

No. 05-10357

IN THE
Supreme Court of the United States

JAMES SMITH,
Petitioner,

v.

SALISH KOOTENAI COLLEGE, A MONTANA CORPORATION,
AND THE COURT OF APPEALS OF THE CONFEDERATED SALISH
AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court review a decision of the United States Court of Appeals for the Ninth Circuit which held that a tribal court had jurisdiction over a non-tribal member's claim against a tribal entity for alleged reservation-based negligence, where the non-member expressly consented to the exercise of jurisdiction pursuant to tribal law?

CORPORATE DISCLOSURE STATEMENT

Respondent, Salish Kootenai College, is a non-profit tribal corporation chartered under the laws of the Confederated Salish & Kootenai Tribes, and incorporated under the laws of the State of Montana. As a non-profit corporation, Salish Kootenai College issues no stock and is not otherwise owned or controlled by any corporation or entity other than the Confederated Salish & Kootenai Tribes.

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This Court should deny certiorari because the court below properly applied the correct rules prescribed by this Court. The appeals court determined that the rule from *Montana v. United States*, 450 U.S. 544 (1981), applied, and that this claim fit within the first of the two exceptions, giving the tribal court jurisdiction. Petitioner consented to the jurisdiction of the tribal court by electing to file his personal injury claim against a tribal entity there. Only after losing a five day jury trial did he first claim that the court from which he affirmatively sought relief did not have jurisdiction. His petition asks this Court to give him a second bite at the apple.

Petitioner attempts to create a conflict between the circuits where none exists. He wrongly claims that the decision below is inconsistent with exhaustion cases from two other circuits. This case is not about exhaustion. Petitioner's actions were never driven by a perceived need to exhaust tribal remedies. He said nothing about exhaustion in the trial court, the tribal appeals court or the district court in this case. He chose to proceed in tribal court and, having consented to do so, should not now be heard to complain.

STATEMENT OF THE CASE

This dispute has a peculiar factual and procedural history. It presents the uncommon question of a tribal court's jurisdiction over a case where Petitioner James R. Smith, a non-member, voluntarily chose the forum. He did not question the jurisdiction of the tribal court until a jury verdict was entered against him.

Respondent Salish Kootenai College (hereafter "SKC") is a tribally controlled college established by the Confederated Salish & Kootenai Tribes (hereafter "the Tribes") of the Flathead Reservation of Western Montana. SKC is located on tribal land in Pablo, Montana in the tribal complex and within the exterior boundaries of the Flathead Reservation. More than three-fourths of the student body of SKC are members of one tribe or another and more than one-third of those are members of the Tribes. SKC was incorporated under tribal law in 1977 and under the laws of the State of Montana one year later.

The accident that gives rise to this lawsuit occurred on U.S. Highway 93 within the exterior boundaries of the reservation. Smith was a student enrolled in the heavy equipment operation course at SKC. As part of that course, Smith was driving a dump-truck with two passengers. Smith alleges that as a result of poor maintenance of the truck, incomplete inspection of the equipment and his inadequate training, a leaf spring broke and he was unable to maintain control of

the vehicle. The truck veered sharply and rolled over. One of the passengers, Shad Burland, was killed. Smith and the other passenger, James Finley, were seriously injured. Both Burland and Finley were enrolled members of the Tribes.

The Burland family sued both Smith and SKC in tribal court. Finley followed suit in a separate case. The two lawsuits were consolidated. SKC filed a cross-claim against Smith for contribution and indemnity and Smith cross-claimed against SKC for contribution, indemnity and for damages for his own personal injury.

Confederated Salish & Kootenai Tribal law requires that a party seeking to invoke the jurisdiction of the tribal court stipulate that jurisdiction exists.

Section 1-2-104, Civil Jurisdiction. (1) The Tribal Court of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, shall have jurisdiction of all suits wherein the parties are subject to the jurisdiction of this Court, and over all other suits which are brought before the Court by stipulation of parties not otherwise subject to Tribal jurisdiction. In suits brought by non-members against members of the Tribes or other persons subject to the jurisdiction of this Court, the complainant shall stipulate in his or her complaint that he or she is subject to the jurisdiction of the Tribal Court for purposes of any counterclaims which the defendant may have against him or her.

CSKT Laws Codified, Tit. I, Ch. 2, § 1-2-104. Smith consented to the jurisdiction of the tribal court in the pleadings filed there, all pursuant to tribal law.

