NO. 06-3093

In The United States Court Of Appeals

For The Eighth Circuit

Plains Commerce Bank,

Plaintiff – Appellant

v.

Long Family Land and Cattle Company, Inc. and
Ronnie and Lila Long,

Defendants – Appellees

On Appeal from the United States District Court
for the District of South Dakota
District Court File No. 05-3002

APPELLANT PLAINS COMMERCE BANK'S BRIEF AND ADDENDUM

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

The District Court erred in finding that the Cheyenne River Sioux Tribal Court had subject-matter jurisdiction of a suit commenced by the Long Family Land and Cattle Company, Inc., and Ronnie and Lila Long against Plains Commerce Bank in the Cheyenne River Sioux Tribal Court and that the Bank was afforded due process.

The District Court erroneously determined that Plains Commerce Bank consented to subject-matter jurisdiction in the Cheyenne River Sioux Tribal Court action because the Bank did not and could not waive the defense of lack of subject-matter jurisdiction. The District Court also erroneously determined that Plains Commerce Bank voluntarily dealt with tribal members rather than a non-tribal member corporation in the transaction underlying the lawsuit; the underlying transaction was not a consensual relationship between a non-tribal member and a tribal member. Finally, the District Court erroneously determined that there was a basis in the trial record for the Cheyenne River Sioux Tribal Court of Appeals to uphold the discrimination verdict; the claim was tried under federal law with the question of tribal law improperly raised by amicus for the first time on appeal. This Court should reverse these errors and enter summary judgment in favor of Plains Commerce Bank.

Plains Commerce Bank requests oral argument and suggests that 30 minutes for each party should be sufficient to fully address these issues.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

PLAINS COMMERCE BANK,

Plaintiff-Appellant,

v.

LONG FAMILY LAND AND CATTLE COMPANY, INC. AND RONNIE AND LILA LONG,

Defendants-Appellees.

Eight Circuit File No. 06-3093

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 28(a)(1) and 26.1(b), Appellant provides the following information regarding the parties to this appeal and their representation by counsel:

Parent Companies:

None.

Listing of all publicly held companies that own 10% or more of Appellant's stock:

None.

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JURISDICTIONAL STATEMENT

Appellant Plains Commerce Bank appeals from the final Order of the District Court dated July 17, 2006 granting the motion for summary judgment of Defendants Long Family Land and Cattle Company, Inc. and Ronnie and Lila Long and denying Plaintiff Plains Commerce Bank's motion for summary judgment. The District Court had jurisdiction of the subject of the action pursuant to 28 U.S.C. § 1331. Plains Commerce Bank filed a timely Notice of Appeal on August 11, 2006. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. The Montana exceptions to the rule that Indian Tribal Courts have no power to adjudicate civil claims involving non-members are narrow. And notwithstanding the Montana issue, tribal courts lack jurisdiction to adjudicate federal discrimination claims. Here, the District Court held that the Montana consensual-relationship exception was met because the Bank waived objection to the subject-matter jurisdiction of the Tribal Court and by piercing the corporate veil of the South Dakota corporation the Bank dealt with. The District Court also ignored the federal-law basis of the discrimination claim. Should this Court correct the District Court's error and find that the Tribal Court lacked subject-matter jurisdiction?

List of most apposite cases:

- Montana v. U.S., 450 U.S. 544 (1981) (establishing limited tribal court jurisdictional exceptions regarding non-members of tribe)
- Nevada v. Hicks, 533 U.S. 353 (2001) (further limiting Montana exceptions)
- Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) (holding subject-matter jurisdiction non-waivable)
- Dole Food Co. v. Patrickson, 538 U.S. 468 (2003) (holding that a corporation and its shareholders are distinct entities)

II. Due process prevents appellate courts from affirming jury-trial judgments on a different legal theory than was tried. Here, the Tribal Court of Appeals adopted the Tribe's amicus argument, first presented on appeal, that the Longs' discrimination claim was based on tribal rather than federal law. Should this Court correct the District Court's error in failing to conclude that the tribal courts denied the Bank due process in the form of notice and an opportunity to be heard on the tribal-law discrimination claim?

List of most apposite cases:

- Banks v. Heun-Norwood, 566 F.2d 1073 (8th Cir. 1977) (prohibiting new arguments on appeal by amicus)
- Wilson v. Owens, 86 F. 571, (8th Cir. 1898) (refusing to take judicial notice of tribal law without pleading and proof)
- Petersen v. Chicago, Great West. Ry. Co., 138 F.2d 304 (8th Cir. 1943) (applying same-theory-as-at-trial doctrine to preclude new theory on appeal)
- Singleton v. Wulff, 428 U.S. 106 (1976) (applying not-pressed-or-passed-below doctrine to preclude new theory on appeal)

STATEMENT OF THE CASE

This is a declaratory-judgment action seeking a determination that the Cheyenne River Sioux Tribal Court lacked subject-matter jurisdiction over and denied fundamental due process to Plains Commerce Bank, a South Dakota corporation, in the case of Long Family Land and Cattle Company, Inc., Ronnie and Lila Long, Plaintiffs v. Edward and Mary Maciejewski, Ralph H. and Norma J. Psicka, and the Bank of Hovan, Cheyenne River Sioux Tribal Court No. R-120-99. The Complaint in this action raised the following issues: (a) whether a Tribal Court may assert jurisdiction over a non-member for claims arising from a lease of non-tribal land owned by an off-reservation South Dakota corporation and a related loan agreement between that corporation and another South Dakota corporation, itself not a tribal entity; (b) whether the Tribal Court had jurisdiction to decide a claim for discrimination against the non-member South Dakota corporation premised upon federal law; and (c) whether due process was accorded the non-member South Dakota corporation when the Tribal Court of Appeals found a basis in tribal law, never asserted previously in the case, to support the discrimination decision.

The District Court found that the Tribal Court had subject-matter jurisdiction over the Plains Commerce Bank because it waived objection to subject-matter jurisdiction and because it voluntarily dealt with a non-tribal member South Dakota corporation that was controlled by tribal members. The District Court also

concluded that the Tribal Court of Appeals was free to determine that the discrimination claim was based on Indian common law, despite the fact that that theory had not been pled or proven in the Tribal Court action.

The District Court granted a summary-judgment motion filed by the Defendant-Appellees and denied the summary judgment motion of the Plaintiff-Appellant on July 17, 2006. The Plaintiff filed a timely Notice of Appeal on August 11, 2006.

STATEMENT OF THE FACTS

Appellant Plains Commerce Bank ("Bank") is a South Dakota banking corporation. The Bank is wholly owned by non-tribal members. (A.App. 16.) It loaned money to Appellee Long Family Land and Cattle Company, Inc. ("Long Company"), which also is a South Dakota chartered corporation. (A.App. 16-17.)

