No. ___

In the Supreme Court of the United States

POARCH BAND OF CREEK INDIANS AND PCI GAMING AUTHORITY D/B/A WIND CREEK CASINO AND HOTEL WETUMPKA, Applicants,

v.

CASEY MARIE WILKES AND ALEXANDER JACK RUSSELL, Respondents.

APPENDIX

A. 09-29-2017 Supreme Court of Alabama Opinion

B. 10-03-2017 Supreme Court of Alabama Opinion on Rehearing

Appendix A

REL: 09/29/2017

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2017

1151312

Casey Marie Wilkes and Alexander Jack Russell

v.

PCI Gaming Authority d/b/a Wind Creek Casino and Hotel Wetumpka, and Poarch Band of Creek Indians

Appeal from Elmore Circuit Court
(CV-15-900057)

PER CURIAM.

Casey Marie Wilkes and Alexander Jack Russell appeal the summary judgment entered by the Elmore Circuit Court in favor of PCI Gaming Authority d/b/a Wind Creek Casino and Hotel

Wetumpka ("Wind Creek-Wetumpka"), and the Poarch Band of Creek Indians (hereinafter referred to collectively as "the tribal defendants"),[1] on negligence and wantonness claims asserted by Wilkes and Russell seeking compensation for injuries they received when an automobile driven by Wilkes was involved in a collision with a pickup truck belonging to Wind Creek-Wetumpka and being driven by Barbie Spraggins, an employee at Wind Creek-Wetumpka. We reverse and remand.

I.

Spraggins began working as a facilities-management administrator at Wind Creek-Wetumpka in November 2013. During the course of her employment, one of her supervisors reported her to higher level management at least six times because she smelled of alcohol while at work. On at least two occasions, Spraggins was tested for alcohol as a result of those reports, and a blood test taken on February 13, 2014, revealed that she had a blood-alcohol content of .078 while at work. Spraggins was eventually referred to an employee-assistance program, and

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she saw a counselor in conjunction with that program from March through September 2014.

The record indicates that, on January 1, 2015, Spraggins arrived for work at approximately 8:00 a.m. after drinking much of the night. At some point after arriving at work, she decided to travel to a warehouse maintained by Wind Creek-Wetumpka approximately 10 miles away in Montgomery to retrieve lamp shades that were needed for some hotel rooms at Wind Creek-Wetumpka. Spraggins was authorized to use a Wind Creek-Wetumpka vehicle for such purposes, and she took a 2008 Chevrolet Silverado pickup truck on that occasion. It is unclear exactly where Spraggins traveled after picking up the lamp shades at the Montgomery warehouse; however, at approximately 10:50 a.m., the pickup truck she was driving struck a guardrail while crossing the Mortar Creek bridge on Alabama State Highway 14 outside of Elmore, crossed into oncoming traffic, and was involved in a head-on collision with a vehicle being driven by Wilkes. Spraggins, Wilkes, and Russell, a passenger in Wilkes's vehicle, were all transported to the Baptist Medical Center South hospital in Montgomery for medical treatment following the accident, and a blood test

administered at the hospital revealed that Spraggins had a blood-alcohol content of .293 approximately 1 hour and 45 minutes after the collision. Spraggins has since been unable to recall why she was traveling on the Mortar Creek bridge at the time of the collision; that location is approximately eight miles west of Wind Creek-Wetumpka and not on the route to the warehouse where she picked up the lamp shades.

On February 16, 2015, Wilkes and Russell sued Spraggins and the tribal defendants in the Elmore Circuit Court.[2] As subsequently amended, Wilkes and Russell's complaint asserted negligence and wantonness claims against Spraggins and the tribal defendants based on Spraggins's operation of the pickup truck at the time of the January 2015 accident, and negligence and wantonness claims against the tribal defendants based on their hiring, retention, and supervision of Spraggins.[3] Following a period of discovery, the tribal defendants moved the trial court to enter a summary judgment in their favor,

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[2]Progressive Specialty Insurance Company, Wilkes's insurer, was also named as a defendant. It is not a party to this appeal.

