

FILED
SUPREME COURT
STATE OF OKLAHOMA

FEB 13 2008

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CLERK

Case No. DF-105,300

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Loyman Cossey,
Plaintiff/Respondent

v.

Cherokee Nation Enterprises, L.L.C., formerly known as
Cherokee Nation Enterprises, Inc., and Cherokee Nation Enterprises, Inc.,
Defendants/Petitioners

**BRIEF IN CHIEF OF DEFENDANTS/PETITIONERS CHEROKEE
NATION ENTERPRISES, L.L.C. AND CHEROKEE NATION
ENTERPRISES, INC.**

**Appeal from the District Court of Rogers County
The Honorable Dynda Post, District Judge**

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SEAN BURRAGE, OBA # 15078
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February 12, 2008

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BRIEF-IN-CHIEF OF PETITIONERS

COME NOW the Petitioners, Cherokee Nation Enterprises, L.L.C. (formerly known as Cherokee Nation Enterprises, Inc.) and Cherokee Nation Enterprises, Inc. (collectively “CNE”),¹ pursuant to this Court’s Order of January 7, 2008 granting CNE’s Petition for *Certiorari*.² Specifically, CNE appeals the “Order Denying Motion to Dismiss” entered by the Honorable Dynda Post, District Judge.³ CNE’s motion to dismiss is predicated on the lack of subject matter and personal jurisdiction over a tribal enterprise and was filed pursuant to 12 Okla.Stat.(Supp.2006) §2012(B)(1) and (2) and (F)(3).

In deciding this case, this Court is asked to consider the issues in light of its decision in *Muscogee (Creek) Nation Gaming Commission, et al. v. The Honorable Mary Fitzgerald, District Judge*, Okla.Sup.Ct. Case No. 104,726 (July 2, 2007)(unpublished). Even though that case was decided in an unpublished

¹These are the parties as identified by the Plaintiff/Respondent in the Petition filed in the Trial Court. Cherokee Nation Enterprises, Inc. was a corporation formed under the laws of the Cherokee Nation; however, it no longer exists as a corporate entity having been converted to a limited liability company under tribal law.

²This Court may hear and determine this appeal pursuant to 12 Okla.Stat.(2001) §952(B)(3) and Okla.Sup.Ct.R. 1.50, *et seq.* If, for any reason, this Court finds that *certiorari* was improvidently granted, CNE asks this Court to treat this case as an original action seeking a writ of prohibition.

³OR:321-322.

order without an opinion, the issues are sufficiently similar to require the same result.

At least two (2) other cases involving similar issues are also pending; one in this Court and one in a division of the Court of Civil Appeals of Oklahoma.⁴ On the issues common to all of these cases, the tribal entities, which either appear as parties or as *amici curiae*, are all in agreement: the district courts of this state lack civil adjudicatory jurisdiction over tort claims, including premises liability claims, which arise in “Indian Country”.⁵

Based on this Court’s previous decision in the *Muscogee (Creek) Nation* case, the Order of the Trial Court should be reversed and the case either dismissed or remanded with instructions to the Trial Court to dismiss.

⁴*See, Dye v. Choctaw Casino, et al.*, Okla.Sup.Ct. Case No. 104,737 (pending in this Court on petition for *certiorari* by Choctaw Casino); and *Griffith v. Choctaw Casino, et al.*, Okla.Sup.Ct. Case No. 104,887 (pending in the Oklahoma City divisions of the Court of Civil Appeals of Oklahoma). Unlike the factual situation in *Dye*, it is undisputed that the Cherokee Nation District Court has civil adjudicatory jurisdiction over tort claims prior to the Compact.

⁵This case is not like *Bittle v. Bahe*, 2008 OK 10, ___ P.3d ___ (February 5, 2008)(Mandate Pending), for a number of reasons. *Bittle* addressed the narrow issue, not present here, whether a tribe has sovereign immunity in certain liquor related cases, and whether a liquor license application constituted a limited waiver of any such immunity. *Bittle* dealt largely with the implications of 18 U.S.C. §1161 (concerning certain liquor laws in Indian Country) and specifically found that the tribe’s gaming compact did not apply. 2008 OK 10 ¶ 2, fn.1 (“In pertinent part, the compact would be inapplicable under these facts because the accident did not occur at the gaming facility.”).

SUMMARY OF THE RECORD

On February 13, 2006, Plaintiff/Respondent, Loyman Cossey (“Mr. Cossey” or “Plaintiff”) filed a “tort claim” with CNE.⁶ According to the Plaintiff’s Petition,⁷ he had been injured in a fall from a chair in which he was sitting at the Cherokee Casino at Roland, Oklahoma, which is operated by CNE.⁸

CNE is an “Enterprise” of the Cherokee Nation, as that term is defined in the Tribal Gaming Compact between the Cherokee Nation and the State of Oklahoma (the “Compact”).⁹ CNE operates the casino pursuant to authority

⁶*Plaintiff’s Petition* ¶6, OR:2.

