IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 12-0010

THE NORTHERN CHEYENNE TRIBE, a Sovereign Indian Tribe of the United States and as a Nation of People, both Individually and Collectively,

Plaintiff and Appellant,

vs.

THE ROMAN CATHOLIC CHURCH; by and through its Corporate and other Business Entities, to include, but not limited to, THE DIOCESES OF GREAT FALLS/BILLINGS; ST. LABRE INDIAN SCHOOL EDUCATIONAL ASSOCIATION, INC., ST. LABRE HOME FOR INDIAN CHILDREN AND YOUTH, INC., and JOHN DOES I-X,

Defendants and Appellees.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

St. Labre has been marketing the land, name, symbols, faces, stories, culture, "plight" and "needs" of the Northern Cheyenne through its fundraising appeals for

half a century. They grossed millions of dollars annually. St. Labre exploited its relationship with the Northern Cheyenne, alleging donations were for the education *and* socio-economic benefit of the Northern Cheyenne. However, St. Labre applied less than half of the donations toward educating and assisting the Northern Cheyenne. Instead, St. Labre made unjustifiable expenditures, made improper investments, incurred exorbitant fundraising and administration costs, gave money to the Diocese, and stockpiled donations in an endowment fund for the ultimate benefit of the Diocese.

As intended beneficiaries of the funds, the Northern Cheyenne are entitled to benefit from donations raised on its behalf. When the NCT voiced concerns regarding St. Labre's marketing of the Northern Cheyenne and use of donations, St. Labre reassured the NCT of St. Labre's obligation to use the donated funds for the Northern Cheyenne's education and socio-economic welfare.

Now that St. Labre has accumulated $90 million in assets and a stable donor base from marketing the Northern Cheyenne, its façade of assisting it is no longer necessary. St. Labre could survive without marketing them. However, the assets accumulated from nearly half a century of marketing the Northern Cheyenne were to be held and used for the education and socio-economic benefit of the Northern Cheyenne people, not the Diocese.

When St. Labre made clear it would no longer make distributions or hold any of the donations in its endowment fund for the benefit of the Northern Cheyenne, the NCT was forced to file suit. St. Labre filed a series of motions for judgment on the pleadings and for summary judgment. The District Court ruled against the NCT on all counts, leaving the Northern Cheyenne people without a remedy. The NCT appeals.

STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED

St. Labre was allowed to occupy land on the Northern Cheyenne Reservation for "so long as they continue to be used solely in the advancement of religious and welfare work for the benefit of the Northern Cheyenne Indians...," pursuant to the 1926 Northern Cheyenne Allotment Act (the "Act"). Dkt. 158, Ex. B. St. Labre was initially funded in large part by government grants to educate the Northern Cheyenne children. Dkt. 158, Ex. E. When the federal government made funding cuts, St. Labre nearly closed its doors, unable to rely on funding from the Catholic Church. Dkt. 158, Ex. E. However, St. Labre survived as a result of its massive fundraising campaign marketing the Northern Cheyenne land, name, symbols, faces, stories, plight and needs, spanning half a century. Dkt. 158, Ex. E. St. Labre's most influential clergy was Father Emmett Hoffman, who ran St. Labre for thirty years and led its fundraising campaign. Dkt.158, Ex. E.

To induce donors to send money, Fr. Emmett Hoffman told donors that St. Labre raised money for the poor Northern Cheyenne, and that the Northern Cheyenne looked to St. Labre for food, clothing, education and employment. He connected St. Labre to the Northern Cheyenne, titled St. Labre newsletters and appeal letters the "Race of Sorrows," and used Northern Cheyenne symbols in St. Labre's fundraising appeals and on its buildings. He told donors the Northern Cheyenne trusted him and called the Northern Cheyenne "our people." He told donors heart-wrenching stories and showed photographs of starving Northern Cheyenne children and poor conditions on the reservation. Dkt. 158, Ex. G. St. Labre's March 1970 newsletter told donors,

> "Education of the young; opportunity of self-support for the adults, improvement of the economic and social status of the Northern Cheyenne, once called the Race of Sorrows because of their sorry plight, have been the goals of St. Labre, the only reasons for its existence."

Dkt. 158, Ex. Z.

Decades of fundraising appeals made clear St. Labre sought donations on behalf of the Northern Cheyenne for their education, employment, welfare, and to improve conditions on the reservation. Dkt. 158, Ex. G. Fr. Hoffman repeatedly affirmed St. Labre raised donations for the Northern Cheyenne, and acknowledged St. Labre's duty to hold and make equitable distributions of those donations to the NCT. Dkt. 158, Ex. F-K.

The NCT questioned St. Labre's distributions of donations through the years, but was consistently met with St. Labre's recognition of the NCT's right to donations raised on its behalf. For example, in 1983 the NCT passed Resolution No. 31 (84) creating a task force to investigate whether St. Labre had available resources that should be distributed to the Tribe. Dkt. 158, Ex. Q. The resolution and letter the NCT gave to St. Labre specifically set forth the NCT's position that St. Labre had a contract and trust relationship with the NCT, solicited and received donations on the NCT's behalf, and that St. Labre should help the Northern Cheyenne to the largest extent possible. Dkt. 158, Ex. Q. Rather than reject the NCT's assertion, St. Labre responded by meeting the NCT's request for a distribution of donations. Dkt. 158, Ex. Q. St. Labre's Board of Directors' January 26-27, 1984 meeting minutes reflect St. Labre's acknowledgment of its duty, stating it "is already, and has been, providing for the socio-economic needs of the Cheyenne people." Dkt. 158, Ex. Q. The Northern Cheyenne Business Development Endowment Fund ("NCBDEF") was subsequently created "as a way of ***augmenting*** what is already being done by St. Labre." Dkt. 158, Ex. Q. The NCBDEF and additional ongoing distributions for other socio-economic needs led the NCT to believe St. Labre recognized NCT's right to donations, and St. Labre's duty to hold and distribute donations to the NCT.

As another example, in 1997, the NCT requested additional distributions of funds and notified St. Labre of its frustrations with the failure of the NCBDEF.[1] Dkt. 139, Ex. 5. The NCT reiterated its belief that because it marketed the Northern Cheyenne, St. Labre raised and held donations on behalf of the Northern Cheyenne. Again, St. Labre responded by increasing its distributions and turned over the NCBDEF to the NCT. Dkt. 158, Ex. S. In 1998, St. Labre gave the Northern Cheyenne Pine Company to the NCT for $1.00, along with $750,000.00 for management and environmental clean-up of the mill.[2] Dkt. 158, Ex. T.

Again, in 1999, the NCT questioned the amount of its distributions. Dkt. 158, Ex. U. St. Labre engaged in protracted negotiations with the NCT, continuing to recognize the NCT's right to donations. Dkt. 158, Ex. V-X. Although alleging it no longer raised money for the NCT, St. Labre did not tell the NCT it had no right to donations already held in the endowment fund from marketing the NCT, or that the endowment fund belonged to the Diocese. Dkt. 159, Ex. 6-7.

