



ROSEBUD SIOUX SUPREME COURT  
ROSEBUD SIOUX RESERVATION  
ROSEBUD, SOUTH DAKOTA

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CA2009-09

STARLA WILSON-COLOMBE,  
Plaintiff/Appellee

VS.

NOTICE OF ENTRY  
OF ORDER

JULIUS R.W. THEOPHILUS,  
Defendant/Appellant(s)

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TO: THE ABOVE-NAMED PARTIES

Please take notice that on the 18<sup>th</sup> day of October, 2010, the Honorable Chief Justice FRANK POMMERSHEIM presiding, The Court entered an **ORDER**. A certified copy of said Judgment of **ORDER** is enclosed and by this reference is incorporated herein and is herewith served upon you.

Dated this 20<sup>th</sup> day of October, 2010.

  
Clerk of Courts

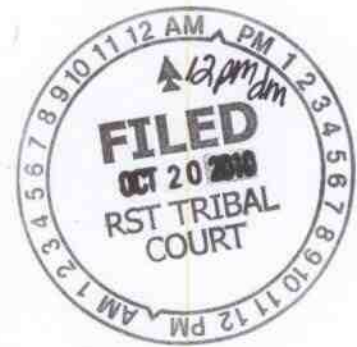
CERTIFICATE OF SERVICE

I, Denita Marshall, Chief Clerk of Courts of Rosebud Sioux Tribal Supreme Court, hereby certify that I served a true and correct copy of the Notice of Entry of Order and copy of said Order upon the Appellant(s) and Appellee(s) as follows by placing in the U.S. Mail, postage prepaid, addressed as follows:

DPLS, Attorney for Plaintiff – PO Box 727, Mission, SD 57555  
Stan Whiting, Attorney for Defendant- 142 E. Third St., Winner, SD 57580

Dated this 20<sup>th</sup> day of October, 2010.

  
Clerk of Courts



IN THE SUPREME COURT  
OF THE  
ROSEBUD SIOUX TRIBE

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STARLA WILSON-COLOMBE,  
Plaintiff/Appellee,

vs.

JULIUS R. THEOPHILUS,  
Defendant/Appellant.

MEMORANDUM OPINION  
AND ORDER

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Per Curiam (Frank Pommersheim, Chief Justice and Associate Justices Charles Abourezk and Leroy Greaves)

I. Introduction

In August 2009, Ms. Starla Wilson-Colombe, Plaintiff/Appellee, filed a *pro se* petition against Julius Theophilus, Defendant/Appellant, in the Rosebud Sioux Tribal Court seeking an order of protection. Plaintiff/Appellee and Defendant/Appellant were co-workers at the Rosebud Indian Health Service and had lived together for some time, but recently had ended their relationship. Plaintiff/Appellee is a member of the Rosebud Sioux Tribe. Defendant/Appellant is a non-Indian. Plaintiff/Appellee's petition alleged various threatening verbal and physical attacks made by Mr. Theophilus against Ms. Wilson-Colombe. These allegations focus primarily on heated verbal exchanges that took place in front of her minor children (and others) in the aftermath of a "party" held on July 7, 2009 at a neighbor's residence on the grounds of the Indian Health Service. In addition, there were more generalized grievances concerning past physical abuse including a split lip.

An *ex parte* temporary order of protection was granted. A hearing to make the order permanent was held on August 31, 2009. Ms. Wilson-Colombe was represented by Ms.

Bernadine Wilson, a paralegal with Dakota Plains Legal Services. Mr. Theophilus appeared *pro se*. A final order of protection supported by findings of fact and conclusions of law was granted by the Honorable Steven Emery on August 31, 2009. The order was to remain in effect until August 30, 2010.<sup>1</sup>

A timely notice of appeal was subsequently filed and oral argument was held before this Court on July 2, 2010. Ms. Wilson-Colombe was represented by Ms. Bernadine Wilson of Dakota Plains Legal Services and Mr. Theophilus was represented by Mr. Stanley Whiting, Esq. of Winner, South Dakota.

