

Certification of Word Count 1740

COURT OF APPEALS, STATE OF COLORADO
State Judicial Building
2 East 14th Avenue, Denver Colorado 80203
Phone: (303) 861-1111

Appeal from DISTRICT COURT, DENVER
COUNTY, COLORADO
Honorable Robert S. Hyatt
05CV1143 and 05CV1144

Applicants-Appellees:

State of Colorado ex rel. John W. Suthers, Attorney
General for the State of Colorado, and Laura E. Udis,
Administrator, Uniform Commercial Code

v.

Respondents-Appellants:

Cash Advance and Preferred Cash Loans

Attorneys for Amicus Curiae:

Anne Whalen Gill, #14610
Gill, Lindquist & Associates, L.L.C.
510 Wilcox Street, Suite C
Castle Rock, CO 80104
Phone: 303 713-9050
Fax: 303 713-0785 fax
E-mail: anne@coloradoappeals.com

FILED IN THE
COURT OF APPEALS
STATE OF COLORADO

OCT 21 2007

Clerk, Court of Appeals

COURT USE ONLY

Case Number:

07 CA 582

AMENDED AMICUS CURIAE BRIEF

TABLE OF CONTENTS

Issue Presented.....1

Did the Court of Appeals impermissibly expand its jurisdiction in *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402 (Colo. App. 2004), to include interlocutory appeals from a pre-trial order on tribal immunity?

Argument.....1

Conclusion.....6

TABLE OF AUTHORITIES

Cases

<i>Abney v. United States</i> , 431 U.S. 651, 97 S.Ct. 2034 (1977).....	5
<i>Bill Dreiling Co. v. Court of Appeals</i> , 171 Colo. 448, 468 P.2d 37 (1970).....	1
<i>Cohen v. Beneficial Indus. Loan Corp.</i> , 337 U.S. 541 (1949).....	2
<i>Furlong v. Gardener</i> , 956 P.2d 545 (Colo. 1998).....	2
<i>Johnson v. Fankell</i> , 520 U.S. 911 (1997).....	passim
<i>Kiowa Tribe of Okla. v. Mfg. Techs., Inc.</i> , 523 U.S. 751, 118 S.Ct. 1700 (1998).....	2
<i>People v. Paul</i> , 83 P.2d 1171 (Colo. App. 2003), <i>rev'd Paul v. People</i> , 105 P.3d 628 (Colo. 2005).....	4, 5, 6
<i>Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe</i> , 107 P.3d 402 (Colo. App. 2004).....	1, 2, 4
<i>Tamiani Partners, Ltd. v. Miccosukee Tribe of Indians</i> , 63 F.3d 1030 (11 th Cir. 1995).....	2
<i>Things Remembered, Inc. v. Fireman's Ins. Co.</i> , 924 P.2d 1089 (Colo. App. 1996).....	2

Statutes

Section 13-4-102, C.R.S.....1

Section 1983.....2, 3

Issue Presented

Did the Court of Appeals impermissibly expand its jurisdiction in *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402 (Colo. App. 2004), to include interlocutory appeals from a pre-trial order on tribal immunity?

Summary of Argument

The division in *Rush Creek* misapprehended the principles of neutrality articulated in *Johnson v. Fankell*, 520 U.S. 911 (1997). As a result, that division has promulgated a monolithic approach to its jurisdiction, allowing federal doctrine to impermissibly expand the state court's jurisdiction beyond that granted to it by the General Assembly.

Argument

The Court of Appeals is a court of statutory creation and, similarly, its jurisdiction is limited to that vested by statute. Section 13-4-102, C.R.S. Although the Court of Appeals has authority to determine whether a particular case lies within its jurisdiction, it has no authority to expand its jurisdiction. *Bill Dreiling Co. v. Court of Appeals*, 171 Colo. 448, 468 P.2d 37 (1970).

The issue here is whether the Court of Appeals has jurisdiction to hear an appeal from an order denying a defendant the defense of tribal immunity. This

Court held it does have jurisdiction into hear such an order in *Rush Creek Solutions, Inc. v. Ute Mt. Ute Tribe*, 107 P.3d 402, 405-406 (Colo. App. 2004).

Amicus asserts that case was wrongly decided for the following reasons.

Decision in Rush Creek

The sovereign immunity of Native American Tribes provides immunity from suit. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 118 S.Ct. 1700 (1998). The Eleventh Circuit has held that a ruling on the availability of tribal immunity is immediate appealable under the collateral order doctrine. *Tamiani Partners, Ltd. v. Miccosukee Tribe of Indians*, 63 F.3d 1030 (11th Cir. 1995) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)). Undersigned has found no other federal authority to this result. The collateral order doctrine, permitting an interlocutory appeal of a collateral order, has not been accepted in Colorado. See *Paul v. People*, 105 P.3d 628 (Colo. 2005); *Things Remembered, Inc. v. Fireman's Ins. Co.*, 924 P.2d 1089 (Colo. App. 1996).

In *Rush Creek Solutions, Inc. v. Ute Mt. Ute Tribe*, 107 P.3d 402, 405-406 (Colo. App. 2004), this court reasoned that the determination that tribal immunity was not available was final and appealable pursuant to the neutrality principles of *Johnson v. Fankell*, 520 U.S. 911 (1997), as applied in *Furlong v. Gardener*, 956 P.2d 545 (Colo. 1998). That division of this court concluded that tribal immunity,

like Colorado Governmental Immunity Act and § 1983 immunity from suit, would be rendered meaningless if immediate appellate review were not available from an adverse determination.

