
**FORT PECK COURT OF APPEALS
ASSINIBOINE AND SIOUX TRIBES
FORT PECK INDIAN RESERVATION
POPLAR, MONTANA 59255-1027**

CREDIT BUREAU OF GLASGOW, INC.,
Plaintiff/Appellee,

vs.

Appeal No. 047

WALTER CLARK,
Defendant/Appellant.

THIS APPEAL is from an Order Denying Appellant's Affidavit Moving for the Disqualification of the Within Presiding Lawyer Judge and Writ of Execution issued on February 18, 1988 by the Fort Peck Tribal Court, Assiniboine and Sioux Tribes, Fort Peck Indian Reservation, Poplar, Montana. Lawyer-Judge Julian H. Brown presided.

FOR APPELLANT: Kevin Rasor, Lay Counselor, P. O. Box 427, Wolf Point, Montana 59201.

FOR APPELLEE: Glasgow, Montana 59230. David Irving, Attorney at Law, Drawer B,

OPINION by Arnie A. Hove, Chief Justice, joined by Daniel R. Schauer, Associate Justice, and Gary James Melbourne, Associate Justice.

IT IS THE UNANIMOUS DECISION OF THIS COURT TO AFFIRM THE ORDER DENYING APPELLANT'S AFFIDAVIT MOVING FOR THE DISQUALIFICATION OF THE WITHIN PRESIDING LAWYER JUDGE, TO SET ASIDE WRIT OF EXECUTION AND REMAND THIS MATTER FOR A HEARING AT WHICH APPELLANT CAN PRESENT EVIDENCE ON THE AMOUNT OF THE DEBT OWED TO APPELLEE BEFORE THE ISSUANCE OF ANOTHER WRIT OF EXECUTION.

On December 2, 1986, Appellee filed a Complaint in the Tribal Court requesting judgment against Appellant in the amount of \$1,025.07 and the costs off this action. On January 8, 1987, Gerald J. Smith, as a process server for Appellee, attempted to obtain service on Appellee. Mr. Smith offered to leave papers with Appellant who threatened him with littering if he did. Mr. Smith did not leave the papers and believed Appellant would not accept service so he left the premises.

On February 9, 1987, Appellee obtained a judgment by default in the amount of \$1,025.07 with interest thereon at the rate of 10% per annum from the date thereof until paid, together with costs and disbursements. On February 26, 1987, the Tribal Court issued a writ of execution for Appellee against Appellant. On March 17, 1987, the Tribal Court issued an order vacating the writ of garnishment.

On January 15, 1988, Appellee filed a Petition for Writ of Garnishment on wages and requested a hearing in the matter. On January 19, 1988, Bruce Bauer, as process server for Appellee, served Appellant with a copy of the Petition for Writ of Garnishment and Notice of Hearing by personal service. On February 8, 1988, Appellant filed an Affidavit for Disqualification of Judge.

The hearing on both the petition and affidavit was held February 18, 1988. At the hearing, the Tribal Court denied Appellant's Affidavit for Disqualification of Judge and issued a writ of execution to Appellee. Appellant appeals on the following two issues.

1. Whether the debt Appellee claims is owed by Appellant is true and correct.
2. Whether the Tribal Court erred when he denied Appellant's Affidavit (Motion) for Disqualification of Judge.

I.

Whether the debt Appellee claims is owed by Appellant is true and correct.

In oral argument and other times Appellant has contended that the debt claimed by Appellee is not true and correct. In this case, Appellant was never actually given a copy of the summons and complaint on the date he was served. Appellant made no appearance and a default judgment was entered for Appellee in the amount requested. These facts raise the issue of whether the Tribal Court had jurisdiction in this matter if Appellant never actually received a copy of the summons and complaint.

Before jurisdiction can be obtained, a defendant must be served as required by Title IV CCOJ 102. This section reads in full as follows:

"(a) Each defendant shall be served with a copy of the complaint.

