IN THE MATTER OF K.B. and R.E.B, minors,

MR. and MRS. RONALD BEECHER,

Appellants.

SWITCA No. 97-015-HTC
HTC No. JV96-014

Appeal filed November 11, 1997

Appeal from the Hualapai Tribal Court
Joseph Flies-Away, Judge

Appellate Judge: Ann B. Rodgers

ORDER DISMISSING APPEAL

SUMMARY

Appeal dismissed on Appellate Court's own motion because for three years appellants took no action to comply with Appellate Court's order requesting more information and directing the parties to address requirements in the Hualapai appellate rules.

***

This appeal is before the Southwest Intertribal Court of Appeals pursuant to resolution 07-95 (February 4, 1995) of the Hualapai Tribal Council and pursuant to the Hualapai Tribe's Law and Order Code as amended, the Southwest Intertribal Court of Appeals rules, and the Court's inherent authority to manage its business. The Court, on its own motion to dismiss the Appeal concludes that the appeal must be dismissed because Appellants have failed to provide the Court documentation that was requested by the Court in 1998.

This Court entered an order on February 24, 1998, containing an initial determination of subject matter jurisdiction and a schedule for the progress of this appeal. The Court stated:

> "In order to assist it in its deliberations, the Court has determined that assistance in the form of more explanation and information from the parties would be helpful. In addition, the Hualapai appellate rules set out specifically the grounds on which the appeal may be determined and the parties are directed to address the requirements set out in section 1.24 of those rules."

Order entered on February 24, 1998 at p.1. Appellants had the option of submitting a written brief or a written waiver of the right to file a written brief within fifteen days after receiving the order. *Order entered on February 24, 1998 at p.2*. The Court file contains a certification that the order was served on Appellants' counsel (advocate) on March 6, 1998, in the evening ("@1837"). The signature on the line designated "Served to:" appears in all respects to be the signature of Counsel, thereby establishing that the February 24, 1998, Order was received on March 6, 1998.

As of the date of this Order, Appellants have not filed either a written brief or a written waiver of the right to file a brief. In fact, Appellants have taken no action to pursue this appeal in any fashion in the past three years. Absent the requested documentation from the Appellants (1) either asserting or waiving their right to submit written briefs, and (2) information as to how this appeal meets the requirements of §1.24 of the Hualapai Law & Order Code, as amended, this Court's motion to dismiss the appeal should be granted.

THEREFORE, IT IS THE ORDER OF THE COURT THAT this Appeal should be, and hereby is, DISMISSED.

March 1, 2001

IN THE MATTER OF H.G., minor,

Plaintiff-Appellee,

v.

MR. and MRS. DARYL GALA,

Defendants-Appellants.

SWITCA No. 97-017-HTC
HTC No. JV96-214

Appeal filed November 11, 1997

Appeal from the Hualapai Tribal Court
Joseph Flies-Away, Judge,

Appellate Judge: Ann B. Rodgers

ORDER DISMISSING APPEAL

SUMMARY

Appeal dismissed on Appellate Court's own motion because for three years appellants took no action to comply with Appellate Court's order requesting more information and directing the parties to address requirements in the Hualapai appellate rules.

***

This appeal is before the Southwest Intertribal Court of Appeals pursuant to resolution 07-95 (February 4, 1995) of the Hualapai Tribal Council and pursuant to the Hualapai Tribe's Law and Order Code as amended, the Southwest Intertribal Court of Appeals rules, and the Court's inherent authority to manage its business. The Court, on its own motion to dismiss the Appeal, concludes that the appeal must be dismissed because Appellants have failed to provide the Court documentation that was requested by the Court in 1998.

In this appeal, Appellants request this Court to resolve an alleged difference of opinion between two Hualapai Tribal Court judges concerning the interpretation of a specific section of the Juvenile Code. This Court entered an order on February 24, 1998, containing an initial determination of subject matter jurisdiction and a schedule for the progress of this appeal. The Court stated:

> "In order to assist it in its deliberations, the Court has determined that assistance in the form of more explanation and information from the parties would be helpful. In addition, the Hualapai appellate rules set out specifically the grounds on which the appeal may be determined and the parties are directed to address the requirements set out in section 1.24 of those rules and the requirement in section 7.25 of juvenile code that an appeal shall be filed within 10 days after the entry of the order or judgment."

Order entered on February 24, 1998 at p.1. Appellants had the option of submitting a written brief or a written waiver of the right to file a written brief within fifteen days after receiving the order. *Order entered on February 24, 1998 at p.2*. The Court file contains a certification that the order was served on Appellants' counsel (advocate) on March 6, 1998, in the evening ("@1837"). The signature on the line designated "Served to:" appears in all respects to be the signature of Counsel, thereby establishing that the February 24, 1998, Order was received on March 6, 1998.

As of the date of this Order, Appellants have not filed either a written brief or a written waiver of the right to file a brief. In fact, Appellants have taken no action to pursue this appeal in any fashion in the past three years. Absent the requested documentation from the Appellants (1) either asserting or waiving their right to submit written briefs, and (2) information as to how this appeal meets the requirements of §§1.24 and 7.25 of the Hualapai Law & Order Code, as amended, this Court has not been given sufficient information to decide the issue raised in this appeal. Thus, the Court's motion to dismiss the appeal should be granted.

THEREFORE, IT IS THE ORDER OF THE COURT THAT this Appeal should be, and hereby is, DISMISSED.

March 1, 2001

LINDSAY QUERTA

Defendant-Appellant,

v.

LORRAINE JACKSON-BRAVO,

Plaintiff-Appellee.

SWITCA No. 97-018-HTC
HTC No. CV97043

Appeal filed November 17, 1997

Appeal from the Hualapai Tribal Court
Joseph Flies-Away, Judge,

Appellate Judge: James Abeita

ORDER DISMISSING APPEAL

SUMMARY

Appeal dismissed on Appellate Court's own motion because for three years appellant took no action to comply with Appellate Court's order directing the appellant to specify the grounds for appeal as required by the Hualapai appellate rules.

***

This appeal is before the Southwest Intertribal Court of Appeals pursuant to resolution 07-95 (February 4, 1995) of the Hualapai Tribal Council and pursuant to the Hualapai Tribe's Law and Order Code as amended, the Southwest Intertribal Court of Appeals rules (SWITCARA), and the Court's inherent authority to manage its business.

This Court entered an order on February 24, 1998, finding subject matter jurisdiction and setting a schedule for the appeal. In that order, the Court requested that the appellant address the specific grounds for appeal set out in the Hualapai appellate rules, specifically section 1.24. *Order entered on February 24, 1998 at p. 1*. Appellant also had the option of submitting a written brief or a written waiver of the right to file a written brief within fifteen days after receiving the order. *Order entered on February 24, 1998 at p. 2*. The Court file contains a

certification that the order was served on appellants' counsel on March 6, 1998. The advocate's signature is on the line designated "Served to", thereby establishing that the February 24, 1998 order was properly served on March 6, 1998.

Appellant has not filed either a written brief or a written waiver of the right to file a brief. In fact, appellant has taken no action to pursue this appeal in any fashion in the past three years. Absent the requested documentation from appellant (1) either asserting or waiving her right to submit written briefs, and (2) information as to how this appeal meets the requirements of § 1.24 of the Hualapai Law & Order Code, as amended, this Court finds that the appeal should be dismissed.

IT IS HEREBY ORDERED THAT THIS APPEAL BE AND HEREBY IS DISMISSED.

December 20, 2001

RHYNE DOSELA

Defendant-Appellant,

v.

THE TONTO APACHE TRIBE

Plaintiff-Appellee.

SWITCA NO. 98-007-TATC
TATC No. AP-98-001, CR-97-014, 023

Appeal filed November 13, 1998

Appeal from the Tonto Apache Tribal Court
Wes Williams, Jr., Judge

Appellate Judge: James Abeita

ORDER DISMISSING APPEAL

SUMMARY

Appeal dismissed on Appellate Court's own motion because appellant did not respond to Appellate Court's order setting a schedule to file briefs.

***

THIS MATTER comes before the Southwest Intertribal Court of Appeals (SWITCA) as the designated appellate court for the Tonto Apache Tribe by Tribal Council Resolution No. 18-98. This Court is bound by the laws and rules of the Tonto Apache Tribe, utilizing the SWITCA Rules of Appellate Procedure (SWITCARA) only when the Tribe's rules are silent.

The appellant filed his request for appeal after being found guilty of the crime of disorderly conduct and sentenced for that crime. This Court issued a preliminary order finding jurisdiction to hear the case, setting out the issues found to be germane to the appeal, and setting a scheduling order for briefs. The order was served on appellant on October 16, 2000, who has not responded to it.

After reviewing the record and the preliminary order issued by this Court, this Court finds that Appellant's failure to respond in any manner to the order requires that the request for appeal should be dismissed.

IT IS HEREBY ORDERED THAT THIS APPEAL BE AND HEREBY IS DISMISSED.

December 20, 2001

BONNIE M. LOPEZ,

Petitioner-Appellant,

v.

GEORGE WELLS, JR.,

Respondent-Appellee.

SWITCA No. 99-005-UMUTC
UMUTC IND. OFF. No. DI-1999-0196

Appeal filed July 28, 1999

Appeal from the Ute Mountain Ute C.F.R. Court
Lynette Justice, Judge.

Appellate Judge: Randolph Barnhouse

ORDER

SUMMARY

Appeal dismissed on Appellate Court's own motion because for over ten months appellant did not respond to Appellate Court's order setting a schedule to file briefs or affidavits, nor did appellant request more time to comply with the order.

In the Southwest Intertribal Court of Appeals for the Ute Mountain Ute C.F.R. Court

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THIS MATTER comes before the Court on its own motion to dismiss the appeal pursuant to Rule 12, SWITCARA.

During its initial review of the notice of appeal and the record below, this Court determined that, despite the number of issues claimed by appellant as the grounds for her appeal, the Court had jurisdiction over only one issue. The appellant appealed from the final judgment granting her petition for divorce from appellee, determining child custody, dividing the property of the parties, and denying a petition for a name change of a minor child seven years of age. The issues raised in the notice of appeal about the divorce petition, child custody determination, and the division of property were dismissed because the Court determined that it did not have subject matter jurisdiction. *SWITCA Order, August 9, 2000.* The Court determined that the issue regarding the name change was properly before the court, *SWITCA Order, August 9, 2000*, and issued its order scheduling briefs or affidavits to be filed. *SWITCA Scheduling Order, August 9, 2000.*

Appellant has failed to comply with the scheduling order. This Court hesitates to dismiss a case, particularly when a party appears *pro se*, because it is important that parties be given the opportunity to present argument regarding issues. However, it is now more than ten months since the Court issued its scheduling order and appellant has not responded to it either by complying with it or requesting more time. It is time for the appeal to end and the underlying case put to rest.

Therefore, it is the order of this Court that the appeal be and hereby is dismissed.

IT IS SO ORDERED.

November 5, 1999

INA JACKSON,

Petitioner-Appellant,

v.

HUALAPAI TRIBE,

Respondent-Appellee.

SWITCA No. 99-007-HTC
HTC No. CR981102, CR981103

Appeal filed November 2, 1999

Appeal from the Hualapai Tribal Court
Delmar Pablo, Judge.

Appellate Judge: James Abeita

ORDER DISMISSING APPEAL

SUMMARY

Appeal dismissed because Appellant failed to meet the threshold requirements in the Hualapai rules of appellate procedure.

***

THIS MATTER is before the Southwest Intertribal Court of Appeals pursuant to resolution 07-95 (February 4, 1995) of the Hualapai Tribal Council and pursuant to the Hualapai Tribe's Law and Order Code as amended, the Southwest Intertribal Court of Appeals rules of appellate procedure, and the Court's inherent authority to manage its business.

Ina Jackson seeks to appeal her conviction on two criminal charges: Permitting Child's Life Health or Morals to be Imperiled and Care of Dependant Persons. Appellant asserts three grounds for appeal: (1) insufficient notice of trial; (2) no opportunity to call witnesses; (3) admissibility of hearsay evidence.

