

IN THE SUPREME COURT  
STATE OF SOUTH DAKOTA

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No. 30046

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LESLIE J. TORGERSON,

Plaintiff and Appellant,

v.

TERRI A. TORGERSON,

Defendant and Appellee,

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APPEAL FROM THE CIRCUIT COURT  
FIFTH JUDICIAL CIRCUIT  
ROBERTS COUNTY, SOUTH DAKOTA

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**APPELLANT'S BRIEF**

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## **TABLE OF CONTENTS**

	PAGE
TABLE OF AUTHORITIES	iii.
PRELIMINARY STATEMENT	1
JURISDICTIONAL STATEMENT	1
STATEMENT OF ISSUES	2
STATEMENT OF THE CASE	3
STATEMENT OF THE FACTS	3
ARGUMENT	5
CONCLUSION	28
CERTIFICATE OF COMPLIANCE	30
CERTIFICATE OF SERVICE	30
APPENDIX	31

## TABLE OF AUTHORITIES

CASES:	PAGES
<u>Ayres v. Jacobs &amp; Crumplar</u> , 99 F.3d. 565, 568-70 (3d Cir. 1996).....	23
<u>Babbitt Ford, Inc. v. Navajo Indian Tribe</u> , 519 F.Supp. 418, 431 (D.Ariz 1981) <i>aff'd in part, rev'd in part on other grounds</i> , 710 F.2d 587 (9thCir.1983), <i>cert. denied</i> 466 U.S. 926, 104 S.Ct. 1707, 80 L.Ed.2d 180 (1984).....	9
<u>Barrett v. Allentown</u> , 152 F.R.D. 46, 49 (E.D.Pa. 1993)	
<u>Daktronics, Inc. v. LBW Tech Co., Inc.</u> , 2007 SD 80, 737 N.W.2d 413.....	9,10
<u>DeCoteau v. District County Court</u> , 420 U.S. 425, 95 S. Ct. 1082 (1975).....	7
<u>DeCoteau v. District County Ct for Tenth Jud. District</u> , 211 N.W.2d 843 (S.D. 1973).....	7
<u>Durfee v. Duke</u> , 375 U.S. 106, 111, 84 S.Ct. 242, 245, 11 L.Ed.2d 186 (1963).....	18
<u>First Nat'l Bank of Philip v. Temple</u> , 2002 SD 36, 642 N.W.2d 197 (S.D. 2002).....	6
<u>Gesinger v. Gesinger</u> , 531 N.W.2d 17 (S.D. 1995).....	6
<u>Hanson v. Denckla</u> , 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958).....	11
<u>Harper v. City of New York</u> , 424 Fed. Appx. 36, 40 (2d Cir. 2011).....	23
<u>Harris v. Young</u> , 473 N.W.2d 141 (S.D. 1991).....	19
<u>Hilton v. Guyot</u> , 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1895).....	11
<u>In Re DeFender</u> , 435 N.W.2d 717 (S.D. 1989).....	6,10,11,12,15
<u>In Re the Matter of J.D.M.C.</u> , 739 N.W. 2 <sup>nd</sup> 796 (S.D. 2007)....	7,8,9,16,18
<u>International Shoe v. Washington</u> , 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945).....	9,11

<u>Kulko v. Superior Court</u> , 436 U.S. 84, 91, 98 S.Ct. 1690, 1696, 56 L.Ed.2d 132, 141 (1978).....	11,12
<u>Langdeau v. Langdeau</u> , 2008 SD 44, 751 N.W. 2d 722 (S.D. 2008).....	6,16,19,26
<u>Leon v. Numkena</u> , 142 Ariz. 307, 689 P.2d 566, 568 (1984).....	13
<u>Lustig v. Lustig</u> , 1997 SD 24, ¶14, 560 N.W.2d 239 (S.D. 1997).....	26
<u>Mexican v. Circle Bear</u> , 370 N.W.2d 737 (S.D. 1985).....	6,11,24
<u>Mississippi Publishing Corp. v. Murphree</u> , 326 U.S. 438, 444-445, 66 S.Ct. 242, 245-246, 90 L.Ed. 185 (1946).....	22
<u>Nelson v. WEB Water Development Ass’n, Inc.</u> , 507 N.W.2d 691, 693 (S.D. 1993).....	27
<u>O’Meara v. Waters</u> , 464 F. Supp. 2d 474, 476 (D. Md. 2006).....	22
<u>Omni Capital Intern., Ltd. v. Rudolf Wolff &amp; Co., Ltd.</u> 484 U.S. 97, 104, 108 S.Ct. 404, 409 (U.S.1987).....	22
<u>One Feather v. O.S.T. Pub. Safety Com’n.</u> , 482 N.W.2d 48, 49 (S.D.1992).....	6
<u>Patel-Julson v. Paul Smith Las Vegas, Inc.</u> , Case No. 2:12-cv-01023-MMD-CWH (D. Nev. Apr. 23, 2013).....	22
<u>Pieper v. Pieper</u> , 2013 S.D. 98, ¶ 12, 841 N.W.2d 781, 785	
<u>Red Fox v. Hettich</u> , 494 N.w.2d 638 (S.D. 1993).....	6,7,9,13
<u>Rush v. Rush</u> , 2015 SD 56, 866 N.W.2d 556.....	26
<u>State ex rel Joseph v. Redwing</u> , 429 N.W.2d 49 (S.D. 1988).....	11,24
<u>Timmerman v. Timmerman</u> , 163 Neb. 704, 81 N.W.2d 135 (1957).....	13
<u>Underwriter’s Nat’l Assurance Co. v. North Carolina Life and Accident and Health Ins. Guar. Ass’n</u> , 455 U.S. 691, 705, 102 S.Ct. 1357, 1366, 71 L.Ed.2d 558, 570-71 (1982).....	25
<u>Wells v. Wells</u> , 451 N.W.2d 402 (S.D.1990).....	6,19,24,25



<u>Williams v. State of North Carolina, 325 U.S. 226,</u> <u>65 S.Ct. 1092, 89 L.Ed. 1577, (1945).....</u>	<u>24</u>
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<u>STATUTES</u>	<u>PAGE</u>
Fed. Rules of Civ. Proc. Rule 4 (b).....	21
SDCL 1-1-25 (1)(a).....	8,12,15,16,17,24
SWO Rules of Civil Procedure Rule 2 (a) and (c).....	20
SWO Tribal Code 34-03-01.....	13
SWO Tribal Code 34-17-01.....	14,17
SWO Tribal Code 34-23-02.....	21
SWO Tribal Code 34-23-04.....	14,15
SWO Tribal Code 34-23-05.....	14,15
SWO Tribal Code 45-01-02.....	12

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v.

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Defendant and Appellee,

**PRILIMINARY STATEMENT**

All references in this brief to the Settled Record of this action are referred to as “SR”, followed by the page number. The Transcript of the May 23, 2022, Motion Hearing will be referred to as “HT” followed by the page and line. References to the Appendix will be referred to as “App.” followed by the page number. References to Plaintiff/Appellant will be referred to as Leslie and Defendant/Appellee will be referred to as Terri.

**JURISDITIONAL STATEMENT**

Terri filed a Motion to Dismiss Plaintiff’s Complaint on March 30, 2022. SR at 10. Terri subsequently filed an Amended Motion to Dismiss

on May 16, 2022. SR at 26. A hearing was held on the Motion to Dismiss on May 23, 2022. The Circuit Court entered an Order of the Court Dismissing Action with Prejudice dated June 5, 2022 and filed on June 6, 2022. SR at 69; App. C. 19. The Order of the Court Dismissing Action with Prejudice was a final order in the Circuit Court and had the effect of terminating the action as to all of the issues and all of the parties. Leslie filed a Notice of Appeal on July 7, 2022. SR at 70. This Court has jurisdiction pursuant to SDCL 15-26A-3.

### **STATEMENT OF THE ISSUES**

**I. DID THE TRIAL COURT ERROR IN RECOGNIZING THE TRIBAL COURT ORDER AS A MATTER OF COMITY UNDER SDCL 1-1-25?**

Most Relevant Authority:

SDCL 1-1-25

Langdeau v. Langdeau, 751 N.W. 2d 722, 730 (S.D. 2008)

Wells v. Wells, 451 N.W.2d 402, 405 (S.D.1990)

In Re the Matter of J.D.M.C., 739 N.W. 2<sup>nd</sup> 796 (S.D. 2007)

**II. DID THE TRIAL COURT ERROR IN DETERMINING THAT THE TRIBAL COURT DIVORCE PROCEEDING WAS FIRST PROPERLY COMMENCED?**

Most Relevant Authority:

SWO Rules of Civil Procedure Rule 2 (a) and (c)

SWO Tribal Code Section 34-23-02

Wells v. Wells, 451 N.W.2d 402, 405 (S.D.1990)

Omni Capital Intern., Ltd. v. Rudolf Wolff & Co., Ltd. 484 U.S. 97, 104, 108 S.Ct. 404, 409 (U.S.1987)

Ayres v. Jacobs & Crumplar, 99 F.3d. 565 (3d Cir. 1996)

**III. DID THE TRIAL COURT ERROR IN FINDING THAT LESLIE AND TERRI OWNED AND OPERATED DAKOTA SIOUX PROPANE FOR MANY YEARS, THAT IT WAS A TRIBALLY CHARTERED BUSINESS, THAT BOTH HAVE HAD DEALING WITH THE SISSETON WAHPETON OYATE AND ITS COURT SYSTEM (FINDING #6)?**

Most Relevant Authority:

Rush v. Rush, 2015 SD 56, 866 N.W.2d 556

**IV. DID THE TRIAL COURT ERROR IN FINDING THAT LESLIE PERSONALLY APPEARED AT THE TRIBAL COURT HEARING (FINDING #9)?**

Most Relevant Authority:

Rush v. Rush, 2015 SD 56, 866 N.W.2d 556

**STATEMENT OF THE CASE**

This is an appeal from the Fifth Judicial Circuit, Roberts County, South Dakota, the Honorable Jon S. Flemmer presiding. This was a divorce action brought by the Lelsie against Terri. *See generally* Complaint, SR at 3-5. Terri filed a Motion to Dismiss and an Amended Motion to Dismiss. SR at 10, 26. The Circuit Court held a hearing on the Motion and orally granted the motion. App. A. 14. The Circuit Court entered Findings of Fact and Conclusions of Law filed on June 6, 2022. SR at 66; App. B. 16. The Circuit Court entered its Order of Court Dismissing Action filed on June 6, 2022. SR at 69; App. C. 19.

**STATEMENT OF THE FACTS**

Leslie initiated this action against Terri seeking a divorce. Leslie and Terri were married on October 7, 1994, at Vermillion, South Dakota. *See*

*generally* Complaint, SR at 3-5. Terri is an enrolled member of the Sisseton Wahpeton Oyate Tribe. App. G. 25. Leslie is not an enrolled member of the Sisseton Wahpeton Oyate Tribe (“Tribe” hereinafter) or any other tribe. App. D. 20. Leslie and Terri have resided at their marital homestead at 45390 121<sup>st</sup> Street, Sisseton, South Dakota, for the entire duration of their marriage. App. D. 20. The parties’ homestead is not located on Indian trust land or land owned by the Tribe. App. D. 20. The parties’ do not have any biological children together, but Leslie did adopt Terri’s son in 1997, who is now thirty-six years old. App. D. 21. Leslie does not conduct business with the Tribe or conduct any business on Tribal land. App. D. 21.

Terri filed a Summons and Complaint in Sisseton Wahpeton Oyate Tribal Court on October 18, 2021. App. F.G. 24, 25. The Tribal Summons was issued by Terri’s attorney, Gordon P. Nielsen. App. F. 24. It is undisputed that the Tribal Summons and Complaint was personally served on Leslie in Sisseton, South Dakota, on October 27, 2021. HT at 3-13; App. A. 3, Line13. The clerk of Tribal Court, Eileen Pfeiffer, did not issue a Tribal Court Summons because she was waiting for an address from Terri’s attorney on where to serve Leslie. The Tribal Clerk never received an address so she did not proceed with the service of the Tribal Summons. App. E. 23. Leslie filed a Motion to Dismiss in Tribal Court citing lack of proper process and lack of jurisdiction. A hearing was held

in Tribal Court on January 10, 2022. The Tribal Court denied the Motion to Dismiss and issued its Order dated January 10, 2022. App. H. 28.

Leslie caused the Summons and Complaint in this case to be delivered to the Roberts County Sheriff's Department for service on Terri on November 10, 2021. App. D. 21. The Sheriff did not serve the papers as requested and so Leslie arranged for service by a private process server. App. D. 21. The Summons and Complaint in this case were served on Terri on January 26, 2022. SR at 6.

In response to the Summons and Complaint in Circuit Court, Terri filed a Motion to Dismiss and an Amended Motion to Dismiss. SR at 10, 26. The Court held a hearing on the Motion on May 23, 2022. Leslie did not testify in person but did submit an Affidavit. App. D. 20. Terri did not offer any testimony. *See generally*, HT. After hearing the arguments of counsel, the Court delivered its decision from the bench granting the motion to dismiss. HT at 12-11; App. A. 12, Line11. The Court subsequently issued Findings of Fact and Conclusions of Law and its Order of the Court Dismissing Action with Prejudice. SR at 66, 69; App. B & D.

## **ARGUMENT**

### **I. THE TRIAL COURT ERRED IN RECOGNIZING THE TRIBAL COURT ORDER UNDER PRINCIPLES OF COMITY.**

The Trial Court concluded that it was bound by the tribal court's finding that it had jurisdiction over the divorce and that Leslie was properly served. See Conclusion of Law #6, App. B. 17, 18.

South Dakota courts will recognize tribal court orders under principles of comity. Langdeau v. Langdeau, 2008 SD 44, ¶39, 751 N.W. 2d 722, 734 (S.D. 2008) (citing First Nat'l Bank of Philip v. Temple, 2002 SD 36, ¶ 16, 642 N.W.2d 197, 203 (citing Wells v. Wells, 451 N.W.2d 402, 403 (S.D.1990)) The party seeking recognition must first establish the tribal court order complies with SDCL 1-1-25. Langdeau at ¶39, 734 ((citing Mexican v. Circle Bear, 370 N.W.2d 737 (S.D.1985)) All five of the statutory elements of SDCL 1-1-25 (1) must be established by clear and convincing evidence. Id at ¶39, 734 (Citing Gesinger v. Gesinger, 531 N.W.2d 17, 19 (S.D.1995) (citing One Feather v. O.S.T. Pub. Safety Com'n., 482 N.W.2d 48, 49 (S.D.1992)) see also Red Fox v. Hettich, 494 N.W.2d 638, 641, 642 (S.D. 1993); Wells v. Wells, 451 N.W.2d 402, 403 (S.D.1990); In Re DeFender, 435 N.W.2d 717, 720 (S.D. 1989).

As in Red Fox, Terri must first clearly and convincingly establish that the Tribal Court had jurisdiction over both the subject matter and the parties. Id at 642. The court in Red Fox stated that it agreed with Professor Pommersheim's general theses that tribal judicial jurisdiction depends on "whether the tribal court has proper subject matter, personal and territorial jurisdiction...." Id at 642.

## **TERRITORIAL JURISDICTION**

The court in Red Fox stated territorial jurisdiction was implicit in jurisdictional analysis as a necessary predicate to the determination of subject matter jurisdiction. Id at 642

Leslie and Terri have both resided at 45390 121<sup>st</sup> Street, Sisseton, South Dakota for their entire marriage of 27 years. App. D. 20. The residence is located on fee land and not on Indian trust land or tribal land. App. D. 20. The status of this land was determined in DeCoteau v. District County Court, 420 U.S. 425, 95 S. Ct. 1082 (1975). In DeCoteau, the United States Supreme Court held that the 1891 Act (Act of March 3, 1891, c. 543, 26 Stat.1035) terminated the Lake Traverse Reservation and that the state has jurisdiction over conduct on non-Indian lands within the 1867 reservation borders. The effect of the 1891 Act was to return unallotted land within the 1867 reservation borders to the public domain. DeCoteau v. District County Ct for Tenth Jud. District, 211 N.W.2d 843, 845 (S.D. 1973). Land within the 1867 borders that is not tribal trust land or allotted trust land, is not in Indian country. In Re the Matter of J.D.M.C., 2007 SD 97, ¶14, 739 N.W. 2<sup>nd</sup> 796, 802 (S.D. 2007). The court went on to say:

“The SWO “territory” is the area “within [the Tribe’s] jurisdiction” and the portion of the earth that is in [the Tribe’s] exclusive possession and control. Since 1975, it has been understood that the Lake Traverse Reservation was terminated, resulting in a jurisdictional schematic resembling a checkerboard, and giving state court jurisdiction over non-Indian lands within the 1867 reservation borders” See DeCoteau, 420 U.S. at 428, 95 S.Ct. at



1085, 43 L.Ed.2d 300. Sisseton does not fall within the territory of the SWO, nor can SWO exercise jurisdiction over Sisseton. See *id.* at 464, 95 S.Ct. at 1102, 43 L.Ed.2d 300 (Douglas, J., dissenting).”

In Re the Matter of J.D.M.C. at ¶31, 806

There is no dispute in this case that the marital domicile is not located in Indian country. Neither wife nor Husband is domiciled on tribal land or in Indian country. This was the finding of the Trial Court in its oral decision from the bench. App. A. 13, Line 10. This being the case, the tribe does not have territorial jurisdiction in this divorce action. Territorial jurisdiction is a necessary predicate to subject matter jurisdiction which is a required element of comity. SDCL 1-1-25(1)(a), App. I. 29. Without subject matter jurisdiction, the Tribal Court Order should not have been recognized by the Trial Court. Terri did not submit any evidence on the issue of territorial jurisdiction.

It is interesting to note that the Tribal Court found that Leslie “resides within the boundaries of the Lake Traverse Reservation.” App. H. 28. There is no factual or legal basis for this finding by the Tribal Court and it is clearly erroneous.

## **PERSONAL JURISDICTION**

Generally, a tribal court can exercise personal jurisdiction if the person has sufficient minimum contacts with the reservation in order to

meet the due process requirements of the Indian Civil Rights Act (ICRA).

See 25 USC 1302, In Re the Matter of J.D.M.C. at ¶44, 811.

“Accordingly, whether tribal courts have personal jurisdiction over a party is analyzed using the minimum contacts standard expressed in International Shoe v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945).” Id at ¶44, 811. The inquiry is whether Leslie has had sufficient minimum contacts with the reservation to conclude that the assertion of jurisdiction “does not offend traditional notions of fair play and substantial justice.” Id at ¶44, 811 (citing Daktronics, Inc. v. LBW Tech Co., Inc., 2007 SD 80, ¶ 5, 737 N.W.2d 413, 416-17 (quoting Int'l Shoe Co., 326 U.S. at 316, 66 S.Ct. at 158, 90 L.Ed. 95)). The J.D.M.C. court went on to say that “More in the way of “minimum contacts” is required for a tribal court to exercise long-arm jurisdiction over a non-Indian “than would be sufficient for the citizen of one state to assert personal jurisdiction over the citizen of another state.”” Id at 812; Red Fox at 645 (quoting Babbitt Ford, Inc. v. Navajo Indian Tribe, 519 F.Supp. 418, 431 (D.Ariz 1981) *aff'd in part, rev'd in part on other grounds*, 710 F.2d 587 (9thCir.1983), *cert. denied* 466 U.S. 926, 104 S.Ct. 1707, 80 L.Ed.2d 180 (1984)).

The three-part minimum contacts test stated by the South Dakota Supreme court is as follows:

First, the defendant must purposefully avail himself of the privilege of acting in the forum state, thus invoking the benefits and protections of its laws. Second, the cause of

action must arise from defendant's activities directed at the forum state. Finally, the acts of defendant must have substantial connection with the forum state to make the exercise of jurisdiction over defendant a reasonable one.

Daktronics, Inc., 2007 SD 80, ¶ 6, 737 N.W.2d at 413, 417

Leslie is a nonresident, non-tribal member who has never resided or domiciled on the reservation. App. D. 20. Leslie does not conduct business with the Tribe or conduct business on Tribal land. App. D. 21. His only connection with the Tribe is that he is married to Terri, a tribal member, and has adopted her son. App. D. 21. The record is devoid of any evidence that Leslie has purposely availed himself of the privilege of acting on Tribal land or interacting with the Tribe or that the divorce action arises from his activities directed at the Tribe. Likewise, there is no evidence that Leslie has such a substantial connection with the forum state to make the exercise of jurisdiction over him a reasonable one. The opposite is true. The record in this case does not reveal any connection between him and the Tribe other than his marriage to a Tribal member, and an adopted son who is a member.

The South Dakota Supreme Court in In Re DeFender, 435 N.W.2d 717 (S.D. 1989), upheld the circuit court's refusal to grant comity to a Cheyenne River Sioux Tribe custody order. The father was a member of Cheyenne River Sioux Tribe and mother was a member of the Standing Rock Sioux Tribe. The mother did not reside on the Cheyenne River Sioux reservation. The father commenced a custody proceeding with the

Cheyenne River Sioux Tribal Court. In its decision, the DeFender court said:

As we noted in *State ex rel Joseph v. Redwing*, 429 N.W.2d 49 (S.D. 1988), a party seeking recognition of a tribal court order under the principle of comity must establish the mandatory requisites of SDCL 1-1-25 by clear and convincing evidence. Under SDCL 1-1-25, the party must establish that (1) the tribal court had jurisdiction over both the subject matter and the parties; (2) the order or judgment was not fraudulently obtained; (3) the order or judgment was obtained by a process that assures the requisite of an impartial administration of justice, including but not limited to due notice and a hearing; (4) the order or judgment complies with the laws of the jurisdiction in which it was obtained; and (5) the order or judgment does not contravene the public policy of the State of South Dakota. *See also Hilton v. Guyot*, 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1895); *Mexican v. Circle Bear*, 370 N.W.2d 737 (S.D. 1985).

Id at 720.

The DeFender court found that mother did not have sufficient contacts with the Cheyenne River Sioux Tribe so as to render her amenable to its personal jurisdiction. Defender at 720, citing International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) and Kulko v. Superior Court, 436 U.S. 84, 91, 98 S.Ct. 1690, 1696, 56 L.Ed.2d 132, 141 (1978). The Defender court went on to say:

Moreover, we do not believe that Mother did anything so as to purposely avail herself of the privilege of conducting activities within the Cheyenne River Sioux Indian Reservation so as to render herself subject to personal jurisdiction by Tribal Court. *See Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). Finally, we must note that the actions of Father alone are insufficient for the tribe to take jurisdiction over Mother. "The unilateral activity of those who claim some relationship with a

nonresident defendant cannot satisfy the requirement of contact with the forum State." *Kulko*, 436 U.S. at 93-94, 98 S.Ct. at 1698, 56 L.Ed.2d at 142, *quoting Hanson, supra*.

DeFender at 721.

Leslie's case is similar. Leslie has done nothing to purposely avail himself of the privilege of conducting activities with the Sisseton Wahpeton Oyate Tribe. Following the holding in DeFender, the unilateral activity of Terri being a member of the Tribe cannot satisfy the requirement of Leslie's contact with the forum. For these reasons, the Sisseton Wahpeton Tribal Court did not properly have personal jurisdiction over Leslie. Personal jurisdiction is a required element of comity. SDCL 1-1-25(1)(a), App. I. 29. Without personal jurisdiction, the Tribal Court Order should not have been recognized by the Trial Court. Moreover, the Tribal Court also had no personal jurisdiction over Leslie because he was not served with a legitimate summons, as more fully discussed at pages 20-26, *infra*.

In addition to satisfying the due process requirements for personal jurisdiction, the Tribal Court must also follow its own laws. SWO Tribal Code Chapter 45 provides the basis for which the Tribal Court may exercise personal jurisdiction over "non-domiciliaries". App. L. 36. SWO Tribal Code 45-01-02 (1-4) enumerates the four different acts that may subject a non-domiciliary to the personal jurisdiction of the tribe. None of the acts described in this section provide for jurisdiction based upon

being married to a member of the Tribe. The Tribal Court does not have personal jurisdiction over Leslie based upon its own Code.

## **SUBJECT MATTER JURISDICTION**

A court's jurisdiction of the subject matter . . . exists when a constitution or statute specifically confers upon the court such jurisdiction. Timmerman v. Timmerman, 163 Neb. 704, 81 N.W.2d 135 (1957). This power is likewise conferred upon Indian courts by their constitutions or tribal codes. *See generally* Cohen, *Federal Indian Law*, p. 428 (1958). Red Fox v. Hettich, 494 N.W.2d 638, 643 (S.D. 1993) citing Leon v. Numkena, 142 Ariz. 307, 689 P.2d 566, 568 (1984)

The SWO Tribal Code clearly provides for civil jurisdiction over divorce actions involving its members. SWO Tribal Code 34-03-01 provides as follows:

### **34-03-01 MARRIAGES AND DIVORCES**

The Sisseton Wahpeton Sioux Tribal Court shall have jurisdiction over marriages and divorces of the **members** of the Sisseton-Wahpeton Sioux Tribe and other Indian Tribes. (emphasis added)

App. K. 32.

What is not clear is whether the language of the 34-03-01 requires that both parties be members of the “Tribe or some other Indian Tribe.” Leslie urges that a plain reading of the various SWO Tribal Code Sections leads to the conclusion that the SWO Tribal Code only grants the SWO Tribal Court jurisdiction over divorces in which both the husband and

wife are tribal members. The plural use of the term “members” suggests that both parties must be members.

Similar language is used in SWO Tribal Code 34-17-01 which reads as follows:

### **34-17-01 DIVORCE**

The Sisseton-Wahpeton Sioux Tribe shall have authority to grant divorces to **members** of the Sisseton-Wahpeton Sioux Tribe or any Indian Tribe whether the marriage was consummated under marriage license issued by the clerk of the Sisseton-Wahpeton Tribal Court, or under license issued by State or Tribal authority.  
(emphasis added)

App. K. 33.

Again, the language uses the plural form of “members” to suggest that both parties to the divorce must be members of the Tribe. The meaning of these last two Tribal Code sections becomes clearer when we look at SWO Tribal Code 34-23-04 and 34-23-05. App. K. 35.

34-23-04 In case service cannot be made upon the reservation, the summons together with a copy of the complaint shall be forwarded to the law and order department of **the Reservation where the defendant is enrolled**, or the law and order department of the jurisdiction of the defendant’s last known address and there served. (emphasis added)

App. K. 35

34-23-05 If service cannot be made personally either on the Lake Traverse Reservation or on **the Reservation where the defendant is enrolled**, a return shall be made to the Clerk showing said facts; thereupon the Clerk shall cause to be posted at the Agency and the courthouse of both Reservations a copy of the summons and complaint; and also mail a copy of the summons and complaint to the last known post office address of the defendant and service shall be deemed complete. The defendant shall be given thirty (30) days in which to answer the complaint, either personally or by mail. (emphasis added)

App. K. 25

In both 34-23-04 and 34-23-05, the Code uses the language “the Reservation where the defendant is enrolled.” The plain reading of these sections leads to the conclusion that it was the intention of the Tribal legislators that the defendant in the Tribal divorce must be a member of the Sisseton Wahpeton Oyate Tribe or some other tribe. This is the only logical way to construe these code sections collectively giving them there plain and ordinary meaning. When read as a whole, the SWO Tribal Code only confers jurisdiction to grant divorces between two members of the Sisseton Wahpeton Oyate Tribe or a member of some other Indian tribe. Thus, the Sisseton Wahpeton Tribal Court is without subject matter jurisdiction over the divorce of Leslie and Terri. Subject matter jurisdiction is a required element of comity. SDCL 1-1-25(1)(a), App. I. 29. Without subject matter jurisdiction, the Tribal Court Order should not have been recognized by the Trial Court.

### **BURDEN OF PROOF**

Terri, as the party seeking recognition, has the burden to establish the mandatory requisites of SDCL 1-1-25 by clear and convincing evidence. Defender at 720. Terri did not present any evidence to the Trial Court. She did not testify or submit an affidavit, nor did she call any witnesses to testify. Terri’s counsel stating “My client, Terri



Torgerson, is the courtroom today if the court would be inclined to hear testimony from her” is not evidence. App. A. 2, Line 22. Terri also did not present a transcript of the Tribal Court proceedings. Terri rested on legal argument and the Tribal Court’s findings of fact, conclusions of law and Order. App. H. 28. Given the fact that there is no evidence to establish the Tribal Court could exert personal jurisdiction over Leslie, the Tribal Court Order should not have been given comity under SDCL 1-1-25. In Re the Matter of J.D.M.C. at ¶49, 813 (holding that the tribal court order was not entitled to comity because there was no evidence presented to establish the tribe could exert personal jurisdiction)

The legislature intended for the Trial Court to enter findings of fact and conclusions of law on each of the mandatory elements of SDCL 1-1-25. Langdeau at ¶41, 735. The Trial Court simply recognized the Tribal Court Order and its findings and conclusions, without the requisite inquiry and burden of proof required under SDCL 1-1-25.

The failure to conduct an evidentiary hearing with the burden on the party seeking recognition, in this case, Terri, puts this Court at significant disadvantage. The Trial Court also failed to make findings regarding “irregularities” raised by Leslie in his Affidavit. App. D. 21 Leslie raised the following issues with the proceedings in Tribal Court in his Affidavit:

1. The Tribal Order fails to provide the factual and legal basis for exerting subject matter and personal jurisdiction in the Tribal divorce action. App. D. 21, par.17.

