Docket No. 03-35306

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

* * * * * * *

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.

* * * * * * *

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

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APPELLANT'S BRIEF

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I. STATEMENT OF JURISDICTION.

The district court's jurisdiction existed under 28 U.S.C. § 1332 based on diversity of jurisdiction with damages in excess of $75,000. This Court's jurisdiction exists under 28 U.S.C. § 1291 based on the judgment appealed from being a final determination of all claims. The district court dismissed Smith's claims and entered final judgment against Smith on March 7, 2003. Smith timely appealed on March 25, 2003, pursuant to Rule 4, F.R.A.P.

II. STATEMENT OF ISSUES.

Appellant, James Richard Smith ("Smith"), presents the following issue for review:

> Did the district court err when it concluded that tribal jurisdiction exists over Smith's claims and dismissed Smith's federal action?

III. STATEMENT OF CASE.

Smith seeks review of the district court's order concluding that tribal court jurisdiction existed over his claims against Salish Kootenai College ("SKC") and dismissing Smith's federal court action. The district court erred when it concluded that tribal jurisdiction existed over a claim between two nonmembers arising from a

single vehicle rollover on a United States highway within the exterior boundaries of an Indian reservation.

This Court should determine that the tribal courts lack subject matter jurisdiction, the district court's order was erroneous, the tribal courts should be enjoined from further action, and Smith's claims should be remanded for trial on the merits.

IV. Statement of Facts.

The district court correctly set out the background facts in its dismissal order, pages 1–3, which are provided below together with additional facts.

Smith brought this action seeking recovery for injuries he received in a vehicular accident on May 12, 1997. Smith is a citizen of Oregon and a member of the Umatilla Tribe. SKC is a Montana non-profit corporation in Pablo, Montana.

On the day of the accident, Smith was operating one of SKC's dump trucks on U.S. Highway 93 near Arlee, Montana. His operation of this truck was within the course and scope of his instruction and class work as a student at SKC. While driving north on Highway 93 the right rear main leaf spring on the dump truck broke, causing the truck to veer to the left. Smith attempted to maintain control of the truck, but it rolled over, killing one of the passengers and injuring Smith and a second passenger.

Smith alleges SKC is liable for the accident. He asserts legal theories of negligence and strict liability.

Smith also asserts a cause of action for spoliation of evidence. SKC conducted an investigation of the accident, and produced notes from such investigation. However, SKC failed to disclose the results of such investigation. Smith now alleges SKC destroyed that evidence, thereby undermining his ability to pursue claims against it.

Following the accident the injured passenger and the estate of the deceased passenger named Smith and SKC as defendants in a lawsuit in the Tribal Court of the Confederated Salish and Kootenai Tribes ("tribal trial court"). Smith and SKC filed cross-claims against each other in that case. In its answer to each claim, SKC challenged the tribal trial court's subject matter jurisdiction.[1] The tribal trial court did

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[1]See Smith's AMENDED COMPLAINT dated July 19, 2002, ¶ 7 (E.R. 6:3) ("SKC, in its answer to each claim, challenged the Tribal Court's subject matter jurisdiction."), admitted in SKC's ANSWER TO AMENDED COMPLAINT dated August 2, 2002, ¶ 6 (E.R. 7:2). SKC's challenges to tribal jurisdiction were as follows: DEFENDANT SALISH KOOTENAI COLLEGE'S ANSWER TO AMENDED COMPLAINT AND CROSS-CLAIM dated January 28, 2000, ("This Court lacks subject matter jurisdiction over Defendant Salish Kootenai College."); DEFENDANT SALISH KOOTENAI COLLEGE'S ANSWER TO CROSS-CLAIM OF JAMES RICHARD SMITH AND DEMAND FOR JURY TRIAL dated March 14, 2000, ("This Court lacks subject matter jurisdiction over the cross-claims asserted by James Richard Smith."); and ANSWER TO COMPLAINT OF JAMES A. FINLEY AND DEMAND FOR JURY TRIAL dated March 21, 2000, ("The Court lacks subject matter jurisdiction over the claims alleged in the Complaint.").

not address the question of its subject matter jurisdiction. Following disposition of some of the various claims, the lawsuit ultimately proceeded to trial on only Smith's cross-claims against SKC. The trial resulted in a jury verdict and judgment in favor of SKC.

Following the trial, Smith moved in the tribal trial court for relief on the basis that it lacked jurisdiction. He also filed an appeal of the judgment. On appeal the Court of Appeals of the Confederated Salish and Kootenai Tribes ("tribal appellate court") remanded the case for a ruling on the jurisdictional issue. On remand the tribal trial court concluded that although SKC "is not a tribal member, it is not a 'nonmember' in the sense addressed by the U.S. Supreme Court in *Strate*."[2] Therefore, it concluded it had jurisdiction over the case.

The tribal appellate court currently presides over Smith's appeal. It is represented in the instant action by attorneys for the Confederated Salish and Kootenai Tribes of the Flathead Reservation ("Tribes" or "CS&KT"). Smith contends it lacks jurisdiction over the matter. Smith requested that the district court issue an injunction prohibiting further action in the tribal appellate court.

The tribal appellate court issued an opinion on February 17, 2003, holding that

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[2]DECISION ON PLAINTIFF'S RULE 60(B) MOTION FOR RELIEF FOR LACK OF SUBJECT MATTER JURISDICTION dated April 6, 2001, unnumbered p. 5 (E.R. 5:5).

tribal jurisdiction exists over Smith's claims under both tribal law and federal law.[3] The opinion concluded that "[f]or purposes of determining jurisdiction, [SKC] must be treated as a tribal entity." While recognizing that tribal jurisdiction over nonmembers is limited, even on tribal land, and that no statute or treaty provides jurisdiction, the court determined that tribal jurisdiction existed.

On February 25, 2003, the district court issued an order dispensing with several pending motions: denying the tribal appellate court's motion to dismiss, denying SKC's motion to abstain, and granting SKC's motion to stay discovery. The court also noted that exhaustion of tribal remedies was moot once the tribal appellate court ruled regarding jurisdiction. The district court stated it "will proceed to address the tribal court jurisdictional issue ... raised in SKC's consolidated Motions to Dismiss in a separate ruling."

On March 7, 2003, the district court issued its order regarding tribal jurisdiction.[4] It declined to apply the *Montana*[5] analysis regarding whether tribal jurisdiction existed, but nonetheless concluded that "the tribal court has jurisdiction over this action because SKC is characterized as a tribal entity." It also concluded

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[3]Tribal appellate court OPINION dated February 17, 2003, p. 17 (E.R. 8:17).

[4]ORDER dated March 7, 2003 (E.R. 9).

[5]*Montana v. United States*, 450 U.S. 544 (1981).

"[t]hat this matter arose on reservation land[, which] further supports tribal court jurisdiction." Accordingly, it dismissed Smith's case. Judgment was entered and this timely appeal followed.

Additional facts are presented as appropriate throughout this brief.

V. Summary of Argument.

The May 1997 dump truck rollover was a tragic event for Smith and his fellow students. One moment Smith was hauling dirt down US highway 93 for a class in his heavy equipment operator program. The next, he was lying on the highway, critically injured. The truck's suspension had failed, causing it to veer out of control and roll. Two other students landed nearby, one dead and another injured. This tragedy would have been avoided if the truck worked properly.

