SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY

COURT OF APPEALS

10,005 E. OSBORN RD. SCOTTSDALE, AZ 85256 (480)362.6315

MICHAEL CORSO,

Petitioner/Appellant,

-V-

ALYSSA BUTLER and JOHN DOE BUTLER, A.R., a minor, JOHN DOES I-X, BLACK AND WHITE CORPORATIONS I-X, and XYZ PARTNERSHIPS I-X,

Respondents/Appellees.

Case No.: **APC 20-0001**

RE: Community Court No. C-18-0052

OPINION AND ORDER

BEFORE: Justices ROBERT N. CLINTON, MARY GUSS, and PAUL BENDER

This matter is before the Court on the timely appeal of Petitioner/Appellant Michael Corso (Corso) from an order of the Community Court refusing to issue a writ of garnishment directed at the tribal per capita payments due to Respondent/Appellee Alyssa Butler (Butler), a citizen of the Salt River Pima-Maricopa Indian Community (Community). Butler has not appeared in any of these proceedings and Corso has been unable to locate her following diligent efforts. We find, for reasons more fully explained below, that (1) the garnishment order sought by Corso is barred by the Community's sovereign immunity; (2) no Community ordinance, resolution or statute has waived the Community's sovereign immunity by expressly authorizing such garnishment in personal injury actions; and (3) the garnishment order sought by Corso is foreclosed by prior precedent of this Court. Therefore the Court has determined that both this Court and the Community Court lacked jurisdiction to issue the requested order and, accordingly, affirm the denial of the requested order by the Community Court. Since the Court has determined from the briefs that it lacks jurisdiction to cause the Community Court to issue the garnishment order sought by Corso, it also denies the Petitioner's Request for Oral Argument in this matter.

Background

On January 26, 2016 Corso was driving a truck outside of the Community that sustained a serious rear-end collision when struck by a vehicle containing Butler, who, according to Corso, was uninsured. Corso's truck was destroyed and he sustained serious personal injuries, which he described to this Court as "life-altering." He initiated a lawsuit against Butler and others in Maricopa Superior Court under Case No. CV 2016-007359. Although apparently properly served by abode service, according to the findings of both the Superior Court and the Community Court, Butler did not appear in the Superior Court proceeding. A default judgment was entered by the Superior Court on September 7, 2017 against Butler awarding Corso judgment in the amount of $900,000 in compensatory damages and $900,000 in punitive damages as well as costs in the amount of $510.60.

Apparently, properly recognizing that the Maricopa Superior Court lacked jurisdiction to enforce its default judgment within the boundaries of the Salt River Pima-Maricopa Indian Community against Butler, Corso initiated this proceeding in the Community Court seeking recognition and enforcement of the Maricopa Superior Court judgment against Butler. Numerous attempts at personal service on Butler at her last known address apparently failed since she no longer resided there. Corso therefore sought and obtained from the Community Court an Order permitting service by publication of a foreign order. Despite such service, Butler never appeared in the Community Court and her whereabouts apparently remain unknown to both Corso and the Community Court.

Following service on Butler by publication, Corso filed a motion to certify the Maricopa Superior Court judgment and to enforce it through garnishment of Butler's per capita payments from the Community. Since Butler's whereabouts continue to remain unknown, she was consistently notified of all hearings in this matter through publication in accordance with repeated Community Court orders. The Community Court held a show cause hearing to determine whether proper service had been made on Butler in the Maricopa Superior Court prior to issuing the default judgment. Having determined that the means of abode service twice used to serve Butler in the Maricopa Superior Court case, together with surrounding investigations, demonstrated proper service on Butler, the Community Court issued an Order dated October 4, 2018 entering a default judgment against Butler, granting comity to and recognizing the state court judgment, and ordering Butler to pay Corso $2,000 on the Monday after each per capita payment commencing with the January 2019 payment. On the same date, the Community Court also issued a Civil Bench Warrant and an Order to Show Cause why Butler should not be held in contempt for failure to appear. When these and other efforts to enforce the state court judgment failed, Corso sought an order to receive payments directly from the Community out of Butler's per capita payments, that is to essentially directly garnish Butler's per capita payments paid by the Community (direct garnishment). Despite its decision to grant comity to the state court judgment, the Community Court by Order dated November 19, 2019 (and filed November 20, 2019) denied the requested direct garnishment order.

