No. 19-1981

In the
United States Court of Appeals
For the Seventh Circuit

ONEIDA NATION,

Plaintiff-Appellant,

v.

VILLAGE OF HOBART, WISCONSIN,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin, No. 1:16-cv-01217-WCG
The Honorable **William C. Griesbach**, Judge Presiding

**PETITION FOR PANEL REHEARING
OF DEFENDANT-APPELLEE
VILLAGE OF HOBART WISCONSIN**

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Pursuant to Federal Rule of Appellate Procedure 40 and Circuit Rule 40, Defendant-Appellee the Village of Hobart (the "Village") files this Petition for Panel Rehearing of the panel's July 30, 2020 Opinion in this case. The Village does not seek rehearing of the panel's primary determination that the Oneida Reservation was not diminished, the panel's decision to reverse that aspect of the district court's decision, or the panel's issue preclusion decision. During the summary judgment proceedings below, however, the Village made a number of alternative arguments to the district court for why the Village could apply its Special Event Ordinance (the "Ordinance") to the Oneida Nation's Big Apple Fest even if the Oneida Reservation had not been diminished. In this petition, the Village seeks rehearing of the panel's treatment of those alternative arguments on appeal. Respectfully, the panel's opinion misapprehended specific factual and legal matters regarding these alternative arguments. The panel's application is also in direct contradiction to Circuit precedent. The Village requests that the panel amend its opinion and judgment and remand to the district court for further proceedings to address in the first instance the alternative arguments that were not addressed by the district court at summary judgment.

RELEVANT BACKGROUND

The parties' summary judgment briefing below effectively raised three issues relating to the applicability of the Ordinance to the Big Apple Fest. First, the parties briefed the issue of whether the Treaty of 1838 created a reservation held in common.

Second, the parties briefed the issue of whether, if the Treaty of 1838 did create such a reservation, its original boundaries remained intact such that the fee land on which portions of the Big Apple Fest occurred remained part of a reservation. Finally, the parties briefed the issue of whether, even if the original boundaries of the reservation remained intact, the Village could nevertheless apply the Ordinance to the Big Apple Fest.

In its decision, the district court only addressed the first two of these issues. In Part A of the district court's decision, the district court addressed whether the Treaty of 1838 created a reservation held in common. The district court concluded "that the Treaty of 1838 created the Oneida Reservation." [A-14.] (Dkt. 130 at 14.) In Part B of the district court's decision, the district court addressed whether the boundaries of the Oneida Reservation remained intact. The district court concluded that the boundaries had been diminished and that land held in trust by the Nation reflected the current size and location of the Oneida Reservation. [A-17 to A-36.] (Dkt. 130 at 17-36.) In Part C of the district court's decision, the district court explained that, as a result of the district court's diminishment finding, the Village could enforce the Ordinance on the Big Apple Fest because it was undisputed that activities associated with the Big Apple Fest occurred in part on non-trust land that was no longer part of the Oneida Reservation. [A-36 to A-37.] (Dkt. 130 at 36-37.)

Importantly, the district court never decided the third issue—whether, even if the original boundaries of the reservation remained intact, the Village could nevertheless apply the Ordinance to the Big Apple Fest. Indeed, at no point in its decision

did the district court address the Village's arguments on summary judgment for why the Ordinance would apply to the Big Apple Fest even if the original boundaries of the Oneida Reservation remained intact. Those arguments, which this brief will refer to as the "Alternative Arguments" included:

- That the Ordinance was an exercise of *in rem* jurisdiction over fee land within the Village's borders, not *in personam* jurisdiction over the Nation, and could be applied to the Big Apple Fest using the same reasoning the district court used in *Oneida Tribe of Indians of Wis. v. Village of Hobart, Wis.*, 542 F. Supp. 2d 908 (E.D. Wis. 2008);

- That the Ordinance could apply to the Big Apple Fest because the Supreme Court has indicated that Indian-owned fee land on a reservation is not immune from state and local zoning laws and regulations;

- That the facts of the case involved the Nation asserting a landowner's right to occupy and exclude a public road by blockading and shutting down a road that should be treated as non-Indian land for purposes of jurisdictional disputes;

- That application of the Ordinance to the Big Apple Fest should be assessed using the Supreme Court's balancing test, not the exceptional circumstances test, that the Village's interests outweighed federal and tribal interests, and that application of the Ordinance would not impermissibly infringe on the Nation's inherent powers of self-government; and

- Even if the exceptional circumstances test did apply, exceptional circumstances existed due to the land-use and road-use implications of the Big Apple Fest.

