FORT PECK TRIBAL COURT OF APPEALS
FORT PECK INDIAN RESERVATION
ASSINIBOINE AND SIOUX TRIBES
POPLAR, MONTANA
****

ANTHONY LEON FERGUSON, through his parents, and JoANNE STEELE and GEORGE W. FERGUSON,
Plaintiffs,

vs. **Appeals No. 200**

THE POPLAR HOSPITAL ASSOCIATION, also known as POPLAR COMMUNITY HOSPITAL
Defendants.

COMES NOW the Fort Peck Tribal Court of Appeals in consideration of the Tribal Court record, briefs submitted counsel, and the oral arguments presented makes the following:

Justice BEAUDRY writing for the Court.

I.

Appellant having come before this court in appeal of the Tribal Courts Tribal Courts order dated October 15, 1993 which in pertinent part states:

> On motion of the Defendant to dismiss the above-entitled action, pursuant to either Rule 41(b), or this Court's own inherent supervisory powers, and good cause appearing; therefore,
>
> IT IS ORDERED that the above-entitled action be, and it is hereby, dismissed with prejudice for the plaintiffs' failure to diligently prosecute this action, and for their willful disobedience of a specific Court Order.
>
> DATED this 15th day of October, 1993.

Appellant request that this Court issue an order overturning the Tribal Court's Order of October 15, 1993 and further request this Court to vacate the Tribal Court's previous requirement that the Plaintiff/ Appellant's submit its medical malpractice claim to the Montana Medical Legal Panel.

II.

ISSUE DECIDED

Whether the Tribal Court exercised sound discretion in adopting and utilizing the procedural provisions of the Montana Medical-Legal Panel Act?

Title IV, Section 501 of the C.C.O.J. is appropriate for discussion here, in pertinent part:

> The Court may in its discretion be guided by statutes, common law or rules of decision of the State in which the transaction or occurrence giving rise to the cause of action took place. IV CCOJ 501(d).

Appellant/plaintiff sets forth the argument that the "…Tribal Court has inadvertently added language to the aforementioned statute and thereby given itself the power of the Executive Board to adopt the Montana Medical Legal Panel laws of the state of Montana..." APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW; page 22; also made part of appellant's oral argument. The Court views the Tribal Courts actions of adopting and utilizing the Montana Medical-Legal Panel Act as consistent with the provisions of Section 501. The tribal statute is clear, section 501(d) sets forth the intent of the Tribal Executive Board without ambiguity. The intent being to **grant** the Tribal Court the authority to use its discretion to determine when it is appropriate to adopt and utilize state law. It is the interpretation of this Court that when the legislative body has delegated authority to the Tribal Court by promulgation of statute, the purpose of the legislative body to exercise its sovereign right is fulfilled. Here, legislative authority and judicial efficiency requires discretionary action of the court.

The presentation of the alleged malpractice action before the Montana Medical-Legal Panel promotes the efficiency of the court. Both parties argue that the decision of the panel is not binding on the court; therefore in accordance with said argument, neither party is prejudice by the panel's findings. It is advantageous for the court that parties reach a settlement prior to courtroom litigation and it is the Court's view that the medical-legal review procedure inherently urges the adoption of settlement; further, a fair and equitable settlement contributes to the advantage of all parties. Within the medical-legal review process each party has a unique opportunity to assess the malpractice claims and defenses of the other before courtroom litigation commences. More noteworthy, a panel of experts, three lawyers and three health care providers examine the merits of the case and decide if there is:

> (1) substantial evidence that the acts complained of occurred and that they constitute malpractice; and

(2) a reasonable medical probability that the patient was injured thereby. Sec. 27-6-602, M. C.A.

There is nothing envisioned why any litigant, who believes he is likely to prevail on the merits of his case, would not prefer a forum of experts deciding his case, especially in view of the fact that the decision is not binding on the courts. Along this line of reasoning the Court finds persuasive Hines v. Elkhart General Hospital, 465 F.Supp. 421 (N.D. Ind. 1979), aff'd, 603 F.2d 646 (7th Cir. 1979):

> The purpose of this medical review panel procedure is, in part, to expedite the handling of such claims by providing expert opinions regarding liability prior to the initiation of the delays inherent in modern day litigation.
>
> The act provides, at the expense of a slight delay in filing the suit in court, a procedure for review to determine from the evidence submitted if there is a basis for the claim. If the panel determines there is a basis for the claim, the claimant obviously is benefited. If it determines that there is no basis for it, the claimant is informed of what others think of the merit of its claim. If he disagrees, he still has access to the courts…
>
> The...act should promote an early disposition of many cases by a voluntary settlement. It brings the parties together after the facts are available to both sides and both sides have heard the opinion that was voiced by the review panel. This, in effect, is in the nature of a pre-trial settlement conference. It in no way encroaches on the powers or prerogatives of the court.