2. The findings of the Tribal Order state that Leslie “resides on the Lake Traverse Reservation.” This finding is untrue and has no factual or legal basis. App. D. 21, Par. 17.
3. The findings of the Tribal Order state that Leslie “is employed by a tribal entity.” This finding is untrue and has no factual basis. App. D. 21, Par. 17.
4. The findings of the Tribal Order state that my “children” are Tribal members. My two biological children are not Tribal members. My one adopted child is a Tribal member. App. D. 21, Par. 17.
5. Leslie raised the issue of insufficient process in that the Clerk did not issue the summons as required under Tribal Code. App. D. 21, Par. 14.
6. Leslie was the only party to submit testimony which was by affidavit. It was improper for the Tribal Court to make findings on matters that were not supported by testimony or affidavit. App. D. 21, Par. 18
7. Leslie does not believe that he received an impartial administration of justice. App. D. 22, Par. 18

The Trial Court erred when it failed to make factual findings on most of the required elements of 1-1-25 (1). The Trial Court did find that the Tribal Court did have subject matter jurisdiction pursuant to Tribal Code 34-17-01. App. B. 17. However, the Trial Court did not make findings on (1) that the tribal court had personal jurisdiction, (2) that the order was not fraudulently obtained, (3) that the order was obtained by a process that assures the requisites of an impartial administration of

justice, (4) that the order complies with the laws, ordinances and regulations of the Tribe, (5) that the order does not contravene public policy of this state. Terri did not offer evidence on these omitted issues either, as was her burden to do.

### **FULL FAITH AND CREDIT**

This court has recognized that a judgment or order entered in the SWO Tribal Court must be given full faith and credit in our state courts. Full faith and credit applies as long as the tribal court “had jurisdiction over the parties and the subject matter.” In Re the Matter of J.D.M.C. at ¶38, 808. A judgment or order is entitled to full faith and credit, even as to questions of jurisdiction, when the second court’s inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court that rendered the judgment. Id at ¶38, 808 (citing Durfee v. Duke, 375 U.S. 106, 111, 84 S.Ct. 242, 245, 11 L.Ed.2d 186 (1963)) In our case, the issues of personal and subject matter jurisdiction were argued, but not fully litigated in tribal court. In J.D.M.C., the Court stated that it was prevented from reviewing whether the issues of personal and subject matter jurisdiction were fully and fairly litigated in tribal court because the record did not include a transcript of those proceedings, only the memorandum opinion. Id at ¶40, 809. Likewise, in our case, the only record of those proceedings is

the Tribal Court Order. App. H. 28. The trial court did not have the benefit of transcript in order to make the necessary findings as to whether the issues of personal and subject matter jurisdiction were fully and fairly litigated. And now this Court, on review, does not have the benefit a Tribal court transcript rendering the Court unable to review whether the issues of personal and subject matter jurisdiction were fully and fairly litigated. Given the lack of evidence to review, the Tribal Court Order should not have received full faith and credit.

## **II. THE DIVORCE PROCEEDINGS WERE FIRST PROPERLY COMMENCED BY LESLIE IN STATE COURT.**

When there is concurrent jurisdiction, the court first to obtain jurisdiction pursuant to proper process and proper service of process attains jurisdiction to hear the action. Langdeau v. Langdeau, 2008 SD 44, ¶ 23, 751 N.W. 2d 722, 731(S.D. 2008); Harris v. Young, 473 N.W.2d 141, 145 (S.D. 1991); Wells v. Wells, 451 N.W.2d 402, 405 (S.D. 1990). The Trial Court found that State Court and Tribal Court have concurrent jurisdiction over the parties' divorce. App. B. 18. The Trial Court further found that divorce proceedings were first properly commenced in Tribal Court and that the Tribal Court was first to obtain valid personal jurisdiction over the parties. App. B. 17, 18. It is Leslie's position that he was first to properly commence his divorce action in state court.

Terri filed a Verified Complaint for Divorce in Tribal Court on October 18, 2021. App. G. 25. On this same date, Terri filed a Summons signed by her attorney, Gordon P. Nielsen. App. F. 24. The Tribal Summons and Complaint were served on Leslie on October 27, 2022, in Sisseton, South Dakota. HT at 3-13; App. A. 3, Line 13. Leslie served Terri with the Summons and Complaint for divorce in the state court action on January 26, 2022. SR at 6. Thus, assuming the Tribal court has subject matter and personal jurisdiction, which is disputed, the Tribal Court divorce would be the first to be properly commenced. However, the Tribal Court Summons is defective such that the service of the Tribal Court Summons on Leslie is ineffective.

The Rules of Civil Procedure of the Sisseton Wahpeton Oyate Tribal Code state in part as follows:

Rule 2

- (a) A civil action is commenced by filing a complaint or petition and serving a copy of such on the defendant or respondent as provided herein. The Court shall have jurisdiction from such time as the complaint or petition and summons are filed. The complaint or petition must be properly served upon the defendant or respondent and a return of service must be filed with the Clerk.
- (c) Service of process shall consist of delivering to the party served a copy of the complaint or petition and summons, **issued by the Clerk**, which advises the defendant or respondent that she/he is required to answer the complaint or petition within 20 days or a default judgment will be entered against her/him. (emphasis added)

App. J. 31.

Section 34-23-02 of Sisseton Wahpeton Oyate Tribal Code

provides as follows:

The Complaining party shall file with the Clerk a certified complaint, stating his or her cause of action, and thereupon, **the Clerk shall issue a summons** in the name of the Sisseton-Wahpeton Sioux Tribe to the defendant, informing him or her of the pendency of the action, and the summons shall concisely state the grounds upon which annulment or divorce is asked. (emphasis added)

App. K. 34.

Both Rule 2 (c) and section 34-23-02 state clearly that it is the Clerk who is to issue the summons upon filing of the complaint. This is similar to the Rule 4 of the Federal Rules of Civil Procedure which states:

- b. Issuance. On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the Clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons- or a copy of a summons that is addressed to multiple defendants – must be issued for each defendant to be served.

Terri, through her counsel, filed the Complaint with the Clerk of the SWO Tribal Court. It is apparent from the face of the Summons that it was not issued by the Clerk. The Summons that was served on Leslie and filed in Tribal Court is signed by “Gordon P. Nielsen, Attorney for Plaintiff”. App. F. 24. The SWO Tribal Code does not authorize anyone to issue a summons other than the Clerk. In addition, SWO Tribal Code section 34-23-02 requires that the Summons concisely state the grounds upon which the divorce is asked. The Summons served in the tribal case

does not state the grounds upon which the divorce is asked. Thus, the Summons in tribal case is defective as it is not in compliance with the requirements of the law of the Sisseton-Wahpeton Oyate Tribe.

After raising the issue of the defective summons in Tribal Court, the Tribal Clerk of Courts, Eileen Pfeifer, issued her Affidavit of Clerk of Courts explaining she did not proceed with service of the Tribal Summons because she was waiting for an address from Plaintiff's attorney on where to serve him (Leslie). App. E. 23.

Service of a proper summons is required for the court to acquire personal jurisdiction over the defendant in every lawsuit. Applying F. R. Civ.P. Rule 4, the court in Omni Capital Intern., Ltd. v. Rudolf Wolff & Co., Ltd. 484 U.S. 97, 104, 108 S.Ct. 404, 409 (U.S.1987), said "[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served." citing Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 444-445, 66 S.Ct. 242, 245-246, 90 L.Ed. 185 (1946). Once service has been contested, the plaintiff bears the burden of establishing the validity of service pursuant to Rule 4. O'Meara v. Waters, 464 F. Supp. 2d 474, 476 (D. Md. 2006).

In Patel-Julson v. Paul Smith Las Vegas, Inc., Case No. 2:12-cv-01023-MMD-CWH (D. Nev. Apr. 23, 2013), the court stated:

A federal court does not have jurisdiction over a defendant unless the defendant has been served properly under [Rule] 4." Direct Mail Specialists v. Eclat Computerized Techs., Inc., 840 F.2d 685,

688 (9th Cir. 1988); see also Murphy Bros., Inc. v. Mitchell Pipe Stringing, Inc., 526 U.S. 344, 350 (1999) ("Service of process, under longstanding tradition in our system of justice, is fundamental to any procedural imposition on a named defendant."). Where the validity of service is contested, the burden is on the party claiming proper service to establish its validity. Cranford v. United States, 359 F.Supp.2d 981, 984 (E.D. Cal. 2005) (citing Grand Entertainment Group, Ltd. v. Star Media Sales, Inc., 988 F.2d 476, 488 (3d Cir. 1993)). Assuming insufficiency of process or insufficiency of service of process, the Court has discretion to dismiss an action or simply quash service. See e.g., SHJ v. Issaquah School District No. 411, 470 F.3d 1288, 1293 (9th Cir. 2006) citing Stevens v. Security Pac. Nat'l Bank, 538 F.2d 1387, 1389 (9th Cir. 1976) ("the choice between dismissal and quashing service of process is in the district court's discretion.")

F. R. Civ. P. 4, SWO Tribal Code Rule 2 (c), and SWO Tribal Code 34-23-02 all require a Summons to be issued by the Clerk. It is clear that the Tribal Summons served on Leslie is defective. Since the Tribal Code only authorizes the Summons to be issued by the clerk of Tribal Court, the fact that it was issued by Terri's attorney makes the summons wholly invalid. Service of a wholly invalid summons does not confer jurisdiction on the Tribal Court. Under the analogous F. R. Civ. P. Rule 4, this defect would render the summons a nullity. Ayres v. Jacobs & Crumplar, 99 F.3d. 565, 568-70 (3d Cir. 1996); see also Harper v. City of New York, 424 Fed. Appx. 36, 40 (2d Cir. 2011). The court in Ayres held that a summons not issued and signed by the clerk with the seal of the court affixed thereto fails to confer personal jurisdiction over a defendant even if properly served. Ayres at 570. "An unsigned summons



demonstrates a flagrant disregard for the rules of procedure and suggests that the summons was issued by the plaintiff and not the clerk.” Barrett v. Allentown, 152 F.R.D. 46, 49 (E.D.Pa. 1993) Likewise, in our case, the SWO Tribal Court has not acquired personal jurisdiction over Leslie due to insufficiency of process due to the failure to serve a proper summons issued by the Tribal Clerk. The Tribal Court’s order is not entitled to recognition in state court because it failed to follow the laws of the SWO Tribal Code.

The Tribal Court determined that the Leslie was properly served in the Tribal divorce case. App. H. 28. He was not. In Wells v. Wells, 451 N.W.2d 402, 405 (S.D. 1990), the South Dakota Supreme Court stated:

South Dakota courts will recognize tribal court orders under the principle of comity, State ex rel. Joseph v. Redwing, 429 N.W.2d 49 (S.D. 1988), cert. Denied 490 U.S. 1069, 109S.Ct. 2071, 104 L.Ed.2d 636 (1989), but the party seeking recognition must first establish that the tribal court order complies with SDCL 1-1-25. Mexican v. Circle Bear, 370 N.W.2<sup>nd</sup> 737 (S.D. 1985). SDCL 1-25-25 (1)(d) requires a showing by clear and convincing evidence that “the order of judgment complies with the laws, ordinances and regulations of the jurisdiction from which it was obtained.”

Id at 403.

In our case, Terri is required to establish by clear and convincing evidence that the Tribal Order complies with the laws of the SWO Tribe.

The Court in Wells went on to say:

It has long been recognized that a party has a “right collaterally to impeach a decree of divorce made in another state, by proof that the court had no jurisdiction.” *Williams*

*v. State of North Carolina*, 325 U.S. 226, 229, 65 S.Ct. 1092, 1095, 89 L.Ed. 1577, 1581 (1945), (*Williams II*): see also *Underwriter's Nat'l Assurance Co. v. North Carolina Life and Accident and Health Ins. Guar. Ass'n*, 455 U.S. 691, 705, 102 S.Ct. 1357, 1366, 71 L.Ed.2d 558, 570-71 (1982) ("Before a court is bound by the judgment rendered in another State, it may inquire into the jurisdictional basis of the foreign court's decree.")

Id at 404.

Because the SWO Tribal Clerk never issued a proper summons to be served and filed with the SWO Tribal Court, the process in Tribal Court is defective and the Tribal Court has not yet acquired jurisdiction pursuant to a plain reading of the rules. At this point, process in tribal court is still defective. On the other hand, Leslie properly served Terri with the Summons and Complaint in Circuit Court on January 26, 2022. SR at 6. Thus, Leslie was first to properly commence a divorce action.

In Wells, the South Dakota Supreme Court refused to recognize a tribal court divorce decree because the summons and complaint were not properly served on the defendant in compliance with the tribal code. Id at 404. In that case, Justice Henderson in his concurring opinion stated:

Here, in *Wells*, I can join the majority without abandoning my position in *Red Wing* because the tribal court patently violated its own rules; and thereby, no valid service was effectuated upon the wife. Succinctly, a tribal judge cannot change a tribal code. Thus, the tribal court did not obtain jurisdiction.

Id, *Wells* at 406

Since process was defective in Tribal Court, the Tribal Court did not obtain jurisdiction. Leslie was first to properly commence a divorce

action and Roberts County Circuit Court has proper jurisdiction over this matter.

Circuit courts may not refuse to hear divorce proceeding that are properly commenced first in South Dakota, in favor of another states jurisdiction. Langdeau v. Langdeau, 2008 SD 44, ¶ 18, 751 N.W. 2d 722, 729(S.D. 2008); citing Lustig v. Lustig, 1997 SD 24, ¶14, 560 N.W.2d 239 (S.D. 1997) Since Leslie first properly commenced his divorce proceeding in circuit court, it should not have been dismissed by the Trial court.

### **III. FINDING OF FACT #6 IS NOT SUSTAINED BY THE EVEDENCE.**

Findings of fact are reviewed under the clearly erroneous standard. Rush v. Rush, 2015 SD 56, ¶ 6 866 N.W.2d 556, 559 (S.D. 2015) (“Pieper v. Pieper, 2013 S.D. 98, ¶ 12, 841 N.W.2d 781, 785 ”)

The Circuit Court entered a finding of fact #6 which states as follows:

Leslie and Terri owned and operated Dakota Sioux Fuel Propane in Sisseton, for many years which was a tribally chartered business and both have had dealings with the Sisseton Wahpeton Oyate and its Court's system.

App. B. 17

The evidentiary record in this case consists of Leslie's Complaint for divorce and Leslie's Affidavit submitted in opposition to the Terri's motion to dismiss. Terri did not testify at the May 23, 2022, motion hearing and she did not submit an affidavit or any other evidence. Leslie stated in his affidavit in paragraph 9 that he does not conduct business with the Tribe.

App. D. 21. Leslie further stated in his affidavit in paragraph 12 that his only connection with the Tribe was that he is married to one of its members, and that he had adopted her son. App. D. 21.

The only reference in the record to support this finding is a statement by Terri's counsel during oral argument as follows:

"They owned and operated Dakota Sioux Fuel and Propane in Sisseton which was a tribally chartered business for many years."

App. A. 3, Line 10.

This was simply a statement offered by Terri's counsel during argument. It is not evidence. There was no evidence offered by Terri to support this statement made by her counsel. In fact, the statement, as well as the finding of fact related to it, are contrary to the evidence offered by Leslie in his affidavit where he states that he his only connection to the Tribe is that he is married to one of its members, and that he adopted her son. App. D. 21. Since there is no evidence in the record to support this finding, this finding is clearly erroneous.

Furthermore, Dakota Sioux Propane, Inc. was administratively dissolved in 2004. Relevant corporate documents are attached, included in the Appendix as App. M. This Court is requested to take judicial notice of these records on file with the South Dakota Secretary of State, which it may do. Nelson v. WEB Water Development Ass'n, Inc., 507 N.W.2d 691, 693 (S.D. 1993). This information is also relevant under

SDCL 1-1-25(2), that “the order or judgment was not fraudulently obtained.”

**IV. FINDING OF FACT # 9 STATING THAT LESLIE APPEARED PERSONALLY AT THE JANUARY 10, 2022, TRIBAL HEARING IS NOT SUSTAINED BY THE EVIDENCE.**

The Circuit Court entered a finding fact that “Leslie appeared personally along with legal counsel at the Tribal Court.” There is no evidence in the record that Leslie appeared personally at the Tribal Court hearing on January 10, 2022. This finding is directly contrary to the content of the Tribal Court Order offered by Terri to support her contention that the Circuit Court was bound by the Order. App. H. 18. The Tribal Court Order clearly states that “The legal representatives of both parties were present, but the Plaintiff and Defendant did not attend.” App. H. 18. Since there is no evidence in the record that supports the finding that Leslie appeared personally at the Tribal Court hearing, this finding is clearly erroneous.

**CONCLUSION**

The Tribal Court Order should not have been recognized under principles of comity or full faith and credit. Terri failed to establish the all of the mandatory elements of SDCL 1-1-25 by clear and convincing evidence. Terri’s process was insufficient under the SWO Tribal Code.

Leslie was first to properly commence his divorce in state court and it should not have been dismissed.

Dated this 11<sup>TH</sup> day of October, 2022.

Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

1. I certify that the Appellant's Brief is within the typeface and volume limitations provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in proportional 12 point type. Appellant's Brief contains 8027 words.
2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Date this 11<sup>TH</sup> day of October, 2022.

\_\_\_\_\_/s/Craig O. Ash

### **CERTIFICATE OF SERVICE**

I hereby certify that, on October 11<sup>th</sup>, 2022, I served a copy of the foregoing document upon each of the following people by the following means:

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IN THE SUPREME COURT  
STATE OF SOUTH DAKOTA

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No. 30046

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LESLIE J. TORGERSON,

Plaintiff and Appellant,

v.

TERRI A. TORGERSON,

Defendant and Appellee,

---

APPEAL FROM THE CIRCUIT COURT  
FIFTH JUDICIAL CIRCUIT  
ROBERTS COUNTY, SOUTH DAKOTA

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**APPELLANT'S BRIEF**

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Notice of Appeal filed July 7, 2022



## **TABLE OF CONTENTS**

	PAGE
TABLE OF AUTHORITIES	iii.
PRELIMINARY STATEMENT	1
JURISDICTIONAL STATEMENT	1
STATEMENT OF ISSUES	2
STATEMENT OF THE CASE	3
STATEMENT OF THE FACTS	3
ARGUMENT	5
CONCLUSION	28
CERTIFICATE OF COMPLIANCE	30
CERTIFICATE OF SERVICE	30
APPENDIX	31

## TABLE OF AUTHORITIES

CASES:	PAGES
<u>Ayres v. Jacobs &amp; Crumplar</u> , 99 F.3d. 565, 568-70 (3d Cir. 1996).....	23
<u>Babbitt Ford, Inc. v. Navajo Indian Tribe</u> , 519 F.Supp. 418, 431 (D.Ariz 1981) <i>aff'd in part, rev'd in part on other grounds</i> , 710 F.2d 587 (9thCir.1983), <i>cert. denied</i> 466 U.S. 926, 104 S.Ct. 1707, 80 L.Ed.2d 180 (1984).....	9
<u>Barrett v. Allentown</u> , 152 F.R.D. 46, 49 (E.D.Pa. 1993)	
<u>Daktronics, Inc. v. LBW Tech Co., Inc.</u> , 2007 SD 80, 737 N.W.2d 413.....	9,10
<u>DeCoteau v. District County Court</u> , 420 U.S. 425, 95 S. Ct. 1082 (1975).....	7
<u>DeCoteau v. District County Ct for Tenth Jud. District</u> , 211 N.W.2d 843 (S.D. 1973).....	7
<u>Durfee v. Duke</u> , 375 U.S. 106, 111, 84 S.Ct. 242, 245, 11 L.Ed.2d 186 (1963).....	18
<u>First Nat'l Bank of Philip v. Temple</u> , 2002 SD 36, 642 N.W.2d 197 (S.D. 2002).....	6
<u>Gesinger v. Gesinger</u> , 531 N.W.2d 17 (S.D. 1995).....	6
<u>Hanson v. Denckla</u> , 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958).....	11
<u>Harper v. City of New York</u> , 424 Fed. Appx. 36, 40 (2d Cir. 2011).....	23
<u>Harris v. Young</u> , 473 N.W.2d 141 (S.D. 1991).....	19
<u>Hilton v. Guyot</u> , 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1895).....	11
<u>In Re DeFender</u> , 435 N.W.2d 717 (S.D. 1989).....	6,10,11,12,15
<u>In Re the Matter of J.D.M.C.</u> , 739 N.W. 2 <sup>nd</sup> 796 (S.D. 2007)....	7,8,9,16,18
<u>International Shoe v. Washington</u> , 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945).....	9,11

<u>Kulko v. Superior Court</u> , 436 U.S. 84, 91, 98 S.Ct. 1690, 1696, 56 L.Ed.2d 132, 141 (1978).....	11,12
<u>Langdeau v. Langdeau</u> , 2008 SD 44, 751 N.W. 2d 722 (S.D. 2008).....	6,16,19,26
<u>Leon v. Numkena</u> , 142 Ariz. 307, 689 P.2d 566, 568 (1984).....	13
<u>Lustig v. Lustig</u> , 1997 SD 24, ¶14, 560 N.W.2d 239 (S.D. 1997).....	26
<u>Mexican v. Circle Bear</u> , 370 N.W.2d 737 (S.D. 1985).....	6,11,24
<u>Mississippi Publishing Corp. v. Murphree</u> , 326 U.S. 438, 444-445, 66 S.Ct. 242, 245-246, 90 L.Ed. 185 (1946).....	22
<u>Nelson v. WEB Water Development Ass’n, Inc.</u> , 507 N.W.2d 691, 693 (S.D. 1993).....	27
<u>O’Meara v. Waters</u> , 464 F. Supp. 2d 474, 476 (D. Md. 2006).....	22
<u>Omni Capital Intern., Ltd. v. Rudolf Wolff &amp; Co., Ltd.</u> 484 U.S. 97, 104, 108 S.Ct. 404, 409 (U.S.1987).....	22
<u>One Feather v. O.S.T. Pub. Safety Com’n.</u> , 482 N.W.2d 48, 49 (S.D.1992).....	6
<u>Patel-Julson v. Paul Smith Las Vegas, Inc.</u> , Case No. 2:12-cv-01023-MMD-CWH (D. Nev. Apr. 23, 2013).....	22
<u>Pieper v. Pieper</u> , 2013 S.D. 98, ¶ 12, 841 N.W.2d 781, 785	
<u>Red Fox v. Hettich</u> , 494 N.w.2d 638 (S.D. 1993).....	6,7,9,13
<u>Rush v. Rush</u> , 2015 SD 56, 866 N.W.2d 556.....	26
<u>State ex rel Joseph v. Redwing</u> , 429 N.W.2d 49 (S.D. 1988).....	11,24
<u>Timmerman v. Timmerman</u> , 163 Neb. 704, 81 N.W.2d 135 (1957).....	13
<u>Underwriter’s Nat’l Assurance Co. v. North Carolina Life and Accident and Health Ins. Guar. Ass’n</u> , 455 U.S. 691, 705, 102 S.Ct. 1357, 1366, 71 L.Ed.2d 558, 570-71 (1982).....	25
<u>Wells v. Wells</u> , 451 N.W.2d 402 (S.D.1990).....	6,19,24,25

<u>Williams v. State of North Carolina</u> , 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577, (1945).....	24
---	----

STATUTES	PAGE
Fed. Rules of Civ. Proc. Rule 4 (b).....	21
SDCL 1-1-25 (1)(a).....	8,12,15,16,17,24
SWO Rules of Civil Procedure Rule 2 (a) and (c).....	20
SWO Tribal Code 34-03-01.....	13
SWO Tribal Code 34-17-01.....	14,17
SWO Tribal Code 34-23-02.....	21
SWO Tribal Code 34-23-04.....	14,15
SWO Tribal Code 34-23-05.....	14,15
SWO Tribal Code 45-01-02.....	12

IN THE SUPREME COURT  
STATE OF SOUTH DAKOTA

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No. 30046

---

LESLIE J. TORGERSON,

Plaintiff and Appellant,

v.

TERRI J. TORGERSON,

Defendant and Appellee,

**PRILIMINARY STATEMENT**

All references in this brief to the Settled Record of this action are referred to as “SR”, followed by the page number. The Transcript of the May 23, 2022, Motion Hearing will be referred to as “HT” followed by the page and line. References to the Appendix will be referred to as “App.” followed by the page number. References to Plaintiff/Appellant will be referred to as Leslie and Defendant/Appellee will be referred to as Terri.

**JURISDITIONAL STATEMENT**

Terri filed a Motion to Dismiss Plaintiff’s Complaint on March 30, 2022. SR at 10. Terri subsequently filed an Amended Motion to Dismiss

on May 16, 2022. SR at 26. A hearing was held on the Motion to Dismiss on May 23, 2022. The Circuit Court entered an Order of the Court Dismissing Action with Prejudice dated June 5, 2022 and filed on June 6, 2022. SR at 69; App. C. 19. The Order of the Court Dismissing Action with Prejudice was a final order in the Circuit Court and had the effect of terminating the action as to all of the issues and all of the parties. Leslie filed a Notice of Appeal on July 7, 2022. SR at 70. This Court has jurisdiction pursuant to SDCL 15-26A-3.

### **STATEMENT OF THE ISSUES**

**I. DID THE TRIAL COURT ERROR IN RECOGNIZING THE TRIBAL COURT ORDER AS A MATTER OF COMITY UNDER SDCL 1-1-25?**

Most Relevant Authority:

SDCL 1-1-25

Langdeau v. Langdeau, 751 N.W. 2d 722, 730 (S.D. 2008)

Wells v. Wells, 451 N.W.2d 402, 405 (S.D.1990)

In Re the Matter of J.D.M.C., 739 N.W. 2<sup>nd</sup> 796 (S.D. 2007)

**II. DID THE TRIAL COURT ERROR IN DETERMINING THAT THE TRIBAL COURT DIVORCE PROCEEDING WAS FIRST PROPERLY COMMENCED?**

Most Relevant Authority:

SWO Rules of Civil Procedure Rule 2 (a) and (c)

SWO Tribal Code Section 34-23-02

Wells v. Wells, 451 N.W.2d 402, 405 (S.D.1990)

Omni Capital Intern., Ltd. v. Rudolf Wolff & Co., Ltd. 484 U.S. 97, 104,108 S.Ct. 404, 409 (U.S.1987)

Ayres v. Jacobs & Crumplar, 99 F.3d. 565 (3d Cir. 1996)

**III. DID THE TRIAL COURT ERROR IN FINDING THAT LESLIE AND TERRI OWNED AND OPERATED DAKOTA SIOUX PROPANE FOR MANY YEARS, THAT IT WAS A TRIBALLY CHARTERED BUSINESS, THAT BOTH HAVE HAD DEALING WITH THE SISSETON WAHPETON OYATE AND ITS COURT SYSTEM (FINDING #6)?**

Most Relevant Authority:

Rush v. Rush, 2015 SD 56, 866 N.W.2d 556

**IV. DID THE TRIAL COURT ERROR IN FINDING THAT LESLIE PERSONALLY APPEARED AT THE TRIBAL COURT HEARING (FINDING #9)?**

Most Relevant Authority:

Rush v. Rush, 2015 SD 56, 866 N.W.2d 556

**STATEMENT OF THE CASE**

This is an appeal from the Fifth Judicial Circuit, Roberts County, South Dakota, the Honorable Jon S. Flemmer presiding. This was a divorce action brought by the Lelsie against Terri. *See generally* Complaint, SR at 3-5. Terri filed a Motion to Dismiss and an Amended Motion to Dismiss. SR at 10, 26. The Circuit Court held a hearing on the Motion and orally granted the motion. App. A. 14. The Circuit Court entered Findings of Fact and Conclusions of Law filed on June 6, 2022. SR at 66; App. B. 16. The Circuit Court entered its Order of Court Dismissing Action filed on June 6, 2022. SR at 69; App. C. 19.

**STATEMENT OF THE FACTS**

Leslie initiated this action against Terri seeking a divorce. Leslie and Terri were married on October 7, 1994, at Vermillion, South Dakota. *See*

*generally* Complaint, SR at 3-5. Terri is an enrolled member of the Sisseton Wahpeton Oyate Tribe. App. G. 25. Leslie is not an enrolled member of the Sisseton Wahpeton Oyate Tribe (“Tribe” hereinafter) or any other tribe. App. D. 20. Leslie and Terri have resided at their marital homestead at 45390 121<sup>st</sup> Street, Sisseton, South Dakota, for the entire duration of their marriage. App. D. 20. The parties’ homestead is not located on Indian trust land or land owned by the Tribe. App. D. 20. The parties’ do not have any biological children together, but Leslie did adopt Terri’s son in 1997, who is now thirty-six years old. App. D. 21. Leslie does not conduct business with the Tribe or conduct any business on Tribal land. App. D. 21.

Terri filed a Summons and Complaint in Sisseton Wahpeton Oyate Tribal Court on October 18, 2021. App. F.G. 24, 25. The Tribal Summons was issued by Terri’s attorney, Gordon P. Nielsen. App. F. 24. It is undisputed that the Tribal Summons and Complaint was personally served on Leslie in Sisseton, South Dakota, on October 27, 2021. HT at 3-13; App. A. 3, Line13. The clerk of Tribal Court, Eileen Pfeiffer, did not issue a Tribal Court Summons because she was waiting for an address from Terri’s attorney on where to serve Leslie. The Tribal Clerk never received an address so she did not proceed with the service of the Tribal Summons. App. E. 23. Leslie filed a Motion to Dismiss in Tribal Court citing lack of proper process and lack of jurisdiction. A hearing was held



in Tribal Court on January 10, 2022. The Tribal Court denied the Motion to Dismiss and issued its Order dated January 10, 2022. App. H. 28.