Before the case went to trial, all of the claims were settled except Smith's claim for personal injury against SKC. The tribal court realigned the parties so that Smith was the Plaintiff and SKC the sole Defendant. This matter was tried to a jury in tribal court. On the fifth day of trial the jury returned a verdict in favor of SKC.

Smith appealed the jury verdict arguing, for the first time, that the tribal court lacked jurisdiction over his claim against SKC. The tribal appellate panel remanded that issue to the tribal trial court because it had never addressed the jurisdiction issue. The trial court found that it had jurisdiction over the claim. Smith appealed that determination to the tribal appellate court.

While that appeal was pending, Smith filed this action in federal district court seeking an injunction against any further proceedings in the tribal court, damages for his personal injury and for spoliation of evidence. The spoliation claim was based upon an alleged destruction of notes of interviews with students at SKC after the accident.

Before the federal district court ruled on the injunction issue, the tribal appellate court issued its order affirming the trial court's finding of jurisdiction. The federal district court determined that the tribal court had jurisdiction, denied the injunction and dismissed Smith's complaint. Smith appealed the decision of

the federal district court to the court of appeals, which initially reversed. An *en banc* panel vacated that opinion and, on rehearing, affirmed the decision of the federal district court. Smith seeks review of this decision.

REASONS FOR DENYING THE PETITION

The Petition for Writ of Certiorari should be denied as this case presents no important issues worthy of this Court's attention. It arises on a very rare set of facts not likely to occur again and follows a circuitous and peculiar procedural route here. Smith endeavors to recast this case as one that presents a significant departure from this Court's holding in *Montana*. He also alleges that other circuit courts of appeal have determined this issue otherwise. Both of those contentions are wrong. On the contrary, Judge Bybee writing for the majority sitting *en banc* concluded that Smith's suit fell within the first exception of *Montana* and the rule of *Williams vs. Lee*, 358 U.S. 217 (1959).

1. *Montana*, its predecessors and progeny most often deal with attempts by tribal courts to assert jurisdiction over non-member defendants. As this Court noted in *Nevada vs. Hicks*, 533 U.S. 353, 358 n. 2 (2001), this Court has "never held that a tribal court had jurisdiction over a nonmember defendant." Likewise, this Court has never held that a tribal court did not have jurisdiction over a claim against one of its members. In spite of the apparent difficulty of applying the rule

in *Montana* to the facts here, the court of appeals used *Montana* as the pathmarking case.

After determining that SKC was a tribal entity, a determination not challenged by Smith here, the circuit court of appeals began its analysis with *Montana*.

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. 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. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its 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.

Montana, 450 U.S. at 565-66 (citations omitted).

This Court has recognized that the party status of the non-member is an important fact in determining a tribal court's jurisdiction. As Justice Souter observed in *Nevada vs. Hicks*, "[i]t is the membership status of the unconsenting party, not the status of real property, that counts as the primary jurisdictional fact." *Hicks*, 533 U.S. at 382 (Souter, J., concurring). Less important is the location of the facts giving rise to the cause of action.

What makes this case both peculiar, if not unique, is that here the consenting party is the non-member—at trial there was no “unconsenting party.” Where, as here, the non-member is the plaintiff, tribal courts may exercise jurisdiction.

In *Williams vs. Lee*, 358 U.S. 217 (1959), this Court held that the tribal court, not the state court, had jurisdiction over a claim against a member of the Navajo Tribe.

There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.

Williams, 358 U.S. at 223.

Montana, Hicks and Strate vs. A-1 Contractors, 520 U.S. 438 (1997), address situations in which the non-member is the defendant. This case, like *Williams*, involves the opposite. This case is most closely related to *Williams*. Like the plaintiff in *Williams*, Smith seeks to enforce his rights against a tribal entity. While the state court (or federal court sitting in diversity) may have concurrent jurisdiction, the tribal court clearly does. Again, no case has been found that holds a tribal court does not have jurisdiction over a claim against one

of its members.

The location of the conduct giving rise to the dispute is, to a lesser degree, important in the analysis. Where defendant is not a tribal member and the facts giving rise to the complaint arise on a U.S. Highway, then the tribal court does not have jurisdiction. *Strate*, 520 U.S. at 442. In the case at bar, Smith's allegations of negligence giving rise to this claim involve conduct which occurred not on the highway, but on the campus at SKC, in the classroom and in the shop where the vehicles were maintained.

