

ROSEBUD SIOUX SUPREME COURT)
ROSEBUD SIOUX RESERVATION)
ROSEBUD, SOUTH DAKOTA)

POSTED TO TRIAL COURT

APPEALS COURT)
JUN 1 2006)

DOCKET # CA2005-02

VS. JODY WALN, Plaintiff/Appellee
PROGRESSIVE INSURANCE COMPANY, Defendant/Appellant

TO: THE ABOVE-NAMED PARTIES

Please take notice that on the 24th day of May, 2006, the Honorable Chief Justice FRANK POMMERSHIEM presiding, The Court entered an **MEMORANDUM OPINION AND ORDER**. A certified copy of said Judgment of **ORDER** is enclosed and by this reference is incorporated herein and is herewith served upon you.

Dated this 1st day of June, 2006.

Dorothy Nelson
Clerk of Courts

CERTIFICATE OF SERVICE

I, Dorothy Nelson, Chief Clerk of Courts of Rosebud Sioux Tribal Supreme Court, hereby certify that I served a true and correct copy of the Notice of Entry of Order and copy of said Order upon the Appellant(s) and Appellee(s) as follows by placing in the U.S. Mail, postage prepaid, addressed as follows:

Patricia A. Meyers, Costello, Porter, Hill, Heisterkamp, Bushnell & Carpenter, LLP, PO Box 290, Rapid City, SD 57709

Robin Zepher, Abourezk & Zepher, P.C., PO Box 9460, Rapid City, SD 57709

Judge Viola Burnette, Rosebud Sioux Tribal Court, Rosebud, SD 57570

Dated this 1st day of June, 2006


Kenneth G. Long
Clerk of Courts

located in Valentine, Nebraska and directly adjacent to, and contiguous with, the Rosebud Sioux South Dakota. The policy was sold to Mr. Bordaex by Stillwell Insurance Agency which is His mailing address – as it appears on his automobile insurance policy – is Box 404, Rosebud, is also a member of the Rosebud Sioux Tribe and a resident of the Rosebud Sioux Reservation. Progressive Insurance Company, Defendant/Appellant, to Mr. Rodney Bordaex. Mr. Bordaex Ms. Jody Waln is a "listed driver" on the automobile insurance policy issued by

boundaries of the Rosebud Sioux Reservation. Road # 4, east of the He Dog School in the He Dog Community, which is within the exterior Rosebud Sioux Tribe. The accident took place on trust land, namely Bureau of Indian Affairs vehicle accident with Sammi Waln, who is also a reservation resident and member of the Reservation and an enrolled member of the Rosebud Sioux Tribe, was involved in a motor On July 9, 2001, Jody Waln, Plaintiff/Appellee, a resident of the Rosebud Sioux

I. Introduction
 Per Curiam (Chief Justice Frank Pommersheim and Associate Justices Leroy Greaves and Cheryl Three Stars Valandra).

JODY WALN Plaintiff/Appellee,	vs.	PROGRESSIVE INSURANCE COMPANY, Defendant/Appellant.
MEMORANDUM OPINION AND ORDER		

SUPREME COURT
 OF THE
 ROSEBUD SIOUX TRIBE
 TRIBAL COURT
 BY 
 FILED

Reservation. Ms. Sammi Wain is uninsured. The policy issued by Progressive Insurance to Mr. Bordaex includes coverage for accidents involving uninsured motorists.

Ms. Jody Wain and her minor son suffered significant bodily injuries and allegedly were without fault. Progressive Insurance paid a small portion of the minor's claim, but based on its preliminary investigation found Ms. Jody Wain at least 50% negligent in causing the accident and denied liability as to Ms. Wain's claim.

This lawsuit followed. Ms. Wain's primary causes of action involved a breach of contract claim against Progressive and a tort claim based on the alleged bad faith of Progressive. Progressive Insurance moved to dismiss Plaintiff's complaint for lack of subject matter

jurisdiction invoking the familiar talisman of *Montana v. United States*, 450 U.S. 544 (1981) and its progeny.¹ The Trial Court denied the motion finding that as to the contract claim there was

the requisite "consensual relationship" between the Plaintiff and Defendant as established by the contract of insurance to satisfy the first prong of the *Montana* proviso and to support tribal court jurisdiction.² (Slip Opinion at 5-6). As to the bad faith tort claim, the trial court found the requisite basis for tribal court jurisdiction in the same consensual relationship when considered along with the Tribe's long arm statute.³ (Slip Opinion at 8-9).

¹ See also *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), *Nevada v. Hicks*, 520 U.S. 438 (1997), and *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001).