Leslie caused the Summons and Complaint in this case to be delivered to the Roberts County Sheriff's Department for service on Terri on November 10, 2021. App. D. 21. The Sheriff did not serve the papers as requested and so Leslie arranged for service by a private process server. App. D. 21. The Summons and Complaint in this case were served on Terri on January 26, 2022. SR at 6.

In response to the Summons and Complaint in Circuit Court, Terri filed a Motion to Dismiss and an Amended Motion to Dismiss. SR at 10, 26. The Court held a hearing on the Motion on May 23, 2022. Leslie did not testify in person but did submit an Affidavit. App. D. 20. Terri did not offer any testimony. *See generally*, HT. After hearing the arguments of counsel, the Court delivered its decision from the bench granting the motion to dismiss. HT at 12-11; App. A. 12, Line 11. The Court subsequently issued Findings of Fact and Conclusions of Law and its Order of the Court Dismissing Action with Prejudice. SR at 66, 69; App. B & D.

## **ARGUMENT**

### **I. THE TRIAL COURT ERRED IN RECOGNIZING THE TRIBAL COURT ORDER UNDER PRINCIPLES OF COMITY.**

The Trial Court concluded that it was bound by the tribal court's finding that it had jurisdiction over the divorce and that Leslie was properly served. See Conclusion of Law #6, App. B. 17, 18.

South Dakota courts will recognize tribal court orders under principles of comity. Langdeau v. Langdeau, 2008 SD 44, ¶39, 751 N.W. 2d 722, 734 (S.D. 2008) (citing First Nat'l Bank of Philip v. Temple, 2002 SD 36, ¶ 16, 642 N.W.2d 197, 203 (citing Wells v. Wells, 451 N.W.2d 402, 403 (S.D.1990)) The party seeking recognition must first establish the tribal court order complies with SDCL 1-1-25. Langdeau at ¶39, 734 ((citing Mexican v. Circle Bear, 370 N.W.2d 737 (S.D.1985)) All five of the statutory elements of SDCL 1-1-25 (1) must be established by clear and convincing evidence. Id at ¶39, 734 (Citing Gesinger v. Gesinger, 531 N.W.2d 17, 19 (S.D.1995) (citing One Feather v. O.S.T. Pub. Safety Com'n., 482 N.W.2d 48, 49 (S.D.1992)) see also Red Fox v. Hettich, 494 N.W.2d 638, 641, 642 (S.D. 1993); Wells v. Wells, 451 N.W.2d 402, 403 (S.D.1990); In Re DeFender, 435 N.W.2d 717, 720 (S.D. 1989).

As in Red Fox, Terri must first clearly and convincingly establish that the Tribal Court had jurisdiction over both the subject matter and the parties. Id at 642. The court in Red Fox stated that it agreed with Professor Pommersheim's general theses that tribal judicial jurisdiction depends on "whether the tribal court has proper subject matter, personal and territorial jurisdiction...." Id at 642.

## **TERRITORIAL JURISDICTION**

The court in Red Fox stated territorial jurisdiction was implicit in jurisdictional analysis as a necessary predicate to the determination of subject matter jurisdiction. Id at 642

Leslie and Terri have both resided at 45390 121<sup>st</sup> Street, Sisseton, South Dakota for their entire marriage of 27 years. App. D. 20. The residence is located on fee land and not on Indian trust land or tribal land. App. D. 20. The status of this land was determined in DeCoteau v. District County Court, 420 U.S. 425, 95 S. Ct. 1082 (1975). In DeCoteau, the United States Supreme Court held that the 1891 Act (Act of March 3, 1891, c. 543, 26 Stat.1035) terminated the Lake Traverse Reservation and that the state has jurisdiction over conduct on non-Indian lands within the 1867 reservation borders. The effect of the 1891 Act was to return unallotted land within the 1867 reservation borders to the public domain. DeCoteau v. District County Ct for Tenth Jud. District, 211 N.W.2d 843, 845 (S.D. 1973). Land within the 1867 borders that is not tribal trust land or allotted trust land, is not in Indian country. In Re the Matter of J.D.M.C., 2007 SD 97, ¶14, 739 N.W. 2<sup>nd</sup> 796, 802 (S.D. 2007). The court went on to say:

“The SWO “territory” is the area “within [the Tribe’s] jurisdiction” and the portion of the earth that is in [the Tribe’s] exclusive possession and control. Since 1975, it has been understood that the Lake Traverse Reservation was terminated, resulting in a jurisdictional schematic resembling a checkerboard, and giving state court jurisdiction over non-Indian lands within the 1867 reservation borders” See DeCoteau, 420 U.S. at 428, 95 S.Ct. at

1085, 43 L.Ed.2d 300. Sisseton does not fall within the territory of the SWO, nor can SWO exercise jurisdiction over Sisseton. *See id.* at 464, 95 S.Ct. at 1102, 43 L.Ed.2d 300 (Douglas, J., dissenting).”

In Re the Matter of J.D.M.C. at ¶31, 806

There is no dispute in this case that the marital domicile is not located in Indian country. Neither wife nor Husband is domiciled on tribal land or in Indian country. This was the finding of the Trial Court in its oral decision from the bench. App. A. 13, Line 10. This being the case, the tribe does not have territorial jurisdiction in this divorce action. Territorial jurisdiction is a necessary predicate to subject matter jurisdiction which is a required element of comity. SDCL 1-1-25(1)(a), App. I. 29. Without subject matter jurisdiction, the Tribal Court Order should not have been recognized by the Trial Court. Terri did not submit any evidence on the issue of territorial jurisdiction.

It is interesting to note that the Tribal Court found that Leslie “resides within the boundaries of the Lake Traverse Reservation.” App. H. 28. There is no factual or legal basis for this finding by the Tribal Court and it is clearly erroneous.

## **PERSONAL JURISDICTION**

Generally, a tribal court can exercise personal jurisdiction if the person has sufficient minimum contacts with the reservation in order to

meet the due process requirements of the Indian Civil Rights Act (ICRA).

See 25 USC 1302, In Re the Matter of J.D.M.C. at ¶44, 811.

“Accordingly, whether tribal courts have personal jurisdiction over a party is analyzed using the minimum contacts standard expressed in International Shoe v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945).” Id at ¶44, 811. The inquiry is whether Leslie has had sufficient minimum contacts with the reservation to conclude that the assertion of jurisdiction “does not offend traditional notions of fair play and substantial justice.” Id at ¶44, 811 (citing Daktronics, Inc. v. LBW Tech Co., Inc., 2007 SD 80, ¶ 5, 737 N.W.2d 413, 416-17 (quoting Int’l Shoe Co., 326 U.S. at 316, 66 S.Ct. at 158, 90 L.Ed. 95)). The J.D.M.C. court went on to say that “More in the way of “minimum contacts” is required for a tribal court to exercise long-arm jurisdiction over a non-Indian “than would be sufficient for the citizen of one state to assert personal jurisdiction over the citizen of another state.”” Id at 812; Red Fox at 645 (quoting Babbitt Ford, Inc. v. Navajo Indian Tribe, 519 F.Supp. 418, 431 (D.Ariz 1981) *aff’d in part, rev’d in part on other grounds*, 710 F.2d 587 (9thCir.1983), *cert. denied* 466 U.S. 926, 104 S.Ct. 1707, 80 L.Ed.2d 180 (1984)).

The three-part minimum contacts test stated by the South Dakota Supreme court is as follows:

First, the defendant must purposefully avail himself of the privilege of acting in the forum state, thus invoking the benefits and protections of its laws. Second, the cause of

action must arise from defendant's activities directed at the forum state. Finally, the acts of defendant must have substantial connection with the forum state to make the exercise of jurisdiction over defendant a reasonable one.

Daktronics, Inc., 2007 SD 80, ¶ 6, 737 N.W.2d at 413, 417

Leslie is a nonresident, non-tribal member who has never resided or domiciled on the reservation. App. D. 20. Leslie does not conduct business with the Tribe or conduct business on Tribal land. App. D. 21. His only connection with the Tribe is that he is married to Terri, a tribal member, and has adopted her son. App. D. 21. The record is devoid of any evidence that Leslie has purposely availed himself of the privilege of acting on Tribal land or interacting with the Tribe or that the divorce action arises from his activities directed at the Tribe. Likewise, there is no evidence that Leslie has such a substantial connection with the forum state to make the exercise of jurisdiction over him a reasonable one. The opposite is true. The record in this case does not reveal any connection between him and the Tribe other than his marriage to a Tribal member, and an adopted son who is a member.

The South Dakota Supreme Court in In Re DeFender, 435 N.W.2d 717 (S.D. 1989), upheld the circuit court's refusal to grant comity to a Cheyenne River Sioux Tribe custody order. The father was a member of Cheyenne River Sioux Tribe and mother was a member of the Standing Rock Sioux Tribe. The mother did not reside on the Cheyenne River Sioux reservation. The father commenced a custody proceeding with the

Cheyenne River Sioux Tribal Court. In its decision, the DeFender court said:

As we noted in *State ex rel Joseph v. Redwing*, 429 N.W.2d 49 (S.D. 1988), a party seeking recognition of a tribal court order under the principle of comity must establish the mandatory requisites of SDCL 1-1-25 by clear and convincing evidence. Under SDCL 1-1-25, the party must establish that (1) the tribal court had jurisdiction over both the subject matter and the parties; (2) the order or judgment was not fraudulently obtained; (3) the order or judgment was obtained by a process that assures the requisite of an impartial administration of justice, including but not limited to due notice and a hearing; (4) the order or judgment complies with the laws of the jurisdiction in which it was obtained; and (5) the order or judgment does not contravene the public policy of the State of South Dakota. *See also Hilton v. Guyot*, 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1895); *Mexican v. Circle Bear*, 370 N.W.2d 737 (S.D. 1985).

Id at 720.

The DeFender court found that mother did not have sufficient contacts with the Cheyenne River Sioux Tribe so as to render her amenable to its personal jurisdiction. Defender at 720, citing International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) and Kulko v. Superior Court, 436 U.S. 84, 91, 98 S.Ct. 1690, 1696, 56 L.Ed.2d 132, 141 (1978). The Defender court went on to say:

Moreover, we do not believe that Mother did anything so as to purposely avail herself of the privilege of conducting activities within the Cheyenne River Sioux Indian Reservation so as to render herself subject to personal jurisdiction by Tribal Court. *See Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). Finally, we must note that the actions of Father alone are insufficient for the tribe to take jurisdiction over Mother. "The unilateral activity of those who claim some relationship with a

nonresident defendant cannot satisfy the requirement of contact with the forum State." *Kulko*, 436 U.S. at 93-94, 98 S.Ct. at 1698, 56 L.Ed.2d at 142, *quoting Hanson, supra*.

DeFender at 721.

Leslie's case is similar. Leslie has done nothing to purposely avail himself of the privilege of conducting activities with the Sisseton Wahpeton Oyate Tribe. Following the holding in DeFender, the unilateral activity of Terri being a member of the Tribe cannot satisfy the requirement of Leslie's contact with the forum. For these reasons, the Sisseton Wahpeton Tribal Court did not properly have personal jurisdiction over Leslie. Personal jurisdiction is a required element of comity. SDCL 1-1-25(1)(a), App. I. 29. Without personal jurisdiction, the Tribal Court Order should not have been recognized by the Trial Court. Moreover, the Tribal Court also had no personal jurisdiction over Leslie because he was not served with a legitimate summons, as more fully discussed at pages 20-26, *infra*.

In addition to satisfying the due process requirements for personal jurisdiction, the Tribal Court must also follow its own laws. SWO Tribal Code Chapter 45 provides the basis for which the Tribal Court may exercise personal jurisdiction over "non-domiciliaries". App. L. 36. SWO Tribal Code 45-01-02 (1-4) enumerates the four different acts that may subject a non-domiciliary to the personal jurisdiction of the tribe. None of the acts described in this section provide for jurisdiction based upon



being married to a member of the Tribe. The Tribal Court does not have personal jurisdiction over Leslie based upon its own Code.

## **SUBJECT MATTER JURISDICTION**

A court's jurisdiction of the subject matter . . . exists when a constitution or statute specifically confers upon the court such jurisdiction. Timmerman v. Timmerman, 163 Neb. 704, 81 N.W.2d 135 (1957). This power is likewise conferred upon Indian courts by their constitutions or tribal codes. *See generally* Cohen, *Federal Indian Law*, p. 428 (1958). Red Fox v. Hettich, 494 N.W.2d 638, 643 (S.D. 1993) citing Leon v. Numkena, 142 Ariz. 307, 689 P.2d 566, 568 (1984)

The SWO Tribal Code clearly provides for civil jurisdiction over divorce actions involving its members. SWO Tribal Code 34-03-01 provides as follows:

### **34-03-01 MARRIAGES AND DIVORCES**

The Sisseton Wahpeton Sioux Tribal Court shall have jurisdiction over marriages and divorces of the **members** of the Sisseton-Wahpeton Sioux Tribe and other Indian Tribes. (emphasis added)

App. K. 32.

What is not clear is whether the language of the 34-03-01 requires that both parties be members of the “Tribe or some other Indian Tribe.” Leslie urges that a plain reading of the various SWO Tribal Code Sections leads to the conclusion that the SWO Tribal Code only grants the SWO Tribal Court jurisdiction over divorces in which both the husband and

wife are tribal members. The plural use of the term “members” suggests that both parties must be members.

Similar language is used in SWO Tribal Code 34-17-01 which reads as follows:

#### **34-17-01 DIVORCE**

The Sisseton-Wahpeton Sioux Tribe shall have authority to grant divorces to **members** of the Sisseton-Wahpeton Sioux Tribe or any Indian Tribe whether the marriage was consummated under marriage license issued by the clerk of the Sisseton-Wahpeton Tribal Court, or under license issued by State or Tribal authority.  
(emphasis added)

App. K. 33.

Again, the language uses the plural form of “members” to suggest that both parties to the divorce must be members of the Tribe. The meaning of these last two Tribal Code sections becomes clearer when we look at SWO Tribal Code 34-23-04 and 34-23-05. App. K. 35.

34-23-04 In case service cannot be made upon the reservation, the summons together with a copy of the complaint shall be forwarded to the law and order department of **the Reservation where the defendant is enrolled**, or the law and order department of the jurisdiction of the defendant’s last known address and there served. (emphasis added)

App. K. 35

34-23-05 If service cannot be made personally either on the Lake Traverse Reservation or on **the Reservation where the defendant is enrolled**, a return shall be made to the Clerk showing said facts; thereupon the Clerk shall cause to be posted at the Agency and the courthouse of both Reservations a copy of the summons and complaint; and also mail a copy of the summons and complaint to the last known post office address of the defendant and service shall be deemed complete. The defendant shall be given thirty (30) days in which to answer the complaint, either personally or by mail. (emphasis added)

App. K. 25

In both 34-23-04 and 34-23-05, the Code uses the language “the Reservation where the defendant is enrolled.” The plain reading of these sections leads to the conclusion that it was the intention of the Tribal legislators that the defendant in the Tribal divorce must be a member of the Sisseton Wahpeton Oyate Tribe or some other tribe. This is the only logical way to construe these code sections collectively giving them there plain and ordinary meaning. When read as a whole, the SWO Tribal Code only confers jurisdiction to grant divorces between two members of the Sisseton Wahpeton Oyate Tribe or a member of some other Indian tribe. Thus, the Sisseton Wahpeton Tribal Court is without subject matter jurisdiction over the divorce of Leslie and Terri. Subject matter jurisdiction is a required element of comity. SDCL 1-1-25(1)(a), App. I. 29. Without subject matter jurisdiction, the Tribal Court Order should not have been recognized by the Trial Court.

### **BURDEN OF PROOF**

Terri, as the party seeking recognition, has the burden to establish the mandatory requisites of SDCL 1-1-25 by clear and convincing evidence. Defender at 720. Terri did not present any evidence to the Trial Court. She did not testify or submit an affidavit, nor did she call any witnesses to testify. Terri’s counsel stating “My client, Terri

Torgerson, is the courtroom today if the court would be inclined to hear testimony from her” is not evidence. App. A. 2, Line 22. Terri also did not present a transcript of the Tribal Court proceedings. Terri rested on legal argument and the Tribal Court’s findings of fact, conclusions of law and Order. App. H. 28. Given the fact that there is no evidence to establish the Tribal Court could exert personal jurisdiction over Leslie, the Tribal Court Order should not have been given comity under SDCL 1-1-25. In Re the Matter of J.D.M.C. at ¶49, 813 (holding that the tribal court order was not entitled to comity because there was no evidence presented to establish the tribe could exert personal jurisdiction)

The legislature intended for the Trial Court to enter findings of fact and conclusions of law on each of the mandatory elements of SDCL 1-1-25. Langdeau at ¶41, 735. The Trial Court simply recognized the Tribal Court Order and its findings and conclusions, without the requisite inquiry and burden of proof required under SDCL 1-1-25.

The failure to conduct an evidentiary hearing with the burden on the party seeking recognition, in this case, Terri, puts this Court at significant disadvantage. The Trial Court also failed to make findings regarding “irregularities” raised by Leslie in his Affidavit. App. D. 21 Leslie raised the following issues with the proceedings in Tribal Court in his Affidavit:

1. The Tribal Order fails to provide the factual and legal basis for exerting subject matter and personal jurisdiction in the Tribal divorce action. App. D. 21, par.17.

2. The findings of the Tribal Order state that Leslie “resides on the Lake Traverse Reservation.” This finding is untrue and has no factual or legal basis. App. D. 21, Par. 17.
3. The findings of the Tribal Order state that Leslie “is employed by a tribal entity.” This finding is untrue and has no factual basis. App. D. 21, Par. 17.
4. The findings of the Tribal Order state that my “children” are Tribal members. My two biological children are not Tribal members. My one adopted child is a Tribal member. App. D. 21, Par. 17.
5. Leslie raised the issue of insufficient process in that the Clerk did not issue the summons as required under Tribal Code. App. D. 21, Par. 14.
6. Leslie was the only party to submit testimony which was by affidavit. It was improper for the Tribal Court to make findings on matters that were not supported by testimony or affidavit. App. D. 21, Par. 18
7. Leslie does not believe that he received an impartial administration of justice. App. D. 22, Par. 18

The Trial Court erred when it failed to make factual findings on most of the required elements of 1-1-25 (1). The Trial Court did find that the Tribal Court did have subject matter jurisdiction pursuant to Tribal Code 34-17-01. App. B. 17. However, the Trial Court did not make findings on (1) that the tribal court had personal jurisdiction, (2) that the order was not fraudulently obtained, (3) that the order was obtained by a process that assures the requisites of an impartial administration of

justice, (4) that the order complies with the laws, ordinances and regulations of the Tribe, (5) that the order does not contravene public policy of this state. Terri did not offer evidence on these omitted issues either, as was her burden to do.

### **FULL FAITH AND CREDIT**

This court has recognized that a judgment or order entered in the SWO Tribal Court must be given full faith and credit in our state courts. Full faith and credit applies as long as the tribal court “had jurisdiction over the parties and the subject matter.” In Re the Matter of J.D.M.C. at ¶38, 808. A judgment or order is entitled to full faith and credit, even as to questions of jurisdiction, when the second court’s inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court that rendered the judgment. Id at ¶38, 808 (citing Durfee v. Duke, 375 U.S. 106, 111, 84 S.Ct. 242, 245, 11 L.Ed.2d 186 (1963)) In our case, the issues of personal and subject matter jurisdiction were argued, but not fully litigated in tribal court. In J.D.M.C., the Court stated that it was prevented from reviewing whether the issues of personal and subject matter jurisdiction were fully and fairly litigated in tribal court because the record did not include a transcript of those proceedings, only the memorandum opinion. Id at ¶40, 809. Likewise, in our case, the only record of those proceedings is

the Tribal Court Order. App. H. 28. The trial court did not have the benefit of transcript in order to make the necessary findings as to whether the issues of personal and subject matter jurisdiction were fully and fairly litigated. And now this Court, on review, does not have the benefit a Tribal court transcript rendering the Court unable to review whether the issues of personal and subject matter jurisdiction were fully and fairly litigated. Given the lack of evidence to review, the Tribal Court Order should not have received full faith and credit.

## **II. THE DIVORCE PROCEEDINGS WERE FIRST PROPERLY COMMENCED BY LESLIE IN STATE COURT.**

When there is concurrent jurisdiction, the court first to obtain jurisdiction pursuant to proper process and proper service of process attains jurisdiction to hear the action. Langdeau v. Langdeau, 2008 SD 44, ¶ 23, 751 N.W. 2d 722, 731(S.D. 2008); Harris v. Young, 473 N.W.2d 141, 145 (S.D. 1991); Wells v. Wells, 451 N.W.2d 402, 405 (S.D. 1990). The Trial Court found that State Court and Tribal Court have concurrent jurisdiction over the parties' divorce. App. B. 18. The Trial Court further found that divorce proceedings were first properly commenced in Tribal Court and that the Tribal Court was first to obtain valid personal jurisdiction over the parties. App. B. 17, 18. It is Leslie's position that he was first to properly commence his divorce action in state court.

Terri filed a Verified Complaint for Divorce in Tribal Court on October 18, 2021. App. G. 25. On this same date, Terri filed a Summons signed by her attorney, Gordon P. Nielsen. App. F. 24. The Tribal Summons and Complaint were served on Leslie on October 27, 2022, in Sisseton, South Dakota. HT at 3-13; App. A. 3, Line 13. Leslie served Terri with the Summons and Complaint for divorce in the state court action on January 26, 2022. SR at 6. Thus, assuming the Tribal court has subject matter and personal jurisdiction, which is disputed, the Tribal Court divorce would be the first to be properly commenced. However, the Tribal Court Summons is defective such that the service of the Tribal Court Summons on Leslie is ineffective.

The Rules of Civil Procedure of the Sisseton Wahpeton Oyate Tribal Code state in part as follows:

Rule 2

- (a) A civil action is commenced by filing a complaint or petition and serving a copy of such on the defendant or respondent as provided herein. The Court shall have jurisdiction from such time as the complaint or petition and summons are filed. The complaint or petition must be properly served upon the defendant or respondent and a return of service must be filed with the Clerk.
- (c) Service of process shall consist of delivering to the party served a copy of the complaint or petition and summons, **issued by the Clerk**, which advises the defendant or respondent that she/he is required to answer the complaint or petition within 20 days or a default judgment will be entered against her/him. (emphasis added)

App. J. 31.



Section 34-23-02 of Sisseton Wahpeton Oyate Tribal Code

provides as follows:

The Complaining party shall file with the Clerk a certified complaint, stating his or her cause of action, and thereupon, **the Clerk shall issue a summons** in the name of the Sisseton-Wahpeton Sioux Tribe to the defendant, informing him or her of the pendency of the action, and the summons shall concisely state the grounds upon which annulment or divorce is asked. (emphasis added)

App. K. 34.

Both Rule 2 (c) and section 34-23-02 state clearly that it is the Clerk who is to issue the summons upon filing of the complaint. This is similar to the Rule 4 of the Federal Rules of Civil Procedure which states:

- b. Issuance. On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the Clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons- or a copy of a summons that is addressed to multiple defendants – must be issued for each defendant to be served.

Terri, through her counsel, filed the Complaint with the Clerk of the SWO Tribal Court. It is apparent from the face of the Summons that it was not issued by the Clerk. The Summons that was served on Leslie and filed in Tribal Court is signed by “Gordon P. Nielsen, Attorney for Plaintiff”. App. F. 24. The SWO Tribal Code does not authorize anyone to issue a summons other than the Clerk. In addition, SWO Tribal Code section 34-23-02 requires that the Summons concisely state the grounds upon which the divorce is asked. The Summons served in the tribal case

does not state the grounds upon which the divorce is asked. Thus, the Summons in tribal case is defective as it is not in compliance with the requirements of the law of the Sisseton-Wahpeton Oyate Tribe.

After raising the issue of the defective summons in Tribal Court, the Tribal Clerk of Courts, Eileen Pfeifer, issued her Affidavit of Clerk of Courts explaining she did not proceed with service of the Tribal Summons because she was waiting for an address from Plaintiff's attorney on where to serve him (Leslie). App. E. 23.

Service of a proper summons is required for the court to acquire personal jurisdiction over the defendant in every lawsuit. Applying F. R. Civ.P. Rule 4, the court in Omni Capital Intern., Ltd. v. Rudolf Wolff & Co., Ltd. 484 U.S. 97, 104, 108 S.Ct. 404, 409 (U.S.1987), said "[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served." citing Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 444-445, 66 S.Ct. 242, 245-246, 90 L.Ed. 185 (1946). Once service has been contested, the plaintiff bears the burden of establishing the validity of service pursuant to Rule 4. O'Meara v. Waters, 464 F. Supp. 2d 474, 476 (D. Md. 2006).

In Patel-Julson v. Paul Smith Las Vegas, Inc., Case No. 2:12-cv-01023-MMD-CWH (D. Nev. Apr. 23, 2013), the court stated:

A federal court does not have jurisdiction over a defendant unless the defendant has been served properly under [Rule] 4." Direct Mail Specialists v. Eclat Computerized Techs., Inc., 840 F.2d 685,

688 (9th Cir. 1988); see also Murphy Bros., Inc. v. Mitchell Pipe Stringing, Inc., 526 U.S. 344, 350 (1999) ("Service of process, under longstanding tradition in our system of justice, is fundamental to any procedural imposition on a named defendant."). Where the validity of service is contested, the burden is on the party claiming proper service to establish its validity. Cranford v. United States, 359 F.Supp.2d 981, 984 (E.D. Cal. 2005) (citing Grand Entertainment Group, Ltd. v. Star Media Sales, Inc., 988 F.2d 476, 488 (3d Cir. 1993)). Assuming insufficiency of process or insufficiency of service of process, the Court has discretion to dismiss an action or simply quash service. See e.g., SHJ v. Issaquah School District No. 411, 470 F.3d 1288, 1293 (9th Cir. 2006) citing Stevens v. Security Pac. Nat'l Bank, 538 F.2d 1387, 1389 (9th Cir. 1976) ("the choice between dismissal and quashing service of process is in the district court's discretion.")

F. R. Civ. P. 4, SWO Tribal Code Rule 2 (c), and SWO Tribal Code 34-23-02 all require a Summons to be issued by the Clerk. It is clear that the Tribal Summons served on Leslie is defective. Since the Tribal Code only authorizes the Summons to be issued by the clerk of Tribal Court, the fact that it was issued by Terri's attorney makes the summons wholly invalid. Service of a wholly invalid summons does not confer jurisdiction on the Tribal Court. Under the analogous F. R. Civ. P. Rule 4, this defect would render the summons a nullity. Ayres v. Jacobs & Crumplar, 99 F.3d. 565, 568-70 (3d Cir. 1996); see also Harper v. City of New York, 424 Fed. Appx. 36, 40 (2d Cir. 2011). The court in Ayres held that a summons not issued and signed by the clerk with the seal of the court affixed thereto fails to confer personal jurisdiction over a defendant even if properly served. Ayres at 570. "An unsigned summons

demonstrates a flagrant disregard for the rules of procedure and suggests that the summons was issued by the plaintiff and not the clerk.” Barrett v. Allentown, 152 F.R.D. 46, 49 (E.D.Pa. 1993) Likewise, in our case, the SWO Tribal Court has not acquired personal jurisdiction over Leslie due to insufficiency of process due to the failure to serve a proper summons issued by the Tribal Clerk. The Tribal Court’s order is not entitled to recognition in state court because it failed to follow the laws of the SWO Tribal Code.

The Tribal Court determined that the Leslie was properly served in the Tribal divorce case. App. H. 28. He was not. In Wells v. Wells, 451 N.W.2d 402, 405 (S.D. 1990), the South Dakota Supreme Court stated:

South Dakota courts will recognize tribal court orders under the principle of comity, State ex rel. Joseph v. Redwing, 429 N.W.2d 49 (S.D. 1988), cert. Denied 490 U.S. 1069, 109S.Ct. 2071, 104 L.Ed.2d 636 (1989), but the party seeking recognition must first establish that the tribal court order complies with SDCL 1-1-25. Mexican v. Circle Bear, 370 N.W.2d 737 (S.D. 1985). SDCL 1-25-25 (1)(d) requires a showing by clear and convincing evidence that “the order of judgment complies with the laws, ordinances and regulations of the jurisdiction from which it was obtained.”

Id at 403.

In our case, Terri is required to establish by clear and convincing evidence that the Tribal Order complies with the laws of the SWO Tribe.

The Court in Wells went on to say:

It has long been recognized that a party has a “right collaterally to impeach a decree of divorce made in another state, by proof that the court had no jurisdiction.” *Williams*

*v. State of North Carolina*, 325 U.S. 226, 229, 65 S.Ct. 1092, 1095, 89 L.Ed. 1577, 1581 (1945), (*Williams II*): see also *Underwriter's Nat'l Assurance Co. v. North Carolina Life and Accident and Health Ins. Guar. Ass'n*, 455 U.S. 691, 705, 102 S.Ct. 1357, 1366, 71 L.Ed.2d 558, 570-71 (1982) ("Before a court is bound by the judgment rendered in another State, it may inquire into the jurisdictional basis of the foreign court's decree.")

Id at 404.

