

**IN THE CROW COURT OF APPEALS
IN AND FOR THE CROW INDIAN RESERVATION**

<p>IN RE THE MATTER OF:</p> <p>Gerald “Jay” Harris,</p> <p style="text-align:center">Plaintiff-Appellee</p> <p>v.</p> <p>Eldena Bear Don’t Walk, Appellate Judge, Crow Court of Appeals,</p> <p style="text-align:center">Defendant-Appellant</p>	<p style="text-align:right">Civil Case No. 10-078</p> <p style="text-align:center">DECISION ON APPEAL</p>
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Decision: **Reversed and Remanded with Instructions to Dismiss with Prejudice.**

Statement of Case: This is an appeal from the decision of Special Judge William Eggars dated July 23, 2010, denying Defendant’s motion to dismiss the complaint based on judicial immunity.

History of the Case

From its inception, the Crow bar examination was initiated by a cooperative effort of Tribal Judges including the undersigned, Robert LaFountain, and Special Judge James Ruegamer, a bar exam advisor (Del Laverdure), General Counsel for the Tribe (Elk River Law Firm) and staff of each of these. After its initiation in 2001, it was administered primarily by the ~~Appellate Judge and the Chief Judge of the Crow Tribal Court. It was classified both as a~~ judicial administrative duty and judicial function.

The Crow Court of Appeals, by and through Appellate Judge Eldena Bear Don’t Walk, on January 22, 2010, administered a tribal bar examination. Three applicants participated.

Plaintiff Gerald “Jay” Harris was one of those. Following grading of the bar examinations taken by the three participants, each was notified of the results. On or about 17 February, 2010, Harris was notified that he had failed the Crow tribal bar examination. No person had contested the bar examination setting date or plans prior to the date the examination was conducted.

On February 26, 2010, Harris filed a Complaint in Tribal Court naming Eldena Bear Don’t Walk as Defendant, seeking an injunction, a declaratory judgment and a writ of mandamus. On 12 March 2010, Harris filed a Motion to Amend Complaint. Defendant on March 19, 2010, filed a Peremptory Motion to Dismiss the Complaint. Harris on April 1, 2010, filed a Response to Defendant’s Motion to Dismiss. Defendant on April 23, 2010, filed Defendant’s Reply. On May 19, 2010, the Trial Court entered an Order Setting Hearing on Peremptory Motion to Dismiss for June 11, 2010. On or about May 27, 2010, Defendant filed a Motion for Continuance. The Court, on June 1, 2010, entered an Order Granting Plaintiff’s Motion to Amend Complaint. On June 7, 2010, Plaintiff filed a Notice to the Court of Plaintiff’s Response to Defendant’s Motion for Continuance. The Court granted Defendant’s Motion for Continuance on 1 June, 2010, and entered an Order Setting Hearing, moving the hearing date on the Motion to Dismiss from June 11, 2010, at Defendant’s request. The Trial Court entered an Order of Temporary Injunction on June 16, 2010. On June 24, 2010, the Court entered an Order Setting Hearing on Temporary Injunction on July 12, 2010. On July 12, 2010, Plaintiff appeared *pro se* and Defendant appeared with her counsel, Maylinn Smith, appeared before the Trial Court at the hearing on Defendant’s Preemptory Motion to Dismiss the Complaint.

The Trial Court in its Findings of Fact and Conclusions of Law dated 23 July, 2010, ruled that the Trial Court had jurisdiction over the parties pursuant to Section 3-2-203, Crow Law and Order Code (CLOC), and that the Court had jurisdiction over the subject matter pursuant to

