IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA-09-0214

DIANE MORIGEAU, personally, and as Personal Representative of the Estate of Benjamin F. Morigeau, Sr., Plaintiff and Appellant, v. DAVID GORMAN, M.D., NORTHWEST HEALTHCARE CORPORATION, a Montana Corporation d/b/a POLSON FAMILY MEDICAL CLINIC, ST. PATRICK HOSPITAL AND HEALTH SCIENCES CENTER, a Montana Corporation d/b/a INTERNATIONAL HEART INSTITUTE OF MONTANA, Defendants and Appellees.	**REPLY BRIEF OF APPELLANT**

Appeal from the Eleventh Judicial District Court in Kalispell,
Cause DV-06-115(A),
The Honorable Ted O. Lympus, presiding Judge

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I. APPELLANT'S STATEMENT OF THE ISSUE FOR REVIEW

Did the District Court err in dismissing for want of subject matter jurisdiction wrongful death and survival claims, by a non-Indian personal representative, against non-Indian Montana healthcare providers based on medical malpractice that occurred, in part, in Polson on the reservation of Confederated Salish & Kootenai Tribes ("CSKT") that resulted in the off reservation death of an Indian decedent in Missoula?

II. THE FOCUS OF THE APPELLANT'S ARGUMENT

In summary the argument of Diane, a non-Indian personal representative and wrongful death claimant, is that Montana courts may hear cases on any subject at law or in equity[1] and are open to every person,[2] including Indians such as the decedent Ben who was a U.S. and Montana citizen.[3] For this Court to deny Montana citizens, who happen to be Indians, their Montana constitutional right to use the Montana Courts, there had better be an overwhelmingly compelling federal interest in the regulation of Indian affairs that overrides access to Montana courts. The United States Supreme Court, the final arbiter of the limits of federal interest in Indian matters, has repeatedly approved the right of Indians to sue non-Indians in state courts, even for

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[1]Mont. Const Art VII §4, M.C.A. §§3–5–302, 3–1–113.

[2]Mont. Const Art. II § 16

[3]43 Stat. 253(1924), 8 U.S.C. 1401; U.S. Const. 14th Amend. §1,*Goodluck v. Apache County*, 417 F. Supp. 13 (D. Ariz. 1975) , aff`d, 429 U.S. 876 (1976)

matters arising in Indian country, precisely because the exercise of that right does not infringe on federal interests. Public Law 280 did nothing to change that right.

III. ARGUMENT

A. The Dog That Didn't Bark - Holmes I.

> "Is there any point to which you would wish to draw my attention?"
> "To the curious incident of the dog in the night-time."
> "The dog did nothing in the night-time."
> "That was the curious incident," remarked Sherlock Holmes.
> *Silver Blaze*, (1892), Sir, Arthur Conan Doyle.

If the Appellees' theory or the district court's conclusions are right, then there should have been many dogs barking in the night. Instead there has been a thunderous silence.

Public law 280 was passed in 1953, more than 56 years ago. The CSKT – Montana agreement was made in 1965, 44 years ago. So, where were the barking dogs during the last half century?

Where are the decisions from the federal courts barking that P.L. 280, in effect, overruled all the prior decisions of the Supreme Court that Indians may sue non-Indians in state courts?

Why in 1959, six (6) years after P.L. 280, did the Supreme Court not bark in *Williams v. Lee*, 358 U.S. 217, 219-20, 79 S.Ct. 269, 270-71, 3 L.Ed. 2d 251, 253-254 (1959)? Instead, that court said:

> Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, . . . **Thus, suits by Indians against outsiders in state courts have been sanctioned.** . . . (Emphasis added).