Because the SWO Tribal Clerk never issued a proper summons to be served and filed with the SWO Tribal Court, the process in Tribal Court is defective and the Tribal Court has not yet acquired jurisdiction pursuant to a plain reading of the rules. At this point, process in tribal court is still defective. On the other hand, Leslie properly served Terri with the Summons and Complaint in Circuit Court on January 26, 2022. SR at 6. Thus, Leslie was first to properly commence a divorce action.

In Wells, the South Dakota Supreme Court refused to recognize a tribal court divorce decree because the summons and complaint were not properly served on the defendant in compliance with the tribal code. Id at 404. In that case, Justice Henderson in his concurring opinion stated:

Here, in *Wells*, I can join the majority without abandoning my position in *Red Wing* because the tribal court patently violated its own rules; and thereby, no valid service was effectuated upon the wife. Succinctly, a tribal judge cannot change a tribal code. Thus, the tribal court did not obtain jurisdiction.

Id, *Wells* at 406

Since process was defective in Tribal Court, the Tribal Court did not obtain jurisdiction. Leslie was first to properly commence a divorce

action and Roberts County Circuit Court has proper jurisdiction over this matter.

Circuit courts may not refuse to hear divorce proceeding that are properly commenced first in South Dakota, in favor of another states jurisdiction. Langdeau v. Langdeau, 2008 SD 44, ¶ 18, 751 N.W. 2d 722, 729(S.D. 2008); citing Lustig v, Lustig, 1997 SD 24, ¶14, 560 N.W.2d 239 (S.D. 1997) Since Leslie first properly commenced his divorce proceeding in circuit court, it should not have been dismissed by the Trial court.

### **III. FINDING OF FACT #6 IS NOT SUSTAINED BY THE EVEDENCE.**

Findings of fact are reviewed under the clearly erroneous standard. Rush v. Rush, 2015 SD 56, ¶ 6 866 N.W.2d 556, 559 (S.D. 2015) (“Pieper v. Pieper, 2013 S.D. 98, ¶ 12, 841 N.W.2d 781, 785 ”)

The Circuit Court entered a finding of fact #6 which states as follows:

Leslie and Terri owned and operated Dakota Sioux Fuel Propane in Sisseton, for many years which was a tribally chartered business and both have had dealings with the Sisseton Wahpeton Oyate and its Court’s system.

App. B. 17

The evidentiary record in this case consists of Leslie’s Complaint for divorce and Leslie’s Affidavit submitted in opposition to the Terri’s motion to dismiss. Terri did not testify at the May 23, 2022, motion hearing and she did not submit an affidavit or any other evidence. Leslie stated in his affidavit in paragraph 9 that he does not conduct business with the Tribe.

App. D. 21. Leslie further stated in his affidavit in paragraph 12 that his only connection with the Tribe was that he is married to one of its members, and that he had adopted her son. App. D. 21.

The only reference in the record to support this finding is a statement by Terri's counsel during oral argument as follows:

"They owned and operated Dakota Sioux Fuel and Propane in Sisseton which was a tribally chartered business for many years."

App. A. 3, Line 10.

This was simply a statement offered by Terri's counsel during argument. It is not evidence. There was no evidence offered by Terri to support this statement made by her counsel. In fact, the statement, as well as the finding of fact related to it, are contrary to the evidence offered by Leslie in his affidavit where he states that he his only connection to the Tribe is that he is married to one of its members, and that he adopted her son. App. D. 21. Since there is no evidence in the record to support this finding, this finding is clearly erroneous.

Furthermore, Dakota Sioux Propane, Inc. was administratively dissolved in 2004. Relevant corporate documents are attached, included in the Appendix as App. M. This Court is requested to take judicial notice of these records on file with the South Dakota Secretary of State, which it may do. Nelson v. WEB Water Development Ass'n, Inc., 507 N.W.2d 691, 693 (S.D. 1993). This information is also relevant under

SDCL 1-1-25(2), that “the order or judgment was not fraudulently obtained.”

**IV. FINDING OF FACT # 9 STATING THAT LESLIE APPEARED PERSONALLY AT THE JANUARY 10, 2022, TRIBAL HEARING IS NOT SUSTAINED BY THE EVIDENCE.**

The Circuit Court entered a finding fact that “Leslie appeared personally along with legal counsel at the Tribal Court.” There is no evidence in the record that Leslie appeared personally at the Tribal Court hearing on January 10, 2022. This finding is directly contrary to the content of the Tribal Court Order offered by Terri to support her contention that the Circuit Court was bound by the Order. App. H. 18. The Tribal Court Order clearly states that “The legal representatives of both parties were present, but the Plaintiff and Defendant did not attend.” App. H. 18. Since there is no evidence in the record that supports the finding that Leslie appeared personally at the Tribal Court hearing, this finding is clearly erroneous.

**CONCLUSION**

The Tribal Court Order should not have been recognized under principles of comity or full faith and credit. Terri failed to establish the all of the mandatory elements of SDCL 1-1-25 by clear and convincing evidence. Terri’s process was insufficient under the SWO Tribal Code.



Leslie was first to properly commence his divorce in state court and it should not have been dismissed.

Dated this 11<sup>TH</sup> day of October, 2022.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

1. I certify that the Appellant's Brief is within the typeface and volume limitations provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in proportional 12 point type. Appellant's Brief contains 8027 words.
2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Date this 11<sup>TH</sup> day of October, 2022.

\_\_\_\_\_  
/s/Craig O. Ash

**CERTIFICATE OF SERVICE**

I hereby certify that, on October 11<sup>th</sup>, 2022, I served a copy of the foregoing document upon each of the following people by the following means:

Gordon P. Nielsen Delaney, Nielsen & Sannes, PC 520 2 <sup>nd</sup> Avenue East PO Box 9 Sisseton, SD 57262 Tel: (605) 698-7084 gordon@delaneylawfirm.com Attorneys for Appellee	Means of Service: <u>Odyssey File &amp; Serve</u>
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\_\_\_\_\_  
/s/Craig O. Ash  
Craig O. Ash

## APPENDIX TABLE OF CONTENTS

	Page
A. Motion Hearing Transcript – May 23, 2022	1
B. Findings of Fact & Conclusions of Law	16
C. Order Dismissing Action - Circuit Court	19
D. Affidavit of Leslie J. Torgerson	20
E. Affidavit of Tribal Clerk	23
F. Summons – Tribal Court	24
G. Complaint – Tribal Court	25
H. Order – Tribal Court	28
I. SDCL 1-1-25	29
J. Tribal Code – Civil Procedure Rule 2	31
K. Tribal Code – Domestic Relations	32
34-03-01	32
34-17-01	33
34-23-02	34
34-23-04	35
34-23-04	35
L. Tribal Code – Chapter 45	36
M. Sec. of State Records – Dakota Sioux Propane, Inc.	37

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF ROBERTS

FIFTH JUDICIAL CIRCUIT

LESLIE JOHN TORGERSON,

DIV22-3

Plaintiff,

TRANSCRIPT OF

v.

HEARING ON AMENDED

TERRI A. TORGERSON,

MOTION TO DISMISS

Defendant.

BEFORE: THE HONORABLE JON FLEMMER,  
Circuit Judge, at Sisseton,  
South Dakota, May 23, 2022  
at 1:55 p.m.

APPEARANCES: For the Plaintiff:

Mr. Craig O. Ash  
Attorney at Law  
102 W. 4th Ave, Ste. 1  
Milbank, South Dakota

For the Defendant:

Mr. Gordon P. Nielsen  
Attorney at Law  
520 2nd Ave. E.  
Sisseton, South Dakota

1           THE COURT: This is the time that's been set  
2 for hearing in connection with an Amended Motion to  
3 Dismiss in the matter of Leslie J. Torgerson v. Terri  
4 A. Torgerson. File number DIV22-3 in Roberts County.  
5 The record should reflect at this time that the  
6 Plaintiff is represented in this proceeding by Craig  
7 Ash. And that the Defendant is represented by Gordon  
8 Nielsen, both of whom are present at counsel table at  
9 this time. Mr. Nielsen, are you prepared to proceed on  
10 your motion at this time?

11           MR. NIELSEN: Yes, Your Honor.

12           THE COURT: And, Mr. Ash, are you prepared to  
13 proceed on the motion, as well, or the amended motion?

14           MR. ASH: Yes, Your Honor.

15           THE COURT: And, Mr. Nielsen, you may proceed.

16           MR. NIELSEN: Thank you, Your Honor. As the  
17 Court is aware, we did file a Motion to Dismiss in  
18 this matter several months ago. And did file an  
19 amended motion here, I think, on the 16th of May. Mr.  
20 Ash did notice this matter for hearing for today and  
21 I'd just like to, Your Honor, make a brief argument.  
22 My client, Terri Torgerson, is in the courtroom today  
23 if the Court would be inclined to hear testimony from  
24 her. The facts of this case, Your Honor, I don't think  
25 for the most part are even in dispute. My client, the

1 wife, is a resident of Roberts County, South Dakota,  
2 and she resides within the original boundaries of the  
3 Lake Traverse Reservation. She's an enrolled member  
4 of the Sisseton Wahpeton Oyate. The husband is a  
5 resident of Roberts County, South Dakota, and resides  
6 within the original boundaries of the Lake Traverse  
7 Reservation. He is not an enrolled member of the  
8 Sisseton-Wahpeton Oyate. The parties were married on  
9 October 7, 1994, in Vermillion, South Dakota. The  
10 parties have lived here for the most part since. They  
11 owned and operated Dakota Sioux Fuel & Propane here in  
12 Sisseton which was a tribally chartered business for  
13 many years. The husband admits that he was served  
14 with a Tribal Summons and Complaint on October 27,  
15 2021. Husband filed a Motion to Dismiss in the Tribal  
16 Court case. A hearing was held on the husband's motion  
17 in Tribal Court on January 10, 2022. On that same day  
18 of January 10, 2022, the Honorable Chief Judge Ruth  
19 Hopkins issued an order denying the Motion to Dismiss  
20 finding that the Sisseton Wahpeton Tribal Court had  
21 jurisdiction in the matter and that the Defendant was  
22 properly served with the Summons and Complaint. That  
23 all happened on January 10th. The husband, Mr.  
24 Torgerson, Plaintiff in this matter, did not appeal  
25 the Tribal Court decision and that became a final

1 decision of that Court. The wife was not served with a  
2 state court Summons until January 26, 2022, well after  
3 the Tribal Court had made a determination that it had  
4 jurisdiction over the parties. Your Honor, it's not a  
5 novel concept as far as jurisdiction goes between  
6 tribal courts and state courts with regard to who has  
7 jurisdiction on a divorce or divorce related  
8 proceedings. The South Dakota Supreme Court in several  
9 cases including **Harris v. Young**, **Wells v. Wells**,  
10 **Langdeau v. Langdeau**, which is a 2008 case, the **Sage**  
11 case, have all made determinations that state courts  
12 and tribal courts have concurrent jurisdiction and  
13 whatever proceeding is first commenced, wherever the  
14 case is first served, the Summons and Complaint is  
15 first served, would have jurisdiction in the case. And  
16 in this particular case Mr. Torgerson was served  
17 properly with a Tribal Court divorce summons. Tribal  
18 Court first obtained valid jurisdiction and this  
19 matter has been determined or ruled upon by the Tribal  
20 Court. In most cases that we talk about, Your Honor,  
21 **Harris v. Young**, the **Langdeau** case, those cases are  
22 similar to this case. For example, in the **Langdeau**  
23 case we had a non tribal member on one side, a tribal  
24 member on the other side, living on fee land within  
25 the Lower Brule Sioux Tribe, not on trust land but on

1 fee land. And in the **Langdeau** case from 2018 the South  
2 Dakota Supreme Court determined again there was  
3 current jurisdiction and current divorce proceedings  
4 and since the Tribal Court first obtained the  
5 jurisdiction that that's where we should go. So I  
6 think that the law is clear, I think the facts are  
7 clear, Your Honor, we'd ask that the Court grant the  
8 Motion to Dismiss. I believe this thing is properly  
9 then venued in Tribal Court. Subject to any questions  
10 the Court has, that's our position.

11 THE COURT: In the cases you cited it involved  
12 a split, both parties to the action weren't tribal  
13 members but it was heard in Tribal Court?

14 MR. NIELSEN: Correct.

15 THE COURT: Mr. Ash?

16 MR. ASH: Thank you, Your Honor. Your Honor, I  
17 on behalf of Plaintiff, Les Torgerson, I'd cite those  
18 same cases, Your Honor, in our memorandum. And they  
19 do stand for the proposition that when there is  
20 concurrent jurisdiction that the first Court to obtain  
21 personal jurisdiction by proper service, proper  
22 process, should assert jurisdiction over the case. But  
23 the-- what differentiates each of those cases from  
24 this case, Your Honor, is that in each of those cases  
25 one of those parties lived on the reservation or in



1 Indian country, so to speak. And that's different  
2 than where we're at here. It's clear that neither of  
3 these parties live on a reservation or in what's  
4 defined as Indian country. Your Honor, the **DeCoteau**  
5 case cited in the memorandum, that was kind of the  
6 seminal United States Supreme Court case and it  
7 involved residents from Roberts County. And that was  
8 really the first case that defined this area or kind  
9 of described what kind of jurisdiction that we have  
10 within this county and within the former boundaries of  
11 the Lake Traverse Reservation and so now, now you hear  
12 alot of, you know, these parties reside within the  
13 former boundaries which has no legal significance,  
14 Your Honor. There's no legal significance to residing  
15 within the former boundaries of the Lake Traverse  
16 Reservation. Pursuant to the **DeCoteau** -- which was  
17 also a South Dakota Supreme Court case, with the same  
18 name. There was also the **J.D.M.C., in the Matter of**.  
19 That was another Roberts County case, Your Honor.  
20 Continuing was your case as the tribal judge. It was  
21 Mr. Nielsen's case as the appellant, it went to the  
22 Supreme Court. And that case says the same thing. Fee  
23 land within those former boundaries is not Indian  
24 country. It's not subject to the jurisdiction of the  
25 Sisseton Wahpeton Tribe. That is clear from those

1 cases. So what's troubling in this case so far as we  
2 try to determine where the real jurisdiction lies. If  
3 you or if I direct your attention, Judge, to the  
4 Tribal Court decision on jurisdiction, it was attached  
5 to our memorandum and I think it was attached to Mr.  
6 Nielsen's too. The Court in that decision references  
7 the boundaries -- well, actually says that my client,  
8 Les Torgerson, resides within the boundaries of the  
9 Lake Traverse Reservation. Now, certainly, that Court  
10 should realize that there is no reservation in that  
11 area. That -- that's clear from the United States  
12 Supreme Court case law, South Dakota case law. It  
13 also says he's employed by a tribal entity. That was  
14 factually false, Your Honor. And so I point that out  
15 because under SDCL 1-1-25, in order for that order to  
16 be entitled to comity in this Court and there's some  
17 requirements that need to be met and one of those  
18 requirements under sub section d, should start with a,  
19 is that the Court, the Tribal Court, had jurisdiction  
20 on the subject matter and the parties. And it's up to  
21 the party wanting that order to be recognized to prove  
22 it by clear and convincing evidence. The other problem  
23 with the Tribal Court case, Your Honor, and it's laid  
24 out in the memorandum and it's not disputed, is that  
25 tribal code requires that the Clerk of Tribal Court

1 issue a Summons. When a case is filed the Clerk issues  
2 a Summons. I can cite you to a couple of places that's  
3 found in the tribal code. I don't think it's disputed.  
4 But in tribal code Section -- well, first of all, it  
5 appears under Rule 2 which is their civil procedure  
6 and Rule 2B requires that the Complaint and the  
7 Summons be served. But it specifically says that it's  
8 a Summons issued by the Clerk. In a different section  
9 under their domestic code, Your Honor, 34-23-02, their  
10 code, the Tribal code, requires -- I can read it. The  
11 complaining party shall file with the Clerk a  
12 certified Complaint. That part was complied with.  
13 Stating her cause of action. Thereupon the Clerk shall  
14 issue a Summons in the name of the Sisseton Wahpeton  
15 Tribe to defend it. Informing him or her of the  
16 pendency of the action and stating concisely the  
17 grounds upon which the annulment or divorce is asked.  
18 That part wasn't done, Your Honor. There was never a  
19 Summons issued by the Clerk of Tribal Court. And the  
20 Clerk when this was made an issue prepared an  
21 affidavit and it's attached to our memorandum, Your  
22 Honor, which clearly indicates that she was going to  
23 issue it but didn't get around to it because she did  
24 not have the address for the defendant which was my  
25 client in that case, Your Honor. And, you know, it

1 might be argued that that's a part of the code that  
2 can be substantially complied with or partially  
3 complied with. I don't think so, Your Honor. You can't  
4 -- the code authorizes who can issue a Summons. In  
5 State Court attorneys can, parties can. But in Tribal  
6 Court under the tribal code only the Clerk can issue  
7 the Summons. And that's a jurisdictional act. The  
8 Clerk issues it, forwards it to the proper party for  
9 service and that's how personal jurisdiction is  
10 attained. Without that the Court doesn't have  
11 jurisdiction. And if the Tribal Court does not have  
12 jurisdiction then this Court would be the first to  
13 obtain jurisdiction, Your Honor. This Court-- The  
14 parties are clearly subject to the jurisdiction of  
15 this Court. They both reside on state fee land.  
16 They're within Roberts County. I don't think there's  
17 any dispute that this Court would have jurisdiction  
18 over these parties. And contrasting that with Tribal  
19 Court jurisdiction, Your Honor, neither of these  
20 parties reside on Indian land or within Indian country  
21 as defined by the United States code. And without that  
22 territorial jurisdiction, meaning neither of these  
23 parties reside within the Tribal Court's jurisdiction,  
24 it cannot exert jurisdiction over both these parties,  
25 Your Honor.

1 THE COURT: Any response, Mr. Nielsen?

2 MR. NIELSEN: Yes, Your Honor. The Tribal Court  
3 made a determination that the Defendant was properly  
4 served with the Summons and Complaint. The Tribal  
5 Court also made a determination that the Sisseton  
6 Wahpeton Tribal Court has jurisdiction in this matter.  
7 If Mr. Torgerson was not satisfied with that ruling of  
8 the Tribal Court, certainly he would have the  
9 opportunity to appeal that there. Which he did not do.  
10 SWO Code 34-17-01 clearly states that the Sisseton  
11 Wahpeton Sioux Tribe has the authority to grant  
12 divorces to its members whether the marriage was  
13 consummated under tribal law or state law. Courts have  
14 the right to determine the status of its citizens. As  
15 **Wells v. Wells** indicated, each State as a sovereign  
16 has a rightful and legitimate concern in the marital  
17 status of its citizens. And that cuts both ways. The  
18 Tribal -- the State Court if it was first -- the  
19 divorce was first commenced in State Court. State  
20 Court have the right to make a ruling in divorce  
21 matters and vice versa would apply. Like I indicated  
22 in the **Langdeau** case, which is 751 NW2d 722, kind of a  
23 fact pattern that's fairly similar here. It talks  
24 about the parties there were Deann and Jay. It says  
25 Deann and Jay were married on May 12, 1998. Deann is a

1 non-Indian. Jay is an enrolled member of the Lower  
2 Brule Sioux Tribe. The couple resided together on fee  
3 land within the external boundaries of the Lower Brule  
4 Sioux Tribe. In that case the South Dakota Supreme  
5 Court doesn't make a bright line rule whether it was  
6 fee land or Indian trust land. It doesn't say since  
7 one party was a tribal member and the other isn't that  
8 there be a bright line rule there. The South Dakota  
9 Supreme Court talks again about concurrent  
10 jurisdiction. As there were many concurrent  
11 proceedings and it talks about concurrent jurisdiction  
12 and which action was filed first. I don't think  
13 there's novel questions of law in this case. I think  
14 this is a matter that the South Dakota Supreme Court  
15 has addressed a number of times. And I've probably  
16 argued 40 times either in this Court or another Court  
17 oftentimes for the other side. And I think that, kinda  
18 like in the **Joe Foss** case, the Tribal Court has the  
19 authority to entertain divorce proceedings with  
20 respect to its members. And that's what they're doing  
21 here with regard to Terri Torgerson. The Tribal Court  
22 has taken jurisdiction on many, many cases. Whether  
23 it's divorces, whether it's child custody, whether  
24 it's child protective matters for children, for  
25 parties living both in Sisseton, out of Sisseton,

1 anywhere within the checkerboard reservation. The  
2 Court does have-- Tribal Court does have jurisdiction.  
3 They asserted that jurisdiction. They've made a ruling  
4 on whether or not Mr. Torgerson was properly served.  
5 This Court obviously doesn't act as an appellate court  
6 to decisions made by Tribal Court. We'd ask that the  
7 Court, based on the law and the facts of this case,  
8 simply grant the Motion to Dismiss and allow these  
9 parties to proceed in Tribal Court with regard to this  
10 divorce proceeding.

11           THE COURT: The Court's heard the arguments  
12 here and has had an opportunity to review the  
13 memorandum that was filed, as well as the motion and  
14 amended motion. I don't believe there's any dispute  
15 that the Tribal Court and the State Court can have  
16 concurrent jurisdiction over a proceeding of this  
17 nature, a divorce proceeding. But the timing of the  
18 service and filing of the action can determine which  
19 Court has superior jurisdiction for purposes of  
20 proceeding with the matter. Here, the matter was  
21 initiated in Tribal Court. There are some assertions  
22 made that an improper procedure was followed in  
23 commencing the action. But the Tribal Court held a  
24 hearing and determined, based upon the order that was  
25 entered, that the Motion to Dismiss should be denied.

1 I agree with Mr. Nielsen that this Court isn't an  
2 appellate Court for the Tribal Court. That would be  
3 in the Tribal Appellate Court. Here what this Court  
4 has to look at is whether or not the prior order of  
5 the Court--from Tribal Court should be honored. While  
6 there's again assertions that the order indicates some  
7 factual discrepancies, the Tribal Judge did determine  
8 that the Summons was properly served and did commence  
9 the action in Tribal Court and, therefore, dismissed  
10 the Motion to Dismiss the Tribal Court Action. I also  
11 don't believe there's any question that the parties'  
12 residence in this case is not in Indian country.  
13 Although the Tribal order makes reference to the  
14 original boundaries of Sisseton Wahpeton or Lake  
15 Traverse Reservation, the **DeCoteau** decision that's  
16 been referenced obviously found that Congress had  
17 disestablished the reservation in the late 1800's and  
18 so that isn't an issue but the tribal code indicates  
19 that the Tribe has authority to grant divorces to  
20 members of the Tribe. So it would appear the  
21 membership is a key element. And it doesn't indicate  
22 that both of the parties to the marriage have to be  
23 members of the Tribe before the Tribe can exercise  
24 that authority and proceed with the divorce. So it  
25 would appear to the Court that, although there may



1 have been some irregularities, the action was properly  
2 initiated in Tribal Court. That Tribal Court had the  
3 necessary service and filing before the State Court.  
4 And, therefore, since there was -- there has been no  
5 order setting aside the Tribal Court order dismissing  
6 the Motion to Dismiss in Tribal Court, the Tribal  
7 Court is the appropriate venue for this proceeding.  
8 And so the Motion to Dismiss or the Amended Motion to  
9 Dismiss at this point would be granted so that further  
10 proceedings would take place as part of the Tribal  
11 Court proceeding in connection with this action. And  
12 Mr. Nielsen would be directed to draft an appropriate  
13 Findings of Fact and Conclusions of Law and Order in  
14 connection with the Court's denial of the--excuse me,  
15 the Court granting the Motion to Dismiss or Amended  
16 Motion to Dismiss the state court action. And,  
17 obviously, if Mr. Ash wishes to appeal that decision  
18 to the Supreme Court that is, I guess, the manner in  
19 which the issue can be further resolved. But it  
20 would appear that at this point that the Tribal Court  
21 would be the appropriate venue for this action. Did  
22 you have anything further, Mr. Nielsen?

23 MR. NIELSEN: No, Your Honor.

24 THE COURT: Mr. Ash?

25 MR. ASH: No, Your Honor.

1 THE COURT: Thank you.

2 (End of proceedings.)

3 STATE OF SOUTH DAKOTA )

SS

CERTIFICATE

4 COUNTY OF ROBERTS )

5 I, Calleen Thorn Misterek, am an Official  
6 Court Reporter within and for the Fifth Judicial  
7 Circuit of the State of South Dakota and I do hereby  
8 certify that I acted as such reporter for this hearing  
9 and that the preceding 15 pages constitute a full,  
10 true and correct transcript of all of the proceedings  
11 held thereon.

12 Dated at Sisseton, South Dakota, this 11th day  
13 of August, 2022.

14  
15  
16 \_\_\_\_\_RPR

17 Official Court Reporter  
18  
19  
20  
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24  
25

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF ROBERTS

FIFTH JUDICIAL CIRCUIT

---

LESLIE J. TORGERSON,

54DIV22-000003

Plaintiff,

v.

FINDINGS OF FACT AND  
CONCLUSION OF LAW

TERRI A. TORGERSON,

Defendant.

---

A hearing was held before this Court on May 23, 2022 at the hour of 1:30 o'clock p.m., in the Courtroom at the Roberts County Courthouse, Sisseton, South Dakota to consider the Defendant's Amended Motion to Dismiss.

The Defendant (herein referred to as "Terri") appeared through her attorney of record, Gordon P. Nielsen of the Delaney, Nielsen & Sannes, P.C. law firm of Sisseton, South Dakota.

The Plaintiff (herein referred to as "Leslie") appeared through his attorney of record, Craig O. Ash of Milbank, South Dakota.

The Court having reviewed the file and having heard the argument presented, the Court now enters the following:

**FINDINGS OF FACT**

1. Terri is a resident of Roberts County, South Dakota and she resides within the original boundaries of the Lake Traverse Reservation.
2. Terri is an enrolled member of the Sisseton Wahpeton Oyate.
3. Leslie is a resident of Roberts County, South Dakota and resides within the original boundaries of the Lake Traverse Reservation.
4. Leslie is not an enrolled member of the Sisseton Wahpeton Oyate.
5. Terri and Leslie were married on October 7, 1994 in Vermillion, Clay County, South Dakota and ever since have been and now are husband and wife.

6. Leslie and Terri owned and operated Dakota Sioux Fuel Propane in Sisseton, for many years which was a tribally chartered business and both have had dealing with the Sisseton Wahpeton Oyate and its Court's system.
7. Leslie admits that he was served with a Tribal Divorce Summons and Complaint on October 27, 2021.
8. On November 15, 2021, Leslie filed in Tribal Court a Motion to Dismiss the Tribal Court divorce matter.
9. A hearing was held on Leslie's Motion to Dismiss in Tribal Court on January 10, 2022 at which time Leslie appeared personally along with legal counsel at the Tribal Court.
10. The Tribal Court issued its Order denying Leslie's Motion to Dismiss on January 10, 2022.
11. In its Order denying Leslie's Motion to Dismiss the Tribal Court Judge determined:
  - 11.1 That the SWO Tribal Court had jurisdiction in this matter; and
  - 11.2. That Leslie was properly served with the Tribal Court divorce summons and complaint.
12. Leslie did not appeal the SWO Tribal Court decision.
13. On November 10, 2022, Leslie's attorney delivered a State Court Summons and Complaint to the Roberts County Sheriff.
14. Terri was served with the State Court Summons and Complaint on January 26, 2022 after the Tribal Court had already obtained jurisdiction over the parties and the action for divorce.
15. The Tribal Court first obtained valid personal jurisdiction over the parties.
16. That the Sisseton Wahpeton Oyate Tribal Court has jurisdiction in this divorce matter based on the Tribal law including SWO Code 34-17-01 which states as follows:

*The Sisseton-Wahpeton Sioux Tribal Court shall have authority to grant divorces to members of the Sisseton Wahpeton Sioux Tribe or any Indian Tribe whether the marriage was consummated under marriage license issued by the Clerk of the Sisseton-Wahpeton Tribal Court, or under license issued by State or Tribal authority.*

17. Any Findings of Fact deemed to be a Conclusion of Law shall be appropriately incorporated into the Conclusions of Law as the case may be.

From the foregoing Findings of Facts the Court now makes and enters the following:

### **CONCLUSIONS OF LAW**

1. The State Court in Roberts County, South Dakota and the Sisseton Wahpeton Oyate Tribal Court have concurrent subject matter jurisdiction over this matter for divorce.
2. Under concurrent jurisdiction, the case could be adjudicated by whichever court system first obtained valid personal jurisdiction over the parties.
3. In this case, the Sisseton Wahpeton Oyate Tribal Court first obtained valid personal jurisdiction over the parties as the matter was commenced in Tribal Court first.
4. The Sisseton Wahpeton Oyate Tribal Court has jurisdiction in this case based on legal precedent.
5. Leslie has first been properly served with the Summons and Complaint in Tribal Court and the Sisseton Wahpeton Oyate has jurisdiction over Leslie and this action for divorce.
6. Under long-standing principles, this Court is bound to recognize the tribal court's determination of its own jurisdiction. Judicial proceedings in tribal courts are entitled to the same full faith and credit as any other out-of-state judicial proceeding.
7. The State Court divorce action (Roberts County file 54DIV22-00003) should be dismissed with prejudice.
8. Any Conclusion of Law deemed to be a Finding of Fact shall be appropriately incorporated into the Findings of Fact as the case may be.

