IN THE COURT OF APPEALS

OF THE

QUINAULT INDIAN NATION

SEBNEM PURA
Plaintiff/Appellant,

v.

QUINAULT HOUSING AUTHORITY,
Defendant/Respondent.

Case No. CV-12-002

OPINION

May 3, 2013 - Argued
August 27, 2013 - Decided

Before: Suzanne Ojibway Townsend - Presiding Judge; Hunter Abell - Judge; Gabriel Galanda - Judge.

Appearances: Jesse Wing (MacDonald, Hoague & Bayless) for Appellant; Ripley B. Harwood (Ripley B. Harwood, P.C.) for Respondent.

This matter comes before the Quinault Indian Nation Court of Appeals pursuant to a Notice of Appeal filed on January 16, 2013, by Appellant Sebnem Pura ("Pura"). Pura appealed the entry of an order granting summary judgment on behalf of the Respondent Quinault Housing Authority ("QHA"). Because this Court determines that the Appellant's claim is partially barred due to sovereign immunity, but that Pura's claims under the Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. 1301 *et seq.*, still require 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 decision.

I. Facts and Procedural History

This is the second trip through the Quinault court system for this case. As such, it has a complex factual and procedural history that necessitates review. On January 10, 2012, Pura

brought an action in Tribal Court alleging, among other things, that QHA breached a written Employment Agreement by failing to pay her an amount allegedly owed under the contract. Dkt. 2. The Employment Agreement included a limited waiver of sovereign immunity which read as follows:

> Nothing in this Agreement shall be construed to be a complete waiver of the Quinault Indian Nation's Sovereign Immunity. The Tribe does consent to a very limited and specific waiver of immunity only to the extent of the value of this Agreement or to enforce the provisions of this Agreement.

Dkt. 2, Exh. A. The Employment Agreement was signed by the Appellant, QHA, and a representative of the Quinault Indian Nation ("Nation" or "Tribe").

According to Appellant, she was hired by QHA to serve as Executive Director for a term of five years. Dkt. 2, at 2. One of Pura's early initiatives as Executive Director was to terminate an employee of QHA who had allegedly been mismanaging HUD contracts and funds. *Id.* at 3. Upon termination, the employee reportedly began harassing and intimidating Pura. *Id.* On September 1, 2011, Pura attended a meeting held by some of QHA's Board of Commissioners ("BOC") where, upon finding that "Pura's physical safety ha[d] been threatened on numerous occasions by a former QHA employee, which has now increased to the level of threats of hate crime," the BOC passed a Resolution "terminat[ing] and buy[ing] out Sebnem Pura from her employment contract and pay[ing] her in full, for the entirety of her employment contract for five years." *Id.*, Ex. 2[1]. A check in the amount of $640,000.00 was issued to Pura the following day. *Id.* at Ex. 3. Later that day, however, a BOC member notified Pura that a "stop" had been placed on the check, "stated that [QHA's] decision to stop payment was the wrong way to treat [her], and encouraged Ms. Pura to take legal action." *Id.* at 5.

QHA disputes the Appellant's version of events. QHA contends that Pura simply stopped coming to work and forced an informal settlement agreement from the BOC on September 1, 2011, that was never ratified or formalized. Respondent's Br., at 4-5.

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[1] The Resolution does not appear to be signed or numbered, although it does indicate that three BOC members voted in favor of the Resolution, zero opposed it, one abstained, and the remaining four BOC members were absent.

A. Motion to Dismiss

After filing of the Complaint, QHA moved to defend against the claim. On March 29, 2012, QHA filed a Motion to Dismiss the action before the Tribal Court, principally arguing that the express waiver of sovereign immunity contained in the contract did not apply to the claims brought by Pura. Dkt. 9. On April 9, 2012, QHA withdrew the Motion to Dismiss, without explanation. Dkt. 13. The same day, QHA filed an Amended Motion to Dismiss, arguing:

> Article V, Section 3(d) of the Quinault Indian Nation Constitution...preserve[s] sovereign immunity except in such rare and unique instances where specifically identified physical assets of value equal to the waiver are pledged as security for the waiver.

Dkt. 14, at 4. The Tribal Court heard QHA's Motion to Dismiss on June 26, 2012. On July 16, 2012, Judge Pro Tem Anita A. Neal issued an Order denying the Motion to Dismiss. Dkt. 37. The Tribal Court found that the Chair of the BOC, acting on behalf of the Quinault Nation, validly entered the Employment Agreement which contained a clause purporting to waive the Nation's sovereign immunity. *Id.* at 1.

B. First Appeal

In response to this ruling, QHA filed the first appeal to this Court of Appeals alleging that the denial of the Authority's Motion to Dismiss based on sovereign immunity was an appealable final order.

The Court of Appeals denied the Authority's appeal. On October 26, 2012, this Court issued an Opinion ruling that the denial of the QHA's sovereign immunity argument was not appealable as an interlocutory order under QTC §31.02.010(b). *Pura v. Quinault Housing Authority*, No. 12-002 (Quinault Ct. App. Oct. 27 2012).

