IN THE COURT OF APPEALS

OF THE

QUINAULT INDIAN NATION

E. LEE SCHLENDER Plaintiff/Appellant,	
v.	OPINION
QUINAULT INDIAN NATION, Defendant/Respondent.	

July 17, 2013 - Argued
September 10, 2013 - Decided

Before: Jane Smith, Presiding Judge; Lisa Atkinson - Judge; Hunter Abell - Judge.

Appearances: E. Lee Schlender, pro se, for Appellant; Ray Dodge, Quinault Indian Nation Reservation Attorney, for Respondent.

This matter comes before the Quinault Indian Nation Court of Appeals pursuant to a Notice of Appeal filed on February 1, 2013 by Appellant E. Lee Schlender ("Appellant"). Appellant appeals an Order to Dismiss entered by the Tribal Court in favor of the Quinault Indian Nation ("Respondent"). Because this Court determines that the Appellant's claim is partially barred due to sovereign immunity, but that Appellant's claim for declaratory relief still requires adjudication by the Tribal Court, the decision of the Tribal Court is **AFFIRMED** in part and **REMANDED** in part for further action in accordance with this opinion.

I. Facts and Procedural History

Appellant was hired as a judge for the Respondent on July 28, 2008 by Resolution 08-59-87. The Employment Agreement subsequently signed by Appellant and Respondent specifically noted that it did not act as a waiver of the Respondent's sovereign immunity.

After approximately three years, on July 26, 2011, the Respondent terminated Appellant from his position by certified letter, without hearing or notice. On August 8, 2011, Appellant served a Notice of Claim on the Chairman of the Business Committee[1] and the Office of Attorney General. On June 26, 2012, Appellant filed a Complaint in the Tribal Court alleging breach of contract and seeking monetary damages and declaratory/injunctive relief. The Complaint was similarly served on the Chairman of the Business Committee and the Office of Attorney General. On August 9, 2012, an Amended Complaint was filed with the same entities.

On January 22, 2013, the Tribal Court granted a Motion to Dismiss in favor of the Respondent. The Tribal Court ruled that a narrow reading of Q.T.C. 99.02.040 required service of Appellant's Notice of Claim on, not only the Chairman of the Business Committee and the Office of Attorney General, but also the Secretary of the Business Committee. Additionally, the Tribal Court ruled that the Employment Agreement was, at best, ambiguous regarding whether there was a waiver of sovereign immunity. Lastly, the Tribal Court ruled that, even if there was a waiver of sovereign immunity, there was not a pledge of collateral as required under Article V, Section 3(d) of the Quinault Tribal Constitution. This appeal followed.

II. Discussion

Appellant's Notice of Appeal alleged five errors:[2]

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[1] The chief executive for the Quinault Nation appears alternately as "President" or "Chairman of the Business Committee" in the Nation's Code, Bylaws, and the parties' briefing in this case. For purposes of this opinion, we consider the terms synonymous, and utilize the Code term of "Chairman of the Business Committee."

[2] We note that Appellant's appellate brief reformulates the issues on appeal into four different, but overlapping, propositions. For sake of simplicity, we observe that the only issue differing markedly from the errors alleged in the Notice of Appeal is one pertaining to whether the Respondent's Motion to Dismiss should have been stayed pending completion of discovery. We address that issue separately herein.

1) That the interpretation of the Quinault Code as set forth in the Memorandum Regarding Notice Under Tribal Claim Statute is error as a matter of fact and law; that a separate service of the Plaintiff's claim was not required upon a separate officer or person acting on behalf of the Quinault Business Committee; that service upon the Chairman of the Quinault Business Committee was in all respects sufficient;
2) That sovereign immunity does not limit nor remove the application of Title 5 procedures, specifically requiring a hearing and vote to remove a judge of the Quinault Indian Nation;
3) That a Title 5 appointed judge is entitled to a hearing and due process before being removed and terminated as a judge of the Quinault Indian Nation;
4) That an ancillary contract to a Title 5 judicial appointment can be, by implication, a limited waiver of sovereign immunity for certain, specific purposes; that an application for specific performance of that contract is not per se a claim for damages restricted or limited by sovereign immunity; and
5) Appointment of the Plaintiff as per Title 5 and providing for a judicial salary is a waiver of sovereign immunity and is not constitutionally prohibited.

Appellant's Notice of Appeal, 1-2. Each of the allegations of error is addressed in turn.