After reviewing the record, this Court has determined it is not necessary to request briefs or hear oral arguments. A sufficient record has been submitted in support of dismissal of this appeal.

A. When the Court Can Hear an Appeal

The Hualapai Tribe's appellate procedures are specific and the appellate court cannot hear cases that fall outside the scope of law. In order to challenge the trial court's findings of fact, an appellant must overcome the

presumption that the findings are without reversible error.

The rule states:

> The presumption may be overcome only by a sworn written statement presented to the Court at the time of the filing of the notice of appeal which establishes on the basis of the statement any one or more of the following grounds:
> (a) That a witness ready and willing to testify at the time of the trial on behalf of the appellant was not allowed by the trial judge to take the witness stand and to testify and that such testimony would have materially altered the judgment of the trial court.
> (b) That the Tribal Judge refused to admit documentary or other physical evidence and that such evidence would have materially altered the judgment of the trial court.
> (c) That after the trial, the appellant discovered material evidence which, with reasonable diligence could not have been discovered and produced at trial, and that such evidence would have materially altered the judgment of the trial court.

Hualapai Nation Law and Order Code, §1.24(1), as amended.

The code also includes the following provision:

> The Appellate Division shall determine whether the conclusions of law are correct based on the findings of fact or amended findings of fact and whether the judgment is supported by the facts and the law.

Hualapai Nation Law and Order Code, §1.24(2), as amended.

B. Applying the Law to this Case

Appellant filed a statement with her notice of appeal, but the statement was not sworn to as required by § 1.24(1), nor did she ask the court to waive the requirement of a sworn statement. Under these circumstances, the Hualapai law is clear that we must presume that the findings of the trial court are "without reversible error". Hualapai Nation Law and Order Code, § 1.24(1), as amended. *Manuel v. Manuel, Jr*. 12 SWITCA Rep. 9 (2001); *Jackson v. Hualapai Tribe*, 12 SWITCA Rep. 5 (2001).

Even if appellant's statements in her notice of appeal are considered, they do not meet the grounds for appeal as required by § 1.24(1-2). Review of the transcript of the proceedings establishes that appellant was charged with violating the Hualapai Tribal Law and Order Code, § 6.10, Care of Dependant Persons and § 6.41, Permitting Child's Life Health or Morals be Imperiled. She was incarcerated September 13, 1998 and released October 1, 1998. Arraignment on the two charges was held November 13, 1998 where she entered a not guilty plea. A pretrial hearing was held January 12, 1999 and trial commenced July 6, 1999. Review of the record indicates appellant submitted a request for dismissal which was denied and she did not submit a request for a continuance of trial. Appellant had ample notice of the charges and of the impending trial, as well as ample opportunity to arrange for witnesses. She had eight months to prepare for trial and did not ask the court for additional time to prepare for trial.

This court need not review questions of admissibility of evidence as the appeal does not meet the requirements for filing an appeal as set out in the Hualapai Code.

THEREFORE, IT IS THE ORDER OF THE COURT THAT this matter should be, and hereby is, DISMISSED because Appellant failed to meet the threshold requirements for appeals as set out in the law of the Hualapai Tribe of the Hualapai Indian Reservation.

August 3, 2001

MIKE JACKSON,

Petitioner-Appellant,

v.

HUALAPAI TRIBE,

Respondent-Appellee.

SWITCA No. 00-001-HTC
HTC Nos. CR980118, CR980119, CR980120

Appeal filed circa January 25, 2000

Appeal from the Hualapai Tribal Court
Delmar Pablo, Judge

Appellate Judge: Ann B. Rodgers

ORDER DISMISSING APPEAL

SUMMARY

Appeal dismissed because Appellant failed to meet the threshold requirements in the Hualapai rules of appellate procedure.

***

THIS MATTER is before the Southwest Intertribal Court of Appeals pursuant to resolution 07-95 (February 4, 1995) of the Hualapai Tribal Council and pursuant to the Hualapai Tribe's Law and Order Code as amended, the Southwest Intertribal Court of Appeals rules, and the Court's inherent authority to manage its business.

Mike Jackson seeks to appeal his conviction on three criminal charges: Public Intoxication, Disorderly Conduct and Assault. Appellant asserts several grounds for appeal: (1) denial of his right to a speedy trial; (2) the judge had a conflict of interest because he acted as a prosecutor when he was initially arrested; (3) his arrest violated the Hualapai Constitution, Article IX-Bill of Rights because he was inside his home.

When the Court Can Hear an Appeal

The Hualapai Tribe's appellate procedures are very specific. The appellate court cannot hear cases that fall outside the scope of law. In order to challenge the trial court's findings of fact, an appellant must overcome the presumption that the findings are without reversible error. The rule states:

> The presumption may be overcome only be a sworn written statement presented to the Court at the time of the filing of the Notice of Appeal which establishes on the basis of the statement any one or more of the following grounds:
>
> a) That a witness ready and willing to testify at the time of the trial on behalf of the appellant was not allowed by the trial Judge to take the witness stand and to testify and that such testimony would have materially altered the judgment of the trial court.
>
> b) That the Tribal Judge refused to admit documentary or other physical evidence and that such evidence would have materially altered the judgment of the tribal court.
>
> c) That after the trial, the appellant discovered material evidence which, with reasonable diligence could not have been discovered and produced at trial, and that such evidence would have materially altered the judgment of the trial court.

Hualapai Nation Law and Order Code, §1.24(1), as amended.

The Appellate Division shall determine whether the conclusions of law are correct based on the findings of fact or amended findings of fact and whether the judgment is supported by the facts and the law. *Hualapai Nation Law and Order Code, §1.24(2), as amended.*

Applying the Law to this Case

Appellant filed statements with his notice of appeal, but the statements were not sworn to as required by the §1.24(1). Based upon the record below, the Appellant was incarcerated at that time. While Appellant requested that any filing fees be waived due to his incarceration, he did not ask the Court to waive the requirement of a sworn statement in support of the notice of appeal due to any inability related to his incarceration. Under these circumstances, the Hualapai Law is clear that we must presume that the findings of the trial court are "without reversible error". *Hualapai Nation Law and Order Code, §1.24(1), as amended.*

Even if Appellant's statements are considered, none of the allowable grounds for appeal are mentioned. Review of the Transcript of Proceeding establishes that there was no issue of a witness who was not allowed to testify; there is no evidence that Appellant was prevented from presenting any documentary or other physical evidence; and there is no statement that new evidence only learned of after trial would exonerate Appellant. Therefore, the statement, even if it had been sworn, does not state any allowable ground for appeal based on the findings of the court.

Appellant raises issues on appeal that were not raised before the trial court. The Transcript reveals that the trial court specifically asked whether there were any motions to be addressed prior to the trial on the merits. Appellant stated "not really, but I will go ahead." Appellate Courts do not address legal arguments that are not first presented to the court below, absent extraordinary circumstances not present in this case. The reason for this rule is proved by just this situation. If a party in a case does not present the trial court with the legal arguments, the trial court does not make any findings or conclusions of law for the appellate court to review.

THEREFORE, IT IS THE ORDER OF THE COURT THAT this matter should be, and hereby is, DISMISSED because Appellant failed to meet the threshold requirements for appeals as set out in the law of the Hualapai Tribe of the Hualapai Indian Reservation.

March 1, 2001

DONALD TWIST, JR. & MICHAEL TWIST

Petitioners-Appellants,

v.

CRYSTAL CONNERS,

Respondent-Appellee.

SWITCA No. 00-002-CTC
CTC Nos. CA99-0062, 63

Appeal filed February 2, 2000

Appeal from the Cocopah Tribal Court
Kerstin LeMaire, Judge

Appellate Judges: Theresa Gomez, Neil Flores,
and Violet Lui-Frank

ORDER DISMISSING APPEAL

SUMMARY

Appeal dismissed for lack of jurisdiction because Appellant failed to state grounds for appeal required by the Cocopah rules of appellate procedure.

***

THIS MATTER comes before the Southwest Intertribal Court of Appeals pursuant to resolution CT 91-50 (enacted December 13, 1991) of the Cocopah Indian Tribal Council on behalf of the Cocopah Indian Tribe which appointed the Southwest Intertribal Court of Appeals to act as the Cocopah Indian Tribe's appellate court. This appeal is governed by the appellate rules of the Cocopah Indian Tribe, Article 2, chapter 8, §§ 210-211 of the Law and Order Code, as well as the rules of the Southwest Intertribal Court of Appeals, and the Court's inherent authority to manage its business. After reviewing the record and convening by teleconference, this Court determines that the appeal should be dismissed because of the appellants' failure to comply with the Tribe's law setting out grounds for appeal. No oral argument will be required since the appeal is dismissed.

1. JURISDICTION AND GROUNDS FOR APPEAL

A party has twenty days from the date the final order is entered by the tribal court, §211(a)(1). Here the final order was filed December 27, 1999, and the notice or petition for appeal was filed January 10, 2000. Thus, the appeal meets the time requirements. However, as discussed below, it does not meet the Tribe's requirements for the grounds for appeal, and must be dismissed.

Appellant appeals the judgment in favor of appellee Connors on two grounds:

1) judgment of the lower court was unjustifiable and unfair; and
2) appellee's knowledge of other means of transportation was not fully considered by the lower court.

2. FACTS AND PROCEDURE

The Cocopah Tribal Court held a separate hearing on each of the complaints and issued its consolidated order on December 27, 1999, finding in favor of the plaintiff, here appellee, Connors. The court found that the defendants, here appellants, took appellee Connors' car and rendered it inoperable, leaving her with no transportation to travel to work or to school. Since appellants had already paid to appellee certain sums, the Court ordered defendants to pay towing charges, transportation charges, and a prorated amount for an educational grant that appellee had to repay since she was forced to drop out of school as a result of her lack of transportation. The total judgment was $1,509.80, plus interest at the rate of 10% per year on the unpaid balance, and the defendants were found to be jointly liable for the entire amount.

The court found, further, that appellee Connors met her duty to mitigate damages and that appellants did not prove that alternative means of transportation to work were both available and a reasonable alternative, considering appellee's work schedule, nor was she able to find reasonable transportation alternatives to school.

3. BASIS FOR APPEAL

The Cocopah Tribe's appellate procedures are specific and the appellate court cannot consider cases that fall outside the scope of that law. Cocopah Tribal Code § 211 (2) states appeals shall be limited to the following:

a) Lack of jurisdiction
b) Irregularities or improprieties in the proceedings, or by the Tribal Court, the jury, any witness, or any party substantially prejudicial to the rights of petitioner.
c) Any ruling, order, decision of abuse of discretion which prevented a fair hearing or trial.
d) Newly discovered material evidence which could not, with reasonable care, have been produced at the trial or hearing.
e) Insufficient evidence to support the verdict, decision, order or judgment of the jury or Tribal Court.

f) An error of law substantially prejudicial to the rights of the appellant.

4. DISCUSSION

Appellants do not challenge the jurisdiction of the Cocopah Tribal Court, nor raise abuse of discretion issues or irregularities or improprieties in the lower court proceeding. Newly discovered evidence is not at issue, nor is sufficiency of the evidence or error of law. Appellants are simply not satisfied with the lower court decision, but do not raise specific errors that would support their challenge to the judgment.

The lower court did consider appellee's duty to mitigate, however, appellants' statement on appeal indicates, again, a dissatisfaction with how the lower court considered appellee's efforts to mitigate. This does not amount to a claim that there is newly discovered material evidence, or insufficient evidence to support the judgment of the court as the lower court clearly stated it considered appellee's effort to find alternative means of transportation and detailed appellee's efforts.

Appellants have not stated grounds required by the Cocopah Code for appeals which would give this Court jurisdiction to consider their appeal. As this Court has stated:

> Appellate courts should and do give great deference to trial court decisions for the simple reason that the trial court, having seen and heard the witnesses, is in a better position to determine their honesty and accuracy than is a higher court. Further, if an appellant believes that an appeal can be taken at any time without having to meet minimum standards requiring proof of something more specific than allegations of "disagreement and belief", every person who does not prevail at trial will file an appeal even if the evidence is clearly against the appellant's claims.