C. Discovery Disputes and Sanctions

After denial of QHA's appeal, the case continued in the Tribal Court. The Tribal Court proceedings appear to have been marked by ongoing and acrimonious discovery disputes. This included a Motion to Compel discovery filed by Pura against QHA on September 5 and 6, 2012. Dkt., 54, 58. On October 1, 2012,

Judge Neal ruled in favor of Pura and ruled that QHA must pay Pura's attorneys fees and costs in bringing the discovery motions and oral argument. Dkt, 81 at 8.

Despite Judge Neal's order granting Pura's Motion to Compel, discovery disputes apparently continued, culminating in an October 11, 2012 Motion for Order of Contempt and Sanctions by Pura. Dkt. 93. On October 23, 2012, the Tribal Court granted Pura significant relief sought in the Motion for Order of Contempt and Sanctions, and scheduled a hearing on the issue of sanctions for November 12, 2012. Dkt., at 119.

D. *Quinault Indian Nation v. Wing*, No. 12-111 (Quinault Tribal Ct.)

During the October 23, 2012, hearing on Pura's motions to compel documents and witnesses, counsel for the Nation informed the Court that (1) Pura's attorneys did not have a Quinault business license; (2) the Nation had filed a separate action against those attorneys, personally; and (3) QHA counsel had filed an *ex parte* Motion for Temporary Restraining Order ("TRO") requesting that Pura's attorneys be enjoined from practicing in the Quinault Tribal Court. In response, Judge Neal continued the hearing on Pura's discovery motions until the business license matter was resolved.

On November 27, 2012, the Tribal Court granted QHA's motion and prohibited Pura's counsel from providing legal representation until such time as they secured a Business License from the Nation. Dkt. 138. Prior to this ruling, it appears that Pura's attorneys had already applied for a business license from the Nation's Department of Revenue ("DOR"). The record indicates, however, that the DOR refused to issue the business license and Pura's attorneys sought a Motion to Compel a Business License in the parallel civil proceeding launched against them (*QIN v. Wing*, No. 12-111) on December 12, 2012. On December 21, 2012, a hearing was set on that motion, to be held January 10, 2013. Dkt. 141.

E. Removal and Appointment of Tribal Court Judges

During this contentious stage of dueling litigation, it appears that the lower Tribal Court bench went through significant transition. Sometime prior to November 30, 2012, Judge Neal was reportedly removed from the bench by the Nation's Business Committee. Appellant's Br., at 17. Appellant sees a sinister motive behind the removal, whereas Respondent argues

that Judge Neal's pro tem appointment had merely expired on May 31, 2012. *Id.* at 39-40; Respondent's Br., at 8-9. After Judge Neal's removal, Judge Leona Colegrove apparently presided over the present case, until she too was reportedly removed at some point between January 16, 2013, and January 30, 2013. Following Judge Neal's removal, the Business Committee appointed Judge Joel Penoyar to this case.

F. QHA's Motion for Summary Judgment and Second Appeal

After the November 27, 2012, ruling, Pura proceeded *pro se* as the parallel civil proceeding against her counsel in *QIN v. Wing* unfolded. During that time, QHA filed a Motion for Summary Judgment on November 13, 2012. On January 11, 2013, as outlined in a Memorandum on Summary Judgment and Memorandum on Sovereign Immunity, the newly-appointed Judge Penoyar granted QHA's Motion for Summary Judgment. The Tribal Court based the decision on an analysis of Article V, Section 3(d) of the Quinault Tribal Constitution addressing situations when the Business Committee may waive sovereign immunity. The Appellant, still acting *pro se* at the time, filed her Notice of Appeal to this Court of Appeals on January 16, 2013.

II. DISCUSSION

The Appellant claims four allegations of error: 1) the award of summary judgment in favor of the Respondent; 2) the Tribal Court's Memorandum on Summary Judgment; 3) the Tribal Court's Memorandum on Sovereign Immunity; and 4) the removal of Judge Neal from the Appellant's case. Because the first, second, and third allegations of error all pertain to the awarding of summary judgment and the Tribal Court's reasoning for granting thereof, they are treated as a single allegation of error for purposes of this appeal.

A. Standard of Review

Summary judgment proceedings are specifically authorized under the Quinault Tribal Code at Q.T.C. §30B.16.020. A trial court's granting of summary judgment is almost universally reviewed by the appellate court *de novo*. *See e.g. Boyd v. Colville Tribal* Credit, 4 CTCR 09, 7 CCAR 27 (Colville Tribal Ct.,May 19, 2003); *Lakey v. Puget Sound Energy, Inc.* 176 Wn.2d 909, 922 (Wash. 2013); *Columbia Pictures Indust. v. Fung*, 710 F.3d 1020 (9th Cir. 2013).

Despite this seeming universality, analysis of the Quinault Tribal Code indicates that such review may not be permitted in Quinault Tribal Courts, as there are two seemingly inconsistent provisions. Although Q.T.C. §31.03.010 states "[u]nder no circumstances shall the Court of Appeals conduct de novo reviews," Q.T.C §31.04.010 states "[t]he Court of Appeals shall limit its consideration, so far as the interests of justice permit, to matters of law and interpretation."