"(b) Service shall be made in one of the following ways:

"(1) to the defendant personally;

"(2) to a person of suitable age and discretion at the defendant's residence or usual place of business who also resides or works there;

"(3) to an agent authorized by appointment or by law to receive service of process;

"(4) by registered or certified mail, return receipt requested, to the defendant's usual residence or principal place of business. If the Court orders, service may be made by publication of the required papers in Wotanin Wowapi or any other local newspaper of general circulation on the Reservation designated by the Court, at least once per week for four weeks.

"(c) Service of process upon the Tribes, or an officer of the Tribes named as a party defendant, shall be made by delivering a copy of the complaint to the Tribal Chairman, the tribal attorney and the officer named in the manner prescribed in subsection (b) above, except that service by publication is not permitted.

"(d) Service in person shall be made by any law enforcement officer or by any adult not a part [sic] to the case.

"(e) Where the Court has jurisdiction of the cause of action, service may be made anywhere within the United States.

"(f) The return postal receipt, filed in the case record, shall constitute proof of service by mail. The affidavit of service by the person making service, filed in the case record, shall constitute proof of service."

Appellee, through a process server, an adult, not a party to this case, attempted service on Appellant. Appellant refused to accept service and also threatened to charge Appellee's process server with littering if he left or dropped any papers on the ground. Appellant has claimed that he was not aware of the nature of this suit and that a default judgment was obtained. The Indian Civil Rights Act (hereinafter ICRA) at 25 U.S.C. Section 1302(8) reads in part.

"No Indian tribe in exercising powers of self-government shall----

" ...

"(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

" ... "

The ICRA requires Appellant be given equal protection under the CCOJ and due process as set forth therein. Appellee was required to follow the CCOJ and obtain proper service over Appellant before depriving Appellant of his property.

This is the first time the issue of proper service has been before this Court and guidance is necessary and authorized by IV CCOJ 501. This section reads in part,

"In determining any cases over which it had jurisdiction, the Court shall give binding effect to

" ...

"(d) where appropriate, the Court may in its discretion be guided by statutes, common law or rules of decision of the State in which the transaction or occurrence giving rise to the cause of action took place."

This case took place in Montana, and therefore, it is appropriate to be guided by Montana's rules of decision in determining whether service of process was proper and the Tribal Court had jurisdiction.

A case not quite on point is Shields v. Pirkle Refrigerated Freightlines, Inc., 181 Mont. 37, 591 P2d 1120 (1979). In Shields, the District Court found a default judgment was void for failure to properly follow the requirements of substitute service.

The Supreme Court stated,

"[T]he fatal flaw in the service here is not merely in a lack of due diligence, but also in the failure to submit a proper and sufficient affidavit in compliance with Rule 4D(2)(f), M.R.Civ. P., in support of substitute service on the Secretary of State. The affidavit did not list the last known address of the person or recite in lieu thereof that "after the exercise of reasonable diligence no such address for any such person could be found". (sic) Rule 4D(2)(f), M.R.Civ.P., [sic]. . The affidavit is defective and insufficient to authorize the entry of an order for substituted service on the Secretary of State. Jurisdiction cannot be acquired without strict compliance with the statute. Therefore, the service conferred no jurisdiction and a default judgment entered thereon was void." (Emphasis added). Id. at 45.

In the instant case, Appellee did not follow through with service of process or attempt substitute service. Appellee's failure, however, was a direct result of Appellant's conduct and threats. Appellee's brief and attached affidavit were found by the Tribal Court to accurately detail the circumstances of this case.

According to the filed affidavit of Gerald J. Smith dated February 2, 1987. Mr. Smith "is a process server" who on "January 8, 1987, ... did contact Defendant Walter Clark at his residence south of Frazer, Montana, at about 5:25 P.M. that day" with papers from Tribal Court and identified Judge Gourneau as the presiding Judge and gave the time, date and place of the hearing on the Complaint" The affidavit states that "Defendant...refused service as he refused to recognize both the papers and the process server as a process server" The affidavit also states, "That Affiant offered to leave said papers with the Defendant, who angerly [sic] responded that he would charge the Affiant with littering if he did so" The process server "to prevent further confrontation ... departed from Defendant's residence." The process server concluded his affidavit with "Affiant believes that Defendant was sufficiently apprised of the facts of service, the complaint and the hearing to constitute notice thereof."