Archuleta v. Archuleta, 9 SWITCA 28 (1998)

THEREFORE, IT IS THE ORDER OF THE COURT THAT this matter should be, and hereby is DISMISSED.

August 17, 2001

IN THE MATTER OF A MINOR CHILD

SWITCA No. 00-004-ZTC
ZTC No. CV-G-98-24

Appeal filed April 7, 2000

Appeal from the Zuni Tribal Court
Albert Banteah, Jr., Judge

Appellate Judges: Randolph Barnhouse, Neil Flores, and William McCulley

ORDER DISMISSING APPEAL

SUMMARY

On Appellate Court's own motion, appeal dismissed for lack of jurisdiction and remanded to trial court for final judgment.

***

This matter comes before the Southwest Intertribal Court of Appeals pursuant to resolution M70-97-E-075 of the Zuni Pueblo Council, adopted December 30, 1997, appointing SWITCA the appellate court for Zuni Pueblo, the laws and rules of the Zuni Pueblo and the appellate rules of the Southwest Intertribal Court of Appeals, hereafter referred to as "SWITCA." This Court finds that the appeal was filed prematurely and should be dismissed and remanded to the Pueblo court for final action.

History

This case arose as a result of a custody dispute between the parents of the child and between the parents and the maternal grandmother. Initially, the grandmother filed a petition seeking legal guardianship and custody of the child who was then in the custody of the child's mother. The pueblo court denied the petition and recognized a written agreement between the parents that the child's custody was to remain with the father. Order of December 1, 1998. Thereafter, the pueblo court issued notices of hearing to the parents for September 28, 1999, for a custody hearing. Apparently, the hearing was not held, and the parents entered into mediation which was ordered by the court in an order dated March 7, 2000. Prior to that order, the pueblo court issued a notice of hearing to the three parties which was described as a "review hearing" and to be held on March 7, 2000. At that hearing, the parents and grandmother were present with both parents represented by counsel, the resulting order transferred *temporary* (emphasis added) guardianship and

custody of the child to the grandmother immediately. Also on March 7, 2000, a New Mexico state court order prohibiting domestic violence was issued pursuant to a motion filed by the father against the mother, but also finding that the father had violated a previous order requiring either an evaluation or counseling for the child. The New Mexico state court then ordered the father to take the child to the doctor and threatened sanctions against him if he failed to comply with the order. The father, through his counsel, submitted a timely notice of appeal from the March 7, 2000 Zuni Pueblo court order transferring temporary guardianship and custody to the grandmother.

Procedural Issue

A court may raise an issue of the court's jurisdiction at any time on its own motion, even if the parties do not raise it. Pursuant to its inherent powers to determine its jurisdiction and to SWITCA appellate rules, the Court determines that it is without jurisdiction to hear this appeal. *Whatonome v. Hwal'Bay'Ba:J Enterprises*, 10 SWITCA Rep. 1 (1999); *Vigil v. Pueblo of Nambe*, 8 SWITCA Rep. 1 (1997)

The SWITCA appellate rules provide that the Court may review any final order ending litigation. SWITCARA # 3(d) (2001), "The appellate court may review any final judgment, order, . . . ending litigation and requiring nothing more than execution of the judgment . . . ." See also *Norwest v. Edwards*, 28 ILR 6078 (Confederated Tribes of the Colville Reservation Court of Appeals, No. AP01-001 (3/16/01)). The rules also provide that if the Court, after a preliminary review of the case, finds that it is without jurisdiction, it shall issue a written order denying the appeal. SWITCARA #12 (2001) (preliminary finding of jurisdiction). Finally, the rules provide a process for seeking an interlocutory appeal. SWITCARA #13 (2001).

Based upon the record and the facts of this case, it is clear the trial court did not issue a final judgment awarding the custody of the child to any party permanently, nor did the appellant comply with rule 13 to seek an interlocutory appeal. Therefore, this Court dismisses this appeal and remands it to the trial court for final determination.

IT IS HEREBY ORDERED THAT THIS APPEAL BE AND HEREBY IS DISMISSED AND REMANDED FOR FINAL DETERMINATION.

December 27, 2001

RAELYNN MANUEL,

Petitioner-Appellee,

v.

STERLING MANUEL, JR.,

Respondent-Appellant.

SWITCA No. 00-005-HTC
HTC No. DV-00-01

Appeal filed April 20, 2000

Appeal from the Hualapai Tribal Court
Joseph T. Flies-Away, Judge

Appellate Judge: Ann B. Rodgers

ORDER DISMISSING APPEAL

SUMMARY

Appeal dismissed because Appellant failed to meet the threshold requirements in the Hualapai rules of appellate procedure.

***

THIS MATTER is before the Southwest Intertribal Court of Appeals pursuant to resolution 07-95 (February 4, 1995) of the Hualapai Tribal Council and pursuant to the Hualapai Tribe's Law and Order Code as amended, the Southwest Intertribal Court of Appeals rules (SWITCARA), and the Court's inherent authority to manage its business.

Appellant Sterling Manuel, Jr., by and through advocate Sterling Manuel, Sr., appeals the order of the trial court granting Appellee's Petition for Divorce, awarding custody of the minor children to Petitioner and allowing Appellant reasonable visitation with the minor children. Appellant argues that, as the father of the minor children, he should be entitled to joint custody "in case anything happens to the mother."

When the Court Can Hear an Appeal

The Hualapai Tribe's appellate procedures are very specific. The appellate court cannot hear cases that fall outside the scope of that law. In order to challenge the trial court's findings of fact, an appellant must overcome

the presumption that the findings are without reversible error. The rule states:

> The presumption may be overcome only by a sworn written statement presented to the Court at the time of the filing of the notice of appeal which establishes on the basis of the statement any one or more of the following grounds:
>
> a. That a witness ready and willing to testify at the time of the trial on behalf of the appellant was not allowed by the trial judge to take the witness stand and to testify and that such testimony would have materially altered the judgment of the trial court.
> b. That the Tribal Judge refused to admit documentary or other physical evidence and that such evidence would have materially altered the judgment of the trial court.
> c. That after the trial, the appellant discovered material evidence which, with reasonable diligence could not have been discovered and produced at trial, and that such evidence would have materially altered the judgment of the trial court.

Hualapai Nation Law and Order Code, § 1.24(1), as amended.

> The Appellate Division shall determine whether the conclusions of law are correct based on the findings of fact or amended findings of fact and whether the judgment is supported by the facts and the law.

Hualapai Nation Law and Order Code, § 1.24(2), as amended.

Applying the Law to this Case

Appellant filed no statement with his notice of appeal, and the notice of appeal cannot constitute a sufficient statement because it was not sworn to as required by the §1.24(1). Under these circumstances, the Hualapai Law is clear that we must presume that the findings of the trial court are "without reversible error". *Hualapai Nation Law and Order Code, §1.24(1), as amended*.

Even if the Notice of Appeal is considered, none of the allowable grounds for appeal are mentioned. There is no statement that a witness was not allowed to testify; there is no statement that Appellant was prevented from presenting any documentary or other physical evidence; and there is no statement that new evidence only learned of after trial would exonerate Appellant. Therefore, the Notice of Appeal, even if it had been sworn, does not state any allowable ground for appeal based on the findings of the court.

Appellant asserts that he is entitled to joint custody because he is the father of the children. The fact that he is the father is undisputed. However, Appellant does not state any legal basis for that claim. The Law & Order Code of the Hualapai Indian Tribe states otherwise.

> The Court shall determine custody, either originally or upon petition for modification, in accordance with the best interests of the child. The court may consider all relevant factors, including:
>
> 1. The wishes of the child's parent or parents as to his custody.
> 2. The wishes of the child as to his custodian.
> 3. The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest.
> 4. The child's adjustment to his home, school and community.
> 5. The mental and physical health of all individuals involved.

Hualapai Tribe Law & Order Code §3.22. The trial court specifically found that "Due to the Respondent's incarceration he is unable to request or take custody of the children." Appellant does not dispute that finding, and it is sufficient to support the legal conclusion that it is in the best interests of the child for the Appellee to have custody of the children. The Court notes that Appellant seems to understand the Court, by granting the petition for divorce and awarding custody to Appellee, terminated his parental rights. This is not so. Termination of parental rights is a separate issue and was not addressed by the trial court. Appellant retains all parental rights, except that of physical custody of the minor children. He still has the power to request the trial court to modify the terms of the decree concerning the issue of joint custody, provided he complies with the requirements of Section 3.22(B) ("No motion to modify a custody decree may be made earlier than one year after its date, unless the Court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may endanger seriously his mental, moral or emotional health").

THEREFORE, IT IS THE ORDER OF THE COURT THAT this matter should be, and hereby is, DISMISSED because Appellant failed to meet the threshold requirements for appeals as set out in the law of the Hualapai Tribe of the Hualapai Indian Reservation.

March 2, 2001

PUEBLO OF ISLETA,

Respondent-Appellee,

v.

MICHAEL ALLEN LENTE

Petitioner-Appellant.

SWITCA No. 00-007-ITC
ITC No. CR-178-00(A)(B)

Appeal filed June 14, 2000

Appeal from the Isleta Pueblo Tribal Court
Racquel Montoya-Lewis, Judge

Appellate Judge: Ann B. Rodgers

ORDER

THIS MATTER comes before the Court on its own motion to dismiss the above referenced matter because the matter has been resolved.

It is therefore the order of this Court that the above matter be and hereby is dismissed.

IT IS SO ORDERED.

May 21, 2001

MICHELLE D. CHAVEZ and GERALDINE RAEL-HASKINS,

Petitioners-Appellants,

v.

MARK TORRES

Respondent-Appellee.

SWITCA No. 00-009-SUTC
SUTC No. 99-CV-100

Appeal filed June 14, 2000

Appeal from the Southern Ute Tribal Court
Elizabeth C. Callard, Judge

Appellate Judge: Melissa L. Tatum

OPINION

SUMMARY

Appellate court affirmed tribal court's dismissal of plaintiffs' complaint for failure to state a claim because tribal court did not commit any reversible errors. Plaintiffs were represented by counsel throughout the proceedings who apparently did not understand the tribal code's fact-pleading requirements. Both of plaintiffs' complaints contained only conclusory allegations and restatements of legal tests, and were devoid of the underlying facts required by the tribal code.

***

This matter comes before the Southwest Intertribal Court of Appeals from the Southern Ute Tribal Court, and arises out of a complaint alleging sexual harassment, tortious interference with employment, negligent infliction of emotional distress, and outrageous conduct. The lower court dismissed plaintiffs' complaint for failure to state a claim. Plaintiff filed a petition with this court requesting permission to bring a discretionary appeal. This court granted permission for the appeal, and the parties have now filed briefs containing their arguments. This Court has reviewed the briefs and, for the following reasons, concludes that the trial court did not commit any reversible errors. Therefore, this Court affirms the decision of the lower court.

I. Factual Background

On June 16, 1999, Michelle D. Chavez and Geraldine

Rael-Haskins ("plaintiffs") filed a complaint in the Southern Ute Tribal Court accusing Mark Torres ("defendant") of sexual harassment and of violating Title IV [sic] of the Civil Rights Act of 1964. Torres filed a motion to dismiss, and on December 7, 1999, plaintiffs filed an amended complaint. The amended complaint listed four claims for relief – sexual harassment, tortious interference with employment, infliction of emotional distress, and outrageous conduct. On January 3, 2000, Torres filed a second motion to dismiss. On July 11, 2000, the trial court granted the motion to dismiss. Plaintiffs appealed to this Court, arguing that the trial court erred in dismissing all four claims and that the trial court also erred in not allowing plaintiffs to amend their complaint to fix the problems.

II. Legal Analysis

The Southern Ute Indian Tribal Code provides that "a civil action is commenced by filing with the court a short statement of the plaintiff's claim setting forth the facts giving rise . . ." to the lawsuit. S.U.I.T.C. §2-1-102(1). This short statement is often referred to as a "complaint," and it serves the purpose of notifying both the defendant and the court of the nature of the lawsuit. It is particularly important to note that the law of the Southern Ute Tribe requires the complaint to set "forth the facts" that form the basis of the action. These facts will inform the defendant of the basis of the lawsuit and will place the defendant on notice of what he is being accused and what he must defend against.