These seemingly inconsistent provisions may be resolved, however, by review of their location in the Code. The prohibition on *de novo* reviews is located in the section of the Code pertaining to remanding a case for new trial and appears to relate to development of a factual record. This is supported by the language of Q.T.C. §5.02.020 which states "[t]he parties shall not be entitled to a trial de novo in the Court of Appeals" (emphasis original). A *de novo* review of issues of law is not a trial *de novo*. At oral arguments, both parties agreed that *de novo* review of issues of law was appropriate in this case. We are satisfied that such review of matters of law is permissible under the Quinault Tribal Code and apply it in this review of the granting of summary judgment.

B. Service on the Nation

As an initial matter, QHA argues that this Court must dismiss this appeal without reaching the merits because the Appellant failed to serve her notice of appeal or appellate brief on the Nation. Respondent's Br., at 12-16. QHA argues that service was required by Q.T.C. §31.09.010, which requires service of a notice of appeal on "all parties."

As QHA's argument was raised in a response brief, the Appellant has not provided counter-argument. Nevertheless, we decline to adopt the Respondent's position. As examined more fully below, it is clear that both the Nation and QHA possess sovereign immunity under Q.T.C. §99.02.010(a) and Q.T.C. §80.05.020, respectively. As this appeal turns on the issue of sovereign immunity, and the protection is common to both potential defendants, it is unnecessary for this Court to ascertain if "all parties" under Q.T.C. §31.09.010 were properly joined. Moreover, the Court notes that the Nation was served by the Appellant's initial Complaint and on March 27, 2012, shortly after service, the Nation's Attorney General informed the Court by letter that it would not participate in the judicial proceedings as the Nation was not named a named defendant to the lawsuit. Dkt. 7. Consequently, the Nation has been aware of

the lawsuit from its inception, and either the Nation or QHA could have taken advantage of the joinder provisions of the Quinault Tribal Code at Q.T.C. §30B.08.010 and §30B.09.010. Finally, the Court notes that QHA has claimed no prejudice by the alleged failure to serve the Nation. In the absence of such an allegation, and in light of the common dispositive issue in this case, we decline the Respondent's request to dismiss the appeal for failure to properly serve. *See English v. Cowell*, 969 F.2d 465, 468 n.6 (7th Cir. 1992)(declining to dismiss case when there was no explanation of why failure to serve, within the facts of the case, required dismissal).

C. Law of the Case Doctrine

The Appellant's first argument is that a previous ruling by the Quinault Tribal Court that sovereign immunity was waived acts as a barrier to a subsequent motion for summary judgment on the same issue under the law of the case doctrine. Appellant's Br., at 17-18. The Appellant contends that Judge Neal's initial ruling on July 16, 2012, that the Nation had waived sovereign immunity is binding throughout the case and should not be overturned on summary judgment. Respondent contends that Judge Neal ruled on a preliminary motion to dismiss, whereas the later-appointed Judge Penoyar ruled on a motion for summary judgment, that they are two different standards, and occur at different points in the litigation. Respondent's Br., at 16-17.

We are persuaded that the Respondent is correct. The law of the case doctrine is a judicial invention to aid in effective case management. *Lockert v. U.S. Dept. of Labor*, 867 F.2d 513, 518 (9th Cir. 1989). "Under the doctrine, a court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case." *Milgard Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703, 715 (9th Cir. 1990). For the doctrine to apply, the issue in question must have been "decided explicitly or by necessary implication in the previous disposition." *Id.* (citing *Liberty Mutual Ins. Co. v. E.E.O.C.*, 691 F.2d 438, 441 (9th Cir. 1982)). Moreover, the law of the case doctrine is discretionary. *Id.* As application of the doctrine is discretionary, a trial judge's decision to depart from it is reviewed for abuse of discretion. *Pyramid Lake Tribe v. Hodel*, 882 F.2d 364, 369 n.5 (9th Cir. 1989); *See also Lower Elwha Band of S'Klallams v. Lummi Indian Tribe*, 325 F.3d 443, 452-53 (9th Cir. 2000).

The Quinault Tribal Code permits both a motion to dismiss and a summary judgment motion. A motion to dismiss is permitted

under Q.T.C. §30B.16.010. This provision makes clear that it may be filed at any time after the complaint is filed. A summary judgment motion is similarly provided for under Q.T.C. §30B.16.020. Unlike a motion to dismiss, however, a summary judgment motion is permitted after the expiration of the period in which the Defendant is to appear, or after service of a motion for summary judgment.

In courts of persuasive jurisdictions, a motion to dismiss under CR 12(b)(6) is typically granted when there is an insuperable bar to the claim. *See e.g. Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 330 (1998). In contrast, a motion for summary judgment under CR 56 is only granted when there is no genuine issue of material fact and judgment may be entered as a matter of law. The Quinault Tribal Code adopts this standard explicitly in Q.T.C. §30B.16.020(c): "The judgment sought shall be granted if the Court finds there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Consequently, not only is the timing different, but the standards are also different and the denial of a motion to dismiss does not necessarily preclude bringing a later motion for summary judgment.