² The *Montana* proviso provides that:

(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. *Williams v. Lee*, 258 U.S. 217, 223; *Morris v. Hitchcock*, 194 U.S. 384; *Buster v. Wright*, 135 F. 947, 950 (CA8); see *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153. 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 or welfare of the tribe. *Montana* at 566.

³ Title 4, Chapter 2, Section 7 of the Rosebud Sioux Law and Order Code reads in pertinent part:

A. To the greatest extent consistent with due process of law, any person, whether or not a citizen, resident, or present on the reservation, who in person or through an agent, does any of the acts as enumerated in this Section, thereby submits said person or his personal

The trial court subsequently granted an order permitting an interlocutory appeal. Oral

argument was heard on April 24, 2006.

II. Issues

This appeal raises two issues, namely:

A) Whether the Tribal court has subject jurisdiction over Plaintiff/Appellee's

contract claim against Defendant/Appellant; and

B) Whether the Tribal court has subject matter jurisdiction over Plaintiff/Appellee's

bad faith tort claim against Defendant/Appellant.

Each issue will be discussed in turn.

III. Discussion

A. Breach of Contract Claim

This is a case of first impression for this Court and therefore it proceeds cautiously. With this note in mind, several preliminary observations are in order. While both parties appear to

agree that the essential posture of this case involves a lawsuit by a tribal member against a non-

Indian business that does not directly transact business (*i.e.* sell insurance) on the Reservation,

this Court does not fully agree with this description despite its *formal* accuracy. Stripped of this

questionable formality, the core of this case, may be more beneficially characterized as focusing

on an auto accident that took place on trust land within the exterior boundaries of the Reservation

and involved two tribal members who are also residents of the Reservation. From this vantage,

representative to the jurisdiction of the Tribal Court as to any cause of action arising from
doing any of the following acts within the Rosebud Indian Reservation:

1. The transaction of any business;
2. The commission of a tortious act;
3. ...
4. Contracting to insure any person, property or risk.

the case thus appears to be a quintessential example of a matter of Tribal court concern. There is no significant non-Indian, state or federal interest.

Yet the mere presence of insurance coverage (by a non-Indian company) for one of the parties changes all this? Perhaps in the unusual landscape of much of federal Indian law

jurisprudence this may appear to be so, but the Court does not think that it is so in this case. This is especially true in light of several other facts. Beneficial does not claim – nor could it claim – that its policy was void or somehow inapplicable to the accident simply because the accident took place on the Reservation. Beneficial's bone to pick with Ms. Waln is the scope of coverage (relative to Ms. Waln's own alleged negligence) not that the policy does not apply on the Reservation in the first instance.

There is also the corollary common sense observation that insurance policies and

contracts – especially for vehicles – follow and accompany the insured wherever he or she might drive. How could it be otherwise? This is the essence of automobile insurance. It is in the

vehicle and the vehicle is in it. When there is an accident, contract performance (*i.e.* coverage) takes place where the accident occurs and/or where the insured resides. In this case the accident occurred on the Reservation and the residency of the insured is on the Reservation. It borders on absurdity to somehow claim that the motor vehicle insurance contract in this case has an insufficient nexus to the reservation for jurisdictional purposes. Yet this appears to be the position of the Defendant/Appellant and to the degree this is its position, the Court rejects it.

With this background in mind, the Court proceeds to the direct *Montana* analysis. The essential claim of Progressive in this regard is that its policy was not issued to Ms. Waln who is merely a "listed driver" on Mr. Rodney Bordeaux's policy. Hence she has no contractual relationship with Progressive and hence no "consensual relationship" adequate to satisfy

Montana. Ms. Wain is merely a 'third party' beneficiary to the contract between Progressive and Mr. Bordeaux. (Appellant's brief at 4-5).

While this general observation of a basic principle of insurance law may be clear enough, its *jurisdictional* implications are decidedly less so. There is no *relevant* Supreme Court case that discusses the jurisdictional ramifications of a (non-Indian) insurance company that insures a tribal member residing on the Reservation and the insured winds up in a dispute with his or her own insurer. The one lower federal court that has expressly addressed the *jurisdictional* question involving an off-reservation insurance company and an accident that took place on the Reservation which involved only tribal members found subject matter jurisdiction to exist in the tribal court pursuant to the *Montana* consensual proviso. *Allstate Indemnity Company v. Stump*, 994 F.Supp. 1217 (D. Mont. 1997).