In 1984, thirty (31) years after P.L. 280, in *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng'g, (Wold I)*, 467 U.S. 138, 148-49, 104 S. Ct. 2267, 2274, 81 L. Ed. 2d 113, 122 (1984) (State court suit by tribe against a non-Indian), why did the Supreme Court not correct itself and say, as the Appellees argue, that a state has no right to hear any matter arising in Indian country unless the tribe consents under P.L. 280? Instead the court said:

> **This Court, however, repeatedly has approved the exercise of jurisdiction by state courts over claims by Indians against non-Indians, even when those claims arose in Indian country.** [Citation in original omitted] **The interests implicated in such cases are very different from those present in *Williams v. Lee*, where a non-Indian sued an Indian in state court for debts incurred in Indian country**, or in *Fisher v. District Court*, where this Court held that a tribal court had exclusive jurisdiction over an adoption proceeding in which all parties were tribal Indians residing on a reservation. **As a general matter, tribal self-government is not impeded when a State allows an Indian to enter its courts on equal terms with other persons to seek relief against a non-Indian concerning a claim arising in Indian country** (emphasis added).

Why did not the Supreme Court, two years later, in *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng'g*, (*Wold II*), 476 U.S. 877, 888-89, 106 S.Ct. 2305, 2312, 90 L.Ed. 2d 881, 892 (U.S. 1986), without bark, growl or whimper in support of Appellees' theory, conclude based on weighty federal interests that:

> The federal interest in ensuring that all citizens have access to the courts is obviously a weighty one. *See, e.g., California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 513-514 (1972); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741, 742-744 (1983). **This Court and many state courts have long recognized that Indians share this interest in access to the courts, and that *tribal autonomy and self-government are not impeded when a State allows an Indian to enter its courts to seek relief against a non-Indian concerning a claim arising in Indian country*** (emphasis added).

Why are there no federal appellate cases espousing the Appellees' theory that state courts are powerless to hear cases of Indians suing non-Indians, unless the tribe consents? Why did the Court of Appeals for the Tenth Circuit not bark in *Brooks v. Nance*, 801 F.2d 1237, 1239-1240 (10th Cir. 1986)? Instead, that court followed the Supreme Court's lead:

> . . . [T]he Supreme Court "repeatedly has approved the exercise of jurisdiction by state courts over claims by Indians against non-Indians, even when those claims arose in Indian country." . . . The exercise of state court jurisdiction in this case would not interfere with the right of tribal Indians to govern themselves under their own laws. "As a general matter, tribal self-government is not impeded when a state allows an Indian to enter its courts on equal terms with other persons to seek relief against a non-Indian concerning a claim arising in Indian country."[citation in original omitted]

Why is it that courts in sister states with large and active Indian populations have been silent about Appellees' theory, and continue to issue opinions that their courts are open for Indians to sue non-Indians? *See, Paiz v. Hughes*, 76 N. M. 562, 417 P. 2d 51 (1966) (wrongful death); *Whiting v. Hoffine*, 294 N. W. 2d 921, 923-924

(S. D. 1980); *Jicarilla Apache Tribe v. Board of County Comm'rs*, 118 N.M. 550, 557, 883 P.2d 136, 143 (N.M. 1994); *Tempest Recovery Servs. v. Belone*, 134 N.M. 133, 138, 74 P.3d 67, 72 (N.M. 2003); *Johnson v. Kerr-McGee Oil Indus*., 129 Ariz. 393, 395, 631 P.2d 548, 549 (Ariz. 1981) (wrongful death); *State v. Zamam*, 190 Ariz. 208, 946 P.2d 459 (Ariz. 1997).

How is it that commentators, treatise writers and others have not recognized, according to Appellees' reasoning, a titanic legal change that closed the state courts to suits by Indians against non-Indians, absent tribal consent? Instead such writers and commentators continue to tread the established path and advise practitioners and courts that Indians may sue non-Indians in state courts, and that such suits do not infringe on federal or tribal interests. *See, e.g.,* 1-14 *Cohen's Handbook of Federal Indian Law* 14.02 [1]; *Adjudication in Indian Country: the Confusing Parameters of State, Federal, and Tribal Jurisdiction*, 38 WM.M.L.R.(William and Mary) 539, 540-41 (Jan. 1997).[4]

Finally, why has this Court not articulated the theory that an Indian may not sue a non-Indian in Montana courts, unless the tribe consents under P.L. 280? Instead, this

[4] "In disputes over the bounds of state adjudicatory power, the Court has held that state courts cannot adjudicate on-reservation disputes involving either a non-Indian plaintiff and an Indian defendant or an Indian plaintiff and Indian defendant; in such situations only tribal court adjudication is permissible. If the plaintiff is a tribe or an individual Indian suing a non-Indian, however, Supreme Court cases suggest that state courts must adjudicate the controversy."