(Dkt. 94 at 51-62; Dkt. 102 at 44-57.)

It is not surprising the district court did not address these Alternative Arguments at summary judgment, because it had no reason to do so. The Alternative Arguments raised subsequent issues that the district court would only have needed

to address if it ruled that the boundaries of the reservation remained intact.[1]

The Nation appealed from the district court's decision and devoted its opening brief on appeal to arguing that the district court's diminishment finding was incorrect. Notably, the Nation did not address the Village's Alternative Arguments in any detail in its opening brief, but instead simply claimed in a footnote that the Village had waived its ability to argue "that exceptional circumstances justify departure from the usual rules of federal pre-emption" by failing to cross-appeal. (Doc. 18 ("Nation Br.") at 12.)

In its response brief in this appeal, the Village sought to respond to the Nation's claim that the Village had waived its alternative arguments by not cross-appealing and to alert the panel to the existence of the subsequent issue that the district court did not address: whether the Village could apply the Ordinance to the Big Apple Fest even if the Oneida Reservation's boundaries remained intact. (Doc. 40, ("Village Br.") at 77-80.) Accordingly, in its response brief the Village briefly identified the arguments it had made to the district court on this subsequent issue and invoked the rule that this Court can affirm on any grounds that appear in the record. (*Id.* at 77.) Alternatively, the Village suggested a remand to the district court to address these

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[1] The Village acknowledges that certain of the Alternative Arguments involved arguments the district court had rejected when it had entered a prior order on burden of proof in which the district court had observed that the Village had the burden of showing "exceptional circumstances" to regulate the Big Apple Fest if it occurred in Indian country. (Dkt. 66 at 6.) The district court later made clear, however, that this was a preliminary determination and the Village was free to argue otherwise on summary judgment. (Dkt. 68.) Thus, to the extent any of the Village's Alternative Arguments involve arguments not dependent on a showing of exceptional circumstances, those arguments were still alive and had not finally been resolved by the district court.

arguments in the first instance, in the event this Court reversed the district court's finding of diminishment. (*Id.* at 80.)

The panel opinion ultimately agreed with the Nation that the boundaries of the Oneida Reservation remained intact and held that the Oneida Reservation had not been diminished. With respect to the Village's Alternative Arguments for applying the Ordinance to the Big Apple Fest even if the reservation remained intact—an issue the district court never addressed—the panel stated that it would not consider most of those arguments because the Village had not properly raised them and the arguments were forfeited. (Doc. 57 ("Opinion") at 44.) The panel also stated that, in the absence of a cross-appeal, it would "not consider any ground for affirmance that would expand the judgment beyond the Oneida fee land." (*Id.* at 45.) The panel did address one of the Village's Alternative Arguments—that state and local land use regulations, including the Ordinance, apply to fee land on a reservation—but held that the Village had not shown circumstances that would justify application of the Ordinance to the Nation. (*Id.* at 46.)

ARGUMENT

I. The Panel's Determination that the Village—the Appellee—Waived Alternative Grounds for Affirmance By Failing to Develop Them On Appeal Conflicts With Circuit Precedent

Notwithstanding that the Village was the appellee and had identified alternative grounds on which the district court's judgment could be affirmed, the panel appears to have refused to consider at least some of the Village's Alternative Arguments based on the panel's determination that the arguments "were not properly raised." (Opinion at 44.) Without identifying which ones, the panel took the position that

certain of these arguments were "forfeited" because they were "perfunctory and undeveloped on appeal." (*Id.*) In support of this conclusion, the panel cited *Lauth v. Covance, Inc.*, 863 F.3d 708, 718 (7th Cir. 2017), but that decision is entirely inapposite. In *Lauth*, this Court held that *an appellant* had waived an argument relating to the bill of costs entered below by failing to develop that argument on appeal. 863 F.3d at 718. Here, however, the Village was an appellee, and the arguments at issue were alternative grounds that the district court below had not addressed in its summary judgment decision (because they related to a subsequent issue it did not need to reach). By holding that the Village waived these arguments by failing to develop them fully, the panel's decision conflicts with applicable decisions of this Court.

