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STATE OF NORTH DAKOTA

Supreme Court No. 20210288
District Court No. 40-2021-DM-00030

STATE OF NORTH DAKOTA

In the Supreme Court

Brock Baker,

Plaintiff/Appellee,

vs.

LuAnn Thiel f/k/a LuAnn Baker-Erickson,

Defendant/Appellant.

On appeal from an Order Granting Motion to Vacate Order Recognizing Tribal Protection Order entered August 24, 2021, in the District Court of Rolette County in the Northeast Judicial District The Honorable Anthony Swain Benson

APPELLANT'S REPLY BRIEF

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REPLY

[¶ 1] The Plaintiff and Appellee, Brock Baker (hereinafter "Baker"), in his response brief argued the district court did not err in granting full faith and credit to the Turtle Mountain Tribal Court Order of Protection regarding the minor children in this case pursuant to 18 U.S.C. § 2265(b). (Baker's Br. ¶42). Baker provided analysis on two primary questions: (1) jurisdiction; and (2) reasonable notice. The Defendant and Appellant, Luann Thiel (hereinafter "Thiel"), vigorously denies Baker's arguments are valid and provides the below rebuttal arguments.

I. Application of the UCCJEA.

[¶ 2] First, Baker argues the Uniform Child Custody Jurisdiction and Enforcement Act (hereinafter "UCCJEA") as a basis for jurisdiction. (Baker's Br. ¶34). Thiel agrees and encourages this Court to consider the UCCJEA provides a logical and appropriate road map for both the tribal court and the district court. Unfortunately, neither court followed that road map, despite its universal application to both courts. Baker and the district court should have used the UCCJEA in its analysis and failed to do so, providing a basis for this appeal and other grounds for why the restraining order was improper and an abuse of process.

[¶ 3] Second, Baker claims under the UCCJEA section 204 the Turtle Mountain Tribal Court had emergency jurisdiction over the parties and subject matter. (Baker's Br. ¶45) Baker's analysis is incorrect. The UCCJEA does not authorize emergency jurisdiction in cases of alleged neglect, which was the pretext for Baker's application in this case. (Baker's Br. ¶20) Under the comments of UCCJEA section 204, "Therefore, 'neglect' has been eliminated as a basis for the assumption of temporary emergency jurisdiction." Delving

further into the drafters' intent is the acknowledgment for potential abuse, the relevant portion follows as such:

> This Act recognizes that a protective order proceeding will often be the procedural vehicle for invoking jurisdiction by authorizing a court to assume temporary emergency jurisdiction when the child's parent or sibling has been subjected to or threatened with mistreatment or abuse. In order for a protective order that contains a custody determination to be enforceable in another State, it must comply with the provisions of this Act and the PKPA.

U.C.C.J.E.A. § 204 comments (Nat'l Conf. Comm'rs on Unif. State L. 1997).

[¶ 4] Thiel emphasizes emergency jurisdiction is intended to be *temporary* and does not allow for a modification of custody without first contacting the state with continuing exclusive jurisdiction over the parties. In this case, tribal court did not contact the district court with jurisdiction and instead made a *de facto* ruling on custody. This is evidenced by Baker's application for the restraining order which had handwritten the title and case number of the district court case, along with a demand for custody and child support in the amount of $1,500.00. (Doc. ID #33, section E, page 1). Baker's intent was clear: he wanted custody along with child support and intended to strong-arm his way into that result even if it meant doing so in violation of the district court's order by way of an end-run through tribal court.

[¶ 5] Section 14-14.1-15(4) of the North Dakota Century Code requires communication between the foreign court and the district court with continuing exclusive jurisdiction. "Communication between courts is required under Sections 204, 206, and 306 and strongly suggested in applying Section 207." U.C.C.J.E.A. § 110 comments (Nat'l Conf. Comm'rs on Unif. State L. 1997). In this case, tribal court had appropriate information, time, and opportunity to confer with the district court before granting a *de facto* custody

determination. If the UCCJEA is the appropriate road map for the tribal court and district court to have followed, then neither of those courts followed the appropriate law and the case should be remanded.

[¶ 6] In his brief, Baker conceded North Dakota is the home state for the minor children. (Baker's Br. ¶44). The UCCJEA according to Baker eliminated inconsistent state interpretations and clarified emergency jurisdiction only on a temporary basis. (Baker's Br. ¶45).