[3]Spraggins's employment at Wind Creek-Wetumpka was terminated before she could return to work following the January 2015 accident.

arguing that the Poarch Band of Creek Indians was a federally recognized Indian tribe and that they were accordingly protected by the doctrine of tribal sovereign immunity or, alternatively, that Spraggins was not acting within the scope of her employment at the time of the January 2015 accident. Wilkes and Russell opposed the tribal defendants' summary-judgment motion; however, on June 7, 2016, the trial court granted the tribal defendants' motion and entered a summary judgment in their favor, holding that it lacked subject-matter jurisdiction over the dispute because of the tribal sovereign immunity held by the tribal defendants. On August 10, 2016, the trial court certified its judgment as final pursuant to Rule 54(b), Ala. R. Civ. P., and, on September 20, 2016, Wilkes and Russell filed their notice of appeal to this Court.

II.

Wilkes and Russell seek the reversal of the summary judgment entered by the trial court holding that the tribal defendants are protected from suit by the doctrine of tribal sovereign immunity. This Court has stated:

> "This Court's review of a summary judgment is de novo. Williams v. State Farm Mut. Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial court applied.

> Specifically, we must determine whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 952-53 (Ala. 2004). In making such a determination, we must review the evidence in the light most favorable to the nonmovant. Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986). Once the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce 'substantial evidence' as to the existence of a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989); Ala. Code 1975, § 12-21-12."

Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004).

III.

The issue presented in this appeal is whether the doctrine of tribal sovereign immunity shields the tribal defendants from the tort claims asserted by Wilkes and Russell. In Michigan v. Bay Mills Indian Community, ___ U.S. ___, ___, 134 S. Ct. 2024, 2030-31 (2014), the Supreme Court of the United States explained tribal sovereign immunity as follows:

> "Indian tribes are '"domestic dependent nations"' that exercise 'inherent sovereign authority.' Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla., 498 U.S. 505, 509 (1991) (Potawatomi) (quoting Cherokee Nation v. Georgia, 5

> Pet. 1, 17 (1831)). As dependents, the tribes are subject to plenary control by Congress. See United States v. Lara, 541 U.S. 193, 200 (2004) ('[T]he Constitution grants Congress' powers 'we have consistently described as "plenary and exclusive"' to 'legislate in respect to Indian tribes'). And yet they remain 'separate sovereigns pre-existing the Constitution.' Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978). Thus, unless and 'until Congress acts, the tribes retain' their historic sovereign authority. United States v. Wheeler, 435 U.S. 313, 323 (1978).
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> "Among the core aspects of sovereignty that tribes possess -- subject, again, to congressional action -- is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.' Santa Clara Pueblo, 436 U.S., at 58. That immunity, we have explained, is 'a necessary corollary to Indian sovereignty and self-governance.' Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C., 476 U.S. 877, 890 (1986); cf. The Federalist No. 81, p. 511 (B. Wright ed. 1961) (A. Hamilton) (It is 'inherent in the nature of sovereignty not to be amenable' to suit without consent). And the qualified nature of Indian sovereignty modifies that principle only by placing a tribe's immunity, like its other governmental powers and attributes, in Congress's hands. See United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512 (1940) (USF & G) ('It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit'). Thus, we have time and again treated the 'doctrine of tribal immunity [as] settled law' and dismissed any suit against a tribe absent congressional authorization (or a waiver). Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc., 523 U.S. 751, 756 (1998)."

However, notwithstanding the fact that the doctrine of tribal sovereign immunity is generally considered to be settled law, the Supreme Court of the United States has recognized that the doctrine is a common-law doctrine that "developed almost by accident," Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 756 (1998), inasmuch as there is no congressional statute or treaty defining the doctrine and, importantly, what, if any, limits the doctrine may have. Although the principle that tribes have the power "to make their own substantive law in internal matters ... and to enforce that law in their own forums" is relatively clear and accepted, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1978), the application of the doctrine of tribal sovereign immunity becomes murkier when tribes interact with those who are not members of the tribes. See New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983) (stating that "[a] tribe's power to prescribe the conduct of tribal members has never been doubted").

