CITIZENS STATE BANK,
Plaintiff, Appellant,
vs.
ROSELINA TOM & ERNEST HOUSE,
Defendants, Appellees.

SWITCA No. 98-006-UMU
No. CV-960087

Chief Magistrate Leigh Meigs, Judge
Todd M. Starr, Attorney for Appellant
Arthur Jacobs, Attorney for Apellee Roselina Tom
Jeffrey Craig, Attorney for Appellee Ernest House

Appellate Panel: Rodgers, Abeita, Barnhouse

SUMMARY

The appellant's notice of private sale of a vehicle repossessed from appellees after they failed to make contractual payments was reasonable and therefore sufficient to meet statutory requirements when the original sale was called off and a second private sale at a date later then that stated in the notice was held. Reversed and remanded.

OPINION AND ORDER

Citizens State Bank ("Bank") appeals, and Defendants Roselina Tom ("Tom") and Ernest House ("House") cross appeal a final judgment entered by the Ute Mountain Ute Court.

The issues raised by the Bank on appeal are:

1. Whether the trial court erred in its application of the Uniform Commercial Code when it determined:
   a. that proper notice was not given prior to a private sale of collateral; and
   b. that the plaintiff had not presented evidence as to the value of the vehicle at the time of the sale which precluded plaintiff from receiving a deficiency judgment; and
2. Whether the trial court erred when it declined to enter default judgment in favor of the Bank.

The issues raised by Ms. Tom and Mr. House on appeal are whether the trial court erred in not awarding the statutory penalty to the defendants and whether the trial court erred in not awarding defendants their attorneys fees.

Because we hold that proper notice was given prior to the private sale, we reverse the trial court on that issue. Our ruling in the Bank's favor on that issue makes it unnecessary for us to address the other issues raised on appeal.

SCOPE OF REVIEW AND APPLICABLE LAW

The jurisdiction of this Court is set out in the Code of Federal Regulations:

> The jurisdiction of the appellate division shall extend to all appeals from final orders and judgments of the trial division, by any party except the prosecution in a criminal case where there has been a jury verdict. The appellate division shall review all issues of law presented to it which arose in the case, but shall not reverse the trial division decision unless the legal error committed affected a substantial right of a party or the outcome of the case.

This CFR provision limits this court's review to issues of law and the law that the panel can consider. 25 C.F.R. §11.500(c). As the parties recognized, and as confirmed by the trial court, the law applicable to this case is the law of Colorado.

FACTS AND DISCUSSION

On November 14, 1995, defendant Roselina ("Ms. Tom") and the Bank entered into a loan agreement. The amount financed was $10,377.01. Ms. Tom used her 1989 Oldsmobile as collateral for the loan. Defendant Ernest House ("Mr. House") consigned the loan.

Ms. Tom failed to make all payments as due on the loan, and consented to the Bank repossessing the collateral. The Bank took possession of the collateral in February 1997.

Two notices were sent to the defendants, a notice of right to cure dated June 13, 1996 and a notice of private sale of collateral dated April 7, 1997. The trial court found that both notices were mailed on or about the date set out on the notices and that both notices were received by Ms. Tom and Mr. House within several days of mailing. The Bank solicited bids on the vehicle it repossessed from Ms. Tom by placing ads in a local paper on April 10, 17, and 24, 1997. The deadline for submitting bids was April 27, 1997. The Bank received one bid of $525.00, which the Bank felt was too low. On May 19, 1997, no sale had been completed, and the trial court granted an extension of the 90 day period "in which to conform to the Uniform Commercial Code requiring creditors to either dispose of the collateral in a commercially reasonable manner or accept it in lieu of the debt." The Bank sold the vehicle on July 19, 1997 after soliciting a second offer on the vehicle for $550.00.

It is undisputed that no additional notice was given by the Bank. The trial court held that the Bank failed to give reasonable notice of the private sale, basing its finding on its determination that the April 7, 1997 notice "became moot when the sale date contemplated therein did not materialize. The notice was rendered moot when

the bank rejected the one bid made in response to the advertised notice of private sale, abandoned that sale, and motioned the court for an extension, which was granted on May 19, 1997."

