

**FORT PECK COURT OF APPEALS  
 ASSINIBOINE & SIOUX TRIBES  
 POPLAR, MONTANA**

\*\*\*\*\*

DOUGLAS GARFIELD,	)	
	)	
Plaintiff/Appellee,	)	Cause No. <u>418</u>
	)	
-vs-	)	
	)	<b>OPINION AND ORDER</b>
SHERMAN MOTOR INN,	)	
	)	
Defendant/Appellant.	)	

\*\*\*\*\*

This is an appeal of an October 14, 2003 Tribal Court Order ruling that the Fort Peck Tribal Court has jurisdiction over the matter. Defendant/Appellant, Sherman Motor Inn filed a Petition for Review of the Order. In December 2003, the proceedings were stayed by stipulation of counsel, pending appeal.

**Appearances**

Mary VanBuskirk, BOSCH, KUHR, DUGDALE, MARTIN & KAZE, PLLP, P.O. Box 7152, Havre, Montana 59501, Counsel for Plaintiff/Appellee.

Leighton E. Reum, Wolf Point, Montana 59201, Lay Counselor at Law for Plaintiff/Appellee.

Shane D. Peterson, Crowley, Haughey, Hanson, Toole & Dietrich, PLLP, Attorneys at Law, P.O. Box 1206, Williston, North Dakota 58802-1206, Counsel for Defendant/Appellant.

Ryan C. Rusche, P.O. Box 1027, Poplar, Montana, 59255; Colin Cloud Hampson, Sonosky Chambers, Sachse Endreson & Perry, Symphony Towers, 750 B. Street, Suite 3300, San Diego California 92101, Counsel for *Amicus Curiae* Assiniboine and Sioux Tribes of the Fort Peck Reservation.

Maylinn E. Smith, Director, Indian Law Clinic, University of Montana School of Law, Missoula, Montana 59812, Counsel for *Amicus Curiae* Indian Law Clinic.

## OVERVIEW

This is a civil tort action for damages due to a slip and fall incident alleged to have occurred at the Sherman Motor Inn on January 12, 2000.

Plaintiff Douglas Garfield, (hereafter “Mr. Garfield”), is an enrolled member of the Assiniboine and Sioux Tribes of the Fort Peck Reservation, (hereafter, “the Tribes”), residing on the Fort Peck Indian Reservation. Defendant Sherman Inn, (hereafter “Sherman Inn”), is a commercial motel, restaurant and lounge business located on fee lands within the exterior boundaries of the Fort Peck Indian Reservation. The Sherman Inn is a Montana corporation whose directors and shareholders are non-Indian persons.

Mr. Garfield alleges that on January 12, 2000, while entering the Sherman Inn for breakfast, he fell in the entryway, causing him injuries. He alleges his fall and injuries were caused by the failure of the Sherman Inn to illuminate the entryway properly and to remove accumulated ice and snow from the entryway.

The Complaint was filed on May 31, 2000. The Sherman Inn filed a Motion, seeking dismissal of the matter on a number of bases including lack of jurisdiction. The Tribal Court heard oral arguments on the Motion to Dismiss on May 15, 2002. Following the hearing, the Tribal Court entered an Order granting leave to the Tribes and to the University of Montana School of Law’s Indian Law Clinic to file briefs as *Amicus Curiae*. Following completion of briefing, the Tribal Court, ruled, on October 14, 2003 that it has jurisdiction of this matter.

The Petition for Review was brought prior to trial or judgment on the merits. The parties stipulated in December 2003 to a stay of proceedings in Tribal Court pending this Review.

**Appeal Issue:** Whether the Tribal Court has jurisdiction of this proceeding.

**Opinion & Order:** Tribal Court has jurisdiction. Remand for further proceedings.

## STANDARD OF REVIEW

The question of jurisdiction is a question of law which we review de novo. Comprehensive Code of Justice, (hereafter "CCOJ"), Title II CCOJ 2000 §202.

## DISCUSSION

The issue on review is whether Tribal or Federal Indian law precludes the Tribal Court from exercising jurisdiction over a tort action filed by a Tribal member against a non-Tribal member doing business within the boundaries of the Fort Peck Indian reservation on fee land owned by a non-Indian entity. We hold neither Tribal nor Federal Indian law precludes tribal court jurisdiction in this matter.