For that reason, the NCT continued to negotiate with St. Labre for years regarding distributions and the amount of corpus that belonged to the NCT. When

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[1] NCBDEF was a loan guarantee program for new Northern Cheyenne owned businesses on the reservation.

[2] Unlike St. Labre, the NCT was unaware that the potential liability for the clean-up far exceeded what St. Labre gave it and the sawmill was losing money. It used the NCBDEF fund to try to keep the sawmill viable. Dkt. 158, Ex. T.

negotiations hit an impasse on January 28, 2005, St. Labre threatened to withdraw all offers of distribution if the NCT continued to pursue its right to donations. Dkt. 158, Ex. Y. Until January 28, 2005, the NCT believed St. Labre would hold donations previously raised on behalf of the Northern Cheyenne for its welfare.

Even after St. Labre changed its fundraising techniques and alleged it raised money for St. Labre alone, St. Labre held donations in its endowment fund from past fundraising efforts marketing the Northern Cheyenne. e.g. Dkt. 154, Ex. F. It was not until January 28, 2005 that St. Labre notified the NCT it lost the right to donations held in the endowment fund. St. Labre never previously told the NCT the Diocese owned the endowment fund. The NCT initiated its lawsuit on March 11, 2005.

STANDARD OF REVIEW

The standard of review for a District Court's order granting a motion for judgment on the pleadings is that for conclusions of law, requiring a determination of whether the District Court's decision is correct. *Paulson v. Flathead Conservation Dist.* (2004), 321 Mont. 364, ¶ 17, 91 P.3d 569, ¶ 17. To obtain judgment on the pleadings, the movant must establish that no material issue of fact remains, and the movant is entitled to judgment as a matter of law. *Paulson*, ¶ 17. "The pleadings are to be construed in the light most favorable to the nonmoving party, whose allegations are taken as true." *Paulson*, ¶ 17.

The standard of review for a District Court's order granting summary judgment is de novo, using the same Rule 56, M.R.Civ.P. criteria applied by the District Court. *Abraham v. Nelson*, 2002 MT 94, ¶ 9, 309 Mont. 366, ¶ 9, 46 P.3d 628, ¶ 9. The Court looks to the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits to determine the existence or nonexistence of genuine issues of material fact. Rule 56, M.R.Civ.P.; *Erker v. Kester* (1999), 296 Mont. 123, ¶ 17, 988 P.2d 1221, ¶ 17. Summary judgment is an extreme remedy which should be granted only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Gliko v. Permann* (2006), 331 Mont. 112, ¶ 12, 130 P.3d 155, ¶ 12; *Lee v. USAA Casualty Insurance Co.* (2001), 304 Mont. 356, ¶ 25, 22 P.3d 631, ¶ 25. "The party seeking summary judgment...has the burden of demonstrating a complete absence of any genuine factual issues," and "must overcome the burden that all reasonable inferences that might be drawn from the offered evidence will be drawn in favor of the party opposing summary judgment." *Lee,* ¶ 25. The purpose of summary judgment is to eliminate unnecessary trials, but summary adjudication "should never be substituted for a trial if a material factual controversy exists." *Boyes v. Eddie* (1998), 292 Mont. 152, ¶ 16, 970 P.2d 91, ¶ 16. The standard of review for a District Court's conclusions of law is for correctness and findings of fact is for clear error. *Gliko*, ¶ 13.

SUMMARY OF ARGUMENT

The Honorable Susan P. Watters ruled against the NCT on every count. *Appendix,* at 001-118. The District Court made incorrect determinations of law, erroneous findings of fact, and failed to draw all reasonable inferences in favor of the NCT.

St. Labre moved for Judgment on the Pleadings on the NCT's claims for violation of Article II, Sections 3, 4 and 10 of the Montana Constitution. The District Court granted the motion based upon the lack of state action and assertion that adequate statutory and common law remedies exist. However, both this Court and the plain language of the Montana Constitution protect persons from private discrimination and private violations of its "inviolable" constitutional rights as well. Additionally, the harms suffered by the NCT from these constitutional violations cannot be remedied by statutory or common law.

St. Labre also moved for Summary Judgment with regard to each of the NCT's claims. St. Labre provided no statement of undisputed facts in support of its motions, and did not address disputed facts alleged in the NCT's Amended Complaint or discovery responses. Instead, St. Labre alleged "the Tribe has no evidence to support their claim..."

In response, the NCT referenced its pleadings, written discovery, deposition testimony, and produced a cross-section of hundreds of pages of relevant

documents. St. Labre did not move to strike this evidence. While the Court questioned the admissibility of some exhibits on hearsay concerns, it provided no ruling on the matter. St. Labre's argument that "no evidence exists" was designed to impermissibly shift the burden of proof to the non-moving party. As such, the motions should have failed.

However, the District Court determined the NCT's evidence was inadmissible or insufficient to present a question of fact, even though the Court used the same evidence to develop, interpret and make inferences of facts favorable to St. Labre. To assist this Court, the NCT has attached evidence from its exhibits that support its claims, if all reasonable inferences are drawn in favor of the NCT. *Appendix,* 125-223.[3] These items, alone, should have precluded summary judgment, as genuine issues of material fact remain in dispute. The District Court's rulings to the contrary are erroneous.

ARGUMENT AND AUTHORITY

A. THE DISTRICT COURT ERRED BY GRANTING JUDGMENT ON THE PLEADINGS ON THE NCT'S CONSTITUTIONAL CLAIMS.

The Court granted St. Labre's Motion for Judgment on the Pleadings with respect to Count VIII of the NCT's Amended Complaint ("Cultural Genocide and Violation of Constitutional Rights"). This claim is based upon the violation of

[3] Expert testimony and financial records also establish how donations were spent and damages. e.g. Dkt. 154, Ex. F.

Article II, Sections 3, 4 and 10 of the Montana Constitution. The District Court's ruling states there is no such cause of action as "cultural genocide." However, the title does not provide a valid basis for dismissal, as the allegations in Count VIII support a claim for violations of constitutional rights and meet Montana's pleading requirements. Rule 8(a), (d), (e), M.R.Civ.P.

The District Court also dismissed the NCT's claims for violations of Article II, Sections 3, 4 and 10 of the Montana Constitution, ruling there was no state action and adequate statutory and/or common law remedies existed. However, Montana law allows a claim against private persons for violation of these constitutional rights. Further, no statutory or common law remedies will adequately address the particular wrongs alleged in Count VIII of the NCT's Amended Complaint.

1. A PRIVATE PERSON IS NOT ALLOWED TO VIOLATE THE CONSTITUTIONAL RIGHTS AFFORDED BY ARTICLE II, SECTIONS 3, 4 AND 10 OF THE MONTANA CONSTITUTION.

