COLVILLE TRIBAL ENTERPRISE CORPORATION, Appellant,
vs.
Roy ORR, Appellee.
Case Number AP98-008, 3 CTCR 05, 26 ILR 6005
5 CCAR 1

[Leslie Weatherhead, Witherspoon, Kelly, Davenport & Toole, Spokane, WA, for the Appellant.
James M. Danielson, Jeffers, Danielson, Sonn & Aylward, for the Appellee.
Trial Court Case Number CV97-17066]

Arguments heard September 18, 1998. Decided December 4, 1998.
Before Chief Justice Dupris, Justice Stewart and Justice Bonga

DUPRIS, C.J.

PER CURIAM

SUMMARY

Roy Orr (hereinafter "Orr") was terminated from his position as one of the Vice Presidents of the Colville Tribal Enterprise Corporation (hereinafter "CTEC") in April, 1997. He first brought a wrongful termination action in the Colville Tribal Administrative Court under CTEC's Personnel Policies and Procedures Manual. The Administrative Court held, *inter alia*, that Orr was an officer of CTEC and, therefore, not entitled to relief under the Personnel Policies and Procedures Manual.[1]

Orr brought a suit in the Colville Trial Court based on the premise that CTEC violated his due process rights by failing to give him a contract clause which included either a 180-day notice of termination or a right to a hearing before the CTEC Board of Directors (hereinafter "Board") before termination. Orr also rested his claim on an implied contract theory. CTEC denied the implied contract based on lack of mutual intent; further CTEC asserted its shield of sovereign immunity to the action.

The Trial Court held an implied contract existed between Orr and CTEC, and said contract included the term of a 180-day notice of termination provision, and awarded damages for the unpaid salary amount, the cost of health insurance, and attorney's fees. The Trial Court did not rule on the issue of sovereign immunity. CTEC appealed both issues to this Court.

For reasons set forth below we hold (1) sovereign immunity bars the action and the damages assessed; and (2) no implied contract existed between the parties to this action.

STANDARDS OF REVIEW

There are two issues before this Court for review: (1) did the Trial Court err by failing to find that sovereign immunity barred the instant action?; and (2) did the Trial Court err by finding that an implied contract existed between the parties?

The implied contract issue necessitates a review of the factual findings of the Trial Court, i.e. do the facts

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[1] The Administrative Court also concluded that Orr's action before it was dismissed "...without prejudice to an opportunity to reapply for relief in this Court as a Court of last resort to assert and [*sic*] Due Process claim he may have, should the Tribal [*sic*] Court also lack jurisdiction." Findings of Fact and Conclusions of Law, April 21, 1998, Conclusion 2.6.

This issue was not raised by the appellant herein, however, we note for future reference, that it is our understanding that the Colville Tribal Administrative Court is a court of limited jurisdiction, not a court of last resort. The Constitution and statutes afford that distinction to the Court of Appeals. Administrative courts are by their very nature limited by the jurisdiction given them by the lawmakers. They are not normally considered full courts of equity.

support the legal conclusion that an implied contract existed between the parties. The accepted standard of review by this Court of findings of fact is the "clearly erroneous" standard. See *CCT v. Nadene Naff*, [APCvF93-12001 to 003], 2 CTCR 08, p. 2, [2 CCAR 50], 22 ILR 6032 (1995), *Wiley v. CCT*, *et al.*, [AP93-16237], 2 CTCR 9, p.6, [2 CCAR 60], 22 ILR 6059 (1995), and *Palmer v. Millard et al.*, [AP94-005], 2 CTCR 14, p. 5, [3 CCAR 27, 23 ILR 6094] (1996). The sovereign immunity issue is a question of law, which requires a *de novo* review. *Id*.

TRIBAL SOVEREIGN IMMUNITY

During the seventeenth and eighteenth centuries, European powers followed the practice of treating Indian tribes as sovereign political communities, or nations. Immediately following the War for Independence, United States negotiators tried to impose the status of conquered nations on the several tribes who had allied with the British. However, the tribes did not agree and inflicted enough damage to the United States in the 1780's and early 1790's to convince the new Nation that the "conquest" doctrine was unworkable. Consequently, Secretary of War Henry Knox proposed to treat the tribes as foreign nations, to secure their consent to such land cessions as they might be willing to grant, and to make good neighbors by "civilizing" them. Federal agents to the tribes soon began the practice of negotiating treaties for cessation of tribal lands and preservation of peaceful relations.

The United States Supreme Court under its first Chief Justice, John Marshall, argued that while in fact Indian tribes within United States borders could no longer be classed as truly independent foreign nations, they had proved capable in law and fact of self-government within the borders guaranteed them by treaty; and they should be acknowledged as "domestic dependent nations" with full powers over their internal policy,..." *Worcester v Georgia*, 31 U.S. (6 Pet.) 515 (1832).

It has long been recognized that as a "domestic dependent nation" a tribe has the ability to exercise all powers of a sovereign unless limited by the federal government. One aspect of sovereignty is the ability of the State to exercise the doctrine of sovereign immunity which precludes a litigant from asserting an otherwise meritorious cause of action against a sovereign or a party with sovereign attributes unless the sovereign consents to suit. *See* Black's Law Dictionary at 1396 (6th Ed. 1990).

The Colville Confederated Tribes (Tribes) have been recognized through numerous proclamations and actions of the United States government as a federally recognized Indian Tribe which possesses all governmental attributes of a "domestic dependent nation." In furtherance of their governmental powers the Tribes have adopted laws and regulations to protect their members' health, safety and general welfare.

The Tribes have also codified its inherent power of sovereign immunity in the Colville Tribes' Law and Order Code (CTC) at Section 1-1-6 (formerly CTC 1.1.06). The Code states:

> Except as required by Federal law, or the Constitution of the Colville Confederated Tribes, or as specifically waived by a resolution or ordinance of the council specifically referring to such, the Colville Confederated Tribes shall be immune from suit in any civil action, and their officers and employees immune from suit for any liability arising from the performance of their official duties.

Title 7 (formerly Title 25) of the CTC *Governmental Corporations Act* also provides that:

> [C]orporations established under this Chapter shall be... entitled to all of the privileges and immunities enjoyed by the Tribe; including but not limited to, immunities from suit in Federal and State courts... except as specifically set out in the corporate charters granted pursuant to this Chapter. CTC 7-1-3.

In order to develop an economic venture to raise funds for Tribal operations, the Tribes have formed under the Governmental Corporations Act a business entity known as the Colville Tribal Enterprises Corporation (CTEC). CTEC was instituted under the Act through a Charter and Articles of Corporation. Article IV, 4.2 of the *Charter* and *Articles of Incorporation of Colville Tribal Economic Corporation* provides that:

> [A]lthough the management of the corporation shall be separate and distinct from the Colville Business Council, the corporation shall possess all immunities from suit and other proceedings as are possessed by the Tribes, except to the extent that such immunities are waived pursuant to Article VI, paragraph 6.1.15 of this Chapter....

Article 6.1.15 enables CTEC to sue on its own behalf or to permit, by written resolution of the Board to be sued:

1. in any or all courts against corporation or its officers; or
2. against any or all assets of the corporation; or
3. against any insurer or bonding agent or other surety of the corporation.

In this case, there was no evidence in the record that a resolution had been adopted by the CTEC Board which waived its sovereign immunity and would allow suit against CTEC. There is no evidence that the Tribes expressly waived the immunity of CTEC either. The Trial Court did not reach a legal conclusion, nor make findings regarding this issue. As a matter of law we hold that the suit brought by Orr against CTEC was barred by sovereign immunity.

Similarly, this Panel finds merit in CTEC's position that Indian sovereignty, like other sovereigns, is not a discretionary principle subject to the vagaries of the commercial bargaining process or the equities of a given situation. See, *United States v. United States Fidelity & Guaranty,* 309 U.S. 506, 513, 60 S.Ct. 653, 56-57 (1940); *American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe,* 780 F.2d 1374, 1378-79 (8th Cir. 1985)); and *Chemehuevi Indian Tribe v. California State Board of Equalization,* 757 F.2d 1047, 1052 n.6 (9th Cir.), reversed in part on other grounds, 474 U.S. 9, 106 S.Ct. 289, 88 L.Ed.2d 9 (1985).

Even though the Trial Court found that an implied agreement existed in this matter, an implied agreement cannot waive sovereign immunity. We abide by the well-established case law that there cannot be an "implied" waiver of sovereign immunity for a tribe. It is our position that for any action to be brought against the Tribes there must be an express and unequivocal waiver of sovereign immunity, *Colville Confederated Tribes v. Naff*, 2 CTCR 08, 22 ILR 6032 (1995). Thus, in order to defeat the sovereign immunity claim herein, Orr's only position is to show that under the Tribal Civil Rights Act,

CTC Chapter 1-5, CTEC was subject to the waiver of immunity because of violations of Orr's due process. This argument is discussed later in this opinion.

INSURANCE

Under Title 1-5 (formerly Title 56), *Colville Tribal Civil Rights Act*, the Tribes have waived their sovereign immunity from suit for limited actions where damages are sought that are within the available insurance coverage:

> 1-5-8 *Insurance*
>
> Notwithstanding any other provision of this Act or the Colville Tribal Code; with respect to any claim made under this Act, in the Courts of the Confederated Tribes, for which the Tribes carries an active and enforceable policy of liability insurance, suit may be brought for damages up to the full available amount of the coverage provided in the insurance policy; provided, no judgment on any such claim may be for more than the amount of insurance carried by the Tribes; and further provided, any such judgment against the Tribes may only be satisfied pursuant to the provisions of the policy or policies of insurance then in effect.

It is well established under the doctrine of sovereign immunity, a sovereign cannot be sued unless it waives its sovereign immunity from suit. Furthermore the sovereign is able to define the extent of such waiver which defines a court's jurisdiction to hear a particular case. *United States v. Sherwood*, 312 U.S. 584, 586 (1941). We find consistency in the position that in waiving its immunity from suit, a sovereign may attach such conditions to the waiver as it deems proper. It makes further sense that in order to institute suit against the sovereign, there must be strict compliance with all those conditions. *Sherwood*, 312 U.S. at 586.

Once a sovereign has established its affirmative defense of sovereign immunity, the claimant assumes the burden establishing that the claim falls within a legislative waiver of immunity. See *Ager v. Wichita General Hospital*, 1998 WL 286590 (Tex. App.-Forth Worth); *Grand v. Savage*, 920 SW 2d 672, 673 (TX App. 1995). This same reasoning has been applied to the Foreign Sovereign Immunities Act which creates a statutory presumption that foreign states are immune from suit unless one of the statutory exceptions to immunity applies under 28 U.S.C. 1604, *et seq*.

In such cases, in order to rebut the presumption of sovereign immunity, a plaintiff must offer evidence that its claim falls within an exception to the act. See *Randolf v. Budget Rent a Car*, 97 F3d 319 (9th Cir. 1996); *Phaneuf v. Republic of Indonesia*, 106 F.3d 302 (1997).

It is well settled that in cases against a sovereign power the plaintiff bears the burden of proving that his or her claim falls within an exception to sovereign immunity. In this case, Orr offered no evidence at trial that the damages remedy to his breach of contract claim fell within an exception to the Tribes' sovereign immunity as set forth in CTC 1-5-8 (formerly CTC 56.08). The Panel finds that Mr. Orr did not establish the existence of insurance coverage. For this reason, we hold that the Tribal Court lacked jurisdiction to entertain the action for damages and attorneys fees against CTEC.

IMPLIED CONTRACT

Even though we have held that the doctrine of sovereign immunity bars Orr's action for damages, the issue of whether there existed an implied contract between the parties which is enforceable under the Tribes' Civil Rights

Statute, still must be addressed. Orr brought the action under, *inter alia*, the CTC Chapter 1-5.[2] We must inquire whether the facts in the record support a conclusion that Orr had an implied clause in his employment contract with CTEC which provided for a 180-day notice of termination as the Trial Court found. Further, if there is a right to 180-day notice or hearing, what is it based on?

We review the Trial Court's findings under a clearly erroneous standard to determine if the findings support a legal conclusion that an implied contract existed between the parties that included a 180-day notice of termination term. *See*, *Naff*, *supra* at 2; *Wiley*, *et al*, at 6; and *Palmer v. Millard et al*, at 5.[3] "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that mistake has been committed." [citing *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948)], *Joseph v. Donover Company*, 261 F.2d 812, 824 (9th Cir. 1959).

The first inquiry is: what are the relevant facts in this case? The Trial Court's Findings of Facts show the following:

> 1) Roy Orr, a member of the Colville Tribes, served on the Board of Directors for CTEC between 1993 and March of 1995, at which time he was hired by CTEC as General Manager for the CTEC Gaming Division. (Findings ##1-3.)
> 2) In August, 1995 Orr was promoted to a vice president position for CTEC, and negotiated a proposed contract with the then-Chief Executive Officer (hereinafter CEO), Clay Antiquoia. (Findings ##4-5.)
> 3) The Board of CTEC, who had approval authority, would not give final approval to Orr's proposed contract because the Board did not approve the six-month termination compensation clause in the proposed contract. (Findings ##5-6.)
> 4) The termination clause in question was included in two (2) officer contracts, but not in three (3) others, including Orr's. (Findings #7.)
> 5) Neither Orr, three (3) of the Board members, nor the current CEO, Wendell George, were aware of a Board resolution setting out a contract format to use in negotiating contracts with officers; the format included a six-month termination clause similar to the one at issue in this case. (Findings ##8-9.)
> 6) Orr continually worked as a vice president of CTEC until his termination in April of 1997.[4] (Findings ##10-13.)
> 7) Orr did not receive termination compensation or a hearing before the Board of Directors regarding his termination. (Findings ##14-15.)[5]

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[2] Formally Chapter 56 of the Colville Tribal Code. It appears, from reviewing the initiating complaint and the pleadings and arguments of the Appellee, that the civil rights claim was brought on a theory of denial of due process by CTEC. *See* CTC §1-5-2(h), "The Confederated Tribes of the Colville Reservation in exercising powers of self-government 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."

[3] Citing Washington State law, the appellee argues the correct standard of review is "the 'substantial evidence' test from *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959)." Appellee's Brief at p. 5. This Court is only directed to state law if there is no Tribal law on the issue. The standard of review issue has been addressed several times by our Court of Appeals; we do not need to look to state law on the issue.

[4] The Trial Court's Finding of Fact #10 states "Despite not having a contract, Mr. Orr continued employment as vice-president." We take this to mean Mr. Orr didn't have a written contract, which is the basis of this action. He apparently was working for a salary and benefits, which evinces some understanding of offer, acceptance and consideration.

[5] The Trial Court also found that the appellee paid his own health insurance for six (6) months after he was terminated. This Finding is not relevant to the issue herein of implied contract.

Neither party has assigned error to these findings, so they become the accepted facts on appeal. *Johnson v. Whitman*, 463 P.2d 207, 209 (1969).

The record shows the following relevant facts not included in the Findings, but not disputed by the parties:

1) Orr was on the CTEC Board of Directors when the Francis Somday case went to Court, after which time the CTEC Board rewrote its Policies and Procedures Manual (Manual) to foreclose any other at-will employee from arguing his contract was modified by the Manual.[6] *See* R. Orr testimony, Transcript of Trial (hereinafter "Transcript") dated April 21, 1998 at pp. 39, 40, 43.
2) Orr was aware that the "changes in the [M]anual were to make it crystal clear that officer level employees were at will employees of CTEC...." *See* R. Orr testimony, Transcript at p. 44.
3) Orr understood that the CEO could not bind CTEC on an employment contract, and that the CTEC Board had the final approval authority. *See* R. Orr testimony, Transcript at pp. 45-46.

TWO TYPES OF IMPLIED CONTRACT

There are two kinds of implied contracts, implied in fact and implied in law (quasi-contract). "Contracts implied in fact arise from facts and circumstances showing a mutual consent and intention to contract.... Quasi-contracts arise from an implied legal duty or obligation, and are not based on a contract between the parties or any consent or agreement." *Johnson v. Whitman*, 463 P.2d 207, 210 (WA Ct of Ap., 1969). *Cf Eaton v. Engelcke Mfg., Inc.*, 681 P.2d 1312 (Wn Ct. of Ap. 1994).

The Trial Court's legal conclusions do not identify which type of implied contract it concluded existed in this case, so we have analyzed both types and, based on the following opinion, we hold neither type of implied contract existed.

I. IMPLIED IN FACT

Fundamental contract law makes no distinction between the essential elements of an implied contract and an express contract. The difference is in the "mode of proof." Both require an analysis of the intentions of the parties to the transaction, and a showing of a meeting of minds between the parties. *Kellogg v. Gleeson*, 178 P.2d 969, 971-972 (WA, 1947); *Cf Eaton*, *supra* at 1314. The Court must assess the parties' acts and conduct viewed in the light of surrounding circumstances in order to ascertain a mutual assent to terms of a implied contract. *Kellogg* at 972.