Indeed, it is well-established in this Circuit that "the failure of an *appellee* to have raised all possible alternative grounds for affirming the district court's original decision, unlike an appellant's failure to raise all possible grounds for reversal, *should not operate as a waiver*." *Transamerica Ins. Co. v. South*, 125 F.3d 392, 399 (7th Cir. 1997) (emphasis in original) (quoting *Schering Corp. v. Ill. Antibiotics Co.*, 89 F.3d 357, 358 (7th Cir. 1996)). As this Court explained in *Schering Corp.*, "[t]he urging of alternative grounds for affirmance is a privilege rather than a duty." 89 F.3d at 358. Thus, in *Door Systems, Inc. v. Pro-Line Door Systems, Inc.*, this Court explained that "[a]n appellee can defend the judgment appealed from on any nonwaived ground, even if the district court did not address it," but that an appellee's "failure to do so is not a

waiver" because "[a]n appellee is not required to advance every possible ground for affirmance." 83 F.3d 169, 173-74 (7th Cir. 1996).

Here, the Village was the appellee. The Village's briefing on appeal identified its Alternative Arguments as relating to a subsequent issue that the district court did not decide and that could serve as alternative grounds on which the panel could affirm the district court's decision. Because the Village was under no obligation even to raise these arguments on appeal, it simply cannot be the case that the Village forfeited them by failing to develop them fully.

Indeed, the situation here is similar to the situation in *Smith v Richert*, 35 F.3d 300 (7th Cir. 1994). In that case, this Court held that the ground on which the district court relied for its decision was "untenable." *Id.* at 305. The Court also noted that the appellee had raised an alternative argument, but that the alternative argument was "so scantily presented in the brief . . . that it cannot be considered preserved for our consideration." *Id.* Nevertheless, the Court recognized that the appellee "although permitted to defend the district court's decision on grounds not considered by that court . . . was not required to do so," and explained that "we do not think this ground can be considered waived forever." *Id.* Thus, although the Court concluded that the appellee's alternative argument was not adequately presented on appeal, it was not waived and was a matter for resolution by the district court in the first instance. *Id.*

Here, as in *Smith*, if the panel believed that the Village's Alternative Arguments for affirmance—which related to a subsequent issue that had not yet been decided by the district court—were not adequately developed, the proper course was to remand to the district court to consider those arguments in the first instance. *See Smith*, 35 F.3d at 305; *see also Midwest Cmty. Health Serv., Inc. v. Am. United Life Ins. Co.*, 255 F.3d 374, 379 (7th Cir. 2001) (declining to address party's arguments because those arguments were not addressed by the district court in the first instance and remanding to district court to make those determinations). By concluding that the Village waived these Alternative Arguments by failing to fully develop them on appeal, the panel's opinion conflicts with the Circuit precedent described above. Thus, the panel should remand to the district court to consider these Alternative Arguments.

II. There Was No Need for the Village to Raise Its Alternative Arguments Via Cross Appeal

In its opinion, the panel also observed that the panel would "not consider any ground for affirmance that would expand the judgment beyond the Oneida fee land" in the absence of a cross appeal. (Opinion at 44-45.) It is unclear which, if any, of the Village's Alternative Arguments the panel actually refused to consider on this basis. To the extent the panel did refuse to consider any of the Village's Alternative Arguments on this basis, the Village respectfully suggests the panel misapprehended the procedural posture of the case and misapplied this Court's law on the need for cross-appeals.

