IN THE SOUTHWEST INTERTRIBAL COURT OF APPEALS
FOR THE SOUTHERN UTE INDIAN TRIBE

Gladys MASON,
Plaintiff-Respondent,

v.

Mary WEAVER,
Respondent-Appellant.

No. 90-003-SUTC
(August 31, 1990)
No. 89-CV-40

Appeal from the Southern Ute Tribal Court, Floyd Kezele, Judge.
Mari Weaver, *pro se*.
Gladys Mason, *pro se*.

SUMMARY

Respondent-appellant appealed the lower court damage award of court costs as well as the cost of additional insurance for Plaintiff's new car and automobile financing, stating the lower court erred in awarding Plaintiff an amount greater than the fair market value of the car and in failing to apply the collateral source rule. The Appellate Court held Respondent-appellant was liable for all reasonable costs stemming from Defendant's wrongdoing including the cost of insurance and interest on the loan for Plaintiff-respondent's new automobile. The Appellate Court dismissed as inapplicable Respondent-appellant's contention the collateral source rule required invalidation of the lower court's award.

OPINION

GREAVES, Judge.

This case comes before this court on appeal from a decision of the Southern Ute Tribal Court. The decision below awarded judgment to the Plaintiff for damages arising from an automobile accident in the amount of nine hundred sixty-seven dollars and forty-six cents ($967.46) and the Respondent appeals.

FACTS

The facts of the case are very straightforward. On September 12, 1988, a vehicle driven by the Defendant-appellant (hereinafter Appellant), collided with another vehicle driven by the Plaintiff-respondent (hereinafter Respondent). From evidence elicited at trial, it was apparent that the accident occurred while the Respondent was eluding a police officer who was attempting to stop the vehicle driven by the Appellant. The vehicle driven by the Respondent was a 1981 Buick with only fifty-two thousand (52,000) miles on it. That vehicle was declared to be a total loss by the insurance adjusters as a result of the accident which occurred on September 12, 1988. The insurance company which covered the automobile driven by the Appellant refused to reimburse the Respondent for her loss. However, the Respondent's insurance company did reimburse her in the amount of two thousand six Hundred dollars ($2,600.00) for the loss of her Buick. In addition, the Appellant paid the Respondent one hundred dollars ($100.00) which was the deductible under the Respondent's insurance contract with her carrier.

The Respondent then used the two thousand six hundred dollars ($2,600.00) as a down payment on another vehicle. At trial, the Respondent indicated that she had attempted to purchase another vehicle similar to her Buick, but was unable to do so, stating that all the cars of like age had over one hundred thousand (100,000) miles on them, and therefore, were unacceptable since she needed reliable transportation.

After a trial during which the Respondent presented no sworn testimony, the lower court awarded damages as follows: twenty-five dollars ($25.00) in filing fees; two hundred thirty-one dollars ($231.00) for added insurance costs and seven hundred eleven dollars and forty-six cents ($711.46) in interest which the Respondent had to pay on an installment loan contract to purchase a replacement vehicle. Total: nine hundred sixty-seven dollars and forty-six cents ($967.46).

ISSUES

On appeal, the Appellant raises two issues: first, that the lower court erred when it allowed that measure of damages which reimburses the injured party for more than the fair market value of the property damaged and; secondly, that the lower court erred when it refused to apply the "collateral source" rule in Appellant's favor.

ANALYSIS OF FIRST ISSUE

It is well settled under the law of torts, that a wrongdoer is liable for any injury which is the natural and probable consequence of her misconduct. 25 C.J.S., "Damages", § 25. Furthermore, the primary object of an award of damages is to restore an injured party to the position she was in prior to the injury. *Harris v. Standard Acc. and Ins. Co.* , 297 F.2d 627 (2d Cir. 1961), *cert. den'd* 369 U.S. 843. And, where the act is criminal or unlawful, the wrongdoer is held liable not only for immediate and natural consequences but for all such consequential injuries as might reasonably be anticipated as the probable result of the wrongful act. *Poland v. Earhart*, 30 N.W. 637 (Iowa 1886). Finally, replacement costs, plus expenses, may constitute the measure of damages. *Central Illinois Light Co. v. Stenzel*, 195 N.E. 2d 207 (Ill. App. 1963).

