

ROSEBUD SIOUX SUPREME COURT)
ROSEBUD SIOUX RESERVATION) SS APPEALS COURT
ROSEBUD, SOUTH DAKOTA)

CYRIL SCOTT, DOCKET # CA2015-01
Plaintiff/Appellant,

VS. NOTICE OF ENTRY
OF ORDER

WILLIAM KINDLE, individually and
In his official capacity et al.,

Plaintiff/Appellee.

TO: THE ABOVE-NAMED PARTIES

Please take notice that on the 25th day of September, 2015, the Appellate Justice Frank Pommersheim entered an **MEMORANDUM OPINION AND ORDER**. A certified copy of said **ORDER** is enclosed and by this reference is incorporated herein and is herewith served upon you.

Dated this 25th day of September, 2015.



Chief Clerk of Courts


CERTIFICATE OF SERVICE

I, Denita Marshall, Chief Clerk of Courts of Rosebud Sioux Tribal Supreme Court, hereby certify that I served a true and correct copy of the Notice of Entry of Order and copy of said Order upon the Appellant(s) and Appellee(s) as follows by placing in the U.S. Mail, postage prepaid, addressed as follows:

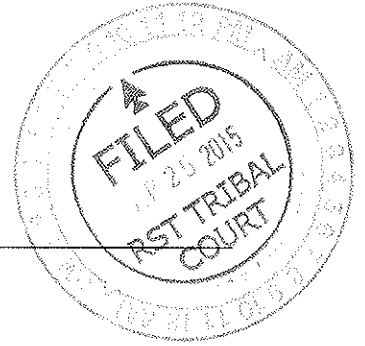
GARY MONTANA for Plaintiff –BY EMAIL AND N. 12923 NORTH PRAIRIE ROAD, OSSEO, WI 54758.

STEVEN D. SANDVEN for Defendant – BY EMAIL AND 3600 SOUTH WESTPORT AVE, SUITE 200, SIOUX FALLS, SD 57106-6344.

Dated this 25th day of September, 2015.



IN THE SUPREME COURT
OF THE
ROSEBUD SIOUX TRIBE



CYRIL SCOTT,
Plaintiff/Appellant

CA2015-01

v.
WILLIAM KINDLE, individually and in
his official capacity, et al.,
Defendant/Appellee

MEMORANDUM OPINION
AND ORDER

Per curiam (Chief Justice Charles Abourezk and Associate Justices Pat Donovan and Frank Pommersheim). Oral argument was waived by the appellant and the appeal was decided on the briefs.

I. Introduction

This case arises from actions taken by the Rosebud Sioux Tribal Council in late 2014 and early 2015 to suspend (and ultimately remove) plaintiff/appellant, Cyril Scott, as the President of the Rosebud Sioux Tribe. Mr. Scott was elected President of the Rosebud Sioux Tribe in September 2012. By Fall 2014, substantial disagreement and wrangling developed between President Scott and the Tribal Council. These contested matters largely dealt with personnel issues and lines of authority.

These various points of conflict came to a head when Ms. Tammy Wilcox, a Tribal employee, was terminated allegedly at the direction of President Scott. Ms. Wilcox subsequently filed a grievance against President Scott with the Rosebud Sioux Tribe's Ethics Commission. The essence of the grievance was that President Scott's actions were personally motivated and retaliatory in nature.

Apparently, the Ethics Commission was unable to effectuate any meeting with or hearing involving President Scott and it ultimately recommended that the Tribal Council hold a hearing.

After much fruitless procedural give and take, the Tribal Council voted on February 17, 2015 to “suspend” President Scott for sixty days, apparently by a vote of 16-0. President Scott did not attend or participate in this hearing.¹

Subsequently, there was another ethics complaint filed against President Scott. This complaint was filed by Mr. Calvin Waln, a member of the Rosebud Sioux Tribal Council. A hearing before the Rosebud Sioux Tribal Council ensued. President Scott was present at the Tribal Council meeting when attendance was taken. The Tribal Council went into executive session to consider Appellant Scott’s motion to disqualify hearing officer Teresa Maule. The Tribal Council came out of executive session and passed a motion denying appellant’s request to disqualify the hearing officer.

The appellant was not present when the actual hearing before the Tribal Council took place. Several witnesses testified and documentary evidence was introduced. At the conclusion of the presentation of the evidence, the Tribal Council again went into executive session.

