TURNER v. MARTIRE

Reginald TURNER et al., Plaintiffs and Appellants, v. Jeffrey MARTIRE et al., Defendants and Respondents.

No. E026082.

-- July 13, 2000

Court of Appeal, Fourth District, Division 2, California.

Davis, Cowell & Bowe, Elizabeth A. Lawrence, Michael T. Anderson, and Florence E. Culp, San Francisco, for Plaintiffs and Appellants.Levine & Associates, Jerome L. Levine, Erin M. Copeland, Los Angeles, and Frank R. Lawrence, Sacramento, for Defendants and Respondents.

OPINION

Plaintiffs Reginald Turner and Steve Guzman appeal from an order quashing service and dismissing their tort action against defendants Jeffrey Martire, Michael Turner, and Robert Mezzie. The principal issue is whether the trial court correctly ruled that defendants, as law enforcement officers of an Indian tribe, were protected by the tribe's sovereign immunity against liability for allegedly assaulting and improperly detaining plaintiffs.

As we will discuss, immunity generally has been afforded to tribal officials acting in their official capacity. However, federal case law shows that this immunity has its roots in the common law immunity traditionally afforded public officials for their discretionary acts in the performance of their duties, rather than in the absolute immunity enjoyed by tribes themselves. We therefore conclude that to establish immunity defendants were required to show their conduct was discretionary in nature and within the scope of their official duties. Finding insufficient evidence on the present record to make the required showing, we reverse.

I

FACTUAL AND PROCEDURAL BACKGROUND

The San Manuel Band of Mission Indians (Tribe), a federally recognized Indian tribe, owns and operates the San Manuel Indian Bingo and Casino, a gaming facility located on the Tribe's reservation in San Bernardino County, California. Defendants are tribal law enforcement officers, but are not members of the Tribe.

Plaintiffs are union organizers. On February 10, 1999, plaintiffs were at the bingo and casino facility to speak with employees about their legal rights. Plaintiff Turner was taking photographs to document his activities.

According to the complaint, defendant Martire approached Turner, demanded his camera, and pushed him. Martire instructed the other defendants to force Turner to the ground and take his camera. Several defendants, their names unknown, pushed Turner to the ground, handcuffed him, struck and kicked him, rammed his head into a wall, and sprayed pepper spray into his face and chest. Several defendants opened Turner's camera and exposed the film. At the direction of Martire, various defendants then forced both plaintiffs into a trailer office, detained and arrested them, and caused them to be detained by county sheriff's deputies without probable cause. Plaintiffs allege defendants took these actions because they opposed plaintiffs' efforts to inform the casino employees of their collective bargaining rights and because plaintiffs opposed an initiative measure authorizing Indian gaming.

Plaintiffs brought suit for damages for assault and battery, false imprisonment, conversion, and violation of civil rights pursuant to Civil Code section 51.7.[1] Defendant Mezzie moved to quash service of summons, on the ground the court lacked personal and subject matter jurisdiction due to tribal sovereign immunity. The court granted the motion, and the parties stipulated the ruling would apply to defendants Martire and Turner as though they had joined in Mezzie's motion.

II

DISCUSSIONA.-B.**

C. Immunity of Tribal Employees

We turn now to the central issue in the case -- whether the Tribe's immunity extended to the individual defendants. Tribal immunity is a matter of federal law. (Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc. (1998), 523 U.S. 751, 759, 118 S.Ct. 1700, 1705, 140 L.Ed.2d 981.) The United States Supreme Court has stated as a general matter that immunity "does not immunize the individual members of the Tribe." (Puyallup Tribe, Inc. v. Dept. of Game of State of Wash. (1977) 433 U.S. 165, 172, 97 S.Ct. 2616, 2621, 53 L.Ed.2d 667, fn. omitted; accord, Santa Clara Pueblo v. Martinez (1978) 436 U.S. 49, 59, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106.)