In the case at bar, there is unrefuted evidence that the Appellant was engaged in illegal activity by eluding a police officer when the accident causing property loss to the Respondent occurred. Furthermore, the record is totally devoid of any contested issue with respect to liability. This being the case, this Court must affirm any award of damages which can be considered "reasonable." *Poland v. Earhart, supra.*

In reviewing the record of the lower court proceedings, it is very clear that the Respondent made extensive attempts to mitigate damages by searching for an automobile similar to that which was totalled in the accident. She stated that those autos which were of similar age and cost all had over one hundred thousand (100,000) miles on them. The only way she was able to replace the vehicle that was destroyed with one of like condition was by spending more money than was allowed her by her own insurance company. Thus any costs incurred by her in replacing the destroyed vehicle with one of similar condition are appropriate. *See Poland v. Earhart, supra; see also Central Illinois Light Co. v. Stenzel, supra.* This Court, therefore, affirms the award of interest on the loan to pay for the replacement vehicle in the amount of seven hundred eleven dollars and forty-six cents ($711.46). The award of filing fees in favor of the Respondent in the amount of twenty-five dollars ($25.00) is also affirmed.

With respect to the lower court's award of increased insurance costs, there is authority which would prohibit such award as damages not proximately caused by the accident. *See Silvernail v. Hallenback*, 226 N.Y.S.2d 48 (N.Y. 1962). However, this Court cannot accept the rationale of that case which stated that the increase was a result of the change in the contractual relationship between the injured party and her insurance company. Rather, the better rule of law is as the lower court found when it stated that, "...but for your actions, this person wouldn't have had reason to get a new car.... She had no other choice than to get a new car." It is well known that a person may not drive an automobile without possessing minimum amounts of liability insurance. The Respondent was forced to pay more for a replacement vehicle and thus increased insurance costs to cover that vehicle. Since there is no viable alternative to purchasing increased insurance coverage, this action is considered

reasonable in light of *Poland, supra*, and the lower court's decision is, therefore, affirmed. To hold otherwise is to reward wrongdoing.

COLLATERAL SOURCE RULE

Simply stated, the collateral source rule requires a tortfeasor to bear the full cost of injury she has caused regardless of any benefit the victim has received from any independent or "collateral source." *Anastasia v. Barnes*, 487 N.Y.S.2d 628 (N.Y. 1985), *Kistler v. Halsey*, 481 P.2d 722 (Colo. 1971), *Moyer v. Merrick*, 392 P.2d 653 (Colo. 1964). The record indicates that the insurance payment received by the injured party was from the injured party's own insurance company and that the tortfeasor did not contribute toward the premiums, even though she did pay the deductible. A correct application of this rule thus would allow not only the payment by the Respondent's insurance company but the award by the lower court below, as well. This Court can only surmise that the Appellant misapprehends the application of the rule, and accordingly, affirms the lower court's award on the basis of the "collateral source" rule.

The Appellant has stated that to allow the lower court's decision to stand would allow the victim a "double recovery." This Court does not agree. The record clearly indicates that the money that was received by the victim was used as down payment on a replacement vehicle. The victim was required to pay additional out-of-pocket funds to cover the purchase price of the replacement vehicle. She did so not because she chose to, but rather because market conditions dictated such action. While the lower court did award interest expense to cover the cost of the loan, which is permissible under *Central Illinois Light Co., supra*, it did not award the additional cost of the replacement vehicle, which this Court feels would also have been permissible. Thus, the argument that the Appellant has paid a double recovery is without merit. However, since the Respondent did not appeal that issue, the lower court's decision remains intact.

This case is remanded for further proceedings not inconsistent with this affirmance. The lower court is specifically directed to allow interest from the date of judgment as allowed by law.

IN THE SOUTHWEST INTERTRIBAL COURT OF APPEALS
FOR THE SOUTHERN UTE INDIAN TRIBE

In the MATTER OF

L.K.
Petitioner-Respondent,

v.

M.E.T.,
Respondent-Appellant.

No. 90-001-SUTC
(November 9, 1990)
No. CS-89-01

Appeal from the Southern Ute Tribal Court, Maylinn Smith, Judge.
Douglas S. Walker, for respondent.
M.E.T., *pro se*.

SUMMARY

Both parties appealed from the lower court's ruling: (1) the Petitioner claimed the court erroneously ruled a putative father was not required to reimburse the state for child support paid by the state to the mother, prior to the determination of the paternity; and, (2) Respondent claimed the lower court wrongly determined it was without jurisdiction to hear the matter. Without a request from Respondent, the Appellate Court declined to address Petitioner's claim because she failed to pay the filing fee required by tribal code and remanded the issue of reimbursement of the state for child support paid to the mother to the lower court. The Appellate Court affirmed the trial court's dismissal, for lack of jurisdiction, of Respondent's petition for custody.

OPINION

KEZELE, Judge.

This case comes before this court on appeal from a decision of the Southern Ute Tribal Court. The decision below denied the State of California the right to receive reimbursement for child support paid to L.K. The lower court found that payment of child support prior to a finding of or acknowledgement of paternity was not a financial burden of a putative father. Petitioner-respondent (hereinafter Respondent) and the State of California as her assignee appeal the lower court's ruling.

