

SUPREME COURT OF ARIZONA

CHERYL SAM and CARLEEN SAM,
individually and on behalf of
themselves and their respective
bankruptcy estates, Lawrence
Warfield, trustee.

Plaintiff/Appellant,

v.

THE LEDBETTER LAW FIRM,
P.L.C. an Arizona professional limited
liability company; STATE FARM
FIRE AND CASUALTY COMPANY,
an Illinois corporation,

Defendants/Appellees.

No. CV-19-0330-PR

Arizona Court of Appeals
No. 1 CA-CV 18-0636

Yavapai County Superior Court
No. V1300 CV2018-80096

**AMICUS BRIEF OF NAVAJO NATION
AND NAVAJO NATION BAR ASSOCIATION**

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INTEREST OF AMICUS CURIAE

The Navajo Nation (“Nation”) is a sovereign tribal nation with two ratified treaties with the United States. Treaty between the United States of America and the Navajo, September 9, 1849, 9 Stat. 974; Treaty between the United States of America and Navajo Tribe of Indians, June 1, 1868, 15 Stat. 667, 668. Most of the Nation’s sovereign territory lies within the exterior boundaries of the State of Arizona.

As part of its sovereign authority, the Nation regulates attorney practice within its territory. The Nation requires attorneys, whether Indian or non-Indian, to become licensed by the Navajo Nation Bar Association (NNBA). Under its bylaws, the NNBA requires attorneys to fulfill detailed eligibility requirements to sit for a Navajo law bar examination. Bylaws of the Navajo Nation Bar Association, §§ IV, VI, available at <https://www.navajolaw.info/bylaws>. Attorneys must pass the examination, and take a Traditional Teachings Course, which educates attorneys on Navajo custom and traditions. *Id.*, § VI. Once attorneys fulfill those requirements, the NNBA must file a motion with the Navajo Supreme Court to approve the attorney to practice within the Nation. *Id.*, § V(G).

After attorneys are licensed by the NNBA and the Supreme Court, the Nation regulates their practice through continuing standards of conduct. To maintain their Navajo law license, Attorneys must fulfill annual Continuing Legal Education requirements, including earning credits for Navajo Law and Navajo Ethics. *See* NNBA CLE Standards, available at <https://www.navajolaw.info/forms>. Attorneys must also comply with the Navajo Rules of Professional Conduct. NNBA Rules of

Professional Conduct, available at <http://www.navajocourts.org/NNBARulesConduct.htm>. The NNBA has a Disciplinary Committee that receives and takes action on complaints by clients concerning attorney practice within the Nation. *See* NNBA Disciplinary Committee Rules of Procedure, available at <https://www.navajolaw.info/forms>. The Nation's Supreme Court and district courts regulate attorney practice as well, through civil and criminal statutes that prohibit the unauthorized practice of law, and through their inherent authority to discipline attorneys who violate Navajo standards of practice. *See* 7 N.N.C. § 606 (2005); 17 N.N.C. § 377; *In re Seanez*, 9 Nav. R. 416, 416 (Nav. Sup. Ct. 2010). Further, the Nation has robust tort laws, deriving from both statutory and common law sources. *See* 7 N.N.C. § 602(A) (2005) (discussing time limitations for filing various tort actions). Under these laws, the Nation's courts have full authority to hear claims for attorney malpractice under its own tort principles. *See Chavez v. Tome*, 5 Nav. R. 187, 188-89 (Nav. Sup. Ct. 1987) (discussing existence of legal malpractice claim under Navajo law).

SUMMARY OF ARGUMENT

As the Nation has a comprehensive structure to regulate attorney practice, including through tort claims for malpractice, the Nation urges the Court to grant the Petition for Review, as the assertion of state court jurisdiction over this case would infringe on the Nation's inherent sovereignty and its Treaty rights. The Nation's argument is more fully set out below.

