

Terrance L. Toavs
LAW OFFICE of TERRANCE L. TOAVS, PLLC
429 2nd Avenue South
Wolf Point, MT 59201
(406) 653-1624

Attorney for Defendant
Ralph Patch

U.S. DISTRICT COURT, DISTRICT OF MONTANA
GREAT FALLS DIVISION

MARGARET WHITE EAGLE-PAYNE ON BEHALF)	Case No. 4:16-cv-00102-
OF HERSELF AND AS PERSONAL)	BMM-JTJ
REPRESENTATIVE AND BENEFICIARY OF)	
THE ESTATE OF ANNABELLE)	<u>MOTION TO DISMISS AS TO</u>
WHITE EAGLE, DECEASED;)	<u>DEFENDANT PATCH WITH</u>
)	<u>SUPPORTING MEMORANDUM</u>
Plaintiff,)	
)	
v.)	
)	
HOWARD BEMER, <u>ET AL.</u>)	
)	
Defendants.)	

COMES NOW, defendant Ralph J. Patch, by and through
counsel, to respectfully move the court for its order
dismissing this action as to defendant Patch for lack of
subject matter jurisdiction, abstention and for failure to
state a claim upon which relief can be granted. Rule 12(b)(6),
F.R.C.P.

This motion is and will be based upon this notice, the
brief in support of this motion set forth herein below, the
entire files and records in this action, and upon such other
and further oral and documentary evidence as may be brought
before the court at any hearing on this motion.

DATED: October 11, 2016

/s/ Terrance L. Toavs
Terrance L. Toavs

SUPPORTING BRIEF

I.

FACTS AND PROCEDURAL HISTORY

This is an action for breach of the United States' trust obligations to Tribal Members, Treaty Violations, Civil Rights, Fraud, Infliction of Emotional Distress, Quiet Title, Slander of Title and Declaratory Relief. (Complaint, pp. 3-4.) By this action Plaintiff Margaret White Eagle-Payne ("Margaret") seeks to overturn a probate decision of the Fort Peck Tribal Court of Appeals which held a personal-property dwelling on Fort Peck Reservation was not part of the probate estate because it had been effectively transferred by the decedent prior to her death.

Margaret is the daughter of decedent, Annabelle White Eagle ("Annabelle"). Margaret was the personal representative of Annabelle's estate, which she probated in the Fort Peck Tribal Court in Poplar, Montana.

During the probate proceedings, an issue arose concerning ownership of a dwelling, which is personal property situated on a home-site lease from the Fort Peck Tribes. (Complaint, pp. 6-7; In re the Estate of White Eagle, 13 Am. Tribal Law Reporter 214 (2016) (A true and correct copy of which is attached hereto as Exhibit A.)

Annabelle's will left the dwelling unit to Margaret. (Complaint, p. 27.) However, prior to her death Annabelle transferred the dwelling to her grandson, Richard White Eagle

1 ("Richard"). Estate of White Eagle, supra, p. 215. The deed
2 was executed on April 17, 2003. (Complaint, p. 5; Estate of
3 White Eagle, supra, p. 215; (a true and correct copy of the
4 Deed of Conveyance of Dwelling Unit dated April 17, 2003, is
5 attached hereto for the court's reference as Exhibit B).)

6 Margaret alleges Annabelle delivered the deed to Richard,
7 and that Richard recorded the deed on July 31, 2014.
8 (Complaint, p. 98.)

9 Margaret litigated the dwelling-ownership issue in the
10 Tribal Court probate proceeding. The Tribal Court ruled in
11 favor of Richard. Estate of White Eagle, supra. The case was
12 appealed to the Fort Peck Tribal Court of Appeals, which
13 affirmed the Tribal Court's ruling the house belonged to
14 Richard and was not part of the probate estate. (Complaint, pp.
15 5-6, 8; Estate of White Eagle, supra, p. 216, Exhibit A.)

16 Defendant Ralph Patch's only involvement in this case is
17 that he was the attorney Annabelle hired in April, 2003, to
18 draft the deed of conveyance from Annabelle to Richard.
19 (Complaint, pp. 18, 26.) Margaret alleges the deed was
20 defective and alleges Annabelle was not competent to sign the
21 deed of conveyance because Annabelle was a severe alcoholic.
22 (Complaint, p. 7.) However she cites an affidavit filed in the
23 probate litigation by Georgianna Fish, who apparently drove
24 Annabelle to attorney Patch's office on April 17, 2003, and
25 states Annabelle had "not been drinking prior to this trip."
26 (Complaint, pp. 31-32.)

27 / / /

28 / / /

II.

