TRIBAL COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX
(DAKOTA) COMMUNITY

FILED MAR 19 2012

LYNN K. McDONALD
CLERK OF COURT

COURT OF THE SHAKOPEE MEDEWAKANTON
SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT **STATE OF MINNESOTA**

Shannon Bunde,

Petitioner/Judgment Creditor

v. Court File No. 712-11

Marvin Ralph Brewer,

Respondent/Judgment Debtor.

Memorandum Opinion and Order

Summary

Under Rule 34 of this Court's Rules of Civil Procedure, the Petitioner, Shannon Bunde, asks the Court to enforce her judgment for money damages, in an amount in excess of $2.7 million, obtained against the Respondent, Marvin Ralph Brewer, in the Minnesota District Court for the First District.

Her judgment was obtained by default; and, a year after the entry of that judgment, the District Court denied the Respondent, Mr. Brewer's, motion to set aside the default. On the basis of that denial, Mr. Brewer contends that the District Court's judgment lacks the regularity that would mandate its enforcement under our Rule 34. He also contends that the Minnesota District Court lacked jurisdiction over him because the statutory basis for the District Court's judgment was Minnesota Statutes §169.09, subdv. 5a, which in his view is a "civil-regulatory" provision of the sort that under federal law does not apply to the Shakopee Mdewakanton Sioux (Dakota) Community.

For the reasons set forth below, the Court respectfully must disagree with both of Mr. Brewer's contentions.

This is an extraordinarily difficult case – difficult because of the terrible facts that underlie it; difficult because, in the Court's view, the Respondent had, and repeatedly ignored, opportunities to present arguments and evidence to the trier of fact that might well have changed the trier's decision; and difficult because, as far as the parties and the Court have been able to discern, there is no case law directly on point with respect to a question that lies at the case's heart.

Yet, after long reflection, the Court is convinced that the resolution reached today is absolutely mandated by the law. The Court therefore grants Ms. Bunde's petition[1].

Factual Background

On September 7, 2007, the Petitioner, Shannon Bunde, attended a gathering at a residence on the Reservation of the Shakopee Mdewakanton Sioux Community. Also attending was a Mr. Sean Pozzi. Neither Ms. Bunde nor Mr. Pozzi are members of any Indian tribe. The residence where the gathering was held belonged to relatives of the Respondent, Mr. Marvin Brewer. Both Mr. Brewer and the owner of the house where the gathering was held are members of the Shakopee Mdewakanton Sioux Community.

A Dodge Viper automobile, belonging to Mr. Brewer, was parked in the driveway of the residence. The vehicle was not insured. Mr. Pozzi wished to drive the vehicle; and, in a manner that is disputed, he obtained the vehicle's keys. Ms. Bunde asked to accompany Mr. Pozzi when he drove the vehicle; Mr. Pozzi assented; and he and Ms. Bunde left the gathering, with Mr. Pozzi driving the car. Shortly thereafter, Mr. Pozzi lost control of the vehicle. The resultant one-car accident occurred on McKenna Road, on the Shakopee Reservation. As a result of the accident, Ms. Bunde sustained injuries that required the amputation of her right leg.

Thereafter, on January 9, 2008, Ms. Bunde signed a one-page handwritten document, drafted by Mr. Brewer, which stated that Mr. Brewer would pay Ms. Bunde one thousand dollars per month for twenty-four months; that Mr. Brewer would pay one thousand seven hundred dollars toward the purchase of a prosthetic limb for Ms. Bunde; and that Mr. Brewer would purchase Ms. Bunde a vehicle with a value of between fifteen and twenty thousand dollars. The agreement provided that, in return, Ms. Bunde would not pursue any other remedies against Mr. Brewer. The effect of the agreement was expressly conditioned upon both parties' compliance with its terms. Mr. Brewer made one payment, of one thousand dollars to Ms. Bunde, but did not make any more payments. The circumstances surrounding that failure are disputed.

