IN THE COURT OF APPEALS
OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD RESERVATION, PABLO, MONTANA

BAYLOR B. BAYLOR, Plaintiff and Appellee vs. THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, FLATHEAD POST AND POLE MILL, AARON JONES, MONTE NELSON, AND JOHN F. MORIGEAU, Defendants and Appellants	CAUSE NO. CV-039-92 ORDER GRANTING BAYLOR'S MOTION TO DISMISS

MOTION TO DISMISS

BACKGROUND

This case was brought in Tribal Court March 24, 1992, by Baylor, a tribal member, against the CS & K Tribes, the Flathead Post and Pole Mill, Aaron Jones, Monte Nelson, and John Morigeau. The complaint sought redress for an injury suffered by Baylor March 26, 1990, while he was operating a sawdust and waste conveyor machine at the Flathead Post and Pole Mill. Baylor's right hand was pulled into the machine and it was severed just above the wrist. At that time, the Post and Pole Mill was operated as a tribal enterprise by the CS & K Tribes. Defendant Aaron Jones was manager of the mill, John Morigeau was supervisor of the mill, and Monte Nelson was a safety director.

Allegations in the complaint were that there was no control panel accessible to the plaintiff to shut off the power running the sawdust and waste conveyor machine. More broadly, the complaint alleged that the defendants owed the plaintiff a duty of due and reasonable care, and that they were negligent in failing to provide a safe place to work, failing to provide protective guards on equipment, failing to maintain equipment in a safe condition, failing to inspect, discover (and warn of) unsafe conditions, and failing to adequately supervise managers, supervisors and employees to prevent injuries to workers. Count XIV of the complaint imputed the negligence of the Post and Pole Mill, Aaron Jones, Monte Nelson, and John Morigeau to the Confederated Salish and Kootenai Tribes.

Baylor alleged that as a result of the defendants' negligence, he suffered damages for personal injury for the loss of his right hand; pain and suffering; loss of enjoyment of life, employability, future wages and benefits; and expenses for hospitals, doctors, and medication.

On July 28, 1992, the Tribes filed a Motion to Dismiss and a supporting memorandum. Central to the Tribes' argument were these circumstances:

(1) The Tribes had contracted with the State Compensation Mutual Insurance Fund to provide insurance coverage for injuries to employees.

(2) Baylor had filed a claim for workers compensation benefits with the State Fund, and he had received a lump sum payment of $34,761.89 in addition to benefits for medical and hospital services, temporary total disability benefits, and other wage loss benefits. These benefits were paid in accordance with State Fund

procedures, and limits under the Montana law which governs such claims.

(3) Montana law provides that the Workers Compensation Act sets forth the exclusive remedy for injuries to employees of entities covered by the State Fund, and states that "an employer is not subject to any liability whatever for the death of or personal injury to an employee covered by the Workers Compensation Act." The Tribes' memorandum on its Motion to Dismiss this case in Tribal Court cites several Montana Supreme Court decisions upholding the Montana "exclusive remedy" statute for claims brought under the Workers Compensation Act.

(4) Baylor had voluntarily availed himself of the State Fund insurance policy provided and paid for by the Tribes. By filing his claim and collecting benefits from the State Fund, he had "availed himself of the state law, regulations, and procedures which govern claims under the State Fund." Having done so, he should not be able to "circumvent the exclusive remedy found in those laws." His cause of action was thus statutorily barred under Montana law as that law was brought to bear on redress for injuries suffered by tribal employees once the Tribes had purchased insurance coverage under the State Fund and the State Fund had "assume[d] the entire liability of the insured to [their] employees."

On August 5, 1992, Judge Gary L. Acevedo issued an order granting a jury trial and requiring the posting of a bond of $500.00.

Baylor filed his Memorandum in Opposition to the Motion to Dismiss August 10, 1992. He countered the Tribes' arguments that the Montana Workers

Compensation statute provided the exclusive remedy for tribal members injured in the course of employment with the Tribes. His position was based on these points:

(1) The insurance that the Tribes obtained from the Montana Workers Compensation Fund could not be equated with an extension of Montana law to apply to Tribal businesses conducted on the Flathead Reservation or to tribal members employed at such businesses. The Tribes could not unilaterally by contract with the State Fund divest the Tribal Court of jurisdiction to hear Baylor's case. Neither the State of Montana nor insurance companies under its control have the jurisdiction to force Baylor to accept as full and final compensation the benefits allowed under state workers compensation statutes.