Because a lawsuit is an expensive and time-consuming process, for both the parties and the court, there are a variety of stages at which the defendant may ask the court to evaluate the basis of the lawsuit and whether enough information has been put forward to justify proceeding. Although the Southern Ute Code makes it clear that formalities should be minimized, the Code also makes it clear that some rules must be observed, or unfounded lawsuits will waste the resources of both the litigants and the court. This is where a motion to dismiss comes into play. A motion to dismiss asks a court to determine whether the plaintiffs have provided enough information to justify continuing with the lawsuit.

In this case, the defendant filed a motion to dismiss, alleging that the plaintiffs' complaint did not satisfy the rules of the Southern Ute Tribe because the complaint did not contain the required information. When ruling on a motion to dismiss, a court looks only at the information contained in the complaint. The purpose of a motion to dismiss is to test the legal sufficiency of the complaint itself, and accordingly must be resolved in light of the requirements found in the Southern Ute Code. *See, e.g.*, 5A Wright & Miller, FEDERAL PRACTICE AND PROCEDURE §1356 (1990). Because a motion to dismiss is often filed at a very early stage in the litigation, before much, if any, discovery has been conducted, the court must assume that all facts listed in the complaint are true and should review all allegations in the light most favorable to the plaintiffs. Unsupported conclusions are not "facts," and therefore a court reviewing a motion to dismiss should not treat them as such.

Because a motion to dismiss involves purely legal issues, this Court reviews a trial court's decision to grant a motion to dismiss *de novo*, meaning this Court takes a fresh and independent look and does not give deference to the trial court's decision. This standard is especially important in the present case, as the decision to grant the motion to dismiss means that plaintiffs will not receive their day in court.

Plaintiffs have raised five issues on appeal:

1) the trial court erred in dismissing the sexual harassment claim;
2) the trial court erred in dismissing the tortious interference with employment claim;
3) the trial court erred in dismissing the infliction of emotional distress claim;
4) the trial court erred in dismissing the outrageous conduct claim; and
5) the trial court erred when it refused to allow plaintiffs to amend their complaint.

This Court will address each of these allegations in turn.

A. Sexual Harassment Claim

In the first count of their complaint, plaintiffs accuse defendant of sexual harassment. This count builds on the "general allegations" portion of the complaint, which contends that defendant repeatedly sexually harassed plaintiffs, plaintiffs expressed their concern, and as a result defendant was ultimately reprimanded and disciplined. Amended Complaint, paragraphs 8-10. The general allegations provision goes on to state that defendant subjected plaintiffs to retaliation, verbal threats, and continued harassment even after he was disciplined. Amended Complaint, paragraph 11.

In their first claim for relief, plaintiffs restate that

defendant repeatedly behaved in an offensive manner, "in the form of sexual statements and innuendo, demeaning and offensive verbal abuse and inappropriate physical contact." Amended Complaint, paragraph 14. Plaintiffs further allege that defendant continued this conduct even after plaintiffs objected, "thereby creating a hostile work environment." Amended Complaint, paragraph 15. As a result of defendant's behavior, plaintiffs "suffered damages, including, but not limited to, emotional distress, loss of reputation, inconvenience, [and] loss of enjoyment of life." Amended Complaint, paragraph 16.

The trial court dismissed plaintiffs' claim for sexual harassment, asserting that no common law claim for sexual harassment exists and that no cause of action for sexual harassment exists under tribal law. Order of Dismissal, paragraphs 7-10 (July 11, 2000).

On appeal, plaintiffs argue that the trial court erred for two reasons. First, the common law of torts is a living creature, and that common law now recognizes sexual harassment as an independent tort. Second, plaintiffs argue that tribal law does contain a cause of action for sexual harassment.

The Southern Ute Indian Tribal Code does explicitly incorporate common law:

> Where there is no law contrary, the common law of the United States as adopted from England, insofar as the same is applicable and of a general nature, shall be the rule of decision, and shall be considered as of full force until repealed or altered by tribal members.

S.U.I.T.C. §1-2-101(4). Sexual harassment, however, is not a common law tort; rather, it is a statutory creation. *See* Schiff & Kramer, LITIGATING THE SEXUAL HARASSMENT CASE 27 (2000); Lindemann & Kadue, SEXUAL HARASSMENT IN EMPLOYMENT LAW 352 (1992). A plaintiff wanting to bring a tort claim for sexual harassment must rely on common law claims such as assault, battery, tortious interference with contract, or intentional infliction of emotional distress. *See* Schiff & Kramer at 27-28; Lindemann & Kadue at 351-52; Conte, SEXUAL HARASSMENT IN THE WORKPLACE §9.4 (1994). *Cf. Green v. Wyman-Gordon Co.*, 664 N.E.2d 808 (Mass. 1996).

Plaintiffs argue that society has increasingly recognized the wrongness of sexual harassment, and it has now become part of common law. While it is true that sexual harassment has been increasingly recognized as a violation of the law, that is primarily due to the state and federal statutes protecting against sexual harassment. Common law claims have increased, but not as a separate tort of sexual harassment. Rather, there is an increasing awareness on the part of courts that sexual harassment can constitute assault, battery, intentional infliction of emotion distress, and other such wrongful conduct. Plaintiffs rely on two cases for their contention that the common law recognizes sexual harassment – *Stamper v. Hiteshew*, 797 P.2d 784 (Colo. App. 1990) and *Arizona v. Schallock*, 941 P.2d 1275 (Ariz. 1997). Neither case stands for that proposition.

Stamper involved a woman who filed suit against her employer for sexual harassment, sexual discrimination, wrongful and constructive discharge, civil assault and battery, and outrageous conduct. The issue in dispute was whether the plaintiff's claims were barred by the state's Workmen's Compensation Act. In other words, was the Workmen's Compensation Act the exclusive method for pursuing her claims? Specifically, the court was faced with the issue of "whether plaintiff's injuries arose out of her employment obligations." 797 P.2d at 785. The appellate court held that the trial court should not have dismissed the plaintiff's claims, as there existed a real question of whether the defendant's actions were intentional, resulting in the possibility that her claims did not arise out of her employment. 797 P.2d at 786. The court was not faced with, and thus did not decide, whether sexual harassment was an independent common law tort. Indeed, since the plaintiff had alleged numerous other common law torts, there was no need for the court to sort out that issue. Thus, *Stamper* does not stand for the proposition that sexual harassment is a common law tort.

Plaintiffs also rely on *Schallock*, an opinion by the Arizona Supreme Court. In that case, the question before the court was whether the supervisor's actions in sexually harassing an employee were within the course and scope of employment. 941 P.2d at 1276. If they were not, then the state had no duty to indemnify the defendant under the state's insurance policy. *Id.* The plaintiff had filed suit alleging the public policy tort of sexual harassment, the tort of negligent retention, and the tort of intentional infliction of emotional distress. 941 P.2d at 1277. The jury found in favor of the plaintiff on the key issues, although the description of the jury verdict reveals that these issues were phrased as 1) intentional or reckless infliction of emotional distress and/or sexual harassment in the workplace and 2) negligent hiring. 941 P.2d at 1278. Thus, although there is some suggestion that

Arizona may view sexual harassment as a common law tort, that was not the key issue in the case, and it was not the issue decided by the Arizona Supreme Court. Even if Arizona does recognize sexual harassment as a common law tort, it appears that Arizona is one of a small minority of states to do so. Thus, sexual harassment has not permeated the common law to the extent that it has become "of a general nature," thus coming within the provisions of the tribal code.

Plaintiffs do argue, however, that tribal law itself recognizes the claim of sexual harassment. Plaintiffs base their argument on two provisions: Title 19 of the tribal code and the employee handbook of the Sky Ute Casino. Neither of these provisions is sufficient to support plaintiffs' claims. Title 19 of the tribal code contains the Southern Ute Indian Tribal Code of Ethics. Section 19-2-120 does declare that "no tribal official shall engage in sexual harassment of any fellow official, tribal employee or any other person while conducting tribal business." S.U.I.T.C. §19-2-120.

Plaintiffs cannot rely on this section for two reasons. First, by its very terms, the prohibition applies to "tribal officials." The Ethics Code defines "tribal officials" as "an elected tribal official or appointed tribal official." S.U.I.T.C. §19-1-104(32). Plaintiffs' complaint states that defendant was the Security Director of Operations for the Sky Ute Casino, not that defendant was an elected or appointed tribal official. Plaintiffs also cannot extrapolate that the Ethics Code covers defendant, as extending the Code that far would violate the stated purpose of the Code, which is "to require the highest standards of ethical conduct of all tribal officials and members of tribal boards, committees and commissions . . ." S.U.I.T.C.§19-1-102.

Plaintiffs also cannot rely on the Ethics Code because it does not create an independent cause of action. Rather, the Code creates an administrative procedure in which people can file complaints with the tribal Ethics Office. S.U.I.T.C. §19–5-101. Aggrieved parties may appeal the administrative decision to the tribal court, but the Code is clear that the tribal court's review is limited to reviewing the record made at the committee hearing. S.U.I.T.C. §19-6-112. Thus, there is no provision for people to directly file suit under the Ethics Code in tribal court.

The employee handbook likewise cannot help plaintiffs establish that tribal law contains a cause of action for sexual harassment. The nature of an employee handbook is to establish policies and procedures for the company. As the trial court noted, an "employment policy provides procedures for addressing sexual harassment in the employment context." Order of Dismissal, paragraph 8 (July 11, 2000). Plaintiffs exercised their rights under that procedure and pursued a grievance against defendant. An employee handbook does not create an independent cause of action under tribal law.

Since sexual harassment is not a common law tort incorporated into tribal law, and tribal law itself does not contain such a cause of action, the trial court was correct to dismiss plaintiffs' claims for sexual harassment.

B. Tortious Interference with Employment Claim

The second claim in plaintiffs' complaint is for tortious interference with employment. In this count, plaintiffs claim that defendant knew of plaintiffs' duties to the Sky Ute Casino and still "interfered with Plaintiffs' ability to fulfill their employment duties and responsibilities by repeatedly subjecting Plaintiffs to sexual conduct, statements and innuendo, demeaning and offensive verbal abuse and harassment of a sexual nature." Amended Complaint, paragraph 20. Plaintiffs also allege that as a result of defendant's actions, they "suffered damages, including, but not limited to, emotional distress, loss of reputation, inconvenience, [and] loss of enjoyment of life." Amended Complaint, paragraph 21. In dismissing this claim, the trial court held:

> The facts alleged in the Complaint all relate to the Plaintiffs' claim that the Defendant sexually harassed them on the job; no facts are alleged, however, that would extend the Plaintiffs' claim of sexual harassment to a claim of tortious interference with contract. The Plaintiffs have not made any specific factual allegations that would place the Defendant on notice as to how the Plaintiffs were prevented from performing their employment obligations, how the Defendant's conduct caused the Plaintiffs pecuniary loss, or what that pecuniary loss might be. The second count of the Complaint cannot survive Defendant's motion to dismiss if there is no more to it than the initial claim of sexual harassment contained in the first count of the Complaint and the general, conclusory language contained in ¶21. The general, conclusory language in ¶21 is not the type of fact-based allegation required by the Tribal Code, and the specific factual allegations relating to sexual harassment, without more, fail to state a claim for

> tortious interference with employment.

Order of Dismissal, paragraph 14 (July 11, 2000).

Tortious interference with employment is a version of the standard common law tort of intentional interference with contract, specifically, with another's performance of his own contract. This tort is enunciated in section 766A of the Restatement of Torts (Second):

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him.

Tortious interference is one of a group of tort claims protecting economic relations. *See, e.g.*, PROSSER & KEETON ON TORTS §§128-130 (1984).

Tortious interference is one of the common law theories used in sexual harassment cases. To be successful, however, a plaintiff "must show that the harasser intentionally and improperly interfered with the complainant's performance of the employment contract, either by inducing the employer to discharge the complainant or in some other way." Lindemann & Kadue at 364. *See also* Conte, SEXUAL HARASSMENT IN THE WORKPLACE §9.8 (1994). In addition, a plaintiff must prove that the harasser acted with an unlawful motive and that the harasser's actions were outside the scope of his authority. Lindemann & Kadue at 364-65. *See also* Conte, SEXUAL HARASSMENT IN THE WORKPLACE §9.8 (1994).

