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The Cherokee Supreme Court

**Eastern Band of Cherokee Indians
Qualla Boundary, Cherokee, North Carolina**

FILED

ARIE J. BIRD,

APPELLANT,

V.

CSC-20-01

OPINION

**EASTERN BAND OF CHEROKEE INDIANS;)
TRIBAL COUNCIL CHAIRMAN ADAM)
WACHACHA, IN HIS OFFICIAL CAPACITY)
ONLY; COUNCIL MEMBER DAVID)
WOLFE, IN HIS OFFICIAL CAPACITY)
ONLY; COUNCIL MEMBER RICHARD)
FRENCH, IN HIS OFFICIAL CAPACITY)
ONLY; COUNCIL MEMBER ROBERT 'BO')
CROWE, IN HIS OFFICIAL CAPACITY)
ONLY; COUNCIL MEMBER TOMMYE)
SAUNOOKE, IN HER OFFICIAL CAPACITY)
ONLY; COUNCIL MEMBER ALBERT D.)
ROSE, IN HIS OFFICIAL CAPACITY ONLY;)
COUNCIL MEMBER LISA TAYLOR, IN)
HER OFFICIAL CAPACITY ONLY;)
COUNCIL MEMBER BOYD OWLE, IN HIS)
OFFICIAL CAPACITY ONLY; COUNCIL)
MEMBER TOM WAHNETAH, IN HIS)
OFFICIAL CAPACITY ONLY; COUNCIL)
MEMBER PERRY SHELL, IN HIS)
OFFICIAL CAPACITY ONLY; COUNCIL)
MEMBER BUCKY BROWN, IN HIS)
OFFICIAL CAPACITY ONLY; COUNCIL)
MEMBER JEREMY WILSON, IN HIS)
OFFICIAL CAPACITY ONLY;)**

AND

**EASTERN BAND OF CHEROKEE INDIANS)
TRIBAL ALCOHOL BEVERAGE CONTROL)
COMMISSION; COMMISSION CHAIRMAN)
PEPPER TAYLOR, IN HIS OFFICIAL)**

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CAPACITY ONLY; COMMISSION MEMBER)
BRENDA NORVILLE, IN HER OFFICIAL)
CAPACITY ONLY; COMMISSION MEMBER)
MARA NELSON, IN HER OFFICIAL)
CAPACITY ONLY; COMMISSION MEMBER)
BRUCE TOINEETA, IN HIS OFFICIAL)
CAPACITY ONLY; AND COMMISSION)
MEMBER CONSIE GIRTY, IN HER)
OFFICIAL CAPACITY ONLY,)
APPELLEES.)

David A. Sawyer, for Appellant Arie J. Bird.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Dale A. Curriden and Nevin Wisnoski, for Appellees Eastern Band of Cherokee Indians and Elected Members of the Tribal Council.

Gross Law Offices, by Mikael R. Gross, for Appellees Eastern Band of Cherokee Indians Tribal Alcohol Beverage Control Commission and Politically Appointed Members of the TABC Commission.

Presiding Chief Justice PIPESTEM, B. TOINEETA, on behalf of the Court.

Plaintiff-Appellant Arie J. Bird (Plaintiff) appeals pursuant to Cherokee Code (C.C.) § 7-2(e) from the 10 January 2020 order entered by Judge Randle L. Jones dismissing all claims alleged in Plaintiff's complaint with prejudice. Defendants-Appellees (Defendants) are all Tribal entities and Tribal officials, elected to Tribal office or appointed by the Principal Chief and confirmed by the Tribal Council, sued only in their official capacity.¹

The complaint that Plaintiff filed in the Cherokee Court (court) sought a declaratory judgment that Defendants violated his rights, injunctive relief in the form of reinstating him to his appointed Tribal office, damages, costs, and attorneys' fees stemming from Tribal Council's

¹ The named Tribal officials listed in the complaint, and in this appeal, include the elected members of Tribal Council and the appointed and confirmed members of the ABC Commission who were serving in the respective Tribal offices at the time Plaintiff filed his complaint in December 2018.