⁷Although the cause, nature, and extent of the Plaintiff’s injuries are disputed, the allegations contained in the Plaintiff’s Petition are admitted solely for the purposes of CNE’s Motion to Dismiss. See, *Western Heights Indep. Sch. Dist. No. 1-41 v. State ex rel. Okla. State Dept. of Ed.*, 2007 OK CIV APP 92 ¶13, 169 P.3d 417, 420 (“In our review of this motion to dismiss [for lack of subject matter jurisdiction], we must take as true the assertions made in School’s petition.”); see also, *Holt v. U.S.*, 46 F.3d 1000, 1002 (10th Cir. 1995) (“In reviewing a facial attack on the complaint [for lack of subject matter jurisdiction], a district court must accept the allegations in the complaint as true.” Citation omitted); and *cf.*, *May v. Mid-Century Ins. Co.*, 2006 OK 100 ¶10, 151 P.3d 132, 136 (“The court, when considering a defendant’s quest for dismissal, must take as true all of the challenged pleading’s allegations together with all reasonable inferences that may be drawn from them.”).

⁸*Plaintiff’s Petition* ¶1, OR:1.

⁹The Compact is authorized by the State-Tribal Gaming Act, 3A Okla.Stat.(Supp.2007) §261, *et seq.*, which provides for its form and contents in §§280 and 281. A copy of the Compact is attached to the Plaintiff’s Motion to Dismiss and Brief in Support at OR:66-93. A copy filed with the Secretary of

granted by Congress in the Indian Gaming Regulatory Act (“IGRA”),¹⁰ by the State-Tribal Gaming Act,¹¹ and by the Compact.

For the purposes of CNE’s Motion to Dismiss, it is undisputed that the Plaintiff’s tort claim seeking \$2.5 million was timely filed in compliance with the “Tort Claim” provisions of the Compact.¹² Even though the Plaintiff’s tort claim exceeds the limitations of the Compact,¹³ thereby exceeding the consent to suit contained in the Compact,¹⁴ the Plaintiff stipulated that he would limit his claim to the amount of CNE’s insurance coverage, which is reflected in the Trial Court’s “Order Denying Motion to Dismiss”.¹⁵

State of Oklahoma is attached to the “Plaintiff’s Response in Opposition to the Motion to Dismiss of the Defendant, Cherokee Nation Enterprises, L.L.C.”; however, due to an apparent error in preparation of the Record on Appeal, it has been divided with pages 1-9 appearing at OR: 125-133 and pages 10-28 at OR:201-219.

¹⁰25 U.S.C. §2701, *et seq.*, and 18 U.S.C. §1166 to 1168 as defined in the *Compact*, Part 3, p. 4 ¶18. OR:69.

¹¹*See*, Footnote 9 and as also defined in the *Compact*, Part 3, p. 5 ¶27. OR:70.

¹²*Compact*, Part 6, pp. 10-15 OR:75-80.

¹³*Compact*, Part 6(A) and (C), pp. 10-12 and 14-15, respectively. OR:75-77 and 79-80, respectively.

¹⁴*Id.*

¹⁵*Order Denying Motion to Dismiss*, p. 1 ¶1. OR:321.

On December 22, 2006, the Plaintiff filed a civil action in the District Court of Rogers County, Oklahoma (the “State Court”) seeking damages and other relief from CNE for his alleged injuries.¹⁶ The Plaintiff has not pursued his tort claim in the Cherokee Nation District Court (the “Tribal Court”), although he has expressed a willingness – at least in the alternative – to have this case “transferred” to the Cherokee Nation District Court if he is unsuccessful here.¹⁷

CNE filed its “Motion to Dismiss and Brief in Support” on March 5, 2007 pursuant to 12 Okla.Stat.(Supp.2006) §2012(B)(1) and (2) and (F)(3).¹⁸ The Plaintiff responded on April 30, 2007,¹⁹ and CNE filed a Reply on June 15, 2007.²⁰

While CNE’s Motion to Dismiss was pending in the Trial Court, this Court decided *Muscogee (Creek) Nation Gaming Commission, et al. v. the Honorable Mary Fitzgerald, District Judge, Okla.Sup.Ct. Case No. 104,726* (July 2,

¹⁶*Plaintiff’s Petition*, OR:1-3.

¹⁷*Plaintiff’s Response in Opposition*, Proposition IV, p. 20, OR:115. CNE knows of no means or method for such a transfer; however, CNE would not object if such a mechanism could be found. This is the same position CNE has taken throughout this case. See, *Defendant’s Reply*, p. 13, fn. 10, OR:240, and *Defendant’s Supplemental Authority*, p. 4, fn. 3, OR:245.

¹⁸*Motion to Dismiss and Brief in Support*, OR:4-94.

¹⁹*Plaintiff’s Response in Opposition*, OR:95-227.

²⁰*Defendant’s Reply*, OR:228:241.