In the absence of any foundational statute or treaty, it has accordingly been left to the Supreme Court of the United States to define the limits of tribal sovereign immunity in

situations where tribal and non-tribal members interact, although that Court has repeatedly expressed its willingness to defer to Congress should Congress act in this arena. See, e.g., Bay Mills, ___ U.S. at ___, 134 S.Ct. at 2037 ("[I]t is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity."), and Kiowa, 523 U.S. at 759 ("Although the Court has taken the lead in drawing the bounds of tribal immunity, Congress, subject to constitutional limitations, can alter its limits through explicit legislation."). In Kiowa, the Court extended the tribal-sovereign-immunity doctrine to shield tribes from lawsuits asserting contract claims based on commercial activities conducted outside tribal lands; however, the Court for the first time also expressed its reservations about perpetuating the doctrine, explaining:

> "There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. See Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973);

> [Oklahoma Tax Comm'n v. Citizen Band of] Potawatomi [Indian Tribe of Oklahoma, 498 U.S. 505, 510 (1991)]; Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996). In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.
>
> "These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule. Respondent does not ask us to repudiate the principle outright, but suggests instead that we confine it to reservations or to noncommercial activities. We decline to draw this distinction in this case, as we defer to the role Congress may wish to exercise in this important judgment.
>
> "....
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> "In light of these concerns, we decline to revisit our case law and choose to defer to Congress. Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. Congress has not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case."

523 U.S. at 758-60 (emphasis added).

We take particular notice of the Court's comment that tribal sovereign immunity hurts most those who "have no choice in the matter" and its concomitant holding refusing to extend the tribal sovereign immunity that tribes enjoy beyond "suits on contracts." Id. In Bay Mills, the Supreme Court further recognized this refusal, explaining in a footnote that it had

never "specifically addressed (nor, so far as we are aware, has Congress) whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct." ___ U.S. at ___ n. 8, 134 S.Ct. at 2036 n. 8. This appeal presents precisely that scenario: Wilkes and Russell have alleged tort claims against the tribal defendants, and they have no way to obtain relief if the doctrine of tribal sovereign immunity is applied to bar their lawsuit.

In light of the fact that the Supreme Court of the United States has expressly acknowledged that it has never applied tribal sovereign immunity in a situation such as this, we decline to extend the doctrine beyond the circumstances to which that Court itself has applied it; accordingly, we hold that the doctrine of tribal sovereign immunity affords the tribal defendants no protection from the claims asserted by Wilkes and Russell. As Justice Stevens aptly explained in his dissent in Kiowa, a contrary holding would be contrary to the interests of justice, especially inasmuch as the tort victims in this case had no opportunity to negotiate with the tribal

defendants for a waiver of immunity. See Kiowa, 523 U.S. at 766 (Stevens, J., dissenting) ("[T]he rule [set forth by the majority] is unjust. This is especially so with respect to tort victims who have no opportunity to negotiate for a waiver of sovereign immunity; yet nothing in the Court's reasoning limits the rule to lawsuits arising out of voluntary contractual relationships. Governments, like individuals, should pay their debts and should be held accountable for their unlawful, injurious conduct.").

Wilkes and Russell did not voluntarily choose to engage in a transaction with the tribal defendants; rather, they were merely traveling on the public roads of this State when they were injured in an automobile accident involving -- and, by all accounts, caused by -- a Wind Creek-Wetumpka employee driving a Wind Creek-Wetumpka vehicle. Thus, to the extent the Bay Mills Court buttressed its decision affording tribal sovereign immunity to tribes with regard to claims stemming from a tribe's commercial activities by reasoning that plaintiffs could "bargain for a waiver of immunity" beforehand, ___ U.S. at ___, 134 S.Ct. at 2035, that rationale has no application to the tort claims asserted by Wilkes and

Russell. Moreover, for the reasons explained by Justice Thomas in his dissent in Bay Mills, we likewise conclude that none of the other rationales offered by the majority in Bay Mills as support for continuing to apply the doctrine of tribal sovereign immunity to tribes' off-reservation commercial activities sufficiently outweigh the interests of justice so as to merit extending that doctrine to shield tribes from tort claims asserted by individuals who have no personal or commercial relationship to the tribe. See Bay Mills, ___ U.S. at ___, 134 S.Ct. at 2045-55 (Thomas, J., dissenting) (explaining that the doctrine of tribal sovereign immunity as articulated by the Supreme Court in Kiowa lacks "substantive justification" and the majority's reasons for continuing to uphold the doctrine -- deference to Congress, stare decisis, etc. -- are insufficient in light of that lack of a justification, and the "unfairness and conflict it has engendered").

