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

5 * * * *

6 GORDON L. BARTELL, Personal) Cause No. AP-94-104-CV
7 Representative of the Estate)
8 of Kenneth Steven Bartell,)
9 deceased,)

10 Plaintiff and Appellant,)

11 vs.)

12 OPINION

13 DARYL ALLEN KERR and FARMERS UNION)
14 MUTUAL INSURANCE COMPANY,)
15 Defendants and Respondents.)

16 * * * *

17 Submitted April 22, 1995

18 Decided July 29, 1996

19 Edward K. Duckworth, Attorney at Law, 104 U.S. Highway
20 93 South, Ronan, Montana 59864, for the plaintiff and
21 appellant.

22 Lon J. Dale, Attorney at Law, Milodragovich, Dale,
23 Steinbrenner, and Binny, P.C., P.O. Box 4947, Missoula,
24 Montana 59806-4947, for defendants and appellees.

25 Appeal from the Tribal Court of the Confederated Salish
26 and Kootenai Tribes, Gary L. Acevedo, Tribal Judge,
Presiding.

Before: GAUTHIER and WHEELIS, Associate Justices, and
DESMOND, Acting Associate Justice.

WHEELIS, Justice:

INTRODUCTION

Gordon L. Bartell ("Bartell") is the personal
representative of Kenneth Steven Bartell ("the decedent"),
who was killed on July 10, 1993, when the motorcycle he was
riding was struck by a pickup truck driven by Daryl Allen
Kerr ("Kerr"). Farmers Union Mutual Insurance Company

1 ("Farmers") provided underinsured motorist coverage to the
2 decedent's family. The decedent was an enrolled member of
3 the Confederated Salish and Kootenai Tribes, and the
4 collision between the decedent's motorcycle and Kerr's
5 pickup occurred at the intersection of Olsen and Logan Roads
6 southeast of Charlo, Montana, within the exterior boundaries
7 of the Flathead Indian Reservation.

8 The decedent's brother, Phillip J. Bartell, was
9 following his brother in an pickup and saw his brother's
10 body flying through the air after it was struck. Kerr was
11 driving his pickup. He had one passenger with him, Benjamin
12 Roylance. Kerr was driving south on Logan Road, the Bartells
13 were eastbound on Olsen Road.

14 The principal investigator at the scene of the accident
15 was Dennis Bennett, an officer in the Montana Highway
16 Patrol. There were other emergency and rescue personnel
17 present, and a postmortem examination of the decedent was
18 conducted by Gary E. Dale, M.D., the state medical examiner,
19 who acted at the request of the Lake County Sheriff's
20 Office.

21 Both Gordon and Phillip Bartell filed suit against Kerr
22 and Farmers in Tribal Court on March 4, 1994, for wrongful
23 death, survivorship, and negligent infliction of emotional
24 distress. After various procedural motions that are not
25 before this Court had been determined, on January 6, 1995,
26 Kerr filed an answer and a third-party complaint against

1 Lake County for negligently maintaining the intersection
2 where the collision occurred. The Bartells amended their
3 complaint to include Lake County as a defendant and settled
4 with the county before trial.

5 Trial began August 21, 1995. Under the ruling of the
6 trial judge, the issue of liability was tried before that of
7 damages. The jury rendered a verdict finding that both Kerr
8 and Lake County were negligent and that the negligence was a
9 proximate cause of the decedent's death. The jury allocated
10 negligence as follows: to Lake County, 40 percent; to Kerr,
11 60 percent; to the decedent, none. The trial then proceeded
12 to the issue of damages.

13 After the parties had rested, but before argument, the
14 Bartells moved for a directed verdict to establish that the
15 decedent's death was not instantaneous and that his estate
16 was entitled to recover damages in survivorship. The record
17 does not show that the Court ruled on the motion, though the
18 Court submitted an instruction defining "instantaneous
19 death" and a verdict form that included a question on
20 whether the decedent survived for "an appreciable length of
21 time." At argument on appeal, the respondent's counsel
22 stated that discussions between the Court and counsel in
23 chambers broke off in such a way that the Court concluded it
24 was not necessary to rule on the motion.