This case is also before this court on appeal from the lower court's ruling that it lacked jurisdiction to hear the Respondent-appellant's (hereinafter referred to as Appellant) petition for child custody based upon the child's absence from the Southern Ute Reservation and status as non-enrolled.

A final matter before this Court is somewhat unclear. That matter is raised via a post-a-note attached to the Court's file which was undated and unsigned stating that the Respondent had failed to pay the appellate fee despite being informed of the need to do so.

FACTS

This case was initially brought before the lower court for determination of paternity. The Respondent lives in California and was the recipient of AFDC benefits on behalf of her minor child K.M.T. The action originated as a URESA action filed in the State of Colorado and was refiled with the Southern Ute Tribal Court on August 17, 1989. Appellant acknowledged paternity and moved for custody of K.M.T., D.O.B. 12/24/87, at the

September 19, 1989 paternity hearing.

The lower court heard the issues of child support; child support debt to the State of California; and the Respondent's motion for custody on December 7, 1989. The court ruled that it did not have jurisdiction to determine the custody issue in that the child was not present on the Southern Ute Reservation and was not an enrolled member nor enrollable as a member of the Southern Ute Tribe. The lower court ordered child support and refused to give the State of California a judgment for the AFDC paid on behalf of the minor child.

ISSUES

Two issues are raised on appeal. First, Respondent contends that the lower court erred in determining that California was not entitled to judgment for AFDC payments made prior to acknowledgement of paternity or determination of paternity. Secondly, Appellant appeals the lower court's determination of lack of jurisdiction and subsequent dismissal of his request for custody. Appellant also raises several issues of procedure and the possibility of a conflict of interest on the part of the Respondent's attorney.

A third issue which was not raised by the parties but which nonetheless cannot be ignored by this court is the threshold procedural issue raised by the notation previously mentioned herein. That notation stated that, "No appeal fee was ever submitted along with the Notice of Appeal which was received 12/22/89. Respondent's attorney was contacted in regard to submitting the fee. The Appellate [sic] Court will need to decide whether to accept this as filed or not."

ANALYSIS OF PROCEDURAL ISSUE

Under the Southern Ute Indian Tribal Code, Title 3, which embodies the Appellate Code, is controlling. "An appeal shall be commenced by filing a notice of appeal with the lower court clerk....(3) At the time of filing a notice of appeal, the party appealing *shall be required to pay* a fee of twenty-five dollars ($25.00) to the Tribal Court Clerk." (Emphasis added). Title 3, section 3-1-104, *Appeal Commenced*. The language of the statute is not permissive. In reviewing the file, this Court can find no pleadings requesting any request for a waiver of this fee. In some jurisdictions, such fees may be waived *in forma pauperis* or for governmental agencies. Such waivers are normally discretionary in that the requesting party must take affirmative action to secure such a waiver. The record reveals no such affirmative action on the part of the Respondent, despite receiving notice from the clerk. In reviewing Title 3, this Court cannot find any other section which negates or modifies the provisions quoted above. Title 3, section 3-1-102, *Procedures for Appeal*, speaks to the issue of "appeals by right." This section is inapplicable in that the Respondent is not being required "to pay damages in excess of Five Hundred Dollars ($500.00)." It is true that Respondent is effectively barred form recovering damages in excess of the statutory amount, but the statute does not speak to loss of recovery, only to payment.

It is apparent, then, to this Court that the lower court initially and the appellate court clerk subsequently erred in allowing this appeal to proceed to this court if the fee was not collected prior to docketing. Alternatively, the appellate court clerk could have docketed the appeal but should have included a pleading in the form of a "Declaration or Certificate of the Court Clerk" indicating the apparent failure of the party to comply with the rules of court, or refused to accept the appeal. The Respondent placed the Court in this twilight zone by failing to answer the inquiry of the clerk by affidavit or payment or motion citing applicable sections of URESA.

In that the record is unclear, this Court is in a bit of a quandary. Upon appeal, it is well settled that courts of appeal should decide matters on the narrowest of grounds possible. Courts in general and courts of appeal specifically are to review, not legislate. The Court is further constrained by the knowledge of the infancy of the

appellate process in lower courts. The body of law thus developed must be developed in a measured and restrained fashion. This Court should not leap frog issues just to decide cases and issue pronouncements. In this light then, this Court will not look to the issues purportedly raised by Respondent until and unless the record is clear regarding their compliance with the Appellate Code of the Southern Ute Tribe. That portion of the case is remanded to the lower court for further proceedings as outlined in this opinion.