The Montana Constitution, as interpreted by this Court, allows a claim against a private person for violating another's constitutional rights.

Art. II, Section 3 provides:

> All persons are born free and have certain inalienable rights. They include ... the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.

Section 3 dictates that citizens not only have inalienable rights, they have "corresponding responsibilities." The corresponding responsibilities create an affirmative duty on "all *persons*," not just the state, to refrain from infringing upon those inalienable rights created by Article II, Section 3.

Art. II, Section 4 provides:

> The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any *person, firm, corporation, or institution* shall discriminate against any person in the exercise of civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas (emphasis added).

In *State v. Long* (1985), 215 Mont. 65, 700 P.2d 153, this Court recognized Article II applied to private acts, aptly noting: "[i]n rare instances, the constitutional language itself has specifically addressed a private action. For instance, Mont. Const., Art. II, § 4 (1972) provides: "neither the state nor any *person, firm, corporation, or institution* shall discriminate against any person..." (emphasis added). *Id.*, at 70. The plain language of Article II, Section 4, makes clear that discrimination against anyone in the exercise of their civil rights, whether by state or private action, is prohibited by Montana's Constitution. To find otherwise was not only error, but sets us back decades in protecting Montanan's civil rights.

St. Labre directed the District Court to the Ninth Circuit's decision in *Single Moms, Inc. v. Montana Power Co.*, 331 F.3d 743 (9th Cir. 2003). However, given that the Ninth Circuit gave little consideration to the Montana Constitution in *Single Moms*, and *never* cited the plain language of Article II, Section 4, the District Court should have taken its guidance from the plain language of the Montana Constitution and this Court, not the Ninth Circuit. The NCT has alleged St. Labre, a "person, firm, or institution," discriminated against the Northern Cheyenne on the basis of race, color, culture, social origin and condition, and political and religious ideas. Article II, Section 4, as stated in *Long,* specifically provides for a private right of action.

Art. II, Section 10 of the Montana Constitution provides:

> The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

This Court held that Art. II, Section 10 is "self-executing," and there are "sound reasons for applying a cause of action for money damages" when a party violates Art. II, Section 10. *Dorwart v. Caraway* (2002), 312 Mont. 1, ¶¶ 44-48, 58 P.3d 128, ¶¶ 44-48. In his special concurrence in *Dorwart*, Justice Nelson explained:

> ¶ 108 Among others, the people guaranteed unto themselves fundamental rights to due process of law, to be free from unreasonable searches and seizures, to individual privacy and to access and redress in their courts. The best-and more likely, the only-protection that the people could reserve unto themselves to make sure that the government, its agents, and in some cases, their fellow citizens did not

> outright violate or inexorably chip away at these rights, was to also guarantee their right to sue directly for these sorts of violations.
>
> ...
>
> ¶ 110 For these reasons, I would hold that the people have reserved unto themselves under Article II, Section 34 of the Constitution of Montana, the unenumerated right to sue their government, its agents, and, in some cases, their fellow citizens, directly in the courts of this state for violations of their fundamental rights protected under Montana's Constitution.

(emphasis added). *Dorwart,* ¶¶ 108-110.

In *Montana Supreme Court Commission on the Unauthorized Practice of Law v. O'Neil* (2006), 334 Mont. 311, ¶ 56, 147 P.3d 200, ¶ 56, this Court clarified its position,

> "The Bar and the Commission also argue that there is no private right of action against a non-governmental entity. They maintain that the privacy section of the Montana Constitution contemplates privacy invasion by state action only. ***On the contrary***, we stated in *Armstrong* that Article II, Section 10 of the Montana Constitution was intended by the delegates to protect citizens ***from illegal private action*** and from legislation and governmental practices that interfere with the autonomy of each individual to make decisions in matters generally considered private. *Armstrong*, ¶ 35 (emphasis added)."

Id. (citation omitted). Contrary to St. Labre's argument and the District Court's ruling, a direct right of action exists against "fellow citizens" for violation of Article II, Section 10.

Thus, pursuant to this Court's decisions in *Dorwart, O'Neil* and *Long*, and the plain language of the Montana Constitution, state action is not required for the NCT to maintain a claim for violation of Article II, Sections 3, 4 and 10. The

District Court's ruling to the contrary was incorrect, and St. Labre's Motion for Judgment on the Pleadings should have been denied.

2. THE PARTICULAR HARMS ALLEGED IN THE NCT'S AMENDED COMPLAINT CANNOT BE REMEDIED BY STATUTORY OR COMMON LAW.

The District Court also ruled that, based on *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, the NCT could not maintain claims for constitutional violations, because adequate statutory and common law remedies exist. However, if statutory and common law remedies adequately addressed the particular wrongs set forth in Count VIII, a private right of action would **never** be appropriate. The NCT's Amended Complaint specifically alleges Defendants wrongfully destroyed their culture, imposed their religion upon them, and deprived them of their right to pursue life's basic necessities, seek their health, safety and happiness, freedom of religion… and their right to individual dignity. Dkt. 38, 9-10. The violations also resulted in harm different from the NCT's breach of contract or tort claims, which are based upon St. Labre's conversion of donations and sought separate compensatory and punitive damages. Dkt. 38, 9-10.

Neither the District Court nor St. Labre pointed to a single statutory or common law that would remedy the NCT's loss of liberty and happiness from the destruction of its culture and religious freedom, or its loss of dignity. The NCT's allegations, if taken as true, support Count VIII.

B. THE DISTRICT COURT ERRED BY GRANTING SUMMARY JUDGMENT ON THE NCT'S BREACH OF CONTRACT CLAIM.

The District Court ruled that there was no evidence of a contract between St. Labre and the NCT, stating "[n]owhere is there any evidence St. Labre bargained for anything, or even consulted with the Tribe on how to conduct fundraising or how to distribute fundraising monies." However, a contract requires only identifiable parties, capable of contracting, their consent, a lawful object and sufficient cause or consideration. See MCA § 28-2-102. Moreover, an "implied contract does not arise from consent of the parties—it springs from principles of natural justice and equity, based on the doctrine of unjust enrichment." *Raglund v. Sheehan* (1993), 256 Mont. 322, 327, 846 P.2d 1000, 1004. The existence and terms of an implied contract are manifested by conduct. § 28-2-103, MCA. "When the conduct of the parties demonstrates the existence of an agreement between them, evidence of that conduct is admissible to establish the agreement." *Weinberg v. Farmers State Bank of Worden*, 231 Mont. 10, 25, 752 P.2d 719, 729, citing *Veterans Rehabilitation Center, Inc. v. Birrer* (1976), 170 Mont. 182, 551 P.2d 1001; *Rentfro v. Dettwiler*, 95 Mont. 391, 398, 26 P.2d 992, 995. If reasonable minds can draw different inferences from the evidence, a question of fact remains for the jury. *Weinberg*, at 27.