Ms. Bunde, having received no additional payments, filed the action in the Minnesota District Court that resulted in the judgment here at issue.

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[1] Ms. Bunde also seeks an order that would garnish the so-called "per capita" payments which the Government of the Shakopee Mdewakanton Sioux Community periodically makes to its members. But, as the Court explained to the parties during oral argument on Ms. Bunde's Petition, the Court lacks jurisdiction to garnish or otherwise attach any monies held by the Community's government for Mr. Brewer or for any Community member. Except with respect to monies owing for child support payments, the Shakopee Community expressly retains its sovereign immunity from unconsented suit with respect to monies it holds for its members' per capita payments. See Resolution No. 09-13-11-016 of the General Council of the Shakopee Mdewakanton Sioux Community, and see Chapter III, section 8.b. of the Domestic Relations Code of the Shakopee Mdewakanton Sioux (Dakota) Community.

Ms. Bunde's claim against Mr. Brewer was based upon Minnesota Statutes §169.09, subd. 5a, which provides that –

> **Driver deemed agent of owner.** Whenever any motor vehicle shall be operated within this state, by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall in case of accident, be deemed the agent of the owner or such motor vehicle in the operation thereof.

In the Minnesota District Court proceeding, Mr. Brewer repeatedly, and over extended periods, failed to participate. He failed to respond to at least some of Ms. Bunde's discovery requests. Trial, which had been scheduled for June 9, 2009, was rescheduled after failed mediation, for October 28, 2009. On August 24, 2009, Mr. Brewer's filed an apparently untimely motion to amend his answer and to dismiss the claims against him on jurisdictional grounds. The hearing on that motion was scheduled for October 21, 2009. On October 9, 2009, Mr. Brewer's counsel withdrew. Accompanying that withdrawal was a cover letter sent by the withdrawing attorney to the District Court and to Ms. Bunde's attorney, indicating that a copy of the withdrawal was being sent to Mr. Brewer. Thereafter, Mr. Brewer failed to appear both at the hearing on his motion and at trial; he maintains that he was unaware either of the trial date or of his counsel's withdrawal.

At the trial, on October 28, 2009, the Minnesota District Court received Ms. Bunde's evidence, and entered judgment against both Mr. Brewer and Mr. Pozzi, in an amount in excess of $2.7 million. In its Findings of Fact and Conclusions of Law, the District Court held that it had jurisdiction over Mr. Brewer, and that Minnesota Statutes §169.09, subd. 5a applied to him. Both holdings were based on the grant of civil jurisdiction conveyed to the State of Minnesota by virtue of the federal statute commonly called Public Law 280, 28 U.S.C. §1360(a) (2006).

Following entry of the judgment from that trial, Ms. Bunde's counsel served, by mail, copies of the judgment, and of various other post-judgment documents, on Mr. Brewer, and sought post-trial discovery. After a period of months without response from Mr. Brewer, a hearing was set for September 14, 2010, in Minnesota District Court, on an Order to Show Cause, sought by Ms. Bunde. One day in advance of that scheduled hearing, a new attorney for Mr. Brewer contacted Ms. Bunde's counsel and asked that the hearing be continued. That request was granted, the hearing was rescheduled for October 7, 2010, and at that rescheduled hearing Mr. Brewer's new attorney advised the Court and Ms. Bunde's counsel, for the first time, that Mr. Brewer intended to file a motion seeking the vacation of the October 28, 2009 judgment.

When that motion to vacate was filed and heard, Mr. Brewer's new counsel did not argue that Mr. Pozzi did not have Mr. Brewer's permission to drive his vehicle – an argument that, if it were accepted, would have meant that Minnesota Statutes §169.09, subd. 5a did not apply, and presumably would have

resulted in Mr. Brewer's avoiding the District Court's judgment. The fact that this argument was not made was the subject of argument before this Court: Mr. Brewer's current counsel asserts that the attorney who represented him in the context of his motion to vacate in the Minnesota District Court also was representing Mr. Pozzi at that time, in other matters before Minnesota courts. So, Mr. Brewer's present counsel argues here, if Mr. Brewer's attorney had argued to the Minnesota District Court that Mr. Brewer did not consent to Mr. Pozzi's use of the vehicle, he essentially would have been arguing that his other client, Mr. Pozzi, had stolen Mr. Brewer's vehicle[2].