## II. Issues

This appeal raises two principal issues, namely whether Defendant/Appellant was denied due process by the trial court and whether there was sufficient evidence to support the findings that the Defendant/Appellant “assaulted” and committed “acts of domestic violence” upon the Plaintiff/Appellee.

Each issue will be discussed in turn.

## III. Discussion

### A. Due Process

Defendant/Appellant’s due process claim focuses on elements of both notice and the opportunity to be heard. Oddly enough, Defendant/Appellant cites *no* authority for the guarantee of due process. There is no mention of the due process guarantees in either the Rosebud Sioux Tribe Constitution<sup>2</sup> or the Indian Civil Rights Act of 1968.<sup>3</sup> Normally, the failure to cite any

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<sup>1</sup> A petition to extend the order of protection beyond August 30, 2010 is currently pending in the Rosebud Sioux Tribal Court.

<sup>2</sup> Sec. 1(F) of Art. X of the Rosebud Sioux Tribe Constitution provides that the Tribe shall not “deprive any person of liberty or property without due process of law.”

<sup>3</sup> 25 U.S.C. § 1302(8) provides that No Indian tribe in exercising powers of self-government shall “deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.”

authority – particularly relevant Tribal constitutional and federal statutory provisions – effectively waives the issue. See e.g., *Rosebud Housing Authority v. Young* (RST 1987); *LeCompte v. Cheyenne River Sioux Tribe* (CRST 89-013-A 1989). See also *Shaffer v. Honeywell, Inc.*, 249 N.W.2d 251 (1976).

Regardless of this shortcoming, the Court will address the issue for purposes of providing clarification and guidance for future practice in this important area of Tribal domestic relations law. Defendant/Appellant asserts that the five day notice provision set out in Sec. 2-3-4 of the Rosebud Law and Order Code<sup>4</sup> does not include weekends. No precedent is adduced for this proposition and the Court necessarily rejects it. *Ex parte* orders of protection are often necessary to protect the physical (and emotional) well-being of both domestic partners and children. Thus expeditious hearings on the merits of the petition and the *ex parte* protection order are most appropriate to safeguard the interests of *all*, which most definitely includes those of the defendant..

Certainly, defendants may seek a continuance for good cause. Mr. Theophilus did not. Yes, the Defendant/Appellant appeared *pro se*, but he is a well-educated professional dentist,

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ASSISTANCE IN FILING PETITION-EXTENSION-HEARING-COSTS AND ATTORNEY FEES - -

Upon the filing of a petition under this chapter, the Court may immediately for good cause shown, issue an *ex parte* order of protection. An immediate and present danger of abuse to the Petitioner shall constitute good cause for purposes of this section. Within ten (10) days of service of such an order on the Respondent under this Chapter, a hearing shall be held, at which time the Court shall either dissolve any *ex parte* order which has been issued, or shall, if the Petitioner has proved the allegation of abuse by preponderance of the evidence, extend the order of protection for a definite period of time not to exceed one (1) year.

Any *ex parte* order protection [sic] shall be in effect until the time of hearing. If no *ex parte* order of protection has been issued as of the time of hearing, and the Petitioner has proved the allegation of abuse by a preponderance of the evidence, the Court may at that time, issue an order of protection for a definite period of time not to exceed one (1) year. The Court shall cause a copy of the petition and notice of the date set for the hearing on such petition, as well as copy of any *ex parte* order of protection, to be served upon the Respondent at least five (5) days prior to such hearing. Such notice shall advise the Respondent that he may be represented by counsel. If the Court, after the hearing, issues or extends an order of protection, Petitioner's Court costs and attorney fees shall be assessed against the Respondent.

who had appeared *pro se* previously in Rosebud Sioux Tribal Court and in fact, had prevailed.<sup>5</sup> Nor does the voluntary decision to proceed *pro se* offend due process. As noted, the Defendant/Appellant is a licensed, professional dentist and could have easily requested additional time to retain counsel, but he did not<sup>6</sup> and it is rather late in the day to suggest that such a voluntary decision was not voluntary and somehow violates due process. No reading of the due process guarantee in either the Rosebud Sioux Tribe Constitution or the Indian Civil Rights Act of 1968 supports the assertions of the Defendant/Appellant.