The court's description of the case sounds quite similar to this case: Two tribal members were killed in the accident. Allstate entered a consensual insurance contract with a tribal member, Denis Sangray. Allstate knew that Sangray lived on the Reservation. Allstate knows that contracts of insurance carry third party obligations. The facts giving rise to subject matter jurisdiction cannot be likened to the off-reservation sale of a dozen eggs. The tribal members who died in the accident were parties, as third party beneficiaries, to the consensual insurance contract between Sangray and Allstate. *Id.* at 1221.⁴

This analysis is both practical and sound. It is also fair. Third party beneficiary status, whatever its *substantive* import as to rights and responsibilities under the vehicle insurance contract, should have no jurisdictional ramifications. If Mr. Bordeaux, the named policyholder, was driving the vehicle, the "consensual relationship" for jurisdictional purposes would be obvious and inescapable. But if Ms. Wain, a "named driver" on the policy who is also a tribal member

⁴ The Ninth Circuit vacated and remanded for Allstate's failure to exhaust tribal court remedies. The Circuit Court was less sanguine about ultimate tribal court jurisdiction, but merely held that because "there is a colorable jurisdictional issue, the district court should stay the action while Allstate exhausts its remedies in tribal court." *Id.* at 1076. *Allstate Indemnity Co. v. Stump*, 191 F.3d 1071, 1076 (9th Cir. 1999).

and Reservation resident is the driver, we should get a different *jurisdictional* result? This seems

to defy logic, common sense, and basic fairness. In addition, there appears to be no direct

federal or tribal court precedent to suggest a contrary result.

B. Bad Faith Tort Claim

The Tribal trial court found that there was also subject matter jurisdiction over the bad

faith tort claim between Wain and Progressive Insurance. The court aptly realized that routine

Montana analysis is almost never satisfied in the context of a tort involving a tribal member and

a (non-resident) non-Indian business. Such (private) torts do not emanate from any "consensual

relationship" and do not interfere with the "political integrity, economic security, or health and

welfare" of the Tribe. (*See Montana* at 566.) Slip Opinion at 7-8.

The trial court nevertheless went further in its analysis. It found that the Tribe's long arm

statute⁵ coupled with the "consensual agreement" reflected in the motor vehicle insurance

contract was sufficient to provide subject matter jurisdiction over the bad faith tort claim. This

analysis falls short. Long arm statutes deal with establishing "minimum contacts" to satisfy the

due process requirements for asserting *personal* jurisdiction. *See, e.g. International Shoe Co. v.*

Washington, 326 U.S. 310 (1945). Such "minimum contacts" analysis has no bearing on the

independent issue of subject matter jurisdiction. Thus, in this respect, the trial court was in error.

Despite this error of analysis, this Court does not reverse the trial court's conclusion as to

existence of tribal court jurisdiction over the bad faith tort claim. Much of what this Court states

in its analysis in Part III (A) of this opinion is appropriate here. A bad faith tort in the context of

insurance policy is unique. The tort is predicated on the insurance contract. Without the contract

of insurance, there is no basis for the bad faith tort. They are joined at the hip so to speak.

⁵ See Title 4, Chapter 2, Sec. 7 of the Rosebud Sioux Law and Order Code cited in full *supra* at note 3.

It would constitute logic chopping analysis in the extreme for this Court to find subject matter jurisdiction for the contract claim, but not for a tort claim involving the same parties, the same incident, the same predicate contract of vehicle insurance. This is a situation of first impression for this court where Indian law meets insurance law and it would be quite unfair and most inefficient to (potentially) send the parties to two different forums.

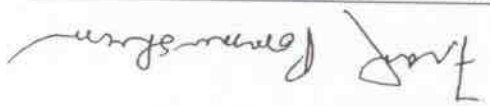
In sum, this Court holds that for *jurisdictional* purposes, a motor vehicle insurance policy issued to a Tribal member (and any "named driver") residing on the Reservation is considered a contract that is performed on the Reservation and therefore it satisfies the "consensual agreement" prong of the required *Montana* analysis when an accident occurs on trust land within the Reservation.⁶ In addition, this "consensual agreement" is also a sufficient jurisdictional predicate to support subject matter jurisdiction over any related bad faith tort claim growing out of the same incident and motor vehicle insurance policy.⁷

IV. Conclusion

For all of the above reasons, the decision of the trial court is affirmed and the case is remanded for an immediate trial on the merits.

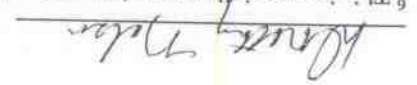
IT IS SO ORDERED.

For the Court:



Chief Justice, Frank Pommersheim

Dated May 24, 2006.



⁶ This is especially true when, as in the case at bar, the insured's dispute is with its own insurer.
⁷ This opinion does not make any findings or pronouncements as to the *substantive* rights and duties of third party beneficiaries to such contracts of insurance. This opinion deals with *jurisdictional* concerns only.

See Progressive Specialty Insurance Co v Vicki A. Burnett,
2007 OSD 7