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No. 66122-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

TALINA CHANDLER, Appellant

v.

JEFFREY PAYNE, et ux., Respondents

BRIEF OF APPELLANT

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I. INTRODUCTION

This appeal arises from the trial court's dismissal of Ms. Chandler's complaint on the ground of a lack of subject matter jurisdiction, and denial of Ms. Chandler's request for CR 11 sanctions against Mr. Payne.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in entering the order of September 29, 2010, dismissing Ms. Chandler's complaint against Mr. Payne.
2. The trial court erred in denying Ms. Chandler's motion for CR 11 sanctions against Mr. Payne in the order entered on September 29, 2010.

Issues Pertaining to Assignments of Error

1. Did the trial court err when it dismissed Ms. Chandler's complaint for lack of subject matter jurisdiction where she did not sue Mr. Payne in his capacity as an employee of the Stillaguamish Tribe, and did not sue the Tribe in any capacity?

2. Did the trial court err when it denied Ms. Chandler's motion for CR 11 sanctions where Mr. Payne lacked standing to assert sovereign immunity on behalf of the Stillaguamish Tribe or himself?

III. STATEMENT OF THE CASE

On November 21, 2006, Ms. Chandler was driving her car northbound on I-405 at Kirkland, Washington when her vehicle was struck from the rear by a vehicle operated by Jeffrey Payne, propelling Ms. Chandler's car into the vehicle in front of her. Ms. Chandler was injured. (CP 4).

At the time of the collision Mr. Payne was employed by the Stillaguamish Tribe (Tribe). He was operating a vehicle owned by the Tribe, and was in the course and scope of his employment at the time of the collision. (CP 12-13).

On November 10, 2009, Ms. Chandler commenced this action against Mr. Payne and his spouse for the injuries he sustained in the collision. Ms. Chandler sued Mr. Payne in his individual capacity and not as an employee of the Tribe. (CP 3-6). Ms. Payne did not sue the Tribe, nor did she allege that the Tribe was vicariously liable for the acts of Mr. Payne. (CP 3-6).

On May 5, 2010, Mr. Payne filed the Defendant's Motion to Dismiss Complaint Pursuant to CR 12(b)(1). In his motion Mr. Payne argued that the trial court lacked subject matter jurisdiction because he is an employee of the Tribe, and the Tribe enjoys sovereign immunity from lawsuits in the state of Washington. (CP 7-11).

Ms. Chandler opposed the motion to dismiss because she had not sued Mr. Payne in his capacity as an employee of the Tribe, and had not sued the Tribe or alleged that the Tribe was liable for Mr. Payne's actions. She moved for the imposition of CR 11 sanctions against Mr. Payne on the basis that he lacked standing to assert sovereign immunity where he had been sued solely in his individual capacity. (CP 18-32).

The trial court heard Mr. Payne's motion on September 29, 2010. The trial court granted Mr. Payne's motion to dismiss on the basis that he was acting within his capacity as an employee of the Tribe and, therefore, was immune from liability. The trial court also denied without explanation Ms. Chandler's motion for sanctions. (CP 43-44).

IV. ARGUMENT

A. The Trial Court Erred In Dismissing Ms. Chandler's Complaint For Lack Of Subject Matter Jurisdiction Because Mr. Payne Was Not Sued In His Capacity As An Employee Of The Tribe, And The Tribe Was Not Sued In Any Capacity.

Where the trial court has dismissed a case for lack of subject matter jurisdiction a question of law exists, which the appellate court reviews de novo. *In re Guardianship of Wells*, 150 Wn.App. 491, 499, 208 P.3d 1126 (2009).

The doctrine of sovereign immunity does not apply to tribal officials/employees who are sued in their individual capacity as opposed to their capacity as a tribal official or employee. One of the cases relied upon by Mr. Payne, *Wright v. Colville Tribal Enterprise Corp.*, 159 Wn.2d 108, 116, 147 P.3d 1275 (2006) says exactly that:

Wright names him solely in his official capacity ... Of course, tribal sovereign immunity would not protect Braman from an action against him in his individual capacity....(citations omitted)

Even a cursory reading of the Complaint for Damages reveals that Mr. Payne has only been sued in his individual capacity. There are no allegations that he was in the course and scope of his alleged employment by the Tribe at the time of the accident, nor are there any allegations that the Tribe is vicariously liable for Mr. Payne's actions as a result of an alleged employment relationship. Because Mr. Payne has been sued solely in his individual capacity he does not enjoy the benefit of the Tribe's sovereign immunity.

In the trial court, Mr. Payne argued that *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718 (9th Cir. 2008) is the controlling authority, not *Wright*, when a tribal employee is sued in their individual capacity. (CP 11-12, 39-40).

Washington courts are not bound to follow decisions of lower federal courts merely because those courts have rendered a decision. If such decisions are not logical or sound Washington courts are not bound to follow them. *S.S. v. Alexander*, 143 Wn.App. 75, 92-93, 177 P.3d 724 (2008).

The facts in *Cook* are very different than this case, rendering that decision neither logical nor sound in light of the facts of this case. In *Cook*, Cook alleged that two tribal employees named as

defendants had acted in the course and scope of their authority as tribal employees. Cook also sought recovery from the tribe, alleging that the tribe was vicariously liable for the actions of its employees. The *Cook* court held that the employees enjoyed sovereign immunity because they had been sued in their capacity as tribal employees. *Cook v. AVI Casino Enterprises, Inc*, 548 F.3d at 727.

