

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 27587

**IN THE MATTER OF THE ESTATE OF CHARLES C.
COLOMBE, DECEASED.**

Rosebud Sioux Tribe,
Plaintiff and Appellee,

v.

**Wesley Colombe, as Personal Representative for the Charles C.
Colombe Estate,**
Defendant and Appellant.

Appeal from the Circuit Court, Sixth Judicial Circuit
Todd County, South Dakota

The Honorable Kathleen F. Trandahl
Circuit Court Judge

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

ARGUMENT1

 I. Failure to Adhere to RST’s Constitution and RST’s Code of Law and Order
 Renders the April 19, 2012 Order Unenforceable Under Comity Principles1

 II. RST Jeopardizes its Sovereignty in Refusal to Uphold and Apply its
 Constitution and Law and Order Code.....4

 III. Comity Results in Inequity and Unjust Enrichment; SDCL § 1-1-25(1)(e)
 Cannot Be Satisfied.....6

CONCLUSION.....7

CERTIFICATE OF SERVICE9

CERTIFICATE OF COMPLIANCE.....10

TABLE OF AUTHORITIES

Cases

Board of Regents v. Carter, 228 N.W.2d 621, 625 (S.D. 1975).....1

Commitment of Lawrence Lee, Jr., RST Supreme Court, CA 99-03, (2000).....3

Discovery Bank v. Stanley, 2008 SD 111, 757 N.W.2d 756.....2

Kansas Gas & Electric Co. v. Ross, 521 N.W.2d 107 (S.D. 1994).....7

Mobridge Cmty. Indus., Inc. v. Toure, Ltd., 273 N.W.2d 128 (1978).....7

RST v Horse Looking, RST Supreme Court, CA 2006-12 (3/30/2007).....3

Statutes

SDCL§ 1-1-25.....5, 6, 7, 8

ARGUMENT

I. Failure to Adhere to RST's Constitution and RST's Code of Law and Order Renders the April 19, 2012 Order Unenforceable Under Comity Principles

It is undisputed that RST's court system and judicial appointment process is governed by Article XI of the Rosebud Constitution and Title 9 of the RST Code of Law and Order. Simultaneously, however, RST seeks this Court's affirmation of the trial court's decision to disregard the plain language of RST's constitutional and statutory authority in its quest for comity.¹ Just as RST admits that "[s]tatutes and court rules must be construed in their entirety," so too must constitutional and statutory language be afforded its "plain meaning and effect." *Discovery Bank v. Stanley*, 2008 SD 111, 757 N.W.2d 756, 762; *Board of Regents v. Carter*, 228 N.W.2d 621, 625 (S.D. 1975). "When the language of a statute is clear, certain, and unambiguous, there is no occasion for construction, and the court's only function is to declare the meaning of the statute as clearly expressed in the statute." *Petition of Famous Brands*, 347 N.W.2d 882, 885 (S.D. 1984).

The Tribal Court shall consist of one chief judge and such associate judges and staff, as are deemed necessary by the Chief Judge, with the advice and consent of Tribal Council. All tribal court personnel shall be subject to the supervision of the Chief Judge. The Chief Judge shall establish such staff positions within the Tribal Court as may be necessary for efficient operation. The Chief Judge shall have the authority to establish qualifications for court staff and shall make the final selection of said staff.

Tab 6 - Article XI of the Rosebud Sioux Tribe Constitution and Bylaws, Section 2.

¹ Appellant relies upon its previously filed Appendix and attachments. Each "Tab" citation refers to Appellant's Appendix.

The Chief Judge shall promulgate rules of pleading, practice, and procedures applicable to any and all proceedings of the tribal court, consistent with the provisions of this Constitution and requirements of federal law.

Tab 6 - Article XI of the Rosebud Sioux Tribe Constitution and Bylaws, Section 4.

The Tribal Court shall apply the applicable laws of the Rosebud Sioux Tribe and the United States in actions before it. *Any matter not covered by applicable tribal or federal laws* shall be decided according to the custom and usage of the Tribe...

Tab 7 - RST Code of Law and Order, Section 4-2-8 (emphasis supplied).

All Tribal Court Judge shall be selected by the Judiciary Committee and recommended to the Tribal Council for approval.

Tab 7 - RST Code of Law and Order, Section 9-1-5(2)(c).

Whether a Special Judge is characterized as an associate judge or staff “deemed necessary by the Chief Judge,” approval by the Tribal Council is required under Article XI, section 2. Although section 2 is included in Judge Trandahl’s Findings of Fact, it is inappropriately undermined by an incorrect interpretation of section 4 and a complete disregard for Law and Order Code sections 4-2-8 and 9-1-5(2)(c). The Chief Judge’s authority articulated in Article XI, section 4, should be read subsequent to, not independent of section 2. *FOF 21 and 22*. Under plain meaning and statutory contextual principles, Article XI section 4 does not authorize the Chief Judge to appoint special judges as a “procedure” that can be accomplished without “the advice and consent of Tribal Council.” Additionally, the Chief Judge is not authorized to arbitrarily limit “All Tribal Court Judges” to exclude Meyers’ appointment from being subject to Law and Order Code section 9-1-5(2)(c). RST’s claim of such an interpretation is in direct conflict with its reminder that “[s]tatutes and court rules must be construed in their entirety.”