However, lower federal court decisions have extended immunity to "tribal officials when acting in their official capacity and within their scope of authority." (United States v. State of Or. (9th Cir.1981) 657 F.2d 1009, 1012, fn. 8; accord, Hardin v. White Mountain Apache Tribe (9th Cir.1985) 779 F.2d 476, 479.) It appears the California Supreme Court has endorsed this view. In Boisclair, the court held that individual tribal officers would not be liable if their acts did not exceed the proper scope of tribal self-government and thus were within their sovereign authority. (Boisclair v. Superior Court (1990) 51 Cal.3d 1140, 1158, 276 Cal.Rptr. 62, 801 P.2d 305.) This court recently held the chief executive officer of a tribe was protected by immunity where it was alleged he was acting within the scope of his agency and employment. (Trudgeon v. Fantasy Springs Casino (1999) 71 Cal.App.4th 632, 643, fn. 3, 644, 84 Cal.Rptr.2d 65.)

Plaintiffs acknowledge the general principle affording immunity to tribal officials acting within their authority. They contend, however, that (1) defendants were not the kind of "tribal officials" to whom immunity extends, and (2) in any event, defendants did not act within the scope of their authority in the incidents involving plaintiffs.

1. Immunity of tribal officials

In Baugus v. Brunson (E.D.Cal.1995) 890 F.Supp. 908 (hereafter, Baugus), the court held a tribal security officer, who was not a member of the tribe, was not a "tribal official" entitled to immunity in a civil rights action under 42 United States Code sections 1983 and 1985. The court stated the term "tribal official" was "virtually always used to denote those who perform some type of high-level or governing role within the tribe." It noted that cases in which the term had been used more expansively had invariably involved tribal members. (Baugus, supra, at pp. 911-912.)

Other courts have reached varying conclusions as to whether immunity should extend to tribal law enforcement officers. In Otterson v. House (Minn.App.1996) 544 N.W.2d 64, the court held a security guard for a tribally chartered corporation was not immune because his employment was "merely ministerial" and his tortious act did not relate to policymaking. (Id., at p. 66.) Two other courts appear to have assumed, without discussion, that tribal immunity covers law enforcement officers performing their official duties. (Suarez v. Newquist (1993) 70 Wash.App. 827, 832, 855 P.2d 1200, 1204 [tribal police officer entitled to immunity for injury arising from transportation of victim]; Romero v. Peterson (10th Cir.1991) 930 F.2d 1502, 1505 [law enforcement officers who had been cross-deputized with Bureau of Indian Affairs and Indian pueblo would have a "substantial argument" for invoking tribal immunity if they were "tribal actors" when they allegedly beat arrestee].)

Plaintiffs assert Baugus is persuasive authority for rejecting immunity here. Defendants assert Baugus is at odds with Ninth Circuit Court of Appeals precedent, notably Snow v. Quinault Indian Nation (9th Cir.1983) 709 F.2d 1319 (hereafter, Snow), Hardin v. White Mountain Apache Tribe, supra, (9th Cir.1985) 779 F.2d 476 (hereafter, Hardin), and Davis v. Littell (9th Cir.1968) 398 F.2d 83 (hereafter, Davis).

Snow held immunity extended to a "Tribal Revenue Clerk." (Snow, supra, 709 F.2d at p. 1322.) As defendants point out, the court did not condition immunity on a showing that the clerk was required to exercise discretion in performing her official duties for the tribe. Snow, however, was an action challenging a tax on business activities within the tribe's reservation. There was no claim that the clerk was liable in her individual capacity; she was sued only in her official capacity. (Ibid.) The court therefore held the case came within the rule established in Larson v. Domestic & Foreign Corp. (1949) 337 U.S. 682, 688, 69 S.Ct. 1457, 1460-1461, 93 L.Ed. 1628 (hereafter, Larson) that sovereign immunity may not be avoided by nominally suing an individual when the suit is, in substance, to compel action by the sovereign. (Snow, supra, citing Larson, supra.)

As the Supreme Court in Larson made clear, in such a case it is the sovereign's immunity that bars the suit, not the immunity of the individual public officer. Whether the officer would have

personal immunity against a claim for damages for his or her own actions is a wholly separate question. (Larson, supra, 337 U.S. at pp. 686-688, 69 S.Ct. at pp. 1460-1461.) Snow therefore cannot be read as holding that personal immunity attaches without regard to the nature of a tribal officer's official duties.

In Hardin, the plaintiff sued a tribe and "various officials" after tribal police removed him from the reservation. (Hardin, supra, 779 F.2d at p. 478.) The court held the individual defendants were immune. (Id., at pp. 479-489.) However, although the caption of the opinion indicates the tribal police department was named as a defendant, the opinion does not state whether individual police officers were named, nor does it address specifically the issue of whether tribal police should be immune. Therefore, Hardin cannot be construed as holding that immunity extends to tribal police.

