IN THE CROW COURT OF APPEALS

IN AND FOR THE CROW INDIAN RESERVATION

CROW AGENCY, MONTANA

CIV. APP. DOCKET NO. 94-85

RAY AND MARILYN EDWARDS,
Plaintiffs/Appellants,

vs.

HARVEY (Doc) NEAL,
Defendant/Appellee.

Decision entered Aug. 13, 1998

[Cite as 1998 CROW 4]

Before Birdinground, C.J., Stewart, J., and Watt, J.

OPINION

¶1 This case raises the legal issue of whether Montana open range law or Crow Tribal statutory law applies in a Tribal Court negligence action involving a car-cow collision on a state highway within the Crow Reservation. This court holds that the Tribal Court erred in applying state law to grant summary judgment in favor of the livestock owner. As the first order of business on remand, however, and despite the parties' stipulation, this court directs the Tribal court to review its subject matter jurisdiction in light of the limitations imposed by the Supreme Court's decision in *Strate v. A-1 Contractors*.

A. Facts and Proceedings Below

¶2 According to the parties' "Pre-Trial Stipulation," plaintiffs Edwards' car ran into a

cow owned by defendant Neal on the night of January 6, 1994. The collision occurred on U. S. Highway 87 approximately two miles north of Wyola, Montana, within the Crow Reservation. As a result of the collision, the Edwards sustained $3,827 in damages to the car and storage costs. The cow, valued at $1,000, was killed. Plaintiff Ray Edwards was cited for a "liquor violation," apparently for possession of alcohol on the Reservation. The record does not contain a copy of the citation or any other police report from the accident.[1]

¶3 The Edwards alleged that the wire on Mr. Neal's fence running parallel to the highway was detached from the posts in a number of places, that some of the posts had fallen down or were missing, and that a portion of the fence was completely down, allowing cattle to freely exit the pasture onto the highway (Amended Complaint ¶ 5; Response to Defendant's Interrogatory No. 13). The Edwards claim that Neal was negligent in maintaining his fences, that his conduct violated Crow Tribal Resolution No. 91-38 by allowing his cattle to wander onto a "primary highway" as defined by the Resolution, and that he is therefore liable to them for compensatory and punitive damages and costs (Amended Complaint).

¶4 In response to the Edwards' claims, defendant Neal denied any negligence in maintaining his fences, and denied that Resolution No. 91-38 applies in this case. Neal argued that under Montana's open range doctrine, a livestock owner is not liable to motorists for damages caused by livestock wandering on a state highway other than a "primary highway" as defined by Mont. Code Ann. §§ 60-7-201 and 202 (Answer; Brief in Support of Summary Judgment). Neal also raised the affirmative defense that the plaintiffs' own contributory negligence prevents them from recovering in this case, and asserted a counterclaim against the plaintiffs for the value of the animal (*Id*.).

¶5 The parties stipulated that the highway "in the location where the accident occurred is a State secondary highway, and is a primary highway as defined in Crow Tribal Resolution No. 91-38." Pre-Trial Stipulation ¶ 3. Based on this stipulation, defendant Neal moved the Tribal Court for summary judgment of dismissal and the parties submitted the issue of the applicable law on briefs. On October 11, 1995, the Tribal Court (Arneson, J.) issued a summary order granting Neal's summary judgment motion. The Edwards timely appealed from that order.

B. Subject Matter Jurisdiction

¶6 The parties also stipulated to Tribal Court jurisdiction of the parties and the subject matter of the dispute pursuant to Sections 3-2-202, 203 and 205 of the Crow Tribal Code. These provisions of the Code assert Tribal Court jurisdiction of all lands, persons and civil causes of action within the Crow Reservation.

¶7 As to subject matter jurisdiction, the Tribal Code and the stipulation reflected the prevailing interpretation of governing federal law in this Circuit at the time. *See, e.g., Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (civil jurisdiction over the activities of Non-Indians on reservation lands "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute"); *Hinshaw v. Mahler*, 42 F.3d 1178

(9th Cir. 1994) (Tribal court jurisdiction of Reservation automobile accident). However, the Supreme Court's opinion in *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S. Ct. 1401 (1997), which effectively overruled *Hinshaw*, now requires a more rigorous analysis of Tribal Court jurisdiction in cases involving defendants who are not members of the Tribe.

¶8 First, *Strate* held that Tribal courts have the power to adjudicate disputes involving a non-member only if the Tribal government would also have the right to regulate the non-member's conduct. *Strate*, 117 S. Ct. at 1413. Next, the *Strate* Court held that in the absence of federal treaties or statutes providing for Tribal regulatory or adjudicatory jurisdiction, the question of whether the Tribe has retained inherent sovereign authority over the non-members depends to a large extent on the location of the nonmember conduct being regulated.

¶9 On the one hand, the *Strate* Court recognized that "tribes retain considerable control over nonmember conduct on tribal land." *Strate*, 117 S. Ct. at 1413 (emphasis added). On the other hand, the *Strate* Court held that if the conduct arose on non-Indian fee land, the Tribe's authority to regulate nonmembers is governed by the main rule and exceptions set forth in *Montana v. United States*, 450 U.S. 544 (1981) (Crow Tribe lacked authority to regulate hunting and fishing by non-Indians on reservation land owned in fee simple by non-Indians).

¶10 With respect to non-Indian fee lands, the *Strate* Court emphasized that the "main rule" is that Tribal civil authority "generally `do[es] not extend to the activities of nonmembers of the tribe.'" *Strate*, 117 S. Ct. at 1413, *quoting Montana*, 450 U.S. at 565 (changes in original). In order for the Tribe's inherent sovereign authority to extend to activities of nonmembers on non-Indian fee lands, the subject matter must fall within one of the two *Montana* exceptions: (1) "activities of nonmembers who enter consensual relationships with the tribe or its members," or (2) conduct which "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Strate*, 117 S. Ct. at 1415, *quoting Montana*, 450 U.S. at 565-566.