Fifty-one percent of the Longs' Company is owned by Appellees Ronnie Long and Lila Long, both members of the Cheyenne River Sioux Tribe ("CRST"). (A.App. 16-17.) Prior to 1995, approximately 2,230 acres of CRST Reservation real estate and a house in Timber Lake, South Dakota, owned by Kenneth Long, a non-tribal member and the father of Ronnie Long, were mortgaged to the Bank for the Long Company debt. (A.App. 17.)

Kenneth Long died July 17, 1995. (A.App. 17.) The Bank filed a creditor's claim against his estate, which was being probated in South Dakota Circuit Court. (A.App. 24.) At that time, the Long Company owed the Bank approximately

$750,000.00. The estate deeded the mortgaged real estate and home in Timber Lake to the Bank in lieu of foreclosure. (A.App. 27.)

On December 5, 1996, the Bank and the Long Company entered into two agreements: a loan agreement providing that the Bank would loan additional money to Long Company under certain conditions and reducing the Long Company's debt in consideration of the Kenneth Long Estate deeding the land and house to the Bank; and a two-year lease with the option to purchase the farm real estate. (A.App. 28-34.)

The Long Company continued in possession of all of the 2,230 acres of the Bank's real estate during the two-year term of the lease. The option to purchase in that lease was never exercised by the Long Company. (A.App. 18.) After the expiration of the lease on December 5, 1998, the Long Company continued to hold over and occupy approximately 960 acres of the real estate. The Bank subsequently moved to sell the remaining portion of the real estate in two parcels and, in June 1999, sought to serve a Notice to Quit on the Long Company as a prerequisite to an action for forcible entry and detainer it filed in South Dakota Circuit Court. (A.App. 18.)

Because off-reservation process servers cannot effectuate valid service on the CRST reservation, the Bank sent the Notice to the CRST Tribal Court ("Tribal Court") asking that the Tribal Court authorize service. (A.App. 141.) The Notice was then served by a tribal process server. (A.App. 147.) In response, Ronnie and

Lila Long commenced the underlying Tribal Court action, seeking a temporary restraining order barring the Bank from completing the sales of the remaining parcels of the real estate. (A.App. 58.) The Bank denied Tribal Court jurisdiction and sought dismissal. (A.App. 18.)

The Tribal Court upheld jurisdiction and did not dismiss the Complaint. (A.App. 60.)

Ronnie and Lila Long then amended their Complaint, adding the Long Company as a Plaintiff and asserting several causes of action including discrimination. (A.App. 62.) The Bank answered, again denying Tribal Court jurisdiction. (A.App. 75.) It then stated a Counterclaim alternatively, "in the event the Court finds that it does have jurisdiction," seeking eviction of the Long Company from the 960 acres of the farm real estate it continued to hold and damages for holding over under the lease. (A.App. 77-78.)

A trial of the matter was held before a Tribal Court jury. The discrimination claim was submitted to the jury under federal law. (A.App. 118.) The jury returned a general verdict against the Bank in the amount of $750,000.00 and indicated that interest should also be awarded. (A.App. 19-20.) On post-trial motions, the Tribal Court upheld jurisdiction over the Bank, ruled that federal law supported the discrimination claim, added interest to the judgment, and gave the Long Company an option to purchase the remaining 960 acres owned by the Bank for a sum to be offset against the judgment against the Bank. (A.App. 84-96.)

The Bank appealed the judgment to CRST Court of Appeals ("Tribal Court of Appeals"). The appeal had been pending for over a year and the matter fully briefed when the CRST ("Tribe") moved for and was granted leave to file an amicus brief. The Tribal Court of Appeals subsequently affirmed the Tribal Court ruling (A.App. 97-115), as the Tribe but neither of the parties argued, that the discrimination claim was based on tribal law. (A.App. 128-39.) The Bank then commenced the present declaratory-judgment action in the U.S. District Court, District of South Dakota, Central Division.

The District Court ruled on the parties' cross-motions for summary judgment. It granted the Long Defendants' motion and denied the Bank's motion. (A.App. 1.) This appeal followed.

SUMMARY OF ARGUMENT

The Tribal Court had no subject-matter jurisdiction over the Bank. The narrow exceptions to the general rule that tribal courts lack jurisdiction over non-member defendants do not apply because the underlying transaction was between two non-tribal-member entities, and no tribal interest was at stake.

The Tribal Court had no right to adjudicate the federal-law discrimination claim. As a matter of policy, tribal-court adjudication of such claims risks conflicting interpretations of federal law, an unacceptable risk in light of the differences between tribal and federal courts including, "the fact that '[t]ribal

courts are often' subordinate to the political branches of tribal governments." Nevada v. Hicks, 533 U.S. 353, 385 (2001) (Souter, J. concurring).

The Tribal Court of Appeals denied the Bank due process by considering a new argument on appeal that the Tribe raised as amicus. In Tribal Court, the Longs litigated a federal discrimination claim. On appeal, the Tribe suggested that their claim instead arose under tribal law, and the Tribal Court of Appeals agreed. In concluding that this was within the Tribal Court of Appeals' power to "affirm on any ground supported by the record," the District Court misapplied conflicting doctrines that limit the scope of review on appeal.

The Tribe had no power to raise the tribal-law issue on appeal because the parties did not have a chance to litigate and present evidence that in the Tribal Court. Moreover, neither this Court nor the District Court are able to take judicial notice of tribal discrimination law because it was neither pleaded nor proven in Tribal Court. The Tribal Court of Appeals should have restricted its review of the Longs' discrimination claim to the federal claim they presented at trial. It lacked the power to affirm the result on a tribal-law theory that was different than what was pressed or passed on in Tribal Court.

ARGUMENT

II. This Court should reverse the District Court's holding that the Tribal Court had subject-matter jurisdiction.

The power of tribal courts to adjudicate claims against non-members is limited. It exists only where a non-member enters a consensual relationship with a

tribe or its members or where jurisdiction is necessary to protect certain tribal interests. Montana v. U.S., 450 U.S. 544, 565 (1981). Tribal courts are not courts of general jurisdiction.

Here, the Bank entered into a contractual relationship with the Long Company, a non-member of the CRST. The narrow exceptions to the general rule that tribal courts lack jurisdiction over claims against non-members do not apply and the subject-matter jurisdiction of the Tribal Court should not be recognized.

Furthermore, tribal courts have no power whatsoever to adjudicate federal-law claims against non-members because the federal courts have no effective way to police tribal-court decisions on such matters. The federal removal statute allows removal only from state courts and there is no right of appeal to federal court from tribal court. Nevada v. Hicks, 533 U.S. 353, 368-69 (2001).

Here, the Bank was forced to litigate a federal-law discrimination claim in Tribal Court. Although the Tribal Court of Appeals tried to cure the deficiency by post-hac determination that tribal law had been applied, the judgment against the Bank on the federal discrimination claim cannot be recognized because the Tribal Court lacked jurisdiction to hear it.