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decision to remove Plaintiff from the Tribal Alcohol Beverage Control Commission (TABC Commission or Commission) in December 2017 and the Commission's preceding decision to suspend him with pay and seek his removal from the Commission by Tribal Council. In the complaint, Plaintiff alleged that Tribal Council's decision to remove him from office by passing Resolution No. 68 (2017) by majority vote was wrongful, tortious, and retaliatory; and, further, that Tribal Council failed to provide him with sufficient due process before voting to remove him from office and during his subsequent protest hearing of said decision, thereby violating his rights under the Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301-1304 (2019). The complaint also alleged that prior to his removal from the TABC Commission by Tribal Council, the other TABC Commission members, without authority under Tribal law, suspended Plaintiff with pay from his office as a member appointed and confirmed to the Commission and sought his removal therefrom by Tribal Council without first providing him due process to address allegations of misconduct that were submitted to Tribal Council in what became Resolution No. 68 (2017), and that such action by the Commission was discriminatory, retaliatory, and wrongful.

Defendants contended that Plaintiff's complaint required dismissal because his removal from office by Tribal Council presented a nonjusticiable political question and because the claims alleged therein were barred by sovereign immunity. The court dismissed the complaint pursuant to Rule 12(b) of the North Carolina Rules of Civil Procedure concluding that the claims alleging improper removal from the Commission constituted a nonjusticiable political question. The court further concluded that Plaintiff's complaint also warranted dismissal because Plaintiff had failed to demonstrate that Tribal Council had expressly and unequivocally waived sovereign immunity with respect to the purported claims that Plaintiff sought to bring against Defendants and because

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he did not have a protected property interest in his position as a member of the TABC Commission. Plaintiff appealed from the court's 10 January 2020 order on 7 February 2020.

Upon careful review of the issues before this Court, we affirm the Cherokee Court's dismissal of all claims alleged in Plaintiff's complaint as set forth below.

BACKGROUND

Allegations in the Complaint

The complaint filed in the Cherokee Court on 19 December 2018 seeks to challenge the authority of the TABC Commission to suspend Plaintiff with pay and to seek his removal from the Commission, Tribal Council's December 2017 decision to remove Plaintiff from his political appointment to the TABC Commission, and the alleged lack of due process afforded to him by the Commission and Tribal Council in taking these actions, as well as Tribal Council's failure to "formally rule[] on [his] underlying objection" that he raised in his January 2018 petition challenging Tribal Council's decision — "that being his termination as a member of the Tribal ABC Commission." The complaint further asserts that "Plaintiff held a [purported] [c]onstitutionally protected property right in his position as a member of the Tribal ABC Commission and as an employee of the EBCI," and alleges four purported claims or causes of action against Defendants: (1) "[l]ibel and [s]lander," (2) "deprivation of private property rights without due process of law in violation of the [ICRA] and the US Constitution," (3) "[v]iolation of First Amendment [r]ight to [f]ree [s]peech" under the ICRA and (4) "[w]rongful [d]ischarge in [v]iolation of [p]ublic [p]olicy."

According to the complaint, Plaintiff was appointed to the TABC Commission in February 2016, served as its Chairman until October 2017, and continued as a member of the Commission

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until he was removed by Resolution No. 68 (2017) upon majority vote of the Tribal Council and ratification by the Principal Chief on 20 December 2017.

The complaint avers that, on or before 7 December 2017, all other members serving on the TABC Commission proposed a resolution to Tribal Council to remove Plaintiff from the Commission based on false allegations that he had committed violations of EBCI law and his oath of office, and that Tribal Council passed said proposal as Resolution No. 68 (2017), without either the Commission or Tribal Council providing him the opportunity to defend against said allegations. Plaintiff also alleges that the true reason that the TABC Commission sought his removal and Tribal Council removed him from his position on the Commission was in retaliation for Plaintiff stating in a public forum on or about 6 November 2017 that the TABC Commission was not properly issuing licenses to sell alcoholic beverages, and for Plaintiff making a report to the Tribe's Internal Audit Department (Internal Audit) on or about 7 November 2017 in which he asserted that other Commission members had violated EBCI laws. According to the complaint, the other members of the TABC Commission notified Plaintiff in writing that he was suspended with pay from the Commission "[w]ithin less than [sic] 36 hours" of his report to Internal Audit. Plaintiff contends that his suspension from the Commission was "without authority, and contrary to EBCI Ordinance [No.] 903, [and C.C.] § 18B-200." The complaint acknowledges that during the suspension Plaintiff remained an official member of the TABC Commission, although he "was devoid of any duties," that the Commission provided Plaintiff with a written document that made "various allegations which would later become the basis of EBCI Resolution [No.] 68," and that "[n]umerous paragraphs" in Resolution No. 68, "as adopted, are false as they pertain to Plaintiff."