The NCT provided evidence of St. Labre's conduct that implied a contract in its opposition to St. Labre's motion. However, the District Court ultimately ruled,

"Because the NCT's contract claim is based on conduct already subsumed by the Allotment Act, and the Allotment Act does not provide a private cause of action, St. Labre is entitled to summary judgment as a matter of law." *Appendix,* 041-042. This finding is improper. The NCT does not seek to enforce the terms of the Allotment Act or remove St. Labre from its lands. The NCT seeks to recover donations made from marketing the Northern Cheyenne. Nothing in the Allotment Act deals with fundraising or marketing the Northern Cheyenne people.

Throughout its ruling, it is clear the District Court failed to make all reasonable inferences in favor of the NCT. The District Court's ruling states the NCT asserted some of the terms of the contract were made in 1884 and 1926. *Appendix*, 032, 038. That is not the case. The NCT explained the mandates of the 1926 Allotment Act simply because it provides a background for the inference that when the NCT allowed St. Labre to use the land, name, faces, stories, plights and needs of the Northern Cheyenne in its fundraising in 1952, both parties intended and believed St. Labre would act for the benefit of the Northern Cheyenne.

The District Court also determined the NCT admitted the breach of contract claim is based on the Allotment Act. *Appendix*, 036. The District Court based its finding on the testimony of Eugene Little Coyote, not the NCT. *Id.* Further, the District Court ignored testimony from Mr. Little Coyote regarding his belief that an implied contract exists, because the Northern Cheyenne people are intended

beneficiaries of the funds solicited with letters marketing the Northern Cheyenne. *Appendix*, 196-205. Mr. Little Coyote states, "...if they are going to be using heart wrenching stories of misfortune that befell our people and not ensuring that any money raised in our name goes to our people, that to me seems like a broken promise." *Appendix*, 198. Mr. Little Coyote's belief that oral contracts for the use of tribal lands are memorialized in the Allotment Act, does not negate the existence of all other contracts.

The NCT provided evidence of St. Labre's written and verbal representations, including fundraising appeals, letters, testimony, and admissions by Fr. Emmett Hoffman that state and imply promises. e. g. *Appendix*, 125-191; Dkt. 131, 4-5 and Ex. A-K. From this evidence, the District Court discusses St. Labre's conduct that, if interpreted in a light most favorable to the NCT, supports the NCT's implied contract claim. *Appendix*, 036-040. Instead, the District Court said the conduct did "not evince a contract," because the NCT's argument was mere speculation that the statements were made pursuant to a contract, and not in furtherance of St. Labre's duty under the Allotment Act. *Appendix*, 037. The District Court interprets the conduct as that "which occurred pursuant to St. Labre's preexisting legal obligation under the Allotment Act." *Appendix*, 041.

This inference of intent or motivation for conduct is a question of fact to be decided by the jury. *AAA Construction of Missoula, LLC v. Choice Land Corp.*

(2011), 362 Mont. 264, ¶ 21, 264 P.3d 709, ¶ 21; *U.S. v. Moody* (1986), 791 F.2d 707, 708. Reasonable minds can differ as to the inferences to be drawn from that evidence. In ruling that St. Labre's conduct and admissions were motivated by its duty under the Allotment Act rather than a contract with the NCT, the Court made improper findings of fact. It is for a jury to decide what motivated St. Labre based upon the circumstances and the evidence presented at trial.

Since the District Court failed to draw all reasonable inferences in favor of the NCT, its dismissal of the NCT's contract claim was in error.

C. THE DISTRICT COURT ERRED BY ENTERING SUMMARY JUDGMENT ON THE NCT'S WRONGFUL CONVERSION, NEGLIGENT MISREPRESENTATION, FRAUD AND FORENSIC ACCOUNTING CLAIMS (COUNTS II, V, VI, IX).

St. Labre advances one basic theory, adopted by the District Court's ruling against the NCT on its wrongful conversion, negligent misrepresentation, fraud and forensic accounting claims. St. Labre asserted the NCT had "absolutely no evidence" of its claims, which impermissibly shifted the burden to the NCT.

In *Mathews v. Glacier General Assurance Company* (1979), 184 Mont. 368, 377-378, 603 P.2d 232, 237-238, this Court determined that the moving party must have "...evidence initially presented...to justify a conclusion that a material question of fact did not exist..." and absent such a showing, the non-moving party "had no duty to come forward with counterproof." *Id.*

The moving party cannot,

> "...foist that initial burden upon the defendant, for it would run contrary to the very purpose of Rule 56, which imposes the burden upon the moving party to show that it is entitled to summary judgment
>
> ...
>
> [I]f the moving party has not by his own evidence properly supported his motion for summary judgment, which means in effect that he has not presented a case valid on its face to permit entry of a summary judgment ruling, the opposing party has no duty to present his own counterproof in opposition to the motion. He can, if he elects, stand on his pleading."

Id., 378, 382; *Brinkman and Lenon, Architects and Engineers v. P & D Land Enterprises* (1994), 263 Mont. 238, 242-243, 867 P.2d 1112, 1115-1116 (statements of counsel do not meet the evidentiary basis required to support a motion for summary judgment). This is still the rule in Montana. *Minnie v. City of Roundup* (1993), 257 Mont. 429, 849 P.2d 212.

St. Labre provided no proof that it was entitled to summary judgment. St. Labre provided no statement of undisputed facts. St. Labre's moving papers failed to point to anything of record indicating an absence of evidence, such as discovery where it attempted to elicit evidence of the NCT's claims during discovery, and there was none. Although the NCT could have stood on it pleadings, the NCT presented evidence. No motion to strike the evidence was made. The pleadings and evidence, if taken in a light most favorable to the NCT, with all reasonable inferences drawn in favor of the NCT, as required, present numerous questions of fact for the jury.

Defendants and the District Court relied on *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 in support of the Court's Order dismissing the NCT's claims for wrongful conversion, negligent misrepresentation, fraud and forensic accounting. *Celotex* supports the position that a party can point to the absence of evidence to support its motion for summary judgment. However, the ruling in *Celotex,* when used as St. Labre suggests, erodes the right to a jury trial and lends itself to abuse by parties who seek a preview of its opponent's case. St. Labre cited *Saari v. Winter Sports, Inc.*, 2003 MT 31, ¶ 17, 64 P.3d 1038, ¶ 17 for the proposition that an absence of evidence cannot establish the existence of a genuine issue of material fact. However, neither St. Labre nor the District Court noted that in *Saari*, the Court made its determination only after the moving party had met its initial burden by establishing, by affidavit, that it did not receive consideration for the use of its facilities. The non-moving party then attempted to show the *absence of evidence*, which was the failure to provide business records during discovery, as proof of the existence of the fact that consideration was received. *Id.* That was not the situation before the District Court in this case.

In certain cases, such as *Saari*, where a party can point to a specific inquiry made during discovery and show that the opposing party lacked evidence in response thereto, the *Celotex* standard may serve justice. In other cases, it impermissibly shifts the burden to the non-moving party before the moving party

has supported its motion. In a case such as this one, where there is voluminous indirect evidence that leads to differing inferences, *Celotex* is unsuitable.

