In the Southwest Intertribal Court of Appeals for the Zuni Tribal Court

AVA HANNAWEEKE,

Plaintiff-Appellant,

v.

PUEBLO OF ZUNI, and ROSETTA EPALOOSE, its Acting Human Resources Director,

Respondents-Appellees.

SWITCA Case No. 15-026-ZTC
Zuni Tribal Court No. CL-2015-0001

Appeal filed November 18, 2015

Appeal from the Zuni Tribal Court
Albert Banteah, Judge

Appellate Judges: Jonathan Tsosie, Anthony Lee and Jeanette Wolfley

ORDER DENYING APPEAL

SUMMARY

Appeal denied because notice of appeal was insufficient under Zuni and SWITCA rules of appellate procedure. Tribal court should discontinue service of process by email because this method is not authorized by the Zuni Rules of Civil Procedure.

* * *

This matter arises from Plaintiff-Appellant's November 18, 2015, notice of appeal from an "Order of Dismissal" dated September 9, 2015, by the Zuni Tribal Court. Pursuant to Rule 25(a) of this Court's Rules of Appellate Procedure ("SWITCARA"), Respondents-Appellees filed "Appellees' Motion to Dismiss Appeal" on December 8, 2015. For the reasons below, Plaintiff-Appellant's notice of appeal is hereby DENIED.

Both the Zuni Rules of Civil Procedure ("ZRCP") and SWITCARA require a notice of appeal to contain at least a short, concise statement of the reason or grounds for appeal. Plaintiff-Appellant's notice of appeal contains no such statement. The notice of appeal merely states (1) that it appeals an Order of Dismissal; (2) who the parties are; and (3) that the notice of appeal was delayed because Plaintiff-Appellant did not receive the tribal court's "Order of Dismissal" until November 5, 2015. This is clearly insufficient to perfect an appeal under either ZRCP Rule 38(c) or SWITCARA #11(e). This Court has consistently held that such a deficiency is jurisdictional. *See, e.g., Rice v. Yavapai-Prescott Indian Tribe*, 21 SWITCA Rep. 12, 13 (2010). Therefore the notice of appeal in this matter must be denied.

This Court must note that it does not deny Plaintiff-Appellant's notice of appeal based on its lack of timeliness, as Respondents-Appellees admit that the underlying "Order of Dismissal" was delivered to Plaintiff-Appellant via e-mail. Because this Court can find no authority within the ZRCP that would allow e-mail to be a valid method for service of process, and because this Court does not recognize e-mail to be a valid method for service of process, this Court refrains from ruling on the issue of the notice of appeal's timeliness. In order to avoid this issue in the future, we urge the Zuni Tribal Court to discontinue its use of e-mail to deliver pleadings, motions and orders to parties and attorneys.

For the reasons above, Respondents-Appellees' motion to dismiss pursuant to SWITCARA #25(a) is well-taken, and the notice of appeal in this matter is hereby DENIED.

It is so ORDERED.

January 8, 2016

GABRIEL L. ROGERS,

Defendant-Appellant,

v.

KAIBAB BAND OF PAIUTE INDIANS,

Plaintiff-Appellee.

SWITCA Case No. 15-027-KPTC
Kaibab Paiute Tribal Court Cause Nos. 2015-CRM-0805, 2015-CRM-0807, 2015-CRM-1001

Appeal filed in Kaibab Paiute Tribal Court on November 25, 2015

Appeal filed in the Southwest Intertribal Court of Appeals on November 30, 2015

Appeal from the Kaibab Paiute Tribal Court
Serena W. Cutchen, Chief Judge

Appellate Judges: Jonathan Tsosie, Anthony Lee and Jeanette Wolfley

ORDER DENYING APPEAL

SUMMARY

Appeal denied because notice of appeal was insufficient under Kaibab Paiute and SWITCA rules of appellate procedure.

THIS MATTER arises from *pro se* Defendant-Appellant's handwritten letter of November 22, 2015, which is a notice of appeal from an order of the Kaibab Paiute Tribal Court issued that same day. Plaintiff-Appellee filed a "Motion to Dismiss Appeal" on February 16, 2016. Plaintiff-Appellee's motion is well-taken and, for the reasons below, Defendant-Appellant's notice of appeal is hereby DENIED.

Both the Kaibab-Paiute Tribal Code and this Court's Rules of Appellate Procedure ("SWITCARA") establish minimum requirements to perfect a notice of appeal. Though this Court may occasionally allow some leeway with *pro se* appellants when their notices of appeal meet most or nearly all of the minimum requirements, Defendant-Appellant's notice of appeal is clearly insufficient, both procedurally and substantively, and must therefore be denied.

Rule 11(e) of this Court's Rules of Appellate Procedure provides as follows:

> The notice of appeal *shall, at a minimum,* include:
>
> (1) the names, titles and addresses, and telephone numbers of the parties taking the appeal and their counsel unless the lower court determines that including the address or telephone number of any person would place that person in physical jeopardy;
>
> (2) the name of the court rendering the adverse ruling and the date the ruling was rendered;
>
> (3) a concise statement of the adverse ruling or alleged errors made by the lower court;
>
> (4) the nature of the relief being sought; and
>
> (5) a concise statement of the reasons for reversal and modification.

SWITCARA #11(e) (emphasis added).

Of these requirements, this Court can only identify with certainty the names of the Defendant-Appellant and his lay counsel. The notice of appeal does not include titles, addresses, telephone numbers, the name of the court that rendered the adverse ruling, nor the date of the adverse ruling. Similarly, the notice of appeal is completely lacking with respect to the nature of the relief being sought, thus leaving this Court to guess, which this Court cannot do.

The proffered reasons for granting the appeal are also unclear and deficient. Defendant-Appellant's grounds for appeal are that Defendant-Appellant's lay counsel had moved the lower court to allow lay counsel to withdraw representation, that lay counsel had suggested to Defendant-Appellant that Defendant-Appellant obtain new counsel, and that "I have civil matters and they concern other Tribal Members and B.I.A. Law Enforcement, which may have effected [sic] the Judges [sic] ability to be impartial in my court case[.]"

As noted in Plaintiff-Appellee's "Motion to Dismiss Appeal," the record reflects that lay counsel's motion to withdraw was denied by the tribal court, and that Defendant-Appellant agreed to proceed with lay counsel's representation. Moreover, simply because one's lay counsel has moved a court to withdraw from representation and has suggested retention of other counsel do not constitute grounds for reversal or modification of a judgment.

Similarly, Defendant-Appellant does not explain what the term "civil matters" means, much less how or why they "may" have affected the Chief Judge's impartiality.

This Court has consistently held that such deficiencies are jurisdictional. *See, e.g., Rice v. Yavapai-Prescott Indian Tribe*, 21 SWITCA Rep. 12, 13 (2010). Therefore the notice of appeal in this matter must be DENIED.

It is so ORDERED.

February 26, 2016

In the Southwest Intertribal Court of Appeals for Zuni Tribal Court

TIMOTHY DRAPER,

Defendant-Appellant,

v.

PUEBLO OF ZUNI,

Plaintiff-Appellee.

SWITCA Case No. 15-010-ZTC
ZTC Cause No. CR-2014-2164

Appeal filed in Zuni Tribal Court on August 8, 2014

Appeal filed in the Southwest Intertribal Court of Appeals on June 26, 2015

Appeal from the Zuni Tribal Court
John Chapela, Judge

Appellate Judges: Jonathan Tsosie,
Anthony Lee and Jeanette Wolfley

ORDER DISMISSING APPEAL

SUMMARY

Appeal dismissed due to Appellant's failure to file a brief in accordance with Appellate Court's order.

* * *

THIS MATTER was originally accepted for appeal by this Court on November 20, 2015. On December 8, 2015, this Court issued an Order amending the briefing schedule in this matter, and ordered Defendant-Appellant to file an opening brief within thirty days of receiving notice of the December 8, 2015, Order.

Well over three months have passed since all parties were put on notice that this matter had been accepted for appeal. Nearly two months have passed since the opening brief was due, and still no brief or motion of any kind has been filed.

Therefore, pursuant to this Court's inherent powers to manage its business, this matter is hereby DISMISSED.

It is so ORDERED.

March 4, 2016

MYRON SHECHE,

Defendant-Appellant,

v.

PUEBLO OF ZUNI,

Plaintiff-Appellee.

SWITCA Case No. 15-011-ZTC
ZTC Cause No. CR-2014-2940

Appeal filed in Zuni Tribal Court on December 1, 2014

Appeal filed in the Southwest Intertribal Court of Appeals on June 26, 2015

Appeal from the Zuni Tribal Court
John Chapela, Judge

Appellate Judges: Jonathan Tsosie,
Anthony Lee and Jeanette Wolfley

ORDER DISMISSING APPEAL

SUMMARY

Appeal dismissed due to Appellant's failure to file a brief in accordance with Appellate Court's order.

* * *

THIS MATTER was originally accepted for appeal by this Court on November 20, 2015. On December 15, 2015, this Court issued an Order amending the briefing schedule in this matter, and ordered Defendant-Appellant to file an opening brief within thirty days of receiving notice of the December 15, 2015, Order.

Three and a half months have passed since all parties were put on notice that this matter had been accepted for appeal. Nearly two months have passed since the opening brief was due, and still no brief or motion of any kind has been filed.

Therefore, pursuant to this Court's inherent powers to manage its business, this matter is hereby DISMISSED.

It is so ORDERED.

March 11, 2016

In the Southwest Intertribal Court of Appeals for Zuni Tribal Court

ESTHER GUARDIAN,

Defendant-Appellant,

v.

PUEBLO OF ZUNI,

Plaintiff-Appellee.

SWITCA Case No. 15-012-ZTC
ZTC Cause No. CR-2014-3446

Appeal filed in Zuni Tribal Court on December1, 2014

Appeal filed in Southwest Intertribal Court of Appeals on June 26, 2015

Appeal from the Zuni Tribal Court
John Chapela, Judge

Appellate Judges: Jonathan Tsosie,
Anthony Lee and Jeanette Wolfley

ORDER DISMISSING APPEAL

SUMMARY

Appeal dismissed due to Appellant's failure to file a brief in accordance with Appellate Court's order.

* * *

THIS MATTER was originally accepted for appeal by this Court on November 20, 2015. On December 21, 2015, this Court issued an Order amending the briefing schedule in this matter, and ordered Defendant-Appellant to file an opening brief within thirty days of receiving notice of the December 21, 2015, Order.

Well over three and a half months have passed since all parties were put on notice that this matter had been accepted for appeal. Approximately one month and a half have passed since the opening brief was due, and still no brief or motion of any kind has been filed.

Therefore, pursuant to this Court's inherent powers to manage its business, this matter is hereby DISMISSED.

It is so ORDERED.

March 11, 2016

PUEBLO OF ZUNI,

Plaintiff-Appellant,

v.

CAMERON LUCIO,

Defendant-Appellee.

SWITCA Case No. 15-019-ZTC
Zuni Tribal Court No. CR-2015-3077

Appeal filed in Zuni Tribal Court on April 6, 2015

Appeal filed in the Southwest Intertribal Court of Appeals on June 25, 2015

Appeal from the Zuni Tribal Court
Albert Banteah, Judge

Appellate Judges: Jonathan Tsosie,
Anthony Lee and Jeanette Wolfley

ORDER DENYING APPEAL

SUMMARY

Notice of appeal denied because allowing appeal would violate the Double Jeopardy Clauses of the Zuni Constitution, the Indian Civil Rights Act, and the United States Constitution after defendant found not guilty in final disposition and judgment order resulting from a bench trial.

* * *

THIS MATTER arises from Plaintiff-Appellant's notice of appeal from a "Final Disposition and Judgment Order" issued by the Zuni Tribal Court on March 30, 2015. Because allowing this appeal would violate the Double Jeopardy Clauses of the Zuni Constitution, the Indian Civil Rights Act, and the United States Constitution, Plaintiff-Appellant's notice of appeal is hereby DENIED.

The Zuni Constitution provides, "The Zuni Tribe, in exercising its powers of self-government, shall not subject any person for the same offense to be twice put in jeopardy." Zuni Const., art. III, § 2(c). This clause is identical to that of the Indian Civil Rights Act, which applies to the Pueblo of Zuni. 25 U.S.C. § 1302(3). The Fifth Amendment of the United States Constitution provides, "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb[.]" U.S. Const., am. 5.

The doctrine of double jeopardy prevents a person accused and acquitted of a crime from being tried again for that same crime by the same sovereign. In a bench trial, jeopardy first attaches to the accused when the court begins to hear evidence. If and when jeopardy terminates, the Double Jeopardy Clauses of these constitutions forever bar re-trying the accused for the same offense. Jeopardy terminates when a judge makes a ruling concerning the evidence that works in defendant's favor. Even if such a ruling results from erroneous evidentiary rulings, jeopardy terminates. *See Smith v. Massachusetts*, 543 U.S. 462 (2005).

In this matter, a bench trial occurred where evidentiary testimony was given and considered by the presiding judge. At the conclusion of the trial, the judge found Defendant-Appellee not guilty of the underlying criminal charges. The "Final Disposition and Judgment Order" explicitly states: "This matter having come on for a Bench Trial; and the Court having heard the cause and being fully advised in the premises: hereby adjudges, orders, and decrees that the defendant be found not guilty[.]" Thus jeopardy attached and terminated. Allowing Plaintiff-Appellant to appeal this judgment and its clear finding of not guilty would impermissibly subject Defendant-Appellee to be twice put in jeopardy for the same offense.

For the reasons above, Plaintiff-Appellant's notice of appeal is hereby DENIED.

It is so ORDERED.

March 21, 2016

PUEBLO OF ZUNI,

Plaintiff-Appellant,

v.

KATIE DEWA,

Defendant-Appellee.

SWITCA Case No. 15-020-ZTC
Zuni Tribal Court No. CR-2015-0687

Appeal filed in Zuni Tribal Court on June 1, 2015

Appeal filed in the Southwest Intertribal Court of Appeals on June 25, 2016

Appeal from the Zuni Tribal Court
Albert Banteah, Judge

Appellate Judges: Jonathan Tsosie,
Anthony Lee and Jeanette Wolfley

ORDER DENYING APPEAL

SUMMARY

Notice of appeal denied because allowing appeal would violate the Double Jeopardy Clauses of the Zuni Constitution, the Indian Civil Rights Act, and the United States Constitution after defendant found not guilty in final judgment resulting from a bench trial.

* * *

THIS MATTER arises from Plaintiff-Appellant's notice of appeal from a "Judgment and Sentence" issued by the Zuni Tribal Court on May 29, 2015. Because allowing this appeal would violate the Double Jeopardy Clauses of the Zuni Constitution, the Indian Civil Rights Act, and the United States Constitution, Plaintiff-Appellant's notice of appeal is hereby DENIED.

The Zuni Constitution provides, "The Zuni Tribe, in exercising its powers of self-government, shall not subject any person for the same offense to be twice put in jeopardy." Zuni Const., art. III, § 2(c). This clause is identical to that of the Indian Civil Rights Act, which applies to the Pueblo of Zuni. 25 U.S.C. § 1302(3). The Fifth Amendment of the United States Constitution provides, "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb[.]" U.S. Const., am. 5.

The doctrine of double jeopardy prevents a person accused and acquitted of a crime from being tried again

for that same crime by the same sovereign. In a bench trial, jeopardy first attaches to the accused when the court begins to hear evidence. If and when jeopardy terminates, the Double Jeopardy Clauses of these constitutions forever bar re-trying the accused for the same offense. Jeopardy terminates when a judge makes a ruling concerning the evidence that works in defendant's favor. Even if such a ruling results from erroneous evidentiary rulings, jeopardy terminates. *See Smith v. Massachusetts*, 543 U.S. 462 (2005).

In this matter, a bench trial occurred where evidentiary testimony was given and considered by the presiding judge. At the conclusion of the trial, the judge found Defendant-Appellee not guilty of the underlying criminal charges. The "Judgment and Sentence" explicitly states: "[T]he court finding the defendant not guilty of the following charges:…[.]" and again, "It is therefore, ordered, adjudged and decreed that: that the defendant is not guilty of the following charges[.]" Thus jeopardy attached and terminated. Allowing Plaintiff-Appellant to appeal this judgment and its clear finding of not guilty would impermissibly subject Defendant-Appellee to be twice put in jeopardy for the same offense.

For the reasons above, Plaintiff-Appellant's notice of appeal is hereby DENIED.

It is so ORDERED.

March 21, 2016

RODERICK TSABETSAYE,

Defendant-Appellant,

v.

PUEBLO OF ZUNI,

Plaintiff-Appellee.

SWITCA Case No. 16-001-ZTC
ZTC Case No. CR-2015-2444

Appeal filed in Zuni Tribal Court on March 2, 2016

Appeal filed in the Southwest Intertribal Court of Appeals on March 7, 2016

Appeal from the Zuni Tribal Court
Albert Banteah, Judge

Appellate Judges: Jonathan Tsosie,
Anthony Lee and Jeanette Wolfley

ORDER DENYING APPEAL

SUMMARY

Appeal denied because notice of appeal was insufficient under SWITCA rules of appellate procedure.

* * *

THIS MATTER arises out of *pro se* Defendant-Appellant's notice of appeal from a "Judgment and Sentence" issued by the Zuni Tribal Court on February 19, 2016, in the above-captioned matter. For reasons below, this panel must DENY this appeal.

Rule 11(e) of this Court's Rules of Appellate Procedure ("SWITCARA") contains several requirements to perfect a notice of appeal:

> The notice of appeal *shall, at a minimum,* include:
>
> (1) the names, titles, addresses, and telephone numbers of the parties taking appeal and their counsel unless the lower court determines that including the address or telephone number of any person would place that person in physical jeopardy;
>
> (2) the name of the court rendering the adverse ruling and the date the ruling was rendered;

(3) a concise statement of the adverse ruling or alleged errors made by the lower court;

(4) the nature of the relief being sought; and,

(5) a concise statement of the reasons for reversal or modification.

SWITCARA #11(e) (emphasis added).

Defendant-Appellant's notice of appeal only complies with SWITCARA #11(e)(2) and #11(e)(3). The notice of appeal only partially complies with SWITCARA #11(e)(1). Most important, the notice of appeal does not contain a statement of the nature of the relief being sought nor any reasons as to why this Court should reverse or modify the tribal court's judgment, as required by SWITCARA #11(e)(4) and #11(e)(5).

This Court has consistently held that such deficiencies are jurisdictional. *See, e.g., Rice v. Yavapai-Prescott Indian Tribe*, 21 SWITCA Rep. 12, 13 (2010). This panel therefore has no choice but to deny the appeal.

For the foregoing reasons, the notice of appeal in this matter is hereby DENIED.

It is so ORDERED.

April 4, 2016

NORMAN COOEYATE, GOVERNOR,
and DANCY SIMPLICIO, LT. GOVERNOR,
PUEBLO OF ZUNI,

Petitioners,

v.

HON. ALBERT BANTEAH,
CHIEF TRIBAL JUDGE,
IN AND FOR ZUNI TRIBAL COURT,

Respondent.

SWITCA Case No. 15-021-ZTC
ZTC Case No. CA-2011-0001

Appeal filed in Zuni Tribal Court
on December 9, 2011

Appeal filed in the Southwest Intertribal Court of Appeals on July 10, 2015

Appeal from the Zuni Tribal Court
John Chapela, Judge

Appellate Judges: Jonathan Tsosie,
Anthony Lee and Jeanette Wolfley

OPINION AND ORDER

SUMMARY

Appeal from April 8, 2011 tribal court decision and order that interpreted Zuni Constitution and caused great controversy. This is a rare case in which SWITCA found it necessary to interpret a tribe's constitution and in which tribe's most respected religious leaders submitted affidavits asking SWITCA to resolve longstanding conflicts and uncertainty.

SWITCA declined to disturb the validity of the April 8, 2011 decision and order insofar as it was the rule of law at Zuni Pueblo from 2011 to 2014. Moving forward, however, the decision and order was vacated in its entirety.

Held: (1) Oath of office administered to current tribal council was constitutional because it was done pursuant to the Zuni Constitution as duly amended in fall 2014; (2) Four or fewer tribal council members do not comprise a constitutional quorum; (3) Head Cacique may now delegate his constitutional authority to administer the oath of office "to a religious leader in accordance with Zuni religious hierarchy"; and (4) There is no requirement in the Zuni Constitution that an incumbent

tribal council must hold over until the members of a tribal council-elect are duly installed into office.

* * *

Petitioners appeal a Decision and Order of April 8, 2011 ("the 2011 April Order") that was authored by then-Chief Judge of the Zuni Tribal Court, John Chapela.[1] The Tribal Court interpreted three provisions of the Zuni Constitution in a manner that caused great controversy among the people of Zuni Pueblo. Petitioners filed a Notice of Appeal with the Zuni Tribal Court on December 9, 2011, but that notice of appeal was not allowed to reach this Court. Petitioners then petitioned this Court for a writ of mandamus and prohibition, and we issued an order to show cause to Judge Chapela. A hearing was held in February, 2012, and this Court issued a Writ of Mandamus and Prohibition on April 13, 2012. Within weeks of that writ, the Zuni Tribe enacted legislation to eliminate this Court's jurisdiction to hear appeals from the Zuni Tribal Court.

On April 29, 2015, the Zuni Tribal Council duly enacted Resolution No. M70-2015-P042, "Resolution to Reinstate SWITCA and to adopt the SWITCA Rules of Appellate Procedure."

Petitioners now ask this Court to rule on the validity of the 2011 April Order. There has been no response brief filed. Only in rare cases does this Court interpret a Tribe's constitution. Because the constitutional issues in this case have not been resolved in over five years, and because Petitioners' brief is supported by unprecedented affidavits from the Tribe's most respected religious leaders specifically asking this Court to provide some resolution to the community's longstanding conflicts and uncertainty, this is one of the rare occasions where we find it necessary to interpret a Tribe's Constitution, both as it existed in 2011, and as it has existed since its amendment in September, 2014.

The issues on appeal are (1) whether four Tribal Council members are sufficient to comprise a constitutional quorum; (2) whether the Head Cacique of the Zuni Pueblo may delegate his constitutional duty to administer the oath of office and, by extension, whether the Zuni Tribal Court may alter the requirements of the Zuni Constitution; and (3) whether the Zuni Constitution requires an incumbent Tribal Council to hold over as the Tribal Council until a newly elected Tribal Council-elect is duly installed by the oath of office.