Court has repeatedly allowed and approved of such actions as a right granted by the Montana Constitution. *See*, discussion in Appellant's Brief, pp. 17-22.

In *Iron Bear v. District Court* (1973), 162 Mont. 335, 512 P.2d 1292, 1295 (dispute between Indians), this Court stated:

> The propriety of legal actions by Indians against non-Indians in the state courts has been recognized and approved by the United States Supreme Court in *Williams*.

In *McCrea v. Busch* (1974), 164 Mont. 442, 524 P.2d at 782 (Indian suing non-Indian wrongful death case, Flathead Reservation), this Court stated:

> Here we are concerned with an Indian person seeking redress in Montana courts against a non-Indian person . . . **[I]t does not appear to this Court to be an invasion of any of the areas protected by the federal government.** Therefore, this case falls within the class of cases that Montana courts **must** and traditionally have given free access to its courts and equal protection of its laws to all persons (emphasis added).

This Court in *Lambert v. Ryozik* (1994), 268 Mont. 219, 886 P.2d 378 (automobile accident, Fort Peck Reservation, Indian suing Canadians), stated:

> **We have repeatedly affirmed the right of Indian plaintiffs to sue non-Indians in state court** as a right guaranteed to all Montana citizens under Article II, Section 16, of the Montana Constitution. . . **Failure to recognize this right would deprive an Indian plaintiff of due process under Article II, Section 17, of the Montana Constitution, and equal protection of the law under Article II, Section 4, of the Montana Constitution** (emphasis added).

See also, *Bonnet v. Seekins* (1952), 126 Mont. 24, 243 P.2d 317. None of these cases has been overruled or repudiated.

Appellees state in their Answer Brief, p. 11, that this Court has held state court jurisdiction exists "only in those limited areas specified in Tribal Ordinance 40-A. Accordingly, the district court was correct when it held that public Law 280 provided the exclusive means for the state to obtain jurisdiction." Remarkably the Appellees **cite only one case** as embodying that holding: *Balyeat Law P.C. v Pettit*, 1998 MT 252, 291 Mont. 196, 967 P. 2d 398. **Yet, *Balyeat* is not a state court suit by an Indian against a non-Indian. Instead *Balyeat* is the opposite – a state court suit by a non-Indian plaintiff to recover a debt from an Indian defendant**.

This single candidate for a "bark" from this Court is irrelevant to the question of whether Indians can sue non-Indians in Montana courts. *Balyeat* does nothing to repudiate, implicitly or explicitly, this Court's statements, rationales or holdings in *Iron Bear v. District Court*, *McCrea v. Busch*, *Lambert v. Ryozik*, or *Bonnet v. Seekins*.

The answer to the rhetorical questions posed by the Appellant is that nothing supports the Appellees' theory. No dog has barked in the night because P.L. 280 did nothing in a half century to disturb the rule that state courts can exercise jurisdiction "over claims by Indians against non-Indians, even though those claims arose in Indian county," *Wold II*, 467 U.S. at 148-49 (Citing 19th and 20th Century Supreme Court cases before P.L. 280, as well Supreme Court cases after P.L. 280).

B. Shoveling Smoke - Holmes II.

"Lawyers spend a great deal of their time shoveling smoke."
Hon. Oliver Wendell Holmes, Jr, Associate Justice of the Supreme Court[5]

To clear the air, Appellant now addresses certain smoggy points argued by Appellees.

1. *Balyeat Law P.C. v Pettit* is Inapplicable.

