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

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Shannon Hopkins,  
Plaintiff/Appellant

vs.

**Appeal No. 309**

Marvin Youpee Sr.,  
Defendant/Appellee

\*\*\*\*\*

**OPINION**

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This appeal arises from an **Order Dismissing Civil Complaint** issued by **The Honorable Barry C. Bighorn**, on **October 5, 1998**. **Mary L. Zemyan, Esq.**, Wolf Point, MT appearing on behalf on plaintiff/appellant. **Marvin Youpee Sr.**, defendant/appellee, pro se.

**BRIEF FACTUAL OVERVIEW AND PROCEDURAL HISTORY**

On **June 15, 1998** appellant **Shannon Hopkins** (hereafter **Shannon**) filed a complaint in Tribal Court alleging that defendant **Marvin Youpee** (hereafter **Marvin**) either converted or destroyed clothing, jewelry and various personal items totaling \$18,411 which had been awarded to plaintiff in a divorce proceeding with defendant. On **July 2, 1998**, **Marvin** filed his answer, generally denying all of the allegations. A hearing pursuant to **CCOJ, Title IV, §103<sup>1</sup>** was held on **July 20, 1998**. At that hearing, **Marvin** made an oral Motion to Dismiss, citing several grounds. The Court, in its **July 22, 1998** written order, set forth a briefing schedule wherein **Marvin's** brief in support of his motions to dismiss was due at **Noon, August 4, 1998**, **Shannon's** brief was due at **Noon, August 18, 1998**. The order further allowed for **Marvin** to file a reply brief at **Noon, August 25, 1998**. A hearing was scheduled for **August 31, 1998** at 1:00 p.m., with the **Section 103** hearing continued until after the ruling on the Motion to Dismiss.

**Marvin** filed his timely brief at 11:32 a.m. on **August 4, 1998**. **Shannon's** attorney filed her brief at 3:59 p.m. on August 18, 1998. **Marvin** filed a reply brief on **August 25, 1998**, and on the same date, he also filed a new Motion to Dismiss, citing as grounds, **Shannon's** belated filing of 3 hours and 59

minutes on **August 18th**.

At the **August 31, 1998** hearing, the Court ordered a briefing schedule on the new Motion to Dismiss and both parties filed their briefs in a timely fashion.

On **October 5, 1998**, the Court issued its **Order Dismissing Civil Complaint** for **Shannon's** failure to file a timely brief, citing the **Fort Peck Tribal Court Rules of Civil Procedure** as establishing the standard for timeliness. It is from this order that **Shannon** seeks our review.

### **ISSUE PRESENTED**

**Whether filing a brief 3 hours and 59 minutes late warrants dismissal of an entire complaint?**

**Shannon** urges that this is an issue of first impression in this Court and that it may very well be an issue of first impression in any Court. For the reasons discussed below, we reverse the Tribal Court's Order Dismissing Civil Complaint.

### **DISCUSSION**

In all of our research of cases in both State and Federal Courts it is consistently recognized that the dismissal of a case with prejudice is a drastic remedy to be used only in those situations where a lesser sanction would not better serve the interests of justice. We found the following language quite common and persuasive:

"The sanction of dismissal is the most severe sanction that a court may apply, and its use must be tempered by a careful exercise of judicial discretion.' [Case cited] The decided cases, while noting that a dismissal [with prejudice] is a discretionary matter, have generally permitted it only in the face of a clear record of delay or contumacious conduct by the plaintiff." **Durham v. Florida East Coast Railway Company, 5th Cir. 1967, 385 F.2d 366, 368.**

**In an employment discrimination case filed pursuant to Title VII of the Civil Rights Act of 1964, a plaintiff's attorney was** instructed by the Court to file a pre-trial order one week before trial and jury instructions three days before trial. The attorney failed on both counts and the trial court dismissed. In reversing the dismissal, the **Fifth Circuit Court of Appeals** stated:

**"A dismissal with prejudice is a drastic sanction which may affect substantial rights of the litigant and is to be used only**

in extreme situations, *Flaksa v. Little River Marine Construction Co.*, *supra*, 389 F.2d at 887, where there is "a clear record of delay or contumacious conduct by the plaintiff," *Durham v. Florida East Coast Railway Co.*, 5 Cir. 1967, 385 F.2d 366, and where lesser sanctions would not serve the best interests of justice. (citation omitted) We do not find these extreme circumstances in this case. Pond was not a participant in the fault, and the conduct of counsel was no more than inadvertence. This is not to say that the trial court may not impose such lesser sanctions as it may find appropriate against counsel, see *Woodham v. American Cystoscope Co.*, 5 Cir. 1964, 335 F.2d 551" **Pond v. Branniff Airways, 453 F.2d 347, 349.**

In its Order, the Tribal Court cited **Rule 7-1** and **Rule 7-2** as establishing the standard as to the question of timeliness<sup>2</sup>. We note the following language in **Rule 7-1**:

"Failure to file briefs within the prescribed time may subject any motion to summary ruling.  
***Failure to file a brief by the moving party*** shall be deemed an admission that, in the opinion of the counsel, the motion is without merit, and, ***failure to file a brief by the adverse party shall be deemed an admission that, in the opinion of counsel, the motion is well taken.***" (our emphasis)

We assume that the Tribal Court in stating that this rule, in part, 'established the standard as to the question of timeliness', interpreted the language of this rule to mean that **any untimely failure** to file a brief constituted a **total failure** to file a brief. Thus, if an extension is not sought and obtained, pursuant to **Rule 7-2**, there is no remedy and thus, no relief for the errant party. In other words, when the Court gave **Shannon** an opportunity to respond to **Marvin's** newest motion to dismiss for failure to file a timely brief, she failed to show that she had filed her brief timely and the Court felt compelled to dismiss the complaint, stating, "Addressing the current question of timeliness, the Court has established its standard through Rules 7-1 and 7-2. Therefore, the Court shall adhere to this standard, and hereby dismisses this Civil Complaint."