A. Service on the Respondent

At oral argument, both parties extensively addressed the threshold question in this case regarding whether Appellant appropriately served the necessary parties specified under Q.T.C. 99.02.040. The record indicates that Appellant served the Chairman of the Business Committee and the Office of Reservation Attorney with the Notice of Claim and his subsequent Complaint. The Code provision at issue reads as follows:

> Procedure with Respect to Actions Authorized by This Title: (a) Any person desiring to institute suit against the Quinault Indian Nation as authorized by this Title shall as a jurisdictional condition precedent to institution of such suit provide notice to the Chairman, Quinault Business Committee and the office of Reservation Attorney of the Quinault Indian tribe.

The Tribal Court found that this language requires service on three distinct individuals or entities: The Chairman of the Quinault Business Committee, the Office of Reservation Attorney, and the Secretary of the Quinault Business Committee. *See* Memorandum Regarding Notice Under Tribal Claim Statute, 1-2.

We review orders granting summary judgment *de novo*. *See Pura v. Quinault Housing Authority*, CV 12-022, at 6-7; *See also Oneida Casino and Bingo v. Liggins*, No. 02-AC-015 at ¶12 (Oneida Appeals 02/01/2003). Additionally, we review questions of statutory interpretation *de novo*. In this case, Appellant argues that the Tribal Court erred, and that common grammar, policy, along with custom and usage, support the proposition that it is only necessary to serve the Chairman of the Business Council and the Office of Reservation Attorney. *See* Appellant's Brief, at 13-18.

In contrast, the Respondent agrees with the Tribal Court and argues that Q.T.C. 99.02.040 requires service on the Chairman of the Business Council, the Office of Reservation Attorney, and the Secretary of the Business Council. *See* Respondent's Brief, at 3-4. The Respondent contends that this comports with the separation of powers inherent in the Quinault form of government and correlates with a long-held interpretation of the Code provision by the Tribal Court.

We agree with Appellant. In doing so, we start with the language at issue. The operative phrase requires service on "the Chairman, Quinault Business Committee and the Office of Reservation Attorney…" The confusion stems from the question of whether the phrase "Quinault Business Committee" modifies the term "Chairman" or requires separate service on the Quinault Business Committee.

We find that the phrase is ambiguous and analyze the Code provisions at issue to effectuate the legislative intent. *See Cleveland v. City of Los Angeles*, 420 F.3d 981, 990 (9th Cir. 2005)("According to the rules of statutory construction, the court can only look to legislative intent when a statute is ambiguous."). In doing so, we find that the purpose of Q.T.C. 99.02.040 is to ensure the Business Committee is on notice of potential litigation against the Quinault Nation. With that being the purpose, and noting that both the Chairman and Secretary serve on the Business Committee, adopting the Respondent's proposed reading of Q.T.C. 99.02.040 creates entirely unnecessary additional labor for litigants. While the Respondent argues that separate service on the President and the

Secretary of the Business Committee is appropriate as they represent different branches of the Quinault government, we are unpersuaded. Respondent's Brief, at 4. The Respondent provides no citation for this proposition, and we observe that no such distinction appears in the Quinault Tribal Constitution or the Quinault Tribal Code.[3] If the intent of the Q.T.C. 99.02.040 is to ensure the Business Committee is aware of pending litigation, the purpose of the statute was well served in this case.

Finally, the parties provide no citation to previous Quinault case law addressing this provision. We note, however, that this issue was addressed, at least tangentially, in *Quinault Indian Nation v. Hendricks et al.*, No. CV 11-093, 11-110. In that case, pertaining to dueling proceedings under the Minor In Need of Care ("MINOC") and guardianship provisions of the Quinault Code, this Court noted the following:

> If this had been a collateral attack on the jurisdiction of the Tribal Court over this matter or on another judgment of the court, the provisions of Title 99 would have been triggered *and service would have been required on the President and the Office of Reservation Attorney.*

Id., at page 4(emphasis added). We also note that the Respondent itself advocated such an interpretation in its briefing in *Hendricks*: "Service upon the Nation is governed exclusively by QTC 99. QTC 99.02.040 requires that service be made upon the President and the Office of Reservation Attorney (now known as the Office of the Attorney General)." Nation's Appellate Brief, *Quinault Indian Nation v. Hendricks*, at 4. Consequently, while not directly addressing the question presented in this case, *Hendricks* provides evidence of prior interpretation in a case directly involving the Respondent. For all these reasons, to the extent the Tribal Court found that service is required on the Chairman, Office of Reservation Attorney, and Secretary of the Business Committee, the Tribal Court is **reversed**.

