

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

**Supreme Court No. 20190230
Rolette Co. Court No. 40-2019-CV-00104**

Darrel Gustafson,)
)
Plaintiff and Appellee,)
)
vs.)
)
Linus Poitra, Raymond Poitra, and any and)
all others in possession of the property)
described in the Complaint,)
)
Defendants and Appellants.)
)

APPEAL FROM THE *JUDGMENT*, DATED JUNE 10, 2019, BY THE HONORABLE JUDGE ANTHONY SWAIN BENSON, NORTHEAST JUDICIAL DISTRICT COURT, ROLETTE COUNTY, NORTH DAKOTA, CASE NO. 40-2019-CV-00104

BRIEF OF APPELLEE DARREL GUSTAFSON

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N.D.C.C. § 47-32-04 ¶11

¶1]

STATEMENT OF ISSUES

- I. WHETHER THE DISTRICT COURT POSSESSED SUBJECT MATTER JURISDICTION IN AN ACTION FOR EVICTION ON PROPERTY LOCATED ON NON-INDIAN FEE LAND WITHIN THE EXTERIOR BOUNDARIES OF THE TURTLE MOUNTAIN INDIAN RESERVATION.**

STATEMENT OF THE FACTS

¶2] This matter is an extension of a long-standing dispute between Appellee Darrel Gustafson (“Gustafson”) and Appellants Linus Poitra and Raymond Poitra (the “Poitras”). This case represents the fourth iteration of the dispute before the North Dakota Supreme Court. See Gustafson v. Poitra, 2018 ND 202, 916 N.W.2d 804; Gustafson v. Estate of Poitra, 2011 ND 150, 800 N.W.2d 842; Gustafson v. Poitra, 2008 ND 159, 755 N.W.2d 479.

¶3] On June 3, 2019, Gustafson initiated eviction proceedings to remove the Poitras from the following real property, situated in Rolette County, North Dakota:

A parcel of land lying in the NW¹/₄NW¹/₄, Section 29, Township 162 N, Range 70 W, described as follows: Beginning at the SW Corner of said NW¹/₄NW¹/₄ thence East on forty-line to a point which is 550 feet West of the East line of said NW¹/₄NW¹/₄, thence North to intersection with the South right-of-way line of State Highway No. 5, thence Southwesterly along said highway right-of-way line to intersection with West line of said NW¹/₄NW¹/₄, thence South on forty-line to said point of beginning, subject to all valid outstanding easements and rights-of-way of record.

(the “Property”). Doc ID# 5, ¶2. The Property was the subject of the quiet title action affirmed in Gustafson’s favor in Gustafson v. Poitra, 2018 ND 202. Since this Court’s affirmation of the quiet title judgment, personal property belonging to the Poitras, including multiple trailers, a camper, and equipment, remain on the Property. Transcript on Appeal (“Tr.”) Page 18, Lines 7-25; Page 19, Lines 1-10; Page 20, Lines 3-20.

Gustafson contends this personal property interferes with his use and enjoyment of the Property.

[¶4] Raymond Poitra was served with a Notice of Intention to Evict on May 28, 2019. Doc ID# 2. Linus Poitra refused personal service, but a Notice of Intention to Evict was posted on the door of his residence on May 29, 2019. Doc ID# 3. The eviction summons and complaint were served in similar manners on June 4, 2019. Doc ID## 9-10. The Poitras, through a special appearance by attorney William Delmore, submitted a Response to the Complaint for Eviction on June 9, 2019. Doc ID## 12-13. In their response, the Poitras retread the same argument that they have made in their past appeals: that the district court lacked subject matter jurisdiction over the dispute in question. Doc ID# 13.