Orr, who is asserting the existence of an implied contract, has the burden of proving "....each fact essential thereto, including the existence of a mutual intention. Where circumstantial evidence is relied on, the circumstances must be such as to make it reasonably certain that the parties intended and did enter into the alleged contract." *Id*.

In the instant case Orr initially negotiated his employment contract as a Vice President of CTEC with Clay Antiquoia. He and Antiquoia had mutual expectations that the contract would be approved. Mutual expectations do not amount to mutual assent.

Proving that a term was being negotiated is not proof of the mutual assent to the terms by the contracting parties. It is just proof that the parties were negotiating terms. *See Pacific Cascade Corp. v. Nimmer*, 608 P.2d 266, 268 (WA Ct. of Ap. 1980).

Orr knew the contract was not final until approved by the Board of Directors. Reluctance of the Board, the final decision maker, to agree to a clause for 180-day severance, plus the actions of the Board not to finalize the

[6] *Francis Somday v. CTEC*, A95-15009, a case in which the Colville Tribal Administrative Court found, *inter alia*, that the existing CTEC Policies and Procedures Manual created an implied contract between CTEC and Mr. Somday. *See* Memorandum Opinion, September 12, 1995, (modified in part by Orders dated December 18, 1995 and January 31, 1996, not relevant to the issue of implied contract).

contract based on the clause, show lack of intent of one of the parties to the contract. Orr's reliance on the willingness of both CEO's, Antiquoia and George, is misplaced. He knew neither CEO had final authority to finalize and approve his proposed employment contract.

Orr accepted the position of Vice President for a set salary and benefits, and with a knowledge, as a past Board member, that officers were at-will unless their contracts specifically provided other terms.[7]

The Board of Directors did not offer Orr the contract term of a 180-day termination clause. "An acceptance of an offer must always be identical with the terms of the offer or there is no meeting of the minds and no contract." *Owens-Corning Fiberglass Corp. v. Fox Smith Sheet Metal, Co.*, 351 P.2d 516, 518 (WA, 1960). If the person who is seeking assent to a term knows or has reason to know that the other party does not intend his actions as expressions of a fixed purpose until a further action is taken, he has not made an offer." [citations omitted] *Pacific Cascade Corp v. Nimmer*, *supra*, at 269.

In assessing what the intent of the parties is, we must look at what their outward expressions and acts were, not what the unexpressed intent may have been. *See Everett v. Estate of Sumstad*, 95 Wn.2d 853, 855, 631 P.2d 366 (1981). In this case, the record is very clear that the Board of Directors did not intend to give Orr a 180-day termination clause. This is supported by the Trial Court's Findings and the testimony of Orr himself.

Upon a review on the entire evidence we are left with the definite and firm conviction that mistake has been committed; there was no implied-in-fact contract between the parties regarding the 180-day termination clause.

II. IMPLIED IN LAW, OR QUASI-CONTRACT

"[Q]uasi-contracts arise from an implied legal duty or obligation, and are not based on a contract between the parties or any consent or agreement." *Johnson v. Whitman*, *supra*, at 210. In order to show a quasi-contract in this case, it must be shown that CTEC had a legal duty or obligation to provide Orr with a 180-day termination clause. Orr argues that he had a due process right to such notice, or at least a hearing before the Board of Directors; these are the only arguments made that could be germane to a quasi-contract theory.

Orr argues that CEO George and another officer (Knapton) each had a 180-day termination notice, and their contracts were approved after Orr's was submitted to the Board for approval. The Findings also indicate that the termination clause in question was not included in two (2) other officers' contracts besides Orr's. (Findings #7.)

A showing that two (2) out of five (5) officer contracts had the sought-after termination clause does not prove that CTEC legally had to treat everyone equitably and put it in every contract of an officer. It supports CTEC's argument that it is discretionary with the Board of Directors whether to include such a clause in its contracts.

Orr has not met his burden of showing CTEC had a legal obligation or duty to him to give him a 180-day termination clause in his contract.[8] There is no showing of a violation of due process by the Board. Orr knew what

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[7] *See* the CTEC Personnel Policies and Procedures Manual, Chapter II(3): "OFFICER OF THE CORPORATION, (A) Officers of the Corporation serve 'at will'. [*sic*] They are hired and terminated by action of the Board of Directors of CTEC. Therefore, portions of this policy, especially with respect to adverse actions do not apply." at p. 3.

And see Chapter III: DEFINITIONS, "Officer of Corporation: President/CEO, all Vice Presidents...."

[8] Orr also argued the applicability of CTEC's Resolution 96-10 to support his theory. The Trial Court also made a finding that the Resolution existed. Resolution 96-10 sets out a proposed contract format for the CEO to use in negotiating contracts with officers.

The record also shows that neither the CEO, nor Orr, nor three (3) of the Board members even knew the Resolution existed. We cannot see how Orr can rely on Resolution 96-10 when neither he nor the other party were aware of it. There is no evidence which proves that the very existence of the Resolution, in and of itself, bound the Board to put it in the contract. We cannot hold otherwise on the record before us.

his status was when he accepted the Vice President position.

Upon a review on the entire evidence we are left with the definite and firm conviction that mistake has been committed; there was no implied-in-law contract between the parties regarding the 180-day termination clause.

The general law is when an employment contract is not definite as to duration it is considered terminable-at-will. *See*, *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 104, 864 P.2d 937 (1994). *Cf Wlasiuk v. Whirlpool Corp.*, 81 Wn.App. 163, 170, 914 P.2d 102 (1996); *Office of Navajo Labor Relations v. West World*, 21 I.L.R. 6070, 6071 (Nav. Sup. Ct. Apr. 18, 1994).

We are sure the parties in this case did not start out with the intent to sever relationships. Orr was receiving a good salary (about $90,000.00), so CTEC must have valued his services when he was hired. Where did the communications fail? Who can say. There was a change in the CEO; there was a change in the Board make-up. Becoming a successful business corporation for a tribe is a double-edged sword; how does the Tribes balance what is good in maintaining its tribal identity with competing in a non-Indian business world? This is also true for tribal members, like Orr, who ask for the respect as a tribal member and a high-level job as a businessman in CTEC. The one side gives way to the other in times like this.

Orr knew the rules of the game. He knew the Board of Directors intended to create an at-will status for officers when he became an officer. He knew the Board had the final say in approving officer-contracts, and they did not approve his with the 180-day notice termination clause. Nothing in the record supports any other theory.

HOLDING

Based on the above, we hold (1) that sovereign immunity bars the action herein for damages and attorneys fees; and (2) that the record does not support a legal conclusion of the existence of an implied contract between the parties which includes a 180-day notice of termination provision, and Reverse the Trial Court. This matter is Remanded for Dismissal consistent with this Opinion.

It is so Ordered.

Lin SONNENBERG, Appellant,

vs.

COLVILLE TRIBAL COURT, Appellee.

Case Numbers AP97-009, AP97-011 and AP97-014, 3 CTCR 09, 26 ILR 6073

5 CCAR 9

[Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, Appellant, pro se.
Theodore J. Schott, Nordstrom, Nees, & Janecek, Spokane WA, counsel for Appellee.
Trial Court Case Numbers J96-15022 (009); J90-1054, J90-1055, J93-12023 (011); and 96-19180 (014)]

Arguments heard March 20, 1998. Decided February 12, 1999.
Before Chief Justice Dupris, Justice Nelson and Justice Chenois.

DUPRIS, C.J.

SUMMARY OF PROCEEDINGS

In each of these three (3) matters, Lin Sonnenberg, Deputy Prosecuting Attorney for the Colville Confederated Tribes (hereinafter Tribes), appeals the assessment of three (3) separate Twenty Five Dollar ($25.00) sanctions[9] imposed upon her by the Trial Court. Two are assessed for failing to timely file two orders in two separate juvenile cases; and one is for failing to timely file a Motion to Dismiss in a criminal case.

In Case No. AP97-009, on January 8, 1997 Sonnenberg was ordered to present an Adjudicatory Hearing Order by January 15, 1997 in juvenile case number J96-15022. On January 26, she filed a Motion and Affidavit to Extend Time to File Order and a proposed Order Extending Time to File Order. On January 28, the Court denied the Motion[10] on the ground that it was untimely filed. The Trial Court then issued Ms. Sonnenberg an Order to Show Cause why she should not be held in contempt for failing to timely file the adjudicatory order.

In Case No. AP97-011, on January 8, 1997 Sonnenberg was ordered to present an Order from Review Hearing by January 15, 1997 in juvenile case numbers J90-1054, J90-1055, and J93-12023. On January 21, 1997 she filed a Motion and Affidavit to Extend Time to File Review Hearing Order and a proposed Order from the Review Hearing. On January 27, the Court denied the Motion[11] on ground that it was not timely filed. The Trial Court again issued Sonnenberg an Order to Show Cause why she should not be held in contempt for failing to timely file the Order from the Review Hearing.

The initial Show Cause combined both of the above-referenced Orders to Show Cause, and was set for February 12, 1997; it was continued to February 26, 1997 on Sonnenberg's motion. A consolidated Show Cause Hearing[12] was held on February 26, 1997, and after considering the evidence the Court took the matter under

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[9] It appears "sanction" is used in the sense of a finding of contempt; there is no Colville Tribal Court Rule comparable to Rule 11 of the federal and state rules.

[10] The Trial Court did sign the Adjudicatory Hearing Order presented with the Motion on January 28, 1998, however.

[11] Our records indicate the Trial Court did not accept the proposed Order, either.

[12] An order from another juvenile case, J96-19087, was at issue at the Show Cause, too; however no reference to that case is made in any of the

advisement.

The Court entered Orders of Show Cause on March 14, 1997, and found "that Lin Sonnenberg failed to comply by untimely filing" the Court orders dated January 8, 1997 and January 16, 1997. No other written findings were made and no conclusions of law were entered in either case. The transcript of the hearing reveals, however, that the judge first found Sonnenberg's conduct "sanctionable" but did not intend "...to impose any more sanctions...." *See* Transcript at page 6. Specifically the Judge "decline[d] to impose a sanction." *Id*. This comports with the handwritten instructions to the clerk by the judge dated March 13, 1997 which said: "Birdie (*sic*) Draft order: Find L.S. failed to comply with Court[;] sanction: ***Respondent shall pay 25.00 in sanctions for any order untimely filed from this date forth.***" (my emphasis). It appears from this note that the trial judge meant the order to be prospective in nature; the problem is that the written order does not conform. *See* our file entry #6 in AP97-009 and #9 in AP97-011.

In the case appealed in AP97-014, the material facts are undisputed. Sonnenberg represented the Tribes in a criminal case[13] in which she and the public defender came to an apparent agreement regarding a change of plea.

April 15, 1997 was the date set as the deadline for filing the Notice of Intent to Change Plea under the Pretrial Order. As that date grew close, Sonnenberg spoke to the public defender regarding the notice. To her chagrin Sonnenberg learned the public defender had confused the defendant in the instant case with another defendant having a similar name, and the offer to change plea had to be withdrawn. Sonnenberg reviewed her file and determined the case should not go to trial.

On April 16, 1997, she filed a Motion for an Order to Shorten Time and To Dismiss, in which the defendant concurred. That same day the trial judge signed the Order Shortening Time and Dismissing Case. She also wrote by hand on the order: "Lin Sonnenberg shall pay $25.00 in sanctions for failure to timely file the motion to dismiss. Payment due by 5/16/97."

ISSUE

The scope of review herein goes to the due process parameters of a trial judge's discretion to impose contempt sanctions. That is, what minimum due process standards is the trial judge required to adhere to when finding contempt against the appellant?

Specifically the appellant argues (1) the trial judge failed to make a finding that the appellant's actions were "willful" in the two juvenile cases; (2) the appellant was found in contempt by failing to follow a rule of the Trial Court enunciated for the first time at the contempt proceedings, and theretofore unknown to the appellant; and (3) in the third case, a criminal matter, the trial judge failed to give any notice or opportunity to be heard before the assessment of the sanction against her.

The appellee Trial Court argues the sanctity of a court's inherent power to impose sanctions for contumacious behavior before it. At the minimum, argues the appellee, regarding the two juvenile cases, this Court should remand for findings of fact and conclusions of law.

STANDARD OF REVIEW

Generally speaking, in matters in which the trial court's findings of fact are appealed, the reviewing court's

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pleadings, so it is assumed the order from that case is not at issue here.

[13] *Colville Confederated Tribes v. Paul Seymour*, Case No. 96-19180

standard of review is whether the court's finding was clearly erroneous. *CCT v. Naff*, [APCvF93-12001/02/03], 2 CTCR 8, [2 CCAR 50, 22 ILR 6032] (1997). In those instances in which the findings of fact are unquestioned and only issues of law are to be considered by the reviewing court, the standard of review is *de novo*. *Id.*

However, in this case we are addressing issues of fact and law that go to the heart of a trial court's contempt powers. The majority of jurisdictions measure appeals on issues regarding contempt under the "abuse of discretion" standard. Washington State's courts described it as follows: "Punishment for contempt of court is within the sound discretion of the judge so ruling. Unless there is abuse of a trial court's exercise of discretion, it will not be disturbed on appeal." *State v. Caffrey*, 70 Wn.2d 120, 122-23, 422 P.2d 307 (1966).

Washington courts go on to say: "The abuse of discretion standard is extremely deferential. Under this standard an appellate court will overturn a trial court's decision only if the court's action was 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" [citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)], *State v. Oxborrow*, 106 Wn.2d 525, 542 (Utter, J., concurring in part, dissenting in part) (1986).

Based on the reasoning below we believe we should adopt the "abuse of discretion" standard when reviewing issues of contempt of court.

DISCUSSION

DEVELOPMENT OF THE TRADITIONAL LEADERSHIP ROLE

Intertwined with the issues herein is the definition of roles of those who practice before the Court, as well as of the Court itself. Questions before our relatively young court system have been addressed by our state and federal counterparts decades ago; yet, they become questions of first impression for us.

Many who come before our courts, including the parties in this case, have been schooled in the non-Indian legal system. It is a system that commands an automatic outward respect from the attorneys for the judges and the courts. It recognizes a wide degree of judicial discretion for judges, thus allowing the judges the freedom to make day-to-day decisions without the fear of constantly being reviewed by the appellate courts.

In the state and federal court systems there is little latitude for filing late; the conduct of attorneys is defined by their Professional Code of Conduct as well as court rules allowing the judge to sanction the attorney summarily.

By contrast, the Tribal Court system as it exists has attenuated roots in the Tribes' culture, and a very short history in the expectations others have for it to be like its federal and state counterparts.

Traditionally the different bands of the Tribes were governed by leaders who were chosen because of the respect others had for their decision-making ability in a particular area. Forms of punishment existed, as in any society, as a measure to control the society as a whole. Such punishments were not generally retributive, however. Rather, they were imposed to make the community whole again; to bring everything back in harmony. The non-criminal decisions of tribal leaders were made with this goal, too, i.e. to ensure community harmony.

In our court system the cultural approach has been eroded and largely replaced by the non-Indian court system. Because of this, it is the tribal judge's heightened responsibility to maintain the cultural milieu of the proceedings before it. The judge is a tribal leader, who must make day-to-day decisions for the good of the whole community, while at the same time maintaining the integrity of the case for those individuals before him.

Attorneys who appear before the tribal courts have the responsibility to show the same respect they would show any judge from any court system, just as culturally there is respect for a tribal leader.

Traditionally, when a tribal leader made a decision, it was followed because of the respect and trust the tribal community had for him. The counterpart to this concept is that, traditionally, when the community no longer trusted the decision-making ability of the leader, they just stopped following him.

It is incumbent upon the tribal judges and justices to sustain the attitude of trust and respect in their leadership role in the Indian community in order to maintain the community's confidence in the court system. On the other hand, today's judicial leaders are not selected in the traditional way; rather, they are appointed by the Colville Business Council. Furthermore, the decision-making responsibilities of the judicial leaders are largely defined by written laws. This method makes it difficult for the community to stop following the leader if it disagrees with him.

