In the Southwest Intertribal Court of Appeals for the Southern Ute Tribal Court

RENEE CLOUD,

Petitioner-Appellant,

v.

SOUTHERN UTE INDIAN TRIBE,

Respondent-Appellee.

SWITCA No. 00-003-SUTC
SUTC No. 00-CV-009

Appeal filed March 31, 2000

Appeal from the Southern Ute Tribal Court
Elaine Newton, Judge

Appellate Judge: Melissa L. Tatum

OPINION AND ORDER

SUMMARY

Appellee was awarded damages and court costs for a claim alleging breach of contract, unjust enrichment, and conversion. Appellant alleged erroneous factual findings and judicial bias. Appellee filed a motion to dismiss the appeal because Appellant failed to timely file her opening brief as required by SWITCA rule 26(f). Although Appellant filed no opening brief, the Appellate Court denied Appellee's motion because Appellant filed two detailed notices of appeal that described the trial court's alleged errors. The Court concluded that the trial court's decision was supported by substantial evidence, there was no abuse of discretion, the decision was not improper in any other respect, and there was no showing of judicial bias. Affirmed.

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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, unjust enrichment, and conversion. Defendant, Renee Cloud, filed a counterclaim against the Tribe, alleging personal damages, breach of contract, and infliction of emotional distress. After a trial, the lower court found in favor of plaintiff and awarded the Tribe damages of $3,520.00, plus court costs of $25. The court also found in favor of plaintiff on the counterclaim. Defendant has appealed the trial court's decision.

This Court's jurisdiction and scheduling order set a time frame for filing briefs and, as appellant, Renee Cloud was ordered to file the first brief within thirty days of being served with a copy of the jurisdiction and scheduling order. Appellant Cloud did not file a brief, and on September 4, 2001, the Southern Ute Indian Tribe (the appellee in this case) filed a motion to dismiss based on this failure.

For the following reasons, this Court denies the motion to dismiss and affirms the trial court's decision.

I. Motion to Dismiss

On September 4, 2001, the Tribe, as appellee, filed a motion to dismiss the appeal on the grounds that Cloud violated SWITCA rule 26(f) by failing to timely file her opening brief. As this Court has previously noted, 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, 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.

Here, however, although Cloud failed to file her brief as required, she has filed two very detailed notices of appeal, which point the Court's attention to specific instances of alleged error. Since those documents provide this Court with enough guidance to resolve the appeal, the Tribe's motion to dismiss is denied.

II. Legal Analysis

In her notices of appeal, Cloud contests a number of the trial court's factual findings, as well as the neutrality of the trial judge. This Court will address each allegation in turn.

A. Challenges to Trial Court's Factual Findings

In her March 30, 2000 "Appeal and Motion" and her April 20, 2000 "Addendum to Appeal and Motion," Cloud recites a long list of alleged errors by the trial judge, the vast majority of which are findings of fact and issues of witness credibility. At the same time, however, Cloud admits that she did not testify on her own behalf and did not submit evidence during the trial. Appeal and Motion ¶9 (March 30, 2000).

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 ones 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, 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.

B. Allegation of Judicial Bias

Cloud also argues that she could not get a fair trial because the trial judge works for the Tribe, and it was the Tribe that committed the alleged wrongdoing here. If this were the case, however, no judge in any court system anywhere in this country (tribal, state, or federal) could hear any case involving claims against that particular government. This is simply not the way our court systems work. Cloud must come forward with specific and articulable grounds as to why the trial judge would be biased against her in this particular case. Cloud has not done so, nor has she pointed to any rulings by the trial judge that would tend to demonstrate bias. This Court has independently reviewed the lower court record and finds no showing of bias. This Court would also note that Cloud cannot arbitrarily refuse to give the trial court evidence to support her arguments and then at the same time complain that the trial court ruled against her.

For the foregoing reasons, this Court AFFIRMS the decision of the lower court.

It is so ordered.

March 14, 2002

JUDITH KNIGHT-FRANK,

Petitioner-Appellant,

v.

WILLIAM C. MEALING,

Respondent-Appellee.

SWITCA No. 01-008-UMUTC
UMUTC No. 1999-0392-MD

Appeal filed May 2, 2001

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

Appellate Judges: James Abeita,
Randolph Barnhouse and Ann B. Rodgers

ORDER DENYING INTERLOCUTORY APPEAL

Appellant sought to recover withheld per capita payments from Appellee. At the trial court level, Appellee filed a counterclaim and a motion to dismiss. The trial court granted Appellee's motion but held that the dismissal did not affect Appellees' counterclaim. Appellant then sought interlocutory appeal, but the Appellate Court held that the interlocutory appeal was not warranted because the trial court did not certify its decision for interlocutory appeal. The Court also held that a collateral-order exception was not applicable in this case because the elements were not met. The Court noted that Appellant would not suffer any prejudice by having to wait until a final order was issued before she could obtain review. Petition for Interlocutory Appeal denied.