Other states have recognized the shortcomings of the *Celotex* decision, as did Justice Brennan in his dissent to the ruling. See, i.e. *Orvis v. Johnson,* 177 P.3d 600, 603-604; *Dennis v. Greyhound Lines, Inc.*, 831 N.E.2d 171, 173; *Kating v. City of Pryor ex rel. Municipal Utility Board of Pryor*, 977 P.2d 1142, 1144, FN5. Courts in those states have expressly rejected the notion that a moving party can simply say "put up or shut up," and recognize the erosive effect that such a lax standard has upon the right to a jury trial and potential for abuse. *Id.*

Nothing in *Celotex* overruled the *Adickes* standard. *Adickes v. S.H. Kress & Co.* (1970), 398 U.S. 144, 159, 90 S.Ct. 1598, 1609, 26 L.Ed.2d 142. "Merely stating that the non-moving party cannot meet its burden at trial is not sufficient." *Anderson v. Radisson* (1993), 834 F.Supp. 1364, 1367; *Clark v. Coates* (1991), 929 F.2d 604; *Adickes*, at 159. A party must first *identify* the record that they believe demonstrates an absence of evidence. *Anderson*, at 1367. St. Labre failed in this respect, identifying nothing to support its motion.

In deciding a motion for summary judgment, the threshold question is not whether NCT proved each element of its claims, it is whether Defendants met their burden of first proving the lack of any genuine issue of material fact.

1. A QUESTION OF FACT REMAINS REGARDING THE NCT'S CONVERSION CLAIM.

To find conversion, the jury need only find 1) plaintiff's ownership and right of possession of the chattel, 2) defendant's conversion of the chattel, and 3) plaintiff's damages. *Johnson v. Furgeson* (1971), 158 Mont. 170, 173, 489 P.2d 1032, 1034. The District Court ruled that the NCT did not provide sufficient evidence of its claim. However, the District Court did not draw its inferences in a light most favorable to the NCT. Reasonable minds can draw different inferences from the evidence presented by the NCT, so a question of fact remains for the jury. *Weinberg*, at 27.

In fact, the District Court previously acknowledged the evidence provided by the NCT could establish the facts necessary to support a conversion claim. In a ruling on a Motion to Compel, not on appeal, the District Court stated, "this Court concludes that the intent of Defendants' donors could be reasonably inferred based upon the Defendants' fundraising materials." Donor intent is vital to the determination of whether a trust existed. *Jackson v. Callan Publishing, Inc.* (Ill. 2005), 356 Ill.App.3d 326, 332, 826 N.E.2d 413, 422. In answering the question regarding "whether the funds raised by defendants' fundraising campaigns were properly spent," the District Court ruled the NCT did not need donor information, because,

> "the fundraising materials, financial statements, and affidavits already provided to Plaintiff...arguably establishes Defendants acted as a charitable corporation which solicited donations for their educational and social programs. This discovery also provides information regarding just how those donations were spent."

Appendix, 123. This same evidence, examples of which were attached to the NCT's opposition, could obviously support a conversion claim. Dkt. 154, Ex. A-D, and F. A jury can look to fundraising material, financial statements, and affidavits to determine Defendants solicited donations for the Northern Cheyenne, giving the NCT a right to the donations. The jury can look to fundraising material, financial statements, and affidavits to determine whether those donations were properly spent or not (defendant's conversion), and the total amount of those funds (NCT's damages). This evidence, recognized by the District Court as leading to factual inferences, should have precluded the District Court's grant of summary judgment.

2. QUESTIONS OF FACT REMAIN REGARDING THE NCT'S NEGLIGENT MISREPRESENTATION AND FRAUD CLAIMS.

To prove negligent misrepresentation, NCT must show:

1) Defendant made a representation as to a past or existing material fact;

2) The representation was untrue;

3) Regardless of actual belief, the Defendant made the representation without any reasonable ground for believing it to be true;

4) The representation was made with the intent to induce the plaintiff to rely on it;

5) The plaintiff was unaware of the falsity of the representation;

6) Plaintiff justifiably acted (or did not act) in reliance upon the truth of the representation; and

7) Plaintiff sustained damage.

Osterman v. Sears, 318 Mont. 342, ¶ 32, 80 P.3d 435, ¶ 32 (2003). The elements of fraud are essentially identical, with the exception that the Defendant must make the representation with knowledge it is false or with ignorance of its truth, and with the intent that the representation be acted upon by the person and in the manner reasonably contemplated. *Barett v. Holland & Hart*, 256 Mont. 101, 106, 845 P.2d 714, 717 (1992).

The jury can look to the fundraising materials, and testimony of Northern Cheyenne and Fr. Hoffman, and determine St. Labre made the representation it was raising money for the Northern Cheyenne. e.g. *Appendix*, 125-191. By looking at how the donations were spent,[4] the jury can decide whether they believe the representations were true, were made without reasonable grounds to believe them to be true, or were made knowing they were false. The jury can look to the testimony, statements and records of the Northern Cheyenne and St. Labre to

[4] The District Court ruled this could be determined by the fundraising material, financial records and Defendant affidavits. *Appendix*, 123.

determine whether they believe the NCT allowed St. Labre to use its name, symbols, faces, stories, plights and needs, because St. Labre represented it was raising money for the Northern Cheyenne. e.g. *Appendix*, 125-239. These facts are in dispute, and the District Court should have drawn these inferences in favor of the NCT.

Instead, the District Court looks solely to the NCT's Exhibit J (*Appendix*, 224-239) to its Opposition, and says the NCT cannot establish St. Labre's representations were made with the intent to induce the NCT to rely on them. *Appendix*, 051-053. Again, intent is a question for the jury. *U.S. v. Moody*, at 708. Exhibit J provided an example of evidence from which a jury could reasonably infer St. Labre represented it was raising money on behalf of the Northern Cheyenne to keep it from objecting to St. Labre's use of its land, name, faces, symbols, stories, plight or needs.

The District Court states that the newspaper articles, book excerpt and board meeting minutes at Exhibit J are inadmissible hearsay and irrelevant. However, they provide evidence the NCT publicly objected to the derogatory marketing of the NCT, St. Labre knew the NCT objected, and St. Labre reaffirmed it raised money for the NCT to stop the bad publicity. The District Court should have drawn inferences from this evidence in favor of the NCT.

St. Labre did not move to strike Exhibit J. The evidence is admissible as non-hearsay admissions and statements offered to prove operative facts, not the truth of the matter asserted. M.R.Evid. 801(c), (d)(2); *Philip R. Morrow, Inc. v. FBS Ins. Montana* (1989), 236 Mont. 394, 398-400, 770 P.2d 859, 861-863. The evidence is also admissible under the ancient documents, business records, and residual hearsay exceptions. M.R.Evid. 803(6), (16), (24). The hearsay rule is designed to keep out unreliable statements. M.R.Evid. 801(c), committee comments. Exhibit J contains reliable statements—even the book excerpts have circumstantial guarantees of trustworthiness, given St. Labre's Father Hoffman confirmed the book's truthfulness. *Appendix*, 233.