CONTEMPT LAWS OF TRIBES

The change in the way "judicial" leaders are chosen, from selection by the members to selection by the Colville Business Council, has brought about a need to define how the interaction between the "judicial" leader and those who appear before him takes place. In the evolution of our court system we have become dependent on written rules regarding conduct in the courts. More specifically, consequences for contemptuous behavior is recognized in six (6) separate Colville Tribal Law and Order Code [hereinafter "Code"] sections.[14] Prior to these instant cases the Court of Appeals has addressed contempt issues in three (3) other cases:

> (1) *In Re the Contempt of Wippel*, 2 CTCR 52, [4 CCAR 31, 24 ILR 6249] (1997), in which the appellant appeared late for a hearing, walked in the door, and the judge held her in contempt without asking why she was late. On appeal it was revealed she wasn't even a party, but just a supervisor observing her staff. The Court of Appeals held that "[i]n matters of direct contempt the trial court must have personal knowledge of all the essential elements of the offense and be in position to evaluate the circumstances which evoked the contemptuous behavior.";
> (2) *Holt v. CCT*, [AP94-011], 2 CTCR 34, [3 CCAR 75, 24 ILR 6110] (1997), in a civil contempt action the Tribal Probation Department Director was found to have failed to comply with a court order directing the Probation Department to file a timely updated pre-sentence investigation report. Sanctions of $100.00 were assessed against appellant. The Court of Appeals held: (a) the Trial Court had sole discretion to decide which type of contempt proceeding to use; (b) "For Contempt purposes, wilfulness is defined as 'a volitional act done by one who knows or should be reasonably aware that his conduct is wrongful'...." [citation omitted]; and (c) Even though the contempt order in the case was partially punitive, courts will regard the contempt as civil in nature if its primary purpose is to coerce compliance; and
> (3) *[In Re A. Children], D. Z., Appellant*, [AP94-018], 2 CTCR 22, [3 CCAR 53, 24 ILR 6019] (1996), which was an appeal from an assessment of costs of $684.08 in a contempt action; the appellant was found in contempt for showing up intoxicated to a hearing the first time, and for failing to appear for another hearing. The Court of Appeals held "[T]he Trial Court has the inherent power to determine what is a contemptuous act and may act accordingly."

In the instant case the parties rely on a Trial Court decision[15] in which the Chief Judge promulgated a

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[14] CTC §1-1-186, [formerly 1.6.07] Contempt of Court; CTC §1-1-400, [formerly 1.12.01] Contempt of Court; CTC §1-1-401 [formerly 1.12.05, modified; original title was "Civil Contempt of Court], Acts or Failures Which Constitute Contempt of Court; CTC §1-1-402 [new section adopted 11/97], Civil Contempt; CTC §1-1-403 [new section adopted 11/97], Criminal Contempt; CTC1-1-404 [new section adopted 11/97], Contempt Procedure. Some of these sections were in existence prior to the filing of this case; others were added afterwards. The new sections defining more specifically the acts which constitute contempt, as well as the procedures attendant to contempt proceedings were passed after this action was filed, and, therefore are not applicable to the question before this Court in this matter.

[15] *In Re the Welfare of M.D.*, J90-1057 [*sic*] (1994), in which a caseworker was found in contempt for failing to timely file a report.

standard to follow in civil contempt proceedings. The Trial Court held that besides the standard due process indicia *(i.e.* notice of charges, opportunity to call witnesses and evidence on her own behalf), it must also be shown: "(1) [the] existence of an order; (2) "[the alleged contemnor had] knowledge of that order; (3) [the alleged contemnor had the] ability to comply with the order; and (4) [the contemnor committed a] willful disobedience or interference with the order." *In Re the Welfare of M.D.*, at 14.

ABUSE OF DISCRETION STANDARD

The instant cases are just a part of a series of contempt questions brought before this Court over the last year. It is essential that we address the parameters of judicial discretion for the lower Court in this context, so that every contempt order doesn't end up in front of us. To this end we want to ensure the trial judges the flexibility and freedom to make day-to-day decisions without having to look over their shoulders at the Court of Appeals. Professor Rosenberg, Columbia School of Law, described it this way:

> The element of flexibility and choice in the process of adjudicating is precisely what justice requires in many cases. Flexibility permits more compassionate and more sensitive responses to differences which ought to count in applying legal norms, but which get buried in the gross and rounded-off language of rules that are directed at wholesale problems instead of particular disputes. Discretion in this sense allows the individualization of law and permits justice at times to be hand-made instead of mass-produced. Maurice Rosenberg, "Judicial Discretion of the Trial Court, Viewed From Above," 22 Syracuse L.Rev. 635, 642 (1971) ["Rosenberg Article"]

At first blush the term "abuse of discretion" may seem vague, and subjective as a standard. Our sister courts in the state and federal systems recognize applicability of the abuse of discretion standard for five reasons: (1) for judicial economy; (2) to maintain judicial morale; (3) for finality of the case; (4) because of the "non-amenability of the problem to rule ...[for] reasons that argue for allowing experience to develop," such as vagueness or novelty, for example; and (5) because the trial judge is in a better position to decide in that he was there, at the hearing in question, and could visibly assess the witnesses and evidence first-hand. *See* "Rosenberg Article" at 663-664.

The give-and-take of applying such a deferential standard is that the trial judge should spell out the reasons for his decision so the parties and the Court of Appeals can discern the basis for the decision. It then is incumbent upon the Court of Appeals to state reasons and give guidance to the trial judge so the trial judge can discover the "metes and bounds of his discretionary power." *Id* at 649.

For these reasons we hold that our standard of review in this matter is "abuse of discretion." That is, we will overturn the Trial Court's decision only if its action was manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. Further, a minimum review for abuse of discretion would require a review for due process.

DID THE TRIAL COURT ABUSE ITS DISCRETION IN THE CASES HEREIN?

In the instant cases we are faced with the issue of due process parameters in contempt proceedings related both to civil and criminal cases. Contempt proceedings in juvenile cases go to the heart of managing juvenile cases; timely orders are necessary for the disposition of the case. When the Trial Court orders an attorney to do the orders by a deadline and the orders are not done, what is the posture of Court? It can be disruptive to the continuing services to the child involved in the case. Such cases are amenable to the "abuse of discretion" standard because of the uniqueness of each juvenile case; the trial judge spends hours managing a juvenile case, and is in a superior position to understand the consequences of alleged contumacious behavior regarding such cases.

In criminal procedural matters, generally speaking, deference is given to the trial judge's day-to-day management of the case. In the instant case, however, the judge's discretion conflicts with prosecutorial discretion. Another distinction between the criminal case and the juvenile cases herein is that the contempt assessed in the criminal case appears to be direct contempt; a show cause hearing was not convened.

DUE PROCESS PARAMETERS OF CONTEMPT: CIVIL CASES

In the civil juvenile cases herein, the Trial Court held a show cause hearing and took evidence. Under the abuse of discretion standard, it would be our job to assess the findings of the Trial Court for compliance with due process standards. The Trial Court has a due process test it uses as announced in *In Re the Welfare of M.D.*, *supra* at note 8 and text, which meets due process standards. Our goal would be not to substitute our judgment for the trial judge's, but to assure ourselves that due process has been afforded the appellant.[16]

One problem in doing such an assessment is that the trial judge did not make adequate findings of fact and conclusions of law in her order. This is not fatal unto itself if we are able to review the record of the case; then we could review the evidence and assess whether there was enough evidence on record to support the trial judge's findings of contempt under the *In Re the Welfare of M.D.* standards. The senior clerk could not find the recording of the Show Cause hearing of February 26, 1998 for our review. *(See* Trial Court Clerk's response to our request for a copy of the Transcript dated December 30, 1998). However, the Trial Court's spokesman located a copy given to him as counsel for the Trial Court. His motion to accept the record and transcript of the hearing was not objected to by the appellant, and will be relied upon by this Court.

A review of the record before the Trial Court shows that the judge took into consideration the arguments of Sonnenberg of past practice as an excuse to filing late. *Transcript* at 5. Further, the judge found that such an excuse was not exceptable; delays in filing proposed orders detracted from the orderly administration of the juvenile case. *Id*. Finally, the judge found that even if the actions of Sonnenberg were sanctionable, she would not impose sanctions on the incidences that lead to the Show Cause hearing, but would consider sanctions on future noncompliances. *Id* at 6.

The Trial Court's findings and decision from the bench at the Show Cause hearing conflict with the written Order dated March 14, 1997 in that the oral decision was not to assess sanctions whereas the written order provided for $25.00 sanctions for each case. We have held in the past that a litigant may rely on the oral orders of a judge, and if they conflict with a written order, the oral order prevails. *John Clark v. CCT*, [AP94-027], 2 CTCR 17, [2 CTCR 30, 3 CCAR 21], 25 ILR 6066 (1996).

This Court cannot substitute its judgment for the Trial Court's. In making a determination whether the Trial Court abused its discretion, either in its findings or in its conclusions of law or both, we review to see if the Trial Court's decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. We can find no abuse of discretion on these bases. Further, a review for due process violations under the Trial Court's own standards reveals that (1) the orders in question were those of January 8, 1997 directing Sonnenberg to file the proposed juvenile orders; (2) Sonnenberg had knowledge of those orders; (3) the Trial Court found that Sonnenberg

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[16] The appellant argues that the trial judge changed the rules; that is, before these cases she was always allowed to file the Motion to Extend on the date the Order was due, and this is why she was held in contempt. The record shows that the trial judge took this argument into consideration and rejected it. *See* Transcript at 5. The order finding Sonnenberg in contempt states her actions of failing to file the proposed orders on time were sanctionable. This was the basis for the contempt.

had the ability to comply with the orders; and (4) the Trial Court found that Sonnenberg did not comply with the orders without good cause." *See, In Re the Welfare of M.D.*, at 14. Therefore, there were no violations of due process in the manner the Trial Court conducted the Show Cause hearing, nor in its findings.

Based on the foregoing, the written orders dated March 14, 1997, finding Sonnenberg in contempt and assessing sanctions shall be set aside and remanded with directions to conform the written order to the oral orders, and dismissing the sanctions entered therein.

DUE PROCESS PARAMETERS OF CONTEMPT: CRIMINAL CASE

The trial judge sanctioned Sonnenberg because the Motion to Dismiss was not timely-filed. It was not timely because the Order from Pretrial Summary Memorandum had set the trial date for April 17, 1997, and a jury had been summoned. It is always disturbing to the Trial Court and its staff to find a case is dismissed after a jury has been summoned. It is not unusual, however, for a prosecutor to learn a key witness has recanted or that something extraordinary has arisen requiring the dismissal of the case.

To permit the use of sanction as done here will likely have a chilling effect on a prosecutor's ability to fully comply with his or her duty to prosecute only those matters in which the defendant's guilt can be proved beyond a reasonable doubt. Knowing that an untimely motion to dismiss will be granted would have little effect on a prosecutor who must decide whether to subject himself to a possible sanction or to prosecute a matter that should rightfully be dismissed.

The Tribal Court conceded at oral argument that, at a minimum, this matter should be remanded for hearing, particularly in light of the *In Re the Contempt of Wippel*[17], [AP97-010], 2 CTCR 52, [4 CCAR 31, 24 ILR 6249] (1997), which held that direct contempt could not be found without the Trial Court inquiring into the circumstances evoking it.

We view this concession as an admission that Sonnenberg was denied due process by failing to receive notice of the proposed sanction and by not having an opportunity to be heard.

We decline to remand this matter for hearing and hold that it shall be dismissed on the ground that motions to dismiss are not subject to deadlines as it is almost always within the discretion of the prosecutor to determine whether a matter should be prosecuted. *CCT v. Laramie*, [AP97-005/006], 2 CTCR 66, [2 CTCR 49, 4 CCAR 22, 24 ILR 6181] (1997).

Lest the trial court be concerned that "untimely" dismissals will become commonplace and bring the judicial system into disrepute, it should be well remembered that the law has a remedy for defendants who have been wrongfully prosecuted, to wit: a civil action for malicious prosecution.

[17] *Wippel* was decided three months after Ms. Sonnenberg was summarily sanctioned.

ORDER

For the above-stated reasons the consolidated appeals are Granted, the two orders dated March 14, 1997 imposing sanctions of Twenty-Five Dollars against Lin Sonnenberg are Vacated, and Remanded to the Trial Court with directions to conform the orders with the oral rulings that no sanctions are assessed, and thereby Dismissing the sanctions.

It is further Ordered that the Order assessing sanctions in the criminal case is Vacated and Remanded with the direction that the Trial Court shall enter an order that no sanctions are assessed and dismissing the case.

Herman STONE, Appellant,

vs.

COLVILLE BUSINESS COUNCIL, et al., Appellees.

Case Number AP98-009, 3 CTCR 11, 26 ILR 6076

5 CCAR 16

[John C. Perry, Attorney at Law, Spokane WA, counsel for Appellant.
Tim Brewer, Office of the Reservation Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Number CV98-18045]

Arguments heard December 18, 1998. Decided February 28, 1999.
Before Presiding Justice Bonga, Justice Miles and Justice McGeoghegan

BONGA, P.J.

This matter came before the Court of Appeals consisting of Presiding Justice David Bonga, Justice Wanda Miles and Justice Earl McGeoghegan for oral argument on December 18, 1998. The parties were represented by their respective counsel.

After thoroughly reviewing the case file and considering the arguments of counsel, the Court of Appeals agrees with the position of the appellee and hereby Affirms the decision of the Trial Court.

FACTS

On or about November 14, 1997 the Colville Tribes hired Herman Lou Stone (hereinafter Stone) as the Tribes Executive Director pursuant to a written contract of employment.

The Colville Business Council (hereinafter the CBC or Council) is the elected governing body of the Colville Tribes, constitutionally empowered to exercise both the executive and legislative authority of the Colville Tribal government, as delineated in the Colville Constitution, Article II & V.

The position of Executive Director was created by the CBC to be the chief administrator for implementing CBC policy and governmental directives.

The nature of the employment relationship between the CBC and the Executive Director is governed by a written employment contract.

The employment contract entered into between the Colville Tribes and Mr. Stone provided that either party could terminate the employment agreement without cause.

Mr. Stone was summoned to a meeting of the CBC, on November 21, 1997 regarding Mr. Stone's proposed reorganization plan for the Tribes administration. Motions, which failed, were made by members of the Council to terminate Mr. Stone's employment. On or about December 18, 1997, the Management and Budget Committee of the CBC presented a recommendation to the full Council that Mr. Stone be terminated. The motion failed and Mr. Stone retained his employment.

On or about February 5, 1998, when the President of the CBC was at home recovering from an injury and the Vice President of the CBC was out of town and unable to return due to weather conditions, twelve of the fourteen Council members convened and acted upon some 67 matters of CBC business. The termination of Mr. Stone from his position as Executive Director was one of the 67 matters dealt with.

Mr. Stone brought suit on February 11, 1998 in case number CV98-18045 against the CBC and four individually named Council persons alleging the CBC had unlawfully terminated him as Executive Director.

On February 19, 1998 a quorum of the CBC met and unanimously voted to ratify all actions of the February 5, 1998 meeting including Resolution 1998-047 that terminated Mr. Stone from the Executive Director's position.

On April 10, 1998 the Tribes brought a Motion for Summary Judgment in the action CV98-18045. After extensive briefing and oral argument, Trial Court Judge Dennis Nelson granted the Tribes' Motion for Summary Judgment on June 8, 1998. This appeal ensued.

DISCUSSION

This panel of the Colville Court of Appeals does not take issue with Appellee's position that "an appellate court reviews a grant of summary judgment award de novo." *Haven's v. C&D Plastics Inc.*, 124 Wn.2d 158, 176-77, 876 P.2d 435 (1994). In fact this Panel has reviewed the evidence and the law as if it were a trial court making its own independent decision in place of the trial court. The Panel looked at all facts and all inferences from the facts in a light most favorable to Stone. However, the Panel disagrees with the conclusion of the appellant that the original employment contract between Stone and the Tribes was orally modified, especially as to the termination provisions of the contract.

Stone argues that this Court must accept that the employment contract was orally modified because of the Trial Court's decision which assumed certain facts in a light most favorable to Stone. The Appellate Panel does not interpret the Trial Court's decision in that manner. It is the Panel's understanding that the Trial Court's interpretation was that Stone would have a reasonable time to submit a reorganization proposal that did not in any way cancel the termination without cause provisions of the contract. The Panel believes that the Trial Court was correct in its assumption that there was no oral modification of the original employment contract and that Stone had only alleged a modification to support his argument.

The Panel finds the appellant's argument that the statement by a council member allegedly supporting appellant' s position was incorrect as the statement was not intended to be an oral modification. Rather the Panel believes that the statement was made within the course of a hotly debated political discussion which, as a matter of law, cannot be construed as a Council action which modified the fundamental terms of a written, integrated employment contract.

It is fundamental that any modification to a written contract must be clear and contain all the requisites of a binding contract:

> To be effective as a modification, the new agreement must possess all the

> elements necessary to form a contract. A modification requires the assent of both, or all, parties to the contract. Mutual assent is as much a requisite element in effecting a contractual modification as it is in the initial creation of the contract. A request, suggestion, or proposal of alteration or modification, made after an unconditional offer of acceptance of an offer, and not assented to by the opposite party, does not affect the contract then in force and effect by reason of its acceptance. The minds of the party must meet as to any proposed modification. The mental purpose of one of the parties to a contract cannot change its terms, nor are indefinite expressions sufficient to establish a binding agreement to change the formal requirements of a binding contract...
> 17A Am. Jur. 2d Contracts Sec. 520.