As the court of appeals found, both of the plaintiffs' claims, the negligence claim and the spoliation claim, arose out of conduct that occurred on the reservation. Smith alleged in his negligence claim that he was acting in the course and scope of his enrollment as a student at SKC and that the provision of this dump-truck to students for course work in its state of repair was negligent. He alleged that SKC was responsible to maintain, inspect and repair the dump-truck as a safe training vehicle for course work at SKC. SKC, he alleged, negligently failed to do so. As a result, he claimed, he was injured.

Smith also claims that SKC is liable for spoliation of evidence. Smith alleges that one of the instructors at SKC interviewed students following the accident and took notes of those interviews. Because the notes could not later be

found, Smith claimed that SKC had control over the notes, would not or could not produce them and was therefore liable. This claim also clearly arose on tribal land.

Tribal law requires that a non-member seeking to invoke the jurisdiction of the tribal court must stipulate to the tribal jurisdiction. Smith stipulated to jurisdiction when he filed his Answer to the Amended Complaint which contained his cross-claim against SKC. In that pleading, filed February 23, 2000, Smith admitted that jurisdiction existed in the tribal court for the following reasons:

- a. the tribe (at that time) was a party;
- b. SKC was an entity of the tribe;
- c. the injured passenger, Mr. Finley, was a Native American residing on the reservation;
- d. Smith was a Native American residing on the reservation;
- e. the incident occurred within the exterior boundaries of the reservation; and
- f. all three young men in the truck resided within the exterior boundaries of the reservation at the time of the accident.

Burland's Amended Complaint (Sept. 15, 1999); *Smith's Answer to Amended Complaint and Cross-Claim* (Feb. 23, 2000). See **Appendix**.

Smith argues that one cannot stipulate to jurisdiction of a court that has limited jurisdiction. However, unlike the federal courts whose jurisdiction is constrained by Article III of the United States Constitution, the laws regulating the Confederated Salish & Kootenai Tribal Court do not restrict jurisdiction over non-members who consent. A party can subject itself to tribal court jurisdiction by entering a consensual commercial relationship with the tribe or its members under the first *Montana* exception. There is no reason why a party cannot subject itself to the jurisdiction of the tribal court by stipulating to jurisdiction there.

Smith had complete control over the forum in which he brought his claim. He could have filed this claim in state court. *See Larrivee vs. Morigeau*, 184 Mont. 187, 602 P.2d 563 (1979). He could also have filed this action, as he ultimately did, as a diversity action in federal court. He could have done this at any time but chose not to do so until after he lost in tribal court.

2. Smith argues that he was compelled to exhaust his potential tribal court remedy prior to filing in federal court. He argues this in an effort to demonstrate the perceived injustice he suffered and in an effort to demonstrate an inconsistency between the court of appeal's decision in the case at bar and the decisions of two other circuit courts of appeal. In *Brown vs. Washoe Housing Authority*, 835 F.2d 1327 (10th Cir. 1988) and *Weeks Construction, Inc. vs. Oglala*

Sioux Housing Authority, 797 F.2d 668 (8th Cir. 1986), those courts of appeal were faced with questions of exhaustion. Neither of those cases dealt ultimately with jurisdiction, rather whether or not a party should be compelled to exhaust his tribal court remedies before seeking relief in a state or federal court.

In *Brown*, a contractor brought suit in federal court for breach of contract against a tribal housing authority. The housing authority sought a dismissal of the action based upon lack of subject matter jurisdiction. The district court denied that motion. On appeal the court of appeals held that principles of comity rather than strict subject matter jurisdiction required the contractor to exhaust his tribal court remedies. The matter was remanded to the district court for a determination as to whether the action should be stayed pending determination by the tribal court of its own jurisdiction. *Brown*, 835 F.2d at 1329.

The *Brown* case is firmly in accord with this Court's exhaustion cases. *Iowa Mutual Insurance Company vs. LaPlante*, 480 U.S. 9 (1987); *National Farmers Union Insurance Companies vs. Crow Tribe*, 471 U.S. 845 (1985).