A. This Court should perform a de-novo review of the Tribal Court's lack of subject-matter jurisdiction over claims arising out of a loan and lease purchase agreement between the Bank and a non-tribal corporation.

This Court reviews the grant of summary judgment de novo. Minn. Mut. Life Ins. Co. Sales Practices Litig., 346 F.3d 830, 833-34 (8th Cir. 2003). The

Court must determine whether the record, when viewed in the light most favorable to the nonmoving party, demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

Federal courts review tribal-court jurisdiction de novo. Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294, 1300 (8th Cir. 1994). Under federal law, the Defendant-Appellees in this case bear the burden of proving that jurisdiction existed in the Tribal Court. See Strate v. A-1 Contractors, 520 U.S. 438, 456 (1997). Furthermore, because tribal courts are not courts of general jurisdiction, a federal court is obliged to start with the presumption that the Tribal Court did not have jurisdiction, Atkinson Trading Co. v. Shirley, 532 U.S. 645, 659 (2001).

B. The exceptions to the Supreme Court's Montana rule are inapplicable to the Tribal Court case.

Subject-matter jurisdiction of tribal courts over the conduct of non-members exists only in limited circumstances. Strate, 520 U.S. at 445. Montana v. United States, 450 U.S. 544, is "the pathmarking case concerning tribal civil authority over non-members." Strate, 520 U.S. at 445. In Montana the Supreme Court enunciated the "general proposition" that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Montana, 450 U.S. at 565. Citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), the Court noted "that the Indian tribes have lost any right of governing every person within their limits except themselves." Montana, 450 U.S. at 564.

The Court then declared the seminal modern statement of the limitation of tribal power over non-members:

> [I]n addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for member . . . . But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.

Id.

To this general rule, the Court appended two exceptions, noting, "[t]o be sure, Indian tribes retain inherent sovereign power to exercise *some* forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." Id. at 565. (Emphasis added.) First, the Court stated: "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." Montana, 450 U.S. at 565. Second, the Court stated: "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Montana, 450 U.S. at 566.

The teaching of Montana was subsequently elucidated in Nevada v. Hicks, 533 U.S. 353, the most-recent expression of the Supreme Court regarding the

limited powers of tribal courts. In Nevada, the Court explained that in Montana, it had rejected the notion that a tribal court has the right to regulate the conduct of non-members with respect to activities on non-Indian land. Nevada, 533 U.S. at 359. The Court went on to observe that even where the land in question is Indian owned it does not necessarily follow that a tribe can regulate non-members thereon. Nevada, 533 U.S. at 360. Where, however, as is the case here, the land is owned by a non-tribal member, the Court observed that the absence of tribal ownership has been "virtually conclusive of the absence of tribal civil jurisdiction." Id.

Neither Montana exception fits the facts of this case. The Bank dealt with the Long Company. Both agreements underlying the Longs' Tribal Court Complaint were between the Bank and the Long Company. (A.App. 28-34.) The Long Company is a South Dakota entity and not a member of the CRST. (A.App. 16.) As such, the first Montana exception, requiring the existence of a consensual relationship with the tribe or tribal members, was inapplicable as a basis for upholding Tribal Court jurisdiction.

The second exception in Montana is narrowly applied. The Supreme Court said as much in Strate:

> Read in isolation, the Montana rule's second exception can be misperceived. Key to its proper application, however, is the Court's preface: 'Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for

> members….But [a tribe's inherent power does not reach] beyond what is necessary to protect self-government or to control internal relations.

Strate, 520 U.S. at 459. Lower federal courts have consistently read the exception narrowly. See Christian Children's Fund, Inc. v. Crow Creek Sioux Tribal Court, 103 F. Supp. 2d 1161, 1167 (D.S.D. 2000). See also Montana v. King, 191 F.3d 1108, 1114 (9th Cir. 1999).

No tribal governmental interest was implicated here. Adjudication of the Tribal Court suit was not necessary to control internal tribal relations. See Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087, 1093 (8th Cir. 1998). The second Montana exception was not a basis for finding Tribal Court jurisdiction.

The Montana exceptions cannot be applied to affirm the subject-matter jurisdiction of the Tribal Court.

C. The District Court rationale for upholding Tribal Court jurisdiction is erroneous.

The District Court concluded that the Tribal Court had subject-matter jurisdiction for several reasons, each of which is erroneous. The District Court found that the Bank had waived objection to the subject-matter jurisdiction of the Tribal Court. (A.App. 7, 12-13.) The District Court also found that the Bank had entered into a consensual relationship, both with the CRST and with tribal members, concluding that the "true consensual relationships" test of the first

Montana exception had been met. (A.App. 8-11, 12.) Each of these erroneous District Court conclusions constitutes reversible error.

First, the Bank did not and could not waive subject-matter jurisdiction. Subject-matter jurisdiction was specifically denied in the Bank's Tribal Court Answer. Moreover, subject-matter jurisdiction can never be waived. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 95 (1998); Sadler v. Green Tree Servicing, LLC, ___ F.3d ___, 2006 WL 2946726 (8th Cir. 2006) (lack of subject-matter jurisdiction of a lawsuit cannot be waived by the parties – or ignored by the courts – at any stage of the litigation). Thus, subject-matter jurisdiction also cannot be conferred by express consent, In re Minn. Mut. Life Ins. Co. Sales Practices Litig., 346 F.3d 830, 834 (8th Cir. 2003), conduct, Int'l Bhd. of Elec. Workers, Local Union No. 545 v. Hope Elec. Corp., 380 F.3d 1084, 1097 (8th Cir. 2004), or even by estoppel, Mahoney v. Northwestern Bell Tel. Co., 377 F.2d 549 (8th Cir. 1967). This fundamental rule of law is equally true in tribal courts. See Stock West, Inc. v. Confederated Tribes of the Colville Reservation, 873 F.2d 1221, 1228 (9th Cir. 1989) ("a party cannot waive by consent or contract a [tribal] court's lack of subject matter jurisdiction").

Second, the District Court erroneously concluded that by asking the Tribal Court to authorize service of a Notice to Quit upon the Long Company and by asserting a Counterclaim in the Tribal Court action, the Bank "entered into a 'consensual relationship' with the tribe within the meaning of Montana." (D. Ct.

decision, p. 12.) (A.App. 12.) The District Court, however, overlooked two facts that demonstrate that there was no consensual relationship between the Bank and the Tribal Court.