Discovery Bank v. Stanley, 2008 SD 111, ¶ 21, 757 N.W.2d 756, 762.

RST's in-house counsel Eric Antoine testified that "the chief justice's authority, to appoint special judges, derives in part from the constitution," specifically Article XI, section 2 and Article XI, section 4. TT: 29:23-31:4. Antoine claims that such practice has gone on for at least 15 years. TT: 25:19-23; 28:5-17. It is on this basis and testimony that RST claims that both tribal law and tribal custom supports Meyers' appointment. Tribal law and tribal custom, however, are mutually exclusive. If tribal law exists in the context of proper judicial appointments, as it does in RST Constitution Article XI, tribal custom, regardless of where it is supposedly derived, is inapplicable. RST's claim to the contrary directly contradicts Law and Order Code section 4-2-8 and ignores its own Supreme Court precedent.

[I]t [tribal custom] cannot become part of the braid of tribal (common) law until it is asserted and established in a specific case. The mere potential of tribal custom cannot be used as a kind of charm or talisman to defeat existing tribal Law.

Commitment of Lawrence Lee, Jr., RST Supreme Court, CA 99-03, (2000), p. 4.

There is also the further caveat that any such "custom and usage" relevant to the authority of Tribal officials (as opposed to private parties in private disputes) could only be exercised within the parameters of due process and equal protection as set out in Art. X, Sec. 3 of the Rosebud Sioux Tribal Constitution and the Indian Civil Rights Act, 25 U.S.C. § 1302 (8).

RST v Horse Looking, RST Supreme Court, CA 2006-12 (3/30/2007), p. 7.

RST's irreconcilable legal position is further underscored by its factual misrepresentations. Article XI did not exist until it became effective on September 20, 2007. Tab 6 – *RST Constitution*, pg. 12. The Order appointing Meyers as Special Judge was issued on November 7, 2011. The 20-year-old "custom" claimed by RST is, at best 4 years old at the time Meyers was appointed and had *no* record of establishment in a specific case. *Commitment of Lawrence Lee, Jr.*, RST Supreme Court, CA 99-03, (2000),

p. 4. RST did exactly what its Supreme Court prohibited – it asserted tribal custom “as a kind of charm or talisman to defeat *existing tribal Law*.” *Id.*

RST has attempted to mislead this Court on the contents of Law and Order Code Section 4-2-8, just as it misled Judge Trandahl. RST Law and Order Code Section 4-2-8 demands that tribal law be applied, unless a matter “is not covered by applicable tribal or federal laws.” Section 4-2-8 does not mandate “that any matter not expressly covered by applicable tribal or federal laws shall be decided according to the customs and usages of the Tribe.” *FOF 24*. Absence of the words “special judges” in the RST Constitution or RST Law and Order Code does not exempt Meyers’ appointment from satisfying the explicit requirements of tribal law.

SDCL § 1-1-25(1)(d) required RST to establish by clear and convincing evidence that the April 19, 2012 tribal court order “complies with the laws, ordinances and regulations of the jurisdiction from which it was obtained.” RST’s need to cherry pick from its Constitution and Law and Order Code, *and* supplement with testimony as to previously unaccepted “custom and usage” to validate the April 19, 2012 tribal court order explicitly violates RST’s own “laws, ordinances and regulations.”

Based upon the unambiguous language used in Article XI section 2 and Law and Order Code § 4-2-8’s, RST is unable to satisfy SDCL § 1-1-25(1)(d)’s comity requirement. Judge Trandahl’s August 13, 2015 Order Granting Comity should therefore be REVERSED and VACATED.

II. RST Jeopardizes its Sovereignty in Refusal to Uphold and Apply its

Constitution and Law and Order Code

Under and by virtue of our Creator and His divine providence, we, the enrolled members of the Rosebud Sioux Tribe of Indians of the Rosebud

Indian Reservation in the State of South Dakota, in order to establish a united tribal organization, to establish justice, to insure tranquility and enjoy the blessings of freedom and liberty, to conserve our tribal property, to develop our common resources, and to promote the best welfare of the present generation and our posterity, in education and industry, do hereby adopt and establish this Constitution and By-Laws.

Tab 6 – *Rosebud Sioux Tribe Constitution, Preamble.*

The government of the Tribe including the community shall not: ... (e) ...deny to any person within its jurisdiction the equal protection, application, or opportunity of the laws...

Tab 6 – *Rosebud Sioux Tribe Constitution, Article X.*

The question of comity before this Court is unrelated to the discussion of tribal sovereignty RST raises in its Appellee Brief. In seeking comity, SDCL§ 1-1-25 requires nothing more than for RST to have upheld the tenets and principles memorialized in its Constitution and guaranteed to its citizenry. Tribal sovereignty is not implicated, infringed upon, or interfered with when the question is whether the April 19, 2012 tribal court order was obtained “by a process that assures the requisites of an impartial administration of justice” and “complies with the laws, ordinances and regulations of the [RST].” SDCL § 1-1-25(1)(c) and (d). Such inquiries align with the principles expressly articulated in RST’s Constitution and Law and Order Code.