The other students in the dump truck, both members of the Flathead Reservation, sued Smith, SKC, and the Tribes in the Flathead Reservation's court. Smith could not have sued there, as he is an Umatilla Indian and a citizen of Oregon. He understood his fellow students' claims; they, too, were hurt and were seeking compensation for their injuries. Smith was driving the truck and might have insurance that covered them.

To Smith's shock and dismay SKC also sued him, alleging it was his fault for

not controlling the crippled vehicle. Facing claims by three parties in tribal court, Smith cross-claimed against SKC. SKC had already challenged the tribal court's jurisdiction, but the tribal court never decided whether it had jurisdiction. The case moved forward as Smith exhausted his tribal remedies.

The other students' claims were eventually settled, leaving only Smith's cross-claim against SKC. Smith went to trial and lost in the fall of 2000, the tribal jury determining that SKC was not negligent. He then asked the tribal court to determine if it had jurisdiction. It did not do so. Smith appealed, but the tribal appellate court also did not decide if it had jurisdiction. Instead, it remanded the case for determination of this issue. The tribal court finally ruled that it did have jurisdiction, more than one and a half years after the case was filed. It would be almost two more years before the tribal appellate court ruled that it had jurisdiction.

During the long delay it began to appear that Smith's attempts to exhaust tribal remedies might be futile, as no facts seemed to permit tribal court jurisdiction. Further, in the intervening months the Supreme Court decided several cases regarding tribal jurisdiction that bolstered Smith's position. Cognizant that federal courts would ultimately decide the matter, Smith filed this action in federal court to determine tribal jurisdiction and resolve his claims. Being an Indian, Smith was not acting out of disdain for Indians or the tribal court system. He simply wanted his

claims resolved by a court of competent jurisdiction.

Smith argued that the Supreme Court's *Montana* analysis determines whether tribal jurisdiction exists over nonmembers like Smith and SKC. Instead of grappling with the terms of the analysis, though, SKC argued that the analysis did not apply. SKC was successful. The district court dismissed Smith's federal court action in favor of a tribal court resolution, without performing the *Montana* analysis.

Smith appeals to this Court to decide where his case should be heard. He contends that the Supreme Court's *Montana* analysis is the proper one. Smith and SKC are nonmembers of the Flathead Reservation, triggering a presumption against tribal jurisdiction. No statute or treaty controls regarding jurisdiction. The dispute does not center on a commercial relationship between a nonmember and the Tribes or its members. And, Smith's conduct does not threaten the integrity of the Tribes. Accordingly, under *Montana* no tribal court jurisdiction exists over Smith's claim.

VI. ARGUMENT.

A. Standard of Review.

The standards of review regarding questions of tribal jurisdiction are clearly erroneous on factual questions and *de novo* on legal questions.[6]

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[6]*FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313–1314 (9th Cir. 1990).

B. *Montana* Rule.

1. General rule and exceptions.

"*Montana v. United States* ... is the pathmarking case concerning tribal civil authority over nonmembers."[7] *Montana* established a framework for determining tribal regulatory jurisdiction over nonmembers. *Strate* applied this framework to civil litigation.[8] Together, *Montana* and *Strate* provide the present contours of tribal civil authority over nonmembers.[9]

Montana's general rule regarding tribal jurisdiction is that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[10] The presumption against tribal court jurisdiction exists in all cases involving nonmembers. This Court has summarily rejected arguments favoring a

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[7] *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997).

[8] Prior to *Strate*, this Court also recognized *Montana* as the leading tribal civil jurisdiction case regarding nonmembers. See *Yellowstone County v. Pease*, 96 F.3d 1169 (9th Cir. 1996).

[9] *County of Lewis v. Allen*, 163 F.3d 509, 513 (9th Cir. 1998). Accord *Big Horn County Elec. Coop. v. Adams*, 219 F.3d 944, 950 (9th Cir. 2000) ("This court's post-*Strate* jurisprudence leaves no doubt that *Montana*'s framework applies in determining a tribe's jurisdiction over nonmembers on non-Indian fee land, the precise situation presented by this case.")

[10] *Montana*, 450 U.S. at 565.

presumption *for* tribal court jurisdiction, stating, "We are not persuaded."[11]

While holding that tribal jurisdiction is "sharply circumscribed"[12], the Supreme Court also recognizes several, narrow exceptions to *Montana*'s general rule.

> To 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. 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. 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.[13]

If proven, the "consensual relationship" and "tribal integrity" exceptions permit a tribal court to exercise subject matter jurisdiction over a nonmember.

Montana and its progeny also recognize that "Congressional power over tribal lands is plenary."[14] Congress may pass legislation requiring or prohibiting tribal jurisdiction. Thus, *Montana*'s framework – limited tribal jurisdiction over nonmembers, subject to two exceptions – can be revised only through an affirmative congressional act expanding or limiting tribal jurisdiction.

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[11]*Pease*, 96 F.3d at 1175.

[12]*Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 650 (2001).

[13]*Montana*, 450 U.S. at 565 (citations omitted).

[14]*Burlington Northern v. Red Wolf*, 196 F.3d 1059, 1063 (9th Cir. 2000).

> [*Burlington I*[15]] believed that Congress would have had to take powers away from the Tribe to prevent taxation, rather than the reverse. ... [I]t is now clear that this type of reverse intent analysis is inadequate. Express, affirmative congressional delegation is required.[16]

Congress has expanded tribal *criminal* jurisdiction to include nonmember Indians.[17] It has not similarly expanded tribal civil jurisdiction over nonmembers, including nonmember Indians, in the twenty-plus years since *Montana*. If the present jurisdictional scheme proves insufficient to meet the practical needs of reservation communities, "then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs."[18]

2. Limited jurisdiction.

"Tribal jurisdiction is limited"[19] and tribal courts are courts of limited jurisdiction.

Respondents' contention that tribal courts are courts of "general

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[15] *Burlington Northern v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991) (addressing a similar issue).

[16] *Burlington Northern Santa Fe v. Assiniboine & Sioux*, 323 F.3d 767, 772 (9th Cir. 2003).

[17] See 25 U.S.C. § 1301(2).

[18] *Duro v. Reina*, 495 U.S. 676, 698 (1990).

[19] *Atkinson Trading Co.*, 532 U.S. at 649.

> jurisdiction" is also quite wrong. ... Tribal courts, it should be clear, cannot be courts of general jurisdiction in this sense, for a tribe's inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction.[20]

Tribal courts, like other courts of limited jurisdiction, should determine at the outset whether they possess jurisdiction.[21] The tribal court failed to do so in this case.

The party alleging tribal jurisdiction bears the burden of proving its existence. When a nonmember is a party to litigation, *Montana*'s general rule applies and the party asserting tribal jurisdiction bears the burden of proving an exception.[22] Absent proof, the presumption against tribal jurisdiction over nonmembers ripens into a holding.[23] SKC failed to argue, and therefore failed to prove, that an exception applied in this case. The district court failed to address, and therefore failed to

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[20]*Nevada v. Hicks*, 533 U.S. 353, 367 (2001) (citation omitted).

