

LORNE JAY V. LAWRENCE LAVALLIE AND MIKE CHARETTE
File No. 40-2018-CV-0050

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STATEMENT OF THE ISSUES

1. Whether North Dakota District Court has jurisdiction over the parties and subject matter.
2. Whether the trial court erred in application of the law and fact-finding.
3. Whether the judgement as attributed to the parties in a comparative fault case was appropriately applied in the lower court.

STATEMENT OF THE FACTS

1. Lawrence Lavallie was involved in an accident December 26, 2016.
2. Lawrence Lavallie was on a snowmobile belonging to Mike Charette when the accident occurred.
3. Lawrence Lavallie was struck by Mike Charette's vehicle, which Mike was driving at the time.
4. Lorne Jay was blowing snow off his driveway with his tractor.
5. Lorne Jay has a tribal land lease from the Turtle Mountain Band of Chippewa Indians.
6. Lorne Jay disputes the facts as to where the accident occurred.
7. Lawrence Lavallie maintains that the tractor was on Highway 43.
8. Mike Charette, a named defendant in this matter, never appeared nor did he answer to the complaint filed by Mr. Lavallie.
9. It was never factually determined whether alcohol was a contributing factor in this matter.
10. Lawrence Lavallie and Mike Charette were driving on the wrong side of Highway 43.
11. All parties in this matter are enrolled members of the Turtle Mountain Band of Chippewa Indians.
12. Mike Charette and Lawrence Lavallie are friends.
13. Mike and Lawrence were socializing in St. John before driving to Belcourt to pick up the snowmobile.
14. First responder on the scene was a Bureau of Indian Affairs officer from Belcourt Law Enforcement.
15. Lawrence Lavallie claims it took over three (3) hours for the ambulance to arrive.
16. Lorne Jay called 911 from his home and brought blankets out for Lawrence while waiting for the ambulance.

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Lorne Jay,)	
Appellant,)	
v.)	
)	
Lawrence Lavallie,)	File No. 40-2018-CV-0050
)	
Appellee,)	BRIEF IN SUPPORT OF APPEAL
)	
and Michael Charette,)	
)	
Appellee.)	

This matter, having been filed on appeal by Appellant Lorne Jay, against Appellees Lawrence Lavallie and Michael Charette. Appellant hereby files the following Brief in Support of Appeal of this matter, formerly known as File No. 40-2018-CV-0050.

A. **This case should be dismissed due to lack of jurisdiction, *Strate v. A-1 Contractors*, 520 U.S. 438 (1997)**

In *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), the parties involved two non-Indian drivers, Fredericks and Stockert, in a vehicle collision. Gisela Fredericks, sued in Tribal Court against A-1 Contractor's diver, Stockert. Tribal Court held jurisdiction over the matter and, upon appeal to the Northern Plains Intertribal Court of Appeals, the lower court's judgment is upheld. This case does not apply to this incident because, in the U.S. Supreme Court, both the parties are non-Indians. The location of the accident occurred on the highway which, although the Ft. Berthold Reservation and the Three Affiliated Tribes of the Ft. Berthold Reservation retained a right-of-way of part of the highway, it did not constitute overall jurisdiction. The state or

federally maintained highway is the focus of whether jurisdiction applied to the Tribe. In the matter of *Strate*, however, both parties are non-Indian.

In the matter before the North Dakota Supreme Court, Mr. Jay, the Appellee, owns a home and farming business on tribally leased property. Mr. Jay, who was clearing his driveway at the time of the accident, maintains that he was on his property. While his clearing of the driveway is a right that Mr. Jay maintains on his property, he also maintains that the other parties in this matter were driving on the wrong side of the road, were under the influence (although neither the medical records nor the police records show that an alcohol breathalyzer was administered on either the victim or co-defendant in the lower case), and the collision, he maintains, occurred on Mr. Jay's property which involved the Appellee and other co-defendant. Appellant Jay maintains that tribal court remedies should have been sought because all three parties named in the case are, in fact, enrolled members of the Turtle Mountain Band of Chippewa Indians (TMBCI). Therefore, this case, which involves all three members of TMBCI, and which occurred on tribal lands, should be dismissed. This fact was presented by Lorne Jay, Defendant in the lower action, and he submitted, as evidence, to the Northeast Judicial District Judge Benson and all parties, copies of (1) his land lease, (2) a map of his property, outlining where tribal lands began and ended, and (3) a Motion to Dismiss based on a jurisdictional argument.