B. Sovereign Immunity

Appellant next argues a series of contentions regarding sovereign immunity, including that an ancillary contract to the appointment as a judge under Title 5 may act as a limited waiver

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[3] The lack of distinction between the executive and legislative stands in marked contrast to the Quinault Tribal Judiciary which is specifically described as "independent" under Article V of the Quinault Tribal Constitution.

of sovereign immunity, that the Respondent's sovereign immunity does not obviate the need to comply with the termination procedures under Title 5 of the Code, and that appointment of Appellant under Title 5 is not a waiver of sovereign immunity and is not constitutionally prohibited. As each of these contentions pertain to sovereign immunity and its applicability in this case, we combine our analysis of them here.

We recently examined at length the requirements under the Quinault Constitution for a valid waiver of sovereign immunity under Article V, Section 3(d). *See Pura*. In doing so, we determined that the particular constitutional language at issue, a provision seemingly unique to the Nation, requires that a waiver of sovereign immunity must be accompanied by a pledge of collateral. In this case, the Tribal Court found that, regardless of whether there was a waiver of sovereign immunity, the Employment Agreement between Appellant and Respondent contained no constitutionally-required pledge.

Appellant disagrees, and relies on the lower court's decision in *Pura* for a significant portion of his analysis. Appellant's brief, at 9. Appellant also argues that the Employment Agreement creates an implied waiver of sovereign immunity by stating "All actions arising under this Agreement or reasonably related to this Agreement shall be tried in the Quinault Tribal Court." *Id.*, at 11.

The Respondent counters by pointing out that the *Pura* decision relied on by Appellant was subsequently reversed by the Tribal Court at summary judgment. Respondent's Brief, at 6. Additionally, the Respondent notes that the Employment Agreement claims to specifically reserve the Respondent's sovereign immunity, whatever the language of the governing law and venue clauses. *Id.*, at 4-5.

Here, we agree with the Tribal Court and the Respondent that, regardless of the provisions of the Employment Agreement, there is no accompanying pledge of collateral as required under the Quinault Tribal Constitution. This constitutional provision, as noted in *Pura*, is unique and appears designed for the Respondent's protection and benefit. As a result, we **affirm** the decision of the Tribal Court on this issue. As there was no pledge of collateral, it is unnecessary for this Court to determine if the venue and governing law provisions of the Employment Agreement constitute a waiver of sovereign immunity.

C. Injunctive/Declaratory Relief

As there was no pledge of collateral sufficient to meet the constitutional requirements of Article V, Section 3(d), dismissal of Appellant's claim for monetary damages under his breach of contract theory was appropriate. *See e.g. Lane v. Pena*, 518 U.S. 187, 192 (1996)(To show that the government is liable for awards of monetary damages, "the waiver of sovereign immnunity must extent unambiguously to such monetary claims."). Appellant does not seek solely monetary damages, however, but also seeks declaratory relief stating that he remains a judge of the Quinault judiciary until a hearing mandated under Title 5 of the Code is held. Appellant's brief, at 2.

Appellant's briefing and oral arguments present the issue of declaratory relief as one of grave importance for the Nation and the Quinault judiciary. At oral arguments, this Court questioned both parties regarding whether, if the service requirements QTC 99.02.040 were met, the Quinault judiciary could award Appellant the declaratory relief he sought. Appellant argues that the Quinault judiciary may award declaratory relief, regardless of any waiver of sovereign immunity. The Respondent did not directly respond, but observed that technical defects in Appellant's case may prevent awarding of the sought relief, regardless of whether it may legally be awarded.

The ability of the Quinault judiciary to award declaratory relief in an action against the sovereign appears to be a matter of first impression. As this matter is of significant importance to the Respondent, as the factual record appears incomplete regarding this issue, and as the parties' respective arguments may be impacted by our recent decision in *Pura*, we find that this matter should be **remanded** to the Tribal Court. Upon remand, in addition to addressing the issue of availability of declaratory relief, the Tribal Court is instructed to prepare complete findings of fact and conclusions of law allowing this Court of Appeals, if necessary, to review a comprehensive factual record. As this dispositive matter is remanded to the Tribal Court for consideration, it is unnecessary for us here to consider Appellant's final allegation of error regarding whether it was error by the Tribal Court to decline to stay the Respondent's Motion to Dismiss until the conclusion of discovery.

III. Conclusion

NOW THEREFORE, IT IS ORDERED:

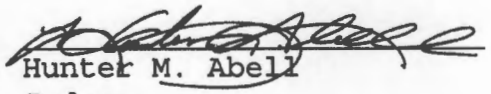
The Tribal Court's decision is **AFFIRMED** in part and **REMANDED** in part for further action in accordance with this opinion.

DATED this 9th day of September, 2013.

Concurring:

Jane Smith
Presiding Judge

Lisa Atkinson
Judge



Hunter M. Abell
Judge