Due to these differences, we are satisfied that the Tribal Court's denial of the motion to dismiss under Q.T.C. §30B.16.010 does not preclude a later granting of summary judgment under Q.T.C. §30B.16.020. Persuasive authority is in accordance. *See McKenzie v. BellSouth Telecomms. Inc.*, 219 F.3d 508, 513 (6th Cir. 2000) ("[O]ur holding on a motion to dismiss does not establish the law of the case for purposes of summary judgment."); *191 Chrystie LLC v. Ledoux*, 82 A.D.3d 681, 682 (N.Y.A.D. 2011) ("The law of the case doctrine is inapplicable where, as here, a summary judgment motion follows a motion to dismiss.") (quotation omitted); *Cipolla v. Rhode Island College, Bd. of Governors for Higher Educ.*, 742 A.2d 277, 280 (R.I. 1999) (same). Consequently, we are satisfied that the Tribal Court's actions under these circumstances do not constitute an abuse of discretion.[2]

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[2] We do, however, find the Tribal Court's various final orders to be generally lacking. The law of the case doctrine was a potentially dispositive issue that was briefed extensively by the parties. It deserved analysis. Instead, we were left with nothing to review. *See Frank v. Illinois Farmers Ins. Co.*, 336 N.W.2d 307, 311 (Minn. 1983) (where district court fails to address issue there is nothing for the appellate court to review). We also note that during the scheduling hearing on the Motion for Summary Judgment, Judge Penoyar stated that he "ha[d] no interest in and d[id] not intend to review the record."

D. Express Waiver of Sovereign Immunity

Appellant's next argument is that she secured an express waiver of sovereign immunity through the Employment Agreement. Appellant's Br., at 18-19. The Appellant argues that the Employment Agreement includes the "very limited and specific waiver of immunity." *Id.*

The Respondent disagrees. The Respondent contends that the Employment Agreement waives the sovereign immunity of "the Tribe" as opposed to QHA. Respondent's Br., at 21. Additionally, QHA argues that sovereign immunity is strictly construed and, as such, the alleged waiver was insufficient to constitute a waiver. *Id.* The Tribal Court agreed with the Respondent and based its decision, at least in part, on this reasoning.

We agree with the Appellant. Here, QHA is a "delegate agency" of the Tribe according to Q.T.C. §80.05.020. Moreover, Q.T.C. §80.03.070 defines the "Nation" as the "Quinault Indian Nation *and any or all of its departments or agencies.*" (emphasis added). As Title 80, which specifically pertains to the QHA, defines the "Nation" as including its "departments or agencies," we find that the use of the phrase "the Tribe," in the context of the Employment Agreement, expressly waives the sovereign immunity extending to the QHA. Moreover, the language of the waiver is clear and unequivocal. Consequently, we agree with the Appellant that the Employment Agreement constitutes an express waiver of the QHA's sovereign immunity. **To the extent that the Tribal Court found otherwise, it is hereby reversed.**

The record at that point spanned over 140 docket entries and consisted of thousands of pages. While we do not expect a Tribal Court to become familiar with every piece of evidence in the record, we do expect that the Tribal Court be "more familiar with the record in this case than we are." *Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 915 (6th Cir. 2004). It is the Tribal Court's familiarity with the record that puts it "in a much better position to determine whether . . . summary judgment in [QHA]'s favor would be appropriate." *Id.* We have herein summarized the record, but expect that, on remand, the Tribal Court will conduct a more searching review of its own record.

E. Constitutionality of Express Waiver

If there was an express waiver of sovereign immunity by the QHA, the next issue is whether such waiver was permissible under Quinault law. Indeed, this is another ground ruled on by the Tribal Court, and is arguably the heart of this case.

Tribal governments enjoy sovereign immunity from suit similar that enjoyed by the United States. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Only Congress or the Tribe itself may waive the Tribe's immunity through suit. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998). A tribe may waive its own sovereign immunity so long as it is "clearly" done. *See Oklahoma Tax Comm'n. v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 506, 509-10 (1991).

Appellant argues that the express waiver was in accordance with constitutional and statutory requirements. Specifically, the Appellant argues that Q.T.C. §80.05.020 authorizes QHA to waive sovereign immunity by "express written contract." Appellant's br., at 18. The Respondent counters that Article V, Section 3(d) of the Quinault Constitution limits waivers of sovereign immunity to situations where unencumbered Tribal assets are specifically pledged as collateral for the waiver. Respondent's Br., at 23. The Respondent contends, as the Tribal Court found below, that no such pledge accompanied the Employment Agreement and, as a consequence, the alleged waiver of sovereign immunity is unenforceable.

In response, the Appellant counters that the provision of Article V, Section 3(d) is not the exclusive manner that the Tribe may waive its sovereign immunity. Further, Appellant argues that, if the Respondent's constitutional argument is accepted, it would have absurd results, invalidate many tribal contracts, and render other Tribal Code provisions unconstitutional. Appellant's br., at 21-25.

Here, there are both constitutional and statutory provisions at issue. Article V, Section 3(d) of the Quinault Constitution limits waivers of sovereign immunity to situations where unencumbered tribal assets are specifically pledged as collateral. This provision states as follows:

> The Business Committee shall have the power…to assert the defense of sovereign immunity in suits brought against the Nation and to waive the said defense by agreement where National realty or personality[3] not held in trust by the United States is pledged or when property held in trust is pledged with the consent of the United States.