IV.

Wilkes and Russell asserted negligence and wantonness claims against the tribal defendants as a result of injuries sustained in an automobile accident involving a vehicle owned

by Wind Creek-Wetumpka and being driven by a Wind Creek-Wetumpka employee. The trial court entered a summary judgment in favor of the tribal defendants on the ground of tribal sovereign immunity, and Wilkes and Russell appealed that judgment to this Court. We now reverse the judgment of the trial court and hold that the doctrine of tribal sovereign immunity affords no protection to tribes with regard to tort claims asserted against them by non-tribe members. In so holding, we are mindful that "tribal immunity is a matter of federal law and is not subject to diminution by the States," Kiowa, 523 U.S. at 756, and that our holding is contrary to the holdings of several of the United States Courts of Appeals that have considered this issue. See, e.g., Arizona v. Tohono O'odham Nation, 818 F.3d 549, 563 n. 8 (9th Cir. 2016) ("We have held that tribal sovereign immunity bars tort claims against an Indian tribe, and that remains good law."). However, as explained supra, the Supreme Court of the United States has expressly acknowledged that it has not ruled on the issue whether the doctrine of tribal sovereign immunity has a field of operation with regard to tort claims, and this Court is not bound by decisions of lower federal courts. See Ex

parte Johnson, 993 So. 2d 875, 886 (Ala. 2008) ("This Court is not bound by decisions of the United States Courts of Appeals or the United States District Courts ...."), and Preferred Risk Mut. Ins. Co. v. Ryan, 589 So. 2d 165, 167 n. 2 (Ala. 1991) ("Decisions of federal courts other than the United States Supreme Court, though persuasive, are not binding authority on this Court."). Accordingly, in the interest of justice we respectfully decline to extend the doctrine of tribal sovereign immunity beyond the circumstances in which the Supreme Court of the United States itself has applied it. The judgment of the trial court holding that it lacked jurisdiction to consider the claims asserted by Wilkes and Russell based on the doctrine of tribal sovereign immunity is accordingly reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Stuart, C.J., and Bolin, Parker, Murdock, Main, Bryan, and Sellers, JJ., concur.

Shaw and Wise, JJ., recuse themselves.

Appendix B

REL: 09/29/2017
REL: 10/03/2017 As modified on rehearing ex mero motu [by substitution of pages 10-11].

SUPREME COURT OF ALABAMA

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In the absence of any foundational statute or treaty, it has accordingly been left to the Supreme Court of the United States to define the limits of tribal sovereign immunity in

situations where tribal and non-tribal members interact, although that Court has repeatedly expressed its willingness to defer to Congress should Congress act in this arena. See, e.g., Bay Mills, ___ U.S. at ___, 134 S.Ct. at 2037 ("[I]t is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity."), and Kiowa, 523 U.S. at 759 ("Although the Court has taken the lead in drawing the bounds of tribal immunity, Congress, subject to constitutional limitations, can alter its limits through explicit legislation."). In Kiowa, the Court extended the tribal-sovereign-immunity doctrine to shield tribes from lawsuits asserting contract claims based on commercial activities conducted outside tribal lands; however, the Court for the first time also expressed its reservations about perpetuating the doctrine, explaining:

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> "In light of these concerns, we decline to revisit our case law and choose to defer to Congress. Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. Congress has not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case."

523 U.S. at 758-60 (emphasis added).

We take particular notice of the Court's comment that tribal sovereign immunity hurts most those who "have no choice in the matter" and the Court's limitation of its holding in Kiowa to "suits on contract." Id. In Bay Mills, the Supreme Court further recognized this limitation, explaining in a footnote that it had never "specifically addressed (nor, so

far as we are aware, has Congress) whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct." ___ U.S. at ___ n. 8, 134 S.Ct. at 2036 n. 8. This appeal presents precisely that scenario: Wilkes and Russell have alleged tort claims against the tribal defendants, and they have no way to obtain relief if the doctrine of tribal sovereign immunity is applied to bar their lawsuit.