2007)(unpublished order without opinion), and granted the extraordinary remedy of a writ of prohibition preventing Judge Fitzgerald from hearing the case. This supplemental authority was brought to the attention of the Trial Court.²¹

The Trial Court denied CNE's Motion to Dismiss and certified these issues for immediate interlocutory appeal on October 23, 2007.²²

This Court granted CNE's Petition for *Certiorari* on January 7, 2008 and this Brief-in-Chief is filed pursuant to this Court's Order of January 10, 2008.

STANDARD FOR REVIEW

"Determination of jurisdiction is a question of law." *State ex rel. Cartwright v. Okla. Ordnance Works Auth.*, 1980 OK 94 ¶4, 613 P.2d 476, 479, citing *Southern Pac. Commun. Co. v. Corp. Comm'n*, 1978 OK 14 ¶11, 586 P.2d 327, 330. "In that a question concerning the jurisdictional power of the trial court to act as it did is implicated our standard of review is *de novo*." Citations omitted. *Jackson v. Jackson*, 2002 OK 25 ¶2, 45 P.3d 418, 422. Questions concerning the court's jurisdiction may be raised at any time. *In re A.N.O.*, 2004 OK 33 ¶9, 91 P.3d 646, 649. Such questions are properly raised, as they were here, by a motion

²¹*Defendant's Supplemental Authority*, OR:242-320.

²²*Order Denying Motion to Dismiss*, p. 2. OR:322. *See also*, "Trial Court Statement", attached to the Petition for *Certiorari*, filed herein on November 21, 2007 pursuant to Okla.Sup.Ct.R. 1.52(b).

to dismiss. *See, Sanders v. Okla. Employment Sec. Comm'n*, 1948 OK 116 ¶10, 195 P.2d 272, 274. Even if not raised by the parties, “this Court must inquire into its own jurisdiction and the jurisdiction of the court below,” Citations omitted. *State ex rel. Okla. Tax Comm'n v. Texaco Expl. & Prod., Inc.*, 2005 OK 52 ¶9, fn. 1, 131 P.3d 705, 708, fn. 1; *see also, Sanders, supra*.

“Questions of law are also reviewed *de novo*, which involves a plenary, independent and non-deferential examination of a trial court’s legal rulings.” Citations omitted. *Jackson, supra*. Specifically with regard to sovereign immunity, the United States Court of Appeals for the Tenth Circuit reviews “*de novo* the legal ruling on when a party can assert its sovereign immunity and the district court’s determination of subject matter jurisdiction.” Citation omitted. *Citizen Pottawatomie Nation v. Norton*, 248 F.3d 993, 996-97 (10th Cir.2001).

In addition, at least to the extent that this case requires interpretation of the Model Tribal Gaming Compact,²³ it requires the application of ordinary rules of statutory construction and interpretation.²⁴ “Statutory construction presents a pure

²³3A Okla.Stat.(Supp.2007) §281.

²⁴The authority for the State of Oklahoma to *offer* to enter into a compact with an Indian tribe for casino gaming is statutory. *See, State-Tribal Gaming Act*, 3A Okla.Stat.(Supp.2007) §261, *et seq.* The terms of each compact are also statutory. *Id.*, §281. Only by accepting the state’s offer in the form of the Model Tribal Gaming Compact can a tribe conduct casino gaming. *Id.*, §280 and IGRA, 25

legal question which we review by a *de novo* standard.” *Texaco, supra*.²⁵ As such, this Court’s review “is plenary, independent and non-deferential.” Citation omitted. *Id.*

All of the issues presented for this Court’s review concern the jurisdiction of the courts of this state, including the Trial Court and this Court. These issues are questions of law which this Court should review *de novo* with no deference to the conclusions of the Trial Court. *See also, Bittle v. Bahe*, 2008 OK 10 ¶14, ___ P.3d ___ (decided February 5, 2008)(Mandate Pending)(“These issues present questions of law to be reviewed *de novo*, without deference to the lower courts.” Citation omitted).

In addition, in deciding the issues in this case, this Court must also be guided by the now familiar rule that, where an ambiguity exists, it must be resolved liberally in favor of the Indian tribe. *Cf., Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 2403 (1985) (“[S]tatutes are to be

U.S.C. §2710(d)(1)(C). In addition, various compacts have been interpreted by treating them as statutes or by applying rules of statutory construction. *E.g., Virginia v. Maryland*, 540 U.S. 56, 73-74, 124 S.Ct. 598, 609 (2003) (interpreting the 1785 Compact concerning the Potomac River); *Texas v. New Mexico*, 462 U.S. 554, 564, 103 S.Ct. 2558, 2565 (1983) (applying the Pecos River Compact); and *Arizona v. California*, 373 U.S. 546, 565, 83 S.Ct. 1468, 1480 (1963) (applying the Colorado River Compact).

²⁵2005 OK 52 ¶7, 131 P.3d at 707-08.

construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit,” Citations omitted).

OVERVIEW

The sole issue to be decided in this case is the jurisdiction of the courts of the State of Oklahoma to decide a civil cause of action which arose in “Indian County”.