Defendants' remaining case authority, Davis, is particularly significant because it is the earliest decision, to our knowledge, that extended immunity to a tribal official. Subsequent decisions typically rely on Davis (or decisions relying on Davis) in holding that tribal officials acting in their official capacity and within their authority are immune. (See, e.g., United States v. Oregon, supra, 657 F.2d 1009, 1013, fn. 8 [citing Davis]; White Mountain Apache Indian Tribe v. Shelley (1971) 107 Ariz. 4, 7-8, 480 P.2d 654, 657-658 [citing Davis]; Snow v. Quinault Indian Nation, supra, 709 F.2d 1319, 1321 [citing United States v. Oregon, supra]; Imperial Granite Co. v. Pala Band of Mission Indians (9th Cir.1991) 940 F.2d 1269, 1271 [citing United States v. Oregon, supra].)

In Davis, the court held that a nontribal member employed as the tribe's general counsel could not be sued for making a defamatory statement to the tribal council about his assistant. The court reasoned that, even though the general counsel was employed under a contract and therefore did not hold a "public office" in the ordinary sense, his position did encompass "public duties, official in character." Accordingly, protection against liability for defamation was justified by "the public need for the performance of public duties untroubled by the fear that some jury might find performance to have been maliciously inspired." (Davis, supra, 398 F.2d at p. 85.)

Defendants contend that under Davis, tribal law enforcement officers should be immune, because they, like the general counsel in Davis, perform "public duties, official in character." To determine whether defendants' argument is valid, we need to examine the basis for the extension of immunity to the individual defendant in Davis.

Davis relied on United States Supreme Court authority holding public officers absolutely privileged against liability for defamatory statements made in the performance of their duties. (Barr v. Matteo (1959) 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434) (hereafter, Barr); Spalding v. Vilas (1896) 161 U.S. 483, 16 S.Ct. 631, 40 L.Ed. 780.) In Barr, a plurality of the court concluded the privilege available to the officer in such a case should not be restricted to executive officers of cabinet rank. (Barr, supra, at p. 572, 79 S.Ct. 1335.)"It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted - the relation of the act complained of to 'matters committed by law to his control or supervision,' [citation] - which must provide the guide in delineating the scope of the rule ."

(Id., at pp. 573-574, 79 S.Ct. 1335.) The court noted that the defendant in Barr, though not a cabinet officer, was "an official of policy-making rank." (Id., at pp. 575, 79 S.Ct. 1335.)

After Davis was decided, the Supreme Court further refined the absolute immunity afforded public officials under Barr. In Westfall v. Erwin (1988) 484 U.S. 292, 108 S.Ct. 580, 98 L.Ed.2d 619 (hereafter, Westfall), the court reversed a summary judgment for the defendants, federal employees who worked as supervisors at an Army depot, in a state court negligence action arising from a workplace injury to a civilian employee. The court held that "absolute immunity from state-law tort actions should be available only when the conduct of federal officials is within the scope of their official duties and the conduct is discretionary in nature." (Id., at pp. 297-298, 108 S.Ct. 580, italics added.)

The Westfall court observed that "official immunity comes at a great cost. An injured party with an otherwise meritorious tort claim is denied compensation simply because he had the misfortune to be injured by a federal official." (Westfall, supra, 484 U.S. at p. 295, 108 S.Ct. 580.) The court further observed that "[t]he central purpose of official immunity, promoting effective government, would not be furthered by shielding an official from state-law tort liability without regard to whether the alleged tortious conduct is discretionary in nature." (Id., at p. 296, 108 S.Ct. 580.) To escape liability, therefore, the official must exercise more than " 'minimal discretion' "; otherwise virtually all official acts would be immunized. (Id., at p. 298, 108 S.Ct. 580.)

In the case before it, the Westfall court held, summary judgment was improper because the plaintiff had asserted the defendants' duties only required them " 'to follow established procedures and guidelines' " and that they were " 'not involved in any policy-making work.' " The defendants, who had the burden of proving they were immune, had not presented "any evidence relating to their official duties or to the level of discretion they exercise." (Westfall, supra, 484 U.S. at p. 299, 108 S.Ct. 580.)