Plaintiffs argue on appeal that they have pled sufficient information in their complaint. According to plaintiffs, the tribal court appears "to be demanding that Plaintiffs supply `evidentiary facts' which provide precise information as to the specific acts and statements of the Defendant which support the claims now asserted against him, and the specific harms suffered by each of the Plaintiffs which support their claims for damages." Plaintiffs' Reply Brief, pp. 2-3. Plaintiffs misunderstand the tribal court's demands, which are based on the plain language of tribal law.

Tribal law requires that plaintiffs begin their case ". . .by filing with the court a short statement of the plaintiff's claim setting forth the facts giving rise . . ." to the lawsuit. S.U.I.T.C. §2-1-102(1). Plaintiffs' amended complaint contains very few facts, but instead is essentially a litany of conclusions. The amended complaint does not describe what defendant did or said that constituted sexual harassment, and what he did to retaliate against plaintiffs. Did he make inappropriate remarks? Make inappropriate physical contact? Make inappropriate demands? Did he threaten to fire plaintiffs? Give them poor job evaluations? Reduce their pay? Tribal law does not require that the complaint contain every relevant fact and every relevant detail. It does, however, require that plaintiffs provide a short statement of the facts underlying the case. The only "facts" provided by plaintiffs are their conclusory assertions that defendant interfered with their ability to perform their contract by sexually harassing them. But sexual harassment in and of itself does not automatically constitute tortious interference. Rather, that sexual harassment must have been motivated by improper reasons and be outside the scope of defendant's authority. Even though plaintiffs have not specifically made these requisite allegations, it can be inferred that most cases of sexual harassment would satisfy them. But, and what is the true fatal error in their amended complaint, plaintiffs have not provided any facts to support their claim that defendant interfered with their ability to perform their employment obligations. Did defendant's actions lead plaintiffs to miss work? Be demoted? Be reprimanded? Although this is not an exclusive list, it does enumerate some of the typical factors that plaintiffs might have alleged.

Plaintiffs' amended complaint does not contain any facts to support their allegation that defendant made it more difficult, or even impossible, to fulfill their employment obligations. It is not enough to allege the conclusion or restate the legal standard; plaintiffs must provide some facts in their complaint to show the basis for their allegations. Accordingly, the tribal court did not err in dismissing plaintiffs' claim of tortious interference with employment.

C. Infliction of Emotional Distress Claim

The third count of plaintiffs' amended complaint accused defendant of acting "in a negligent manner by continuing to subject Plaintiffs to abusive and harassing conduct of a sexual nature after Plaintiffs had objected to such conduct." Amended Complaint, paragraph 23. The complaint also accuses defendant of acting in a negligent manner by retaliating against the plaintiffs after he was reprimanded for his sexual harassment, and that

defendant's actions "caused Plaintiffs to be put in fear for their own safety and well-being." Amended Complaint, paragraphs 23 and 24.

In dismissing plaintiffs' claim for negligent infliction of emotional distress, the trial court stated "[t]he Plaintiffs have not alleged facts that, if proven, would establish a claim for negligent infliction of emotional distress under any of the four standards that the Court might choose to apply when interpreting the common law and defining Tribal law as it pertains to claims of negligent infliction of emotional distress." Order of Dismissal, paragraph 18 (July 11, 2000).

Historically, the common law has been reluctant to provide damages for emotional distress, as emotional distress is hard to measure and is subject to problems of proof. PROSSER & KEETON ON TORTS §54 (1984). Nevertheless, many jurisdictions now recognize the tort of negligent infliction of emotional distress, although it is subject to varying tests to control for the problems of assessment and proof.

Regardless of which test is used, however, this Court must still return to the Southern Ute Code's requirement that a complaint contain a statement of the facts giving rise to the claim. As with the previous claim, plaintiffs' complaint is again extremely conclusory and lacking in facts. What did defendant do to retaliate against plaintiffs? What statements or actions did he make that put plaintiffs "in fear for their own safety and well-being?" How were plaintiffs inconvenienced? Did their work suffer? Did they miss days? Were they reassigned? Were they not given promotions? Were they ridiculed in front of other employees? Did they suffer any medical harm?

Although plaintiffs are not required to fully describe and prove every single relevant fact in their complaint, they are required to make at least a short statement of the facts in their complaint. These facts can then be fleshed out and explored as part of discovery, but the complaint must contain more than conclusory assertions of liability. The statements "defendant acted in a negligent manner by continuing to harass plaintiffs" and that "defendant acted in a negligent manner by retaliating against plaintiffs" are, at best, conclusory assertions. They are not the facts required by §2-1-102(1) of the Southern Ute Indian Tribal Code. Accordingly, the trial court did not err in dismissing this count of the complaint.

D. Outrageous Conduct Claim

In the final count of their complaint, plaintiffs allege that defendant's actions were "so outrageous in character, and so extreme in degree, that a reasonable member of the community would regard such conduct as atrocious, going beyond all possible bounds of decency and utterly intolerable in a civilized community." Amended Complaint, paragraph 27. In dismissing this claim, the trial court declared that "[t]he tort of outrageous conduct requires the proof of facts far beyond offensive sexual harassment of fellow employees on the job, and the Plaintiffs have provided insufficient factual allegations to support such a claim." Order of Dismissal, paragraph 21 (July 11, 2000).

The common law does recognize a claim for outrageous conduct. But this claim is subject to very strict requirements. A leading treatise on tort law declares:

> [T]he rule which seems to have emerged is that there is liability for conduct exceeding all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind. The requirements of the rule are rigorous, and difficult to satisfy.

PROSSER & KEETON ON TORTS §12 (1984). With respect to this claim, the lower court has overstated the legal requirements for a claim of outrageous conduct. Sexual harassment covers a wide assortment of possible behaviors, ranging from inappropriate comments to inappropriate touching to inappropriate demands. At the most severe end of the scale, it is easily possible that repeated sexual harassment could satisfy the requirements of the tort. Despite this overstatement, however, the lower court correctly granted the motion to dismiss. Once again, the problem is that plaintiffs failed to provide the requisite statement of facts. The complaint does not describe the nature of the sexual harassment or the nature of the retaliation. Rather, it simply declares that defendant sexually harassed plaintiffs and retaliated against them, and that these actions satisfy the legal test. That is a listing of mere conclusory assertions, unsupported by facts. *Cf. Deitsch v. Tillery*, 833 S.W. 2d 760 (Ark. 1992) (motion to dismiss claim of outrageous conduct was wrongfully granted because complaint went beyond mere assertions, as it specifically identified the conduct that was allegedly outrageous). As such, the complaint fails the minimal requirements set forth in the Southern Ute Code, and the trial court was

correct to grant the motion to dismiss.

E. Denial of Permission to Amend Complaint

Finally, plaintiffs argue that the trial court erred in not allowing them to file a third version of their complaint. In refusing to grant plaintiffs' request, the lower court stated, "[a]lthough the amendment of a complaint may be appropriate to allow a party an opportunity to correct deficiencies in a complaint or to conform the complaint to recently discovered evidence, it is not appropriate to allow a party to abuse the provisions authorizing the amendment of complaints to obtain repeated opportunities to amend a complaint every time an opposing party points out its legal deficiencies." Order of Dismissal, paragraph 23 (July 11, 2000).

The trial court is correct that plaintiffs should not be given repeated opportunities to amend their complaint in response to errors pointed out by the defendant. Here, plaintiffs were already given one opportunity to amend their original, wholly deficient, complaint. The second complaint, while not as blatantly bad as the original, is still insufficient as a matter of tribal law. The Southern Ute Indian Tribal Code does address amendments of pleadings, including complaints. The Code explicitly states that "A party may amend its pleadings once prior to trial . . ." S.U.I.T.C. §2-1-110. Plaintiffs were given that opportunity. The Code says nothing about a second amendment.

Plaintiffs argue on appeal that leave to amend "shall be freely given when justice so requires." This standard, however, is drawn from the language of the Federal Rules of Civil Procedure. See F.R.C.P. 15(a). The Southern Ute Indian Tribal Code contains no similar language. In addition, the federal courts have adopted a more relaxed, notice style pleading in which a plaintiff need only plead "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." F.R.C.P. 8(a). Again, this is a different standard than the one contained in tribal law, which explicitly requires fact pleading. Indeed, the leading treatise on federal procedure states that the relaxed standard of Rule 15(a) "reflects the fact that the federal rules assign the pleadings the limited role of providing the parties with notice of the nature of the pleader's claim or defense and the transaction, event, or occurrence that has been called into question; they no longer carry the burden of fact revelation and issue formulation . . . ." Wright, Miller & Kane, 6 FEDERAL PRACTICE AND PROCEDURE §1471 (1990). Thus, plaintiff's argument is based on the wrong standard. Tribal law requires fact pleading, and both of plaintiffs' complaints contain only conclusory allegations and restatements of legal tests, devoid of underlying facts.

The record reflects that plaintiffs were represented by counsel at all stages in this proceeding. Thus, plaintiffs were not pro se litigants who could not be expected to read the tribal code and understand its requirements. Attorneys are supposed to be versed in how to research and understand legal requirements, as well as the difference between federal, state, and tribal law. It is possible that plaintiffs' amended complaint could meet the very lenient standards of notice pleading in federal court. It certainly does not meet the tribal code's fact pleading requirements. Indeed, both complaints filed by counsel on behalf of plaintiffs failed in these requirements. Justice does not demand a third bite at the apple.

III. Conclusion

For the foregoing reasons, this Court finds that the trial court committed no reversible error. Accordingly, this Court affirms the judgment of the lower court. It is so ordered.

June 22, 2001

MATTHEW C. LUCERO,

Petitioner-Appellant,

v.

ROSALIE ABEITA,

Respondent-Appellee.

SWITCA No. 00-010-ITC
Isleta No. CR-0361-95

Appeal filed August 18, 2000

Appeal from the Isleta Pueblo Tribal Court
James Abeita, Judge

Appellate Judge: Ann B. Rodgers

ORDER

THIS MATTER comes before the Court on its own motion to dismiss the above referenced case and refer it to

the newly constituted Isleta Court of Appeals.

It is therefore the order of this Court that the above matter be and hereby is dismissed.

IT IS SO ORDERED.

May 21, 2001

BILLY CRUZ,

Petitioner-Appellant,

v.

ISLETA GAMING PALACE,

Respondent-Appellee.

SWITCA No. 00-011-ITC
Isleta No. CV-010-98

Appeal filed August 18, 2000

Appeal from the Isleta Pueblo Tribal Court
Racquel Montoya-Lewis, Judge

Appellate Judge: Ann B. Rodgers

ORDER

THIS MATTER comes before the Court on its own motion to dismiss the above referenced case and refer it to the newly constituted Isleta Court of Appeals.

It is therefore the order of this Court that the above matter be and hereby is dismissed.

IT IS SO ORDERED.

May 21, 2001

JOSE D. JIRON/ JIRON'S HAYBARN,

Petitioner-Appellant,

v.

ALEX and CHARLOTTE LUCERO,

Respondents-Appellees.

SWITCA NO. 00-012-ITC
Isleta No. CV-056-98

Appeal filed August 18, 2000

Appeal from the Isleta Pueblo Tribal Court
Steffani A. Cochran, Judge

Appellate Judge: Ann B. Rodgers

ORDER

THIS MATTER comes before the Court on its own motion to dismiss the above referenced case and refer it to the newly constituted Isleta Court of Appeals.

It is therefore the order of this Court that the above matter be and hereby is dismissed.

IT IS SO ORDERED.

May 21, 2001

MIKE and GLORIA CASIAS MOUNTS,

Petitioners-Appellants,

v.

MATTHEW J. BOX,

Respondent-Appellee.

