IN THE COURT OF APPEALS OF
THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

DOCKET NO. CT. APP. 012-96 & CT. APP. 013-96

LITTLE SIX, INC. A CORPORATION CHARTERED PURSUANT TO THE LAWS OF THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY, MEMBERS OF ITS BOARD OF DIRECTORS, ALLENE ROSS, RON WELCH, MELVIN CAMPBELL, JAMES ST. PIERRE, AND THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY, SOLE SHAREHOLDER OF LITTLE SIX, INC.,

RESPONDENTS,

VS.

LEONARD PRESCOTT, AND F. WILLIAM JOHNSON, INDIVIDUALLY AND AS CURRENT AND FORMER OFFICERS AND/OR DIRECTORS OF LITTLE SIX, INC.

APPELLANTS.

MEMORANDUM OPINION AND ORDER

This action was instituted by Little Six, Inc. (LSI), an arm of the Shakopee Mdewakanton Sioux Community[1] against William Johnson and Leonard Prescott. Between 1991 and June of 1994, Mr. Johnson served in various capacities for LSI, including president, chief executive officer and chief operating officer. Leonard Prescott is an enrolled member of the Shakopee Mdewakanton Sioux Community and is a resident of the Reservation. Prescott has served as

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[1] See, Culver Security Systems v. Kraus Anderson, Civ. No. 26-92 (Court of the Shakopee Mdewakanton County, June 14, 1994)

Chairman of the Board and Chief Executive Officer of Little Six, Inc.. On June 8, 1994, Johnson resigned from his position with LSI, and except for a single visit later in June of 1994, has not returned to the Reservation. Johnson resides in Edina, Minnesota and owns no real property located on the Reservation and has had no business contracts with the Reservation since 1994.[2]

On October 21, 1994, LSI filed a civil Complaint against Johnson and Prescott, alleging various torts, largely related to an alleged improper diversion of LSI funds. The allegations relate to the point in time when Johnson was employed by the Tribe and was present on the Reservation. Johnson was served by United States Mail at his home in Edina on October 21, 1994. In his Answer, Johnson, appearing specially, challenged the Court's subject matter and personal jurisdiction. Although Johnson engaged in discovery, he did so only with the express understanding that by doing so was not waiving his jurisdictional challenges.

The trial court held that it possessed both personal jurisdiction over Prescott and Johnson, and subject matter jurisdiction over the broad range of claims raised in the Community's Complaint. The trial court's conclusion with respect to subject matter jurisdiction was based on Ordinance No. 11-14-95-003. On appeal, Johnson and Prescott challenge this holding, asserting the Ordinance No. 11-14-95-003 cannot be applied retroactively. We disagree: for the reasons stated in the trial court's opinion, we are of the view that there is no bar, arising from the Indian Civil Rights Act, 25 U.S.C. §1302 (1994) or any other source, to the retroactive application of Ordinance No. 11-14-95-003, and we conclude that it does, indeed, give the trial court subject

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[2]Johnson is a member of the Turtle Mountain Band of Chippewa Indians but that fact plays no part of our decision today.

matter jurisdiction. In addition, we conclude that the terms of the Shakopee Mdewakanton Sioux (Dakota) Community Real Estate Ordinance No. 03-27-90-003 (the Real Estate Ordinance) independently gave the trial court subject matter jurisdiction over this matter in 1990.

The trial court also held that it had personal jurisdiction over Johnson, but it did note extensively discuss this issue. On appeal, Johnson strenuously argues that, in fact, we have no personal jurisdiction over him, because (i) he is not a member of the Community, (ii) he left the Reservation in 1994, (iii) he was served with process off the Reservation, and (iv) he has never returned to the Reservation. This issue, we think, deserves considerable discussion.