Corso filed a timely Notice of Appeal from the Community Court Order denying the requested direct garnishment order. No responsive brief has ever been filed by Butler who has never

appeared in this proceeding. Following the filing of Appellant's Opening Brief, this Court having reviewed that brief determined that the Community had a significant interest in this appeal but was not a party to this proceeding. Accordingly, the Court issued an Order Inviting the Salt River Pima-Maricopa Indian Community to File Amicus Brief. The Court also granted Corso's motion for leave to file a responsive brief to any amicus brief filed by the Community. After several continuances and long delays created by the COVID-19 pandemic, this Court ultimately received an extensive and helpful amicus brief from the Community and a response thereto from Corso. Having reviewed these submissions, the Court has determined that this matter can and will be resolved based entirely on the Community Court record, the Appellant's initial brief, the Community's amicus brief and Corso's response to the amicus brief.

Discussion

A. Sovereign Immunity

The Merits Brief of Amicus Curiae, The Salt River Pima-Maricopa Indian Community (Amicus Brief) correctly asserts that "Courts have long held that Indian tribes, like other sovereign powers, possess immunity from suit." p, 9 citing *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 789 (2014); *Santa Clara Tribe v. Martinez*, 436 U.S. 49, 58 (1978), and *Turner v. United States*, 248 U.S. 354, 358 (1919). Such sovereign immunity extends not only to damage actions brought against an Indian tribe, but also cases in which parties seek court orders directed either at an Indian tribe as a party defendant, as in *Bay Mills Indian Community*, or as a third party ancillary recipient of an enforcement order, such as the direct garnishment order Corso seeks here. For example, in *United States v. Morris*, 754 F. Supp, 185 (D. N.M. 1991), a federal court held that due in part to tribal sovereign immunity it lacked jurisdiction to issue a garnishment order sought by the United States government against the Navajo Nation to enforce restitution order against a special debtor whose husband was an employee of the Navajo Nation. If the federal government cannot overcome tribal sovereign immunity without benefit of a federal or tribal statute expressly waiving such immunity and authorizing the garnishment, neither can Corso.

The Amicus Brief also correctly points out that tribal sovereign immunity constitutes a subject matter jurisdictional issue. p. 9, citing *Filer v. Tohono O'Odham Nation Gaming Enterprise*, 212 Ariz. 167. 170, 129 P.3d 78 (Az. Ct. App. 2006). Thus, in the absence of an express statutory waiver of tribal sovereign immunity and authorization for the direct garnishment order Corso seeks, both the Community Court and this Court lack subject matter jurisdiction to issue the requested direct garnishment order. *Cook v. AVI Casino Enterprises, Inc.,* 548 F.3d 718, 725 (9th Cir. 2008) ("Tribal sovereign immunity protects Indian tribes from suit absent express authorization by Congress or a clear waiver by the tribe."); *see also Kiowa Tribe of Oklahoma v. Manufacturing. Techs., Inc.,* 523 U.S. 751, 754 (1998). The cases also hold that any waiver of tribal sovereign immunity "cannot be implied but must be unequivocally expressed." *MM&A Productions LLCv. Yavapai-Apache Nation*, 234 Ariz,. _. 64, 316 P.3d. 1248 (Ariz. App. 2014), *see also Santa Clara Tribe v. Martinez*, 436 U.S. 49, 58 (1978).

In his Response to Merits Brief of Amicus Curiae, The Salt River Pima-Maricopa Indian Community (Response Brief) Corso cites absolutely no cases refuting the existence of the Community's sovereign immunity. Instead, he simply claims that sovereign immunity fails to

reach this case, pointing out that:

> Appellant did not file a lawsuit against the Community. Instead the Appellant is asking this Court to acknowledge that the Community Court has the authority to garnish a community member's *per capita* payments to enforce the certified Judgment obtained by Appellant. Appellant's request is not an attempt to garnish the Community's assets; rather, it is an attempt to garnish the Appellee's asset that is, per the Community, "akin to a legal entitlement." (Quoting Amicus Brief at p.2)