Essentially, it is black letter Indian law that state courts:

A. have jurisdiction to hear suits by Indians against non-Indians, even if they arise on the reservation; *Williams v. Lee*; *Wold I*; *Wold II*; 38 Wm.M.L.R., 539, *infra. N.4.;*

B. lack jurisdiction to hear suits by non-Indians against Indians, arising on the reservation. *Williams v. Lee*; *Wold I; Wold II*; *State v. Zamam*, 190 Ariz. 208, 946 P.2d 459 (Ariz. 1997)[6]; 38 Wm.M.L.R., 539, *infra. N.4.* (such cases are appropriate for tribal courts); and

C. lack jurisdiction to hear suits between two Indians of the same tribe, arising on the reservation. *Fisher v. District Court*; *Wold I*, *State v. Zamam*, *infra. N.6*; 38 Wm.M.L.R., 539, *infra. N.4.* (such cases are appropriate for tribal courts).

This Court has recognized that jurisdiction of Montana courts is constrained

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[5] Dictionary of Quotes, http://www.dictionary-quotes.com/lawyers-spend-a-great-deal-of-their-time-shoveling-smoke-oliver-wendell-holmes-jr.

[6] "In the four decades following *Williams,* only in actions 'by non-Indians against Indians or … between Indians … [has state court jurisdiction been found to] intrude[] impermissibly on tribal self-governance.' "

when a non-Indian sues an Indian (Case "B") as in *Balyeat*. *See, e.g.*, *Security State Bank v. Pierre (1973)*, 162 Mont. 298, 511 P.2d 325. *McCrea v. Busch,* discussed *Pierre,* noting :

> The natural result as stated in *Pierre* was that because of federal limitations the state of Montana was unable to guarantee equal protection to the **non-Indian plaintiff** who was attempting to enforce a commercial transaction obligation against an **Indian defendant** . . . (emphasis added).

The Court went on to conclude the same federal limitations were not applicable when an Indian sued a non-Indian (case "A"), as in *McCrea v. Busch*.

As explained in Diane's Brief p.22-29, the federal government, through legislation, certainly could consent to state courts' exercising jurisdiction in cases "B" and "C" above (non-Indian plaintiff - Indian defendant; suits between Indians) – in effect waiving federal limitations and allowing state courts to hear matters normally within federal purview. But the federal government cannot restrict the power of state courts to hear case "A" (Indian plaintiff, non-Indian Defendant) suits, because the exercise of this sovereign power by the states does not interfere with any federal interest in Indian affairs and promotes the general federal interest in access to courts. *Williams v. Lee, Wold I, Wold II.*

The federal government, in Public Law 280, consented to six states' exercising unrestricted jurisdiction in cases "B" and "C," thereby waiving the federal limitations

to such jurisdiction. In other states, including Montana, the federal government decided to allow the tribes affected to consent as to how much of the federal jurisdiction in case "B" and "C," if any, the courts in that state could exercise as to their reservation, in conjunction with tribal courts.

Balyeat involved case "B" (non-Indian plaintiff, Indian defendant). The question in *Balyeat*, therefore, had nothing to do with case "A" (Indian suing non-Indian) and everything to do with whether in case "B" (non-Indian suing an Indian) the CSKT consent was broad enough to waive the federal limitations so the state court could proceed. The CSKT consent was not broad enough to waive the federal limitations in a suit by a non-Indian against an Indian that involved a debt, so the state court could not act – a result as in *Williams v. Lee*, and *Pierre.*

Obviously, *Balyeat* has no application here, because there are no federal limitations in case "A" suits (Indian Plaintiff, non-Indian defendant) that can be, or need to be, waived by the tribe.

2. Appellees' assertion that Montana courts never have jurisdiction of malpractice claims on the Flathead reservation is incorrect.

