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COURT OF APPEALS

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STATE OF WASHINGTON

BY _____
CARTY

No. 35067-0-II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PAUL M. MATHESON,

Appellant,

v.

CHRISTINE GREGOIRE, Governor of the State of Washington;
CINDI YATES, Director, GARY O'NEIL, Assistant Director,
Washington State Department of Revenue; THE WASHINGTON
STATE DEPARTMENT OF REVENUE; M. CARTER MITCHELL,
Tobacco Tax Control Enforcement Program Manager, Washington
State Liquor Control Board; THE WASHINGTON STATE LIQUOR
CONTROL BOARD; THE STATE OF WASHINGTON; CHAD R.
WRIGHT, Cigarette Tax Director, Puyallup Tribe of Indians; and
THE PUYALLUP TRIBE OF INDIANS, a Federally Recognized
Indian Tribe,

Respondents.

**BRIEF OF RESPONDENTS PUYALLUP TRIBE OF INDIANS
AND CHAD R. WRIGHT**

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INTRODUCTION

The Tribal Defendants (the Puyallup Indian Tribe and its Cigarette Tax Director), Respondents on this appeal, file this brief in support of the trial court's ruling dismissing them as defendants from the case. The trial court was entirely correct when it held that the Tribe's sovereign immunity from suit requires dismissal. Its judgment should be affirmed.

This is a frivolous appeal. The Appellant offers no argument or authority in his brief to this Court on the issue of sovereign immunity, the basis for the trial court's ruling concerning the Tribal Defendants. The Tribal Defendants therefore respectfully request an award of attorney fees under RAP 18.9.

The trial court was also correct when it dismissed the claims against the State Defendants (the State of Washington and various State officials). Because the Tribe was the party whose absence dictated dismissal, the Tribal Defendants have an interest in the disposition of that issue, and will discuss briefly the Appellant's arguments concerning the application of Rule 19 where Indian tribes are involved.

ISSUES PRESENTED

Appellant's assignments of error concern the merits of his claims, which the trial court did not reach and are not at issue in this appeal. Only three issues are properly before the Court on this appeal:

1. Did the trial court properly dismiss the Tribal Defendants based on the Tribe's sovereign immunity from suit?
2. Did the trial court properly dismiss the claims against the State Defendants because of the absence of an indispensable party?
3. Is an award of attorney fees to the Tribal Defendants appropriate under RAP 18.9(a) to compensate them for the need to respond to this frivolous appeal?

STATEMENT OF THE CASE

Factual Background

The Legislature in 2005 enacted RCW 43.06.465 authorizing the Governor to enter into an agreement with the Puyallup Tribe concerning cigarette taxation, so long as the agreement includes certain terms specified in the legislation. Pursuant to that authorization, on April 20, 2005, the Puyallup Tribe and the State of Washington entered into the Cigarette Tax Agreement that is the subject of this litigation.

The Agreement provides, among other things, that the Tribal cigarette tax imposed by the Puyallup Tribe will be exclusive – no state taxes will be applicable to sales of cigarettes made in compliance with the Agreement by retailers who are licensed by the Tribe.¹ RCW 43.06.465(2). As indicated in the Complaint, Plaintiff-Appellant (hereafter “Matheson” or “the retailer”) operates a retail cigarette outlet licensed by the Tribe. He sold cigarettes in compliance with the Agreement, and the Tribe taxed those sales under the Tribe’s Cigarette Tax Code.

In May, 2005, the retailer filed suit in Thurston County Superior Court against two groups of defendants: (1) the State, its governor and several agency officials, and (2) the Puyallup Tribe and its Cigarette Tax Director. The Complaint named all the individuals in their official capacities. CP 12, paragraph 23.

The retailer asked for a declaration that the Cigarette Tax Agreement is invalid for a variety of reasons and for the return of moneys that his retail cigarette outlet had paid in Tribal cigarette tax.

¹ CP 101, Agreement, p. 5, Part IV, Sec. 2(d); also attached to Appellant Matheson’s Opening Brief in this appeal.

Procedural Background

Both Tribal and State Defendants filed motions to dismiss. The trial court dismissed the Tribal Defendants based on the Tribe's sovereign immunity from suit but did not reach other bases for dismissal that they had offered. CP 635-639. The trial court later dismissed the claims against the State Defendants under Rule 19 based on the absence of a necessary and indispensable party (the Tribe). CP 633-634. The retailer asked for reconsideration of those orders; the trial court denied the motion. CP 209-210.

ARGUMENT

I. The Trial Court Correctly Ruled That the Tribe's Sovereign Immunity From Suit Requires Dismissal of the Tribal Defendants

Standard of Review. The propriety of the trial court's order dismissing the Tribal Defendants is a legal issue subject to de novo review by this Court. *Marthaller v. King Co. Hospital Dist. No. 2*, 94 Wn.App 911, 915, 973 P.2d 1098 (1999).

