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OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA-08-0084

D. LISA LOZEAU,

Plaintiff and Appellant,

v.

GEICO INDEMNITY CO. and  
ELIZABETH DURGLO, a/k/a  
LIZ DURGLO,

Defendant and Appellee.

FILED

JUL 09 2008

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

PLAINTIFF LOZEAU'S REPLY BRIEF

ON APPEAL FROM THE TWENTIETH JUDICIAL DISTRICT COURT,  
LAKE COUNTY, MONTANA

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## TABLE OF CONTENTS

TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii
THE PLAINTIFF'S DISTRICT COURT COMPLAINT ..... WAS NOT REQUIRED TO DESCRIBE THE PARALLEL CASE THAT WAS BEING LITIGATED IN TRIBAL COURT	2
THE LACK OF PREJUDICE IS APPARENT ON ITS FACE GIVEN ..... THE ALTERNATIVE FILINGS BY PLAINTIFF LOZEAU IN TWO DIFFERENT COURTS	4
THE FILING OF PLAINTIFF'S TRIBAL COURT COMPLAINT ..... DID INDEED CONSTITUTE A REASONABLE LEGAL REMEDY	5
§27-2-407 MCA, IS, THOUGH NOT RAISED IN ..... THE DISTRICT COURT, INSTRUCTIVE IN THE APPROACH TAKEN TO THE COMPANION THEORY OF EQUITABLE TOLLING	7
CONCLUSION .....	8
CERTIFICATE OF COMPLIANCE .....	10
CERTIFICATE OF SERVICE .....	11

## TABLE OF AUTHORITIES

### STATUTES

MCA §27-2-407 .....	7
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### CASES

<i>Butte Country Club v. Metropolitan Sanitary &amp; Storm Sewer Dist. No. 1 et al</i> (1974), 164 Mont. 74, 77, 519 P.2d 408, 409 .....	3
<i>Erickson v. Croft</i> , 233 Mont. 146 (1988) 760 P.2d 706 .....	5
<i>Ereth v. Cascade County</i> , 2003 MT 328, 318 Mont. 355, 81 P3d. 463 .....	4
<i>Harrison v. Chance</i> , 244 Mont. 215 (1990) 797 P.2d 200 .....	4-5
<i>Hash v. U.S. West Communications</i> , 268 Mont. 326 (1994) 886 P.2d 442 .....	5
<i>Kunst v. Pass</i> , 1998 MT 71, ¶ 35, 288 Mont. 264, ¶ 35, 957 P.2d 1, ¶35 .....	3
<i>Mysse v. Martens</i> , 279 Mont. 253, 266, 926 P.2d 765 .....	3

**THE PLAINTIFF'S DISTRICT COURT COMPLAINT  
WAS NOT REQUIRED TO DESCRIBE THE PARALLEL  
CASE THAT WAS BEING LITIGATED IN TRIBAL COURT.**

Defendant Durglo's Response Brief in this case argues initially (Page 6) that Plaintiff Lozeau's automobile negligence case against Durglo was not timely filed and the district court complaint makes no reference to the parallel filing in the tribal court. In so arguing, Durglo fails to note that she was the same Defendant in the Tribal Court action, she was aware of the very same allegations in that complaint, and she made the jurisdictional arguments to the tribal court that resulted in dismissal of that case. Durglo now claims that it was "deficient" of Lozeau not to mention in her district court complaint the existence of the tribal court complaint. Defendant cites no authority to that effect.

Plaintiff Lozeau would suggest that it is disingenuous of Durglo's counsel to argue that there is an issue relating to notice which required Lozeau to mention the tribal court case as part of the allegations in Lozeau's district court complaint. Plaintiff Lozeau gave notice to Defendant Durglo of all of her claims in the action in the tribal court. The same lawyer represented her in Tribal Court, in the District Court, and on this appeal, and neither the lawyer nor his client were in a position to argue lack of notice to the District Court. But that is just what defense counsel persists in doing, when, in fact, he and his client have had notice of and have been

litigating Lozeau's claims long in advance of the expiration of the statute of limitations.