This Constitutional provision is not alone. As noted previously, Q.T.C. §80.05.020 states as follows:

> The Business Committee hereby gives its consent…allowing the Authority…to waive the immunity from suit it possesses as a delegate agency of the Quinault Indian Nation; provided that the QIN…shall not be liable for the contracted debts or obligations of the Authority…Provided further, that any waiver by the Authority of the sovereign immunity which the Authority possesses as a delegate agency of the Nation must be explicit and set forth in a written contract to which the Authority is a party and must comply with all federal and tribal requirements for the waiver of sovereign immunity.

This broad grant of permission to the QHA to waive immunity is partnered with a general waiver permitting the Nation to be sued "with respect for any claim for which the Quinault Indian Nation is insured." Q.T.C. §99.02.020(c).

The parties sharply disagree regarding the meaning of these constitutional and statutory provisions, particularly regarding the meaning of the words "personalty" and "pledge" in Article V of the Constitution. The Appellant contends that "personalty" may include sums of money and that "pledge" may mean a promise to pay. In response, the Respondent argues that the term "pledge" involves the actual transfer of property pledged as security for a debt or other obligation. Respondent's Br., at 23-26. Additionally, Respondent contends that the provisions of Article V are a condition precedent on the waiver of sovereign immunity. *Id.*

Neither party has provided analysis of the history or purpose underlying Article V, Section 3(d). This provision appears to be unique among Tribal constitutions. Our review of all Federally-recognized Indian Tribes in the State of Washington does not reveal any other Tribe with a similar

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[3] The parties have stipulated that the word "personality" is, in fact, intended to be "personalty."

provision.[4] Review of early government documents from the Nation does not shed any additional light on the matter. The first governing documents for the Nation, following the Quinault River Treaty of 1856 establishing the Reservation, were the Tribal Council Bylaws of August 24, 1922. Veronica E. Velarde Tiller, Tiller's Guide to Indian Country 997 (2005). These Bylaws, however, do not have a similar provision regarding under what circumstances the Tribal Council may waive the Tribe's sovereign immunity. *See* BYLAWS OF THE TRIBAL COUNCIL OF THE INDIANS OF THE QUINAULT INIDIAN RESERVATION, available at http://www.quinaultindiannation.com/BYLAWS.htm. On March 22, 1975, the present Constitution was adopted. Tiller, *supra,* at 997. The text of the present Constitution provides no additional insight into the meaning of Article V, Section 3(d).

Although Article V, Section 3(d) appears unique amongst governing documents, the provision is notably similar to provisions in corporate charters issued under the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. §461, *et seq.* Section 17 of the IRA permits a Tribe to establish corporations that are wholly-owned by the Tribe. 25 U.S.C. §477. Among the powers possessed by Section 17 corporations is the power to "sue or be sued" with judgments being limited to "assets specifically pledged or assigned." *See* Cohen's Handbook of Federal Indian Law, §4.04[3][a], (Nell Jessup Newton ed., 2005) [hereinafter COHEN'S HANDBOOK] (citing *e.g.*, Corporate Charter and By-Laws of the Omaha Tribe of Nebraska, §5(i)). Courts have sustained this limitation. *See e.g. Maryland Cas. Co. v. Citizens Natl. Bank,*

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[4] Of the 29 Federally-recognized Tribes in the State of Washington, we find only three Tribes, other than the Quinault Nation, that specifically address waiver of sovereign immunity in their Constitutions. *See* SKOKOMISH TRIBAL CONSTITUTION, Art. V, §1(o), available at http://www.skokomish.org/SkokConstitution&Codes/Constitution/SkokConst.htm ("The Tribal Council shall have the following powers…to assert as a defense to lawsuits against the tribe and to waive as permitted by Federal Law the sovereign immunity of the Skokomish Tribe."); SNOQUALMIE TRIBAL CONSTITUTION: Art. I, §3, available at http://www.snoqualmienation.com/content/tribal-court ("The Snoqualmie Indian Tribe is immune from suit except to the extent that the Tribal Council expressly and unambiguously waives its sovereign immunity."); JAMESTOWN S'KLALLAM TRIBAL CONSTITUTION: Art. VII, §1(r), available at http://www.jamestowntribe.org/govdocs/gov_const.htm ("The Tribal Council of the Tribe shall be authorized to….assert as a defense to lawsuits against the Tribe, and to waive only by express written agreement, the sovereign immunity of the Tribe, including limited waivers of sovereign immunity.").

361 F.2d 517 (5th Cir. 1966). This limitation allows a tribal corporation to enter business transactions, but requires that the party contracting with the corporation seek a pledge in advance of whatever security it may require since general assets of the corporation cannot be reached. Cohen's Handbook, §4.04[3][a]; *Namekagon Dev. Co. v. Bois Forte Reservation Hous. Auth.*, 517 F.2d 508 (8th Cir. 1975). The purpose of this provision is to protect the tribe involved. As noted by an Alaska Supreme Court decision examining Section 17, "[s]ome of the tribal property could be kept in reserve, *safe from a judgment execution which could destroy the tribe's livelihood*, in recognition of the special status of the Indian Tribe." *Atkinson v. Haldane*, 569 P.2d 151,, 175 (Alaska 1977)(emphasis added).