[21]*Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997) ("[T]he existence of subject matter jurisdiction is a threshold inquiry in virtually every federal examination of a tribal judgment." (Citing *Strate*, 520 U.S. at 117, and *Montana*, 450 U.S. at 565-66.)).

[22]See *Strate*, 520 U.S. at 446 ("[P]etitioners must show that Fredericks' tribal-court action against nonmembers qualifies under one of *Montana*'s two exceptions.") and *Atkinson Trading Co.*, 532 U.S. at 654 ("[I]t is incumbent upon the Navajo Nation to establish the existence of one of *Montana*'s exceptions.").

[23]See *Atkinson Trading Co.*, 532 U.S. at 659 ("Because respondents have failed to establish that the hotel occupancy tax is commensurately related to any consensual relationship with petitioner or is necessary to vindicate the Navajo Nation's political integrity, the presumption ripens into a holding.").

acknowledge, the applicability of either *Montana* exception.

Limited subject matter jurisdiction may be challenged by any party at any time. Parties may not stipulate that a court has subject matter jurisdiction.[24] Years of trials and appeals[25] do not prevent dismissal for lack of subject matter jurisdiction.[26] Actions or admissions of the parties do not estop challenges to a court's subject matter jurisdiction.[27] The tribal appellate court recognizes that a court lacking

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[24]*Janakes v. United States Postal Service*, 768 F.2d 1091, 1095 (9th Cir. 1985) ("[T]he parties cannot by stipulation or waiver grant or deny federal subject matter jurisdiction."). See also *Morongo Band of Mission Indians v. California State Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988) ("The parties have no power to confer jurisdiction on the district court by agreement or consent.).

[25]See *Richardson v. United States*, 943 F.2d 1107, 1112 (9th Cir. 1991) ("The facts, as stated by appellants, include '**fourteen years** [of]...litigation, ... numerous status and pretrial conferences, motions, three liability trials, one damage trial, and two prior appeals to the Ninth Circuit Court of Appeals.' ... Indeed, on appeal the government expressly stated the district court had jurisdiction pursuant to the Federal Tort Claims Act." (Emphasis added.)).

[26]*Id.*, 943 F.2d at 1114 ("[W]e must affirm the district court's dismissal for lack of subject matter jurisdiction.")

[27]See *Insurance Corp. of Ireland, Ltd. v. Compangnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("[N]o action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, principles of estoppel do not apply, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings." (Internal citations omitted.)).

jurisdiction can only act to dismiss a pending action.[28] Both SKC and Smith properly challenged the tribal court's limited jurisdiction while litigation was pending in tribal court.

3. Subject matter, not personal, jurisdiction.

Whether a tribal court has jurisdiction over a nonmember is a question of subject matter, not personal, jurisdiction.

> *Strate*'s limitation on jurisdiction over nonmembers pertains to subject-matter, rather than merely personal, jurisdiction, since it turns upon whether the actions at issue in the litigation are regulable by the tribe.[29]

This Court has refused to recognize tribal court judgments entered when tribal *subject matter* jurisdiction was lacking.[30]

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[28]*Moran v. Council of the Confederated Salish & Kootenai Tribes*, 22 I.L.R. 6149, 6152 (CS&KT Ct. App., October 23, 1995) ("If the trial court lacks subject matter jurisdiction at the time the action is filed, it is powerless to do anything except dismiss the action, and any other order is a nullity." (Citations omitted.)).

[29]*Hicks*, 533 U.S. at 367 n. 8. See also *Strate*, 520 U.S. at 445 ("The Court of Appeals concluded that our decision in *Montana* [] was controlling precedent, and that under *Montana*, the Tribal Court lacked subject-matter jurisdiction over the dispute.").

[30]See *Wilson*, 127 F.3d at 813 ("Applying the comity analysis to this case, we find that the tribal judgment is not entitled to recognition or enforcement because the tribal court lacked subject matter jurisdiction, one of the mandatory reasons for refusing to recognize a tribal court judgment. Our jurisdictional determination is commanded by *Strate*....")

4. Membership of parties.

A court's subject matter jurisdiction is determined independent of which party is plaintiff and which is defendant. The *Montana* framework applies regardless of whether the nonmember is the plaintiff or the defendant, although typical cases have tribal defendants.

> [W]e have never held that a tribal court had jurisdiction over a nonmember defendant. Typically, our cases have involved claims brought against tribal defendants. See, *e.g.*, *Williams v. Lee*, 358 U.S. 217 (1959). In *Strate* [], however, we assumed that "where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumably lies in the tribal courts," without distinguishing between nonmember plaintiffs and nonmember defendants.[31]

The Supreme Court has not distinguished between cases involving nonmember plaintiffs and nonmember defendants in its tribal jurisdiction analysis.

Tribal members are not disadvantaged by the recognition that tribal court jurisdiction is generally lacking over cases involving nonmembers as either plaintiffs or defendants. Tribal members may still assert their rights as plaintiffs or defendants in state or federal forums.[32] Tribal members, as citizens of the United States and their respective states, participate in their national and state governments. On the other

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[31] *Hicks*, 533 U.S. at 358 n. 2 (citation omitted; emphasis added).

[32] See *Red Wolf*, 196 F.3d at 1065.

hand, nonmembers are generally not represented by tribal governments, not able to participate in or vote for tribal leadership roles, and not permitted on tribal juries. *Montana*'s general restriction on tribal jurisdiction over nonmembers protects the nonmembers' rights by preventing adjudication by a tribal government in which the nonmember has no representation, absent the extraordinary situations addressed by *Montana*'s exceptions.

C. Status of Parties.

Smith is a citizen of Oregon and a member of the Umatilla Tribe in Oregon. He is not a CS&KT member.

The Tribes are the governing body of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana.

SKC is a Montana non-profit corporation having its principal place of business in Pablo, Montana. SKC is not a CS&KT tribal member, and cannot be a CS&KT tribal member.[33] It is completely separate from the Tribes.[34] The Tribes have no

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[33] See the tribal trial court's DECISION ON PLAINTIFF'S RULE 60(B) MOTION FOR RELIEF FOR LACK OF SUBJECT MATTER JURISDICTION dated April 6, 2001, unnumbered p. 5 (E.R. 5:5).

> After due consideration, the Court finds that the College is not a tribal member as provided in Title I, Chapter I, Part 1, Article II, Section 3 of the *CSKT Law Codified*. The College was never a natural child of a

ownership interest in SKC.[35] Although the Tribes were dismissed from the tribal litigation, SKC was not, a recognition that the two are separate.

SKC might receive funding as a "tribal college" under the Tribally Controlled Community College Assistance Act of 1978 (25 U.S.C. § 1801 et seq.), although there has been no proof of this. Nonetheless, such a title is superfluous to the

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> member of the Tribes and cannot possess one quarter or more blood of the Tribes and is, therefore, not eligible to vote or hold office in Tribal elections or receive a per capita dividend or receive Tribal preference in hiring.

[34] See Tribes' BRIEF IN SUPPORT OF MOTION TO DISMISS dated October 29, 1999, pp. 2–3 (E.R. 2:2–3).