25 The jury awarded damages for negligent infliction of
26 emotional distress and for wrongful death, but it concluded

1 that the decedent did not survive the collision for an
2 appreciable length of time. Judgment was then entered, and
3 the Bartells filed a renewed motion for judgment as a matter
4 of law and a motion for a new trial on the survivorship
5 issue alone. That motion was denied by the Tribal Court, and
6 Gordon Bartell appealed.

7 The issues presented to this Court on appeal are
8 phrased somewhat differently by each party in its brief,
9 but, as restated here, they are essentially as follows:

10 1. Whether the Tribal Court had a duty to rule on the
11 Bartells' motion for a directed verdict on the issue of
12 survivorship.

13 2. Whether Bartells were entitled to a directed verdict
14 on the issue of survivorship.

15 3. Whether the Tribal Court correctly instructed the
16 jury on the issue of survivorship.

17 4. Whether the special verdict form and the Tribal
18 Court's instruction on survivorship were confusing to the
19 jury.

20 5. Whether the Tribal Court erred in denying the
21 Bartells' post-trial motions for judgment as a matter of law
22 and for a new trial on damages.

23 We affirm.

24 DISCUSSION

25 1. Whether the Tribal Court Judge failed to rule on the
26 motion for directed verdict. Neither party has cited Tribal

1 Court authority to this Court pertaining to the issues
2 before it. Therefore, the Court will apply case law from
3 other jurisdictions pursuant to Ordinance 90B of the Law and
4 Order Code of the Confederated Salish and Kootenai Tribes.

5 During trial, it is inarguable that the Tribal Court
6 must rule on the motions that come before it. Though a trial
7 court's rulings may in some instances be summary, a ruling
8 should be clear and on the record. That ideal was not
9 achieved on the Bartells' motion for a directed verdict, but
10 it is apparent that the motion was denied. Before argument,
11 the Tribal Court considered two instructions on the question
12 of survivorship, rejecting one and adopting the other, and
13 included the issue of whether the decedent survived for an
14 appreciable period of time on its special verdict form.
15 Counsel argued the issue to the jury after the court read
16 its instructions. There could have been no doubt that the
17 motion had been denied. If there was error in the procedure
18 used by the Tribal Court Judge in responding to the motion
19 for a directed verdict, it was harmless.

20 2. Whether the decedent survived as a matter of law.

21 The Montana Supreme Court has adopted an "appreciable
22 length of time" test to establish a survival cause of
23 action; the actual length of survival may vary. See,
24 *Stephens v. Brown*, 160 Mont. 453, 505 P.2d 667 (1972).
25 Bartell argues that the uncontradicted testimony of a
26 medical expert showed conclusively that the decedent

1 survived the collision for long enough to require a directed
2 verdict on the issue of survival. The principal support for
3 that position is the deposition testimony of Gary Dale,
4 M.D., a forensic pathologist, who conducted a postmortem
5 examination of the decedent. He testified that the high
6 cervical fracture sustained by the decedent did not result
7 in his immediate death because his chest cavity had a good
8 deal of blood in it, which "more likely than not represented
9 probably a tear of the large vessel carrying blood away from
10 the heart." Dr. Dale would not speculate on whether the
11 decedent survived the collision for even a few brief
12 seconds. He stated that decedent's "heart would have had to
13 continue pumping for some time, time of which I do not
14 know." (Dale deposition, p. 19, lines 14-19.) Other
15 witnesses, including those who were at the collision site
16 when or shortly after it occurred testified that the decedent
17 showed no signs of life.

18 A finder of fact is not obligated to adopt the
19 testimony of an expert. *Goodover v. Lindey's Inc.*, 255 Mont.
20 430, 439, 843 P.2d 765 (1992); *Brown by Brown v. Markve*, 216
21 Mont. 145, 148, 700 P.2d 602 (1985); *Tompkins v.*
22 *Northwestern Union Trust Co., of Helena*, 198 Mont. 170, 181,
23 645 P.2d 402 (1982). Here, the testimony of the expert did
24 not itself conclusively state that the decedent survived the
25 collision long enough to require the finding that he
26 survived for an "appreciable" time.

