FORT PECK TRIBAL COURT OF APPEALS
FORT PECK INDIAN RESERVATION
ASSINIBOINE AND SIOUX TRIBES
POPLAR, MONTANA

****

CARRIE KENNEDY, a Minor, and her
Mother and Legal Guardian, KARA RED DOG
Plaintiffs/Appellants,

vs.

Appeal No. 281

WILLIAM (BILL) RUSCHE, et al.
Defendants.

****

O P I N I O N

****

This is an appeal from an Order Granting Summary Judgment in favor of William Rusche, the Honorable A. J. Stafne, Chief Judge, Fort Peck Tribal Court, presiding. Arnie A. Hove, Esq., Circle, MT, for the plaintiffs/appellants and Laura Christoffersen, Esq. Wolf Point, MT, for defendant/appellee Rusche.

BRIEF FACTUAL OVERVIEW AND PROCEDURAL HISTORY

On May 3, 1995, the Roosevelt County Sheriff's office and other law enforcement agencies combined forces to conduct a drug raid at plaintiffs' residence. During the raid, the plaintiff minor claims to have been sexually assaulted by one of the law enforcement officers. At her deposition, the minor identifies defendant Rusche as the officer who assaulted her. Various officers, who are joint defendants[1] and were at the scene, stated during their depositions that defendant Rusche did not participate in the drug raid. Various civilian witnesses, who were either at, or near the scene, supported plaintiff's identification of Rusche.

After considerable discovery, three (3) motions for summary judgment were filed: one filed on behalf of all of the defendants, one filed on behalf of plaintiffs, and one filed solely on behalf of defendant Rusche. In
support of his motion, defendant Rusche filed his own affidavit stating that he was on a leave of absence (annual leave) on the day of the raid, and further, that he was approximately 30 miles from the scene at the time of the raid. Additionally, Rusche filed various pieces of documentary evidence,

including an affidavit from a neighbor which supported Rusche's version as to his whereabouts at the time and date of the raid; leave[2] and time[3] records from the Roosevelt County Sheriff's department; a radio dispatch log; a notebook belonging to Rusche and calendars belonging to both Rusche and his father; all of which combined to support Rusche's claim that he was not at the scene, nor could he have been, in that he was some thirty (30) miles from the scene no more than seven (7) minutes before the raid took place[4]. On July 15, 1997, after thoroughly reviewing all of the evidence before it, our Tribal Court granted defendant Rusche's motion, while denying each of the other motions. It is from the grant of Rusche's motion that this appeal is taken.

ISSUE PRESENTED

In it's Order granting summary judgment, the Tribal Court stated:

> "Upon review of the record herein, the Court finds that the *undisputed physical evidence* places William Rusche at a location at least 8 miles north of Wolf Point, Montana at the time of the drug raid in Poplar, Montana. Reasonable minds cannot conclude other than that Mr. Rusche was not present at the drug raid wherein Carrie Kennedy claims she was sexually assaulted and therefore, it is not probable that reasonable minds could find Mr. Rusche liable for the injuries allegedly suffered by Carrie Kennedy." (**see page 2, lines 14 through 22**) (our emphasis)

Plaintiffs' petition enumerates four (4) reasons in support of her appeal, all of which can be condensed into one question. The answer to this question was foundational to the Court's grant of summary judgment:

Whether the Tribal Court erred in concluding that no material issue of fact was present in that there was "undisputed physical evidence" which placed defendant Rusche in a location so distant from the scene as to compel reasonable minds to conclude that he was not present at the drug raid and it was not probable that those same reasonable minds could find him liable for the injuries suffered by plaintiff?

In support of the grant for summary judgment, Rusche argues that: 1) the only evidence tying him to the scene of the incident was eyewitness testimony which was obtained through unconstitutionally faulty procedures, and 2) that the physical evidence placing him at a location 30 miles distant from the incident makes it impossible for him to be held liable (**see Defendant's brief, page 2, lines 10 through 19**). Defendant further contends that plaintiff fails to address these "legal arguments" and "attempts to avoid summary judgment and dismissal through use of a lot of rhetoric and not a lot of substance" (**id. page 2, lines 24 - 25**). We agree that plaintiff's brief is replete with rhetoric and utterly fails to support her legal position with case law citations. However, we cannot agree that plaintiff's

petition is "without substance".