¶11 Applying the foregoing analysis to the facts of that case, the Court in *Strate* held that "tribal 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." *Strate*, 117 S. Ct. at 1408.

¶12 This court has recognized the fundamental principle that "[s]ubject matter jurisdiction may be raised at any time, by the parties or the court, and may not be waived by the parties." *Estates of Red Wolf and Bull Tail v. Burlington Northern Railroad Co.*, Civ. App. Docket No. 97-010 (Order Re. Judicial Notice, April 22, 1998) at 3, *citing Cripps v. Life Ins. Co. of North America*, 980 F.2d 1261, 1264 (9th Cir. 1992). In order for a Tribal court to enter a judgment of record that will be recognized by the state and federal courts under principles of comity, the Tribal court must have competent jurisdiction of the subject matter of the dispute. *Wilson v. Marchington*, 127 F.3d 805, 811, 815 (9th Cir. 1997). Therefore, the parties' stipulation as to jurisdiction is ineffective.

¶13 This court has also recognized that the federal law, "including the controlling decisional law of the federal courts," limits the Tribal Court's jurisdiction. *Crow Tribe v. Gregori and Big Horn County Electric Co-op.*, Civ. App. Docket No. 94-151 (April 2, 1998) at 15-16, *citing National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852-53 (1985). Of course, the Tribal Code itself recognizes the limitations imposed by federal law, *see, e.g.*, Section 3-1-104 (applicable law), Section 3-2-201 (general policy to exercise jurisdiction not otherwise enclosed by acts of Congress), and Section 3-2-204(2) (jurisdiction over property limited only by federal law). Thus, although Section 3-2-205 of the Crow Tribal Code asserts subject matter jurisdiction "over all causes of action arising within the exterior boundaries of the Crow Indian Reservation[,]" its broad wording must be read in the context of other Code provisions and subject to the United States' plenary legal power over Tribal governments.

¶14 Accordingly, in light of *Strate*, it is error for the Tribal Court not to analyze its jurisdiction under federal law in any case involving claims against a non-Tribal member. *Gregori, supra*, at 16. Although this lack of jurisdictional inquiry was understandable in light of the parties' pre-*Strate* stipulation, the result is that the record in this case does not disclose essential facts upon which this court can base a *de novo* review of subject matter jurisdiction. This court is therefore compelled to remand this case for further factual findings and a determination of whether the Tribal Court has subject matter jurisdiction.

¶15 Despite the lower federal courts' broad interpretations of *Strate*,[2] the scant record which does exist convinces the court that this case is sufficiently different from *Strate* as to warrant a further jurisdictional inquiry by the Tribal Court. These differences stem from the basic fact that, unlike the specific question confronted in *Strate*, this case does not involve a "civil action against an allegedly negligent driver and the driver's employer, neither of whom is a member of the tribe[.]" *Strate*, 117 S. Ct. at 1407 (emphasis added).

¶16 In the first place, although the collision itself occurred within the highway right-of-way, the basis for Mr. Neal's alleged negligence in this case is his failure to maintain fences, not his negligent driving. This is also the conduct which the Tribe has sought to regulate in Tribal Resolution No. 91-38. Further factual inquiry is therefore necessary to determine the precise location of fences in question: whether they are within the State highway right-of-way, or on other non-Indian fee land, or on Indian-owned trust or fee land. In our opinion, if a portion of the fence is located on Indian land, there is a reasonable basis for sustaining Tribal Court jurisdiction under *Strate* and *Montana*. *See, e.g., Wilson v. Marchington*, 127 F.3d 805, 814 (9th Cir. 1997) (dismissal under *Strate* based on district court's findings that accident occurred entirely within highway right-of-way). In applying *Strate* to this type of boundary determination between Indian and non-Indian land, the Tenth Circuit has recognized that the Tribal court's findings are entitled to substantial deference, and will only be disturbed if they are "clearly erroneous." *Enlow v. Moore*, 134 F.3d 993, 997 (10th Cir. 1998).

¶17 In the second place, unlike the defendant in *Strate*, the defendant in this case resides on the Reservation and possesses cattle and land here. Further factual inquiry may reveal that Mr. Neal leases agricultural land from the Tribe or its members, or has other qualifying "consensual relationships" under the first *Montana* exception. As we read *Strate*,

there must be a nexus between the consensual relationships and the plaintiffs' cause of action (*see Strate*, 117 S. Ct. at 1415), but we do not believe that this requires a complete identity between the parties in the court case and the parties to the consensual relationship as there was in *Gregori, supra*, at 27. *See, e.g., Allstate Indemnity Co. v. Stump*, 994 F.Supp. 1217, 1220 (D. Mont. 1997) (Tribal member plaintiffs were third-party beneficiaries of insurance company's contract with another tribal member). However, the Ninth Circuit has recently clarified that the consensual relationship, if one exists, must be commercial in character for mutual benefit. *County of Lewis v. Allen*, 141 F.3d 1385, 1391 (9th Cir. 1998).

¶18 Finally, if necessary, the Tribal Court must determine whether the defendant's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. In *Strate*, the Court held that the threat to the safety of tribal members caused by "those who drive carelessly on a public highway" did not sufficiently affect the Tribe's self-government interests so as to trigger the second Montana exception. *Strate*, 117 S. Ct. at 1415. Although *Strate* involved two non-Indian drivers, the Ninth Circuit has interpreted that decision to mean that actual injury to a Tribal member is not sufficient by itself to fall within this exception. *Wilson v. Marchington*, 127 F.2d 805, 815 (9th Cir. 1997), *citing Yellowstone County v. Pease*, 96 F.3d 1169, 1170-71 (9th Cir. 1996) (dispute involving taxation of one particular Crow Tribal member's property insufficient to invoke second Montana exception).

