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Lewis v. Clarke

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***Lewis v. Clarke*, 137 S. Ct. 1285 (2017)**

Summer L. Carmack

One manner in which Indian tribes exercise their inherent sovereignty is by asserting sovereign immunity. In *Lewis v. Clarke*, the Court decided that the sovereign immunity extended to instrumentalities of tribes did not further extend to tribal employees acting within the scope of their employment. The Court acknowledged the concerns of the lower court, namely, the possibility of setting a precedent allowing future plaintiffs to sidestep a tribe's sovereign immunity by suing a tribal employee in his individual capacity. However, the Supreme Court ultimately felt that the immunity of tribal employees should not exceed the immunity extended to state and federal employees sued in their individual capacity.

I. INTRODUCTION

The United States Supreme Court granted certiorari in *Lewis v. Clarke* to resolve two issues: (1) whether the scope of tribal sovereign immunity extends to protect a tribal employee from a negligence suit resulting from acts committed within the scope of his employment; and (2) whether a tribe's indemnification policy in negligence suits against its employees affects the Court's immunity analysis.¹ In an 8-0 decision, the Court reversed the judgment of the Supreme Court of Connecticut.² Analogizing the scope of tribal sovereign immunity to that enjoyed by state and federal employees and entities, the Court decided that extending immunity to tribal employees sued in their individual capacity was beyond the purview of the tribe's sovereign immunity.³ The Court also held that a tribal indemnity statute did not "convert the suit against [the defendant] into a suit against the sovereign."⁴ Therefore the statute did nothing to alter the Court's immunity analysis.⁵

II. FACTUAL AND PROCEDURAL BACKGROUND

The Mohegan Tribe of Indians of Connecticut has been a federally recognized tribe since 1994.⁶ In order to promote economic development through gaming industries on the reservation, the tribe has adhered to and complied with state and federal statutory and regulatory

1. *Lewis v. Clarke*, 137 S. Ct. 1285, 1289 (2017).

2. *Id.*

3. *Id.* at 1292.

4. *Id.* at 1293.

5. *Id.* at 1294.

6. *Id.* at 1289-1290 (citing 59 Fed. Reg. 12,140 (1994); MOHEGAN CONST., pmb. and art. II).

requirements.⁷ The Mohegan Tribal Gaming Authority (“MTGA”), “an arm of the Tribe,”⁸ manages tribal gaming activities on behalf of the tribe.⁹ While the tribe had waived its immunity to be sued in the Mohegan Gaming Disputes Court, “neither the Tribe nor the [MTGA] ha[d] consented to suit for claims under Connecticut state law.”¹⁰ In addition, the Mohegan Tribal Code includes provisions that the MTGA shall indemnify its employees in negligence suits, except where the employee’s actions were deemed “wanton, reckless, or malicious.”¹¹

William Clarke, the defendant, was driving a limousine as an employee of the MTGA when he rear-ended the vehicle of the plaintiffs, Brian and Michelle Lewis, on a state highway in Norwalk, Connecticut.¹² Both parties stipulated that the defendant was negligently driving.¹³

The plaintiffs sued the defendant for negligence in Connecticut state court.¹⁴ The defendant filed a motion to dismiss for lack of subject matter jurisdiction, arguing that because he was acting within the scope of his employment when the accident occurred, he was entitled to the same immunity from suit extended to the MTGA.¹⁵ The trial court denied the motion, reasoning that because the defendant was sued in his individual capacity, and neither the MTGA nor the tribe were party to the suit, it was irrelevant whether the defendant was acting within the scope of his tribal employment when the incident occurred.¹⁶ The defendant argued that the tribe’s indemnification policies made the MTGA party to the suit because they were ultimately responsible for remedies awarded to the plaintiffs.¹⁷ In its rejection of this argument, the trial court stated that a “voluntary undertaking cannot be used to extend sovereign immunity where it did not otherwise exist.”¹⁸

The Supreme Court of Connecticut reversed the trial court decision, holding that the defendant was entitled to the benefits of tribal

7. *Id.* at 1290 (referring to the requirements of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (2012), including entrance into a Gaming Compact with the State of Connecticut, and the establishment of a Gaming Disputes Court).

8. *Id.*

9. *Id.* (citing MOHEGAN CONST. art. XIII, § 1; Mohegan Tribe of Indians Code § 2-21 (1995)).

10. *Id.* (citing MOHEGAN CONST. art. IX, § 2(t); Mohegan Tribe of Indians Code § 3-250(g) (amended 2014); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991) (observing that Indian tribes have not surrendered their immunity against suits by States)).

11. *Id.* (quoting Mohegan Tribe of Indians Code § 4-52 (2007)).

12. *Id.*

13. *Id.*

14. *Id.* (citing *Lewis v. Clarke*, No. KNLCV136019099S, 2014 WL 5354956, at *2 (Conn. Super. Ct. Sept. 10, 2014) [hereinafter *Clarke III*]).

15. *Id.* (citing *Clarke III*, at *5).

16. *Id.* at 1290-1291 (citing *Clarke III*, at *20).

17. *Id.* at 1291 (citing *Clarke III*, at *7).