After the executive session ended, a motion by Tribal Council Representative Lila Kills in Sight stated:

That after providing notice and giving Cyril Scott the opportunity to reply to the ethics complaint filed by Calvin Waln, Tribal Council makes the finding that counts 1 and 3-5 are considered neglect of duty and gross misconduct. Further, the described conduct violates Sections F, K, L and M of Ordinance 86.4. Hence, Cyril Scott is hereby removed as President of the Rosebud Sioux Tribe effective immediately. Cyril Scott is hereby disqualified from again seeking tribal office. Seconded by Kathy Wooden Knife, question by Arnetta Brave.

The vote was 16 in favor, 0 opposed, and 0 not voting. Motion carried. The legal basis for President Scott’s removal relied on Article VII, Section 4 of the Rosebud Sioux Tribal Constitution, which provides: “The Tribal Council may by a two-thirds vote of the total members

¹ The actions of the Ethics Commission and the Tribal Council led Mr. Scott file a lawsuit against various defendants in Tribal court. This lawsuit was (subsequently) voluntarily dismissed with prejudice.

of the Tribal Council, after due notice and opportunity to be heard, remove any Tribal Council member for neglect of duty or gross misconduct.”

This lawsuit ensued. Plaintiff/appellant Scott sought both injunctive relief in the form of reinstatement and money damages in the amount of \$50,000. Once again there was a blizzard of motions by both sides relative to judicial notice, recusal of the trial judge, and the scope of defendant’s attorney representation of members of the Tribal Council. Ultimately, Special Judge Patricia Meyers issued a short written order on April 14, 2015 and dismissed plaintiff/appellant’s complaint on sovereign immunity grounds. This appeal followed.²

II. Issues

This appeal raises numerous issues, only two of which are of substantive consequence. One such issue was raised by each side. They are

- A. Whether the appeal should be dismissed on grounds of mootness, and
- B. Whether the trial court erred in dismissing the complaint based on tribal sovereign immunity.

Each issue will be discussed in turn.

III. Discussion

A. Mootness

Mootness is a commonplace federal courts’ precept that stems from the “case and controversy” requirement of Art. III of the federal Constitution. A case becomes moot “when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *Murphy v. Hunt*, 455 U.S. 478 (1981). The critical question when analyzing mootness is whether a continuing controversy can be redressed by the appellate court. *Carpenter*

² There was no motion for an expedited appeal pursuant to Rule 14 of the Rosebud Sioux Supreme Court Rules of Appellate Procedure.

Union v. Labor Board, 341 U.S. 707 (1951). The mootness doctrine requires that the plaintiff's claims remain alive throughout the course of the proceeding. 13A CHARLES A. WRIGHT, ARTHUR R. MILLER, & EDWARD COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533, at 211 (2nd ed. 1984).

It is important, of course, to note that this staple of federal court practice does not automatically apply in tribal court. Tribal courts are *not* Art. III courts of limited jurisdiction under the United States Constitution. More accurately, they are courts of general jurisdiction.

The doctrine of mootness is closely related to the issue of standing, another core ingredient of the Article III “case and controversy” requirement. If facts develop subsequent to the filing of a case that resolve the dispute, the case should be dismissed. As noted by the Supreme Court, “mootness [is] the ‘doctrine of standing in a time frame. The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)’.” *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980).

Conventional federal courts jurisprudence would see this case as a classic example of mootness. The principal remedy, that of reinstatement, which plaintiff/appellant Scott seeks is unavailable to him. The Rosebud Sioux Tribe recently (on August 28, 2015) elected and installed a new Tribal President, namely William Kindle. This constitutionally required election and taking of office as set out in the Rosebud Sioux Constitution at Art. III, Secs. 11 and 12, effectively negates any possibility of reinstating Mr. Scott to his (former) position as the President of the Rosebud Sioux Tribe. To dislodge President Kindle from his office in order to reinstate his predecessor would itself be unconstitutional and would violate both the Tribe's

Constitution, Rosebud Sioux Tribe Constitution, Art. III, Sec. 12, and the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8).

Even more significant in this case is the separation of powers doctrine. It is generally understood that the separation of powers doctrine counsels judicial caution in order to avoid unnecessary institutional conflict between the judiciary and other branches of tribal government, including the tribal council. Political conflict between different branches of government – whether at the tribal, state, or federal level – risks legitimacy and stability and therefore is to be avoided whenever possible.

The case at bar is fraught with such risk. There is no doubt that the action of the Tribal Council in removing President Scott from office is of historical significance. As such, it ought not be too readily set aside, especially when no practical remedy is available. As noted above, a new Tribal president, William Kindle, has recently been elected and taken office. Mr. Scott, even if he *could* prevail on his substantive arguments, cannot be placed back in office.³ Under these circumstances, it's best to avoid any unnecessary constitutional conflict.