**LET JUDGMENT BE ENTERED ACCORDINGLY**

**6/5/2022 12:07:24 PM**

Attest:  
Guy, Brenda  
Clerk/Deputy



BY THE COURT:

  
Honorable Jon S. Flemmer

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF ROBERTS

FIFTH JUDICIAL CIRCUIT

LESLIE J. TORGERSON,

54DIV22-000003

Plaintiff,

v.

ORDER OF THE COURT  
DISMISSING ACTION WITH  
PREJUDICE

TERRI A. TORGERSON,

Defendant.

A hearing was held before this Court on May 23, 2022 at the hour of 1:30 o'clock p.m., in the Courtroom at the Roberts County Courthouse, Sisseton, South Dakota to consider the Defendant's Amended Motion to Dismiss.

The Defendant (herein referred to as "Terri") appeared through her attorney of record, Gordon P. Nielsen of the Delaney, Nielsen & Sannes, P.C. law firm of Sisseton, South Dakota.

The Plaintiff (herein referred to as "Leslie") appeared through his attorney of record, Craig O. Ash of Milbank, South Dakota.

The Court having reviewed the file and having heard the argument presented, and the Court having entered its Findings of Fact and Conclusions of law it is hereby:

ORDERED, ADJUDGED and DECREED AS FOLLOWS:

1. That the Defendants Motion to Dismiss is **GRANTED**.
2. The State Court divorce (Roberts County file 54DIV22-00003) is hereby dismissed with prejudice.

Attest:  
Guy, Brenda  
Clerk/Deputy



**6/5/2022 12:07:44 PM**  
BY THE COURT:

A handwritten signature in black ink, appearing to read "Jon S. Flemmer", is written over a horizontal line.  
Honorable Jon S. Flemmer

STATE OF SOUTH DAKOTA) )SS.  
COUNTY OF ROBERTS)

IN CIRCUIT COURT  
FIFTH JUDICIAL CIRCUIT

**LESLIE J. TORGERSON,**

**Plaintiff,**

**Case No. 54DIV22-000003**

**VS.**

**AFFIDAVIT OF  
LESLIE J. TORGERSON IN  
OPPOSITION TO MOTION TO  
DISMISS**

**TERRI A. TORGERSON,**

**Defendant.**

STATE OF SOUTH DAKOTA )  
 )SS.  
COUNTY OF GRANT )

**Leslie J. Torgerson, being first duly sworn, states and alleges as follows:**

1. I am the Plaintiff in the above captioned divorce proceeding. I am not an enrolled member of the Sisseton Wahpeton Oyate tribe, or any other tribe.
2. I married Terri A. Torgerson on October 7, 1994, in Vermillion, South Dakota.
3. I have lived at 45390 121<sup>st</sup> Street, Sisseton, South Dakota, 57262 (homestead property), continuously since July 1992.
4. The homestead property was purchased by my aunt on or about September 1992. My aunt purchased the property for me to live in.
5. Defendant moved in with me at 45390 121<sup>st</sup> Street, Sisseton, South Dakota, 57262, or about July 1994, and we have lived together at this address ever since.
6. The homestead property described herein is located on fee land under the *jurisdiction of the State of South Dakota*.
7. I have never lived on tribal land or Indian trust land at any time during our marriage, nor at any other time in my life.

8. Defendant does not live on tribal land or Indian trust land. Defendant is resident of Roberts County, South Dakota, residing on fee land.
9. I do not conduct business with the Sisseton Wahpeton Oyate Tribe, or conduct any business on tribal land of the Sisseton Wahpeton Oyate Tribe.
10. The Defendant and I do not have any children together and neither of us have any minor children. I adopted Defendant's son, Ross Torgerson, in 1997 in Circuit Court in and for Roberts County, South Dakota. Ross is now 36 years of age.
11. Defendant recently sought and obtained a protection order from this Court in Case No. 54TPO21-000037 indicating Defendant's belief that this is the appropriate Court for domestic matters involving the two of us.
12. The only connection that I have with Sisseton Wahpeton Oyate Tribe is that I am married to one of its members, and I adopted her son. Both the marriage and the adoption were pursuant to the laws of the State of South Dakota.
13. I believe that this divorce is rightfully venued in state court where the Court would clearly have both subject matter and personal jurisdiction over both parties.
14. On October 27, 2021, the Defendant attempted to commence a divorce action in Sisseton Wahpeton Oyate Tribal Court by having me served with a summons issued and signed by her attorney, Gordon Nielsen. I have never been personally served with a Summons issued by the clerk of Tribal Court as is required by the Tribal Code.
15. The Summons and Complaint in this case were delivered to the Roberts County Sheriff's Department for service on November 10, 2022. The Sheriff's Department delayed serving the papers until February 14, 2022.
16. Since the Sheriff did not serve the papers as requested, I arranged to have the papers served by a private party with successful service on January 26, 2022.
17. The Tribal Court Order "MOTION TO DISMISS DENIED" dated January 10, 2022, has several factual inaccuracies and fails to provide the factual and legal basis for Tribal jurisdiction. The Findings state that I reside within the Lake Traverse Reservation. This is factually untrue. The Findings state that I am employed by a Tribal entity. This is also factually untrue. The Findings also state that my children are Tribal members. This is partially untrue in that my two biological children are not Tribal members. My one son by adoption is a Tribal member. The Findings do not address the failure of the Defendant to follow the requirements of the SWO Tribal Code for commencement of the action in Tribal Court. Specifically, I was never served with a summons issued by the clerk as required by the code.



18. I was the only person to submit testimony by affidavit or otherwise. This being the case, it was improper for the Tribal Court to make findings on factual matters that were not supported by testimony or affidavit.
18. I do not believe that I received a fair and impartial administration of justice in Tribal Court. The fact that a Tribal Court is still referring to the Lake Traverse Reservation in jurisdictional questions is evidence of bias.
15. I make this Affidavit in opposition to Defendant's Motion to Dismiss. I hereby request that the Court deny the Motion to Dismiss and allow this case to proceed in this Court.

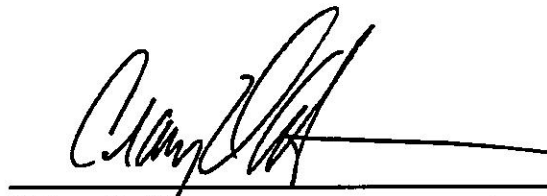
Dated this 12<sup>th</sup> day of May, 2022.

  
\_\_\_\_\_  
Leslie J. Torgerson, Plaintiff

Subscribed and sworn to before me this 12<sup>th</sup> day of May, 2022.

SEAL



  
\_\_\_\_\_  
Notary Public,  
My commission expires: 12/13/2024

**SISSETON-WAHPETON OYATE  
LAKE TRAVERSE RESERVATION  
STATE OF SOUTH DAKOTA**

)  
) SS.

## IN TRIBAL COURT

**CASE NO. D-22-027-641**

IN THE MATTER OF

**TERRI TORGERSON,**

Plaintiff,

 $V_s$ 

**LESLIE J. TORGERSON,**

Defendant

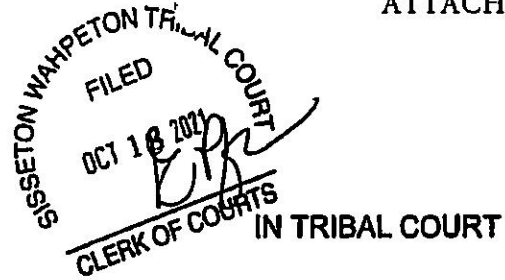
## AFFIDAVIT OF CLERK OF COURTS

I, Eileen Pfeiffer, Clerk of Courts, Bing first duly sworn, deposes and states that on the 18<sup>th</sup> day of October, 2021 a divorce summons and complaint was filed in SWO Tribal Court. I had a 20 day summons prepared in the computer ready to attach to the copies for the defendant, however I did not print it off because I was waiting for an address from the plaintiff's attorney on where to serve him or if they were going to have him served for the Tribal Court case. I never received an address so I did not proceed with service of our twenty day summons.

**Dated this 13<sup>th</sup> day of December, 2021**

  
Eileen Pfeiffer, Clerk of Court

SISSETON WAHPETON OYATE  
OF THE LAKE TRAVERSE RESERVATION  
STATE OF SOUTH DAKOTA



TERRI A. TORGERSON,

File # D-22-027-641

Plaintiff,

SUMMONS - DIVORCE

vs.

LESLIE J. TORGERSON,

Defendant.

TO THE ABOVE NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED and requested to serve upon Plaintiff's attorney, at the address below, an answer to the Complaint which is hereby served upon you within thirty (20) days from the date of service of this Summons upon you, exclusive of the day of service.

IF YOU FAIL TO ANSWER, judgment by default will be taken against you for the relief demanded in the Complaint.

Dated this 13 day of October 2021.

DELANEY, NIELSEN & SANNES, P.C.

A handwritten signature in black ink, appearing to be "Gordon P. Nielsen", written over a horizontal line.

Gordon P. Nielsen  
Attorney for Plaintiff  
P.O. Box 9  
520 2<sup>nd</sup> Avenue East  
Sisseton, South Dakota 57262  
(605) 698-7084 - phone

SISSETON WAHPETON OYATE  
OF THE LAKE TRAVERSE RESERVATION  
STATE OF SOUTH DAKOTA



IN TRIBAL COURT

TERRI A. TORGERSON,

File #

D-22-027-641

Plaintiff,

vs.

VERIFIED COMPLAINT  
FOR DIVORCE

LESLIE J. TORGERSON,

Defendant.

COMES NOW the Plaintiff, by and through her attorney of record, Gordon P. Nielsen of the Delaney, Nielsen & Sannes, P.C. law firm of Sisseton, South Dakota and for his cause of action states and alleges as follows:

1. That the Plaintiff is a resident of Roberts County, South Dakota and resides within the original boundaries of the Lake Traverse Reservation.
2. The Plaintiff is an enrolled member of the Sisseton Wahpeton Oyate.
3. The Defendant is a resident of Roberts County, South Dakota and resides within the original boundaries of the Lake Traverse Reservation.
4. The Defendant is not an enrolled member of the Sisseton Wahpeton Oyate.
5. That the Plaintiff and Defendant were married on October 7, 1994 in Vermillion, Clay County, South Dakota and ever since have been and now are husband and wife.
6. That the Court has jurisdiction in this case.
7. That one child has been more as issue to the marriage which child is an adult. The Defendant is not now pregnant.
8. That the Defendant has acted in a manner that constitutes grounds for divorce as set forth in the Sisseton Wahpeton Oyate Tribal Code (including section 34-18-01) with said grounds being extreme mental cruelty, adultery, and in the alternative, mutual consent.
9. That the parties to this action have accumulated various items of real property, personal property, and indebtedness.

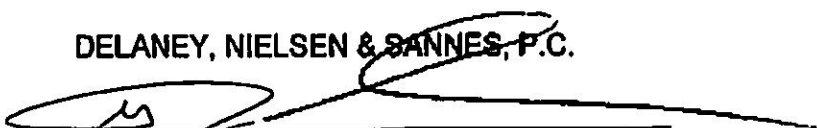
10. That neither party to this action is a member of any branch of the Armed Services of the United States.
11. That the Plaintiff should be awarded an equitable division of the real property, personal property and indebtedness of the parties.

WHEREFORE, the Plaintiff prays for judgment as follows:

- A. That Judgment be made and entered herein awarding the Plaintiff an Absolute Decree of Divorce from the Defendant.
- B. That the Court make a fair and equitable division of the real property, personal property and a distribution of the indebtedness, or in the alternative, approve any property settlement agreement that the parties may enter into.
- C. For such other and further relief as the Court may deem just and equitable in the premises.

Dated this 13 day of October 2021.

DELANEY, NIELSEN & SANNES, P.C.



Gordon P. Nielsen  
Attorney for Plaintiff  
P.O. Box 9  
520 2<sup>nd</sup> Avenue East  
Sisseton, South Dakota 57262  
(605) 698-7084 - phone

**VERIFICATION**

Terri A. Torgerson, being duly sworn, deposes and says: That she has read the foregoing Verified Complaint and knows the contents thereof; that the same is true of her knowledge except as to the matters therein stated on information and belief, and as to those matters she believes it to be true.



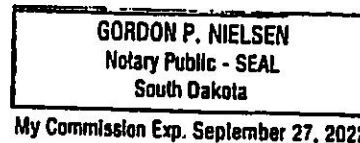
Terri A. Torgerson

On this the 13 day of October 2021, before me, the undersigned officer, personally appeared Terri A. Torgerson, known to me or satisfactorily proven to be the person whose hand and seal is affixed hereto, and acknowledged that she executed the foregoing document for the purposes therein contained.

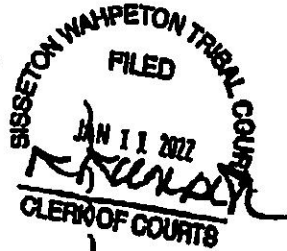
IN WITNESS THEREOF, I have affixed my hand and seal.

  
NOTARY PUBLIC

(SEAL)



SISSETON WAHPETON OYATE  
LAKE TRAVERSE RESERVATION  
STATE OF SOUTH DAKOTA



IN TRIBAL COURT  
CASE NO: D-22-027-641

TERRI TORGERSON,  
Plaintiff

MOTION TO DISMISS  
DENIED

v.

LESLIE TORGERSON,  
Defendant.

The above referenced matter having come before the Court on January 10, 2022 at 9AM, on a Motion to Dismiss filed by the Defendant's attorney. The legal representatives of both parties were present, but the Plaintiff and Defendant did not attend.

#### FINDINGS

- 1.) While the Defendant is not an SWO Tribal member, his wife and children are. He resides within the boundaries of the Lake Traverse Reservation and is employed by a Tribal entity. This claim was also filed by the Plaintiff, who is a Tribal member.
- 2.) In this matter, the Tribal Court may have concurrent jurisdiction with the state, but because the claim was filed in this Court first, it obtained valid personal jurisdiction over the parties first.
- 3.) The Defendant was served in a manner consistent with Tribal Court service process and the Defendant admitted that he had received service.

#### CONCLUSIONS OF LAW

- 1.) The SWO Tribal Court has jurisdiction in this matter.
- 2.) The Defendant was properly served with the Summons and Complaint.

It is hereby ORDERED, ADJUDGED and DECREED that the defendant's Motion to Dismiss is DENIED.

So ordered this 10<sup>th</sup> day of January, 2021.

SEAL:

*Hon. Ruth Hopkins*  
Honorable Chief Judge Ruth Hopkins

ATTEST:

*K. Rasmussen*  
Clerk of Courts

App. P. 28

## **SDCL 1-1-25**

### **1-1-25. When order or judgment of tribal court may be recognized in state courts.**

No order or judgment of a tribal court in the State of South Dakota may be recognized as a matter of comity in the state courts of South Dakota, except under the following terms and conditions:

- (1) Before a state court may consider recognizing a tribal court order or judgment the party seeking recognition shall establish by clear and convincing evidence that:
  - (a) The tribal court had jurisdiction over both the subject matter and the parties;
  - (b) The order or judgment was not fraudulently obtained;
  - (c) The order or judgment was obtained by a process that assures the requisites of an impartial administration of justice including but not limited to due notice and a hearing;
  - (d) The order or judgment complies with the laws, ordinances and regulations of the jurisdiction from which it was obtained; and
  - (e) The order or judgment does not contravene the public policy of the State of South Dakota.
- (2) If a court is satisfied that all of the foregoing conditions exist, the court may recognize the tribal court order or judgment in any of the following circumstances:
  - (a) In any child custody or domestic relations case; or
  - (b) In any case in which the jurisdiction issuing the order or judgment also grants comity to orders and judgments of the South Dakota courts; or
  - (c) In other cases if exceptional circumstances warrant it; or
  - (d) Any order required or authorized to be recognized pursuant to 25 U.S.C., § 1911(d) or 25 U.S.C., § 1919.



The citation of the Federal Rules of Civil Procedure herein shall not be deemed an action deferring to federal jurisdiction of any matter where such jurisdiction does not otherwise exist.

- (g) These rules shall supersede and replace all provisions of Chapter 33 which address requirements of filing and procedures in civil matters presented to the Tribal Court.

## **RULE 2. COMMENCEMENT OF ACTION AND PRELIMINARY MATTERS**

- (a) A civil action is commenced by filing a complaint or petition and serving a copy of such on the defendant or respondent as provided herein. The Court shall have jurisdiction from such time as the complaint or petition and summons are filed. The complaint or petition must be properly served upon the defendant or respondent and a return of service must be filed with the Clerk.
- (b) Upon proper filing of a complaint or petition and answer or response, the Court shall immediately notify the parties of the availability of Alternative Dispute Resolution 21-16-01.
- (c) Service of process shall consist of delivering to the party served a copy of the complaint or petition and summons, issued by the Clerk, which advises the defendant or respondent that she/he is required to answer the complaint or petition within 20 days or a default judgment will be entered against her/him.
  - (i) The return of service shall be endorsed with the name of the person serving and the date, time, and place of service and shall be filed with the clerk.
  - (ii) The Clerk shall furnish the plaintiff with a copy of the notice showing the time and place of hearing. Each defendant shall be served with a copy of the statement of claim and a notice of the time and place of hearing on the claim. Service by mail shall be made by the Clerk by registered or certified mail, return receipt requested. Service in person shall be made by any adult not a party to the case.
  - (iii) Proof of Service. The return postal receipt, filed in the case record, shall constitute proof of service by mail. The affidavit of service by the person making personal service, filed in the case record, shall constitute proof of service.
  - (iv) Service may be made on a party by delivering the required papers to the party or upon some person of suitable age and discretion over 16

years old at the party's home or principal place of business, or on an officer, managing agent or employee, or partner of a non-individual party.

- (v) Service by publication may be made upon order of the Court for good cause shown by publishing the contents of the summons in a local newspaper of general circulation at least once per week for three weeks and by leaving an extra copy of the complaint or paper with the Court for the party.
  - (vi) Service may be made by any law enforcement officer so authorized by the Court or other person, not a party, 18 years of age or older.
  - (vii) Service upon a person otherwise subject to the jurisdiction of the Sisseton-Wahpeton Oyate Tribal Court may be made anywhere in the United States.
  - (viii) If a person personally refuses to accept service, it shall be deemed performed if the person is informed of the purpose of the service and offered copies of the papers served.
- (d) Except as otherwise provided in these Rules, every order required by its terms to be served, every pleading subsequent to the original complaint or petition, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties or their attorneys of reference.
- In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.
- Service by facsimile upon other parties is not allowed. Filing with the Court by ~~facsimile~~ may be allowed with permission of the Court.
- (e) All papers required to be filed or served shall be deemed filed or served on the date of mailing via U.S. Mail (with the exception of those papers requiring personal service as provided in these Rules or by order of the Court), or on the date of facsimile with court permission, in which case originals must be received by the Court within five (5) days.
  - (f) An action shall be commenced by filing a complaint or petition with the Clerk of Court. The Clerk shall collect a filing fee of twenty-five dollars (\$25.00) for filing any complaint or petition which commences an action. No filing fee

**SISSETON-WAHPETON SIOUX TRIBE**

**CHAPTER 34**

**DOMESTIC RELATIONS**

ATTACHMENT 7

S.W.S.T. CODE

☐ Amendment

☒ New Adoption

Judicial Approved

Council Adopted

02-03-82

**34-01-01 RECOGNITION OF PREVIOUS MARRIAGES**

Indian marriages consummated prior to the adoption of this Code whether according to State Law or Tribal custom, are declared valid subject to annulment as is provided in Section 34-12-01 of this Code.

**34-02-01 RECOGNITION OF DEPARTMENT REGULATIONS FOR HEIRSHIP PURPOSES**

For the purposes of determining heirship, the rules and regulations heretofore adopted by the Secretary of the Interior shall remain in effect on all questions that arose prior to the date of adoption of this Code.

**34-03-01 MARRIAGES AND DIVORCES**

The Sisseton-Wahpeton Sioux Tribal Court shall have jurisdiction over marriages and divorces of the members of the Sisseton-Wahpeton Sioux Tribe and other Indian Tribes.

**34-04-01 MARRIAGE DEFINED**

Marriage is a personal relationship arising out of a civil contract to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage. It must be followed by a solemnization.

**34-05-01 SOLEMNIZATION OF MARRIAGE**

A marriage may be solemnized by any recognized clergyman or Judge within the jurisdiction of the Indian Reservation only after issuance of a license.

**34-06-01 MARRIAGE LICENSE AND MARRIAGE CEREMONY**

Any member of the Sisseton-Wahpeton Sioux Tribe or other Indian Tribe, eligible by age and otherwise as hereinafter defined, may obtain a marriage license from the Clerk of Court, and marriages consummated by authority of such license shall be deemed legal in every respect.

**34-06-02** Prior to the performance of any marriage ceremony, the Judge of the Tribal Court shall examine the compatibility, age, sex, health, blood relationship, and other pertinent matters of the applicants for marriage. After said examination, the Judge shall determine whether the requisites for marriage have been met.

1. For causes mentioned in subparagraph 1., by the party to the marriage who was married under the legal age of consent, or by a parent, guardian, or other person having charge of such non-aged person, at any time before such married minor has arrived at the age of legal consent.
2. For causes mentioned in subparagraph 2. by either party during the life of the other, or by such husband or wife.
3. For causes mentioned in subparagraph 3. by the party injured, or relative or guardian of the party of unsound mind, at any time before the death of either party.
4. For causes mentioned in subparagraph 4. by the injured party within four (4) years after the discovery of the facts constituting the fraud.
5. For causes mentioned in subparagraph 5. by the injured party within four (4) years after the marriage.
6. For causes mentioned in subparagraph 6. by the injured party within four (4) years after the marriage.

**34-14-01 CHILDREN LEGITIMATE**

Where the marriage is annulled on the grounds that a former husband or wife was living, or on the grounds of insanity, children begotten before the judgement are legitimate and succeed to the estate of both parents.

**34-15-01 CUSTODY OF CHILDREN**

The Sisseton-Wahpeton Sioux Tribal Court must award the custody of the children of the marriage annulled on the grounds of fraud or force, to the innocent parent, and may also provide for their education and maintenance out of the property of the guilty party, unless the innocent party is completely unfit to have such custody.

**34-16-01 EFFECT OF JUDGEMENT**

A judgement of nullity of marriage is conclusive only as against the parties to the action and those claiming under them.

**34-17-01 DIVORCE**

The Sisseton-Wahpeton Sioux Tribal Court shall have authority to grant divorces to members of the Sisseton-Wahpeton Sioux Tribe or any Indian Tribe whether the marriage was consummated under marriage license issued by the Clerk of the Sisseton-Wahpeton Tribal Court, or under license issued by State or Tribal authority.

**34-20-01 ADULTERY BY HUSBAND - CHILDREN LEGITIMATE**

When a divorce is granted for the adultery of the husband, the legitimacy of children of the marriage begotten of the wife before the commencement of the action is not affected.

**34-21-01 ADULTERY OF WIFE - PRESUMPTION OF LEGITIMACY**

When a divorce is granted for adultery of the wife, the paternity of children begotten of her before the commission of the adultery is not affected, but the paternity of other children of the wife may be determined by the Sisseton-Wahpeton Sioux Tribal Court upon the evidence in the case. In every such case, all children begotten before the commencement of the action are to be presumed legitimate until the contrary is shown.

**34-22-01 SEPARATE MAINTENANCE AND ALIMONY**

**34-22-02 Maintenance** - Though judgement of divorce is denied, the Court may in an action for divorce, provide for maintenance of the wife and her children, or any of them, by the husband.

**34-22-03 Temporary Alimony** - While an action for divorce is pending, the Sisseton-Wahpeton Sioux Tribal Court, may in its discretion, require the husband to pay any alimony, any money, necessary to enable the wife to support herself, or to prosecute or defend the action.

**34-22-04 Support** - Where a divorce is granted for an offense of the husband, the Sisseton-Wahpeton Sioux Tribal Court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife for her support during her life or for a shorter period as the Sisseton-Wahpeton Sioux Tribal Court may deem just, having regard for the circumstances of the parties respectively; and the Sisseton-Wahpeton Sioux Tribal Court, may from time to time modify its orders in these respects.

**34-23-01 PROCEDURE FOR ANNULMENT AND DIVORCE**

Any person applying for annulment or divorce shall deposit with the Clerk of the Sisseton-Wahpeton Sioux Tribal Court, twenty-five dollars (\$25.00) at the time of action. In case the defendant files a cross-complaint, the Clerk may with the approval of the Court require the defendant to pay into Court a fee of like amount.

**34-23-02** The complaining party shall file with the Clerk a certified complaint, stating his or her cause of action, and thereupon, the Clerk shall issue a summons in the name of the Sisseton-Wahpeton Sioux Tribe to the defendant, informing him or her of the pendency of the action, and the summons shall concisely state the grounds upon which annulment or divorce is asked.

34-23-03 The summons, when issued together with a copy of the complaint, shall be delivered to the law and order department of the Tribe for service and shall immediately be served if service can be had. When served, the Tribal officer shall make return, showing the time of service of the summons, to the Clerk.

34-23-04 In case service cannot be made upon the Reservation, the summons, together with a copy of the complaint shall be forwarded to the law and order department of the Reservation where the defendant is enrolled, or the law and order department of the jurisdiction of the defendant's last known address and there served.

34-23-05 If service cannot be made personally either on the Lake Traverse Reservation or on the Reservation where the defendant is enrolled, a return shall be made to the Clerk showing said facts; thereupon the Clerk shall cause to be posted at the Agency and courthouse of both Reservations a copy of the summons and complaint; and also mail a copy of the summons and complaint to the last known post office address of the defendant and service shall be deemed complete. The defendant shall be given thirty (30) days in which to answer the complaint, either personally or by mail.

34-23-06 If the defendant fails to appear and answer within the time required, the case may be heard by the Judge at any time thereafter, but if the defendant answers the complaint, then the trial of action shall be placed on the calendar by the Clerk and tried by the Court at the next regular court session, unless adjourned by application of either party upon sufficient grounds.

34-24-01 SEVERABILITY

If any clause, sentence, paragraph, section, or part of this code shall, for any reason be adjudicated by any Court of competent jurisdiction, to be invalid or unconstitutional, such judgement shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section, or part thereof directly involved in the controversy in which the judgement shall have been rendered.

S.W.S.T. CODE  
☐ Amendment  
☒ New Adoption  
Judicial Approved  
2-24-88  
Council Adopted  
3-01-88



SISSETON-WAHPETON SIOUX TRIBE

CHAPTER 45

ACT OF NON-DOMICILIARIES

☐ Amendment  
☐ New Adoption  
Judicial Approved

Council Adopted

45-01-01 PERSONAL JURISDICTION BY ACT OF NON-DOMICILIARIES

45-01-02 Acts Which are the Basis of Jurisdiction

As to the cause of action arising from any of the acts enumerated in this Section, a Court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. Transacts any business within the Lake Traverse Indian Reservation: or
2. Commits a tortious act within the Lake Traverse Indian Reservation, except as to cause of action for defamation of character arising from the act; or
3. Commits a tortious act without the Lake Traverse Indian Reservation causing injury to person or property within the Lake Traverse Indian Reservation, except as to cause of action for defamation of character arising from the act, if he:
  - (a) Regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumes or services rendered, in the Lake Traverse Reservation; or
  - (b) Expects or should reasonably expect the act to have consequences in the Lake Traverse Indian Reservation and derives substantial revenue from interstate or international commerce.
4. Own, uses or possesses any real property situated within the Lake Traverse Indian Reservation.

45-01-03 Effect of Appearance

Where personal jurisdiction is based solely upon this Section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this Section.

45-02-01 SEVERABILITY

If any clause, sentence, paragraph, section, or part of this code shall, for any reason be adjudicated by any Court of competent jurisdiction, to be invalid or unconstitutional, such judgement shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section, or part thereof directly involved in the controversy in which the judgement shall have been rendered.

3-17-88  
☐ Amendment  
☒ New Adoption  
Judicial Approved  
02-24-88  
Council Adopted  
03-01-88



**OFFICE OF THE SECRETARY OF STATE**  
**STEVEN J. BARNETT, SECRETARY OF STATE**  
**JASON LUTZ, DEPUTY SECRETARY OF STATE**

**Filing Information**

**Name:** **DAKOTA SIOUX PROPANE, INC.**

**General Information**

**SOS Business ID** DB034868  
**Filing Type:** Business Corporation - Domestic  
10/03/1994  
**Status:** Cancelled  
**Duration Term:** Perpetual

**Registered Agent Address**  
TERRI LAFONTAINE- TORGERSON  
PO BOX 166  
SISSETON, SD 57262-0166

The following document(s) was/were filed in this office on the date(s) indicated below:

<u>Date Filed</u>	<u>Filing Description</u>	<u>Image #</u>
07/01/2004	Cancellation	
10/11/2002	2002 Annual Report	
10/30/2001	2001 Annual Report	
11/01/2000	2000 Annual Report	
12/31/1999	1999 Annual Report	
10/20/1998	1998 Annual Report	
10/07/1997	1997 Annual Report	
04/11/1997	1997 Annual Report	
10/18/1995	1995 Annual Report	
10/03/1994	Initial Filing	DB034868



# State of South Dakota



## OFFICE OF THE SECRETARY OF STATE

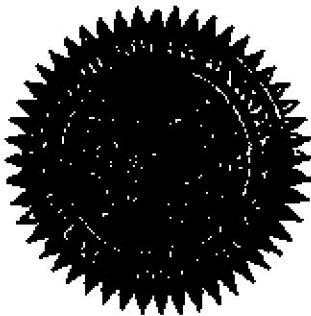
### CERTIFICATE OF INCORPORATION

### BUSINESS CORPORATION

I, JOYCE HAZELTINE, Secretary of State of the State of South Dakota, hereby certify that the Articles of Incorporation of DAKOTA SIOUX PROPANE, INC. duly signed and verified, pursuant to the provisions of the South Dakota Business Corporation Act, have been received in this office and are found to conform to law.