Sovereign immunity. The trial court dismissed the Tribal Defendants from the case because of the Tribe's sovereign immunity from suit. Yet even though he has appealed the dismissal of the Tribal Defendants, the retailer does not once in his brief

mention sovereign immunity. His arguments are directed primarily at the merits of his claims, issues the trial court did not reach.

That should be the end of the discussion, since an appellate court generally does not consider issues that an appellant fails to address. *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990); RAP 10.3(a)(5). We will nevertheless summarize the legal standard under which the trial court correctly dismissed the Tribal Defendants.

The Puyallup Tribe. It is beyond dispute that Indian tribes are immune from suit. *North Sea Products, Ltd. v. Clipper Seafood Co.*, 92 Wn.2d 236, 238, 595 P.2d 938 (1979); *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wn.2d 862, 876, 929 P.2d 379 (1996); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978); *Puyallup Tribe v. Washington Department of Game*, 433 U.S. 165, 172-173, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977). A waiver of a tribe's immunity is effective only if it is "unequivocally expressed." *Santa Clara Pueblo, supra*, 436 U.S. at 58; *Lane v. Pena*, 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996).

As sovereign entities, Indian tribes are immune from suit in state or federal court. It is well settled that waiver of

their sovereign immunity will not be implied, but must be unequivocally expressed.

Anderson & Middleton Lumber Co. v. Quinault Indian Nation, supra,
130 Wn.2d at 876.

In the trial court, the retailer made a few half-hearted attempts to suggest that the Puyallup Tribe had waived its immunity from this suit. The trial court considered and rejected those arguments. CP 636-638. As noted, the retailer has not included even those patently insufficient suggestions in his brief to this Court.

The retailer argued, for example, that because he alleged off-reservation activities in his Complaint, the Tribe's immunity does not apply. But that is incorrect as a matter of law. The U.S. Supreme Court recently confirmed that tribal sovereign immunity is effective off-reservation as well as on. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 760, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998).

The retailer argued that a mediation provision in the Cigarette Tax Agreement constituted a waiver of the Tribe's immunity. Case law is clear, however, that an arbitration provision waives a tribe's immunity, if at all, only as to the other party or

parties to the agreement. *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418-419, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001). The retailer of course is not a party to the Cigarette Tax Agreement between the State and the Tribe.

The retailer's most remarkable argument was that the Tribe lost its immunity "by not regulating the immigration of white persons into its territory." CP 6, lines 19-21. Needless to say, the trial court did not find that argument convincing.

In short, the retailer did not suggest any action or provision that even remotely approaches a waiver of the Tribe's sovereign immunity.

The Tribe's Cigarette Tax Director. Case law is also clear that a suit filed against a tribal official acting in his official capacity is in effect against the tribe and is barred by the tribe's immunity unless the official acted outside the scope of his authority. *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1321 (9th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984); *United States v. Oregon*, 657 F.2d 1009, 1012 n. 8 (9th Cir. 1981); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-80 (9th Cir. 1985); *Suarez v. Newquist*, 70 Wn.App. 827, 831 n.7, 855 P.2d 1200 (Div. 3 1993). "[W]hen tribal

officials act in their official capacity and within the scope of their authority, they are immune.” *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991).

The Tribe’s Cigarette Tax Director acts in his official capacity when he enforces the requirement to pay the Tribal tax. He is therefore insulated from suit.

The courts are particularly careful not to allow suit against a government official where the relief sought would in effect be against the government itself, where the result of the case, if the plaintiff prevails, would be to require action by the government.

In ... such [a] case the compulsion, which the court is asked to impose, may be compulsion against the sovereign, although nominally directed against the individual office. If it is, then the suit is barred ... because it is, in substance, a suit against the Government over which the court, in the absence of consent, has no jurisdiction.

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 688, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949); *Imperial Granite Co.*, *supra*, 940 F.2d at 1271. The reason for that scrutiny is to ensure that a plaintiff is not circumventing the government’s sovereign immunity by naming an individual as a defendant in order to accomplish the same result that would be barred in a suit against the government.

The retailer's lawsuit seeks to invalidate two things: the Agreement that the Tribe entered into with the State, and the Tribe's cigarette tax. Neither of those was an action of the Director, or of any individual official or employee; both were actions of the Tribe acting in its capacity as a sovereign government. The retailer thus is seeking relief that would directly impact and nullify those governmental actions. Under the Supreme Court and Ninth Circuit rulings discussed above, the Director is protected by the Tribe's sovereign immunity.

The trial court therefore correctly held that the Tribe's sovereign immunity requires dismissal of the Tribe's Cigarette Tax Director as a defendant. Nothing in the retailer's brief even addresses, much less contradicts, that conclusion.

II. The Trial Court Correctly Ruled That the Absence of an Indispensable Party Requires Dismissal of the State Defendants Under Rule 19

The State Defendants thoroughly address their dismissal under Rule 19. The Tribal Defendants here wish to comment only on the three Washington appellate decisions noted in the retailer's brief that discuss the application of Rule 19 when Indian tribes are involved. *Aungst v. Roberts Construction Co. Inc.*, 95 Wn.2d 439,

625 P.2d 167 (1981); *Trans-Canada Enterprises, Ltd. v. King County*, 29 Wn.App. 267, 628 P.2d 493 (Div. 1, 1981); *Cordova v. Holwegner*, 93 Wn. App. 955, 971 P.2d 531 (Div. 3, 1999). The cases do not conflict with, and in fact support, the principle that a tribe is an indispensable party in a case that challenges an agreement to which the tribe is a party.