It should be noted that Mr. Jay submitted his evidence and Motion to Dismiss to the Court and parties August 27, 2017. Judge Benson did not decide on the Motion to Dismiss until May 29, 2019.

Incidentally, Mr. Jay made nearly every hearing, only missing one hearing on May 28, 2019, whereby Judge Benson ordered from the bench that the scheduled jury trial would now be a

bench trial and Mr. Jay was never made aware of the judge's bench order allowing a bench trial for this matter. Therefore, when Mr. Jay showed up to attend the trial, he was expecting the first day to be selection of jury members and was unprepared to move forward with the trial. (*See* Court Record of this matter in lower court.) Mr. Jay, while it is not on the record in the Transcript of the hearing, was surprised to learn without a notice that so many substantive changes regarding the case was decided at the pretrial conference in May 2019.

Mr. Jay informed the court, off record, that he was unprepared, but he was uninformed that a scheduling "Plan" had been granted at the June 2019 Pretrial Hearing. (*See* Transcript at p. 5). Any proceeding of this nature is considered a Court ordered schedule in accordance with the North Dakota Rules of Civil Procedure, Rule 16(b)(1). As such, any order scheduling the future proceedings of the case must be served upon all parties. Since Mr. Jay was not present at the May 28, 2019 hearing, he was not privy to the conversation which laid out a scheduling "Plan." In fact, it was not a "plan" but a scheduling order in this matter, which was to be served upon all parties and it was not reduced to writing but verbal conversation between one party and the judge. By not sharing the scheduling plan or order, the court put Mr. Jay in a position that could only manifest injustice. N.D.R. Civ. R. 16(e).

Lastly, as a basis of the location for the accident, the Jays, Mr. Lorne Jay and his wife, Stephanie Jay, along with his children, provided immediate assistance to the victim at the scene of the accident. The Jays used their telephone in order to dial 911 whereby the Belcourt Law Enforcement (which is the tribal law enforcement) was dispatched to the scene of the accident. Mr. Jay, barred by the permission to allow tribal and BIA law enforcement to enter as witnesses in state courts under federal law which creates law enforcement in Indian Country, was not able

to establish the location of the accident except for submission of the tribal law enforcement officer's report of the incident without the officer permitted to enter state court as a witness by the Department of Justice. 25 U.S.C. 2803.

B. This case should be dismissed due to the tribal exhaustion rule, *Winer v. Penny Enterprises, et.al*, 2004 ND 21 (2004).

This matter should have been dismissed by the trial level judge due to the lack of exhaustion of the tribal remedies before the parties. Mr. Jay, having raised the issue of the lack of jurisdiction of the matter due to lack of subject matter and personal jurisdiction, deserved to have his Motion to Dismiss at a pretrial hearing whereby his oral arguments and evidence would have been presented to support his Motion to Dismiss. While no deference for *pro se* litigants over those represented by an attorney is given in the Court, common courtesy of practice and rules of civil procedure call for an oral argument on such a substantive issue raised by Mr. Jay. In fact, if he had requested a hearing on his Motion, it would be granted under N.D.R.Civ.P. 3.2(a)(3).

As the parties are all tribal members of TMBCI, and as the location of the accident is in question and at trial no issues were addressed with jurisdiction by the opposing counsel, this matter should have been dismissed upon the realization that the Northeast Judicial District lacked subject matter jurisdiction. *Strate v. A-1*

Further, in *Winer v. Penny Enterprises, et.al*, 2004 ND 21 (2004), the parties, which involved a non-Indian and an enrolled member of the Spirit Lake Nation in Ft. Totten, North Dakota colliding on North Dakota Highway 20, it was determined and upheld by the North Dakota Supreme Court that the Tribal Court lacked jurisdiction over the parties due to the location of the accident occurring on a North Dakota State maintained highway. Summarily, the case at hand has an accident occurring on tribal land, between three members of the TMBCI, and no party

filing in Tribal Court except until this appeal was filed by Mr. Lorne Jay, and filed merely to preserve the statute of limitations. This matter, therefore, in the State Court must be dismissed. This case is dictated by the exact location of the accident and by the exact location of the parties, like the matter in *Winer*. For Judge Benson to summarily dismiss the argument over lack of jurisdiction did not weigh the importance of the already decided cases in federal and North Dakota Supreme Court before dismissing Mr. Jay's claim. This is Comparable to contempt of the overriding decisions in both the U.S. Supreme Court and the North Dakota Supreme Court. Based on *Winer*, this case should be dismissed.