ARGUMENT

I. STATE COURT JURISDICTION OVER MALPRACTICE CLAIMS AGAINST NAVAJO NATION-LICENSED ATTORNEYS IS IMPROPER BECAUSE IT UNDULY INFRINGES ON THE NATION'S INHERENT SOVEREIGNTY.

Review of the Court of Appeals decision is necessary because, if not reversed, state courts will infringe on the Nation's sovereign prerogative to regulate attorney practice before its courts. There is then an important question of law that has been incorrectly decided. *See* ARCAP 23(d)(3).

In its decision, the Court of Appeals held state court jurisdiction over the malpractice claim would not infringe on the Nation's right of self-government, simply because the two parties involved are non-Indians. Decision, ¶ 15 ("Because Warfield and Ledbetter are not members of the Navajo Nation, the infringement test is inapplicable, and the trial court is not divested of jurisdiction."). The Nation submits the Court of Appeals' analysis is incorrect, but, moreover, would result in a significant infringement of the Nation's inherent sovereignty.

The Court of Appeals applied the "infringement" test from the U.S. Supreme Court's decision in *Williams v. Lee* to hold the state superior court could hear the malpractice claim. That test bars state court jurisdiction over a case arising within a tribal nation's sovereign territory if such jurisdiction would "infringe[] on the right of reservation Indians to make their own laws and be ruled by them." 358 U.S. 217, 220 (1959). Under the specific facts in *Williams*, the U.S. Supreme Court held there was infringement, as the non-Indian's suit was against a Navajo tribal member for a loan entered into on the Navajo Reservation. *Id.* at 223.

In support of its holding, the Court of Appeals relied primarily on this Court's opinion in *State v. Zaman*, 190 Ariz. 208 (1997). That case concerned a suit by the State of Arizona on behalf of a Navajo mother against a non-Indian to establish paternity, child custody, and child support. *Id.* at 209-10. Under the unique facts of that case, this Court held there was no infringement of the Nation's sovereignty, as it characterized the case as an Indian invoking state court jurisdiction over a non-Indian. *Id.* at 212 ("Nor can we perceive of any threat to Indian self-governance by requiring a non-Indian to answer a complaint of an Indian in state court."). This Court further stated, in response to an argument raised by the non-Indian defendant that the tribal nation's sovereign interests should be considered independent of the Indian plaintiff's interests, that the "[t]he adjudicatory authority of state courts in matters involving an Indian party depends upon the Indian party's interests, not on the interests of the tribe as a whole." *Id.* at 21.

The Court of Appeals applied *Zaman* to hold that any suit by a non-Indian against another non-Indian arising within sovereign tribal territory *per se* does not infringe on tribal sovereignty. Decision, ¶ 15.¹ According to the Court of Appeals,

¹ The Court of Appeals also cited *Smith Plumbing Co., Inc v. Aetna Cas. & Surety Co.*, 149 Ariz. 545 (App. 1990), a prior decision of that court, for the same proposition. Decision, ¶ 15. In that case, the Court of Appeals held that concurrent state jurisdiction over a suit brought by a non-Indian company against another non-Indian company concerning a construction bond did not infringe on the White Mountain Apache Tribe's sovereignty. *Smith*, 149 Ariz. at 550-51. The court did not apply a *per se* rule that all suits between non-Indians are outside the infringement test, but analyzed the specific suit and concluded there was nothing that recognized the tribe's exclusive sovereignty over the subject matter. *Id.* As discussed above, the Nation's sovereign authority over attorney practice within its territory is exclusive, and therefore *Smith's* holding does not apply, even it was binding on this

Zaman means that “the infringement test exists to protect Indians and does not preclude state court jurisdiction in action between two non-Indians.” *Id.*