3. AN ACCOUNTING IS A VIABLE CAUSE OF ACTION.

The District Court ruled that the NCT failed to prove an accounting is a cause of action under Montana law. The NCT cited *American Jurisprudence* to aid the District Court in its application of an accounting. The Court disregarded Plaintiff's reliance on *American Jurisprudence*, stating the NCT failed to prove Montana adopted *American Jurisprudence's* position on an accounting. However, *American Jurisprudence* can serve as authority and is often cited by this Court. "An action for an accounting may be a suit in equity or it may be a particular remedy sought in conjunction with another cause of action." See *1 Am. Jur. 2d Accounts and Accounting* § 52 (2005). A cause of action for accounting has

existed in Montana since at least 1910. *Alywin v. Morley* (1910), 41 Mont. 191, 108 P. 778.

The District Court also ruled the NCT did not meet its burden to provide evidence showing entitlement to an accounting. However, St. Labre did not meet *its* burden to support its motion for summary judgment. St. Labre makes the bare assertion that its document production is a sufficient accounting, but counsel's statements do not meet the evidentiary basis required to support a motion for summary judgment. *Brinkman and Lenon,* at 242-243. Further, fundraising material arguably established a constructive trust and fiduciary relationship between the parties. *Appendix,* 066-068. A fiduciary or trust relationship can give rise to an equitable action for accounting. See *1 Am. Jur. 2d Accounts and Accounting* § 55 (2005). The District Court's dismissal of the NCT's forensic accounting claim was erroneous.

D. THE DISTRICT COURT ERRED BY ENTERING PARTIAL SUMMARY JUDGMENT ON THE NCT'S CONSTRUCTIVE TRUST AND UNJUST ENRICHMENT CLAIMS, BASED UPON THE STATUTE OF LIMITATIONS (COUNTS I, III, AND VII).

Before discussing the statute of limitations, it is important to confirm the NCT's claims for constructive trust and unjust enrichment. A "constructive trust may be imposed because the title holder obtained title by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act," or "where a title holder innocently obtained title to property but would be unjustly enriched if he

were allowed to retain the title." § 72-33-219, MCA; *In re Estate of McDermott* (2002), 310 Mont. 435, ¶ 26, 51 P.3d 486 ¶ 26. Montana law no longer requires a showing of fraud or other wrongful acts as a prerequisite. *Id.* In this case, several grounds justified imposition of a constructive trust—conversion, misrepresentation, breach of fiduciary duty, or unjust enrichment. At its simplest, the NCT claims a right to donations collected by St. Labre on behalf of the Northern Cheyenne.

A trust is a "fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it." *Restatement (Second) of Trusts* § 2 (1959). In *Jackson v. Callan Publishing, Inc.,* 356 Ill.App.3d 326, 332-33, 826 N.E.2d 413, 422 (Ill. 2005), disabled police officers alleged defendants breached their fiduciary duties by allowing fundraising contractors to keep 78% of donations raised to help them. The *Jackson* court found "a trier of fact could reasonably infer that the individual donors, in response to defendants' solicitations, donated funds with a manifest intention that their donations be ultimately distributed by defendants...to the disabled police officers and families..." *Id.*, at 333. Consequently, the *Jackson* court held that donor understanding, the intention of the trust, could lead to the imposition of a constructive trust in favor of Plaintiffs. *Id.*

The *Jackson* Court also noted it is the intent of the donors and not that of the would-be trustee that is controlling. *Id.*

In this case, the District Court agreed and determined that "the intent of Defendants' donors could be reasonably inferred based upon the Defendants' fundraising materials." *Appendix,* 123. St. Labre's fundraising materials and representations were attached to the NCT's oppositions to St. Labre's summary judgment motions, so the NCT provided sufficient evidence for a jury to decide St. Labre raised money on behalf of the NCT. Dkt. 158, Ex. G. The jury could also decide St. Labre breached its duty to distribute donations to the NCT, based upon St. Labre's fundraising materials, statements and financial records, which evidence how donations were spent. *Appendix*, 123. These factual inferences justify a finding of breach of fiduciary duty and imposition of a constructive trust. *Jackson,* at 333.

When it viewed facts in a light most favorable to the NCT, the District Court even recognized that a constructive trust based upon unjust enrichment was arguably created in 1952, when St. Labre's fundraising appeals began. *Appendix*, 066-068. Notwithstanding, the District Court dismissed the NCT's constructive trust claim entirely, and unjust enrichment claim beyond three years prior to filing, based upon the statute of limitations.

The question of whether an action is barred by the statute of limitations is decided by the jury when there is conflicting evidence as to when the cause of action accrued. *Hill v. Squibb & Sons* (1979), 181 Mont. 199, 592 P.2d 1383; *Werre v. David* (1996), 275 Mont. 376, 913 P.2d 625. Summary judgment is not appropriate when the date of discovery and accrual of the cause of action are disputed by the parties. *Estate of Watkins v. Hedman, Hileman & Lacosta* (2004), 321 Mont. 419, 91 P.3d 1264.

1. THE NCT'S CLAIMS DID NOT ACCRUE UNTIL ST. LABRE DISAVOWED ITS DUTY TO HOLD AND DISTRIBUTE DONATIONS FOR THE BENEFIT OF THE NCT.

A cause of action accrues when all elements of the cause exist or have occurred, the right to maintain an action on the cause is complete, and a court or other agency is authorized to accept jurisdiction of the action. § 27-2-102(1)(a), MCA. The District Court correctly asserted the statute of limitations begins to run upon accrual of a cause of action, but erroneously determined that the accrual of the NCT's constructive trust claim occurred "at the moment the law creates the trust," citing *Opp v. Boggs* (1948), 121 Mont. 131, 139, 193 P.2d 379, 384. *Appendix*, 066. In *Opp*, this Court made such a statement, but went on to hold:

> This is the general rule but it is based upon the supposition that the constructive trustee is holding the property adversely to the beneficiary. Where as in this case there is a relationship of trust and confidence and there is no holding by the trustee adversely, the statute is not running against the beneficiary until refusal to carry out the trust by reconveyance.

...

> 'Where, however, the beneficiary of a constructive trust has no reason to believe that the constructive trustee is holding the property adversely, the beneficiary will not be barred by laches even though he knows of the circumstances giving rise to the constructive trust...When the circumstances show an apparent recognition of the trust the statute does not begin to run until the beneficiary has received notice of the assertion of an adverse interest.

Id.

