

SUPREME COURT  
OF THE  
ROSEBUD SIOUX TRIBE

ROSEBUD SIOUX TRIBE  
2008 APR 24 PM 1:09  
FILED

BARTIMUS BONE SHIRT,  
Plaintiff/Appellant,

CA 2007-05  
BY: \_\_\_\_\_



vs.

MEMORANDUM OPINION  
AND ORDER

MICHAEL SCHMIDT, Individually and  
as an employee of the Sinte Gleska  
University, and SINTE GLESKA  
UNIVERSITY,  
Defendants/Appellees.

Per curiam (Chief Justice Frank Pommersheim and Associate Justices Charles Abourezk and Cheryl Three Stars Valandra)

I. Introduction

Bartimus Bone Shirt, Plaintiff/Appellant, is a member of the Rosebud Sioux Tribe and a resident of the Rosebud Sioux Reservation. In the Spring of 2004, Mr. Bone Shirt was a student at Sinte Gleska University taking courses in pursuit of a degree in carpentry. At this time, he requested permission of Michael Schmidt, Defendant/Appellee, an employee of Sinte Gleska University, to use the carpentry shop at Sinte Gleska to work on some bookshelves.

Mr. Schmidt gave his permission to Mr. Bone Shirt to use the carpentry shop and one of its Makita power saws. Apparently, all the safety features of the saw had been removed by staff or students of Sinte Gleska under the direction of Mr. Schmidt. When Mr. Bone Shirt was using the saw, the saw kicked back and caused substantial injuries to his left hand. Mr. Schmidt was allegedly acting as an employee of Sinte Gleska and within the scope of his employment when these events took place.

It is admitted that the Sinte Gleska University, at all relevant times, held a personal injury liability insurance policy, which covered the events in controversy. This policy was issued by the Philadelphia Insurance Company, a for profit company incorporated under the laws of Pennsylvania. The limits of the coverage under this policy are \$5,000,000 per accident. Medical payments portions of the policy are not known, as the insurance policy was not made a part of the record below.

Mr. Bone Shirt, through his previous attorney, filed a claim against Sinte Gleska University and its insurer. The insurer offered to settle the claim for \$25,000, which was rejected by Mr. Bone Shirt. The insurer also apparently agreed to mediation in order to resolve Mr. Bone Shirt's claim, but subsequently rescinded its agreement to proceed with mediation.

This personal injury lawsuit was subsequently filed in the Rosebud Sioux tribal court by Mr. Bone Shirt. Sinte Gleska University filed an answer and moved for judgment on the pleadings, which was subsequently revised as a motion for summary judgment. A hearing on the motion was held on August 2, 2007 before Judge Steven Emery. An order granting summary judgment in favor of Defendants/Appellees was issued on August 8, 2007. The order was based solely on a finding that "there is no genuine issue as to any material fact related to the Defendant's sovereign immunity."

A timely notice of appeal was subsequently filed by Plaintiff/Appellant and oral argument was heard before the court on March 28, 2008.

## II. Issues

This appeal raises two issues, namely:

- A) Whether the trial court's grant of summary judgment in favor of Appellee, Sinte Gleska University, was improvidently granted because of the existence of significant issues of material facts between the parties.
- B) Whether Appellee, Sinte Gleska University, is a tribal entity that enjoys the sovereign immunity of the Rosebud Sioux Tribe.

Each issue will be discussed in turn.

## III. Discussion

### A. Summary Judgment

Pursuant to Rules 12(c) and 56 of the Rosebud Sioux Law and Order Code, a motion for summary judgment is appropriate:

At any time 30 days after commencement of an action any party may move the Court for summary judgment as to any or all issues presented in the case, and such shall be granted by the Court if it appears that there is *no genuine issue as to any material fact* and that the moving party is entitled to judgment as a matter of law. Such motion shall be served not less than 10 days prior to the hearing on said motion and may be supported by affidavits, discovery material, or memorandum, all of which must be made available to the opposing parties at least 10 days prior to the hearing. The opposition shall have full opportunity to respond to such motion at the time fixed for hearing. (emphasis added)

The appropriate standard of review is *de novo* and appellate review turns on a single inquiry as to whether the trial court erred in concluding that there is "no genuine issue of material fact."

*Groseth Intern, Inc. v. Tenneco, Inc.*, 410 N.W.2d 159, 164 (SD 1987). At the hearing on the motion for summary judgment, no witnesses testified and no documentary evidence was submitted.

At oral argument before this court, it became clear that there are at least three (potential) issues of material fact that were inadequately developed or presented at the motion hearing. First, there is the matter of the terms and conditions of the liability policy issue by the Philadelphia Insurance Company and what it says (or does not say) relative to sovereign immunity, mediation, and terms of coverage. Clearly, any of these conditions might legitimately raise an issue of material fact. Somewhat surprisingly, the insurance policy itself was never placed in evidence by either side.

Second, there is the issue of whether any of the various sources of funding for Sinte Gleska University are provided through federal law known as the (Amended) Indian Self-Determination and Education Assistance Act. If so, there is a portion of the statute that deals expressly with liability insurance and the waiver of trial sovereign immunity to the limits of any policy. See 25 U.S.C. § 450f(c)(3)(A) which provides:

Any policy of insurance obtained or provided by the Secretary pursuant to this subsection shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage or limits of the policy of insurance.

While this issue was timely raised, it appears that adequate discovery was not fully completed by the time of the hearing.

Third, there are significant factual questions relative to the changes in the name, corporate identity, and authority to amend bylaws of Sinte Gleska University that were not adequately explored at the motion hearing. No documents were officially put into evidence and no witnesses were presented to provide testimony relative to the documents. Counsel for both

sides offered much commentary and opinion, but there was no factual predicate *in the record* for their argument. Apparently, as with the above concern, discovery was never completed by the parties.

There well may be other issues of material fact, but the above discussion surely indicates that there are (potential) issues of material fact sufficient to make the granting of summary judgment in the court below premature, if not absolutely erroneous as a matter of fact and law. In light of the current status of the record in this appeal, the case is remanded to allow for further discovery, including necessary depositions, relative to the matters addressed above.<sup>1</sup>

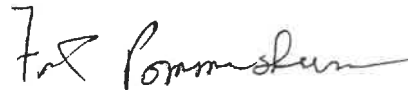
#### IV. Conclusion

For all the above-stated reasons, the decision of the trial court is reversed and remanded for additional proceedings not inconsistent with this opinion.<sup>2</sup>

IT IS SO ORDERED.

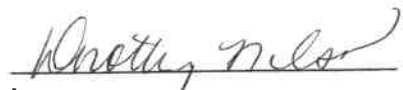
Dated this 21<sup>st</sup> day of April, 2008.

FOR THE COURT:



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Frank Pommersheim  
Chief Justice



<sup>1</sup> It is somewhat curious in this regard that the Appellees did not address the issue of summary judgment in their brief, especially when the issue raised by the Appellant. See Appellant's Brief at pp. 6-14.

<sup>2</sup> Given the ruling on the summary judgment issue, the Court does not reach the issue of Sinte Gleska University's sovereign immunity as a matter of law.