SWITCA No. 00-013-SUTC
SUTC No. 00-CV-40

Appeal filed August 18, 2000

Appeal from the Southern Ute Tribal Court
Elizabeth C. Callard, Judge

Appellate Judge: Melissa L. Tatum

OPINION

SUMMARY

In breach of contract dispute, appellate court affirmed tribal court's award of damages because there was no reversible error. Tribal court had jurisdiction over appellants under federal and tribal law. Tribal court judge was fair and even-handed with all parties. Tribal court's decision that appellee substantially performed the contract for excavation services was supported by substantial evidence, and there was no abuse of discretion. Alleged alterations of evidence were not material nor were they done to mislead the court, but rather to provide additional information to the court. The trial court's decisions were based on its credibility decisions and findings of fact and were not clearly erroneous. The ruling that appellee reasonably did not understand that he was fired is not clearly erroneous. The doctrine of accord and satisfaction is inapplicable because the disputed debt was not clearly defined where part of the debt was disputed and part was not disputed.

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This matter comes before the Southwest Intertribal Court of Appeals from the Southern Ute Tribal Court, and arises out of a complaint alleging breach of contract. After a trial, the lower court found in favor of plaintiff and ordered defendants to pay damages of $1,130.00, plus court costs of $25. Defendants have exercised their right to appeal the trial court's decision and have filed a brief in support of their appeal. Plaintiff was also given an opportunity to file a brief but has chosen not to do so. This Court has reviewed the Mounts' notice of appeal and their brief, as well as both the lower court record and the tapes of the two hearings conducted below. For the following reasons, this Court finds no reversible error. Accordingly, this Court affirms the judgment of the lower court.

I. Defendants' Motion to Dismiss

As a preliminary matter, this Court must address the pleading filed by defendants on September 19, 2001. This pleading is misleadingly captioned "Brief in Support of Defendant's Response to Plaintiff Motion for Dismissal of Judgment and Order." The contents of this pleading reveal not that plaintiff filed a motion for dismissal, but rather that defendants argue plaintiff's failure to file a response brief should be construed as entitling defendants to the appellate equivalent of a default judgment. Defendants misunderstand both the nature of an appeal and the relevant appellate rules.

Defendants filed this appeal challenging the trial court's judgment, which found in favor of plaintiff. Thus, defendants bear the burden of convincing this Court that some or all of the trial court's decision was in error. Defendants must do this by pointing to specific things they think are wrong and arguing why the trial court's decision is incorrect. This burden is the reason that defendants have the responsibility of filing the notice of appeal and filing the first brief. Plaintiff then has the opportunity to file a response, and defendants get the last word with the reply brief.

As this Court has noted on two occasions, the appellate rules of the Southern Ute Indian Tribal Court mandate the filing of a notice of appeal and a filing fee, but make the filing of additional briefs optional rather than mandatory. *See Southern Ute Tribe v. Williams*, 6 SWITCA Rep. 10, 11 (1995); *Southern Ute Tribe v. Williams*, 6 SWITCA Rep. 14, 14-15 (1995). There is some authority to the contrary, as in *Santistevan v. Myore*, 9 SWITCA Rep. 21, 21-22 (1997), this Court dismissed an appeal because the appellant failed to file a brief. As should be clear, however, it is very different for an appellant not to file a brief than for the appellee. The appellant bears the burden of pointing out errors in the trial court's process and decision, as well as the burden of convincing the appellate court to reverse the lower court's decision because of those errors. If an appellant's notice of appeal does not contain enough information, and the appellant does not file a supplemental brief, then the appellate court has no information on which to base its decision. In the present case, however, the plaintiff-appellee is the one who failed to file a brief. The plaintiff, as appellee, though, bears no burden of proof. Thus, what is critical to this Court's ability to render an opinion is that defendants-appellants have filed both a notice of appeal and a supplemental brief. Both of those documents point out alleged errors in the trial court's decision. By failing to file a brief, plaintiff has forfeited his chance to have a say and to argue why plaintiff believes defendants-appellants are incorrect and that the lower court did not err. Plaintiff has not, however, forfeited the lawsuit. This Court will determine the appeal based solely on defendants' pleadings. Defendants' motion is therefore DENIED.

II. Factual Background

This litigation began in March 2000, when plaintiff Matthew Box filed a complaint against defendants Mike and Gloria Mounts. The complaint alleged that defendants had not paid a bill for $2,254.40 worth of excavation work performed by Box. On March 21, 2000, the Mounts gave Box a check for $1,124.40, marked "paid in full" on the memo line. Box cashed the check, which cleared the Mounts' account on April 10, 2000.

On April 12, 2000, defendants sent a letter to the Southern Ute Tribal Court questioning, among other things, whether the court possessed jurisdiction over defendants. In a second letter, dated April 14, 2000, defendants again

questioned the courts' jurisdiction over them and also raised the issue of accord and satisfaction, based on plaintiff's actions in cashing defendants' check.

On March 17, 2000, the trial court held a hearing on the issue of jurisdiction, although due to some confusion the court also took evidence from plaintiff as to the merits of the litigation. The trial court issued its order on May 18, 2000, concluding it did possess jurisdiction over defendants.

The trial court then held a second hearing on June 28, 2000, dedicated to the rest of the evidence regarding the merits of the litigation. The trial court carried over the evidence from the May 17 hearing and considered it as part of the trial court's deliberations. At trial, defendants argued that they should not be required to pay the balance of the bill because 1) plaintiff's work was unsatisfactory; 2) plaintiff's bills were inaccurate and reflected double billing on some items; and 3) plaintiff accepted defendants' check as payment in full. On August 28, 2000, the trial court issued its opinion ruling in favor of plaintiff on all matters and ordering defendants to pay plaintiff $1,130.00, plus court costs in the amount of $25 and interest at the rate of 8% per year.

III. Legal Analysis

On September 11, 2000, defendants filed their appeal challenging the trial court's decision. This Court issued a jurisdiction and scheduling order finding that defendants had satisfied the jurisdictional prerequisites for an appeal and that defendants were entitled to an appeal as of right under the appellate code of the Southern Ute Indian Tribe. This Court has carefully read all documents filed with the appellate court by defendants, and those documents reveal that defendants raise six issues on appeal:

1. the trial court erred in finding it possessed jurisdiction over defendants;
2. the trial court did not behave in an impartial manner, but rather acted as plaintiff's lawyer;
3. the trial court made improper and unsupported findings of fact;
4. plaintiff altered documents and provided false testimony;
5. the trial court improperly required that defendants should have notified plaintiff in writing that he was fired; and
6. the trial court erred in refusing to find that the doctrine of accord and satisfaction barred plaintiff's claim.

This Court will address each of these allegations in turn.

A. Jurisdiction

Defendants have argued from the inception of this litigation that the Southern Ute Tribal Court does not possess jurisdiction over them. After reviewing the relevant tribal code provisions, as well as the U.S. Supreme Court's decision in *Montana v. United States*, the trial court ruled that it possessed jurisdiction over defendants, even though they are non-Indian, because defendants live within the exterior boundaries of the Southern Ute reservation, because the work performed by plaintiff was performed on land within the exterior boundaries, because plaintiff is a tribal member, and because defendants entered into an consensual business relationship with plaintiff.

The issue of a tribal court's civil jurisdiction is complex and rests on an examination of both federal and tribal law. Federal law has established certain limits on the civil jurisdiction of a tribal court. Contrary to defendants' contention, federal law does not completely bar tribal courts from hearing lawsuits involving non-Indians. In fact, certain civil actions involving non-Indians must be brought in tribal court. *See, e.g., Iowa Mutual v. LaPlante*, 480 U.S. 9 (1987); *National Farmers Union v. Crow Tribe*, 471 U.S. 845 (1985); and *Williams v. Lee*, 358 U.S. 217 (1959). Defendants also contend that they are not subject to tribal court jurisdiction because the work at issue in the litigation was performed on land owned by non-Indians. Again, defendants misunderstand the relevant law and have confused the Tribe's power as a land owner with the Tribe's power as a government.

To fully explore this issue requires a careful examination of federal law establishing the limits of a tribal court's civil jurisdiction. In *Nevada v. Hicks*, the Supreme Court reaffirmed that a tribal court's civil jurisdiction is no broader than the tribal government's legislative jurisdiction. 121 S. Ct. 2304 (2001). In its two recent cases involving tribal court civil jurisdiction over non-Indians, the Court began its analysis by applying the test developed in *Montana v. United States*, 450 U.S. 544 (1981). *See Nevada v. Hicks*, 121 S. Ct. 2304 (2001) and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

The first step in determining the civil jurisdiction of a tribe is to determine the exterior boundaries of the reservation. Here, the record below reflects agreement on the fact that defendants' land is located within in the exterior boundaries of the reservation. The record also reflects no dispute about the fact that the land in question is owned by non-Indians; it is not tribal trust land. Thus, we are concerned in this litigation with what is known as "fee land within the exterior boundaries of the reservation." On this type of land, the presumption is that a tribe does not possess civil jurisdiction over non-Indians, although the tribe can rebut that presumption

by satisfying one or both of two exceptions.

The first exception is whether the non-Indian has engaged in consensual relations, such as a contractual business arrangement, with the tribe or a tribal member. Again, in the present litigation, it is undisputed that defendants hired plaintiff to perform work, thus entering into a contractual business arrangement. In fact, defendants sought out plaintiff, requesting bids for certain services and then hiring plaintiff to perform those services. It is also undisputed that plaintiff is a member of the Southern Ute Tribe. Accordingly, the presumption against jurisdiction has been successfully rebutted, and nothing in federal law would prohibit the tribal court from exercising civil jurisdiction over defendants.

In their brief, defendants argue that the trial court erred in finding that plaintiff's business was one hundred percent Indian owned because plaintiff's wife, a non-Indian, owns half the business and plaintiff's employees are not tribal members. The only fact on this issue in the record below is plaintiff's statement that his business is one-hundred percent Indian owned. Defendants did not dispute this at trial, nor was any evidence offered about who owned the business and in what percentage. An appellate court is barred by law from making findings of fact, but must rather rest on the facts as presented to the lower court. Based on the evidence in the record, the lower court did not err in ruling that plaintiff's business is one hundred percent Indian owned. Even if that ruling is in error, however, it has no effect on the lower court's jurisdiction. All the law discussed above refers to contracts with tribal members, and plaintiff is undisputedly a member of the Southern Ute Indian Tribe. It is irrelevant to the issue of jurisdiction whether other owners of the business are non-Indians. Defendants hired Matthew Box to do the work, and Matthew Box is a tribal member.

That is not, however, the end of the matter as far as the jurisdictional issue is concerned. A tribe is not obligated to exercise its civil jurisdiction to the full extent permitted by tribal law, and indeed can voluntarily limit its own jurisdiction. This Court, then, must review the Constitution and laws of the Southern Ute Tribe to see whether it has limited its own jurisdiction in such a way that it could not exercise its authority to hear this case against defendants.

Nothing in the Constitution of the Southern Ute Tribe limits the Tribe's jurisdiction. Indeed, Article I of the Constitution declares "[t]he jurisdiction of the Southern Ute Indian Tribe . . . shall extend to all the territory within the exterior boundaries of the reservation." The laws of the Southern Ute Tribe are consistent, as they declare that it is the policy of the Tribe that

> Persons residing, doing business, or otherwise present . . . within the exterior boundaries of the Southern Ute Indian Reservation be afforded redress in the Southern Ute Indian Tribal Court and that such redress be extended to Southern Ute Indian Tribal members and nonmembers alike and further that enforcement of civil ordinances be extended to Southern Ute Indian Tribal members and nonmembers in order to promote the peace, welfare, health and safety of the Southern Ute Indian Tribe. . . ."

S.U.I.T.C. §1-1-06(1). The laws also declare that it is Tribal policy to provide "civil redress against all persons who through their residence, presence, business dealings, or other actions or failures to act (or other significant minimum contacts) incur civil obligations to persons or entities entitled to tribal protection. . . ." S.U.I.T.C. §1-106(2). As stated above, the lower court found that the land in question is located within the exterior boundaries of the reservation and that defendants transacted business with a tribal member, thus satisfying this portion of the tribal code.

The tribal laws also clearly assume "jurisdiction over all territory within the exterior boundaries of the reservation . . ." S.U.I.T.C. §1-1-07, and assume personal jurisdiction over

1) any person residing, located or present within the reservation;
2) any person who transacts, conducts, or performs any business or activity within the reservation . . .; and
3) any person who owns, uses, or possesses property within the reservation.