The complaint further alleges that Tribal Council passed Resolution No. 68 (2017) removing Plaintiff from the TABC Commission based on one or more false allegations that he

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violated his oath of office and/or Tribal laws, and that Tribal Council violated his due process rights in his purported “[c]onstitutionally protected property right in his position as a member of the Tribal ABC Commission,” by passing said resolution after allowing him only five minutes to speak, which he contends was inadequate to defend against the accusations presented to Tribal Council. Additionally, Plaintiff’s complaint alleges that, after filing a timely protest of the decision on Resolution No. 68 (2017), his protest hearing held before Tribal Council on 24 January 2018 was abbreviated and problematic in numerous respects, including alleged failures by Tribal Council to (1) record the hearing for judicial review, (2) provide Plaintiff the opportunity to present a defense to the public allegations in Resolution No. 68 (2017) in an open session of Tribal Council, and (3) subpoena witnesses on behalf of Plaintiff, which he contends violated his ICRA due process rights in his purportedly protected property right in his political appointment as a member of the TABC Commission. Further, after the protest hearing, Tribal Council did not reverse its decision which removed Plaintiff for cause from the Commission.

With respect to Plaintiff’s “libel and slander” claim, the complaint alleges that, in the process of removing him from office, Defendants published and presented false information to the public wrongfully accusing him of violating Cherokee law and his oath of office which resulted in reputational damage and emotional injury. Regarding Plaintiff’s claim that his due process rights under ICRA were violated, the complaint relies on his allegation of a purported constitutionally protected property right in his position as a member of the TABC Commission and asserts that the process by which he was suspended and removed from office violated his rights to due process. Similarly, Plaintiff rests his third purported claim alleging a violation of his free speech rights under the First Amendment and the ICRA upon his contention that he purportedly had a protected property right in his office as a member of the Commission and contends that he was suspended

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by the Commission and later removed by Tribal Council in retaliation for publicly exercising his free speech rights in November 2017. The fourth and final purported claim alleges wrongful discharge in violation of public policy, whereby Plaintiff again relies upon his purported property right in his position on the Commission. Plaintiff's requested relief includes declaratory judgment, preliminary and permanent injunctions, compensatory and punitive damages, costs and attorneys' fees.

DISCUSSION

I. Standard of Review

Issues regarding whether a claim or action presents a nonjusticiable political question that precludes judicial review, and whether a claim or action brought against the Tribe, a Tribal entity, or Tribal officials in their official capacities is barred by the defense of tribal sovereign immunity are questions of subject matter jurisdiction under Rule 12(b)(1). *Blankenship v. E. Band of Cherokee Indians*, 16 Am. Tribal Law 30, 36-40 (E. Cherokee Sup. Ct. 2019) (per curiam) (addressing issue of whether the plaintiffs' claims presented a nonjusticiable political question as a question of subject matter jurisdiction under Rule 12(b)(1)); *Campos v. E. Band of Cherokee Indians*, No. CSC-19-06, slip op. at 36 (E. Cherokee Sup. Ct. Aug.7, 2024) (addressing the issue of whether the Tribe waived sovereign immunity as a question of subject matter jurisdiction under Rule 12(b)(1)). We review the court's order granting a Rule 12(b)(1) motion to dismiss de novo, which "means that the appellate court evaluates the materials without needing to pay deference to the lower court's order." *Teesateskie v. E. Band of Cherokee Indians Minors Fund*, 13 Am. Tribal Law 180, 185 (E. Cherokee Sup. Ct. 2015) (per curiam). This review allows the Court "to consider matters outside the pleadings and weighed by the lower court when coming to its conclusions in determining whether subject matter jurisdiction is properly asserted or denied." *Teesateskie*, 13

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Am. Tribal Law at 185 (citing *State ex rel. Cooper v. Seneca-Cayuga Tobacco Co.*, 197 N.C. App. 176, 181, 676 S.E.2d 579, 583 (2009)).