Aungst. The Washington Supreme Court held in *Aungst* that a claim for damages against an individual agent could be maintained under the Consumer Protection Act. However, the Court specifically found that an action for rescission of the contracts involved in the dispute could not go forward because one of the parties to the contracts was an Indian tribe whose sovereign immunity prevented its joinder. “Rescission, in this instance, is not available to appellants because of the prejudice to nonjoinable parties [including] the Tribe ...” 95 Wn.2d at 445. All that was allowed to go forward was a statutory damages claim against a party other than the tribe.

In the instant case, the retailer seeks invalidation of the Agreement between the Tribe and the State, despite the Tribe’s absence from the case. Although he seeks other relief as well, he cannot succeed on his other claims against either the Tribal or

State Defendants unless he prevails on his claim that the Agreement is invalid. *Aungst* therefore supports dismissal of the State Defendants in this case.

Trans-Canada. Division 1 held in *Trans-Canada* that although a tribe was a necessary party, the case did not need to be dismissed even in the tribe's absence because the relief granted by the lower court could be modified to avoid any impact on the tribe. The lawsuit sought to require King County to make repairs to a dike in order to protect the plaintiff's property. There was no agreement or contract involved in the case. The Court of Appeals allowed the case to go forward only with the very important qualification that because the tribe was immune from suit, the trial court must add language to its order directing the County to take action only "to the extent not rendered impossible by the legal rights of the Muckleshoot Indian Tribe ..." 29 Wn.App. at 274.

In the instant case, it is impossible to qualify or limit the relief in a manner that would protect the Puyallup Tribe from harm. The relief the retailer seeks precludes the kind of limitation the Court used in *Trans-Canada*.

Cordova. Division 3 held in *Cordova* that a tribal corporation was not a necessary party to an action for damages

brought against a non-Indian employee of the corporation. The Court held that because Washington law makes employers and employees jointly and severally liable for damages, the case could proceed independently against the employee without implicating the tribe's interests. 93 Wn.App. at 961-962. Because the Court held that the tribal corporation was not a necessary party, it explicitly did not reach the question of whether it would be an indispensable party. *Id.* at 962.

Once again, the case did not involve a contract or agreement, and did not deal with the question of whether the tribe itself would be a necessary or indispensable party when such a document is involved. In sharp contrast to *Cordova*, the retailer in the instant case seeks relief that cannot be granted without having a drastic impact on the Tribe. The two cases are therefore in no way equivalent.

In short, *Aungst*, *Trans-Canada* and *Cordova* do not in any way contradict the conclusion of Washington and federal courts, detailed in State Respondents' brief, that a challenge to the validity of an agreement cannot be heard in the absence of a party to the agreement.

III. This Appeal Is Frivolous; an Award of Attorney Fees to Tribal Defendants Is Appropriate Under RAP 18.9

RAP 18.9(a) authorizes an award of attorney fees when a party “files a frivolous appeal.”

An appeal is frivolous when there are no debatable issues upon which reasonable minds could differ and when the appeal is so totally devoid of merit that there was no reasonable possibility of reversal.

Mahoney v. Shinpoch, 107 Wn.2d 679, 691, 732 P.2d 510 (1987).

A claim is frivolous where, as here, the appellant “failed to address the basis of the trial court's decision.” *Id.* at 692. The Court awarded attorney fees as a result of the frivolous appeal. *Ibid.*

Here, the retailer does not address the issue of sovereign immunity, the sole basis for the trial court's dismissal of the Tribal Defendants. The Tribal Defendants respectfully request an award of attorney fees to compensate them for the need to respond to this frivolous appeal.

CONCLUSION

The Tribal Defendants respectfully request that the Court affirm their dismissal by the trial court based on the Tribe's

sovereign immunity from suit. The Tribal Defendants ask for an award of attorney fees in light of this frivolous appeal.

DATED this 19th day of October, 2006.

Respectfully submitted,

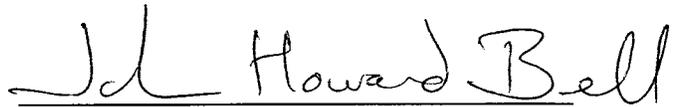


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CERTIFICATE

I certify that I mailed a copy of the foregoing Brief of Respondents Puyallup Tribe of Indians and Chad R. Wright to Robert E. Kovacevich, Plaintiff-Appellant's attorney, at his office address, 818 W. Riverside Avenue, Ste. 715, Spokane, WA, 99201-0995, and to Heidi A. Irvin and David M. Hankins, attorneys for the State Defendants-Respondents, at P.O. Box 40123, Olympia, WA, 98504-0123, postage prepaid, on October 19, 2006.



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