By stating it would "not consider any ground for affirmance that would expand the judgment beyond the Oneida fee land," the panel appears to have given weight to concerns raised by the Nation in its briefing that the Village's alternative arguments would "expand the district court's judgment to allow the Village to regulate activity on its trust land as well as its fee lands." (Doc. 45, "Nation Reply Br.") at 35.) But, affirming the district court's judgment by relying on any of the Village's Alternative Arguments would not have expanded the district court's judgment. Here, the district court's judgment was that the Village could apply the Ordinance to the Big Apple Fest. The district court's reasoning for that judgment was that portions of the Big Apple Fest occurred on fee land that was no longer part of a reservation (and thus was not Indian Country). [A-36 to A-37.] (Dkt. 130 at 36-37.) The Village's Alternative Arguments—that even if the boundaries of the reservation remained intact, and the Big Apple Fest thus occurred entirely within Indian Country, the Big Apple Fest was subject to the Ordinance—sought the same judgment the Village had already obtained: the Village could apply the Ordinance to the Big Apple Fest.

Indeed, it is undisputed that significant portions of the Big Apple Fest occurred on fee land. (Dkt. 86 ¶¶ 10-12.) Accepting any of the Village's Alternative Arguments would not result in a situation in which the Village is regulating an activity that occurs only on trust land. It is possible that, in the future, the Nation may attempt to hold the Big Apple Fest entirely on trust land and the question might arise whether the Village could apply the Ordinance to the event in that scenario. But, a party need not cross-appeal to advocate for reasoning "that by operation of the doctrine of stare

decisis will give the judgment a broader consequence," so long as the party is not seeking to alter the judgment below. *United States v. Tarkowski*, 248 F.3d 596, 603 (7th Cir. 2001). The Village's Alternative Arguments do not seek to alter the judgment below—that the 2016 Big Apple Fest, which occurred partly on fee land, is subject to the Village's Ordinance.

Finally, to the extent the panel was concerned by the Nation's argument that "were the Village to prevail here on its exceptional circumstances claim, all of the Nation's activities, including on trust land, would be subject to Village regulation," (Nation Reply Br. at 35), there was no basis for such concern. That there might be "broader consequences" of such a decision, does not mean the Village was seeking to expand its rights under the judgment (as already discussed). Moreover, as the panel itself recognized, exceptional circumstances cases are fact-intensive. (Opinion at 45.) Whether exceptional circumstances exist that allow the Village to apply the Ordinance to the Big Apple Fest would not, as the Nation claimed, suddenly subject "all of the Nation's activities, including on trust land" to Village regulation. To the extent the Village attempts to regulate other activities by the Nation that occur on trust land, the Village would still need to justify doing so under the appropriate legal standard.

In sum, under Circuit precedent a cross-appeal is only necessary or permitted when a party "wants a different judgment." *Tarkowski*, 248 F.3d at 602; *see also Froebel v. Meyer*, 217 F.3d 928, 933 (7th Cir. 2000) ("No cross-appeal is necessary unless the appellee wants the court of appeals to alter the judgment, not just the

reasoning, of the district court."). Because the Village's Alternative Arguments, if adopted, would have resulted in the same judgment reached by the district court—that the Ordinance applies to the Nation's Big Apple Fest under the facts of this case—it was not necessary for the Village to raise any of the arguments via cross-appeal to preserve them. This is especially true where there was no district court decision finally resolving the Village's Alternative Arguments for the Village to appeal. The district court never finally decided, let alone even addressed in the summary judgment decision, the Alternative Arguments. To the extent the panel opinion refused to consider any of the Village's Alternative Arguments or held such arguments waived because the panel believed a cross-appeal was necessary, the panel should remand those arguments to the district court to consider in the first instance.

III. The Panel Should Have Remanded At Least the One Alternative Argument It Did Decide for the District Court to Resolve In the First Instance

Finally, with respect to the one alternative argument that the panel opinion did address—whether Indian tribes can assert immunity from state and local land use regulations when those regulations are applied to fee land on a reservation—the Village respectfully submits that, rather than deciding that issue, the panel should have remanded the case to the district court to decide the issue in the first instance. Indeed, this Court often remands when confronted with subsequent issues that the district court did not have occasion to decide. *See Humphrey v. Trans Union LLC*, 759 F. App'x 484, 491 (7th Cir. 2019) (Kanne, J., Hamilton, J., Barrett, J.) (reasoning that issues that district court did not address because it was unnecessary to its decision should be remanded to be addressed by the district court, or by a jury, in the

first instance); *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1054 (7th Cir. 2013) (reversing on preemption issue but remanding on constitutional question "[b]ecause the district court . . . never had reason to address th[ose] arguments"); *see also FMC Corp. v. Boesky*, 852 F.2d 981, 994 (7th Cir. 1988) (remanding and reasoning "[s]uch a determination on review, without the benefit of the district court's prior careful consideration of questions involved, would be inappropriate.")