¶19 Unlike *Strate*, the present case does not involve regulation of "the conduct of users of a small stretch of highway." *Montana v. U.S. Environmental Protection Agency*, 137 F.3d 1135, 1141 (9th Cir. 1998) (distinguishing Tribe's interest in regulating water quality). The defendant's driving is not at issue in this case, and the character of the Reservation thoroughfare involved in this case may be substantially different than the one in *Strate*. With respect to the defendant's conduct in caring for his cattle, which is the conduct at issue in this case, the Crow Tribal Council has made specific legislative findings regarding the danger to the Reservation community from livestock straying onto highway rights-of-way, and the resultant property damage and deaths and injuries to humans and animals. *See* Preamble to Resolution No. 91-38 quoted in Part C.2, *infra*. Although we do not believe that the existence or non-existence of Tribal legislation on a subject is controlling with regard to the second *Montana* exception, these legislative findings deserve careful weighing in the balance.

¶20 On remand, the Tribal Court is directed to consider (1) whether any treaties or federal statutes provide for or prohibit Tribal regulatory or adjudicatory jurisdiction; and if not (2) whether the cause of action arose in whole or in part on Indian-owned land, or (3) if on the highway right-of-way, whether the nature of the highway right-of-way grants resulted in the Tribe retaining jurisdiction; and if not (4) whether either of the Montana exceptions applies in this case.

C. Livestock Owner Liability

¶21 The Tribal Court's jurisdictional inquiry would be without much practical effect on the litigants if the Tribal Court's interpretation of Montana open range law and its

application of that law to this case are correct. We proceed to review the substantive issue raised by the parties in this appeal: whether under the law applicable in this case the Tribal Court erred in granting summary judgment for the livestock owner and dismissing the Edwards' claims with prejudice.

¶22 Under Rule 19(a) of the Crow Rules of Civil Procedure, incorporating Rule 56 of the Federal Rules of Civil Procedure, we review the grant of summary judgment *de novo*, viewing the evidence in the light most favorable to the non-moving party. *Gregori*, Civ. App. Docket No. 94-151 (April 2, 1998) at 31-32, *citing Hoeck v. City of Portland*, 57 F.3d 781 (9th Cir. 1995).

¶23 In order to provide a context for this court's determination of applicable law and its effect in this case, we begin by reviewing the evolution of the reported Anglo-American law in this area, including Montana law.

1. The Common Law and Montana's Open Range Doctrine

¶24 Under English common law,[3] the owner of a trespassing animal was strictly liable for damages caused by the animal. *See, e.g.*, Turner, 24 *Colorado Lawyer* at 1581 (July 1995); Prosser & Keeton, *The Law of Torts* (5th ed. 1984) at 539. At early common law in the United States, the owner of a domestic animal was generally said to be not liable for damages caused by the animal being at large, unless the owner had knowledge of the animal's "vicious propensities" or the owner should reasonably have anticipated that injury would result from the situation. *See* Rigelhaupt, Annotation, *Liability of Owner of Animal for Damage to Motor Vehicle or Injury to Person Riding Therein Resulting from Collision with Domestic Animal At Large in Street or Highway*, 29 A.L.R. 4th 431, 439 (1986) and cases collected therein. Before automobiles were commonplace, this rule often barred recovery by a vehicle owner for damages caused by livestock straying onto the highway, particularly in the western states. Id.; *Prosser on Torts, supra*, at 540.

¶25 As automobile travel became more prevalent in this country, the modern common law evolved to reflect the changed conditions. Thus, the majority of State courts which have considered the question in this century have held that the livestock owner may be held liable at common law when his animal causes a highway accident, provided that the landowner was negligent. see 29 A.L.R. at 439, 443-448. These decisions often emphasize the exception in the older common law rule by holding that, in modern times, the injury caused by a cow or horse straying onto a highway can reasonably be anticipated. *Id*. As noted in Comment k to the Restatement (Second) of Torts § 518(b) (American Law Institute 1977):

> Thus, if a horse is turned loose in a field that abuts upon a public highway, and there is no fence to keep him off the highway, it may reasonably be anticipated that he will wander onto it, and that, particularly in the night time, his presence there may constitute an unreasonable danger to traffic. In these cases there may be liability for negligence upon the same basis as in other negligence cases.

¶26 A minority of jurisdictions, including Montana, have retained their old common-law

rule insulating the livestock owner from liability in the absence of a state statute prohibiting livestock from being allowed to stray onto a highway. *In Bartsch v. Irvine Co.*, 149 Mont. 405, 407, 427 P.2d 302, 304 (1967), the Montana Supreme Court observed that "Montana has been open range country even before Montana was a state." Based on Montana's long history of not imposing any trespass liability on livestock owners for failing to fence their livestock in,[4] the *Bartsch* court held that neither the landowner or the livestock owner could be held liable when Mr. Bartsch was killed in a nighttime collision with a horse. *Id.*, 149 Mont. at 409, 427 P.2d at 305. As in the case at issue in the present appeal, the highway in *Bartsch* was a "Montana Secondary Highway."[5]

¶27 As have most other states, the Montana legislature has enacted statutes that have been applied to override the common-law rule against civil liability in some circumstances. "The open range doctrine has become increasingly eroded over the years as a greater number of motorists have appeared on Montana's roads and highways. Sections 60-7-201 and 60-7-202, MCA, are statutory embodiments of this erosion." *Ambrogini v. Todd*, 642 P.2d 1013, 1018 (1982).

¶28 Before 1974, the Montana statutes only made it unlawful for the livestock owner to "willfully" permit his livestock to stray onto primary highways. *Ambrogini, supra*, 642 P.2d at 1018; *Jenkins v. Valley Garden Ranch, Inc.*, 151 Mont. 463, 443 P.2d 753 (1968) (affirming directed verdict for livestock owner and against injured passenger in nighttime car-cow collision). The statute was amended in 1974 to simply state that the livestock owner "may not permit the livestock to graze, remain upon, or occupy a part of the right-of-way[.]" *Ambrogini, supra*, 642 P.2d at 1018, *quoting* Mont. Code Ann. § 60-70-201.