Regrettably, this Court must frequently decide cases wherein the petition and supporting brief merely "touches", if at all, upon the relevant issue, leaving us in the unenviable position of either doing the legal research ourselves or being willfully blind to potential legal error. **(Babby v. Babby, FPCOA #217c, @page 11; Llewellyn Eagle v. Fort Peck Tribes FPCOA #210 @page 7; Fort Peck Tribes v. Morales, FPCOA #283 @page 6).** Try as we might, it is not in us to lose sight of the burden that comes with the phrase: "…and justice for all". We harbor the notion that even those who cannot[5] set forth their case in a legally acceptable manner deserve a full measure of the law. And it is to that end we are charged.

STANDARD OF REVIEW

Title I CCOJ Section 201 provides: "The jurisdiction of the Court of Appeals shall extend to all appeals from final orders and judgments of the Tribal Court. The Court of Appeals shall review *de novo* all determinations of the Tribal Court on matters of law, but shall not set aside any factual determinations of the Tribal Court if such determinations are supported by substantial evidence." The grant or denial of a summary judgment motion is purely a question of law, thus we review the Court's Order *de novo*.

DISCUSSION

As we stated in **Payne v. Payne, FPCOA #253**: "There are two important rules to be applied to summary judgment motions: 1) all pleadings and supporting papers of the moving party are *strictly construed* and 2) all pleadings and papers of the opposing party are *liberally construed*. All doubts and conflicts must be resolved in favor of the party opposing the summary judgment motion" **(@ p.5)**. A defendant is entitled to summary judgment if our Tribal court determines that, as a matter of law, plaintiff's evidence does not permit a trier of fact to find in plaintiff's favor.

Applying these rules, it is clear that, we must accept as true the pleadings and evidence submitted by plaintiff in support of her claim against defendant Rusche. Additionally, In determining whether plaintiff's evidence is sufficient, neither our Tribal court, nor this Court, may weigh the evidence or consider witnesses' credibility. Instead, our Courts must accept as true the evidence most favorable to plaintiff and must disregard conflicting evidence. The court must give to the plaintiff's evidence all the value to which it is legally entitled, indulging every legitimate inference that may be drawn from the evidence in plaintiff's favor. However, we pause to note that a mere 'scintilla of evidence' does not create a conflict for the jury's resolution; there must be substantial evidence to create the necessary conflict.

In his summary judgment motion, Rusche submits documentary and testimonial evidence supporting his contention that he did not take part in the drug raid at plaintiff's dwelling; that he was some thirty miles away from the scene at the time of the drug raid and therefore, could not have been the person alleged to have sexually assaulted plaintiff. Plaintiff opposed the summary judgment with her own deposition testimony along with five (5) other alleged percipient witnesses, stating that the defendant

was, indeed, at the scene at the time of the drug raid, and further, according to the victim, that Rusche was the police officer that sexually assaulted her.

In it's Order granting summary judgment, it is clear that the Tribal Court not only "weighed" the evidence but also considered the "credibility of witnesses":

> "Finally with regard to the most "reliable" of the Plaintiff's witnesses, the Plaintiff herself, the Court finds that Plaintiff's own identification was irreparably prejudiced by the fact that she was never shown photographs of other potential perpetrators. The fact that Plaintiff herself was never initially comfortable with her identification of Rusche leads this court to find that the identification as a matter of law cannot be relied upon to hold Mr. Rusche responsible for the injuries in the face of physical evidence placing him elsewhere. In reaching this conclusion, the Court has considered that Carrie Kennedy as the alleged victim was in close proximity to her alleged attacker and should have had opportunity to clearly view the man. The Court further considered the accuracy of her prior descriptions and the level of certainty when making the identification. Carrie Kennedy's physical description of her attacker has varied when she described him to her grandmother as opposed to when she described him (sic) others. Finally her physical description of her attacker as a "short white guy" or "little short guy" does not exclude other officers who were present at the raid and therefore the accuracy of her description is suspect." **(@p 3, line 14 through p 4, line 7)**

It is also clear that the Tribal Court adopted defendant's version of the facts, citing "lack of credibility" of plaintiff's testimony in it's Order.

It may very well be that plaintiff and her entourage of witnesses lack credibility. It may also be that plaintiff's witnesses are biased, in that some of them are blood relatives of plaintiff and further, that two (2) had been charged with criminal acts by the very officers that were being sued and thus those two (2) witnesses had reason to lie because they bore the proverbial "ax to grind". It is also true that eyewitnesses are often mistaken.