This Court should grant review of this case to clarify under what circumstances state courts may hear cases between non-Indians arising within sovereign tribal nations. *See* ARCAP 23(d)(3) (stating one ground for granting a petition for review to be “that a decision of the Supreme Court should be overruled or qualified.”). The Nation submits that the non-Indian status of the parties is relevant, but not dispositive of whether state court jurisdiction infringes on tribal sovereignty. While the status of the parties may be a factor in determining jurisdiction, the analysis should not end there. Instead, it is appropriate to look at the nature of the plaintiff’s claims, and how adjudication of those claims in state court affects the sovereign right of the Nation to govern. To the extent *Zaman* holds otherwise, it should be overruled or qualified. *See id.*

In this case, the underlying claim of malpractice against the Ledbetter Law Firm concerns an attorney’s practice of Navajo law representing a Navajo family in a Navajo court. As noted above, the Nation has a comprehensive structure to regulate such practice, and therefore any remedy against the Firm should be adjudicated and awarded by the Nation under its own laws.² If the state case is allowed to go forward, the Nation’s exclusive sovereign authority to regulate

Court.

² The Nation and the NNBA state no views on whether the Ledbetter Law Firm’s conduct justifies a malpractice claim. Any such conclusion is properly made by the Nation’s courts.

attorney practice will be threatened. A litigant unhappy with their non-Indian attorney licensed by the Nation can evade the Nation's laws by simply filing suit in state court under state law.³ Contrary to the views of the Court of Appeals, this extension of state authority into the Nation's territory clearly infringes on the Nation's sovereignty, and should be reviewed and reversed.

II. STATE COURT JURISDICTION OVER THE MALPRACTICE CLAIM WOULD INFRINGE ON THE NATION'S EXCLUSIVE JURISDICTION OVER ITS TERRITORY RECOGNIZED IN THE TREATY OF 1868.

Beyond the general federal common law principles of infringement, *Williams* recognizes the Nation's exclusive jurisdiction over its territory based on its Treaty of 1868 with the United States. 358 U.S. at 222. Article II of the Treaty states:

[T]he United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents and employees of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.

Treaty between the United States of America and Navajo Tribe of Indians, June 1, 1868, art. IX, 15 Stat. 667, 668.

Two interrelated principles derive from Article II. First, "it cannot be doubted that the reservation of certain lands for the exclusive use and occupancy of the

³ Plaintiff's complaint makes no reference to Navajo law in its claim for malpractice. Complaint, ¶¶ 68-79, App. 042-044. It then appears Plaintiff intended to not only invoke the state court's subject matter jurisdiction, but also to apply Arizona tort law to the malpractice claim. Plaintiff confirms this intention in his Response to the Petition for Review, at 7 (characterizing his claim against the Ledbetter Law Firm as a "state-law, state-based legal malpractice claim[.]").

Navajos and the exclusion of non-Navajos from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos[.]” *McClanahan v. Ariz. St. Tax Comm’n*, 411 U.S. 164, 172 (1973). Second, the Nation can exclude non-Indians from its sovereign lands, and therefore regulate non-Indian activities on those lands when the Nation consents to their presence. *Window Rock Unified School Dist. v. Reeves*, 861 F.3d 894, 904-05 (9th Cir. 2017). Such regulatory authority transcends the limited authority recognized in *Montana v. United States*, 450 U.S. 544 (1981) as the Nation does not have to fulfill the exceptions in that case to justify its jurisdiction.⁴ *Id.* at 903.

Under the Treaty, non-Indian attorneys authorized by the Nation to enter its sovereign territory to practice law in its courts are under the exclusive regulatory authority of the Nation. The Court of Appeals decision allowing the claims to be heard in state court under state law undermines the Nation’s treaty rights, and even more significantly infringes on the Nation’s sovereign authority over its lands.

CONCLUSION

For the forgoing reasons, the Nation respectfully requests this Court grant the Petition for Review and reverse the Court of Appeals decision.

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⁴ The Nation agrees with Petitioner, however, that even if *Montana* controlled, the Nation has jurisdiction over non-Indian attorney practice, as attorneys consent to the Nation’s authority by becoming a member of the Navajo Nation Bar Association. Petition for Review, at 8-11.