On February 7, 2011, the Minnesota District Court denied Mr. Brewer's motion to vacate[3]. No appeal was taken from that denial, and the Petition that is here at issue was filed on September 16, 2011.

The Parties' Arguments

Mr. Brewer argues that this Court should not enforce the Minnesota District Court's judgment because, he asserts, the proceedings before that Court lacked the "regularity" that our Rule 34 requires, and because the Minnesota District Court lacked jurisdiction over Mr. Brewer and over the Ms. Bunde's claims against him.

The contentions with respect to "irregularity" are: (i) Mr. Brewer assertedly was not aware of his trial date, and because he missed the trial he was unable to testify or to provide evidence on his own behalf; (ii) hearsay evidence, in the form of the record of police interviews with Mr. Pozzi, was admitted during the trial, and was used against Mr. Brewer; (iii) the Minnesota District Court ignored the effect of the settlement agreement that Ms. Bunde had signed; and (iv) the Minnesota District Court denied Mr. Brewer's motion to vacate the default judgment when such motions generally are granted.

Mr. Brewer also argues that Minnesota Statutes §169.09, subd. 5a does not apply to Indians in Indian Country, citing the Minnesota Supreme Court's decision in State v. Stone, 572 N.W.2d 725 (Minn. 1996). The Stone decision held that several motor vehicle-related sections in Chapter 169 of Minnesota Statutes are not "criminal prohibitory" statutes, but instead are "civil regulatory" provisions of the type

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[2] Attached to Mr. Brewer's briefing materials was an October 26, 2011 Petition to the Minnesota Supreme Court, filed by the Minnesota Office of Lawyers Professional Responsibility, alleging fifteen separate counts of professional misconduct by Mr. Barry Voss, the attorney who represented Mr. Brewer in the context of his motion to vacate. None of those counts concerns Mr. Voss' representation of Mr. Brewer.

[3] The exhibit attached to the affidavit of Ms. Bunde's counsel that supposedly contained the entirety of the Minnesota District Court's ruling on Mr. Brewer's motion to vacate did not, in fact, contain the whole document. Rather, the exhibit contained only the Court's order and the third page of the Court's supporting memorandum. However, it is plain from these materials that the Minnesota District Court did consider and did reject Mr. Brewer's arguments relating both to regularity and to jurisdiction.

that the United States Supreme Court held, in Bryan v. Itasca County, Minnesota, 426 U.S. 373 (1976), were not included in Congress' grant of jurisdiction to the State of Minnesota under Public Law 280.

Ms. Bunde responds, as to the "regularity" arguments, that Mr. Brewer's arguments were submitted to, and in a memorandum, were rejected by the Minnesota District Court. She asserts that, during the trial, she testified that she had seen Mr. Brewer give Mr. Pozzi consent to drive the vehicle in question. And she contends that Mr. Brewer had, and ignored, multiple opportunities to be heard before the District Court.

On the subject of jurisdiction, Ms. Bunde argues that there is a fundamental and controlling difference between the provisions of Minnesota Statutes §169.09, subd. 5a, and the sections of Chapter 169 of Minnesota Statutes that were the dealt with in the Stone decision. She points out that the sections which Stone held to be inapplicable to Indians in Indian Country all were traffic laws that are enforced by the State of Minnesota (*i.e.*, speeding restrictions; driver licensing requirements; vehicle registration requirements; seat belt usage and child restraint mandates; and motor vehicle insurance and proof of insurance requirements). By contrast, Minnesota Statutes §169.09, subd. 5a cannot be enforced by the State of Minnesota; it carries no criminal or civil penalty of any kind; rather, it creates, as a matter of civil law, an implied agency between a vehicle's owner and any person who is driving the vehicle with the owner's consent. This, Ms. Bunde says, is exactly the sort of general civil law of Minnesota that Congress had in mind when it gave the State of Minnesota civil jurisdiction over Indians in Indian Country outside of the Red Lake Reservation.