¶29 In the *Ambrogini* case, decided in 1982, the district court granted summary judgment for the livestock owner and against the truck driver who collided with two of the defendant's angus heifer calves on Highway 10. Interpreting Section 60-7-201, the Montana Supreme Court reversed, announcing: "Ranchers in Montana are now liable for negligence rather than willful conduct which results in the presence of their cattle on the right-of-ways." *Ambrogini*, 642 P.2d at 1018. After finding that none of the three exclusions in Mont. Code Ann. § 60-7-202 applied, the *Ambrogini* court held that the livestock owner in that case "has a legal duty to exercise due care in preventing his livestock from wandering on Highway 10," and "the reasonableness of [the livestock owner's] conduct is for the jury to decide." *Id.* at 1019.

¶30 Despite its expansive announcement, the *Ambrogini* decision only applied to primary highways covered by the 1974 statutes. The court made this distinction clear three years later, reaffirming the vitality of the open range doctrine in a case arising from a collision with a horse on Blue Creek Road outside Billings:

> The accident occurred on a secondary highway that ran through an open range. Because the highway is not part of the national system of interstate and defense highways or part of the federal-aid primary system, owners of livestock are not legally obliged to keep their livestock off any part of the right-of-way.

Siegfried v. Atchison, 709 P.2d 1006, 1008 (Mont. 1985).

¶31 Similarly, in *Williams v. Selstad*, 766 P.2d 247 (Mont. 1988), relied on by Mr. Neal in this case, the court refused to impose civil liability on the livestock owner based on a violation of Montana's old livestock containment laws, specifically the herd district statutes enacted in 1917. In *Williams*, the plaintiff was injured when she lost control of her vehicle trying to avoid the defendants' horse on a county road near Shepherd. Although the road was not part of the federal-aid primary system, it was located within a "herd district" created pursuant to Mont. Code Ann. §§ 81-4-301, *et seq.*, which makes it a misdemeanor for a livestock owner to willfully permit his animals to run at large within the district. However, the court observed that these livestock containment statutes "were not designed to protect motorists but were only intended to protect landowners and owners of livestock." *Williams*, 766 P.2d at 248. The court therefore held that "the Legislature did not intend to change the open range no-duty rules through enactment of the herd district statutes," and affirmed summary judgment for the livestock owners. *Id.* at 249.[6]

¶32 That this area of the law remains a lively one in Montana is reflected in the Montana Supreme Court's most recent opinion in *Indendi v. Workman*, 272 Mont. 64, 899 P.2d 1085 (1995), which applied another old livestock containment statute much more expansively than in *Williams*.

¶33 In *Indendi*, the district court directed a verdict for the livestock owner and against the plaintiff driver, who ran into the defendant's palomino on Highway 84 near Bozeman, a federal-aid primary highway. The supreme court reversed, holding that the area was not "open range" under one of the exclusions which apply even to primary highways in Mont. Code Ann. § 60-7-202, so that the livestock owners were not relieved of their statutory duty to keep their animals off the highway. *Indendi*, 899 P.2d at 1088-89.

¶34 Having convinced the supreme court that her claim was not barred by the open range doctrine, Indendi argued that the livestock owner's violations of fencing statutes should also entitle her to the advantages of certain common-law principles to simplify her burden of proving negligence. The court rejected the first argument, that a violation of the general primary highway fencing-out statute, Section 60-7-201, would give rise to a presumption of negligence under the doctrine of *res ipsa loquiter*. *Indendi*, 899 P.2d at 1089. The court relied on the penalty provision in Mont. Code Ann. § 60-7-203, which makes violation of the statute a misdemeanor subject to a $5 - $100 fine, and also provides that in any civil action for damages caused by vehicle-livestock collisions, "there is no presumption or inference that the collision was due to the negligence" of either the livestock owner or the vehicle driver.

¶35 Indendi next argued that the Workmans were negligent *per se*, because their single-wire electrified fence did not comply with the detailed definition of a "legal fence" in the 1881 livestock containment laws, Mont. Code Ann. § 81-4-101, *et seq.* Justice Gray explained that this is not the same as a presumption of negligence. *Indendi*, 899 P.2d at 1091 (Gray, J., specially concurring). Negligence *per se* means that the plaintiff does not need to prove a legal duty and a breach of that duty under ordinary negligence law, but "need only establish

that the defendant violated the statute and then prove that the damage or injury was cause by the statutory violation." *Id*.

¶36 The *Indendi* court recognized that the livestock containment laws specifically imposed civil liability only for injury to others' livestock, as did the court in *Williams, supra,* when it refused to extend the herd district statute to protect motorists. However, the *Indendi* court reached the opposite conclusion. Noting that the legislature had enacted § 81-4-102 in 1933 to provide for vehicle passes in legal fences, the *Indendi* court concluded that the legislature "recognizes the reality that one of the purposes of a legal fence is to keep livestock off the roadways of this state and that no [further] amendments to the statute are required to afford that protection to the motoring public." *Indendi*, 899 P.2d at 1090. Since the language of Mont. Code Ann. § 81-4-103 did not expressly exclude civil actions by motorists, the court held that "violation of § 81-4-101, MCA, can be the basis for a finding of negligence per se when that violation results in injury to a motorist or passenger traveling on the highways." *Id*.[7]

¶37 Although *Indendi* made violations of the "legal fence" statute negligence per se in actions involving motorists, we read the decision as only applying to the same highways which are already exempted by statute from the open range doctrine, i.e., Interstates and highways designated by agreement of the state and federal highway authorities as part of the "federal-aid primary system." Mont. Code Ann. §§ 60-7-201(1) and (2). In the present case, the parties stipulated that the highway is a "State secondary highway." Based on our review of Montana law above, it would appear that Montana's open range law would sustain the Tribal Court's grant of summary judgment in favor of the livestock owner, if Montana law applied in this case.