Likewise in *Weeks*, again in a suit between a contractor and a tribal housing authority, the district court dismissed the case for lack of jurisdiction. The eighth circuit court of appeals held that, in order to avoid undermining the authority of tribal courts, the dispute between the contractor and the housing authority should

first be resolved by the tribal court. *Weeks*, 797 F.2d at 674. The court of appeals was careful to state that it was not deciding the issue of jurisdiction over the parties. *Id.*

There is no disagreement between the courts of appeal on this point. In *Allstate Indemnity Company vs. Stump*, 191 F.3d 1071 (9th Cir. 1999), the ninth circuit court of appeals followed this Court's rulings in *Iowa Mutual* and *National Farmers Union*. The court of appeals determined that a plaintiff must exhaust tribal remedies before seeking relief in the federal courts unless it is plain that the tribal court lacks jurisdiction over the dispute, following *Strate* and *Iowa Mutual*. The court found the facts of *Allstate Indemnity* were nearly identical to those facing this Court in *Iowa Mutual*. The ninth circuit followed the rule of the *Brown* and *Weeks* cases.

The district court dismissed this case because it affirmatively concluded that the tribal court had jurisdiction. We decline to go so far, for it appears to us that the dispute arises not from the parties' contractual relationship, as the first *Montana* exception requires, but from alleged conduct governed by the Montana Unfair Claims Settlement Practices Act, MCA § 33-18-242(3). Because we hold only that there is a colorable jurisdictional issue, the district court should stay the action while Allstate exhausts its remedies in tribal court.

Allstate Indemnity, 191 F.3d at 1076 (citation omitted).

In the case at bar, the ninth circuit did nothing to change the rule of *Allstate Indemnity*. All three of the circuit court opinions cited above, *Brown*, *Weeks* and *Allstate Indemnity* are exhaustion cases and do not deal with ultimate issues of tribal court jurisdiction. All are in accord that principals of comity require that the federal courts stay their hand while the tribal courts make the jurisdictional determination in the first instance.

Smith argues that the ninth circuit opinion in this matter effectively equates exhaustion with consent. This is both an inaccurate assessment of the ninth circuit court's decision and a misrepresentation of the record in the court below.

First, the opinion of the court of appeals does not hold that fulfilling the requirement of exhaustion constitutes a consensual relationship for purposes of jurisdiction. The court of appeal's opinion in this matter does not address the issue of exhaustion in any substantive way because that issue was not before the court. Unlike the plaintiffs in *Brown* and *Weeks*, Smith did not first attempt to file his claim in any court other than tribal court. As the ninth circuit noted in the opinion below, the Smith had full control over where this claim was filed. If Smith had filed this claim in state or federal court in the first instance, either of those courts may have declined to hear his claim pending initial determination of

the matter in tribal court. That is the import behind the exhaustion rule cited above.

On the other hand, if Smith had not consented to jurisdiction or made any statement at all that he was simply fulfilling an exhaustion requirement, then his actions here would look less like opportunistic forum shopping. Instead, Smith voluntarily filed his claim in tribal court, consented to the jurisdiction of the tribal court and litigated that claim fully. He never questioned the jurisdiction or indicated that his actions arose out of a need to exhaust tribal remedies until he received a bad result.

In contrast, the plaintiffs in both the *Brown* and the *Weeks* cases sought relief in the federal court from what they perceived to be an unfavorable forum. They did not voluntarily consent to have their claims heard in tribal court.

Perhaps most importantly, Smith demonstrated his power to file this matter in another forum at any time when he filed in federal court prior to the tribal court's decision on jurisdiction. Smith never actually faced the exhaustion dilemma he has constructed in an effort to show a split among the circuits.

3. While the court of appeals found that this case fits within the first of the two exceptions to the *Montana* general rule, the record here supports tribal jurisdiction under the second as well.

A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its 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.

Montana, 450 U.S. at 566 (citation omitted).

SKC is a tribally controlled college under the Tribally Controlled College or University Grant Program, 25 U.S.C. § 1801 *et. seq.* The Tribes and the federal government have recognized the importance of education since they entered into the treaty which established the Flathead Reservation, the Treaty of Hell Gate, July 16, 1855, 12 Stat. 975. In that treaty, the United States agreed to establish and maintain an agricultural and industrial school.

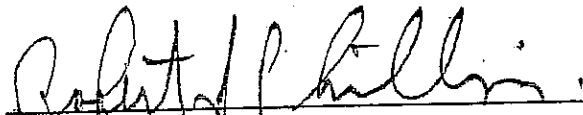
The tribal court of appeals in ruling on the jurisdictional issue here stated: "SKC is a tribal entity closely associated with and controlled by the tribes. For purposes of determining jurisdiction, it must be treated as a tribal entity." Over 34% of its 1,100 students are members of the Tribes and SKC favors Native Americans in hiring, as 40% of the faculty members are Indians. The majority of students receiving degrees from this institution are Indians.