[¶5] The Poitras appeared pro se at the eviction hearing held before the Hon. Anthony S. Benson at the Rolette County Courthouse on June 10, 2019. Tr. 4:20-25, 5:1-3. At the hearing, Gustafson identified information from photographs received as Exhibit 8 and testified to the Poitras continued presence on the Property and to the personal property of the Poitras that remained there. Tr. 18:7-25; 19:1-10; 20:3-20. Judge Benson determined that the district court had subject matter jurisdiction and that he would grant the eviction; he signed an order authorizing the eviction the same day. Tr. 37:2-22; Doc ID# 23. The eviction judgment was also entered by the Clerk of Court on June 10, 2019. Doc ID# 24. Notice of Entry of the Judgment was served and filed on June 11, 2019. Doc ID# 26. The Poitras filed a timely Notice of Appeal on July 31, 2019. Doc ID## 28, 31.

LAW AND ARGUMENT

[¶6] In their appellate brief, the Poitras have asserted three separate issues on appeal, including (1) whether the district court erred in finding that it had subject-matter jurisdiction in lieu of tribal jurisdiction; (2) whether the subject matter of this action (i.e. an eviction) meets the sufficient requirements in Montana v. United States, 450 U.S. 544 (1981) to establish tribal jurisdiction; and (3) whether the Poitras raised tribal jurisdiction to the district court. Gustafson argues that the legal issue can be more accurately reframed under the following legal question: whether the district court had jurisdiction to maintain an action for eviction regarding the Property, which is non-Indian fee land that is located within the Turtle Mountain Indian Reservation.

[¶7] The North Dakota Supreme Court has explained its analysis of subject matter jurisdiction in Fredricks v. Fredricks, 2016 ND 234, ¶ 6, 888 N.W.2d 177 (citations omitted), stating “[s]ubject-matter jurisdiction cannot be conferred by agreement, consent, or waiver, and issues involving subject-matter jurisdiction can be raised by the court or a party at any time in a proceeding. When the facts are not in dispute, the district court’s decision on subject matter jurisdiction is reviewed de novo on appeal.” Id. Here, the dispute is not factual. In Gustafson v. Poitra, 2018 ND 202, it was accepted by this Court that: (1) Gustafson is a non-Indian; (2) the Property at issue is owned by Gustafson in fee; and (3) the Property at issue is located within the exterior boundaries of the Turtle Mountain Indian Reservation. Id. at ¶17. Accordingly, the applicable standard of review for this appeal is de novo. Gustafson asserts that the de novo standard of review resolves the third issue identified by the Poitras in their appellate brief (i.e. whether the Poitras raised tribal jurisdiction to the district court).

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT IT HAD SUBJECT MATTER JURISDICTION FOR THIS EVICTION ON NON-INDIAN FEE LAND LOCATED WITHIN THE EXTERIOR BOUNDARIES OF THE TURTLE MOUNTAIN INDIAN RESERVATION.

[¶8] District courts in North Dakota are courts of general jurisdiction and derive such power through the North Dakota Constitution and the North Dakota Century Code. See N.D. Const. art. VI, § 8; N.D.C.C. § 27-05-06. “North Dakota has disclaimed jurisdiction over Indian reservation lands.” Gustafson v. Estate of Poitra, 2011 ND 150, ¶ 13, 800 N.W.2d 150 (quotations omitted). However, as noted in Fredricks, “[t]he absence of tribal court jurisdiction is a factor to be considered in determining whether state court jurisdiction exists.” Fredricks at ¶13 (citations omitted). This court further acknowledged that under the Plains Commerce Bank case, “once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it.” Fredricks at ¶9 (citing Plains Commerce Bank v. Long Family Land and Cattle Co., Inc., 554 U.S. 316, 328 (2008)).

A. THE GENERAL RULE SUPPORTING SUBJECT MATTER JURISDICTION

[¶9] In Plains Commerce Bank, the United State Supreme Court has summarized the limits of tribal sovereignty, indicating that “[i]t centers on the land held by the tribe and on tribal members within the reservation.” Plains Commerce Bank at 327 (citations omitted). Further, “tribes do not, as a general matter, possess authority over non-Indians who come within their borders.” Id. at 328. Here, we have land owned in fee, not by the tribe, but by Gustafson, a non-Indian. The United States Supreme Court describes a general rule, that “restricts tribal authority over nonmember activities taking place on the reservation” and notes that this general rule is “particularly strong when the nonmember’s activity occurs on land owned in fee simple by non-Indians...[i.e.] ‘non-Indian fee land.’” Id.