Shakopee Mdewakanton Sioux Community Ordinance 02-13-88-01, passed in 1988, indicates that the Court has personal jurisdiction over "all Community members and persons enrolled in a federally recognized Indian tribe who reside, or may be present on, the lands held in trust by the United States for the Shakopee Mdewakanton Sioux Community and shall be subject to the jurisdiction of the Shakopee Mdewakanton Sioux Tribal Court". In 1990 the Community passed the Real Estate Ordinance which granted the Community Court the authority to exercise personal jurisdiction "to the fullest extent permitted by law". See, Section 10.01. In 1995 the Community passed Ordinance 11-14-95-003 which provides that the Tribal Court has personal jurisdiction over "all members whose actions involve or effect the Shakopee Mdewakanton Sioux (Dakota) Community or its members, or where the person in questions enters into consensual relationships with the community or its members through commercial dealings, contracts, leases, or other arrangements.

Both parties have argued that this case either fits or does not fit into the analysis of the Supreme Court in Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245 (1981). In that

case the issue was whether the Crow Tribe of Indians had the authority to regulate non-Indian fishing and hunting on non-Indian-owned fee property located within the Crow Reservation. Id. 1249. The Montana case is now well known for its formulation of tribal regulatory authority over non-Indian conduct on non-Indian-owned fee property located within the Reservation. The Court held that --

> to be sure, Indian Tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on the Reservation even on non-Indian fee lands. A Tribe may regulate, through taxation, licensing, or other means the activities of non-Members who enter into consensual relationships with the Tribe or its members, through commercial dealings, contracts, leases, or other arrangements... 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.

Id. 1258 (citation omitted).

Accordingly, the "Montana exception" to the bar against Tribal civil regulatory authority over non-Indians on a Reservation includes instances wherein there is a "consensual relationship" between the non-Indian and a tribal entity or where a non-Indian's conduct threatens the political integrity, economic security or health or welfare of the tribe. The Appellant contends that the Montana analysis supports a finding of no personal jurisdiction because it appears to require a "current consensual relationship" with the particular tribe.[3] The Community, on the other hand,

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[3] See p. 8, *infra*, for a discussion of the "current consensual relationship" argument.

submits that Montana plainly supports an exercise of personal jurisdiction over Johnson because the current situation fits within the first Montana exception, in that there was a consensual employment relationship between Johnson and LSI which gave rise to this Court.

Our view of Montana, Brendale[4] and Borland,[5] is that they do not address the question presented in this case. We are dealing here with civil adjudicatory jurisdiction over a non-member Indian, whose activities, beyond dispute, occurred on the Reservation. We are not dealing with a question of civil regulatory authority over non-Indian residents and property owners who are located on a Reservation. Here, we are concerned with the Court's authority to exert personal jurisdiction over a non-resident, non-member Indian whose conduct has given rise to a Tribal Court cause of action. Even were Montana, Brendale and Borland imported to this unique fact situation, those cases would only provide a resolution of whether the Court has subject matter jurisdiction over the Reservation based activity.

Similarly, the parties' arguments which are based on the comity/exhaustion of remedies cases, including Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987); National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985) and their progeny, do not advance the analysis of this Court's personal jurisdiction over non-member non-residents. The National Farmers and Iowa Mutual cases stand, primarily, for the proposition that --

> Tribal authority over the activities of non-Indians on Reservation lands is an important part of tribal sovereignty...Civil jurisdiction over such activities presumptively lies in the Tribal Courts unless affirmatively limited by a specific provision or federal statutes.

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[4]Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408 (1989).

[5]South Dakota v. Bourland, 508 U.S. 679 (1993).

480 U.S. at 18 (citations omitted)

The Appellant contends that Iowa Mutual's presumption is rebutted because it is limited by the Montana "consensual relationship" requirement which, in the view of the appellant, requires "current contacts" with the Reservation. The Community, on the other hand, submits that the Court has jurisdiction over the Appellant because this case relates to Reservation activities, and the Court's jurisdiction over such activities has not been limited by any treaty provision or federal statute. It is our view that, again, both parties miss the point. The rule of law which flows from National Farmers, and subsequently from Iowa Mutual, relative to Tribal Court jurisdiction relates to civil subject matter jurisdiction over non-Indians. As the Court notes in National Farmers:

> thus, we conclude that the answer to the question of whether a Tribal Court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed... Rather, the existence and extent of a Tribal Court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, executive branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions...We believe that examination should be conducted in the first instance in the Tribal Court itself.