B. Sufficiency of the Evidence

While the Defendant/Appellant has raised many issues relative to the alleged improper admission of Plaintiff/Appellee's evidence as hearsay and improper exclusion of Defendant/Appellant's documentary evidence,<sup>7</sup> no objections were raised or preserved at trial and perhaps, more importantly, counsel on appeal does not cite or discuss a single Rosebud Sioux Tribe or Federal Rule of Evidence. Defendant/Appellant cannot prevail on such grounds when he neither cites (or discusses) the applicable Rules of Evidence allegedly violated nor the appropriate standard of review. *Farmer's State Bank of Mission v. Boyd and Boyd* (CA 89-03, 1990).

Nevertheless, there is one critical issue as to the sufficiency of the evidence and the adequacy of the trial court proceedings. That issue involves the legal duty of law enforcement officers in the context of investigating domestic abuse complaints, particularly when the

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<sup>5</sup> See Trial Transcript (hereinafter TT) of August 31, 2010, at 18.

<sup>6</sup> TT at 2:

Judge Emery: Do you have counsel?  
J. Theophilus: I don't sir.  
Judge Emery: Are you ready to proceed in this matter?  
J. Theophilus: Yes sir.

<sup>7</sup> Work schedules at the I.H.S. Hospital and Defendant/Appellant's phone records. TT at 42-43.

underlying facts become relevant and central in a proceeding seeking an order of protection. The Rosebud Law and Order Code, Domestic Abuse, Section 8. Written Report expressly provides:

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.

As this court noted in *Leader Charge v. Leader Charge* (CA 08-06, 2009), the investigation and reports of law enforcement officers are critical to the due process and integrity of the judicial process. This is especially true in the case at bar, when no law enforcement officers testified and no police reports were submitted in evidence, and both parties made quite *opposite* assertions about law enforcement. Plaintiff/Appellee stated in her petition for a protection order that “his (*i.e.* Defendant/Appellant Julius Theophilus) behavior is violent. The *officers who came to his house can testify to that.*” (emphasis added) In contrast, the Defendant/Appellant testified at the protection order hearing that “the police officers . . . Sheriff Farmer, the Rosebud Police Officer, Mr. Cournoyer, the police never charged me because they told me specifically that they did not believe that I assaulted anybody and that I was intoxicated.”<sup>8</sup> These glaring (and unchallenged) contradictions cannot be ignored.

The Tribe’s (legislative) intent as manifest in the Domestic Abuse portion of the Law and Order Code is that law enforcement officers (*when* summoned, as in this case) play a prominent role in investigating and participating in protection order proceedings. This is particularly important when both parties, as in this case, offer quite contradictory *assertions* about what the law enforcement officers *would* testify to. The fact that neither party attempted to call law enforcement to testify is also puzzling. All of these facts taken together suggest substantial evidentiary deficiencies and due process concerns.

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<sup>8</sup> TT at 53.

IV. Conclusion


For all the above-stated reasons, the decision of the trial court is reversed and remanded with directions to the trial court to hold a hearing to receive law enforcement testimony, including any and all relevant documents and reports prepared by law enforcement and for the trial court to prepare additional findings of fact and conclusions of law.

The order of protection issued in this matter shall remain in full force and effect during the pendency of the remand. In addition, any separate proceeding now pending in the trial court to extend the order of protection is hereby stayed.

IT IS SO ORDERED.

Dated this 18<sup>th</sup> day of October, 2010.

FOR THE COURT:

  
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Frank Pommersheim  
Chief Justice