

APPENDIX "A"

THIS OPINION HAS BEEN RELEASED FOR PUBLICATION  
BY ORDER OF THE COURT OF CIVIL APPEALS

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION III

**FILED**  
COURT OF CIVIL APPEALS  
STATE OF OKLAHOMA

MAR 23 2007

MICHAEL S. RICHIE  
CLERK

Case No. 103,716

SHANTONA BITTLE,

Plaintiff/Appellant,

vs.

Valentine Bahe and Val Tsosie,

Defendants,

THE ABSENTEE SHAWNEE TRIBE OF  
OKLAHOMA and THUNDERBIRD  
ENTERTAINMENT CENTER, INC.,

Defendants/Appellees.

APPEAL FROM THE DISTRICT COURT OF  
POTTAWATOMIE COUNTY, OKLAHOMA

HONORABLE DOUGLAS COMBS, JUDGE

AFFIRMED

Gary B. Homsey,  
Jeffrey M. Cooper,  
Kevin E. Hill,  
Homsey, Cooper, Hill & Associates,  
Oklahoma City, Oklahoma,

For Appellant,

Robert T. Goolsby,  
Jeremy Z. Carter,  
Jennifer A. Bruner,  
Goolsby, Olson & Proctor,  
Oklahoma City, Oklahoma,

For Appellees.

Opinion by Larry Joplin, Presiding Judge:

¶1 Plaintiff/Appellant Shantona Bittle (Plaintiff) seeks review of the trial court's order granting the motion to dismiss of Defendants/Appellees The Absentee Shawnee Tribe of Oklahoma and Thunderbird Entertainment Center, Inc. (individually, by name, or collectively, Tribe) in Plaintiff's action to recover for injuries sustained in an automobile accident allegedly caused by an intoxicated patron of Tribe. In this appeal, Plaintiff asserts that the Tribe enjoys no sovereign immunity from liability for injuries causally related to its service of alcoholic beverages to its visibly intoxicated patrons. Having reviewed the record, however, we hold the trial court did not err in dismissing the claim. The order of the trial court is affirmed.

¶2 In April 2004, Plaintiff sustained personal injury in an automobile collision with the vehicle driven by Defendant Valentine Bahe and owned by Defendant Val Tsosie (Defendants). In December 2005, Plaintiff commenced the instant action against Tsosie, Bahe and Tribe. By subsequently amended petition, Plaintiff alleged that Defendants became intoxicated while patrons of Tribe's Thunderbird Entertainment Center, that Tribe's employees negligently served an excessive amount of alcoholic beverages to

Defendants “when [they] knew or should have known that Bahe was intoxicated and should not drive a motor vehicle,” and that Bahe’s intoxication caused the automobile accident and Plaintiff’s injuries.

¶3 Tribe filed a special appearance/motion to quash and motion to dismiss, claiming sovereign immunity from liability. *See, e.g., Michael Minnis & Associates, P.C. v. Kaw Nation*, 2004 OK CIV APP 36, ¶18, 90 P.3d 1009, 1014;<sup>1</sup> *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 1702, 140 L.Ed.2d 981 (1998).<sup>2</sup> Plaintiff responded, attaching evidentiary materials showing that Tribe, by ordinance, consented to alcoholic beverage licensure and regulation by the state. So, said Plaintiff, because state law specifically proscribes a licensee’s service of alcoholic beverages to a visibly intoxicated person, Tribe had effectively waived its sovereign immunity from tavern-keeper’s liability for service of alcoholic beverages to obviously intoxicated patrons. *See*, 37 O.S. §537(A)(2);<sup>3</sup> 18 U.S.C. §1161; *Rice v. Rehner*, 463 U.S. 713, 726, 734, 103 S.Ct. 3291, 3301-3302, 3303, 77 L.Ed.2d 961 (1983). Tribe replied, asserting that §537 created no private right of action, and that consent to regulation did not amount to a waiver of tribal sovereign immunity as to

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<sup>1</sup>“An action against a sovereign Native American tribe in state court is barred absent Congressional authorization or an express waiver of tribal sovereign immunity.”

<sup>2</sup>“As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.”

<sup>3</sup>“No person shall: . . . . Sell, deliver or knowingly furnish alcoholic beverages to an intoxicated person . . . .”

expose the Tribe to potential liability on a state common law dram-shop claim, first recognized in *Brigance v. Velvet Dove Restaurant, Inc.*, 1986 OK 41, ¶24, 725 P.2d 300, 305-306. See, *Filer v. Tohono O'Odham Nation Gaming Enterprise*, 129 P.3d 78 (Ariz. App. 2006); *Holguin v. Ysleta Del Sur Pueblo*, 954 S.W.2d 843 (Tex. App. 1997).

