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FILED

IN THE SUPREME COURT
OF THE
ROSEBUD SIOUX TRIBE

DONALD LEADER CHARGE,
Defendant/Appellant,

vs.

NORA LEADER CHARGE,
Plaintiff/Appellee.

BY: _____

MEMORANDUM OPINION
AND ORDER

Per Curiam (Frank Pommersheim, Chief Justice and Associate Justices Leroy Greaves and Cheryl Three Stars Valandra)

I. Introduction

Donald 'Skeeter' Leader Charge, Defendant/Appellant, and Nora Leader Charge, Plaintiff/Appellee, are both members of the Rosebud Sioux Tribe and reside within the exterior boundaries of the Rosebud Sioux Reservation. On August 1, 2008, Ms. Leader Charge returned home at about ten o'clock p.m. after visiting with friends at the Prairie Hills Golf Club.

Upon returning home, a marital dispute ensued between Nora and Donald. At some point, law enforcement was requested by Ms. Leader Charge and Officer Crow Eagle responded. No arrests were made and Officer Crow Eagle, for reasons not reflected in the record and contrary to normal police protocol, apparently prepared no written report.

Subsequently, on August 5, 2008, the Plaintiff/Appellee obtained an *ex parte* temporary order of protection excluding the Defendant/Appellant from the marital residence. A hearing was held on September 25, 2008, to determine whether the temporary protection order should be made permanent. Both parties were represented by counsel.¹ Both Nora and Donald testified.²

¹ Ms. Leader Charge is not represented by counsel on appeal and appeared *pro se*. Mr. Leader Charge is represented by a very capable (non-law trained) Tribal Advocate.

After taking evidence at the hearing, Judge Steve Emery issued a permanent order of protection against the Defendant/Appellant on October 29, 2008. The Order contained the required findings of fact and conclusions of law.

A timely notice of appeal was filed and oral argument was heard by this Court on March 28, 2009.

II. Issues

This appeal raises four issues, namely:

- A. Whether the Trial Court committed reversible error in allowing the Plaintiff/Appellee to testify as to the medical status of her injured finger in the absence of any testimony by the treating physician;
- B. Whether the Trial Court committed reversible error by allowing the Plaintiff/Appellee to place in evidence various telephone records without establishing the necessary authentication and chain of custody;
- C. Whether the Trial Court committed reversible error in not admitting into evidence a police dispatch report offered by the Defendant/Appellant.
- D. Whether the trial court committed error in failing to grant a continuance to the Defendant/Appellant based on the unavailability of the investigating police officer on the day of the trial.

III. Discussion

Each issue will be discussed in turn.

A. Medical Opinion Testimony

The Rosebud Sioux Tribe Court follows the basic Federal Rules of Evidence. The

² Mr. Leader Charge planned on calling Officer Crow Eagle, but he was unavailable on the date of the hearing. Mr. Leader Charge's motion for a continuance based on this fact was denied. See discussion *infra* at pp. 4-5.

pertinent rule for 'medical diagnosis and treatment' is FRE 803(4), which provides:

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

This section of the rule is part of the general rule on 'Hearsay Exceptions.' While the Plaintiff/Appellee may testify as to her symptoms and sensory perceptions, such as 'It was very painful,' she does not possess the necessary expertise to offer an expert medical conclusion. She may, however, offer her own prognosis/opinion of her condition. Such (nonprofessional) testimony is weighed and evaluated by the finder of fact. In the instant case, it is significant to note that the Trial Court's order of protection relied on a finding of physical contact and restraint, rather than any diagnosis of a broken or fractured finger:

"Defendant/Appellant's actions to shove, push and physically restrain the Plaintiff/Appellee is abuse as defined by the Law and Order Code."

B. Telephone Records

The admission into evidence of certain telephone records directly from the website of Alltell Wireless did not comply with Rule 803(6) which requires testimony by the custodian of such records or submission of appropriate certification. Nevertheless, such records are admissible for the purposes of refreshing the witness's recollection as to telephone calls she made during a certain time frame. Again, the testimony of the witness must be evaluated by the fact finder. It is further true that the trial judge's order of protection in this matter made absolutely no reference to any telephone records or conversations.

C. Police Dispatch Reports

The issue of whether police dispatch reports marked as Defendant/Appellant's exhibits #7 and #8 were improperly ruled inadmissible by the trial court is not properly before the Court. The admissibility of exhibits #7 and #8 was not ruled on by the trial judge because they were not submitted by the Defendant/Appellant.

Judge Emery: Did you have that [Dispatch Report] marked?

Mr. Siemans: No, I didn't your honor, I didn't offer it as evidence.

(Trial Transcript, September 9, 2009, pages not numbered)

The failure to make the offer effectively waives the issue.

D. Due Process

At the conclusion of the bench trial, the Defendant/Appellant moved for a one day continuance in order to produce the investigating officer, Iver Crow Eagle. Although the record is not clear, several attempts to serve a subpoena were apparently unsuccessful because Mr. Crow Eagle was in surgery. In addition, it was alleged by Defendant/Appellant's advocate, that Mr. Crow Eagle "did say he was going to be here." Judge Emery denied the motion for the continuance as "untimely."

Due process is guaranteed by both the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8), and Act X of the Rosebud Sioux Tribal Constitution. The core of due process is essential fairness, including the opportunity to be heard. In the instant case, the sole non-party witness of importance is Officer Crow Eagle. He investigated the event and spoke to both of the parties. In addition, for reasons not clear in the record, he did not write the report as required by

Section 8 of the Domestic Abuse Section of the Tribal Law and Order Code.³ For all of these reasons it appears to this Court that the testimony of Officer Crow Eagle is necessary to insure basic fairness to all concerned.

IV. Conclusion

The Court finds no merit to any of Defendant/Appellant's claims as set out in the evidence matters discussed in Issues III.A, III.B, and III.C. The Court does find sufficient merit – particularly in the unique circumstances of this case – in Appellant's due process claim. As a result, the Court reverses the decision of the Trial Court and remands for a limited hearing to receive the testimony of Officer Crow Eagle.

The Order of Protection issued in this matter shall remain in full force and effect.

IT IS SO ORDERED.

Dated this 22nd day of May, 2009.

FOR THE COURT:



Frank Pommersheim
Chief Justice

³ Law and Order Code of the Rosebud Sioux Tribe, Domestic Abuse, Section 8. Written Report: Whenever a law enforcement officer is called to the scene of a reported incident of domestic violence, and he or she does not make an arrest, he or she shall file a written report with his or her supervisor, setting forth the reason or reasons for his or her decision.