Regardless, for purposes of evaluating defendant's motion for summary judgment, the Tribal Court is *legally obliged to assume* that plaintiff's recitation of the facts is true. By adopting the defendant's supporting testimonial and documentary evidence, the Tribal Court has resolved a disputed issue of fact in the defendant's favor. In so doing, the Tribal Court errs: disputed issues of fact must be resolved not by the Court reviewing a summary judgment motion, but by the trier of fact, whose task it is to weigh the evidence and evaluate the credibility of witnesses at the trial proceedings. The statement from the Tribal Court's Order quoted above, would be perfectly acceptable if it had come *after* a full trial where the Court was sitting as the trier of fact. Unfortunately, such observations and conclusions in a summary judgment proceeding are not acceptable. In the summary judgment context, our tribal courts misapprehend their function when they impermissibly decide a contested issue:

> "[T]he function of the trial court in ruling on a motion for summary judgment is merely to determine whether such issues of fact exist, and not to decide the merits of the issues themselves." (**Molko v. Holy Spirit Assn. (1988) 46 Cal. 3d 1092, 1107; 252 Cal. Rptr. 122, 762 P.2d 46.)**

While we cite a leading California case for this proposition, it should be noted that this is a common and well established rule which has a long history with the U.S. Supreme Court. In deciding that the "quantity" and "quality" of evidence required should be consistent with the evidentiary standard of the case (i.e. whether a Court should use the "clear and convincing" standard of proof in deciding a summary judgment motion in a libel action of a public figure) the Court stated:

> "…that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. *Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict*. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. Adickes, 398 U.S., at 158-159. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. Kennedy v. Silas Mason Co., 334 U.S. 249 (1948). **Anderson v. Liberty Lobby, Inc., supra, 477 U.S. 242,255; 91 L.Ed.2d at p. 216].)**

Stated in the most simplistic terms, if plaintiff's case has "no chance" of success, summary judgment is proper. Conversely, if plaintiff's case has *even the slimmest chance of success*, summary judgment *is not* the proper remedy and must not be granted even if the Tribal Court believes that the case will almost certainly fail before a jury. We believe that our Tribal Court thoughtfully and very carefully reviewed *all* of the evidence before it and then concluded that "reasonable minds" would side out with defendant Rusche. While we agree with the proposition that "when no reasonable minds can be found believing plaintiff's story, summary judgment is proper", we believe that our Tribal Court arrived at this conclusion only after impermissibly assessing the weight of the evidence and credibility of the

witnesses.

We now examine the defendant's argument that there exists "undisputed physical evidence" placing him thirty (30) miles from the drug raid, at, or near, the time that it took place. In support of this contention the defendant filed the documentary evidence enumerated above (i.e. leave records, time records, etc.). The Tribal Court echoes this argument in it's Order stating, "…the Court finds that the *undisputed* physical evidence places William Rusche at a location at least 8 miles north of Wolf Point, Montana[6] at the time of the drug raid in Poplar, Montana. In the first instance, the documentary evidence referred to by defendant and our Tribal Court is not "physical evidence" that defendant was at any particular location at any particular time. These documents are, at best, "physical evidence" that records exist regarding when Rusche worked and when he did not work. The dispatch log is "physical evidence" that records exist regarding the dispatches of the Roosevelt County Sheriff's department. To suggest that these documents, in any way, shape, or form, are "physical evidence" that Rusche was at a particular location at a particular time is simply inaccurate. An example of when "physical evidence" is "undeniable", compelling "reasonable minds" to only one conclusion would be to point to the Statue of Liberty and assert, "That's a Boeing 747!" Or to point to the same statue and say, "The Statue of Liberty is now located in Paris, France" when everyone obviously knows that it is located on Bedloe's Island in New York Harbor.

Further, the assertion, first made by Rusche and then adopted by our Tribal Court, that Rusche's physical evidence was "undisputed" is equally inaccurate. If the documents, regardless of how many and varied they may be, all together indicate that Rusche was at "Point A" at a particular time, it would only take one purported eyewitness to state that Rusche was at "Point B" at the exact same time to create a conflict. If Rusche's location at a particular time was material, then you would indeed have a genuine issue of material fact. Plaintiff produced, including herself, no less than six (6) witnesses contradicting those documents.