Here, the District Court found the NCT's constructive trust claim was time barred, because it accrued when the constructive trust was arguably created by unjust enrichment at commencement of St. Labre's fundraising endeavors in 1952. *Appendix*, 067. This ruling was incorrect. Because of their relationship of trust and confidence, the statute of limitations on the NCT's constructive trust claim did not begin to run until the NCT received notice of St. Labre's adverse interest in the funds. Whether a relationship of trust and confidence between St. Labre and the NCT exists, and when the NCT received notice of St. Labre's assertion of an adverse interest, are disputed questions of fact.

St. Labre consistently made distributions of donations to the NCT throughout the years. Dkt. 158, Ex. Q-U, DD. While the NCT disliked the timing and amount of distributions, St. Labre never wholly denied the NCT's right to distributions or the corpus of donations held in its endowment fund. Instead, through the years, St. Labre confirmed its duty to distribute and hold those funds for the education and socio-economic welfare of the NCT. St. Labre's paternalistic

distributions of donations, did not equate to a repudiation of the NCT's interest in the corpus of donations. Any argument to the contrary presents a question of fact for the jury.

When the NCT finally sought to terminate its relationship with St. Labre and prevent St. Labre's continued use of the Northern Cheyenne land, name, symbols, faces, stories, plight and needs, St. Labre entered into protracted negotiations with the NCT, which included the NCT's claim to past and future donations. Dkt. 158, Ex. V-W. St. Labre continued to recognize the NCT's interest in donations until negotiations ended on January 28, 2005, when St. Labre made an offer to be withdrawn if not accepted. Dkt. 158, Ex. Y. For the first time, St. Labre took the position that it would withdraw any offers unless the NCT accepted its offer, which included a release of all interests in remaining donations. Prior to January 28, 2005, St. Labre did not notify the NCT it would deny its interest in donations already held in the endowment fund, or that the Diocese owned the endowment fund. St. Labre provided the District Court no evidence to the contrary.

The NCT agrees with the District Court that a constructive trust would be imposed from the date of the first fundraising efforts in 1952, and would continue as long as St. Labre raised donations for the education and socio-economic benefit of the Northern Cheyenne. However, the right to enforce the constructive trust did

not accrue until St. Labre made clear that it held donations in its endowment fund adversely, which did not happen until January 28, 2005.

Given the nature of the injury and the parties' past relationship of trust and confidence, St. Labre had the duty to make full disclosure of the facts, particularly that the Diocese owned the endowment fund, and its failure to do so amounted to fraudulent concealment of those facts. *Estate of Watkins*, at ¶ 25. Because the NCT had no ability to discover St. Labre's true intent to permanently deprive them of donations, the statute of limitations was tolled. *Keneco v. Cantrell*, 174 Mont. 130, 568 P.2d 1225 (Discovery doctrine tolls statute of limitations where, because of nature of injury or relationship between the parties, it is virtually impossible for plaintiff to know he has a cause of action.)

Genuine issues of material fact remain regarding both the date of accrual and discovery of the NCT's claims, so summary judgment was not appropriate. *Estate of Watkins*; *Hill*; and *Werre*.

2. ST. LABRE SHOULD BE EQUITABLY ESTOPPED FROM ASSERTING THE STATUTES OF LIMITATIONS TO BAR THE TRIBE'S CLAIMS.

The doctrine of equitable estoppel is founded in equity and good conscience, and its object is to prevent a party from taking unconscionable advantage of his own wrong while asserting his strict legal right. *In re Matter of Shaw,* 189 Mont. 310, 316, 615 P.2d 910. It is used to promote "justice, honesty, fair dealing and to

prevent injustice." *Keneco,* at 135, citing *Morris v. Langhausen*, 155 Mont. 362, 472 P.2d 860. Equitable estoppel arises when "one by his acts, representations or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts." *Lindblom v. Employer's Liability Assur. Corp.*, 88 Mont. 488, 295 P. 1007, 1008. "An equitable estoppel rests largely on the facts and circumstances of the particular case." *Id.*, at 1009.

In this case, St. Labre attempts to take unconscionable advantage of a half century of its actions, representations, negotiations, admissions and silence designed to keep the NCT from objecting to the marketing of the NCT and use of its lands. In its opposition papers, the Northern Cheyenne set forth the elements of equitable estoppel and presented evidence supporting such a finding.

The District Court took selected excerpts of the NCT's evidence, and improperly drew inferences favorable to St. Labre. In reviewing that same evidence, including the excerpts, differing reasonable interpretations can be made that favor the NCT. St. Labre's statements quoted by the District Court do not change the character of past donations. If reasonable minds can draw different inferences from the evidence, a question of fact remains for the jury. *Weinberg,* at

27. The District Court made impermissible findings of fact and summary judgment should not have been granted.

E. THE DISTRICT COURT ERRED BY ENTERING SUMMARY JUDGMENT ON THE NCT'S UNJUST ENRICHMENT CLAIM (COUNT III).

Although the District Court ruled against St. Labre on its argument that unjust enrichment was subsumed within the NCT's other legal claims, and rejected the argument that the NCT has an adequate remedy at law, the District Court then determined the NCT had no evidence of its unjust enrichment claim. Again, St. Labre's bare statement there was "no evidence" and the *Celotex* argument was accepted, without qualification. *Appendix,* 095-098. The District Court also refuses to consider evidence prior to March 11, 2002, because it ruled the NCT's unjust enrichment claims are barred beyond March 11, 2002. *Appendix,* 089. However, relevant evidence, particularly fundraising material from 1952 forward, pre-dates that time and should have been considered by the District Court.

Again, the District Court says St. Labre need not prove it requested evidence from the NCT, it can merely assert there is no evidence. This statement is indicative of the fundamental flaw in the analysis of each of St. Labre's Motions for Summary Judgment. In *Adickes*, the Montana Supreme Court made the specific finding that a party must first present evidence in support of its motion for summary judgment. If District Courts allow parties to support a motion for

summary judgment by simply stating "there is no evidence of" a claim or defense, the non-moving party will always bear the burden.

The theory of unjust enrichment and restitution is brought into play when no contract between the parties exists and the court implies a contract in law." *Gray v. Billings*, 213 Mont. 6, 689 P.2d 268 (1984), citing *Maxted v. Barrett*, 198 Mont. 81, 643 P.2d 1161 (1982). The substance of an action for unjust enrichment lies in a promise, implied by law, that one will render to the party entitled thereto that which in equity and good conscience belongs to him or her. See *66 Am. Jur. Restitution and Implied Contracts* §§ 9, 169; *Nevada Indus. Development, Inc. v. Benedetti*, 103 Nev. 360, 741 P.2d 802 at FN2; *Earling v. Emigh*, 218 U.S. 27, 30 S.Ct. 672, 54 L.Ed. 915 (1910). However, in order to reach such a finding, "Unjust enrichment requires a factual examination of the circumstances and of the conduct of the parties, which is....**[a task] for the trier of fact.**" See *66 Am. Jur. Restitution and Implied Contracts* § 9; *Crowell v. Danforth*, 222 Conn. 150, 609 A.2d 654 (1992).