> Salish Kootenai College is completely separate from The Tribes. While The Tribal Council appoints the seven member Board of Directors, The Tribes do not provide funding for the College. The college's employees, officers and agents are not officers, agents or employees of The Tribe. The Tribe has no responsibility for the college's operations or the actions of its employees, officers or agents. [Aff. Joe McDonald ¶ 6]
> ...
> No officer, agent or employee of The Tribes, acting in the capacity of an officer, agent or employee of The Tribes, had anything to do with the College. [Aff. Joe McDonald, ¶ 7] No officer, agent or employee of The Tribes acting for The Tribes participated in anything even remotely related to [the] accident.

(Emphasis added). See also AFFIDAVIT OF JOE MCDONALD dated October 29, 1999 (E.R. 3).

[35] A Montana non-profit corporation, by definition, has no owners; Montana law does not allow issuance of stock for Montana non-profit corporations. See § 35-2-118(2), Mont. Code Ann.

jurisdiction analysis. The Supreme Court rejected an analogous title, holding it is not determinative of tribal jurisdiction.

> Respondents and their principle *amicus*, the United States, also argue that petitioner consented to the tax by becoming an 'Indian Trader.' ... Petitioner has acquired the requisite license to transact business with the Navajo Nation.... But whether or not the Navajo Nation could impose a tax on activities arising out of this relationship, an issue not before us, it is clear that petitioner's 'Indian Trader' status by itself cannot support the imposition of the hotel occupancy tax.[36]

The salient issue, therefore, is not what SKC is called but what it is. By its own admission and that of the Tribes, SKC is separate from the Tribes.

The district court relied on five cases for its contrary "conclusion that SKC is a tribal entity or arm of the tribe for purposes of federal Indian law regarding tribal court jurisdiction"[37]: *Hagen* (8th Cir. 2000)[38], *Dillon* (8th Cir. 1998)[39], *Pink* (9th Cir.

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[36] *Atkinson Trading Co.*, 532 U.S. at 656.

[37] ORDER dated March 7, 2003, p. 8 (E.R. 9:8).

[38] *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040 (8th Cir. 2000).

[39] *Dillon v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581 (8th Cir. 1998).

1998)[40], *Duke* (10th Cir. 1999)[41], and *Giedosh* (D. S.D. 1997)[42]. Each of cases involved statutory claims of discrimination against social service entities in Indian communities. Their holdings relied on broadly defining "Indian tribe", as specifically required when interpreting statutes passed for the benefit of Indians.[43] However, a broad definition of "Indian tribe" is inapplicable to Smith's common law claims, where the congressional intent for a broad definition is lacking. Accordingly, the district court's reliance on these cases for a definition of "Indian tribe" is error.

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[40] *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185 (9th Cir. 1998).

[41] *Duke v. Absentee Shawnee Tribe of Oklahoma Housing Authority*, 199 F.3d 1123 (10th Cir. 1999) *cert. denied*, 529 U.S. 1134 (2000).

[42] *Giedosh v. Little Would School Board, Inc.*, 995 F.Supp. 1052 (D. S.D. 1997).

[43] See, for example, *Giedosh*, 995 F.Supp. at 1056.

> [I]t is a settled principle of statutory construction that statutes passed for the benefit of dependent Indian tribes are to be liberally construed, with doubtful expressions being resolved in favor of the Indians ... This Court finds that Congress intended to include the Board within the definition of an 'Indian tribe.' The canons of construction require this Court to liberally interpret the definition contained in the statute and to resolve any doubts in favor of the Indians. Accordingly, this Court finds that the Board is an 'Indian tribe' under Title VII and the ADA; therefore, this Court does not have the subject matter jurisdiction to proceed over the above entitled matter.

Quoting *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138 (1984).

Court addressing this issue recognize that definition of a "tribe" is contextual.[44]

> Because "the definition of an Indian tribe changes depending upon the purpose of the regulation or statutory provision under consideration," we must interpret the Title VII exemption in light of its purpose of "promot[ing] the ability of sovereign Indian tribes to control their own economic enterprises." Given the canon that we construe all ambiguities in favor of Indian sovereignty, we conclude the district court did not err in finding ASHA was a "tribe" entitled to the Title VII exemption.[45]

Only in the context of statutory discrimination claims did these cases apply a broad definition of "Indian tribe". *Montana* makes no suggestion that a similarly broad definition is appropriate for common law tort claims.

In *Hagen* (8th Cir. 2000) non-Indians sued a tribal college in federal court alleging discrimination. After a jury awarded damages, the college challenged subject matter jurisdiction and claimed immunity. The lower court declined to dismiss. The Eighth Circuit reversed, dismissing the case based on statutory immunity without discussing whether tribal subject matter jurisdiction existed. The district court cited *Hagen* as an example of a tribal college being held to be an arm

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[44]*Dille v. Council of Energy Resource Tribes*, 801 F.2d 373 (10th Cir. 1986) ("Plaintiffs would have us rely on definitions of Indian tribes taken from other contexts. But the definition of an Indian tribe changes depending upon the purpose of the regulation or statutory provision under consideration. Accordingly, we are constrained to stay within the statutory language and purpose of the exemption involved in this case." (Internal citation omitted)).

[45]*Duke*, 199 F.3d at 1125 (internal citations omitted).

of the tribe . It is factually distinguishable from the instant case because there the college's status as a tribal entity was not disputed.[46] Here, SKC's status is challenged and the facts differ because SKC was not chartered by the Tribes, is not an arm of the Tribes, was not directly responsible to the Tribes, and does not limit its services to tribal members. *Hagen* relied on other discrimination cases (*Dillon* and *Pink*) where the definition of "Indian tribe" is broadly construed.

In *Dillon* (8th Cir. 1998) a non-Indian sued the tribal housing authority in federal court alleging discrimination. The lower court dismissed due to statutory tribal immunity and the Eighth Circuit affirmed. The district court cited *Dillon* as another example of what constitutes a tribal entity. It is factually distinguishable because SKC was not established by the tribes and is not the tribes. SKC explicitly agreed to sue and be sued, waiving any immunity it may have.[47] *Dillon* also relied on the broad interpretation of "Indian tribe", which applied only because discrimination disputes are creatures of statute.

In *Pink* (9th Cir. 1998) an Indian sued a tribal health entity created by two tribes in federal court alleging discrimination. The lower court dismissed for lack of subject

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[46]*Hagen*, 205 F.3d at 1043 ("[T]he facts are undisputed....").

[47]See AFFIDAVIT OF JOE MCDONALD dated October 29, 1999 (E.R. 3:10) and *Dillon*, 144 F.3d at 584.

matter jurisdiction and this Court affirmed. The district court cited *Pink* as an example of a tribal entity being held to be an arm of the tribes. It is factually distinguishable because SKC was not formed by one tribe, let alone a collection of tribes, and is not controlled by a tribe. *Pink* also relied on the broad statutory interpretation of "Indian tribe".

In *Duke* (10th Cir. 1999) a nonmember Indian sued the tribal housing authority in federal court alleging discrimination. The lower court dismissed for lack of subject matter jurisdiction and the Tenth Circuit affirmed. The district court cited *Duke* as an example of a tribal entity being held to be an arm of the tribes. It is factually distinguishable because SKC was not chartered by the Tribes, is not an arm of the tribal government, was not directly responsible to the Tribes, and does not limit its services to tribal members. *Duke* relied on the broad statutory interpretation of "Indian tribe". It also misapplied an expansive criminal statutory definition of a tribal organization (18 U.S.C. § 1163) from *Crossland*[48] to civil litigation.