1 Conflicting inferences could be drawn from all the
2 evidence, including the testimony of Dr. Dale. The Montana
3 Supreme Court has said:

4 When this Court reviews a directed verdict granted
5 pursuant to Rule 50(a), M.R.Civ.P., it looks to
6 see if the evidence leads to only one conclusion.
7 "If only one conclusion is reasonably proper, then
8 the directed verdict is proper." *Semenza v.*
9 *Leitzke* (1988), 232 Mont. 15, 18, 754 P.2d 509,
10 511 (quoting *Cremer v. Cremer Rodeo Land &*
11 *Livestock Co.* (1979), 181 Mont. 87, 92, 592 P.2d
12 485, 488). A directed verdict is properly granted
13 when the "evidence is so insufficient in fact to
14 be insufficient in law." *Semenza*, 754 P.2d at 511
15 (quoting *Parini v. Lanch* (1966), 148 Mont. 188,
16 191, 418 P.2d 861, 863). *Westfork Construction v.*
17 *Nelson, Inc.*, 265 Mont. 398, 401, 877 P.2d 481
18 (1994).

12 Whether a decedent survived for an "appreciable" length
13 of time can be a difficult question, particularly when, as
14 here, the evidence is not unequivocal. The Tribal Court's
15 denial of the Bartells' motion for directed verdict was
16 reasonable. If the evidence did not require a directed
17 verdict on the issue of survival, the question was properly
18 one for the jury to determine.

19 3. Whether the Tribal Court Judge properly instructed
20 the jury on the issue of survival. At the close of evidence
21 in that portion of the trial when the jury was to consider
22 damages, after effectively denying the Bartells' motion for
23 a directed verdict, the Tribal Court Judge gave two
24 instructions on survivorship:
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Instruction No. 5

Your award should include reasonable compensation to decedent's estate for damages suffered by decedent if you find death was not instantaneous, i.e., an appreciable length of time. Your award should then include reasonable compensation to decedent's estate for the amount of decedent's lost earnings between the time of injury and the time of death; the present value of decedent's reasonable earnings, including Tribal benefits, after the date of death during the remainder of his life expectancy.

Instruction No. 6

The survival of a decedent for even a few seconds or a couple of minutes can constitute survival for an appreciable length of time for survival damages.

During the settlement of instructions, the Bartells offered the following instruction on survivorship, which was identical to Montana Pattern Instruction 25.25:

Plaintiff's Proposed Instruction No. 39

Your award should include reasonable compensation to decedent's estate for damages suffered by decedent if you find death was not instantaneous. Your award should then include reasonable compensation to decedent's estate for the amount of decedent's lost earnings between the time of injury and the time of death; the present value of decedent's reasonable earnings after the date of death during the remainder of his life expectancy; the medical and funeral expenses which were incurred as a result of the injury and death; and reasonable compensation for decedent's conscious mental and physical pain and suffering in the interval between injury and death.

Ordinance 97 of the Confederated Salish and Kootenai Tribes was adopted by the Confederated Salish and Kootenai Tribes Tribal Council on May 9, 1996. It has been codified into the Tribal Law and Order Code, and Section 4-1-106 of

1 Ordinance 97 as codified reads as follows:

2 Survival of cause of action and action for wrongful
3 death. (1) An action, cause of action, or defense
4 does not abate because of the death or disability
5 of a party or transfer of any interest therein, but
6 whenever the cause of action or defense arose in
7 favor of such party prior to his or her death or
8 disability or transfer of interest, it survives and
9 may be maintained by his or her successors in
10 interest. If the action has not been begun or
11 defense interposed, it may be commenced in the name
12 of his or her successors in interest.

13 (2) When injuries to and the death of one person
14 are caused by the wrongful act or neglect of
15 another, the personal representative of the
16 decedent's estate may maintain an action for
17 damages against the person causing the death or, if
18 such person be employed by another person who is
19 responsible for his or her conduct, then also
20 against such person.

21 (3) Actions brought under this section must be
22 combined in one legal action, and any element of
23 damages may be recovered only once.