C. This case should be dismissed due to the lack of jurisdiction over the matter because of *Montana v. U.S.*, 450 U.S. 544 (1981)

In *Montana v. U.S.*, 450 U.S. (1981) the "Montana Exceptions" were created. Basically, the primary issue in using the "Montana Exceptions" in litigation concern exceptions for nonmembers who enter consensual relationships with tribes or tribal members. In this incident, all the parties are enrolled members of the Turtle Mountain Band of Chippewa Indians and none of the parties are non-Indian individuals. Under the exceptions, and *in concert* with all the arguments laid out in this brief, this case should have been dismissed in state court. This matter should have been filed in the Turtle Mountain Tribal Court in Belcourt, North Dakota.

The two-prong test developed in *Montana v. U.S.* does not apply, which also points to the fact that this case belongs in Tribal Court. The Motion to Dismiss based on jurisdiction deserved a hearing on its merits whereby Jay would have been able to present evidence provided with his Motion, his tribal land lease, his map of his property, and testimony as to where not only the

accident occurred but also where the parties were in proximity to the operation of his tractor as he maintains it was on his property.

D. Definition of “Indian Country” the argument of jurisdiction by Appellant.

18 USC § 1151(a) defines “Indian Country” as:

- (a) All lands within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

E. Trust land status of proximity of accident site requires a probe of factual circumstances.

No expert witnesses were called, the Turtle Mountain Band of Chippewa Tribal Land Office was not consulted nor were they asked to be a witness or tested the validity of jurisdictional claims raised by Mr. Jay.

Mr. Jay provided more than a brief in support for his motion to dismiss. He provided substantial evidence in support of that motion including his tribal land lease, map of tribal land and testimony of the incident of the evening of December 26, 2016. Mr. Jay’s issue raised in his Motion to Dismiss in the lower court deserved to be heard on its merits and not summarily dismissed on the hearing held January 4, 2019. (*See* Transcript at 6.).

Even if the jurisdictional issues were not raised by Mr. Jay, disposal of application of this analysis is appropriate but not parsed out by the tribal court. This issue is also unaddressed, upon earlier decision by Judge Benson which may have been addressed interlocutory, thus denying due process as a matter of law.

F. This case should be dismissed for lack of evidence provided at trial by Petitioner/Appellee.

Mr. Lavallie's attorney appeared to coach Mr. Lavallie at trial (transcript at pp.63-66) Mr. Lavallie did not produce paycheck stubs nor did he produce income tax forms to verify his income, nor corroborating testimony due to the inability to call the first responder, which incidentally was a BIA Officer, and no ability to subpoena the police record because the district court cannot subpoena the tribal jurisdiction to appear or present documentation, the only witnesses called at trial by Mr. Lavallie were himself and the prosthetic doctor

In addition, defendant Mike Charette, a very close and long-time friend of Mr. Lavallie, never appeared and was never compelled to appear at this hearing, no Contempt of Court was ever issued for Mr. Charette. He (Charette) is ultimately the party that struck Mr. Lavallie. Yet, Mr. Jay provided Mr. Lavallie with immediate assistance by calling 911, he covered up Mr. Lavallie with blankets and made him comfortable as well as his family tending to Mr. Lavallie until the ambulance arrived, which according to Mr. Lavallie's own testimony, was approximately three hours later. A timeframe that could have possibly caused more damage to the injuries of Mr. Lavallie.

There was no expert witness to testify whether the delay of the ambulance arrival of three hours could have directly resulted in further injury to Mr. Lavallie's leg. Instead the bulk of fault is attributed to Mr. Jay.

Mr. Lavallie's testimony on page 121 of the Transcript states that Mr. Charette was travelling at an unsafe speed greater than 55 miles per hour given the road conditions along with the blowing snow and the fact that Mr. Jay smelled alcohol on Mr. Lavallie and Mr. Charette's breath. This, in itself, is an issue with probative value.