Ms. Chandler sued Mr. Payne solely in his individual capacity, not as an employee of the Tribe. Nor has she ever alleged that the Tribe is vicariously liable for any of Mr. Payne's actions. This is far different than the situation in *Cook*. *Cook* is not controlling authority. *Wright* is the controlling authority in this case. The trial court erred in dismissing this case, and that dismissal must be reversed.

B. The Trial Court Abused Its Discretion When It Denied Ms. Chandler's Motion for CR 11 Sanctions.

Ms. Chandler moved the trial court for the imposition of CR 11 sanctions on Mr. Payne and/or his counsel for bringing the motion to dismiss because Mr. Payne lacked standing to assert sovereign immunity, and there was no factual or legal basis to support the

motion to dismiss. (CP 20-22). The trial court, without explanation, denied Ms. Chandler's motion. (CP 43-44).

Decisions either denying or granting CR 11 sanctions are reviewed for an abuse of discretion. *Washington State Physicians Insurance Exchange & Assn. v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). A trial court abuses its discretion when its order is manifestly unreasonable, based upon untenable grounds, or for untenable reasons. *Eugster v. City of Spokane*, 110 Wn.App.212, 231, 39 P.3d 380 (2002).

**1. Respondent Payne, In His Individual Capacity,
Lacked Standing To Bring His Motion To Dismiss.**

The doctrine of standing, as a general rule, prohibits a litigant from asserting another's legal rights. *Walker v. Munro*, 124 Wn.2d 402, 879 P.2d 920 (1994); *Sabey v. Howard Johnson & Co.*, 101 Wn.App. 575, 584, 5 P.3d 730 (2000); *Miller v. U.S. Bank of Washington, N.A.*, 72 Wn.App. 416, 424, 865 P.2d 536 (1994); *Gustafson v. Gustafson*, 47 Wn.App. 272, 276, 734 P.2d 949 (1987).

Because Mr. Payne was sued solely in his individual capacity he had no personal stake in the sovereign immunity enjoyed by the Tribe or its officials/employees acting in their official capacity. Nor did he have standing to assert the legal rights of the Tribe, or its officials acting in their official capacity because they have not been sued in that capacity.

Given that Mr. Payne had been sued only in his individual capacity his motion should have been denied.

2. CR 11 Sanctions Are Required Because Mr. Payne Lacked Standing To Bring His Motion To Dismiss.

Superior Court Civil Rule 11 provides, in part, that:

... The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; andIf a pleading, motion or legal memorandum is signed in violation of the rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction,

which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

Under the rule there are two types of sanctionable filings those that are “baseless” and those that are interposed for an improper purpose. *Madden v. Foley*, 83 Wn.App. 385, 922 P.2d 1364 (1996). For the purpose of Ms. Chandler’s motion for sanctions, we are concerned with a “baseless” filing. A baseless filing is one that is: (1) not well grounded in fact; (2) is not warranted by existing law, or a good faith argument for the alteration of existing law; and (3) the attorney signing the pleading has failed to conduct a reasonable inquiry into the factual or legal basis of the motion. *Madden v. Foley*, 83 Wn.App. at 389-390.

A party who brings an action or motion which he lacks standing to bring is subject to sanctions under CR 11. *State ex rel. Quick-Rubin v. Verharen*, 136 Wn.2d 888, 905-906, 969 P.2d 64 (1998).

As pointed out above, Mr. Payne failed to point to any facts or legal authority that would allow him to assert the sovereign immunity of the Tribe or any officials or employees sued in their official capacity.

The complaint on its face names Mr. Payne solely in his individual capacity. There are no facts that support Mr. Payne's argument that he or the Tribe is entitled to sovereign immunity. The authorities cited by Mr. Payne are contrary to his argument that he is entitled to sovereign immunity. Mr. Payne failed to cite to a single relevant legal authority supporting his request that the Complaint for Damages be dismissed. That is because there is none, and he failed to make a good faith argument for an alteration of existing law to permit such dismissal. Finally, it is obvious from the motion to dismiss that defense counsel failed to conduct a reasonable inquiry into the factual or legal basis for the motion asking for dismissal of the complaint.

Because Mr. Payne lacked standing to bring his motion to dismiss, CR 11 sanctions should have been imposed on him and his counsel by the trial court.

However, the record is silent as to the trial court's reason(s) for denying Ms. Chandler's motion for sanctions. Where the record is silent as to the trial court's reason for denying or granting a motion for CR 11 sanctions the case should be remanded for further

proceedings. *Doe v. Spokane and Inland Empire Blood Bank*, 55 Wn.App. 106, 112, 780 P.2d 852 (1989).

V. CONCLUSION

For the reasons set forth above, this Court should reverse the dismissal of Ms. Chandler's complaint, and remand this matter for further proceedings with respect to her motion for the imposition of CR 11 sanctions.

DATED this 13th day of December, 2010.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I am employed in the County of Snohomish, State of Washington. I am over the age of eighteen and not a party to the within action. My business address is 9623 32nd Street S.E., Bldg. C-101, Lake Stevens, Washington 98258.

On, December 13, 2010, I served the foregoing documents on the interested parties in this action by depositing a true copy with a messenger and/or placing it for collection, mailing, and deposit with the United States Postal Service following ordinary business practices, addressed as follows:

1. Brief of Appellant

**Original to: Richard D. Johnson – Court Administrator/Clerk
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I am readily aware that the business practice for collection and processing of correspondence for mailing with the United States Postal Service and that the correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 13th day of December, 2010.



Tonya McLeod