The Quinault Nation voted to accept the IRA, but did not reorganize under it. As a consequence, it kept the Bylaws of 1922 until the adoption of the present Constitution. As a result, it is unclear to what extent, if any, Section 17 of the IRA may have influenced the drafters of the current Constitution. It provides important contemporaneous evidence, however, of interpretation of a similar provision widely used in Indian Country during the time of the Constitution's drafting. As such, this provision appears specifically intended to protect the Tribe. Under a plain reading of Article V, Section 3(d), and combined with the intent and policy considerations outlined above, we find that the Quinault Constitution requires a pledge of National realty or personalty before a waiver of sovereign immunity is valid, and that such a pledge requirement is designed for the Nation's protection and benefit.[5]

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[5] In *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community*, 674 P.2d 1376 (Ariz. Ct. App. 1983), a tribal corporation argued that there was no waiver of immunity because "the waiver of sovereign immunity [in the Tribe's Constitution] is limited to only those situations where specific income or chattel are pledged or assigned" and the complaint did not "indicate any . . . income or chattel [that] has been specially pledged or assigned." *Id.* at 1383 (quotation omitted). The clause of that constitution stated that "the grant or exercise of such power to sue and be sued shall not be deemed a consent . . . to the levy of any judgment, lien or attachments upon the property of the [Tribe] other than income or chattels especially pledged or assigned." *Id.* at 1380 (quotation omitted). The court held that this clause did "not affect [the court's] conclusion that the Indian Corporation has waived its immunity." *Id.* at 1384. Instead, it merely resulted "in a situation where any resulting judgment may be for all practical purposes unenforceable." *Id.*; *see also generally McCarthy & Associates v. Jackpot Junction Bingo Hall*, 490 N.W.2d 156 (Minn. Ct. App. 1992) (same). These cases are

According to the U.S. Supreme Court, there are three elements necessary to create a pledge: 1) a debt; 2) an offer of property to secure that debt; and 3) transfer of the property from the debtor to the creditor. *Mechanic's & Trader's Ins. Co. v. Kiger*, 103 U.S. 352, 356 (1880); *see also In re Alabama Land and Mineral Corp.*, 292 F.3d 1319, 1325 (11th Cir. 2002). The Employment Agreement appears to be a fairly standard contract that specifies a term, salary, and termination conditions. As noted by the Tribal Court, however, there is nothing in the Employment Agreement that could reasonably be construed as a transfer of any property from the Nation to the Appellant. Consequently, even assuming that the "personalty" requirement of Article V, Section 3(d) is satisfied by the specified salary, no pledge was made within the meaning of the Quinault Constitution.

Appellant claims that such an interpretation renders other constitutional provisions invalid. We share no such concern. As noted by the U.S. Supreme Court, "[W]e are obligated to construe [a] statute to avoid [constitutional] problems if it is 'fairly possible' to do so." *Boumediene v. Bush*, 553 U.S. 723, 787 (2008)(*quoting Crowell v. Benson*, 285 U.S. 22, 62 (1932)). Both Q.T.C. §80.05.020 and §99.02.020 may be read in accordance with the above canon of statutory interpretation. As such, they may be construed as outlining situations where QHA or the Tribe may waive sovereign immunity when the underlying constitutional requirements have already been met. Indeed, Article V, Section 3(d) expressly limits the Business Committee's ability to waive sovereign immunity to a certain prescribed circumstance: where the Nation has pledged National realty or personalty not held in trust, or where it has made such a pledge with the permission of the United States. The insurance provision of Q.T.C. §99.02.020 is instructive and analysis of case law indicates that the pledge of insurance proceeds may satisfy the requirement of a "pledge." "It is a well-established, general rule that, if the parties so provide, a pledge of a life insurance policy can be made to secure all existing indebtedness of the assignor to the assignee." *Sun Life Ins. Co. v. Weyen*, 136 F. Supp. 592, 596 (E.D. Wash. 1955). Moreover, such a pledge of insurance proceeds may be in accordance with the transfer requirements for a pledge:

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distinguishable. Here, the Nation's Constitution makes the pledge of reality or personalty a *condition precedent* to a waiver of immunity, rather than a mere limitation on damages. *See* Quinault Constitution, Article V, § 3(d).

> At common law, actual, physical possession by the pledgee himself was not strictly necessary. Rather, a court may find that a pledge was perfected if the collateral was in the possession of a third party acting as the pledgee's agent...This third party agent cannot be the pledger itself.

McCoy v. American Express Co., 253 N.Y. 477, 483 (1930). It is not the province of this Court to instruct the Nation on an exhaustive list of means whereby it may waive its sovereign immunity in accordance with the Constitution. Instead, it is sufficient to demonstrate that the requirements of Article V do not necessarily render the statutory provisions of Q.T.C. §80.05.020 or §99.02.020 unworkable. Additionally, it is sufficient to conclude that the Employment Agreement did not include a pledge sufficient to withstand Quinault constitutional requirements for waiver of sovereign immunity.

In addition to the concerns about the pledge requirements of Article V rendering certain statutory provisions invalid, the Appellant also contends that Article V is not the only means whereby the Tribe may waive its sovereign immunity. Appellant's Br., at 21-22. Specifically, the Appellant argues that the Nation may consent to suit and points to Q.T.C. §80.05.020 and §99.02.020 as situations where it has done so. Based on the analysis above, however, we disagree. Any waiver of sovereign immunity that ignores the express provisions of Article V violates the well-known principle of statutory interpretation that courts give specific language precedence over general language. *See Varity Corp. v. Howe*, 16 U.S. 489, 511 (1996)(describing this approach as a "warning against applying a general provision when doing so would undermine limitations created by a more specific provision."). As such, we decline the Appellant's invitation to find alternate methods to waive sovereign immunity.