### Tribal law

We first examine Tribal Court jurisdiction under Tribal law.

The Tribal Court correctly ruled it had jurisdiction. Fort Peck Tribal law addresses both personal and subject matter jurisdiction in one section of law, which provides in relevant part:

The Court shall have jurisdiction over any action where one party to the action shall be an Indian, or corporation or entity owned in whole or in substantial part by an Indian or the Tribes or a corporation or entity chartered by the Tribes; and (a) the cause of action arises under the Constitution or laws of the Tribes; or (b) an Indian party to the action resides on the Fort Peck Reservation.

II CCOJ 2000 §107.

Application of this provision to the matter at hand results in a finding that under Tribal law the Tribal Court's exercise of jurisdiction was proper. Mr. Garfield is an Indian and a member of the Tribes residing on the Fort Peck Reservation. The cause of action arises under the Constitution and laws of the Tribes. The Sherman Inn is a non-Indian entity doing business with both Indians and non-Indians within the boundaries of the reservation. See, e.g., In the Matter of Calder and Wetsit v. Friesen, CV. No. 97-10-245 July 13, 2000.

The jurisdiction authorized under Section II CCOJ 107 is within the constitutional power of the Tribes to regulate law and order on the reservation set forth in Article VII, sections 3 and 5. The Sherman Inn's constitutional arguments to the contrary are not adequately supported in law or fact.

### **Federal law**

In addition to following Tribal Law, the Tribal Court is, of course, required to comply with the limits placed upon tribal court jurisdiction by federal law. The Tribal Trial Court was correct in ruling that Federal Indian law does not preclude it from exercising jurisdiction. Tribal interests significant under Federal Indian law support tribal jurisdiction here. An important component of tribal self-government is the regulation of tortious behavior on the reservation as well as the adjudication of disputes arising on the reservation.

This is not a case that is “distinctly non-tribal in nature”. Strate v. A-1 Contractors, 520 U.S. 438, 457 (1997). Rather, this is a case that arose in a distinctly tribal context. A tribal member, while entering a place of business, a hotel\restaurant, for a meal, was injured, allegedly as a result of unsafe conditions at the hotel entrance. The hotel\restaurant in question is located on the reservation and regularly serves members of the Tribes. Prior to trial, we can have no view as to the factual merits of Mr. Garfield's case. Yet, it is significant to our jurisdictional analysis that both his allegations, i.e., inadequate lighting and inadequate removal of ice, pertain to safety. As the business is located on the reservation, it would seem that the governmental entity best positioned to address the safety issues of on-reservation businesses is that of the Tribes.

Federal Indian law has evolved to reflect changes in federal policy, Congressional enactments and judicial decisions as well as to respond to a more complex world. As a result, tribal authority has been narrowed in scope from its breadth prior to European contact. Worcester v. Georgia, 31 U.S. (6 Pet) 515 (1822); United States v. Wheeler, 435 U.S. 313 (1978); Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978). Yet, we must review each situation in light of the unchanging, broad, principles of Federal Indian Law, which include sustained federal recognition of and support for tribal self-government. Decisional law has been especially deferential to tribal authority when it is found to be necessary to preservation of tribal self-government. See, e.g., Williams v. Lee, 358 U.S. 217 (1959). As indicated above, this case involves an important component of the

preservation of tribal self-government, specifically regulation of safety on the reservation.

In analyzing the extent of tribal jurisdiction over a non-Indian defendant we begin with the case of Montana v. United States, 450 U. S. 544 (1981), now considered the most significant contemporary United States Supreme Court statement of the scope of tribal jurisdiction over nonmembers. As the Ninth Circuit recently explained,

In Montana, the Court found that tribal courts have two bases for their authority. First, tribes possess inherent power “necessary to protect tribal self government [and] to control internal relations...Second, tribes possess such additional authority as Congress may expressly delegate.

Smith v. Salish Kootenai College, 434 F. 3d 1127, 1130 (2006); cert. den. \_\_\_ U.S. \_\_\_, 126 S. Ct. 2893 (2006). As the question of delegated authority has not been raised here, we discuss inherent authority only. The Supreme Court held that the inherent sovereign powers of an Indian tribe do not generally extend to the activities of non-Indians, Montana. 450 U.S. at 565. However, the Court listed two exceptions to this general rule. As the well-known passage in Montana explains:

Indian tribes retain inherent sovereign powers to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian lands. [1] 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. [2] 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 and welfare of the tribe.