For reasons below, we decline to disturb the 2011 April Order with respect to the years of 2011 through 2014, when the Zuni Tribal Council was led by former Governor Quetawki. We hold that the current Tribal Council, which was elected to replace the Quetawki administration, was duly installed into office pursuant to the amended Zuni Constitution. Thus both the Quetawki Tribal Council and the current Tribal Council were and are legitimate. We further hold (1) that four Tribal Council members or fewer do not comprise a constitutional quorum; (2) that the Head Cacique may delegate his constitutional duty to administer the oath of office; and (3) that there is no requirement in the Zuni Constitution that an incumbent Tribal Council must hold over until the members of a Tribal Council-elect are duly installed into office.

BACKGROUND

To fully understand the importance and unique nature of this case, we provide the factual and procedural history at length.

On December 14, 2010, the people of the Pueblo of Zuni conducted their regular election of a new Tribal Council, which occurs every four years. Pursuant to the Zuni Constitution, a full Tribal Council consists of eight council members - a Governor, a Lieutenant Governor, and six council members. In order to be properly installed as council members, the Zuni Constitution mandated that "the Head Cacique of the Pueblo and his aides" administer the oath of office to the council members-elect. Zuni Const., Art. XVI.[2] The Head Cacique is the Zuni Tribe's highest religious leader in their religious hierarchy.[3] The oath of office for the newly elected administration was to occur on January 1, 2011.

[1] Also at issue is a much smaller matter, Petitioner's (sic) Motion to Amend Caption, and Motion for Order to Show Cause Why Zuni Tribal Court Has Not Certified and Forwarded the Record in This Case to SWITCA for Appeal, Pursuant to This Court's April 13, 2012 Writ of Mandamus, dated July 8, 2015, and filed in this Court on July 13, 2015. The Zuni Tribal Court has forwarded the record in this case, therefore that is no longer an issue. Petitioners' motion to amend the caption is well-taken and has been made above.

[2] The provision in full: "All newly elected officers and members of the Zuni Tribal Council shall be required to take an oath of office, as shown below, at the time of their installation. Such oath shall be administered by the Head Cacique of the Pueblo and his aides." Zuni Const., Art. XVI.

[3] The Head Cacique is also known as a Rain Priest. While Petitioners argue that there is only one Head Cacique, certain documents in the record appear to indicate that there are two. Whether there is one or two, all parties concede that the Head Cacique is the highest and most important traditional religious leader of the Zuni Tribe.

Sometime between the election and January 1, 2011, one of the council members-elect announced that she would not accept the position, thus leaving the Tribal Council-elect reduced to seven members.

When it came time to administer the oath on January 1, 2011, the Head Cacique announced that he could not administer the oath to the remaining seven council members-elect because he could only administer the oath if all eight council members-elect were present. The oath of office therefore did not occur on that date.

Because the oath of office did not occur, the prior Tribal Council, led by lead Petitioner here, attempted to invoke Article XV, section 6[4] of the Zuni Constitution, which they claimed mandated them to hold over as the Tribal Council until the incoming Tribal Council was duly installed.

By January 12, 2011, the Governor-elect and Lieutenant Governor-elect had filed a petition for immediate injunctive relief, though the record is unclear as to when that petition was originally filed. On the following day, January 13, 2011, Judge Chapela ordered the previous council to declare to the Pueblo that vacancies on the Tribal Council existed. Judge Chapela further ordered a special election to occur on April 23, 2011, to fill the seats vacated by those council members-elect who had relinquished their seats. (The special election eventually occurred in May, 2011.)

On January 14, 2011, the previous council officially resigned their positions in an open letter addressed to the Pueblo, but they also claimed that the council-elect would not be legitimate until the Head Cacique performed his constitutional duty to administer the oath of office.

Arrangements were then made for members of the incoming Tribal Council to be administered the oath of office based on an announcement by the Head Cacique that he had delegated the responsibilities of administering the oath of office to newly elected Tribal officials to the Sakisda:kwe. 2011 April Order, at 3. The Sakisda:kwe is also a religious leader within the Pueblo, and is a position closely associated with the Catholic Church.

The Head Cacique's delegation of this authority became a highly disputed constitutional issue, and forms the heart of this dispute. Opponents of the delegation, which included Petitioners here, claimed the delegation was not permitted by the constitution, and that the Sakisda:kwe was not an "aide" of the Head Cacique, as written in the constitution. The Head Cacique's delegation, as described below, eventually resulted in a constitutional amendment.

The oath of office was then scheduled to occur on January 15, 2011, for the five remaining council members-elect. On that date, however, one of the council members-elect did not attend the oath of office ceremony, thus leaving four council members-elect to take the oath of office from the Sakisda:kwe. These four council members-elect are the "Quetawki group."[5] The Sakisda:kwe administered the oath of office to these four.

On March 16, 2011, the Quetawki group filed a Motion for Declaratory Judgment and Memorandum in Support Thereof in Zuni Tribal Court, asking the court to declare that the four of them constitute a quorum of the Zuni Tribal Council or, in the alternative, that the court authorize them to act as the Tribal Council on urgent matters.

The Quetawki group urged the Zuni Tribal Court (1) to declare that the Head Cacique's delegation of the oath of office to the Sakisda:kwe was consistent with the constitution; and (2) to declare that the four petitioners of the Quetawki group either constitute a legal quorum pursuant to the constitution, or, in the alternative, that the four petitioners may lawfully act as a Tribal Council. A hearing was held on the amended motion in late March.

On April 8, 2011, Judge Chapela issued the Decision and Order at issue, which acknowledged that four Tribal Council members do not comprise a legal quorum under the Zuni Constitution, but that "the absence of a quorum would create unacceptable disruption of tribal government and chaos for the Zuni people." 2011 April Order, at 9. The 2011 April Order stated that "[t]he Zuni people established a constitution to provide them with a functioning government, not to serve as a barrier to a functioning government." *Id.* at 6. Further, "[t]he will of the Zuni people, as evidenced by the election of a new tribal administration on December 14, 2010, is being thwarted by the inability of the elected leaders to obtain a quorum for the conduct of tribal business." *Id.*

The 2011 April Order also held that the Head Cacique's delegation of authority to administer the oath of office to

[4] "The regular election of the Zuni Tribe shall be held every four (4) years on a date to be set by the Zuni Tribal Council, to be called and held during the period intervening between the end of Shalako and the beginning of the winter Desh'kwi. The first election under this constitution shall be held on a date to be set by the tribal council in 1970. The incumbent tribal council members, at the time of the adoption of this constitution, shall hold office until the expiration of the term for which they were elected, and until their successors are duly elected and installed on the first day after the winter Desh'kwi." Zuni Const., Art. XV, § 6.

[5] Named after Governor-elect Quetawki.

the Sakisda:kwe was constitutional because the Sakisda:kwe was one of the Head Cacique's "aides," and because the Head Cacique's religious stature deserved great deference. 2011 April Order, at 10. Judge Chapela also found that "[t]he Court is not bound by nor required to give any deference to the conclusions of the [Bureau of Indian Affairs] Regional Director," *id.*, who had warned the Quetawki group by letter of March 18, 2011, that the actions of four Tribal Council members may be open to legal challenge.

The 2011 April Order makes no explicit finding or ruling with respect to the constitution's holdover provision. The provision is only mentioned once in the "Facts" section, and it is never mentioned or alluded to again. Nor was the holdover provision considered in the hearing on the Quetawki group's amended motion in late March.

Ultimately, the 2011 April Order ordered: (1) that the Zuni Tribal Court would defer to the decision of the Head Cacique to delegate to the Sakisda:kwe the authority to administer the oath of office; (2) that a list submitted to the Zuni Tribal Court by the Quetawki group of governmental matters requiring immediate attention could be acted upon and approved by the Quetawki group, "notwithstanding that they do not constitute a quorum under the Zuni Constitution," *Id.* at 11.; (3) that the Quetawki group may submit to the Tribal court for the court's review any additional matters requiring immediate attention; (4) that when the vacancies on the Tribal Council are eventually filled on May 16, 2011, via special election, a quorum of the full council will then ratify the actions that had been taken by the four members of the Quetawki group.

On April 21, 2011, members of the previous administration, *i.e.*, Petitioners here, announced in an open letter to the Tribe that they were rescinding their January resignations from the Tribal Council because the Quetawki group had not been legitimately administered the oath of office, therefore Petitioners had a constitutional duty to holdover as a Tribal Council until a new council could be properly installed.

On April 28, 2011, Petitioners filed a notice of appeal with the Zuni Tribal Court, appealing the 2011 April Order. On May 2, 2011, Judge Chapela ordered Petitioners to post an appeal bond in the amount of $4,000.00 in order to forward the appeal to SWITCA, in addition to costs of preparing the record. In that order, Chapela determined that the intent of Petitioners' appeal was "to subvert the will of the Zuni people as evidenced by the election of a new tribal administration on December 10, 2010"; "to subvert the duties and responsibilities of the duly elected Governor, Lieutenant Governor, and members of the Zuni Tribal Council to provide essential governmental services to members of the Zuni Tribe pending outcome of the Special Election,"; and "to return the Zuni Tribal Government to the state of uncertainty and paralysis that existed prior to the Decision and Judgment that was issued by this [Zuni Tribal] Court on April 8, 2011." Order Requiring Posting of Appeal Bond, at 1, 2. Petitioners did not have $4,000.00 for an appeal bond, and the notice of appeal remained in the Zuni Tribal Court.

On May 16, 2011, the Tribe conducted a special election to fill vacancies on the Tribal Council.

On November 23, 2011, Petitioners filed a Motion for Relief from the Order Requiring Posting of a Bond. Claiming that they were the true Tribal Council, Petitioners argued they were statutorily immune from having to post an appeal bond, as the Zuni Tribal Code provided, "Neither the Tribe nor its offices or employees when involved in a civil action rising from the performance of their official duties shall be required to post security by bond or otherwise for any purpose." ZTC § 1-8-5(3). Judge Chapela denied that motion on December 1, 2011.

On December 9, 2011, Petitioners filed a Notice of Appeal from Judge Chapela's May 2, 2011, and December 1, 2011, orders. On December 14, 2011, Chapela issued an order raising the appeal bond amount from $4,000.00 to $10,000.00 upon motion of the Quetawki group. In that order, Chapela noted that Petitioners had waited nearly seven months, without explanation, to appeal the $4,000.00 appeal bond, during which time the Sakisda:kwe had sworn in new Tribal Council members after the May special election, and that the Tribal Council had made and passed hundreds of official decisions and Resolutions. Petitioners did not have $10,000.00 for the appeal bond.

For reasons unknown to this Court, two vacancies on the Tribal Council necessitated yet another special election that was held on December 13, 2011. Petitioner Cooeyate filed to run for one of the vacancies, but Cooeyate also continued to contend that he was the constitutional 'holdover Governor.' Chapela wrote that if Cooeyate were to win a seat on the Tribal Council in the December 13, 2011, special election, then Cooeyate would potentially hold the offices of Tribal Council member and of Governor, in violation of the Zuni Constitution, which does not allow a Tribal Council member to occupy more than one elective office. See Zuni Const., Art. V. § 3.

On January 10, 2012, upon motion of the Quetawki group, Judge Chapela ordered Petitioners to pay attorney fees and costs to the Pueblo of Zuni. Petitioners remained unable and unwilling to pay the $10,000.00 appeal bond. The very next day Petitioners filed with SWITCA a Petition for Expedited Writ of Mandamus and Prohibition,

alleging constitutional violations at the Pueblo. The petition included the 2011 April Order, the relevant provisions of the Zuni Constitution, a March 18, 2011, letter from the BIA Regional Director, and several other letters, motions and orders. The Petitioners asked this Court to order Chapela: (1) to vacate the appeal bond; (2) to forward the entire record of this matter to this Court for appeal; (3) to refrain from imposing attorney fees on Petitioners or Petitioners' attorney; and (4) to disqualify himself from presiding over any further proceedings in this matter.

On January 18, 2012, a panel of this Court issued an Order to Show Cause to Judge Chapela. The Quetawki group filed a motion to intervene, but we denied that motion. On February 12, 2012, a panel of this Court conducted the show cause hearing at the Pueblo of Zuni. Chapela maintained throughout that hearing that his 2011 April Order and the actions of the Quetawki group were legitimate.

On April 13, 2012, we issued a Writ of Mandamus and Prohibition to Judge Chapela, in which we granted all of Petitioners' requested relief. The Zuni Tribal Court, however, did not forward the record for appeal. By the end of April, 2012, SWITCA received a Zuni Tribal Council Resolution eliminating SWITCA's jurisdiction to hear appeals from the Zuni Tribal Court. The Zuni Tribal Court demanded of this Court the return of all pending appeals, and this Court complied.

Three years later, on April 29, 2015, a newly elected and installed Zuni Tribal Council duly enacted Resolution No. M70-2015-P042, "Resolution to Reinstate SWITCA and to adopt the SWITCA Rules of Appellate Procedure." After the enactment of that Resolution, this Court began receiving appeals from the Zuni Tribal Court, many of which have been pending for several years, including the one at issue.

This Court also learned that on September 9, 2014, the people of Zuni held a Secretarial Election to amend their constitution. The provision pertaining to the duty of administering the oath to newly elected officials had been amended to read as follows:

> The newly elected Governor, Lieutenant Governor, and members of the Zuni Tribal Council shall be required to individually take an oath of office at the time of their installation. The Head Cacique will delegate his authority to administer the oath of office to a Zuni religious leader in accordance with Zuni religious hierarchy. Zuni Const., Art. XVI.

DISCUSSION

This Court must acknowledge at the outset that the Quetawki administration governed the Zuni Tribe as its Tribal Council pursuant to the 2011 April Order for essentially the entire four-year term, until the next regularly scheduled election in 2014. During that time, as all Tribal governments do, the Quetawki administration made numerous important decisions affecting numerous individuals and entities both within and without the Pueblo. The Quetawki administration conducted business for and on behalf of the Zuni Tribe by entering into contracts on behalf of the Tribe, providing services to Tribal members, non-Tribal members and outside entities, and by making day-to-day governmental decisions. Governing as the Zuni Tribal Council, the Quetawki administration created rights and obligations upon which innumerable individuals and entities relied, and continue to rely.

The 2011 April Order also engendered intense conflict within the Pueblo, and, according to Petitioners' unopposed brief, several disputes - both legal and otherwise - remain outstanding from the years 2011 through 2014. Though Petitioners do not describe with particularity the nature or number of these longstanding disputes, we may, given the contentious history surrounding the 2011 April Order, infer that these disputes are grounded in strongly held differences of opinion as to the legitimacy of the Quetawki administration throughout its term. To vacate the 2011 April Order since its inception, as Petitioners seek, would potentially delegitimize all of the actions of the Quetawki administration. This would destabilize the Zuni Tribe once again and potentially upset established relationships and agreements within the Pueblo, as well as between the Zuni Tribe and other governments.

We are necessarily in a precarious position where we must answer Petitioners' questions by interpreting and applying the Zuni Constitution as it existed in 2011 to the underlying facts of this matter, which is when such facts occurred, but yet we must also consider the fact that the constitution has since been amended and that the Quetawki administration is no longer the governing body of the Zuni Tribe.

In support of our decision to move forward with interpreting and applying the prior and current versions of the Zuni Constitution, we note certain attachments to Petitioners' brief that are either written by or signed by the highest and most respected leaders of the Zuni Tribe's religious hierarchy. These attachments are directly addressed to this Court and ask for final resolution so that the Pueblo may begin to heal from longstanding conflicts.

A September 27, 2015, Affidavit from a Head Cacique states that the 2011 decision to delegate to the Sakisda:kwe the duty of administering the oath was "a mistake," as "the results of the [2011] affidavit only began a series of events that created an attitude where the Governor and Tribal Council think they can do anything and cannot be held accountable." The Head Cacique further states that the current Tribal Council was administered the oath pursuant to the amended constitution, as the oath was administered by a Rain Priest. The Affidavit then proclaims, "I hope and expect the Southwest Inter Tribal Court of Appeals (SWITCA) will review the matters in the Cooeyate action and bring a sense of welcome finality to the past disagreements. We feel now for SWITCA to set the record straight."

A December, 2011, Affidavit of Facts and Zuni Customs and Traditions, written by the Head Bow Priest and Spokesperson for the Rain Priests, explains that "Head Cacique and his Aides" refers to seven particular religious leader positions, which are described in the affidavit, and that the Sakisda:kwe is not one of them. According to this affidavit, the Sakisda:kwe is thus not one of the "aides" described in the 2011 constitution. This Court had not seen this affidavit until four years after it was written, when Petitioners submitted their opening brief in this matter in late 2015.

These affidavits from the Zuni Tribe's highest religious leaders are unprecedented in this Court and are uniquely persuasive. But we must also consider the harmful consequences of potentially delegitimizing the actions and decisions of an entire administration from 2011 to 2014.

Given (1) that the 2011 April Order was written for an administration that is no longer the Zuni Tribe's governing body; (2) that the 2011 April Order was the law of Zuni for practically four years and countless Tribal Council decisions were made pursuant to it; (3) that the Zuni Tribe duly amended their constitution in September 2014 to specifically address the 2011 April Order; (4) that Petitioners' brief is supported by the highest of Zuni's religious hierarchy; and (5) that Petitioners' brief is unopposed, we decline to disturb the validity of the 2011 April Order during the years of the Quetawki administration, and we hold that the oath of office that was administered to the members of the current Tribal Council was constitutionally valid. As of the undersigned date, we hereby vacate the 2011 April Order in its entirety.

I. Four Tribal Council Members or Fewer Do Not Comprise a Constitutional Quorum.

The Zuni Constitution provides:

> A legal quorum of the Zuni Tribal Council for the conduct of official business shall be four (4) or more councilmen and the presiding officer. The presiding officer shall be entitled to vote as a member of the tribal council. Zuni Const., Art. VII, § 4.

Generally, four members of the Zuni Tribal Council or fewer may not constitute a legal quorum. The plain language of the Zuni Constitution explicitly requires at least five Tribal Council members for a legal quorum, which may then act with all the authority of a legitimate Tribal Council.

However, exceptions to this rule may have to be allowed in extraordinary and unforeseeable circumstances. For example, if a duly installed and acting Tribal Council were to suddenly lose several council members within a short period of time due to disability, death, recall or resignation such that less than a legal quorum remained, the remaining council members and the entire Tribe would be confronted with an emergency for which neither the constitution nor the Tribal Code appear to have a quick solution.

II. The Head Cacique May Delegate His Constitutional Duty to Administer the Oath of Office.

Newly elected Zuni Tribal Council members are not required to be sworn in by the Head Cacique, his "aide," or by the Sakisda:kwe, as ruled in the 2011 April Order. Nor can the Zuni Court unilaterally and effectively change the oath requirements of the Zuni Constitution.

In 2011, the constitutional provision at issue read as follows:

> All newly elected officers and members of the Zuni Tribal Council shall be required to take an oath of office, as shown below, at the time of their installation. Such oath shall be administered by the Head Cacique of the Pueblo and his aides. Zuni Const., Art XVI.

In September, 2014, the people of Zuni voted to amend this provision, which now provides:

> The newly elected Governor, Lieutenant Governor, and members of the Zuni Tribal Council shall be required to individually take an oath of office at the time of their installation. *The*

> *Head Cacique will delegate his authority to administer the oath of office to a Zuni religious leader in accordance with Zuni religious hierarchy.* Zuni Const., Art. XVI (emphasis added).

Thus the people of Zuni have elected to allow the Head Cacique to delegate his duty to another religious leader, and the constitutional language about "aides" of the Head Cacique has been eliminated entirely. According to the Affidavit of a Head Cacique, the current Tribal Council that was voted into office in December 2014 to replace the Quetawki administration was administered the oath of office pursuant to the amended constitution. That 2015 oath of office was valid. Future Tribal Council members may be administered the oath of office by "a Zuni religious leader in accordance with Zuni religious hierarchy," as long as such religious leader has been delegated the duty to do so by a Head Cacique. Whether the amendment intends to require the Head Cacique to delegate this duty is a question we do not decide. Similarly, we do not decide the definition of "Zuni religious hierarchy."

Because we decline to disturb the 2011 April Order insofar as it was the rule of law during the Quetawki administration, and because the constitution has been amended to allow the Head Cacique to delegate his duty to another religious leader, the issue of who may or who must administer the oath verges on mootness. We will, however, point out that Judge Chapela did not "unilaterally" change the oath of office requirements in the 2011 April Order, as Petitioners contend. Judge Chapela had considered both an announcement and an affidavit from a Head Cacique delegating the duty of administering the oath. Moreover, the term "aides" remained reasonably ambiguous until the constitution was amended and before the meaning of "aides" could be determined on appeal. Further, the constitution as it existed in 2011 was silent as to whether the Head Cacique could delegate his duty or not. Thus Judge Chapela did not act as "unilaterally" as Petitioners claim with respect to the oath of office provisions of the constitution.

III. <u>The Zuni Constitution Does Not Provide that an Incumbent Tribal Council Must Hold Over until the Tribal Council-Elect Is Duly Installed by the Oath of Office.</u>

The constitutional clause at issue applied only to the Tribal Council that was sitting and incumbent at the time of the enactment of the Zuni Constitution in 1970. The language of the clause itself, when read in the context of the entire constitutional Section, supports this interpretation.

> The regular election of the Zuni Tribe shall be held every four (4) years on a date to be set by the Zuni Tribal Council, to be called and held during the period intervening between the end of Shalako and the beginning of the winter Desh'kwi. The first election under this constitution shall be held on a date to be set by the tribal council in 1970. The incumbent tribal council members, *at the time of the adoption of this constitution,* shall hold office until the expiration of the term for which they were elected, and until their successors are duly elected and installed on the first day after the winter Desh:kwi. Zuni Const., Art. XV, § 6 (emphasis added).

Thus as of the date of the enactment of this version of the constitution, August 13, 1970, "the first election under this constitution" had not yet occurred. Shalako is a ceremony renown outside the Zuni Pueblo, and occurs in November or December. When the first two sentences are read together in light of the date of August 13, 1970, they demonstrate that the first election must be held soon, within a matter of a few months. The very next sentence then provides that the incumbent Tribal Council members, "at the time of the adoption of this constitution," are to remain in office until their terms expire and the council members-elect are duly elected and installed. By contrast, the sentence does not contemplate future Tribal Councils, but rather the incumbent members "at the time of the adoption of this constitution." We cannot ignore the plain language of the clause "at the time of the adoption of this constitution." Therefore, we hold that the constitutional hold over provision only applied to the Tribal Council that was incumbent as of the first election under that constitution in late 1970.

