

CASE NO. APP-24-001

**IN THE COURT OF INDIAN APPEALS  
FOR THE SOUTHERN PLAINS REGION**

CARLA CARNEY, Plaintiff/Appellant

v.

PONCA BUSINESS COMMITTEE,  
OLIVER LITTLECOOK, SR., Chairman

OLIVER LITTLECOOK SR.,  
Individually and as  
Ponca Business Committee Member,

ROBERT COLLINS,  
Individually and as  
Ponca Business Committee Member,

MATILDA DELAGARZA,  
Individually and as  
Ponca Business Committee Member,

DEBORAH MARGERUM,  
Individually and as  
Ponca Business Committee Member,

LEOTA WHITE,  
Individually and  
Ponca Business Committee Member, and

EARL TREY HOWE III  
Individually and  
Ponca Business Committee Member,

Defendants/Appellees.

**APPELLANT'S REPLY BRIEF**

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I. **Appellees' Characterization of this Case as One Involving the Immune Ponca Tribe and Authorized Business Committee Functions is Inaccurate**

Reading the Appellees' response, one would think the Appellant had sued the Ponca Tribe for money in spite of its governing body undertaking perfectly legitimate government functions. Not so. The pleadings filed in the Tribal District Court demonstrate:

- The Ponca Tribe was not a named defendant below;
- The relief sought against the Defendant Business Committee was injunctive only and prospective in nature;
- The Business Committee members named in their official capacity are alleged to have removed Appellant in a manner that is outside any authority the Ponca Tribe is authorized to give them;
- Named individuals are sued for torts they allegedly committed against Appellant that have no relationship to their official duties.

All those facts support that the case was properly before the Ponca District Court and should not have been dismissed for lack of jurisdiction.

Appellees cite to cases that discuss Federal and CFR Court jurisdictional prohibitions, but there is no federal and certainly no tribal prohibition against the Tribe's own tribal court hearing the claims asserted in this case. As discussed below, there is a distinct difference between the Court of Indian Appeals fulfilling an appellate court role at the specific request of the Tribe, and a Court of Indian Offenses that lacks jurisdiction because the Tribe has not adhered to the requirements of the Code of Federal Regulations. In this instance, the Tribe has complied with the regulations, and both the Tribal District Court and this Court have subject matter jurisdiction in this case. In accordance with Ponca Constitution, Article VII, Section 2A, the Ponca Business Committee delegated its judicial authority under the Constitution in 2009 to the CFR Court to

hear appeals from orders of the Ponca District Court. *See Business Committee Resolution No. 21-041309* (April 13, 2009). Such is the status quo between the Ponca Tribe and this Court for over fifteen years.

Appellees spend many pages arguing the Ponca Tribe is immune and has not explicitly waived its sovereign immunity. That is a non-issue, as the Ponca Tribe is not a party to the case. There was no need to discuss sovereign immunity in any detail in Appellant's brief because it is not implicated here. When the complaint alleges that the named officer defendants have acted outside the amount of authority that the sovereign is capable of bestowing, "an exception to the doctrine of sovereign immunity is invoked." *Tenneco Oil Co. v. Sac and Fox Tribe*, 725 F.2d at 574, 576 (10<sup>th</sup> Cir. 1984).

The six individual Appellee Business Committee members' characterization of the matter as an "intertribal" or "intratribal" dispute belies the fact that the genesis of this action is the request of over 340 Ponca Tribal citizens to the Tribe's Election Board to hold a recall election. In September 2023, a recall petition circulated calling for the removal of the Chairman, Vice-Chairman and member of the Business Committee from office because they were alleged to have committed serious wrongdoing.<sup>1</sup> The signature effort was successful, and a recall election was set, but the individuals resisted by having the Tribal Prosecutor file case number CIV-2023-023, *Ponca Tribe v. Ponca Election Board* on their behalf, seeking an injunction to stop the election. Despite the fact the recall involved only three individual Business Committee members,<sup>2</sup> the Tribe

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<sup>1</sup> The Vice-Chairman was alleged to be abusing and selling methamphetamine in the community, and refused to be drug tested. The Chairman was cited for not taking action to require the Vice-Chair to be drug tested as required by Ponca law. He and another member allegedly attempted to influence their relatives' case outcomes in Tribal Court, and illegally manipulated tribal housing matters, including attempting to have tribal housing assigned to themselves and/or relatives who did not qualify.