ANALYSIS

A. This Court Lacks Jurisdiction over the Claims against Attorney Patch.

The claim alleged against attorney Patch concerns the sufficiency of the deed he drafted in 2003. This issue does not invoke any federal question, nor is there diversity of citizenship. While this court does have supplemental jurisdiction over certain claims under 28 USCS § 1367, such jurisdiction only exists over "claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." This is not the case here.

The primary focus of Margaret's complaint deals with her assertions her civil rights were violated in the Tribal Court probate proceeding. She alleges she was "blindsided [sic]" when Richard produced the Deed of Conveyance, did not have the chance to challenge the validity of the deed, denied the right to challenge or stop Richard's attorney from appearing in the case, and denied the right to challenge Richard's ownership of the dwelling. (Complaint, p. 5.) These allegations are only tangentially related to her claim against attorney Patch, which is that he incorrectly drafted the deed in 2003.

The drafting of the deed (correctly as the Tribal Court held, or incorrectly as Margaret claims) is a separate and distinct claim from a civil rights case. Evidence in an attorney-malpractice case usually centers around expert

1 testimony an attorney met or did not meet the standard of care
2 to his client. This is distinct from the question here;
3 whether or not the Tribal court provided a fair hearing. The
4 probate facts occurred in 2015; the deed was signed in 2003.

5 Because the claims against Patch are not related to the
6 federal issues raised herein, the court lacks jurisdiction over
7 the claims against Mr. Patch. Therefore, plaintiff's claims
8 against attorney Patch should be dismissed for lack of
9 jurisdiction.

10 B. The Claims against Attorney Patch should be Dismissed
11 under the Doctrine of Absention.

12 Assuming, arguendo, the court has subject matter
13 jurisdiction over Margaret's claims as to Mr. Patch, this court
14 should nevertheless dismiss Mr. Patch from this lawsuit under
15 the doctrine of abstention.

16 This case involves a claim by an alleged heir to personal
17 property of a Tribal member located on the Reservation. The
18 subject dwelling is situated on a leased lot owned by the Fort
19 Peck Tribes. (Estate of White Eagle, supra.) The Fort Peck
20 Tribal Court has determined the deed prepared by Mr. Patch is
21 valid, thus, the dwelling was not part of the probate estate.
22 These issues fall within the purview of the Tribal Court and
23 should be left alone.

24 The U.S. Congress has encouraged the development of
25 sophisticated Tribal Court systems in order to foster Indian
26 Tribes' self-regulation and Tribal sovereignty. Thus, Tribes
27 have the power, derived from "the tribe's general authority, as
28 sovereign, to control economic activity within its

jurisdiction" and to govern transactions "'occurring on trust lands and significantly involving a tribe or its members'" This power is derived from "the tribe's general authority, as sovereign, to control economic activity within its jurisdiction" and extended to transactions "'occurring on trust lands and significantly involving a tribe or its members'" Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137, 71 L. Ed. 2d 21, 102 S. Ct. 894 (1982) (quoting Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 152, 65 L. Ed. 2d 10, 100 S. Ct. 2069 (1980)). While the U.S. Supreme Court has found Indian Tribes do not have authority to regulate off reservation activities and some on-reservation activities involving non-members (see Montana v. United States, 450 U.S. 544, 67 L. Ed. 2d 493, 101 S. Ct. 1245 (1981)), matters which involve disputes between Tribal members on the reservation are generally within the jurisdiction of the Tribes. See e.g. Plains Commerce Bank v Long Family Land & Cattle Co. (2006, SD) 2006 DSD 11, 440 F Supp 2d 1070, affd (2007, CA8 SD) 491 F3d 878, revd. (2008) 554 US 316, 128 S Ct 2709, 171 L Ed 2d 457. This is the case here.

Further, this court should consider the position of the Montana Supreme Court, which has a history of deference to Tribal Court jurisdiction. The Montana Supreme Court has deferred to tribal court opinions on the basis of abstention/comity numerous times. See e.g. Nielsen v. Brocksmith Land & Livestock, Inc., 321 Mont. 37, 42-43; 88 P.3d 1269 (2004); In re Marriage of Limpy (1981), 195 Mont. 314, 318-19, 636 P.2d 266, 269 ("we defer to [the tribal court's]

1 opinion on the basis of comity believing that the Tribal Court
2 should interpret Tribal law as a matter of policy");
3 Stewart v. District Court (1980), 187 Mont. 209, 212, 609 P.2d
4 290, 292 ("under the principles of comity we should abstain and
5 leave to the Tribal Court the decisional task of divorce
6 matters between tribal members.").

7 In the case at bench, Margaret's allegations against the
8 sufficiency of attorney Patch's deed are issues inexorably tied
9 to Annabelle's Tribal Court probate. The subject deed involves
10 a transfer of Indian-owned property on the reservation.