S.U.I.T.C. §1-108(a), (b), and (c). Again, for the reasons stated above, defendants satisfy all of these provisions.
Two other sections of the tribal code, §§1-2-101(1) and 2-1-101(4), further reinforce the conclusion that the tribal court correctly exercised jurisdiction over defendants. In §1-2-101(1), the tribal code provides that "[j]urisdiction over civil actions shall be outlined by this Code" and that "[c]ivil actions shall proceed according to the Tribal Court Rules of Civil Procedure." The pertinent portion of those rules declares that a civil action is within the jurisdiction of the tribe if

(a) the actions complained of took place on Indian lands within the exterior boundaries of the Southern Ute Indian Reservation; or
(b) they involve a tribal member within the exterior boundaries of the Southern Ute Indian Reservation.

S.U.I.T.C. §2-1-101(4). Again, for all the reasons discussed above, these provisions are satisfied. Thus,

both federal and tribal law permit the tribal court to exercise jurisdiction over defendants in this case, and the trial court's decision that it possessed jurisdiction was correct.

B. Judicial Neutrality

Defendants argue that the trial judge ceased to be a neutral decision maker, but rather functioned as plaintiff's attorney, asking questions of plaintiff and making his arguments for him. As a preliminary matter, this Court must note that a trial judge is always entitled to ask questions of a witness. Most courts will refrain from doing so, however, when the parties are represented by counsel. The general theory is that it is an attorney's job to ask questions and make arguments, thus laying the necessary evidence before the court. This neat theoretical division of responsibility, however, does not often work in practice. Attorneys fail to ask key questions or witnesses fail to explain matters in a way that make sense to the judge.

These problems are exacerbated when litigants choose to represent themselves, as both sides in this litigation have done. The ordinary layman is not trained in the law and is not skilled in the rules and procedures of a court. A judge in such a case will often be compelled to provide legal advice to the unrepresented party and to ask clarifying questions of witnesses. Ultimately, a judge's job during a bench trial (which this was) is to make sure that the proceedings are fair to all litigants and that the judge possesses all information necessary to make a fair and just ruling.

This Court has carefully reviewed the complete tapes of both hearings conducted below. In the first hearing, the trial judge did ask a number of questions while Mr. Box was testifying, but they were standard clarification-type questions. None of the questions were improper. At a few points, the trial judge also summarized parts of plaintiff's argument, but it was not done to put words in plaintiff's mouth, but rather was clearly so that the judge could ensure she was properly understanding what plaintiff was arguing. It is also true that at the first hearing, the trial judge did not ask many questions of Mike Mounts (the only defendant to testify at the first hearing), but by the time defendant Mike Mounts testified, the court realized (indeed, as Mike Mounts correctly pointed out), the first hearing was supposed to be only on the issue of jurisdiction. Thus, while plaintiff provided some evidence as to the merits, Mike Mounts' testimony went only to the relatively straightforward facts necessary to resolve the jurisdictional issue. The trial judge in no way violated the principles of judicial neutrality during the first hearing.

This conclusion is further reinforced by a review of the tape of the second hearing. The second hearing began with a brief statement by plaintiff, but plaintiff rested his case largely on the evidence presented during the first hearing. The bulk of the second hearing consisted of defendant's case, which rested almost exclusively on the testimony of Mike Mounts, with a short bit of testimony at the end of the hearing by Gloria Mounts, after the judge allowed defendants to reopen their case to present some additional testimony. The second hearing also contained substantial rebuttal testimony by plaintiff. At the second hearing, the trial judge asked numerous questions of all three witnesses. All of these questions were clearly directed at clarifying the testimony and ensuring the judge possessed all relevant and necessary information. The trial judge asked a substantial number of questions of Mike Mounts to clarify what the exhibits (particularly the photographs) showed, what instructions were given to plaintiff, and what defendants had to do to rectify the problems allegedly caused by plaintiff. The trial judge also asked defendants questions about the propane lines, the propane tanks, the underground storage unit, and other disputed issues.

In addition, the trial judge gave defendants the same legal advice she gave to plaintiffs about how the proceedings worked and how to admit exhibits into evidence. Finally, the trial judge also gave defendants legal advice about the status of accord and satisfaction law in the Southern Ute Indian Tribe. The judge in no way treated defendants differently than plaintiff, and indeed was fair and even-handed with all parties.

C. Findings of Fact

Before making her ruling, the trial court had to resolve a number of factual disputes, which also required making some decisions about credibility. Plaintiff and defendants had a number of disagreements over matters including how many times plaintiff spoke with Mike Mounts, what instructions were given to plaintiff, whether plaintiff had access to sufficient raw materials, whether the site for the pole barn was level, whether the ditch for the propane tank was dug in accordance with instructions, and whether improper excavations were done for the underground structure. All of these are findings of fact and issues of witness credibility.

The general rule followed by all court systems is that trial courts are to resolve issues of fact and appellate courts give those factual findings a great deal of deference. This rule is premised on the fact that trial judges are the one who actually see and hear the witnesses, thus making them better able to evaluate body language, intonation, and other matters necessary to resolving disputes about facts and credibility. *See, e.g., Hualapai Nation v. D.N.*, 9 SWITCA Rep. 2, 3 (1997); *Archuleta v. Archuleta*, 9 SWITCA Rep. 28 (1998); *see also Burch v. Southern Ute*

Indian Tribe, 5 SWITCA Rep. 2, 3 (1994) ("The appellate court shall review the evidence in the light most favorable to the trial court's findings."). An appellate court will not reverse a lower court's decisions on these issues unless they are not supported by substantial evidence in the record or unless "there is a strong showing that the court abused its discretion, acted arbitrarily or capriciously, made a clearly erroneous decision, or made an illegal decision." *Hualapai Nation*, 9 SWITCA Rep. at 3-4.

After carefully reviewing the entire record of the lower court, including listening to the tapes of both hearings and examining the exhibits, as well as carefully reviewing all of defendants' arguments, this Court concludes that the lower court's decisions were supported by substantial evidence in the record, that the lower court did not abuse its discretion, and that the lower court's decision was not improper in any other respect. Accordingly, this Court affirms the lower court's findings of fact.

In their brief, defendants argue that requiring them to pay "would be like going to an ice cream store and asking for vanilla ice cream and the clerk gives you chocolate instead of vanilla but you are expected to pay for it." That statement, however, is not fully analogous to what happened in this case. Here, the clerk thought defendants ordered chocolate ice cream, and that is why he gave them chocolate. This litigation was not over whether defendants ordered chocolate or vanilla ice cream, but whether plaintiff reasonably understood defendants to order chocolate and whether that is what he delivered. The trial court's decision that plaintiff substantially performed the contract is supported by substantial evidence in the record, and therefore this Court will not overturn it.

D. Alleged Alteration of Evidence and False Testimony

In their appeal, defendants also allege that plaintiff altered evidence and gave false testimony. The trial court addressed these issues and found plaintiff to be credible and found that the alleged alterations of evidence were not material and were not done to mislead the court; rather they were done in an effort to provide additional information to the court. Trial Court's Judgment and Order ¶10 (August 28, 2000). The trial court's decisions were based on its credibility decisions and findings of fact. As was stated above, this Court has no power to reverse the lower's courts findings of fact unless they are clearly erroneous. Since these decisions were not clearly erroneous, this Court affirms the lower court's decisions on these issues.

E. Requiring Written Notification of Firing

Defendants argue on appeal that the trial court improperly required that defendants should have notified plaintiff in writing that he was fired. It is clear from the trial court's judgment and order, however, that it imposed no such requirement. In paragraph 11 of the judgment and order, the court found that "Plaintiff testified persuasively at trial that he was never clearly informed that he was to stop work or he would have stopped." The trial judge also explained the evidence she relied upon in reaching that conclusion. It is true that the trial judge stated "[t]here was no evidence to corroborate the Defendants' claim [that they fired Plaintiff]" and that "Defendants did not prove that they clearly communicated [their intention] . . . to the Plaintiff." The fact that the trial judge required defendants' to "clearly communicate" their intent does not mean that she was requiring them to put their intent in writing. This issue ultimately came down to one of credibility – whose testimony did the trial court believe? The trial court believed plaintiff and cited sufficient evidence in the record to support her belief. This Court will not overturn the lower court's findings of credibility and findings of fact unless they are clearly erroneous. The ruling that plaintiff reasonably did not understand he was fired is not clearly erroneous, and this Court therefore will not reverse it.

F. Accord and Satisfaction

In pretrial pleadings and at the trial itself, defendants consistently argued that plaintiff's actions in cashing defendants' check marked "paid in full" constituted accord and satisfaction, thus freeing defendants from any obligation to pay the balance of the bill. The trial court rejected defendants' argument, declaring:

> The doctrine of accord and satisfaction does not operate to relieve a party of its obligations under a contract by virtue of partial payment unless the other party expressly agrees to accept partial payment as payment in full. In this case, there is no evidence that the Plaintiff ever agreed to accept partial payment. The fact that he cashed a check that had been marked payment in full is immaterial. If the act of cashing such a check could constitute accord and satisfaction, creditors would be placed in the untenable position of having to choose between accepting partial payment as payment in full or no payment at all when such a check is tendered. In this case, the Plaintiff mailed the Defendants a receipt after cashing the check that clearly indicates that the Plaintiff did not accept the check as payment in full and that there was a remaining balance due. The Court is aware of no jurisdiction where marking a check "paid in full", alone, is sufficient to establish an accord and satisfaction, and the Court does not choose to establish such a legal precedent in this jurisdiction.

Trial Court's Judgment and Order, ¶13 (August 28, 2000).

In their appellate brief, defendants argue:

> Judge Callard advised Defendants that the Southern Ute Indian Tribe has their own Accord and Satisfaction Law none of which was never [sic] cited or provided to the Defendants. Accord and Satisfaction according to state law was satisfied, payment was paid in full to the in accordance [sic] to the work that was done and was not an attempt on not paying our bill.

Defendants' argument contains a number of misconceptions. First, as defendants admit, Judge Callard did inform them at the second hearing that the Southern Ute Indian Tribe does not follow the Uniform Commercial Code's provisions on accord and satisfaction. A fuller explanation of what happened at the hearing, as well as its context, is required.

Before exploring that context, however, a brief reminder of the pertinent facts is in order. In the memo line of the check in question, defendants wrote "paid in full." As the evidence at trial demonstrated, plaintiff cashed that check and it cleared defendants' bank. Defendant argue that, based on the doctrine of accord and satisfaction, plaintiff's action in cashing the check constituted acceptance of the partial payment as a full settlement of the dispute.

At the second hearing, defendant Mike Mounts made an accord and satisfaction argument based on the Uniform Commercial Code. Judge Callard interrupted him and informed him (correctly) that the Southern Ute Indian Tribe has not enacted the accord and satisfaction provisions of the Uniform Commercial Code. The Tribe, does, however follow general common law unless and until the tribal legislature enacts a statute to the contrary. *See* S.U.I.T.C. §1-2-101(4)("Where there is no law contrary, the common law of the United States as adopted from England, insofar as the same is applicable and of a general nature, shall be the rule of decision, and shall be considered as of full force until repealed or altered by tribal members."). Accord and satisfaction is a general common law doctrine.

The very nature of the common law is such that it is not written and recorded in a statute, but is a matter of court decisions. Thus, there is no statute or ordinance for the trial court to give to defendants, and unless the lower court had previously addressed the issue of accord and satisfaction in a written opinion, there may not be any written source of law in the Southern Ute Indian Tribe to hand to defendants. Even if there were a written source of law, it is not the trial court's responsibility to find it and give it to defendants. It is defendants' burden (or their attorney's burden, but here defendants chose to act as their own attorney) to research the appropriate law. As it stands, the trial judge went beyond the requirements of her job when she explained to defendants that they were citing non-binding law and summarized for them the correct law on accord and satisfaction. As the trial judge indicated, the correct law is drawn from the general common law as developed by courts in England and the United States, and it is to this general common law that Southern Ute courts should refer, not to the law of any particular jurisdiction. Thus, defendants' contention that they complied with the state of Colorado's version of accord and satisfaction is irrelevant. Even if defendants' contention were true (and it is not clear that defendant's action did comply with Colorado law), that would be like defending a lawsuit in New Mexico by saying "But the Colorado courts said it was okay." What is relevant is the law of the jurisdiction hearing the lawsuit, not the law of some other jurisdiction.