<sup>2</sup> It is doubtful that the Ponca Tribe is the real party in interest, and there is nothing in the pleadings to indicate that the Ponca Business Committee ever formally approved that a case be filed on the Tribe's

alleged it was a proper party plaintiff, and the District Court judge found the Court had jurisdiction to hear the dispute. She then granted an *ex parte* injunction halting the recall vote, which has never occurred. It defies logic that the Tribal Court has jurisdiction over the Tribe and one of its agencies, and can enjoin it, but cannot grant the same relief against the Business Committee and its members when they act in deprivation of Appellant's rights. The Court's deference to the Business Committee in the face of clearly unlawful actions is unprecedented and improper.

Far from acting in accordance with the Ponca Constitution, and Ponca and Federal law, the three individuals subject to recall encouraged the other Business Committee members to join them in retaliating against Appellant because her brother led the initiative. They began their vendetta via secret gatherings that in no way complied with the Ponca Constitution, Articles X, XII, or XIII or were legally sanctioned, and voted to remove Appellant from elected office. They allegedly committed torts which have become more numerous and egregious since the filing of the Complaint in the District Court. Whether this is technically an "intratribal" dispute is questionable, because it is clear that the Ponca Business Committee **does not possess the authority to remove one of its members.** Pursuant to the Ponca Constitution, Article V, Section 1 of the Ponca Constitution, that power is reserved to the Ponca People. The Business Committee can vote to suspend a member, but only for specific reasons enumerated in Article V, Section 2 of the Constitution, and only with *written notice and by giving the member an opportunity to be heard*. Under Section 2 (A), a suspended committeeman can *only* be expelled from the Business Committee pursuant to Ponca members' affirmative vote in a recall election. And the Election

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behalf. Further, there is nothing to show that the attorney who filed the case was the Tribe's Attorney General at the time as represented, or was authorized by the Business Committee to file the case on behalf of the Tribe. Nevertheless, the Court has continued to this day to make rulings under the guise of having jurisdiction over both the Ponca Tribe and its agency, the Election Board.

Board that declares a Business Committee seat vacant, not the Business Committee and certainly not by a removal vote as happened here.

The record is replete with evidence of Constitutional violations and *ultra vires* wrongdoing by the Defendants/Appellees. Appellees can cite no case to support that these Defendants are entitled to sovereign immunity.

**II. Precedent Dictates that Ponca Business Committee Resolution No. 21-041309 Explicitly Grants this Court Appellate Jurisdiction over this Appeal.**

The Ponca Tribal Business Committee established its Tribal Court System around 1999.<sup>3</sup> The Tribal District Court has a courthouse and Court personnel, and exercises both criminal and civil jurisdiction through a regular court docket. On April 13, 2009, the Ponca Business Committee delegated its judicial authority granted under the Ponca Constitution to this Court via Ponca Business Committee Resolution No. 21-041309 to hear appeals as follows:

NOW, THEREFORE, BE IT RESOLVED that the Ponca Tribal Business Committee does hereby grant final appellate review jurisdiction to the Pawnee Agency Court of Indian Offenses from all decisions and orders issued by the Ponca Tribal District Court under the authority of the Constitution of the Ponca Tribe of Indians of Oklahoma.

Resolution No. 21-041309 passed unanimously on April 13, 2009. Among those voting affirmatively to utilize this Court were two defendants in this case! If that delegation was insufficient to allow this Court to hear appeals from Ponca District Court involving individuals who were Business Committee members, it has had ample opportunity to so state. Instead, this Court has recognized Resolution 21-041309 as explicitly conferring jurisdiction to this Court.