In the case at bar appellant Stone argues that the Tribes' intended to modify the original employment contract from an at-will position to a position where termination for cause was controlling. The Panel finds that the evidence does not support appellant's position as votes in Council beginning on November 21, 1997 and ending on February 19, 1998 were numerous which called for Stone's resignation. Statements by Councilwoman Watts on December 18, 1997, which the appellant relies upon for supporting evidence that the Council had modified his contract, are seen by the Panel as giving the appellant an opportunity to rectify his actions which were objectionable to the Tribes. The Panel finds merit with the Trial Court's statement that "the oral modification implicitly canceled the termination without cause provision for a "reasonable" amount of time...is a tenuous argument and without merit." *Summary Judgment and Order of Dismissal,* p.3.

The Panel also finds further proof that there was not a meeting of the minds by the actions of the Tribes which voted twice in favor to relieve him of the position as Executive Director. A contract as defined in *Black's Law Dictionary*, 5th edition states "that essentials to a contract are competent parties, subject matter, a legal consideration, *mutuality of agreement* (emphasis added) and mutuality of obligation." Mutual modification by subsequent agreement cannot be based on doubtful or ambiguous factors, and requires meeting of the minds and consideration separate from the original contract. *Wagner v. Wagner,* 95 Wn.2d 94 (1980). In the case at bar the Panel finds that the evidence does not support the position that there was a mutuality of agreement nor a meeting of the minds and that there was not a modification to the written employment contract.

The plain language of the parties employment contract is unambiguous as to termination of an employee. Section XV.B of Stone's contract provides as follows:

> B. TERMINATION WITHOUT CAUSE
>
> > 1. This Agreement may be terminated at any time prior to the expiration date without cause by either party on 30 calendar days' written notice to the other. If Tribes shall so terminate this Agreement, after the 90th day of employment, following service of the notice of termination employee shall be entitled to severance pay compensation as follows: 90 days of regular pay as set out in this contract. Contract Employee shall be paid for accrued vacation. Any termination without cause occurring after ninety (90) days of employment shall be entirely pursuant to this subsection.
> > 2. This agreement may also be terminated without cause by either party within (90) days of the date that the Contract Employee assumes his responsibilities without cause. The Tribes' decision to terminate will be based on the decision of the Colville Business Council. Should termination take place within ninety (90) days of employment, Contract Employee shall be entitled to thirty (30) days severance pay and accrued vacation.

> 3. There shall be no right to appeal any administrative or judicial court a decision to terminate under this part.

Since there was not a modification to the appellant's employment contract, and since the appellant has received all benefits due him, as the record indicates that Mr. Stone has accepted the Colville Tribes payment of severance pay, 30 days vacation pay and 30 day notice pay, which are the maximum contractual remedies available to him, there is no further basis for this suit according to the terms of the employment contract at Section *XVI, Limitation of Liabilities* which provides:

> It is agreed between the parties that Contract Employee shall have no right to recover against the Tribes any amount of money except the compensation earned and owing as of the effective date that this Agreement is terminated, and to the extent applicable the severance pay, provided in Section XV and vacation leave and attorney fees, provided in Section XVIIC

As such, the need to reach the issues of Sovereign Immunity or the Nonjusticiable Political claim are no longer necessary and will not be decided.

Similarly, the Panel finds no need to disturb the Trial Court's award of costs and reasonable attorney fees to appellee upon submission of appropriate documentation.

The Appellate Panel hereby Affirms the decision of the Trial Court in this matter.

Barbara COVINGTON-GARRY, Appellant,

vs.

Joanne SANCHEZ, Appellee.

Case Number AP98-012, 3 CTCR 20

5 CCAR 20

[Barbara Covington-Garry, Appellant, pro se.
Joanne Sanchez, Appellee, pro se.
Trial Court case number CV95-15316]

Decided June 14, 1999.

Before Chief Justice Dupris, Justice Pascal and Justice Stewart

STEWART, J.

Neither party was represented by an attorney. The appellant, Barbara Covington-Garry, informed the Court at the Initial Hearing on December 21, 1998 that she did not want oral arguments. A briefing schedule was given to the parties, but no briefs were filed.

The Court of Appeals Panel met May 21, 1999 to review this case. We could see the case was important to all parties involved. However, it was decided by unanimous decision, to dismiss the case. We concluded that if the case was not done right, we could not fix it or do it right with the records we had to work with. All of the justices felt the lower court's finding should not be overturned unless there was serious error, and we did not find one.

It is Ordered that the Appeal in this case is Dismissed and the matter Remanded to the Trial Court.

Clara VARGAS HARRIS and Trent HARRIS, Appellants,

vs.

Charles GIESE, Martin OLBRICHT and Lloyd OLBRICHT, Appellees.

Case No. AP98-007, 3 CTCR 21, 26 ILR 6120

5 CCAR 21

[Vargas Harris & Harris, Appellants, pro se.
Henry Rawson, Attorney at Law, Okanogan Washington, counsel for Appellees.
Trial Court Case Number CV96-16242.]

Arguments heard May 21, 1999. Decided June 18, 1999.
Before Presiding Justice Bonga, Justice Fry and Justice Miles

PER CURIAM

The Appellate Panel of Justice Wanda Miles, Justice Elizabeth Fry and Presiding Justice David Bonga convened on May 21, 1999 for oral arguments at the Colville Tribal courthouse. The appellees were represented by counsel, Mr. Henry Rawson. The appellants were present and proceeded pro se.

The Justices after hearing the oral arguments and after having reviewed the file and information submitted find merit in appellee's position and has decided that this matter should be remanded for trial.

HISTORY OF THE CASE

On February 7, 1997, a hearing before Judge Wynne was held on Appellants' Motion for Default. Judge Wynne did not issue a ruling on Appellants' motion. On April 1, 1998, Judge Wynne entered an Order of Recusal wherein she removed herself and appointed Judge Dennis Nelson to take the case. Judge Nelson reviewed the pleadings, transcripts and briefs and issued an Order Denying Motion for Default and Default Judgment dated April 15, 1998. The appellants disagreed and timely filed this appeal.

DISCUSSION

The Appellate Panel did not find any irregularity in the proceedings from which this appeal was taken. The trial judge acted within the law and his decisions to deny the motions before him and setting a trial date were not abusive or unfair. The trial judge was taking actions to insure that the parties had their day in court. The Panel will not alter that decision.

The Panel also finds that the decision was not contrary to the law and evidence. In this case the first trial judge, Judge Wynne, had issued an Order of Recusal, which had removed her as the judge. As the facts show the second judge, Judge Nelson, found that the first judge had not issued an Order or finding that there had been a default by the appellees. It was lawfully appropriate for Judge Nelson to review the evidence and decide that the Default Motion should be denied.

The trial judge's decision to deny the Default Motion and to set a date for trial afforded substantial justice to the parties. The actions of Judge Nelson gave the parties the opportunity to have their day in court. The Appellate Panel will not hinder that fairness and deny the parties the right to justice.

The Panel hereby remands this case with instructions to schedule the case for trial.

Connie WILLIAMS, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP99-005, 3 CTCR 22, 26 ILR 6120

5 CCAR 22

[M. Brent Leonhard, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
David Ward, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Number 99-22054]

Initial Hearing June 18, 1999. Decided June 18, 1999.
Before Chief Justice Dupris, Justice Chenois and Justice Pascal

DUPRIS, C.J.

This matter came before the Court of Appeals for an Initial Hearing on June 18, 1999. The appellant, Connie L. Williams, was represented by Brent Leonhard, Colville Tribal Public Defender's Office. The appellee, Colville Confederated Tribes (hereinafter Tribes), was represented by David Ward, Colville Tribal Prosecutor's Office.

The appellant ask this Court to find that the Trial Court was wrong when it held that the Tribes' Public Intoxication statute, CTC § 3-1-187, did not violate the Tribes' Civil Rights statute's prohibition against cruel and unusual punishment, "despite the fact that alcoholism is a disease." See CTC § 1-5-2(g), Notice of Appeal, dated June 3, 1999.

From a review of the trial record, including: the briefs filed by both parties at the trial level; the Defendant's Statement on Plea of Guilty; the Trial Court's Order Accepting the Guilty Plea; and the Trial Court's Order Denying Motion to Dismiss, we hold there is no evidence in the Trial Court record that the appellant is an alcoholic. The Trial Court's Order Denying Motion to Dismiss signed May 10, 1999 even points this out.

A review of the Trial Court's orders further reveals that the Trial Court specifically withheld on whether "being an alcoholic can be criminalized" in violation of the Tribes' Civil Rights statute because there was no evidence presented to it on the issue of alcoholism. See Trial Court's Order Denying Motion to Dismiss at page 4. This issue is not ripe for our review.

Appellant further asserts in her Notice of Appeal that the Public Intoxication statute is "facially invalid in that it can label an individual a criminal despite the fact that there is no mens rea element, nor *actus reus* element to the offense when applied to a certain class of individuals." This Court has already held that the crime of Public Intoxication is *malum prohibitum*, i.e. the prohibited act itself is the crime. There is no *mens rea* requirement. See *Innes v. CCT,* [AP91-14180], 1 CTCR 57, [1 CCAR 51] (1992).

The appellant's allusion to "a certain class of individuals," in and of itself, does not bring an issue of violation of the rights of alcoholics before this Court. As stated above, there is no evidence in the trial record to support an allegation that the appellant **is** an alcoholic, or a member of "a certain class of individuals" of alcoholics whose civil rights are violated by the enforcement of the Tribes' Public Intoxication statute. The issues as framed by the appellant are not ripe for review by this Court.

We cannot, nor should we attempt to, address issues that have not been fully developed before the Trial Court. The issue of the validity of the Public Intoxication statute in today's society as it applies to alcoholics is an important issue, but it is not the duty of the Court of Appeals to make comments or rulings on issues not properly before it, no matter the import of the issue.

Finally, there is no showing from the record that the Trial Court entered its rulings unsupported by law and the evidence presented. Based on these findings, it is now, therefore

Ordered that the Appeal herein is Denied, and the Judgement and Sentence in this matter is Remanded to the Trial Court for execution.

COLVILLE TRIBAL CREDIT, Appellant,

vs.

Charles GUA Jr., Appellee.

Case Number AP96-012, 3 CTCR 23, 26 ILR 6183

5 CCAR 23

[Tim Brewer, Office of the Reservation Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Stephen L. Palmberg, Attorney at Law, Grand Coulee, counsel for Appellee.
Trial Court Case Number CV94-14373]

Argued December 19, 1997. Decided July 1, 1999.

Before Presiding Justice Fry, Justice Bonga and Justice McGeoghegan

FRY, P.J.

SUMMARY

Appeal of Trial Court order granting default judgment. The Trial Court sent notice by Tribal interoffice mail to the attorney for the appellant. Appellant's attorney's office lost the notice. Appellant argued that the Court failed to send adequate notice of hearing because the notice was not sent in "the usual method", which was alleged to have been by placing it in a file box located in Trial Court clerk's office specifically for the Colville Tribal Credit Department. The Colville Tribal Credit Department is located on the Nespelem Agency Campus, Nespelem, Washington, as is the Colville Tribal Court. The appellant failed to move to set aside the default judgment at the trial court level, and instead filed a notice of appeal. Court of Appeals dismisses the appeal.

FULL TEXT

1. JURISDICTION

The Court has subject matter jurisdiction in this case pursuant to the Colville Tribal Code, and personal jurisdiction over the parties as they have been properly served.

2. ISSUE ON APPEAL

Is this matter ripe for appeal?

3. DISCUSSION

A. Ripeness. The parties argue that the issue in this matter is notice of the trial date. However, it is apparent to the Court that the issue in this appeal is ripeness.

The appellant chose to file this appeal instead of a motion to set aside the default judgment.

The Colville Tribe does not have a specific court rule regarding this situation. However, Washington State law is quite clear on this issue:

RCW 12.20.020(3) states:

> (3) The justice shall have full power at any time after a judgment has been given by default for failure of the defendant to appear and plead at the proper time, to vacate and set aside said judgment for any good cause and upon such terms as he shall deem sufficient and proper.

A moving party may have a judgment set aside under Washington Superior Court Civil Rule 60(b)(1) for "mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order." Washington Superior Court Civil Rule 55 allows for default judgments.

While Washington State law is not authority for the Colville Tribal Court, it is well-established in this Court that such law can be utilized as a guideline. *Colville Confederated Tribes v. Ronald LaCourse*, 1 CTCR 5, [1 CCAR 02] (1982). *David St. Peter v. Colville Confederated Tribes*, AP92-15400 *et seq.* [1 CTCR 72, 1 CCAR 73]. In using the law as a guideline, it becomes evident that the Trial Court judge in this case had full discretion to vacate and set aside the judgment for any good cause, if that motion had been brought. Therein lies the difficulty. The appellant chose to file this matter immediately in Court of Appeals. For purposes of establishing a factual basis upon which to appeal, however, it was not the most appropriate action. Appellant brings affidavits before the Court of Appeals which require a fact-finding hearing, a type of hearing not suited to an appellate court. *American Universal Ins. Co. v. Ranson*, 59 Wash.2d 811, 370 P.2d 867 (1962). *Kataisto v. Low*, 73 Wash.2d 341, 438 P.2d 623 (1968).

The only Washington court rule addressing the issue of presentation of new factual evidence on appeal is Rule of Appellate Procedure 9.11, which as been construed to "not allow the consideration of additional evidence on appeal when a party fails or neglects to present evidence to the trial court and attempts to have an appellate court establish new facts never before the trial court." *State v. Ziegler*, 114 Wn.2d 533, 789 P.2d 79, 84 (1990) [citing from Appellee's Brief, page 11].

B. Tribal Code. The Court finds that CTC § 1.9.02(1), set forth below, and sought to be made applicable by the appellant, is inapplicable.

CTC § 1.9.02(1)

> ... That substantial justice has not been done. When the motion is based on matters outside the record, the facts shall be shown by affidavit.

This section is not applicable because there is no motion before the Court. The new facts sought to be introduced are part of the appeal brought by the appellant.

C. Trial Court. "The appellate court must consider only those matters in the record in determining whether the trial judge abused his discretion." *Barnum v. State*, 72 Wash.2d 928, 435 P.2d 678 (1967) [cited in Appellee's Brief, page 10]. This appellate court can only consider those matters in the record from the Trial Court in determining whether the Trial Court judge abused his discretion. What are those matters in the record on appeal? The matters in the Trial Court record do not include new affidavits filed at the appellate level. Upon reviewing the Trial Court record, this Court can only conclude that the Trial Court acted properly in granting the default judgment.

4. ORDER

This Court therefore orders that this appeal be dismissed.

Jason BLUE, Appellant,

vs.

Toni HOLDER, Appellee.

Case Numbers AP99-007, 3 CTCR 24

5 CCAR 25

[Stephen L. Palmberg, Attorney at Law, Grand Coulee WA, counsel for Appellant.
Wayne Svaren, Attorney at Law, Grand Coulee WA, counsel for Appellee.
Trial Court Case Number CV99-19036, CV99-19037]

Initial hearing held August 20, 1999. Decided August 20, 1999.
Before Chief Justice Anita Dupris, Justice Elizabeth Fry and Justice Dennis L. Nelson

DUPRIS, C.J.

This matter came before the Court of Appeals pursuant to an Initial Hearing and a Motion to Dismiss Appeal. Present at the hearing were Appellant, Jason Blue, and his counsel, Stephen L. Palmberg; and Appellee, Toni Holder, and her counsel, Wayne Svaren. Chief Justice Dupris and Justice Fry were present, Justice Nelson presided by telephone conference call.

After hearing arguments, reviewing the record and rules, the Court of Appeals makes the following Order:

1. The Motion to Dismiss is granted based on the finding that the original document filed in the Court of Appeals is a Motion for Reconsideration and not a Notice of Appeal and therefore this matter is not ripe for consideration at this time.

2. This matter is remanded back to the Trial Court to rule on the Motion and Affidavit for Reconsideration which was originally filed in the Trial Court and sent up as a Notice of Appeal.

It is So Ordered.

Abraham GRUNLOSE, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP96-007, 3 CTCR 25, 27 ILR 6033

5 CCAR 26

[Jeffrey Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Wayne Svaren, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Number 92-15349, 92-15350]

Oral Arguments heard March 21, 1997. Decided December 6, 1999.
Before Presiding Justice Chenois, Justice Bonga and Justice Miles

CHENOIS, CJ

This matter came on for the consideration of the Court of Appeals on the 21st day of March, 1997. The Appellate Panel consisted of Associate Justice David Bonga, Associate Justice Wanda L. Miles and Presiding Justice Edythe Chenois. The appellant, Abraham Grunlose, appeared by and through his counsel, Jeffery Rasmussen. The appellee, Colville Confederated Tribes, was represented by Lin Sonnenberg.