CONCLUSION

For the foregoing reasons, we decline to disturb the validity of the 2011 April Order insofar as it was the rule of law at Zuni Pueblo during the years of the Quetawki administration, 2011 to 2014. Because the Zuni Constitution was duly amended by the people of Zuni in the fall of 2014, and because the current Tribal Council was then administered the oath of office pursuant to the amended constitution, we hold that the oath of office administered to the current Tribal Council was constitutional. Moving forward, however, the 2011 April Order is VACATED in its entirety.

We further hold that (1) four Tribal Council members or fewer do not comprise a constitutional quorum; (2) that the Head Cacique may now delegate his constitutional authority to administer the oath of office "to a religious leader in accordance with Zuni religious hierarchy"; and (3) that there is no requirement in the Zuni Constitution

that an incumbent Tribal Council must hold over until the members of a Tribal Council-elect are duly installed into office.

It is so ORDERED.

June 2, 2016

GARRETT BESSELENTE,

Defendant-Appellant,

v.

PUEBLO OF ZUNI,

Plaintiff-Appellee.

SWITCA Case No. 15-017-ZTC
ZTC Cause No. CR-2014-3807

Appeal filed in Zuni Tribal Court on December 24, 2014

Appeal filed in the Southwest Intertribal Court of Appeals on June 26, 2015

Appeal from the Zuni Tribal Court
John Chapela, Judge

Appellate Judges: Jonathan Tsosie, Anthony Lee, and Jeanette Wolfley

ORDER DENYING "MOTION FOR RECONSIDERATION TO DISMISS APPEAL"

SUMMARY

Appeal dismissed due to Appellant's failure to file a brief in accordance with Appellate Court's order; related motion for reconsideration denied because Appellant's reasons were vague and insufficient.

*** * ***

THIS MATTER was originally accepted for appeal by this Court on March 23, 2016. We ordered Defendant-Appellant to file an opening brief within thirty days of receiving notice of that March 23, 2016, order. On May 9, 2016, we issued an Order Dismissing Appeal because more than a month and a half had passed since we accepted the appeal, and we had not received an opening brief or a motion of any kind requesting an extension of time. On May 18, 2016, Defendant-Appellant submitted a Motion for Reconsideration to Dismiss Appeal. For reasons below, we deny Defendant-Appellant's motion for reconsideration of our dismissal.

Defendant-Appellant's sole reasons for reconsidering our dismissal are vague and insufficient. Defendant-Appellant claims "The Executive and Legislative branch of the Zuni Tribal Council has effectively barred my representative from further work on my case for political reasons. My representative has attempted to resolve this issue through traditional means and by filing a civil suit in the Zuni Tribal Court but this issue has not been resolved." Further, Defendant-Appellant states, "Based upon the Zuni Tribal Council's actions that are political and arbitrary they are denying me my right to representation."

Defendant-Appellant does not explain what these "political reasons" are, nor why such reasons should persuade this Court to reverse its dismissal other than that these "political reasons" are "arbitrary." Moreover, we do not know what "civil suit" Defendant-Appellant is referring to, nor the parties or underlying claims of that suit. We also do not know what the "civil suit" has to do with this case. With such conclusory and nebulous allegations, this Court is left to guess at what these terms mean, which this Court cannot do.

Importantly, Defendant-Appellant's motion indicates that he and his representative had notice that we had accepted this appeal and had ordered a deadline for an opening brief. Despite knowledge of the impending deadline, neither Defendant-Appellant nor his representative gave any kind of notice to this Court that an opening brief could not be filed on time, much less any reason why Defendant-Appellant could not move forward with his appeal. As we noted in our order dismissing this appeal, we had not received any motion of any kind from Defendant-Appellant after a month and a half of issuing our order accepting the appeal. Only upon our dismissal of the appeal did Defendant-Appellant make any effort to contact this Court.

For the reasons above, we must hereby DENY Defendant-Appellant's Motion for Reconsideration to Dismiss Appeal in this matter.

It is so ORDERED.

June 2, 2016

In the Southwest Intertribal Court of Appeals for Zuni Tribal Court

PHILIP VICENTI, JR.,

Defendant-Appellant,

v.

PUEBLO OF ZUNI,

Plaintiff-Appellee.

SWITCA Case No. 15-024-ZTC
ZTC Cause No. CA -2008-001

Appeal filed in Zuni Tribal Court on April 16, 2012

Appeal filed in the Southwest Intertribal Court of Appeals on November 13, 2015

Appeal from the Zuni Tribal Court
John Chapela, Judge

Appellate Judges: Jonathan Tsosie,
Anthony Lee and Jeanette Wolfley

OPINION AND ORDER AFFIRMING SUMMARY JUDGMENT AND REMANDING COUNTERCLAIMS

SUMMARY

SWITCA affirmed order of summary judgment for civil trespass relating to violation of a grazing permit because Appellant failed to offer evidence or a feasible argument that would cause SWITCA to determine that there was a factual dispute that should proceed to trial. For reasons of fairness and justice, due process requires that Appellant's long-pending counterclaims of unjust enrichment and misrepresentation be remanded to be considered by Zuni Tribal Court.

Decision and order of abolished Zuni Tribal Court of Appeals was a nullity and void ab initio. Appellant's allegations of bias and prejudice and his claim of inordinate delay and irreparable prejudice were without merit because they were not supported by the record, nor by legal authority or analysis.

* * *

Defendant-Appellant appeals an order of summary judgment issued on March 26, 2012, by the Zuni Tribal Court, which found Defendant-Appellant ("Mr. Vicenti") to be in trespass on certain lands within the exterior boundaries of the Zuni Indian Reservation. The Southwest Intertribal Court of Appeals ("SWITCA") has jurisdiction over this matter pursuant to Zuni Tribal Council Resolution No. M70-2015-P042, "Resolution to Reinstate SWITCA and to adopt the SWITCA Rules of Appellate Procedure," enacted on April 29, 2015.

For the reasons below, we AFFIRM the order of summary judgment finding Mr. Vicenti in trespass, and we REMAND Mr. Vicenti's counterclaims of unjust enrichment and misrepresentation to the Zuni Tribal Court for due consideration.

BACKGROUND

Defendant-Appellant Philip Vicenti, Jr., is a member of the Zuni Tribe. On certain trust lands located within the exterior boundaries of the Zuni Reservation, Mr. Vicenti kept and grazed livestock pursuant to a grazing permit issued to him on March 31, 1992, by the Bureau of Indian Affairs ("BIA") on behalf of the Zuni Tribe. Prior to March 31, 1992, Mr. Vicenti and members of his family had grazed their livestock in the vicinity of the lands at issue for several decades.

The grazing permit was issued pursuant to the 1976 version of the Zuni Range Code, which was revised in 2005. The Zuni Range Code is a part of the Zuni Tribal Code. The grazing permit issued to Mr. Vicenti in 1992 restricted Mr. Vicenti's use of these lands - referred to as "Unit Y" in the record - to grazing livestock. Mr. Vicenti, however, wished to build a permanent residence on Unit Y. On April 10, 1997, Mr. Vicenti sent a formal request to the BIA to survey Unit Y so that he could build a home site. By letter dated April 27, 1997, the BIA denied Mr. Vicenti's request and reminded Mr. Vicenti that his use of Unit Y was restricted to livestock grazing only.

On November 17, 2000, the Zuni Tribal Council passed a resolution withdrawing certain lands from grazing use in favor of commercial development that would economically benefit the entire tribe. As a result of that resolution, 694 acres were withdrawn from Mr. Vicenti's grazing permit on Unit Y. By letter dated April 27, 2001, the BIA informed Mr. Vicenti that 694 acres had been withdrawn from his grazing area. These 694 acres included the area where Mr. Vicenti wished to construct a permanent home site.

Mr. Vicenti continued to make improvements on Unit Y at his own expense, such as building fences, constructing a barn, and utilizing a water pump station. Mr. Vicenti claimed that he had obtained permission to do so from various individuals in various offices of both the Pueblo of Zuni and the BIA.

In July 2002, Mr. Vicenti placed a mobile home onto an area of Unit Y that had been withdrawn for commercial development. In May of 2003, the Zuni Tribal Council demanded that Mr. Vicenti remove the mobile home

because Mr. Vicenti was not authorized to place it there. Mr. Vicenti did not remove the mobile home.

On February 28, 2006, Mr. Vicenti's grazing permit for the portions of Unit Y that had not been withdrawn expired. The Zuni Tribe did not renew the grazing permit for any portion of Unit Y. In March, 2006, the Governor of the Pueblo informed Mr. Vicenti that Mr. Vicenti had to remove the mobile home from Unit Y within sixty days. Mr. Vicenti did not remove the mobile home. Six months later, in September, 2006, the Zuni Game and Fish Department issued Mr. Vicenti a notice of trespass pursuant to the Zuni Range Code.

The Zuni Game and Fish Department then brought a criminal complaint for trespass on November 30, 2006, but withdrew that complaint. On May 13, 2008, the Zuni Game and Fish Department instead filed a civil trespass action against Mr. Vicenti. Mr. Vicenti answered by arguing that the Pueblo had the obligation to automatically renew his grazing permit when it expired because the Pueblo had consistently done so in the past, and because the Zuni Livestock Committee had recommended that Mr. Vicenti's grazing permit be renewed, a process requiring the final approval of the Governor of the Pueblo. Mr. Vicenti also claimed that he had to deal with a confusing morass of bureaucracy between the various offices, which led him to believe that he had permission to proceed with his improvements. Mr. Vicenti also brought counterclaims against the Pueblo of Zuni for "breach of agreement," "misrepresentation" and unjust enrichment.

During the course of litigation, on October 24, 2009, Mr. Vicenti admitted in a deposition that as of the expiration of his grazing permit in February, 2006, he did not have any authority from the Pueblo to keep his mobile home on Unit Y.

On February 3, 2011, the Pueblo of Zuni filed a motion for summary judgment on the issue of trespass based on the fact that Mr. Vicenti's grazing permit for Unit Y had expired in 2006 and was not renewed by the Pueblo, and that Mr. Vicenti had admitted that he did not have any authority or permission from the Pueblo to keep his mobile home on Unit Y as of February 28, 2006. The motion for summary judgment did not address Mr. Vicenti's counterclaims.

In opposition to the motion for summary judgment, Mr. Vicenti claimed that summary judgment against him would not be appropriate because: (1) Mr. Vicenti was a traditional religious leader in the community and summary judgment would not accord with Zuni tribal customs and traditions as described in the Preamble of the Zuni Constitution; (2) it would violate the Code of Federal Regulations with respect to grazing leases; (3) it would be "selective prosecution" by the Governor presiding in 2006 for that Governor's personal interests; (4) the Pueblo and BIA induced Mr. Vicenti to spend significant amounts of his own assets to make improvements on the disputed lands by representing to Mr. Vicenti that he would be able to remain there; and (5) the motion for summary judgment was untimely and should be barred due to failure to prosecute.

On April 20, 2011, the Zuni Tribal Court issued an Order Denying Plaintiff's Motion for Summary Judgment, finding that there were genuine issues of material fact that should be submitted to a jury for consideration. On December 19, 2011, the Zuni Tribal Court issued a Minute Order to schedule an evidentiary hearing to clarify two questions for the court: (1) "whether [Mr. Vicenti's] mobile [sic] and other improvements are situated within the 694 acres that the Zuni Tribal Council withdrew for economic development," and; (2) "where exactly [Mr. Vicenti] claims that his parents and relatives once lived and grazed their livestock[.]"

The evidentiary hearing occurred on February 1, 2012, and both parties called witnesses and entered exhibits in evidence. Maps entered in evidence demonstrated that Mr. Vicenti's mobile home and improvements fell within the 694 acres that were withdrawn from grazing in November, 2000. Mr. Vicenti testified and described the familial and grazing history of the area surrounding the disputed lands. As the purpose of the evidentiary hearing was to address the two questions of Judge Chapela's Minute Order, the hearing ended when Judge Chapela felt that he was satisfied with what the parties had presented. At no point during the evidentiary hearing did Judge Chapela address Mr. Vicenti's counterclaims.

As a result of the evidentiary hearing, the Zuni Tribal Court entered an order of summary judgment[1] on March 26, 2012, against Mr. Vicenti on the issue of trespass and ordered him to remove the mobile home and all personal property from Unit Y. The order of summary judgment found that the mobile home and Mr. Vicenti's improvements fell within the 694 acres that had been withdrawn from grazing by the Zuni Tribal Council in November, 2000. This order of summary judgment did not address Mr. Vicenti's counterclaims.

Mr. Vicenti timely filed a Notice of Appeal and Request for Stay on April 16, 2012, pursuant to the Zuni Rules of Civil Procedure. The notice of appeal claims that the order of summary judgment "is not in accordance with the

[1] The order was entitled Order Vacating Order Denying Motion for Summary Judgment and Granting Plaintiff's Motion for Summary Judgment. For the sake of ease and expedience, we refer to that order as the "order of summary judgment" at issue.

Zuni Constitution, the Tribal Code, and the customs, traditions and culture of the Zuni Tribe." The notice of appeal further states that the order of summary judgment did not address Mr. Vicenti's counterclaims for unjust enrichment and misrepresentation. For reasons unknown, the notice of appeal does not mention Mr. Vicenti's counterclaim of "breach of agreement," and therefore we consider that counterclaim to be abandoned. The Zuni Tribal Court issued an Order Staying Judgment on April 16, 2012.

Eight days later, on April 24, 2012, the Zuni Tribal Council terminated its relationship with this Court. On May 3, 2012, Judge Chapela sent a letter to counsel for Mr. Vicenti informing him of the Tribal Council action and its decision to establish a Zuni Tribal Court of Appeals, which would consider Mr. Vicenti's appeal. As a result, Mr. Vicenti's notice of appeal was not immediately forwarded to this Court.

The record before us indicates that nothing happened with Mr. Vicenti's appeal for nearly three years, during which time a new Tribal Council was elected in December 2014. On February 15, 2015, the Zuni Tribal Court of Appeals issued an Order Dismissing Appeal based on the fact that Mr. Vicenti did not file his notice of appeal until twenty-one calendar days after the order of summary judgment was entered. In response, Mr. Vicenti timely submitted a Motion to Reconsider the Order Dismissing Appeal, explaining that under Rules 38(c) and 3(a) of the Zuni Rules of Civil Procedure, the notice of appeal was timely because the twentieth calendar day after the order of summary judgment fell on a Sunday, and therefore it was permissible to file the notice of appeal the following Monday. The Zuni Court of Appeals did not immediately rule on Mr. Vicenti's motion to reconsider.

Two months later, the newly elected Tribal Council decided to terminate Judge Chapela's employment with the Zuni Tribal Court and the Zuni Tribal Court of Appeals. On April 29, 2015, the Zuni Tribal Council passed Resolution No. M70-2015-P042, "Resolution to Reinstate SWITCA and to adopt the SWITCA Rules of Appellate Procedure." The Zuni Tribal Council concurrently passed Resolution No. M70-2015-P041, "Resolution Rescinding the Zuni Appellate Court and its Rules of Procedure," which contained the following language:

> Whereas, under former Chief Judge Chapela's tenure, the integrity, impartiality and independence of the Zuni Appellate Court System is non-existent. No tribal member has been afforded due process from biased rulings by former Chief Judge John Chapela and his hand selected appellate court judges who are former law school interns and coworkers obviates impartiality and true justice[.]

Despite the Tribal Council Resolution reinstating jurisdiction to SWITCA to consider appeals from the Zuni Tribal Court, the Governor of the Pueblo executed three "Consultant Agreements" with three individuals to act as a panel of appellate judges on a Zuni Tribal Court of Appeals for the purpose of considering Mr. Vicenti's appeal. On August 19, 2015, these "Justices of the Zuni Tribal Court of Appeals" issued a Decision on Motion for Reconsideration and Appeal, finding that Mr. Vicenti's notice of appeal was indeed timely and affirming Judge Chapela's order of summary judgment.

In response, Mr. Vicenti filed a Motion to Dismiss on September 14, 2015, in the Zuni Tribal Court, arguing that the entire matter should be dismissed because the Zuni Tribal Council Resolutions of April 29, 2015, abolished the Zuni Tribal Court of Appeals and therefore the subsequent decision of that panel was never valid. The Pueblo opposed Mr. Vicenti's motion to dismiss, but when Chief Tribal Court Judge Albert Banteah, Jr. ordered the parties to argue their positions at a hearing, the Pueblo of Zuni filed a Request to Vacate Hearing and Transfer Question to Appellate Court on October 8, 2015. The basis for the Pueblo's request was that the Zuni Tribal Court no longer had jurisdiction over the matter as of Mr. Vicenti's notice of appeal to an appellate court, and therefore the appeal should be heard by an appellate court, whether such court is the Zuni Tribal Court of Appeals or SWITCA.

On October 19, 2015, Chief Judge Banteah issued an Order Vacating Hearing and Transferring Question to Court of Appeals. Mr. Vicenti's April 16, 2012, notice of appeal was finally forwarded to this Court on November 5, 2015. We accepted the appeal and briefs were filed by both parties.[2]

[2] We strike Mr. Vicenti's reply brief due to tardiness. Mr. Vicenti's reply brief was mailed eighteen calendar days after receipt of the Pueblo's response brief, and *SWITCARA* #26(c) requires service within fifteen calendar days. The Pueblo moved to strike the reply brief. Mr. Vicenti argues that *SWITCARA* #8(b) allowed him three additional days to serve the reply brief, as it was served by standard mail. The Pueblo argues that *SWITCARA* #8(b) does not apply to the service of briefs, which is provided for in *SWITCARA* #26(d): "Service may be made personally or by certified mail or its equivalent." We are persuaded by the Pueblo and strike Mr. Vicenti's reply brief.

In his opening brief, Mr. Vicenti, who is represented by counsel, argues that the entire matter should be dismissed due to the biases and prejudices of former Chief Judge Chapela and the former Governor and former Tribal Council. Mr. Vicenti cites the language of Zuni Tribal Council Resolution No. M70-2015-P042, supra, and two writs of mandamus and of prohibition that this Court issued to Judge Chapela in 2012 in two other matters. Mr. Vicenti also argues that we should dismiss this matter because of the "inordinate delay" in prosecuting this case, which has caused Mr. Vicenti "irreparable prejudice." Appellant's Opening Brief, at 7.

Alternatively, Mr. Vicenti argues that we should remand this matter for further evidentiary hearings and a jury trial so that Mr. Vicenti may "present his argument about his history of land use, Zuni culture and tradition regarding such use, the promises made to him by previous tribal administrations, and his efforts and monetary expenditures in developing the land to a jury of his peers." *Id.*, at 8. In the event of remand, Mr. Vicenti additionally requests that the trial court consider Mr. Vicenti's counterclaims, which were not considered below, in light of the Zuni Constitution's clause providing that, "The Zuni Tribe, in exercising its powers of self-government, shall not take any private property for a public use without just compensation." Zuni Const., art. III, § 2(e).

In its response brief, the Pueblo of Zuni first contends that Mr. Vicenti's opening brief is substantively deficient in that it merely offers conclusory allegations without supporting legal authority or legal analysis. The Pueblo argues that the only issue that Mr. Vicenti properly preserved for appeal was his contention that his counterclaims were never considered by the trial court, but that Mr. Vicenti has not explained why those counterclaims are relevant. According to the Pueblo, we should not consider the issues in Mr. Vicenti's brief that were not raised in his notice of appeal. The Pueblo provides legal authority for the argument that improper and inadequate briefing is sufficient grounds to dismiss an appeal.

Alternatively, the Pueblo argues that Mr. Vicenti's claims are meritless. The Pueblo contends that Mr. Vicenti's allegations of judicial bias have no support in the record, and that Mr. Vicenti failed to demonstrate a nexus between Judge Chapela's actions in this case and the language of Tribal Council Resolution No. M70-2015-P042, supra, and two writs of mandamus and of prohibition that were issued by this Court to Judge Chapela in 2012. As for Mr. Vicenti's claim of "irreparable prejudice due to inordinate delay," the Pueblo claims that Mr. Vicenti not only failed to explain how he suffered "irreparable prejudice," but that Mr. Vicenti failed to include this argument in his notice of appeal.

With respect to Mr. Vicenti's counterclaims, the Pueblo contends that Mr. Vicenti had the opportunity to argue misrepresentation below but that he failed to do so, even when Judge Chapela ordered the parties to submit briefs, exchange disclosures and provide any relevant documentation or witness testimony relevant to whether or not Mr. Vicenti had any authority to remain on the disputed land. As for Mr. Vicenti's counterclaim of unjust enrichment, the Pueblo asserts that the underlying action for trespass was only intended to remove Mr. Vicenti from tribal trust lands, as opposed to private property, and that Mr. Vicenti will be allowed to remove his personal property within time limits prescribed by the Zuni Range Code.

STANDARD OF REVIEW

On appeal, the grant of a motion for summary judgment is a question of law that is reviewed *de novo*, *i.e.*, anew. *Beggs v. City of Portales*, 210 P.3d 798, 800, 136 N.M. 372 (N.M. 2009). Summary judgment is proper where there is no evidence raising a reasonable doubt that a genuine issue of material fact exists. *Id.* However, if any genuine controversy as to any material fact exists, a motion for summary judgment should be denied and the factual issues should proceed to trial. *Id.* In reviewing the grant of a motion for summary judgment, all reasonable inferences from the record are construed in favor of the non-moving party. *Id.* Our review of a grant of summary judgment does not resolve factual disputes, if any, but is rather limited to determining whether a factual dispute exists that should proceed to trial. *See id.*

Given the unique history of this case, which has seen the Zuni Tribe terminate its relationship with this Court for a period of three years, which was presided over by a judge that the current Zuni Tribal Council elected to terminate under inauspicious circumstances, and which was purportedly decided by an appellate court that had supposedly been abolished when that court considered this matter, we have elected, *sua sponte*, to review the record with a somewhat higher level of scrutiny than usual.

DISCUSSION

A. The "Decision on Motion for Reconsideration and Appeal" Is a Nullity.

As a preliminary matter, we hold that the August 19, 2015, decision and order of the "Zuni Tribal Court of Appeals" is a nullity and void ab initio. This is because the Zuni Tribal Council had previously abolished the Zuni Tribal Court of Appeals and its Rules of Appellate Procedure on April 29, 2015, via Zuni Tribal Council Resolution No. M70-2015-P041, "Resolution Rescinding the Zuni Appellate Court and its Rules of Appellate Procedure." The Zuni Tribal Council simultaneously

enacted Tribal Council Resolution No. M70-2015-P042, "Resolution to Reinstate SWITCA and to Adopt the SWITCA Rules of Appellate Procedure," April 29, 2015.

