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Oklahoma Supreme Court Deals Body Blow To Tribal Sovereignty In *Cossey v. Cherokee Nation Enterprises LLC*

COSSEY V. CHEROKEE NATION ENTERPRISES, LLC

2009 OK 6 __P.3d__, 80 Okla. B. J. 187 (Jan. 20, 2009)

In a much anticipated decision, the Oklahoma Supreme Court took another swipe at tribal sovereignty when it recently ruled that Cherokee Nation Enterprises ("CNE") can be sued in state court by individuals who get hurt on CNE lands. Following the decision in *Bittle v. Bahe*, 2008 OK 10 (Feb. 5, 2008) - allowing Tribal casinos to be sued in state court for common law negligence action against the seller of alcoholic beverages who sells alcohol to an intoxicated person – the Cossey decision is a further opening of the door for tort claims to be asserted against tribes in Oklahoma state courts.

Cossey arose out of a lawsuit in state court by Loyman Cossey, a non-Indian, against CNE for personal injuries suffered at the Cherokee Casino in Roland, Oklahoma. The trial court denied CNE's motion to dismiss the claims and the matter was appealed.

The Court first looked at the issue of whether Oklahoma district courts were "courts of competent jurisdiction" as that phrase is used in the model Compact. The Court held that Oklahoma district courts are "courts of competent jurisdiction." Moreover, the Court held that the Compact is derived from Oklahoma statutes and incorporates Oklahoma's Governmental Tort Claims Act ("GTCA") into its provisions. Therefore, the Court reasoned, Oklahoma district courts have subject matter jurisdiction over claims originating under the Compact.

Next, the Court held that Tribal courts are not courts of general jurisdiction and, therefore, can assert jurisdiction over matters involving non-Indians only when their activities on Indian lands are activities that may be regulated by the Tribe and fall into one of two "exceptions" set forth in *Montana v. United States*, 450 U.S. 544 (1981). The Court then noted that non-Indians visiting a casino as invitees on Indian land is not an activity the Tribe can regulate under its "inherent sovereign interests." The Court concluded that "Cossey entered into no consensual relationship with the Tribe 'through commercial dealings, contracts, leases, or other arrangements' by entering the casino as a customer. The Compact represents a consensual relationship between the Tribe and the State, but Cossey was not a party to it." (emphasis added).

The implications of the Cossey decision are enormous. Not only do tribes now face the prospect of lawsuits in state courts for personal injuries suffered on Indian lands, but the Cossey majority decision implies that tribal courts are not "courts of competent jurisdiction" under the model Compact and cannot exercise jurisdiction over non-Indians in actions against the Tribe for injuries suffered on Indian lands. In disrespect to the government-to-government relationship between tribes and the state, the Court's majority appears to imply that tribal courts are now *courts of incompetent jurisdiction* as it relates to non-Indians and gaming.

The Oklahoma Supreme Court has not yet released the Cossey decision for official publication. Additionally, there were a number of separate concurring and dissenting opinions written, indicating the issues are not fully settled even within the Oklahoma Supreme Court. We are monitoring the situation and are working on developing strategies to deal with this latest erosion of Tribal sovereignty.

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