A claim of negligence in the operation of the educational program at SKC must necessarily involve the inherent authority of the Tribes. Whether and to what extent it provides adequate educational services to its students, the failure to do so

being one of the bases of Smith's claim, is clearly within the regulatory and adjudicatory jurisdiction of the Tribes. While the court of appeals did not reach this issue or find it dispositive, it is clear the second *Montana* exception provides an independent basis for jurisdiction. Finding no jurisdiction on these facts would seriously infringe on the right of reservation Indians to "make their own laws and be ruled by them." *Williams vs. Lee*, 358 U.S. at 220.

CONCLUSION

The Petition for Writ of Certiorari should be denied.



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APPENDIX A

Burland's Amended Complaint (Sept. 15, 1999)

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IN THE TRIBAL COURT
OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD RESERVATION, PABLO

EUGENE R. BURLAND, PERSONAL
REPRESENTATIVE OF THE ESTATE OF
SHAD EUGENE BURLAND, deceased,
and EUGENE R. BURLAND and ROBIN
G. BURLAND, individually,
Plaintiffs,

-vs-

THE CONFEDERATED SALISH AND
KOOTENAI TRIBES OF THE FLATHEAD
RESERVATION, SALISH KOOTENAI
COLLEGE, JAMES RICHARD SMITH,
JR., a single man, and JOHN DOES
A THROUGH D,
Defendants.

Cause No. 99-227-CV

AMENDED COMPLAINT FOR
WRONGFUL DEATH, SURVIVAL
REMEDIES AND NEGLIGENT
INFLICTION OF EMOTIONAL
DISTRESS AND DEMAND FOR
JURY TRIAL

COME NOW the Plaintiffs above-named and for a cause of
action against Defendants above-named, complain and allege as
follows:

AMENDED COMPLAINT FOR WRONGFUL DEATH, SURVIVAL REMEDIES AND NEGLIGENT
INFLICTION OF EMOTIONAL DISTRESS AND DEMAND FOR JURY TRIAL - Page 1

JURISDICTION

1. That the Tribal Court has jurisdiction because of the following:

- (a.) The Confederated Salish and Kootenai Tribes ("CS&KT") of the Flathead Reservation is a Defendant.
- (b.) The Salish Kootenai College, believed to be an entity of the CS&KT of the Flathead Reservation, is a Defendant.
- (c.) James A. Finley, at the time of the incident resulting in the claims itemized in this Complaint, was an individual of Native American ancestry residing on the Flathead Reservation.
- (d.) James Richard Smith, Jr., at the time of the incident resulting in the claims itemized in this Complaint, was an individual of Native American ancestry residing on the Flathead Reservation.
- (e.) The incident that is the subject of this Complaint occurred within the exterior boundaries of the Flathead Indian Reservation.
- (f.) Shad Eugene Burland, James A. Finley, and James Richard Smith, Jr. resided within the exterior boundaries of the Flathead Indian Reservation at the time of the accident, which is the subject of this Complaint.

2. That the Plaintiffs, Eugene R. Burland and Robin G.

Burland, husband and wife, the parents of Shad Eugene Burland, reside on the Flathead Indian Reservation, and Eugene R. Burland is an enrolled member of the CS&KT of the Flathead Reservation. Plaintiff Eugene R. Burland is the duly appointed, qualified and acting Personal Representative of the Estate of Shad Eugene Burland, by order of the Montana Twentieth Judicial District Court, Lake County, in Cause No. DP 99-51.

GENERAL ALLEGATIONS

3. That on or about May 12, 1997, Shad Eugene Burland, James Richard Smith, Jr., and James A. Finley were all enrolled as students of the Salish Kootenai College, and as part of their course work, James Richard Smith, Jr. was operating a 1980 International Dump Truck with the permission and under the direction of Defendants, the Salish Kootenai College and/or the CS&KT of the Flathead Reservation. Shad Eugene Burland and James A. Finley were passengers in said 1980 International Dump Truck (the "Vehicle") which was owned by the Salish Kootenai College and/or the CS&KT of the Flathead Reservation.

4. At the direction of, under the supervision of, and with the permission of the Salish Kootenai College and/or CS&KT of the Flathead Reservation, James Richard Smith, Jr. was operating the Vehicle identified in Paragraph 3 northbound on U.S. Highway 93 near milepost 15.1 when the mainspring for the right rear main leaf spring broke, causing the Vehicle to veer to the left and roll over. This incident ultimately led to the death of Shad Eugene Burland.