Indeed, although the Village had identified this issue as a possible alternative ground for affirmance, the panel's decision against the Village on this issue, without the benefit of full development in the district court and this court, resulted in the loss of important facts. For example, the panel opinion noted that "[t]he Village has not argued that the Oneida fee land at issue is checkerboarded with non-Indian land such that uniform regulation is necessary to advance state interests." (Opinion at 45.) It is true that, in the brief recitation of the Village's Alternative Arguments provided on appeal, the Village did not expressly make this point. But, it is essentially an undisputed fact that the Nation's fee land on the reservation is checkerboarded within and among non-Indian owned fee land. Indeed, this Court itself recognized this aspect of the Oneida Reservation in *Oneida Tribe of Indians of Wis. v. Village of Hobart, Wis.*, 732 F.3d 837, 838 (7th Cir. 2013). Given this fact, the Village requests, at minimum, panel rehearing on this issue and a remand to the district court to address this issue in the first instance.

Second, the panel opinion took the position that the Village had not "explained why the balance of tribal and state interests would merit a departure from the general

rule that the state may not assert jurisdiction over Indians on reservations," (Opinion at 46) but this ignores the Supreme Court's majority opinion in *City of Sherrill v. Oneida Nation of New York*, 544 U.S. 197 (2005). That opinion expressed concern over the ability of Indian Tribes to remove parcels from local zoning controls simply by purchasing the land in fee and recognized that local governments have a strong interest in uniformly applying zoning and land-use laws. Indeed, although the panel opinion focused on Justice Stevens's dissent in that case and concluded that Justice Stevens's dissent "did not suggest a per se rule that Indian fee land should be subject to state regulation," (Opinion at 45) the majority opinion in *City of Sherrill* does provide reason to believe that the Supreme Court would treat state and local zoning and land-use regulations differently from other forms of state regulation of Indian fee land on a reservation and that the exceptional circumstances standard cited by Justice Stevens in his dissent might not apply to such regulations. 544 U.S. at 200. The panel opinion did not address the majority opinion in *City of Sherrill*.

Finally, the panel omitted to discuss an important interest the Village did identify: the Village's interest in controlling the use of public roads within its borders in order to ensure that Village residents and/or emergency services are not unreasonably impacted by large-scale events. Indeed, here the Nation closed a Village road without permission of the Village (despite simultaneously applying to the Wisconsin Department of Transportation ("WDOT") and Brown County for a permit to close a state highway associated with the Big Apple Fest). (Dkt. 86 ¶ 20; Dkt. 91 ¶¶ 142, 144.) By applying to the state and county governments for a permit,

the Nation effectively admitted that the Big Apple Fest was subject to state and local jurisdiction, at least to the extent it affected roads on the reservation. Given this fact, there is no reason why the event's impact on roads within the Village, including the closure of a Village road, does not similarly justify application of the Ordinance to the event. At minimum, the panel should grant rehearing on this issue and remand to the district court for the district court to decide the question in the first instance.

CONCLUSION

For the above reasons, the Village requests the panel grant rehearing and remove Part II.E and other parts of its opinion that address the Village's Alternative Arguments. The Village requests that the panel, instead of remanding to the district court with instructions to enter judgment in favor of the Nation, should amend its opinion and judgment to remand to the district court for further proceedings including consideration in the first instance of the Village's Alternative Arguments that were not addressed by the district court.

Respectfully submitted this 13th day of August, 2020.

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitations of Fed. R. App. P. 32, 40(b)(1) and Circuit Rule 40 because this document contains 3899 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

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Dated: August 13, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2020, the Petition for Panel Rehearing of Defendant-Appellee was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: August 13, 2020.

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