It is also pertinent to note that many other tribal courts have adopted the doctrine of mootness. For example, in applying the mootness doctrine in a tribal court context, tribal courts recognize and apply the doctrine, notwithstanding the fact that it may not be articulated in their tribal constitutions. For example, in *Ducheneaux v. Cheyenne River Sioux Tribe Election Bd.*, 2 AM. TRIBAL LAW 39 (Cheyenne River Sioux Tribal Court of Appeals 1999), the Cheyenne River Sioux Tribal Court of Appeals recognized the doctrine of mootness even though there was nothing in the Constitution or By-Laws that limited the jurisdiction of its courts. *Id.* at 41.

³ It is important to note that the decision of the trial court was based on a motion to dismiss and plaintiff/appellant's complaint was dismissed on sovereign immunity grounds. The trial court made no findings or rulings on the 'merits' of plaintiff's claim that he was improperly and illegally suspended and removed from office. That issue therefore is not before this Court and we express no opinion on it.

The mootness issue in *Ducheneaux* was quite similar to the case at bar in that it involved a challenge by the Tribal president to an election in which he, the incumbent, lost. The court held that the fact that the newly-elected president had (legally) taken office made it legally impossible to provide the remedy of a new election, which the appellant sought. The appeal was dismissed on the grounds of mootness.

Other tribal courts have also recognized and applied the mootness doctrine. In *Funmaker v. Cloud*, 7 AM. TRIBAL LAW 48 (Ho-Chunk Nation Supreme Court 2007), the major issue was “whether the case was moot due to the prior removal of George Lewis as President of the Ho-Chunk Nation by a subsequent General Council previously upheld by this Court.” *Id.* at 49. The major relief the appellants were requesting was for the recall of President George Lewis, who had already been removed from office and replaced through a subsequent election. In holding the issue to be moot, the Tribal Court found that it could not provide meaningful relief and therefore the appeal should be dismissed.

Further, in *Wilson v. White*, 2004 WL 6012174 (Leech Lake Band of Ojibwa Tribal Court, Trial Division 2004), a case that involved the brief suspension of salary payments of two Tribal Council members, which were later reinstated, the Tribal Court found the issue to be moot and therefore found that it “lack[ed] jurisdiction to resolve any action that is moot because no active case or controversy exists.” The Tribal Court further found that it was “not permitted to resolve legal issues merely because they may become the grist of future disagreements.” *Id.*

B. Sovereign Immunity

As noted above, the Court’s ruling on the issue of mootness completely disposes of this appeal. The case is moot and the appeal is denied in full. Normally, that would end it. No other issues would be discussed. Appeals are ordinarily decided on the narrowest possible grounds as

a matter of judicial economy and (where applicable) respect for other branches of (tribal) government.

This case, however, proves itself to be an exception to that basic rule. Recall that Special Judge Patricia Meyers dismissed the underlying complaint in this matter on the grounds of Tribal sovereign immunity. Despite the grave importance of this case, which involves the removal of the then Tribal President from office, Judge Meyer's order cited *no* authority for her ruling as a matter of either federal or Tribal law.

Inasmuch as this Court considers her ruling incorrect as a matter of both federal and Rosebud Sioux Tribe Constitutional law, we find it necessary to address the issue of sovereign immunity in this case. If the Court did not undertake to review the issue of sovereign immunity, our failure to do so might be perceived as an endorsement of the lower court's ruling. Nothing could be further from the truth. This is of particular concern in this case in light of the plain text of the Rosebud Sioux Constitution at Article XI, Secs. 3 and 7, as well as recent caselaw of this Court in *Whiting v. Rosebud Sioux Election Board* (2009) and *Running v. Rosebud Sioux Tribe Election Board* (CA 2014-04) (Rosebud Sioux Supreme Court). Both of these important sources of Tribal law stand for exactly the opposite of Judge Meyer's order.

In matters involving basic 'civil rights,' tribal governments are obligated under the Indian Civil Rights Act of 1968 to provide due process and equal protection, 25 U.S.C. §1302(8). In the seminal case of *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Supreme Court held that the Indian Civil Rights Act did *not* waive tribal sovereign immunity for purposes of *federal* court litigation against the tribe. The Court, however, was emphatic that the Indian Civil Rights Act had a quite different effect on litigation against the tribe in *tribal* court based on the Indian Civil Rights Act of 1968. Specifically, the Court stated:

Tribal forums are available to vindicate rights created by the Indian Civil Rights Act, and §1302 has the substantial and intended effect of changing the law which these forums are obliged to apply. *Id.* at 65.