Finally, regarding the Appellant's argument that the signature by the Tribal official on the Employment Agreement should work toward the Appellant's favor by virtue of equity, case law does not support that conclusion. Courts typically hold that unauthorized acts by tribal officials do not waive sovereign immunity. *See e.g. Native American Dist. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1295 (10th Cir. 2008)(holding that tribal entity was not equitably estopped from asserting immunity because "misrepresentations of the Tribe's officials or employees cannot affect its immunity from suit"); *Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282, 1288 (11th Cir. 2001)(rejecting argument that tribal representative had actual

or apparent authority to waive immunity because "[s]uch a finding would be directly contrary to the explicit provisions of the Tribal Constitution"); *World Touch Gaming v. Massena Mgmt., LLC*, 117 F. Supp. 2d 271, 276 (N.D.N.Y. 2000)(holding that a senior vice president's signature to an agreement with an express waiver of sovereign immunity provision did not waive sovereign immunity because that right was reserved exclusively to the tribal council.). As such, any act by a Nation official that purportedly waived sovereign immunity in this case was *ultra vires* and beyond the clear requirements of Article V, Section 3(d) of the Quinault Constitution.

F. ICRA Claims

Appellant also claims violations of her rights under the Indian Civil Rights Act of 1968. 25 U.S.C. 1301 *et seq.* Specifically, Appellant claims violations of her equal protection and due process rights. Appellant's Br., at 32-39. The Respondent counters by claiming that the section of the Appellant's brief pertaining to the ICRA allegations should be struck as it violates the page limitations of Q.T.C. §31.11.010. Respondent's Br., at 32, n. 23. Respondent also claims that the ICRA claims are time barred by the one-year statute of limitations contained at Q.T.C. §99.01.010 and that the ICRA claims should be rejected as the Complaint was never served on the Nation. *Id.* at 32-33, 35.

In *Santa Clara Pueblo*, the U.S. Supreme Court determined that, with the exception of petitions for *habeas corpus*, the ICRA did not waive the sovereign immunity of tribes and that claims under the ICRA may only be brought in tribal courts. *Santa Clara Pueblo*, 436 U.S. at 58. Since that decision, a split has developed in tribal jurisdictions on whether the ICRA constitutes a waiver of tribal sovereign immunity in tribal court. *Compare e.g. Satiacum v. Sterud*, No. 82-1157 (Puy. Tr. Ct. 1982); *Stone v. Sonday*, 10 Indian L. Rep. 6039 (Colv. Tr. Ct. 1983); *Kotch v. Absentee Shawnee Tribe*, 3 Okla. Trib. 184, 195 (Absentee Shawnee Tribe. Sup. Ct. 1993); *Pawnee Tribe v. Franseen*, 19 Indian L. Rep. 6006, 6008 (Ct. Indian App. - Pawnee 1991); *Board of Trustees v. Wynde*, 18 Indian L. Rep. 6033, 6035 (N. Plns. Intertr. Ct. App. 1990); *Johnson v. Navajo Nation*, 14 Indian L. Rep. 6037, 6040 (Nav. Sup. Ct. 1987); *with e.g. Oglala Sioux Tribal Personnel Bd. v. Red Shirt*, 16 Indian L. Rep. 6052, 6053 (Oglala Sioux Ct. App. 1983); *Works v. Fallon Paiute-Shoshone Tribe*, 24 Indian L. Rep. 6033 (Intertr. Ct. App. Nev. 1997); *Dupree v. Cheyenne River Hous. Authority*, 16 Indian L. Rep. 6106, 6108-09 (Chy. R. Sx. Ct. App. 1988); *See also Bellue*

v. Puyallup Indian Tribe, No. 94-3045 (Puy. Tr. Ct. 1994) (explaining that "[a]t least two tribal courts have rejected sovereign immunity as an affirmative defense when tribal members or employees seek redress [under ICRA] against the tribe in the tribal court") (citing *Hudson v. Hoh Indian Tribe*, HOH-CIV 4/19015 (Hoh Tr. Ct. 1992); *O'Brien v. Fort Mojave Tribal Court*, 11 Indian L. Rep. 6001 (Fort Mojave Ct. App. 1984)).

The question of whether the ICRA constitutes a waiver of sovereign immunity in the courts of the Quinault Nation appears to be an issue of first impression. Although this Court has applied the principles of the ICRA in previous cases, it has not had occasion to determine this particular issue. *See e.g. Quinault Indian Nation v. Rocky D. Johnson*, CV 10-083, at 3-4 (Quinault Ct. App. 2010) (examining a potential due process right to testify in a civil matter). The alleged ICRA claims were not addressed by the Tribal Court. Absent a ruling and factual record by the Trial Court on this issue, the appropriate course of action is to remand for consideration of the Appellant's ICRA claims, in light of our decision outlined above. **This case is so remanded.** As this issue is remanded, it is unnecessary for us to decide the Respondent's request to strike the overlength portions of the Appellant's brief. We note, however, that Appellant "is proceeding *pro se*, and therefore must be afforded some leniency in the construction of [her] pleadings and compliance with court rules." *Tucker v. Thomasville Toyota*, 623 F.Supp.2d 1378, 1381 (M.D.Ga. 2008). We also note that page limitations exist to promote economy for the Court and the litigants, and this Panel will not hesitate to act as it deems appropriate if faced with similar briefing by either party.