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THIS MATTER comes before the court on appellant's petition for interlocutory appeal of the trial court's order, of March 19, 2001, granting appellee's motion to dismiss the complaint filed by appellant Judy Frank-Knight. The trial court's order explicitly recognizes that the dismissal does not affect the counterclaim filed by appellees Mealing and the Ute Mountain Ute Tribe against appellant. Furthermore, the sums at issue have been placed in an escrow account pending resolution of the counterclaim.

Interlocutory review is sought because appellant alleges that her action against appellee Mealing is permissible under this Court's ruling in *Soto v. Lancaster*, (SWITCA No. 97-006-UMU, 9 SWITCA REP 4 (1998)).

The appellate panel reviewed the record below and the applicable law, as well as submissions of appellant and

Appellees' response in opposition to the request for interlocutory appeal. We conclude that granting appellant's request for review at this time is not warranted under the applicable rules, either as an interlocutory appeal or pursuant to the collateral order exception to final judgment review. Our reasoning is set forth below.

The substantive issue that is before the lower court is whether appellee Ute Mountain Ute Indian Tribe wrongfully considered certain monies paid to appellant to be income, rather than loans. Due to this dispute, the Tribe has been withholding certain per capita payments usually payable to appellant. This action was brought against the finance director of the Ute Mountain Ute Tribe to determine the status of the monies paid to appellant under tribal law and policies, and to force payment of the withheld per capita payments. The same substantive issues are before the trial court at this time in the counterclaim filed by the appellees against appellant.

The Code of Indian Offenses does not provide for interlocutory appeal in the regulations setting out the scope of this Court's jurisdiction. 25 C.F.R. §11.503 states that, absent inconsistency with the tribal rules of procedure, or an order of the Court of Indian Offenses, the Federal Rules of Civil Procedure must be applied by a Court of Indian Offenses.

Federal statute 28 USCA §1292 permits federal appellate courts to hear interlocutory appeals under specific circumstances, but absent an injunctive remedy, it is essential that the trial court certify its decision for interlocutory appeal. That was not done in this case.

Where an appeal raises the validity of a trial court's ruling on an issue of immunity, federal law also allows review under the collateral order doctrine found in 28 U.S.C.A. §1291. The collateral order doctrine is a very narrow exception to the rule that appellate courts only review final judgments. Generally, the order in question must finally determine claims of right separate from, and collateral to, rights asserted in the action; it must be too important to be denied review and too independent of a cause itself to require that appellate consideration be deferred until the whole case is adjudicated. *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

In this particular case, we do not find that these elements have been met. First and foremost, due to the existence of the counterclaim brought by appellees, the substantive matter is capable of being resolved in the trial court. Furthermore, since the Tribe has actively participated in this matter as a party, and jointly made the counterclaim against appellant, the immunity claimed by appellees as to the initial complaint does not exist for resolution of the counter-claim. Finally, the sums in question have been placed in escrow at the order of the trial court and will be subject to disposition once the trial court enters its final order in this matter. If appellees ultimately prevail, appellant can raise these issues at that time. Thus, appellant suffers no prejudice by not obtaining review of the trial court's order at this time.

THEREFORE, IT IS THE ORDER OF THIS COURT that the Request for Interlocutory Appeal should be and hereby **IS DENIED.**

January 17, 2002

JUDITH KNIGHT-FRANK,

Petitioner-Appellant,
v.

WILLIAM C. MEALING,

Respondent-Appellee.

SWITCA No. 01-008-UMUTC
UMUTC No. 1999-0392-MD

Appeal filed May 2, 2001

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

Appellate Judges: James Abeita,
Randolph Barnhouse and Ann B. Rodgers

ORDER ON REMAND

SUMMARY

The Appellate Court remanded a motion for admission to practice in the Court of Indian Offenses. The Court further ordered that all motions filed in this case that were submitted to the Court after its denial of interlocutory appeal shall be determined in the first instance by the Court of Indian Offenses.

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THIS MATTER came before this Court on a motion for interlocutory appeal. On January 17, 2002 this Court entered an opinion and order denying interlocutory review. Since the entry of that order at least one motion for admission to practice in the Court of Indian Offenses, Ute Mountain Ute Agency, has been submitted to this Court. After reviewing the motion and the record in this case, the Court finds that the case should be remanded to the trial court, and that it is the responsibility of the trial court to determine in the first instance any motions filed in this case after denial of interlocutory appeal.

THEREFORE, IT IS THE ORDER OF THE COURT THAT this matter is remanded to the Court of Indian Offenses, Ute Mountain Ute Agency; and,

IT IS FURTHER ORDERED that all motions filed in this case that were submitted to this Court after denial of interlocutory appeal, shall be determined in the first instance by the Court of Indian Offenses, Ute Mountain Ute Agency.

December 12, 2002

RICHARD and CAROL OLGUIN,

Petitioners-Appellants,

v.

SOUTHERN UTE INDIAN TRIBE,

Respondent-Appellee.