In light of the fact that the Supreme Court of the United States has expressly acknowledged that it has never applied tribal sovereign immunity in a situation such as this, we decline to extend the doctrine beyond the circumstances to which that Court itself has applied it; accordingly, we hold that the doctrine of tribal sovereign immunity affords the tribal defendants no protection from the claims asserted by Wilkes and Russell. As Justice Stevens aptly explained in his dissent in Kiowa, a contrary holding would be contrary to the interests of justice, especially inasmuch as the tort victims in this case had no opportunity to negotiate with the tribal

defendants for a waiver of immunity. See Kiowa, 523 U.S. at 766 (Stevens, J., dissenting) ("[T]he rule [set forth by the majority] is unjust. This is especially so with respect to tort victims who have no opportunity to negotiate for a waiver of sovereign immunity; yet nothing in the Court's reasoning limits the rule to lawsuits arising out of voluntary contractual relationships. Governments, like individuals, should pay their debts and should be held accountable for their unlawful, injurious conduct.").

Wilkes and Russell did not voluntarily choose to engage in a transaction with the tribal defendants; rather, they were merely traveling on the public roads of this State when they were injured in an automobile accident involving -- and, by all accounts, caused by -- a Wind Creek-Wetumpka employee driving a Wind Creek-Wetumpka vehicle. Thus, to the extent the Bay Mills Court buttressed its decision affording tribal sovereign immunity to tribes with regard to claims stemming from a tribe's commercial activities by reasoning that plaintiffs could "bargain for a waiver of immunity" beforehand, ___ U.S. at ___, 134 S.Ct. at 2035, that rationale has no application to the tort claims asserted by Wilkes and

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IV.

Wilkes and Russell asserted negligence and wantonness claims against the tribal defendants as a result of injuries sustained in an automobile accident involving a vehicle owned

by Wind Creek-Wetumpka and being driven by a Wind Creek-Wetumpka employee. The trial court entered a summary judgment in favor of the tribal defendants on the ground of tribal sovereign immunity, and Wilkes and Russell appealed that judgment to this Court. We now reverse the judgment of the trial court and hold that the doctrine of tribal sovereign immunity affords no protection to tribes with regard to tort claims asserted against them by non-tribe members. In so holding, we are mindful that "tribal immunity is a matter of federal law and is not subject to diminution by the States," Kiowa, 523 U.S. at 756, and that our holding is contrary to the holdings of several of the United States Courts of Appeals that have considered this issue. See, e.g., Arizona v. Tohono O'odham Nation, 818 F.3d 549, 563 n. 8 (9th Cir. 2016) ("We have held that tribal sovereign immunity bars tort claims against an Indian tribe, and that remains good law."). However, as explained supra, the Supreme Court of the United States has expressly acknowledged that it has not ruled on the issue whether the doctrine of tribal sovereign immunity has a field of operation with regard to tort claims, and this Court is not bound by decisions of lower federal courts. See Ex

parte Johnson, 993 So. 2d 875, 886 (Ala. 2008) ("This Court is not bound by decisions of the United States Courts of Appeals or the United States District Courts ...."), and Preferred Risk Mut. Ins. Co. v. Ryan, 589 So. 2d 165, 167 n. 2 (Ala. 1991) ("Decisions of federal courts other than the United States Supreme Court, though persuasive, are not binding authority on this Court."). Accordingly, in the interest of justice we respectfully decline to extend the doctrine of tribal sovereign immunity beyond the circumstances in which the Supreme Court of the United States itself has applied it. The judgment of the trial court holding that it lacked jurisdiction to consider the claims asserted by Wilkes and Russell based on the doctrine of tribal sovereign immunity is accordingly reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Bolin, Parker, Murdock, Main, Bryan, and Sellers, JJ., concur.

Shaw and Wise, JJ., recuse themselves.