On pages 120-121 of the Transcript, Mr. Lavallie describes getting off the snowmobile after the accident, but Mr. Jay testified that he saw Mr. Lavallie's body fly into the air upon impact and hit the ground where he remained until the ambulance arrived. Mr. Lavallie's recollection of events understandably differs from Mr. Jay's testimony of the accident whether this is from the alcohol Mr. Jay smelled on their breath or from Mr. Lavallie's condition being struck by Mr. Charette is also an issue which has probative value.

On pages 127-128 of the Transcript, Mr. Lavallie admits that he was travelling on the wrong side of the road, in addition, Mr. Lavallie, also, after questioning by Mr. Jay, admits that he did not have a good sense of where the center of the highway was, but Mr. Lavallie insists that the tractor was in the center of the road. Since Mr. Lavallie does not have a good sense of where the center of the road was, how can he possibly determine that the tractor was sitting in the middle of the highway. Without testimony or any statements from Mr. Charette, there is no way to corroborate Mr. Lavallie's version of where the tractor was is correct. This is despite Judge Benson referring to testimony provided by Mr. Jay and Mr. Charette. Mr. Charette at no time appeared in court nor did he respond to the pleadings at any time.

Page 129 of the Transcript, Mr. Lavallie does not believe that defendant Mike Charette was driving 55 miles per hour, he believes that he was driving faster than 55 miles per hour.

On page 139 of the Transcript, Mr. Jay's testimony is in contradiction to Mr. Lavallie's testimony as to the location of the tractor, he was conscientious of staying off the highway, as Mr. Jay has done snow removal for his crossing many times and even presented a picture to demonstrate how he edged the snow on his property next to the highway, in an effort to clarify the location of the tractor. Not only does Mr. Lavallie not know where the center of the road is, he admits that he as well as Mr. Charette were both driving on the wrong side of the road. Mr. Lavallie believed that Charette's vehicle drove between the tractor and snowmobile when in fact Mr. Jay's testimony reveals that his tractor was not on the highway, but in fact in his own driveway.

CONCLUSION

Based on the foregoing, Mr. Lorne Jay, Appellant, hereby requests this case be placed under review by the Supreme Court of North Dakota.

Mr. Lorne Jay, who was a good Samaritan in seeing to Mr. Lavallie's well-being at the time of the accident, was doing what he knows how to do – blow snow from his driveway. He has done it before, he testified, and knew not only which direction to move the snow but remained conscientious of staying off the highway.

Mr. Mike Charette, who never answered to the original Complaint, who never showed up for any hearing, never provided testimony or his side of the story – who also was the party that struck Mr. Lavallie, remains silent on this entire matter, yet is only attributed a minimal percentage of the fault.

Clearly, Mr. Jay is a family farmer and rancher and has had issues with Mr. Charette as a neighbor but appears to have the most to lose and offer in this case. Mr. Jay has his farm, which

is tribally leased land, and Mr. Charette, unfortunately, was never present to describe his occupation, his involvement in this unfortunate series of events.

Mr. Jay properly submitted a Motion to Dismiss with evidence to support his motion. The motion was not heard for nearly two years into this case and just weeks before the trial was not granted and summarily denied clearing up the record for the trial date. The Motion to Dismiss is proper and the accident, even if it was on Highway 43 and not on Mr. Jay's tribally leased property, is to be treated as under the tribal jurisdiction. In fact, the Tribal Court has general jurisdiction over these parties and the first responder was even a Bureau of Indian Affairs officer.

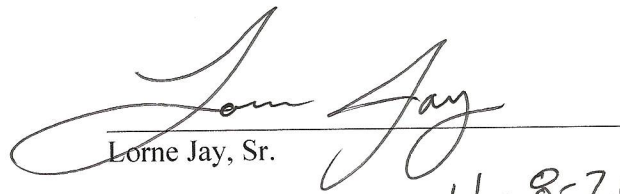
It is no doubt unfortunate that Mr. Lavallie has lost a limb. Some of the causation of the events that occurred that evening was attributed to both Mr. Lavallie and Mr. Charette but certainly not Mr. Jay, who was preparing his family for the after-storm issues, which were getting his wife to work. Both Lavallie and Charette chose a blustery winter day to collect a snowmobile after an afternoon of perhaps drinking and "socializing" as Judge Benson called it in an earlier pleading. In addition, Mr. Charette was driving at an unsafe speed, which lends to the causation.