Discussion

The Full Faith and Credit Clause of the United States Constitution does not apply to Indian tribal governments. Hence, absent a federal statute that mandates otherwise, the judgments of Indian tribal courts are not automatically given deference by the courts of the several states[4]; and, likewise absent contrary federal law, tribes are free to consider a variety of factors when they are asked to enforce the judgment of a state court.

But the sound functioning of state and tribal judicial systems is aided when litigants are not encouraged to "forum shop", and when a matter that has been fully and fairly litigated in one court is brought to repose rather than re-litigated in another court. These considerations led this Court, in 1997, to adopt our Rule 34, which provides:

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[4] See e.g., Rule 10.2(a) of the Minnesota General Rules of Practice, which mandates a "comity" analysis when a Minnesota court considers a tribal court judgment, and which enumerates an extensive list of factors that Minnesota state courts are to consider when they are asked to enforce a tribal court judgment.

An action for enforcement of a foreign judgment shall be commenced by filing a Petition therefore, in a form approved by the Court, accompanied by an exemplified or certified copy of the foreign judgment and any relevant supporting documents, and accompanied by a filing fee of twenty-five dollars. If the judgment is one for money damages, the Petition shall be accompanied by Affidavits of Identification of the Judgment Creditor and of the Judgment Debtor, in forms approved by the Court. The Petition and all supporting materials, including any affidavits, shall be served upon each person against whom the Petitioner seeks to enforce the judgment, who shall be denominated Respondents. Each Respondent shall have twenty days from the date of service upon them, within which to respond to the Petition. Upon the completion of such service, the Court shall examine the Petition and supporting materials, and any response thereto, and shall order such additional proceedings as it may deem appropriate. If no substantial question appears with respect to the jurisdiction of the foreign court and the regularity of the foreign proceedings, the Court shall enter an order enforcing the foreign judgment.

Under Rule 34, this Court routinely has enforced State court judgments. See e.g., Texidor v. Cleveland, 3 Shak. T.C. 153 (Apr. 12, 1999). We consider that neither our judicial system nor the system of any other jurisdiction is well-served if parties are uncertain whether a judgment can be successfully taken to a court that should have a role in its enforcement.

For those reasons, it is the Court's view that the various aspects of the Minnesota District Court's proceedings to which Mr. Brewer now objects as lacking "regularity" do not warrant this Court's declining to enforce Ms. Bunde's judgment. Whether this Court would or would not have decided various issues differently – issues relating to the fact that Mr. Brewer's first attorney withdrew shortly before the scheduled trial date, or that Mr. Brewer's second attorney may well have had a conflict of interest that caused him to fail to raise a vitally important contention in Mr. Brewer's defense, or that the District Court declined to re-open a default judgment that involved a very considerable sum of money – all of these things are immaterial. The Minnesota District Court case appears to comport with Minnesota's rules of procedure; no part of the Minnesota District Court proceedings were appealed; and Mr. Brewer's repeated failure to protect his own interests, during very considerable portions of the proceedings before the District Court, make the decision to avoid reconsidering the regularity of the District Court's proceedings all the more appropriate.

But Mr. Brewer's other contention, with respect to the jurisdiction of the Minnesota District Court, raises a much more fundamental question. Mr. Brewer is a member of a federally recognized Indian tribe, and all of the events at issue before the Minnesota District Court took place within the boundaries of the reservation of Mr. Brewer's tribe. Hence, the Minnesota District Court's jurisdiction over Mr. Brewer depends entirely upon whether a Minnesota statutory provision is civil or civil-

regulatory[5] – a question of federal Indian law of considerable complexity. Under these circumstances, I think the District Court's jurisdictional conclusion should be open to more scrutiny than this Court normally will give the jurisdictional conclusions of courts whose judgments are presented to us for enforcement.