The Bank had no choice but to seek the appointment of a CRST process server to serve the Notice. The Bank commenced an action in South Dakota state court to evict the Long Company. But, "It is well established that 'state officials have no jurisdiction on Indian reservations . . . to serve process on an enrolled Indian . . . ." Bradley v. Deloria, 587 N.W.2d 591, 593 (S.D. 1998) (quoting Annis v. Dewey County Bank, 335 F. Supp. 133, 136 (D.S.D. 1971). Thus, "a private process server who resides outside the reservation boundaries is not authorized under . . . [South Dakota law] to make service of process on a defendant residing within the exterior boundaries of an Indian reservation." Bradley, 587 N.W.2d at 594. The Bank commenced a South Dakota state-court action against the Long Company and the Longs and in doing so was required to seek Tribal Court approval of the service of the Notice to Quit initiating that action by a CRST process server. (A.App. 141.) That does not constitute a true consensual relationship with a tribe as contemplated under the first Montana exception. The District Court erred in holding that it was.

The District Court also failed to recognize that the Bank's Counterclaim was, on its face, pleaded in the alternative. The Bank's Answer denied Tribal Court jurisdiction. Paragraph I of the Answer asserted, "This Court lacks

jurisdiction over the parties and the subject matter of their action." (A.App. 75.) The Counterclaim was carefully conditioned upon denial by the Tribal Court of the Bank's subject-matter-jurisdiction defense. "[A]lthough Defendants deny jurisdiction of the Court, in the event the Court finds that it does have jurisdiction, . . . Defendants make this counterclaim against Plaintiffs." (A.App. 77.)

Again, the Bank had no choice but to make its counterclaim. Sued in Tribal Court over transactions related to land within the Reservation , the Bank could not risk the possibility that if the Tribal Court upheld jurisdiction it would be deemed to have waived its claim to evict the Long Company from the land. As a consequence, the assertion of the Counterclaim is not a true consensual relationship with the Tribe within the meaning of the first Montana exception. The District Court erred in finding to the contrary.

Third, the District Court's finding that the Bank dealt with tribal members disregards the corporate form of the Long Company. The Court based its findings on the fact that the Long Company, "is a closely held corporation" of which "CRST members have controlled at least 51%." (A.App. 9.) The District Court overlooked a basic tenant of American corporate law: a corporation and its shareholders are distinct entities. Dole Food Co. v. Patrickson, 538 U.S. 468, 474 (2003).

There is a presumption that a corporation is a separate entity from its shareholders. A party who seeks to pierce the corporate veil bears the burden of

proving that there are substantial reasons for doing so. See Contractors, Laborers, Teamsters & Engineers Health & Welfare Plan v. Hroch, 757 F.2d 184, 190 (8th Cir. 1985).

Federal courts frequently look to state law to determine whether a corporation is an alter ego of its shareholders. See Tamko Roofing Prod., Inc. v. Smith Eng'g Co., 450 F.3d 822, 827 (8th Cir. 2006). South Dakota law is fully consistent with Eighth Circuit law regarding the burden of proof and test for piercing a corporate veil. See Brebet Int'l, Inc. v. Great Plains Luggage Co., 604 N.W.2d 268, 274 (S.D. 2000).

The piercing-the-corporate-veil doctrine is, "the rare exception, applied in the case of fraud or certain other exceptional circumstances." Dole, 538 U.S. at 475. There was no basis in either the Tribal Court or the District Court record to support the conclusion that the Bank dealt with a tribal member. The Bank dealt with a non-member of the CRST, the Long Company, which is separate and distinct from its shareholders.

None of the reasons the District Court found to affirm the subject-matter jurisdiction of the Tribal Court can withstand analysis. The Tribal Court did not have subject-matter jurisdiction over the Bank.

D. The Tribal Court had no jurisdiction to try the federal discrimination claim.

The District Court, ignoring the fact that the Tribal Court tried the discrimination claim under federal law, found that the case had been litigated under

CRST tort law and concluded that application of tribal tort law is an "other means" of tribal regulation within the meaning of the first Montana exception. (A.App. 10-12.)

The Tribe recognized, and the Tribal Court of Appeals agreed that a tribal court has no jurisdiction to try a case based on federal discrimination laws. (A.App. 102.) ("The Bank argues by extension that tribal courts would have no jurisdiction over a discrimination claim grounded in 42 U.S.C. § 1981(c). This is likely true . . . .")

In Nevada, the Supreme Court reasoned that while it is true that state courts of "general jurisdiction" have the constitutional power to try cases arising under federal statutes, "[t]his historical and constitutional assumption of concurrent state-court jurisdiction over federal-law cases is completely missing with respect to Tribal Courts." Nevada, 533 U.S. at 367. Justice Scalia noted that some federal statutes provide tribal-court jurisdiction over certain federal-law questions, but concluded that "no provision in the federal law provides for tribal-court jurisdiction over § 1983 actions." Id.

The same is true here. The federal law cited to by the Tribal Court in upholding jurisdiction at the trial level, 42 U.S.C. § 2000d, (A.App. 90), contains no provision for tribal-court jurisdiction. Therefore, the "serious anomalies" noted by Justice Scalia in Nevada exist with equal force here:

> [T]he general federal-question removal statute refers only to removal from state court, see, 28 U.S.C. § 1441. Were § 1983 claims cognizable in Tribal Court, defendants would inexplicably lack the right available to state-court § 1983 defendants to seek a federal forum.

Id. (Emphasis in original.)

Section 2000d cases are removable from state courts when initiated there. See Linker v. Unified Sch. Dist., 344 F. Supp. 1187, 1195 (D. Kan. 1972). But, just as there is no right to remove a § 1983 action initiated in Tribal Court, there is also no such right with respect to a § 2000d action commenced in Tribal Court. The result is, "a risk of substantial disuniformity in the interpretation of state and federal law, a risk underscored by the fact that [t]ribal courts are often subordinate to the political branches of tribal governments." Nevada, 533 U.S. at 385 (Souter, J. concurring) (internal quotations and citations omitted).

Therefore, in the absence of express congressional authorization of tribal-court jurisdiction, Nevada controls and "the . . . way to avoid the removal problem is to conclude (as other indications suggest anyway) that Tribal Courts cannot entertain [§ 2000d] suits." Nevada, 533 U.S. at 369. The Tribal Court lacked jurisdiction to entertain the federal discrimination claim against the Bank. The last-minute attempt at the appellate level to place the basis for the decision on tribal law, addressed below, speaks for itself. There was no jurisdiction for the Tribal Court to hear the federal-law discrimination claim because the Bank had no right of removal.

III. The Tribal Court of Appeals' after-the-fact rationalization that the Longs' discrimination claim sounded in tribal as opposed to federal law denied the Bank due process.

The Longs, the Bank, and the Tribal Court all believed that the Longs' discrimination claim was based on federal law. That is the way the parties litigated the case and the way the Tribal Court instructed the jury. It wasn't until the Tribe's amicus brief to the Tribal Court of Appeals that anyone offered a different view. (A.App. 128-39.)