The Appellees go to great length, Answer Brief, pp. 14-21, cobbling together federal cases talking about various aspects of Indian law (none of which addresses whether an Indian may sue a non-Indian over claims arising on a reservation) to make this assertion, yet Appellees ignore the specific guidance of the Supreme Court on this

issue in *Wold I and Wold II*, respectively quoted *infra* at pp. 3-4, namely:

> **This Court, however, repeatedly has approved the exercise of jurisdiction by state courts over claims by Indians against non-Indians, even when those claims arose in Indian country.**

and

> **This Court and many state courts have long recognized that Indians share this interest in access to the courts, and that *tribal autonomy and self-government are not impeded when a State allows an Indian to enter its courts to seek relief against a non-Indian concerning a claim arising in Indian country*** (emphasis added).

This Court is better served relying on the Supreme Court's actual words, and its own cases of *McCrea v. Busch* and *Lambert v. Ryozik*, than upon Appellees' analysis.

Moreover, the Appellees are technically incorrect. The claims here are survival and wrongful death claims (resulting from malpractice) based on Montana statutes, M.C.A. 27–1– 501, 513. Under M.C.A. 27–2– 102(1)(a):

> "a claim or cause of action accrues when all elements of the claim or cause exist or have occurred, the right to maintain an action on the claim or cause is complete, and a court or other agency is authorized to accept jurisdiction of the action."

The element of harm or damage (death) occurred off the reservation, in Missoula. The completion of the Medical Legal Panel proceeding, a condition precedent to suit, also occurred off the reservation. These causes of action arose only after off reservation action or events.

Additionally, Appellees' view is overly narrow. If a Montana citizen

wrongfully caused the death of another Montana citizen in Saudi Arabia (or another country), and the personal representative filed suit in Montana where the tortfeasor lived, no doubt the Montana courts have subject jurisdiction. If an Indian, a citizen of Montana, comes off the reservation to enter the courts of Montana in the county where a tortfeasor Montana citizen resides, there is no difference.

3. Cases involving tribes not giving a P.L. 280 consent are applicable.

Appellees' central argument is that state court jurisdiction exists "only in those limited areas specified in Tribal Ordinance 40-A," Answer Brief p. 11, i.e., only the consent, a mere tribal ordinance, defines all state court jurisdiction in all instances (Cases "A," "B" & "C"). Appellees seek to distinguish all cases involving what they call "non Public Law 280 reservations," thereby conveniently avoiding any case approving suits by Indians against non-Indians, but not referring to a tribal consent, as inapplicable. *See*, Answer Brief, pp. 27-28. This is illogical. Under Appellees' scheme, any reservation that does not enter into a consent is specifying that there is no area at all in which state court jurisdiction exists. That is completely at odds with *Williams v. Lee, Wold I, Wold II*, *Iron Bear v. District Court*, *McCrea v. Busch*, *Lambert v. Ryozik*, *Bonnet v. Seekins*, and the various cases from sister jurisdictions, cited *infra* at pp. 3-4, and reason to reject Appellees' theory entirely.

McCrea v. Busch is directly on point, as it involves the CSKT Flathead

reservation and allows a wrongful death suit by an Indian against a non-Indian. However, Appellees make the distinction that the CSKT consented to state court jurisdiction for automobile accidents, so under Appellees' scheme the result in *McCrea v. Busch* is correct but its rationale is wrong. However, *McCrea v. Busch* was decided correctly, solely on the basis that the Montana courts have the jurisdiction, and a constitutional duty, to hear claims by Indians against non-Indians. The consent, rightly, is not the basis of the decision because the consent removes federal limitations to cases "B" and "C" above (non-Indian plaintiff, Indian defendant; between Indians) and *McCrea v. Busch* is neither a case "B" or "C" suit, but case "A" suit (Indian suing a non-Indian). Both *McCrea v. Busch* and *Lambert v. Ryozik* were correctly decided for the same reasons (based on inherent state power without regard to any consent) as case "A" suits involving an Indian suing a non-Indian. The difference between the two reservations is that for the Flathead reservation, the Montana courts have consent (waiving the federal limitations) in case "B" and case "C" suits (non-Indian plaintiff, Indian defendant; between Indians) in the limited circumstance set forth in the tribal consent, while for the Fort Peck reservation the Montana court can hear case "A" suits, but not "B" and "C" suits because the federal limitations have not been waived by a tribal consent.