B. The Grant of Summary Judgment is Affirmed.

The record contains substantial evidentiary support for the Pueblo's claim of civil trespass, including evidence to support findings (1) that Mr. Vicenti's mobile home and improvements are located on tribal lands that were lawfully withdrawn from grazing use by the Zuni Tribal Council in favor of economic development for the benefit of the Zuni Tribe; (2) that Mr. Vicenti had actual notice from the BIA in 1997 that his grazing permit restricted his use of Unit Y to grazing only, and that the grazing permit did not allow for the location of a permanent home site; and (3) that Mr. Vicenti's grazing permit expired in February, 2006, and was not renewed by the Pueblo, pursuant to the provisions of the Zuni Range Code.

Mr. Vicenti, on the other hand, has provided little to no evidentiary support for his contention that the traditional and customary laws of the Pueblo allow him to remain on Unit Y despite the lack of permission from the tribal government, which withdrew the lands in question from grazing use pursuant to the authority of both the Zuni Constitution and the Zuni Tribal Code. Other than asserting that his stature in the traditional religious community is highly respected, that he has the utmost respect for Zuni traditions and culture, and that he and his family have a long history of grazing their livestock in the area, he has not put forth any evidence or submitted a feasible argument as to why these assertions would or should make him immune from the actions of the Zuni Tribal Council.

Similarly, we fail to see any reasonable interpretation of the Preamble of the Zuni Constitution that would allow Mr. Vicenti to remain on the disputed lands. As concluded by Judge Chapela, the Zuni Tribal Council acted pursuant to its constitutional authority, "[t]o prevent the sale, disposition, lease or encumbrance of tribal land, interests in land, water, minerals or other tribal assets; to approve and provide for the execution of any sale, grant, lease, or relinquishment of any interests in land, water, minerals or other assets of the tribe or the use thereof: subject to the approval of the Secretary of the Interior where required by law," Zuni Const., Art. VI, § 1(f), and "[t]o regulate the use of tribal property[.]" Zuni Const., Art. VI, § 1(g).

In light of the above, we must affirm the order of summary judgment with respect to civil trespass.

C. The Record Is Completely Devoid of Bias or Prejudice by Chief Judge Chapela, by the Governor of the Pueblo, or by the Zuni Tribal Council.

Though the Pueblo correctly points out that Mr. Vicenti's allegations of bias and prejudice were not included in his notice of appeal, the notice of appeal was written in 2012 and did not reach this Court for over three years, during which time Judge Chapela was dismissed from the bench by the Zuni Tribal Council. Due to the gravity of such an allegation, we decided to thoroughly review the record, including review of all audio records. We find no instance of bias or prejudice by Judge Chapela, nor by the Governor or the Zuni Tribal Council.

Moreover, Mr. Vicenti's "authority" for his allegation of judicial bias is based in language from a Tribal Council Resolution that clearly, and only, pertains to the Zuni Tribal Court of Appeals:

> Whereas, under former Chief Judge Chapela's tenure, the integrity, impartiality and independence of the *Zuni Appellate Court System* is non-existent. No tribal member has been afforded due process from biased rulings by former Chief Judge John Chapela and his hand selected *appellate court judges* who are former law school interns and coworkers obviates impartiality and true justice[.] Zuni Tribal Council Resolution No. M70-2015-P041, enacted April 29, 2015 (emphasis added).

Because Judge Chapela presided over this matter in the Zuni Tribal Court, we fail to see how this language pertains to Judge Chapela's actions or orders at the tribal court level. The fact that the Resolution itself is entitled "Resolution Rescinding the Zuni Appellate Court and its Rules of Procedure" underscores the irrelevance of this language.

Similarly, Mr. Vicenti has failed to allege, much less demonstrate, a nexus between this Court's two writs of mandamus and of prohibition in completely unrelated matters and the case at bar.

As for Mr. Vicenti's allegations of bias or prejudice by the Governor of the Pueblo or the Zuni Tribal Council, the record is thoroughly lacking. The Zuni Range Code allows for the cancellation of grazing permits, and Mr. Vicenti has offered no evidence other than a bare assertion that the Governor of the Pueblo was legally obligated to renew Mr. Vicenti's grazing permit when it expired. Mr. Vicenti's allegations of bias and prejudice are therefore without merit.

D. Mr. Vicenti's Claim of "Inordinate Delay" and "Irreparable Prejudice" Are Without Merit.

The Pueblo's argument with respect to Mr. Vicenti's claims of "irreparable prejudice due to inordinate delay" is well-taken. Mr. Vicenti's opening brief merely puts forth the allegation without any supporting authority or analysis. Mr. Vicenti does not describe the actual harm suffered, much less explain how such harm satisfies any legal standard. We hold the claim of "irreparable prejudice due to inordinate delay" to be without merit and inappropriate for appellate review.

E. The Zuni Tribal Court Must Address Mr. Vicenti's Counterclaims of Unjust Enrichment and Misrepresentation.

We find that the Zuni Tribal Court never addressed Mr. Vicenti's counterclaims at any point. Mr. Vicenti raised his counterclaims in his answer to the Pueblo's complaint. However, Mr. Vicenti's counterclaim of "breach of agreement" was not addressed in his notice of appeal, and must therefore be considered waived and abandoned.

The Pueblo argues that Mr. Vicenti abandoned the counterclaim of misrepresentation because he failed to argue it below when he had the opportunity to do so. The Pueblo reasons that any counterargument to the Pueblo's claim of trespass would necessarily include offered evidence of promises or representations made to Mr. Vicenti that might support his claim to remain on the disputed lands.

A review of the record shows that Judge Chapela never addressed Mr. Vicenti's counterclaims in any meaningful manner. In the hearing of April 6, 2011, on the Pueblo's motion for summary judgment, Judge Chapela opens the hearing by acknowledging the existence of two of the three counterclaims, but then immediately begins questioning the attorneys about other matters and other legal theories. Except for mentioning the existence of the counterclaims at the beginning of the hearing, the counterclaims are never spoken of again.

As for the evidentiary hearing of February 1, 2012, the purpose of that hearing, as stated by Judge Chapela at the beginning of the hearing and in his December 19, 2011, Minute Order ordering the evidentiary hearing, was to clarify two questions: (1) the exact location of Mr. Vicenti's mobile home and improvements with respect to the boundaries of the lands withdrawn from grazing use; and (2) Mr. Vicenti's familial history of using the land and surrounding areas for grazing.

When these two questions were answered to Judge Chapela's satisfaction, the evidentiary hearing concluded. Mr. Vicenti's counterclaims were never mentioned by the judge or either party at the evidentiary hearing. The order of summary judgment at issue resulted from that hearing, and the order of summary judgment made no mention of the counterclaims.

As for the counterclaim of unjust enrichment, the Pueblo argues that because the Zuni Range Code allows Mr. Vicenti to remove his property from tribal lands, as opposed to private lands, upon a finding of trespass, then a claim for unjust enrichment is meritless. The Pueblo does not address, however, the property belonging to Mr. Vicenti that cannot be removed, such as fixtures or any other property that cannot be feasibly removed without destroying it or rendering it useless. Would such property fall within the Zuni Constitution's Takings Clause?

For reasons of fairness and justice, we hold that due process requires the Zuni Tribal Court to address Mr. Vicenti's counterclaims of unjust enrichment and misrepresentation. We therefore remand this matter to the Zuni Tribal Court to consider Mr. Vicenti's counterclaims of unjust enrichment and misrepresentation.

CONCLUSION

For the reasons above, we AFFIRM the Zuni Tribal Court's order of summary judgment finding Mr. Vicenti to be in civil trespass. Because Mr. Vicenti did not challenge the award of attorney fees in the order of summary judgment, any such challenge has been waived and abandoned, and the award of attorney fees to the Pueblo is AFFIRMED. Mr. Vicenti's appeal bond of $5,000.00 is to be applied to court costs and attorney fees.

With respect to Mr. Vicenti's counterclaims of unjust enrichment and misrepresentation, we REMAND these counterclaims to the Zuni Tribal Court for due consideration.

It is so ORDERED.

July 21, 2016

MARGARET ERIACHO, and PHILLIP VICENTI, elected Council Members for the Pueblo of Zuni,

Plaintiffs-Appellants,

v.

VAL R. PANTEAH, SR., Governor, BIRDENA SANCHEZ, Lt. Governor, and VIRGINIA CHAVEN, CARLETON BOWEKATY, AUDREY SIMPLICIO, and ERIC BOBELU, elected Council Member for the Pueblo of Zuni,

Defendants-Appellees.

SWITCA Case No. 16-002-ZTC
Zuni Tribal Court Nos. CV16-0001/CA-2016-0001

Appeal filed May 3, 2016

Appeal from the Zuni Tribal Court
Peter Tasso, Judge

Appellate Judges: Jeanette Wolfley, Anthony Lee and Rodina Cave Parnall

ORDER DENYING APPEAL

SUMMARY

Appeal denied because notice of appeal was insufficient under Zuni and SWITCA rules of appellate procedure.

* * *

Plaintiffs Margaret Eriacho and Phillip Vicenti sued the members of the Pueblo of Zuni Tribal Council for removal of them from the Tribal Council pursuant to two Council resolutions passed on January 25, 2016. The lower court, following extensive briefing and hearing on the Defendant's motion to dismiss and Plaintiffs' motion for summary judgment, found that it lacked subject matter jurisdiction based on tribal sovereign immunity.

The Plaintiffs filed a Notice of Appeal on May 3, 2016, and an Amended Notice of Appeal on May 10, 2016. For the reasons below, Plaintiffs-Appellants' notice of appeal is denied.

SWITCARA #11(e) (2001) requires at a minimum the notice of appeal contain a "concise statement of the adverse ruling or alleged errors made by the lower court". Plaintiffs-Appellants' Amended Notice of Appeal contains no such statement. The Amended Notice of Appeal merely states "[t]hat the Appellants submit this appeal on the basis that the Honorable Peter Tasso abused his discretion when he dismissed the matter in the above captioned cause on April 25, 2016."

The statement is clearly insufficient to perfect an appeal under either ZRCP Rule 38(c) or SWITCARA #11(e) because the statement fails to provide the Court with adequate information of the errors challenged to form the basis for the appeal. Further, the notice does not contain any mention of the Zuni Constitution, Zuni Law and Order Code provision, or Zuni custom or tradition that was misinterpreted or not considered by the lower court for the Court to review. This Court has consistently held that such a deficiency is jurisdictional. See, Rice v. Yavapai-Prescott Indian Tribe, 21 SWITCA Rep. 12, 13 (2010). Therefore the notice of appeal in this matter must be denied.

It is so ORDERED.

July 29, 2016

JOHN A. CHAPELA,

Plaintiff-Appellant,

v.

ZUNI TRIBAL COUNCIL, and VAL R. PANTEAH, SR., Governor, PUEBLO OF ZUNI, in his individual capacity, and MARGARET M. ERIACHO, Member of Zuni Tribal Council, in her individual capacity,

Defendants-Appellees.

SWITCA Case No. 15-023-ZTC
Zuni Tribal Court No. CA-2015-0002

Appeal filed October 28, 2015

Appeal from the Zuni Tribal Court
Albert Banteah, Judge

Appellate Judges: Jeanette Wolfley, Anthony Lee and Rodina Cave Parnall

OPINION

SUMMARY

Suit against tribal officers acting within scope of official duties was barred by sovereign immunity. Tribal court judge's failure to recuse himself was harmless error that did not undermine confidence in the judicial system.

* * *

Plaintiff John A. Chapela sued the Zuni Tribal Council, and Zuni Governor Val R. Panteah, Sr., and Tribal Council member Margaret M. Eriacho in their individual capacities (Defendants) for termination of his position as Chief Judge of the Zuni Tribal Court. Plaintiff claimed a violation of his employment agreement, and libel claim and interference with his employment contract against Defendant Panteah, and interference with his employment contract against Councilwoman Eriacho. The lower court dismissed Plaintiff's complaint finding it lacked subject matter jurisdiction, principally relying on tribal sovereign immunity.

On appeal, Plaintiff argues that the lower court erred on the following grounds: (1) denying Appellant's request for subpoenas; (2) dismissing Plaintiff's due process claims against the Zuni Tribal Council; (3) dismissing Appellant's tort claims against Defendants Panteah and Eriacho; and (4) Judge Banteah should have recused himself from the case in accordance with Section 1-3-6 of the Zuni Tribal Code. We conclude that the lower court did not err in holding sovereign immunity bars this action and we affirm. We further find that Plaintiff's argument pertaining to recusal is harmless error and does not provide a grounds for reversal.

I. Background

Plaintiff served as the Chief Judge of the Zuni Tribal Court. In January 2015, Plaintiff was notified of a public hearing before the Zuni Tribal Council to consider his removal as Chief Judge based on several grounds. He was further notified he could provide witnesses and address the alleged grounds for removal. On January 16, 2015, a hearing was held and Governor Panteah and Councilwoman Eriacho spoke about the Plaintiff's conduct during court hearings, and eight witnesses addressed conflicts of interest in several cases, and the failure of Plaintiff to recuse himself. Plaintiff addressed the grounds for removal, but called no witnesses. After considering the presentations, six members of the Tribal Council voted to remove Plaintiff from his position as Chief Judge. Governor Panteah and Councilwoman Eriacho recused themselves from the Council's vote as they spoke to Plaintiff's conduct.

Following his removal, on March 30, 2015, Plaintiff filed suit against the Zuni Tribal Council, Governor Panteah and Councilwoman Eriacho alleging a violation of due process and breach of contract against the Tribal Council. Plaintiff alleged libel against Governor Panteah, and wrongful interference with employment agreement against Governor Panteah and Councilwoman Eriacho.

Defendants moved to dismiss Plaintiff's claims, and after a hearing on the motion, the Zuni Tribal Court granted the motion to dismiss based on sovereign immunity under the Zuni Tribal Code. The lower court also found Governor Panteah and Councilwoman Eriacho acted within the scope of their official duties when they spoke at the Plaintiff's hearing and thus were immune. The court further found the Plaintiff failed to show an express waiver of the Defendants' sovereign immunity.

Plaintiff timely filed a notice of appeal alleging several grounds of error.

II. Standard of Review

We review the lower court's ruling on a motion to dismiss for lack of subject matter jurisdiction *de novo* as a question of law. *Hualapai Indian Nation v. Mukeche*, 9 SWITCA Rep. 21, 22 (1998); *Gallegos v. Pueblo of Tesuque*, 46 P.3d 668 (2002 NM); *Martinez v. Cities of Gold Casino*, 215 P.3d 44 (2009 NMCA) (" we review de novo the legal question of whether an Indian tribe . . . possesses sovereign immunity.")(citation omitted).

III. Discussion

On appeal, Plaintiff Chapela has presented several arguments. The Defendants contend, and the lower court concluded, that sovereign immunity conclusively resolved the issues presented here. We begin with the issue of sovereign immunity because procedurally it is a threshold issue as to whether the court has authority to review and consider the other issues raised on appeal.

A. Sovereign Immunity

It is well established that Indian tribes are sovereign entities "possessing attributes of sovereignty over both their members and their territory." *United States v. Mazurie*, 419 U.S. 544 (1975). The general doctrine of tribal sovereignty and the right to self-government have several adjuncts, one of the most important of which is tribal sovereign immunity. The doctrine of sovereign immunity holds that Indian tribes, as sovereigns, cannot be sued without their consent. *Michigan v. Bay Mills Indian Community*, 572 U.S. ___, 134 S.Ct. 2024, 2031 (2014); *Santa Clara v. Martinez*, 436 U.S. 49, 56 (1978). Over ninety years ago, the Supreme Court recognized the tribal immunity doctrine. *Turner v. United States*, 248 U.S. 354, 359 (1919); *United States v. Fidelity. & Guaranty Co.*, 309 U.S. 506, 512 (1940).

In *Santa Clara v. Martinez*, the Supreme Court addressed sovereign immunity in the context of an action by a tribal member against an Indian tribe. The Court upheld immunity of the tribe and explained the basic tribal immunity from suit as follows:

> Indian tribes have long been recognized as possessing the common law immunity from

> suit traditionally enjoyed by sovereign powers [citations omitted]. This aspect of tribal sovereignty, like all others, is subject to the superior and plenary power of Congress. But, 'without Congressional authorization,' the 'Indian nations are exempt from suit.' [citations omitted].

436 U.S. at 58. Recently, in *Bay Mills*, the Supreme Court explained that "[l]ong before the formation of the United States [t]ribes 'were self-governing sovereign political communities.'" 134 S.Ct. at 2040 (Sotomayor, J., concurring) (quoting *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978)). *See also Kiowa Tribe v. Mfg. Technologies, Inc.*, 523 U.S. 751 (1998); *Three Affiliated Tribes v. Wold Eng'g. P.C.*, 476 U.S. 877, 890-91 (1986).

"Because sovereign immunity is a jurisdictional question, [it] automatically raises questions concerning the Tribal Court's jurisdiction over the [tribe] and its agents, representatives, and employees." *Hualapai Indian Nation v. Mukeche*, 9 SWITCA Rep. 21, 22 (1998). Tribal sovereign immunity from suit goes to the subject matter jurisdiction of a court over suits against Indian tribes. *Chemehuevi Indian Tribe v. California State Board of Equalization*, 737 F.2d 1047, 1051 (9th Cir.), *rev'd on other grounds*, 474 U.S. 9 (1985). Accordingly, because the issue is jurisdictional in nature, it is a threshold question and must be addressed and resolved irrespective of the merits of the claims. *Chemehuevi*, 757 F.2d at 1051. Sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation. *California ex rel. California Dept. of Fish and Game v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979).

"The common law immunity of [Indian tribes] is coextensive with that of the United States . . . ." *Kennerly v. United States*, 721 F.2d 1252, 1258 (9th Cir. 1983). Tribal sovereign immunity is rooted in the unique relationship between the federal government and Indian tribes, whose sovereignty predates the United States Constitution. *United States v. Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981). Such immunity is necessary to preserve the autonomous political existence of tribes. *Id.*

This Court has considered sovereign immunity in several cases. *See, Rice v. Yavapai-Prescott Indian Tribe*, 18 SWITCA Rep. 5 (2007); *Pinnecoose v. Bd. of Comm'rs of the Southern Ute Housing Auth*., 3 SWITCA Rep. 4 (1992); *Hualapai Indian Nation v. Mukeche*, 9 SWITCA Rep. 21.

Tribal sovereign immunity is "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes v. Wold Eng'g. P.C.*, 476 U.S. at 890-91. In light of this principle, a tribe's immunity can only be waived in two limited circumstances. First, Congress by explicit statute, may authorize suit against an Indian tribe. Second, an Indian tribe may expressly waive its immunity to suit. *Bay Mills*, 134 S.Ct. at 2030-31. Neither waiver exists in this case. Plaintiff bears the burden of clearly demonstrating that such sovereign immunity has been expressly waived by Congress or the Zuni Tribe.

As stated, Congress may waive tribal sovereign immunity by legislation. However, such waivers will not be upheld carte blanche. *See Quechan Tribe*, *supra*, 595 F.2d at 1155 (Declaratory Judgment Act and Public Law 280 do not waive tribal immunity). The Supreme Court declared in *Santa Clara Pueblo*, a waiver of sovereign immunity "cannot be implied, but must be unequivocally expressed." 436 U.S. at 57, *quoting United States v. Testan*, 424 U.S. 1, 4 (1969). Moreover, the waivers are to be "strictly construed" by all courts. *See Ramey Constr. Co. v. Mescalero Apache Tribe*, 673 F.2d 315, 320 (10th Cir. 1982). Further, any question of waiver of immunity must be interpreted liberally in favor of the Tribe, here, the Zuni Tribal Council, and restrictively against the Plaintiff. In this case, there has been no Congressional authorization to waive the immunity the Zuni Tribal Council's immunity from suit.

The second waiver to sovereign immunity is where "Indian tribes may consent to suit without explicit congressional authority." *United States v. Oregon*, 657 F.2d at 1013. Again, the waiver must be "unequivocal … and cannot be implied." *Snow v. Quinault Nation*, 709 F.2d 1319, 1321 (9th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984). And, the question of waiver of immunity must be interpreted liberally in favor of the tribe and restrictively against a claimant. *Santa Clara Pueblo*, 436 U.S. at 65. In this case, under Section 1-8-4 of the Zuni Tribal Code, the Pueblo of Zuni, its entities and officers acting within the scope of their official duties are immune from suit except as "specifically waived by resolution or ordinance of the Tribal Council specifically referred to as such." Z.T.C. § 1-8-4. Plaintiff did not provide any express waiver to the court below nor has he cited to us any waiver on appeal. Again, Plaintiff bears the burden of showing the Tribal Council expressly waived their sovereign immunity, and has not provided the Court with any documents demonstrating a waiver. "Like other sovereigns, Indian tribes are immune from suit unless there is a clear and unequivocal wavier of this immunity." Rice, 18 SWITCA Rep. at 6. The lower court correctly held that Plaintiff failed to demonstrate an express waiver of the Defendants' sovereign immunity.[1]

[1] Plaintiff asks this Court to adopt state court decisions that have limited the common law doctrine of sovereign immunity. We refuse to do so. SWITCA Rules of Appellate Procedure provide that "the following rules are

Although neither congressional authorization nor tribal waiver exist in this case against the Zuni Tribal Council, our analysis does not end here because Plaintiff further urges this Court to recognize that Defendants Panteah and Eriacho as Tribal officers are sued in their individual capacity and do not enjoy the same immunity from suit as does the tribe itself. *Santa Clara Pueblo*, 436 U.S. at 59 (*citing Ex parte Young*, 209 U.S. 123, 132 (1908)). Plaintiff contends that the Defendants participation in the hearing of the Tribal Council regarding Plaintiff's conduct was not an official duty, and therefore, is not shielded by sovereign immunity.

The lower court held that Governor Panteah and Councilwoman Eriacho were immune because they "acted within the scope of their officials duties at all times relevant to [Plaintiff's] claims when they spoke about [Plaintiff's] conduct at the January 16, 2105 hearing before the Zuni Tribal Council." The Zuni Constitution provides that Tribal Council members have the authority to "act in all matters that concern the welfare of the tribe." Zuni Const. at. VI § 1(d). This provision of the Zuni Tribal Constitution grants members of the Tribal Council broad discretion including the authority to remove a tribal judge subject to the requirements of notice and an opportunity to be heard. Zuni Const. art. XVII §1.

At the removal hearing Governor Panteah and Councilwoman Eriacho raised concerns about Plaintiff's conduct as Chief Judge. Plaintiff has not provided the court with any Zuni law that prohibits members of the Tribal Council from expressing opinions or testifying at a removal hearing, nor do we find any prohibition. Plaintiff, however, argues that the statements were false. We are unable to find that statements at the hearing, even if they may have been wrongfully motivated, are insufficient to remove a government official's actions from the scope of his or her respective authority. *See, Wyoming v. U.S.*, 279 F.3d 1214, 1230 (10th Cir. 2002) ("[T]he mere allegation that an officer acted wrongfully does not establish that the officer, in committing the alleged wrong, was not exercising the powers delegated to him by the sovereign.").