ACCORDINGLY and by virtue of the authority vested in me by law, I hereby issued this Certificate of Incorporation and attach hereto a duplicate of the Articles of Incorporation of DAKOTA SIOUX PROPANE, INC.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State of South Dakota, at Pierre, the Capital, this October 3, 1994.



*Joyce Hazeltine*  
JOYCE HAZELTINE  
Secretary of State

1995

RETURN TO  
 SECRETARY OF STATE  
 STATE CAPITOL  
 500 E. CAPITOL  
 PIERRE, S.D. 57501-5077  
 605-773-4845  
 FAX (605) 773-4550

## ANNUAL REPORT

DOMESTIC  
 PLEASE TYPE OR USE BLACK INK

FILING FEE: \$10 MAKE CHECK PAYABLE TO SECRETARY OF STATE  
 ADDITIONAL PENALTY FEE OF \$50 APPLIES TO ALL LATE FILINGS

FILE DATE 10-18-95  
 RECEIPT NO. 994923

RECEIVED  
 SEP 20 1995  
 OCT 18 1995

## 1. Corporate Name, Registered Agent and Registered Address:

DB-034988 OCT. 00  
 DAKOTA SICK PROPRANE, INC.  
 LAFONTAINE, TERRI  
 PR 2 BOX 81  
 SISSETON, SD 57262-9715

Telephone # S.D. 605-698-3521  
 FAX # (605) 698-3521

Federal Taxpayer ID [REDACTED]  
 FILING DATE: Due during the month the  
 Certificate of Incorporation was issued,  
 and delinquent after the last day of the  
 following month.

## \*\*\*\*\* ATTENTION - FILING INSTRUCTIONS \*\*\*\*\*

IF ALL of the information, including the registered agent and address listed in number one is identical as set forth in the prior report, you may check the box below and sign the report in the presence of a notary public. To report a change in the registered agent and/or office, both sides of this form must be fully completed. Any change requires full completion of the front side of this form.

☐ ALL OF THE INFORMATION REQUIRED ON THE ANNUAL REPORT IS IDENTICAL AS SET FORTH IN THE PRIOR REPORT.

## 2. The character of the business in which it is actually engaged in South Dakota

## 3. The names and addresses of its directors and officers. (Both officers and directors must be listed in the spaces provided).

NAME	OFFICE	STREET ADDRESS	CITY	STATE	ZIP + 4
<u>Terri LaFontaine-Torgerson</u>	<u>Director</u>	<u>PO Box 166, Sisseton, South Dakota</u>	<u>South Dakota</u>	<u>57262-0166</u>	
<u>Terri LaFontaine-Torgerson</u>	<u>President</u>	<u>PO Box 166, Sisseton, South Dakota</u>	<u>South Dakota</u>	<u>57262-0166</u>	
<u>Terri LaFontaine-Torgerson</u>	<u>Vice President</u>	<u>PO Box 166 Sisseton, South Dakota</u>	<u>South Dakota</u>	<u>57262-0166</u>	
<u>Terri LaFontaine-Torgerson</u>	<u>Secretary</u>	<u>PO Box 166 Sisseton, South Dakota</u>	<u>South Dakota</u>	<u>57262-0166</u>	
<u>Terri LaFontaine-Torgerson</u>	<u>Treasurer</u>	<u>PO Box 166 Sisseton, South Dakota</u>	<u>South Dakota</u>	<u>57262-0166</u>	

## 4. The aggregate number of shares which it has authority to issue, itemized by classes, par value of shares, shares without par value, and series, if any, within a class:

NUMBER OF SHARES CAN ISSUE	CLASS	SERIES	PAR VALUE OR STATE THAT SHARES ARE NO PAR VALUE
<u>100,000</u>	<u>Common</u>		<u>\$1.00</u>
<u>1,000</u>	<u>Common</u>		<u>\$1.00</u>

6. The amount of its stated capital is \$ 1,000.00

The report must be signed by the chairman of the board of directors, its president, or any other officer in the presence of a notary public.

Dated September 25, 1995  
2021 25 250 21 14

By Terri LaFontaine-Torgerson  
 (Signature)  
 Its CEO, Dakota Sick Propane, Inc.  
 (Title)

STATE OF SOUTH DAKOTA  
 COUNTY OF ROBERTS

I, Floyd DeCoteau, a notary public, do hereby certify that on this 25th day of September 19 95  
 personally appeared before me Terri LaFontaine-Torgerson who, being by me first duly sworn, declared that he/she is the  
CEO of Dakota Sick Propane, Inc.

that he/she signed the foregoing document as officer of the corporation, and the statements therein contained are true.

My Commission Expires

FLOYD DECOTEAU

Notary Public

(Notarial Seal)

NOTARY PUBLIC, STATE OF SOUTH DAKOTA  
 MY COMMISSION EXPIRES DEC 23, 1999

SOS CRP 410 11/94



# State of South Dakota



## OFFICE OF THE SECRETARY OF STATE

### Certificate of Administrative Dissolution

(DB, DF, DL, CO)

I, **Chris Nelson**, Secretary of State of the State of South Dakota, by virtue of the authority vested in me by SDCL 47-7-30.1, § 47-18-16.4, and 47-34A-810 hereby Administratively Dissolve the below named for failure to file the annual report when due.



\* DB-034868 \*

DB-034868

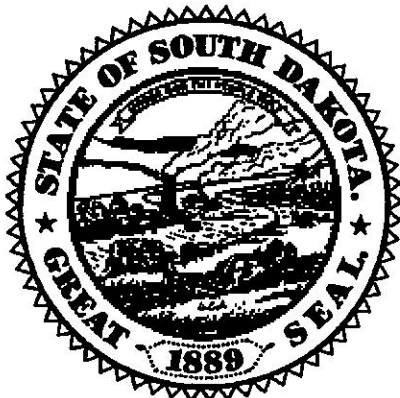
DAKOTA SIOUX PROPANE, INC.

TORGERSON, TERRI LAFONTAINE-

PO BOX 166

SISSETON SD 57262-0166

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State of South Dakota, at Pierre, the Capital, this July 1, 2004.



*Chris Nelson*

Chris Nelson  
Secretary of State

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

---

Appeal No. 30046

---

LESLIE J. TORGERSON,  
Plaintiff and Appellant,

v.

TERRI A. TORGERSON,  
Defendant and Appellee,

---

APPEAL FROM THE CIRCUIT COURT  
FIFTH JUDICIAL CIRCUIT  
ROBERTS COUNTY, SOUTH DAKOTA

---

THE HONORABLE JON S. FLEMMER  
Circuit Court Judge

---

BRIEF OF THE APPELLEE

---

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Sisseton, SD 57262  
698-7084 (605)

---

NOTICE OF APPEAL FILED JULY 7, 2022

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## **TABLE OF CONTENTS**

### TABLE OF AUTHORITIES

iii

### PRELIMINARY STATEMENT

1

### JURISDICTIONAL STATEMENT

1

### STATEMENT OF THE ISSUES

3

## STATEMENT OF THE CASE

4

## STATEMENT OF THE FACTS

4

## STANDARD OF REVIEW



	6
ARGUMENT	7
I. DID THE TRIAL COURT’S FINDINGS OF FACT SUPPORT ITS CONCLUSIONS OF LAW?	7
II. IS APPELLANT COLLATERALLY ESTOPPED FROM ATTACKING A FINAL JUDGMENT ON JURISDICTIONAL GROUNDS?	13
III. DID THE TRIAL COURT ERROR IN RECOGNIZING THE TRIBAL COURT ORDER AS A MATTER OF COMITY UNDER SDCL 1-1-25?	21
IV. DID THE TRIAL COURT ERROR IN DETERMINING THAT THE TRIBAL COURT DIVORCE PROCEEDING WAS FIRST PROPERLY COMMENCED?	26
V. DID THE TRIAL COURT ERROR IN FINDING THE FINDINGS OF FACT #6 AND #9?	27
CONCLUSION	
	28
CERTIFICATE OF COMPLIANCE	
	30
CERTIFICATE OF SERVICE	
	31



## TABLE OF AUTHORITIES

<u>CASES:</u>	<u>Page</u>
<u>Agard v. Menagh</u> , 60 S.D. 262, 244 N.W. 379	24
<u>Baldwin v. Iowa State Traveling Men’s Ass’n</u> , 283 U.S. 522, 51 S. Ct. 517	14, 15
<u>Bell v. Dillard Dep’t Stores, Inc.</u> , 85 F.3d 1451, 1456 (10th Cir. 1996)	17, 26
<u>Canyon Lake Park, LLC v. Loftus Dental, PC</u> , 2005 S.D. 82, 700 N.W.2d 729	6
<u>Colombe v. Rosebud Sioux Tribe</u> , 747 F.3d 1020, 1024 (8 <sup>th</sup> Cir. 2014)	20
<u>Davis v. Davis</u> , 305 U. S. 32	15, 16
<u>DISH Network Serv. L.L.C. v. Laducer</u> , 725 F.3d 877, 882 (8 <sup>th</sup> Cir. 2013)	20
<u>Durfee v. Duke</u> , 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963)	14, 16, 26
<u>Estate of Palmer</u> , 2007 S.D. 133, 744 N.W.2d 550	7
<u>Harris v. Young</u> , 473 N.W.2d 141 (S.D. 1991)	22, 25
<u>Hitzel v. Clark</u> , 334 N.W.2d 37 (S.D. 1983)	24
<u>Huth v. Hoffman</u> , 464 N.W.2d 637, 638 (S.D. 1991)	6, 7
<u>In re Estate of Green</u> , 516 N.W.2d 326 (S.D. 1994)	22
<u>In re Guardianship of Flyinghorse</u> , 456 NW2d 567, 568 (S.D. 1990)	25
<u>In Re the Matter of J.D.M.C.</u> , 2007 S.D. 97, 739 N.W.2d 796	14, 16, 26, 27

<u>Iowa Mut. Ins. Co. v. LaPlante</u> , 480 U.S. 9, 15-16 (1987)	20
<u>Jones v. Jones</u> , 334 N.W.2d 492 (S.D. 1983)	24
<u>Karras v. Alpha Corp.</u> , 528 N.W.2d 397, 401 (S.D. 1995)	10, 28
<u>Klundt v. Hemenway</u> , 60 S.D. 248, 244 N.W. 377	24
<u>Leon v. Numkena</u> , 689 P.2d 566, 568 (Ariz. Ct. App. 1984)	24
<u>Mellema v. Mellema</u> , 407 N.W.2d 827, 829 (S.D. 1987)	24
<u>Met Life Auto and Home Ins. Co. v. Lester</u> , 2006 S.D. 62, 719 N.W.2d 385	22
<u>Moe v. Moe</u> , 496 N.W.2d 593, 595 (S.D. 1993)	18
<u>Mokrejs v. Mokrejs</u> , 55 S.D. 285, 226 N.W. 264, 265 (S.D. 1929)	27
<u>National Farmers Union Ins. Co. v. Crow Tribe</u> , 471 U.S. 845	20
<u>Premier Bank, N.A. v. Mahoney</u> , 520 N.W.2d 894, 895 (S.D. 1994)	6, 7
<u>Red Fox v. Hettich</u> , 494 N.W.2d 638, 641 (S.D. 1993)	21, 22, 24
<u>Reservation Tel. Coop. v. Three Affiliated Tribes of Fort Berthold Reservation</u> , 76 F.3d 181, 184 (8 <sup>th</sup> Cir. 1996)	20
<u>Selway Homeowners Ass’n v. Cummings</u> , 2003 S.D. 11, ¶14, 657 N.W.2d 307, 312	6
<u>Sherrer v. Sherrer</u> , 334 U. S. 343	15, 16
<u>State ex rel. Joseph v. Redwing</u> , 429 N.W.2d 49, 51 (S.D. 1988)	25
<u>Steensland v. Steensland</u> , 43 S.D. 416, 179 N.W. 495, 496	27

<u>Stoll v. Gottlieb</u> , 305 U. S. 165	15
<u>Sutera v. Sully Buttes School Dist.</u> 58-2, 1997 S.D. 27, ¶9, 561 N.W.2d 20, 23	7, 13
<u>Timmerman v. Timmerman</u> , 163 Neb. 704, 81 N.W.2d 135 (1957)	25
<u>Treinies v. Sunshine Mining Co.</u> , 308 U. S. 66	15, 16
<u>Underwriters Nat'l Assurance Co. v. N.C. Life and Accident and Health Insurance Guaranty Ass'n</u> , 455 U.S. 691, 102 S.Ct. 1357 (1982)	17, 26
<u>Union Bond &amp; Mort. Co v. Brown</u> , 64 S.D. 600, 269 N.W. 474 (1936)	22
<u>Van Duysen v. Van Duysen</u> , 2015 SD 84, P12, 871 N.W.2d 613, 616	27, 28
<u>Wells v. Wells</u> , 2005 S.D. 67, 698 N.W.2d 504	14, 17, 18, 19
<u>Wells v. Wells</u> , 451 N.W.2d 402, 405-406 (S.D. 1990)	22
<u>Western Bldg. Co., Inc. v. J.C. Penney Co., Inc.</u> , 60 S.D. 630, 245 N.W. 909 (1932)	24
<u>Williams v. State of North Carolina</u> , 317 U.S. 287, 63 S.Ct. 207 (1942)	25
<u>Williams v. North Carolina</u> , 325 U.S. 226, 65 S.Ct. 1092 (1945)	25

## **STATUTES:**

SDCL 1-1-25

21

SDCL 15-26A-3

2

5, 9,  
11, 12, 13, 22,  
25

**OTHER AUTHORITIES:**

Restatement (Second) of Conflict of Laws 71, comment a (1971)	25
Restatement (First) of Judgments § 9 (1942)	14
Restatement (Second) of Judgments § 12 (1982)	18
Restatement (Second) of Judgments § 12 cmt a (1982)	18
Restatement (Second) of Judgments § 12 cmt b (1982)	19

### **PRELIMINARY STATEMENT**

Citations to the settled record as reflected by the Clerk's Index are designated with "SR" followed by the page number. Citations to the Appendix are designated "App." followed by the page number.

References to Plaintiff/Appellant in this matter, may be referred to as "Appellant" or "Leslie". The Defendant/Appellee in this matter, may be referred to as "Appellee" or "Terri".

The Transcript of the May 23, 2022, Motion Hearing will be referred to as "HT" followed by the page and line.

### **JURISDICTIONAL STATEMENT**

Terri and Leslie were married on October 7, 1994, in Vermillion, Clay County, South Dakota. Leslie admits that he was served with a Tribal Divorce Summons and Complaint on October 27, 2021. On November 15, 2021, Leslie filed in Tribal court a Motion to Dismiss the Tribal court divorce matter. A hearing was held on Leslie's Motion to Dismiss in tribal court on January 10, 2022, at which time Leslie appeared personally along with legal counsel at the tribal court. (App. 1) The tribal court issued its Order denying Leslie's Motion to Dismiss on January 10, 2022. In its Order denying Leslie's Motion to Dismiss the tribal court Judge determined (1) That the SWO Tribal Court had jurisdiction in this matter; and (2) That Leslie was properly served with the tribal court divorce summons and complaint. Leslie did not appeal the SWO Tribal Court decision (App. 4).

On November 10, 2021, Leslie's attorney delivered a State Court Summons and Complaint to the Roberts County Sheriff. Terri was served with the State Court Summons and Complaint on January 26, 2022, after the tribal court had already obtained jurisdiction

over the parties and the action for divorce (SR 6).

Terri filed a Motion to Dismiss Plaintiff's Complaint in circuit court on March 30, 2022. (SR at 10). Terri subsequently filed an Amended Motion to Dismiss in circuit court on May 16, 2022. (SR at 26). A hearing was held on the Motion to Dismiss on May 23, 2022. The circuit court granted Terri's Motion to Dismiss and entered Findings of Fact and Conclusions of Law dated June 5, 2022, and filed on June 6, 2022. (SR at 66, App. 47). Leslie failed to propose findings of fact and conclusions of law and also failed to file objections to the circuit court's Findings of Fact and Conclusions of Law. The circuit court entered an Order of the Court Dismissing Action with Prejudice dated June 5, 2022, and filed on June 6, 2022. (SR at 69; App. 43). Notice of Entry was dated June 17, 2022, and filed July 21, 2022 (App. 44). The Order of the Court Dismissing Action with Prejudice was a final order in the circuit court and had the effect of terminating the action as to all of the issues and all of the parties. Leslie filed a Notice of Appeal as to the circuit court Order on July 7, 2022. (SR at 70). This Court has jurisdiction pursuant to SDCL 15-26A-3.

The divorce trial was held in the Sisseton Wahpeton Oyate Tribal Court on July 19, 2022. Leslie was provided with notice of the trial but did not appear. Leslie's attorney did appear at the time of trial but elected not to participate stating that he was only there for the purpose of arguing jurisdictional matters. (App. 5). The SWO Tribal Court entered its Findings of Fact and Conclusions of Law (App. 5) and Judgement and Decree of Divorce (App. 19) and filed both documents with the Tribal Clerk of Courts on August 2, 2022.



Leslie failed to properly appeal the tribal court Judgement and Decree of Divorce. (App. 39, 41).

### **STATEMENT OF THE ISSUES**

I. DID THE TRIAL COURT'S FINDINGS OF FACT SUPPORT ITS CONCLUSIONS OF LAW?

A. The circuit court's findings of fact support its conclusions of law.

Relevant Authority:

Sutera v. Sully Buttes School Dist. 58-2, 1997 S.D. 27, ¶ 9, 561, N.W.2d 20, 23

Estate of Palmer, 2007 S.D. 133, 744 N.W.2d 550

Karras v. Alpha Corp., 528 N.W.2d 397, 401 (S.D. 1995)

II. IS APPELLANT COLLATERALLY ESTOPPED FROM ATTACKING A FINAL JUDGMENT ON JURISDICTIONAL GROUNDS?

A. This Court is bound to recognize the tribal court's determination of its own jurisdiction.

Relevant Authority:

Durfee v. Duke, 375 U.S. 106, 111, 84 S.Ct. 242, 245

Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 525-27, 51 S. Ct. 517, 518

Wells v. Wells, 2005 S.D. 67, 698 N.W.2d 504

National Farmers Union Ins. Co. V. Crow Tribe, 741 U.S. 845 (1985)

III. DID THE TRIAL COURT ERROR IN RECOGNIZING THE TRIBAL COURT ORDER AS A MATTER OF COMITY UNDER SDCL 1-1-25?

A. The State Court in Roberts County and the Sisseton Wahpeton Oyate Tribal Court have concurrent subject matter jurisdiction over this matter.

Relevant Authority:

SDCL 1-1-25

Red Fox v. Hettich, 494 N.W.2d 638, 641 (S.D. 1993)

Met Life Auto and Home Ins. Co. v. Lester, 2006 S.D. 62, 719 N.W.2d 385

SWO Code 34-17-01

IV. DID THE TRIAL COURT ERROR IN DETERMINING THAT THE TRIBAL COURT DIVORCE PROCEEDING WAS FIRST PROPERLY COMMENCED?

A. Appellant was first properly served in tribal court.

Relevant Authority:

In Re the Matter of J.D.M.C., 2007 s.d. 97, 739 N.W.2d 796

Underwriters Nat'l Assurance Co. v. Life and Accident and Health Insurance Guaranty Ass'n, 455 U.S. 691, 704-05, 102 S.Ct. 1357, 1371

Bell v. Dillard Dep't Stores, Inc., 85 F.3d 1451, 1456 (10<sup>th</sup> Cir. 1996)  
V. DID THE TRIAL COURT ERROR IN FINDING THE FINDINGS OF FACT #6  
AND #9?

A. The Findings of Fact #6 and #9 are supported by evidence and were found  
by the circuit court.

Relevant Authority:

Van Duysen v. Van Duysen, 2015 SD 84, ¶ 12, 871 N.W.2d 613, 616

Steensland v. Steensland, 43 S.D. 416, 179 N.W.2d 495, 496

Mokrejs v. Mokrejs, 55 S.D. 285, 226 N.W.2d 264, 265 (S.D. 1929)

### **STATEMENT OF THE CASE**

This is an appeal from the Fifth Judicial Circuit, Roberts County, South Dakota, the Honorable Jon S. Flemmer presiding. This was a divorce action brought by Leslie against Terri. See generally Complaint (SR at 3-5). Terri filed a Motion to Dismiss and an Amended Motion to Dismiss. (SR at 10, 26). The circuit court granted the motion and entered its Findings of Fact and Conclusions of Law filed on June 6, 2022. (SR at 66; App 47). Leslie failed to propose findings of fact and conclusions of law and also failed to file objections to the circuit court's Findings of Fact and Conclusions of Law. The circuit court entered its Order of the Court Dismissing Action filed on June 6, 2022. (SR 69; App 43).

### **STATEMENT OF THE FACTS**

Terri is a resident of Roberts County, South Dakota and she resides within the original boundaries of the Lake Traverse Reservation. (SR 66). Terri is an enrolled member of the Sisseton Wahpeton Oyate. (SR 66). Leslie is a resident of Roberts County, South Dakota and resides within the original boundaries of the Lake Traverse Reservation. (SR 66). Leslie is not an enrolled member of the Sisseton Wahpeton Oyate. (SR 66). Terri and Leslie were married on October 7, 1994, in Vermillion, Clay County,

South Dakota. (SR 66). Terri and Leslie were divorced by order of the Sisseton Wahpeton Oyate Tribal Court on August 2, 2022. (App. 19). Leslie and Terri owned and operated Dakota Sioux Fuel and Propane in Sisseton for many years which was a tribally chartered business and both have had dealing with the Sisseton Wahpeton Oyate and its Court's system. (SR 67). Leslie admits that he was served with a Tribal Divorce Summons and Complaint on October 27, 2021. (SR 67). On November 15, 2021, Leslie filed in tribal court a Motion to Dismiss the tribal court divorce matter. (SR 67, App. 1). A hearing was held on Leslie's Motion to Dismiss in tribal court on January 10, 2022, at which time Leslie appeared personally along with legal counsel at the tribal court. (SR 67, App. 1). The tribal court issued its Order denying Leslie's Motion to Dismiss on January 10, 2022. (SR 67, App. 4). In its Order denying Leslie's Motion to Dismiss the tribal court Judge determined (a) that the SWO Tribal Court had jurisdiction in this matter; and (b) that Leslie was properly served with the tribal court divorce summons and complaint. (See Findings of Fact #9, SR 67, App. 4). Leslie did not appeal the SWO Tribal Court decision. (SR 67). On November 10, 2022, Leslie's attorney delivered a State Court Summons and Complaint to the Roberts County Sheriff. (SR 67). Terri was served with the State Court Summons and Complaint on January 26, 2022, after the tribal court had already obtained jurisdiction over the parties and the action for divorce. (SR 1, 3, 6, 67).

The tribal court first obtained valid personal jurisdiction over the parties. (SR 67, App. 4, 48). The Sisseton Wahpeton Oyate Tribal Court has jurisdiction in this divorce matter based on the Tribal law including SWO Code 34-17-01. (SR 67, App. 7, 53). Terri filed a Motion to Dismiss and an Amended Motion to Dismiss the circuit court divorce.

(SR 10, 26). The circuit court granted the motion and entered Findings of Fact and Conclusions of Law filed on June 6, 2022. (SR 66; App. 47). Leslie failed to propose findings of fact and conclusions of law and also failed to file objections to the circuit court's findings of fact and conclusions of law. The circuit court entered its Order of the Court Dismissing Action filed on June 6, 2022. (SR 69; App. 43). The divorce trial was held in the Sisseton Wahpeton Oyate Tribal Court on July 19, 2022. Leslie was provided with notice of the trial but did not appear. Leslie's attorney did appear at the time of trial but elected not to participate stating that he was only there for the purpose of arguing jurisdictional matters. (App. 5). Leslie did submit exhibits to be used at SWO Tribal Court for trial. (See paragraph 13 of tribal court Findings of Fact, App. 6). The SWO Tribal Court entered its Findings of Fact and Conclusions of Law (App. 5) and Judgement and Decree of Divorce (App. 19) and filed both documents with the Tribal Clerk of Courts on August 2, 2022.

Leslie failed to properly appeal the tribal court Judgement and Decree of Divorce. (App. 39, 41).

### **STANDARD OF REVIEW**

In this case Leslie failed to propose findings of fact and conclusions of law and also failed to file objections to the circuit court's Findings of Fact and Conclusions of Law.

"The failure of an appellant to object to findings of fact and conclusions of law and to propose his or her own findings, limits review to the question of whether the findings support the conclusions of law and judgment." Canyon Lake Park, LLC v. Loftus Dental, PC, 2005 S.D. 82, 700 N.W.2d 729 (citing Premier Bank, N.A. v.

Mahoney, 520 N.W.2d 894, 895 (S.D. 1994)) (quoting Huth v. Hoffman, 464 N.W.2d 637, 638 (S.D. 1991)). See also Selway Homeowners Ass’n v. Cummings, 2003 S.D. 11, ¶14, 657 N.W.2d 307, 312 (holding that since the appellant failed to either object to findings of fact or conclusions of law proposed by the appellee, or propose findings of fact and conclusions of law of their own, this Court’s review was whether the findings supported the conclusions of law and judgment).

Therefore, this Court’s review in this case is limited to determining whether the trial court’s findings of fact support its conclusion of law.

### **ARGUMENT**

#### **I. DID THE TRIAL COURT’S FINDINGS OF FACT SUPPORT ITS CONCLUSIONS OF LAW?**

Leslie failed to propose findings of fact and conclusions of law and failed to file objections to the circuit court’s Findings of Fact and Conclusions of Law.

As stated above, this Court’s review in this case is limited to determining whether the trial court’s Findings of Fact support its conclusion of law in this action for divorce.

The circuit court entered its Order of the Court Dismissing Action with Prejudice on June 5, 2022. (SR 69, App. 43). This Order was entered in response to Terri’s Motion to Dismiss. (SR 10, 26). The circuit court further entered its Findings of Fact and Conclusions of Law on June 5, 2022. Leslie failed to object to said Findings of Fact and Conclusions of Law or to propose his own Findings and Fact and Conclusions of Law.

This Court’s standard of review when an appellant fails to object to or propose findings of fact and conclusions of law is narrow and well settled. “ ‘The failure of an appellant to object to findings of fact and conclusions of law or to propose his or her own

findings, limits review to the question of whether the findings support the conclusions of law and judgment.”’ Sutera v. Sully Buttes School Dist. 58-2, 1997 S.D. 27, ¶9, 561 N.W.2d 20, 23 (quoting Premier Bank, N.A. v. Mahoney, 520 N.W.2d 894, 895 (S.D. 1994) (quoting Huth v. Hoffman, 464 N.W.2d 637, 638, (S.D. 1991)))).

In this case, the circuit court’s conclusions of law and judgment are supported by the underlying findings which stand procedurally unchallenged. Estate of Palmer, 2007 S.D. 133, 744 N.W.2d 550.

The circuit court in its June 5, 2022 Findings of Fact specifically found as follows:

1. Terri is an enrolled member of the Sisseton Wahpeton Oyate. (See Findings of Fact #2).
2. Leslie admits that he was served with a tribal Divorce Summons and Complaint on October 27, 2021. (See Findings of Fact #7).
3. On November 15, 2021, Leslie filed in tribal court a Motion to Dismiss the tribal court divorce matter. (See Findings of Fact #8).
4. A hearing was held on Leslie’s Motion to Dismiss in tribal court on January 10, 2022 at which time Leslie appeared personally along with legal counsel at the tribal court. (See Findings of Fact #9).
5. The tribal court issued its Order denying Leslie’s Motion to Dismiss on January 10, 2022. (See Findings of Fact #10).
6. In its Order denying Leslie’s Motion to Dismiss the tribal court Judge determined:
  - a. That the SWO Tribal Court had jurisdiction in this matter; and
  - b. That Leslie was properly served with the tribal court divorce summons and complaint.(See Findings of Fact #11).
7. Leslie did not appeal the SWO Tribal Court decision. (See Findings of Fact #12).

8. Terri was served with the State Court Summons and Complaint on January 26, 2022 after the tribal court had already obtained jurisdiction over the parties and this action for divorce. (See Findings of Fact #14).
9. The tribal court first obtained valid personal jurisdiction over the parties. (See Findings of Fact #15).
10. That the Sisseton Wahpeton Oyate Tribal Court has jurisdiction in this divorce matter based on the Tribal law including SWO Code 34-17-01 which states as follows:

*The Sisseton-Wahpeton Sioux Tribal Court shall have authority to grant divorces to members of the Sisseton Wahpeton Sioux Tribe or any Indian Tribe whether the marriage was consummated under marriage license issued by the Clerk of the Sisseton-Wahpeton Tribal Court, or under licenses issued by State or Tribal Authority.*  
(See Findings of Fact #16).