[¶ 7] In his brief, Baker admitted jurisdiction is temporary. (Baker's Br. ¶66). While the initial temporary protection order may have had emergency jurisdiction over the parties, a final permanent order did not. Baker concedes, "it would appear that neither the Turtle Mountain Tribal Court nor the District Court communicated with one another." (Baker's Br. ¶69). Section 14-14.1-15(d) of the North Dakota Century Code requires communication between the state with child-custody determination and a court of another state having exercised emergency temporary jurisdiction for the purposes of resolving the emergency, protecting the safety of the parties and child, and determining a period for the duration of the temporary order. It is a requirement before the final permanent order is put in place that the courts communicate with each other to ensure that a situation like that of this case does not happen where there are two controlling court orders giving custody to different parties. The application of this rule does not render the UCCJEA obsolete but is exactly why it was enacted throughout the United States in the first place, to ensure contradictory orders do not happen.

[¶ 8] Additionally, Baker's "feelings" are not relevant to whether an immediate danger was present to the minor children. (Baker's Br. ¶20). Baker had full control over the

children, Thiel had already asked him to keep the children for five (5) weeks, and there was no actual immediate threat of harm to the children. An ex parte order should never have been granted due to the lack of immediacy. Thiel has a right to due process in a court of appropriate jurisdiction. Feelings are not the bedrock of jurisprudence.

[¶ 9] Baker's attempt to register the foreign judgment after the permanent order was in place only solidifies Thiel's argument tribal never had proper jurisdiction. Communication between the courts would not have required the registration of such judgment as the home state would have been able to issue the final order.

[¶ 10] Baker cites *Steckler v. Steckler*, 492 N.W.2d 076 (N.D. 1992) as a guiding case; however, this case supports an opinion in Thiel's favor. Thiel agrees and consents to Baker's position that the Court remand with instructions for contact between the two courts to resolve any conflicts. *Steckler* precedent does not mean that the district court did not error; the *Steckler* precedent means the courts did not commence with the communication necessary between the courts to establish a custody and parenting modification that would be in the children's best interests. Instead, Baker has found and exploited a tribal court loophole and used it to alienate the children away from their mother.

II. Baker admits Thiel was never properly served.

[¶ 11] Baker argues Thiel had appropriate notice and opportunity to be heard and that as a matter of "public policy" this Court should hold she was properly served. (Baker's Br. ¶76). This is incorrect and in contravention to basic tenants of public policy surrounding the service of process, but also in contravention to the plain language of tribal code as well as the North Dakota and Federal Rules of Civil Procedure.

[¶ 12] Baker argues it is contrary to public policy for the Court to hold Thiel was never properly served. (Baker's Br. ¶88). Public Policy and the basic tenants of the justice require notice and the opportunity to be heard. The fact remains that Thiel was never properly served. The first time Thiel even knew about the tribal restraining order was the day it was issued. The plain language of tribal code requires both the emergency and permanent restraining order be served either by personal service or by certified mail. Turtle Mountain Tribal Code § 2.0407. Baker attempts a shortsighted end-run around this by arguing Jenna Azure, the tribal court's clerk of court, sent notice of the hearing regular mail and that she wrote in an unauthenticated email the letter was never returned thereby proving Thiel had actual notice. (Baker's Br. ¶99). This is not the requirement pursuant to tribal code. The requirement, as expressed in the original brief, is personal service or certified mail, return receipt requested with the returned green card as proof. Turtle Mountain Tribal Code § 2.0407. The record shows no evidence Thiel was ever served in the manner required by any code, whether state or tribal.

[¶ 13] Baker's factual contentions admit there was never any immediate harm present for the children for which he sought an emergency temporary restraining order. There can be no immediate harm when Baker knew for the next five (5) weeks Thiel would not be present in the state of North Dakota or within the exterior boundaries of the Turtle Mountain Band of Chippewa Reservation. (Baker's Br. ¶24). Additionally, in his protection order request, he asks for child support and custody, revealing his true motive – which was a *de facto* change of custody using the tribal court's restraining order process as a lever. (Doc. ID #33, section E, page 1).

[¶ 14] Baker argues that the Court does not have a duty to ensure a party's presence of trial; however, court does have a duty to ensure every party is reasonably informed of court proceedings. (Baker's Br. ¶89). The "analogous" case cited by Baker cannot be further from the facts of this case. In *St. Claire* the prisoner was served personally by law enforcement. *St. Claire v. St. Claire*, 675 N.W.2d 175 (N.D. 2004). In this case, Theil was never served. The tribal court clerk assumed service was because the mail was not returned as no delivery. (Baker's Br. ¶99). There is nothing reasonable about an assumption of service, especially when Baker knew Thiel was not present at her usual abode. Additionally, the tribal advocate's letter asserting he would attempt certified service is an unverified statement by a non-licensed attorney tantamount to hearsay, but a copy of the returned certified envelope was never filed with the court, despite numerous opportunities and ample time frame to do so. (Baker's Br. ¶94). Presumably, this is because the returned certification does not exist.