Finally, in *Giedosh* (D. S.D. 1997) non-Indians sued a tribal school board in federal court alleging discrimination. That court granted summary judgment to the school board for lack of subject matter jurisdiction due to statutory tribal immunity. The district court cited *Giedosh* as another example of a tribal entity being held to be

[48] *United States v. Crossland*, 642 F.2d 1113 (10th Cir. 1981).

an arm of the tribes. It is factually distinguishable because SKC was not chartered by the Tribes, is not an arm of the Tribes, was not directly responsible to the Tribes, and only provides optional, secondary education, not mandatory, primary education. Moreover, summary judgment was entered in that case because the material facts were deemed undisputed. *Giedosh* also relied on the broad statutory interpretation of "Indian tribe".

Importantly, none of the cases relied on by the district court suggest that a non-tribal, nonmember entity can be an "Indian tribe" outside of the broad statutory construction mandated for discrimination cases. SKC, the district court, and the tribal courts cite no authority, and Smith has found none, requiring such an interpretation. Indeed, *Montana* requires the opposite, permitting tribal jurisdiction over nonmembers in only rare circumstances. As a result, the view that SKC as not a "nonmember" in the sense addressed by *Strate* is unsupported by controlling law, which treat everyone who is not the tribe or a tribal member as a nonmember. The rule of statutory construction by which non-tribal entities are conferred with "Indian tribe" status simply does not apply to this common law tort case.

To circumvent the fact that SKC is not the Tribes or a tribal member, the tribal appellate court suggested that "significant tribal interests" can confer tribal entity

status on a nonmember.[49] That court made the remarkable suggestions that SKC's name, location, or patronage by tribal members can deem it to be an arm of the Tribes.[50] Such a metamorphosis is not only facially unjustified, it is inconsistent with *Atkinson Trading Co.*, which held that an "overwhelming Indian character" is insufficient to confer tribal jurisdiction [51], and undermines *Montana*'s second exception, which held that tribal jurisdiction is permitted only when conduct *directly affects* the tribe's integrity. The mischaracterization of SKC as a tribal entity was both inconsistent with the facts of record and incompatible with *Montana* and its progeny.

D. *Situs.*

The rollover occurred on US 93, a right-of-way through the Flathead

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[49]Tribal appellate court OPINION dated February 17, 2003, p. 11 (E.R. 8:11).

[50]Tribal appellate court OPINION dated February 17, 2003, p. 10–11 (E.R. 8:10–11).

[51]*Atkinson Trading Co.*, 532 U.S. at 657.

> Although we have no cause to doubt respondents' assertion that the Cameron Chapter of the Navajo Nation possesses an "overwhelming Indian character," [] we fail to see how petitioner's operation of a hotel on non-Indian fee land "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

(Citation omitted.)

Reservation. Public rights-of-way are alienated, non-Indian land for civil jurisdiction purposes.[52] Criminal law statutes that provide tribal jurisdiction on alienated land do not change the rules in civil cases.

> We find misplaced the Court of Appeals' reliance upon 18 U.S.C. § 1151, a statute conferring upon Indian tribes jurisdiction over certain criminal acts occurring in "Indian country"…. [W]e do not here deal with a claim of statutorily conferred power. Section 1151 simply does not address an Indian tribe's inherent or retained sovereignty over nonmembers on non-Indian fee land.[53]

Pursuant to *Strate*, if a claim arises out of an accident involving nonmembers on a state highway, tribal jurisdiction is generally lacking.

Smith's claim arose when he suffered damages during the rollover on US 93. Until he suffered damages, Smith had no claim. "[A] tort is not wrongful conduct in the air; the arrow must hit its mark. ... Until there is hurt, there is no tort."[54] His allegations of on-going negligence applied both on and off US 93. SKC's negligence was ongoing up to and including the rollover since, for example, it failed to properly maintain its vehicle and supervise its students in the moments leading up to the

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[52] *Red Wolf*, 196 F.3d at 1064 ("In sum, under the *Strate* analysis, a federally-created right-of-way is the functional equivalent of land alienated in fee to non-members.").

[53] *Atkinson Trading Co.*, 532 U.S. at 653 n. 5.

[54] *Heil v. Morrison Knudsen Corp.*, 863 F.2d 546 (7th Cir. 1988) (internal citation omitted).

rollover. "The place of injury is the place where the injury was suffered, not where the wrongful act took place."[55] SKC acknowledged this principle and successfully argued in tribal court that "there was only one occurrence: the dump truck rollover of May 12, 1997."[56]

In arguments to the district court, SKC changed its tune and argued that Smith's claim arose on the reservation, not on US 93.[57] It ignored that Smith had no viable negligence claim until all the required elements – duty, breach, causation, and damages – existed. The rollover on US 93 caused Smith's damages; this is when his claim arose. As *Strate* recognizes, it is the existence of a *claim*, not merely negligence, that triggers analysis of whether tribal jurisdiction exists.

> [T]ribal courts may not entertain *claims* against nonmembers arising out of accidents on state highways....[58]

The *Montana* analysis applies even if SKC's off-highway, on-reservation

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[55]*Johnson v. Oroweat Foods Co.*, 785 F.2d 503 (4th Cir. 1986) (citations omitted).

[56]SKC's REPLY BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT, No. 99-227-CV, p. 5 (CS&KT tribal trial court, August 9, 2000).

[57]See SKC's BRIEF IN SUPPORT [SIC] CONSOLIDATED MOTIONS TO DISMISS FOR SUBJECT MATTER JURISDICTION TO STAY ALL DISCOVERY AND TO ABSTAIN dated January 9, 2003, p. 12 (C.D. 45) ("Contrary to Smith's assertions, **none** of the alleged negligent acts by SKC occurred on US 93, or otherwise on non-Indian land." (Emphasis in original.)).

[58]*Strate*, 520 U.S. at 442 (emphasis added).

actions are considered. As the Supreme Court stated in *Hicks*, tribal membership is a critical element to whether the *Montana* analysis is necessary, while the location of the events is only one of many factors to whether a *Montana* exception applies.

> Both *Montana* and *Strate* rejected tribal authority to regulate nonmembers' activities on land over which the tribe could not "assert a landowner's right to occupy and exclude." Respondents and the United States argue that since Hicks's home and yard *are* on tribe-owned land within the reservation, the Tribe may make its exercise of regulatory authority over nonmembers a condition of nonmembers' entry. Not necessarily. While it is certainly true that the non-Indian ownership status of the land was central to the analysis in both *Montana* and *Strate*, the reason that was so was *not* that Indian ownership suspends the "general proposition" derived from *Oliphant* that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" except to the extent "necessary to protect tribal self-government or to control internal relations." *Oliphant* itself drew no distinctions based on the status of land. And *Montana*, after announcing the general rule of no jurisdiction over nonmembers, cautioned that "[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," – clearly implying that the general rule of *Montana* applies to both Indian and non-Indian land. The ownership status of land, in other words, is only one factor to consider in determining whether regulation of the activities of nonmembers is "necessary to protect tribal self-government or to control internal relations."[59]

Location on tribal land is only one of many factors, not an element of the *Montana* analysis, because Indian tribes are not full territorial sovereigns.

