

IN THE ROSEBUD
SIOUX TRIBAL COURT
OF APPEALS

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opinion

ROSEBUD SIOUX TRIBAL COURT)
ROSEBUD INDIAN RESERVATION) SS
ROSEBUD, SOUTH DAKOTA)

ROSEBUD SIOUX TRIBE,)
)
Plaintiff / Appellee)

v.)

DAVID WALSH/ a partner in W.)
Partnership dba Gambles Store;)
PEGGY WHITING, dba Gambles)
Store; WILLIAM J. STORMS, dba)
Gas n' Git; MAXINE MEYERS dba)
Meyer U-Wash; JOE ASSMAN dba)
Assman Implement Co.; MARILYN)
FOLKER dba Starlite Gift Shop.)

ORDER

Defendants / Appellants)

On November 12, 1991, David Walsh, et al., the Defendants / Appellants herein, filed a timely (general) Notice of Appeal. No other documents, requests, or pleadings were filed. On June 18, 1992, this Court, on its own motion dismissed the appeal. The Court's order enumerated three reasons for the dismissal:

- 1) The general notice of appeal violated Rule 5 (4) of the Rules of Procedure of the Rosebud Sioux Tribal Court of Appeals in that it did not provide "an itemization of all assignments of error or legal or factual issues desired to be considered in the Appeal.";

2) Appellants failed to file any Designation of Record as requested by Rule 6; and

3) Appellants failed to file a brief as required by Rule 8(1).

On June 29, 1992, Appellants filed a motion to reconsider the order of dismissal. Their argument consists largely of the following: they did ultimately file a brief in this matter at approximately the time this Court made its initial decision, but before Appellants received notice of this Court's order of dismissal; that the general notice of appeal was sufficient; and that no Designation of Record was required given the general notice of appeal.

In essence, Appellants do not claim that they did comply with the appropriate rules of appellate procedure, but rather that their failure to do so was a matter of excusable neglect. The excusable neglect focuses on the vague assertion of failed efforts at 'reconciliation between the parties' and the assertion that since the nub of the appeal was a clear question of law with no trial below, that apparently neither a specific notice of appeal nor any designation of record was required.

Wash

Given the fact that Appellants' counsel is a seasoned practitioner in state and federal appellate litigation, these claims seem almost disingenuous. It is black letter law that without some record on appeal, there is nothing for the appellate court to consider and therefore it cannot properly carry out its reviewing function. See e.g. Stanton v. Saks 303 N.W. 2d 819 (S.D. 1981), McCook County National Bank v. Dupris (Cheyenne River Sioux Tribal Appeal #89-015-A).

In addition, this Court recently pointed out to all members of the Rosebud Sioux Tribal Bar who practice before this Court that "it will not hesitate in the future to impose the sanctions available to this Court under Rule 8 of the Rules of Procedure of the Rosebud Sioux Tribal Court of Appeals as well as the Court's inherent authority."¹

¹ Rosebud Sioux Tribe v. Good Voice (CR-89-1058) at 6.

Rule 8 provides, in relevant part, "Failure of either party to file briefs in a timely manner, as required by this Code, shall be sanctioned by the Court by subjecting the case to summary dismissal, unless the failure to file is specifically excused by the Appellate panel."

Rule 12 provides, in relevant part, "In addition to the above, the Court may, upon its own motion summarily dispose of the case."

Appellants also raise the question in their motion whether the Chief Justice alone made the original decision in this case. The answer to that question is no. The motion was considered by the full panel and the Chief Justice's order was joined by Justices Grey Eagle and Roubideaux.

The failure to comply with the applicable appellate rules has neither been cured nor adequately explained. Therefore the Appellants' motion is hereby denied.

IT IS SO ORDERED.

Frank Pommersheim

Frank Pommersheim

Chief Justice

Justices Roubideaux and Grey Eagle concur with the decision.

Dated August 27, 1992

FILED

In the

ROOSEVELT SIOUX TRIBAL COURT OF APPEALS

The undersigned Clerk of the Roosevelt Sioux Tribal Court of Appeals hereby certifies that this document was received and entered on the docket in the above entitled action by this Court on the 31st day of AUGUST, 1992.

