Docket No. 03-35306

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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JAMES RICHARD SMITH,

Plaintiffs/Appellants,

v.

SALISH KOOTENAI COLLEGE, a Montana Corporation, and the COURT OF APPEALS OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION
Defendants/Appellees.

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On appeal from the United States District Court for the District of Montana

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APPELLANT'S RESPONSE TO PETITIONS FOR REHEARING *EN BANC*

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I. ARGUMENT.

This action arises out of a traffic accident which occurred on U.S. Highway 93 within the exterior boundaries of the Flathead Indian Reservation. US 93 is a public highway through the reservation of the Confederated Salish and Kootenai Tribes. The Plaintiff, Smith, is a non-member of the tribes. The Defendant, SKC, is a Montana non-profit corporation and also a non-member of the tribes. Appellees' petitions for rehearing tend to obscure these simple undisputed facts which are dispositive of this appeal. In the context of this action, these facts mandate reversal of the District Court.

The District Court had erroneously held that SKC was an arm of the tribe and that any legal action against it must be brought in tribal court irrespective of the situs of claims arising against it and irrespective of the non-member status of Plaintiff. This ruling would compel tribal court jurisdiction even if the defective dumptruck had rolled over and injured a busload of children in Seattle or other non-members of the tribe at any location on or off the reservation. On appeal, the three judge Panel rejected this unprecedented and expansive view of tribal jurisdiction and reversed the District Court. The Panel noted that "the Supreme Court has not distinguished between non-

member plaintiffs and non-member defendants."[1] The Panel thus rejected the District Court's conclusion that "...the rules in *Montana* and *Strate* apply only to the conduct of a non-member defendant"[2] and "...the *Montana* rule and its exceptions are inapplicable to a case where the defendant is a tribal entity and the plaintiff is not a member of the tribe."[3]

The District Court ruling fails to recognize the limited and dependant sovereignty of tribes generally.[4] Consequently, it fails to recognize that tribal courts are courts of extremely limited jurisdiction when it comes to asserting

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[1]Slip Op. at 10623, note 5.

[2]Excerpts of Record, pg 090010.

[3]Excerpts of Record, pg 090011.

[4]*Montana* is the leading Supreme Court case outlining tribal authority over non-members in the absence of a federal statute or treaty. In *Montana* the Supreme Court held that the Crow Tribe had no authority to regulate hunting and fishing by non-members on non-Indian land within the boundaries of the reservation. In reaching this conclusion, the Court's starting point was the limited sovereignty of Indian tribes. The Court explained that despite the inherent sovereignty of Indian tribes, they have "lost many of the attributes of sovereignty." *Montana* at 563. Contrasting a tribe's relations with non-members with those of members, the Court specifically stated that "[t]he areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and non-members of the tribe" *Montana* at 564. Thus, a tribe's authority over non-members is necessarily more limited than its authority over members.

jurisdiction over a non-member of the tribe. Tribal courts do not have the plenary authority over non-members that a state government or court would have. Unless there is a statute or treaty expressly conferring jurisdiction, the party asserting tribal court jurisdiction must show that one of the two tests set forth in *Montana* is present. Under *Montana*, tribal courts may adjudicate the claims involving a non-member only if the "consensual relations" or "self-government" exceptions exist to the tribal courts' general lack of jurisdiction over claims involving a non-member of the tribe.

On petition for rehearing, Appellees abandon the "self-government" exception and attempt to construct a "consensual relations" exception. In the end, this attempt fails for the very reasons enunciated by the Panel. There must be a nexas between the consensual relationship and the claim. *Atkinson Trading* (2001).[5] Further, the Supreme Court has expressly held that a tort claim is not a "consensual relationship" for the purpose of the Montana test. *Strate* (1997).[6]

The present action is not a contract dispute. It is a tort claim which

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[5]*Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 656 (2001).

[6]*Strate v. A-1 Contractors*, 520 U.S. 438, 456-7 (1997).

"...arose not from Smith's consensual contractual relationship as a student at SKC, but from separate duties that SKC owed Smith, which duties were derived not from contract but from Montana tort law."[7] Appellees' logic would hold that a product liability claim against Ford is a contract claim because, on their reasoning, no duty would exist but for the commercial transaction wherein the product changed hands. The Panel recognized that this logic was untenable and unsupported by controlling authority. Smith's status as a student is unrelated and irrelevant to the jurisdictional issue. Smith's claims are unrelated to the consensual relationship because he is not asking the Court to regulate the conduct giving rise to the relationship but is asking for damages arising out of tort claims against SKC.

Appellees contend that the Panel decision conflicts with virtually every leading case concerning tribal court jurisdiction. The opposite is true. The Panel decision follows controlling authority and reconciles the decisions which Appellees contend are in conflict. The Panel decision recognized that viewed in isolation, certain phrases or dicta in various cases might appear in tension with the "pathmaking" principles of *Montana*. The Panel decision explains

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[7]Slip Op. at 10631.

how these decisions can and should be read together to follow the principles set forth in *Montana*.