Undersigned amicus submits that the *Rush Creek* division misapprehended the neutrality principles articulated in *Johnson v. Fankell, supra*.

Johnson involved qualified immunity to suit on a § 1983 claim. The district court denied a claim of immunity, and the defendant appealed. Under Idaho procedure, the state court held that no appeal lay from the interlocutory order. On certiorari to the United States Supreme Court, that court held that federal doctrines and procedures are not binding on state courts. The critical issue was whether the state procedure was neutral in its denial of an interlocutory appeal. The neutrality principle is set forth in Footnote 9 of *Johnson* at 918:

...Petitioners claim that the rule is not neutral because it permits interlocutory appeals in certain limited circumstances but not here. But we have never held that a rule must be monolithic to be neutral. Absent evidence that Appellate Rule 11(a) (1) discriminates against interlocutory appeals of § 1983 qualified immunity determinations by defendants-as compared with other types of appeals-we must deem the state procedure neutral.

Because there was no evidence on discrimination against interlocutory appeals in the Idaho court, the United States Supreme Court upheld the decision that no

interlocutory appeal was available in the state court.

The Colorado Supreme Court applied this concept in *Furlong v. Gardner, supra*. It reasoned that permitting an interlocutory appeal on questions of law involving the availability of immunity under the CGIA necessitated permitting interlocutory appeals on questions of law involving the availability of qualified immunity in § 1983 actions.

The division in *Rush Creek* construed this holding to require interlocutory appeals on the issue of tribal immunity.

The result is a monolithic application of a rule, exactly what the United States Supreme Court cautioned against in *Johnson*. The ramifications of *Rush Creek* is that pre-trial orders holding that a particular defense is not available to a defendant should be immediately appealable. If there is not an immediate appeal, then the reasoning of the *Rush Creek* division would apply to hold that denial of an immediate appeal was a discriminatory application of state procedures.

The *Johnson* court expounded on the “countervailing considerations” presented when an issue of federal pre-emption of state law arises. *Johnson* at 922. It held that those countervailing consideration were strong enough to deny public officials an interlocutory appeal of the immunity defense in a § 1983 action. The United States Supreme Court pointed out that imposing federal concepts on what

orders are appealable on a state court would require a fundamental restructuring of the operation of the state courts. As a result, it concluded that it must recognize the state's neutral procedural rules even when it denied an interlocutory appeal in a § 1983 action. See *Johnson* at footnote 13.

Here, the Court of Appeals' jurisdictional statute and the Colorado Appellate Rules, generally limiting appeals to final judgments present neutral application that should be enforced by this court. Only if the General Assembly expands its jurisdiction by legislation, as it did in the CGIA, should this court hear this interlocutory appeal.

Paul v. People

This court in a somewhat analogous proceeding, this court expanded its jurisdiction to hear an interlocutory appeal from an order denying a defense of double jeopardy. *People v. Paul*, 83 P.2d 1171 (Colo. App. 2003), *rev'd Paul v. People*, 105 P.3d 628 (Colo. 2005). This court based its reasoning on *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034 (1977). There the U.S. Supreme Court held that a pretrial motion denying a motion to dismiss on double jeopardy grounds fell under the collateral order exception to the requirement of finality. The collateral order exception allows an interlocutory appeal of an order that determines "an important issue completely separate from the merits of the action."

Paul at 1173.

On review, the Colorado Supreme Court rejected that reasoning, citing *Johnson*, pointing out that the collateral order doctrine is not a matter of constitutional necessity and is not binding on the state. *Paul*, 105 P.3d at 631. It further held:

We have never held, however, that the federal collateral order exception, interpreting the meaning of “final decisions,” as that term appears in 28 U.S.C. section 1291, is equally applicable to the interpretation of final judgments,” as that terms is used in C.A.R. 1(a): and we have particularly not held that the collateral order exception governs the appealability of orders denying pre-trial motions to dismiss on double jeopardy grounds.

Our supreme court heard the issues in *Paul* by exercising its jurisdiction under C.A.R. 21; it did not find that the pre-trial order had the required indicia of finality for the Court of Appeals to have heard the case. This reasoning applies to the issue of tribal immunity. Our supreme court has not ruled whether an interlocutory appeal is available on a denial of a defense of tribal immunity. This court’s jurisdictional statute does not grant authority to hear such an appeal, and there is no Colorado authority other than *Rush Creek* holding that such an interlocutory appeal is available. In light of the federal decisions cautioning so strongly against federal pre-emption of state procedures, and the existence of

facially neutral principles delineating the jurisdiction of the Court of Appeals, it would be error to expand this court's jurisdiction and hear an interlocutory appeal on the tribal immunity issue.

There is no authority in the jurisdictional statute of Supreme Court Rule for the Court of Appeals to hear this interlocutory appeal. Those authorities are neutral; there is not constitutional requirement that this court expand its jurisdiction to hear this appeal.

Conclusion

Undersigned amicus curiae requests this court to determine that it lacks jurisdiction to hear an interlocutory appeal from a denial of the defense of tribal immunity.

Respectfully submitted,



Anne Whalen Gill
Gill, Lindquist and Associates, L.L.C.
510 Wilcox Street, Ste. C
Castle Rock, CO 80104

Certificate of Service

I certify that a true copy of the foregoing **Amicus Brief** was placed in the United States mail, postage prepaid, on October 19, 2007, addressed as follows:

Paul Chessin, Esq.
Office of the Attorney General
1525 Sherman Street, 7th floor
Denver, CO 80203

Edward T. Lyons, Jr., Esq.
Jones & Keller, P.C.
1625 Broadway, Suite 1600
Denver, CO 80202


