

No. 11-508

Supreme Court, U.S.
FILED

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In The
Supreme Court of the United States

OMAHA TRIBE OF NEBRASKA
a/k/a OMAHA NATION,

Petitioner,

v.

STOREVISIONS, INC.,

Respondent.

**On Petition For Writ Of Certiorari
To The Nebraska Supreme Court**

**BRIEF IN OPPOSITION TO THE
PETITION FOR WRIT OF CERTIORARI**

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**COUNTERSTATEMENT OF
QUESTION PRESENTED**

Respondent objects to the question presented in the Petition. The question presented by the Petition is:

Is apparent authority sufficient to bind an Indian tribe to a waiver of the tribe's federally protected sovereign immunity, when the purported waiver is executed by a tribal official acting outside the scope of his actual authority?

Respondent presents the question as follows:

When tribal law is silent regarding who has authority to waive sovereign immunity, does state law or federal common law apply in determining who has authority to waive tribal immunity?

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**BRIEF IN OPPOSITION TO THE
PETITION FOR A WRIT OF CERTIORARI**

StoreVisions, Inc. respectfully submits this brief in opposition to the petition for a writ of certiorari to review the judgment of the Nebraska Supreme Court. The Nebraska Supreme Court correctly applied general principles of agency when it decided that two tribal officials had apparent authority to waive sovereign immunity for the Omaha Tribe of Nebraska where tribal law was silent on the issue.

STATEMENT OF THE CASE

On October 9, 2009, StoreVisions, Inc. filed a Complaint against Omaha Tribe of Nebraska in the District Court of Thurston County, Nebraska, docketed at Case No. CI09-116. The Complaint alleged eleven separate causes of action for breach of contract based upon eleven separate contracts and/or written proposals entered into between the parties beginning in April of 2008. In the Complaint, StoreVisions, Inc. alleged that the Omaha Tribe of Nebraska (“Tribe”) signed a waiver of its sovereign immunity, consenting to the jurisdiction of the district court.

In December of 2007, prior to entering into any contract or written proposal with Omaha Tribe of Nebraska, StoreVisions, Inc. presented Omaha Tribe of Nebraska with a written waiver of its sovereign immunity. On January 7, 2008, the Tribal Council Chairman and Vice Chairman for the Omaha Tribe

of Nebraska signed this waiver in the presence of three other Tribal Council Members, as well as StoreVisions, Inc.'s principals, at the Tribal Meeting Room located at Omaha Tribe of Nebraska's headquarters in Macy, Nebraska.

On October 19, 2009, Omaha Tribe of Nebraska moved to dismiss StoreVisions, Inc.'s Complaint, alleging that it had not waived its immunity and that the district court therefore lacked jurisdiction. The district court denied Omaha Tribe of Nebraska's motion. The Nebraska Supreme Court affirmed the district court's decision.

The Nebraska Supreme Court determined that the only question on appeal was whether Omaha Tribe of Nebraska waived its sovereign immunity. App. 15. The Nebraska Supreme Court relied on the decision of *Rush Creek Solutions v. Ute Mountain Ute Tribe*, 107 P.3d 402 (Colo. App. 2004) in deciding that the Tribal Council Chairman and Vice Chairman had apparent authority to waive the Omaha Tribe of Nebraska's sovereign immunity. App. 16. In conducting the apparent authority analysis, the Nebraska Supreme Court relied upon a Nebraska case, *Koricic v. Beverly Enters*, 773 N.W.2d 145 (Neb. 2009). App. 17-18.

REASONS FOR DENYING THE PETITION

Certiorari should be denied for two reasons. First, the decision of the Nebraska Supreme Court

does not ignore decisions of this Court, decisions of the U.S. Court of Appeals, and other state courts in deciding whether apparent authority applies when tribal law is silent regarding who has authority to waive sovereign immunity. Second, the practical effect of the decision below is correct, even if federal common law principles of agency should apply when deciding who has authority to waive sovereign immunity when tribal law is silent on the issue.

I. THE DECISION OF THE NEBRASKA SUPREME COURT DOES NOT IGNORE PREVIOUS AUTHORITY OF THIS COURT, THE U.S. COURT OF APPEALS, OR OTHER STATE COURTS

This Court has not specifically addressed the issue of whether federal common law or state law agency principles apply where tribal law is silent or ambiguous regarding who has authority to waive sovereign immunity. *See The Stillaguamish Tribe of Indians v. Pilchuck Group II, LLC*, 2011 U.S. Dist. LEXIS 101222, 15-20 (W.D. Wash. Sept. 7, 2011). The United States District Court for the Western District of Washington acknowledged that “. . . other federal courts have readily deferred to tribal law, at least where tribal law provides explicit rules regarding sovereign immunity waivers.” *Id.* at 17.