(2) The Confederated Salish and Kootenai Tribes and the State of Montana worked out an agreement under the terms of Public Law 280 [in 1963-1965] in which the Tribes granted concurrent civil jurisdiction to the State of Montana in eight areas of law. Workers compensation was not included in the eight subject matter areas. The relevant Tribal ordinance provided that "[a]ll jurisdiction not expressly transferred to the State remains with the Tribes."

(3) Baylor noted that a Montana Attorney General's opinion in 1977 concluded that "[t]he Montana Workers Compensation statutes do not apply to Indian businesses being conducted within an Indian reservation."

(4) Baylor is not estopped--by receiving benefits under the Tribes' insurance policy--from bringing an action in Tribal Court for his injuries and losses. He has

not waived his right to have his case heard in Tribal Court because he had not had full knowledge of his right to bring such an action; therefore, there was neither full knowledge nor express waiver of this right.

(5) While Baylor had received a lump sum impairment award of $34,761.89 for the loss of his right hand under the Tribes' workers compensation coverage, it allegedly can be established through a vocational rehabilitation expert that his monetary losses over his remaining working life will be in excess of $700,000.00, not including damages for bodily injury and pain and suffering. It is conceded that "[t]here may be a right to set off the amounts paid under the Tribes' insurance policy against Baylor's personal injury recovery."

The Tribal Court's decision denying the Tribes' Motion to Dismiss was issued September 27, 1995. The Court based the decision on the general federal Indian law principle that state law does not apply on Indian reservations without express Congressional approval through treaty or federal statute. The Court recounted the details of the agreement between the Confederated Salish and Kootenai Tribes and Montana on concurrent jurisdiction in eight areas of civil law pursuant to Public Law 280, and concluded that workers compensation is not one of the duly authorized areas of concurrent jurisdiction.

In setting forth Tribal law on the subject, the Court cited a 1992 Tribal Court decision that held that the Montana Workers Compensation Act does not apply to Indian owned businesses whose business activity is conducted wholly within

the boundaries of the Flathead Indian reservation. (State Fund v. Pierce Logging (CV-161-92). Although Pierce dealt with a different aspect of the Montana Workers Compensation Act, the Court found its reasoning applicable. Here, too, federal Indian law was determinative. After the 1968 amendments to Public Law 280, the consent of an Indian tribe to an extension of state law to a reservation had to be obtained through a majority vote of the adult Indians voting at a special election held for that purpose. In Kennerly v. District Court, 400 U.S. 423 (1971), the United States Supreme Court had held that the Public Law 280 procedures had to be strictly followed. The Tribal Council's entering into a contract with the State Fund to obtain insurance for employee injuries did not constitute a proper conveyance of jurisdiction to the State of Montana. Therefore, under both Pierce and Kennerly, the Montana Workers Compensation Act does not apply, the statute's exclusive remedy requirement is without force, and Baylor's Tribal Court action is not barred by the Montana statute. Further, the Court found no basis for estoppel because the liability language in the Tribes' insurance policy with the State Fund did not affect Baylor's choice of remedies.

PROCEEDINGS IN THE COURT OF APPEALS

The Tribes appealed the decision of the Tribal Court denying their Motion to Dismiss to this Court October 26, 1995. In turn, Baylor moved to dismiss the appeal on the grounds that an order denying a motion to dismiss is not an appealable order. Central to his argument are the terms of Section 3-2-303 (1), Ordinance 90B, giving this Court exclusive jurisdiction

over appeals by an aggrieved party from a final judgment of the Tribal Court. His brief sets out Section 3-2-303 in its entirety, including the final judgment section and the two subsequent sections which provide for specific interlocutory appeals. (e.g., orders relating to injunctions, class actions, certain probate matters). Not included in either section is the appealability of the denial of a Motion to Dismiss based on the Tribal Court's alleged lack of jurisdiction.

The Tribes' Answer and brief opposing the Motion to Dismiss states the belief that this Court has jurisdiction to hear this appeal, and "that the best interests of justice will be served and ultimate termination of litigation will best be reached by hearing the requested Appeal."