[¶10] This same general rule for subject matter jurisdiction was followed by this Court in Fredericks, in which this court held that fee land, which has been divested from tribal control and treated as non-Indian property, is subject to state court jurisdiction. Fredericks, 2016 ND 234, ¶ 13. More importantly, this same general rule was applied by this court between the *same parties* and this *same property* in Gustafson v. Poitra, 2018 ND 202:

In Fredericks, 2016 ND 234, ¶¶ 8-11, 888 N.W.2d 177, this Court considered a reformation and quiet title action under the two Montana exceptions and the Supreme Court’s decision in Plains Commerce Bank, 554 U.S. 316. In Fredericks, we said that when a tribe or tribal members convey a parcel of fee land to non-Indians, the tribe loses any former right of absolute and exclusive use and occupation of the conveyed lands, and as a general rule, the tribe has no authority itself, by way of tribal ordinance or action in tribal courts, to regulate the use of fee land unless one of the two Montana exceptions authorizes tribal court jurisdiction. Fredericks, at ¶9.

Id. at ¶14. In the preceding appeal, it was confirmed that Gustafson was a non-Indian owner in fee of two parcels of land located within the boundaries of the Turtle Mountain Indian Reservation. This eviction action relates to the Poitras presence and storage of personal property on one of these two parcels.

[¶11] “Eviction actions under N.D.C.C. ch. 47-32 are summary proceedings.” Watford City Lodging LLC v. Mishkin, 2019 ND 136, ¶ 12, 927 N.W.2d 860. “The purpose of the statute [N.D.C.C. § 47-32-04] is to provide an inexpensive, expeditious, and simple means to determine possession.” Id. “The right to the possession of the real estate is the only fact that can be rightfully litigated unless damages or rent is claimed.” Id. at ¶ 15. Gustafson brought the eviction action to establish his right to possession of the Property. The Property in question is the same property in which title was quieted to Gustafson

under Gustafson v. Poitra, 2018 ND 202. As held in Fredricks, the Property, owned by Gustafson in fee, “has been divested from tribal control and treated as non-Indian property, [and] is subject to state court jurisdiction.” Fredricks at ¶ 13. Under the general rule established in Plains Commerce Bank, “the tribe has no authority itself, by way of tribal ordinance or action in the tribal courts, to regulate the use of fee land.” Plains Commerce Bank at 328.

B. APPLICATION OF THE TWO MONTANA EXCEPTIONS

[¶12] However, despite the general rule, we must also look at the two Montana exceptions:

We have recognized two exceptions to this principle, circumstances in which tribes may exercise “civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.” Montana [v. United States], 450 U.S. [544,] 565 [101 S.Ct. 1245, 67 L.Ed.2d 493 (1981)]. First, “[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.” Ibid. Second, a tribe may exercise “civil authority over the conduct of non-Indians on fee lands within the 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., at 566 [101 S.Ct. 1245]. These rules have become known as the Montana exceptions, after the case that elaborated them. By their terms, the exceptions concern regulation of “the activities of nonmembers” or “the conduct of non-Indians on fee land.”

Fredricks at ¶9. Gustafson contends that neither of these two “Montana exceptions” are applicable in the instant case.

[¶13] The first exception permits regulation by a tribe through taxation, licensing, or other means, of non-members, such as Gustafson, entering consensual relationships with tribal members, such as the Poitras, through commercial dealing, contracts, leases, etc.

Id. The nature of this eviction proceeding is to remove the Poitras from “squatting” on Gustafson’s property. Gustafson’s ownership in fee of the Property is not in question and there are no facts to establish a consensual relationship with the Poitras. Gustafson obtained title to the Property through a Sheriff’s sale to the detriment of the Poitras. The Poitras have left equipment, vehicles, and other personal items on the Property. There is no current or applicable commercial dealing, contract, or lease between the parties. Through the eviction proceedings, Gustafson is seeking removal of those items so that he may have full use and enjoyment of the Property.