In this case, the trier of fact can determine that St. Labre raised donations for the Northern Cheyenne based upon St. Labre's fundraising appeals, representations and admissions that state or imply funds were raised on behalf of the Northern Cheyenne. e.g. *Appendix,* 123, 125-191. This, in turn, can lead to a finding that St. Labre would be unjustly enriched if allowed to keep those donations for the

Diocese, rather than turning them over to the NCT. If all reasonable inferences are drawn in favor of the NCT, by the District Court's own acknowledgement, unjust enrichment arguably began in 1952, when St. Labre began its fundraising. *Appendix,* 066-068.

Long ago this Court stated,

> "the recent decisions of this Court and of the United States Supreme Court have moved toward greater protection of the parties' right to jury trial on any factual issues raised in either a court of law or court of equity. In State ex rel. Industrial Indem. Co. v. District Court (1975), 169 Mont. 10, 544 P.2d 438, we affirmed relator's right to jury determination of the existence of the oral contract before the alleged contract could be construed in a declaratory judgment action."

Gray, 272. The District Court's dismissal of the NCT's unjust enrichment claim before factual issues were resolved by the jury was erroneous.

F. THE DISTRICT COURT ERRED BY ENTERING SUMMARY JUDGMENT AGAINST THE NCT AS TO ALL COUNTS OF ITS COMPLAINT AGAINST THE DIOCESE.

The District Court determined that all claims against the Diocese should be dismissed on the same grounds as St. Labre. For the same reasons addressed above, the District Court's ruling as to the Diocese was erroneous.

The District Court did not find that the Diocese was improperly named. The Diocese was named a Defendant and representative entity of the Roman Catholic Church in this action, and the Bishops of the Diocese have participated in the action since its commencement. The Diocese also holds itself out as the

regional representative association of the Roman Catholic Church, and, through its Bishop, has direct supervision and authority over the missions, parishes and clergy within its geographical boundaries. Dkt. 175, Ex. 1-3.

The Diocese is liable for the acts of its St. Labre clergy. It is well settled that a master is liable for the torts of its servant if committed within the scope of employment or in furtherance of the employer's interests. *Kornec v. Mike Horse Mining & Milling Co.* (1947), 120 Mont. 1, 7, 180 P.2d 252; *Maguire v. State* (1991), 254 Mont. 178, 182, 835 P.2d 755. The clergy appointed to St. Labre by the Roman Catholic Church were under the employment, supervision, and control of the Roman Catholic Church's Bishop and Diocese, and acted upon their authority, request and/or permission, to further the interests of the Roman Catholic Church. Dkt. 175, Ex. 4-6. As representatives, agents and/or employees, the actions of the St. Labre Catholic clergy are imputed to the Diocese. The St. Labre clergy engaged in the wrongful activity alleged in the NCT's Amended Complaint, and the Diocese reaped the rewards of those actions. *Appendix*, 192-195; Dkt. 171, ¶ 7. The District Court does not appear to disagree, and made no ruling to the contrary.

Further, St. Labre and the Diocese had an actual or ostensible agency relationship. "An agency may be either actual or ostensible…It may be created by a precedent authorization, or a subsequent ratification…It may be implied from

conduct and from all the facts and circumstances in the case...and may be shown by circumstantial evidence...ratification may be implied from the acts and conduct of the alleged principal." *Butler Manufacturing Company v. J & L Implement Company* (1975), 167 Mont. 519, 524, 540 P.2d 962, 965 (citations omitted). St. Labre held itself out as a representative of the Roman Catholic Church and the Diocese on numerous occasions. e.g. Dkt. 175, Ex. 2-5. By knowingly accepting and retaining the benefit of St. Labre's acts,[5] the Diocese effectively ratified St. Labre's actions of marketing the Northern Cheyenne to raise donations and converting those donations for the benefit of the Diocese. §§ 28-10-211 and 212, MCA.

The Diocese also argued it was entitled to the same ruling as St. Labre for Judgment on the Pleadings regarding Constitutional claims, asserting "to rule otherwise would raise constitutional issues of titanic proportions," because such a ruling would somehow infringe upon the "free exercise of religion." The Diocese afforded no basis for the assertion. As a threshold matter, a finding in favor of the NCT will not "substantially burden" or present any burden to the Diocese's or St. Labre's free exercise of religion. *Navajo Nation v. U.S. Forest Service* (2008), 535 F.3d 1058, 1068. A discussion of Defendants' religious doctrine, beliefs, practice or hierarchy is not necessary to a determination of any claims. The NCT claimed

[5] Dkt. 171, at ¶ 7; Dkt. 175, Ex. 18, 19.

Defendants physically and mentally abused tribal members to alter and destroy the *tribal members'* language, culture, and beliefs, and improperly marketed the Northern Cheyenne for their own gain. The Diocese did not present evidence of how the NCT's claims are so inextricably intertwined with its religious teachings or beliefs that a remedy cannot be afforded without interference with its exercise of religious beliefs. The Diocese has not claimed that abuse or the use of the Northern Cheyenne's faces, stories and symbols are part of its belief system. To remedy and prohibit such activity is not a substantial burden upon the "free exercise of religion." Rather, it is upholding the inalienable constitutional rights of the Northern Cheyenne people. A person cannot engage in abuse and theft, and hide behind the Free Exercise Clause.

Given the Diocese's relationship with St. Labre, and the fact that the Diocese claims ownership of donations belonging to the NCT, the District Court's dismissal of the NCT's claims against the Diocese is erroneous for the same reasons its rulings were erroneous as to St. Labre.

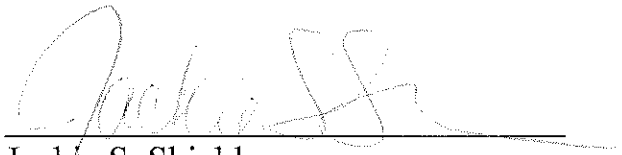
CONCLUSION

The Northern Cheyenne Tribe has a right to have its issues of fact decided by a jury. That is Montana law. The District Court swept away powerful evidence against St. Labre. The District Court went well away from Montana law, and the record, to grant complete absolution to an entity not entitled to that—an entity that

hid behind robes and religion to ride the Northern Cheyenne nation to just plain money--$90 million. What has been done by the Church and the District Court is unconscionable. In the interest of justice and truth, this case must be reversed and remanded.

RESPECTFULLY submitted this 13th day of April, 2012.

EDWARDS, FRICKLE & CULVER



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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief of Appellant is double spaced; the document is proportionately spaced using Times New Roman font with 14 characters per inch; 9,978 words, excluding this Certificate of Compliance, Certificate of Service, the Table of Contents and Table of Authorities.

Dated this 13th day of April, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Appellant has been duly served upon the attorneys listed below depositing same in the U.S. Mail, postage prepaid, on this 13th day of April, 2012.

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