Defendants have provided a significant amount of authority from jurisdictions outside Colorado for the proposition that the notice in this case is deficient. Although the reasoning of those courts is compelling, this court is bound on appeal of this case to follow the law of Colorado in the absence of written tribal ordinance or customs to the contrary. 25 C.F.R. §11.500(c). The Colorado Court of Appeals was presented with a very similar set of facts in *Western National Bank vs. V.F.W. Post* 103, 660 P.2d 919 (Colo. App. 1983). In that case, the creditor had sent a letter to the debtors notifying them that if they did not pay off their loan by a certain date, the creditor would sell the collateral. The Colorado Court of Appeals held that the notice given by Western National Bank sufficiently informed the debtors that the bank had opted to use a private sale. The court held that the statutory notice requirement is fulfilled when the creditor sends "reasonable notification stating the date after which the collateral will be sold."

Notice in the case before this Court consisted both of a letter sent to the defendants and an enclosure to that letter entitled "notice of private sale." The letter sent to defendants references the enclosed notice, "wherein the Bank gives notice of Sale of your 1989 Olds at 9:00 a.m. on April 28th." The enclosed notice states only that bids will be accepted through midnight April 27th, 1997, and "will be opened on April 28, 1997 9:00 a.m." The bank reserved the right to accept or reject all bids.

The Bank also filed and served on defendants a motion to confirm sale which included confirmation of the Bank's intent to sell the collateral at a private sale. The order sought by the Bank in that motion was not opposed by the defendants, and the lower court granted the motion on May 19, 1997.

Applying the holding of the Colorado Court of Appeals in *Western National Bank* to the facts as found by the trial court, we hold that the defendants received reasonable notification stating the date after which the collateral would be sold, and that the notice sufficiently informed the defendants that the Bank opted to use a private proceeding. We therefore reverse the trial court holding that notice was insufficient.

Ernest House also argued to the trial court that the Bank had breached its contractual obligations by failing to mail notice to the address required in the agreement. House's response to Plaintiff's argument at 4. The trial court rejected the argument and that ruling was not challenged on appeal. However, House raises on appeal the argument that the Bank breached its contract with the defendants because the loan agreement required the bank to, "provide reasonable notification of the time and place of any sale or intended disposition." House's response brief at 7. The Uniform Commercial Code provides minimum requirements that must be met by a creditor. Parties can agree upon greater rights than provided by the Uniform Commercial Code. However, this argument was not presented to the Trial Court and therefore will not be considered by this Court on appeal.

Because this Court rules in favor of the Bank on the issue of notice, we need not reach the other issues raised on appeal.

CONCLUSION

It is the order of this Court that the lower court's decision is reversed on the issue of notice given prior to the private sale of collateral; and

It is further ordered remanding the case to the trial court for entry of an order consistent with this opinion.

IT IS SO ORDERED.

Dated: September 8, 2000

CITIZENS STATE BANK,
Plaintiff, Appellant.
vs.
ROSELINA TOM & ERNEST HOUSE,
Defendants, Appellees.

SWITCA No. 98-006-UMU
UMU No. CV-960087

Chief Magistrate Leigh Meigs, Judge
Todd M. Starr, Attorney for Appellant
Arthur Jacobs, Attorney for Apellee Roselina Tom
Jeffrey Craig, Attorney for Appellee Ernest House

Appellate Panel: Barnhouse, Rodgers, Abeita

SUMMARY

The petition for rehearing was denied.

ORDER

THIS MATTER comes before the Ute Mountain Ute Court of Appeals on the petition for rehearing filed by appellees seeking reversal or a rehearing of this Court's final opinion and order issued on September 8, 2000, reversing the tribal court and remanding to that court for entry of an order consistent with this Court's opinion that the notice of the sale of a vehicle was lawful.