CNE contends that the resolution of this threshold jurisdictional issue requires a three-step analysis: Step One, due to federal preemption, a tribal enterprise – like CNE – is immune from suit on a civil cause of action in Indian Country unless Congress has abrogated that immunity or the tribe has clearly and unequivocally waived its immunity in the manner approved by Congress; Step Two, to the extent that the terms of the Compact between the State of Oklahoma and the Cherokee Nation provide a limited waiver of the tribe’s immunity, the Compact conditions that waiver on compliance by a plaintiff with its requirements, including the filing of a proper claim with the tribal enterprise, denial of that claim by the tribal enterprise, and suit in “a court of competent jurisdiction”; and Step Three, due to federal preemption, courts of the State of Oklahoma have no civil adjudicatory jurisdiction in Indian Country absent compliance with federal law.

In the present case: (1) CNE is entitled to assert the immunity of the Cherokee Nation; (2) The Compact provides a limited, conditional waiver of that immunity; and (3) the State of Oklahoma has not complied with federal law and, therefore, the State Court is not a Court of Competent Jurisdiction. The State Court erred as a matter of law and this Court must reverse consistent with its prior determination in *Muscogee (Creek) Nation v. Fitzgerald*.

PROPOSITIONS OF ERROR

PROPOSITION I: The trial court erred, as a matter of law, in finding that a district court of this state is a “court of competent jurisdiction” as required by the Tribal Gaming Compact between the Cherokee Nation and the State of Oklahoma.

It is undisputed that the Compact controls the rights and liabilities of the parties in this case. It is also undisputed that the Compact authorizes suit on a tort claim, like that of the Plaintiff, against CNE. The dispute between the parties in this appeal is strictly limited to a disagreement about the forum in which such a suit may be brought. The Plaintiff filed his suit in the State Court which, the Plaintiff contends, has at least concurrent jurisdiction with the Tribal Court. Conversely, CNE contends that the only forum available to the Plaintiff is the Tribal Court because only that court has civil adjudicatory jurisdiction in the

Cherokee Nation's Indian Country and, hence, is the only "court of competent jurisdiction" as provided in the Compact.²⁶

- A. The terms of the Compact require tort claims to be brought in a "court of competent jurisdiction".**

Part 6 of the Compact provides, in pertinent part, as follows:

PART 6. TORT CLAIMS; PRIZE CLAIMS; LIMITED CONSENT TO SUIT

A. Tort Claims. The enterprise shall ensure that patrons of a facility are afforded due process in seeking and receiving just and reasonable compensation for a tort claim for personal injury or property damage against the enterprise arising out of Incidents occurring at a facility, hereinafter "tort claim", as follows:

2. *The tribe consents to suit on a limited basis with respect to tort claims subject to the limitations set forth in this subsection and subsection C of this Part.* No consents to suit with respect to tort claims, or as to any other claims against the tribe shall be deemed to have been made under this Compact, except as provided in subsection B and C of this Part;

3. The enterprise's insurance policy shall include an endorsement providing that the insurer may not invoke tribal sovereign immunity in connection with any claim made within the limit of liability if the claim complies with the limited consent

²⁶Compact, Part 6(c), p.14.OR:79

provisions of subsection C of this Part. Copies of all such insurance policies shall be forwarded to the SCA [State Compliance Agency²⁷];

9. A judicial proceeding for any cause arising from a tort claim may be maintained in accordance with and subject to the limitations of subsection C of this Part only if the following requirements have been met:

C. Limited Consent to Suit for Tort Claims and Prize Claims. *The tribe consents to suit against the enterprise in a court of competent jurisdiction with respect to a tort claim* or prize claim if all requirements for paragraph 9 of subsection A . . . have been met; provided that such consent shall be subject to the following additional conditions and limitations:

1. For tort claims, consent to suit is granted only to the extent such claim or any award or judgment rendered thereon does not exceed the limits of liability. Under no circumstances shall any consent to suit be effective as to any award which exceeds such applicable amounts. * * *

D. Remedies in the Event of No or Inadequate Insurance for Tort Claim. In the event a tort claim is made and there is no, or inadequate, insurance in effect as required under this Compact, the enterprise shall be deemed to be in default hereunder unless, within ten (10) days of a demand by the SCA or a claimant to do so, the enterprise has posted in an irrevocable escrow account at a state of federally chartered bank which is not owned or controlled by the tribe, sufficient cash, a bond or other security sufficient to cover any award that might be made within the limits set forth in paragraph 1 of subsection A of this Part, and informs the claimant and the state of:

²⁷

The Oklahoma Office of State Finance (“OSF”) is the “State Compliance Agency” (“SCA”) as defined in the Compact. *Compact*, Part 3, Paragraph 25, p. 5, OR:70.

4. *The notice and hearing opportunities in accordance with the tribe's tort law*, if any, otherwise in accordance with principles of due process, which will be afforded to the claimant so that the intent of this Compact to provide claimants with a meaningful opportunity to seek a just remedy under fair conditions will be fulfilled. [Emphasis added]

Compact, OR:201-206.