The application of the Westfall rule to federal officials was superseded in 1988 by the enactment of the Federal Employees Liability Reform and Tort Compensation Act. That act eliminated the discretionary conduct requirement and conferred absolute immunity on federal employees for common law tort claims, relegating claimants to an action against the government under the Federal Tort Claims Act. (28 U.S.C. § 2679(b), (d); see Pani v. Empire Blue Cross Blue Shield (2d Cir.1998) 152 F.3d 67, 72.) However, "the Westfall test remains the framework for determining when nongovernmental persons or entities are entitled to the same immunity." (Pani, supra, at p. 72.)

Defendants, while they are law enforcement officers of a federally recognized tribe, manifestly are not federal officials. Therefore, their right to immunity remains a matter of common law. As the Ninth Circuit Court of Appeals has stated, "Tribal immunity has been described as 'the common-law immunity from suit traditionally enjoyed by sovereign powers.' [Citation.] A necessary first step in the analysis is determining the scope of sovereign immunity at the common law." (In re Greene (9th Cir.1992) 980 F.2d 590, 593.) The Westfall rule represents the Supreme Court's most recent formulation of the scope of common law immunity for government officials. In the absence of further guidance from that court as to the appropriate

standard for determining immunity of tribal officials, we conclude the Westfall standard should govern.[3]

The remaining question is the extent to which immunity under that standard extends to tribal law enforcement officers. Under Westfall, immunity depends on whether an official's tortious conduct is discretionary in nature. Police officers as a group have never been afforded absolute common law immunity (Pierson v. Ray (1967) 386 U.S. 547, 555 [87 S.Ct. 1213, 1218, 18 L.Ed.2d 288]; Falls v. Superior Court (1996) 42 Cal.App.4th 1031, 1038, 49 Cal.Rptr.2d 908), perhaps in recognition of the fact that not all of their duties are inherently discretionary. On the other hand, it is recognized that police officers, like other public officials, "exercise some discretionary functions while carrying out their executive duties." (Walden v. Carmack (8th Cir.1998) 156 F.3d 861, 869.)[4] Thus, in actions alleging violations of constitutional rights under 42 United States Code section 1983 (section 1983), police officers enjoy the same qualified immunity afforded most public officials as a matter of common law, i.e., they are immune unless their conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known. (Ibid.) The rationale for affording a measure of immunity to police and other officials is that, while they may err in the performance of their duties, "it is better to risk some error and possible injury from such error than not to decide or act at all." (Scheuer v. Rhodes (1974) 416 U.S. 232, 242, 94 S.Ct. 1683, 1689, 40 L.Ed.2d 90.)[5]

We therefore disagree with Baugus to the extent it suggests tribal law enforcement officers necessarily cannot be immune because they do not occupy a "high-level or governing role within the tribe." (Baugus, supra, 890 F.Supp. 908, 911.) Rather, under Westfall, "immunity attaches to particular official functions, not to particular offices." (Westfall, supra, 484 U.S. at p. 296, fn. 3, 108 S.Ct. 580; accord, Pani v. Empire Blue Cross Blue Shield, supra, 152 F.3d 67, 72.) The court therefore must look to the functions of the officer, not merely to his or her position in the tribal hierarchy.

We also disagree with the suggestion in Baugus that a more expansive standard for immunity may apply to officials who are tribal members. (Baugus, supra, 890 F.Supp. 908, 911.) As stated, ante, the United States Supreme Court has repeatedly held that tribal immunity does not extend to individual tribal members. Any immunity tribal officials may enjoy emanates from the need to protect their discretionary performance of their official duties, not from their status as tribal members.

Applying the Westfall standard - whether the tortious conduct was discretionary in nature - to the record before us, we conclude, as did the court in Westfall, that the evidence does not sustain a finding of immunity. The only evidence as to the nature of defendants' official duties was a declaration stating that tribal law enforcement officers, including Mezzie, enforce tribal laws and provide security for all tribal lands, including tribal government offices, public reservation roads, the bingo and casino facilities, and the residential areas of the reservation.[6]

In short, defendants' evidence established no more than the fact they performed ordinary law enforcement duties. There was no evidence from which it could be inferred that defendants' alleged tortious conduct was discretionary in nature, as required by Westfall. There was no

evidence, for example, that defendants had discretion to determine the appropriate response of the Tribe to on-reservation labor organizing activities such as those of plaintiffs.