The standard to be used by this Court for rehearing is set out in rule 40 of the Federal Rules of Appellate Procedure. The language in rule 40 does not provide guidance to this Court on the standard of review to be

applied. However, the federal Tenth Circuit's rules do provide language regarding the standard of review:

> a petition for rehearing should not be filed routinely. Rehearing will be granted only if a significant issue has been overlooked or misconstrued by the court. 10th Cir. R.40.1 (A).

After reviewing the petition, this Court finds that it presents no new or compelling argument, nor does it show this Court where it misconstrued or overlooked a significant issue and we find that the petition should be denied.

In its opinion, this Court found that the contract in question required that New Mexico law apply. New Mexico law, in turn, applies the law and authority of Colorado regarding notice of sales of repossessed vehicles. This Court then found that the sale of the vehicle in question complied with Colorado's law. Petitioners-appellees claim that Montana authority should apply to this matter. It is their burden to show Colorado authority for the proposition that Montana authority applies in this case. They have not done so and this Court will not assume that burden.

Appellees focus on the wording of the letter which accompanied the notice of sale, but do not address the fact that the notice, the legal document, does not state the date of sale with certainty. Appellees received notice of the sale and made no attempt to cure the deficiency, either by the date set out in the letter or thereafter until appellant sought a deficiency judgment. Only after appellant attempted to collect the deficiency owed on the vehicle did appellee raise the claimed notice failure. We found that the appellee received adequate notice. Appellees do not provide compelling argument to find differently now. The petition is hereby denied.

IT IS SO ORDERED.

Dated: November, 14, 2000

AMERICAN CHECK ADVANCE AND TITLE LOAN, Plaintiff-Appellant,
vs.
FERNANDA ROOT, Defendant-Appellee.

SWITCA No. 99-004-UMU
UMU No. MD-1999-0000007

Chief Magistrate Roger Candelaria, Judge
Margaret N. Webb, Attorney for Apellees
American Check Advance and Title Loan, Appellant *Pro Se*

Appellate Panel: Barnhouse, Abeita, Rodgers

SUMMARY

Construing pleadings based on substance, not simply on the title of a document, the Court rules that the tribal court had subject matter and personal jurisdiction under the Code of Federal Regulations to hear appellee's "complaint" because it was an action to enforce the court's judgment in the non-Indian appellant's original action in which it submitted itself to tribal jurisdiction; appellant did not appeal the trial court's determination that it had no security interest in appellee's vehicle and the original determination giving full faith and credit to the tribal court's decision is binding upon the parties, since New Mexico law is controlling under appellant's contract form; appellant cannot now raise issues decided by the trial court in its original action which it did not appeal within the time limits allowed. Affirmed.

OPINION AND ORDER

The American Check Advance and Title Loan ("American Check") brings this appeal of an order entered by the Ute Mountain Ute Court on May 12, 1999. The issues on appeal are:

1. Whether the Court of Indian Offenses has subject matter jurisdiction over a non-Indian who brings an action in tribal court;
2. Whether a Court of Indian Offenses has subject matter jurisdiction to enter orders against a non-Indian to enforce a prior judgment;
3. Whether the Ute Mountain Ute court had personal jurisdiction over American Check;
4. Whether an earlier order of the Ute Mountain Ute court holding that American Check had not perfected its lien on the vehicle was binding on American Check in other jurisdictions; and
5. Whether American Check's failure to timely appeal the court's October 12, 1999, order regarding American Check's failure to perfect its lien barred American Check from raising these issues on appeal of the court's May 12, 1999, order.

Because we find that (1) subject matter jurisdiction exists, (2) the court did have personal jurisdiction over American Check, (3) the court's order was entitled to full faith and credit, and (4) American Check did not timely appeal the underlying issue of its failure to perfect the lien, we affirm the lower court's order.