5. Defendants the CS&KT of the Flathead Reservation and/or the Salish Kootenai College, their officers, agents, or employees, and fictitious John Doe Defendants, while acting within the scope of their authority, negligently caused the death of Shad Eugene Burland in failing to adequately maintain, inspect, and repair the Vehicle, or created an unreasonably defective product that caused the injuries resulting in the death of Shad Burland.

6. Further, the Defendants, the CS&KT of the Flathead Reservation and/or Salish Kootenai College, and fictitious John Doe Defendants are responsible for the actions of James Richard Smith, Jr. ("Smith") and any negligence of Smith is attributable to the CS&KT of the Flathead Reservation and/or Salish Kootenai College as a permissive user of the Vehicle.

7. Further, the CS&KT of the Flathead Reservation and/or Salish Kootenai College failed to ensure that an adequate number of seat belts were available for all occupants of the Vehicle, which was a cause of the injuries and ultimate death of Shad Eugene Burland.

8. Smith was acting as an agent of the Salish Kootenai College and/or the CS&KT of the Flathead Reservation while operating said Vehicle, and said Defendants were negligent for allowing Smith to operate the Vehicle.

Count One -- Wrongful Death

9. Plaintiffs incorporate by reference the allegations contained in Paragraphs 1-8 of this Complaint.

10. As a direct and proximate result of such negligence as alleged herein, Shad Eugene Burland died on May 12, 1997. At the time of his death, Shad Eugene Burland was survived by his parents, Eugene R. Burland and Robin G. Burland, and two siblings. Shad Eugene Burland's heirs have been deprived of the care, companionship, society, comfort, and support of their son and brother and are entitled to reasonable damages for the death of Shad Eugene Burland, and for their grief caused by his death.

Count Two -- Survivorship

11. Plaintiffs incorporate by reference the allegations contained in Paragraphs 1-10 of this Complaint.

12. As a direct and proximate result of such negligence as alleged herein, Shad Eugene Burland sustained severe and agonizing physical and emotional pain and suffering and distress prior to his death. The Estate of Shad Eugene Burland is entitled to recover damages on behalf of Shad Eugene Burland's Estate for such injures and losses before the death of Shad Eugene Burland, and which causes survived his death. The Estate of Shad Eugene Burland is entitled to survival damages for the reasonable value of the lost future earnings and the pain, suffering, mental anguish, and distress suffered by Shad Eugene Burland prior to his death.

Count Three -- Negligent Infliction of Emotional Distress

13. Plaintiffs incorporate by reference the allegations contained in Paragraphs 1-12 of this Complaint.

14. As a direct and proximate result of such negligence as

alleged herein, Plaintiffs, Eugene R. Burland and Robin G. Burland, have sustained severe emotional and mental anguish and distress. Eugene R. Burland and Robin G. Burland are entitled to recover damages for the Defendants' negligent infliction of emotional distress from which they suffer and will continue to suffer.

WHEREFORE, Plaintiffs pray for judgment against Defendants as follows:

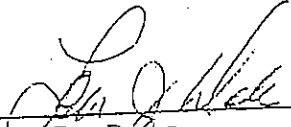
1. For wrongful death damages, including the reasonable value for the loss of the care, comfort, companionship, society, and support of Shad Eugene Burland;
2. For Estate survival damages, including physical and mental pain, anguish, distress, and other damages sustained by Shad Eugene Burland before his death, and for his future lifetime earnings, reduced to present value;
3. For the reasonable value of the mental and emotional distress sustained by Eugene R. Burland and Robin G. Burland;
4. For Plaintiffs' costs and disbursements herein; and
5. For such other and further relief as this Court deems just and proper under the circumstances.

DATED this 15th day of September, 1999.

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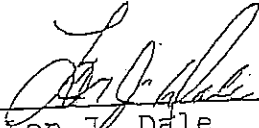
By: 
Lon J. Dale

DEMAND FOR JURY TRIAL

COME NOW the Plaintiffs and demand a jury trial on all
issues of fact in the above case.

DATED this 15th day of September, 1999.