2. Crow Tribal Resolution No. 91-38

¶38 On April 13, 1991, the Crow Tribal Council unanimously enacted Resolution No. 91-38 amending the Sections 8-2-201, 8-5-563 and -564 of the Crow Criminal Code governing cruelty to animals and public nuisance. The Resolution clearly embodies the Crow Tribe's policy of doing more to prevent injuries to people, animals and property caused by collisions with livestock straying onto the highways.

The Resolution included an extensive preamble reciting the legislative findings of the need for the act as follows:

> WHEREAS, the Crow reservation community has suffered the loss of the lives of two young Crow people within the past nine months, and
>
> WHEREAS, there have been numerous traffic accidents over the past several years which have resulted in serious injuries and death of vehicle drivers and passengers, and
>
> WHEREAS, there has been and continues to be, a large number of animals either killed or injured as a result of these accidents occurring through incident

involving loose or straying livestock, encountering vehicles upon highway right-of-ways, and

WHEREAS, there has been thousands of dollars in property damage resulting from stray or loose animals which have been encountered by vehicles upon highway right-of-ways, and

WHEREAS, all governments must bring change to provide for modern transportation and safer conditions for inhabitants, both human and animal, residing under jurisdictional protection of said governments, and

WHEREAS, the Crow Tribe must take immediate action to alleviate the continuing suffering of both animals and humans stemming from encounters between straying livestock and vehicles upon highway right-of-ways,

THEREFORE BE IT RESOLVED, that the Crow Tribal Council hereby amends the Crow Law and Order Code to provide for Loose or Straying Livestock[.]

¶39 In pertinent part, the Resolution expanded the Crow Tribal Code's existing definition of public nuisance in Section 8-5-564(1)(c) as "a condition which renders dangerous for passage any public highway" to include the following:

allowing any animal defined as livestock to stray, graze, cross or wander unattended upon any road right-of-way that is not posted, or authorized as an "OPEN RANGE" area and is a primary, paved, transportation route within the jurisdictional boundaries Crow Indian Reservation.

In turn, the Resolution added a definition for "Open Range" in Section 8-2-201 to mean any road on the Reservation that does not have fences on either side, and, "if paved, is posted as OPEN RANGE. OPEN RANGE classified road ways shall be so designated by official action of the Crow Tribal Law and Order Commission, and proper posting henceforth ordered to appropriate authorities." Thus, for livestock owners along a "primary, paved transportation route" to be exempt from the Tribal public nuisance law as amended by Resolution No. 91-38, the area must be (1) unfenced and designated as open range by the Law and Order Commission and (2) posted as "open range."

¶40 The Tribal public nuisance law authorizes the Tribal authorities or "any resident of the Crow Reservation" to bring a civil action sounding in equity in the Tribal Court for abatement of the nuisance and temporary injunctive relief. Crow Tribal Code § 8-5-564(3)(a) and (b). Resolution No. 91-38 amended Section 8-5-564(3)(d)(i) to authorize the Tribal Court to order confiscation and public sale of livestock found to be in violation. The Resolution also authorized the Tribal Court to issue warnings to offending livestock owners informing them of the "potential for confiscation, criminal charges being filed, and potential civil action and liability which may arise from public injury or damage resulting from such offense." The Resolution also directed the Law and Order Commission to identify areas qualifying as open range and to work with "any appropriate entity" to cause such areas to be properly posted. Finally, Resolution No. 91-38 directed the Commission to "provide the Crow Tribal

Court with appropriate levels of fine and/or jail term for violations[.]"

¶41 In the present case, the parties have stipulated that the highway was a "primary" highway as defined in Resolution No. 91-38, and there is no evidence in the record indicating that it was posted as open range or that the Law and Order Commission ever designated the area as open range. Thus, if Resolution No. 91-38 applies in this case, the Tribal Court erred in granting summary judgment for the livestock owner.

¶42 With this background and understanding of the implications of our decision, we turn to the parties' arguments on the law applicable in this case.

3. Applicable Law

¶43 The Appellants argue, as they did in the court below, that Resolution No. 91-38 applies, and that they are entitled to a trial on the issue of the defendant's negligence.

¶44 As he did before the Tribal Court, appellee Neal first argues that Montana open range law applies in this case. As we have seen, Montana law, in its current stage of evolution, would appear to bar any liability on the part of the livestock owner in vehicular collisions on a State "secondary highway," which U.S. Highway 87 was stipulated to be in this case.

¶45 The Crow Tribal Code provides specific guidance to the Tribal Court on what law it must apply in cases coming before it. Section 3-1-104(1) directs the Tribal Court to apply federal law in the first instance when it applies to the Reservation or the Tribe as a matter of federal law, or when it has been incorporated by reference in Tribal law. The parties have not pointed to any federal law which applies in this case.

¶46 In cases not disposed of by reference to federal law, the Code directs the Tribal Court to apply Tribal ordinances and resolutions and the Tribal Code. Section 3-1-104(2). Next, if the issues cannot be resolved by reference to federal law or Tribal statutes, the Code authorizes the Tribal Court to "seek authority in the custom, usage, and jurisprudence of the Crow Tribe, traditional or modern, and in common law jurisprudence." Section 3-1-104 (3).

¶47 Finally, Section 3-1-104(4) specifically provides that State laws "shall not be deemed applicable law in any proceeding," unless agreed to by the parties with the consent of the court. In this case, the plaintiffs dispute that State law applies. Therefore, under the Code's applicable law provisions, we must reject Mr. Neal's argument that Montana law is controlling in this case.[8] If the Tribal Court had jurisdiction of this case, it erred to the extent that it relied on Montana law in granting summary judgment in favor of the livestock owner and dismissing the Edwards' claims with prejudice.[9]

¶48 If State and federal law do not apply, then the next question under the Code's applicable law provisions is whether any Tribal resolution, ordinance or code provision applies to the facts of this case. In this regard, Mr. Neal argues that Resolution No. 91-38,

upon which the plaintiffs rely, cannot apply to him because it is a criminal law, and Indian tribes do not have criminal jurisdiction over non-Indians under *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). However, the plaintiffs in this case are seeking only money damages, so if Resolution No. 91-38 applies in this case, it does not involve the Tribe's criminal jurisdiction. *Oliphant* therefore does not prevent the application of Resolution No. 91-38 to the non-Indian defendant in this civil action.