FACTS

The facts of this case do not appear to be in dispute. The defendant-appellee, Fernanda Root ("Root"), owned a 1989 GMC pick-up truck together with Thomas House, Jr. On or about June 18, 1998, Root borrowed One

Thousand, Seven Hundred Dollars ($1,700.00) from American Check, signing a loan agreement which required her to pay Two Thousand, Forty Dollars ($2,400.00) one month later and which purported to grant a security interest pursuant to New Mexico law in the 1989 pick-up. The vehicle was titled in Colorado, but the loan agreement required application of New Mexico law. American Check obtained a New Mexico title for the vehicle showing American Check as the first lien holder. Root did not pay the total amount due under the loan.

In an attempt to collect on its security interest in the vehicle while it was on the Ute Mountain Ute Reservation, American Check sought an order from the Ute Mountain Ute Court allowing it to repossess the truck, in the process, submitting to the personal jurisdiction of the Ute Mountain Ute Court. On October 20, 1998, the court entered an order holding that it could not issue an order requiring transfer of possession of the truck to American Check. However, the court granted American Check additional time, until October 27, 1998, to furnish law to the contrary, "absent which [the] case shall be closed unless a stipulation or other pleading is filed."

On October 27, 1998, the trial court issued an order after a hearing, finding that American Check had not perfected its lien on the title of the vehicle, had no valid court order entitling it to possession and had not established an entitlement to possession of Thomas House, Jr.'s undivided half interest in the vehicle. American Check did not appeal. The court's order disposed of all issues and therefore was an appealable final order pursuant to SWITCARA 3(D). ("The court of appeals may review any final judgment, order, or commitment having the effect of ending litigation and requiring nothing more than execution of the judgment." See *Fielding v. Arcadia Financial Limited*, 9 SWITCA Rep. 26 (Hualapai Nation 1998).

The parties took no further action until December 12, 1998, when American Check attempted repossession of the vehicle in New Mexico, but was unsuccessful. That same day Root drove to Durango, Colorado, where American Check repossessed the truck. Root filed an incident report with the tribal police which was forwarded to the court. Root filed an affidavit with the court on December 17, 1998.

On December 14, 1998, American Check issued a notice of intent to sell and right to redeem indicating that the truck would be sold on December 24, 1998. On December 22, 1998, American Check was contacted and told that a hearing was scheduled on December 23, 1998, in Ute Mountain Ute Court regarding the repossession of the vehicle. On December 23, 1998, American Check filed a notice with the Ute Mountain Ute Court indicating that it would not appear in the matter. That same day, Root filed a motion for temporary restraining order and a document captioned "verified complaint." Both were filed in the original action filed by American Check and listed American Check as the petitioner, Root as the defendant, and had the same case number as the original action filed by American Check. The trial court issued a restraining order on December 23, 1998, and scheduled a hearing for January 19, 1999, on Root's request for a preliminary injunction.

At the hearing on January 19, 1999, both parties were ordered by the court to submit briefs on issues before the court, which both parties did. A trial on Root's "complaint" was held in April 1999. On May 12, 1999, the court entered judgment in favor of Root, from which this appeal was taken.

DISCUSSION

Issues 1 and 2. Subject Matter Jurisdiction.

The Ute Mountain Ute Tribal Court and this Appellate Court are known as Courts of Indian Offenses, created by Congress pursuant to its plenary power in the area of Indian affairs. 25 CFR. This court cannot look solely to tribal law to determine its subject matter jurisdiction because federal regulations limit the scope of this court's subject matter jurisdiction. These regulations are found in 25 CFR. §11. The civil jurisdiction of the CFR courts is limited:

> Except as otherwise provided in this title, each Court of Indian Offenses shall have jurisdiction over any civil action arising within the territorial jurisdiction of the court in which the defendant is an Indian and of all other suits between Indians and non-Indians which are brought before the court by stipulation of the parties.

25 CFR § 11.103(a).

Appellant American Check argues that this regulation bars the tribal court (and this Court) from ruling in this matter because it did not have subject matter jurisdiction to hear Root's "complaint". The court disagrees and holds that the trial court did have subject matter jurisdiction to issue the orders entered in this case.