Contrary to the Panel's approach, Appellees attempt to create a conflict of authority by isolating phrases and dicta outside the factual context of the particular decisions. This attempt fails to demonstrate any authoritative departure from *Montana*. Only by strict adherence to *Montana* can the Court reconcile *Williams* (1959)[8] (finding tribal court jurisdiction over a non-member's claim against a member) with *Pease* (1996)[9] (finding no tribal court jurisdiction over a non-member's claim against a member.) *Pease* can only be explained by reference to *Montana*. Appellee's effort to ignore *Pease* shows the fallacy of their position. Appellees are left to argue along with the district court that Smith's status as a non-member of the tribes should make no difference to the tribal court's jurisdiction and that *Montana* applies only to tribal member plaintiffs. The Panel demonstrates that this argument is inconsistent with longstanding authority. Beyond this, the argument leads to absurd results.

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[8] *Williams v. Lee*, 358 U.S. 217 (1959).

[9] *Yellowstone County v. Pease*, 96 F.3d 1169, 1174 (9th Cir. 1996).

Here, Smith's dispute with SKC arose as cross claims between SKC and Smith. After being sued by the estate of the deceased passenger, both Smith and SKC filed cross claims for affirmative relief against each other. The rule urged by Appellees would give Tribal *subject matter* jurisdiction over Smith's affirmative claim against SKC but not SKC's affirmative claim against Smith. A rule that purports to split up the various damage claims arising out of a single traffic accident defies the concept of subject matter jurisdiction. Beyond this, SKC always retained affirmative claims against Smith for costs throughout the course of the tribal litigation. Upon entry of the tribal jury verdict in its favor, SKC filed its bill of costs seeking $11,477. This defies even the rule urged by Appellees. These anomalous results help to demonstrate the practical problems that would result from the creation of a new rule outside the parameters established by *Montana* and its progeny.

The Panel's decision anticipates and refutes each of Appellee's arguments in their requests for rehearing. The Panel did not disregard *McDonald* (2002).[10] Instead, it explained how the *McDonald* panel rendered its decision "under *Montana*". Nor has the Panel narrowed *Montana's* first

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[10] *McDonald v. Means*, 309 F.3d 530 (9th Cir. 2002).

exception. The U.S. Supreme Court, explained in *Strate* that tort claims do not satisfy the first exception to the rule against tribal jurisdiction.

The Panel decision does not create a jurisdictional void. Recently the Montana Supreme Court has stated, "This Court has long held that the courts of this state are open to all Montana citizens including our Indian citizens." *Nielsen* (2004).[11] This conclusion flows from equal protection analysis with the stated purpose of assuring a remedy for all claims arising within the state.

Smith has not consented to tribal court jurisdiction. The Panel rejected the argument that by filing his cross-claim he consented to jurisdiction. The Panel rejected this theory "because Smith was required to exhaust his remedies in tribal court."[12] Beyond this, subject matter jurisdiction cannot be created by consent of the parties. Parties may not stipulate that a court has subject matter jurisdiction.[13] Years of trials and appeals do not prevent dismissal for lack of

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[11]*Nielsen v. Brocksmithland & Livestock Inc.*, 2004 MT 101, ¶ 14, citing *Bad Horse v. Bad Horse*, (1974), 163 Mont. 445, 450, 517, P2.d 893, 895.

[12]Slip Op. at 10629, note 8.

[13]*Janakes v. United States Postal Service*, 768 F.2d 1091, 1095 (9th Cir. 1985).

subject matter jurisdiction.[14] Actions and admissions of the parties do not prevent challenges to a court's subject matter jurisdiction.[15] For a full discussion of this topic, see Appellant's opening brief beginning at page 13. Appellees have never seriously responded to any of the argument or authority presented by Smith on the Panel on this issue.

II. CONCLUSION.

Appellees' requests for rehearing should be denied.

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[14]*Richardson v. United States*, 943 F.2d 1107, 1112 (9th Cir. 1991).

[15]Insurance Corp. of Ireland, Ltd. v. Compangnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982).

DATED this 8th day of October 2004.

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Certificate of Compliance

I certify that pursuant to Fed. R. App. P. 32(a)(7)(B), and Ninth Circuit Rule 32-1, the attached APPELLANT'S RESPONSE TO APPELLEES' PETITION FOR REHEARING *EN BANC* is:

_X_ Proportionately spaced, has a typeface of 14 points or more and contains _2050_ words.

Dated this 8th day of October 2004.

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of October 2004, a true and correct copy of the foregoing APPELLANT'S RESPONSE TO APPELLEES' PETITION FOR REHEARING *EN BANC* was served upon the following by U.S. mail, hand-delivery, Federal Express, or facsimile:

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