Similarly, de novo review is appropriate when this Court reviews a trial court's ruling on a Rule 12(b)(6) motion to dismiss. *Teesateskie*, 13 Am. Tribal Law at 188. In conducting this review, the Court must determine “whether, as a matter of law, the [factual] allegations of the complaint treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not.” *Campos*, CSC-19-06, slip op. at 31 (alteration in original) (quoting *Teesateskie*, 13 Am. Tribal Law at 188). “The reviewing court is not, however, required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences,” *Campos*, CSC-19-06, slip. op. at 31 (citing *Strickland v. Hedrick*, 194 N.C. App. 1, 20, 669 S.E.2d 61, 73 (2008)), and a court may properly dismiss a claim under this standard “if there is a want of law to support a claim of the sort made, an absence of facts sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim.” *Teesateskie*, 13 Am. Tribal Law at 188-89 (quoting *Dalenko v. Wake Cty. Dep't of Human Servs.*, 157 N.C. App. 49, 54-55, 578 S.E.2d 599, 603 (2003)).

II. Political Question

The political question doctrine distinguishes between matters that are exclusively committed to the province of a separate branch of government and are not appropriate for judicial inquiry, and those matters that require adjudication in a court of law. *E.g.*, *E. Band of Cherokee Indians ex rel. Enrolled Members v. Lambert*, 15 Am. Tribal Law 55, 62-63 (E. Cherokee Sup. Ct. 2018) (emphasizing that “courts should not become involved in ‘the appointment and removal of public officers’” and should avoid interfering “with the political choices of the EBCI legislative branch–Tribal Council”) (citation omitted); *Blankenship*, 16 Am. Tribal Law at 35-40; *see also*

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Nixon v. United States, 506 U.S. 224, 234-38, 113 S.Ct. 732, 738-40 (1993). “This Court [has] made plain that it is not the role of the Cherokee [c]ourts to adjudicate political questions.” *Blankenship*, 16 Am. Tribal Law at 36. Accordingly, we have previously held (1) that the issue of whether the Tribe’s Principal Chief “should be impeached and removed [from office] is a political question that we will not entertain,” *Lambert*, 15 Am. Tribal Law at 63, and (2) that a complaint filed in the Cherokee Court by former political appointees to the Tribal Gaming Commission (TGC) containing claims seeking to challenge their removal from office by Tribal Council, including the removal procedure employed by Tribal Council, “present[ed] a political question that was properly dismissed . . . under Rule 12(b)(1),” *Blankenship*, 16 Am. Tribal Law at 40 (holding that “Tribal Council has the power under the Cherokee Code to remove TGC commissioners from office with cause by majority vote,” that “[t]his power is exclusively committed to the political branches of tribal government, not the judiciary,” and that the plaintiffs’ claims challenging their removal from public office presented a nonjusticiable political question).

The TABC Commission is the independent arm of Tribal government that is responsible for administering Tribal laws governing the regulation, distribution, and issuance of permits for the sale of alcoholic beverages and providing for their enforcement. C.C. §§ 18B-100 to -1007 (2020). As a member of the TABC Commission, Plaintiff served as a tribal officer who was politically appointed by the Principal Chief and confirmed by Tribal Council for a term of specified years, took an oath of office administered to Commission members before assuming office, and was subject to removal for cause by a majority vote of Tribal Council. *See* Ord. No. 903 (2009) (codified at C.C. § 18B-200(b)-(c), (h) (2010)); *cf. Blankenship*, 16 Am. Tribal Law at 36 (stating that “[a] TGC commissioner is a tribal officer as evidenced by the Cherokee Code which states that a commissioner is appointed by the Principal Chief of the EBCI, subject to the approval of