Rusche urged our Tribal Court, and now implores this Court, to carefully review the identification procedures used by plaintiff and her attorney in identifying him as plaintiff's attacker. In so doing, Rusche argues that "(t)he identification procedure used by the plaintiff is inherently faulty and violated (his) due process rights". If Rusche were being charged with criminal sexual assault in this case, the argument might hold water. Unfortunate as it is for defendant's analysis, this is a civil matter and the procedural standards for eyewitness identification in a criminal context are simply not applicable, thus this argument comes up bone dry in the "hold water" department. All of the thirteen (13) cases[7] which defendant cites in support of his position, are criminal cases. We are in essential agreement with these cases. They simply have no relevance to the case before us.

We also agree with many of the legal propositions promulgated by Rusche in support of his contention that "(n)o genuine material issue of fact exists as to (his) location at the time of the raid…" Rusche cites **Miller v. Herbert, 900 P.2d 273,276 (Mont, 1995)** in support of the proposition that "speculative" or "conclusory statements" cannot create a genuine issue of material fact. We wholeheartedly agree with that proposition. However, in **Miller**, the injured plaintiff was suing an insured *after* he (the plaintiff) signed a full release of all claims. Thus, his complaint was at variance with his own previous actions. Nonetheless, the plaintiff contended that he suffered mental and/or emotional difficulties and in support thereof offered an expert affidavit to the effect that "*he may"* have

been so suffering at the time that he signed the affidavit. The Montana Supreme Court held that the affidavit was speculative and could not therefore, create a material issue of fact. **Miller** is easily distinguished from the case herein. Plaintiff and her supporting witnesses have not directly contradicted themselves, nor have they relied on experts who have carefully crafted and couched their statements.

Rusche also cites **Ulrigg v. Jones, 907 P.2d 937,942 (Mont. 1995)** as standing for the proposition that "(u)nsupported conclusions and speculation are legally insufficient to withstand summary judgment". Again, we wholeheartedly agree with this proposition. In **Ulrigg**, the injured plaintiff sued the owner of the other vehicle *without naming* the driver of the vehicle, who was the owner's daughter. The lower Court granted summary judgment stating that there was no applicable statutory authority that would make the owner/father vicariously liable for the actions of the unnamed driver/daughter. The Court also disposed of plaintiff's arguments that the owner/father had either negligently entrusted the vehicle to the daughter and/or the daughter was the agent of the father, by stating that plaintiff had offered *no evidence* to support these "conclusory" statements, while, on the other hand, the defendants submitted affidavits in support of their contrary positions. Once again, our case is easily distinguished from **Ulrigg**. Plaintiff draws no legal conclusions, but rather, points her finger to one of the defendants whom she believes attacked her. Neither do her supporting witnesses draw any legal conclusions, but rather, they also point their fingers at the very same defendant.

Rusche cites **Jewish Hospital of St. Louis, Missouri v. Boatmen's National Bank, 261 ILL. App.3d 750,754** as standing for the proposition that trial courts must consider whether reasonable minds can draw different conclusions from the facts as presented. While we are not entirely sure that the cited case stands precisely for the proposition propounded by Rusche, we certainly do agree that when reasonable minds *cannot differ*, then, in that event, no triable issue of fact exists. We have previously signed on to this proposition (see page 6, supra). We also previously noted that our Tribal Court came to this conclusion, *but only after* impermissibly evaluating the "weight of the evidence" and the "credibility of the witnesses". The error in Rusche's argument is pointed up by examining it more closely:

> "Thus, the Court must consider whether reasonable minds can draw different conclusions from the facts as presented. In this case, reasonable minds cannot. The victim cannot positively identify Rusche and only two persons (related to the victim) positively identify Rusche as being present (and do so only after Kennedy identified Rusche in their presence) but did not see the actual injury occur. Additionally these witnesses were on the floor much of the raid making their field of vision rather limited. This all aside, only one conclusion can be drawn after review of ALL of the evidence --- the witnesses are mistaken in their identification of Mr. Rusche. (**Rusche Brief, line 16, p. 29**

through line 1, p. 30.)