ANALYSIS OF THE SECOND ISSUE

Appellant at the lower court acknowledged paternity and sought to gain custody of his minor child. The lower court correctly sought out a factual basis for asserting jurisdiction over the issue raised by Appellant. The facts as determined by the lower court are that Appellant is a member and resident of the Southern Ute Indian tribe and reservation respectively; that Respondent is neither and that the minor child of the parties (acknowledged by Respondent at an earlier hearing) is not now an enrolled or enrollable member of the Tribe nor does she reside on the reservation now or at any time pertinent to this action was she located on the reservation. Jurisdiction of the lower court in such matters is clearly outlined in Southern Ute Tribal Code, Title VI, *Children's Code*, and alternately Title VII, *Domestic Relations Code*.

The lower court in applying the law to the facts of the case looked to Title VI, section 3(A), in which it is stated that "the Court shall have jurisdiction over any child residing or found on the reservation," and further to Title VI, section 3(A)(4), stating that the court's powers are restricted to those children coming "within the Southern Ute Indian Tribal Children's Court's jurisdiction under the provisions of this section." The facts were clear that the minor child did not fall within the former section and that the latter section was inapplicable as well. Appellant would rely on his procedural appeal citing the court's failure to compel presence of the mother and his child as being relevant in this matter. Clearly it is not, as court compelled presence for restricted courtroom proceedings is insufficient to grant jurisdiction for other matters. To accept such jurisdiction would also be violative of Title II, *Civil Procedure Code*, in that nothing contained therein allows for the assertion of jurisdiction in non-related matters through the service of or compliance with subpoenas of the Southern Ute Tribal Court.

The lower court alternately looked at the *Domestic Relations Code* which states, "(a) child custody proceedings may be commenced in Southern Ute Indian Tribal Court by a parent...by the filing of a petition seeking custody of the child if the child is permanently a resident...." Title VII, section 30(A), Southern Ute Indian Tribal Code. The operative language is, "if the child is permanently a resident." In the instant case, the facts strongly show that is not the case and that though Appellant is a "parent", his child is not a permanent resident. Thus, no jurisdiction rests in the lower court over this custody matter and the lower court's ruling regarding its lack of jurisdiction is hereby affirmed.

The final matters to be addressed involve the allegations of failure to provide procedural due process via the court's subpoena process and the failure of the Respondent's attorney to provide verbally requested information. The lower court's records and pleadings received by this Court indicate that the Appellant is no stranger to the court process. He is an employee of the tribe, and by his own pleadings he is knowledgeable of the law and of other attorneys who practice before the Southern Ute Tribal Court. The procedural irregularities alleged in his Notice of Appeal are of a shotgun approach and have little direction. The intricacy of his Notice and citation of code sections indicate a somewhat refined knowledge of the Southern Ute Code and actions under it. The record, on the other hand, indicates a complete failure to file appropriate court pleadings at appropriate times to enforce his rights. If the Respondent's attorney failed to respond to verbal requests for information, Appellant Torres' remedy was under Title II, *Civil Procedure*. Similarly, Title I, *Southern Ute Indian Tribal Code General Provisions*, Article 3, "Tribal Court, Judges and Other Personnel," afforded Appellant his rights and procedures

in enforcing those rights during the progression of his case. His failure to enforce those rights in a timely and correct fashion should not and cannot set aside the court's ruling from the evidence which was properly presented before it. If the appellant wishes he may still have enforceable remedies for allegations which he can make and prove under applicable sections of Title I, but such remedies do not lie within the province of this Court. Thus, the Court cannot accept Appellant's appeal based on procedural irregularities and lack of due process, in that of the faults that were alleged correction was within his own control. In the one instance in which it was not, that being the allegation of a possible conflict of interest, the appellant has not demonstrated a harm which would merit reversal. The lower court's determination of child support is thus affirmed and the appellant's request for a new trial is denied.

This case is remanded for further proceedings consistent with this opinion. The lower court is specifically directed to review the issue of the filing of the notice of appeal by Respondent.

IN THE SOUTHWEST INTERTRIBAL COURT OF APPEALS
FOR THE SOUTHERN UTE INDIAN TRIBE

SOUTHERN UTE INDIAN TRIBE,
Plaintiff-Respondent,

v.

Lynda N. JEFFERSON,
Defendant-Appellant.

No. 90-005-SUTC
(December 1, 1990)
No. 90-TR-10

Appeal from the Southern Ute Tribal Court, Maylinn Smith, Judge.
Lynda N. Jefferson, *pro se*.

SUMMARY

Defendant appealed the lower court conviction of careless driving. The Appellate Court, finding no error, affirmed the lower court's verdict of guilty and conviction of careless driving.

OPINION

CERNO, Judge.
THIS MATTER having come on for hearing before the Southwest Intertribal Court of Appeals on September 28, 1990, upon the appeal taken by Defendant-appellant in the above-styled cause, and this Court having thoroughly considered the appeal based upon the record of the lower court;

This Court finds that there is no error in the lower court's order finding the Defendant-appellant guilty of the careless driving charge;

IT IS THEREFORE ORDERED that the Order of the Southern Ute Tribal Court filed July 10, 1990 is hereby affirmed.