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<sup>3</sup> Neither the Tribal Court, the Tribe's Attorneys, nor the BIA has been able to produce a law or resolution that initially established the Ponca Tribal Court. However, Resolution No. 24-30-0599, dated March 5, 1999, established a Ponca Tribal Courts Bank Account at Nation's Bank in Ponca City, OK, leaving a presumption that the Court was established by that time.



In *Simpson v. Ponca Tribal Election Board*, App. CIV-09-A03P, Appellant Ponca Election Board members appealed decisions from the Tribal District Court that determined they had not followed the provisions of the Ponca Election Ordinance. The District Court, Judge Tripp had ordered a new election to be held on a date certain, and also established election rules and procedures to follow for the election. The Court further ordered that the Business Committee members that were elected in the previous election would remain in office until a new election was held. Defendants below appealed.

The Court of Indian Appeals, Magistrate Cliff Shilling wrote the opinion for the unanimous panel of long-time Magistrates: “The Court of Indian Appeals has jurisdiction to hear this matter pursuant to 25 C.F.R. Section 11.118 which provides in part: “ (a) A Court of Indian Offenses may not adjudicate an election dispute, take jurisdiction over a suit against a tribe, or adjudicate any internal tribal government dispute, unless the relevant tribal governing body passages a resolution, ordinance or referendum granting the court jurisdiction.” The relevant governing body for the Ponca Tribe is the Business Committee. See Ponca Tribal Constitution, Article III, Section 1. The Ponca Tribal Business Committee may, if it deems appropriate, establish a Tribal judicial system to which it may delegate some or all of the judicial power of the Tribe. See Ponca Tribal Constitution, Article VIII, Section 2A. **The Ponca Business Committee has, pursuant to the above section of the Constitution, granted appellate jurisdiction to this Court by Resolution #21-041309.**” *Opinion* at p. 3 (emphasis added). The Court affirmed the District Court’s authority to void the election, but ruled it did not have authority to mandate when the election should occur, what procedures should be used for that election, or who could run for office. The Court found the election procedures set out in the Ponca Election Ordinance must not

be supplanted by an order of the Court.<sup>4</sup> *Id.* It remanded the case to the District Court to conduct further proceedings in accordance with the opinion.

Likewise, in 2014, the Southern Plains Court of Indian Appeals heard an appeal from the Ponca District Court in a tribal government election dispute. The case below, *Arkeketa v Ponca Tribal Election Board* is discussed in detail in the Appellant’s brief. The appeal was given case number APP 14-006, and styled *Ponca Tribal Election Board, Tamara Campbell, Chairman, Sea Feathers, Vice-Chairman, JoAnn Springwater, Secretary, Deborah Wallace, Clerk/Teller and Sarah Bell, Marshall, Petitioner/Appellant v Ponca Tribal District Court, Respondent*. The appeal arose after the District Judge had made both an affirmative finding of jurisdiction and that Mr. Arkeketa’s due process rights had been violated. As a result, he ordered that a new election be held on a date certain. After the election, the losing candidate filed an “appeal” with the Court of Indian Appeals, even as she wasn’t a named party in the case below. Appellant Election Board urged the same position, namely that the District Court’s decision should be reversed.

Magistrate Ghezzi delivered the Court’s unanimous opinion on April 3, 2015. Under the heading “Jurisdictional Issues,” the Court found it had jurisdiction to hear the appeal, citing both *Simpson* and *Resolution No. 21-041309*. The Court reviewed the District Court’s findings regarding due process violations, and held it had a sufficient factual basis to determine that the Ponca Election Board had violated Mr. Arkeketa’s right to due process, and that those claims provided a jurisdictional basis for the Court to conduct a judicial review. While the Court ultimately dismissed the appeal as being filed untimely, its analysis regarding both courts’ jurisdiction over the types of claims permissible for review fits precisely with due process

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<sup>4</sup> Ironically, the District Judge in case CIV-2023-023 has taken control over the 2024 Ponca General Election and postponed it three times. She has ordered the date of the election and the timeline for activities that conflict with the Election Ordinance, rulings *Simpson* Court held were beyond the authority of a Ponca District Court judge.

violations (lack of notice and opportunity to be heard) alleged in this case. Appellees have not identified a single case where this Court has declined to hear an appeal from the Ponca District Court after Resolution 21-041309 was passed.