¶49 Mr. Neal further argues that even if application of Resolution No. 91-38 is not barred by federal law, the Resolution does not apply in this case as a matter of Tribal law because it does not create any civil liability on Reservation livestock owners. It is true that Resolution No. 91-38 is codified in the Crow Criminal Code, and does not expressly declare that a livestock owner is liable for civil damages for allowing livestock to stray onto a Tribal primary highway. However, the Tribal public nuisance statute that it amended specifically provides for other civil remedies, including the equitable remedies of temporary injunctions and abatement. Crow Tribal Code § 8-5-564(3)(a), (b) and (d). In addition, the Resolution's reference to "potential civil actions and liability" clearly reflects the Tribal Council's assumption that violations of the Resolution would subject livestock owners to civil liability under Tribal law.

¶50 Therefore, this court holds that Resolution No. 91-38 applies in this case, and supersedes any aspects of traditional Tribal law[10] or common-law open range doctrine that may have applied before its enactment. Under the stipulated facts of this case, the Tribal Court erred in granting summary judgment to the livestock owner.

4. Standard of Proof

¶51 If in the absence of a Tribal statute we based our decision on common law jurisprudence as authorized by Crow Tribal Code § 3-1-104(3), the weight of modern authority would subject the livestock owner to liability under ordinary negligence principles. *See* discussion, Part C.1, *supra*. In other words, the plaintiffs would have the burden of proving that the livestock owner breached his legal duty by failing to take reasonable care to keep his livestock off the highway, and that this negligence caused the plaintiffs' damages. However, because we have held that Resolution No. 91-38 does apply in a civil action such as this, this court must further rule on whether a violation of the Resolution also subjects the defendant to a higher standard of care than ordinary negligence.

¶52 In most jurisdictions, violation of a criminal statute is deemed by the courts to be negligence *per se* in a civil action. Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 Columbia Law Rev. 21, 27 (1949). In other words, once the plaintiffs show that the statute was violated, the livestock owner's breach of his duty to use reasonable care is established as a matter of law, and the plaintiffs need only prove that the violation caused their damages. *Id*. In order for it to be applied this way to a civil negligence action, the statute's purpose must be to (1) protect the same class of persons as the plaintiffs against (2) the same type of hazard that resolution in the plaintiffs' injury. Restatement (Second) of Torts § 286 (1965). The decision to adopt the criminal statute's standard of conduct in a civil action is "purely a judicial one." *Id*. comment d.

¶53 The Montana Supreme Court has used essentially this same "class-hazard" analysis to determine whether criminal traffic laws apply in civil negligence actions.[11] The court also used this analysis to conclude that a violation of the "legal fence" statute was negligence *per se* in its most recent livestock collision case. *Indendi, supra*, 899 P.2d at 1090.; but see *Nehring v. LaCounte*, 712 P.2d 1329, 1333 (Mont. 1986) (statute forbidding bartender's sale of liquor to intoxicated persons was intended to protect the people of the state generally, rather than specifically to protect motorists against drunk drivers).

¶54 There can be no question in the present case that the Tribal Council enacted Resolution No. 91-38 specifically to protect Reservation motorists such as the Edwards from "serious injury or death" and "property damage" caused by the hazard of "straying livestock" on the highway. Furthermore, upon the facts stipulated in this case, defendant Neal violated the Resolution by "allowing any animal defined as livestock to stray, graze, cross or wander unattended upon any road right-of-way that is not posted, or authorized as an 'OPEN RANGE' area and is a primary, paved, transportation route within the jurisdictional boundaries Crow Indian Reservation."

¶55 Therefore, traditional common-law principles provide ample authority for this court to hold that Mr. Neal was negligent *per se*, unless the violation was "excused." Restatement (Second) of Torts § 288B(1). The violation would be "excused" only if the defendant is able to show that it was due to circumstances largely beyond his control, i.e., he was unable to comply or was incapacitated, did not know or should not have known about the requirement, was confronted by an emergency not of his own making, or if compliance with the Resolution would have involved some greater risk of harm to himself or others. Restatement (Second) of Torts § 288A(2). This court is concerned, however, with some of the technicalities in this approach, and that it could impose too harsh a burden on Crow and non-member ranchers alike in view of the relatively recent enactment of the Resolution and the open range tradition that still prevails in the countryside surrounding the Reservation. Considering the broad and generalized nature of the livestock owner's duty under the Resolution, this court declines to adopt a rule that every violation is negligence *per se*.

¶56 As an alternative, some courts have held that violation of a statute is only *evidence* of negligence, to be considered by the fact-finder along with all the other evidence under the basic reasonable person standard. Restatement (Second) of Torts § 288B(2); *see also*, Morris, *supra*, 49 Columbia Law Rev. at 30. However, considering the express legislative findings explaining the purposes of Resolution No. 91-38, we believe this latter approach would tend to minimize the serious and urgent dangers that the Tribal Council sought to address. "A statute designed for the protection of human life is not to be brushed aside as a form of words, its commands reduced to the level of cautions, and the duty to obey attenuated into an option to conform." *Martin v. Herzog*, 228 N.Y. 164, 126 N.E. 814, 816 (N. Y. 1920) (Cardozo, J.) (holding the plaintiff in a collision negligent as a matter of law by driving his buggy after dark without lights in violation of traffic statute).