IN THE SOUTHWEST INTERTRIBAL COURT OF APPEALS
FOR THE SOUTHERN UTE INDIAN TRIBE

SOUTHERN UTE INDIAN TRIBE,
Plaintiff-Respondent,

v.

Bertha GROVE,
Defendant-Appellant.

No. 90-006-SUTC
(December 11, 1990)
No. 90-CR-17

Appeal from the Southern Ute Tribal Court, Steve Boos, Judge.
Douglas S. Walker, for respondent.
Nancy Hollander, for appellant.

SUMMARY

Defendant appealed from a jury verdict finding her guilty of criminal contempt. Two issues were raised on appeal. First, that the evidence was insufficient to convict her of criminal contempt; and, second the trial judge committed "plain error" in giving a last-minute definition of criminal contempt to the jury and requesting the jury reach a unanimous verdict within forty-five minutes. The Appellate Court ruled (1) the evidence was insufficient to find the Defendant guilty of criminal contempt because the Defendant's action (verbal abuse of court clerk) did not rise to the level of interfering with the court's proceedings or dignity and (2) the trial judge committed plain error in issuing instructions which were highly prejudicial. The Appellate Court summarily dismissed Plaintiff-respondent's contention Defendant-respondent's filing of a Petition for Discretionary Appeal was not timely.

OPINION

CERNO, Judge.

THIS MATTER having come before the Southwest Intertribal Court of Appeals upon the appeal taken by the above-named Defendant-appellant (hereinafter Defendant) from a jury verdict finding her guilty of the charge of criminal contempt. By Defendant's appeal, this Court is called upon to essentially review two (2) issues, those being: (1) to review the sufficiency of the evidence to support the conviction of the Defendant on the criminal contempt charge, and (2) to determine whether a reversal of the conviction is in order based upon the "plain error" rule to the jury instruction provided by the lower court going toward the definition of "interference with the dignity of the court," and in the further charge by the lower court judge to the jury to see if they could reach a unanimous decision "within the next forty-five minutes."

In addition to the above-described issues raised upon appeal, the Plaintiff-respondent (hereinafter Plaintiff) has filed a Motion to Dismiss the appeal for failure of the Defendant to timely file a "Petition for Discretionary Appeal" pursuant to the Southern Ute Appellate Code. Given the record, transcript, and legal memoranda submitted, the court concludes that the Plaintiff's motion for dismissal can be determined on the basis of the material submitted and currently before the court. With regard to Plaintiff's motion, the Court notes that within the motion itself Plaintiff states that it is not contested that a Notice of Appeal was timely filed. Nor did Plaintiff take issue with the amended Notice of Appeal filed by the Defendant (Plaintiff's motion, paragraph 4). The basic premise of the motion, however, is the argument that the Defendant also needed to file a "Petition for Discretionary Appeal." Without the filing of a discretionary appeal, the Plaintiff argues, the Defendant's current appeal must fail and should be dismissed. The court is not convinced by this argument. Since it is apparent that

the "time" for filing of the appeal is not at issue, the only concern centers around the "labeling" of the appeal taken. Although most state statutes and court rules designate the caption to be used on pleadings, as does Section 3-1-111 of the Southern Ute Tribal Code, this court would adhere to the policy that pleadings should be construed according to their substance and not to their name. The Defendant is correct in her argument that nothing in the Southern Ute Constitution suggests that this appellate court lacks the power to disregard mere labeling errors. Therefore, the Plaintiff's Motion to Dismiss is denied.

In order to reach any determinations on the issues presented, a brief account of the events leading up to the conviction of the Defendant on the contempt charge is in order.

On or about February 23, 1989, the Defendant found an old receipt she had received from the lower court when she had paid a jury fee. As far as the Defendant could remember, this previous matter had never been heard by the court, so Defendant took the receipt to the court to see if she could get a refund of the $25.00 jury fee. The Defendant arrived at the court sometime between 2:30 p.m. and 4:00 p.m. and went directly to the Court Clerk's office. The Defendant informed the Clerk, a Sherri Prairie Chief, of the receipt and requested a refund. When the Clerk had trouble finding the case file, the Court's paralegal, Elaine Newton, attempted to help. After some time had passed and the file could not be located, Ms. Newton informed the Defendant that they would need more time to check their files and to check with the judge who had already left for the day before determining whether they could issue a check to her. The Court Clerk testified that upon hearing this the Defendant became angry and upset and called Ms. Newton a "son-of-a-bitch," and asked, "what kind of system are you running here?" After this exchange, the Defendant took back her receipt and left the building. Apparently, this exchange was overheard by the tribal probation officer who then reported the incident to tribal police. The Defendant was arrested several blocks from the courthouse and was initially charged by the police with disturbing the peace. For whatever reason, which is not clear from the record, the charge was changed to criminal contempt - Southern Ute Code § 1-3-117(j). The Defendant requested a jury trial and paid the $25.00 jury fee. Trial was held on July 6, 1990.