(SR 66-68, App. 47-49, 53)

The circuit court in its June 5, 2022 Conclusions of Law specifically determined as follows:

1. That the State Court in Roberts County, South Dakota and the Sisseton Wahpeton Oyate Tribal Court have concurrent subject matter jurisdiction over this matter for divorce. (See Conclusions of Law #1).
2. Under concurrent jurisdiction, the case could be adjudicated by whichever court system first obtained valid personal jurisdiction over the parties. (See Conclusions of Law #2).
3. In this case, the Sisseton Wahpeton Oyate Tribal Court first obtained valid personal jurisdiction over the parties as the matter was commenced in tribal court first. (See Conclusions of Law #3).
4. The Sisseton Wahpeton Oyate Tribal Court has jurisdiction in this case based on legal precedent. (See Conclusions of Law #4).
5. Leslie has first been properly served with the Summons and Complaint in Tribal Court and the Sisseton Wahpeton Oyate has jurisdiction over Leslie and this action for divorce. (See Conclusions of Law #5).
6. Under long-standing principles, this Court is bound to recognize the tribal

court's determination of its own jurisdiction. Judicial proceedings in tribal courts are entitled to the same full faith and credit as any other out-of state judicial proceeding. (See Conclusions of Law #6).

7. The State Court divorce action (Roberts County file 54 Div22-00003) should be dismissed with prejudice. (See Conclusions of Law #7). (SR 68, App. 49)

In the instant case, Leslie failed to object to the circuit court's Findings of Fact and Conclusions of Law or to propose his own findings of fact and conclusions of law. Having not properly challenged the circuit court's Findings of Fact and Conclusions of Law, Leslie is not now entitled to the review normally afforded appeals. Consequently, this Court need not reach the issue of whether the circuit court's findings were erroneous. Karras v. Alpha Corp., 528 N.W.2d 397, 401 (S.D. 1995). Instead, this Court's review is limited to determining whether the findings support the conclusions and judgment. Id. In this case the circuit court's Findings of Fact support the Court's Conclusions of Law and judgment as follows:

The circuit court's conclusion that the State Court in Roberts County and the Sisseton Wahpeton Oyate Tribal Court have concurrent subject matter jurisdiction over this matter (See Conclusions of Law #1) and the conclusion that the case could be adjudicated by whichever court system first obtained valid personal jurisdiction over the parties (See Conclusions of Law #2) is specifically supported by the findings that:

- Terri is an enrolled member of the Sisseton Wahpeton Oyate (See Findings of Fact #2);
- Leslie admits that he was served with a Tribal Divorce Summons and Complaint on October 27, 2021 (See Findings of Fact #7);
- A hearing was held on Leslie's Motion to Dismiss in tribal court on



January 10, 2022, at which time Leslie appeared personally along with legal counsel at the tribal court (See Findings of Fact #9);

- The tribal court first obtained valid personal jurisdiction over the parties (See Findings of Fact #15); and
- The Sisseton Wahpeton Oyate Tribal Court has jurisdiction in this divorce matter based on the Tribal law including SWO Code 34-17-01 (See Findings of Fact #16).

(SR 66, App. 47, 53)

The circuit court's conclusion that the tribal court first obtained valid personal jurisdiction over the parties as the matter was commenced in tribal court first (See Conclusions of Law #3) is specifically supported by the findings that:

- Leslie admitted he was served with a Tribal Divorce Summons and Complaint on October 27, 2021 (See Findings of Fact #7);
- A hearing was held on Leslie's Motion to Dismiss in tribal court on January 10, 2022 at which time Leslie appeared personally along with legal counsel at the tribal court (See Findings of Fact #9).
- Tribal court issued an Order denying Leslie's Motion to Dismiss determining that the tribal court had subject matter jurisdiction and that Leslie was properly served with the tribal court divorce summons and complaint (See Findings of Fact #11);
- Terri was served with State Court Summons and Complaint on January 26, 2022, after the tribal court had already obtained jurisdiction (See Findings of Fact #14); and

- The tribal court first obtained valid personal jurisdiction over the parties (See Findings of Fact #15).

(SR 66, App. 47)

The circuit court's conclusion that the tribal court has jurisdiction in this case based on legal precedent (See Conclusions of Law #4) is specifically supported by the finding that:

- The tribal court has jurisdiction based on tribal law including SWO Code 34-17-01 (See Findings of Fact #16).

(SR 66, App. 47, 53)

The circuit court's conclusion that Leslie was first properly served with the Summons and Complaint in tribal court and that the Sisseton Wahpeton Oyate has jurisdiction over Leslie and this divorce action (See Conclusions of Law #5) is specifically supported by the finding that:

- Leslie admitted he was served with a Tribal Divorce Summons and Complaint on October 27, 2021 (See Findings of Fact #7); and
- That the tribal court first obtained valid personal jurisdiction over the parties (See Findings of Fact #15).

(SR 66, App. 47)

The circuit court's conclusion that under long-standing principles, the circuit court is bound to recognize the tribal court's determination of its own jurisdiction and that judicial proceedings in tribal courts are entitled to the same full faith and credit as any other out-of-state judicial proceeding (See Conclusions of Law #6) is specifically supported by the finding that:

- Leslie filed in tribal court a Motion to Dismiss the tribal court divorce matter (See Findings of Fact #8);
- A hearing was held on Leslie's Motion to Dismiss in tribal court at which time Leslie appeared personally along with legal counsel (See Findings of Fact #9);
- Tribal court issued an Order denying Leslie's Motion to Dismiss (See Findings of Fact #10);
- The tribal court Order denying Leslie's Motion to Dismiss determined that the tribal court had jurisdiction and that Leslie was properly served with the tribal court Summons and Complaint (See Findings of Fact #11);
- Leslie did not appeal the tribal court decision (See Findings of Fact #12); and
- The tribal court has jurisdiction in this divorce matter based on Tribal law including SWO Code 34-17-01 (See Findings of Fact #16).

(SR 66, App. 47, 53)

The circuit court's conclusion that the State Court divorce action should be dismissed with prejudice (See Conclusions of Law #7) is specifically supported by all the Findings of Facts determined by the Court and its Conclusions of Law as previously described. (SR 66, App. 47).

Here, the circuit court's Findings of Fact support its conclusion that the State Court divorce action should be dismissed with prejudice as described in detail above.

Sutera v. Sully Buttes School Dist., 1997 S.D. 27, 561 N.W.2d 20.

## **II. IS LESLIE COLLATERALLY ESTOPPED FROM ATTACKING A**

## **FINAL JUDGMENT ON JURISDICTIONAL GROUNDS?**

Leslie is barred by collateral estoppel from attacking the tribal court's final judgment on jurisdictional grounds because the matter was already fully and fairly litigated and it is res judicata. This Court has already recognized that judicial proceedings in tribal courts are entitled to the same full faith and credit as any other out-of-state judicial proceeding. (See Conclusions of Law #6, SR 67). A judgment or order is entitled to full faith and credit when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court that rendered the judgment. In Re the Matter of J.D.M.C., 2007 S.D. 97, ¶ 38, 739 N.W.2d 796, 808 (citing Durfee v. Duke, 375 U.S. 106, 111, 84 S.Ct. 242, 245, 11 L.Ed.2d 186 (1963)).

### **A. Fully and Fairly Litigated / Res Judicata**

The issues of personal and subject matter jurisdiction appear to have been litigated in tribal court. The tribal court's decision clearly indicates that Leslie appeared to contest jurisdiction. This Court has noted:

*"Where a defendant appears in an action to object that the court has no jurisdiction over him and the court overrules the objection and judgment is rendered against him, the parties are precluded from collaterally attacking the judgment on the ground that the court had no jurisdiction over the defendant."*

Wells v. Wells, 2005 S.D. 67, ¶19 n1, 698 N.W.2d 504, 509 n1 (quoting Restatement (First) of Judgments § 9 (1942)). Accordingly, because Leslie has already contested this issue, he is precluded from collaterally attacking the tribal court judgment in state court, so this Court cannot examine whether or not there was personal jurisdiction under Durfee v. Duke, 375 U.S. at 111, 84 S.Ct. at 245, 11 L.Ed.2d at 191, and Baldwin v. Iowa State

Traveling Men's Ass'n, 283 U.S. 522, 525-27, 51 S.Ct. 517, 518. Here, Leslie is attempting to directly prevent the enforcement of the tribal court order in circuit court by asserting that tribal court did not have personal jurisdiction.

With respect to questions of jurisdiction over the person, this principle was unambiguously established in Baldwin v. Iowa State Traveling Men's Assn., 283 U. S. 522. There it was claimed that the original Missouri court did not have jurisdiction over the defendant's person. It was held that the federal court in Iowa must give binding effect to the judgment of a federal court in Missouri once it was shown to the court in Iowa that the question of personal jurisdiction had been fully litigated in the Missouri forum despite said claim. "Public policy," said the Court, "dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. In Baldwin, the United State Supreme Court held, "We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause." Baldwin, 283 U. S. at 525-526.

Following the Baldwin case, the United States Supreme Court soon made clear in a series of decisions that the general rule is no different when the claim is made that the original forum did not have jurisdiction over the subject matter. Davis v. Davis, 305 U. S. 32; Stoll v. Gottlieb, 305 U. S. 165; Treinies v. Sunshine Mining Co., 308 U. S. 66; Sherrer v. Sherrer, 334 U. S. 343. In each of these cases the claim was made that a court, when asked to enforce the judgment of another forum, was free to retry the question of that forum's jurisdiction over the subject matter. In each case the United

States Supreme Court held that since the question of subject-matter jurisdiction had been fully litigated in the original forum, the issue could not be retried in a subsequent action between the parties.

This doctrine of jurisdictional finality was applied even more unequivocally in Treinies, supra, involving title to personal property, and in Sherrer, supra, involving, like Davis, recognition of a foreign divorce decree. In Treinies, the rule was succinctly stated: "One trial of an issue is enough. 'The principles of res judicata apply to questions of jurisdiction as well as to other issues,' as well to jurisdiction of the subject matter as of the parties." Treinies, 308 U.S. at 78.

It is true that in ordinary circumstances a judgment of a court in one jurisdiction is conclusive on the merits in another jurisdiction only if the court in the first jurisdiction had power to pass on the merits. Here, however, the issue of jurisdiction was litigated in tribal court; thus, res judicata applies, and the question of jurisdiction should not be relitigated. "[A] judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment." Matter of J.D.M.C., 2007 S.D. 97, 739 N.W.2d 796 (citing Durfee v. Duke, 375 U.S. 106, 111, 84 S.Ct. 242, 245, 11 L.Ed.2d 186 (1963)).

Leslie mentions in this appeal that he did not have a full and fair opportunity to litigate the jurisdictional questions in tribal court. On the contrary, the tribal court and the circuit court found that Leslie filed in tribal court a Motion to Dismiss, Leslie's attorney appeared in the tribal court, reportedly to argue jurisdiction issues, and, after a hearing, the tribal judge entered a thoughtful written decision fairly considering whether the tribal

court had subject matter and personal jurisdiction. Leslie even admits in his Appellant Brief that the issues of jurisdiction were argued in tribal court (See Appellant Brief, page 18). The tribal court filed its Findings of Fact and Conclusions of Law showing that the matter had been fully and fairly litigated by specifically stating that the tribal court had subject matter and personal jurisdiction in this matter (App. 5). These questions had been fully and fairly litigated, so the tribal court made its decision. (App. 19). Then, Leslie failed to properly appeal the tribal court's Judgment and Decree of Divorce (App. 39, 41). While Leslie had the opportunity to exhaust tribal remedies and file an appeal, he failed to do so in a timely matter, resulting in its dismissal (App. 39, 41). Additionally, Leslie does not contend that he was denied basic due process rights, including the right to a fair hearing before an impartial tribal judge.

Leslie's argument to this Court focuses on the issues wherein the tribal court allegedly entered an erroneous decision. But, as the United States Supreme Court has noted, "[e]rroneous or not," when the jurisdictional issue was fully and fairly litigated and finally determined, another jurisdiction's judgment cannot be collaterally attacked. Underwriters Nat'l Assurance Co. v. N.C. Life and Accident and Health Insurance Guaranty Ass'n, 455 U.S. 691, 704-05, 102 S.Ct. 1357, 1371, 71 L.Ed.2d 558 (1982). Moreover, Leslie never argued that the tribal court did not enter a final judgment. Leslie had the full and fair opportunity to first appeal the tribal court's order on the Motion to Dismiss, and then to appeal the tribal court's divorce decree. However, he did not appeal the tribal court's Order and he failed to properly appeal the SWO Tribal Court's Judgment and Decree of Divorce (App. 41). At this point, the case is a final judgment as Leslie failed to properly appeal the tribal court decision. See Bell v. Dillard Dep't Stores,

Inc., 85 F.3d 1451, 1456 (10th Cir. 1996) (lack of opportunity to appeal may weigh against finding that a party had a full and fair opportunity to litigate an issue).

Similar circumstances present themselves in Wells v. Wells, 2005 S.D. 67 wherein an Indian tribal member sought relief from a previous state court judgment that he contended was void for lack of personal and subject matter jurisdiction. The tribal member's argument was straight forward: since he had always resided on tribal land, the circuit court lacked personal and subject matter making the judgment void and enabled his attack on said judgment. Wells v. Wells, 2005 S.D. 67, P14, 698 N.W.2d 504, 508. However, the court could not ignore the issue of res judicata. Res judicata bars further court action when (1) there was a final judgment on the merits in the earlier action, (2) the question decided in the former proceeding is the same as the one decided in the present action, (3) the parties to both actions are the same, and (4) "there was full and fair opportunity to litigate the issues in the prior adjudication." Id. (citing Moe v. Moe, 496 N.W.2d 593, 595 (S.D. 1993)). "The principal of finality has its strongest justification where the parties have had full opportunity to litigate a controversy, especially if they have actually contested both the tribunal's jurisdiction and issues concerning the merits." Id. (Citing Restatement (Second) of Judgments § 12 cmt a (1982)).

This Wells v. Wells also cites the following:

*When a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation except it:*

*(1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of*



*authority; or*

*(2) Allowing the judgment to stand would substantially infringe the*

*authority of another tribunal or agency of government; or*

*(3) The judgment was rendered by a court lacking capability to make an*

*adequately informed determination of a question concerning its own*

*jurisdiction and as a matter of procedural fairness the party seeking to*

*avoid the judgment should have opportunity belatedly to attack the court's*

*subject matter jurisdiction.*

Restatement (Second) of Judgments § 12 (1982).

Applying these three Restatement policy considerations to the case currently at hand, it appears they favor upholding the circuit court's Order Dismissing the Action with Prejudice so that the tribal court Judgment and Decree of Divorce stands. The subject matter of this divorce action was not so plainly beyond the tribal court's jurisdiction that its matter was a manifest abuse of authority since both the tribal court and the circuit court concluded that the tribal court had jurisdiction (SR 68, App. 4, 5, 49). Allowing the tribal court Judgment and Decree of Divorce to stand would not substantially infringe on state court's authority; the state court is free to protect its interest and make findings and conclusions in matters brought to them. The tribal court judgment was rendered by the Sisseton Wahpeton Tribal Court which is fully capable of making an adequate determination on the question of its own jurisdiction, as both the tribal court and the circuit court determined in their conclusions of law (SR 68, App. 5, 49). Because of this, Leslie should not be able to have the opportunity to belatedly attack the tribal court's subject matter jurisdiction.

It must be noted that “[u]nder the modern rule, “conclusiveness of determinations of subject matter jurisdiction gives finality substantially greater weight” than purported invalidity. Wells, 2005 S.D. at P21 (citing Restatement (Second) of Judgments § 12 cmt b (1982)). Here, subject matter jurisdiction has been thoughtfully concluded by both the tribal court and the circuit court which contributes to the finality of the tribal court’s Judgment and Decree of Divorce and weighs against its alleged invalidity.

Leslie raised the question of jurisdiction in tribal court, it was litigated and determined, and Leslie failed to timely file an appeal. The Judgment and Decree of Divorce is res judicata.

#### **B. Failure to Exhaust Legal Remedies**

A rule was announced in National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, that requires the exhaustion of tribal remedies. It is federal policy that requires federal courts to stay their hands in order to give tribal courts a full opportunity to first determine their own jurisdiction. Id. “A federal court should stay its hand in order to give tribal forums the initial opportunity to determine cases involving questions of tribal authority.” Reservation Tel. Coop. v. Three Affiliated Tribes of Fort Berthold Reservation, 76 F.3d 181, 184 (8<sup>th</sup> Cir. 1996) (citing Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15-16 (1987)). This way, the administration of justice maintains order, federal courts are provided with the benefit of tribal expertise, and the factual and legal issues that are in dispute and relevant for any jurisdictional evaluation are clarified. Colombe v. Rosebud Sioux Tribe, 747 F.3d 1020, 1024 (8<sup>th</sup> Cir. 2014) (citing DISH Network Serv. L.L.C. v. Laducer, 725 F.3d 877, 882 (8<sup>th</sup> Cir. 2013)). “Exhaustion includes both an initial decision by the tribal court and the completion of appellate review.” Id. (citing \_

DISH Network Serv. L.L.C. v. Laducer, 725 F.3d at 882-883). “Until appellate review is complete, the ... Tribal Courts have not had a full opportunity to evaluate the claim and federal courts should not intervene.” Id. (quoting Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 17 (1987)). This same standard should be applied to state courts as well.

In the instant case, Leslie did not exhaust all tribal remedies before bringing an action in state court. He did not appeal the tribal court’s decision denying his Motion to Dismiss. Leslie appeared at tribal court for the hearing to contest jurisdiction, but once the tribal court issued its Judgment and Decree for Divorce, Leslie failed to timely file an appeal and his appeal was dismissed. This failure to timely appeal made it impossible for the tribal court to have the opportunity to fully evaluate Leslie’s claim through appellate review, and therefore Leslie did not exhaust tribal remedies.

### **III. DID THE TRIAL COURT ERROR IN RECOGNIZING THE TRIBAL COURT ORDER UNDER PRINCIPLES OF COMITY?**

SDCL 1-1-25 states, “No order or judgment of a tribal court in the state of South Dakota may be recognized as a matter of comity in the state courts of South Dakota, except ...” This Court has held that “[a]s a preliminary matter, this statute applies only to an ‘order or judgment of a tribal court in the state of South Dakota.’” Red Fox v. Hettich, 494 N.W.2d 638, 641 (S.D. 1993). No request was made to the circuit court to recognize as comity any order or judgment of the tribal court in the state of South Dakota.

The issue in the present case should not be whether the circuit court erred in recognizing the tribal court’s Judgment and Decree of Divorce because no request was made for the circuit court to recognize any such order. (See SR 10, 26). The circuit court was not requested to recognize any tribal court order, and therefore it did not recognize

any tribal court order. As such, SDCL 1-1-25 is not applicable to this matter.

Instead of recognizing any tribal court order, the circuit court simply concluded that it had concurrent jurisdiction with the Tribe and that the Tribe first obtained valid personal jurisdiction over the parties because the matter was commenced in tribal court first (See Conclusions of Law #3, SR 66, App. 47), and the circuit court concluded that it is bound to recognize the tribal court's determination of its own jurisdiction (See Conclusions of Law #6, SR 67, App. 48). Subsequently the circuit court granted Terri's Motion to Dismiss.

This Court has found concurrent state and tribal jurisdiction over divorce-related litigation between reservation Indians and spouses domiciled off the reservation, whether the off-reservation spouse is Indian or non-Indian. Harris v. Young, 473 N.W.2d 141 (S.D. 1991); Wells v. Wells, 451 N.W.2d 402, 405-406 (S.D. 1990).

Under concurrent jurisdiction, the case could be adjudicated by whichever court system first obtained valid personal jurisdiction over the parties, and there was no impermissible interference with the sovereignty of the tribe. Harris v. Young, 473 N.W.2d 141 (S.D. 1991). As such, the circuit court was well within its authority to grant the Motion to Dismiss.

Although it is Terri's position that comity was not requested and therefore is not at issue, Terri will address the Leslie's claims of lack of jurisdiction.

#### **A. Personal Jurisdiction**

Tribal judicial jurisdiction depends on whether the tribal court has personal jurisdiction over the defendant. Red Fox v. Hettich, 494 N.W.2d 638 (S.D. 1993). The Sisseton Wahpeton Tribal Code does not limit jurisdiction to any great extent and grants

the tribal court personal jurisdiction over the parties hereto. See SWO Code 34-17-01 (App. 53).

A person may waive a lack of personal jurisdiction by submitting to the jurisdiction of the court and pleading on the merits. See Met Life Auto and Home Ins. Co. v. Lester, 2006 S.D. 62, 719 N.W.2d 385 (citing In re Estate of Green, 516 N.W.2d 326 (S.D. 1994)); Union Bond & Mort. Co v. Brown, 64 S.D. 600, 269 N.W. 474 (1936). That is what occurred during the January 10, 2022 tribal court hearing. (See circuit court Finding of Fact #9, SR 67, App. 48). Additionally, Leslie submitted a list of personal property to the tribal court to be used as an exhibit in the tribal divorce trial (See tribal court Finding of Fact #13, App. 6). Leslie can not be heard now to reassert a lack of personal jurisdiction after having already submitted to the tribal court's jurisdiction.

Terri is a tribal member and voluntarily submitted to the jurisdiction of the SWO Tribal Court (See Finding of Facts #2, SR 66, App. 5, 47). In addition, Leslie has sufficient minimum contacts so as to allow the tribal court to assert personal jurisdiction over him. (See Finding of Fact #3, #6, #8, #9, SR 66, App. 47). (See tribal court Findings of Fact #3, #7, #9, #10, #13, App. 5 - 6). The SWO Tribal Court had personal jurisdiction over the parties to this divorce action.

Further, as set forth above, a hearing was held on Leslie's Motion to Dismiss in tribal court on January 10, 2022 at which time Leslie appeared personally along with legal counsel at the tribal court. (See Findings of Fact #9, SR 67, App. 48).

The tribal court in its Findings of Fact and Conclusions of Law filed with the tribal court on August 2, 2022 in Finding of Fact #13 as follows:

*13. Husband did not appeal the SWO Tribal Court's January 10, 2022*

*decision. Further Husband, through his legal counsel, has appeared personally before this Court on two separate occasions to argue jurisdiction. Further, Husband has corresponded with this Court and did submit a list of personal property to be used as an exhibit in the divorce trial.*

(App. 6).

The treatment of extraneous material not incorporated into the trial court's findings of fact and conclusions of law is well settled:

“Any expression of opinion or views by the trial judge extraneous to his decision in the manner and form contemplated by law is of no binding force or effect as a matter of law either upon the trial judge himself or any one else. Agard v. Menagh, 60 S.D. 262, 244 N.W. 379; Klunt v. Hemenway, 60 S.D. 248, 244 N.W. 377. Such expressions by the trial judge are, of course helpful and indeed almost necessary in advising counsel as to the views of the court and for the information of counsel in drafting findings and conclusions for presentation to the court. But such expression of opinion constitutes no proper part of the record on appeal, whether announced in the form of an oral statement in open court transcribed by the reporter or in the form of a memorandum or letter addressed to counsel. [cites omitted].” Mellema v. Mellema, 407 N.W.2d 827, 829 (S.D. 1987) (quoting Western Bldg. Co., Inc. v. J.C. Penney Co., Inc., 60 S.D. 630, 636-637, 245 N.W. 909, 911-912 (1932)). “Thus, we ignore the trial court's oral pronouncements and limit our review to the written findings and conclusions.” Id. (citing Jones v. Jones, 334 N.W.2d 492 (S.D. 1983); Hitzel v. Clark, 334 N.W.2d 37 (S.D. 1983)). The tribal court in the present case heard arguments and made a decision by issuing findings and

conclusions that Leslie was served properly with a tribal court divorce summons and complaint, and that the tribal court first obtained valid personal jurisdiction over the parties. (App. 5).

As described above, Leslie's actions are evidence to his submission to the jurisdiction of the tribal court.

## **B. Subject Matter Jurisdiction**

Subject matter jurisdiction relates to the power of a court to hear and determine a general class of cases to which a particular proceeding belongs. Red Fox v. Hettich, 494 N.W.2d 638 (S.D. 1993) (citing Leon v. Numkena, 689 P.2d 566, 568 (Ariz. Ct. App. 1984) (citations omitted)). See also Harris v. Young, 473 N.W.2d 141, 143-44 (S.D. 1991); In re Guardianship of Flyinghorse, 456 NW2d 567, 568 (S.D. 1990); State ex rel. Joseph v. Redwing, 429 N.W.2d 49, 51 (S.D. 1988). A court's jurisdiction of the subject matter ... exists when a constitution or statute specifically confers upon the court such jurisdiction. Timmerman v. Timmerman, 163 Neb. 704, 81 N.W.2d 135 (1957). This power is likewise conferred upon Indian courts by their constitutions or tribal codes. See generally Cohen, *Federal Indian Law*, p. 428 (1958). Leon, 689 P.2d at 568.

The tribal court had subject matter jurisdiction in the present case. As explained by the United States Supreme Court in Williams II: "The domicile of one spouse within a State gives power to that State ... to dissolve a marriage wheresoever contracted." Williams v. North Carolina, 325 U.S. 226, 229-30, 65 S.Ct. 1092, 1095 (1945). A state where only one spouse is domiciled has this power because domicile creates a relationship with a state, and "[e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders." Williams v. State

of North Carolina, 317 U.S. 287, 298, 63 S.Ct. 207, 213, 87 L.Ed. 279, 286 (1942) (Williams I); see also Restatement (Second) of Conflict of Laws 71, comment a (1971) (“When the spouses have separate domiciles, each state of domicile has an interest in their marriage status.”).

Similarly, the Sisseton Wahpeton Oyate, as a sovereign, has a rightful and legitimate concern in the marital status of its tribal members and jurisdiction over the divorce and parties is supported by tribal law. (SWO Code 34-17-01, App. 53). The tribal court had subject matter jurisdiction to hear the divorce action under its laws, so the tribal court in its Judgment and Decree of Divorce determined that it had jurisdiction of the subject matter of this action and personal jurisdiction over the parties. (App. 19).

**IV. DID THE TRIAL COURT ERROR IN DETERMINING THAT THE TRIBAL COURT DIVORCE PROCEEDINGS WAS FIRST PROPERLY COMMENCED?**

As stated above, “[A] judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court’s inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.” Matter of J.D.M.C., 2007 S.D. 97, 739 N.W.2d 796 (citing Durfee v. Duke, 375 U.S. 106, 111, 84 S.Ct. 242, 245, 11 L.Ed.2d 186 (1963)).

Leslie’s alleged issue of improper service was litigated in tribal court; thus, res judicata applies, and this question should not be relitigated. After hearing Leslie’s argument at a hearing, the tribal court thoughtfully considered it and issued in its Findings of Fact and Conclusions of Law that Leslie was in fact served properly and jurisdiction was established. (See Conclusions of Law #5, SR 68, App. 49).

Then, Leslie failed to properly appeal the tribal court’s Judgment and Decree of



Divorce. While Leslie had the opportunity to exhaust tribal remedies and file an appeal, he failed to do so in a timely matter, resulting in its dismissal.

Again, “[e]rroneous or not,” when the jurisdictional issue was fully and fairly litigated and finally determined, another jurisdiction’s judgment cannot be collaterally attacked. Underwriters Nat’l Assurance Co. v. N.C. Life and Accident and Health Insurance Guaranty Ass’n, 455 U.S. 691, 704-05, 102 S.Ct. 1357, 1371, 71 L.Ed.2d 558 (1982). At this point, the case is a final judgment as Leslie failed to properly appeal the tribal court decision. See Bell v. Dillard Dep’t Stores, Inc., 85 F.3d 1451, 1456 (10th Cir. 1996) (lack of opportunity to appeal may weigh against finding that a party had a full and fair opportunity to litigate an issue).

**V. DID THE TRIAL COURT ERROR IN FINDING THE FINDINGS OF FACT #6 AND #9?**

As previously stated, "[t]he circuit court's 'findings of fact must be supported by the evidence and conclusions of law must in turn be supported by the findings of fact.'" In re J.D.M.C., 2007 S.D. 97, ¶ 18, 739 N.W.2d 796, 803.

However, it must be noted that in Van Duysen v. Van Duysen, wherein the court entered its findings of facts in a divorce matter that supported the conclusion that the mother, Jennifer, would be granted primary physical custody of their children and the father appealed, certain facts were found that had no evidentiary basis in the settled record. Van Duysen v. Van Duysen, 2015 SD 84, P12, 871 N.W.2d 613, 616. The South Dakota Supreme Court noted that while these facts had no evidentiary basis, "[T]he facts that are clearly established are such as to fully warrant the court in giving [Jennifer] the custody of the children . . . it is therefore of no importance if . . . the court went . . . too far in findings as to other facts." Id. (Citing Steensland v. Steensland, 43 S.D. 416, 179

N.W. 495, 496). “Although the court had no evidentiary basis on this record to make these findings, this "inclusion of certain unsupported findings . . . is not sufficient cause for reversing a judgment . . . [that] is otherwise sufficiently supported by findings of fact based upon the evidence." Id. (Citing Mokrejs v. Mokrejs, 55 S.D. 285, 226 N.W. 264, 265 (S.D. 1929)). In other words, even though certain facts may not have had evidentiary bases in the record, the facts that supported the main conclusions of the case were clearly established.

Additionally and as previously mentioned, since Leslie did not properly challenge the circuit court’s findings of fact and conclusions of law, this Court need not reach the issue of whether the trial court’s findings were erroneous. Karras v. Alpha Corp., 528 N.W.2d 397, 401 (S.D. 1995). Instead, this Court’s review is limited to determining whether the findings support the conclusions and judgment. Id.