Section 3-2-205 CLOC. The Trial Court judge also determined that Appellate Judge Bear Don't Walk was sued in her official capacity. Bear Don't Walk, in her Motion to Dismiss, asserted that suit was barred by Tribal sovereign immunity rendering the Defendant absolutely immune from this suit; that the case was not ripe for adjudication; and, that Harris had failed to exhaust administrative remedies. Harris alleged that Bear Don't Walk acted in her official capacity and that the Crow bar examination is an administrative, rather than judicial function, and that judicial immunity does not attach. Harris argued that there are constitutional (due process, including a meaningful notice of an examinee's performance) and statutory rights (the right to have the bar exam administered by the Crow Appellate Court, not the Appellate Court Judge acting alone) of which Bear Don't Walk should have been aware; that Bear Don't Walk abused her discretion by not considering the appearance of the manner by which she administered the Crow bar examination; that the practice of the Appellate Judge administering is unconstitutional because the authority to administer the exam is in the Appellate Court but not the Appellate Judge; that "The fact that a law-trained judge believes that a single person could be vested with authority to be the exam writer, administrator, and grader with no meaningful notice of performance to the exam taker in an American jurisdiction with a constitutional Due Process Clause is simply astounding." Plaintiff's Response to Defendant's Motion to Dismiss and Brief in Support, page 9. The crux of Harris' Complaint is that Bear Don't Walk, as Chief Appellate Judge, instead of a panel of three Court of Appeals judges, exceeded her authority by solely administering the bar examination in which Harris participated.

The Court, upon noting that there is no precedent on the judicial immunity issue in the case history of the Crow Court, determined that the acts relating to administration of the Crow bar examination are administrative in nature and do not appear to comprise acts that consist of

Defendant acting in her judicial capacity. The Court concluded that teaching a bar review course, writing bar exam questions, proctoring a bar examination, grading a bar examination, as alleged in the Complaint, are not “judicial functions.” The Court also concluded that if Defendant’s acts are proven, they constitute a violation of clearly established constitutional rights. The Court further ruled the case ripe for adjudication, and that declaratory judgment, wherein a determination of party rights would be made, by way of declaratory judgment and injunctive action is not barred by judicial immunity. The Court ordered that Defendant Bear Don’t Walk was enjoined, and restrained from advertising, conducting, presenting, grading, and announcing test scores for the July, 2010 Crow bar examination or any future Crow bar examination until further Order of the trial Court. Bear Don’t Walk filed a timely appeal on 5 August, 2010.

Standard of Review

The Appeals Court is obligated to reverse if it is left with the definite and firm conviction that a mistake has been committed. *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1975). The Appellate Court reviews the Tribal Court’s questions of law under a *de novo* standard. *Rose v. Adams*, 2001 Crow 1, Para. 2; *Crow*; *People v. Wehde*, 211 Ill. App. 3d 56, 568 N.E. 2nd 910 (1991). Decisions regarding immunity principles involve legal decisions. The abuse of discretion standard of review is applicable to issues relating to the interpretation of law, *i.e.*, did the Court correctly apply the law, particularly the constitutional requisites to hearing notices, deprivation of liberty and property rights and civil procedure. A judgment will be termed an abuse of discretion if the adjudicator has failed to exercise sound, reasonable and legal decision-making skills. *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995).

Statutory Bar Examination Considerations and Requisites

The Crow Law and Order Code, at § 3-2-206, sets forth the reach of sovereign immunity on the Crow Reservation.

Sovereign Immunity. Nothing contained in the preceding provisions on jurisdiction, or any other provision of the Crow Tribal Code shall be construed as a waiver of sovereign immunity of the Crow Tribe, its officers or businesses, unless specifically waived by such entity.

The Crow Law and Order Code, at § 3-3-308 (4) states:

Duties of Appellate Judge. The Appellate Judge shall preside over the Court of Appeals. He or she shall have the authority to promulgate rules applicable and pertaining to practice and procedure before the Court of Appeals and Rules of Professional Conduct of attorneys and advocates who practice before the Court of Appeals. It shall be the duty and responsibility of the Appellate Judge to ensure that all appellate matters are decided solely on the basis of the law and facts presented, without fear or favor, and without political influence or concern.

The Crow Law and Order Code, at § 3-7-705 states:

Denial of Admission. If an applicant is denied admission to the Court, he or she shall receive written notice of such denial including the reason for denial of admission. A request for review and any additional information the applicant wishes to have considered must be submitted within twenty (20) days of the date of the notice of reason for denial of admission. Any further action on the request for admission is solely at the discretion of the Court. The Chief Judge's denial of any person's admission to practice in the Tribal Court may be appealed to the Crow Court of Appeals.

The Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1302, sets forth limitations on Tribal officials and Tribal governments in the administration of due process requisites within reservation boundaries, specifically:

Constitutional Rights. No Indian Tribe in exercising powers of self-government shall ...
(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.

It is clear from the plain meaning of § 3-3-308 (4), CLOC, that the Appellate Judge has authority to establish rules relating to the practice, procedure and conduct of attorneys and

advocates who practice before the Crow Court of Appeals. It is also clear from the plain meaning of § 3-3-702, CLOC, that those rules of practice, procedure and conduct are intended to be administered in conjunction with the duty of the Appellate Court to administer the Tribal bar examination twice each year. The Code sections do not preclude, nor define, the specifics as to whether the Appellate Judge is to establish the rules and govern practice on her or his own, with or without the assistance of the two associate judges or special appellate judges who would serve on a panel of judges of the Court of Appeals in particular cases. The Appellate Judge is designated as such and is authorized to perform certain functions, whether defined as “administrative” or “judicial” functions in order to complete tasks necessary to an operable and efficient Tribal Court system.

Judicial Immunity

The Special Judge in the Trial Court sets forth an excellent summary of “judicial immunity.” That summary is adopted herein for purposes of determining whether judicial immunity shields the Appellate Judge, in her official capacity, from the lawsuit filed by Harris.

For purposes of immunity, whether the act done by a judge was judicial or not is to be determined by its character, and not by the character of the agent. Absolute immunity is strong medicine, justified only when the danger of officials’ being deflected from the effective performance of their duties is very great. *Forrester v. White*, 484 U.S. 219, 226-27, 108 S. Ct. 538, 98 L.Ed.2d 555 (1988). It is only for acts performed in his “judicial” capacity that a judge is absolutely immune. *Stump v. Sparkman*, 435 U.S. 349, 355, 98 S. Ct. 1099, 55 L.Ed. 2d 331 (1978). The Due Process Clause of the Crow Constitution, just as the Fourteenth Amendment of the United States Constitution, protects against any government conduct that “shocks the conscience.” *Rochin v. California*, 342 U.S. 165, 172, 72 S. Ct. 205, 96 L.Ed. 183 (1952).

Crowe v. County of San Diego, 593 F.3rd 841 (9th Cir. Cal. 2010.) The Court must first ask whether the facts that plaintiff has set forth in the Complaint make out a violation of a constitutional right, and second, if so, whether that right was “clearly established” at the time of Defendant’s alleged misconduct. *See, Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L.Ed. 2d 272 (2001), modified by *Pearson v. Callahan*, 555 U.S. ___ 129 S. Ct. 808, 172 L.Ed.2d 565 (2009). (The doctrine of qualified immunity protects government official from liability for civil damages insofar as the conduct does not violate clearly established statutory or constitutional right of which a reasonable person would have known. Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction and liability when they perform their duties reasonably. The protection of qualified immunity applies regardless of whether the government official’s error is a mistake of law, mistake of fact, or a mistake based on mixed questions of law and fact.) Findings of Fact and Conclusions of Law, pp. 6-7.

As a matter of federal Indian law, an Indian Tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998). *See, also, Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), a suit in Federal court for declaratory and injunctive relief against the Tribe under the ICRA, which suit was barred by the Tribe’s sovereign immunity. A Tribe’s immunity extends to individual Tribal officials acting in their representative capacity and within the scope of their authority thereby barring suits against Tribal officers. *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985). A Tribal Judge, acting within course

of his official duties is shielded by absolute judicial immunity in the case of a complaint for declaratory judgment and injunction. *Moss v. Busman*, Slip Copy, 2009 WL 891867 (D.S.D.).