A Zuni Tribal Council member, as provided under the Zuni Tribal Constitution, must be free to ask questions, speak, testify and raise concerns about the conduct of a Tribal Judge during a removal hearing. A Tribal Council member must be free to do so without fear of being subject to personal liability. Here, Plaintiff was given the opportunity to challenge any alleged untrue statements and present other evidence at the hearing. Governor Panteah and Councilwoman Eriacho did not participate in the final vote to remove Plaintiff. Accordingly, Section 1-8-4 of the Zuni Tribal Court forecloses any liability because Tribal Council members are immune "from suit for any liability arising from the performance of their official duties." We conclude that the action against the Zuni Tribal Council, Governor Panteah and Tribal Councilwoman Eriacho is barred by sovereign immunity.

B. Recusal of Judge Banteah

Plaintiff also argues on appeal that the Zuni Tribal Court Judge Banteah, erred when he refused to recuse himself. In support of this contention, the Plaintiff asserts Judge Banteah is the first cousin of Governor Panteah. Plaintiff orally moved for Judge Banteah's recusal pursuant to Section 1-3-6 of the Zuni Tribal Code, at the hearing on Defendant's motion to dismiss.

Section 1-3-6 provides: "A judge shall disqualify himself from hearing any matter in which he has a direct interest or in which any party to the matter is a relative by blood, in the fourth degree (first cousins) or where he feels that he will not be able to render a just decision." This issue is one of first impression before this Court. Accordingly, we look to federal law and tribal court decisions for guidance. "Zuni Tribal Courts, including this Court, may look to . . . federal laws and the common law interpreting such laws as persuasive authority . . . and federal case law [may be] cited herein as guidance for making its decisions." *Hannaweeke v. Pueblo of Zuni*, 22 SWITCA Rep. 6, 7 (2011).

The Tenth Circuit reviewed a similar challenge to a judge who refused to recuse himself. *See Higganbotham v. Okla. ex rel. Okla. Transp. Comm'n.*, 328 F.3d 638 (10th Cir. 2003) (Plaintiff's allegation that the district court judge's family tie to Governor Keating, and the political importance to the Governor of the law at issue, would cause a reasonable person to harbor doubts about the judge's impartiality was not an abuse of discretion). In *Higginbotham*, the Tenth Circuit considered whether a judge's refusal to recuse himself was harmless error,

> [we] consider 'the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process.' "

Citing Harris v. Champion, 15 F.3d 1538, 1571-72 (10th Cir.1994) (*quoting Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988)). We conclude that none of these risks is present. At issue here are straightforward questions of law (sovereign immunity)

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not intended to diminish the authority of nor create an implied waiver of sovereign immunity by any participating pueblo or tribe." SWITCARA #1 (c). We acknowledge and follow the Zuni Tribal Code adopting the doctrine of tribal sovereign immunity.

decided following Defendants' motion to dismiss. We have independently reviewed those issues *de novo* and concluded that Plaintiff's complaint was properly dismissed. And there were no extended proceedings or trial during which discretionary decisions by the Judge Banteah could have determined the outcome. An error by Judge Banteah in not recusing himself would have been harmless under the circumstances of this case. Judge Banteah has no direct interest in the outcome of the case. Further, this is a unique circumstance, which does not undermine the public confidence in the judicial system. Even if Judge Banteah erred in refusing to recuse himself, we find that such an error would be harmless and would not require reversal and remand for the reasons stated above.

CONCLUSION

The lower court properly dismissed the complaint because Defendants are accorded immunity from suit and such immunity has not been waived.

We therefore AFFIRM the rulings of the Zuni Tribal Court.

IT IS SO ORDERED.

August 5, 2016

IVY SANDY,

Defendant-Appellant,

v.

PUEBLO OF ZUNI,

Plaintiff-Appellee.

SWITCA Case No. 15-013-ZTC
ZTC Cause No. CR-2014-3513

Appeal filed in Zuni Tribal Court
on December 8, 2014

Appeal filed in the Southwest Intertribal Court
of Appeals on June 26, 2015

Appeal from the Zuni Tribal Court
John Chapela, Judge

Appellate Judges: Jonathan Tsosie,
Anthony Lee and Jeanette Wolfley

OPINION

SUMMARY

Guilty verdict of indecent exposure was reversed and vacated because it was invalid as an abuse of discretion that was not supported by substantial evidence and was clearly erroneous. Warrantless entry into Appellant's home constituted an unreasonable search and seizure in violation of the Zuni Constitution because the totality of the circumstances right before entry did not demonstrate that a serious crime was in progress or imminent, and there were no indications of any exigent circumstance.

The Zuni Tribal Court is strongly urged to vacate all convictions resulting from the underlying arrest, and should consider retaining the power to correct manifest injustice and illegal sentences.

* * *

Defendant-Appellant appeals a Judgment and Commitment Order issued by the Zuni Tribal Court on December 3, 2014, which found Defendant-Appellant guilty of indecent exposure. Appellant had already pleaded guilty, at arraignment, on September 22, 2014, to five other charges arising out of the same underlying arrest. The Zuni Tribal Court issued a Judgment and Commitment Order with respect to those convictions that same day, September 22, 2014. While the convictions for Appellant's guilty pleas are not on appeal here, we have

some serious concerns about them that we address in this decision.

The Southwest Intertribal Court of Appeals ("SWITCA") has jurisdiction over this matter pursuant to Zuni Tribal Council Resolution No. M70-2015-P042, "Resolution to Reinstate SWITCA and to adopt the SWITCA Rules of Appellate Procedure," enacted on April 29, 2015.

Defendant-Appellant (hereinafter "Appellant") filed an opening brief, to which the Pueblo of Zuni did not file a response. Appellant urges us to consider three issues on appeal: (1) whether the guilty verdict was supported by substantial evidence; (2) whether the warrantless entry into her home and her subsequent arrest violated the Zuni Constitution; and (3) whether the Zuni Tribal Court violated Appellant's rights to due process of law and equal protection as guaranteed under the Zuni Constitution.

We hold that the guilty verdict of indecent exposure was invalid. The guilty verdict was an abuse of discretion, it was not supported by substantial evidence and it was clearly erroneous. Moreover, the underlying arrest occurred after a warrantless entry into Appellant's home, without Appellant's permission, without probable cause to arrest for a serious offense, and without exigent circumstances.

The guilty verdict of indecent exposure is therefore REVERSED and VACATED.

BACKGROUND

In the early morning hours of September 19, 2014, around 12:38 a.m., four or more Zuni Tribal Police officers responded to a complaint of loud music coming from the residence of Appellant. Appellant is a member of the Zuni Tribe and her home was located within the exterior boundaries of the Zuni Reservation.

Upon arrival, the officers could hear loud music, laughing, and yelling coming from inside the home. Officer Tammie Delena knocked on the front door several times. While Officer Delena was at the front door, Officer John Homer made his way to a "northwestern" window that he determined to be the origin of the noise. Because the room behind the window was dark, Officer Homer shone his flashlight into the room and observed Appellant and Appellant's boyfriend, who were both nude and engaging in sexual relations. Upon seeing the light of the officer's flashlight, Appellant and her boyfriend immediately ceased what they were doing. Officer Homer asked Appellant and her boyfriend to get dressed and come to the front door. Appellant's boyfriend shut the window and closed the blinds. Officer Homer then began walking toward the front door, where he saw that Officer Delena had made contact with Appellant's boyfriend, who had opened the living room window blinds to look outside. Officer Delena asked him through the window to turn down the music. Appellant's boyfriend did not open the front door. Appellant's boyfriend retreated into the house and the music volume was turned down. The officers testified that they continued to hear laughing, yelling, and "mocking" noises directed at the officers coming from inside the home.

Though the music had been turned down, the officers lingered outside the residence for several minutes, trying to decide what to do. After a particularly loud noise, the officers began to knock on the front door again. Officer Homer testified that Appellant opened the blinds in a window near the front door for three to four seconds, during which time he saw Appellant's exposed breasts. When asked how he could see Appellant's exposed breasts when the room was dark and unlighted, Officer Homer stated that an outside porch light provided enough light for him to see. Appellant claims she never went to that window, which was the living room window, and that Officer Homer may have seen her boyfriend instead.

When no one answered the front door after several attempts, Sergeant Neil Waseta instructed the officers to enter the residence. Sergeant Waseta did not have a warrant to enter the home when he instructed the officers to enter, nor is there any indication in the record that Sergeant Waseta or any of the other officers attempted to obtain a warrant.

According to Officer Homer, he, Sergeant Waseta and Officer Delena then walked to the bedroom window into which Officer Homer had shone his flashlight. Officer Homer testified that he noticed that the window was partly open, that the blinds had been opened, that the room was still dark, and that he removed the window screen and proceeded to open the window. He testified that Appellant attempted to close the window and began to shout profanities at the officers, demanded that the officers leave, and continued to mock the officers. The officers noticed that Appellant was holding a can of beer, and that her breasts were exposed. Officer Homer prevented Appellant from shutting the window and he managed to open it. He and Sergeant Waseta then lifted Officer Delena up and through the window into Appellant's bedroom.

Officer Delena testified that upon entering the bedroom, she saw that Appellant was nude, and that she saw Appellant's breasts and genitals. Officer Delena then walked through the residence to open the front door for the officers outside. After opening the front door, Officer Delena returned to Appellant's bedroom and ordered her to get dressed. Officer Delena stated that Appellant was uncooperative and belligerent, and that she continued to shout profanities. Officer Delena testified that she was the

only person in the bedroom with Appellant, and that she shut the bedroom door for Appellant's privacy. The male officers remained outside the bedroom in the hallway, and Officer Homer never saw Appellant's "bottom portion."

Appellant's version of how the officers entered her bedroom is slightly different than Officer Homer's version, but it is not inconsistent with Officer Homer's version in any material aspect. According to Appellant, she was in her bedroom, nude but trying to clothe herself, when she noticed flashlights approaching her half-open window. She rushed to close the window and lock it. She then heard a loud pop, which she claims was the sound of the window's lock breaking, and she saw Officer Delena come inside through the window, shining a bright flashlight at Appellant. Angry, Appellant began to shout profanities and demanded that Officer Delena and the other officers leave. Appellant admits she was nude.

At trial, Officers Delena and Homer testified that Appellant was not acting in a manner intended to be sexually arousing or gratifying to the officers or to herself.

While inside the home, the officers learned that two of Appellant's minor children were also in the home, sleeping in other rooms. Apparently, the commotion from the officers' entry woke and frightened the children.

Appellant was arrested and charged with indecent exposure, endangering the welfare of a child, intoxication, possession of liquor, disorderly conduct and resisting arrest. Appellant was arraigned on September 22, 2014, where Appellant pleaded guilty to all charges except for the charge of indecent exposure.

On October 14, 2014, the Lay Prosecutor for the Pueblo filed a Motion to Dismiss the charge of indecent exposure because he believed that the underlying facts could not satisfy the elements of the charge as provided in the Zuni Tribal Code, and because he believed Appellant had the right to be nude in her own home. The judge denied the motion without a hearing.

On November 3, 2014, the Lay Prosecutor filed a Motion to Withdraw as Counsel, in which he reiterated his beliefs about the indecent exposure charge. The judge denied that motion as well. At the beginning of the trial on November 17, 2014, the Lay Prosecutor again moved the court to dismiss the indecent exposure charge, but the judge denied that motion, too, and insisted that the trial proceed to determine Appellant's "intent."

At trial, Appellant was *pro se.* After the prosecution had presented its case-in-chief, the judge asked Appellant if she wished to present a defense. When Appellant asked if that meant that she would have to testify, the judge replied, "Yes."

At the conclusion of the trial, the judge found Appellant guilty of indecent exposure, and he issued his Judgment and Commitment Order on December 3, 2014.

On December 4, 2014, Appellant, who had obtained counsel, filed with the Zuni Tribal Court a Motion to Vacate Conviction, or in the Alternative Withdraw Guilty Plea with respect to the other five criminal charges that Appellant pleaded guilty to at her arraignment. Four days later, on December 8, 2014, Appellant filed a Notice of Appeal Motion to Stay with the now-defunct Zuni Tribal Court of Appeals. On December 17, 2014, the judge issued an Order Denying Motion to Withdraw Guilty Plea. Appellant did not appeal that order.

On April 29, 2015, the Zuni Tribal Council passed Resolution No. M70-2015-P042, "Resolution to Reinstate SWITCA and to adopt the SWITCA Rules of Appellate Procedure." Appellant's notice of appeal was forwarded to this Court on June 26, 2015. We accepted the notice of appeal but withdrew it on February 17, 2016, upon Appellant's motion for an extension to file the opening brief based on the fact that the Zuni Tribal Court did not provide Appellant a record of the tribal court proceedings until three weeks after we had accepted the appeal. The record that Appellant received was also not complete.

STANDARD OF REVIEW

At the time Appellant filed her notice of appeal, the Zuni Rules of Appellate Procedure ("Z.R.A.P.") were in place. Appellant cites Rule 14(C) of the Z.R.A.P. for the standard of review. Though the title of Rule 14 is "Stay in Civil Matters," Rule 14(C) is the only place in the Z.R.A.P. that provides a standard of review. Because the standard of review of Rule 14(C) is identical to that of *Hualapai Nation v. D.N.*, A Minor, 9 SWITCA Rep. 2 (1998), a criminal case decided by this Court, we apply that standard of review here.

"The decision of the trial court shall be set aside only if it is shown that the decision: (1) is arbitrary, capricious or reflects an abuse of discretion; (2) is not supported by substantial evidence; or (3) is otherwise not in accordance with law." Rule 14(C), Z.R.A.P. (The Zuni Tribal Council rescinded the Z.R.A.P. on April 29, 2015, by Tribal Council Resolution No. M70-2015-P042.)

DISCUSSION

Appellant Was Not Guilty of Indecent Exposure

In order to find Appellant guilty of the criminal offense of indecent exposure, it was incumbent upon the prosecution to prove beyond a reasonable doubt each of the elements of the following:

> "A person is guilty of indecent exposure if he knowingly and intentionally exposes his primary genital area to public view for the purpose of arousing or gratifying sexual desire of himself or of any person." Z.T.C. § 4-4-20.

No evidence was presented that would satisfy *any* element of the offense of indecent exposure, much less every element. The record establishes that Appellant and her boyfriend were engaging in an intimate act in the privacy of Appellant's home, in a dark unlighted bedroom, well after midnight, when Officer Homer shone his flashlight into the bedroom. There were no members of the public in the area outside the home at that hour. The Zuni Tribal Officers at the scene were not members of the public, as they arrived in their capacity of police officers.

The only person who saw Appellant's "primary genital area," *i.e.* vaginal area, was Officer Delena, and this occurred only after Officer Delena forcefully entered the privacy of Appellant's bedroom without Appellant's permission.

Officer Homer testified that Appellant was not at all behaving in a sexually arousing or gratifying manner toward him or herself. When Officer Delena was asked whether Appellant was acting in a sexually arousing or gratifying manner, Officer Delena twice answered "No," but then twice elaborated with the puzzling non sequitur that Appellant had just had sexual intercourse. Not only did Officer Delena not see the act of sexual intercourse, the sexual intercourse occurred late at night in a dark unlighted bedroom in the privacy of Appellant's home.

When the judge asked Officer Homer, "How do you know what she was thinking?" in an attempt to elicit Appellant's intent, Officer Homer replied, "I don't know what she was thinking."

Based on the above, it is clear that the elements of indecent exposure were not proven by the prosecution beyond a reasonable doubt. In fact, the elements of indecent exposure could not have been proven based on these facts, and the Lay Prosecutor knew this.

We therefore hold that Appellant's conviction of indecent exposure was arbitrary, an abuse of discretion, was not supported by substantial evidence, and was clearly not in accordance with law. We therefore REVERSE and VACATE the conviction of indecent exposure.

The Warrantless Entry and Subsequent Arrest

The Bill of Rights of the Zuni Constitution protects the citizens of the Pueblo from unreasonable searches and seizures. "The Zuni Tribe, in exercising its powers of self-government, shall not violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizure, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized[.]" Zuni Const., art. III, § 2(b).

This language is derived from, and practically identical to, the Fourth Amendment of the United States Constitution, which provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., am. 4.

A foundational principle of the Fourth Amendment is that the sanctity of one's home is paramount. The home is a place where one has a legitimate expectation of privacy, especially against the intrusion of the government, which must have a compelling and legal reason to intrude, especially when it lacks the permission of those who live in the home. To search a home or to seize property or persons who live in the home (*i.e.*, arrest) without the consent of one who lives in the home or who has the apparent authority to consent to entry, an agent of the government will usually require either a warrant to search or a warrant to seize. In only very limited circumstances may an agent of the government make a warrantless entry into one's home without consent.

As the jurisprudence of the Fourth Amendment has developed, it has been established that a police officer may not make a warrantless entry into one's home to make a felony arrest without probable cause and the existence of exigent circumstances. *Payton v. New York*, 445 U.S. 573 (1980). Thus probable cause to arrest for a felony and exigent circumstances must exist before warrantless entry into a home. It follows that it would be even more unreasonable, and therefore illegal, to make such an arrest for a misdemeanor.

A defendant's remedy for such an arrest is suppression of all evidence found subsequent to the arrest.

While the Zuni Tribal Code does not distinguish between felonies and misdemeanors, it distinguishes between Class A, Class B and Class C offenses, with Class A apparently being the most serious type of offense, as the contemplated penalties are more severe. Of these classifications, the Zuni Rules of Criminal Procedure only contemplate the necessity of a warrant to arrest for Class A offenses. Rule 11(B), Z.R.Crim.P. (2014). For Class B or Class C offenses, however, an officer "shall" issue a summons to appear in court unless there are reasonable

grounds to believe that the suspect will not appear in court. *Id.*

A warrant to search or a warrant to seize "may be issued by a Tribal Judge on the request of the Tribal Prosecutor, a full-time salaried tribal police officer, tribal ranger, or any officer of the United States authorized to enforce or assist in enforcing any federal law." Rule 14(A), Z.R.Crim.P. (2014). The warrant must show probable cause for its issuance and the name of any person whose sworn statement of facts showing probable cause. *Id.* at 14(B). Probable cause shall be based upon substantial evidence. *Id.* at 14(D).

To search or seize without a warrant, a police officer may stop a person in a *public place* if the officer has probable cause to believe that the person is in the act of committing a criminal offense, has committed a criminal offense, or is attempting to commit a criminal offense. Rule 14(F), Z.R.Crim.P. (2014) (emphasis added).

These rules are consistent with the jurisprudence of federal and state courts, including the U.S. Supreme Court, which has held that searches and seizures inside a home without a warrant are presumptively unreasonable. *Payton v. New York*, 445 U.S. 573 (1980); *Welsh v. Wisconsin*, 466 U.S. 740 (1984). To overcome this presumption, the seriousness of the crime must be considered, and there must not only be probable cause to arrest but "exigent circumstances," which include emergency aid, hot pursuit, or preventing the imminent destruction of evidence. *Id.* The Supreme Court has ruled that such warrantless arrests may only be made if it is a felony arrest. *Id.*

With respect to the matter at issue, the Zuni Tribal Police forcefully entered Appellant's home without Appellant's permission, without a warrant, and without any attendant exigent circumstances of emergency aid, hot pursuit, or preventing the imminent destruction of evidence. When Officer Delena entered the home with the assistance of the other officers, there had been no evidence of any serious crime being committed, having been committed, or about to be committed. All the officers knew before entering was that they had been called to the home to investigate loud music, that there were two nude individuals inside engaging in apparently consensual sex, that the loud music was turned down, that there was laughing and yelling inside, that these individuals would not open the front door, and that Appellant, whose breasts could be seen in a dark room, was directing profanities at them as she was demanding that the officers leave.

While Appellant's brief-in-chief claims that the officers did not see Appellant drinking beer until after they had entered the home, Officer Homer testified that he could see Appellant holding a beer through her bedroom window. Whether the officers saw Appellant drinking a beer before or after entry does not matter, as the totality of the circumstances did not demonstrate, right before entry, that a serious crime was being committed or was about to be committed, and there were no indications of any exigent circumstance.

The officers could have, and should have, obtained a warrant under these circumstances.

Appellant was indeed charged with two counts of the Class A offense of endangering the welfare of a child, but the officers only learned that Appellant's children were in the home after their warrantless entry. Moreover, at that late hour, the children were asleep in their own room until the officers arrived, and there was no indication that the children were in any danger before the warrantless entry, which would have been an exigent circumstance justifying such entry.

Based on the above, we hold that the warrantless entry into Appellant's home constituted an unreasonable search and seizure, in violation of the Zuni Constitution. Because evidence of Appellant's "primary genital area" was not discovered until after Officer Delena made warrantless entry, such evidence should not have been admitted in evidence at the trial for indecent exposure. Had all charges resulting from this arrest gone to trial, evidence indicating culpability for the five charges to which Appellant pleaded guilty may have been suppressed as well. Appellant, however, pleaded guilty to the five other charges on September 22, 2014, and did not move to vacate those convictions or withdraw her guilty pleas until December 4, 2014.

The New Zuni Tribal Court Rules of Criminal Procedure

On March 11, 2015, the Zuni Tribal Council adopted new Zuni Rules of Criminal Procedure ("Z.R.Crim.P."), by Zuni Tribal Council Resolution No. M70-2014-Q020. Unlike the Zuni Rules of Appellate Procedure, which were abolished on April 29, 2015, the new Zuni Rules of Criminal Procedure remain in effect.

The new rules allow a defendant to move to vacate a judgment upon motion made within ten days after sentencing. Rule 38(A), Z.R.Crim.P. (2014). On December 4, 2015, Appellant moved to vacate the charges to which she pled guilty on September 22, 2014, well beyond the time allowed by the rule. In the same motion, Appellant moved to withdraw her guilty pleas pursuant to Rule 16(I), Z.R.Crim.P. (2014). The judge denied the motion in an order based on Appellant's knowledge of the charges made against her and their consequences, and the voluntariness with which she pled guilty. Appellant did not appeal the denial of this motion.

We notice that the new Zuni Rules of Criminal Procedure do not provide for a defendant to appeal an order denying a motion to withdraw a guilty plea, which is an order affecting the substantial rights of defendant. Apparently, the new rules only contemplate the availability of appeal to a defendant when a matter has gone to trial and resulted in a guilty verdict and a sentence: "After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of his right to appeal." Rule 41, Z.R.Crim.P. (2014).