[¶14] In a prior appeal between the parties (Gustafson v. Estate of Poitra, 2011 ND 150), facts existed that would arguably make this exception applicable. In the 2011 appeal, this court vacated a district court judgment in favor of Gustafson against the Poitras on the basis of lack of subject-matter jurisdiction. The dispute at the center of 2011 appeal arose out of a consensual lease between the parties. The Property was still owned by the Poitras (not Gustafson) in that timeframe; however, if Gustafson had owned the land in fee, the consensual and contractual nature of the dispute may establish an argument in favor of this first Montana exception. But the case in hand is not contractual. It is not consensual. It is the regulation through eviction of non-Indian fee land.

[¶15] The second exception permits a tribe to “exercise civil authority over the conduct of non-Indians on fee lands within the 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.” Fredricks at ¶9. Notably, however, the second Montana exception has been narrowed to only include conduct that “imperil[s] the subsistence of the tribal

community.” Plains Commerce Bank, 554 U.S. at 336. It is unclear to Gustafson how this exception, given its limitations, can possibly apply to this case. The Poitras argue that these exceptions are applicable in their appellate brief; however, they fail to identify any arguments beyond conclusory statements of support. The “conduct” of Gustafson is simply an expression of his right to possess the Property to the exclusion of the Poitras.

[¶16] Gustafson contends that the political integrity of the Turtle Mountain Band of Chippewa Indians is neither threatened nor affected by the district court’s exercise of subject matter jurisdiction of this eviction proceeding. The tribe’s economic security, health or welfare are not impacted in any way. Permitting Gustafson to maintain an action for eviction in district court simply does not “imperil the subsistence of the tribal community.” In fact, should this court rule that an action for eviction triggers this second exception, it would render the court’s authority to quiet title to Gustafson moot. If the state court system can establish title, but cannot permit Gustafson to control, enjoy, or use the Property, the state court’s authority has no real effect. According to Watford City Lodging, LLC, an eviction action is merely the determination of “[t]he right to the possession of the real estate.” Watford City Lodging, LLC v. Mishkin, 2019 ND 136, ¶15.

[¶17] Because neither exception applies, the general rule remains in effect: “the tribe has no authority itself, by way of tribal ordinance or *action in the tribal courts*, to regulate the use of fee land.” Plains Commerce Bank at 328 (emphasis added). The same rationale employed by this court in the 2018 appeal applies to this case: the eviction proceeding works “no additional intrusion on tribal relations or self-government and does

not imperil the subsistence of the Tribe or the tribal community and cannot fairly be called catastrophic for tribal self-government.” Gustafson v. Poitra, 2018 ND 202, ¶17.

II. CONCLUSION

¶18] As discussed herein, the district court correctly determined it held subject matter jurisdiction over the eviction proceedings. Appellee Darrel Gustafson respectfully requests this Court to affirm the decision of the district court.

Dated: October 18, 2019.

SMITH PORSBORG SCHWEIGERT
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By: /s/ David J. Smith
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CERTIFICATE OF COMPLIANCE

[¶19] The undersigned certifies that the Appellee's Brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure the Brief contains 12 pages, excluding this Certificate of Compliance.

Dated: October 18, 2019.

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Darrel Gustafson,

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described in the Complaint,

Defendants and Appellants.

AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA)
)ss
COUNTY OF BURLEIGH)

[¶1] On the 18thth day of October, 2019, I, Carissa Lewis, served the party(s) described below with the document(s) also described below by electronically filing the document(s) with the North Dakota Supreme Court Clerk of Court. The email addresses of each such party served are taken from the North Dakota Supreme Court website or are the last know email address. I am over the age of eighteen and not a party in this matter.

[¶2] **Document(s) Served:**

1. Brief of Appellee Darrel Gustafson.

[¶3] **Names & Address of Party(s) Served:**

William J. Delmore
bill@delmorelawfirm.com



Carissa Lewis

Subscribed and sworn to before me
this 18th day of October, 2019.


Notary Public / Burleigh County