Hines, 465 F.Supp. at 432-33.

The December 30, 1992 Tribal Court order specifically states: "…Therefore this Court will adopt and be guided by MCA 22-6-101, entitle "Montana Medical Malpractice Act'…" The courts decision is not without precedent, as pointed out by Appellee:

> . . Indeed, the power and authority of the Tribal Court to adopt and utilize state statutes and case law has routinely been recognized and upheld by this Court. See, e.g., Boyd Brothers v. Traders State Bank, Appeal No. 133 (February 6, 1992) (adopting Montana "bad faith' law) ; In re the Marriage of Bauer, Appeal No. 59 (April 12, 1989) (adopting and utilizing the Montana Motor Vehicle Safety-Responsibility Act); Buckles v. Fort Peck Tribal Court, Appeal No. 53 (September 12, 1989) (adopting and utilizing the Montana Motor Vehicle Safety-Responsibility Act); Loegering v. Granbois, Appeal No. 35 (September 24, 1987) (adopting and utilizing Montana's parental liability laws) . Appellee brief fn.3 page 12, Jan.18, 1994.

In the case before the court today the Tribal Court did not abuse its discretion in adopting and utilizing the Montana Medical Malpractice Act.

III.

ISSUE DECIDED

Whether the Tribal Court abused its discretion in dismissing the action with prejudice based on the theory that the plaintiff failed to prosecute the case and/or failed to comply with an order of the court?

Appellant argues that the case must go forward on its merits and dismissal should only be an action of last resort. Appellant has cited several cases which fortifies its argument. In dicta but appropriate here the court in Figueroa Ruiz v. Alegria, 896 F. 2d 645, 648 (1st cir. 1990) set forth considerations which guides this Court. Dismissal on account of delay alone is appropriate only in cases of "extremely protracted inaction (measured in years). Cosme Nieves v. Deshler, 826 F.2d at 2. A district court should resort to dismissal as a penalty for delay only after determining that none of the lesser sanctions available to it would be appropriate. Zavala Santiago, 553 F.2d 712. Here, it appears to the court that their was no "extreme protracted inaction measured in years". The court agrees the facts indicate a delay in plaintiff complying with the Tribal Courts order directing its case to the Montana Medical-Legal Panel. However, dismissing the case with prejudice and without warning appears to overreach the court's discretionary power. In this case the court had a lesser sanction available to it, the court could have dismissed the case without prejudice or could have issued a warning to the plaintiff, or could have in its order specified a date by which plaintiff had to present its case to the Montana Medical-Legal Panel.

This case in particular because of its merits should go forward and not remain unresolved. The complaint of August 28, 1992 alleges: "... .The death of the Plaintiff ANTHONY FERGUSON and the resulting damages were the proximate result of the following acts of negligence, among others, on the part of the Defendant POPLAR COMMUNITY HOSPITAL and/or its agents:' [This court is not making a judgment on the merits.] To uphold a dismissal of this case based on plaintiffs' delay or because of dilatory actions of the plaintiffs' counsel would leave the case unresolved on its merits.

The Court is in accord with dissenting, Justice Black in Link v. Wabash R. Co., 82 S. Ct. at 1398 who noted: "laudable objective should not be sought in a way which undercuts the very purposes for which courts were created -- that is, to try cases on their merits and render judgment in accordance with the substantial rights of the parties". Link at 1398. Additionally, in Titus v. Mercedes Benz of North America, (CA 3rd, 1982) 695 F.2d 746 the opinion expresses that a court should be reluctant to deprive a plaintiff of the right to have his claim adjudicated on the merits. Other cases cited by the appellant/plaintiff favor decisions on the merits: Scarborough v. Eubanks, 747 F.2d 871 (1984); Carver v. Bunch, 946 F.2d 451 (1981) and Gross v. Stuco Component Systems, Inc., 700 F.2d 120 (1983). See also: Hillig v. Commissioner of Internal Revenue, 916 F.2d 171 (1991) wherein the court set forth factors a district court should consider in determining whether a matter should be dismissed for failure to prosecute and/or comply with a court order.

This court is not blind to Rule 41(b), Fed.R.Civ.P., however, the directive of that statute must yield where considerations of proceeding on the merits of the case outweighs a dismissal based on failure to prosecute and/or failure to comply to a court order.

NOWTHEREFORE in consideration of the foregoing this Court hereby ORDERS that the Tribal Courts order of October 15, 1993 which dismissed with prejudice the plaintiffs' action, be and is hereby overturned. It is the further ORDER of this Court that the plaintiffs', within sixty (60) days of the date of this writing, comply with the Tribal Court's order dated December 30, 1992.

DATED this _____ day of March, 1993.

BY THE COURT OF APPEALS:

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Gary M. Beaudry, Chief Justice

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Gerard M. Schuster, Associate Justice