At trial, the Plaintiff called several witnesses who testified that the Defendant appeared upset and in an angry mood. None, however, were either threatened nor insulted by the remarks made by the Defendant. At the end of the trial, the Judge gave the jury their final instructions and allowed them to retire to deliberate the case. After the jury had deliberated approximately three hours, the bailiff informed the judge that the jury was deadlocked. The judge then asked the foreperson of the jury whether there was anything the court could do to help overcome any questions and help the jury reach a verdict. Among other requests, the foreperson indicated that the jury wanted to find out what the definition of "dignity of the court" was. The court agreed to write a new instruction while the jury went to dinner.

Upon the return of the jury, the judge informed all parties that he had drafted a new instruction on the meaning of the "interference of the dignity of the court," which stated:

> The Court is an institution of sovereign government. It is made up of many parts. Judges, court clerks, paralegals, probation officers, as well as the physical structure which is the courthouse. All of these things are the Court. The institutions of a sovereign government have the right to be held in esteem and honored and to be respected by all persons. The Court, as an institution of sovereign government, also has a right to be held in esteem, honored, and treated with respect. This respect is directed to the Court as an institution. However, disrespect to the individuals who make up the Court is equivalent to disrespect to the

> institution. So, any act which is disrespectful to the Court or the individuals who make up the Court, is in interference with the dignity of the Court. Any act which dishonors or damages the esteem to which the Court is entitled is an interference with the dignity of the Court.

After the giving of this instruction, the judge then stated to the jury, "I'd like to see if you can reach a unanimous verdict by, within the next forty-five minutes, all right, and I'll send the bailiff to check on you by then if we haven't heard from you by then, all right?" The jury returned in approximately forty (40) minutes with a unanimous verdict of guilty. It is from this finding that the Defendant now appeals.

WAS THERE SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT?

The Plaintiff argues that there was sufficient evidence produced at trial that showed that the Defendant made disrespectful remarks in a disrespectful manner to the court personnel to the extent that another employee went to fetch the police. From this evidence, the Plaintiff argues that the jury could have found that such remarks and the method of their delivery along with the Defendant's demeanor interfered with the honor of the court.

The general rule is that in any criminal proceeding due process prohibits a criminal conviction of any person except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which a persons charged. *In re Winship*, 397 U.S. 358 (1970). In this case, the Defendant was charged with the crime of criminal contempt. The elements of such crime are: (1) that the Defendant, (2) on the Southern Ute Reservation, at or about the place and date charged, (3) interfered with the process, proceedings or dignity of the court or the judge of the court while in the performance of his official duties. Southern Ute Code § 1-3-117(j). Of the above-stated elements, the one that the Defendant takes issue with and which she feels was not supported by any evidence at trial is the third element - interference with "the dignity of the court." From the record, there was apparently no interference with any process or proceedings of the court and no interference with the judge in the performance of any of her duties since the judge was not present at the courthouse at the time Defendant was there.

The Defendant's argument is that under a correct definition of criminal contempt, the Defendant should have been acquitted, and that the record contained absolutely no evidence that the Defendant's alleged remark(s) interfered with the administration of justice.

The essence of contempt is that the conduct obstructs, or tends to obstruct, the administration of justice. 17 C.J.S., "Contempt", § 8. The general rule in the area of contempt is that only attacks on the tribunal, as distinguished from the judge, can be punishable as contempt. This is not to say that attacks on the judge cannot also be punished by use of a contempt charge, however, the proceeding should be confined to an act or conduct, either in open court or out of court, which is clearly disobedient to any of the court's direct orders or to any unjustifiable conduct which directly tends to bring the court in disrepute. And, before any utterances can be punished as contempt as constituting a clear and present danger working a substantive evil in the administration of justice, the substantive evil must be "extremely serious and the degree of imminence extremely high." 17 C.J.S. § 8.

The facts in the instant case show that the Defendant, as she was leaving the Court Clerk's office, called Elaine Newton, a paralegal, a "stupid son-of-a-bitch." The record further indicates that Ms. Newton testified that she was not threatened by the words directed toward her by the Defendant nor did she feel personally offended by them. At the time this incident occurred the Court was not in session and the judge was absent from the courthouse. All the record shows is that when the Court Clerk could not locate the file and could not give an

immediate answer to the Defendant as to whether she could get a reimbursement of the $25.00 jury fee. It was at this point that the name calling occurred. This was apparently done more out of anger and frustration on the part of the Defendant rather than any calculated attempt to hinder the administration of justice. The mere utterance of the above-stated expletive did not pose any threat to the administration of justice. Apparently, the jury also could not find the evidence was substantial enough initially or else they would not have been deadlocked after nearly three (3) hours of deliberation.