Whether our assumption of the Tribal Court's interpretation is correct or not, we must respectfully disagree with its ruling to dismiss the complaint. First, we note that the language of **Rule 7-1** allowing for a summary ruling is permissive, not mandatory ("Failure to file briefs within the prescribed time ***may*** subject any motion to summary ruling.) Secondly, even though there is mandatory language regarding

conclusions that are triggered by a party's failure to file a brief (e.g. **Failure** to file a brief by the moving party **shall be deemed an admission** that, in the opinion of the counsel, the motion is without merit, and, **failure** to file a brief by the adverse party **shall be deemed an admission** that, in the opinion of counsel, the motion is well taken) we do not believe that the ultimate sanction of dismissal is necessarily warranted for such failure. When dealing with the matter summarily, the Tribal Court is not required to impose the ultimate sanction, but rather, may, in its discretion impose whatever sanction is warranted by the particular situation. It is our firm belief that the Tribal Court has broad discretion regarding the imposition of sanctions. Therefore, there is no question that the Tribal Court had the authority to dismiss a complaint. The pertinent question is, "In dismissing the complaint, did the Tribal Court 'step over the line' in exercising that authority."

In the case before us it would appear that **Shannon's** only fault was her attorney's filing of a brief 3 hours 59 minutes late. The record is completely devoid of any contumacious behavior, nor is there a showing of any consistent negligence or dereliction on the part of **Shannon** or her attorney. Neither **Shannon**, nor her counsel, have been guilty of any conduct that would justify the imposition of the severe sanction of a dismissal with prejudice. While we in no way condone any violation or disregard of our Tribal Courts' orders, neither do we believe that an errant finger should render the body dead.

To uphold and preserve the strong public policy that all parties are entitled to 'their day in Court', there must be a balancing of interests and the preservation of the cause of action of plaintiffs, if any they have. Such presumptive preservation outweighs any inconvenience occasioned to the defendant. Indeed, in any dispute, the very best resolution for all of the parties is to have the matter fully heard and decided on the merits.

It is often said that an abuse of discretion occurs when a Court 'exceeds the bounds of reason'. We believe that our Tribal Court in dismissing **Shannon's** complaint did just that. Accordingly, we reverse the Order Dismissing Civil Complaint and remand to the Tribal Court for further proceedings consistent with this opinion.

### BY THE COURT OF APPEALS:

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Gary P. Sullivan  
Chief Justice

CONCUR:

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Gary M. Beaudry  
Associate Justice

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Carroll J. DeCoteau  
Associate Justice

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<sup>1</sup>**Sec. 103. Hearing.**

At the time the verified complaint is filed, the clerk shall schedule a hearing on the claim not less than fifteen (15) days after the complaint is filed. The clerk shall furnish the plaintiff with a copy of the notice showing the time and place of the hearing and shall affix such notice to the copy of the complaint to be served on each defendant. At the hearing, the presiding judge shall ascertain whether:

(a) The defendant has any defenses to the claim, or wishes to present any counterclaim against the plaintiff or cross-claim against any other party or person concerning the same transaction or occurrence;

(b) Any party wishes to present evidence to the Court concerning the facts of the transaction or occurrence;

(c) The interest of justice require any party to answer written interrogatories, produce any documents or other evidence, or otherwise engage in any pre-trial discovery considered proper by the judge;

(d) Some or all of the issues in dispute can be settled without a formal adjudication; and

(e) The claim is ready for trial:

(1) If the claim is ready for trial, the judge may try it immediately or set a subsequent date for trial.

(2) If the claim is not ready for trial, the judge shall set a subsequent date for trial and order such preparation by the parties as he/she deems necessary-

<sup>2</sup>**7-1 MOTIONS**

Upon serving and filing a motion, or within 5 days thereafter, the moving party shall serve and file a brief. The adverse party shall have 10 days after receipt of the motion and brief within which to serve and file an answer brief. Upon the filing of briefs, the motion shall be deemed made and submitted and taken under advisement by the Court, unless the Court orders oral arguments on the motion. The Court may, in its own discretion, order oral arguments on its own motion, or upon an application contained in the brief of either party.

Failure to file briefs within the prescribed time may subject any motion to summary ruling. Failure to file a brief by the moving party shall be deemed an admission that, in the opinion of the counsel, the motion is without merit, and, failure to file a brief by the adverse party shall be deemed an admission that, in the opinion of counsel, the motion is well taken.

**7-2 EXTENSION OF TIME**

Extensions of time to further plead, file briefs or continue a hearing on a motion may be granted by order of the Court upon written application which shall note that opposing counsel has been contacted concerning the extension or continuance, and whether opposing counsel objects to the motion. All requests for extension of time or continuance shall be accompanied by an appropriate form of order with sufficient copies for the Clerk to mail to adverse parties.

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