The Tribe appreciated the problem created by grounding the Longs' discrimination claim in federal law: namely, that the tribal courts would lack jurisdiction. And so it offered the possible solution of finding a basis for the claim in tribal law.

That, however, created a due-process problem. Rather than refusing to consider the Tribe's improper amicus analysis, the Tribal Court of Appeals instead simply affirmed the Longs' judgment on the basis urged by the Tribe. The Tribal Court of Appeals essentially decided that because there was a basis for common-law discrimination in the customs and traditions of the tribe, it could uphold the result of the jury trial and judgment for the Longs. (A.App. 103-05.)

But to this day, no one has articulated the parameters of this tribal discrimination law. The Tribal Court of Appeals' citations to tribal legal authority provide little illumination regarding the nature of tribal common-law discrimination. (A.App. 103-05.) Other than saying that there is such a thing, and

that it is likely substantially similar to federal discrimination law, the Tribal Court of Appeals did not elaborate. To this day, the Bank cannot evaluate how this change from federal to tribal discrimination law prejudiced it.

This inability to evaluate prejudice represents a fundamentally unfair denial of due process. The law entitles the Bank to a declaration that the Tribal Court of Appeals denied it due process, with the effect that the Longs' tribal-court judgment is not entitled to comity. An essential principle of due process is that a deprivation of life, liberty, or property must be preceded by notice and an opportunity for a hearing appropriate to the nature of the case. Mullane v. Central Hanover Bank & Trust, Co., 339 U.S. 306, 313 (1950). "It has long been the law of the United States that a foreign judgment cannot be enforced if it was obtained in a manner that did not accord with the basics of due process." Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997) (holding that tribal-court personal-injury judgment was not entitled to recognition in federal court; tribal-court proceedings must afford the defendant the basic tenets of due process or the judgment will not be recognized). The Bank never had a chance to present evidence or argument to the Tribal Court on the tribal-law discrimination theory.

A. This Court should perform a de-novo review of the fundamental unfairness of the tribal-court proceedings that allowed the Tribe, as amicus, to introduce an entirely new issue on appeal.

The parties litigated cross motions for summary judgment in the Bank's declaratory-judgment action before the Federal District Court for the District of

South Dakota. There were no disputes of material facts; the only question presented was which party was entitled to judgment as a matter of law. On appeal from this posture, this Court reviews the district court's summary-judgment order de-novo. Diez v. Minn. Mining & Mfg. Co., 88 F.3d 672, 675 (8th Cir. 1996).

B. The Tribal Court of Appeals should have resisted the Tribe's invitation to make a sua-sponte holding regarding the underlying legal basis for the Longs' discrimination claim.

The Tribe participated as amicus curiae in the Bank's appeal to the Tribal Court of Appeals. In its amicus brief, the Tribe was the first to articulate the idea that a less-problematic basis for the Longs' discrimination claim was tribal rather than federal law. (A.App. 128-39.) The Tribe, however, had no standing to expand the scope of issues on appeal to include this question. The Longs, the Bank, and the Tribal Court all presumed the discrimination claim was based on federal law. That is the claim the Tribal Court charged the jury with analyzing, and which it did analyze. The Tribal Court of Appeals' after-the-fact announcement that the claim the parties had instead litigated a tribal-law discrimination claim deprived the Bank the fundamental fairness of knowing the nature of the claim against it so that it could fashion a defense.

Amicus curiae are not parties. There are limits on the scope of their participation. Federal courts have long recognized that, absent exceptional circumstances, they will not consider an argument advanced by amicus when that argument was not raised or passed on below and was not advanced by the party on

whose behalf the argument is being raised. See, e.g., United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 60, n. 2 (1981).

The Tribal Court of Appeals' adoption of the Tribe's amicus justification for the underlying basis of the Longs' discrimination claim amounted to a sua-sponte appellate ruling. The general rule is that courts should avoid such rulings. See, e.g., Singleton v. Wulff, 428 U.S. 106, 119 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."). This is because parties need to be able to offer all the evidence relevant to the issues and to avoid parties being surprised on appeal by final decisions of issues upon which they had no opportunity to offer evidence. See Hormel v. Helvering, 312 U.S. 552, 556 (1941).

This Court has followed this rule. For example, in Banks v. Heun-Norwood, 566 F.2d 1073, 1077 (8th Cir. 1977), this Court refused to consider an argument concerning the propriety of an injunction raised for the first time on appeal by the EEOC participating as amicus. The justification for the refusal was "common fairness." Id. The opinion went on to explain that before an injunction could be considered, the aggrieved party would need to request it of the trial court, either before, during, or at the conclusion of trial, and that the opposing party should have the opportunity to present evidence. Id.

Here, the Tribal Court of Appeals should have refused to consider the Tribe's argument. Without an opportunity for the parties to create a record that

defined the applicable parameters of tribal discrimination law, there was absolutely no basis for affirming the judgment on that theory. The Tribal Court of Appeals denied the Bank due process when it changed the underlying legal basis for the Longs' discrimination claim on appeal, based on the Tribe's amicus argument. This surprising result unfairly deprived the Bank of the opportunity of defending against and presenting evidence regarding the tribal-law-discrimination claim.

C. The Tribal Court of Appeals denied the Bank due process by articulating a basis in tribal custom and tradition sufficient to support a tribal, common-law discrimination claim.

In announcing a basis in tribal custom and tradition sufficient to support the Long's discrimination claim, the Tribal Court of Appeals cited to certain tribal authorities. (A.App. 103-05.) These authorities, however, simply give no guidance to the Bank regarding the parameters of tribal discrimination law it is said to have violated. As such, the Bank has no way of knowing what tribal discrimination law is.

This Court has previously considered the inaccessibility of tribal law to non-members of tribes, and the special legal problems that presents. In Wilson v. Owens, 86 F. 571 (8th Cir. 1898), this Court considered an argument raised for the first time on appeal by the plaintiff tribe member that the law of the Chickasaw Nation invalided the lease at issue. The record disclosed that the applicable tribal statute was not pleaded by the plaintiff, nor offered in evidence in the trial court. This Court declined plaintiff's request to take judicial notice of the statute, instead

placing such laws on the footing of local usages and customs, and requiring them to be pleaded and proven by litigants who rely upon them. See also, Hockett v. Alston, 110 F. 910 (8th Cir. 1901) (holding courts do not take judicial notice of the laws of the Indian tribes in the Indian Territory; they must be pleaded and proved before effect can be given to their provisions in judicial proceedings).