Taken in order, defendant's contention that the victim "cannot positively identify Rusche" is terribly misleading. In her deposition, the plaintiff/minor was shown a photograph of Rusche wearing sunglasses. The plaintiff exhibited some uncertainty when pressed under cross-examination regarding whether this was the officer who had attacked her, stating, "It's hard to recognize him with sunglasses on." (quoted in **Rusche Brief @line 24, page 7**). She had already positively identified Rusche and was, under cross-examination, simply noting what was to her a material difference in appearance when shown a picture of someone who was wearing sunglasses. This was in no way a repudiation of her earlier identification. Further, inasmuch as Rusch was in the same room during plaintiff's testimony, why not just ask the victim to identify her attacker first hand? If litigation is to be short-circuited for want of a "positive identification", this would have been a much preferred avenue to that end.

Next, we examine Rusche's argument, "…and only two persons {related to the victim} positively identify Rusche as being present {and do so only after Kennedy identified Rusche in their presence} but did not see the actual injury occur…" Rusche concludes that "reasonable minds" can draw only one conclusion: "the witnesses are mistaken in their identification of Mr. Rusche". With all due respect, any reasonable mind would necessarily take a few preliminary steps before reaching such a conclusion: Did the blood relationship of these two witnesses to the victim influence or bias, in any way, their positive identification? Did the two witnesses' demeanor during their testimony disclose any of the more common characteristics of someone who might be lying? Unsure? Truthful? What was the physical circumstances and the events surrounding their opportunit(ies) to witness the injury? Were they able to "take in" the activity of those present? One thing is absolutely clear: No reasonable mind can arrive at *any* conclusion from the argument set forth above, without evaluating the "weight of the evidence" and closely examining the "credibility of the witnesses".

During this evaluative process, reasonable minds could very easily draw different conclusions. If one did not believe that the two witnesses were biased by their blood relationship, and if the demeanor and testimony of these two witnesses were straight-forward and forthcoming and appeared to be truthful, and if they had the opportunity to view the law enforcement officers at the raid, as well as those persons subjected to the raid, then it is quite possible that the trier of fact could reach the conclusion that these witnesses were telling the truth and were not mistaken in their identification. But, we need not resort to Las Vegas odds-making in an attempt to "handicap" this race at the courthouse. For to do so necessarily places us upon that impermissible ground of evaluating the weight of the evidence and examining the credibility of the witnesses. For summary judgment purposes, it is sufficient, and the analysis must stop, when a determiniation is reached that reasonable minds could, indeed, differ on the basis of all of the evidence. At that moment, the summary judgment scale is "out of balance" and is no longer appropriate.

Finally, we are not unmindful of those who struggle with the costs of what they perceive as "unnecessary litigation". Indeed, it is painful enough to just go through the rigors of a trial, without adding the insult of the costs attendant thereto. But the proper remedy for any truly unnecessary litigation lies within a malicious prosecution or abuse of process action, or somewhere within the expanding gamut of our tort law. To be sure it does not reside within the law of summary judgment unless warranted by the well settled rules set forth herein.

The Order Granting Summary Judgment In Favor of William Rusche is reversed and the matter is remanded to the Tribal Court for trial.

Dated:________________________________

BY THE COURT OF APPEALS:

____
Gary P. Sullivan
Chief Justice

CONCUR:

____
Gary M. Beaudry
Associate Justice

____
Carroll J. DeCoteau
Associate Justice

____

[1] The four (4) named defendants were all employees of the Roosevelt County Sheriff's department: the Sheriff, the Chief Deputy, and two (2) deputy sheriffs.

[2] Roosevelt County Sheriff's Department leave records reflected that Rusche had applied for and been granted 40 hours of "annual leave" from May 1 through May 5, 1995.

[3] Roosevelt County Sheriff's Department time records reflected that Rusche was on "vacation" from May 1 through May 5, 1995.

[4] Additionally, certain BIA records supported Rusche's claim of being 30 miles distant *at the very time* of the drug raid.

[5] Whether a litigant "cannot" or "will not" properly set forth their case is a question we acknowledge but do not address today. For those who think our position of accepting the additional responsibility of spotting important constitutional issues that have not been presented or properly briefed, amounts to "illegal advocacy", we happily run the risk of their criticism in the interest of "and justice for all". For those who believe that litigants who cannot, for whatever reason, present their case properly, are rendered justice by having their case dismissed, we acknowledge their position and respect their opinion and the validity upon which it is based.

[6] This Court takes judicial notice of the fact that Wolf Point is approximately 20 miles from Poplar.

[7] Eleven (11) state cases: Montana (5), Idaho (3), Ohio (2), Arkansas (1) and two (2) US Supreme Court cases.