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Tribal Council”). As we emphasized in *Blankenship*, Tribal officers hold “positions of ‘sacred public trust,’ not mere positions of employment with the [T]ribe.” *Blankenship*, 16 Am. Tribal Law at 37 (citations omitted). Here, as in *Blankenship*, the Cherokee Code unambiguously establishes the authority of Tribal Council to remove political appointees for cause by a majority vote of Tribal Council under C.C. § 18B-200(c) (providing, in pertinent part, that “[a]ll Commission members may be removed for cause by a majority vote of the Tribal Council”), which, like C.C. § 16-2.01(d), “is an express, textually demonstrable commitment of this responsibility to the legislative branch.” *Blankenship*, 16 Am. Tribal Law at 38 (citations omitted). And, under the express language of C.C. § 18B-200(c), Tribal Council is not required to provide a member of the TABC Commission with notice or a hearing prior to a decision to remove said officer for cause. *See Blankenship*, 16 Am. Tribal Law at 38 (indicating that “[u]nder the express language in [C.C.] § 16-2.01(d), Tribal Council is not required to provide [TGC commissioners] with notice or a hearing prior to [their] removal for cause,” opining that “[i]t is neither new nor novel for such power to remove a public officer, even without a hearing, to rest with lawmakers,” and noting that “Tribal Council has similar authority to remove Tribal Alcohol Beverage Control (ABC) commissioners . . . for cause by majority vote without notice and hearing”) (citing C.C. § 18B-200(c)). The power that Tribal Council has under the Cherokee Code to remove a member of the TABC Commission from office for cause by majority vote “is exclusively committed to the political branches of tribal government, not the judiciary,” therefore, any legal claims or causes of action challenging Tribal Council’s decision to remove a member of the TABC Commission from public office presents a nonjusticiable political question that requires dismissal by the Cherokee courts. *Blankenship*, 16 Am. Tribal Law at 40.

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Here, Plaintiff's complaint challenges Tribal Council's decision to remove him from office and contends that his removal from the Commission was, among other things, a wrongful discharge in violation of public policy for which he is entitled to judicial review and relief. To the extent that a plaintiff's claim requires a judicial inquiry to second-guess or reverse a decision that has been exclusively committed to the Tribal Council, said claim presents a political question that is nonjusticiable in the Cherokee courts, regardless of the plaintiff's attempts to relabel the claim or reclassify the issue as something else. The decision to remove a Tribal official from office for cause has been entrusted exclusively to Tribal Council under Cherokee law and presents a nonjusticiable political question. *See Blankenship*, 16 Am. Tribal Law at 40.

In sum, a tribal official like Plaintiff cannot prevent Tribal Council from removing him from office for cause by placing a tort label on a lawsuit, and the Cherokee courts cannot adjudicate Plaintiff's claim seeking to reverse Tribal Council's decision to remove him from the Tribal office which had been entrusted to him. Accordingly, the Cherokee Court correctly determined that Plaintiff's challenge to his alleged wrongful removal from public office by Tribal Council presented a nonjusticiable political question that must be dismissed under Rule 12(b)(1).

III. Sovereign Immunity

“‘Indian tribes[, like the EBCI,] have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers,’ and cannot be sued absent a waiver of tribal sovereign immunity effectuated by the United States Congress (Congress) or the tribe itself.” *Campos*, No. CSC-19-06, slip op. at 37 (alteration in original) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 1677 (1978)). “Courts also have routinely held that sovereign immunity is enjoyed by tribal entities or instrumentalities,” *Campos*, No. CSC-19-06, slip op. at 37 (citations omitted); *cf.* C.C. § 18B-200(g) (providing that “[t]he Commission, as an

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instrumentality of the Tribe, retains all of the Tribe's rights, privileges and immunities, including sovereign [immunity] from suit"). Regarding waivers of sovereign immunity under Cherokee law, Tribal Council has mandated:

The [Cherokee courts] shall dismiss any claim or cause of action against the [EBCI], or any of its programs, enterprises, authorities, officials, agents, or employees acting in their official capacities, unless the complaining party demonstrates that the Cherokee Tribal Council or . . . Congress has expressly and unequivocally waived the [EBCI's] sovereign immunity for such a claim in a written ordinance, law, or contract.

