable for their unlawful, injurious conduct." *Id*. at 766.

And also notably, in their dissent in *Bay Mills*, Justices Clarence Thomas, Antonin Scalia, Ruth Bader Ginsburg, and Samuel A. Alito, Jr., opposed tribal immunity for off-reservation torts, noting that tribal immunity "significantly limits, and often extinguishes, the States' ability to protect their citizens and enforce the law against tribal businesses." *Bay Mills*, 572 U.S. at 782.

Based on the U.S. Supreme Court's increasing unease with tribal sovereign immunity when it denies access to state courts for those who have no choice in the matter, the Alabama Supreme Court declined to apply tribal sovereign immunity:

> In light of the fact that the Supreme Court of the United States has expressly acknowledged that it has never applied tribal sovereign immunity in a situation such as this, we decline to extend the doctrine beyond the circumstances to which that Court itself has applied it; accordingly, we hold that the doctrine of tribal sovereign immunity affords the tribal defendants no protection from the claims asserted by [the non-tribal tort victim].

Wilkes at *4.

The Alabama Supreme Court found no rationale for "continuing to apply the doctrine of tribal sovereign immunity to tribes' off-reservation commercial activities [that would] sufficiently outweigh the interests of justice so as to merit extending that doctrine to shield tribes from tort claims asserted by individuals who have no personal or commercial relationship to the tribe." *Wilkes* at *4. Logically, if tribal sovereign immunity "is divested to the extent it . . . involves a tribe's external relations," then that immunity cannot extend to tortious conduct

toward non-members. *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 425-426 (1989) (plurality opinion).

The Alabama Supreme Court held it was "not bound by decisions of lower federal courts" and noted the U.S. Supreme Court had "expressly acknowledged that it has not ruled on the issue whether the doctrine of tribal sovereign immunity has a field of operation with regard to tort claims." *Wilkes* at *4.

"Accordingly, in the interest of justice," the Alabama Supreme Court "respectfully decline[d] to extend the doctrine of tribal sovereign immunity beyond the circumstances in which the Supreme Court of the United States itself has applied it." *Wilkes* at *4. In a companion case, the Alabama Supreme Court similarly declined "to extend the doctrine of tribal immunity to actions in tort, in which the plaintiff has no opportunity to bargain for a waiver and no other avenue for relief." *Harrison v. PCI Gaming Authority*, 251 So.3d 24, 33 (Ala. 2017).

This Court and many other state and federal courts have routinely and uncritically accepted claims of tribal sovereign immunity in personal-injury and wrongful-death cases. This Court should reconsider that approach in light of *Harrison* and *Wilkes*, especially after the U.S. Supreme Court refused to grant the writ of certiorari in *Wilkes*.

3. The raft incident occurred within the State of Arizona's territory.

Tribal sovereign immunity notwithstanding, "[a]bsent express federal law to

the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Gingras v. Think Finance, Inc.*, 922 F.3d 112, 121 (2nd Cir. 2019) (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973)). "Tribes and their officers are not free to operate outside of Indian lands without conforming their conduct in these areas to federal and state law." *Id*. at 128. *See also Bay Mills*, 572 U.S. at 795 (Unless federal law says differently, Indians who leave reservation boundaries "are subject to any generally applicable state law.").

So, the rafting incident's location matters. The respective states have title to and ownership of land beneath navigable waters within their state boundaries. 43 U.S.C. § 1311. "There can be no Indian lands in the bed of a navigable river, because such underwater lands as a matter of law were held in trust for the state by the United States prior to statehood, and passed to the State of Alaska on statehood." *Alaska v. United States*, 200 F.3d 1154, 1165 (9th Cir. 1996).

Because "ownership of land under navigable waters is an incident of sovereignty," after a State joins the United States, "title to the land is governed by state law." *Montana v. United States*, 450 U.S. 544, 551 (1981). As sovereign entities in our federal system, the States have the absolute right to all of their navigable waters and to the soils under them for their own common use. *Tarrant Regional Water District v. Herrmann*, 569 U.S. 614, 631 (2013).

"The Colorado river is a navigable stream of the United States." *State of Arizona v. State of California*, 298 U.S. 558, 569 (1936). That is, the Colorado River "has been declared navigable waters," so the State of Arizona holds "title to its submerged lands and navigable waters." *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 427 (1968).

The location of the negligence that GCRC's two employees committed against Sara Fox on the Colorado River matters because, when the relevant activity moves off the reservation, "the State's governmental and regulatory interest increases dramatically, and federal protectiveness of Indian sovereignty lessens." *Smith Plumbing Co., Inc. v. Aetna Casualty & Surety Co.*, 149 Ariz. 524, 530 (1986), *cert. denied*, 479 U.S. 987 (1986). After all, it is a longstanding principle that each State is "entitled to the sovereignty and jurisdiction over all the territory within her limits." *Lessee of Pollard v. Hagan*, 3 How. 212, 228 (1845).