As the Tribe itself argued, tribal common law is based upon tribal tradition and customs that can only be adduced through expert testimony and the wealth of written materials located in libraries and archives throughout the United States. (A. App. 130.) Justice Souter confirmed the complexities of tribal law and courts in his concurrence in Nevada:

> Tribal courts . . . differ from other American courts (and often from one another) in their structure, in the substantive law they apply, and in the independence of their judges. Although some modern Tribal Courts 'mirror American courts' and 'are guided by written codes, rules, procedures, and guidelines,' tribal law is still frequently unwritten, being based instead 'on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices', and is often 'handed down orally or by example from one generation to another.' [Internal citations omitted]. The resulting law applicable in Tribal Courts is a complex 'mix of tribal codes and federal, state, and traditional law,' [internal citations omitted], which would be unusually difficult for an outsider to sort out.

Nevada, 533 U.S. at 384-85.

Here, although the Longs did not plead or prove any tribal discrimination law in the Tribal Court, the Tribal Court of Appeals' opinion makes note of several authorities. (A.App. 103-04.) Miner v. Banley, Chy. R. Sx. Tr. Ct. App., No. 94-003 A, Mem. Op. and Order at 6 (Feb. 3, 1995), cited by the Tribal Court of

Appeals, is a case involving a child-custody dispute between two members of the tribe; it does not mention "discrimination." Thompson v. Cheyenne River Sioux Tribal Court of Police Commissioners, 23 ILR 6045, 6048 Chey R. Sx. Tr. Ct. App. (1996), also cited by the Tribal Court of Appeals, is a case involving an appeal from an administrative review of a termination of a tribe member as a detention officer for the tribe based on an undisclosed prior felony conviction; it does not mention "discrimination." The cited statutory provisions, Cheyenne River Sioux Tribal Law and Order Code sec. 1-4-3 and CRST By-laws, Art. V, sec. 1(c), both address the tort jurisdiction of tribal courts; neither address "discrimination."

Having articulated the idea that tribal customs and traditions – including justice, fair play, decency, fairness, and respect for individual dignity – could potentially support a claim of tribal-law discrimination, the Tribal Court of Appeals refrained from defining it. It concluded only that such a claim could therefore proceed as a tort claim, "as derived from tribal customs and traditions, *or even from the federal ingredients defined at 42 U.S.C. § 2000-2001*." (A. App. 104.) (Emphasis added.) Based on this, the Tribal Court of Appeals affirmed the discrimination judgment for the Longs in the Tribal Court as being based on tribal law rather than federal law. But without a record where tribal law was pleaded and proven, the Bank did not receive due process.

The Bank was not given notice that it was being sued under tribal common law rather than federal law. Nor was the Bank given an opportunity to present a defense that conformed with possible defenses available under tribal common law or the differing standards that may exist between tribal and federal discrimination law. And in this case, the distinction makes a difference.

Because the Bank was never on notice that this complex interplay of tribal traditions and customs was at issue, it never had an opportunity to present expert testimony, evidence, or arguments within the context of tribal law, tradition, or customs. In fact, no mention was made of tribal law during the Tribal Court proceedings. The parties retained no tribal-law experts; they presented no evidence of tribal tradition or customs concerning discrimination. The Bank simply was not afforded the fundamental due process rights of having notice of the claims asserted against it as well as an opportunity to present a defense that directly responded to those claims.

D. This Court does not apply the affirm-on-any-ground doctrine literally; it is inapplicable to the Tribal Court of Appeals' decision.

The District Court for the District of South Dakota characterized the Tribal Court of Appeals' recasting of the Longs' discrimination claim as arising under tribal rather than federal law as within the inherent appellate power to "affirm on any ground supported by the record." (A.App. 15.) The District Court then adopted that analysis to approve the Tribal Court of Appeals,' finding that the

Tribal Court reached the right result for the wrong reason. In doing so, however, the District Court collapsed several conflicting appellate doctrines regulating the scope of review on appeal.

This Court does not apply the affirm-on-any-ground doctrine literally. It only applies to certain issues in certain postures. And the application of this doctrine to this case conflicts with the more apposite pressed-or-passed-below and same-theory-as-at-trial doctrines.

1. The affirm-on-any-ground doctrine applies to analysis of legal questions present in the record and litigated by the parties; the tribal-law basis for the Longs' discrimination claim was first raised by amicus on appeal.

The case the District Court cites for the "affirm on any ground supported by the record" proposition is inapposite. Gralike v. Cook, 191 F.3d 911, 921 n.9 (8th Cir. 1999). Although the Gralike opinion contains that language, it and the decisions leading up to it show that this Court applies this rule only to particular postures.

Gralike was a case involving multiple constitutional challenges to a state statute. The district court granted summary judgment holding the statute unconstitutional. This Court used its discretion to affirm on any ground supported by the record to reach an issue that, though not addressed by the district court, was part of the record because the speech-and-debate-clause issue was pleaded in the Complaint.

The Gralike opinion relies on two cases for the affirm-on-any-ground proposition. United States v. Sager, 743 F.2d 1261, 1263 n. 4 (8th Cir. 1984); and Wisdom v. First Midwest Bank, 167 F.3d 402, 406 (8th Cir. 1999). Sager involved a situation where the alternative basis was one defendant had a full opportunity to litigate on a petition for rehearing. Wisdom involved an appeal from a motion to dismiss for failure to state a claim. Sager adds the idea that the affirm-on-any-ground doctrine contemplates that parties had a chance to be heard and present evidence and argument on an issue the lower court did not reach. Wisdom, on the other hand, adds the idea that a de-novo legal review affords an appellate court more flexibility in affirming a result for a different reason than that used by the lower court.

Further analysis of the 8th Circuit's affirm-on-any-ground doctrine strengthens the notion that it principally applies to de-novo review of legal questions, like Rule 12 and Rule 56 dispositions. See, e.g., Stevens v. Redwing, 146 F.3d 538, 543 (8th Cir. 1998) (applying doctrine to dismissal for lack of personal jurisdiction); Zotos v. Lindbergh Sch. Dist., 121 F.3d 356, 362 (8th Cir. 1997) (applying doctrine to grant of summary judgment). The critical language in this Court's use of the doctrine is affirm on any ground supported by the record. Without an adequate record of an issue, the doctrine is inapplicable.

What is notably absent in the affirm-on-any-ground doctrine line of decisions is this Court's application of that doctrine to reach new issues raised by

amicus parties, new issues argued for the first time on appeal, or – most importantly – justifications for claims that are different than those presented to the lower court or argued to a jury. This is because these kinds of issues implicate different doctrines, which limit the scope of appellate review rather than broaden it.