Nor is the lack of notice argument well-taken under Montana law. The Rules of Civil Procedure in Montana are predicated upon notice pleading. Kunst v. Pass, 1998 MT 71, ¶ 35, 288 Mont. 264, ¶ 35, 957 P.2d 1, ¶ 35. A complaint is must disclose the "presence of all the elements necessary to make out a claim." Mysse v. Martens, 279 Mont. 253, 266, 926 P.2d 765, citing Butte Country Club v. Metropolitan Sanitary & Storm Sewer Dist. No. 1 et al. (1974), 164 Mont. 74, 77, 519 P.2d 408, 409. Defendant Durglo was not in any particular lacking notice of Plaintiff's claims, and the District Court Complaint simply brought those claims into an alternative forum for a final disposition in the event of a dismissal in the Tribal Court.

The argument that the District Court Complaint was deficient or defective because not mentioning the substantively identical proceeding still pending in the Tribal Court at the time the District Court case was filed elevates form over substance. The District Court had before it all the evidence that it needed to determine that a timely filed Tribal Court complaint identical in its allegations to the District Court Complaint had been brought, and should have determined that the tribal court filing formed a sufficient basis to reject Defendant Durglo's motion to

dismiss.

**THE LACK OF PREJUDICE IS APPARENT ON ITS FACE GIVEN  
THE ALTERNATIVE FILINGS BY PLAINTIFF LOZEAU  
IN TWO DIFFERENT COURTS**

In Page 10 of Defendant Durglo's brief, Durglo argues that the District Court's rejection of equitable tolling was proper because Lozeau could not demonstrate lack of prejudice to Durglo. Defendant discusses the District Court's reliance on Ereth v. Cascade County, 2003 MT 328, 318 Mont. 355, 81 P3d. 463. The District Court's determination that prejudice had occurred as a result of the passage of time is sound on the sole basis of Ereth. In that case, there was no dual filing in two different courts of the same case to protect against the expiration of the statute of limitations. In Ereth, there was no identity between the defense lawyer that sought dismissal of one case and then dismissal of the second case based upon lack of timely notice under a statute of limitations. There is really no similarity between the underlying efforts of the Plaintiff to make a timely filing and protect against the expiration of the statute of limitations, as was done in this case, in comparison to Ereth.

Plaintiff Lozeau would argue that she gave timely notice of her claims in a continuing process that at the least began in the Tribal Court and continued forward in the District Court. The equitable tolling elements articulated in Chance v.

Harrison, 244 Mont. 215 (1990) 797 P.2d 200 and Erickson v. Croft (1988), 233 Mont. 146, 760 P.2d 706 are in this case, more than any other Montana equitable tolling case, clearly satisfied: 1) there was timely notice to the defense within the applicable statute of limitations; 2) there was no prejudice to the Defendant in gathering evidence, as Durglo and her insurer were aware of the case and chose to ignore the negligence claims and damage claims contained in it in favor of a dismissal argument in one of the courts; 3) there was good faith and reasonable conduct by the Plaintiff in filing the second claim, which the District Court specifically found.

**THE FILING OF PLAINTIFF'S TRIBAL COURT COMPLAINT  
DID INDEED CONSTITUTE A REASONABLE LEGAL REMEDY**

Relying on Hash v. U.S. West Communication Services, 268 Mont. 326, 886 P2d. 442 (1994), Defendant Durglo argues that equitable tolling does not apply because it is only available where the Plaintiff has several legal remedies at her disposal and she reasonably and in good faith pursues one. Since the District Court found that Plaintiff's choice of the Tribal Court forum was done in good faith, Defendant Durglo attacks the reasonableness of the choice of forums.

In making this argument, Defendant Durglo invites this Court to second guess the complex array of factual, legal and combined factual-legal issues applicable to a

tort claim arising out of an on-reservation tort committed by a tribal member against a non-member. Durglo argues (for the first time on appeal) but does not come close to demonstrating, that Plaintiff Lozeau's initial choice of forum, the Confederated Salish and Kootenai Tribal Court, was unreasonable and therefore there is no basis for equitable tolling.

Defendant Durglo is a tribal member. She lives on the reservation and she caused a car wreck on the Indian reservation. Plaintiff lives on the reservation. Plaintiff is a non-member but was formerly married to a tribal member. Plaintiff's accident was investigated by Tribal Law Enforcement. There was nothing obvious that presented a barrier to subject matter jurisdiction in the Tribal Court. Defendant Durglo mounted an attack on jurisdiction that relied in part on very recent case law from the Ninth Circuit Court of Appeals. Those arguments ultimately prevailed in the Tribal Court but not before Plaintiff had filed her case in the District Court to protect against a statute of limitations argument.