4. The Foxes can sue the raft operators in their individual capacities and then seek indemnification from GCRC if they recover damages.

Finally, it is important to remember that, federal law allows the Foxes to sue the two raft operators in their individual capacities. So far, even GCRC has not contested that vital point.[1] If successful in establishing the liability of either or both

[1] GCRC never "put at issue in its motion to dismiss whether individual-capacity damages claims may be brought in state court against tribal employees." *Specially Appearing Defendants Hwal'Bay Ba:J Enterprises, Inc. and Grand Canyon Resort Corporation's Motion for Reconsideration of Denial of Motion to*

of the negligent raft operators, the Foxes may seek indemnification from insurance and, for that matter, from GCRC itself.

The Foxes can do that under *Lewis v. Clarke*, 137 S.Ct. 1285 (2017). *Lewis* addressed the issue of who is the real party in interest for asserted tribal sovereign immunity. These are the operative facts: On October 22, 2011, Brian Lewis was driving his car south on Interstate Route 95 in Norwalk, Connecticut. His wife, Michelle Lewis, was his passenger. William Clarke was driving a limousine behind the Lewises. *Lewis v. Clarke*, No. KNLCV136019099S, 2014 WL 5354956 at *1 (Conn. Super. Sep. 19, 2014) (copy attached as Exh. 1).

Suddenly and without warning, Clarke drove the limousine into the rear of the Lewises' car, pushing it forward so hard that came to rest partly on top of a Jersey barrier on the left-hand side of the highway. Clarke's negligence caused the collision that injured the Lewises. *Id*.

Clarke was a Connecticut resident, had a Connecticut driver's license, and, according to the Mohegan Tribal Gaming Authority's Director of Transportation, was driving a limousine owned by the MTGA and was employed by the MTGA to do so. Specifically, Clarke was driving patrons of the Mohegan Sun Casino to their homes. The limousine was covered by an insurance policy. *Id*.

When the Lewises sued, Clarke moved to dismiss for lack of subject-matter

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Dismiss (Nov. 15, 2018) (App190 at 2:20-23).

jurisdiction. Clarke argued that, because he was a Mohegan Tribal Gaming Authority employee, and was acting within the scope of his employment at the time of the accident, he was entitled to sovereign immunity against suit. The Connecticut superior court denied the motion to dismiss, holding that a tribal employee sued in his individual capacity was not immune from suit, even when, as here, the Tribe claimed to be the real party in interest because it had committed itself to indemnify and defend its employee. *Id*. at *7-8.

The Connecticut Supreme Court, however, held that tribal immunity barred the suit because Clarke was acting within the scope of his employment with the Mohegan Tribe when the accident occurred. *Lewis v. Clarke*, 135 A.3d 677, 685-86 (Conn. 2016). The U.S. Supreme Court granted certiorari. *Lewis v. Clarke*, 137 S.Ct. 31 (2016).

Although Clarke was a tribal employee and was acting within the scope of his tribal employment at the time of the collision, the U.S. Supreme Court reversed, because a lawsuit "against a tribal employee in his individual capacity, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated." *Lewis*, 137 S.Ct. at 1288. The fact that "an employee was acting within the scope of his employment at the time the tort was committed is not, on its own, sufficient to bar a suit against that employee on the basis of tribal sovereign immunity." *Id*.

Significantly for obtaining compensation for tort victims, *Lewis* held that a tribal "indemnification provision does not extend a tribe's sovereign immunity where it otherwise would not reach." *Id*. "The critical inquiry," after all, "is who may be legally bound by the court's adverse judgment, not who will ultimately pick up the tab." *Id*. at 1292-93.

In 2017, the Alabama Supreme Court, discussing *Lewis*, confirmed that "individual defendants, being sued in their individual capacity, [are not] entitled to tribal immunity simply because they were employed by the tribe or acting within the scope of that employment." *Rape v. Poarch Band of Creek Indians*, 250 So.3d 547, 555 (Ala. 2017). Relying on *Lewis*, the Eighth Circuit has likewise held that common-law "claims against tribal officers acting in their individual capacities are not barred by the Tribe's sovereign immunity." *Stanko v. Oglala Sioux Tribe*, 916 F.3d 694, 697 (8th Cir. 2019).

One important aspect of *Lewis* is that tribal sovereign immunity did not bar the lawsuit "despite the fact that the tort was committed during the scope of the employee's employment, and for which the tribe had indemnified the employee." Alma Orozco, *The Dark Side of Tribal Sovereign Immunity: The Gap Between Law and Remedy*, 19 Nev. L.J. 689, 717 (Winter 2018). Another important aspect is that, although the Tribe "may indemnify Clarke for any negligence that occurred as a result of his driving a vehicle on Connecticut roads as a part of his employment,

that indemnification does not convert a claim against him in his personal capacity to an official capacity case." Grant Christensen, *A View from American Courts: The Year in Indian Law 2017*, 41 Seattle L. Rev. 805, 813 (Spring 2018).

DATED this 1st day of October, 2019.

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