Other circuits applying the affirm-on-any-ground doctrine have made explicit the requirement that the basis must be one the parties litigated. For example, in Elkins v. Comfort, 392 F.3d 1159, 1162 (10th Cir. 2004), the 10th Circuit explained the factors influencing its application of the affirm-on-any-ground doctrine: whether the ground was fully briefed and argued on appeal and below; whether the parties have had a fair opportunity to develop the factual record; and whether, in light of factual findings to which the court defers or uncontested facts, its decision would involve only questions of law. See also Cardozo v. Robert Bosch Corp., 427 F.3d 429, 432 (7th Cir. 2005) (affirm summary judgment on any ground supported in the record, so long as that ground was adequately addressed in the district court, and the nonmoving party had an opportunity to contest the issue); Lakeview Dev. Corp. v. City of South Lake Tahoe, 915 F.2d 1290, 1329 (9th Cir. 1990) (affirm summary judgment on any ground supported by the record, provided the parties have an opportunity to discuss it in their briefs). The Supreme Court has also applied the affirm-on-any-ground doctrine where the alternate grounds were raised and litigated below but not

reached by the trial court. See, e.g., Bennett v. Spear, 520 U.S. 154, 166 (1997) (because asserted grounds were raised below, and have been fully briefed and argued here, it was an appropriate exercise of discretion to consider them now rather than leave them for disposition on remand).

In the present case, the affirm-on-any-ground doctrine is inapposite. On appeal to the Tribal Court of Appeals, the first introduction of the idea that tribal, rather than federal, law governed the Longs' discrimination claim came from the Tribe's amicus brief. (A.App. 128-39.) The Longs, the Bank, and the Tribal Court all presumed the claim was based on federal law. This is not a question that the parties briefed or argued in the Tribal Court. Even following the Tribal Court of Appeals' opinion, there is still no record regarding the parameters of tribal discrimination law beyond the assertion that it exists. (A.App. 103-05.) The Bank simply did not have an opportunity to be heard and present evidence on a tribal-law discrimination claim.

2. On appeal, the Longs should have been bound by the federal discrimination theory they presented and endorsed at trial.

Throughout the litigation in the Tribal Court, the Longs litigated a discrimination claim based on federal law. This mutual understanding encompassed the Longs, the Bank, and the Tribal Court. The Tribal Court instructed the jury regarding a federal discrimination claim, and the parties presented evidence and arguments on that basis.

Rather than call for the application of the affirm-on-any-ground doctrine cited by the District Court, this posture implicates the same-theory-as-at-trial doctrine. For example, in Campbell v. Am. Crane Corp., 60 F.3d 1329 (8th Cir. 1995), in declining to allow plaintiff to argue a different strict liability on appeal than was presented at trial, this Court articulated the longstanding general rule of appellate practice that, "a reviewing court will consider a case only on the theory upon which it was tried in the district court." Id. at 1332-33.

Petersen v. Chicago, Great West. Ry. Co.,138 F.2d 304 (8th Cir. 1943) presents a closely analogous example of the application of this doctrine. Petersen involved a negligence claim arising in Iowa litigated in a diversity action in the District of Nebraska. While plaintiff neither pleaded nor proved an Iowa statute, her allegations against the railroad defendant were based on the theory of the Iowa statute. Id. at 306. The railroad company answered and set up defenses, without question or attack by plaintiff, based on the Iowa statute. At trial, plaintiff submitted to the court a memorandum setting out the Iowa statute and Iowa decisions and in doing so indicated the law upon which she was relying to assist the trial court in applying it. Both parties introduced evidence tailored to a case under the Iowa statute. Before the close of evidence, plaintiff requested jury instructions framed from the theory of the Iowa law. Then, right before closing arguments, plaintiff requested an additional instruction that because Iowa law had not been pleaded or proven, Nebraska law should govern. Id. at 307. The trial

court refused to give this instruction. This Court affirmed, explaining that federal court applied the same principles of practical estoppel as Nebraska courts, namely that courts review cases only in light of the theory on which the parties proceeded in the trial court; that if a theory has been adopted and relied upon by the parties during trial, it will be followed on appeal regardless of whether correct; that a party cannot complain of actions by the trial court that it invited or induced. Id.

In the present case, the Tribal Court of Appeals should have constrained itself to analyzing the Longs' discrimination claim on the federal-law basis that it was litigated in the Tribal Court. Although the Longs' pleadings made no explicit reference to federal law, it was clear both during and after the trial that the Longs, the Bank, and the Tribal Court all believed it was a federal discrimination claim. Changing the underlying theory from federal to tribal law for the first time on appeal to the Tribal Court of Appeals violated principles of fundamental fairness and due process.

3. This Court's refusal to rule on issues not pressed or passed below should apply with equal force in reviewing the unfairness of the Tribal Court of Appeals' doing so.

Another doctrine more applicable to the present case than the affirm-on-any-ground doctrine is the not-pressed-or-passed-below doctrine. It is largely the converse of the affirm-on-any-ground doctrine as applied to review of legal questions supported by the record. The Supreme Court has articulated the not-

pressed-or-passed-below doctrine as motivated principally by the need for a properly developed record to facilitate appellate review.

In Singleton v. Wulff, the Supreme Court considered the propriety of the 8th Circuit's reaching an issue not passed upon by the trial court. 428 U.S. at 119. It explained that the reason underlying the general rule that federal appellate courts refrain from reaching such issues is that parties need the opportunity to offer all the evidence and arguments they believe relevant to the issues. Id. Singleton suggests that resolving new issues on appeal may be appropriate where proper resolution is beyond any doubt, or where injustice might otherwise result. Id. But when applied to the facts in Singleton, the Supreme Court concluded taking up the new issue on appeal was inappropriate particularly given the fact that the issue resolved had never been passed on by the Supreme Court. Id. "That being so, injustice was more likely to be caused than avoided by deciding the issue without petitioner's having had an opportunity to be heard." Id.

The 8th Circuit follows the not-pressed-or-passed-below doctrine, generally declining to address arguments raised for the first time on appeal unless the proper resolution is beyond any doubt, or when the argument involves a purely legal issue in which no additional evidence or argument would affect the outcome of the case. Tarsney v. O'Keefe, 225 F.3d 929, 938 (8th Cir. 2000). For example, in Davidson & Schaff, Inc. v. Liberty Nat'l Fire Ins. Co., 69 F.3d 868 (8th Cir. 1995), this Court applied this doctrine in declining to address appellant's argument on appeal that

Kansas law should apply after having successfully argued to the district court that Missouri law applied. "The rule that we will not address arguments raised for the first time on appeal . . . applies even more forcefully when the appellant took the opposite position in the district court." Id. at 869. See also, Cronquist v. City of Minneapolis, 237 F.3d 920, 924 (8th Cir. 2001) (holding that plaintiff waived argument on appeal that *Price Waterhouse* rather than *McDonnell Douglas* standard applied where plaintiff never argued it, raised it in complaint, statement of case, at summary judgment oral argument, and where district court reasonably assumed parties agreement on *McDonnell* standard).