Defendant Durglo goes on to characterize the filing of a Tribal Court Complaint as a "legal miscalculation" (Page 19) and "folly" (Page 16). This is bootstrapping indeed. The Defendant did, after all, know of the claim well within the statute of limitations, and the claim in the District Court was the same that she was defending in the Tribal Court. The type of defense that she raised, which was



ultimately successful, was not based on the merits, but she cites no authority to suggest that a jurisdictional flaw necessarily made a subsequent filing in another court fatally defective and unsuited to the application of equitable tolling. Plaintiff believes this Court should summarily reject this theory.

**§27-2-407 MCA, IS, THOUGH NOT RAISED IN THE DISTRICT COURT, INSTRUCTIVE IN THE APPROACH TAKEN TO THE COMPANION THEORY OF EQUITABLE THEORY.**

Plaintiff would have been well served by raising §27-2-407 in the District Court, and did not do so, and fully expects that she will be precluded from arguing its direct applicability in this appeal. Defendant Durglo argues in essence that jurisdictional arguments in the tribal court do not count. But the fact is that the District Court based its determination on prejudice. In so ruling, this Court glossed over the filing of the Tribal Court Complaint well within the statute of limitations and the clear effort of the Plaintiff to continue her claim in an alternative forum in the event of a dismissal in Tribal Court. The continuity of the claims, Plaintiff Lozeau would submit, trumps the argument that Defendant was prejudiced. Defendants in many cases, after all, choose to litigate jurisdictional issues to a date in time well beyond the expiration of the applicable statute of limitations. Cases can go on for years on jurisdictional arguments before the merits are ultimately addressed. If a party seeking dismissal on jurisdictional or other technical grounds

chooses to not investigate the merits of the underlying claim, that is his or her choice, but §27-2-407 MCA stands for the proposition that a claim timely filed in one court can be pursued later on in another court if that statute's requirements are met. An argument of prejudice in such a case will not be heard if the savings statute is raised. Although that statute was not raised to the District Court, its implications directly conflict with the Court's rationale for deciding against Plaintiff Lozeau.

### **CONCLUSION**

Defendant Durglo has persuaded the District Court that equitable tolling cannot apply because the Defendant was prejudiced. The Court's ruling draws the all its force from the fundamental principle behind statutes of limitations, which requires dismissal of cases that are not filed within the time allowed.

The District Court did not rely on any specific fact brought to its attention by the Defendant to show that a particular witness had become unavailable, or a particular bit of evidence was permanently lost, or a crucial fact cannot be proven by one side or the other. The Court relied on the policy of the statute of limitations itself.

But that policy is perverted by the Defendant's arguments. Defendant Durglo was defending this same case in the Tribal Court long before the expiration of the

statute of limitations. The Defendant obtained a dismissal, but before that happened Plaintiff Lozeau had turned to another court, alleging the same facts, and after that case was served Defendant Durglo sought dismissal on a new legal theory. Defendant did not undertake any discovery and so did not present to the District Court any specific harm with respect to lost evidence. The Court ruled on its own, on the basis of the public policy of the statutes of limitations.

The District Court erred in failing to conclude that the Tribal Court case justified, indeed mandated, application of equitable tolling. Where Defendant Durglo did not herself make a showing of prejudice, the District Court erred in determining that the element of prejudice could not be overcome. The policy of the statute of limitations was just not applicable here, where Durglo was defending this case in another court well before the statute of limitations expired. The Court's dismissal should be reversed.

RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of July, 2008.

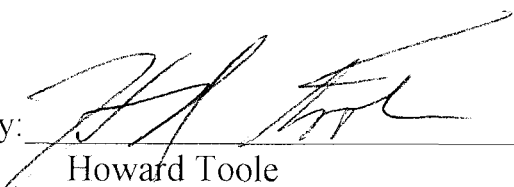
  
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Attorney for Appellant Lisa Lozeau

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count is not more than 5,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

Dated this 9<sup>th</sup> day of July, 2008.

HOWARD TOOLE LAW OFFICES  
Attorney for Appellant

By:   
Howard Toole

**CERTIFICATE OF SERVICE**

I certify that on the 9<sup>th</sup> day of July, 2008, I served a copy of the preceding document by prepaid mail on the following parties:

John E. Bohyer

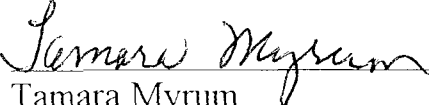
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