[¶ 15] The undertaking of a restraining order against the mother of minor children is serious, even more so when it denies her the right to see or communicate with her children absolutely for over a year. Thiel has been denied her constitutional right to parent her children and refute the grave and serious charges lodged against her with the benefit of due process. The least she deserved in this case was proper notice pursuant to the tribe's own rules. Notices only sent by regular mail are not proper service; especially, given the fact that such interpretation is not utilized by the tribal court itself. The tribal court has given direction regarding the seriousness of proper service and notice:

> The basic tenants of due process of law are notice and an opportunity to be heard. A fundamental requirement of due process is that the parties be given adequate or reasonable notice. An elementary and fundamental requirement of due process [. . .] is notice be reasonably calculated, under all the

> circumstances, to apprise interested parties of the pendency of the action [and] the notice must be of such nature as reasonably to convey the required information.

Monette v. Schlenvogt (Turtle Mountain Tribal Ct. of App. 2005) *citing Smith v. Belcourt School District #7*, No. 02-10155, at 2 (Turtle Mountain Band App., November 30, 2004); *Synowski v. Confederated Tribes of Grand Ronde*, 31 Indian L. Rptr. 61 17, 6118 (Grand Ronde App. 2003); *Hoopa Valley Indian Housing Authority v. Gerstener*, 22 Indian L. Rptr. 6002, 6005 (Hoopa Valley Tribe App. 1993).

[¶ 16] Baker cites to 18 U.S.C. § 2265(b)(2) which requires reasonable notice and opportunity to be heard must be given to the person against whom the order is sought, sufficient to protect the person's rights to due process. A non-certified mailing would never under any law be sufficient to protect a person's due process rights.

[¶ 17] Baker claims the duty of service is prefaced by the word "may." (Baker's Br. ¶98). Specifically, citing Turtle Mountain Tribal Code § 2.0405(1) "A copy of the summons, together with a copy of the complaint as required under Section 2.0402 may be served by certified mail, return receipt requested, or may be served personally upon an individual defendant." Baker is correct, the word "may" is included in the tribal code, however, it offers two methods of service may be served by certified mail OR may be served personally upon an individual defendant. The use of the word "or" would be that either method is sufficient proof. No where in the rule does it state that service may be effectuated via regular no return receipt requested. Assuming service is tantamount to an obvious due process violation and a disingenuous reflection of the loose interpretation utilized in Baker's treatment of this case as lacking adherence to the rule of law and fair jurisprudence.

CONCLUSION

[¶ 18] This Court should remand the district court's order with instructions to remove findings regarding the propriety of service in this case as well as the findings regarding the tribal's courts extent of jurisdiction.

Dated this the 25th day of March 2022.

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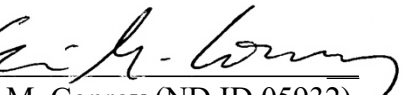
CERTIFICATION

[¶ 19] The undersigned, as the attorney representing Appellant, and the author of the Appellant's Reply Brief, hereby certifies that said brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, in that the brief was prepared with proportional typeface and that the total number of pages does not exceed twelve (12) pages.

Dated this the 25th day of March 2022.



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IN THE SUPREME COURT

OF THE STATE OF NORTH DAKOTA

Brock Baker, Appellee/Plaintiff, vs. LuAnn Baker-Thiel, Appellant/Defendant	Civil No. 40-2021-DM-00030 Supreme Court No. 20210288 **AFFFIDAVIT OF SERVICE**

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COUNTY OF BOTTINEAU	)	**AND ELECTRONIC SERVICE**

Nikole Soli, being first duly sworn, deposes and states that she is of legal age and that on the 25th day of March 2022, she electronically filed with North Dakota Supreme Court and served the following:

1. **Appellant's Reply Brief**.

Nikole Soli

By sending a true and correct copy through electronic service to:

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Subscribed and sworn to before me this the 25th day of March 2022.

ERIN M. CONROY
Notary Public
State of North Dakota
My Commission Expires Sept. 6, 2023

Notary Public