

1 IN THE COURT OF APPEALS
2 OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES
3 OF THE FLATHEAD INDIAN RESERVATION

4 DENNIS CLAIRMONT) Cause No. AP-14-0200-CV
5 Appellant,)
6 Vs.) OPINION AND ORDER
7 THE ESTATE OF ALPHONSE)
8 HENRY CLAIRMONT)
9 Appellee.)

10 Appeal from the Trial Court of the Confederated Salish and Kootenai Tribes before the
11 Honorable David Morigeau, Associate Judge.

12 **Appearances:**

13 R Jack Clapp, Attorney at Law, Polson, MT, Attorney for Appellant Dennis Clairmont

14 Mathew O'Neill, O'Neill Law Office, Polson, MT, Attorney for Appellee Estate of Alphonse

15 Henry Clairmont

16 **Before:** Chief Justice Eldena Bear Don't Walk, Associate Justice Robert McDonald and

17 Associate Justice Joshua C. Morigeau. Associate Justice Morigeau delivers the Opinion of
18 this Court.

19 Dennis Clairmont appeals from the Tribal Court's final judgment entered in this matter on
20 February 19, 2015. We AFFIRM.

21 We address the issues brought on appeal as follows:

22 (1) Whether, pursuant to Tribal Law, the Trial Court properly proceeded to trial with

23 Appellant acting as a *pro se* litigant?

(2) Whether, the Estate was properly awarded damages?

1 (3) Whether the Trial Court improperly granted partial summary judgment to the
2 Plaintiff/Appellee?

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4 **FACTUAL AND PROCEDURAL HISTORY**

5 The present case before the Court involves allegations that the Appellant failed to fulfill
6 his fiduciary responsibilities as Personal Representative of the Estate of Alphonse Clairmont and
7 misappropriated Estate assets. A full accounting of the allegations and issues in the underlying
8 matter are contained in the record of the Trial Court proceedings. For purposes of this Opinion,
9 a detailed recitation of the entire underlying case would be redundant. An abbreviated version of
10 the pertinent underlying procedural history is more appropriate.

11 At all times leading up to trial in the underlying matter, the Parties were represented by
12 Counsel. To avoid confusion, it should be noted that Dennis Clairmont was represented by
13 Thane Johnson of Johnson, Berg, & Saxby, PLLP at the trial level and according to the record,
14 retained the above named, R. Jack Clapp for this Appeal only.

15 The Appellant denied wrongdoing at the Trial Court. Prior to trial, Motions for Summary
16 Judgment were filed by both parties. The Trial Court denied Defendant/Appellant's Motion for
17 Summary Judgment while granting Plaintiff/Appellee's Motion for Partial Summary Judgment,
18 resulting in a trial date set for January 29, 2015. Both parties waived jury trial and elected to
19 proceed with a bench trial.

20 The parties proceeded to trial on January 29, 2015. Both parties submitted proposed
21 Findings of Fact, Conclusions of Law, and Judgments. The Trial Court took the matter under
22 advisement and issued its Findings, Conclusions of Law, and Judgment on February 19, 2015 in
23 favor of Plaintiff/Appellee.

1 This appeal followed. Both Parties submitted timely briefing and participated in oral
2 argument on October 7, 2015.

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4 **DISCUSSION**

5 **(1). Did the Trial Court properly proceed to trial with the Appellant acting as a pro**
6 **se litigant?**

7 The proper standard of review for this issue is whether the trial court abused its discretion
8 by conducting the underlying trial with the Appellant acting as a pro se litigant. In Re Matter of
9 Estate of: Mary H Burland, cause #AP-00-174-P, Ct. of App. CSKT (2002).

10 Appellant argues that CSKT Laws Codified §1-2-401 provides him with an absolute right
11 to an attorney during an adversarial proceeding, and that the trial court violated that right when it
12 proceeded with trial in this matter. The provision at issue is a “Declaration of Policy” and reads
13 in its entirety as follows:

14 **“1-2-401. Declaration of Policy.** *(1) Every person appearing as a party before Tribal*
15 *Court, except as otherwise provided for proceedings associated with Small Claims, has a*
16 *right to be represented by an attorney or other person admitted to practice before the*
17 *Court at the person's own expense.*
18 *(2) An indigent defendant accused of a criminal offense punishable by imprisonment has*
19 *a right to representation by the Tribal Defender's Office.*
20 *(3) Other persons are entitled to representation by the Tribal Defenders Office pursuant*
21 *to the policies of that Office as approved by the Tribal Council.”*

22 We disagree with the Appellant’s argument. When read as a whole it is clear to this
23 Court that the policy being declared is not one that dictates an absolute right to an attorney in all
cases before the Tribal Courts. Subsections (2) and (3) clearly lay out the types of cases in
which the Tribal Defenders shall represent clients. There is no argument from the Appellant that

1 this case falls within these two subsections because this case clearly arises from a civil estate
2 dispute between non-indigent parties.

3 Subsection (1) clearly states that the policy of the Tribes is to allow any party appearing
4 in Tribal Court to hire an attorney if they should choose to hire one at their own expense. That is
5 the true purpose and meaning of CSKT Laws Codified 1-2-401. It does not expand a party's
6 rights to counsel any further than the meaning of its plain language.