24 Although the section quoted was not enacted until after
25 the incident giving rise to the matter under appeal, it varies
26 in no significant way from Montana Code Annotated § 27-1-501,
the Montana survival statute, the statutory underpinning for
Stephens v. Brown, 160 Mont. 453, 505 P.2d 667 (1972). Both
parties argue that *Stephens* is not only persuasive but also
dispositive of this appeal. We agree that the *Stephens* Court
enunciated a reasonable doctrine when it interpreted the
Montana survival statute. Quoting *Dillon v. Great Northern*
Railway. Co., 38 Mont. 485, 496, 100 P. 960, 963, (1909), the
Montana Supreme Court stated:

"With these elementary principles before us the
question recurs, Is it possible for one who is
instantly killed to have a cause of action for the
wrong which caused his death? The very statement of
the question would seem to suggest its own answer.

1 Since there is not any appreciable length of time
2 between the wrong and the death, or, in other
3 words, the wrong and the death being coincident in
4 point of time, the instant the wrong is committed
5 the victim of the wrong has ceased to exist, and'
6 it seems impossible that there is any cause of
7 action in favor of such victim. This conclusion
8 seems inevitable when the elements which are to be
9 considered in determining the measure of damages
10 are taken into account. Those elements are physical
11 and mental pain and suffering, expense of medical
12 attendance, loss of time, and decreased earning
13 capacity. In the case of instant death every one of
14 these elements is absent. To presume the existence
15 of any one of them is to presume that life did not
16 become extinct until some appreciable time had
17 elapsed after the wrong was committed, a fact which
18 is negated by the agreed statement of facts in
19 this case."

20 *Stephens v. Brown*, 160 Mont. 453, 459, 505 P.2d 667
21 (1972).

22 The Court's Instruction No. 5 suffers from awkward
23 wording. That instruction, however, coupled with Court's
24 Instruction No. 6, adequately conveys the proper test on the
25 issue of survival. The instructions meet the standard of
26 clarity required by the Montana Supreme Court in *Tiggerman*
v. City of Butte, 44 Mont. 138, 119 P. 477 (1911), i.e., the
statement of the law in the instructions would not have
misled an intelligent jury. The *Tiggerman* Court explained:

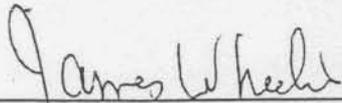
[E]rror cannot be predicated upon the refusal of
the trial court to correct an erroneous
instruction tendered and give it in correct form.
But the principle announced in those cases applies
only to an offered instruction which does not
correctly state the rule of law intended, or to
one which combines a correct rule with one which
is erroneous. It does not warrant a court in
refusing an instruction which correctly states a
rule applicable, on the ground that the language
employed to express the rule is not the most
precise and refined English. It was never intended
to limit a party to those proper instructions only
which are clothed in the tersest or most elegant

1 language. The inquiry before the court should be:
2 Is the language employed such as is likely to
3 mislead an intelligent jury as to the meaning of
4 the rule sought to be announced? Judged by its
5 diction, the instruction is not a model. If it is
6 to be tested by the rules of syntax, it is
7 defective; but that its meaning could be
8 misunderstood by any reasonably intelligent person
9 is beyond belief.
10 *Tiggerman v. City of Butte*, 44 Mont. 138, 144, 119 P.
11 477* (1911).

12 The jury was properly instructed on the issues under
13 review. It made its decision on evidence that may have
14 supported a contrary finding, but arriving at a conclusion
15 in the midst of conflicting evidence is a jury's prime task.
16 We find no error in the proceedings in Tribal Court.

17 AFFIRMED.

18 IT IS SO ORDERED THIS 29th DAY OF JULY, 1996.

19 

20 James Wheelis
21 Associate Justice

22 We concur: -

23 

24 Brenda Desmond
25 Acting Associate Justice



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Robert Gauthier
Associate Justice

CERTIFICATE OF MAILING

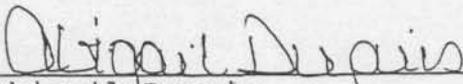
I, Abigail Dupuis, Appellate Court Administrator, do hereby certify that I mailed true and correct copies of the OPINION to the persons first named therein at the addresses shown below by depositing same in the U.S. Mail, postage prepaid at Pablo, Montana, or hand-delivered this 8th day of August, 1996.

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