18. *Id.* (quoting *Clarke III*, at *7).

sovereign immunity.¹⁹ Connecticut's supreme court viewed the suit as a means for the plaintiffs to impermissibly "circumvent tribal immunity by merely naming the defendant" in a suit concerning actions taken within the scope of his employment.²⁰ The court found that this would "eviscerate" the protections of tribal immunity.²¹ Since the court found that the defendant was entitled to sovereign immunity on the first issue, it did not address whether the tribe's indemnification policy also entitled the defendant to immunity.²²

The United States Supreme Court later granted certiorari to resolve whether the defendant was immune from suit as an employee of the tribe, when his negligent acts were committed while working within the scope of his employment.²³

III. ANALYSIS

After granting the plaintiffs' petition for certiorari, the United States Supreme Court was tasked with resolving whether tribal sovereign immunity extended to tribal employees sued in their individual capacity, and the role of a tribal indemnification policy in the Court's sovereign immunity analysis. The Court's analysis is discussed below.

A. Sovereign Immunity in Individual-Capacity Suits

The Court looked to sovereign immunity suits involving state and federal employees for guidance in determining whether the sovereign immunity of the Mohegan Tribe extended to bar suits against its individual employees for acts committed within the scope of their employment.²⁴ In suits filed against federal or state employees, courts first verify whether the employee or the sovereign is the "real party in interest" to determine whether sovereign immunity applies.²⁵ To do this, courts discern "whether the remedy sought is truly against the sovereign."²⁶

Here, the Court drew a distinction between official- and individual- capacity claims. Official-capacity suits are in fact "against the official's office and thus the sovereign itself," thereby triggering the protections of sovereign immunity.²⁷ In individual-capacity suits, the

19. *Id.*

20. *Id.* (quoting *Lewis v. Clarke*, 135 A.3d 677, 683 (Conn. 2016) [hereinafter *Clarke II*] (citations omitted)).

21. *Id.* (quoting *Clarke II*, 135 A.3d at 684).

22. *Id.*

23. *Id.* at 1292.

24. *Id.* at 1291 (*see Hafer v. Melo*, 502 U.S. 21, 25 (1991)).

25. *Id.*

26. *Id.* (*see, e.g., Ex parte New York*, 256 U.S. 490, 500-502 (1921)).

27. *Id.* at 1292 (citing *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989); *Dugan v. Rank*, 372 U.S. 609, 611 (1963)).

official comes to court as an individual, and sovereign immunity is therefore inapplicable.²⁸ Determining the capacity in which the real party in interest is being sued controls the immunity available to the party.²⁹

The Court applied these general rules of sovereign immunity to the tribal context, and determined that the suit was brought against the defendant in his individual capacity.³⁰ While the defendant was within the scope of his employment when the incident occurred, he was on a state highway, and the negligence action was “simply a suit against [the defendant] to recover for his personal actions.”³¹

B. Role of a Tribal Indemnity Policy in Sovereign Immunity Analysis

Whether a tribal indemnification policy would extend the tribe’s sovereign immunity to an employee sued in his individual capacity was a question of first impression for the United States Supreme Court.³² The defendant argued that the MTGA “[was] the real party in interest” under the Court’s sovereign immunity analysis because the Mohegan Tribal Code § 4-52 required the MTGA “to indemnify [the defendant] for any adverse judgment.”³³ The Court ultimately determined that “[t]he critical inquiry is who may be legally bound by the court’s adverse judgment, not who will ultimately pick up the tab.”³⁴

Plaintiffs brought the suit against the defendant in Connecticut state court, and any judgment rendered there was unenforceable against the tribe, who had not waived its immunity from suit.³⁵ Although the MTGA may ultimately pay remedies awarded against the defendant, the Court determined that “[t]he Tribe’s indemnification provision does not somehow convert the suit against Clarke into a suit against the sovereign.”³⁶ The Court determined that the tribe’s indemnification

28. *Id.* (quoting *Hafer*, 502 U.S. at 25; *see also Hafer*, 502 U.S. at 27-31 (discharged employees entitled to bring person damages action against state auditor general); *cf. Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 1293.

33. *Id.* (emphasis in original).

34. *Id.* at 1293-1294. The Court looked to *Regents v. Univ. of California* for its analysis. 519 U.S. 425, 426 (1997). There, a state instrumentality asserted the state’s sovereign immunity as a defense, although the federal government had previously agreed to indemnify the state instrumentality. Here, the Court said its earlier analysis in *Regents* had “turned on where the potential *legal* liability lay, not from whence the money to pay the damages award ultimately came.” *Clarke*, 137 S. Ct. at 1292.

35. *Id.* at 1294.

36. *Id.*

statute did not alter its sovereign immunity analysis as to who was the real party in interest.³⁷

IV. CONCLUSION

The decision in *Lewis v. Clarke* is significant because the United States Supreme Court chose not to extend tribal sovereign immunity to individual tribal employees acting within the scope of their employment. Assertions of immunity are viewed as an important aspect of tribal sovereignty. As the Supreme Court of Connecticut warned, it will be important to monitor the effects of the Court's decision.³⁸ Ultimately the result of this case may be the creation of a loophole, where claimants may maneuver around tribal sovereign immunity.

37. *Id.* at 1295.

38. *Id.* at 1291 (citing *Clarke II*, 135 A.3d 677, 683-684 (Conn. 2016)).