4. <u>Appellant did not receive due process</u>.

Appellees contend that Diane received due process, Answer Brief pp.28-31. This is not correct. *Lambert v. Ryozik*, quoted early (p. 6), provides:

> **We have repeatedly affirmed the right of Indian plaintiffs to sue non-Indians in state court** as a right guaranteed to all Montana citizens under Article II, Section 16, of the Montana Constitution. . . **Failure to recognize this right would deprive an Indian plaintiff of due process under Article II, Section 17, of the Montana Constitution, and equal protection of the law under Article II, Section 4, of the Montana Constitution** (emphasis added).

What the Court is considering here is whether the Montana courts have the power to hear and decide a wrongful death and survival claim by a non-Indian asserting her own claim and the survival claim of the estate of an Indian against non-Indian Montana defendants – that power to hear is subject matter jurisdiction.

In this suit Diane filed a timely Montana Medical Legal Panel proceeding (Appellees did not challenge the subject matter jurisdiction of the panel) and then a timely suit in the district court alleging wrongful death and survival claims as the result ofmedical malpractice. Surely the district court had subject matter jurisdiction of the claim of Diane, a non-Indian, for her own wrongful death claim against non-Indian Montana residents, without any reference to Indian law. Additionally, under every applicable decision of the Court and the United States Supreme Court, Diane, representing a deceased Indian, had the right to sue for Ben's survival claim against

non-Indian Montana defendants in the Montana courts.

Diane, out of an abundance of caution as a prudent personal representative seeking to preserve all options of the estate, filed an action with Tribal Court. This action was found untimely under the Tribal Court's procedural rules, without trial or determination on the merits. This does not alter that the district court had subject matter jurisdiction in a properly filed timely action and is the only court that can proceed to a determination on the merits. To focus on the actions, motivations or legal theories of the Tribal Court in a case, that was essentially a nullity because it was procedurally untimely, is a slippery slope that leads away from whether the district court had subject matter jurisdiction.

IV. CONCLUSION

Diane is ready to prove the Appellees wrongfully caused Ben's death. For the Appellees, non-Indians, to assert Indian law in a manner that deprives the representative of an Indian decedent of a well established right to sue in the state courts is a wrong and cynical attempt by the non-Indian defendants to avoid trial on the merits in any court.

Appellees' theories twist and convolute Indian law into something unrecognizable. What possible interest could the federal government, or a tribe, have in prohibiting its tribal members from voluntarily choosing to sue non-Indians in the

courts of the state where the members reside? Obviously, the answer in *Williams, Wold I, Wold II* and *McCrea v. Busch* is none. Public Law 280 does nothing to change that answer.

The district court's decision should be reversed. This case should be remanded to the district court for trial.

RESPECTFULLY SUBMITTED this 28th day of September 2009.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that the Reply Brief of Appellant and supporting documentation is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by WordPerfect 6.1 for Windows is not more than 5,000 words for this reply, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

DATED this 28th day of September 2009.

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Michael H. Keedy, Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have filed a true and accurate copy of the foregoing REPLY BRIEF OF APPELLANT with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing REPLY BRIEF OF APPELLANT upon the Clerk of the District Court, each attorney of record, and each party not represented by an attorney in the above-referenced District Court action, on this 28th day of September 2009 as follows:

W. Carl Mendenhall Worden Thane, P.C. P.O. Box 4747 Missoula, MT 59806-4747 Attorneys for Appellees, Dr. Gorman and Northwest Healthcare Corporation	[X] U.S. Mail, first class postage [ ] Facsimile [ ] Hand delivery [ ] Federal Express
Clerk of the District Court 800 South Main Street Kalispell, Montana 59901	[X] U.S. Mail, first class postage [ ] Facsimile [ ] Hand delivery [ ] Federal Express

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