After the above, Appellee contended that the Court's file did not reflect Appellant formally contesting any personal or subject matter jurisdiction in this action. This Court disagrees and as Appellee knows, courts must require strict compliance to their rules of procedure for obtaining proper service in order to have jurisdiction over the parties. The Tribal Court must require strict compliance to the requirements of the CCOJ in obtaining proper service before getting jurisdiction over the parties.

The facts demonstrate that Appellee attempted to comply with the CCOJ and effect proper service. But for the active resistance of Appellant, service would have been completed. Appellee, however, did have options to effect proper service by either leaving the copy of the summons and complaint or exercising another method permitted by IV CCOJ 102.

In this case, it is inequitable to require strict compliance to the CCOJ when an effort had been made and further efforts may have resulted in a breach of the peace, although a littering charge was clearly defensible. Equity demands the balancing of each parties' rights when compliance to the requirements of a statute are purposely or knowingly thwarted by one of the

parties. In this case, Appellee must be allowed to collect on a judgment for a debt and Appellant must be assured due process and allowed his day in Tribal Court to substantiate what is actually owed on said judgment.

Therefore, the existing writ of execution is set aside and this matter remanded to Tribal Court for a hearing to be held within 30 days at which time Appellant can present evidence on the amount of the debt owed to Appellee before the issuance of another writ of execution according to the requirements of the CCOJ.

II.

Whether the Tribal Court erred when it denied Appellant's Affidavit (Motion) for Disqualification of Judge.

On February 18, 1988, the Tribal Court issued an Order Denying Defendant's Affidavit for the Disqualification of the Within Presiding Lawyer Judge. Appellant was requesting the Lawyer Judge disqualify himself. At first glance, it would seem improper for a judge to rule on his own disqualification, however, in the aforementioned order, the Lawyer Judge presented a very detailed and correct analysis in support of his handling the disqualification and issued an order denying Appellant's request. This analysis will be set out and discussed in part in the following.

In the order, the Tribal Court made several findings and used the guidelines previously established by this Court for the disqualification of a judge or justice. In deciding if the Lawyer Judge's refusal to disqualify himself was proper, one must look to the CCOJ for who is to decide whether a judge or justice is to be disqualified, what the grounds are for such

First, the Tribal Court was correct on who is responsible for determining disqualifications. The Tribal Court order stated,

"Title I, Section 307, of the Fort Peck Tribal Comprehensive Code of Justice (I CCOJ 307), amended by Resolution # 1616-86-10 (adopted 13 October 1986), provides in part that 'The Lawyer Judge must determine all disqualifications in the Tribal Court.'

Second, the Tribal Court correctly found that Appellant's affidavit for disqualification of Judge, gave the only grounds in support of the request for disqualification as follows:

"I have reason to believe that I cannot have a fair and impartial hearing before the Honorable Julian Brown, Judge of the above entitled Court, who now has jurisdiction of said cause, by reason of Bias and/or Prejudice of said Judge in that; [sic] due to previous votes of confidence by the Tribal Executive Board, in which I am a Councilman, where I have voted against Judge Brown, that therefore the Judge is prejudiced to hear the case.

The Tribal Court then correctly found that these grounds were insufficient to grant the disqualification.