### **III. The District Court Committed Error when it Relied on an Outdated Resolution and a Non-Existent Forum Instead of Ponca Law to Dismiss the Case**

The District Court's dismissal order cites a 1984 Business Committee resolution that predates the formation of the Ponca Tribal Court System by the Ponca Business Committee. Even in the 1980's, it was rejected by this Court as an improper vehicle to deny it jurisdiction. Appellees continue to maintain that resolution bars even the Tribe's own Tribal Court from hearing intratribal disputes. That position is untenable given current Ponca law passed in 2010 that confirms the Ponca Tribal Court is one with general jurisdiction. It provides the Court has jurisdiction over all civil actions arising under the Ponca Constitution, laws or treaties of the Tribe, including tribal common law, over all general civil claims which arise within the tribal jurisdiction, and over all transitory claims in which the defendant may be served within the tribal jurisdiction. *Ponca Code*, Title I, Tribal Court. Appellant's Complaint contained allegations that established the District Court's jurisdiction. If the Court does not have such jurisdiction, then most civil cases that have come before District Court, including juvenile and child welfare cases, should have been dismissed. There would be no law to establish the parameters of the Court's jurisdiction. If Appellees are to be believed, the 1984 resolution means that no disputes involving the Governing Body and the Election Board are properly before the Tribal Court.

Two additional facts confirm that the Court's interpretation of Resolution No. 14 FY 1984 is wrong. First, the Business Committee's specific delegation of appellate review to the Court of Indian Appeals came from a subsequent resolution (*Resolution No. 21-041309*) that supersedes

the previous resolution. That Resolution makes clear the Court of Indian Appeals has authority to hear appeals from all orders of the District Court, and does not exclude cases involving intratribal disputes. Second, the Business Committee has made no effort through law or resolution to declare itself a forum for adjudication of any kind of legal dispute, nor established any procedures under a “reservation” of authority. Words like “all decisions and orders” have plain meaning. The idea that the Business Committee meant to reserve certain actions after adopting a code and resolution that specifically delegated all authority to its Tribal Court is without merit.

There is no Ponca Tribal law that deprives its own Tribal Courts of jurisdiction to enter injunctive and equitable relief, nor bars them from hearing constitutional and other claims against officials. The *Akeketa* court did so, and this Court affirmed that inquiry. The Ponca Constitution at Article VIII, Section 3 requires the Ponca Business Committee, to “exercise its power consistent with the provisions of this Constitution and federal law.” The Ponca Business Committee in accordance with Article VIII, Section 2 of the Constitution established the Ponca Tribal Judicial system to ensure same. The fact that the Business Committee has established the Tribe’s Court system and created procedures in law, and delegated review authority to the Court of Indian Appeals is dispositive. It outweighs any argument that the Business Committee itself is the only proper forum to hear constitutional and tort claims against its members, as well as impose injunctive relief against itself.

Resolution No. 134-07232010, which approved the “Tribal Court Code,” was passed a little over a year after the resolution which delegated appellate review to this Court. Appellees make much of the fact that the Bureau of Indian Affairs did not explicitly approve the Court Code, which it deems a “law and order” code. That may be true, however, the Bureau of Indian Affairs is aware the Court is exercising jurisdiction pursuant to that code and has never sanctioned nor

withheld funding from the Ponca Court as a result. The District Court has certainly acknowledged the Court Code as well as the Procedure Codes passed at the same time, even as it never provided those codes to the parties.<sup>5</sup> Additionally, it has been enforcing an Election Code that has been amended several times in the recent past, none of which were “approved” by the BIA. Furthermore, this Court’s ruling in *Snake* that the code need not be approved has not been overturned, and the provision requiring BIA approval of codes is no longer in the Ponca Constitution.