The term “court of competent jurisdiction” is not defined in the Compact; however, the position of the compacting parties concerning the effect of the Compact on jurisdictional issues is succinctly set out in Part 9 of the Compact which provides, *in toto*, as follows:

Part 9. JURISDICTION

This Compact shall not alter tribal, federal or state civil adjudicatory or criminal jurisdiction. *Compact*,

OR:83. Whether treated as a statute²⁸ or as a contract,²⁹ these provisions must be read together.

²⁸*Cf.*, *Tyler v. Shelter Mutual Ins. Co.*, 2008 OK 9 ¶12, ___ P.3d ___ (Mandate Pending) (The intent of a statute “is ascertained from the whole act in light of its general purpose and objective considering relevant provisions together to give full force and effect to each.” Footnotes omitted).

²⁹*Cf.*, *Okla. Oncology & Hematology P.C. v. US Oncology, Inc.*, 2007 OK 12 ¶ 27, 160 P.3d 936, 946 (“The courts will read the provisions of a contract in their entirety, ..., to give effect to the intention of the parties as ascertained from the four corners of the contract, and where the language is ambiguous, it will be interpreted in a fair and reasonable sense.” Citations omitted).

Since the Compact “shall not alter tribal, federal or state civil adjudicatory . . . jurisdiction”, the State Court can only have jurisdiction if it already had such jurisdiction before the Compact.³⁰ Regardless of the existence of the Compact, state courts have no civil adjudicatory jurisdiction in “Indian Country”, unless the state and tribe have complied with federal law.

B. State Courts have no civil adjudicatory jurisdiction in “Indian Country”.

“Indian tribes are domestic dependent nations that exercise inherent sovereign authority over their members and territories.” [Citation omitted, internal quotation marks omitted]. *Okla. Tax Comm’n v. Pottawatomie Tribe*, 498 U.S. 505, 509, 111 S. Ct. 905, 909 (1991). By virtue of Article I, Section 8, Clause 3 of the Constitution of the United States, Congress and the federal government have plenary authority over Indian tribes. *See, Williams v. Lee*, 358 U.S. 217, 220, fn. 4, 79 S. Ct. 269, 270 (1959); *State ex rel. May v. Seneca-Cayuga Tribe of Okla.*, 1985 OK 54 ¶6, fn. 12, 711 P.2d 77, 80, fn. 12; and *Enterprise Mgmt. Consultants, Inc. v. State ex rel. Okla. Tax Comm’n*, 1988 OK 91 ¶1, 768 P.2d 359, 364-65

³⁰CNE knows of no act of Congress or of the Cherokee Nation which would allow a state court to exercise civil adjudicatory jurisdiction in the Cherokee Nation’s Indian Country. Furthermore, CNE knows of no effort by the State of Oklahoma to comply with the applicable requirements of Public Law 83-280 (specifically 25 U.S.C. §1322) by which it might have obtained civil adjudicatory jurisdiction in Indian Country.

(Kauger, J. and Opala, J., concurring) (“Such constitutional power over Indians and their lands, exercised by Congress, has been characterized as plenary, exclusive, and complete.” Footnote omitted). States, however, have no authority over Indian tribes which “are ‘distinct, independent political communities, retaining their original rights’ in matters of local self-government.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, 98 S.Ct. 1670, 1675 (1978), quoting *Worcester v. Georgia*, 6 Pet. 515, 31 U.S. 515, 8 L.Ed. 483 (1832). State courts, therefore, have no subject matter jurisdiction “over Indians or activities on Indian lands unless a federal statute provides for such jurisdiction, or the exercise of jurisdiction will not infringe upon Indians’ rights to self-governance.” *Cohen v. Little Six, Inc.*, 543 N.W.2d 376, 381 *aff’d* 561 N.W. 2d 889, *cert. denied* 524 U.S. 903, 118 S.Ct. 2059 (Minn.App. 1996), citing *Williams, supra*, and *Duluth Lumber & Plywood Co. v. Delta Dev., Inc.*, 281 N.W.2d 377, 380-82 (Minn. 1979); *see also, Kizis v. Morse Diesel Int’l, Inc.*, 260 Conn. 46, 794 A.2d 498 (2002); *Jones v. Billy*, 798 So.2d 1238 (Miss. 2001); *Diepenbrock v. Merkel*, 33 Kan.App.2d 97, 97 P.3d 1063 (Kan.App. 2004); and *Gallegos v. Pueblo of Tesuque d/b/a Camel Rock Gaming Center*, 132 N.M. 207, 46 P.3d 668 (N.M. 2002).

1. **Because the Compact does not comply with the requirements of federal law for acquiring jurisdiction in “Indian Country”, the State Court can have no such jurisdiction.**

As noted above, Article I, Section 8 of the Constitution of the United States gives Congress and the federal government plenary authority over Indian tribes. *See, Williams v. Lee*, 358 U.S. 217, 220, 79 S. Ct. 269, 270 (1959). Congress has specifically consented to the assumption of jurisdiction over civil causes of action by state courts in Indian Country, **but only** “with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption”. 25 U.S.C. §1322(a). The consent of a tribe necessary to confer civil adjudicatory jurisdiction on the state courts of Oklahoma can be granted “only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose.” 25 U.S.C. §1326.