MILODRAGOVICH, DALE,
STEINBRENNER & BINNEY, P.C.
P.O. Box 4947
Missoula, MT 59806-4947
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Attorneys for Plaintiffs

By: 
Lon J. Dale

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15-2/bls

APPENDIX B

Smith's Answer to Amended Complaint and Cross-Claim (Feb. 23, 2000)

Rex Palmer
 ATTORNEYS INC., P.C.
 301 W Spruce
 Missoula, MT 59802
 (406) 728-4514
 ATTORNEYS FOR DEFENDANT/
 CROSS CLAIMANT/CROSS DEFENDANT
 JAMES RICHARD SMITH

IN THE TRIBAL COURT OF THE CONFEDERATED SALISH AND
 KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, PABLO, MONTANA

EUGENE R. BURLAND, PERSONAL)
 REPRESENTATIVE OF THE ESTATE OF)
 SHAD EUGENE BURLAND, deceased, and)
 EUGENE R. BURLAND and ROBIN G.)
 BURLAND, individually,)
 Plaintiffs,)

v.)
 SALISH KOOTENAI COLLEGE, and)
 JAMES RICHARD SMITH, JR., a single)
 man, and JOHN DOES A THROUGH D,)
 Defendants.)

and)
 SALISH KOOTENAI COLLEGE, a Montana)
 Corporation,)
 Cross-Claimant,)

v.)
 JAMES RICHARD SMITH,)
 Cross-Defendant,)
 and)

JAMES RICHARD SMITH,)
 Cross-Claimant,)

v.)
 SALISH KOOTENAI COLLEGE a Montana)
 Corporation, and JOHN DOES A)
 THROUGH D,)
 Cross-Defendants.)

Cause No. 99-227-CV

DEFENDANT, CROSS-DEFENDANT
 AND CROSS-CLAIMANT JAMES
 RICHARD SMITH'S;

ANSWER TO AMENDED
 COMPLAINT;

ANSWER TO CROSS-CLAIM; and

CROSS CLAIM AGAINST
 DEFENDANTS SALISH KOOTENAI
 COLLEGE, A MONTANA
 CORPORATION, AND JOHN DOES A
 THROUGH D

* * * * *

ANSWER TO AMENDED COMPLAINT

Defendant James Richard Smith hereby answers the allegations of the Amended Complaint as follows:

1. As to paragraph one, Defendant Smith admits subsections (a), (d) and (e) and upon information and belief admits sub-paragraphs (b), (c) and (f).
2. As to paragraph two, Defendant Smith admits the same upon information and belief.
3. As to paragraphs three and four, Defendant Smith admits the same except for the references to the Confederated Salish and Kootenai Tribes ("CS&KT").
4. As to paragraph five, Defendant Smith admits that he was driving the International dump truck within his authority as a student of the Salish Kootenai College under the direct supervision of Shad Burland and further admits that Shad Burland received injuries in the accident which resulted in his death and admits that the Salish Kootenai College, its officers, agents or employees, and fictitious John Doe Defendants, while acting in the scope of their authority, negligently caused the death of Shad Eugene Burland as described in paragraph five. This Defendant denies the remaining allegations contained in paragraph five.

5. As to paragraph six, Defendant Smith denies he was negligent in any way and admits that the Salish Kootenai College is responsible for his actions within the course and scope of his studies as a student of Salish Kootenai College as a permissive user of the dump truck under the supervision of Shad Eugene Burland in the course and scope of the college training program. This Defendant denies the remaining allegations contained in paragraph number six.
6. As to paragraph seven, Defendant Smith is without sufficient information to form a belief as to the truth of the allegations and therefore denies the same.
7. As to paragraph eight, Defendant Smith admits that at the time of the accident he was acting in the course and scope of his enrollment as a student at Salish Kootenai College and admits that Salish Kootenai College was negligent for providing this particular dump truck to students for course work and training in its condition and state of repair in May 1997. This Defendant denies any remaining allegations contained in paragraph eight.
8. As to paragraph nine, Defendant Smith restates his answer to paragraphs one through eight as if fully set forth herein.

9. As to paragraph ten, Defendant Smith lacks sufficient information to form a belief as to the truth of the identity of the survivors of Plaintiff's decedent and therefore denies those allegations. Defendant Smith admits that Shad Eugene Burland died as a result of the negligence of Salish Kootenai College and its agents but denies the remaining allegations of paragraph ten.
10. As to paragraph eleven, Defendant Smith restates his answers to paragraphs one through ten as if fully set forth herein.
11. As to paragraph twelve, Defendant Smith lacks sufficient information to form a belief as to the truth of the remaining allegations and therefore denies the same.
12. As to paragraph thirteen, Defendant Smith restates his answers to paragraphs one through twelve as if fully set forth herein.
13. As to paragraph fourteen, Defendant Smith admits that Eugene R. Burland and Robin G. Burland have sustained severe emotional and mental anguish and distress but denies that he did anything to cause that distress and anguish. Defendant denies the remaining allegations contained in paragraph fourteen.
14. Defendant Smith denies each and every allegation of the Amended

Complaint not specifically admitted or qualified above.