In contrast, there is no provision in the new rules allowing a defendant to appeal an order of final judgment rendered without a trial, such as the judge's order denying Appellant's motion to withdraw her guilty pleas. The previous Zuni rules of criminal procedure, on the other hand, would have allowed Appellant to appeal the judge's order of denial, and was a rule that remains, in substance, common throughout non-Zuni jurisdictions. The previous rule provided, "The defendant has the right to appeal from the following: (1) A final judgment of conviction; (2) From an order made, after judgment, affecting his substantial rights." Rule 28, Z.R.Crim.P. (1978) (*superseded* by Z.R.Crim.P. (2014). Thus the previous rule would have allowed Appellant to appeal the judge's denial of Appellant's motion to withdraw her guilty pleas, as such order affected Appellant's substantial rights.

Moreover, the previous Zuni Rules of Criminal Procedure allowed the Zuni Tribal Court to correct tribal court instances of manifest injustice, even after a guilty plea, and to correct illegal sentences:

"A motion to withdraw a plea of guilty may be made only before sentence is imposed or imposition of sentence is suspended; *but to correct manifest injustice the Court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea*." Rule 23(D), Z.R.Cr.P (1978) (emphasis added).

The previous rules also provide, "The Court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within thirty days after the sentence is imposed, or within thirty days after receipt by the Court of a mandate issued upon affirmance of the judgment or dismissal of the appeal." Rule 26, Z.R.Crim.P. (1978).

Because these old rules are no longer in effect, this Court is powerless to enforce them. However, given the manifest injustice of the warrantless entry and subsequent arrest in this matter, the illegal sentences resulting therefrom with respect to the Appellant's guilty pleas; as well as the clearly erroneous guilty verdict of indecent exposure, we strongly urge the Zuni Tribal Court to vacate all convictions resulting from the underlying arrest. Because the new Zuni Rules of Criminal Procedure are incomplete with respect to what a defendant may commonly appeal, in light of what is common in other jurisdictions, we feel that the Zuni Tribal Court should consider retaining the power of correcting manifest injustice and illegal sentences.

CONCLUSION

For the foregoing reasons, Appellant's conviction of indecent exposure is hereby REVERSED and VACATED.

It is so ORDERED.

August 10, 2016

M.B., a minor,

Respondent-Appellant,

v.

PUEBLO OF ZUNI,

Petitioner-Appellee.

SWITCA Case No. 15-009-ZTC
ZCC Cause Nos. JV-2013-0145;
JV-2013-0147; JV-2014-0001

Appeal filed in Zuni Tribal Court of Appeals on June 11, 2014

Appeal filed in the Southwest Intertribal Court of Appeals on June 26, 2015

Renewed Notice of Appeal filed in the Southwest Intertribal Court of Appeals on February 12, 2016

Appeal from the Zuni Children's Court
John Chapela, Judge

Appellate Judges: Jonathan Tsosie,
Anthony Lee and Jeanette Wolfley

OPINION

SUMMARY

Children's Court order transferring jurisdiction of petitions to Tribal Court to try Appellant as an adult was an abuse of discretion, arbitrary, not supported by substantial evidence, and violated Children's Code. Children's Court's failure to follow the law and to appoint counsel violated Appellant's due process rights. Children's Court's refusal to allow expert testimony via

video conference was arbitrary and violated Children's Code and Appellant's due process rights. Children's Court's refusal to consider recommendations of expert, juvenile probation officer, or Zuni Tribal Social Services was an abuse of discretion, was arbitrary, and violated Children's Code and Appellant's due process rights. Unreasonable delays violated Appellant's right to speedy delinquency proceeding. Therefore, order transferring jurisdiction to tribal court was reversed, and SWITCA ordered tribal court to dismiss the underlying petitions with prejudice.

* * *

Respondent-Appellant, a minor, appeals an order of the Zuni Children's Court transferring jurisdiction of the underlying matters to the Zuni Tribal Court for the purpose of trying Respondent-Appellant as an adult. The Southwest Intertribal Court of Appeals ("SWITCA") has jurisdiction over this matter pursuant to Zuni Tribal Council Resolution No. M70-2015-P042, "Resolution to Reinstate SWITCA and to adopt the SWITCA Rules of Appellate Procedure," enacted on April 29, 2015.

For the reasons below, we REVERSE the Zuni Children's Court order transferring jurisdiction to the Zuni Tribal Court, and we order the Zuni Tribal Court, of which the Zuni Children's Court is an arm, to DISMISS the underlying petitions WITH PREJUDICE.

BACKGROUND

Because this case concerns a minor, we will describe potentially identifying facts and dates with some vagueness. Suffice it to say that Respondent-Appellant (hereinafter "Appellant"), a member of the Zuni Tribe, has endured a uniquely difficult life filled with unfortunate circumstances, abuse and neglect. This has resulted in delayed growth--mentally, physically, emotionally, socially--and a number of psychiatric disorders. Since a very early age, Appellant had been in trouble with the law, the vast majority of times for nonviolent offenses. For various periods of Appellant's life, Appellant lived away from home and under the custody of social services, where Appellant received necessary treatment and care and seemed to thrive more so than at home.

In early to mid-2013, Zuni Tribal Social Services ("ZTSS") was given legal custody of Appellant because Appellant had been adjudicated to be a Minor in Need of Care, a result of a pending neglect case involving Appellant's mother. As Appellant's legal custodian, ZTSS implemented a care and monitoring plan for Appellant, much of which involved traditional beliefs, ideals and customs of the Zuni Tribe. According to ZTSS, Appellant was responding well to treatment and making psychological and emotional progress.

By the time the three petitions for the underlying offenses were filed in the Zuni Children's Court in late 2013, Appellant was already on probation for previous acts of delinquency. The first of the underlying petitions was filed over a year after the alleged incident occurred. Almost immediately after that first petition was filed, two more incidents allegedly transpired in quick succession, which resulted in two more petitions. The three petitions allege a total of four Class A offenses, which is the most serious class of offense in the Zuni Criminal Code. The Zuni Children's Court consolidated the three petitions for judicial economy. After the preliminary hearings, but before the hearing to transfer jurisdiction from Children's Court to Zuni Tribal Court occurred, Appellant had been arrested and charged with another offense of intoxication, which is different from the offense of intoxication to which Appellant pled guilty at the preliminary inquiry, discussed below.

The Zuni Children's Code[1] enumerates a detailed process for adjudicating a minor as delinquent. A preliminary inquiry must first be held in which the Children's Court determines whether probable cause exists that the minor committed the alleged delinquent act or acts. The minor's juvenile probation officer (hereinafter "JPO") is required to report on the "circumstances and the best interests of the minor and the Tribe" at this preliminary inquiry. § 9-6-6(C), ZTC. If the Children's Court determines there is indeed probable cause, the court "shall order mediation, adjudication, or other procedures[.]" § 9-6-6(D), ZTC.

The prosecutor, however, may file a petition requesting the Children's Court to transfer jurisdiction to the Zuni Tribal Court for the purpose of trying the minor as an adult. § 9-3-4(A). A transfer hearing is then required to occur within ten days of the filing of the petition to transfer. § 9-3-4(B), ZTC. At least three days before the transfer hearing, the minor's JPO is required to prepare and present a report, and "the prosecutor and other parties may also file written recommendations" regarding the issue of whether to transfer. § 9-3-4(C), ZTC.

At the preliminary inquiry in early January, 2014, Appellant's JPO submitted a Motion for Juvenile Probation Violation, as Appellant had apparently violated a number of probation conditions, but the JPO did not report on the circumstances or best interests of Appellant. When Appellant denied all charges of the three petitions except for a charge of intoxication, the JPO recommended that Appellant be detained until adjudication. Based on the JPO's recommendation and Appellant's admission of intoxication, the judge ordered that Appellant be immediately detained for thirty days. At the end of the preliminary inquiry, the judge asked the JPO to consult

[1] Title IX of the Zuni Tribal Code.

with the lay prosecutor about the possibility of filing a petition to transfer jurisdiction to Zuni Tribal Court to try Appellant as an adult. The record does not reflect that the judge made any findings of probable cause at the preliminary inquiry.

Ten days later, the Children's Court held a pre-adjudicatory hearing where Appellant again denied all charges. A social worker from ZTSS accompanied Appellant. Apparently anticipating the possibility that Appellant would be tried as an adult, the social worker requested that the hearing be continued so that Appellant could be evaluated by a doctor of psychology. The social worker also stated that Appellant needed more time to locate an attorney. The judge advised the social worker that no petition to transfer jurisdiction had yet been filed by the lay prosecutor, and therefore the social worker's request for a psychological evaluation was premature. The judge also advised the social worker that Appellant was welcome to retain an attorney, but that Appellant would be personally responsible for the expenses of retaining one. The social worker informed the judge that a doctor at the Indian Health Service who had provided psychiatric care to Appellant for several years had requested that the court allow Appellant to be evaluated, and that such evaluation would occur in three weeks. The judge again stated that no petition to transfer jurisdiction had yet been filed, but added that if such a petition were to be filed it would necessitate a transfer hearing, and "there will be a need for testimony at that time from a child psychiatrist, psychologist, rather."

The following day, the lay prosecutor filed the petition to transfer jurisdiction to Zuni Tribal Court. Ten days after the filing of the petition to transfer, the lay prosecutor asked for and was granted a continuance. The transfer hearing did not occur until four and a half months later, well beyond the statutory ten days. For reasons that are not clear from the record, the forensic psychologist, who was based out of Albuquerque, did not perform the "Neuropsychological Evaluation" until early March, 2014, when the transfer hearing had been rescheduled for later that month. The psychologist, however, did not receive notice about the transfer hearing until the day before the hearing was to occur, and the psychologist had not finished his evaluation report due to the complexity of Appellant's history and current condition. Both the psychologist and ZTSS asked the court for a continuance so that the psychologist could finish his report, which the judge granted. Appellant did not waive the right to a speedy trial.

During the four months preceding the transfer hearing, ZTSS requested that the court at least appoint Appellant a guardian ad litem pursuant to the Children's Code, arguing that there would be a conflict of interest in having Appellant's mother represent Appellant because one of the alleged victims in one of the petitions was Appellant's sister, and the sister and Appellant shared the same mother. The judge denied the motion because "this is a criminal case," and Appellant was therefore responsible for obtaining counsel at Appellant's own expense. As a last resort, ZTSS then moved for permission to represent Appellant itself, reasoning that Appellant could not proceed pro se due to being a juvenile and the conflict of interest in having Appellant's mother represent Appellant. ZTSS also pointed out that it had legal custody of Appellant, and that this was not yet a criminal case because it was still in Children's Court and therefore a juvenile delinquency proceeding. The judge denied ZTSS's request to represent Appellant.

The psychologist eventually completed his evaluation report, which turned out to be fifty pages in length, in late April, 2014, and filed it with the Zuni Tribal Court. The transfer hearing had been rescheduled for late May, 2014. As the date of the transfer hearing neared, the psychologist informed ZTSS and the Children's Court that he would be unable to attend the transfer hearing in person, but would be available to appear by telephone. ZTSS then moved the court to allow the psychologist to appear telephonically. The lay prosecutor opposed that motion by invoking the confrontation clauses of the Zuni Constitution and the Indian Civil Rights Act, arguing that if a defendant has the right to confront witnesses against him, then so should the Pueblo of Zuni. Oddly, the judge agreed with the lay prosecutor and denied the motion for the psychologist to appear telephonically. ZTSS then requested that the psychologist be allowed to appear via video conferencing, and indicated that the psychologist was only appearing to offer expert testimony about Appellant. The ZTSS even offered its own laptop computer because the court was not equipped with video conferencing capabilities. The lay prosecutor objected and the judge denied that ZTSS motion as well. The transfer hearing thus occurred without the psychologist's appearance.

At the transfer hearing, Appellant was not represented by counsel. Appellant did not speak on his own behalf. Though Appellant's mother attended the transfer hearing, she only uttered a few words and obviously did not understand what was occurring. The social worker from ZTSS only spoke briefly at the beginning of the hearing when questioned about her two requests that the court allow the psychologist to appear by video conferencing or a web-based conferencing system. The social worker stated she had brought a laptop, but then said that she had already informed the psychologist that her requests had been denied, and therefore the psychologist was probably not available at that time. The judge then denied the motions because the courtroom was not equipped with the appropriate technology. Even though the social worker had prepared a substantial report and recommendation,

she did not speak again for the duration of the transfer hearing.

The lay prosecutor then presented his argument for transferring jurisdiction by going through all the statutory elements except for Appellant's emotional maturity and mental condition. When the judge asked the lay prosecutor to speak as to those requirements, the lay prosecutor deferred to the probation office, stating that the probation office would know more about that than he did. The judge then asked the lay prosecutor if Appellant had ever raised the issue of mental competence or mental maturity as a defense, to which the lay prosecutor responded no. Later in the hearing, the lay prosecutor informed the court that he had urged Appellant to admit to all the charges in exchange for being tried as a juvenile, but because Appellant refused to do so, the lay prosecutor decided to proceed with the petition to have Appellant tried as an adult.

Appellant's JPO then presented the report she had prepared for the transfer hearing. When the JPO began by speaking of Appellant's family and living situation at home, the judge cut her short, stating that he would be able to read the JPO's report for that information. The judge directed the JPO to speak about past efforts to rehabilitate Appellant. The JPO described the many difficulties of working with Appellant over the years, but that recently Appellant was responding positively to treatment for the first time and had had some major breakthroughs. The JPO explained that she was part of a team of social workers working with Appellant, and that the traditional approach they were using, which incorporated Zuni culture and customs, was yielding good results. The JPO concluded by recommending that jurisdiction remain with the Children's Court and that Appellant stay under the supervision of the juvenile probation office.

At different points in the hearing, however, the judge expressed strong concerns about allowing these matters to remain in Children's Court when Appellant's eighteenth birthday was to occur in a few weeks, upon which both the Children's Court and the juvenile probation office would lose jurisdiction over Appellant. According to the judge, there was clearly not enough time to rehabilitate Appellant before his eighteenth birthday.

Toward the end of the transfer hearing, the JPO had to explain to Appellant's mother in the Zuni language what the purpose of the transfer hearing was. Neither Appellant nor Appellant's mother presented any argument against transferring jurisdiction to the Zuni Tribal Court. Thus the only person who spoke substantively about Appellant at the transfer hearing was the JPO.

During the transfer hearing, the judge gave no indication that he had read either the psychologist's or the ZTSS's reports and recommendations. Nor did the judge call on the social worker, who was present, to speak about her report.

Despite the strong recommendations of the JPO, the ZTSS and the psychologist to keep these matters within the jurisdiction of the Children's Court, the judge issued an order transferring jurisdiction to the Zuni Tribal Court. The transfer order makes no reference to the written reports or recommendations of the psychologist or the ZTSS. The transfer order quotes certain sentences from the JPO's written report, but does not mention the JPO's recommendation that jurisdiction over Appellant remain in Children's Court. The transfer order finds that Appellant has "no physical disabilities," but makes no finding regarding Appellant's emotional maturity or mental condition. Instead, the order states, "The issue of [Appellant's] ability to comprehend the nature and the seriousness of the numerous charges that have been made against him over the last 10 years has never been raised." The order finds that Appellant's history of conduct is a danger to the community and that there is no reasonable prospect for rehabilitation "through the resources available to the Court," "especially when taking into consideration the [ ] weeks that remain before this Court loses jurisdiction over [Appellant]."

Pursuant to the Children's Code, the transfer order is appealable. Appellant was able to obtain legal counsel and timely filed a notice of appeal in June, 2014. At that time, the Zuni Rules of Appellate Procedure were in place, and the appeal was to be decided by the now-defunct Zuni Tribal Court of Appeals. According to those old rules of appellate procedure, the parties to the appeal were supposed to receive the record for appeal within approximately sixty days of filing the notice of appeal.

Upon the filing of the notice of appeal, the Zuni Tribal Court Clerk had twenty days to prepare audio recordings of the proceedings, and thirty days to identify and number the items of the record and file them with the Zuni Tribal Court of Appeals. The Tribal Court Clerk was then required to send a copy of the docket sheet to all parties with a statement of costs of preparing the record. Upon receipt of the record by the Zuni Tribal Court of Appeals, the Court of Appeals Clerk was to file the record and immediately send notice to all parties of the date that the record was filed. Within thirty days of that notice, Appellant was to have thirty days to file the brief-in-chief.

Appellant's counsel did not receive the Children's Court record until December, 2014, nearly six months after filing the notice of appeal. During that time, Appellant's counsel made numerous inquiries as to the status of the record. When Appellant's counsel finally received the

record, it was obviously incomplete, as it lacked the audio recordings from the preliminary inquiry and pre-adjudication hearing, as well as the letter motions from ZTSS requesting the appointment of a guardian ad litem and that ZTSS be allowed to represent Appellant. The record was also missing the written reports and recommendations of the psychologist and the ZTSS. Appellant's counsel then filed a Motion to Supplement the Record and Toll Briefing Schedule with the Zuni Tribal Court of Appeals.

The Zuni Tribal Court of Appeals never acted on Appellant's motion to supplement the record. The Zuni Tribal Court of Appeals was abolished by the Zuni Tribal Council on April 29, 2015. On that same day, the Zuni Tribal Council reinstated appellate jurisdiction over matters arising out of the Zuni Tribal Court to SWITCA. Appellant's notice of appeal, however, was not immediately forwarded to SWITCA. Only after we received and accepted this appeal was the outstanding motion to supplement the record brought to our attention. We then withdrew our acceptance of the appeal and ordered the Zuni Tribal Court to provide the items missing from the Children's Court's record.

Appellant's counsel did not receive a complete and correct record from the Zuni Tribal Court until January, 2016, over a year and a half after filing the notice of appeal. Appellant then filed a renewed notice of appeal with SWITCA, which was well-taken, and filed the brief-in-chief. The Pueblo of Zuni did not file a response.

On appeal, Appellant urges us to reverse the order transferring jurisdiction because: (1) the Children's Court violated Appellant's due process rights; (2) the order is arbitrary, capricious, not based on substantial evidence, and is contrary to the Children's Code and Zuni Customary Law; (3) the Children's Court denied Appellant the equal protection of Zuni's laws; and (4) Appellant was deprived of the right to a speedy trial.

STANDARD OF REVIEW

Pursuant to the Zuni Rules of Appellate Procedure ("Z.R.A.P."), which were effective at the time of Appellant's notice of appeal, a decision of the tribal court "shall be set aside only if it is shown that the decision: (1) is arbitrary, capricious or reflects an abuse of discretion; (2) is not supported by substantial evidence; or (3) is otherwise not in accordance with law." Rule 14(C), Z.R.A.P. (The Zuni Tribal Council rescinded the Z.R.A.P. on April 29, 2015, by Tribal Council Resolution No. M70-2015-P042.)

Though not all issues were preserved for appeal in the Children's Court, we regularly accord the pro se respondent some leeway. In a case such as this, where respondent was a minor without counsel or an advocate and developmentally delayed, we accord even greater leeway.

DISCUSSION

When a minor is alleged to have committed an act that would make the minor a juvenile offender, the Zuni Children's Code requires that a preliminary hearing be conducted "to determine whether probable cause exists to believe the minor committed the alleged act[.]" § 9-6-6(A), ZTC. At this preliminary inquiry, "The juvenile probation officer will report on the circumstances and the best interests of the minor and the Tribe." § 9-6-6(C), ZTC. In the event that the minor admits to the commission of the delinquent act, the court may proceed to a disposition hearing, but only if the court first determines that: "(1) The minor fully understands his rights under this [Children's] Code; (2) The minor fully understands the consequences of admitting he committed the delinquent act; and (3) No facts have been stated which would be a defense." § 9-6-6(E), ZTC.

In order to begin the process of transferring jurisdiction from the Children's Court to the Zuni Tribal Court, the "prosecutor may file a petition requesting the Court to transfer an alleged juvenile offender to the jurisdiction of Tribal Court if the minor is at least 16 years of age and is alleged to have committed an act, which if committed by an adult, would be a Class A offense under the Criminal Code or a felony under the laws of another jurisdiction." § 9-3-4(A), ZTC. If the prosecutor files such a petition, "The Court *shall* conduct a hearing within ten days of filing to determine whether the matter should be transferred." § 9-3-4(B), ZTC (emphasis added). At least three days before the transfer hearing is to occur, the juvenile probation officer "shall prepare and present a written report … containing information on the alleged offense; and the minor's condition, as evidenced by his age, mental and physical condition; past record of offenses; and rehabilitation efforts. Within the same time limit, the prosecutor and other parties may also file written recommendations." § 9-3-4(C), ZTC.

In order to transfer jurisdiction, the Children's Court judge "*shall*" consider: "(1) The nature and seriousness of the offense, as set forth in the petition; (2) The minor's emotional maturity, mental condition as indicated in reports provided to the Court; *and* (3) The past record of offenses and rehabilitation efforts." § 9-3-4(D), ZTC (emphasis added).

In the event a minor is not represented by counsel and does not have a parent or custodian who is able to represent the minor, the Children's Court must appoint either a guardian ad litem or a Court Appointed Special Advocate ("CASA"):

> The Court, at any stage of a proceeding, *shall* appoint a guardian ad litem or CASA for a minor if the minor has no parent, guardian or custodian appearing on behalf of the minor, *if the interest of the minor conflicts with the interest of parent*, guardian or custodian, or when it appears to the Court that the child's best interests warrant appointment. § 9-4-19, ZTC (emphasis added).

The Children's Court's jurisdiction over the delinquent acts of a minor does not necessarily end when the minor turns eighteen years of age. The Children's Code provides,

> Jurisdiction over a child shall continue until the child becomes 18 years of age, unless such jurisdiction is terminated prior thereto, provided that the Court shall maintain jurisdiction over a person who becomes 18 years of age *for up to one year from events which occurred prior to the person's 18th birthday*. § 9-3-6, ZTC (emphasis added).

The Bill of Rights of the Zuni Constitution provides, "The Zuni Tribe, in exercising its powers of self-government, shall not: Deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, at his own expense, to have the assistance of counsel for his defense." Zuni Const., art. III, § 2(f). Further, the Zuni Tribe "shall not: Deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." Id., at § 2(h).

I. The Preliminary Inquiry

Here, the Zuni Children's Court failed to follow several statutory requirements of the Children's Code. At the preliminary inquiry, the JPO had the statutory duty to "report on the circumstances and the best interests of the minor and the Tribe." The 'best interests of the child' standard occurs throughout the Children's Code and is so important that, "All actions and decisions made under the authority of this Code *shall* be implemented to serve the best interests of the child." § 9-2-1, ZTC (emphasis added). One of the foundational purposes of the entire Children's Code is to "[s]ecure for each child before the Court the care and guidance that is in the best interest of the child and consistent with the customs, cultural values, and laws of the Pueblo of Zuni[.]" § 9-1-2(A)(2), ZTC.