With that background, the Court must now turn to an examination of the general common law doctrine of accord and satisfaction. Both the trial court and defendants are correct as to part of the common law rule, that is accord and satisfaction addresses the circumstance where a debtor offers to pay part of a debt, provided the creditor will waive the remainder of the balance. Both the trial court and defendants, however, have incorrectly explained the details of that rule. The common law doctrine applies when a creditor agrees by word or action to accept a partial payment as payment in full of the entire debt. There is not complete agreement, however, among jurisdictions about which actions by a creditor indicate acceptance of the partial payment. Many jurisdictions have determined that if the creditor cashes a check marked "paid in full," that action constitutes accord and satisfaction. *See generally, Modern Status of Rule that Acceptance of Check Purporting to be Final Settlement of Disputed Amount Constitutes Accord and Satisfaction*, 42 A.L.R.4th 12 (2000). Most jurisdictions that have established this rule, however, have placed strict conditions on it.

The key restrictions for purposes of the present litigation are that the debt must be unliquidated or disputed. Since we are dealing with a bill for a certain amount of money (as opposed to a promise to hand over a painting, a parcel or land, or other such item), what this Court must determine is whether the debt owed by defendants to plaintiff is "disputed." To some extent, this may seem like a silly question, since the parties are clearly involved in litigation, which by definition means there is a dispute about the debt. A closer look, however, reveals that this is not such an easy question.

Plaintiff performed a number of different excavation projects for defendants. As part of this work, plaintiff provided defendants with three bids and two bills. This

paperwork covered a number of different projects, including:

a) excavate approximately two feet of existing grade back from home site;
b) smooth and fine-tune existing piles of dirt along with what is pulled back from the home site project;
c) relocate existing laid gravel to desired area and smooth;
d) excavate, lift, place, and backfill Zircon storage shed;
e) dig utility trenches;
f) relocate excavated dirt from Zircon;
g) dig stairwell to Zircon; and
h) connect culverts.

Defendants did not dispute all plaintiff's work. Indeed, at the second hearing, defendant Gloria Mounts provided the trial judge with a detailed summary of which portion of the bills were disputed and which were not. According to the doctrine of accord and satisfaction, a creditor's acceptance of a partial payment as to an undisputed debt does not work to waive the creditor's right to collect the remaining balance.

Accord and satisfaction is part of the general common law of contracts, and a court will not lightly presume to find a contract if all the elements are not established. One of the key elements of a contract is a meeting of the minds about the terms of the contract. The doctrine of accord and satisfaction says that if a creditor cashes a check marked "paid in full" for a disputed debt, there is a meeting of the minds and an agreement to waive the balance. The problem for defendants is that part of the debt in this case is dispute and part is undisputed. Which part of the debt was the check directed to? One interpretation is that the check addressed the entire amount of the debt and resolved all issues. Another, equally plausible, interpretation, is that defendants provided plaintiff with a check to cover the undisputed portions of the bill, leaving the court to resolve the disputed issues. What is very clear is that defendants meant the check to mean one thing, and plaintiff interpreted to mean the other. Thus, by definition, there is no meeting of the minds. And the doctrine of accord and satisfaction cannot establish a meeting of the minds, because it applies only to a clearly defined debt that is disputed. Here, plaintiff performed a number of different services for defendants, and defendants agreed some of the work was accepted. Thus, the debt is not a unitary, disputed debt, and the doctrine of accord and satisfaction is inapplicable.

III. Conclusion

For the foregoing reasons, this Court finds that the trial court committed no reversible error. Accordingly, this Court affirms the judgment of the lower court.

IT IS SO ORDERED.

December 27, 2001

ERNEST HARRINGTON,

Appellant,

v.

PUEBLO OF SANTA CLARA,

Appellee.

SWITCA No. 00-016-SCPC
SCPTC No. CR 00-206

Appeal filed November 15, 2000

Appeal from the Santa Clara Tribal Court,
Dennis M. Silva, Judge

Appellate Judge: James Abeita

ORDER DISMISSING APPEAL

SUMMARY

Appeal dismissed because appellant did not assert any error that constituted grounds for appeal. Appellant had no legal right to court-appointed counsel, nor was he denied the right to prepare his defense, testify on his own behalf, subpoena witnesses, or cross-examine them.

***

THIS MATTER comes before the Southwest Intertribal Court of Appeals pursuant to resolution 99-25 (enacted September 30, 1999) of the Santa Clara Pueblo Council on behalf of the Santa Clara Pueblo which appointed the Southwest Intertribal Court of Appeals to act as the Santa Clara Pueblo's appellate court. This appeal is governed by the appellate law of the Santa Clara Pueblo and rules of the Southwest Intertribal Court of Appeals which were made the rules of the Pueblo by Council resolution, as well as this Court's inherent authority to manage its business. After reviewing the record, the Court finds that neither briefs nor oral argument are necessary and that this appeal should be dismissed for the reasons set out below.

1. JURISDICTION

Jurisdiction for this Court to hear appeals arises when the appellant complies with the Pueblo's law regarding appeals. If the appellant fails to file a notice of appeal within the time limits set by law, jurisdiction fails.

Notice of appeal must be filed with the Pueblo court within fifteen days after the judgment or order is entered. SWITCARA #11. Appellant Ernest Harrington was found guilty of the charge of sexual abuse in a written judgment entered October 26, 2000, and filed a notice of appeal on November 2, 2000. This appeal is timely.

2. PROCEDURE AND FACTS

Appellant Ernest Harrington appeals a criminal conviction for sexual assault in the Santa Clara Pueblo Court. Appellant was convicted after a bench trial, a written judgment was entered to this effect, and he was sentenced on October 27, 2000. The notice of appeal, filed on November 2, 2000, states as grounds that the appellant was denied, and we summarize:

1. the right to an appointed attorney to assist him with his defense;
2. the right to present witnesses and to cross-examine witnesses;
3. the right to testify on his own behalf;
4. the right to adequately prepare to defend against the charges.

3. DISCUSSION

The simple issue on appeal is based on whether appellant was denied his right to due process because he was not appointed an attorney to represent him. Appellant contends that, because he was denied a court-appointed attorney, he was not afforded an opportunity to adequately defend himself, and he was convicted as a result of the denial.

The record indicates appellant was arraigned on October 2, 2000 where he was advised of his right to counsel at his own expense. A bench trial was scheduled at arraignment for October 20, 2000. Appellant did not seek a continuance of the trial so that he could employ an attorney or prepare a defense.

Appellant's appeal must be dismissed summarily by this Court. Appellant has no legal right to court-appointed counsel either pursuant to Santa Clara law or pursuant to the U.S. Constitution. Appellant does have the right to an attorney at his own expense. Indian Civil Rights Act, 25 U.S.C. § 1302(6). While an individual citizen's right to appointed counsel is protected under the Sixth and Fourteenth Amendments to the U.S. Constitution in a criminal action brought by the federal government or state government, tribes are not required to similarly appoint counsel in tribal criminal actions. Burch v. Southern Ute Indian Tribe, 5 SWITCA 2 (1993). Appellant could have sought legal representation, indeed, and he did so for this appeal, but he did not for the trial.

As to appellant's other allegations, the record does not indicate that appellant was denied his right to prepare his defense, testify on his own behalf, subpoena witnesses, or cross examine them. He chose not to do so. Appellant does not state any error that would provide this Court grounds to entertain his appeal. Appellant's request for hearing, which this Court takes as a request for oral argument, is denied.

THEREFORE, IT IS THE ORDER OF THE COURT THAT this matter should be, and hereby is DISMISSED.

August 16, 2001

REYNOLD NARCIA,

Petitioner-Appellant,

v.

GLENNADEAN LEWIS,

Respondent-Appellee.

SWITCA No. 00-020-ACTC
ACTC No. CV85-101, AP00-001

Appeal filed December 15, 2000

Appeal from the Ak-Chin Tribal Court
Charlene Jackson-Louis, Judge

Appellate Judge: James Abeita

ORDER DISMISSING APPEAL

SUMMARY

Appeal dismissed for lack of jurisdiction due to untimely filing of notice of appeal. Even if notice had been timely, appeal would be dismissed for failure to state a basis for review by appellate court.

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This appeal is before the Southwest Intertribal Court of Appeals pursuant to Resolution Number A-74-99 of the Ak-Chin Indian Community Council, November 3, 1999. After reviewing the record, the Court concludes that the appeal must be dismissed because appellant has failed to meet the requirements of filing an appeal within fifteen days of a final judgment. The judgment appealed from was entered on November 17, 2000. Notice of appeal

was filed on December 14, 2000.

Rule 11 of the Southwest Intertribal Court of Appeals Rules of Appellate Procedure (SWITCARA #11) which governs this appeal requires that appeals be started by the filing of a notice of appeal with the lower court within fifteen days of entry of judgment. The Appellate Court cannot hear cases that do not comply with the jurisdictional requirement of timely filing of notices of appeal. *Baker v. Southern Ute Indian Tribe*, 5 SWITCA Rep. 1 (Southern Ute, 1993) *Archuleta v. Archuleta*, 9 SWITCA Rep. 28 (San Juan Pueblo, 1998).

However, even if the notice of appeal met the timely filing requirement, the appeal would still be dismissed as discussed below.

On June 1, 1985, appellee Lewis and appellant Narcia were divorced by order of the Ak-Chin Community Court. The Dissolution of Marriage order included a provision for child support to be paid by appellant Narcia. Appellee Lewis began receiving Aid to Families with Dependent Children from the state of Arizona and assigned collection of child support payments to the state's Child Support Enforcement Division. On December 7, 1998, an order of the Superior Court of Arizona of Pinal County, No. SE 3892, was entered closing the assignment of child support payments to the state of Arizona. Appellee requested the closing. On August 15, 2000, appellee Lewis then filed a motion to modify child support payments in Ak-Chin Community Court. This appeal arises from the Ak-Chin Court's order granting her request.

Appellant Narcia contends the request by appellee Lewis to stop the child support collection by the state court amounts to a dismissal of the child support obligation. This Court has reviewed the record and it is clear that the tribal court has had jurisdiction over the issue of child support continuously since 1985, even though the state acted as the money collector. The only action appellee took was to request that the state of Arizona no longer collect the money.

A request to stop child support enforcement is not a request to dismiss the child support issue in its entirety. Such a request would have to be addressed to the Ak-Chin Community Court which has the sole power to determine whether that request should be granted and has had that power since 1985. Appellee has not done this. The Arizona Superior Court's order was correctly limited solely to the assignment of benefits.

Thus, even if the notice of appeal had been timely, the appeal does not state a basis for review by this Court.

THEREFORE, IT IS THE ORDER OF THE COURT THAT THIS MATTER SHOULD BE AND HEREBY IS DISMISSED.

August 8, 2001

TAHSEEANNA HOWE,

Petitioner-Appellant,

v.

ARAYLIA BROWN,

Respondent-Appellee.

SWITCA No. 01-015-SUTC
SUTC No. 00-CV-181

Appeal filed September 12, 2001

Appeal from the Southern Ute Tribal Court
Elizabeth C. Callard, Judge

Appellate Judge: Melissa L. Tatum

ORDER OF DISMISSAL

This matter comes before the Southwest Intertribal Court of Appeals from the Southern Ute Tribal Court, and arises out of a complaint alleging negligence resulting in an automobile accident. The lower court granted defendant's motion for summary judgment, thus ending the case. Plaintiff appealed the trial court's decision.

The parties have now agreed to settle the litigation and dismiss the appeal. To that end, the parties have filed a joint stipulated motion to dismiss. This court hereby grants that motion, dismissing the appeal with prejudice. Each party is to bear her own costs and attorneys' fees.

IT IS SO ORDERED.

December 21, 2001