If nothing else, the Code and adopting Resolution demonstrates clear intent of the Ponca Governing Body concerning the review power of the Court. Title I, Section 617 reads like a directive to the Courts in this case:

**Section 617. Judicial Review of Legislative and Executive Actions**

The District and Supreme Courts shall have the authority to review any act by the Tribal Legislative Body, or any tribal officer, agent, or employee to determine whether that action, and the procedure or manner of taking that action, is Constitutional under the Tribal Constitution, authorized by tribal law, and not prohibited by the Indian Civil Rights Act. If the Court finds that the contemplated action is authorized by the Constitution and tribal Statutes enacted thereto, or the common law, and that the manner in which the authorized action is to be exercised is not prohibited by the Tribal Constitution, Tribal statutes enacted pursuant thereto, or federal law, the Court shall dismiss the case. The Court shall not otherwise review the exercise of any authority committed to the discretion of a tribal officer, agency, agent, or employee by Tribal law unless some specific provision of law authorizes judicial review of the merits of the discretionary decision or action.

As sufficiently plead and presented, the Defendants had no discretion to hold secret gatherings and take what purported to be official governmental action. Business Committee meetings are public except for certain confidential matters, and the evidence at hearing was that no notice of

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<sup>5</sup> Appellees urge that Appellant cannot assert the applicability of the Court Code now because she didn’t make that argument below. The Court is reminded that the Court had but didn’t share Title I with counsel, who has never practiced in Ponca Tribal Court before this case and is still struggling with obtaining the Tribe’s laws, court opinions, and transcripts. Counsel for Appellees doesn’t cite the code either, because although he apparently knew about it, he didn’t have a copy.

the time and place of the gatherings in question nor an agenda was ever posted. Appellant rarely missed meetings, and certainly would have been in attendance had she known what the individual members had planned to do to her in her absence. That the District Court would ignore Section 617 of the Tribal Court Code in one case and enforce it in another is entirely unexplainable and grounds for reversal. Clearly, the Business Committee intended that both the trial and appellate courts could examine any actions taken by government entities and officials and the manner in which they were undertaken to ensure conformity with tribal law.

Under the authority granted by Constitution, Article VIII, “Jurisdiction and Powers of the Ponca Business Committee,” Section 2A, the Business Committee has assigned the Tribe’s appellate judicial authority to the Southern Plains Region appeals court. Resolution 21-041309 is entitled, “A Resolution Authorizing the Ponca Tribal Business Committee to Provide for Appellate Jurisdiction and Process from Decisions of the Ponca Tribal District Court,” and states it is “within the best interest of the Ponca Tribe and Ponca Tribal District Court to have a separate appeal process.” It is clear the Business Committee wanted appellate review of jurisdiction to take place in Southern Plains Region Court of Indian Offenses. Under these authorities, this Court cannot let the District Court’s dismissal of Appellant’s claims of wrongdoing without any substantive review stand.

**IV. Appellant Pled and Presented Evidence of Violations of Substantive Rights established in Federal and Tribal Law and Tort Claims against the Individual Defendants which is Sufficient to Withstand a Motion to Dismiss.**

Appellees complain that the Complaint filed in November 2023 lacks specificity as to the tort allegations. The Civil Procedure Rules only require a short statement of fact, which was pled, and allow for liberal amendment. *Ponca Code Title 3, Ponca Rules of Civil Procedure*, Rule I-7 and

Rule 15. At the time the Court dismissed the case, two hearings had been held, and Appellant had learned about and been subjected to additional torts at the hands of the individual defendants. Appellant was prepared to file an amended complaint, which was her right under the Ponca Civil Procedure Code, as none of the Defendants had answered. For example, since the filing of the Complaint, various defendants have caused Appellant to be arrested and charged with keeping the Tribe's laptop for three days after she was notified of her removal from the Business Committee, have assisted in having her arrest and confidential information published on social media, have committed liable and slander, and continue to prohibit payment of her earned compensation, to name just a few acts. An individual's qualified immunity from suit turns on whether he/she has authority to act as they did on behalf of the entity. The District Court dismissed all Appellant's claims against the individuals without determining whether the individual defendants acted outside their authority.