The appellant requests that this Court find that the Trial Court erred in its decision to reinstate jail time which had been previously suspended, based upon its finding that the defendant had not submitted an alcohol evaluation and subsequent monthly reports.

BACKGROUND

The Trial Court record reflects that Abraham Grunlose was sentenced by the Court on January 31, 1995, for the offense of Driving While Under the Influence of Intoxicaing Liquor and/or Drugs.

Mr. Grunlose was ordered to pay a fine of $500.00, with $250.00 suspended, service of 30 days in jail, 28 days suspended, and credit for 2 days served. A condition of the suspension was:

> i. The defendant shall file an alcohol evaluation from Certified Alcohol Program or Tribal Community Counseling Services by May 1, 1995. The defendant shall follow the recommendations of Certified Alcohol Program or TCCS for one (1) year, i.e. until January 31, 1996. The defendant shall file progress reports from Certified Alcohol Program or TCCS on July 31, 1995; October 31, 1995; and the final compliance report prior to the pre-dismissal hearing which is scheduled for January 2, 1996.

At the time of the sentencing the Court scheduled a predismissal hearing for January 2, 1996. Mr. Grunlose did not appear. During the court proceeding, the Trial Court noted that the defendant had not submitted proof of the alcohol evaluation or the subsequent reports required by the Court in its Order of February 2, 1995. The Trial Court found that the defendant also failed to pay the fine of $250.00 or provide documentation of performance of community service. In addition the Court ruled the defendant had failed to inform the Court of his change of address.

The Court set a January 12, 1996 date for a Show Cause hearing and issued new notices that were not adequately served. As a result, Mr. Grunlose failed to appear on January 12, 1996 although his counsel did appear. The Court set a second Show Cause hearing for January 25, 1996. The defendant again failed to appear at the second Show Cause hearing and the Court issued a bench warrant that resulted in Defendant's arrest. At Defendant's bail hearing on February 12, 1996, Defendant was informed that his new Show Cause hearing was set for February 23, 1996.

At the Show Cause conducted on February 23, 1996, the Court found that Mr. Grunlose had failed to comply with the Judgment and Sentence, and having considered the presentations of the parties, imposed the suspended jail time.

The defendant then filed an appeal.

DISCUSSION

A review of the Notice of Appeal cites five (5) separate issues raised by defense counsel:

ISSUE I asserts that the Trial Court wrongly held a show cause hearing after losing jurisdiction. Appellant cited CTC 2.4.05. He argues CTC 2.4.05 requires that a show cause hearing be held within 10 days of the pre-dismissal hearing.

ISSUE 2 asserts that the Court wrongly considered whether defendant had failed to file an alcohol evaluation and quarterly progress reports. Appellant alleges he was not given adequate notice of that issue, only that he had not complied "with his alcohol program". He asserts that the Court should not have interpreted the Show Cause notice to include whether defendant had submitted compliance reports to the Court.

ISSUE 3 asserts that the Court wrongly held that defendant had not complied with an alcohol evaluation based solely on evidence that the defendant had not filed compliance reports with the Court. He alleges no competent evidence was introduced that he had not complied, only that he had not filed reports with the Court.

ISSUE 4 asserts the Court wrongly admitted and/or considered heresay evidence and evidence which was without proper foundation regarding defendant's alcohol program. Appellant alleges the Court allowed testimony from a probation officer which was derived from documents in another probation officer's file.

ISSUE 5 asserts the Court wrongly reimposed all suspended portions of the Judgment and Sentence based only upon a finding that defendant had not submitted an evaluation and quarterly progress reports. Appellant alleges that the Court abused its discretion in reimposing all the suspended terms based upon the finding which it had made and that the Court's actions were arbitrary and capricious.

However, we note that issues number 1, 2, and 4 were not presented through briefs, or at oral argument, and therefore this panel will not address those issues.

Appellant cites *Clark v. CCT*, AP94-027, 2 CTCR 17, 2 CTCR 30, 25 ILR 6066, 3 CCAR 21 (01/26/96), arguing that defendants must receive notice of the issues to be litigated at Show Cause hearing. This Court finds that *Clark v. CCT* is not applicable to this matter. We find that defense counsel was aware of the contents of all

documents filed, which was a significant difference from the circumstances found in *Clark*.

We find that a review of the Trial Court record indicates that the defendant did not cite that he suffered prejudicial harm or any law which would restrict the Trial Court from the reimposition of suspended jail time. We have held in *In Re Sonnenberg*, AP97-009/011/014, 3 CTCR 09, 5 CCAR 9 (02/12/99), that a review for an abuse of discretion requires that before we will overturn the Trial Court's decision, we must find that its actions were manifestly unreasonable, exercised on untenable grounds, or for untenable reasons. We further need to review for due process violations. We did not find that the Trial Court's actions were unreasonable for untenable, nor did we find any due process violation. Therefore, we must find that the Trial Court did not abuse its discretion in imposing suspended jail time.

CONCLUSION

The decision of the Trial Court is affirmed and the matter remanded back to the Trial Court for proceedings consistent with this opinion.

Dustin A. CARSON, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP00-002, 3 CTCR 26, 27 ILR 6153

5 CCAR 28

[Stephen L. Palmberg, Attorney at Law, Grand Coulee WA, counsel for Appellant.
Leslie Kuntz, Office of Prosecuting Attorney, counsel for Appellee.
Trial Court case number 99-22288 to 99-22291]

Emergency hearing held February 25, 2000.
Before Chief Justice Dupris, Justice Miles and Justice Stewart

DUPRIS, C.J.

This matter came before the Court of Appeals pursuant to a Motion for Emergency Hearing Re: Stay of Execution filed by Leslie Kuntz, Office of the Prosecuting Attorney for the Confederated Tribes of the Colville Reservation on February 24, 2000. An emergency hearing was held before the Court of Appeals on February 25, 2000. Justice Dupris and Justice Stewart presided in person, Justice Miles presided by telephone conference. Appellant Dustin Carson was present and was represented by his spokesman, Stephen L. Palmberg. Appellee was represented by Leslie Kuntz.

I. ISSUE

The issue before the Court of Appeals is whether to uphold or overturn the Stay of Execution entered by the Trial Court in this matter.

II. PROCEDURAL HISTORY

On September 27, 1999 a Criminal Complaint was filed in the Colville Tribal Court (hereinafter Court) alleging the defendant committed four violations of the Colville Tribal Law and Order Code (hereinafter CTC), to wit: Burglary, Battery, Malicious Mischief and Trespass to Buildings. On November 18, 1999, the Appellant appeared in Court and pled guilty to the offenses. An Alford plea was accepted by the Court. A presentence investigation report was ordered and a sentencing date set. An order was also entered for a drug/alcohol evaluation and a mental health/emotional health evaluation to be conducted on the Appellant.

A presentence investigation and the evaluations were conducted and a report filed with the Court by the Probation Office on January 26, 2000. The sentencing hearing was held on February 4, 2000. The Court imposed the following sentence:

1. Pay a fine of $10,000 with $7,500 suspended conditionally;
2. Serve 990 days incarceration with 720 suspended conditionally;
3. Pay $20 court costs.

Conditions of the suspensions:

a. submit to a neuro-psychological evaluation prior to release from jail and follow and recommendations of said evaluation, including referrals for other testing or to other programs.

The Appellant appealed and a Stay of Execution order was issued February 24, 2000 on the Appellant's Motion for a stay of execution of the sentence, effective at 4:00 p.m. on February 25, 2000. The later stay allowed counsel for the Appellee time to file an Emergency Motion before the Court of Appeals. An emergency hearing was held on February 25, 2000.

III. DISCUSSION

At the emergency hearing, Ms. Kuntz argued that the Court of Appeals should find good cause to overturn the Court's Stay of Execution on the grounds that the Appellant was a sexual deviant and a danger to the community. She cited the severity of the offenses and the actions admitted to by the Appellant in his plea of guilty before the Court. She also referred to the mental health report filed with the Presentence Investigation Report which stated, "Treatment prognosis is poor because these individuals are experiencing little emotional distress, limiting their motivation for any interventions. It is also noted that this client could lack the insight into his motivation and behavior and ineffectiveness in dealing with the problems of daily life. Psychological interventions is usually guarded."[18] Ms. Kuntz also related that she had several contacts with the victim, who indicated to Ms. Kuntz that she was afraid for her safety should Appellant be released prior to his completion of his imposed incarceration. At each contact the victim was visibly upset and very distressed. Ms. Kuntz stated that she was also concerned for the safety of the community should Mr. Carson be released pending the outcome of his appeal. She did not feel that the restrictions imposed in the Stay of Execution Order would be ample enough to deter him from either contacting the victim or from staying away from the Inchelium area, should he begin to drink.

Ms. Kuntz cited Washington State law which, if this offense had been charged in State courts, would have

[18] Letter to Stephen L. Palmberg from Phyllis Grant J.Ed. MHP for Nespelem District, dated 1/12/00 and attached to the Presentence Investigation Report filed with the Trial Court on 1/26/00.

been designated a felony and a stay of execution would not be allowed by the courts. She argued that the Court of Appeals had the discretion to look to the State procedures as guidelines in determining if a stay should be granted or denied.

Counsel for Appellant, Mr. Palmberg, stated that he disagreed that the Appellant was labeled a sexual deviant by the Court and also disagreed that this matter should be equated with a felony offense. He felt that labeling this offense as a felony was inflammatory and should not be considered by the Panel. He also argued that this was a first offense for the Appellant, that he was under the influence of alcohol and drugs at the time of the incident and that he was very remorseful for his actions. Mr. Palmberg also stressed that the conditions imposed in the Stay were very thoughtful and were more than adequate to deter Appellant from violating any of them.[19] Mr. Palmberg argued that the trial judge exercised a great deal of discretion in imposing the conditions and allowing the Appellant to be released pending the outcome of his appeal.

Ms. Kuntz countered that the Judge had indicated at the Stay hearing that he felt that he was not allowed to exercise any discretion in the stay. His interpretation was that a stay was automatic and that he was allowed to impose bond conditions only. Had he been able to exercise his discretion, he would not have allowed a stay and the Appellant would be ordered to serve out his sentence waiting the Court of Appeals decision in his appeal.

IV. DECISION

After deliberating, the Court of Appeals Panel determined that the Court and parties followed reasonable procedures in the Stay hearing and in issuing the Stay of Execution order. That is, (1) the Court correctly determined it is in the discretion of the Court of Appeals to find if there is good cause to deny a stay; (2) it is in the discretion of the Court to set conditions on bail; (3) a party not satisfied with the Order Staying Judgment Pending Appeal may file a motion with the Court of Appeals regarding said order. The Panel herein felt that the conditions imposed by the Court were adequate to deter the Appellant from violating any of the conditions of release from incarceration pending the outcome of his appeal. The motion to lift the Stay is should be denied.

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[19] Conditions include: Posting of a $10,000 bond, either by surety, cash or personal assurance agreement; Contact his attorney every 2 weeks; Make all court appearances concerning this case; Not be cited for any violations of any criminal laws in any jurisdiction; Residence restricted to his sister's abode in Coulee Dam, WA; Must not harass, threaten, intimidate, tamper with, improperly influence, or injure the person or property of witnesses,...related to official proceedings before this court; **Must have not contact with the following persons for any reason....Sonia Zaugg, Juanita Thomas, and both their residences.** (emphasis in document); No alcohol consumption or illegal drug use and no frequenting establishments(s) which serve alcohol as their main commody; Restricted from entering the Inchelium District. *Order Establishing Conditions of Release*, filed 2/24/2000.

The Panel found further that the Clerk of the Court of Appeals should prepare the tape recording of the sentencing hearing for review of the justices prior to the Initial Hearing set for March 17, 2000.

It is so ORDERED.

James GALLAHER Jr., Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP98-014, 3 CTCR 27, 27 ILR 6099

5 CCAR 31

[M. Brent Leonhard, Office of Public Defender, counsel for Appellant.
Leslie Kuntz, Office of Prosecuting Attorney, counsel for Appellee.
Trial Case number 91-14401, 91-14402, 91-14403]

Show Cause Hearing held October 15, 1999. Decided March 7, 2000.
Before Presiding Justice Nelson, Associate Justice Miles and Associate Justice Pascal

NELSON, P. J.

This matter came before the Appellate Panel on October 15, 1999 for Leslie Kuntz, deputy prosecuting attorney for the Colville Confederated Tribes, to show cause why she should not be sanctioned for failing to adequately represent her client on appeal in violation of DR 6-101(A)(2)[20],'

DISCUSSION

Ms. Kuntz wrote the response brief herein and presented oral arguments on July 15, 1999. The most notable feature of her argument, both in her brief and at hearing, was the omission of case law favorable to her client's position.

At hearing, Ms. Kuntz explained it was part of her case strategy not to present case law favorable to her client. When questioned about the lack of reference to such law during oral argument, she stated it was sufficient for her to point out the limitations and deficiencies of the appellant's case law as he has the burden of proof and, in her opinion, he had not met that burden.

Ms. Kuntz's supervisor, David Ward, was present during the Show Cause Hearing and made various comments implying that the Appellate Panel, during the course of its own research, could find appropriate case law, including that in his client's favor.

The panel is not concerned with its finding appropriate case law. It is concerned that the attorneys

[20] DR 6-101(A)(2) - "A lawyer shall not handle a legal matter without preparation adequate under the circumstances." This disciplinary rule has been adopted by the American Bar Association, the bar associations of the several states, and the federal government. It is, in our opinion, the legal equivalent of Rule 19(b) of our Interim Appellate Court Rules. Both rules are applicable in this instance. See CTC 1-2-11, Applicable Law.

appearing before it provide adequate representation for their clients. Not presenting favorable case law on the assumption that the appellate court will find such is not a zealous representation for one's client nor is it acceptable.

In addition, the panel is concerned that the supplemental brief ordered filed by September 5, 1999, was not filed until October 14, 1999, the day before the Show Cause hearing. While Ms. Kuntz filed a Request for Extension of Time in which to file the brief, it was not filed until September 17, 1999, twelve days after the due date. Furthermore, the Request was not copied to the appellant nor had Ms. Kuntz otherwise communicated the Request to him. She stated in the Request that she assumed he would have no objection, which proved not the case.

The inadequate representation, the late filing of the supplemental brief, the late filing of the Request for Extension of Time, and the failure to notify the opposing party of the Request indicate a serious misconception or serious disregard of the manner in which the legal system functions. We find that Ms. Kuntz has not shown sufficient cause to the panel why she should not be sanctioned for failing to adequately represent her client.

SANCTION

An appropriate sanction is dependent on the nature of the offense, the relative experience of the person being sanctioned, and prior offenses committed, if any. Sanctions normally imposed by Supreme Courts of the various jurisdictions within the United States are, in ascending order of severity: censure, reprimand, suspension or disbarment.

Ms. Kuntz has been a member of the Colville Tribal Court Bar since 1996 and a member of the Washington State Bar Association for less than a year.

During her tenure as Deputy Prosecutor for the Colville Confederated Tribes she has been sanctioned as follows:

Roy Stensgar v. Colville Confederated Tribes, AP96-011. Ms. Kuntz, together with Public Defender, Jeffrey Rasmussen, was sanctioned with a fine of $100.00 for "being negligent in their responsibilities to the court" by failing to proceed and participate in the appeal of the case. The Office of the Prosecuting Attorney was also sanctioned a fine of $125.00, presumably for failing to adequately monitor its pending cases on appeal.

The strategy of not presenting case law favorable to its client and attacking as insufficient the case law of the other party was apparently initiated by the Office of the Prosecuting Attorney in *Amundson v. Colville Confederated Tribes*, 4 CCAR 62[, 2 CTCR 68, 25 ILR 6178] (1998). The appellate panel in that case found the brief insufficient and ordered supplemental briefing as "it was felt incumbent on both parties to present all the law, pro and con, on the issue before the Court. at page 62. No disciplinary action was taken.

Ms. Kuntz, representing the Tribes in the matter, had written its initial brief. She was replaced by another attorney prior to the supplemental briefing being filed, but clearly she had sufficient notice that this Court does not approve of the strategy of not presenting case law favorable to one's client.

This is the fourth instance of Ms. Kuntz' falling short in the performance of her professional duties. In none of these matter has her client been noticeably harmed and, therefore, it is our opinion that a sanction of disbarment or suspension not appropriate.

We are concerned, however, with her continuing pattern of performance. It is not acceptable and must be discouraged. Accordingly, we find it appropriate to impose a monetary sanction.

Therefore, it is ordered that a monetary sanction in the amount of five hundred dollars ($500.00) be imposed upon Ms. Kuntz to be paid from her personal funds no later than thirty days following the distribution of this order.