No such consent has been sought by the State of Oklahoma, no such consent has been granted by the Cherokee Nation, and no such election has been held by the Cherokee Nation for that purpose. The Compact alone is not enough.

In Kennerly v. District Court of the Ninth Judicial District of Montana, 400 U.S. 423, 91 S. Ct. 480 (1971), a grocery store located on the Blackfeet Indian

Reservation in Montana sued members of the Blackfeet tribe in state court for debts owed to the store. The Supreme Court of Montana upheld the state court's exercise of jurisdiction under a provision of the Blackfeet Tribal Law and Order Code which purported to grant concurrent jurisdiction to the Montana state courts. The Supreme Court of the United States reversed finding that tribal consent to state court civil adjudicatory jurisdiction "must be manifested by majority vote of the enrolled Indians within the affected area of Indian country. [Footnote omitted] Legislative action by the Tribal Council does not comport with the explicit requirements of the Act." *Kennerly*, 400 U.S. at 429, 91 S. Ct. at 483.

In the case at bar, the Cherokee Nation has not consented to state court civil adjudicatory jurisdiction in an election called for that purpose or otherwise. Absent such consent, a "court of competent jurisdiction", as that phrase is used in the Compact, can only refer to the Tribal Court.

2. Courts of other jurisdictions, when presented with similar facts, have found subject matter jurisdiction exclusively in tribal court.

In *Kizis*, a casino patron was injured in a fall which occurred, like the incident here, inside a tribally owned casino. The patron sued the tribe's employees and others in state court. Following denial of the tribe's motion to

dismiss, the Supreme Court of Connecticut reversed the trial court due to lack of subject matter jurisdiction. *Kizis*, 260 Conn. at 51-54, 794 A.2d at 501-03. The Court said, “We conclude that the trial court did not have subject matter jurisdiction over the present action because the proper forum for relief is the Mohegan Gaming Disputes Court.” *Id.*, 260 Conn. at 51, 794 A.2d at 501.

Under similar facts in *Gallegos*, a casino patron was injured in a tribally owned casino and sued the tribe, its insurer, and others in state court. The state trial court sustained the casino’s motion to dismiss for lack of subject matter jurisdiction and the New Mexico Supreme Court agreed. *Gallegos*, 132 N.M. at 211, 46 P.3d at 672.

In another case involving claims arising out of alleged negligence at a tribally owned casino, the Court of Appeals of Kansas affirmed the trial court’s dismissal of a wrongful death case because that court lacked subject matter jurisdiction. *Diepenbrock*, 33 Kan.App.2d at 98-99, 97 P.3d at 1065.

The law and facts applicable to this case are no different. Both the Trial Court and this Court are without subject matter jurisdiction. This case must be dismissed pursuant to 12 Okla.Stat.(Supp. 2006) §2012(B)(1) and (F)(3).

The civil adjudicatory jurisdiction of the Tribal Court to hear and decide cases under the Compact has not been disputed in this case. That is the proper forum for the Plaintiff's tort claim.

PROPOSITION II: The Trial Court erred, as a matter of law, in finding that Cherokee Nation Enterprises, L.L.C., which is an arm or alter ego of the Cherokee Nation, is not entitled to assert the immunity of the Cherokee Nation.

The Compact and the State-Tribal Gaming Act treat tribal enterprise entities – like CNE – as an arm or alter ego of the Cherokee Nation. As such, CNE is entitled to the same immunity as the Cherokee Nation and, absent Congressional abrogation or explicit waiver, CNE is immune. The Plaintiff's recourse, therefore, is exclusively pursuant to the Compact and exclusively in Tribal Court just as if the government of the Cherokee Nation operated the facility where the alleged tort occurred.

For example, the Compact recognizes that the Cherokee Nation “shall have the ultimate responsibility for ensuring that a facility conforms to the Compact”³¹ It requires that “the tribe shall be responsible for all duties which are assigned to it, *the enterprise*, the facility, and the [Tribal Compliance Agency]

³¹*Compact*, Part 3, p. 3 ¶14. OR:68.

under this Compact.” [Emphasis added].³² Moreover, the Compact expressly defines “Enterprise” as “the tribe or the tribal agency or section of tribal management with direct responsibility for the conduct of covered games, the tribal business enterprise that conducts covered games, or a person, corporation or other entity that has entered into a management contract with the tribe to conduct covered games, in accordance with the IGRA.”³³ Under the Compact, the “*enterprise*” must “ensure that patrons of a facility [like Mr. Cossey] are afforded due process”,³⁴ yet it is the “*tribe*” which “consents to suit on a limited basis with respect to tort claims”.³⁵ Further, “net revenues” that the tribe receives from the enterprise can only be used for the tribal purposes enumerated in the Compact³⁶ and in the IGRA.³⁷

Because the Cherokee Nation and CNE are both entitled to assert the immunity of the tribe and because both CNE and the Cherokee Nation are

³²*Compact*, Part 5(A), p. 6. OR:71.