After questioning whether the Tribal Court had properly applied federal Indian law in reaching its decision, the Tribes set out a federal statute, 28 U.S.C. 1292 (b), which provides an avenue of appeal from an order that is not otherwise appealable if it involves ". . . a controlling question of law as to which there is substantial ground for difference of opinion and . . . immediate appeal from the order may materially advance the ultimate termination of the litigation." Acknowledging that there is a specific requirement in 28 U.S.C. 1292 (b) to the effect that a trial judge must state in writing his opinion that the decision involves a controlling question of law, the Tribes cite a 1988 decision of the Cheyenne River Sioux Court of Appeals that found appellate jurisdiction proper as long as the two fundamental requirements of 28 U.S.C. 1292 (b) are met:

(1) There is substantial ground for a difference of opinion as to the order appealed, and (2) The appeal would advance the termination of the case.

The Tribes argue that both of these requirements are met in the case before us.

On December 19, 1995, this Court issued an order relative to the schedule to be followed in this case, and stayed the briefing schedule until a decision is reached on the Motion to Dismiss.

In a reply brief Baylor again argues that Ordinance 90-B Section 3-2-303 provides tribal law on the scope of this Court's appellate jurisdiction. Therefore, there is no necessity to turn to federal law. Further, he argues that 28 U.S.C. 1292 (b) is a specific statute dealing only with special federal cases and federal courts, and therefore, it is not relevant to the matter before us.

DISCUSSION

This Court's jurisdiction over appeals in civil cases is set out in Ordinance 90-B, Section 3-2-303. As noted above, Part 1 of that Section gives this Court the right to hear appeals "[f]rom a final judgment entered in an action or special proceeding commenced in the Tribal Court or brought into the Tribal Court from another court or administrative body." Parts 2 and 3 of 3-2-303 list several orders (other than final judgments) issued by the Tribal Court that are also subject to the appellate jurisdiction of this Court. Not included in those orders is a decision by the Tribal Court denying a Motion to Dismiss based on the alleged lack of jurisdiction of the Tribal Court. No change was made in this section between its initial enactment as part of Ordinance 90-A in 1991 and its re-enactment

as part of Ordinance 90-B in 1995.

The Tribes do not make the argument that this Court should hear this appeal because we are authorized to do so under the terms of Ordinance 90-B. Instead, they rely on a federal statute, 28 U.S.C. 1292 (b). That statute provides that when a federal district court judge issues an order in a civil action that is not otherwise appealable, he can recommend that the right to an appeal should be granted by stating in writing that the order involves a controlling question of law as to which substantial difference of opinion exists, and that an immediate appeal would materially advance the ultimate termination of the litigation. The statute also provides that a federal Court of Appeals may, in its discretion, permit an appeal to be taken from such an order.

The decision of the Cheyenne River Sioux Court of Appeals, cited by the Tribes, concluded that that court could accept and decide an appeal of an order of the Tribal Court denying a Motion to Dismiss brought on sovereign immunity grounds. In that case, the Cheyenne River Sioux Court of Appeals remanded the case to the Tribal Court after applying the provisions of 28 U.S.C. 1292 (b) despite the fact that the requirement noted above of a specific written statement from the trial court had not been precisely met. In reaching its decision, the CRS Court of Appeals relied on a section of the Cheyenne River Sioux Tribe's Rules of Civil Procedure, published as part of the Cheyenne River Sioux Tribe's Law and Order Code. Rule (1) (d) mandates that when a matter is not specifically addressed in the Tribal Court rules, it shall be handled in accordance with the federal rules of civil procedure, provided such rules are not inconsistent with the tribal rules of

procedure and with principles of fairness and justice. Dupree v. Cheyenne River Housing Authority (Chy. R. Sx. Ct. App, Aug. 19, 1988; 16 I.L.R. 6106 (August 1989).

After acknowledging that the rules of procedure of the CRS Court of Appeals do not address the appealability of interlocutory orders, the CRS Court stated that it "must look to the applicable Federal Rules of Appellate Procedure for guidance." Section 5 of those federal rules implements 28 U.S.C. 1292 (b) by establishing a schedule and procedure for petitioning to a federal Court of Appeals from an interlocutory order containing the statement prescribed by the statute. The petition is to contain a statement of facts necessary to an understanding of the controlling question of law determined by the order of the district court; a statement of the question itself; and a statement of the reasons why a substantial basis exists for a difference of opinion on the question, and why an immediate appeal may materially advance the termination of the litigation. The petition is to be filed within 10 days after the entry of the order by a district court, and an adverse party may file an answer in opposition.

In applying FRAP (5) to the case before it, the CRS Court of Appeals implicitly applied 28 U.S.C. 1292 (b).