RST also chose the jurisdiction to which it now questions. After purposefully availing itself to state court jurisdiction, RST is prohibited from challenging this Court’s jurisdiction on tribal sovereignty grounds.

The late Charles Colombe was an enrolled and active member of the Rosebud Sioux Tribe. As such, Colombe was entitled to rely upon the protections and procedures enumerated in the Rosebud Constitutional and its Law and Order Code. Neither Colombe, nor any other RST member, is to be denied “the equal protection, application,

or opportunity of the laws...” Yet, the trial court’s grant of comity to the April 19, 2012 tribal court order has allowed RST to selectively pick and choose which parts of its Constitution and Law and Order Code it wants to apply and follow. It is RST actions and the trial court’s condoning of such actions in its grant of comity that negatively affects RST’s tribal sovereignty - not Colombe’s demand for due process and equal protection.

III. Comity Results in Inequity and Unjust Enrichment; SDCL § 1-1-25(1)(e)

Cannot Be Satisfied

In August 1999, BBC withdrew its share of the Contract’s division of net profits of which it had deferred payment on and set aside for casino operating expenses. BBC and RST mutually agreed to this arrangement. Despite the confirmation of BBC’s withdrawal amounts by third-party auditors, RST commenced litigation regarding the mutually agreed upon contract modification’s permissibility. RST took the position that BBC was not owed *any* money. RST’s own (properly appointed) Special Judge B.J. Jones and Supreme Court Justice Frank Pommersheim both acknowledged the inequity and unjust enrichment would result if BBC were to receive nothing. Tab 15 – *2004-01-16 RST Tribal Court Memorandum Decision, Special Judge B.J. Jones*; Tab 16 – *2003-04-30 RST Tribal Court Order, Special Judge B.J. Jones*; Tab 17 – *2006-10-02 RST Supreme Court, Chief Justice Frank Pommersheim Summary Order*. The subsequent internal accounting resulted in BBC owing the full amount of what it had withdrawn. In short, RST’s tribal court determined BBC was to receive nothing for its years of work and contribution.

None of this is refuted by RST.

Colombe, however, was not BBC. He was a BBC shareholder entitled to the protections corporate formalities provide. Absent a “sufficient reason to the contrary,”

BBC should have been and remained a separate legal entity. *Mobridge Cmty. Indus., Inc. v. Toure, Ltd.*, 273 N.W.2d 128, 132 (1978). Of the six well-recognized factors that may justify piercing the corporate veil, Judge Meyers' mentioned none of them in her Order Granting Summary Judgment holding Colombe personally responsible. *See Kansas Gas & Electric Co. v. Ross*, 521 N.W.2d 107, 112 n. 6 (S.D. 1994). Instead, Judge Meyers' disregarded RST Law and Order Code Section 4-2-8's mandate on choice of law and, in her Memorandum Decision, stated that she "utilized cases determined by the Courts of the State of South Dakota." None of this is refuted by RST.

Allowing RST to personally collect money from the estate of a shareholder, of which none was owed under RST's mutually agreed upon contract terms with BBC, violates South Dakota's longstanding policy against unjust enrichment. The undisputed facts establish that RST cannot satisfy SDCL § 1-1-25(1)(e) by clear and convincing evidence. Judge Trandahl's August 13, 2015 Order Granting Comity should therefore be *reversed and vacated*.

CONCLUSION

RST admitted both at the Evidentiary Hearing on January 8, 2015 and in its Appellee Brief, that Meyers' appointment and subsequent April 19, 2012 tribal court order is a product of and authorized by a combination of tribal law and tribal custom. The RST Constitution, RST Law and Order Code, and RST Supreme Court precedent all confirm that tribal law and tribal custom are mutually exclusive. The April 19, 2012 tribal court order is therefore unable to satisfy SDCL § 1-1-25(1)(c) or (d).

Recognition of the tribal court order also "contravenes[s] public policy of the State of South Dakota" by condoning RST's refusal to recognize and honor Colombe's

rights to due process and equal protection under tribal law. SDCL § 1-1-25(1)(e). The economic windfall RST would enjoy if the tribal court order was afforded comity is also contrary to South Dakota’s intolerance for unjust enrichment.

RST’s failure to prove by “clear and convincing evidence” that Meyers’ April 19, 2012 tribal court order satisfied all five specifically enumerated requirements of SDCL § 1-1-25(1) results in no legal basis for this Court to “recognize the tribal court order or judgment...” SDCL § 1-1-25(2). Based upon the foregoing, as well as the arguments and authorities provided in Appellant’s Brief, South Dakota law requires Judge Trandahl’s August 13, 2015 Order Granting Comity be *reversed* and *vacated*.

Respectfully submitted this 8th day of February, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4) I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This Brief was prepared using Microsoft Word, and contains 2,225 words from the Argument through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

On this 8th day of February, 2016.

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