At the preliminary inquiry, however, the JPO merely filed and presented a Motion for Probation Violation that listed the ways Appellant had violated the terms of probation. When Appellant denied all the charges except for one of intoxication, the JPO immediately recommended that Appellant be detained. The JPO never mentioned the "circumstances and the best interests of the minor," nor did the Children's Court judge inquire of the JPO about them. In a case like this, where the JPO and the Children's Court already knew that Appellant had been deemed to be a Minor in Need of Care as a result of a pending case of parental neglect, and that Appellant was in the custody of ZTSS, consideration of Appellant's circumstances and best interests would be particularly important. This is especially so before even contemplating the possibility of trying a minor as an adult.

As for further errors at the preliminary inquiry, when Appellant admitted to the offense of intoxication, the Children's Court had the statutory duty to ensure that Appellant understood his rights under the Children's Code, as well as the consequences of admitting to that offense. The Children's Court also had the duty to consider whether any facts had been stated that could constitute a possible defense. Only then could the Children's Court proceed to disposition with respect to the admitted offense. The Children's Court here, however, did not at all ensure that Appellant understood the consequences of admitting to intoxication. Given Appellant's delayed mental age and lack of fluency with the English language, it is plausible, if not probable, that Appellant did not fully understand his rights under the Children's Code.

Lastly, the record does not reflect that the judge made any findings of probable cause, which is the very purpose of the preliminary inquiry. Instead, the judge sentenced Appellant to thirty days of detention.

II. The Transfer Hearing

More errors occurred before and during the transfer hearing. First, the Children's Court should have appointed counsel to Appellant, even if not required to do so by the Children's Code. Not only was Appellant a minor, Appellant was mentally young for his age by a number of years. It was apparent that Appellant and his mother did not understand everything that was happening during these hearings, and that they sometimes needed certain concepts to be explained to them in the Zuni language. Appellant was also indigent and unemployed, and was a Minor in Need of Care in the custody of ZTSS. Moreover, Appellant's mother should not have been expected to represent Appellant because she did not understand the purpose of the transfer hearing, and there was an obvious conflict of interest in representing her child when one of the alleged victims was another one of her children.

At the level of a transfer hearing in Children's Court, where a minor is considered a minor until determined

otherwise by a preponderance of the evidence, a case is not 'criminal.' 'Criminal' proceedings involve an adult defendant, or a minor being tried as an adult defendant, in Zuni Tribal Court. The judge was thus incorrect when he characterized these proceedings as "a criminal case" and relied on this characterization as the basis for denying the request to appoint Appellant a guardian ad litem and to insist that Appellant pay for counsel at Appellant's own expense if Appellant wished to be represented by an attorney. Characterizing these proceedings as a criminal case reflects either a misunderstanding of, at best, or a disregard for, at worst, the Children's Code.

The judge was similarly incorrect when he stated more than once at the transfer hearing that the Children's Court and the juvenile probation office would lose jurisdiction over these matters upon Appellant's eighteenth birthday. The Children's Code clearly states that the Children's Court would be able to retain jurisdiction for up to one year after the occurrence of the underlying events, even if Appellant were to turn eighteen during the course of that year. Appellant could have conceivably remained under the supervision of the juvenile probation office and continued to receive the services and treatment of ZTSS, until the spring of 2015, a year after one of Appellant's intoxication offenses.

The difference between trying a minor as a juvenile versus as an adult is vast, and the potential ramifications of being found guilty of serious crimes as an adult are lifelong. Given these circumstances, it is impossible for this Court to envision how this minor, indigent, mentally delayed Appellant could have received a fair hearing by requiring Appellant to proceed without an attorney or, at the least, a guardian ad litem or a Court Appointed Special Advocate. Appellant's mother did not understand the purpose of these proceedings, much less the underlying law of the Children's Code, and was therefore unqualified to advocate on Appellant's behalf. The obvious conflict of interest in having Appellant's mother represent Appellant triggered the statutory duty of appointing Appellant either a guardian ad litem or a Court Appointed Special Advocate. Basic, fundamental fairness would require the appointment of counsel, or of some other qualified advocate, in exactly this kind of situation. The Children's Court's failure to do so in these circumstances clearly denied Appellant a fair transfer hearing and violated his rights to due process.

Another disturbing aspect of the transfer hearing was the manner in which the Children's Court treated the evaluation report and impending testimony of the psychologist retained to offer expert opinion about Appellant. When the lay prosecutor opposed the ZTSS's request to have the psychologist appear telephonically, the lay prosecutor made the invalid argument of invoking the constitutional right of a defendant to confront, i.e., cross-examine, anyone offering testimony against the defendant. This is a constitutional right of defendants and accused, and not of the government, i.e., the Pueblo of Zuni. It is important to remember that the Bill of Rights of the Zuni Constitution, which is essentially identical to that of the Indian Civil Rights Act, exists to protect citizens of the Pueblo from governmental overreach. They do not exist to be invoked by the Pueblo itself. Here, however, the Children's Court agreed with the lay prosecutor, much to this Court's surprise, and denied the psychologist's appearance by telephone. Denying the psychologist's telephonic appearance on the basis of a defendant's right to confront those testifying against that defendant was clearly an abuse of discretion and not in accordance with law.

Similarly, the Children's Court denial of ZTSS's request to have the psychologist appear by video conferencing was unreasonable and unjust, especially (a) when ZTSS offered its own computer and a reasonable solution, (b) when the psychologist did not live in the Pueblo and was unavailable to attend; (c) when the judge acknowledged the necessity of a psychologist's testimony at the pre-adjudicatory hearing; and (d) when the transfer hearing was supposed to occur, statutorily, within ten days of the filing of the petition to transfer jurisdiction. The psychologist was based over one hundred and fifty miles away in Albuquerque. The psychologist was eminently qualified to offer his expert opinion about Appellant's mental and physical condition, as required by the Children's Code, and had conducted extensive interviews with and testing on Appellant. Contrary to what the lay prosecutor and the judge apparently believed, the purpose of the psychologist's testimony was not to testify on behalf of Appellant and 'against' the Pueblo. The reason for the psychologist's written report and testimony was to report the findings of an objective medical evaluation of Appellant's mental and physical condition in order to assist the court with the determination of whether it was appropriate for Appellant to be tried as an adult. For the Children's Court to delay the transfer hearing well beyond the statutory ten days - to approximately 120 days - to allow the psychologist to prepare a complex report in a complex matter, only to summarily exclude the psychologist's appearance and to disregard his report entirely, was fundamentally unfair, an abuse of discretion, and not in accordance with the Children's Code.

We also take issue with the judge's treatment of the statutory requirement to consider Appellant's mental age and emotional maturity during the transfer hearing. At the hearing, the judge asked the JPO if Appellant had ever raised the issue of mental age or emotional maturity before. The transfer order specifically finds that Appellant had never raised these issues before. Whether Appellant had raised the issue is not the correct legal standard. The Children's Court, rather, is statutorily required to consider

a minor's mental age and emotional maturity when determining whether to try a minor as an adult. The Children's Court thus failed to properly consider Appellant's mental age and emotional maturity, which were discussed in the reports of the ZTSS and the psychologist. By placing the burden exclusively on Appellant to raise the issues of mental age and emotional maturity in order for them to be considered for the purposes of transfer, the Children's Court violated Appellant's due process rights.

If the Children's Court judge had read the psychologist's report--and the order transferring jurisdiction does not indicate that the judge read or considered the report--the judge would have read the following: "It is highly plausible that the confluence of substance abuse issues, physical and emotional abuse, and 8 potential psychological disorders, could have significantly affected [Appellant's] 'mental and physical condition,' which is part of the determining factors in the Zuni Children's Code as to whether this child may be tried as an adult." Further, in the report's conclusion section: "Strongly recommend juvenile court adjudication as [Appellant's] mental, emotional, executive and functional age is that of a 15 year old or younger."

Similarly, the judge's order does not indicate that the judge read or considered the report and recommendation of ZTSS, which detailed the significant hardships of Appellant's background, as well as the progress Appellant was making as a result of receiving services and therapy oriented in traditional Zuni culture and customs. The ZTSS wrote that "it is the strong recommendation of this agency that the case should remain in Children's Court for adjudication of [Appellant] as a juvenile." The ZTSS also elaborated the significant ramifications of trying this particular Appellant as an adult:

> Unless the Tribe plans to keep [Appellant] incarcerated for the rest of his life, it must make a plan to ensure that he receives the treatment he needs to reintegrate into the Zuni Pueblo. The question becomes, then, whether a transfer to Tribal Court would further that goal. Are there treatment options that are not available to [Appellant] as a juvenile which would become available to him if tried as an adult? The answer is clearly no. On the other hand, if he is tried as an adult and convicted, he will begin his adult life with a record, which will only add to the obstacles he already faces in becoming a more mature adult. Most importantly, he will have serious difficulties obtaining gainful employment, an obstacle which clearly correlates with increased recidivism.

The judge also ignored the recommendations of the JPO's report, even though the JPO considered the best interest of the child standard and the hope for rehabilitation. The JPO wrote that Appellant still had behavioral issues, but that Appellant appeared to be responding well to treatment and making improvements. The JPO recommended and requested that Appellant remain "under the Zuni Children's Court and under Juvenile Supervised Probation Department until the minor turns the age of eighteen years old, which is in the best interest of the juvenile." The JPO also wrote, "it is a strong hope that minor will finally be given another chance to receive further assistance and to rehabilitate himself and return to the community a better person." Instead, the judge focused on the report's history of probation violations in 2012, on the fact that Appellant had not finished high school, and on Appellant's turbulent and longstanding history with social services.

Given that the only report the judge refers to in his order is the report prepared by Appellant's JPO, we find it fundamentally unfair that the judge did not duly consider the lengthy reports and strong recommendations of the psychologist and the ZTSS, both of whom wrote that Appellant's difficult background and mental disorders had resulted in a person much younger than his actual age, both mentally and physically. Because the Children's Code requires the Children's Court to consider "[t]he minor's emotional maturity [and] mental condition as indicated in the reports provided to the Court," we find that the Children's Court's failure to do so by disregarding the reports of the psychologist and of ZTSS was an abuse of discretion, was arbitrary, was not supported by substantial evidence, and was not in accordance with law.

III. Unreasonable Delays

Lastly, there is the serious issue of the inordinate delays in holding the transfer hearing and in preparing the record properly for appeal. The transfer hearing was supposed to occur within ten days of the lay prosecutor's filing of the petition to transfer jurisdiction. It did not occur here for over four months - over 120 days. While the lay prosecutor asked for and was granted a continuance, much of the delay was due to the preparation of the psychologist's report on the complex personal history of Appellant. While this Court understands the importance of a thorough report in a case like this and the necessity of extra time to prepare it, the delay is not justified when the Children's Court did even not consider the report and refused to allow the psychologist to offer his expert opinion remotely.

We have similar concerns about the Zuni Tribal Court's delay in preparing a complete and proper record for appeal, especially for an appeal of a proceeding that was supposed to occur within ten days of the filing of the

petition to transfer jurisdiction. Contrary to the statutory requirement of the Zuni Rules of Appellate Procedure that were effective at the time Appellant filed the notice of appeal, counsel for Appellant did not receive a record of the proceedings for 174 days - essentially six months after filing the notice of appeal. During those six months, counsel for Appellant regularly contacted the Zuni Tribal Court about the progress of preparing the record for appeal. When the record prepared by the Zuni Tribal Court was finally received, however, it was incomplete in several crucial respects. The record did not include the reports of the psychologist or the ZTSS, nor did it include the audio recordings of the preliminary inquiry or the pre-adjudicatory hearing. The record also lacked two letter motions from ZTSS requesting the appointment of a guardian ad litem and, when that was denied, the request for permission to represent Appellant.

Moreover, the Zuni Tribal Court of Appeals never acted upon Appellant's motion to supplement the record and toll the briefing schedule. The motion to supplement the record was still outstanding when the Zuni Tribal Council abolished the Zuni Tribal Court of Appeals and the Zuni Rules of Appellate Procedure on April 29, 2015. When this Court finally received the record for appeal in June, 2015, we received the incomplete record. When this was brought to our attention, we withdrew our acceptance of the appeal and ordered the Zuni Tribal Court to properly supplement the record, which resulted in even more delay.

Though the language of the Zuni Constitution refers to a "criminal proceeding" when guaranteeing a "person" the right to a speedy trial, we can discern no reason why a minor would not have the same right to a speedy trial in a delinquency proceeding. In fact, given that the Children's Court's jurisdiction ends either when the minor turns eighteen years of age or for up to one year after delinquent events occurring prior to the minor's eighteenth birthday, the right to a speedy trial is arguably even more urgent in juvenile proceedings.

We find that the Zuni Tribal Court's inordinate delay in preparing a complete record for appeal violated Appellant's right to a speedy trial, especially in light of the facts that: (1) the transfer hearing was supposed to occur within ten days of the filing of the petition to transfer jurisdiction; (2) the Zuni Tribal Court prepared an incomplete record after six months of regular inquiries about the record; (3) the Zuni Tribal Court of Appeals failed to rule on a motion to supplement the record and left it outstanding; and (4) Appellant is no longer a minor. It would be manifestly unjust, as well as legally questionable, to remand these matters to Children's Court for adjudication, as Appellant is no longer a minor as of 2014 and the underlying events allegedly occurred in 2012 and 2013. Because we have already enumerated the many deficiencies of the hearing transfer process, we refuse to remand these matters to Zuni Tribal Court where Appellant would be tried as an adult. The underlying petitions must therefore be dismissed with prejudice.

CONCLUSION

In conclusion, we hold:

(1) that the Zuni Children's Court's order transferring jurisdiction of the underlying petitions to the Zuni Tribal Court for the purpose of trying Appellant as an adult was an abuse of discretion, was arbitrary, was not supported by substantial evidence, and was not in accordance with the Zuni Children's Code;

(2) that the Zuni Children's Court's failures to follow its own laws with respect to the requirements of the preliminary hearing and the transfer hearing violated Appellant's due process rights;

(3) that the denial of the appointment of counsel in this case--where minor Appellant was developmentally delayed both mentally and physically, had been deemed a Minor in Need of Care, did not understand the proceedings, was indigent, and whose mother could not properly represent Appellant due to a conflict of interest and lack of understanding of the proceedings--was so fundamentally unfair as to violate Appellant's due process rights;

(4) that the Children's Court's refusal to allow the psychologist to provide expert testimony via video conferencing was so unreasonable and unfair as to be arbitrary, not in accordance with the Children's Code, and a violation of Appellant's due process rights;

(5) that the Children's Court's refusal to consider all three recommendations of the psychologist, the ZTSS and Appellant's JPO--all of which spoke to Appellant's mental age and emotional maturity as required by statute, and which strongly recommended that jurisdiction remain in Children's Court--was an abuse of discretion, was arbitrary, was not in accordance with the Children's Code, and was a violation of Appellant's due process rights;

(6) that the delays in conducting the transfer hearing and in providing Appellant a complete and correct record for appeal were so unreasonably and unjustifiably long that they violated Appellant's right to a speedy trial, i.e., speedy delinquency proceedings.

For the foregoing reasons, the Zuni Children's Court order transferring jurisdiction of these matters to the Zuni Tribal Court is hereby REVERSED. We further order the Zuni Tribal Court to DISMISS WITH PREJUDICE the underlying petitions in this matter.

It is so ORDERED.

September 1, 2016

JOHNATHAN LEMENTINO,

Respondent-Appellant,

v.

TERRANCE HOOEE &
MERLINDA CHAVEZ,

Petitioners-Appellees.

SWITCA Case No. 15-018-ZTC
ZTC Cause No. CL-2013-0034

Appeal filed in Zuni Tribal Court on March 4, 2015

Appeal filed in the Southwest Intertribal Court of Appeals on June 25, 2015

Appeal from the Zuni Tribal Court
Albert Banteah, Judge

Appellate Judges: Jonathan Tsosie, Anthony Lee, and Jeanette Wolfley

OPINION

SUMMARY

Appellant converted Appellees' steer and appealed the tribal court's restitution award against him. SWITCA set aside the award because it was not supported by substantial evidence. It also set aside the tribal court's holding that all parties were contributorily negligent because it was not supported by substantial evidence and was not in accordance with law. SWITCA remanded the case for a determination of the value of the steer when it was converted, and for the tribal court's reconsideration of its finding that the parties were equally negligent in light of Appellant's unreasonable and bad-faith conduct.

* * *

Respondent-Appellant appeals the Zuni Tribal Court's award of $1,500.00 to Petitioners-Appellees for the value of a steer, arguing that Petitioners-Appellees failed to provide any evidence that the steer was worth the amount claimed in their petition for restitution. The Southwest Intertribal Court of Appeals ("SWITCA") has jurisdiction over this matter pursuant to Zuni Tribal Council Resolution No. M70-2015-P042, "Resolution to Reinstate SWITCA and to adopt the SWITCA Rules of Appellate Procedure," enacted on April 29, 2015. For the reasons below, we REMAND this matter and direct the Zuni Tribal Court to determine the fair market value of the steer.

BACKGROUND

Petitioners-Appellees (hereinafter "Appellees") are brother and sister, and were the owners of a steer, known as a "limousine steer," that previously belonged to their father. In January, 2013, the steer got out of its holding pen, which was located within the exterior boundaries of the Zuni Reservation, and wandered away. Over the next few months, Appellees devoted considerable time searching for the steer in the surrounding areas, and inquiring of members of the Pueblo if they had seen the steer. Appellees efforts to locate the steer were unsuccessful.

On May 2, 2013, a Zuni Tribal Ranger contacted Appellees to inform them that their steer had been located at Respondent-Appellant's (hereinafter "Appellant") ranch. The Tribal Ranger had personally observed the steer at Appellant's ranch. On May 5, 2015, Mr. Delbert Chavez, husband to Appellee Chavez, visited Appellant's ranch to retrieve the steer. Mr. Chavez observed the steer in its own holding pen on Appellant's ranch. Appellant refused to surrender the steer. Appellant told Mr. Chavez that the steer had injured one of Appellant's bulls. Appellant told Mr. Chavez that he was going to sue Appellees for the trespass of the steer onto his grazing unit and for the costs of feeding and watering the steer. At trial, Appellant testified that he refused to surrender the steer because Mr. Chavez arrived at his ranch without an appropriate means of transporting the steer.

Mr. Chavez relayed what Appellant had told him to Appellees. Appellees claimed in their Petition for Restitution of Stolen Property that they took no further immediate action because they were waiting for Appellant to follow through on his threat to take legal action. When Appellees did not receive a summons or complaint from Appellant for over two months, Appellees sought assistance from the Zuni Tribal Council to retrieve their steer. The Council referred them to the Zuni Game and Fish Department. Appellant never filed a complaint of any kind.

On July 28, 2013, a Zuni Tribal Ranger accompanied Appellee Chavez and Mr. Chavez to Appellant's ranch to retrieve the steer. There, Appellant told them, "Good luck finding him because I dropped him off at Miller Canyon." When Appellee Chavez asked Appellant why he did that, Appellant responded that he had grown tired of feeding and watering the steer.

The steer was never found. Appellees brought action for restitution in the amount of $3,000.00 plus costs and attorney fees.

At trial, Appellant testified that the steer had wandered onto his grazing unit and that he knew that the steer belonged to Appellees because the same steer had wandered onto his grazing unit or had joined his herd before. Appellant claimed that Appellees had always kept the steer in an inadequate holding pen, which allowed the steer to trespass onto his grazing unit. Appellant testified that he once tried to visit Appellees at their home to tell them he had the steer, but that no one answered the door. Appellant further claimed that he had contacted the Zuni Game and Fish Department about the steer, as required by the Zuni Range Code, but the Department took no action.

It is undisputed that Appellant never informed Appellees that their steer was in his possession. Appellees discovered that Appellant had the steer when they were contacted by a Zuni Tribal Ranger. It is also undisputed that Appellant released the steer to open range to fend for itself.

Appellant's Answer to Petition for Restitution of Stolen Property is a summary denial of nearly every allegation of Appellees' Petition for Restitution of Stolen Property. Appellant's answer does not make any counterclaims, nor does it argue that the court should offset any award because of the costs of feeding and watering the steer, or because of the alleged injury to Appellant's bull. At trial, Appellant argued to the court for the first time, without providing any evidence other than his testimony, the costs of feeding and watering the steer, as well as the cost of the alleged injury to his bull.

At the close of trial, the judge ruled orally "both parties to be negligent in some way," and that "there are duties of care when you do have livestock." The judge ruled in favor of Appellees but also that Appellant "has mitigated the amount," and awarded Appellees the amount of $1,500.00. In the judge's written Civil Court Judgment and Order, the judge found that "Respondent did directly deprive the Plaintiffs of their property by not returning their brown Limousine steer." The judge then held, "The Plaintiffs and the Respondent were negligent in some regard in this case; therefore the Plaintiffs are awarded one-half of their original claim of $3,000.00 for the loss of their brown Limousine steer."

In closing argument, Appellant's counsel argued that Appellees' claim should fail because they never introduced evidence as to damages suffered by the loss of the steer, thus preserving the issue for appeal. It should be noted that lay counselor for Appellees also pointed out that Appellant had never mentioned the costs of injury to his bull or of caring for the steer until trial, and that Appellant had presented no evidence reflecting such costs, either.

STANDARD OF REVIEW

At the time of Appellant's filing of his notice of appeal, the Zuni Rules of Appellate Procedure ("Z.R.A.P.") were in effect, and the notice of appeal was filed pursuant thereto. According to those rules, a decision of the tribal court "shall be set aside only if it is shown that the decision: (1) is arbitrary, capricious or reflects an abuse of discretion; (2) is not supported by substantial evidence; or (3) is otherwise not in accordance with law." Rule 14(C), Z.R.A.P.

Furthermore, "The Court of Appeals may dismiss the appeal, affirm or modify the decision of the tribal court, reverse the decision in whole or in part, order a new trial, or take any other actions as the merits of the case and interest of justice may require." Rule 22(A), Z.R.A.P. (The Zuni Tribal Council rescinded the Z.R.A.P. on April 29, 2015, by Tribal Council Resolution No. M70-2015-P042.) This rule is essentially identical to Rule 31(a) of SWITCA's Rules of Appellate Procedure,[1] and we therefore apply both rules here.

