IN THE APPELLATE COURT
OF THE CONFEDERATED SALISH AND KOOTENAI
TRIBES OF THE FLATHEAD RESERVATION
PABLO, MONTANA

No. 93-044-CV-AP

CHECK COLLECT,

Plaintiff-Appellee,

v.

TONI MITCHELL,

Defendant-Appellant.

Appeal from the Trial Court
of the Confederated Salish and Kootenai Tribes
No. 93-044-CV--Gary L. Acevedo, Tribal Court Judge.

Decided May 13, 1994

Before GAUTHIER, HALL and PEREGOY, Civil Appellate Judges.

OPINION REGARDING MOTION TO VACATE DISMISSAL OF APPEAL AND/OR REMAND TO TRIAL COURT

PEREGOY, Chair, Civil Appellate Panel:

On March 28, 1994, we dismissed the appeal in this case on the ground that appellant Toni Mitchell did not file an opening brief, and thereby failed to comply with Rule 10(b) of the Tribal Court Appellate Procedures. Rule 10(b) required appellant to file her brief by December 8, 1993. As of the date of dismissal nearly four months later, no brief had been filed, nor had appellant moved for an extension of time. We accordingly dismissed the case in the interests of the sound and orderly administration of justice. See Check Collect

v. Mitchell, 93-044-CV-AP (App. Ct. Confederated Salish and Kootenai Tribes 1994).[1]

On April 11, 1994 counsel for appellant moved this court to vacate the dismissal and/or remand the case to the trial court. With commendable candor, Mitchell states her motion is based on counsel's "inadvertence and misunderstanding of applicable procedures, due to the fact that attorney for Defendant-Appellant was awaiting receipt of the trial transcript prior to preparation of a Brief..."

In support of her motion, appellant filed the affidavit of Evelyn Stevenson, managing attorney of Tribal Legal Services for the Confederated Salish and Kootenai Tribes. Stevenson's affidavit states her office did not assume representation of Mitchell until the appellate stage, and that she "normally" supervises and monitors cases of attorneys and advocates working in the office. The affidavit further states that in this case Stevenson "was out of town for the week and didn't get to review the file before it was assigned to newly-hired attorney JoAnn Jayne", and continues:

> Attorney Joann Jayne filed the Notice of Appeal and thought she had to wait until the next move was told to be her's because she was yet unfamiliar with rules and procedures of the Tribal Court system....
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> The Notice of Appeal filed was actually done under Ordinance 90A, Appellate Procedures, but there appears to have been confusion as to proper format and the method by which a transcript of the lower court would be forthcoming. Attorney JoAnn Jayne informs me that she somehow understood that the Clerk of the Court would provide her with copies of all previous court filings and entries along with the trial Court record. At first glance, Rule 3 of the Appellate Procedures could intimate that belief, but it is noted later on in the section that the Appellant is responsible for specifically requesting those materials...

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[1] The appeal arose out of a dispute between Toni Mitchell and Credit Check concerning the balance on an automobile repair bill in the amount of $147.85.

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> It is unfortunate that other time schedules, confusion, and excessive workload created a problem experience for a brand new attorney and for the Court. The case came within two weeks of JoAnn Jayne's employment and she had a lot to learn for a multitude of cases with only a minimum of assistance.

Without citing any supporting procedural rules or other legal authority, Mitchell asserts the foregoing constitutes "reasonable excuse and neglect" and asks us to set aside the dismissal of her appeal. We decline to do so.

Rule 3 of the Tribal Court Appellate Procedures provides in relevant part:

> Rule 3. Record on Appeal. (a) The original papers and the exhibits filed in the trial court, the transcript of the proceeding, if any, and a certified copy of the minute entries prepared by the Clerk of the Court shall constitute the record on appeal in all cases.
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> (b) Within 5 days after filing the notice of appeal, the appellant shall order from the reporter, if the proceedings were recorded by a court reporter, or form the Clerk of the Court, if there was no court reporter, a transcript of such parts of the proceedings not already on file as appellant deems necessary for inclusion in the record. The transcript shall be certified with the Clerk of the Court as part of the record on appeal within 20 days of the filing of the notice of appeal....
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> The cost of producing the transcript shall be borne by the appellant unless the transcript is to be provided by the Clerk of the Court, and the Chief Judge waives the transcript cost for good cause shown...