Any time the court of a state is asked to exercise jurisdiction over an Indian with respect to matters arising on that Indian's reservation, a question of federal law is presented. Williams v. Lee, 358 U.S. 217 (1959). The question is whether Congress has authorized that exercise of jurisdiction; and the question here is whether the "civil" part of Public Law 280, 28 U.S.C. §1360(a) (2006) authorizes that exercise. That statute provides:

> Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:
>
> ...
>
> | State of | Indian country affected |
> |---|---|
> | ... | ... |
> | Minnesota......................... | All Indian country within the State, except the Red Lake Reservation |

On its face, the sweep of this language is very broad; but that facial breadth has been diminished by the United States Supreme Court. In Bryan v. Itasca County, *supra*, the Supreme Court held that the statute's grant of jurisdiction did not include a state's civil tax code. It is worth quoting at some length what the Supreme Court said about the Congressional intent that underlay the adoption of the civil portion of Public Law 280:

> The primary concern of Congress in enacting Pub. L. 280 that emerges from its sparse legislative history was with the problem of lawlessness on certain Indian reservation, and the absence of adequate tribal institutions for law enforcement. ... Thus provision for state criminal jurisdiction over offenses committed by or against Indians on the reservations was the central focus of Pub. L. 280 and is embodied in §2 of the Act, 18 U.S.C. §1162.
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> In marked contrast in the legislative history is the virtual absence of expression of congressional policy or intent respecting §4's grant of civil jurisdiction to the States.
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> ...

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[5] The Minnesota District Court appears to have held that it would have jurisdiction over Mr. Brewer even if Public Law 280 did not convey jurisdiction, because the accident in question occurred within a right-of-way that is owned by the City of Shakopee, Minnesota. But that analysis certainly is incorrect: the accident occurred within an Indian Reservation. Title to the land on which the accident occurred has no more legal relevance here than it did in the context of State v. Stone, where all of the offenses at issue occurred on State-owned and maintained roads.

> Piecing together as best we can the sparse legislative history of §4, subsection (a) seems to have been primarily intended to redress **<u>the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens</u>**, by permitting the courts of the States to decide such disputes; this is definitely the import of the statutory wording conferring upon a State "jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in... Indian country...to the same extent that such State...has jurisdiction over other civil causes of action." With this as the primary focus of §4(a), the wording that follows in §4(a) –"and those civil laws of such State..that are of general application to private persons or private property shall have the same force and effect within Indian country as they have elsewhere within the State" – **<u>authorizes application by the state courts of their rules of decision to decide such disputes</u>**. Cf. 28 U.S.C. §1652. This construction finds support in the consistent and uncontradicted references in the legislative history to "permitting" "State courts to adjudicate civil controversies" arising on Indian reservations. ... and the absence of anything remotely resembling an intention to confer general state civil regulatory control over Indian reservations.
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> 476 U.S., at 381, 383-4 (Emphasis supplied).

Nine years after the <u>Bryan</u> decision, the Supreme Court again considered the scope and sweep of Public Law 280, this time in the context of gambling regulation. In <u>California v. Cabazon Band of Mission Indians</u>, 480 U.S. 202 (1987), the Court held that the State of California's ostensibly criminal laws regulating bingo games were not applicable to Indian tribes in Indian Country. The Court distinguished between, on the one hand, "criminal/prohibitory" state laws which, in Public Law 280 jurisdictions, apply to Indians in Indian County by the virtue of grant of criminal jurisdiction appearing at 18 U.S.C. §1162(a) (2006), and, on the other hand, "civil/regulatory" provisions which "generally permit[] the conduct at issue, subject to regulation", 480 U.S., at 209. The Court held that enforcement of the latter sorts of provisions, in a criminal prosecution, was not contemplated by Public Law 280.