In applying the not-pressed-or-passed-below doctrine to post-trial postures, the 8th Circuit has described it as a form of estoppel. See, e.g., Adams v. Boy Scouts of America-Chickasaw Council, 271 F.3d 769, 777 (8th Cir. 2001) (holding that plaintiffs were bound by their decision to rely on the equal-benefits clause of § 1981 in the district court as opposed to the contract clause). "On appeal the appellant must adhere to the theory upon which the case was tried below." Ludwig v. Marion Lab., Inc., 465 F.2d 114, 117 (8th Cir. 1972). The idea that it is impermissible to shift in theory from the position taken at trial is a fundamental appellate rule. See St. Louis Dev. Disabilities Treatment Center Parents' Assoc. v. Mallory, 767 F.2d 518, 520 (8th Cir. 1985). As this Court explained in Gilby v. Traveler's Ins. Co., 248 F.2d 794, 797 (8th Cir. 1957), where the record shows no pleading, evidence, argument, or requested instruction to the trial court that even

remotely establishes that a question was raised in the trial court, the appellant is bound by the theories of recovery advanced by her at the trial. The reason for this post-trial application of the not-pressed-or-passed-below doctrine is to prevent unfairness to parties; this is "nothing more than the essentials of due process and fair play." Armstrong Cork Co. v. Lyons, 366 F.2d 206, 208-10 (8th Cir. 1966).

In the present case, the Longs, the Bank, and the Tribal Court all believed the Longs were pursuing a federal discrimination claim. There was never any mention of tribal discrimination law in the Tribal Court. The Tribal Court believed it had no source for such a claim other than federal law.

The first announcement that there was such a thing as tribal discrimination law came from the Tribal Court of Appeals. What that law consists of is not defined in the record or otherwise. The question of whether the Longs based their discrimination claim on tribal or federal law was not "beyond doubt." And it was one that called for additional evidence and argument in the Tribal Court – at a minimum, on the question of how tribal custom and tradition define the parameters of tribal discrimination law.

The Longs did not dispute the assumption that their claim was based on federal law. The Tribal Court instructed the jury on that theory. The parties presented evidence and arguments tailored to that theory. The Longs' own conduct prevents the Tribal Court of Appeals or the Tribe as amicus from urging a different theory after trial.

Ultimately, Wilson v. Owens, 86 F. 571 (8th Cir. 1898), should control the outcome in this case. As in Wilson, the idea that tribal law had some bearing on the outcome of the Longs' discrimination claim was not raised at the trial court level. And as in Wilson, tribal discrimination law was neither pleaded nor offered in evidence in the Tribal Court. Neither this Court nor the District Court are able to take judicial notice of tribal law without a proper record.

The affirm-on-any-ground doctrine is inapplicable because whether the basis of the Longs' discrimination claim was tribal or federal law was not a legal question in the record litigated by the parties. The same-theory-as-at-trial doctrine should bind the Longs as having tried their discrimination claim as a federal claim. And the not-pressed-or-passed-below doctrine similarly should prevent recasting of the Longs' discrimination claim on appeal as sounding in tribal law.

E. The Bank had no reason to challenge the legal basis for the Longs' discrimination claim because until the Tribe's amicus brief on appeal, everyone agreed it was a federal discrimination claim.

The District Court concluded that the Bank had opportunities to challenge the source of law for the Longs' discrimination claim and failed to do so. (A.App. 15.) But the District Court erred in concluding that the Bank waived due process because it failed to challenge the source of law at the Tribal Court level. There was no direct challenge to the source of law because there was no dispute that the Longs based their discrimination claim on federal law. The Tribal Court record makes this clear.

Throughout the proceedings in the Tribal Court, the parties and the court proceeded under the assumption that the discrimination claim was based upon federal law. For example, before submitting the case to the jury, the Tribal Court considered Bank's motion to dismiss. The Bank, citing Nevada v. Hicks, argued that the Tribal Court did not have jurisdiction to hear the discrimination claim because it was based upon federal law. (A.App. 117.) In deciding the motion, the Tribal Court asked the Longs' attorney if the discrimination law he claimed was violated was the federal law regarding "private lending" and the attorney answered, "yes." (A.App. 117.) The Tribal Court then determined that it had authority to enforce federal laws. (A.App. 118.) No one ever argued in the Tribal Court proceedings that the discrimination claim was based upon tribal law.

Subsequently, while discussing jury instructions, the Tribal Court again made clear that the discrimination claim was being considered under federal law. The Tribal Court stated that offering "a contract for deed to non-Indians but not to Indians. That violates federal law." (A.App. 118.)

Finally, after the trial, the Bank moved for Judgment NOV or a new trial. In its motion, the Bank again argued that under Nevada, the Tribal Court had no jurisdiction to hear a discrimination claim brought under federal law. (A.App. 120-21.) The Tribal Court denied the motion, holding that it had jurisdiction over the discrimination claim (which the court characterized as a federal anti-discrimination claim). (A.App. 91.) In doing so, the Tribal Court stated that

because the Tribe did not "have specific code provisions prohibiting private discrimination," the Court was required "to look to relevant federal law." (A.App. 92.)

The Bank sought a declaration from the District Court for the District of South Dakota that the tribal courts denied it due process. The Tribal Court of Appeals recast the Longs' discrimination claim from federal to tribal law on appeal. It did so by adopting a new argument on appeal of a non-party, the Tribe, that directly contradicted the theory litigated by the Longs in the Tribal Court. This created an unfair surprise for the Bank, which had tailored its response at trial to a federal discrimination claim. The Tribal Court of Appeals' imposition of this after-the-fact rationalization was wholly incompatible with due process. Because it would not have been permissible in this Court, it should not have been permissible in the Tribal Court of Appeals. This Court should reverse the District Court's grant of summary judgment for the Longs on the due-process issue, and instead grant summary judgment for the Bank holding that the tribal courts denied the Bank due process.

CONCLUSION

The Tribal Court lacked subject-matter jurisdiction over the Longs' claims under the consensual-relationship Montana exception because the Bank lacked a relationship with the Tribe or its members. Notwithstanding the Montana issue, the Tribal Court lacked jurisdiction to entertain a federal discrimination claim.

And in adopting the Tribe's new argument on appeal recharacterizing the Longs' discrimination from federal to tribal law, the Tribal Court of Appeals denied the Bank due process.

The Bank therefore asks this Court to reverse the District Court's grant of summary judgment for the Defendant-Appellee Longs, and its denial of the Bank's motion for summary judgment. Instead, the Bank asks this Court to direct entry of summary judgment in its favor.

Respectfully submitted,

DATED: October ___, 2006

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ATTORNEYS FOR PLAINTIFF-APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

PLAINS COMMERCE BANK,

Plaintiff-Appellant,

Eight Circuit File No. 06-3093

v.

LONG FAMILY LAND AND CATTLE COMPANY, INC. AND RONNIE AND LILA LONG,

Defendants-Appellees.

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ADDENDUM

INDEX TO APPELLANT'S ADDENDUM