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Janita Marshall
Clerk of Courts

IN THE ROSEBUD
SIOUX TRIBAL COURT
OF APPEALS

ROSEBUD SIOUX TRIBAL COURT)
ROSEBUD INDIAN RESERVATION) SS
ROSEBUD, SOUTH DAKOTA)

ROSEBUD SIOUX TRIBE,)
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Plaintiff / Appellee)

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DAVID WALSH/ a partner in W.)
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1) The general notice of appeal violated Rule 5 (4) of the Rules of Procedure of the Rosebud Sioux Tribal Court of Appeals in that it did not provide "an itemization of all assignments of error or legal or factual issues desired to be considered in the Appeal.";

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In essence, Appellants do not claim that they did comply with the appropriate rules of appellate procedure, but rather that their failure to do so was a matter of excusable neglect. The excusable neglect focuses on the vague assertion of failed efforts at 'reconciliation between the parties' and the assertion that since the nub of the appeal was a clear question of law with no trial below, that apparently neither a specific notice of appeal nor any designation of record was required.

Given the fact that Appellants' counsel is a seasoned practitioner in state and federal appellate litigation, these claims seem almost disingenuous. It is black letter law that without some record on appeal, there is nothing for the appellate court to consider and therefore it cannot properly carry out its reviewing function. See e.g. Stanton v. Saks 303 N.W. 2d 819 (S.D. 1981), McCook County National Bank v. Dupris (Cheyenne River Sioux Tribal Appeal #89-015-A).

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The failure to comply with the applicable appellate rules has neither been cured nor adequately explained. Therefore the Appellants' motion is hereby denied.

IT IS SO ORDERED.

Frank Pommersheim

Frank Pommersheim

Chief Justice

Justices Roubideaux and Grey Eagle concur with the decision.

Dated August 27, 1992

FILED

In the

ROUBIDOUX SIOUX TRIBAL COURT OF APPEALS

The undersigned Clerk of the Roubidoux Sioux Tribal Court of Appeals hereby certifies that this document was received and entered on the docket in the above entitled action by this Court on the 31st day of August, 1992.

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Diana Marshall
Clerk of Courts

IN THE
ROSEBUD SIOUX TRIBAL
COURT OF APPEALS

ROSEBUD SIOUX TRIBE,)
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Plaintiff / Appellee,)
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v.)
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DAVE WALSH/A PARTNER IN W.W.)
PARTNERSHIP dba GAMBLES STORE;)
PEGGY WHITING/A PARTNER IN)
W.W. PARTNERSHIP dba GAMBLES)
STORE; WILLIAM J. STORMS, dba)
GAS-N-GET; MAXINE MEYER, dba)
MEYER U-WASH LAUNDRY; JOE J.)
ASSMAN, dba ASSMAN IMPLEMENT)
CO.; and MARILYN FOLKERS, dba)
STARLITE GIFT SHOP,)
)
Defendants / Appellants.)

MOTION TO RECONSIDER
ORDER OF DISMISSAL

Comes now the Appellants, above named, by their attorney, Tom D. Tobin, Tobin Law Office, P.C., Winner, South Dakota, and respectfully moves this Court for an Order reinstating the appeal in the above entitled action. This motion is made pursuant to Rule 11 of the Rules of Procedure of the Rosebud Sioux Tribal Court of Appeals. The basis for said motion is contained in the attached Memorandum.

Dated this 29th day of June, 1992.

Tom D Tobin by Mem Alay
Tom D. Tobin
Tobin Law Office, P.C.
Attorney for Appellants
P.O. Box 730
Winner, SD 57580
(605) 842-2500

IN THE
ROSEBUD SIOUX TRIBAL
COURT OF APPEALS

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Plaintiff / Appellee,)
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DAVE WALSH/A PARTNER IN W.W.)
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ASSMAN, dba ASSMAN IMPLEMENT)
CO.; and MARILYN FOLKERS, dba)
STARLITE GIFT SHOP,)
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Defendants / Appellants.)

MEMORANDUM IN SUPPORT OF
MOTION TO RECONSIDER
ORDER OF DISMISSAL

On June 24, 1992, counsel for Appellants received the Order entered by Chief Justice Frank Pommersheim summarily dismissing this appeal. The reasons cited for the dismissal were three fold. First, Chief Justice Pommersheim indicated that Rule 5 (4) of the Rules of Procedure of the Rosebud Sioux Tribal Court of Appeals in that the Notice of Appeal did not contain "an itemization of all assignments of error or legal or factual issues desired to be considered in the appeal. Second, according to Chief Justice Pommersheim, No designation of Record had been filed, and finally, the Appellants' Brief had not been filed.