A review of the facts and law of the case as set forth in the Complaint and in the arguments of the parties demonstrate that judicial immunity shields Bear Don't Walk from lawsuit on the matter of whether she had authority to act solely in the administration of the Tribal bar examination. A review of the character of the act, *i.e.*, the sole administration of a Tribal bar examination by the Chief Appellate Judge, without direct participation by a panel of three Court of Appeals judges, demonstrates that the duties of preparing, conducting, grading and completing the bar admission process are within the authority of the Appellate Judge. The bar exam conducting and grading process is not distinguishable from, nor is it exclusive apart from the Crow bar examination application process. They are part and parcel to the whole, the goal being to prepare, examine and license a successful applicant to practice in the Courts. All phases must be successfully completed before one gains a right to practice before the Crow Court system. When one is licensed to practice, there is no separate requirement for the attorney or advocate to practice in the trial court as opposed to the Court of Appeals.

The trial judge erred in his legal conclusion that judicial immunity does not attach to the acts of the Appellate Judge in the administration of the Crow Tribal bar exam. Harris can demonstrate no waiver of sovereign immunity. The acts of the Appellate Judge were, clearly, judicial acts, acts conducted in the normal course of duties of the Appellate Judge. Although the acts did not include going to court and conducting a trial in the matter, the acts were "judicial" in nature. The facts set forth in the Complaint do not set forth "clearly established" rights. To establish a procedural due process violation, the Plaintiff is required to demonstrate three elements: (1) that he had a life, liberty or property interest protected by the due process clause of

the constitution; (2) that he was deprived of that protected interest within the meaning of the due process clause; and (3) that the (Tribe) did not afford him adequate procedural rights before depriving him of his protected interest. See, *Med. Corp. Inc., v. City of Lima*, 296 F.3d 404,409, (6th Cir. 2002); *Martin v. Little River Band of Ottawa Indians*, Case No. 09248GC, page 6 (July 7, 2010). It is well-settled law that an applicant who may sit for the bar examination again has not been deprived of “substantial rights.” *Matter of Bowman*, 269 Ga. 721, 722 507 S.E. 2d 438-39 (1998). Harris had a right to take the bar exam, once he qualified, but he could not gain a vested due process right (property right) to practice in the Crow court system until he would actually pass the Tribal bar exam. Harris did have a right to attempt to pass the bar exam once he qualified as an applicant. Because he could not assert that he definitively passed the bar exam and because he could not demonstrate that he had, in fact, passed the bar exam, however, Harris could not claim a property right, to include loss of wages or other damages, thus precluding him from setting forth sufficient facts to make out a violation of constitutionally protected rights.

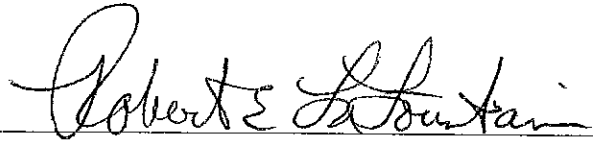
This Court, therefore holds that the Tribal Court erred as a matter of law when it held that Bear Don’t Walk was not protected from lawsuit by judicial immunity. This is sufficient grounds to dispose of this appeal by reversing the Tribal Court. This Court holds that whether or not the guidelines are clear for administration of the Tribal bar examination by the Appellate Judge solely or Court of Appeals panel, the underlying lawsuit is barred by the judicial immunity which shields the Appellate Judge.

Case is Reversed and Remanded

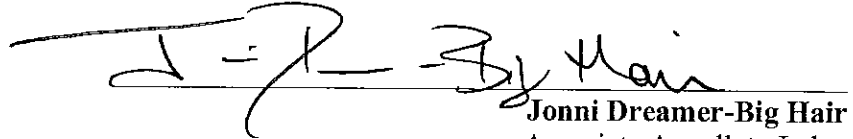
The Tribal Court’s injunction against Bear Don’t Walk is discharged and VACATED. The Tribal Court’s Findings of Fact and Conclusions of Law, dated 23 July, 2010, denying the Defendant’s motion to dismiss is **REVERSED**, and this case is **REMANDED** to the Tribal

Court with directions to dismiss the case with prejudice. The action is not deemed a manipulative or frivolous lawsuit in that there are issues worthy of consideration posed by the pleadings and neither party is awarded costs of suit or attorney fees.

DONE and DATED this 6th day of March, 2012.



Robert E. LaFountain
Acting Appellate Judge



Jonni Dreamer-Big Hair
Associate Appellate Judge



Sheila Wilkinson Not Afraid
Associate Appellate Judge