SWITCA No. 01-013-SUTC
SUTC No. 01-CV-23

Appeal filed August 6, 2001

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

Appellate Judge: Melissa L. Tatum

ORDER OF DISMISSAL

SUMMARY

In a dispute over cattle grazing, trial court awarded damages to defendant Tribe. Plaintiffs appealed, but the parties then filed a joint motion to dismiss with prejudice. Motion granted and damages ordered to be paid immediately to Tribe.

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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 dispute over cattle grazing. The lower court found in favor of Defendant and awarded the Tribe damages of $9,540.00, plus court costs of $25. Plaintiffs appealed the trial court's decision.

The parties have now filed a joint motion requesting dismissal of the case with prejudice. Seeing no reason to deny the motion, this Court hereby grants the motion for dismissal. The parties will each pay their own costs and attorneys' fees for the appeal. In addition, as requested by the parties, this Court also orders that the funds currently held in the registry of the Southern Ute Indian Tribal Court be immediately paid to Defendant.

IT IS SO ORDERED.

March 4, 2002

GLENDA and WILLARD PRICE,

Petitioners-Appellants,

v.

RANDALL C. BAKER,

Respondent-Appellee.

SWITCA No. 01-016-SUTC
SUTC No. 01-CV-171

Appeal filed November 16, 2001

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

Appellate Judge: Melissa L. Tatum

ORDER DISMISSING APPEAL

SUMMARY

The trial court issued a default judgment against Appellant for failure to appear. Appellant filed a notice of appeal requesting a new judge and a new court date but didn't file a brief, thereby failing to specify alleged errors in the trial court's decision. Finding no obvious error, the Appellate Court dismissed the appeal with prejudice.

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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 dispute over the sale of a motorcycle. The lower court issued a default judgment against defendant Willard Price, Sr. and ordered him to pay Randall S. Baker $3,230.35, plus court costs of $25. On November 16, 2001, Price filed a notice of appeal. On December 21, 2001, this Court issued an order accepting jurisdiction over the appeal and setting a briefing schedule.

It is now well past the deadline for Price to file his opening brief, yet he has failed to either file a brief or explain his failure. As this Court has previously noted, 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, 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, Price is the appellant, and he has failed to carry his burden to point to specific errors in the lower court's decision. Price's notice of appeal is also of no help on this matter, as that document states only ". . . I did not agree with Judge Liz ruling. In which my side was not heard or listen to. I am requesting a new judge and a new court date be set." As both the default order states and the record reflects, Price was notified of the date of the hearing and failed to appear. He provided no excuse as to why he did not show up. Price cannot simply miss the hearing date and then complain that the trial judge did not listen to his side of the story. He was given an opportunity to tell his side and did not take advantage of that opportunity. This Court finds no obvious errors on the face of the record. Accordingly, this Court hereby dismisses Price's appeal with prejudice.

It is so ordered.

March 14, 2002

MARJORIE SOTO,

Petitioner-Appellant,

v.

HONORABLE WILLIAM L. McCULLEY,

Chief Magistrate, Court of Indian Offenses
Towaoc, Colorado,
Respondent-Appellee.

SWITCA No. 02-004-UMUTC
UMUTC No. 2002-0000001-AP

Petition for Writ of Mandamus
filed September 13, 2002

Appeal from the Ute Mountain Ute C.F.R. Court
William L. McCulley, Judge

Appellate Judges: James Abeita,
Randolph Barnhouse and Ann B. Rodgers

WRIT OF MANDAMUS

SUMMARY

Appellant petitioned for a writ of mandamus to order and direct Appellee magistrate to issue a timely decision on a matter pending in the Court of Indian Offenses. The Appellate Court determined that an order to show cause was not necessary and that there was good cause to issue the writ.

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This matter comes before the Court upon the petition of petitioner Marjorie Soto for a writ of mandamus pursuant to SWITCARA #23 to order and direct the respondent, the Honorable William L. McCulley, to issue his decision on a matter before the Court of Indian Offenses for the Ute Mountain Ute Tribe identified only as civil no. 94-0003. The judges herein having been appointed to act as appellate judges for the Ute Mountain Ute Court of Indian Offenses by the Bureau of Indian Affairs pursuant to the Code of Indian Offenses have jurisdiction to act in this matter.

The petition was served properly on the respondent who filed his response in this Court on September 20, 2002, without this Court having to issue an alternative writ of mandamus requiring an order to show cause. After reviewing the petition and the response, this Court determines that an order to show cause is not necessary and that there is good cause to issue this writ requiring the respondent to issue his decision in a timely manner. Respondent's response establishes that Petitioner has an

adequate remedy in the lower court. We find as well taken the respondent's request that he be given additional time to comply with the writ, and we further find that December 6, 2002, would be the proper deadline for respondent to comply with this writ.

Therefore, this Court orders that a writ of mandamus be issued against respondent immediately and respondent shall comply with the writ no later than December 6, 2002.

IT IS SO ORDERED.

September 25, 2002