¶57 This court has determined to take a middle ground in balancing the legitimate interests at stake. This court holds that the livestock owner's violation of Resolution No. 91-

38 by permitting his livestock to stray onto a primary paved Reservation thoroughfare resulting in a collision with a motor vehicle raises a presumption of negligence on the part of the livestock owner. *See, e.g.*, Watzig v. Tobin, 292 Ore. 645, 642 P.2d 651, 29 A.L.R. 4th at 418 (1982); see also 29 A.L.R. 4th at 440, 459-462, and cases collected therein. The livestock owner may rebut the presumption by showing that the livestock escaped due to circumstances beyond his control, as listed in connection with the discussion of negligence *per se* above, or by showing that he used reasonable care in trying to prevent his livestock from straying onto the roadway, including maintenance of his fences and such other actions as are reasonable under the specific circumstances of the case.

¶58 Under our holding here and the stipulated facts of this case, the Edwards have made a *prima facie* case against Mr. Neal. In further proceedings below, the burden will shift to Mr. Neal to prove some excuse, or to prove that his fence maintenance and other conduct was reasonable and prudent for keeping his cows off the highway.

D. Comparative Fault of the Plaintiffs

¶59 The rebuttable presumption of the livestock owner's negligence also does not prevent the livestock owner from defending by proving that all or part of the cause of the accident was negligence on the part of the vehicle's driver.

¶60 In the present case, the parties stipulated that "plaintiff was given a ticket by the Crow Tribal police for a liquor violation." In the defendant's brief in support of his motion for summary judgment, Mr. Neal contended that the fact of the liquor violation indicates that the Edwards were driving their car in a negligent manner. Def. Brief at 2. Without other support in the factual record,[12] Defendant Neal argues as a final matter in this appeal that the Tribal Court correctly dismissed the case "because of the contributory negligence of plaintiff in that he was intoxicated at the time of the event." Appellee's Brief at 2. Based on statements in the plaintiffs' reply brief filed August 14, 1995, it appears that the "liquor violation" was for simple possession of alcohol on the Crow Reservation. The Edwards argued below that a possession charge is different than being cited for intoxication, that it does not show intoxication or negligence by the plaintiffs, and that neither of them were cited for intoxication or for not driving safely. The Edwards also argued that if Mr. Neal is able to bring forward any other evidence of negligent driving, it should be weighed by the trier of fact in comparing their negligence to that of Mr. Neal's. We agree with the Edwards.

¶61 The court does not comprehend the Tribal law forbidding possession of intoxicants, Crow Criminal Code Section 8-5-572, as being aimed specifically at driving under the influence of alcohol. Instead, it is intended generally to protect public morals on the Reservation by controlling the availability of alcoholic beverages. Obviously, a person can merely possess liquor without it having any effect on his or her driving. For all these reasons, the Edwards' violation of the Tribal liquor possession statute is not evidence of any negligence on their part.

¶62 On the other hand, Section 13-3-302 of the Crow Traffic Code, which prohibits

driving while under the influence of alcohol, is the type of criminal statute whose violation is probably negligence *per se* in a civil action under the "class-hazard" test described above. Thus, if the livestock owner in this case can prove that the plaintiffs were driving under the influence of alcohol "to a degree which renders him/her incapable of safely driving a motor vehicle" in violation of § 13-3-302, the Tribal Court would need to consider this as establishing civil negligence by the plaintiffs (regardless of whether they were issued a criminal citation). However, any "contributory negligence" by the plaintiffs does not, as a matter of law, completely bar their claims against the livestock owner.

¶63 The doctrine of "contributory negligence," in which any negligence by the plaintiffs completely barred their claims against the defendant, was adopted as the common law by the English and American courts beginning in the early nineteenth century. *See* Schwartz, Victor E., *Comparative Negligence* § 1-2(a)(3d ed. 1994). Before the 1960's, the doctrine still prevailed in all but six states; the latter states had instead adopted the alternative doctrine of "comparative negligence." *Id* § 1-1. Under comparative negligence, the contributorily negligent plaintiffs' claims are not barred as matter of law, but instead their damages are reduced in proportion to the amount of their fault compared to the fault of the defendant. *Id*. § 2-1.

¶64 The modern trend toward comparative negligence began in earnest in the late-1960's. Since then, more than two dozen states have enacted comparative negligence statutes, and another dozen states have adopted comparative negligence by judicial decision. *Id*. § 1-1; *see also, Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973), *Nga Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226 (1975) (the first modern cases in which the state supreme courts adopted comparative negligence by judicial decision). As observed by the leading commentator in this area: "By 1994, comparative negligence had replaced contributory negligence as a complete defense in at least forty-six states, Puerto Rico, and the Virgin Islands. It has become the prevailing doctrine in the United States."[13] Schwartz, *Comparative Negligence* § 1-1.

¶65 This court confirms that comparative negligence is the law of the Crow Tribe. The record before this court cannot sustain the Tribal Court's grant of summary judgment to the livestock owner on the basis on the plaintiffs' contributory negligence. On remand, the Tribal Court is directed to weigh any negligence of the plaintiffs under the principles of comparative negligence with respect to both the plaintiffs' claims and Mr. Neal's counterclaim for the loss of his animal.

Conclusion

¶66 The order of the Tribal Court granting summary judgment in favor of the defendant Neal is REVERSED. This case is REMANDED to the Tribal Court for further proceedings to determine whether it has subject matter jurisdiction, and if so, to conduct further proceedings on the merits in accordance with this opinion.

Endnotes

[1] Defendant Neal resides in Wyola, and the plaintiffs reside in Lodge Grass, both on the Crow Reservation (Amended Complaint and Answer). The form of complaint supplied by the Tribal Court and used by the plaintiffs in this case does not contain spaces for alleging the Tribal membership status of the parties. From the briefs, however, it is apparent that defendant Neal is not a member of the Crow Tribe. Appellee's Response Brief at 2; Appellants' Reply Br. At 2. The fact that Mr. Edwards was cited for a liquor violation indicates he is an Indian within the Tribe's criminal jurisdiction.