This response misperceives the situation in three major respects. First, it misperceives the scope of tribal sovereign immunity, as the *Morris* case demonstrates. As pointed out above, tribal sovereign immunity not only bars suits for damages against Indian tribes, it also prevents direct and indirect efforts to issue enforceable judicial orders requiring a tribal response, such as a direct garnishment order. Second, this response conveniently ignores the fact that the recipient of the direct garnishment order Corso seeks is the Community, not Butler. It is the Community, not Butler that Corso wants to produce the per capita payments that the Community Court order directed for satisfaction of the state court judgment. Third, while Butler may have a legal entitlement to the per capita payments (an issue we need not decide), until such funds are disbursed to Butler by the Community they remain part of the Community's funds. The Community Court correctly held that it could direct Butler to pay Corso funds from the per capita payments, once she received them, to satisfy the state court judgment. But Corso seeks to go one step further and to redirect funds, through a direct garnishment order, intended for Butler as per capita payments from the Community treasury *before they are disbursed* to Butler. Thus, Corso actually seeks to reach Community funds through his proposed garnishment order. Without an express waiver of tribal sovereign immunity and a clear and express statute authorizing such disbursement, no tribal court, including the Community Court, has any subject matter jurisdiction to issue such a direct garnishment order.1

B. Lack of Community or Federal Ordinance, Resolution or Statute Authorizing Garnishment of Per Capita Payments to Satisfy Personal Injury Judgments

By misstating or misperceiving the breadth of tribal sovereign immunity, Corso's Response Brief incorrectly states his burden of proof to establish a legal entitlement to the direct garnishment order he seeks. He incorrectly states "It is the fact that there is no legal authority prohibiting garnishment of *per capita* payment that is important. The Community cites to no such prohibition." Unfortunately for Corso, that argument states his burden 180 degrees backwards. Precisely because tribal sovereign immunity bars any direct garnishment order directed to the Community of the type that Corso seeks, the burden rests with him to show, as noted above, a

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The lack of power of any court to issue garnishment orders directed to the Community to satisfy judgment creditors is further confirmed by the Amicus Brief. The Community, in accordance with federal law, generally holds in trust per capita payments to which minors or protected persons are entitled, even *after* they are disbursed. While such funds remain in that protected trust status held by the Tribe, both the Amicus Brief and the Response Brief concede they are expressly protected from creditors – precisely because they are held in trust by the Community. Amicua Brief, p. 7, Response Brief, p. 11.

clear and express statutory waiver of sovereign immunity and a statutory authorization for the entry of such a judicial direct garnishment order. Nowhere in Corso's Response Brief does he cite any Community or federal ordinance, resolution or statute expressly waiving the Community's sovereign immunity and clearly authorizing the direct garnishment order he seeks. Corso's Response Brief virtually concedes the non-existence of any such statutory authorization and instead urges this Court to judicially create such a remedy to make him whole. Due to tribal sovereign immunity, no tribal court has subject matter jurisdiction to judicially craft the remedy Corso seeks.

Instead of citing any Community statutory authorization for the direct garnishment order he seeks, Corso attempts to rely on limited Community practice to establish a judicial entitlement to the garnishment order. Citing *Members Credit Untion v. Alhameed,* 2008-1213-CV-FJ, 8 Am. Tribal Law 183, 188-90, 2009 WL 1615822, (Grand Traverse Trib. Ct. 2009), Corso argues that a tribal *practice* of enforcing foreign judgments through garnishments of per capita payments constitutes sufficient grounds to establish his right to the direct garnishment order he seeks. He points out that the Community acknowledged in its Response Brief indicated "as a practice the Community voluntarily complies with all Federal garnishment orders." Corso claims this admission is "fatal to its position." Response Brief, p. 7. Corso is wrong in two respects. First, he ignores the word "voluntarily" in the quoted alleged concession. Nothing in tribal sovereign immunity or tribal law prevents any tribe from voluntarily complying with any garnishment order when it is presented to the Tribe. In fact, nothing prevents Corso from asking the Community Council to voluntarily enforce his state court judgment. But that is not what he did when he requested the Community Court to issue a garnishment order directing the Community to *involuntarily* directly garnish the per capita payments due to Butler before they were disbursed to her. That is precisely the type of involuntary court order that sovereign immunity bars.