CONCLUSION

There is clarity in the law of the Confederated Salish and Kootenai Tribes that determines our action on the Motion to Dismiss that is before us. It is encompassed in Ordinance 90B, Section 3-2-303. As noted above at more than one juncture, that section gives this Court exclusive jurisdiction over appeals from

a final judgment of the Tribal Court, and over specific interlocutory orders--some eighteen in number. It is evident that an order of the Tribal Court denying a Motion to Dismiss based on the alleged lack of jurisdiction of the Tribal Court is not one of the interlocutory orders set out in Ordinance 90B, Section 3-2-303, Parts (2) and (3). The negative implications of these provisions are strong--that other interlocutory orders of the Tribal Court are not appealable to this Court, and we are not disposed to set aside these implications.

In providing for the appellate jurisdiction of this Court in civil cases, the law of the Confederated Salish and Kootenai Tribes tracks the law of many jurisdictions in the United States. Generally at the outset of such laws, most appellate courts are limited to hearing appeals from final judgments entered by the trial courts. This "Rule of Finality" is based on several considerations. Among them is efficiency--providing a framework in which an appellate court will only hear a case once, after all relevant decisions have been made by the trial court, and will not need to review interim orders that may not be relevant by the time a case is brought to conclusion. Further, the trial judge is given control over a case, control that would be weakened if an attorney could file appeals at each juncture that the trial court reaches an adverse decision.

The law of most jurisdictions mirrors that of the Confederated Salish and Kootenai Tribes by providing statutory exceptions to the finality rule in order to permit appellate courts to review specific types of non-final orders, or, interlocutory appeals, and those statutes generally have been strictly applied. (See, e.g., U. Bentelle

and E. Carey, Appellate Advocacy : Principles and Practice (2 ed. 1995), pp. 17-23.

While the Tribes have emphasized a decision of the Cheyenne River Sioux Tribe Court of Appeals that permitted that Court to hear an appeal of a Motion to Dismiss, based on a jurisdictional challenge in the Tribal Court, we find pertinent distinctions in the circumstances of that case and in the governing laws and rules of the Cheyenne River Sioux Tribe and the Confederated Salish and Kootenai Tribes. Both parties agreed to the CRS Court of Appeals hearing the appeal. The Cheyenne River Sioux Tribe's Code did not provide for appellate jurisdiction over any interlocutory orders. Further, the Cheyenne River Sioux Tribe had adopted the federal rules of civil procedure for matters not covered by Tribal law. By contrast, Ordinance 90-B specifies the interlocutory appeals that may be heard by this Court, and the Confederated Salish and Kootenai Tribes in their Law and Order Code refer directly at two junctures to the federal rules of civil procedure and adopt them over these matters: Defenses and Objections and Discovery. As we stated in our September 22, 1995 Order in the case of Brian W. Hitchcock and Albert L. Hitchcock vs. Shaver Manufacturing Company and Triple W. Equipment, Inc., Cause No. AP-94-284-CV, we recognize that the federal rules of civil procedure are important guidelines for the Tribal Court in matters not specifically covered either by the Law and Order Code or by the Rules of Practice in Civil Actions and Proceedings in the Tribal Court of the Confederated Salish and Kootenai Tribes. We were disinclined then, and remain disinclined now, to judicially mandate the adoption of other federal rules of civil procedure. Similarly, this Court will not adopt a federal statute as an addition to the rules imposed upon it by the Tribal Council of The

Confederated Salish and Kootenai Tribes in Ordinance 90-B.

Accordingly, Baylor's Motion to Dismiss this Appeal is granted, and the appeal is dismissed. This case is remanded to the Tribal Court for further proceedings. Finally, we wish to emphasize that we are making no determination at this time of the jurisdictional issues on which the Tribes have appealed.

Dated this 28th of June, 1996.

Margery H. Brown

Margery H. Brown, Associate Justice

Associate Justice Margaret Hall and Acting Associate Justice D. Michael Eakin concur.

CERTIFICATE OF MAILING

I, Abigail Dupuis, Appellate Court Administrator, do hereby certify that I mailed true and correct copies of the **ORDER GRANTING BAYLOR'S MOTION TO DISMISS** to the persons first named therein at the addresses shown below by depositing same in the U.S. Mail, postage prepaid at Pablo, Montana, or hand-delivered this 1st day of July, 1996.

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