Tribal courts have consistently interpreted this language to mean that the Indian Civil Rights Act waives tribal sovereign immunity and exposes tribes to declaratory and injunctive relief in tribal court.⁴

This result – that is a waiver of sovereign immunity exists – is equally true under the Rosebud Sioux Tribe Constitution itself. Art. IX, Sec. 3 of the Tribal Constitution expressly provides:

The authority of the tribal court shall include but is not limited to the power to review and overturn tribal legislation and executive actions for violation of this Constitution or of the Federal Indian Civil Rights Act of 1968 as well as to perform all other judicial and court functions.

This language is repeated verbatim in Article XI, Sec. 7 with specific reference to the Rosebud Sioux Tribe Supreme Court:

There is hereby established the Rosebud Sioux Tribe Supreme Court. The Supreme Court shall take appeals from the Rosebud Sioux Tribal Court that are deemed meritorious under rules and standards set by the Rosebud Sioux Tribal Council by ordinance. The authority of the court shall include the power to review and overturn tribal legislative and executive actions for violations of this Constitution or of the Federal Indian Civil Rights Act of 1968 as well as to perform all other appellate court functions.

The Rosebud Sioux Tribe Constitution also provides its own specific Bill of Rights protections in Art. X, which include due process and equal protection. *See* Art. X(e) and (f).

⁴ *See, e.g.*, THE INDIAN CIVIL RIGHTS ACT AT FORTY, EDITORS KRISTEN CARPENTER, MATTHEW FLETCHER & ANGELA RILEY 70 (UCLA American Indian Studies Center 2012). *See also Dupree v. Cheyenne River Sioux Housing Authority*, 16 INDIAN L. RPTR. 6106, 6108 (Cheyenne River Sioux Ct. App. 1988); *McCallister v. Spirit Mountain Gaming*, 33 INDIAN L. RPTR.6057, 6061 (Confederated Tribes of the Grand Ronde Community Tribal Ct. 2007); *Healy v. Mashantucket Pequot Gaming Enterprise*, 26 INDIAN L. RPTR. 6189, 6191 (Mashantucket Ct. of App. 1999); *Jackson v. Kahgegab*, 33 INDIAN L. RPTR. 6105, 6108 (Saginaw Chippewa Indian Tribe App. Ct. 2003).

These Tribal constitutional provisions leave no doubt that there is no Tribal sovereign immunity available to the Tribal Council, where a plaintiff is seeking injunctive or declaratory relief for an alleged violation of tribal law (including, of course, the Tribe's Constitution itself) and/or the Indian Civil Rights Act, 25 U.S.C. § 1302. Action of the Tribal Council suspending and removing the Tribal President from office is a quintessential legislative act, fully comprehended within the Tribe's Constitution. The Tribe's constitutional text could not be plainer or more clear.

In fact, this Court has made the very point in its two most recent decisions involving challenges to Election Board decisions about a candidate's eligibility to run for office. Tribal sovereignty immunity is not a bar to challenging Election Board results as to the eligibility to run for office. *See, e.g., Whiting v. Rosebud Sioux Election Board* (2009) and *Running v. Rosebud Sioux Election Board* (2015). Certainly, suspension and/or removal from the highest Tribal elective office can yield no different result.

It is, of course, axiomatic that any Tribal Ordinance or Tribal Resolution that purports to recognize or preserve Tribal sovereign immunity in electoral or removal matters must fail in light of the unimpeachable clarity of the Tribal constitutional text. A text which, of course, most directly reflects the voice of the citizenry of the Rosebud Sioux Tribe.

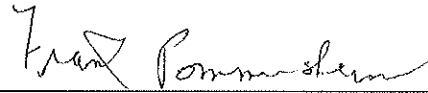
A final word about potential relief is in order. This Court makes it absolutely clear that neither the Indian Civil Rights Act nor the Tribal Constitution permits any claim for money damages against the Tribe. Injunctive and declaratory relief are equitable in nature and require no additional or special legislation. Money damages, on the other hand, constitute an action at law and therefore require express federal or tribal legislation permitting such relief. No such laws currently exist.

IV. Conclusion

For all the above-stated reasons, the appeal in this matter is dismissed on grounds of mootness. In addition, the Court (re)affirms its previous decisions concerning the lack of Tribal sovereign immunity in matters concerning the Indian Civil Rights Act of 1968 and actions of the Tribal Election Board and the Tribal Council.

IT IS SO ORDERED.

FOR THE COURT



Frank Pommersheim
Associate Justice

Dated this 23 day of September, 2015.