450 U.S. at 565-66 (citations omitted). Here, the Tribal Trial Court has authority to adjudicate this action under both exceptions noted in Montana.

Concerning the first exception, we find that a consensual relationship begins as a member of the Tribes enters the Sherman Inn for purposes of purchase of the goods and services offered therein. Although the Sherman Inn argues that a consensual relationship would not have arisen until Mr. Garfield actually ordered some service or goods, we conclude otherwise. In order to be in a position to order

services or goods, one must first enter the premises. The consensual relationship commences when one enters the property legitimately for the purposes of transacting business offered therein. The Sherman Inn's argument that any duty owed to Mr. Garfield would not come into being until he had entered the restaurant and ordered his food would lead to the illogical conclusion that the hotel/restaurant owes a duty to patrons leaving the premises but not to those entering the premises. By contrast, as *Amicus* Fort Peck Tribes points out, our reasoning also fits within the traditional tort principles set forth in the Restatement 2<sup>nd</sup> of Torts §332 (3) (1965). As a patron of the Sherman Inn, Mr. Garfield was subject to the implied representation that reasonable care has been taken to make the premises safe for the purpose for which they are open to him.

The Sherman Inn also argues that the first Montana exception does not apply largely because of its view that the "regulation imposed by the Indian tribe must have a nexus to the consensual relation itself," citing Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645, 656 (2001). Atkinson is distinguishable. Atkinson concerned the validity of a tribal occupancy tax. The United States Supreme Court found the Navajo Tribe lacked authority to tax nonmember hotel guests because there was not a nexus between the tax imposed and the consensual relationship with the nonmember hotel guests. Here, the issue is not the validity of a tax, but rather the relationship between an on-reservation business owner and its customers. Further, here, the cause of action does arise directly out of that relationship.

Turning to the second Montana exception, we also find basis for the exercise of Tribal Court jurisdiction based on that exception. As Mr. Garfield points out, the conduct that allegedly led to his injury fits within the second exception because the health and welfare of tribal members is affected. Even more, the situation before us clearly impacts the political integrity of the tribe. People look to their government for protection. If a government cannot promote the safety of Tribal members by regulating conduct of on-reservation businesses, both the safety of the members and the legitimacy of the government are potentially adversely impacted.

Since the issue has been raised, we also address briefly the significance of the status of the land on which the Sherman Inn is located. As noted above, the Sherman Inn is located on fee land but within the boundaries of the Fort Peck Reservation. The United States Supreme Court's most recent statement on the issue is found in Nevada v. Hicks, 533 U.S. 353 (2001). The Hicks Court held that Montana applies to both Indian and non-Indian land, stating, "The ownership status of the land, in other words, is only one factor to consider." Hicks, 533 U.S. at 360;

see also, Id. at 381 (Souter, J concurring) “a tribe’s remaining inherent civil jurisdiction to adjudicate civil claims arising out of acts committed on a reservation depends in the first instance on the character of the individual over whom jurisdiction is claimed, not on the title of the soil on which he acted”. As the Ninth Circuit stated in Smith v. Salish Kootenai College:

Our inquiry is not limited to determining precisely when and where a claim arose, a concept more appropriate to determining when the statute of limitations runs or to choice-of-law analysis. Rather, our inquiry is whether the cause of action brought by these parties bears some direct connection to tribal lands.

Smith at 1135. As discussed above, the cause of action here bears a direct connection to tribal lands because it concerns the tribal government’s authority to regulate health and safety on those lands.

### CONCLUSION

In conclusion, both Tribal and Federal law support the Tribal Trial Court’s decision on jurisdiction. Therefore, the matter should be remanded for trial on the merits.

### IT IS NOW, THEREFORE, THE ORDER OF THIS COURT THAT:

The matter is remanded to the Tribal Court for further proceedings thereon.

DATED this 25 day of September, 2006.

### FORT PECK COURT OF APPEALS<sup>1</sup>

By: Brenda C Desmond  
BRENDA DESMOND, Chief Justice

Joe Raffiani - by D.R.  
JOE RAFFIANI, Associate Justice

<sup>1</sup> Associate Justice Gerald M Schuster recused himself from this matter.