7 The record indicates the Appellant elected to use an attorney until the date of trial and
8 then chose to proceed without counsel when his attorney withdrew on the day of trial. It is not
9 this Court's duty to inquire into the interactions between the Appellant and his attorney prior to
10 trial. It is unclear as to why the Appellant and his attorney parted ways, but it is sufficiently
11 clear to this Court that the Appellant chose to proceed with the trial after his attorney formally
12 withdrew. (Transcript of Proceeding pgs 6-7.)

13 Importantly, the trial court addressed the Appellant immediately after his counsel
14 formally withdrew, inquiring as follows:

15 "THE COURT: Okay. Then Mr. Clairmont, are you ready to proceed with your case?

16 MR. CLAIRMONT: Yes, I am, Your Honor." *Id* at 7.

17 It was well within Appellant's rights to proceed without an attorney. This Court has
18 found no support for the proposition that a party is forced to hire or keep an attorney through all
19 stages of an estate matter such as the one at issue. Appellant did not object to his counsel's
20 withdrawal, nor did he ask for a continuance of any type. Nothing in the record indicates the
21 Appellant was incompetent or otherwise unable to proceed, nor does it indicate the Appellant
22 was coerced or otherwise involuntarily induced into proceeding with trial. Instead, the record
23 indicates the Appellant made a voluntary decision to proceed.

1 Appellant also cites this Court's decision in In Re Matter of Estate of: Mary H. Burland,
2 AP-00-174-P, Ct. of App. CSKT (2002), as support for his argument that he had an absolute
3 right to an attorney at his trial. We do not agree that this Court made such a broad holding in
4 Burland. The facts of Burland are distinguishable to the present case. In Burland, the Court
5 proceeded with trial without the formal withdrawal of counsel of record when the Appellant's
6 attorney simply did not show up. Here, counsel was allowed to withdraw after giving reason to
7 the trial court. There was no objection by the Appellant or the Appellee. The Court then further
8 inquired whether the Appellant was ready to proceed. When the Appellant answered in the
9 affirmative the trial commenced.

10 Likewise, we do not agree with the Appellant's reliance on M.C.A. § 37-61-403 as
11 persuasive authority for his argument. While Rule 4-1-104 of the CSKT Laws Codified allows
12 the Tribal Court to consider Federal and State authority, this Court does not find the cited statute
13 persuasive to determining the Appellant was fatally wronged in this case. The statute reads:

14 "37-61-403. Change of attorney. The attorney in an action or special proceeding may be
15 changed at any time before or after judgment or final determination, as follows:
16 (1) upon consent of both client and attorney, filed with the clerk or entered upon the
17 minutes;
18 (2) upon the order of the court, upon the application of either client or attorney, after
19 notice from one to the other."

18 The statute allows withdrawal of counsel upon consent of the client and attorney, as well
19 as by court order. The record indicates no evidence that the withdrawal of the Appellant's
20 attorney was not consensual. (*Transcript of Proceeding*). Additionally, the withdrawal request
21 was made by Appellant's attorney when he motioned in open court with the Appellant present.
22 There were no objections or statements by the Appellant to the effect that he opposed the
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1 withdrawal of his attorney at that time, nor at any time on the record. The trial court, therefore,
2 ordered it so. *Id.*

3 Finally, we will only briefly address the contention by the Appellant that Due Process
4 was somehow violated when the trial court adopted the Appellee's Proposed Findings and
5 Conclusions in a verbatim manner post-trial. First, the contention was not properly presented
6 and briefed as an issue of law for this Court to address. Second, though courts have occasionally
7 opined criticism of the practice, there is no authority presented, that specifically forbids the
8 adoption of a party's proposed findings of fact and conclusions of law as an automatic violation
9 of Due Process. In order to be successful on such an argument, the Appellant would have to
10 show clear error by the trial court in the adoption the proposed Findings and Conclusion by the
11 trial court. *Ronald Bick vs. Spring Anna Pierce.*, cause RP-CV-92-134 (1996). The Appellant
12 here, makes no argument that the adopted Findings and Conclusions were clearly erroneous,
13 therefore this argument is not well taken.

14 For the above stated reasons, this Court does not find that the trial court abused its
15 discretion in allowing the Appellant to proceed as a pro se litigant during the underlying trial.
16 We find the record and applicable law does not support the arguments made by the Appellant on
17 this issue.

18 **(2) Did the trial court properly award the Estate damages in light of the Mediated**
19 **Settlement Agreement?**

20 The Appellant argues that damages could not have been awarded by the trial court for the
21 following reasons:

- 22 1. Appellant contends he followed the Mediated Settlement Agreement.
23

1 2. Appellant contends the Estate of Alphonse Clairmont had limited assets upon his
2 passing.

3 3. Appellant contends the cattle at issue belonged to Sherry Clairmont at her father's
4 passing.