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[59]*Hicks*, 533 U.S. at 359–360 (italics in original; underlining added; internal citations omitted).

> Only full territorial sovereigns enjoy the "power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens," and Indian tribes "can no longer be described as sovereigns in this sense."[60]

Thus, *Montana*'s general rule applies on tribal land. The occurrence of events on tribal land does not trigger a *Montana* exception, absent proof of other factors. SKC attempted no proof, and the district court provided no analysis, regarding an exception. Accordingly, the *situs* of Smith's claim cannot support tribal jurisdiction, especially where the rollover occurred on US 93.

E. Application of *Montana*.

Montana's general rule prohibits tribal jurisdiction since neither Smith nor SKC are members of the Flathead Reservation.

> [T]ribal courts may not entertain claims against nonmembers arising out of accidents on state highways, absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway in question.[61]

Indeed, the material facts of this case mirror those in *Strate*, which found tribal jurisdiction lacking.

> Thus, this case mirrors the facts of *Strate* almost precisely: it was an automobile accident between two individuals on a United States

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[60] *Atkinson Trading Co.*, 532 U.S. at 653 n. 5 (citation omitted).

[61] *Strate*, 520 U.S. at 442.

> highway designed, built, and maintained by the State of Montana, with no statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway. The tribe has consented to construction of the road to which the general public had unrestricted access.[62]

However, the facts in this case are more compelling against tribal jurisdiction than *Strate*'s in a number of ways. In *Strate*, several ancillary parties were tribal members. In *Strate*, the tortfeasor was an on-reservation subcontractor for a tribally-owned business constructing a tribal community building. Here, there are no tribal member parties, and SKC operated separate from the Tribes.[63] Thus, while similar to *Strate*, Smith's claim is more compelling in favor of applying *Montana*'s general rule.

Notably, the law firm representing SKC successfully made this very argument in *Holen v. Azure*[64]. Holen, a nonmember of the tribe, sought injunctive relief from a tribal court action brought by Azure, a tribal member, for a vehicle-livestock collision on a highway right-of-way through a reservation. Holen argued that *Strate* barred tribal jurisdiction when even one party is a tribal member.

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[62]*Wilson*, 127 F.3d at 814.

[63]See, for example, Smith's AMENDED COMPLAINT dated July 19, 2002, ¶ 18 (E.R. 6:4) ("Except as a sovereign governmental entity, the Tribes do not control or have responsibility for the operations of SKC or its officers, agents or employees. The Tribes do not provide funding for SKC."), admitted in SKC's ANSWER TO AMENDED COMPLAINT dated August 2, 2002, ¶ 16 (E.R. 7:3).

[64]*Holen v. Azure*, No. CV-01-17-BLG-JDS (D. Mont. 2001).

> In this case, the undisputed facts establish that Ms. Azure's accident occurred on alienated, non-Indian land (U.S. Highway 2) and that Robert Holen is not a member of the Fort Peck Tribe. Pursuant to *Strate* the Fort Peck Tribal Court does not have jurisdiction over the Azures' claims in the Tribal Court lawsuit.[65]

In that case, the district court correctly applied *Montana*'s general rule, found tribal jurisdiction lacking, and granted summary judgment enjoining the tribal action.

> The Azures' negligence suit arose from facts analogous to the ones the Supreme Court considered in *Strate*. Therefore, this Court must reach the same result as the Supreme Court. *Montana*'s main rule, and not its exceptions, applies. The Fort Peck Tribal Court lacks jurisdiction over the negligence suit, and Robert Holen need not exhaust his remedies in the tribal court system.[66]

Accordingly, while the district court has correctly performed a *Montana* analysis and apply *Montana*'s general rule in the past, its failure to do so this time and its failure to find tribal jurisdiction lacking constitute reversible error.

1. Jurisdiction statute or treaty.

Neither party argues that Congress, via statute or treaty, required or prohibited the tribal court from assuming jurisdiction over Smith's claims. The code is devoid of any congressional intent one way or the other. Accordingly, this Court's *Montana*

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[65] *Holen*, PLAINTIFF ROBERT HOLEN'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT dated June 12, 2001, p. 4.

[66] *Holen*, ORDER dated September 6, 2001, p. 5.

analysis must focus on the two exceptions to *Montana*'s general rule.

2. First exception.

Montana's "consensual relationship" exception provides jurisdiction "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." If the subject of litigation is not a commercial relationship[67] between a nonmember and the tribe or its members, the first exception cannot apply.

Smith's relationship with SKC is not the subject matter of his litigation. Smith asserts no contract or other commercial claim against SKC. In rejecting application of *Montana*'s first exception to highway accidents, *Strate* recited the types of commercial claims to which the first exception applies.

> *Montana*'s list of cases fitting within the first exception, see 450 U.S., at 565-566, indicates the type of activities the Court had in mind: *Williams v. Lee*, 358 U.S. 217, 223 (1959) (declaring tribal jurisdiction exclusive over lawsuit arising out of on-reservation sales transaction between nonmember plaintiff and member defendants); *Morris v. Hitchcock*, 194 U.S. 384 (1904) (upholding tribal permit tax on nonmember-owned livestock within boundaries of the Chickasaw

[67] *Boxx v. Long Warrior*, 265 F.3d 771, 776 (9th Cir. 2002) ("[C]ourts have inferred that 'qualifying relationships' only arise from some form of commercial transaction. ... We reaffirm this principle today.")

> Nation); *Buster v. Wright*, 135 F. 947, 950 (CA8 1905) (upholding Tribe's permit tax on nonmembers for the privilege of conducting business within Tribe's borders; court characterized as "inherent" the Tribe's "authority . . . to prescribe the terms upon which noncitizens may transact business within its borders"); *Colville*, 447 U.S., at 152-154 (tribal authority to tax on-reservation cigarette sales to nonmembers "is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status"). Measured against these cases, the Fredericks-Stockert highway accident presents no "consensual relationship" of the qualifying kind.[68]

As in *Strate*, none of the exemplary cases are remotely similar to Smith's tort claim.

In *Strate*, A-1 Contractors was performing on-reservation work for the tribes when it committed a tort on a highway right-of-way. The Supreme Court found jurisdiction lacking under *Montana*'s first exception because "Gisela Fredericks was not a party to the subcontract, and the [T]ribes were strangers to the accident."[69] As in *Strate*, Smith is a stranger to any alleged relationship between SKC and the Tribes. Further, that relationship is not the subject matter of this litigation. Thus, even if a relationship existed between the Tribes and SKC, tribal jurisdiction was lacking for a run-of-the-mill highway accident.

The tribal appellate court asserted that Smith's status as an SKC student triggered the first *Montana* exception. "His allegations against the college are a

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[68] *Strate*, 520 U.S. at 457 (underling added).

[69] *Id.*, 520 U.S. at 457 (quotations and citation omitted).

direct outcome of the relationship of student-college that he chose to establish."[70] This assertion is wrong for two reasons. First, SKC is not part of the Tribes. Second, and more importantly, SKC's tortious conduct, not its commercial relationship with Smith, is the subject of this litigation. *Montana*'s first exception is inapplicable because there is no nexus between Smith's claims and whatever relationship may exist between SKC and the Tribes.