¶4 On consideration of the parties' submissions and argument, the trial court granted Tribe's motion to dismiss, holding:

.... [Tribe] did not clearly or expressly waive tribal sovereign immunity by applying for and accepting a state license to sell and distribute alcoholic beverages in accordance with the Oklahoma Alcoholic Beverage Control Act, 37 O.S. §501 et seq. . . .

Neither the common law nor *Brigance v. Velvet Dove Restaurant, Inc.*, [1986 OK 41], 725 P.2d 300 . . . , subsequent case law, nor the Oklahoma Alcoholic Beverage Control Act allow private enforcement of the regulations set forth at 37 O.S. §527 against the Tribe . . . .

Further, the Tribe did not clearly or expressly waive tribal sovereign immunity by adopting its own Alcohol Regulation Statute as cited by Plaintiff, . . . which provides that "tribal licensees are subject to all the enumerated prohibited acts contained in 37 O.S. §537 and failure of the operator to observe state law will subject said licensee to federal prosecution under 18 U.S.C. §1161."

Finding no just reason for delay, the trial court subsequently directed preparation and entry of a final order disposing of all Plaintiff's claims against Tribe. See, 12 O.S. §994A. Plaintiff appeals.

¶5 Plaintiff tendered evidentiary materials in support of the motion to dismiss, and the motion is accordingly treated as a motion for summary judgment. 12 O.S. §2012(B).

“Summary judgment is appropriate only where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law.” *Wathor v. Mutual Assur. Adm’rs, Inc.*, 2004 OK 2, ¶4, 87 P.3d 559, 561. (Citation omitted.) “As this decision involves purely legal determinations, our standard of review of a trial court’s grant of summary judgment is *de novo*.” *Id.*

¶6 It cannot be disputed that an action against a sovereign Native American tribe in state court is barred absent Congressional authorization of suit or a *clear and express* waiver of tribal sovereign immunity. *Kaw Nation*, 2004 OK CIV APP 36, ¶18, 90 P.3d at 1014; *Kiowa Tribe of Oklahoma*, 523 U.S. at 754, 118 S.Ct. at 1702; *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S.Ct. 905, 909, 112 L.Ed.2d 1112, 1119 (1991). It also appears reasonably clear that the doctrine of tribal sovereign immunity does not prevent a state’s regulation of the sale and service of alcoholic beverages on tribal lands. 18 U.S.C. §1161; *Rehner*, 463 U.S. at 726, 734, 103 S.Ct. at 3301-3302, 3303.

¶7 That said, however, a tribe’s consent to alcoholic beverage regulation by a state does not constitute an *express* waiver of the tribe’s sovereign immunity exposing the tribe to statutory or common law dram-shop liability of the kind recognized in *Brigance. Filer*, 129 P.3d at 84; *Holguin*, 954 S.W.2d at 854. As the Arizona appellate court explained:

[A] state’s power to regulate certain tribal activities and its ability to bring a lawsuit against a tribe in state or federal court are not necessarily coextensive. That is to say, sovereign immunity may bar the latter but

not the former. And a private suit, even if deemed a valid exercise of the state's regulatory power, is subject to the same limitations. . . .

....

... [T]ribal immunity generally exists unless expressly abrogated by Congress or waived by the tribe. A Congressional waiver of tribal immunity must be unequivocal and explicit. Section 1161, 18 U.S.C., however, does not even mention tribal immunity, much less waive it for private dram shop actions.

....

... We therefore conclude the trial court correctly ruled that Arizona [state] courts lack jurisdiction to entertain or adjudicate a private statutory dram shop action against the [tribal] Gaming Enterprise.

*Filer*, 129 P.3d at 83, 84. (Citations omitted.)

¶8 We are satisfied this analysis applies here. Section 1161 of title 18, U.S.C., reflects neither a clear and express Congressional authorization of suit against a tribe for violation of state alcoholic beverage laws, nor a clear and express waiver of tribal sovereign immunity. The Tribe's agreement, by ordinance, to adhere and comply with state regulations for the service and sales of alcoholic beverages on tribal land does not constitute the requisite *clear and express* waiver of tribal sovereign immunity. While violation of §537 may expose the Tribe to administrative sanctions, §537 does not create a private right of action. *See also, Ohio Cas. Ins. Co. v. Todd*, 1991 OK 54, ¶11, 813 P.2d 508, 510.<sup>4</sup> Absent Congressional authorization or express waiver, Tribe is not

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<sup>4</sup>“[A] violation of Section 537(A)(2) does not amount to negligence per se . . . .”

subject to suit in state court. We consequently conclude the trial court did not err in dismissing Plaintiff's dram-shop claims against Tribe.

¶9 The order of the trial court is AFFIRMED.

ADAMS, J., and MITCHELL, V.C.J., concur.