5 This appeal arises out of a trial for damages against Appellant after partial summary
6 judgment was granted to Appellee on the issue of whether the Appellant breached his fiduciary
7 duty to the estate in his capacity as Personal Representative. Evidence was presented at trial by
8 Appellee to support the extent of the claimed damages for the Appellant's breach of his fiduciary
9 duty. After testimony, the trial court ruled the Appellee had incurred damages in the amount of
10 \$73,367.96 for Appellant's "*failure to account for grain check, payment of Sherry Clairmont's*
11 *loans at Eagle Bank, purchase of tractor and 4-wheeler for Sherry Clairmont, payment of*
12 *expenses unrelated to the Estate, failure to produce receipts for claimed expenses of Estate.*" as
13 well as attorney fees of \$14,137.50 and costs of \$287.80 (Findings of Fact Conclusion of Law
14 and Judgment, pgs. 6-7). Appellant does not appeal the award of costs and attorney fees but
15 appeals the compensatory damage award.

16 First, this Court rules on issues of law presented to it and does not rule on legal issues not
17 presented appropriately to the Court. A review of the arguments made by the Appellant reveals
18 no argument as to why any damages awarded by the trial court are not legally appropriate for a
19 breach of the Appellant's fiduciary duty. Appellant merely recites fact arguments more
20 appropriately made at the trial level for mitigation or negation of damages, as well as arguments
21 that are appropriate for determining whether summary judgment on the breach of duty was
22 appropriate. If a ruling for summary judgment is affirmed (see below Court's Opinion on Issue
23 3), it follows that the damages subsequently awarded after trial on damages will be affirmed,

1 subject to a valid legal argument on the inappropriateness of the challenged damages.

2 Accordingly, we have not been presented with legal reason to overturn the trial court's actual
3 award of damages as a matter of law.

4 Therefore, it is the conclusion of this Court that as there has been no matter of law
5 presented on appeal in respect to damages that this Court can decide, the trial court's award of
6 damages is AFFIRMED.

7 **(3). Whether the Trial Court improperly granted partial summary judgment to the**
8 **Plaintiff/Appellee?**

9 As noted above, this appeal arises after summary judgment and trial on damages occurred
10 at the trial level. Summary judgment "should be rendered if the pleadings, the discovery and
11 disclosure materials on file, and any affidavits show that there is no genuine issue as to any
12 material fact and that the movant is entitled to judgment as a matter of law." Labair v. Carey,
13 367 Mont. 453, 291 P.3d 1160 (Mont., 2012)., "the party opposing the summary judgment
14 motion must present material and substantial evidence, rather than conclusory or speculative
15 statements, to raise a genuine issue of material fact." Heiat v. Eastern Montana College, 912 P.2d
16 787, 275 Mont. 322 (Mont., 1996)

17 Appellant argues that there existed genuine issues of material fact which precluded
18 summary judgment. The Appellee cites two statements contained in the Affidavits of Sherry
19 Clairmont and Dennis Clairmont. These Affidavits state as follows:

20 "7. All of the complaints which led to the Complaint being filed in Cause 14-200-CV,
occurred prior to the Mediated Settlement Agreement on September 28, 2011.

21 8. All issues against Dennis Clairmont operating as Personal Representative occurred
22 before the Mediated Settlement Agreement and were resolved in the Mediated Settlement
Agreement." (Affidavits of Dennis and Sherry Clairmont.)

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1 Appellant fails to meet his burden in demonstrating these are issues of material fact in this case
2 by supporting the conclusory statements with any additional substantial evidence. A mere
3 assertion in an affidavit is not, in and of itself, a determination that there exists a genuine issue of
4 fact that is material to the claim. According to the record, the breach of the Appellant's fiduciary
5 duty was determined based on 23 facts listed in the trial Court's Findings of Fact and
6 Conclusions of law as the material facts of the case as determined by the trial court. The
7 Appellant does not challenge any of these facts in its briefing, nor gives any supporting evidence
8 as to why the two affidavit statements above support its argument sufficiently. The Appellant
9 fails to meet his burden. Therefore, the trial court's decision is AFFIRMED.

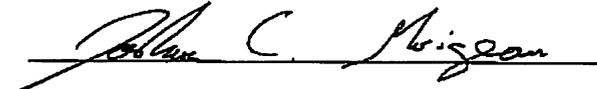
10 **CONCLUSION**

11 For the aforementioned reasoning we AFFIRM the trial court on all three issues
12 presented in this Appeal.

13 Dated this 2nd day of May, 2016.



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JOSHUA C. MORIGEAU
Associate Justice


ELDENA BEAR DON'T WALK
Chief Justice


ROBERT MCDONALD
Associate Justice

Certificate of Mailing

I, Abigail Dupuis, Appellate Court Administrator, do hereby certify that I mailed a true and correct copy of the Opinion and Order to the persons first named therein at the addresses shown below by depositing same in the U.S. Mail, postage prepaid at Pablo, Montana, or hand-delivered this 3rd day of May, 2016.

**R. Jack Clapp
55459 Irvine Flats Road
Polson, MT 59860**

**Matthew O'Neill
O'Neill Law Office
PO Box 699
Polson, MT 59860**

**Cara Croft
Clerk of the Tribal Court
PO Box 278
Pablo, MT 59855**


**Abigail Dupuis
Appellate Court Administrator**