Concerning the first two matters, this case was a very simple one. The only issue was whether non-tribal members who owned and ran businesses on fee land within the reservation could be required to purchase tribal business licenses. No hearings were held, the only record to be designated were the pleadings and briefs.

Rules 5 and 6 of the Rules of Procedure do not contain any provisions as to the consequences for failure to follow these provisions.

The Chief Justice does correctly cite Rule 8 (1) of the Rules of Procedure, which indicates the Appellants' Brief has to be filed within thirty days after the filing of the last Designation of Record with the Appellate Clerk. The Chief Justice does not cite the last paragraph of Rule 8. That provides:

Failure of either party to file briefs in a timely manner, as required by this Code, shall be sanctioned by the Court by subjecting the case to summary dismissal, unless the failure to file is specifically excused by the Appellate panel. (Emphasis added).

The Chief Justice had not seen Appellants' Brief, which was mailed to the Court on June 17, 1992. The last paragraph of the first page of said brief sets forth the reason for the late filing of the brief. It states:

On November 12, 1991, Appellants filed a timely Notice of Appeal. Immediately thereafter, attempts were made seeking alternatives short of having this Court formally decide this issue at this time. These efforts have not been successful.

Certainly, asking this Court to hear the appeal after both parties having made these efforts at reconciliation between the parties is not unreasonable.

Further, it appears that the summary dismissal of this Appeal by the Chief Justice may itself be flawed. The last paragraph of Rule 12 provides: "In addition to the above, the Court may, upon its own motion summarily dispose of the case.: (Emphasis added). There is no indication on the order signed by the Chief Justice

This action was taken with the support of the other members
of the court, or a panel thereof.

Rule 16 sets forth the powers of the Chief Justice. It
provides:

The duties of the Chief Justice shall include, but not be limited to: granting oral arguments upon request; designating alternate Justices to hear cases in instances of conflict or unavailability of permanent Justices; assigning cases to individual Justices for opinion writing; scheduling and order of presentation of cases; and, scheduling meetings or additional sessions of the Rosebud Sioux Tribal Court of Appeals.

These powers are administrative in nature. They do not give the Chief Justice the power to dismiss an appeal on his motion.

If the appellate Court accepts Appellants' Brief, counsel for Appellee has indicated that the opposing brief will be filed within the time allowed by the Rules of Procedure.

Dated this 29th day of June, 1992.

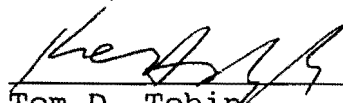
Tom D. Tobin by *Ken A. Rugh*
Tom D. Tobin
Tobin Law Office, P.C.
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Winner, SD 57580
(605) 842-2500

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 29th day of June, 1992, he served a copy of the Motion to Reconsider Order of Dismissal and supporting Memorandum upon the person herein next designated, by depositing a copy thereof in the United States Mail at Winner, South Dakota, with first class postage prepaid, in an envelope addressed to said addressee, to-wit:

Terry Pechota
Attorney at Law
1617 Sheridan Lake Rd.
Rapid City, SD 57702

which address is the last address of the addressee known to the subscriber.

for 

Tom D. Tobin

IN THE COURT OF APPEALS
FOR THE
ROSEBUD SIOUX TRIBE

THE PEOPLE OF THE ROSEBUD SIOUX)
TRIBE IN THE INTEREST OF)
J.E., Minor Child,)
AND CONCERNING)
THERESA EAGLE aka EASTMAN.)

CASE # CC 89-25

APPEAL FROM THE CHILDREN'S COURT
FOR THE
ROSEBUD SIOUX TRIBE

THE HONORABLE JANEL Y. SULLY
TRIBAL COURT JUDGE

Cheryl Three Stars Valandra
Attorney for the Appellant,
Viken, Viken, Pechota,
Leach & Dewell
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Robert W. Brown
Attorney for Appellee
Office of the Public
Defender
Box 129
Rosebud, SD 57570

BEFORE

JUSTICES GREY EAGLE, POMMERSHEIM, AND ROUBIDEAUX

FILED
In the

ROSEBUD SIOUX TRIBAL COURT OF APPEALS

The undersigned Clerk of the Rosebud Sioux Tribal Court of Appeals hereby certifies that this document was received and entered on the docket in the above entitled action by this Court on the 14th day of June, 1992.

Denita Marshall