Furthermore, Corso's argument misstates the issue and holding in *Alhameed.* The question in that case was not whether the Court could order the Tribe to directly garnish per capita payments to satisfy a foreign judgment, it was whether per capita payments could be garnished for that purpose *once disbursed* to the tribal member. In that context, the tribal court held that a practice of such garnishment was sufficient to permit such a judicial order even in the absence of an express tribal ordinance covering the situation. Since the garnishment order in *Alhameed* was directed at the judgment creditor, not the tribe, no sovereign immunity issue arose and none was addressed by the Court. The Court's final judgment in that case makes this point clear:

> Petitioner's request to register the foreign judgment for the purposes of enforcement of the same is hereby granted. Consistent with the above, the Court further orders that the Respondent, Pearly Alhameed (TID # 989; DOB: 7/6/1956) shall pay from the December 2009 per capita distribution and/or each future per capita distribution until paid in full, the sum of $6,101.72 to Petitioner, Members Credit Union, P.O. Box 795, Traverse City, MI 49685. In addition to this amount, a $100.00 administrative fee will be applied each time per capita is accessed.

The *Alhameed* order is precisely the type of order the Community Court issued to Butler. Thus, the very case cited by Corso demonstrates that he was entitled to the enforcement order he actually received and *no more.*

While not relied upon by Corso, the Community Amicus Brief notes that the Community Council has twice voted to authorize certain garnishments and involuntary deductions from a Community member's per capita payments as they are disbursed. On December 24, 2001 the Council approved Policy 3-6 Administrative Procedure for Deductions of Child Support Arrearages and Other Judgement Debt from Per Capita Payments and Other Disbursements. This Policy only authorized deductions and garnishments of debts due to the Community. Later enactment of Sections 10-49 through 10-59 of the SRPMIC Code of Ordinances largely replaced, codified, and somewhat enlarged this prior administrative policy. The Amicus Brief notes that the Community Council has also specifically authorized by ordinance direct deductions from tribal member per capita payments in three other very limited situations, mostly involving fines. Amicus Brief, p. 6-7. None of these express statutory authorizations cover the type of direct garnishment for a judgment creditor that Corso seeks. In fact, the existence of these express statutory authorizations for direct garnishments of or deductions from per capita payments demonstrates a Community understanding and practice that such direct garnishments and deductions from Community member per capita payments *before disbursement* can only occur pursuant to express authorization by Community ordinance.2 And Corso can point to no Community ordinance expressly authorizing the direct garnishment order he seeks. Thus, Corso is not entitled to any order to enforce the state court judgment beyond that which the Community Court properly issued, directing enforcement of the state judgment to Butler by directing her to regularly pay the judgment from per capita payments *once disbursed.* The fact that Corso has been unable to locate either Butler or any of her assets does not entitle him to ignore the Community's sovereign immunity. 3

C. The Garnishment Order Corso Seeks is Foreclosed by Prior Decision of This Court

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While not directly at issue in this case, the Court notes that the Community's Amicus Brief, after explaining the approval of the Community Revenue Allocation Plan (RAP) by tribal initiative on September 21, 2000, argues that the 35 percent of tribal gaming revenues of the Casino set aside for per capita distraction cannot be altered without another tribal vote. Arguing against permitting the garnishment order Corso seeks, the Amicus Brief claimed, "only a majority vote of enrolled Community members could amend or modify that 35 percent of net gaming revenues is distributed to to every enrolled Community member, including minors, in quarterly distributions." Without deciding the question, this Court wonders whether the Community's argument in this respect might have gone too far in claiming a sacrosanct entitlement of each tribal member to their *pro rata* share of exactly 35 percent of the tribal gaming revenues. If taken seriously, such claims might call into question the legal support for the subsequent Community Council decisions by Administrative Policy and later Tribal Ordinance without any tribal vote to permit garnishments and certain involuntary deductions for child support and certain other payments due the Community, including fines.

While Corso claims that denying him the garnishment order he seeks leaves him without any remedy that is far from the case. Perhaps Corso might attempt to convince the Community Council to *voluntarily* disclose either the location of the bank account into which Butler's per capita payments are paid or the address to which they are mailed. For the same reason that no Community court could not issue the direct garnishment order that Corso seeks, no court would have subject matter jurisdiction to force the Community to involuntarily disclose such information. Additionally, the record is completely devoid of any suggestion that Corso has hired private investigators to locate Butler (other than for the limited purposes of service) or to discover the location of any of her assets for purposes of enforcing the state court judgment against her.