The Tribal Court's analysis set forth that Appellant's concern was addressed by this Court in Fort Peck Assiniboine and Sioux Tribes v. Eagleman, Appeal No. 014 (Fort Peck Court of Appeals 15 Dec. 1986). The Tribal Court stated,

"Defendant's concern in his affidavit that his authority over the within Lawyer Judge -- and of every other Judge of the Tribal Court -- renders the Lawyer Judge incapable of a fair

and impartial decision has generally been addressed by the Fort Peck Court of appeals in Eagleman, slip opinion at 7-8 (emphasis is in original opinion of the Fort Peck Court of Appeals):

" 'The observation of Matter of Searches Conducted on March 5, 1980, 497 F.Supp. 1283, 1290 n. 1 (E.D. Wis. 1980) (emphasis added), is a [sic] applicable to a member of the tribal bench as to a member of the federal bench:

" 'Those individuals who become members of the federal bench do not arrive there from some cloistered order. They are perforce persons who have engaged in public affairs, often as politicians or officials from the ranks of the executive branch of government. They are not sterile creatures who don judicial robes without any prior contacts in the community but rather are likely to be men and women with a broad exposure to all kinds of citizens of all shades of persuasion and background.

" '... Does this mean that if these officials have had prior official contact with petitioners they cannot provide a fair impartial tribunal? Lawyers and judges by training learn to compartmentalize facts proven in court from extrajudicial impressions, rumors and reputation.'"

This Court agrees that Appellant's concerns were addressed in Eagleman. This Court also agrees with the Tribal Court in regard to a party's right to choose a judge and the duty of a judge or justice to hear a controversial case in the following:

"Defendant's status as a Councilman of the Tribal Executive Board provides him with as much -- but no more -- hiring and other authority over the within Lawyer Judge as over every other Judge of the Fort Peck Tribal Court. The logic of Defendant's affidavit would appear [sic] be that his authority in the past, present, and future over each Tribal Judge renders each Judge disqualified to preside over his case -- except where he decides to not object to a particular Judge.

"The rejection of a party's right to choose a Judge of that party's choice has been confirmed in Eagleman, Id. at 6 (emphasis is in original opinion of the Fort Peck Court of Appeals), in that Court's analysis of the similarity of the tribal and federal laws for disqualification of Judges:

" 'No judge, of course, has a duty to sit where his impartiality might be reasonably questioned. However, the ... test should not be used by judges to avoid sitting on difficult or controversial cases.

" 'At the same time, in assessing the reasonableness of a challenge to this impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a reasonable basis. Nothing in this ... legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a 'reasonable fear' that the judge will not be impartial.

Litigants ought not to have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice."

"Turning specifically to Tribal Courts, the Fort Peck Court of Appeals stated in Eagleman, Id. at 12-12 (emphasis is in original opinion of the Fort Peck Court of Appeals):

" 'Finally, notice must be taken that Tribal Trial and Appellate Courts might, more than many Courts, be confronted with a situation in which limitations of judicial and financial resources would mean that there would be no Judge or Justice to act, if a particular Judge or Justice should be disqualified by interest, relationship, or the like. By the great weight of authority, under such circumstances, the particular Judge or Justice may act, in order that his refusal to act does not result in the prevention of a judicial determination of a proceeding. See, Annotation, Necessity as Justifying Action by Judicial or Administrative Officer Otherwise Disqualified to Act in Particular Case, 39 A.L.R. 1476 (1925).

" 'The Rule of Necessity has been described in detail in United States v. Will, 449 U.S. 200, 213-216, 101 S.Ct. 471, 480-431, 66 L.Ed.2d 392 (1980) footnotes omitted (emphasis added):

" 'The Rule of Necessity had its genesis at least five and a half centuries ago. Its earliest recorded invocation was in 1430, when it was held that the Chancellor of Oxford could act as judge of a case in which he was a party when there was no provision for appointment of another judge. Y.B. Hil. 8 Hen. VI, f. 19, p1. 6. Early cases in this country confirmed the vitality of the Rule.

" 'The Rule of Necessity has been consistently applied in this country in both state and federal courts....