C.C. § 7-22 (2022).² Accordingly, because Defendants in this matter are the Tribe, its TABC Commission, and several Tribal officials sued only in their official capacities, Defendants are shielded by tribal sovereign immunity, and any purported claim or cause of action brought against Defendants must be dismissed unless Plaintiff “sufficiently demonstrates that Tribal Council or Congress expressly and unequivocally waived tribal sovereign immunity in one of three ways — a written ordinance, law, or contract.” *Campos*, No. CSC-19-06, slip op. at 38 (citation omitted).

Plaintiff's complaint contains scant allegations regarding any alleged waiver of tribal sovereign immunity that would allow Plaintiff to overcome the Tribe's defense of sovereign immunity and permit the Cherokee Court to adjudicate Plaintiff's alleged claims against Defendants as required under C.C. § 7-22. With respect to his purported claims, Plaintiff's complaint merely asserts that, “[u]pon information and belief,” the Tribe obtained liability insurance to cover damages “for cases such as these and, thus effected a limited waiver of any defense of sovereign immunity to the extent of coverage under the policy” in accordance with

² At the time of the lawsuit in the instant matter, this substantive provision was located in former C.C. § 7-13 (2018). Tribal Council subsequently recodified, but did not substantively amend, former C.C. § 7-13 as C.C. § 7-22. Ord. No. 186 (2022).

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Tribal law.³ This contention appears to rely upon the remedies potentially available to the court under C.C. § 1-2(g)(3) (stating that “[t]he Cherokee Court of Indian Offenses or any successor Cherokee Court shall exercise jurisdiction over actions against the [EBCI] seeking . . . [d]amages for tort claims where the Tribe maintains insurance coverage for such claims, with recovery not to exceed the amount of liability coverage maintained by the Tribe”), which this Court addressed in *Campos* wherein the Court concluded that Tribal Council did not waive sovereign immunity under C.C. § 1-2(g)(3) to allow a plaintiff to bring a tort claim or action against the Tribe, Tribal entities, or Tribal officials acting in their official capacities. *Campos*, No. CSC-19-06, slip op. at 71-72. Therefore, Plaintiff’s allegations in his complaint to that effect are not sufficient as a matter of law to demonstrate that Tribal Council expressly and unequivocally waived sovereign immunity for any purported tort claim or action that Plaintiff seeks to bring against Defendants. Accordingly, Plaintiff’s claims for libel and slander and for wrongful discharge in violation of public policy were properly dismissed by the court for lack of subject matter jurisdiction based on the defense of sovereign immunity.

Other than the complaint’s scant allegations of a purported waiver of sovereign immunity under C.C. § 1-2(g)(3), the complaint fails to make any allegations as to an alleged waiver of sovereign immunity by the Tribe under Cherokee law that would allow the Cherokee Court to adjudicate any of Plaintiff’s remaining purported claims in accordance with C.C. 7-22. To the extent that Plaintiff’s complaint cites C.C. § 1-2(a) and C.C. § 1-2(g)(1) as the alleged basis for the Cherokee Court’s jurisdiction over this matter, this Court notes that the complaint does not assert that the Tribe waived sovereign immunity pursuant to either of these statutes, and,

³ While Plaintiff’s complaint alleges that the Tribe purchased liability insurance with respect to all four purported claims, technically, the complaint only asserts that the purchase of insurance “effected a limited waiver of any defense of sovereign immunity” with respect to Plaintiff’s third and fourth purported claims.

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regardless, Plaintiff's assertion with respect to jurisdiction does not negate the mandate under C.C. § 7-22, which requires that Plaintiff sufficiently demonstrate that Tribal Council or Congress effectuated an express and unequivocal waiver of sovereign immunity under Cherokee law in order for the court to adjudicate such claims against the Tribe. *See Campos*, No. CSC-19-06, slip op. at 71-72.