³³*Compact*, Part 3, p. 3 ¶13. OR:68.

³⁴*Compact*, Part 6(A), p. 10. OR:75.

³⁵*Compact*, Part 6(A)(2), p. 10. OR:75.

³⁶*Compact*, Part 5(D), pp. 7-8. OR:72-73.

³⁷*See*, 25 U.S.C. §§2703(9) and 2710(b).

obligated under the Compact to provide due process for tort claims, the Plaintiff's forum is the same, whether the defendant is CNE or the Cherokee Nation. Since neither the Cherokee Nation nor CNE has consented to suit in State Court (See Proposition I, above), the Plaintiff's only available forum is the Tribal Court.

“Tribal sovereign immunity protects a tribal corporation owned by a tribe and created under its own laws, absent express waiver of immunity by the tribe or Congressional abrogation.” *Wright v. Colville Tribal Ent. Corp.*, 159 Wash.2d 108, 111, 147 P.3d 1275, 1278 (2006) (*en banc*) citing *Kiowa Tribe of Okla. v. Mfg Techs., Inc.*, 523 U.S. 751,754, 118 S. Ct. 1700 (1998). CNE is a limited liability company created by the Cherokee Nation pursuant to its own laws and Constitution.³⁸ CNE is wholly owned by Cherokee Nation Businesses, L.L.C., which was created under tribal law, and which – in turn – is wholly owned by the Cherokee Nation.³⁹ CNE operates exclusively for the benefit of the tribe and its people. The tribe has not waived and Congress has not abrogated the immunity of either the Cherokee Nation or CNE.

³⁸OR:14,15 Certificate of Limited Liability company, Office of the Principal Chief of the Cherokee Nation, Articles of Organization and Operating Agreement for Cherokee Nation Enterprises, L.L.C., Exhibit “A” to the CNE’s Motion to Dismiss and Brief in Support.

³⁹See generally, *Plaintiff’s Response in Opposition*, p. 12. OR: 240

This conclusion is well supported by the Washington Supreme Court’s analysis in *Wright v. Colville Tribal Ent. Corp.*, *supra*. In that case, the court noted that “[u]nder federal law, tribal sovereign immunity comprehensively protects recognized American Indian tribes from suit absent explicit and ‘unequivocal’ waiver or abrogation.” 147 P.3d at 1278, citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59, 98 S.Ct. 1670 (1978). The court then explained that “[a]s ‘domestic dependent nations,’ Indian tribes ‘exercise inherent sovereign authority over their members and territories,’ including sovereign immunity from suit ‘absent a clear waiver by the tribe or congressional abrogation.’” 147 P.3d at 1278, quoting *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S.Ct. 905 (1991). The Washington court rejected any distinction between “governmental” and “commercial” activities as well as any distinction between “on or off a reservation” again citing *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. at 754-55 and also citing *Md. Cas. Co. v. Citizens Nat’l Bank*, 361 F.2d 517, 521 (5th Cir. 1966), *cert. denied* 385 U.S. 918, 87 S. Ct. 227 (“The fact that the Seminole Tribe was engaged in an enterprise private or commercial in character, rather than governmental, is not material.”). *Wright*, 147 P.3d at 1278.

The decisions of courts from around the country support this analysis and have extended sovereign immunity to a wide variety of tribal entities. *See generally, Hagen v. Sisseton-Wahpeton Comm. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000) (“It is also undisputed that a tribe’s sovereign immunity may extend to tribal agencies.”). These agencies include casinos,⁴⁰ colleges,⁴¹ housing authorities,⁴² and other subordinate economic enterprises.⁴³

Under the subordinate economic enterprise doctrine, “an action against a tribal entity is, in essence; an action against the tribe itself.” *Local IV-302 Int’l Midworkers Union of Am. v. Menominee Tribal Enterps.*, 595 F.Supp. 859, 862 (E.D.Wis. 1984). In *Barker v. Menominee Nation Casino*, 897 F.Supp. 389 (E.D.Wis. 1995), the federal district court found that the defendant casino had

⁴⁰*See e.g., Worrall v. Mashantucket Pequot Gaming Enter.*, 131 F.Supp.2d 328, 329-31 (D.Conn. 2001).

⁴¹*See e.g., Hagen, supra.*

⁴²*See e.g., Garcia v. Akwesasne Housing Auth.*, 268 F.3d 76, 87 (2d Cir. 2001); *Weeks Const., Inc. v. Oglala Sioux Housing Auth.*, 797 F.2d 668, 670 (8th Cir. 1986); *MacArthur v. San Juan Cty.*, 391 F.Supp.2d 895, 1042 (D.Utah 2005) *rev’d in part* 497 F.3d 1057 (10th Cir. 2007); and *cf., Duke v. Absentee Shawnee Tribe of Okla. Housing Auth.*, 199 F.3d 1123, 1125 (10th Cir. 1999), *cert. denied* 529 U.S. 1134, 120 S.Ct. 2014 (housing authority included in the definition of “Indian tribe” for purposes of Title VII).