> *Montana*'s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself. ... A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another – it is not "in for a penny, in for a Pound."[71]

As in *Strate*, Smith's tort claims lack a "consensual relationship" of the qualifying kind.

> The dispute, as the Court of Appeals said, is "distinctly non-tribal in nature." It "arose between two non-Indians involved in [a] run-of-the-mill [highway] accident." Although A-1 was engaged in subcontract work on the Fort Berthold Reservation, and therefore had a "consensual relationship" with the Tribes, "Gisela Fredericks was not a party to the subcontract, and the [T]ribes were strangers to the accident."[72]

The Tenth Circuit has likewise declined to apply *Montana*'s first exception when a

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[70]Tribal appellate court OPINION dated February 17, 2003, p. 14 (E.R. 8:14).

[71]*Atkinson Trading Co.*, 532 U.S. at 656 (internal citation omitted).

[72]*Strate*, 520 U.S. at 457 (internal citations omitted).

relationship with the tribe is indirect at best and unrelated to the subject matter of the litigation.

> Under *Montana*'s consensual relationship exception, the relationship must be one between the nonmember and "the tribe or its members." Here, Truck Insurance's contractual relationship was with the clinic, another nonmember. Thus, the Navajo Nation's exertion of authority over Truck Insurance is too attenuated to fall under *Montana*'s consensual relationship exception.[73]

This Court should recognize that there was no commercial relationship between Smith and the Tribes. This Court should also recognize that this litigation regards a tort claim, not a commercial relationship as required by *Montana*. Accordingly, this Court should find *Montana*'s first exception inapplicable.

3. Second exception.

Montana's "tribal integrity" exception provides jurisdiction over nonmembers on the reservation whose conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." "Although framed in broad terms, Montana's second exception is narrowly construed."[74] The Supreme Court expounded upon this narrow construction of the second exception.

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[73] *MacArthur v. San Juan County*, 309 F.3d 1216, 1223 (10th Cir. 2002) (emphasis in original, citations omitted).

[74] *Boxx*, 265 F.3d at 777 (citing *Allen*, 163 F.3d at 515).

> In *Strate* [] we stated that *Montana*'s second exception "can be misperceived." The exception is only triggered by nonmember conduct that threatens the Indian tribe; it does not broadly permit the exercise of civil authority wherever it might be considered "necessary" to self-government.[75]

This Court has also described the narrow application of the exception.

> *Strate* puts the exception in its proper context:
>
> > 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 tribal self-government or to control internal relations."
>
> As explained in *Wilson v. Marchington*, the tribal court plaintiff's status as a tribal member alone cannot satisfy the second exception. Nor is it sufficient to argue, as the tribe does, that the exception applies because the tribe has an interest in the safety of its members. That simply begs rather than answers the question. Under the tribe's analysis, the exception would swallow the rule because virtually every act that occurs on the reservation could be argued to have some political, economic, health or welfare ramification to the tribe. The exception was not meant to be read so broadly.[76]

Thus if the nonmember's conduct does not specifically threaten the integrity of the tribe, the second exception cannot apply.

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[75] *Atkinson Trading Co.*, 532 U.S. at 657 n. 12.

[76] *Allen*, 163 F.3d at 515 (internal citations omitted).

Smith's conduct in the tribal court litigation was initially to defend against claims made by the other student passengers. Later, SKC and Smith cross-claimed against each other. Ultimately, Smith's cross-claim alleging that SKC was negligent proceeded to trial in tribal court with Smith. Similar claims were later filed in the federal district court. Smith's conduct consisted initially of defending against, and later prosecuting, claims for damages. Smith knows of no authority, and neither SKC nor the district court cited any, that apply *Montana*'s second exception to the "conduct" of defending and prosecuting tort claims.

The district court ignored this exception in its decision because it refused to apply the *Montana* analysis. SKC's prior briefing likewise paid scant attention to this issue. However, while the tribal appellate court provided some analysis in its Opinion regarding application of the second exception, it failed to discuss how Smith's conduct triggered the exception. As discussed below, that court only addressed how education generally is important to the Tribes.

The conduct at issue in the both this and the tribal litigation is SKC's tortious conduct (negligence, product liability, and spoliation of evidence). SKC's defenses included comparative negligence by Smith. While some negligent conduct could theoretically trigger the second exception, it would only do so in the rare situations where the other elements – a <u>threat to the integrity</u> of the <u>Tribes</u> – were met.

However, Smith's garden variety tort claim and SKC's comparative negligence defense do not rise to the level of conduct required to trigger the second exception.

Neither does this litigation or its underlying conduct threaten tribal integrity. The Supreme Court, in *Strate* and elsewhere, rejected general issues such as highway safety as being a tribal-specific concern sufficient to trigger the second exception.

> The second exception to *Montana*'s general rule concerns conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Undoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if Montana's second exception requires no more, the exception would severely shrink the rule.[77]

Atkinson rejected application of *Montana*'s second exception to the "conduct" of obtaining an "Indian trader" license and conducting business within the exterior boundaries of a reservation, neither of which threatens a tribe's integrity.

This Court finds tribal jurisdiction lacking when only conduct of general concern is at issue. For example, *Boxx* rejected alcohol related traffic accidents as a tribal concern sufficient to trigger *Montana*'s second exception.

> Even assuming that the Tribe possesses some regulatory and adjudicatory power over the sale and consumption of alcohol, the Tribe is not prevented in any way from exercising such authority by being denied the right to adjudicate this garden variety automobile accident. If we were to find jurisdiction here, "the exception would swallow the

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[77] *Strate*, 520 U.S. at 457–458.

> rule because virtually every act that occurs on the reservation could be argued to have some ... welfare ramification to the tribe." We hold, therefore, that the tribal court lacks jurisdiction over Long Warrior's personal injury action.[78]

This Court has also rejected the presence of tribal litigants as a concern sufficient to trigger the exception.

> If the possibility of injuring multiple tribal members does not satisfy the second *Montana* exception under *Strate*, then, perforce, Wilson's status as a tribal member alone cannot.[79]

These rulings make sense; even if litigation in a non-tribal forum were to affect the a tribe or its members, only in very limited circumstances would it actually *threaten* the integrity of the tribe, triggering *Montana*'s narrow exceptions.[80]

Again, neither the district court nor SKC explained why an exception is triggered by this case. The tribal appellate court attempted to do so, but is rationale simply begged the question *Allen* warned about.

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[78] *Boxx*, 265 F.3d at 777–778 (internal citation omitted).

[79] *Wilson*, 127 F.3d at 815.

[80] See *Atkinson Trading Co.*, 532 U.S. at 659 ("Whatever effect petitioner's operation of the Cameron Trading Post might have upon surrounding Navajo land, it does not endanger the Navajo Nation's political integrity." (Citation omitted.)); and *Wilson*, 127 F.3d at 815 ("As Justice Ginsburg observed, '[n]either regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve the right of reservation Indians to make their own laws and be ruled by them.'" (Citation omitted.)).