Rule 3 of the Tribal Court Appellate Procedures is derived from and virtually identical in many respects to Rule 10 of the Federal Rules of Appellate Procedure.[2] Tribal appellate Rule 3(a) and federal appellate Rule 10(a) provide that "the transcript of the

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[2] Similarly, Rules 4 and 5 of the Tribal Court Appellate Procedures are virtually identical to Rules 11 and 12 of the Federal Rules of Appellate Procedure.

proceedings, if any" is a part of the record on appeal. The transcript referred to is the trial court reporter's transcript of the verbatim record of the lower court proceedings. While the reporter is generally required to ***record*** all proceedings in open court, he or she is not obliged to ***transcribe*** proceedings in civil cases. The reporter will not transcribe the record which he is obliged to make of proceedings unless he is requested to do so by the court, a direction which is ordinarily not made, or unless he is requested to do so by a party who agrees to pay a fee therefor. Thus, the existence of "any transcript" at all is ordinarily dependent upon its having been ordered and paid for by one of the parties to the action in the trial court. However, if the reporter *is* effectively requested to transcribe the record, then he must deliver a certified copy of the transcript to the clerk of the trial court, and the transcript thus becomes part of the record on appeal. See 9 Moore's Federal Practice, ¶210.04[3], The Transcript of Proceedings, (1992), at 10-19, 20.

Rule 3(b) **requires** the appellant to order from the trial court reporter "such parts of the proceedings not already on file as the appellant deems necessary for inclusion in the record." Rule 3(b) in unmistakable terms places the burden of ordering, and thus of paying for, necessary parts of the transcript plainly and squarely upon the appellant.[3] "This is so because of the familiar rule of appellate practice that the burden of showing error by reference to matters in the record is upon the appellant. Unless the record he brings before the court of appeals affirmatively shows the occurrence of the matters upon which he relies for relief, he may not urge those matters on appeal." 9 Moore's Federal Practice,

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[3] Under Rule 3(b), the clerk of the court has no duty to order transcripts, unless instructed to do so by the court.

¶210.05[1], Duty of Appellant to Order Necessary Transcript; Time of Ordering; What Transcript Should Be Ordered, (1992), at 10-22, 23. Under Rule 3(b), the appellant discharges her duty with respect to the preparation of the transcript if she orders the transcript within 5 days of filing the notice of appeal. See Id.[4]

Several jurisdictions have decided controversies in fact situations similar to the instant case. In Grimard v. Carlston, 567 F.2d 1171, 1173 (1st Cir. 1978), the First Circuit found it "more than a technical oversight" where the appellant did not order transcripts of the proceedings from the district court, and thereby failed to comply with the requirements of Fed.R.App.P. 10(b). The court ruled that "[l]acking a record of the proceedings below, we will not review the sufficiency of those proceedings." Id. See also, In re Colonial realty Investment Co., 516 F.2d 154, 160 (1st Cir. 1975) (court of appeals would not review sufficiency of evidentiary hearing below when appellant had proceeded without a transcript). Ordering the transcript within 5 days under Tribal Court Appellate Rule 3(b) "does not affect the validity of the appeal but clearly constitutes a 'step' in the procedure on appeal and therefore is ground for 'such other action as the court of appeals deems appropriate, which may include dismissal of the appeal.'" See 9 Moore's Federal Practice, ¶ 210.05[1], *supra*, at 10-25; United States v. One Motor Yacht Named Mercury, 527 F.2d 112, 113 (1st Cir. 1975).

Notwithstanding the foregoing authority, this court may suspend the requirements of

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[4] The rules are designed mainly to assure that the materials, adequate record and arguments necessary to dispose of the appeal on the merits are presented to the appellate court. Most motions for excuse for default are pro tanto applications to do a thing out of time rather than to be excused from doing it at all. See Moore, ¶ 202.02, *infra*, f.n. 13 at 2-9.

the Tribal Court Appellate Procedures for "good cause shown" in a particular case on application of a party, and may order proceedings in accordance with its direction. See Fed.R.App.P. 2.[5] Similarly, under Rule 26(b) of the Federal Rules of Appellate Procedure, this court "for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time..." The standard to be applied for ruling on motions under Rule 2 and Rule 26 is "good cause." "Good cause" is not the same as "excusable neglect." See 9 Moore's Federal Practice, ¶ 202.2[2], Relief From Consequences of Default, (1992), at 2-8.[6]