Error of application of the law in deciding the Motion to Dismiss, for the probative value of getting to the facts in this case was the Court's responsibility. There does not appear to be enough evidence to support the facts of the case. There is no evidence to show that Mr. Charette earned \$40,000.00 per year, no evidence that he had his capacities in place to recall the actual accident, in fact, getting some material facts incorrect according to Mr. Jay's rebutted testimony,

and no evidence to support that Mr. Jay's proximity to the accident was proximate cause, which is an issue that was never parsed out fully by the trial court.

For the foregoing reasons, this case should be dismissed, or remanded, based on lack of personal and territorial jurisdiction and because evidentiary findings of fact and conclusions of law were never found at trial or during discovery in this matter.

Dated this 8th day of April, 2020.


Lorne Jay, Sr. 4-8-2020

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Lorne Jay,)
 Appellant,)
 v.)
 Lawrence Lavallie,)
 Appellee,)
 and Michael Charette,)
 Appellee.)

File No. 40-2018-CV-0050

BRIEF IN SUPPORT OF APPEAL

My name is Yvette Falcon. I am at least 18 years of age.

The following documents are hereby attached as service:

- 1. Brief in Support of Appeal

I served a true and correct copy of each of the court documents listed in the above Paragraph by mailing them, securely enclosed in an envelope, by Certified Mail, postage prepaid. Return Receipt Requested, Deliver to Addressee Only, directed to the person listed below.

- 1. Michael Charette
3538 County Road 43
St. John, ND 58369
- 2. Jason R. Vendsel, Attorney for Plaintiff
2400 Burdick Expressway E., Ste. 100
PO Box 998
Minot, ND 58702-0998
- 3. Clerk of District Court
P.O. Box 460
Rolla, ND 58367

Copies of the receipt of this service to the parties are herein attached.

I swear under penalty of perjury that everything I stated in this Affidavit of Service by Mail is true and correct.

State of North Dakota)

County of Rolette)

Dated this 4 day of 8, 201~~9~~20 ^{YF}

Yvette Falcon

Process Server

Print Name: Yvette Falcon

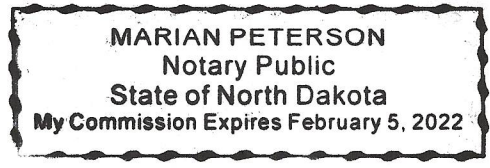
Server Address: 9629 BIA Road 21, Belcourt, ND 58316

Telephone Number: (701) 477-0904

NOTARY PUBLIC: Subscribed and sworn to before me 8th day of April 8, 2020.

Marian Peterson

Notary Public



My Commission expires: Feb 5, 2022

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Lorne Jay,)	
Appellant,)	
v.)	
Lawrence Lavallie,)	
)	File No. 40-2018-CV-0050
Appellee,)	AFFIDAVIT OF SERVICE
)	BY MAIL
and Michael Charette,)	
)	
Appellee.)	

My name is Yvette Falcon. I am at least 18 years of age.

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1. Michael Charette
3538 County Road 43
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Minot, ND 58702-0998
3. Petra H. Mandigo Hulm
Clerk of the Supreme Court
State Capitol
600 E. Boulevard Avenue
Bismarck, ND 58505-0530

I swear under penalty of perjury that everything I stated in this Affidavit of Service by Mail is true and correct.

State of North Dakota)

County of Rolette)

Dated this 16th day of April, 2020 YF

[Signature]

Process Server
Print Name: Yvette Falcon

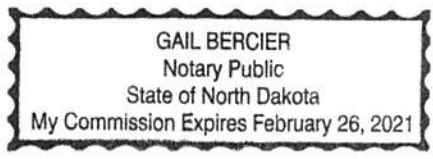
Server Address: 9629 BIA Road 21, Belcourt, ND 58316

Telephone Number: (701) 477-0904

NOTARY PUBLIC: Subscribed and sworn to before me 16th day of April, 2020.

[Signature]

Notary Public



My Commission expires: February 26, 2021