While surprisingly not cited by the Community, Corso is now aware of this Court decision in *Keil v. James*, No. APC-16-0002 (decided Oct. 27, 2016) since he cited that precedent in his Response Brief.4 Response Brief, pp. 6-7. In *Keil*, a case remarkably similar to this one, this Court affirmed the denial of a direct garnishment order against the Community to enforce a state court judgment that had been granted comity by the Community Court. After taking note of the limited Community authorizations for involuntary garnishments and deductions of child support payments and certain fines due the Community, we wrote "[w]e find no provision in the current law permitting [other] garnishment of a tribal member's per capita distribution." Corso points to no new authorization since *Keil* was decided and this Court knows of none. Nor does Corso offer any compelling reason or any suggestion at all that *Keil* should be overruled. Accordingly, this Court finds that Corso is foreclosed from securing the direct garnishment order he seeks by the *Keil* decision and that the Community Court, without citing *Keil* in its Order, correctly followed the precedent of the *Keil* decsion.

Conclusion

IT IS THEREFORE ORDERED, based on the prior discussion that the Order of the Community Court dated November 19, 2019 is AFFIRMED insofar as it denied Corso's request for direct garnishment of Butler's per capita payments from the Community.

ISSUED this 3d day of August, 2020

Electronically approved 08/03/2020

_____/s/_____
Robert N. Clinton, Justice,

Electronically approved 08/03/2020

_____/s/_____
Mary E. Guss, Justice

SEAL

OPINION OF JUSTICE PAUL BENDER, CONCURRING IN THE JUDGMENT

Appellant seeks garnishment of the per capita payments of a tribal member in order to

Since it was not cited in Corse's initial brief and giving him the benefit of the doubt, this Court assumes that Corso was not aware of this Court's decision in *Keil* when he requested the contested garnishment order or filed this appeal. Otherwise both the initial request and this appeal might be considered frivolous.

satisfy a state court judgment in favor of Appellant that has been recognized as valid by the Community Court. Four years ago, in a case almost identical to this one, a panel of this Court held that garnishment of per capita payments was not available in such a situation because there were "no provisions in the current law permitting garnishment of a tribal member's per capita distribution." *Keil v. James*, APC-16-0002, Oct. 28, 2016. There have been no relevant changes in tribal or federal law since *Keil v. James* was decided, *Kiel* has not been overruled or modified, and its validity as a precedent has not been questioned, either by the parties in this case or by the majority in its Opinion here. I would rely on *Kiel v. James* to affirm the Community Court's decision not to garnish per capita payments in this case. I do not join my colleagues' sovereign immunity analysis, both because engaging in that complex analysis is not necessary in order to decide this case and because I am not sure that it would ever be correct to characterize an order of one branch of a tribe's government, authorized by another branch of that tribal government, as an invasion of that tribe's sovereign immunity.

The panel in *Kiel*, of which I was a member, did not rely on or even mention tribal sovereign immunity in its decision. The reason for that, I believe, was that tribal sovereign immunity has no bearing upon whether per capita payments may be garnished by the Community Court. Any right to garnish per capita payments in satisfaction of a state court judgment would have to be based on whether the provisions of the tribal Code, the tribal Constitution or federal law contain that authorization, not on the presence or absence of tribal sovereign immunity. Thus, if the Tribal Council should ever wish to authorize garnishment in order to satisfy private debt, tribal sovereign immunity obviously would not prevent the Council from taking that action. On the other hand, if the Tribal Council should not want to authorize garnishment of per capita payments, as is the case here, tribal sovereign immunity would just as obviously not require the Council to do so. The relevant question is not whether or not there is sovereign immunity, it is whether the Tribal Council has or has not authorized garnishment of per capita payments. Our decision in *Kiel v. James* holds that the Tribal Council has not authorized garnishment in the circumstances of this case. We should simply and straightforwardly follow that decision.

I concur in affirming the judgment of the Community Court, but do not join my colleagues' opinion insofar as it rests our decision on the doctrine of tribal sovereign immunity.

Electronically approved 08/03/2020

/s/
Paul Bender, Justice