WAS "PLAIN ERROR" COMMITTED?

The "plain error" rule is a well-recognized exception to the general rule that errors may not be considered on appeal unless they were brought to the attention of the lower court. It has also been stated that plain error should be applied only "in those exceptional cases where, after reviewing the entire record, it can be said that the claimed error is a fundamental error." *State v. Reilly*, 321 S.E.2d 564 (N.C. App. 1984). Most cases have defined in various ways when plain error has been committed, but most agree that plain error must fall within one of the following areas: (1) a fundamental error, meaning "something so basic, so prejudicial, so lacking in its elements that justice cannot be done;" or (2) a grave error which must amount "to a denial of a fundamental right of the accused;" or (3) the error has "resulted in a miscarriage of justice;" or (4) an error that denies appellant "a fair trial;" or (5) an error that "seriously affect(s) the fairness, integrity or public reputation of judicial proceedings;" or (6) "where it can be fairly said that the instructional mistake had a probable impact on the jury's finding that the Defendant was guilty." In this case, the Defendant argues that the judge's additional instruction to the jury on interference with the "dignity of the court", and his additional charge that he would like to see if the jury could reach a "unanimous decision within the next forty-five (45) minutes" constituted plain error which was highly prejudicial to the Defendant.

The facts indicate that after the jury had deliberated for nearly three (3) hours they were hopelessly deadlocked. When this was reported to the court, the court inquired of the jury whether there was' anything that the court could do or provide that would help the jury. The foreperson stated that the jury wished to listen to the tape recording of certain testimony that had been given and also requested a definition of what constituted "dignity of the court." The additional tapes were provided as well as the additional instruction of what constituted an "interference with the dignity of the court." This additional instruction was not objected to by the lay advocate representing the Defendant at trial. The new instruction basically instructed the jury that any act which is disrespectful to the court as an institution of sovereign government, or to any individual who works for or makes up the court is an interference with the dignity of the court. This definition without more left no room for the jury to consider the issue whether the Defendant's words in and of themselves in any way interfered with the court, or constituted a clear and present danger to the administration of justice.

A last minute instruction of the type given in this case is particularly susceptible to scrutiny under the "plain error" rule. *Bollenbach v. United States*, 326 U.S. 607 (1946). In the *Bollenbach* case the Supreme Court stated about last minutes instructions:

> Precisely because it was a last minute instruction the duty of special care was indicated in replying to a written request for further light on a vital issue by a jury whose foreman reported that they were hopelessly deadlocked after they had been out seven hours. In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining question of law. The influence of the trial judge on the jury is necessarily and properly of great weight, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word

is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminated abstract charge (citations omitted).

In the instant case, the Court finds that the judge's instruction left out a vital element of the offense of criminal contempt and that was to fully explain what constituted an "interference" with the dignity of the court. The judge's instruction on whether the jury could also reach a unanimous decision was very "coercive" in nature and coupled with the new instruction certainly did have a "probable effect" on the jury's findings that the Defendant was guilty of contempt of court. The outcome may have been different had the court given a supplemental charge to the jury that included the reminder that each juror should not relinquish his or her own individual judgment just for the sole purpose of returning a unanimous verdict. A review of the record shows that no such instruction has been given in the first set of instructions given to the jury. Therefore, it was paramount that the judge should have informed the jurors of their right to not relinquish or surrender their honest beliefs solely because of the opinions or views expressed by their fellow jurors.

For the above-stated reasons, the Court finds that "plain error" was committed in the giving of the highly prejudicial instruction on interference with the "dignity of the court", that the judge's instruction went beyond a permissible *Allen* charge, and that there was insufficient evidence presented that established beyond a reasonable doubt that the Defendant was guilty of the charge of criminal contempt. The Defendant's guilty conviction is hereby overturned and the case is dismissed. IT IS SO ORDERED.

IN THE SOUTHWEST INTERTRIBAL COURT OF APPEALS
FOR THE SOUTHERN UTE INDIAN TRIBE

Wendy J.W. FERRELL,
Plaintiff-Appellant,

v.

William RICHARDS, Jr., and Alfred RAEL,
Defendants-Respondents.

No. 90-004-SUTC
(December 17, 1990)
No. 89-CV-110

Appeal from the Southern Ute Tribal Court, Maylinn Smith, Judge.
Wendy J.W. Ferrell, *pro se*.
William Richards, Jr. and Alfred Rael, *pro se*.