Undoubtedly, defendants exercised some discretion in their conduct toward plaintiffs. However, there is no basis for concluding this was more than the kind of "minimal discretion" ruled insufficient in Westfall. (Westfall, supra, 484 U.S. at pp. 298-299, 108 S.Ct. 580.) We therefore conclude defendants failed to establish they qualified as tribal officials for purposes of immunity.

2.-3.***

III

DISPOSITION

The order appealed from is reversed. Appellants shall recover their costs on appeal.

FOOTNOTES

1. Civil Code section 51.7, in relevant part, provides that all persons have the right to be free from any violence, or intimidation by threat of violence, committed because of their political affiliation or position in a labor dispute.

FOOTNOTE. See footnote *, ante.

3. Defendants asserted at oral argument that application of the Westfall standard is unprecedented and at odds with the federal decisions holding that immunity extends to tribal officials acting in their official capacities. Our own review of federal case law reveals no inconsistency between application of the Westfall standard and the general recognition of official immunity. Defendants have cited no decision, and we are aware of none, holding that any individual employed by or affiliated with a tribe is absolutely immune from tort liability for acts in the course of his or her duties, without regard to the nature of those duties. And although no case has expressly adopted the Westfall standard as a test for immunity of tribal officials, the basis for immunity set forth in the Ninth Circuit's seminal decision in Davis -- "the public need for the performance of public duties untroubled by the fear that some jury might find performance to have been maliciously inspired" (Davis, supra, 398 F.2d at p. 85) -- wholly supports application of the Westfall standard. Official duties which are sufficiently sensitive that they cannot be effectively performed unless the actors are protected from later inquiry into their motivations, such as the communications between the general counsel and the tribal council in Davis, are virtually certain to qualify as "discretionary" conduct under Westfall.

4. Though not strictly relevant to our analysis of federal law, it is interesting to note that, under California law, public officials had common law immunity for their discretionary acts, and now have such immunity by statute. (Caldwell v. Montoya (1995) 10 Cal.4th 972, 979-984, 42 Cal.Rptr.2d 842, 897 P.2d 1320; Gov.Code, § 820.2.) This immunity has been applied to acts of law enforcement in the course of their ordinary duties. (See Bratt v. City and County of San

Francisco (1975) 50 Cal.App.3d 550, 553, 123 Cal.Rptr. 774 [decision to pursue fleeing vehicle]; Michenfelder v. City of Torrance (1972) 28 Cal.App.3d 202, 206-207, 104 Cal.Rptr. 501 [failure to take action to prevent crime].) A recent decision, however, held officers were not immune under Government Code section 820.2 against claims for assault and battery and other torts in connection with a mistaken arrest. The court stated immunity under section 820.2 only covers " 'basic policy decisions.' " (Bell v. State of California (1998) 63 Cal.App.4th 919, 929, 74 Cal.Rptr.2d 541.)

5. The fact police officers enjoy only qualified immunity in section 1983 actions does not militate against affording tribal law enforcement officers absolute immunity against common law tort liability to the extent their tortious acts fall within the discretionary conduct standard articulated in Westfall. Different standards apply in determining immunity for constitutional violations than for common law torts. (See Butz v. Economou (1978) 438 U.S. 478, 495, 98 S.Ct. 2894, 57 L.Ed.2d 895.) Indeed, whereas Westfall would afford absolute tort immunity to all public officials to the extent their tortious acts are discretionary, absolute immunity for constitutional violations is reserved for only a small number of public officials, e.g., judges and prosecutors performing certain functions. (Asgari v. City of Los Angeles (1997) 15 Cal.4th 744, 756, 63 Cal.Rptr.2d 842, 937 P.2d 273.) We note a lower federal court prior to Westfall held federal law enforcement officers should have only qualified immunity even against liability for common law torts. (Martin v. Malhoyt (D.C.Cir.1987) 830 F.2d 237, 252.) However, the Martin court recognized its holding might be superseded by Westfall, which was then pending (Martin, supra, at p. 247), and in our view it was.

6. Defendants Martire and Turner produced no evidence as to their official duties. However, by stipulating that the court's finding of immunity as to Mezzie applied equally to Martire and Turner, plaintiffs effectively conceded that the evidence produced by Mezzie applied to Martire and Turner as well.

FOOTNOTE. See footnote *, ante.

RICHLI, J.

RAMIREZ, P.J., and McKINSTER, J., concur.