National Farmers, 471 U.S. at 855-56.

Again, in this case the issue is not whether the activities occurred on Reservation, as they clearly did, or whether the Court would have subject matter jurisdiction over an on-Reservation

dispute between a tribal entity, such as LSI, and a non-member Indian employee, as these cases, as well as the Montana line of cases, clearly establish that it would. The question is whether the Tribal Court may reach beyond the confines of the Shakopee Reservation to secure service of process on a non-Indian non-resident calling him or her to Tribal Court to account for alleged tortious conduct occurring on the Reservation. Neither the Montana line of cases, nor the National Farmers line of cases answer this question and the arguments of counsel on these two lines of cases really are irrelevant to the Court's final decision.[6]

Likewise, we find A-1 Contractors v. Strate, 76 F.3d 930 (8th Cir. 1996) and the Appellants' arguments based thereon unpersuasive on the issue of personal jurisdiction. At most, and based on what we find to be flawed analysis, the Eighth Circuit in A-1 Contractors determined that the Fort Berthold District Court lacked subject matter jurisdiction over a tort claim arising out of an automobile accident between two non-Indians which occurred on a state highway traversing the Fort Berthold Reservation. The Court determined that the Fort Berthold District Court would lack subject matter jurisdiction unless the Tribe could establish that one of the two Montana exceptions applied:

> In our view, the Tribal Court in this case would not have subject matter jurisdiction under Montana unless the appellees can establish the existence of a Tribal interest under either of the two [Montana] exceptions.

76 F.3d at 935.

The Court performed a "Montana analysis" and determined that an accident between two

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[6] This is not to say, however, that these cases are not relevant as a backdrop for determining what personal jurisdiction reach a tribal court should have. See p. 7, *infra*.

non-Indians occurring on a state Highway which traverses the Fort Berthold Indian Reservation did not threaten the political, economic, or health and welfare interests of the Tribe, and neither did it represent a consensual relationship between the Tribe and those non-Indian members either of which would have given rise to trial subject matter jurisdiction under Montana:

> Because we have concluded that no tribal interest as defined in Montana exist in this case, we conclude that the Tribe does not retain the inherent sovereign power to exercise subject matter jurisdiction over this dispute through its Tribal Court.

76 F.3d at 941.

In short, A-1 Contractors represents the Eighth Circuit's rejection of a purely territorial definition of Tribal Court subject matter jurisdiction. This subject matter jurisdiction analysis does not advance the personal jurisdiction question here at issue.[7] Moreover, even if A-1 Contractors were offered as a challenge to this Court's subject matter jurisdiction over the Defendant Johnson, it is quite plain from the facts of this case that the Court would possess subject matter jurisdiction under the Eighth Circuit analysis. Hardly a "simple personal injury tort claim arising from an automobile accident" between two non-Indians on a state highway, this case involves a claim for tort damages arising directly out of a consensual employment relationship between an arm of the Government of the Shakopee Community and one of its officers, involving conduct which admittedly occurred on the Reservation. Accordingly, there not only is a plain "consensual relationship" basis for subject matter jurisdiction in this case,

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[7] The Eighth Circuit ruled only on subject matter jurisdiction despite the fact that the Defendants in the Tribal Court action entered a special appearance challenging both the subject matter and personal jurisdiction of the Court. 76 F.3d at 933. The Fort Berthold District Court determined it has subject matter and personal jurisdiction and the Northern Plains Intertribal Court of Appeals affirmed. Id.

there may also be a basis under the first Montana requirement of implicating the economic security of the tribe, inasmuch as the complaint alleges a diversion of tribal funds. However, this form of an analysis is merely an interesting discussion, as we conclude that A-1 Contractors does not, as the Appellant purports, defeat Tribal Court personal jurisdiction over Johnson.