> The Tribal Council has decided the availability of higher education to tribal members is important enough to that governing body that it has supported and strengthened SKC for over 25 years. What better measure of the significance of this Tribal activity to the Tribe and its political integrity can there be?[81]

This statement is factually wrong because the evidence demonstrated that the Tribes are separate from SKC and are *not* materially "supported and strengthened" by the Tribes. More importantly, even though education is important to the Tribes, it is not a tribal-specific concern, as the tribal appellate court recognized.

> It is difficult to argue that an educated citizenry is not essential to self-government, *whether of a tribe or of another government*. Therefore, we conclude that jurisdiction in this case can be sustained under the second Montana exception.[82]

Moreover, Smith's litigation poses no threat to tribal integrity because it seeks to *enforce* appropriate educational and road safety standards, not threaten education. There are simply no tribal-specific concerns involved in this litigation, and certainly no threat to a healthy education system.

The tribal appellate court did not reconcile its broad application of the second exception with the narrow application anticipated by *Montana*. With a fundamentally flawed premise, its holding favoring tribal jurisdiction can stand only if *Montana*,

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[81]Tribal appellate court OPINION dated February 17, 2003, p. 15 (E.R. 8:15).

[82]Tribal appellate court OPINION dated February 17, 2003, p. 16 (E.R. 8:16) (emphasis added).

Strate, *Atkinson*, *Boxx*, and all other controlling authority regarding the second exception are ignored. These authorities should be followed, not ignored, to find that tribal integrity is not threatened.

Finally, even if Smith's conduct somehow posed a threat to the very existence of some entity, that entity would be SKC, not the Tribes. As the Tribes argued, supported by the college president's affidavit, SKC and the Tribes are completely separate. The Tribes were dismissed from the tribal litigation on this basis. Even if some relationship existed between the two, SKC could disappear from existence and the Tribal government would continue to exist and function as it always has.

Fortunately, SKC will not disappear because *its* existence is not even threatened. It will continue to provide educational services with the comfort of knowing that its insurance protects against claims such as Smith's. Indeed, this litigation seems rife with maneuvers designed to protect the insurer with no tangible benefit to SKC. The protracted litigation over an issue that should have been decided at the outset – tribal subject matter jurisdiction – likely has inconvenienced SKC as much as Smith, delaying resolution of the this dispute only to the insurer's benefit. Ultimately, however, SKC's insurance will cover any award to Smith, up to policy

limits.[83] SKC's integrity is not threatened by this litigation, and the *Tribes'* integrity certainly is not threatened. The second exception cannot apply.

4. *Montana* exceptions conclusion.

SKC did not meet its burden of proving that a *Montana* exception applies to this garden variety tort action by a nonmember, against a nonmember, on nonreservation land. The district court failed to discuss the *Montana* analysis. *Montana*'s general rule bars jurisdiction over this case. The tribal appellate court's attempt to apply both *Montana* exceptions was incompatible with the proper application of these narrow exceptions. No *Montana* exception is applicable.

Congress is the proper forum for permitting broader tribal jurisdiction than that outlined by *Montana* and its progeny. Congress has declined to do so in the civil context. By contrast, its expansion of tribal jurisdiction in the *criminal* context and its refusal to do so in the civil context highlights its confidence in the *Montana* analysis. The district court erred in not undertaking a *Montana* analysis, erred in not finding tribal jurisdiction lacking, and erred in not enjoining the tribal court action.

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[83]See, for example, *Crowell v. School Dist. No. 7*, 247 Mont. 38, 58, 805 P.2d 522 (1991) (holding that a school's purchase of liability insurance waives any immunity to the extent of the coverage granted by the policy).

F. Injunctive Relief.

Smith originally filed a motion for injunctive relief on June 6, 2002, which was denied without prejudice on June 11, 2002. He again sought injunctive relief on June 20, 2002. Smith argued there was impending harm due to delay, increased costs, SKC's pending claim for costs in tribal court, loss of access to a court with competent jurisdiction, and potential for future tribal action to address any findings, conclusions, or remand ordered by that court. He also argued it would be fundamentally unjust to require Smith to proceed before a court that plainly lacks jurisdiction. The district court did not resolve Smith's motion until it was dismissed more than eight months later for lack of jurisdiction. Smith's fears of delay proved accurate.

Moreover, Smith's ability to prosecute his claim is slipping away. A key SKC witness who instructed Smith to drive the doomed dump truck, Gordon Bartell, passed away prior to litigaton. Another key witness and SKC's Vice President Academic Affairs, Gerald Slater, passed away after trial. SKC has lost or destroyed evidence of witness interviews taken immediately after the rollover. SKC has threatened to discard the wrecked dump truck.

Smith's injuries make protracted litigation difficult. He is medically and financially in poor shape, unable to remain gainfully employed to provide for his wife and children. Smith's medical treatment bills exceed $90,000, and the uncontroverted

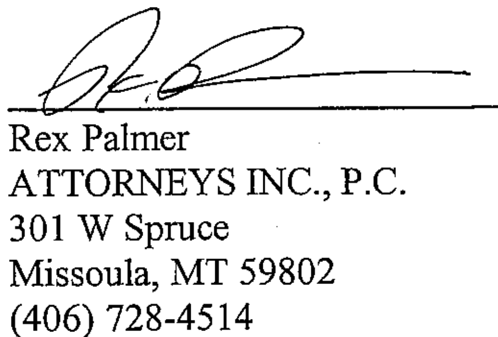
testimony of Smith's economist is that Smith's total present value economic loss exceeded $400,000. Further delay jeopardizes Smith's right to justice. Injunctive relief against further tribal court proceedings is the proper action by this Court.

VII. CONCLUSION.

Both parties are nonmembers of the Tribes, and the Tribes are not a defendant to Smith's tort claims. Moreover, the rollover that caused Smith's injuries occurred on alienated land. Smith and SKC were tribal court defendants to a lawsuit by another party who chose that forum. *Montana*'s general rule bars tribal jurisdiction, no exception to this rule has been proven, and no exception applies to this case. The district court erred in failing to apply a *Montana* analysis, failing to find tribal subject matter jurisdiction lacking, failing to enjoin the tribal court action, and dismissing Smith's claim.

This Court should reverse the district court's dismissal, enjoin the tribal court action, and remand with instructions that Smith's claim proceed to trial on the merits.

DATED this 21 day of May 2003.



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I hereby certify that on the 21 day of May 2003, a true and correct copy of the foregoing was served upon the following by U.S. mail, hand-delivery, Federal Express, or facsimile:

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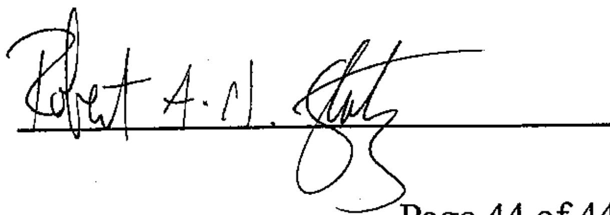

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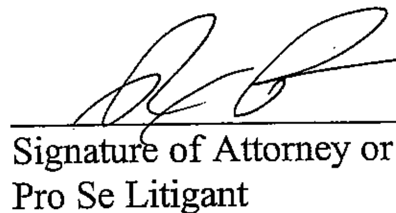

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