G. Request for New Tribal Judge on Remand

Although the Appellant's first three allegations of error were consolidated as pertaining to the awarding of summary judgment, there remains the Appellant's fourth allegation of error regarding the removal of Judge Neal from the case. The Appellant contends that a new judge must be assigned on remand in order to preserve the appearance of fairness. Appellant's Br., at 39. Specifically, the Appellant argues that "[e]xperience suggests the [Business] Committee will terminate judges who rule in favor of Ms. Pura creating the threat of undue pressure to rule against her." *Id.* Additionally, Appellant argues that "at this point remanding to any judge assigned by the Business Committee will necessarily perpetuate the appearance of unfairness." *Id.* at 40.

While the Respondent does not directly address the appearance of unfairness argument, the Respondent notes that the recently-appointed Tribal Court judge is an experienced trial court and appellate judge with the State of Washington. Respondent's Br., at 1-2.

In any jurisdiction, tribal or otherwise, the termination of a judge in the middle of litigation profoundly undermines confidence by the parties in their ability to receive a full and fair trial before an impartial decision maker. Unfortunately, this is a recurring and serious concern throughout Indian Country. This Court notes that the Quinault judiciary is an independent judiciary under Article V, Section 3(b) of the Quinault Constitution. We also note that the appointment of Tribal Court judges is entrusted solely to the Business Committee under Q.T.C. §5.03.010. Additionally, we note that the term of office for judges is fixed under Q.T.C. §5.04.020 and the process for removal is specified under Q.T.C. §5.04.030. Finally, we observe that the process for disqualifying a Tribal Court judge is found at Q.T.C. §5.04.090.

We presume the independence and professionalism of all judges duly appointed to the Quinault bench, unless presented evidence to the contrary. The circumstances of Judge Neal's removal are not properly before this Court in this case. Moreover, it does not appear the Appellant moved to disqualify the later-appointed Tribal Court judge under Q.T.C. §5.04.090 before the ruling on summary judgment. Additionally, examination of the Tribal Court judge's credentials indicate they are exemplary. Based on the presumption of independence and the Tribal Court judge's demonstrated experience, we decline the Appellant's request to remand to a new Tribal Court judge. This Court remains, however, acutely sensitive to the appearance of fairness in this case and strongly encourages the Business Committee to refrain from any action that suggests Ms. Pura may be unable to receive a fair trial in the Quinault judiciary.

H. Costs, Fees, and Sanctions

Respondent requests costs and fees from the initiation of litigation to the conclusion of the Appeal. Respondent's Br., at 37. The awarding of costs and/or attorneys' fees to the winning party is permissible under Q.T.C. §30B.26.010 if it would be "equitable to do so." Despite the Respondent's success on the sovereign immunity issue, we find that the equities do not support awarding of attorneys' fees or costs. The issues

presented in this case are novel and of significant importance to the parties, the Nation, and the entities doing business with the Nation. Moreover, the Appellant's ICRA claims remain to be adjudicated and the sovereign immunity claims, while ultimately unsuccessful, were colorable. Consequently, the Respondent's request for costs and fees is denied.

This Court also notes with dissatisfaction that the language employed by counsel for both parties in their written briefs approached or exceeded the ordinary bounds of professionalism. Just as importantly, however, the Court notes there are allegations that at least two sanctions orders dating from October 2012 against the QHA remain unpaid as of the date of briefing. **Upon remand, the Tribal Court is directed to hold a hearing within thirty (30) days to inquire into the status of the sanctions payments and, if necessary, take additional steps as it deems appropriate.**

III. Conclusion

This case is unfortunate. At the inception, it appears all parties were hopeful for a fruitful working relationship. It also appears that all parties negotiated in good faith an express waiver of sovereign immunity. The result outlined above may seem unjust to those unfamiliar with sovereign immunity. As noted under similar circumstances, however, "The result may seem unfair, but that is the reality of sovereign immunity: '[I]mmunity can harm those who…are dealing with a tribe…'" *Memphis Biofuels, LLC v. Chickasaw Nations Industries, Inc.*, 585 F.3d 917, 922 (6th Cir. 2009), (citing *Kiowa*, 523 U.S. at 758). We note that sovereign immunity protects the U.S. government and state governments as well, and that litigation against any sovereign is notoriously fraught with peril. *Santa Clara Pueblo*, 436 U.S. at 58 ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."). As such, Ms. Pura joins a long line of disappointed litigants vis-à-vis sovereign immunity.

Finally, we echo the sentiments of the Tribal Court encouraging the Business Committee to reexamine the wisdom of the particularly strenuous requirements of Article V, Section 3(d).

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 27th day of August, 2013.

For the Panel:

Suzanne O. Townsend
Presiding Judge

Gabriel S. Galanda
Judge

Hunter M. Abell
Judge