11 The Tribal Court's decision that the deed was valid should
12 be left to the Tribal Court. To hold otherwise will invite
13 every dissatisfied litigant in Tribal Court to seek this
14 court's review of the Tribal Court's decisions.

15 The motion should be granted.

16 C. The Complaint Fails to State a Claim against
17 defendant Patch which can be Granted.

18 To the extent Margaret asserts claims against Mr. Patch in
19 her individual capacity, these claims cannot be granted because
20 Mr. Patch's duty was to his client Annabelle, not to Margaret,
21 a third party and stranger to the transaction. See Rhode v.
22 Adams, (1998) 288 Mont. 278, 957 P.2d 1124. Margaret was
23 neither Mr. Patch's client nor a beneficiary of the deed he
24 drafted.

25 Nowhere does Margaret allege she had any contact at any
26 time with Mr. Patch, verbal, written or otherwise. Nowhere
27 does Margaret allege Annabelle had any contact with Mr. Patch
28 since April 17, 2003, the day he met with Annabelle and she

1 signed the deed. Nowhere does Margaret allege Mr. Patch made
2 any statement or representation to Annabelle that was false -
3 indeed, she could not competently make any such representation
4 since, by her own admission, she was not present for that
5 attorney conference.

6 The Complaint fails to assert any facts which could form
7 the basis of any claim Mr. Patch breached any duty to her or to
8 Annabelle. This is clear from a review of the complaint, as
9 follows:

10 Count 1 alleges breach of trust against defendants other
11 than Mr. Patch. Count 2 alleges treaty violations which do not
12 involve Mr. Patch. Count 3 alleges civil rights which also
13 have nothing to do with the deed or Mr. Patch. Count 4 asserts
14 a lack of standing argument which likewise doesn't involve Mr.
15 Patch.

16 Regarding Counts 5 and 6 (fraud) there are no allegations
17 that Mr. Patch made any false representations or concealed any
18 facts from Annabelle. As to Margaret, attorney Patch had a
19 duty not to disclose information concerning Annabelle (his
20 client) to Margaret (a third party). (See Cannon 6, Fort Peck
21 Tribal Code of Ethics, "An attorney shall not reveal
22 information communicated by a client..."; see also Rule 1.6(a),
23 Montana Rules of Professional Conduct, "(a) A lawyer shall not
24 reveal information relating to the representation of a client
25 unless the client gives informed consent, the disclosure is
26 impliedly authorized in order to carry out the representation
27 ...")

28 / / /

1 As to Count 7 (intentional infliction of emotional
2 distress) there is no allegation of any act by Mr. Patch that
3 could form the basis of a valid emotional distress claim.
4 Count 8, which alleges slander of title, is baseless as there
5 is no allegation that the deed was not requested and/or
6 executed by Annabelle. Count 9 (quiet title) seeks to invoke
7 this court's power in matters of property ownership determined
8 by the Tribal Court. Further, there are no allegations against
9 Mr. Patch.

10 Count 10 (declaratory judgment) does not involve Mr. Patch
11 because according to the complaint, he merely drafted a deed at
12 the request of his client, Annabelle. Mr. Patch does not
13 assert and has never asserted any interest in the property.
14 Count 11, alleging violation of Montana law on "beneficiary
15 deeds", is likewise deficient because it alleges no duty or
16 breach of duty concerning Mr. Patch. Incidentally, the
17 provision of Montana law cited in the Complaint concerning
18 "beneficiary deeds" has nothing to do with this case because
19 the deed at issue is not a "beneficiary deed." A Beneficiary
20 Deed is a particular type of deed that is drafted to transfer
21 an interest in property only death. M.C.A. § 72-6-121. The
22 deed here is not, under any definition, a beneficiary deed.

23 Section 72-6-121 has no application here, and Count 11 of
24 the complaint fails to state any cause of action against Mr.
25 Patch.

26 Finally, although the Tribal Court has already held the
27 Deed of Conveyance was valid, to the extent the complaint
28 alleges any claim for legal malpractice, the complaint is

1 barred by the statute of limitations set forth in M.C.A. § 27-
2 2-206 ("An action against an attorney licensed to practice law
3 in Montana ... based upon the person's alleged professional
4 negligent act or for error or omission in the person's practice
5 must be commenced within 3 years after the plaintiff discovers
6 or through the use of reasonable diligence should have
7 discovered the act, error, or omission, whichever occurs last,
8 but in no case may the action be commenced after 10 years from
9 the date of the act, error, or omission.")

10 III.

11 CONCLUSION

12 For all of the foregoing reasons, the motion should be
13 granted. Mr. Patch did nothing to warrant being hauled into
14 court in Great Falls, Montana. Here merely did his best to
15 draft a deed requested by his client in 2003.

16 DATED: October 11, 2016

/s/Terrance L. Toavs
Terrance L. Toavs, attorney
for Ralph Patch