Dustin A. CARSON, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP00-002, 3 CTCR 28, 27 ILR 6154

5 CCAR 33

[Stephen L. Palmberg, Attorney at Law, Grand Coulee WA, counsel for Appellant.
Leslie Kuntz, Office of Prosecuting Attorney, Nespelem WA, counsel for Appellee.
Trial Court Case number 99-22288/22291]

Initial Hearing held March 17, 2000. Decided March 17, 2000.
Before Chief Justice Dupris, Associate Justices Miles and Stewart

DUPRIS, C. J.

This matter came before the Court of Appeals pursuant to an initial hearing which was held on this date. The Appellant appeared through his attorney, Stephen L. Palmberg. The Appellee appeared through his attorney, Leslie Kuntz.

After review of the record, the tape of the sentencing hearing and hearing oral testimony from counsel, the Panel determined that there was insufficient grounds to go forward with this appeal. It was determined that the trial judge was within his discretion to impose sentencing that was within the statutory limits. *Coleman v. CCT*, 2 CCAR 43, 3 CTCR 18. It was also determined that the defendant knew that the trial judge was not bound by any plea agreement between him and Appellee. *Condon v. CCT*, 1 CCAR 70, 1 CTCR 21. The Panel found that there was no remedy that could be imposed that would substantially change the outcome of the Trial Court's decision.

Therefore, it is Ordered that this appeal is dismissed and this matter is remanded to the Trial Court for processing consistent with this Order.

Julian VARGAS, Appellant/Appellee,

vs.

Shannon BOYD, Appellee/Appellant.

Case Number AP98-003, AP98-004, 3 CTCR 29, 27 ILR 6211

5 CCAR 33

[Julian Vargas, Appellant/Appellee, pro se.
Shannon Boyd, Appellee/Appellant, pro se.

[Trial Court case number CV97-17265]

Oral Argument held September 4, 1998. Decided July 18, 2000.
Before Chief Justice Dupris, Justice Fry and Justice Pascal

Fry, J.

SUMMARY

Appeal of jury trial verdict finding that the Appellee was not negligent in hitting Appellant's horse with his truck. Judgment was entered finding that neither party should take as against the other, nor were costs were imposed. Both parties appealed. The Court of Appeals reverses and remands for a new trial.

FULL TEXT

Plaintiff filed a civil complaint on December 9, 1997 claiming that the Defendant damaged her horse, that she and her mother lost wages transporting the horse to the veterinarian, and that she was caused emotional stress due to the horse's condition. She further claims that the land where the accident occurred was "open range," and therefore the Defendant was liable for damages. Plaintiff asked the court to order that the Defendant pay for the cost of the horse, the lost wages for herself and her mother, the cost of transporting the horse, and for the veterinarian bill.

Defendant responded that the land where the accident occurred was not open range, that the animal was not being cared for properly, and had been out of the fenced area several times. The Defendant counter-claimed for damage to his truck.

A jury trial was held on April 9, 1998 with Judge Dennis Nelson as the presiding judge. The Plaintiff presented the factual basis for her claim of damages. The Defendant did not present a factual basis for his claim of damages.

The jury completed a Special Verdict Form. Question No. 1 asked "Was the defendant negligent?" The jury answered by circling the "no."

Question No. 2 asked, "Was the defendant's negligence a proximate cause of cause damage to the plaintiff?" The jury left the question unanswered.

Question No. 3 was "What do you find to be the plaintiff's amount of damages? (Do not consider the issue of contributory negligence, if any, in your findings.)" The jury left the question unanswered.

Question No. 4 asked, "Was the plaintiff also negligent?" The jury left the question unanswered.

Question No. 5 asked, "Was the plaintiff's negligence a proximate cause of injury or damage to the plaintiff? Answer 'yes' or 'no.'" The jury left the question unanswered.

Question No. 6 attempted to allocate fault between the parties, and again the jury left the question unanswered.

The Special Verdict Form was dated April 9, 1998 and signed by the foreman.

The trial judge entered a judgment on April 17, 1998 stating that he did not submit the Defendant's counterclaim because he had not presented evidence of damages, that the jury returned a

verdict that the defendant was not negligent, that each party would take nothing against the other, and that no costs would be imposed on either party.

Shannon Boyd appealed those portions of the judgment, which held that the Defendant was not negligent, and that she would take nothing against the Defendant. She based her appeal on several grounds: irregularity in the proceedings of the court, jury or prosecution, or any order of the Court, or abuse of discretion by which the party was prevented from having a fair trial (CTC § 1-1-282(7)), and that substantial justice has not been done (CTC § 1-1-282(8)). She additionally claims that the Trial Court failed to give a jury instruction on strict liability law and the granting of the jury trial request despite the Defendant making the request less than fourteen days before the trial date in violation of CTC § 2-2-101. She requested a remand for a new trial.

Julian Vargas appealed claiming that he did not receive damages at the jury trial, and time lost and mileage, stress and court costs. In addition, he requested repair of his truck. He claimed Shannon Boyd said she was responsible for her livestock and the damage to his truck. He said at trial that the judge said he could fill out paperwork for damages at the end of the hearing, and when he asked for paperwork, the judge said there was none. He claimed that as an error of the judge.

I. JURISDICTION

This Court has jurisdiction of this case pursuant to Colville Tribal Code (hereinafter CTC).

II. ISSUES ON APPEAL.

1. What is the applicable law in this matter?
2. Was the applicable law applied in this case?

III. DISCUSSION

As applied to the facts in this case, it would appear that Shannon Boyd's horse could be considered livestock under the Colville Tribal Code. There is no definition of livestock in the definition section of the Colville Tribal Code. Black's Law Dictionary defines "livestock" as "domestic animals."[21] Webster's Dictionary includes horses in the definition of livestock.[22] The following laws apply to livestock on the Colville Reservation:

1. The livestock can only be turned out onto the range when it was properly authorized by the Colville Business Council, *See* CTC § 4-11-32, Grazing Seasons[23];

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[21] Black's Law Dictionary, Sixth Edition, 1990, page 935.

[22] Webster's Encyclopedic Unabridged Dictionary, 1996 Edition.

[23] CTC § 4-11-32, Grazing Season
No livestock shall be turned on the open range at the beginning of the grazing season until properly authorized by the Business Council upon the recommendation of the Director. All stock shall be promptly removed from the range at the end of the grazing season.

2. A grazing permit for the livestock needs to be issued by the Business Council on recommendation of the Director, *See* § 4-1-33, Grazing Fees, CTC § 4-11-100, Grazing Permits[24];

3. The Business Council may determine the kind of livestock that may be grazed on range units, *See* CTC § 4-11-74, Kind of Livestock[25];

4. Grazing upon or driving across any individually owned or tribal lands of any livestock without an approved grazing or crossing permit is prohibited, *See* CTC § 4-11-140(a)[26];

5. Allowing livestock to drift and graze range lands without an approved permit is prohibited, *See* CTC § 4-11-140(b)[27];

6. Allowing the grazing of livestock within an area closed to that class of livestock is prohibited, *See* CTC § 4-11-140(c)[28];

7. There are penalties and damages owing for violation of this Chapter, *See* CTC § 4-11-142[29];

8. The violator is given notice of the violation, and must remove the animal, *See* CTC § 4-11-141[30];

9. Livestock trespassing without a permit are subject to impoundment, *See* CTC § 6-9-1[31].

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[24] CTC § 4-11-33, Grazing Fees. (a) The Business Council shall determine the minimum grazing fees for the issuance of grazing permits. Any Indian corporations, Indian associations, or adult tribal members of the Tribes obtaining a permit without competitive bidding as provided by this Chapter, shall be required to pay not less than the minimum rate established by the Business Council in accordance with this Section, for all non-Indian owned livestock which they may be authorized to graze in accordance with the grazing permit issued.

CTC § 4-11-100, Grazing Permits. Unless otherwise provided by this Subchapter, all use of range units for livestock grazing, shall be authorized by a grazing permit issued by the Business Council upon the recommendation of the Director. Unless otherwise provided by the Business Council, each grazing permit shall last for a period of five (5) years and non-members whose permanent residence is not within the boundaries of the Colville Indian Reservation shall not be permitted to graze livestock on the reservation.

[25] CTC § 4-11-74, Kind of Livestock. Upon consideration of the recommendations of the Director, the Business Council may determine the kind of livestock, e.g. cattle, sheep, etc, that may be grazed on range units within the reservation. The kind of livestock shall be subject to the grazing capacity determined in accordance with this Chapter and the conservation and land use requirements of this Chapter.

[26] CTC § 4-11-140, Acts Prohibited on Restricted Lands. The following acts are prohibited under this Chapter: (a) grazing upon or driving across any individually owned lands or any livestock without an approved grazing or crossing permit;

[27] CTC § 4-11-140, Acts Prohibited on Restricted Lands. The following acts are prohibited under this Chapter: (b) unless otherwise provided by this Chapter, allowing livestock to drift and graze rangelands without an approved permit;

[28] CTC § 4-11-140, Acts Prohibited on Restricted Lands. The following acts are prohibited under this Chapter: (c) the grazing of livestock upon rangelands within an area closed to grazing of that class of livestock;

[29] CTC § 4-11-142, Penalties and Damages. This section discusses the amount due the landowner and/or the Tribes, i.e. $2.00 per head per day, damages to property, expenses to Tribe.

[30] CTC § 4-11-141, Notice and Order to Remove. This section deals with when a violation has taken place, written notice is to be served on the violator. The violator is instructed to remove the livestock.

[31] 6-0-1 Impoundment-Generally. Livestock negligently or willfully permitted to trespass without lease or permit or which otherwise violates any provision of this Code or any other resolution or ordinance of the Colville Business Council concerning control and regulation of livestock, shall be subject to impoundment as hereinafter provided. Such livestock may be impounded at any convenient place on the Reservation by either the person owning or leasing the premises where such livestock are found, the Superintendent of the Colville Indian Agency or his representative, or any tribal law enforcement official. Within 24 hours after impoundment, the person impounding the livestock shall register the same with the Tribal Court.

The Colville Tribal Code requirements pertaining to livestock grazing on the Colville Indian Reservation are clear. Livestock grazing is regulated thoroughly by the Colville Confederated Tribes. It would appear that the Business Council has considered and legislated on the issue of livestock traveling where it should not be traveling. It appears the factual situation of this case may be one of livestock grazing.

The Tribes have not chosen to address the question in terms of open range. The only open range provision in the CTC pertain to wild horses, and the horse at issue is not a wild horse (unbranded and unclaimed). The only evidence presented regarding open range was the testimony of Jim Orwin, from the Bureau of Indian Affairs. Mr. Orwin stated the Resevation was all open range and had been since its establishment. There has been no law provided to substantiate this claim. Rather, as shown above, the Tribes has extensive laws that illustrate the contrary.

In Jury Instruction Number Seven, the Trial Court provided the jury in this case with its understanding of the applicable law, as follows:

> No. 7
>
> VIOLATION OF STATUTE, ORDINANCE OR ADMINISTRATIVE RULE AS EVIDENCE OF NEGLIGENCE
>
> The violation, if any, of open range policies is not necessarily negligence, but may be considered b you as evidence in determining negligence.
>
> RCWA [Revised Code of Washington Annotated] 16.24.010 - Restricted Areas- Range Areas
> The county legislative authority of any county of this state shall have the power to designate by an order made and published, as provided in RCW 16.24.030, certain territory as stock restricted area within such county in which it shall be unlawful to permit livestock of any kind to run at large. No territory so designated shall be less than two square miles in area. RCW 16.24.010 through 16.24.065 shall not affect counties having adopted cattle, horses, mules or donkeys to run at large. Provided, that the county legislative authority may designate areas where is [sic] shall be unlawful to permit any livestock other than cattle to run at large.
>
> RCWA 16.24.060 - Road Signs in Range Areas
> At the point where a public road enters a range area, and at such other points thereon within such area as the county legislative authority shall designate, there shall be erected a road sign bearing the words: "RANGE AREA. WATCH OUT FOR LIVESTOCK."
>
> RCWA 16.24.065 - Stock in Restricted Areas
> No person owning or in control of any livestock shall willfully or negligently allow such livestock to run at large in any stock restricted area or to wander or stray upon the right-of-way of any public highway lying within a stock restricted area when not in the charge of some person.
>
> **The Colville Confederated Tribes have adopted the above-referenced laws.** (Emphasis added)

This Court was unable to locate any provision of the Colville Tribal Code which reflected an adoption of the Washington State laws as cited in Jury Instruction Number Seven in substitution of Colville Tribal Code Chapter

4-11 on Range Management. This Court determines that erroneous law was provided to the jurors at the time of trial. Since the jury was not able to apply the appropriate law to the facts of this case, this Court must reverse the decision of the lower court and remand this matter for a retrial.

V. ORDER

It is so ordered that the Jury Verdict and Judgement herein are hereby reversed, and this matter is remanded to the Trial Court for a retrial.

In Re A
Gerald ANDREWS, Appellant,
vs.
COLVILLE CONFEDERATED TRIBES, Appellee,
Leann SEYMOUR, Appellee,
A. J. A., J. L. A., M. A., Minors/Appellees.
Case No. AP00-005, 3 CTCR 30
5 CCAR 38

[Christine Ives, Wynne Law Firm, counsel for Appellant.
Joseph Caldwell, Office of Prosecuting Attorney, counsel for CCT.
James Edmonds, Office of Legal Services, counsel for minors.
Leann Seymour, pro se.
Trial case number J99-18058, J99-18059, J99-18060]

Argued October 20, 2000. Decided October 20, 2000.
Before Chief Justice Dupris, Associate Justice Nelson, Associate Justice Pascal
DUPRIS, C.J.

This matter came before the Court of Appeals pursuant to a Show Cause hearing being scheduled on this date. Christine Ives, counsel for Appellant, and James Edmonds, counsel for the minors, were present. Joe Caldwell, counsel for the Tribes, was not present.

The Show Cause hearing was convened pursuant to a failure to appear for hearing scheduled for August 11, 2000 by counsel for the Appellant and the filing of a document signed by a staff person who was not a member of the Colville Tribal Court Bar nor the counsel of record.

The Court heard comments from Ms. Ives concerning the circumstances which led to her failure to appear and the filing of the Motion. The Court determined that though the circumstances were such that had the proper paperwork been filed, this Show Cause hearing would not have been necessary, the Court was concerned that Ms. Ives did have a responsibility to follow through to make sure that her case had been properly attended to.

1. Ms. Ives had assumed that an affidavit had been filed which outlined her reasons for the failure to appear. The Court had no record of this affidavit and Ms. Ives did not contact the Court clerk nor did she request to inspect the file to see if the affidavit was there.

2. Ms. Ives had directed her staff person to sign on her behalf. The Court advised that a better procedure would have been for a member of the Bar to have signed and/or appeared for her and that she should look into

having a backup system, should this issue every come up again.

3. Ms. Ives' failure to appear and the submission of a document not signed by the attorney of record are sufficient to warrant a finding of contempt of Court.

Now, therefore

It is ORDERED that Ms. Ives will be censured by the Court of Appeals and this censure will remain in her file with the Court of Appeals for a period of one year. She may cause the censure to be removed at the end of the year by complying with the following conditions:

1. Ms. Ives is to submit a detailed Affidavit which explains the circumstances which led to her failure to appear for the hearing scheduled for August 11, 2000 and the filing of a document signed by someone other than her.

2. Ms. Ives is not to have any further disciplinary actions of any type before the Court of Appeals for the one year period.

3. If the Affidavit is submitted and no contempt violations are incurred, Ms. Ives may petition the Court of Appeals to have her censure removed from her file.

John MANUEL, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP98-006, 3 CTCR 31, 28 ILR 6077

5 CCAR 39

[M. Brent Leonhard, Office of the Public Defender, counsel for Appellant.
Lin Sonnenberg, Office of the Prosecuting Attorney, counsel for Appellee.
Trial case number 97-20341]

Argued May 1, 1998. Decided January 19, 2001.
Before Chief Justice Dupris, Associate Justice Bonga and Associate Justice Chenois

BONGA, J.

HISTORY

About 5:00 a.m. on a Saturday in October 1997, Tribal Police officers responded to a complaint of battery in HUD Housing, Nespelem, Washington. The officers contacted the victim, Amelia Tatshama, who had fled to a house across the street from her residence. She was visibly upset and crying. She was observed to have a swollen lip, dried blood and stretched clothing. She was also holding her right arm and lower jawbone.

She stated that the Appellant, John Manuel, had been consuming alcohol and when they arrived home, he had called her names and beat her. She then fled the home and called CTPS. She stated that the Appellant was still in the residence. An inquiry prior to her transport to the hospital revealed that the Appellant had a loaded rifle in the home, which he kept next to his bed.