When public officials act outside the scope of their authority, the cloak of immunity dissolves, and courts of law are authorized and should review their actions. *Davis v. Littell*, 398 F.2d 83 (9th Cir. 1968) cert. den. 393 U.S. 1018, 89 S. Ct. 621, 21 L. Ed. 2d 562 (1969). Since the meetings where the Business Committee members took actions against Plaintiff were not official meetings, any action taken by the individuals against Appellant on those days was outside the scope of their authority, and thus is reviewable by the Tribal court. *See Burlington Northern v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991). The idea that the District Court is allowed to commit unchecked error as Appellees claim because there is no substantial right implicated in this case is ludicrous. The Ponca Constitution is quite clear that Ponca citizens have guaranteed personal and property rights, and Appellant has suffered loss of both.

Additionally, the Judge has thrice delayed the 2024 Ponca Tribe General Election, which is further impacting Appellant's rights. The Court in CIV-23-023 has been issuing orders that directly impact Appellant and other individual Ponca Tribal member candidates for office, with no way for Appellant and other candidates to challenge those rulings. The dismissal of Plaintiff/Appellant's case for lack of jurisdiction over the Business Council directly conflicts with the Court's contemporaneous assumption of jurisdiction and continuing issuance of substantive orders in *Ponca Tribe v. Ponca Election Board*, CIV-2023-023, a case governed by the same Constitution that the Court claims denies her jurisdiction over the claims in this case. Although those actions are the subject of another appeal (from an order denying a request to intervene), this Court can and should take judicial notice of the pleadings, record, and orders in that case as context for why the procedural outcome in this case should not stand. *See Green v. Warden, United States Penitentiary*, 699 F2d 364, 369 (7<sup>th</sup> Cir. 1983). This Court may take judicial notice of proceedings in other courts both within and outside its own judicial system.

**V. This Court Should Remand the Case with Instructions to Restore the Appellant to the Business Committee Pending Further Proceedings**

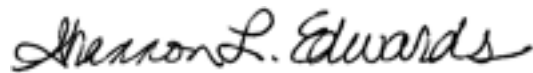
Under Ponca Tribal Rules of Civil Procedure I-9D, and 65D, the District Court should have enjoined the Defendants pending further proceedings. The pleadings and evidence presented at hearing, transcripts of which are part of the Record on Appeal, are legally sufficient to support the Court restoring Appellant to her seat on the Business Committee pending further proceeding. This Court has the authority to reverse the Court's dismissal of the case and remand with instructions to restore Plaintiff/Appellant to her offices pending further proceedings. She has waited almost six months to have her claim in that regard adjudicated. There is no reason for further delay.



**CONCLUSION**

This Court should overturn the District Court’s dismissal of all of Plaintiff/Appellant’s claims, order that the District Court take jurisdiction over the claims and review them in accordance with the Constitution, the Indian Civil Rights Act, and Ponca law, and order that Plaintiff/Appellant be restored to her elected positions prior to the individual members’ *ultra vires* actions pending further proceedings. The claims against the individual defendants were sufficiently pled to survive a motion to dismiss. Appellant is entitled to undertake discovery and present her evidence in support of her substantive claims at the appropriate time. Upon remand, Appellant intends to file an Amended Complaint to allege further claims against the individuals who continue to utilize Tribal resources and make false claims in an attempt to keep her out of office.

Respectfully Submitted,



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**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the above and foregoing document was emailed on the 24th day of June, 2024 to:

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