15. Defendant Smith denies that he was negligent in any way, but if he is found to be negligent, Plaintiff's decedent was also contributorily or comparatively negligent and his negligence operates to bar or reduce Plaintiff's recovery in this case. Plaintiff's injuries were caused by the negligence or wrongful acts of other parties for which Defendant Smith is not responsible.

ANSWER TO CROSS-CLAIM

Defendant James Richard Smith hereby answers the allegations of the Cross-Claim of Defendant Salish Kootenai College as follows:

1. As to paragraph one, denies that Salish Kootenai College is entitled to indemnity and contribution and affirmatively alleges that Salish Kootenai College has at least \$1,000,000 of insurance coverage for this tragic incident and that indemnity or contribution would require Defendant Smith to, in effect, repay insurance proceeds which were intended, and required under the law, to compensate for injuries such as those suffered by Plaintiffs and Defendant Smith.

//

CROSS CLAIM AGAINST DEFENDANT SALISH KOOTENAI COLLEGE,

A MONTANA CORPORATION AND JOHN DOES A THROUGH D

COMES NOW the Defendant and Cross Claimant, James Richard Smith [Smith], and for his cause of action against Cross Defendants Salish Kootenai College, a Montana Corporation, and John Does A through D and alleges as follows:


1. That on or about May 12, 1997, Shad Eugene Burland, James Richard Smith, and James A. Finley were all enrolled as students of the Salish Kootenai College, and as part of their course work, Smith was operating a 1980 International dump truck in the course and scope of his enrollment as a student at Salish Kootenai College.
2. Smith was operating the dump truck identified in paragraph 2, northbound on U.S. Highway 93, near Milepost 15.1 when the mainspring for the right rear main leaf spring broke causing the vehicle to veer to the left and roll over.
3. Defendant Salish Kootenai College, its officers, agents and employees were responsible to adequately maintain, inspect and repair the dump truck, as a safe training vehicle for course work at the college.
4. Defendants John Doe are all other corporations, partnerships or

individuals involved in the maintenance, inspection and repair of the dump truck.

5. Defendants negligently failed to adequately maintain, inspect and repair the dump truck as a safe training vehicle for course work at the college.
6. Salish Kootenai College was negligent for providing this particular dump truck to students for course work and training in its condition and state of repair in May 1997.
7. Because of Defendants acts and omissions alleged above, Smith sustained injuries, incurred expenses, medical treatment and hospitalization.

WHEREFORE, Smith prays for judgment against the Defendants for his special and general damages and for such other and further relief to which he may be entitled and which will be proven at trial.

DATED this 23 day of February 2000.



Rex Palmer
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301 W Spruce
Missoula, MT 59802
(406) 728-4514
ATTORNEYS FOR DEFENDANT/
CROSS CLAIMANT/CROSS DEFENDANT
JAMES RICHARD SMITH

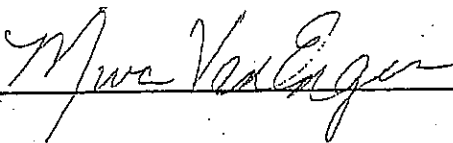
CERTIFICATE OF SERVICE

I, legal assistant for Attorneys Inc., P.C., hereby certify that on the 23 day of February 2000 a true and correct copy of the foregoing was served upon the following by U.S. mail, hand-delivery, Federal Express, or facsimile:

Faxed & Mailed to
Michael Williamson
Madden, Poliak, MacDougall and
Williamson
1001 4th Ave Bldg, Suite 2800
Seattle, WA 98154

U.S. Mail
 Hand Delivered
 Federal Express
 Facsimile

Faxed & Mailed to
Lon J. Dale
Milodragovich, Dale, Steinbrenner &
Binney, P.C.
PO Box 4947
Missoula, MT 59806-4947



Hand Delivered
Bob Phillips/Fred Simpson
Phillips and Bohyer
283 W Front Suite 301
Missoula, MT 59802