IV. ICRA Claims

The ICRA provides, in pertinent part, that: "No Indian tribe in exercising powers of self-government shall . . . make or enforce any law . . . abridging the freedom of speech," 25 U.S.C. § 1302(a)(1), or "deprive any person of liberty or property without due process of law," *id.* § 1302(a)(8). In Indian country, the scope and extent of due process rights and free speech rights are not governed by the United States Constitution, but by the ICRA and the extent to which such rights and associated remedies have been codified and defined by a tribe.⁴ The ICRA standing alone does not waive the Tribe's sovereign immunity with respect to Plaintiff's purported claims and, in general an Indian Tribe, as a sovereign, is not required to adopt the ICRA, in whole or in part, nor must a tribe provide a venue to adjudicate alleged ICRA violations unless a tribe elects to do so. *Campos*, No. CSC-19-06, slip op. at 61 n.45. The ICRA was drafted to respect tribal sovereignty, recognizing each tribe's power to make their own substantive law in internal matters in accordance with their tribal customs and traditions. *See Santa Clara Pueblo*, 436 U.S. at 55-58, 98 S.Ct. at 1675-78. In this jurisdiction, the law is clear – "Cherokee courts must dismiss any claim

⁴ The ICRA provides only one federal remedy, the writ of habeas corpus, for violations of the rights secured thereunder. *See* 25 U.S.C. § 1303 (2019) (providing that "[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe"); *see also Campos*, No. CSC-19-06, slip op. at 61 n.45 (noting that "the only remedial avenue available under the ICRA in the federal courts is habeas relief, i.e., a petition for writ of habeas corpus to determine whether an individual's imprisonment or detention by an Indian Tribe is lawful"). Exercising inherent jurisdictional authority within the confines of federal law, the Tribe adopted "all the protections afforded in Title 25, Chapter 15 of the United States Code, as amended" via enactment of Ordinance No. 182 (2012) (codified at C.C. § 15-7 (2012)) to govern procedures and to provide for enhanced sentencing in criminal matters brought before the Cherokee courts.

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or cause of action brought against the Tribe and/or its entities based on the defense of sovereign immunity unless a plaintiff sufficiently demonstrates that Tribal Council or Congress expressly and unequivocally waived tribal sovereign immunity” for his ICRA claims “in one of three ways – a written ordinance, law, or contract,” *Campos*, No. CSC-19-06, slip op. at 37-38 (citation omitted). Thus, in regard to Plaintiff’s alleged ICRA claims, a key issue is whether Tribal Council expressly and unequivocally waived sovereign immunity via an ordinance or law to allow Plaintiff to bring his purported ICRA claims against the Tribe seeking the following relief —declaratory judgment, preliminary and permanent injunctions, compensatory and punitive damages, and attorneys’ fees.

In *Blankenship*, “this Court recognized a limited waiver of sovereign immunity by the Tribe that allows a party to bring some form of limited action concerning alleged violations of ‘appropriate protections’ under the ICRA against the Tribe in the Cherokee Court seeking a declaratory judgment under C.C. § 1-2(g)(1),” *Campos*, No. CSC-19-06, slip op. at 63 (citing *Blankenship*, 16 Am. Tribal Law at 41-42). However, Tribal Council elected not to provide monetary damages as potential relief in C.C. § 1-2(g)(1), and Tribal Council has expressly excluded temporary restraining orders and preliminary injunctions from the relief available for any party other than the Tribe itself. *See Campos*, No. CSC-19-06, slip op. at 61-64; *see also Lambert*, 15 Am. Tribal Law at 63 (concluding that Tribal Council waived the Tribe’s sovereign immunity with respect to an action brought against the Tribe under C.C. § 1-2(i) seeking preliminary injunctive relief only “if the action is instituted by the [Tribe],” and holding that the Tribe waived immunity with regards to the justiciable issues raised on the Tribe’s behalf by the Tribe’s Attorney General) (citing C.C. § 1-2(i)).