The *Stillaguamish* court suggests the following:
1) where tribal law includes specific provisions governing immunity waivers, federal courts should

respect those provisions; 2) state law plays no role in deciding whether a Tribe has waived sovereign immunity; and 3) federal common law could apply where tribal law is silent or ambiguous on the issue of who has authority to waive sovereign immunity.

In the present case, tribal law is silent on this issue of sovereign immunity waivers. Thus, the Nebraska Supreme Court could not look to tribal law to determine whether the Chairman and Vice Chairman had authority to waive the Omaha Tribe of Nebraska's sovereign immunity. Instead, the Nebraska Supreme Court, relying on the decision of *Rush Creek Solutions v. Ute Mountain Ute Tribe*, 107 P.3d 402 (Colo. App. 2004), applied general agency principles to determine that the Chairman and Vice Chairman had apparent authority to waive the Tribe's sovereign immunity. The Nebraska Supreme Court cited the following definition of apparent authority:

For apparent authority to exist, the principal must act in a way that induces a reasonable third person to believe that another person has authority to act for him or her. App. 18

The definition cited by the Nebraska Supreme Court closely resembles federal common law. *See Asher v. Chase Bank United States, N.A.*, 310 Fed. Appx. 912, 919-920 (7th Cir. Ill. 2009). ("Illinois law and federal common law are in accord with the Restatement (Second) of Agency on the issue of apparent authority. *Opp v. Wheaton Van Lines, Inc.*, 231 F.3d 1060, 1064 (7th Cir. 2000). Apparent authority arises

when the principal's words or conduct cause a third person to reasonably believe that the putative agent's conduct on the principal's behalf is authorized.").

Just as in *Rush Creek, infra*, the Nebraska Supreme Court appropriately found that the words, actions, and conduct of the Tribe, reasonably interpreted, would and did cause StoreVisions, Inc. to believe that the Tribe consented to have the Waiver signed on the Tribe's behalf by its two highest members: the Chairman and Vice Chairman. Both of these individuals held themselves out as the Tribe's ultimate authorities and acted with apparent, if not actual, authority in assenting to the waiver of sovereign immunity.

Moreover, just as in the *Rush Creek* case, the Constitution and Bylaws of the Omaha Tribe of Nebraska are completely silent with regard to waivers of sovereign immunity and who had authority to sign such a waiver on behalf of the Tribe. Because nothing in the Tribe's constitution expressly addresses authority to waive sovereign immunity and nothing expressly refutes or prohibits it, the Nebraska Supreme Court determined it was reasonable for StoreVisions, Inc. to rely upon the words and actions of the Tribe with respect to the waiver of immunity.

In the present case, the words, conduct, and deeds of the Omaha Tribal Council Chairman and Vice Chairman, as well as the words, conduct, and deeds of three of their five council members who reviewed the Waiver and were present when it was

signed, establishes that the Tribe's Chairman and Vice Chairman had authority to sign the Waiver at issue in this case. StoreVisions, in good faith, relied upon their belief that the Chairman and Vice Chairman had authority to sign the waiver, as such authority was represented to them at all times by not only the Tribe's two highest members, but also by three of the five other council members.

It cannot be understated in this case that five out of seven of the Tribal Council Members, including the two top ranking members, were present when the Waiver was signed. All members present reviewed the Waiver and watched while both the Chairman and Vice Chairman signed. Moreover, StoreVisions' principals traveled to the Tribe's tribal headquarters and met in the tribal council meeting room where a quorum of the council was present. The sole purpose of the meeting was for the Waiver to be reviewed by the Omaha Tribal Council and executed. Such behavior on the part of the Tribal Council would most certainly induce a reasonable person to believe that the Council had authority to act, and the Nebraska Supreme Court properly found that StoreVisions' reliance upon the words, actions, and deeds of the Tribe with respect to the waiver of immunity was reasonable.

II. THE DECISION OF THE NEBRASKA SUPREME COURT IS CORRECT

Ultimately, whether the Nebraska Supreme Court applied state law or federal common law principles of

agency is irrelevant because the outcome would be the same. As stated above, the Nebraska state law agency principles closely resemble federal common law principles of agency. The application of federal common law would not change the outcome of this case. The Nebraska Supreme Court applied general principles of agency, and was correct in concluding that apparent authority existed.

◆

CONCLUSION

It is clear that the principles of agency law were properly applied in finding that Omaha Tribe of Nebraska's Chairman and Vice Chairman had apparent authority to execute the waiver of sovereign immunity on behalf of the Tribe. For the reasons stated herein, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

StoreVisions, Inc., Respondent

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