[2] *See Marchington, supra,* 127 F.3d at 815 (plaintiff's status as injured Tribal member does not satisfy second Montana exception if "the possibility of injuring multiple tribal members does not" under *Strate*), effectively overruling *Strate v. Bremner*, 971 F. Supp. 436, 438 (D. Mont. 1997) ("injury to a single tribal member is sufficient to implicate the interests protected by the second Montana exception"), followed in *Austin's Express v. Arneson*, 996 F. Supp. 1269 (D. Mont. 1998) (Crow Tribal Court lacks jurisdiction of tort action for death of Tribal member hit by non-Indian's truck on Interstate 90); *see also, Burlington Northern Railroad Co. v. Estates of Red Wolf and Bull Tail*, Cause No. CV 96-17-BLG-JDS (D. Mont. April 30, 1998) (Crow Tribal Court lacks jurisdiction of tort claims by estates of Tribal members killed in collision with train on railroad right-of-way).

[3] In pertinent part, "common law" has been defined as follows:

> As distinguished from statutory law created by enactment of legislature, the common law comprises the body of those principles and rules of action . . . which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming and enforcing such usages and actions; and, in this sense, particularly the ancient unwritten law of England. In general, it is a body of law that develops and derives through judicial decision, as distinguished from legislative enactments.

Black's Law Dictionary (West 6th ed. 1990) at 276. In the words of a distinguished American jurist:

> The life of the law has not been logic: it has been experience. The felt necessities of time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than syllogism in determining these rules by which men should be governed.

O.W. Holmes, *The Common Law* (1881), *reprinted in* Posner, *The Essential Holmes* (Univ. Chicago 1992).

[4] In fact, the case of *Bienhorn v. Griswold*, 27 Mont. 79, 69 P. 557 (1902), on which the *Bartsch* court relied, was one of the leading authorities for the proposition that English common law need only be followed by American courts when it is suitable and appropriate. Prosser, *et al., Cases and Materials on Torts* (7th ed. 1982) at 707.

[5] In a special concurrence, Justice Harrison recognized the mixed blessings of technological changes like automobile travel, stating:

> Aware as I am of the economic problems of our agriculture and livestock industry, I feel we as a people, must soon approach legislatively this most humane need to protect our motorist. *Bartsch*, 149 Mont. at 411, 427 P.2d at 305 (Harrison, J., concurring).

[6] Justice Sheehy dissented in protest against the court's continued reliance upon the open range doctrine. Justice Sheehy wrote that the "venerable" livestock containment laws which preceded modern day vehicular traffic "should be disregarded and the ordinary rules of negligence laws should apply." *Williams*, 766 P.2d at 249 (Sheehy, J., dissenting).

[7] Justice Weber dissented from the court's holding on negligence per se, contending that the adequacy of the Workmans' single-wire electrified fence "should remain an issue of fact to be determined in the course of trial." *Indendi*, 899 P.2d at 1093 (Weber, J., dissenting in part). Citing contradictions in the various old livestock containment laws, Justice Weber objected to the expansion of livestock owner liability on practical grounds:

> While not a matter of record, it is common knowledge that electrified fences have been used throughout Montana for a number of years as a means of containing livestock. Electrified fences as commonly used do not meet the requirements of § 81-4-101, MCA. It will come as a shock to many livestock owners in the State of Montana to find that they are negligent per se in the use of electrified fences which fail to meet the legal fence definition of § 81-4-101, MCA, which requires three barbed, horizontal, well stretched wires, securely fastened as nearly equal distant as possible to substantial posts and with other additional provisions. *Id*.

[8] This court does not interpret Section 3-1-104(4) as prohibiting the Tribal courts' consideration of Montana law as persuasive but non-binding authority in the context of the common-law jurisprudence of the United States which we are authorized to apply under Section 3-1-104(3).

[9] It is true that Montana law would probably apply if the Tribal Court lacked jurisdiction under *Strate* (see discussion in Part B, *supra*). If so, rather than dismissing with prejudice by granting summary judgment to the livestock owner on the merits in this case, the Tribal Court would be compelled to dismiss *without* prejudice on jurisdictional grounds. Assuming that the doctrine of equitable tolling would prevent the running of the statute of

limitations on their claims (*see Marchington*, 127 F.3d at 815 n.10), the plaintiffs would then be free to proceed in State court, and it would be for the State courts to decide whether or not plaintiffs' claims are barred by Montana's open range doctrine. Our analysis of Montana law below is not intended to prejudice that determination, should it be necessary.

[10] In light of our holding that Resolution No. 91-38 applies, the court need not consider whether the application of Tribal custom and tradition would yield a different result. We note, however, that Crow country was open range long before Montana was a territory, and long before there were any domestic cattle on it. It was Plenty Coups' dream of these strange spotted-buffalo spreading across the plains from a hole in the ground that forewarned the Crows of the irresistible tide of white settlement. Linderman, Frank B., *Plenty-Coups, Chief of the Crows* at 64, 73 (U. Neb. Press 1962).

[11] Montana uses a 5-part test for establishing negligence per se: (1) the defendant violated the particular statute; (2) the statute was enacted to protect a specific class of persons; (3) the plaintiff is a member of that class; (4) the plaintiff's injury is the sort the statute was enacted to prevent; and (5) the statute was intended to regulate members of the defendant's class. *Hislop v. Cady*, 862 P.2d 388, 391 (Mont. 1993) (failed to show violation of highway traffic statute).

[12] Plaintiff Ray Edwards responded "yes" to an interrogatory inquiring whether he had "consumed any alcoholic beverage or illicit or legal prescription or non-prescription drugs of any type during the twelve hours immediately preceding the incident.]" Response to Interrogatories of Defendant (Sept. 22, 1994). It is not clear from the record who was driving the car at the time of the collision.

[13] As of 1994, the contributory negligence rule survived in only four states--Maryland, Virginia, North Carolina and Alabama--and in the District of Columbia. Schwartz, *supra*, § 1.5(e)(3). Montana adopted "modified" comparative negligence by statute in 1975, in which the plaintiffs' claim is barred only if their negligence is greater than the defendant's. Mont. Code Ann. § 27-1-702.