The only case of which we are aware, which discusses Tribal Court personal jurisdiction over non-resident, non-Indians, is Hinshaw v. Mahler, 42 F.3d 1178 (9th Cir. 1994). That case, relied on by the tribal court, involved Lynette Hinshaw's challenge to the Confederated Salish and Kootenai Trial Court's exercise of personal jurisdiction over her in a wrongful death case. 42 F.3d at 1179. Hinshaw framed her personal jurisdiction challenge in light of the United States Supreme Court's decision in International Shoe v. Washington, 326 U.S. 310 (1945), which allows states to exercise personal jurisdiction over non-residents where, among other things, they have had sufficient minimum contracts with the forum which are in some way related to the litigation. Rather than adopting International Shoe and its theoretical underpinnings, the tribal Court by analogy, ruled that it possessed jurisdiction over persons with "some relationship" with the Tribe such that it would be "reasonable for the tribal Court to exercise control over the parties" see 42 F.3d 1178, 1181. The Ninth Circuit found that such an analysis satisfies the due process requirements protected by the International Shoe test.

Therefore, Hinshaw is not necessarily in conflict with A-1 Contractors. As the Ninth Circuit recently has noted, "we reject Pease's contention that A-1 Contractors...is in conflict with Hinshaw. ...the Hinshaw Court implicitly concluded that state and tribal authorities coupled with the tortfeasor's specific contacts with the reservation created the requisite tribal interest under Montana." See Yellowstone County v. Pease, 96 F.3d 1169, 1175 (9th Cir.

1996). Similarly, here there is a plain tribal interest inasmuch as it is the party plaintiff. Moreover, there is no dispute that the action arose as a result of reservation-based conduct. As Yellowstone points out, Hinshaw and A-1 Contractors seem to agree that in such a situation, there is a sufficient tribal interest to satisfy Montana. Id. at 1181.

The Hinshaw Court's analysis of Tribal Court personal jurisdiction also is consistent with the tenor of Supreme Court precedent regarding tribal court authority generally. The Supreme Court has repeatedly recognized that tribal Court's are vital to promoting tribal self-government and self-determination and that civil jurisdiction over the activities of non-Indians on reservation lands presumptively lies in tribal Courts. Iowa Mutual, 480 U.S. 9, 18 (1987). It would be strange, indeed, to suggest that a non-Indian, or a non-member Indian could engage in tortious conduct on a reservation and not be held accountable because the tribal Court cannot reach beyond the reservation to call him before the Court. The more plausible position is found in Hinshaw, where the Court determined that tribal courts have personal jurisdiction over non-Indians' reservation based activities where there exists the proper tribal interest. To rule otherwise would render the authority of tribes as declared in National Farmers, Iowa Mutual and their progeny, and the federal policy underlying those decisions, meaningless.[8]

The Appellant's contend that the exercise of personal jurisdiction over non-Indians is only appropriate where there are "current consensual contacts". This argument boils down to a contention that personal jurisdiction ends when a non-Indian leaves the reservation: "a tribal government's authority over a non-member that may exist on reservation ceases when the non-

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[8] This decision thus does not represent an expansion of tribal Court jurisdiction, but rather an affirmance of a tribal court's ability to exercise that jurisdiction which it already possesses.

member leaves the tribe's lands". Appellant Johnson's Reply Brief of the Issue of Personal Jurisdiction at p. 3. But we have found no authority to support a current consensual contract requirement, and the Appellants provided none. We believe this argument must be rejected based on the tenor of tribal court jurisdiction cases (supra) which focus on jurisdiction over reservation-based conduct generally, without reference to or discussion of a physical presence requirement. In Iowa Mutual and National Farmers the Defendant insurance companies were subject to tribal court jurisdiction despite not being present (other than via their insured) on the Reservation.

The Appellants also contend that the Court cannot exercise personal jurisdiction because the Appellees would be incapable of enforcing any judgment the Court might render. While that may be true -- or it may not -- it is irrelevant. The Appellant again offered no authority, and we have found none, which premises a court's personal jurisdiction on speculation as to whether a judgment, should one be entered, would be collectible.

For the foregoing reasons, the trial court's decision of July 1, 1996 is AFFIRMED.

Date: December 31, 1996

BY THE COURT.

John E. Jacobson, Judge

Henry M. Buffalo, Jr., Judge

Robert A. Grey Eagle, Judge

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