SUMMARY

Plaintiff-appellant appealed the lower court denial of Plaintiff's request that Defendants-respondents' liability for damages include the costs of repairs made by the second garage, in addition to those costs incurred at the first garage which had failed to repair Plaintiff's auto. The Appellate Court overruled the lower court determination that Defendants could not be held liable for the inability of the first garage to properly repair the automobile and ordered Defendants-respondents make complete restitution to Plaintiff-appellant. The Appellate Court ruled the Defendants had a duty to return Plaintiff to at least as good a position as existed prior to the commission of the crime.

OPINION

GREAVES, Judge.

This case is on appeal from a judgment issued by the Southern Ute Tribal Court on January 23, 1990. The judgment appealed from awarded judgment in favor of the Defendants-respondents (hereinafter Defendants) and ordered that the Plaintiff take nothing by way of her complaint. In her prayer for relief, the Plaintiff-appellant (hereinafter Plaintiff) requested monetary damages in the amount of $336.69 (three hundred thirty-six dollars and sixty-nine cents), for damages to her vehicle.

The facts of the case are not in dispute and are described as follows. On April 21, 1989, the above-named Defendants, without the Plaintiff's permission, took possession of the Plaintiff's vehicle. Extensive damages to the vehicle occurred while the vehicle was still in the Defendants' possession. Both Defendants were charged with trespass and theft and pled guilty to those charges.

The Juvenile Division of the Southern Ute Tribal Court, in separate proceedings (89-JV-14 and 89-JV-16), ordered the Defendants to make restitution to the Plaintiff for the damages they had caused.

The Plaintiff, on May 16, 1989, took her vehicle to Morehart Chevrolet of Durango, Colorado (hereinafter Morehart), to have her vehicle repaired. When the vehicle was returned to her, it still was not working properly, so she returned it to Morehart on May 19, 1989, only to discover that it still was not working properly. The Plaintiff then returned the vehicle to Morehart on May 25, 1989, and requested for the third time that they repair it.

When she retrieved her vehicle from Morehart for the third time, the record reveals that the vehicle was still not working properly, so she decided to seek the services of another repair shop and on August 31, 1989, took the vehicle to Cannon Automatic Transmission Service in Farmington, New Mexico. That company effectuated repairs to the vehicle's transmission and charged the Plaintiff $899.03 (Eight Hundred Ninety-nine Dollars and three cents), for the work they had performed. The Plaintiff paid that billing and the record indicates that the Plaintiff then received $496.00 (four hundred ninety-six dollars), from her insurance company and an additional $66.34 (sixty-six dollars and thirty-four cents), from Morehart, apparently paid as reimbursement to her for ineffective work performed by them. It is the remaining amount ($899.03 minus $496.00 minus $66.34 or $336.69), for which the Plaintiff sought reimbursement below and in this appeal.

In its written decision, the lower court entered the following pertinent conclusions of law (as numbered): 2) Defendants are liable for any damages directly arising from their unauthorized use of the Plaintiff's vehicle; and, 3) Defendants are not liable for defective workmanship or insufficient repairs made by a third party to the vehicle in question. In addition, the lower court held that the Defendants had made restitution for damages caused to the Plaintiff's vehicle while in the Defendants' possession.

After reviewing the record in the case, this Court agrees with the lower court's conclusion of law as expressed in conclusion number 2 (two), but cannot accept the lower court's conclusion as stated in conclusion number 3 (three). It is also this reviewing Court's express holding, that the Defendants did not make complete restitution to the Plaintiff for damages they had caused to the Plaintiff's vehicle.

The record clearly demonstrates that the Plaintiff, in good faith, took her vehicle to Morehart for repairs. She believed Morehart, as an authorized Chevrolet dealer, possessed the necessary expertise to properly repair her Chevrolet vehicle. When it became clear that Morehart, for whatever reason, would not or could not repair her

vehicle, the Plaintiff took the next best course of action and sought another company to repair her vehicle. She did, after all, need her vehicle to get to and from work to earn her livelihood. It became quite obvious to the Plaintiff, that, after several attempts, it was futile to continue to request Morehart to repair her vehicle.

In *Weaver v. Mason*, 90-003-SUTC, this Court recently held that a tort-feasor is responsible for placing an injured party in at least as good a position as that prior to the commission of the tort. Since there was not one iota of evidence adduced by the Defendants to controvert sworn testimony implicating the Defendants as the parties responsible for the damage to Plaintiff's vehicle, the Defendants must make full restitution to the injured party, regardless of who effectuates the repairs. *Weaver v. Mason, citing Poland v. Earhart* (citations omitted).

It is for this reason that the judgment of the lower court should be and hereby is reversed. The lower court is instructed to notify the parties that judgment is entered in favor of the Plaintiff for $336.69 (three hundred thirty-six dollars and sixty-nine cents), together with interest at a rate authorized by tribal law to be computed from the time of filing of the original complaint on November 7, 1989. The Defendants are to be held jointly and severally liable for this amount.