The officers attempted to gain entry to the home, but there was no response. Near a window of a bedroom both officers heard snoring. The officers again contacted the victim. They obtained information that the residence was being rented by both the parties, each paying an equal share of the rent. The victim authorized the officers to

enter the residence to arrest the Appellant. Emergency Services arrived and transported the victim to the local hospital for x-rays of her injuries.

When the officers approached the residence, they noted that there was now a light on in the window where they had previously heard snoring. They knocked on the front door and announced that they were police officers several times. They received no response. The officers then entered the unlocked residence, located the Appellant, and arrested him for Battery and Resisting Arrest.

Appellant filed a Motion to Suppress Evidence on January 29, 1998 alleging that the officers made an illegal entry into his home and made an unlawful arrest. Appellant requested that all evidence of his Resisting Arrest violation be suppressed. Appellant alleged that the officers could not enter his home without his consent as he was present and had refused to open the door.

On May 1, 1998, the Appellant plead guilty to the offense of Battery and was sentenced. The guilty plea was conditional on a ruling from the Court of Appeals on the Motion to Suppress.

Appellant filed his appeal on May 1, 1998. Briefs were submitted and oral arguments were heard November 20, 1998. The Appellant was represented in this matter by Brent Leonhard, Office of the Public Defender. The Tribes were represented by Lin Sonnenberg, Office of the Prosecuting Attorney.

BONGA, J.

ISSUE #1

CAN A THIRD PARTY GIVE CONSENT TO AUTHORITIES WITHOUT A WARRANT TO CONDUCT A VALID SEARCH OF A PLACE?

Prosecution may justify a warrantless search of a place by proof of voluntary consent by a third party who possesses common authority over or other sufficient relationship to the premises sought to be inspected.

> "the consent of one who possess common authority over premises or effects is valid as against the *absent*, nonconsenting (sic) person with whom that authority is shared, *U.S. v. Matlock*, 415 U.S. 164, 170, 94 S. Ct. 988 (1974)

In the case at bar the facts indicate that the victim and Appellant resided together in a spousal-type relationship and both shared costs for the home. Neither party objected to those facts or additional factors supporting the spousal-type relationship between the parties.

> "...when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by defendant, but may show that permission to search was obtained from a 3rd party who possessed common authority over...the premises...to be inspected." Id. At 250.

Under the rule established by *Matlock* the government/prosecution in this case made the requisite showing that the victim had common authority over the house involved. Therefore, one can easily conclude that the victim had authority to give consent to law enforcement to validate entry into the house for arrest of the Appellant for an alleged criminal act of abuse.

ISSUE #2

IS A WARRANTLESS ENTRY TO ARREST A SUSPECT CONSENTED TO BY A THIRD PARTY NOT PRESENT AUTHORIZED IF THE SUBJECT OF THE ARREST IS PRESENT AND REFUSES TO

ANSWER THE DOOR?

The rule is that warrantless entry by authorities is valid if the entry was consented to by a party not present but who possessed common authority over the premises.

In this case the Appellant was present in the house, but that fact was unclear to the officers at the time of entry. The Appellant had the ability to object to entry by the officers, but chose not to by not answering the door.

The officers had a valid consent to enter the house from the victim and did so. As a result of the valid entry they found the Appellant and arrested him.

Appellant argues that he is protected by the Fourth Amendment of the U. S. Constitution which prohibits unreasonable searches and seizures. He goes on to cite the Washington State Constitution which provides that "No person shall be disturbed in his private affairs or his home invaded, without authority of law."[32] A quote from *Illinois v. Rodriguez*, 497 U.S. 177, 110 S.Ct. 2793 (1990) is appropriate here:

> What Rodriguez is assured by the trial right of the exclusionary rules, where it applies, is that no evidence seized in violation of the Fourth Amendment will be introduced at trial unless he consents. What he is assured by the Fourth Amendment itself, however, is not that no government search of his house will occur unless he consents, but that no such search will occur that is "unreasonable." U. S. Constitution, Amendment 4...
>
> The fundamental objective that alone validates all unconsented government searches is, of course, the seizure of persons who have committed or are about to commit crimes, or of evidence related to crimes.

In this case the officers had evidence of probable cause to arrest the Appellant and the officers had consent to search the house for him.

CONCLUSION

The Panel finds that the Trial Court did not err in denying Appellant's Motion to Suppress Evidence and Dismiss the case and affirms the March 16, 1998 Order in this matter. This case is remanded to the Trial Court for execution of the Judgment and Sentence of May 1, 1998.

It is SO ORDERED.

[32] Washington State Constitution, Article 1, Section 7.

Joseph SWEOWAT, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee,

Case Number AP97-023, 3 CTCR 32

5 CCAR 42

[M. Brent Leonhard, Office of Public Defender, spokesperson for Appellant.

Frank S. LaFountaine, Office of Prosecuting Attorney, spokesman for Appellee.

Trial Court Case Number 95-18449, 95-18450]

Argued May 15, 1998. Decided January 27, 2001.

Before Chief Justice Dupris, Associate Justice McGeoghegan and Associate Justice Stewart

McGEOGHEGAN, J.

This matter came before the Court of Appeals on May 15, 1998 for Oral Arguments. The Appellant was represented by M. Brent Leonhard and the Appellee was represented by Mr. Frank LaFontaine, Deputy Prosecutor for the Colville Confederated Tribes.

INTRODUCTION

The appellant was charged with the offenses of Possession of Drug Paraphernalia and Escape. At sentencing, the Court accepted the appellant counsel's Motion for a Deferred Sentence and accepted the appellant's guilty pleas to Possession of Drug Paraphernalia and Escape. The Court ordered the appellant's sentence on both charges deferred for a period of one year. The defendant failed to appear for his Pre-Dismissal Hearing. Following a Show Cause Hearing the Court revoked the appellant's deferred sentence. The Appellant was sentenced to the following:

1. The defendant shall pay a fine in the amount of $4500.00, with $3500.00 suspended conditionally, the unsuspended $1000.00 due and payable immediately.
2. The defendant shall serve 360 days in jail, with 300 days suspended conditionally. Defendant is credited for 22 days already served. The remaining 38 days shall begin immediately.
3. The defendant shall pay $25.00 court costs due and payable immediately.

Conditions of Suspension

1. The defendant shall file a drug and alcohol substance abuse evaluation within 60 days from release from jail and follow the recommended treatment for one year. The defendant shall also file with the Court his quarterly progress reports and a final progress report to be filed no later than the pre-dismissal hearing.
2. The defendant shall not commit any further criminal offenses in any jurisdiction for a period of one (1) year, i.e., until October 2, 1998. If the defendant is cited for any criminal offenses before any court he may be brought before this court to show cause why he should not be found in violation of this court order.
3. The defendant shall notify the Court of any mailing and/or physical address change for one year, i.e., until October 2, 1998.
4. Within 24 hours of release from jail the defendant shall immediately contact the Colville Confederated Tribes Probation and Parole Department for supervision of compliance in this case and vocational rehabilitation of the defendant.
5. The defendant shall fully comply with all orders of the court.[33]

[33] Judgment and Sentence, 95-18449, 95-18450, 10-28-97.

The Judgment and Sentence set a Pre-Dismissal Hearing for September 14, 1998. The sentencing Judge did not issue formal written findings and the audio record of the sentencing proceedings are not available for review.

On October 2, 1997, the Appellant filed a Notice of Appeal, and the Appellant filed a Motion for Stay for the execution of the Judgment and Sentence. On October 3, 1997, Judge Eldemar granted the appellant's motion and ordered the Judgment and Sentence stayed upon the appellant posting a $1,025.99 bond until a final order is ordered by the Tribal Court of Appeals.

ISSUES ON APPEAL

The issues before the Appellate Panel are: 1) Whether a Sentencing Court Judge is required to express findings of fact in writing to support or justify a criminal sentence when the sentence is within the statutory limits. 2) Whether the Court below abused its discretion in sentencing the Appellant to the maximum sentence within statutory limits. 3) Whether the Court arbitrarily and capriciously sentenced the Appellant to the maximum allowed under the limits of the statute. 4) Whether the Court used erroneous information at the time of sentencing the Appellant.

DISCUSSION

At the time of the appellant's sentencing, the former Tribal Code section dealing with sentencing CTC 2.6.07, applied and reads:

> "CTC 2.6.07 Sentencing
>
> A sentence shall be imposed at once or, in the discretion of the judge, at a later date not to exceed 60 days from the day of judgment. The judge may suspend all or any part of the fine or sentence imposed by him upon a person found guilty of violating any of the provisions of this Code as provided in section 3-1-263. Pending sentence, the judge may commit the defendant to jail or continue the bail. Before imposing sentence, the judge shall allow a spokesman or the defendant to speak on behalf of the defendant and to present any information which would help the judge in setting the punishment. Amended 08/17/89, Resolution 1989-612"

The language of the last sentence of the statute clearly requires the Court to allow a spokesman or the defendant to present any information to help the Judge in setting the punishment and sentence for the defendant. The implication is that the Court uses discretion in sentencing the defendant. Where there is a claim by the defendant that the Court abused its discretion in sentencing, the reviewing court must look to the record to determine whether the Court abused its discretion. Where the record shows that the Court properly evaluated the facts and information presented at the time of sentencing, this Court will not disturb the lower Court's sentence. The record must show by clear and convincing evidence that the Judge did abuse his or her discretion in sentencing the defendant. Where there is no substantial record, either written or oral, fairness dictates that the defendant's sentence must be vacated and the case remanded to the lower Court for re-sentencing. A claim of abuse of discretion requires us to freely review the facts in the record of the Court below.

Although Federal case law and the Federal Rules of Criminal Procedure are not authority over the Colville Tribal Court System, they may be analyzed for advisory value.

In *United States v. Barnhart*, 980 F.2d 219 (3rd Cir. 1992), Judge Garth, speaking for the Third Circuit Court of Appeals, said the following:

> "Moreover, under the pre-Sentencing Guidelines law, a district court is not obligated to give its reasons for imposing a specific sentence, *United States v. Felder*, 744 F.2d 18, 20 (3rd Cir. 1984) (citing *United States v. Del Piana*, 593 F.2d 539, 540 (3rd Cir.), cert. denied, 442 U.S. 944, 99 S.Ct. 2889, 61 L.Ed. 2d (1979), although a district court judge who sentences a defendant under

> the Sentencing Guidelines must state in open court the reasons for imposition of a particular sentence. *United States v. Georgiadis*, 933 F.2d 1219, 1222-23 (3rd Cir. 1991)." *U.S. v. Barnhart*, 980 F.2d at 225.

In *United States. v. Georgiadis*, 933 F.2d 1219 (3rd Cir. 1991), the Third Circuit Federal Court of Appeals speaking through Judge Nygaard stated the following about sentencing statements at sentencing hearings:

> "We reject Georgiadis' contentions. We hold instead that a sentencing court does not commit reversible error under the Sentencing Reform Act by failing to state expressly on the record that it has considered and exercised discretion when refusing a defendant's requested downward departure from the Guidelines.
>
> The statute controlling judicial sentencing statements, 18 U.S.C. §3553 [footnote omitted], does not require the statements Georgiadis seeks. Section 3553(c) defines the only statements a district court must make during sentencing. The section requires that at the time of sentencing a judge shall "state in open court the reasons for its imposition of the particular sentence." 18 U.S.C. §3553(c). [Footnote omitted] This general requirement is satisfied when a district court indicates the applicable Guideline range, and how it was chosen." *United States v. Georgiadis*. 933 F.2d at 1222-23.

It is clear from *U.S. v. Georgiadis*, 933 F.2d 1219 (1991) that the federal Sentencing Reform Act does not require that district court judges make formal written findings of fact at sentencing hearings but only need to make statements on the record required by 18 U.S.C. §3553. These cases may be distinguished in that the Colville Tribal Trial Court is not bound by Sentencing Guidelines, and exercises more discretion in sentencing under tribal laws.

In *United States v. Morgan*, 942 F.2nd 243 (4th Cir. 1991), the Fourth Circuit Court of Appeals held that where the defendant challenged the accuracy of information contained in the pre-sentence report, the district court is required by Federal Rules of Criminal Procedure 32(c)(3) (D) to make a finding with respect to each objection a defendant raises to facts contained in a presentence report before it may rely on the disputed fact in sentencing. The Court of Appeals said that required finding by the district court may be made in several ways. The district court may separately recite its finding as to each controverted matter. Alternatively, the district court may expressly adopt the recommended findings contained in the presentence report.

Apparently such findings are made on record as there was no mention of any requirement for formal written findings of fact.

Further, the United States Supreme Court, in *Dorszynski v. United States*, held that "once it is determined that a sentence is within the limits set forth in the statute under which it is imposed, appellate review is at end."[34] In this there is no need for formal written findings of fact to support the appellant's sentence where the Sentencing Court Judge sentenced the appellant to a sentence within the statutory limits of the penalty for Possession of Drug Paraphernalia and Escape.

It is clear from the above federal case law that sentencing court judges do not need to make formal written findings of fact to support their sentences of criminal defendants in federal courts because of the statutory limits placed on their sentences in federal sentencing guidelines, which are mandatory.

Appellee argues that *Colville Confederated Tribes v. David St. Peter*[35] clearly holds the Sentencing Judge is not required to make formal findings of fact to support or justify a criminal sentence. In *St. Peter* we stated in

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[34] *Dorszynski v. United States*, 418 U.S. 424 , 432, 94 S. Ct. 3042 (1974)

[35] 2 CCAR 2, 14, AP93-15400/507/508/509/510, 1 CTCR 75, 20 ILR 6108

dicta the sentencing judge was not required to state specific reasons for the sentences imposed[36]. Dicta does not constitute a ruling of the Court. In *St. Peter* the Court was presented with the issue of due process in the particular sentence of the Defendant/Appellant. We examined the trial record and found sufficient indicia on record to support the trial judge's sentence. *Sam* is not inapposite. The ruling in *Sam* supports the proposition that a sentencing judge has discretion , within the statutory limits of what punishment may be imposed.[37]

In *Sylvester Sam v. Colville Confederated Tribes*, AP93-15379, AP93-15380, AP93-15414, AP93-15415, 2 CTCR 04, 2 CCAR 37, 21 ILR 6040 (1994), we said:

> "A criminal sentence imposed within statutory limits is generally not reviewable by an appellate court. Id. at 6613 (citations omitted). A particular sentence imposed within the limitations imposed by statute and the Constitution is within the discretion of the court.

To the extent that the Appellee argues that no reasoning is required in the record, we disagree and thus modify the holdings in *St. Peter* and *Sam* to the better and more prudent ruling that absent a statute mandating a specific punishment, findings and conclusions must be expressed in the record, either orally or in writing, which reflect the Court's discretion in sentencing a defendant. When a Court deviates from a stipulated recommended sentencing and the defendant requests written findings at sentencing, the Court must express on the record its reason for denying such a request. In this way defendants can rely on their Courts having in place methods and procedures which establish and preserve fairness and reliability while meeting the expectations of the community subject to this judicial system.

CONCLUSION AND ORDER

Absent mandatory sentencing by statute for a particular crime, the Court uses its discretion to determine appropriate punishment for a defendant. Discretion requires the Court to analyze and evaluate favorable and unfavorable information about the defendant and announce findings on the record which justify the punishment imposed upon the defendant by the Court. Where the record below fails to provide such findings, either orally or in writing, the Appellate Court is unable to determine whether the defendant's sentence was imposed using erroneous information or imposed arbitrarily and capriciously. The defendant's sentence must be vacated. This case is remanded to the Court below for re-sentencing under the guidance of this opinion.

IT IS HEREBY ORDERED.

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[36] Id. at page 14.

[37] *Sam v. CCT*, 2 CCAR 37, 42, AP93-15379/380/414/415, 2 CTCR 04, 20 ILR 6108

In Re L. S.-L. and R. S.-L., Minors/Appellants,

vs.

Colville Confederated Tribes, Eugene Sanchez and L. J., Appellees.

Case Number AP00-004.3 CTCR 33, 28 ILR 6109

5 CCAR 46

[Wayne Svaren, Attorney at Law, Grand Coulee WA, represented Minors/Appellants.
Cynthia Jordan, Office of Prosecuting Attorney, represented Appellee Colville Tribes.
Eugene Sanchez, father/Appellee, pro se.
James Edmonds, Office of Legal Services, represented Appellee mother L. J.
Juvenile Court case number CV-MI-2000-20117]

Argued January 19, 2001. Decided March 5, 2001.
Before Chief Justice Dupris, Justice Bonga and Justice Chenois.