" 'Similarly, the Supreme Court of Pennsylvania held:

" 'The true rule unquestionably is that wherever it becomes necessary for a judge to sit even where he has an interest where no provision is made for calling another in, or where no one else can take his place it is his duty to hear and decide the case, however disagreeable it may be." Philadelphia v. Fox, 64 Pa. 169, 185 (1870).

" 'Other state and federal courts have recognized the rule.

" 'The concept of the absolute duty of judges to hear and decide cases with their jurisdiction revealed in [F.] Pollack, [A First Book of Jurisprudence (6th ed. 1929),] and Philadelphia (sic) v. Fox, supra, is reflected in decisions of this Court.... It would appear, therefore, that this Court so took for granted the continuing validity of the Rule of Necessity that no express reference to it or extended discussion of it was needed .'

" 'United States v. Will, id. [sic] at 216 n. 19, 101 S.Ct. at 481 n. 19 (emphasis in United

States v. Will) elaborated that

" 'In another, not unrelated context, Chief Justice Marshall's exposition in Cohens v. Virginia, 6 Wheat. 264, 5 L.Ed. 257 (1821), could well have been the explanation of the Rule of Necessity; he wrote that a court "must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them." *Id.*, at 404 (emphasis added).'

The Lawyer Judge was unable to call in another judge to hear this case that would not be in the same position. Appellant sits on the Tribal Executive Board and acts on the employment decisions of all of the judges and justices. Regardless of the above, this Court did set forth the tests for determining whether to disqualify a judge or justice in Eagleman, *supra* at 11:

"In Parrish v. Board of Commissioners, 524 F.2d 98 (5th Cir. 1975) (en banc), *cet. denied*, 425 U.s. 944, 96 S.Ct. 1685, 48 L.Ed. 188 (1976), the Court held among other things, that the Trial Judge's impartiality could not reasonably be questioned by virtue of allegations that he had been president of a local bar association in which black lawyers were denied membership; that he had acquaintanceship or friendship with witnesses and a defense attorney in the pending action; and that he had a substantial or financial interest in the pending suit because of his membership in the integrated state bar. The Court quoted United States v. Thompson, 433 F.2d 527, 523 (3rd Cir. 1973), for the standard that would convince a reasonable man that a bias exists, 524 F.2d at 100:

" 'In an affidavit of bias, the affiant has the burden of making a three-fold showing:

" '1. The facts must be material and stated with particularity; [sic]

" '2. The facts must be such that, if true they would convince a reasonable man that a bias exists. [sic]

" '3. The facts must show the bias is personal, as opposed to judicial, in nature.'"

The following will address each of the three (3) tests. It is evident from Appellant's affidavit that the first test was not met when the facts of the bias were not material or stated with particularity. The second test is met since the facts are obviously true; however, a reasonable man would have to agree that the same bias, if it existed with the Lawyer Judge, would exist regardless of which Tribal Court Judge heard the matter. Appellant could argue this bias and disqualify Judges until he obtained a Judge he felt would be favorable to his position. The third test was not met in that nothing shows the Lawyer Judge actually had anything personal against Appellant.

For the foregoing reasons, the Tribal Court did not err in denying Appellant's motion to disqualify the presiding Lawyer Judge.

THEREFORE:

IT IS THE UNANIMOUS DECISION OF THIS COURT TO AFFIRM THE ORDER DENYING APPELLANT'S AFFIDAVIT MOVING FOR THE DISQUALIFICATION OF THE WITHIN PRESIDING LAWYER JUDGE, TO SET ASIDE WRIT OF EXECUTION AND REMAND THIS MATTER FOR A HEARING AT WHICH APPELLANT CAN PRESENT EVIDENCE ON THE AMOUNT OF THE DEBT OWED TO APPELLEE BEFORE THE ISSUANCE OF ANOTHER WRIT OF EXECUTION.

DONE this ____ day of June, 1988.

BY THE COURT OF APPEALS:

Arnie A. Hove, Chief Justice

Daniel R. Schauer, Associate Justice

Gary James Melbourne, Associate Justice