Mr. Brewer argues that, under the doctrines of these cases, Minnesota Statutes §169.09, subd. 5a must be deemed a "civil/regulatory" provision and therefore inapplicable to him. He notes that Chapter 169 of Minnesota Statutes – the Chapter in which Minnesota Statutes §169.09, subd. 5a is placed – is entitled "Traffic Regulations". And, in section 169.09, the section in which Minnesota Statutes §169.09, subd. 5a appears, a person's failure to comply with any of the provisions, <u>except only one</u>, can result in both the suspension of the person's driver's license and the imposition of criminal penalties[6].

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[6] The headings of the other subdivisions of §169.09 illustrate the nature of the section's provisions:
Subdivision 1. Driver to stop for accident with individual.
Subd. 2. Driver to stop for accident to property.
Subd. 3. Driver to give information.
Subd. 4. Collision with unattended vehicle.
Subd. 5. Notify owner of damaged property.
Subd. 5a. Driver deemed agent of owner.
Subd. 6. Notice of personal injury.

That one exception is the subdivision here at issue – subdivision 5.a.— which is designed to be used only in civil lawsuits such as Ms. Bunde's.

Mr. Brewer argues that the subdivision 5a. should be regarded as the same sort of provision as all of the other provisions that surround it: he asserts that it must be considered to be a traffic regulation, and as such it should be regarded as a "civil regulatory" provision of the sort that State v. Stone held to be inapplicable to Indians in Indian Country.

But under the Bryan and Cabazon analysis, although the placement of a statute within a body of law may not be wholly irrelevant, its placement clearly must be far less important than the nature and intended operation of the statute itself.

Mr. Brewer's argument that Minnesota Statutes §169.09, subd. 5a is akin to the provisions that were discussed in Stone is flawed by the fact that the sections at issue in Stone were, at least on their face, criminal statutes. They carried criminal penalties; they were enforceable by the State of Minnesota; they were designed to regulate conduct. By contrast, Minnesota Statutes §169.09, subd. 5a carries no criminal penalty; it cannot be enforced by the State of Minnesota; it applies only in civil litigation between private parties. It is a civil statute, pertaining to the tort law of the State of Minnesota.

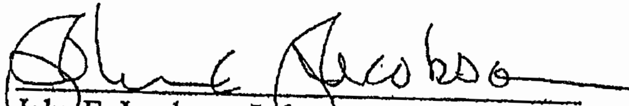
The parties were unable to cite the Court to any prior case where the applicability of such a statute to the actions of an Indian in Indian Country has been analyzed in a Public Law 280 context, and the Court also has been unable to find any. The Court therefore is obliged to decide this case without directly applicable reasoning from other judges – but not wholly without guidance.

According to the Supreme Court in Bryan, the purpose of Pubic Law 280's grant of civil jurisdiction to the State of Minnesota and the other States that are dealt with by the statute was to permit the "resolving [of] private legal disputes between reservation Indians, and between Indians and other private citizens" by "the state courts [using]... their rules of decision". Hence, in my view, Minnesota's law relating to torts – whether that law derives from Minnesota's courts or from its Legislature – applies to Indians in Indian Country, outside the Red Lake Reservation.

Minnesota Statutes §169.09, subd. 5a is a generally applicable "rule of decision" for the resolution of "private legal disputes" – disputes involving torts – and under the foregoing analysis it is applicable to Indians in Indian Country under Public Law 280. For these reasons, the decisions of the Minnesota District Court that are the subject of the Petition herein will be enforced by this Court.

Subd. 7. Accident report to commissioner.
Subd. 8. Officer to report accident to commissioner.
Subd. 9. Accident report format.
Subd. 10.[Repealed, 2005 c 163 s 89]
Subd. 11. Coroner to report death.
Subd. 12. Garage to report bullet damage

Dated: March 19, 2012



John E. Jacobson, Judge
Shakopee Mdewakanton Sioux Community
Tribal Court