As such, the circuit court’s conclusions of law were sufficiently supported by findings of facts that are clearly established and was previously described in detail. Therefore, alleging the finding that Leslie and Terri owned and operated Dakota Sioux Propane for many years and the finding that Leslie personally appeared at the tribal court hearing do not have evidentiary bases in the record is not sufficient cause to reverse the circuit court’s judgment. Van Duysen v. Van Duysen, 2015 SD 84, P12, 871 N.W.2d 613, 616.

### **CONCLUSION**

The circuit court’s Conclusions of Law are sufficiently supported by its Findings of Fact. The matter at hand has already been fully and fairly litigated so that Leslie is collaterally estopped from attacking the judgment and the matter is res judicata. The

principle of comity does not apply because the circuit court did not recognize the tribal court's Judgment and Decree of Divorce; it only recognized the tribal court's jurisdiction over the matter. The circuit court properly concluded that the tribal court divorce was commenced first. The circuit court's Findings of Fact that allegedly have no evidentiary basis is not sufficient cause to justify a reversal.

DATED this \_\_\_\_ day of November, 2022.

Respectfully submitted,

DELANEY, NIELSEN & SANNES, P.C.

---

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### **CERTIFICATE OF COMPLIANCE**

Gordon P. Nielsen, one of the attorneys for Appellee, hereby certifies that the foregoing brief meets the requirements for proportionately spaced typeface in accordance with SDCL 15-26A-66(b) as follows:

- a. Appellees' brief does not exceed 32 pages;
- b. The body of Appellees' brief was typed in Times New Roman 12 point typeface;  
and
- c. Appellees' brief contains 7,312 words and 36,730 characters, according to the work and character counting system in WordPerfect used by the undersigned.

---

GORDON P. NIELSEN

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that on the \_\_\_\_ day of November 2022, a true and correct copy of Appellee's Brief and Appendix to Appellee's Brief were electronically transmitted via the Odyssey File and Serve System to:

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I, the undersigned, hereby certify that on the \_\_\_\_ day of November 2022, a true and correct bound copy of the foregoing Appellee's Brief and Appendix to Appellee's Brief were sent via U.S. mail to:

South Dakota Supreme Court  
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Pierre, SD 57501-5070

I, the undersigned, hereby certify that on the \_\_\_\_ day of November 2022, a true and correct Word Perfect copy of the foregoing Appellee's Brief was emailed to [scclerkbriefs@ujs.state.sd.us](mailto:scclerkbriefs@ujs.state.sd.us).

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GORDON P. NIELSEN

IN THE SUPREME COURT  
STATE OF SOUTH DAKOTA

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No. 30046

---

LESLIE J. TORGERSON,

Plaintiff and Appellant,

v.

TERRI A. TORGERSON,

Defendant and Appellee,

---

APPEAL FROM THE CIRCUIT COURT  
FIFTH JUDICIAL CIRCUIT  
ROBERTS COUNTY, SOUTH DAKOTA

---

THE HONORABLE JON S. FLEMMER  
Circuit Court Judge

---

APPELLANT'S REPLY BRIEF

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*Notice of Appeal filed on July 7, 2022*

## TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	ii
PRELIMINARY STATEMENT .....	1
REPLY TO JURISDICTIONAL STATEMENT .....	1
REPLY TO APPELLEE’S STATEMENT OF FACTS .....	2
REPLY TO APPELLEE’S ARGUMENT.....	5
I.    Trial Court’s Findings of Fact Did Not Support Its Conclusions of Law...5	
II.   Leslie Is Not Collaterally Estopped from Attacking a Final Judgment on Jurisdictional Grounds. ....	9
A. Not Fully and Fairly Litigated / No Res Judicata. ....	9
B. No Failure to Exhaust Legal Remedies. ....	11
III.  Trial Court Did Not Make a Competent Finding or Ruling. ....	11
A. Personal Jurisdiction. ....	13
B. Subject Matter Jurisdiction. ....	14
IV.   Trial Court Divorce Proceeding Was Not First Properly Served. ....	14
CONCLUSION.....	14
REQUEST FOR ORAL ARGUMENT .....	14
CERTIFICATE OF COMPLIANCE.....	16
CERTIFICATE OF SERVICE .....	15

## TABLE OF AUTHORITIES

### CASES

<i>Addington v. Texas</i> , 441 U.S. 418, 99 S.Ct. 1804, 60 L. Ed.2d 323 (1979) .....	12
<i>Babbitt Ford, Inc. v. Navajo Indian Tribe</i> , 519 F.Supp. 418 (Ariz. 1981) .....	2, 13
<i>DeCoteau v. District County Court for Tenth Judicial District</i> , 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975).....	3, 6, 9
<i>Engresser v. Young</i> , 2014 S.D. 81, 856 N.W.2d 471 .....	13
<i>Estate of Colombe</i> , 2016 SD 62, 885 N.W.2d 350 .....	9,10
<i>First National Bank of Phillip v. Temple</i> , 2002 SD 36, 642 N.W.2d 197.....	13
<i>Harris v. Young</i> , 473 N.W.2d 141 (SD 1991) .....	7, 8
<i>In re J.D.M.C.</i> , 2007 SD 97, 739 N.W.2d 796 .....	9, 10
<i>Langdeau v. Langdeau</i> , 2008 SD 44, 751 N.W.2d 722 .....	7, 8
<i>Red Fox v. Hettich</i> , 494 N.W. 2d 638, 642 (SD 1993).....	12, 14
<i>Sage v. Sicangu Oyate, Inc.</i> , 473 N.W.2d 480 (SD 1991).....	7
<i>Santosky v. Kramer</i> , 455 U.S. 745, 102 S.Ct. 1388, 71 L. Ed.2d 599 (1982).....	12
<i>S. Dakota Bd. Of Regents v. Heege</i> , 428 N.W.2d 535 (SD 1988).....	11
<i>Wells v. Wells</i> , 451 N.W.2d 402 (SD 1990) .....	7, 8, 13
<i>Williams v. Lee</i> , 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959).....	8

### STATUTES

SDCL 1-1-25.....	9, 12, 13, 14
SDCL 15-6-52(a) .....	5
SWO Tribal Code 34-23-02 .....	6, 14
SWO Tribal Code 34-17-01.....	7



SWO Tribal Code 21-14-02 .....	7
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## **PRELIMINARY STATEMENT**

All references in this brief to the Settled Record of this action are referred to as “SR” followed by the page number. The Transcript of the May 23, 2022, Motion Hearing will be referred to as “HT” followed by the page and line. References to the Appendix will be referred to as “App.” Followed by the page number. References to the Affidavit of Leslie J. Torgerson in Opposition to Motion to Dismiss will be referred to as “Leslie’s Aff.” Followed by the paragraph number. References to Plaintiff/Appellant Leslie J. Torgerson will be referred to as “Leslie” and Defendant/Appellee Terri A. Torgerson will be referred to as “Terri.” The Sisseton Wahpeton Oyate Tribe will be referred to as “SWO.” The appendix to Appellant’s Brief and the Brief of Appellee are both Cited as “App. p. \_\_\_\_”. To distinguish them in the brief, they are cited as “Leslie App. \_\_\_\_” and “Terri App. \_\_\_\_.”

## **REPLY TO JURISDICTIONAL STATEMENT**

Contrary to the claim at Appellee’s Brief p. 1, that “Leslie appeared personally along with legal counsel at the Tribal Court”, he did not. The brief cites App. 1, which is the Notice of Motion and Motion to Dismiss. That Motion begins with “Defendant hereby makes a special appearance in this action and moves the Court for an order dismissing the Complaint.” Terri App. 1.

Leslie did not “fail” to file objections to proposed Findings of Fact and Conclusions of Law, because none were proposed. See p. 2 and 5.

This Jurisdictional Statement correctly notes that Leslie did not appear, but his attorney did only to dispute jurisdiction. Leslie has not submitted to the jurisdiction of the Tribal Court. Strangely, at Appellee’s Brief, p. 8, Terri makes the claim that:

A hearing was held on Leslie's Motion to Dismiss in tribal court on January 10, 2022 at which time Leslie appeared personally along with legal counsel at the tribal court. (See Findings of Fact #9).

This inaccurate claim is repeated at Appellee's Brief, pp. 10, 11, and 12. This statement is contradicted several times in the record.

### **REPLY TO APPELLEE'S STATEMENT OF FACTS**

Terri apparently believes that repeating the same thing numerous times makes that assertion true. Throughout her jurisdictional statement, statement of facts, and argument, she makes the statement or implies that Leslie was properly served with a Tribal Divorce Summons and Complaint, 11 times. This is not true; he was not served with a Tribal Summons which complied with SWO Tribal Code Sections 34-23-02 and 21-14-02, Rule 2(c), as discussed below. Leslie App. 34 and 30. Terri makes the assertion, or implication, 13 times that Leslie made an "appearance" in Tribal Court. This is also not true, because Leslie never appeared in Tribal Court, and his attorney, Craig Ash, always appeared specially, also as discussed below.

Leslie did not "fail" to propose Findings of Fact and Conclusions of Law and did not "fail" to file objections to the Findings of Fact and Conclusions of Law proposed by Terri, another charge repeatedly made in Appellee's Brief, because no such proposals were ever submitted to the Court or served on Leslie's attorney. See Affidavit of Craig O. Ash, ¶¶ 3-10. Even without consideration of the Ash Affidavit, there is no evidence in the electronic record of 54 DIV 22-000003 showing that proposed Findings of Fact and Conclusions of Law were served on Leslie's attorney, Craig Ash. There is no basis for concluding that Mr. Ash was given the five-day opportunity for objecting to proposed findings and conclusions

submitted by Terri's attorney, as required by SDCL 15-6-52(a). The only Findings of Fact and Conclusions of Law in the record are those signed by the Circuit Court. R 66-68.

At p. 4 of Appellee's Brief, Terri asserts that Leslie and Terri resided within the original boundaries of the Lake Traverse Reservation. Whether or not a party resides within the original boundaries of a reservation is meaningless, which was determined by the United States Supreme Court in *DeCoteau v. District County Court for Tenth Judicial District*, 420 U.S. 425, 447, 95 S.Ct. 1082, 1094, 43 L.Ed.2d 300 (1975). Terri and Leslie once "owned and operated Dakota Sioux Fuel and Propane" (Appellee's Brief, p. 4), but have not for almost 20 years. See p. 27 of Appellant's Brief and Leslie App. 37-41. There is no evidence that Leslie "had dealing with . . . its Court's system." The Brief of Appellee ignores these facts.

Leslie and Terri resided at 45390 121st Street, Sisseton, SD 57262. That is not SWO reservation land. Contrary to the assertion at p. 5 of Appellee's Brief, Leslie never admitted that he was properly served with a Tribal Divorce Summons and Complaint as implied, he simply acknowledged he had received documents with these titles. See, e.g. Memorandum of Law in Opposition to Motion to Dismiss, p. 2. R 34. He did file a Tribal Court Motion to Dismiss, under SWO Tribal Code 21-14-02, Rule 17(b), by way of his attorney's special appearance, but he did not appear personally at the January 10, 2022 hearing on that motion. The Tribal Court Judge entered an order, Motion to Dismiss Denied, also on January 10, 2022, which is replete with factual errors. See p10, *infra*. The ruling was that the SWO Tribal Court had jurisdiction, and that Leslie was properly served with the Tribal Court Divorce Summons and Complaint, but for the reasons stated above, in

the Appellant's Brief, and as follows, this determination was factually incorrect and legally defective.

On November 10, 2022, Leslie's attorney did deliver a State Court Summons and Complaint to the Roberts County Sheriff, but the Sheriff failed and refused to properly serve those pleadings, in an obvious effort to make sure that Terri's case remained in Tribal Court. The pleadings were eventually served by a private citizen. R6.

The Circuit Court for Roberts County did grant Terri's Motion to Dismiss the Circuit Court divorce, but Leslie did not fail to propose Findings of Fact and Conclusions of Law because he was never given an opportunity to do so. The divorce trial was, in fact, held at the SWO Tribal Court on July 19, 2022. As stated at Appellee's Brief, p. 6, Leslie did not appear, and his attorney only appeared specially. Leslie did not submit exhibits to be used at this trial, as asserted in Appellee's Brief. See Affidavit of Craig O. Ash, ¶ 13. It is unclear from the record whether Leslie failed to properly appeal the Tribal Court Judgment and Decree of Divorce. The Order Denying Appeal cites Tribal Code 21-14-02 Rule 39(c) for the appeal deadline of 20 days from the August 2, 2022 Judgment and Decree of Divorce, Terri App. 41, and states it was received by email on August 26, 2022, Terri App. 42. But, the Notice of Appeal is dated August 22, 2022 and served on opposing counsel that day. Terri Ap. 39-40. The record does not disclose whether there was a four-day delay between service and filing, or whether there was an error at the Tribal Court.

## **REPLY TO APPELLEE'S ARGUMENT**

The Standard of Review section at pp. 6-7 of Appellee's Brief is wrong. Because Terri failed to comply with SDCL 15-6-52(a) by serving proposed Findings of Fact and Conclusions of Law on Leslie's counsel, he had no opportunity to object. Counsel for Leslie received the Notice of Entry of Order of Court Dismissing Action with Prejudice by mail on or about June 18, 2022. He did not receive the Notice of Entry from Odyssey File & Serve as indicated in the Certificate of Service. See Exhibit B attached to the Craig Ash Affidavit.

On July 6, 2022, when preparing to file the notice of appeal, he discovered on the e-Courts system that there was a document entitled "Findings of Fact and Conclusions of Law" on the docket. That was his first indication that there were Findings of Fact and Conclusions of Law proposed by Terri's counsel and entered by the Court. On July 8, 2022, he sent an email to Terri's Counsel informing him that no proposed Findings of Fact and Conclusions of Law had been served on him. Exhibit C to Ash Affidavit.

### **I. The Trial Court's Findings of Fact Did Not Support Its Conclusions of Law.**

The trial court entered Findings of Fact and Conclusions of Law on June 5, 2022, 14 days after the hearing. R 66. The record does not show when Terri sent her proposed Findings of Fact and Conclusions of Law to the Court, so it is impossible to conclude that there was compliance with SDCL 15-5-52(a), even if the Ash Affidavit is not considered. There is no document in the Clerk's Certified Record showing that proposed findings and conclusions were served upon Leslie's counsel at any time. SDCL 15-6-52(a) requires, in pertinent part, that:

The court may not sign any findings therein prior to the expiration of five days after service of the proposed findings

during which time the parties may in writing submit to the court and serve on their adversaries their objections or additional proposals. Thereafter the court shall make or enter such findings and conclusions as may be proper.

SDCL 15-6-52(a). There was no compliance with this statute.

Finding of Fact No. 1 correctly states that “Terri is a resident of Roberts County, South Dakota,” but the following part of the finding about residing within the original boundaries of the reservation is meaningless. *DeCoteau*, supra. Finding of Fact No. 2 correctly states she is an enrolled member of the SWO Tribe. Regarding Leslie, the first part of Finding of Fact No. 3 is correct, but the second half of the finding is meaningless under *DeCoteau*. Findings of Fact No. 4, 5, 8, 10, 11, and 13 are true.

Finding of Fact No. 6 is true, but the Dakota Sioux Fuel Business has not been in operation since 2004 when it was administratively dissolved. Leslie App. 37-41. There is no evidence in the record that Leslie has “had dealing with the Sisseton Wahpeton Oyate and its Court system,” whatever that imprecise language is supposed to mean. If this is intended to mean that if a non-member of the tribe once engaged in business with the tribe that he is for his lifetime subject to tribal court jurisdiction, Terri has cited no authority for this remarkable proposition, and so has waived that argument. There is absolutely no evidence of Leslie’s “dealing” with the SWO Court system.

Finding of Fact No. 7 implies that Leslie admitted he was served with a valid tribal Summons, which is not true, due to Tribal Code Sections 34-23-02 and 21-14-02 Rule 2(c); he did admit he received the papers entitled “Summons and Complaint”. Leslie filed, by special appearance, a motion to Dismiss the Tribal Court divorce matter. Terri App. 1. Leslie did not appear personally at the January 10, 2022 hearing and his attorney only appeared specially, contrary to Finding of Fact No. 9. This finding is clearly contradicted by

the Tribal Court Motion to Dismiss Denied: “The legal representatives of both parties were present, but the Plaintiff and Defendant did not attend.” Terri App. 4. Findings of Fact 9 is clearly erroneous.

Finding of Fact No. 14 is true about when Terri was served with the State Court divorce, but not that “The Tribal Court had already obtained jurisdiction over the parties and the action for the divorce.” That jurisdictional matter is, in any case, a conclusion of law, and fully reviewable. The same applies to Findings of Fact Nos. 15 and 16, as noted in Finding of Fact No. 17. SWO Code 34-17-01 does not authorize jurisdiction over Leslie, a non-tribal member not living on reservation land, nor committing any acts within the reservation.

Therefore, the Findings of Fact do not support the Conclusions of Law, as follows, with the following paragraph’s numbered to correspond to the numbered Conclusions of Law at R 68:

1. Both court systems, in theory, have concurrent subject matter jurisdiction over certain divorce actions, but not for these facts.
2. This is disputed, when only one of the parties is a tribal member, and the other party is not a tribal member, has never lived on the SWO reservation, is not engaged in any commerce on the reservation, and has committed no tortious acts while on the reservation. Terri paints with too broad of a brush when arguing concurrent jurisdiction, by tribal and state courts, over this divorce. In the May 23, 2022 hearing in Circuit Court, Terri’s counsel refers to “*Harris v. Young, Wells v. Wells, Langdeau v. Langdeau*, which is a 2008 case, the *Sage* case” as uniformly establishing concurrent jurisdiction. Leslie App. 4. *Sage v. Sicangu Oyate, Inc.*, 473 N.W.2d 480, 483 (SD 1991) involved an employment



grievance against the school by a non-member principal of a tribal school; there was no State Court subject matter jurisdiction due to federal preemption. The State Court had no jurisdiction. *Harris v. Young*, 473 N.W.2d 141, 145, 148 (SD 1991) held there was concurrent jurisdiction where the Indian mother and daughters lived on the reservation, for a petition by non-Indian father, who did not reside on the reservation, to modify custody provisions. *Harris* held the State Court also had jurisdiction due to the Tribal Court's lack of personal and subject matter jurisdiction. *Harris* relied upon *Wells v. Wells*, 451 N.W.2d 402 (SD 1990) which is also clearly distinguishable from the Torgerson case. In *Wells*, both parties were enrolled tribal members, but the wife moved from the Crow Creek Reservation to Rapid City. *Id.* at 402-403. Therefore, "when an Indian leaves the reservation and establishes a new domicile, a situation significantly different than *Lee* arises".<sup>1</sup> *Id.* at 405. In *Torgerson*, both parties lived outside the reservation throughout their marriage, and still do. Finally, *Langdeau v. Langdeau*, 2008 SD 44, ¶ 22, 751, N.W.2d 722, 730, determined that the Circuit Court could not refuse to hear the divorce case when the wife was a non-tribal member who did not live on the reservation. There is not always concurrent jurisdiction; it depends on the facts, which here point to no tribal court subject matter jurisdiction over Leslie for the divorce case.

3. This is not correct, because the tribal court did not first obtain valid personal jurisdiction over Leslie, for the reasons stated for Findings of Fact Nos. 1, 3, 6, 7, 14, 15, and 16. The trial court referred to "several irregularities" App. Pp. 3-4, but a Summons not complying in two respects with the Tribal Code is not a mere irregularity.

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<sup>1</sup> This refers to *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959). The State of South Dakota acquired an interest in the divorce when Mrs. Wells moved to Rapid City.

4. This is an error of law, given *DeCoteau*, and *In re J.D.M.C.*, 2007 SD 97, 739, N.W.2d 796.

5. and 7. These are errors of law, for the reasons stated regarding Findings of Fact 1, 3, 6, 7, 14, 15, and 16.

6. This Court is not bound to recognize “the tribal court’s determination of its own jurisdiction,” even when that determination was legally flawed. This flies in the face of SDCL 1-1-25, discussed at pp. 11-13. “The mere issuance of an order by a Tribal Court judge, however, does not by itself mean all formalities of the judicial process were valid.” *In re Estate of Colombe*, 2016 SD 62 ¶ 25, 885 N.W.2d 350, 357. Full faith and credit is only afforded to judicial proceedings in Tribal Court which have been fully and fairly litigated. That did not happen here, because Leslie did not participate in the divorce trial, only appeared specially through his attorney, and presented no evidence, due to the tribal court’s lack of personal and subject matter jurisdiction.

## **II. Leslie Is Not Collaterally Estopped from Attacking a Final Judgment on Jurisdictional Grounds.**

### **A. Not Fully and Fairly Litigated / No Res Judicata.**

Leslie is not collaterally estopped from attacking the Tribal Court’s judgment, as claimed at Appellee’s Brief, p. 13. The matter was not fully and fairly litigated; Leslie only appeared specially, and only through his attorney, to object to jurisdiction. To now say he cannot attack the Tribal Court’s ruling regarding the jurisdiction would mean a non-member of a tribe could never contest being hailed into Tribal Court. Full faith and credit only applies to a Tribal Court judgment so long as the Tribal Court has jurisdiction over the parties and the subject matter. “An issue regarding jurisdiction is a question of law

reviewed do novo. [citations omitted]. [W]e afford no deference to the conclusions reached by the trial court.” *In re J.D.M.C.*, 2007 SD 97, ¶ 7, 739 N.W.2d 796, 799.

Like Leslie, the father in *In re J.D.M.C.* was a non-resident, non-tribal member who never domiciled or resided on the reservation:

As indicated above, the tribe lacked personal jurisdiction over Father. Therefore, neither full faith and credit nor comity should have been granted to the Tribal Court order.

*In re J.D.M.C.*, 2007 SD 97 at ¶ 48, 739 N.W.2d at 813.

The tribal judge did not enter “a thoughtful written decision considering whether the Tribal Court had subject matter and personal jurisdiction.” Appellee’s Brief, p. 16. The hearing was on January 10, 2022. A one-page order was entered the same day. Leslie App. 28. It states Leslie “resides within the boundaries of the Lake Traverse Reservation.” *Id.* That is undeniably false. Then it states that Leslie “is employed by a Tribal entity.” *Id.* That is not only false, but one struggles with the written record to discern where that could have been stated. It was not. Finally, the order states “The Defendant was served in a manner consistent with the Tribal Court service process.” *Id.* The Tribal Judge ignored her own Tribal Code in making this finding, which is actually a conclusion of law. “We have previously examined whether tribal courts have satisfied tribal law on a number of occasions for purposes of comity determinations.” *In re Estate of Colombe*, 2016 SD 62, ¶ 25, 885 N.W.2d 350, 357. The same examination needs to be made here. In *Colombe*, a comity review was performed by the Circuit Court. That was not done in this case.

Res judicata should not be applied in this case, because (1) the Tribal Court order was not a final judgment on the merits; (2) the question decided in the January 10, 2022 proceeding was not the same as the one decided, or what should have been decided in the

May 23, 2022 proceeding, namely comity under SDCL 1-1-25(1); and (3) there was not a full and fair opportunity to litigate the issues on January 10, 2022.

### **B. No Failure to Exhaust Legal Remedies.**

The lack of personal and subject matter jurisdiction has been discussed at length in this brief. “Exhaustion [of remedies] is not required where the agency does not have jurisdiction over the subject matter of parties.” *S. Dakota Bd. Of Regents v. Heege*, 428 N.W.2d 535, 539 (SD 1988). The meager record of the Tribal Court proceedings prevents, in any case, the application of the exhaustion rules.

### **III. Trial Court Did Not Make a Comity Finding or Ruling.**

State law defines when an order or judgment of a tribal court may be recognized in the state. The first compelling principal of this law is that a tribal court order or judgment *may* be recognized if five criteria are all met, not that a tribal court order or judgment must be recognized unless certain criteria exists:

- (1) Before a state court may consider recognizing a tribal court order or judgment *the party seeking recognition shall establish by clear and convincing evidence* that:
  - (a) The tribal court had jurisdiction over both the subject matter and the parties;
  - (b) The order or judgment was not fraudulently obtained;
  - (c) The order or judgment was obtained by a process that assures the requisites of an impartial administration of justice including but not limited to due notice and a hearing;
  - (d) The order or judgment complies with the laws, ordinances and regulations of the jurisdiction from which it was obtained; *and*
  - (e) The order or judgment does not contravene the public policy of the State of South Dakota.

(2) *If a court is satisfied that all of the foregoing conditions exist, the court may recognize the tribal court order or judgment in any of the following circumstances:*

(a) In any child custody or domestic relations case; or

.....

SDCL 1-1-25. There is no territorial jurisdiction because Leslie and Terri spent their entire married lives living off the reservation. There is no subject matter or personal jurisdiction. This statute is undeniably conjunctive. The standard of proof is clear and convincing evidence.

When SDCL 1-1-25 was promulgated in 1986, the legislature acted within the confines of existing law. The standard of proof was adopted knowingly:

The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'

*Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323 (1979)

(quoting in *Santosky v. Kramer*, 455 U.S. 745, 755-6, 102 S.Ct. 1388, 1295, 71 L. Ed.2d 599 (1982)). *Santosky* discusses the societal judgments about the risk of error between litigants complicit in the burdens of preponderance of the evidence and beyond a reasonable doubt, comparing the importance of interests involved. *Id.* The midpoint clear and convincing evidence standard of proof "adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process." *Santosky*, 455 U.S. at 669, 102 S.Ct. at 1403.

Terri "must first clearly and convincingly establish that the Tribal Court had jurisdiction over both the subject matter and the parties." *Red Fox v. Hettich*, 494 N.W. 2d 638, 642 (SD 1993). The Circuit Court did not perform a comity analysis, did not apply any

standard of proof, and certainly did not require that all five criteria of SDCL 1-1-25(1) be proven by clear and convincing evidence. This means that the evidence must “clearly and convincingly establish,” that all five criteria are met. *Engresser v. Young*, 2014 S.D. 81, ¶ 28, 856 N.W.2d 471, 481. This did not happen and was not even attempted.

When the trial court announced its decision at the May 23, 2022 hearing, it did not explicitly address any of the five factors in SDCL 1-1-25(1), made no findings about those criteria, and certainly not by clear and convincing evidence. Subsection (a) may have been obliquely addressed by the comment that “although there may have been some irregularities, the action was properly initiated in Tribal Court,” App. pp. 3-4, but subsections (b)-(e) were not addressed. The party seeking recognition of the Tribal Court order must first establish that the Tribal Court order complies with SDCL 1-1-25. *First National Bank of Phillip v. Temple*, 2002 SD 36, ¶ 16, 642 N.W.2d 197, 203; *Wells v. Wells*, 451 N.W.2d 402, 403 (SD 1990). This, Terri did not do. She offered no testimony, and no evidence. Her attorney did not mention SDCL 1-1-25, Leslie App. 1-15, but Leslie’s did. Leslie App. 7.

#### **A. Personal Jurisdiction.**

There was no personal jurisdiction in Tribal Court over Leslie because he was not served with a proper Summons. Leslie App. 24. This “Summons-Divorce” document would be a standard South Dakota divorce summons before the advent of the required Temporary Restraining Order language. It does not comply with the Tribal Code. See Part IV below. In addition, Leslie did not have sufficient minimum contacts with the SWO Tribe to allow for personal jurisdiction:

More in the way of “minimum contacts” is required for a tribal court to exercise Long-arm jurisdiction over a non-Indian “than would be sufficient for the citizen of one state to assert personal jurisdiction over the citizen of another state.” *Babbitt*

*Ford, Inc. v. Navajo Indian Tribe*, 519 F.Supp. 418, 431 (Ariz. 1981) *aff'd in part, rev. in part on different grounds*.

*Red Fox v. Hettich*, 494 N.W.2d 638, 645 (SD 1993).

**B. Subject Matter Jurisdiction.**

Leslie never lived on the SWO reservation, did not work there, was not conducting any business there, and committed no tortious conduct there. During their entire marriage, Leslie and Terri were domiciled off the reservation. Simply marrying a tribal member, without more, cannot give the Tribal Court subject matter jurisdiction over a non-member.

*Red Fox v. Hettich*, 494 N.W.2d at 647.

**IV. Tribal Court Divorce Proceeding Was Not First Properly Commenced.**

This argument has already been addressed in this Reply Brief. The tribal divorce action was not properly commenced in Tribal Court for failure to follow procedural requirements under Tribal Code sections 34-23-02, and Section 21-14-02 Rule 2(c). The Tribal Code requires that the Clerk issue a Summons for service containing a concise statement of the grounds alleged for divorce. The Summons issued in this case did not comply with SWO Tribal Code, in that it was not issued by the Clerk and did not contain a concise statement of the grounds for divorce. Leslie App. p. 24.

**CONCLUSION**

The total failure to comply with SDCL 1-1-25 is sufficient reason, by itself, to reverse and remand this case. It should also be reversed and remanded because the Tribal Court lacked personal and subject matter jurisdiction.

**REQUEST FOR ORAL ARGUMENT**

The Appellant respectfully requests oral argument of twenty (20) minutes.

Dated this 5<sup>th</sup> Day of December, 2022.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 5th day of December, 2022, a true and correct copy of the foregoing Appellant's Reply Brief was served via Odyssey File & Serve upon the following:

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## CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b), I hereby certify that this brief complies with the requirements as set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word and contains 4,947. I have relied on the word count of a word-processing program to prepare this certificate.

Dated this 5<sup>th</sup> Day of December, 2022.

/s/ Thomas K. Wilka

Thomas K. Wilka