SUMMARY

On May 1, 2000, L. S.-L. and R. S.-L., minor children, were placed in protective custody by Colville Tribal Children and Family Services (CFS). A Petition for Temporary Custody was subsequently filed and a hearing held before the Honorable Frank S. LaFountaine. Temporary custody was granted to CFS. The mother of the minor children then filed an Affidavit of Prejudice against Judge LaFountaine. Counsel for Appellants filed a response in opposition of the Affidavit of Prejudice. An order was issued from the Court granting the Affidavit of Prejudice. Judge LaFountaine considered the Affidavit against himself and ruled on it. Appellants filed the Notice of Appeal, alleging the Affidavit of Prejudice should have been before a different judge of the Court and that Judge LaFountaine was in error for ruling on it himself. An adjudicatory hearing was held and the matter was dismissed because of lack of notice to some of the parties. Appellants recognize that the case in the lower court has been dismissed, but argued the issue being appealed is of such importance that it should not be considered moot. Briefs were filed and oral arguments were held.

DUPRIS, J.

ISSUES

1. MAY THE COURT OF APPEALS CONSIDER AN ISSUE WHEN THE UNDERLYING MATTER IN THE LOWER COURT HAS BEEN DISMISSED?
2. WHEN AN AFFIDAVIT OF PREJUDICE IS FILED, MAY THE AFFIDAVITED JUDGE REVIEW AND MAKE A RULING ON THE AFFIDAVIT?

DISCUSSION

First Issue

An issue of first impression is whether the issue appealed survives the dismissal of the action at the trial level. Specifically we consider the issue of which judge should rule on an Affidavit of Prejudice. The parties were in general agreement on this issue. They argued that even though the underlying case had been dismissed, this issue should be reviewed by the Court of Appeals. Appellant asked this Court to consider, as guidance, the test in

Philadelphia II v. Gregoire[38] to establish a test for mootness. The criteria in *Philadelphia* includes:

1. Public or private nature of the question presented;
2. The desirability of an authoritative determination which will provide future guidance to public officers;
3. The likelihood that the question will recur; and
4. The likelihood that the question will never be decided by a court due to the short-lived nature of the case. *Id* at 712.

We are persuaded that the *Philadelphia* criteria serves the interests of justice for our Court, and will apply them to the issue at hand.

The instant case by its very nature is a very private case, *i.e.* it involves the welfare of minors in a dependency proceeding. The issue of whether a judge can rule on an Affidavit of Prejudice is a very public concern, however, in that it may affect the ability to file an Affidavit of Prejudice of any number of individuals who appear before the Court in all types of cases, not just in juvenile cases.

This issue is also a case of first impression. It is such an issue the Court of Appeals is responsible to provide an authoritative determination which will guide the future conduct of all judges at the trial court level, both in the adult and children's courts.

The Court recognizes that the issue of Affidavits of Prejudice are very likely to be filed in the future. Conflicts, whether real or imagined, occur in courts everywhere. It is also recognized that in the instant case, it was very short-lived. The case was dismissed prior to any ruling that might have been made by the Court of Appeals.

Based on the foregoing, we now hold that the issue of who may rule on an Affidavit of Prejudice is not moot, and we will decide the issue.

Second Issue

The second issue goes to the authority of the legislative body of the Tribes, the Colville Business Council, to enact a provision specifically directing the Court on who may rule on an Affidavit of Prejudice.[39] The Trial Court first found that it is a long-standing practice of the Trial Court judges to rule on Affidavits of Prejudice against themselves, finding the complained against judge was in the best position to make the decision on the Affidavit. *See* Trial Court's Order Dismissing With Prejudice, entered June 13, 2000 and signed July 5, 2000, at pp 2-3. A long-standing practice does not rise to the level of a law when the law is plain on its face. There is no ambiguity in the wording of the statute in which the Trial Court may exercise discretion in its interpretation.[40] The Trial Court has not offered any reasoning, nor have we found any, to dispute this rule of law.

The Trial Court also based its decision on a finding that to allow one judge to rule on another's Affidavit of

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[38] 128 Wn.2d 707, 712 (1996)

[39] At Oral Arguments the parties were asked to comment on the issue of whether or not the Colville Business Council violated separation of powers by enacting a law directing the Court on who could rule on the Affidavit of Prejudice. It appears the older statute left that decision up to the judge against whom the Affidavit was filed. *See* CTC 1.5.04, 1979 version. Though the issue had not been briefed, nor could Counsel supply any caselaw, it was generally felt that the Business Council could change the law on the Affidavit of Prejudice and it was not a violation of the separation of powers doctrine. Absent a fully developed argument to the contrary, this Court agrees.

[40] *See*, CTC Section 1-1-7(b) Principles of Construction:
The following principles of construction will apply to all of the Law and Order Code unless a different construction is obviously intended: ....(b) Words shall be given their plain meaning and technical words shall be given their usually understood meaning where no other meaning where no other meaning is specified.

Prejudice could, at some point, make such decisions rise to the level of a matter of law. In other words, asserts the Trial Court, once Judge A rules on Judge B's Affidavit based on fact pattern C, Judge A could be bound to rule on all fact patterns similar to C in the same manner, thereby become a rule of law.

We disagree with the Trial Court's conclusions that *stare decisis* would dictate granting an Affidavit of Prejudice against a judge in similar fact patterns. Every Affidavit of Prejudice must be reviewed particularly for the individual case and individual parties. The reviewing judge is not bound to automatically grant the Affidavit, but may make an exhaustive inquiry into the nature of the Affidavit. *See Stensgar v. CCT* and *St. Peter v. CCT*, 1 CCAR 73, at 74 (1993). Each reason will, by its very nature, be unique to each party filing the Affidavit, dealing with the party's relationship with the Judge.

It is very clear that the language in the Affidavit of Prejudice section[41] directs that a judge other than the affidavited judge should make the ruling on the motion. The judge in this case reviewed the Affidavit of Prejudice and made a ruling on it. We hold that this was in error. This ruling will not impact the instant case because it is closed at the trial level. The impact is prospective. Based on the foregoing we grant the appeal and REVERSE the Trial Court's holding.

IT IS SO ORDERED.

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[41] 1-1-143 Disqualification of Judge. Any party to any legal proceeding hereunder, including trials and appeals, may accomplish a change of assignment of his case from one judge to another upon filing an Affidavit of Prejudice with the Court, giving satisfactory reasons for the change. The Affidavit shall be in written form and must be filed with the Court before any trial action whatever has been taken by the initial judge. The initial judge shall refer the affidavit to another judge for decision.

Such an order of the Trial Court may be appealed immediately under the procedures established in the Subchapter on Appellate Proceedings of this Chapter, and all further actions in the case will be stayed pending outcome of the appeal. Only one such change will be allowed. Such an order of the Appellate Court shall not be appealable.

Shawn NORWEST, Appellant,

vs.

Shannon EDWARDS, Appellee.

Case No. AP01-001, 3 CTCR 34, 28 ILR 6078

5 CCAR 49

[Shawn Norwest, Appellant, pro se.

Shannon Edwards, Appellee, pro se.

Trial Court number CV-CU-1999-19159]

Initial hearing March 16, 2001. Decided March 16, 2001.

Before Presiding Justice Earl McGeoghegan, Justice David Bonga, Justice Conrad Pascal

McGeoghegan, J.

This matter came before the Court of Appeals pursuant to a Notice of Appeal being filed by Appellant on February 23, 2001 and an Initial Hearing being scheduled for this date. Appellant Shawn Norwest appeared in person and without counsel. Appellee Shannon Edwards appeared in person and without counsel.

The Court, after reviewing the record and talking with the parties, determined that the trial court had sufficient evidence before it to make a reasoned decision on the Motion for Temporary Custody which was filed on February 14, 2001. The Court further determined that there were no facts presented to justify overturning his decision.

The Court also found that there were no exigent circumstances presented to allow the Court of Appeals to go forward with the Appeal as filed. Based on *Inchelium Water District v. Williamson*, 1 CCAR 68, 1 CTCR 68 (04-21-1993), the Court can only hear appeals "from final judgments, sentences, and other final orders of the Trial Court." The February 14, 2001 order is not a final order in this case.

Based on the foregoing, the Court declines to hear this appeal at this time.

It is So Ordered.

Trent HARRIS and Clara V. HARRIS, Appellants,

vs.

COLVILLE TRIBAL CREDIT, Appellee.

Case Number AP01-003, 3 CTCR 35, 28 ILR 6183

5 CCAR 49

[Dan Gargan, Wynne Law Firm, counsel for the Appellants.

Jill Conrad, Dorsey & Whitney, counsel for Appellees.

Civil case number CTC99-20929]

Decided August 2, 2001.

Before Presiding Justice Nelson, Justice Bonga and Justice Pascal

Nelson, PJ

This appeal is based upon an Order Denying the cross motions of the parties for summary judgment. The trial court judge denied both motions. Trent Harris and Clara V. Harris, appellants, appealed the denial of their motions on the grounds that the statute of limitations was not applicable to this action. The appellee, Colville Tribal Credit, has moved to dismiss the appeal on the grounds that a denial of a motion for summary judgment is not a final judgment and the grounds for appeal were not raised at the trial court and are not stated with particularity.

Appeals may be heard only from final judgments, sentences, and other final orders of the trial court. *Williamson v. IWD*, AP92-CV91-11199, 1 CCAR 68, 1 CTCR 68. A summary judgment is rendered when the trial court determines that its decision must be the same regardless of which party's version of the facts is accepted and that the moving party is entitled to judgment as a matter of law.

When a motion for summary judgment is denied, questions of fact remain in dispute and the case moves forward to the trial phase. An Order Denying a Motion for Summary Judgment is not a final order and is not ripe for appeal. Id. *Williamson*.

Therefore, It is ORDERED that the appeal in this matter is DISMISSED and the matter is remanded to the trial court for disposition.

It is Further Ordered that the hearing set before this Court at 10:00 a.m., August 17, 2001, is stricken from the calendar.

Lisa A. ORTIZ, Appellant,

vs.

Mathew E. PAKOOTAS, Appellee.

Case Number AP01-007, 3 CTCR 36, 28 ILR 6183

5 CCAR 50

[Appellant appeared pro se.

Appellee appeared pro se.

Trial Court case number CV-DI-1999-19034]

Argued September 14, 2001. Decided September 17, 2001.

Before Chief Justice Dupris, Justice Fry and Justice Stewart

Dupris, CJ

This matter came before this Court for an Initial Hearing today on the Appellant, Lisa Ortiz's interlocutory appeal of the Trial Court's Order denying the Appellant's request to change judges. Both parties were present in person and without legal representation.

The Court explained to the parties that the only issue before it was whether or not the Trial Court Judge, Nadene Naff, erred in denying the Appellant's request to change the judge in the underlying case herein. The Appellant also asked this Court to rule on the issue of temporary custody as decided by Chief Judge Steve Aycock on August 3, 2001. We find that the issue of temporary custody is not properly before us in that a final order has not been issued, and we will not enter an order regarding the custody issue.

After a review of the Trial Court's record, and after reviewing the arguments of the parties and the applicable law, we find:

1. The Appellant did allege at the trial level she was treated unfairly by Judge Aycock in the case herein.

2. The Appellant did allege at the trial level she was not given adequate notice from Judge Aycock for a hearing or hearings.

3. Judge Naff did not may any specific findings regarding the allegations of unfair treatment and lack of notice in her decision to deny the Appellant's request to change judges.

4. Colville Tribal Code, section 1-1-143 provides for an immediate appeal on the issue of changing judges at the trial level.

5. Minimum due process indicates the Appellant has alleged sufficient cause for the Trial Court to make an inquiry into the nature of the alleged unfair treatment and lack of notice alleged by Appellant, but not inquiry was made.

Based on the foregoing we hold that the Order Denying Motion to Recuse Judge entered in the Trial Court on August 22, 2001, is VACATED and this matter REMANDED to the Trial Court to allow Judge Nadene Naff to make a specific inquiry into the facts alleged to support the Appellant's claim of unfair treatment and lack of notice before she enters an order on the Motion to Recuse. Such an inquiry may be made either by accepting sworn affidavits on the issues or by having a hearing on the motion. Said decision shall be made no later than September 21, 2001 by 4:00 p.m.

It is So Ordered this 14th day of September, 2001.

James H. GALLAHER Jr., Petitioner,

vs.

Officer ANDERSON, Officer EVANS, Officer ORR,
and COLVILLE TRIBAL POLICE SERVICES, Respondents.

Case Number AP01-005, 3 CTCR 37, 29 ILR 6001

5 CCAR 51

[Petitioner was pro se.

James R. Bellis, Office of Reservation Attorney, appeared for Respondents.

Trial Court case number CV-OC-2000-20127]

Argued September 14, 2001. Decided September 20, 2001.

Before Chief Justice Dupris, Justice Nelson and Justice McGeoghegan

DUPRIS, CJ

This matter came before the Court of Appeals pursuant to a filing of a Petition for Writ of Mandamus by Petitioner Gallaher on August 9, 2001. An Initial Hearing was held on September 14, 2001. Petitioner was not present and was not represented by counsel. Attempts to contact the Federal Correctional Facility for telephone conferencing were unsuccessful. Respondents appeared through their counsel, James Bellis, Office of Reservation Attorney.

After hearing arguments of counsel and reviewing the file, the Panel determined that there was sufficient evidence to show that the Writ of Mandamus should be granted. There were eight motions that have been filed by Petitioner from June 14, 2000 to April 9, 2001. They were:

1. Motion for declaratory relief filed June 14, 2000.
2. Motion for summary judgment filed July 10, 2000.
3. Motion for default filed November 12, 2000.
4. Motion entitled "Responce [sic] to Respondant's Motion for Default Judgment and Summary Judgment" filed January 1, 2001.
5. Motion for subpoena for Judge Aycock and for deposition by written interrogatories filed January 1, 2001.
6. Motion for production of documents filed January 10, 2001.
7. Motion for hearings on motions filed April 1, 2001.
8. Motion to compel discovery filed April 9, 2001.

There is no record in the file that any of the motions have been acted upon by the presiding judge.

A Motion to Set Aside Appointment of Counsel filed by counsel for Respondents was granted after a hearing on May 10, 2001.

Counsel for Respondents argued that during part of that time, there was some confusion as to the status of legal representation of Petitioner. However, the Panel feels that some action should have been taken by the Trial Court. The Panel does recognize that the Trial Court is understaffed and civil cases may not get acted upon as quickly as other types of cases, but as this case has been brought to their attention, the Panel must consider the instant matter and act on the Writ.

Therefore it is Ordered that Judge Aycock shall issue decisions or schedule hearings on the motions filed by Petitioner within 60 days of the hearing date, i.e. by November 13, 2001.

Deborah Finley JUSTUS, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP01-010, 3 CTCR 38, 28 ILR 6191

5 CCAR 52

[Dan Gargan, Wynne Law Firm, counsel for Appellant.

David Ward, Office of Prosecuting Attorney, Colville Tribe, counsel for Appellee.

Trial Court case number CV-2001-24083]

Decided September 26, 2001.

Before Chief Justice Dupris

This matter came before the Court of Appeals pursuant to a Notice of Appeal filed on September 24, 2001. Upon review the Court determined that this matter is not ripe for appeal as there has been no final order filed in this case. There is a Motion to Set Aside Verdict in Count II and Brief in Support filed September 24, 2001 which has not been ruled upon. Sentencing is set for November 2, 2001. There is no final written judgment in the file.

Colville Tribal Code section 1-1-280 states:

> *A panel of three judges shall sit as the Appellate Court to hear appeals from* ***final judgments****, sentences and other final order of the Trial Court.* [emphasis added]

Colville Tribal Code section 1-1-293 states:

> *Within ten days from the entry of judgment, the aggrieved party may file with the Trial Court written notice of appeal, and upon giving proper assurance to the Court, through the posting of a bond or any other way that will satisfy the judgment if affirmed, shall have the right to appeal, provided the case to be appealed meets the requirements established by this Code or by Rules of Court.*

Interim Court Rule 5.1 states:

> *A party shall initiate an appeal by filing a written Notice of Appeal (Notice) with the Tribal Court of Appeals Clerk within ten (10) days from the* ***entry of final judgment,*** *sentence, or disposition order...* [emphasis added]

The Court of Appeals has ruled in prior cases that it will only hear matters from final judgments.[42] A final judgment is one in which there are no further matters for which the Trial Court must render a decision.

In *CCT v. Laramie*, AP97-005/006, 2 CTCR 65, 4 CCAR 2 (1997) the Court of Appeals ruled that the issue of whether or not an Appeal has been perfected, including whether or not the order being appealed is a "final order," is generally within the review of the Court of Appeals and not the Trial Court.

Based on the foregoing, it is ORDERED that a final judgment has not been entered in this matter and therefore it is not ripe for appeal. The appeal is denied without prejudice and is remanded to the Trial Court for execution of its procedures consistent with this order.

[42] *Inchelium Water District v. Williamson*, AP92-CV91-11199, 1 CCAR 68 (1993); *Harris v. Colville Tribal Credit*, AP01-003 (2001).