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In the instant matter, Plaintiff's complaint predicates his due process-based ICRA claim upon his allegation that he was an official and/or an employee of the Tribe who possessed a "protected property right in his position as a member of the Tribal ABC Commission." Cherokee law is clear, however, that "Tribal officials hold office as a sacred public trust; they do not possess property rights in their positions." *Blankenship*, 16 Am. Tribal Law at 41. As a Tribal official appointed by the Principal Chief and approved by Tribal Council, subject to removal for cause at any time during his term of service upon a majority vote of Tribal Council, C.C. § 18B-200(b), (c), Plaintiff had no property interest in his position as a member of the TABC Commission. Furthermore, as noted earlier, under the express language of the Cherokee Code, Tribal Council is not required to provide members of the TABC Commission with notice or a hearing prior to removing them from office for cause. C.C. § 18B-200(c); *see Blankenship*, 16 Am. Tribal Law at 38. Again, under Cherokee law, Tribal Council's decision to remove Plaintiff from office for cause under C.C. § 18B-200(c) implicates a nonjusticiable political question for which judicial review is barred. This proscription holds true for Cherokee courts even when, as here, Plaintiff believes that Tribal Council's resolution finding cause to remove him from office was wrongful. Consequently, his alleged due process-based ICRA claim fails as a matter of law, and the court's dismissal of this claim was proper.

Although Plaintiff purports to allege an ICRA violation involving his First Amendment free speech rights, the complaint fails to point to any specific Cherokee law(s) that allegedly abridged his rights of free speech. Moreover, as noted above, Plaintiff's complaint predicates his claim upon a purported protected property right in his position that does not exist under Cherokee law. Accordingly, with respect to his purported free speech-based ICRA claim we hold that Plaintiff's complaint neglects to allege that Tribal Council made or enforced any law that abridged

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Plaintiff's free speech rights, as required to establish an ICRA violation regarding 25 U.S.C. § 1302(a)(1) under Cherokee law, and fails to allege a protected property right, as he had no property right in his appointed position as a Tribal official under Cherokee law. Thus, the court did not err by dismissing this purported claim pursuant to Rule 12(b).

V. Suspension from TABC Commission

As discussed above, the claims and requests for relief articulated in Plaintiff's complaint that seek to challenge Tribal Council's decision to remove him from office for cause present a nonjusticiable political question that precludes judicial review. However, the political question doctrine does not bar judicial review in the Cherokee courts of Plaintiff's purported claim that the members of the TABC Commission lacked the authority to suspend him and/or seek his removal by Tribal Council under C.C. § 18B-200. *See Lambert*, 15 Am. Tribal Law at 63 (emphasizing that the issue of whether the Tribe's Principal Chief "should be impeached and removed is a political question" that the Court would not address, but that "it is within the province of this Court to address matters of statutory interpretation and ascertain the authority granted to the coordinate branches of government by the [Tribe's] Charter and Governing Document and the Cherokee Code").

Nevertheless, judicial review of Plaintiff's purported claims against the TABC Commission is prevented by key material defects in Plaintiff's complaint, including that all allegations contained therein are insufficient as a matter of law to demonstrate that Tribal Council expressly and unequivocally waived sovereign immunity for any of the purported claims for relief that he seeks to bring against any of the Defendants, including the TABC Commission and its members. Additionally, Plaintiff's alleged property right in his appointed position as a Tribal official does not exist under Cherokee law, thereby conclusively negating his purported ICRA

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claims against all Defendants, including the Commission and its members. Therefore, the court did not err by dismissing the purported claims alleged in Plaintiff's complaint pursuant to Rule 12(b), including his purported claims against the Commission related to his suspension from office before he was removed for cause by Tribal Council.

In sum, for these reasons, the Cherokee Court's 10 January 2020 order dismissing all claims alleged in Plaintiff's complaint with prejudice pursuant to Rule 12(b) is affirmed.

AFFIRMED.

Brenda Toineeta Pipestem

Brenda Toineeta Pipestem
Presiding Chief Justice

1-13-25

Date

Robert C. Hunter

Robert C. Hunter
Associate Justice

1/13/25

Date

Sharon Tracey Barrett

Sharon Tracey Barrett
Associate Justice Pro Tem

1-13-25

Date