DISCUSSION

Appellees' Petition for Restitution of Stolen Property does not specifically identify any particular cause of action. The petition requests "restitution" in the amount of $3,000.00 or, in the alternative, a replacement limousine steer on the ground that, "[Appellant] disposed of our brown limousine steer unnecessarily and illegally." The petition also alleges that the Zuni Range Code imposed certain duties on Appellant that Appellant failed to abide.

The Civil Court Judgment and Order makes the following findings: "By releasing the Plaintiff's brown Limousine steer in the Millers Canyon the [Appellant] did intentionally deprive the Plaintiffs of their property." And, "The [Appellant] did directly deprive the Plaintiffs of their property by not returning their brown Limousine steer." Additionally, the order holds that both parties "were negligent in some regard in this case; therefore the Plaintiffs are awarded one-half of their original claim of $3,000.00 for the loss of their brown Limousine steer."

[1] "The appellate panel may dismiss the appeal, affirm or modify the decision being reviewed, reverse the decision in whole or in part, order a new trial, or take any other action as the merits of the case and the interest of justice may require." *SWITCARA* #31(a) (2001).

Based on the above, Appellant's brief states that the "theory of recovery by the Tribal Court seems to be conversion." We agree.

As for the remainder of Appellant's brief, we are unpersuaded by its argument that the Zuni Tribal Court erred as a matter of law and committed reversible error when it awarded damages to Appellees when Appellees had failed to offer any proof of damages at trial. Appellant's reliance on three judicial opinions and the Restatement (Second) of Torts is misplaced, as none of the cited authorities support Appellant's contention that the Zuni Tribal Court committed reversible error.

Generally, the required elements of a prima facie case of conversion do not include the element of damages when the case involves a defendant alleged to have seriously interfered with plaintiff's right of possession in the subject chattel.[2] Thus it is possible for a plaintiff to prevail on a claim of conversion, an intentional tort, without alleging actual damages. If such plaintiff wishes to claim damages or restitution, however, the plaintiff should eventually provide evidence supporting the claim. A prima facie case based in negligence, on the other hand, requires as an element the allegation of actual damages in order for the case to remain viable throughout litigation. The failure of a plaintiff to prove damages in an action based in negligence is grounds for ruling against that plaintiff at trial, as well as grounds for reversal on appeal.

Here, Appellant argues that Appellees had the burden of proving damages at trial - i.e., the duty to provide evidence showing that the limousine steer was worth $3,000.00 - but that Appellees failed to do so, constituting reversible error.

In support of this contention, Appellant first cites *Folz v. New Mexico*, 1990-NMSC-075, 110 N.M. 457, 797 P.2d 246, for the proposition that Appellees had the burden of proving damages at trial. The precise paragraph cited in Appellant's brief begins, "As with any negligence action, the plaintiff has the burden to prove damages." *Id.* at 41. The appeal at issue, however, is not a negligence action, but an action based in conversion. Whereas a negligence action indeed requires a plaintiff to allege and prove damages at trial, an action based in conversion does not. Folz is therefore inapposite to this appeal.

Appellant also makes the following broad assertion: "Where the evidence supplied does not include proof of damages, a monetary award must be vacated." In support of this claim, Appellant cites *AlphaMed Pharms. Corp. v. Arriva Pharms., Inc*., 432 F. Supp. 2d 1319 (S.D. Fla. 2006), a complex and voluminous case concerning, in relevant part, the plaintiff's claim of unfair competition. In Florida, the claim of unfair competition was "elastic" and its "precise elements" were "somewhat elusive." *Id.* at 1353. Thus some claims of unfair competition required proof of certain elements like damages, while other claims of unfair competition apparently did not. In order to clarify what that plaintiff would have to prove at the *AlphaMed* trial, the court informed plaintiff before trial that proof of damages would be an "essential element" to the claim of unfair competition. *Id.* Plaintiff did not object. Plaintiff similarly did not object to jury instructions that instructed the jury to consider whether plaintiff had proved damages arising from identified acts of unfair competition. After the jury rendered a verdict in favor of plaintiff, defendants submitted renewed motions for judgment as a matter of law. The Southern District of Florida then vacated the jury's verdict because plaintiff failed to prove at trial the "essential element" of damages to support the claim of unfair competition, and therefore the jury verdict could not be allowed to stand.

AlphaMed is thus easily distinguishable from the appeal at issue, as we are not dealing with a case of unfair competition, much less an "elastic" cause of action consisting of elusive and imprecise elements. Moreover, the element of damages is not "essential" to alleging and proving that Appellant committed the tort of conversion.

The last opinion Appellant cites is *Weiland Tool & Mfg. Co. v. Whitney*, 100 Ill. App. 2d 116, 241 N.E.2d 533 (Ill. 1968), as support for the argument that "Appellees had the burden of proof on damages in a conversion action." While that case was indeed based, in part, in conversion, Appellant fails to mention that the opinion was reversed in its entirety by *Weiland Tool & Mfg. Co. v. Whitney*, 44 Ill. 2d 105, 251 N.E.2d 242 (Ill. 1969). It is therefore inapplicable to this appeal.

Finally, Appellant contends that in order for Appellees to recover in conversion, section 927 of the Restatement (Second) of Torts required Appellees to prove the value of the steer at the time of conversion.[3] The Pueblo of Zuni has not adopted the Restatement, thus the Restatement is

[2] For less serious interferences with a plaintiff's right of possession in a chattel, such as when a defendant does not actually dispossess the plaintiff of the chattel, the element of damages is required for the prima facie claim of the tort of trespass to chattels.

[3] (1) When one is entitled to a judgment for the conversion of a chattel or the destruction or impairment of any legally protected interest in land or other thing, he may recover either

(a) the value of the subject matter or of his interest in it at the time and place of conversion, destruction or impairment[.]

§ 927(1)(a), Restatement (Second) Torts (1979).

not binding law. Because the Restatement is not binding, Appellant cannot argue that Appellees had the obligation to follow it. It is plausible that Appellees were not even aware of this particular section of the Restatement. The fact that Appellees did not abide the Restatement cannot be a basis for reversible error. However, we do agree that Appellees should have the opportunity to prove the value of the steer at the time of its conversion.

Because Appellant has not convinced this panel that the Zuni Tribal Court committed reversible error, we remand this matter to the Zuni Tribal Court so that Appellees may provide evidence of the value of the steer at the time of its conversion by Appellant.

On remand, we would ask the Zuni Tribal Court to reconsider its basis for deciding that Appellees and Appellant were equally "negligent," and then using that finding to reduce Appellees' claimed restitution amount by half. We cannot discern any instance in the record where Appellees were negligent. Appellees began to search for the steer as soon as it got out of its holding pen, and continued to search for it and ask about it in the community for months. Appellant testified at trial that Appellees' holding pen was inadequate for the steer, but this allegation was never substantiated by any evidence, was never brought up in Appellant's answer to Appellees' petition, and Appellees were never questioned about it. When a Zuni Tribal Ranger contacted Appellees in early May, 2013, to inform them that the steer was in Appellant's possession, Appellees, through Mr. Chavez, immediately visited Appellant's ranch to retrieve it, whereupon Appellant refused to release the steer, demanded compensation, and told Mr. Chavez that he was going to sue Appellees. Appellees, knowing that Appellant would not return the steer and expecting to be served with a lawsuit for compensation, waited for Appellant to follow through with litigation, which was not unreasonable. When no lawsuit came, Appellees attempted to retrieve the steer again, but Appellant had hauled the steer away and released it. We do not see how Appellees could have been found to be negligent, especially when negligence was never alleged in Appellant's answer to the petition.

We fail to see how Appellant could have been held to be negligent, either, given that he knew exactly what he was doing with the steer--*i.e.*, acted with knowledge and intent--ever since he placed the steer in his holding pen. Appellant was familiar with the steer by the time it came onto his range land in March, 2013. Appellant knew who owned the steer yet never contacted Appellees to inform them where the steer was. Appellant had a duty to inform Appellees that he had their steer. When Delbert Chavez visited Appellant in May, 2013, Appellant refused to surrender the steer and later claimed he did so because Mr. Chavez's vehicle was not equipped to transport the steer. During that same visit, however, Appellant testified that he demanded compensation for feeding and watering the steer, and that he would not relinquish the steer until he was compensated. Appellant said that he was going to sue Appellees. Appellant claimed that the costs of feeding and watering the steer were high, yet he still refused to surrender the steer, thereby incurring even more costs of caring for the steer. Appellant could have avoided all these costs if he had made immediate arrangements with Appellees to return the steer when he first noticed it on his grazing unit, or when he first penned it up. When Appellees finally returned to Appellant's residence with a Zuni Tribal Ranger to retrieve the steer in July, 2013, Appellant had hauled the steer away and left it in a canyon. Thus Appellant had the means and ability to transport the steer, yet refused to deliver the steer to its rightful owners, but instead delivered it to a remote area and left it there.

Willfully hauling the property of another away, after demand had been made for the property by its owners, and then abandoning that property in a remote location, was, at best, an act of bad faith. Appellant's conduct and actions leading up to that event were also unreasonable, if not also in bad faith.

As for Appellant's claims at trial with respect to the costs of feeding and watering the cow and the costs of injury to a bull, they were not alleged in Appellant's answer, nor was any notice of them provided to Appellant before the trial. Other than Appellant's oral testimony, Appellant provided no evidence to substantiate the claimed amounts. Most important, Appellant could have avoided a great deal of these costs if he had made arrangements to return the steer immediately. Given Appellant's course of conduct and actions between taking the steer into his possession and releasing it in a remote location, without any notice whatsoever to Appellees, and the fact that Appellant did not mitigate damages when he could have easily done so by promptly returning the steer, we have to wonder whether Appellant is entitled to offset any award of restitution at all.

CONCLUSION

It is certain that Appellant converted the cow in bad faith, and that Appellees must receive restitution. We set aside the award of the Civil Court Judgment and Order because it was not supported by substantial evidence. We also set aside the order's holding that all parties were contributorily negligent, as this was not supported by substantial evidence and was not in accordance with law.

We hereby REVERSE the Civil Court Judgment and Order and REMAND this matter for a determination of the value of the steer at the time of its conversion. We leave it to the Zuni Tribal Court to decide whether

Appellant should be allowed to offset any costs of restitution.

It is so ORDERED.

September 1, 2016

MARGARET ERIACHO, and PHILLIP VICENTI, elected council members for the Pueblo of Zuni,

Plaintiffs-Appellants,

v.

VAL R. PANTEAH, SR., GOVERNOR, BIRDENA SANCHEZ, Lt. Governor, and VIRGINIA CHAVEN, CARLETON BOWEKATY, AUDREY SIMPLICIO, and ERIC BOBELU, elected Council member for the Pueblo of Zuni,

Defendants-Appellees.

SWITCA Case No. 16-002-ZTC
Zuni Tribal Court Nos. CV16-0001/CA-2016-0001

Appeal filed May 3, 2016

Appeal from the Zuni Tribal Court
Honorable Peter Tasso, Judge

Appellate Judges: Jeanette Wolfley, Anthony Lee and Rodina Cave Parnall

ORDER

SUMMARY

Motion for reconsideration denied because notice of appeal was insufficient to perfect an appeal under Zuni and SWITCA rules. Appellants' counsel had a higher duty than a pro se litigant to strictly adhere to court rules and procedures.

* * *

This matter is before the Court as a Motion for Reconsideration of Dismissal by this Court to Take Jurisdiction of the Matter Before the Zuni Tribal Court. We dismissed the appeal on July 27, 2016. This Motion for Reconsideration is authorized under SWITCARA #22, which provides that a Motion for Reconsideration may be filed within 15 days of the service of the order dismissing the appeal. Appellants advised the Court in their Motion they received the Court's order on August 9, 2016, and this motion was filed on August 23, 2016. The motion is timely and properly before this Court.

In their motion, the Appellants argue that this Court in *Shack v. Lewis*, 9 SWITCA 28 (1998), reviewed a trial court decision similar to this case involving an interpretation of tribal custom and tradition, and therefore, we should grant jurisdiction. In *Shack*, the appellants in their notice of appeal alleged five errors of which two are relevant here:

> 1. The trial court erred in granting summary judgement because there were genuine issues of material fact especially as what constitutes a legal resignation under Zuni law, which includes custom and tradition.
>
> 4. The trial court erred in holding that the installation of Andrew Othole was lawful and the actions undertaken by the Bow Priest and Head Cacique in August 1997, were proper under Zuni custom.

In *Shack*, the Court reviewed the case under a summary judgment standard of review, and with numerous affidavits and documents submitted below. The Court remanded for further evidentiary hearing on the issue of resignation and the interpretation of Zuni customary law.

There is a clear difference here. Appellants' Amended Notice of Appeal stated "[t]hat the Appellants submit this appeal on the basis that the Honorable Peter Tasso abused his discretion when he dismissed the matter in the above captioned cause on April 25, 2016." Unlike the *Shack* Notice of Appeal, the Amended Notice of Appeal, here, fails to raise any specific errors relating to tribal customary law that were not decided by the lower court or would support their challenge to the decision. When the Court reviews a notice of appeal, it is not in the position to assume or create an error made by the lower court. Furthermore, even though this Court has reviewed issues of tribal customary law as in *Shack*, it does not mean the Court will do so if minimum statutory requirements for jurisdiction are not met or adhered to. In *Shack* the appellants clearly set out the errors committed by the lower court which they sought SWITCA to review. *See Baker v. Southern Ute Indian Tribe*, 5 SWITCA 2 (Southern Ute Tribe, 1993); *Archuleta v. Archuleta*, 9 SWITCA 27 (San Juan Pueblo, 1998) (denying appeal alleging "disagreement and belief" with decision below); *Twist Jr. v. Connors*, 12 SWITCA 6 (Cocopah Tribe 2000) (denying appeal that alleged "judgment of the lower court was unjustifiable and unfair."). It is the responsibility of counsel to meet the statutory requirements set out in the rule. As stated in *Peters v. Ak-Chin Indian Community*, 16 SWITCA 11, 12 (Ak-Chin 2005), "this Court is not in a position to guess

the Appellants' reasons for reversing and modifying the lower Court's decision or granting any specific relief when it is not clearly requested."

The Court in *Peters* further noted that when an appellant is represented by counsel, "it is understood that counsel has a higher duty and obligation to comply and strictly adhere to Court rules and procedures, whereas, *pro se* litigants generally have some latitude but must also comply with the minimum statutory requirements . . .." *Id*. at 12. The statement is clearly insufficient to perfect an appeal under either ZRCP Rule 38(c) or SWITCARA #11(e) because the statement fails to provide the Court with adequate information of the errors challenged to form the basis for the appeal. Appellant has not pointed to any documents, affidavits or pleadings that demonstrate the issue of customary law was raised or decided by the lower court. Therefore, the Motion for Reconsideration is denied.

It is so ORDERED.

September 6, 2016

TINA K. GASPER,

Defendant-Appellant,

v.

PUEBLO OF ZUNI,

Plaintiff-Appellee.

SWITCA Case No. 15-016-ZTC
ZTC Cause No. CR-2014-3690

Appeal filed in Zuni Tribal Court on Dec. 19, 2014

Appeal filed in the Southwest Intertribal Court of Appeals on June 26, 2015

Appeal from the Zuni Tribal Court
John Chapela, Judge

Appellate Judges: Jonathan Tsosie,
Anthony Lee and Jeanette Wolfley

OPINION

SUMMARY

Guilty verdict for endangering the welfare of a child was reversed and vacated because it was not supported by substantial evidence and was not in accordance with law in case in which lay prosecutor did not specify which prong of the charge he was attempting to prove, nor did judge address either prong of the charge.

Defendant-Appellant appeals a conviction of Endangering the Welfare of a Child. The Southwest Intertribal Court of Appeals ("SWITCA") has jurisdiction over this matter pursuant to Zuni Tribal Council Resolution No. M70-2015-P042, "Resolution to Reinstate SWITCA and to adopt the SWITCA Rules of Appellate Procedure," enacted on April 29, 2015. For the reasons below, we REVERSE the underlying Final Disposition and Judgment Order of January 15, 2015, and VACATE the conviction of Endangering the Welfare of a Child.

BACKGROUND

On the evening of October 3, 2014, Mr. Carl Bowekaty noticed from his home a crying child trying to get into a nearby home. The child was wearing a T-shirt and shorts, and had apparently been locked out of his house. About an hour later, as Mr. Bowekaty's wife and daughter were leaving to attend a local football game, the child was still outside and locked out. Mr. Bowekaty decided to call the Zuni Tribal Police. Mr. Bowekaty then went outside and spoke to the child, who was cold and frightened, and he offered the child a blanket while they waited for the police.

When the police arrived, the child, nine years old at the time, said that he had come from a friend's house and that no one was at his home to let him in. The child indicated that his mother, Appellant, "might"[1] be at the local high school football game. Officer John Homer then went to the football game to locate Appellant. Officer Homer did not locate Appellant at the game. When Officer Homer returned to the child's home that evening, Appellant had come home and had been personally contacted by a social worker from Zuni Tribal Social Services. Officer Homer's complaint states that Appellant told him that she had been looking for her son ever since school let out that day, and that when she could not find him, she went to the football game to see if the child was there. Officer Homer wrote, "T. Gasper did leave her son not knowing where he was at but instead left to the football game." Officer Homer charged Appellant with Endangering the Welfare of a Child, pursuant to the Zuni Tribal Code.

At the beginning of trial, Appellant moved for a continuance so that she could obtain an attorney. The judge denied her motion, stating that Appellant had time to obtain an attorney by then. There is no indication in the record that any continuance had been granted before. Appellant was clearly confused about trial procedure throughout the trial.

[1] Officer's Complaint.

Appellant's husband testified that he is usually at home when the child gets off the school bus in the afternoons. When the child had not come home on that day, the husband notified Appellant, who was at work, and they both began searching in places where the child was known to go and had been found before. The husband testified that during the search, he checked back at the house at least twice to see if the child had returned. The husband also testified that Appellant and husband had stopped by the football game to pick up their other son.

There had been three earlier occasions when the child had not immediately come home after school, and Appellant and husband had to search for him. The child had been diagnosed with Attention Deficit Hyperactivity Disorder, and both Appellant and husband testified that the disorder often affects the child's judgment and the child can be impulsive.

The child did not testify at trial. Upon learning that the child would not testify, the lay prosecutor moved the court to dismiss the case because the lay prosecutor believed he would not be able to prove the elements of the charge without the child's testimony. The judge then read the complaint aloud and decided that the elements could be proven.

When issuing the verdict, the judge stated, "If you know that your child is ADHD and he's done this in the past, as apparent, Ms. Gasper, you should understand that you need to take precautions to ensure that when the child gets off the bus that there's always somebody there to ensure he gets home. … I don't know what happened, whether the child never got on the bus from the school or what, but again it's for those types of reasons that you need to take extra precautions to ensure the child is safe. … With the understanding that you have a special needs child, I find that you were remiss in your responsibilities toward caring for your child."

STANDARD OF REVIEW

At the time Appellant filed her notice of appeal, the Zuni Rules of Appellate Procedure ("Z.R.A.P.") were in place. Because the standard of review of Rule 14(C) of the Z.R.A.P. is identical to that of *Hualapai Nation v. D.N., A Minor*, 9 SWITCA Rep. 2 (1998), a criminal case decided by this Court, we apply that standard of review here.

"The decision of the trial court shall be set aside only if it is shown that the decision: (1) is arbitrary, capricious or reflects an abuse of discretion; (2) is not supported by substantial evidence; or (3) is otherwise not in accordance with law." Rule 14(C), Z.R.A.P. (The Zuni Tribal Council rescinded the Z.R.A.P. on April 29, 2015, by Tribal Council Resolution No. M70-2015-P042.)

DISCUSSION

The Zuni Tribal Code provides,

> A person is guilty of endangering the welfare of a child if he is the parent, guardian, or other person supervising the welfare of a child under 18 and he knowingly endangers the child's welfare by violating a duty of care, protection or support by intentionally leaving or abandoning a child without care or otherwise neglecting to care for a child in any manner which threatens serious harm to the physical, emotional or mental wellbeing of the child.[2] §4-4-62, ZTC.

Thus in order to find Appellant guilty of endangering the welfare of her child, the prosecution must have proven beyond a reasonable doubt all of the elements of either of the following:

1) Appellant knowingly endangered the child's welfare by violating a duty of care, protection or support by **intentionally** leaving or abandoning a child without care; or
2) That Appellant neglected to care for the child in any manner which threatened **serious harm** to the physical, emotional or mental wellbeing of the child.

At trial, the lay prosecutor did not distinguish which of these two he was attempting to prosecute, much less did he argue any of the elements of either prong of the charge. At no point did the lay prosecutor argue that Appellant knowingly and intentionally left or abandoned her child without care. Nor did the lay prosecutor ever allege that Appellant neglected to care for her child in a manner that threatened serious harm to the child. The lay prosecutor simply relied on testimony from Mr. Bowekaty and the police officer that there was a child locked out of his home, frightened and crying.

The judge did not address either prong of the charge at trial, either. Though the judge scolded Appellant at length for the unfortunate situation, the judge never found nor stated that Appellant intentionally left or abandoned her child. In fact, when issuing his verdict, the judge stated, "I don't know what happened." Nor did the judge find or mention the threat of serious harm required of the second prong. The judge merely stated, "I find that you were remiss in your responsibilities toward properly caring for your child." While the judge did point out that the child had been alone, frightened and cold "for three hours," and

[2] We note that counsel for Appellant did not provide this statute in its entirety to this Court.

that "Who knows what could have happened?", we do not find these points to rise to the threat of serious harm required by the statute for such a serious offense.

Similarly, with respect to the charge in his written order, the judge simply wrote, "The Court, having heard the cause and being fully advised in the premises: FINDS: Defendant was found Guilty of Endangering the Welfare of a Child in violation of 4-4-87 [sic] of the ZTC during a bench trial on December 2, 2014[.]" Thus the judge again failed to address which prong of the charge Appellant was guilty.

On the other hand, there is uncontroverted testimony from Appellant's husband and Appellant that they both began to search for the child soon after the child was supposed to be home. Appellant even left work early to begin searching, and they searched in several places in the community.

Again, the judge's only elaborated finding, of either the trial or the written order, is simply that Appellant was "remiss in [her] responsibilities toward properly caring for [her] child." This clearly does not satisfy the elements of either prong of the criminal statute of endangering the welfare of a child.

For the foregoing reasons, we hold that the judge's verdict of guilty was not supported by substantial evidence and was not in accordance with law. Because our holding is sufficient to reverse and vacate the verdict, we do not address Appellant's other arguments.

The guilty verdict below is hereby REVERSED and VACATED.

It is so ORDERED.

September 26, 2016