⁴³*See e.g., MacArthur*, 391 F.Supp.2d at 1042, citing *Dixon v. Picopa Constr. Co.*, 160 Ariz. 251, 772 P.2d 1104, 1108 (1989); and *White Mtn. Apache Tribe v. Shelley*, 107 Ariz. 4, 480 P.2d 654, 656 (1971).

been “issued a corporation charter by the [tribal] Legislature through a tribal ordinance and pursuant to the Tribal Constitution” and that “because ‘an action against a tribal enterprise is, in essence, an action against the tribe itself,’” then the casino was “likewise immune from suit unless Congress or the [tribal] Legislature has waived its sovereignty for purposes of this type of action.” 897 F.Supp. at 393-94 quoting *Local IV-302 Int’l Woodworkers Union of Am, supra*. This doctrine “allows Indian *tribes* to conduct their economic affairs through subordinate governmental agencies without fear of an unintended waiver of immunity.” [Italics in original]. *Dixon v. Picopa Constr. Co.*, 160 Ariz. 251, 772 P.2d 1104, 1109 (1989).

The proper focus was discussed by the Supreme Court of Minnesota in *Gavle*, as follows:

We also note that federal statutory law supports the notion that gaming activity is closely linked to the well-being of the tribe. All Indian gaming is conducted pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§2701-2721 (1994). Under the provisions of IGRA, only tribal entities can engage in Indian gaming and gaming by Indian tribes is recognized as a “means of promoting tribal economic development, self-sufficiency and strong tribal governments.” 25 U.S.C. §2702 (1994). ***Thus, as a matter of federal law, [the gaming entity – like CNE] must be a tribal entity in order to conduct gaming authorized by the statute. A mere commercial activity, incorporated by Indian individuals for the ostensible purpose of conducting gaming in***

Indian country, would be prohibited from doing so under federal law. [Emphasis added]

555 N.W.2d at 295.

This Court need not limit its analysis to the cases previously cited. Two others are offered here. In *Worrall v. Mashantucket Pequot Gaming Ent. d/b/a Foxwoods Resort Casino*, 131 F.Supp.2d 328 (D.Conn. 2001), a casino patron was injured when the chair in which he was sitting collapsed. The federal district court granted the Gaming Enterprises' motion to dismiss under Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction finding that "the Gaming Enterprise is entitled to the same tribal sovereign immunity that protects the Tribe itself." [Footnote omitted]. *Id.*, at 331.

More recently in April of last year, the Supreme Court of Connecticut affirmed the dismissal of a tort claim against a tribal casino finding that the tribe's sovereign immunity prevented suit in the state court. *Beecher v. Mohegan Tribe of Indians of Conn.*, 282 Conn. 130, 918 A.2d 880 (April 24, 2007). The plaintiff in that case also complained, as Mr. Cossey complained in the Trial Court, that the tribe had sued in state court and should not be allowed to escape the same court's jurisdiction when it is a defendant. As the Connecticut court explained, "[t]he perceived inequity of permitting the tribe to recover from a non-Indian for civil

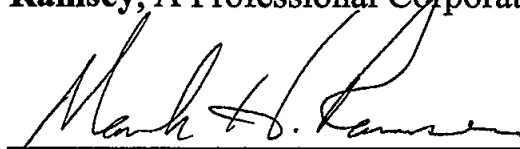
wrongs in instances where a non-Indian allegedly may not recover against the [t]ribe simply must be accepted . . . much in the same way that the perceived inequity of permitting the United States or North Dakota to sue in cases where they could not be sued as defendants because of their sovereign immunity also must be accepted.” [Internal quotation marks omitted, brackets in original]. *Id.*, 918 A.2d at 887.

CONCLUSION

CNE is an arm or alter ego of the Cherokee Nation. As such, it is entitled to assert the tribe’s sovereign immunity and, hence, can only be sued where the tribe may be sued under the Compact. Because the State of Oklahoma has not obtained civil adjudicatory jurisdiction in Indian Country in the manner required by Congress under 25 U.S.C. §§1322(a) and 1326, neither the Trial Court nor this Court has such jurisdiction and, therefore, this case must be dismissed.

This does not, however, eliminate the Plaintiff’s claim; rather, it simply means that he must pursue his claim in Tribal Court subject to the limitations imposed by the Compact.

Respectfully submitted,
**Taylor, Burrage, Foster, Mallett, Downs &
Ramsey, A Professional Corporation**



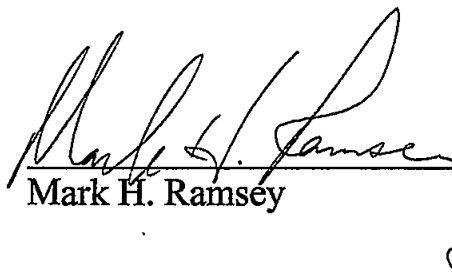
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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing Entry of Appearance was mailed this 12th day of February, 2008, to:

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Mark H. Ramsey