Under the applicable rules, the issue to be decided is whether Mitchell has shown good cause to set aside the dismissal of her appeal, or alternatively, to remand the case to the trial court. In our inquiry we are guided by decisions of other appellate courts in similar fact situations. In Stern v. United States Gypsum, Inc., 560 F.2d 865, 866 (8th Cir. 1977), the court held that counsel's **belief** that the 14 days allowed for filing of a bill of costs was to be measured from the disposition of a petition for rehearing rather than from the date of entry of judgment did not constitute good cause to enlarge the time period for filing the

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[5] Federal law is made applicable to the Tribal Court pursuant to Ordinance 36-B, Chapter II, Civil Actions, Section 2, Laws Applicable in Civil Actions. Rule 2 of the Federal Rules of Appellate Procedure provides:

> In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction,

[6] For a discussion of "excusable neglect," see United States v. Anderson, 584 F.2d 849 (6th Cir. 1978).

bill of costs. In Denofore v. Transportation Ins. Rating Bur., 560 F.2d 859 (7th Cir. 1977), the court ruled that good cause for enlarging the time period for filing a bill of costs beyond the mandatory 14 days of judgment was not shown where counsel acknowledged that he had three business days to timely file after receiving a copy of the court's ruling in his favor. The fact that the attorney of record was absent from the office during the relevant times did not save the situation. The Seventh Circuit ruled:

> We do not think good cause is shown to enlarge a time period expressly specified in the Federal Rules of Appellate Procedure by the mere inattendance to daily chores's in one's law office...If attention had been given promptly to incoming matters which might (and here did) involve deadlines, there was sufficient time at least to have filed within fourteen days a motion for an extension of time, which motion could have set forth extenuating circumstances.

The foregoing authority is instructive here. The plain language of Rule 3(b) imposes an unambiguous duty ("shall") on appellant to order transcripts deemed necessary within 5 days after filing the notice of appeal. Counsel, as officers of the court, are charged with the responsibility of reading, understanding and following court rules, notwithstanding whether they are "brand new," or are seasoned attorneys. Failure to order transcripts of the proceedings of the trial court is "more than a technical oversight."

Inexperience, inadvertence, misunderstanding of applicable procedures, confusion, demanding time schedules, excessive workload, absence of a supervisor during the relevant time period, or failure to exercise supervisory responsibility over inexperienced attorneys do not constitute good cause to suspend the applicable appellate rules in this case, or to set aside the dismissal of Mitchell's appeal. To enter a good cause ruling in this case on the basis of attorney neglect of a duty imposed by clear and unmistakable statutory language by

the Tribal Council would result in an aberration in the field of jurisprudence governing this issue. For us to hold otherwise would set an unmanageable precedent that would open the floodgates to similar motions based on similar grounds held to be insufficient under long-standing applicable case law. This court simply will not subscribe to a lower standard of good cause (or excusable neglect) than those of our sister jurisdictions, and therefore will not depart from established precedent.

If there was confusion or misunderstanding regarding the applicable rules, clarification could have been readily obtained through cursory research. If time was a problem, a motion for extension of time could have and should have been filed. In this case, no such motion was filed to extend the time to order the transcripts deemed necessary or for filing the required brief(s).[7] In fact, on the record before us, it appears that counsel did nothing for four months after filing the notice of appeal. The orderly disposition of appeals "depends upon the establishment of routines, and the duties placed upon the parties by the rules are generally simple and not burdensome. This being the case, the parties and their attorneys are not privileged to flout the rules and they do so at their own peril." Moore, *supra*, ¶ 202.02[2] at 2-7.

Upon consideration of the foregoing, good cause not having been shown as to why defendant-appellant is, within our discretion, entitled to a suspension of the appellate rules or an enlargement of time, the motion to set aside the dismissal of her appeal, or

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[7] Observations of relevant decisions suggest that "extensions of time requested before the time has run are granted with a much more generous hand....Accordingly counsel faced with time problems are well advised to seek an extension and not rely on post hoc excuses." Moore, *supra*, ¶ 226.02[2] at 26-7.

alternatively to remand the case to the trial court is denied.

MOTION DENIED

SO ORDERED this 13th of May, 1994.

Robert M. Peregoy, Chairman
Civil Appellate Panel