While the general rule is that laws setting out the authority of courts of limited jurisdiction, such as this court, should be narrowly construed, special rules of construction and interpretation apply to federal statutes and regulations in light of the federal trust responsibility owed to tribes. *United States ex rel. Hualapai Indians v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941). All ambiguities must be interpreted in favor of the Indian tribe and its powers. *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976). This regulation clearly gives the court subject matter jurisdiction to hear any civil action "in which the defendant is an Indian." Appellee appears to take the position that the next phrase constitutes a limit on this phrase. At best, exactly what is

meant is ambiguous. The second phrase refers to "all **other** suits between Indians and non-Indians which are brought before the court by stipulation of the parties." [Emphasis added.] Based upon the applicable rules of statutory construction, this ambiguity must be construed in favor of the both the tribal member defendant and the tribe's authority. Therefore, the court holds that § 11.103(a) gives the trial court the power to hear any and all cases where the defendants are Indians without regard to the political status of the plaintiffs.

This particular action was initially filed by American Check against Root, a member of the Ute Mountain Ute Tribe, seeking a court order permitting American Check to repossess Root's truck. American Check argued that it had a perfected security interest in the vehicle as collateral for a loan to Root, that Root had not made the necessary payments. After a hearing on the merits, the court determined that American Check did not have a valid security interest in the truck and denied the repossession order. American Check did not appeal that tribal court decision, but ignored it instead, eventually taking the truck from a store parking lot while Root was shopping.

In determining what took place in the lower court, pleadings must be construed based on substance, not the title of the document. American Check argues that the trial court did not have subject matter jurisdiction to hear this further motion, suggesting that it is a totally separate action filed by Root against them. There is a shred of support for this position in that the papers are entitled "complaint". In substance, however, the papers merely asked the court to enforce its previous judgment. Appellant ignores the fact that any court has the power to enforce its own judgments and, if subject matter jurisdiction existed for entry of the judgment initially, it also exists to enforce that judgment. *McKee-Berger-Mansueto, Inc. v. Board of Education of City of Chicago*, 691 F.2d 828 (7th Cir. 1982), see, e.g. Federal Rules of Civil Procedure 69 and 70. While the trial court deemed the filing to be a counterclaim in that it did allege new damages claims against American Check, the essence was to enforce the previous determination of the court that American Check had not perfected security interest in the vehicle or otherwise proved a valid security interest and, therefore, could not take it from Root.

Therefore, the trial court had subject matter jurisdiction to enforce its previous judgment, even though American Check is not an "Indian" under governing federal regulations and case law. The fact that the trial court considered the filing to be the equivalent of a counterclaim rather than an enforcement motion is, at worst, harmless error.

Issue 3. The Lower Court Had Personal Jurisdiction Over American Check.

American Check sought relief in the Ute Mountain court and, in the process, subjected itself to the court's personal jurisdiction. It has been consistently held by courts throughout the United States that, once a party seeks affirmative relief from a court, the party has submitted itself to the court's personal jurisdiction for all matters relating to the relief sought. *Marchman v. NCNB Texas Nat. Bank*, 120 NM24, 898 P.2d 709 (1995); *Carrington v. Unsold*, 22 Kan. App. 2d 805, 923 P.2d 1052 (Ct.App. 1996). When American Check responded to Root's filing, alleging lack of personal jurisdiction, it was too late.

Issue 4. The Effect of the Tribal Court Order.

American Check sought and received a ruling from the lower court on October 20, 1999. It did not appeal or otherwise challenge that final order. American Check then sought to avoid the court's final order by using self-help procedures that, under certain circumstances, would have been legal in New Mexico (NMSA § 55-9-503) or Colorado's choice of law provision but for the Ute Mountain Ute Court's order disposing of the title issue. The Ute Mountain Ute Court, asked by American Check to consider the issue, held that American Check did not have a security interest in the vehicle. Therefore, American Check did not qualify as a secured party and could not use the self-help repossession remedies available to a secured party under state law.

That order was entitled to full faith and credit under New Mexico law, the law American Check's contract identifies as controlling. See *Jim v. CIT*, 87 NM 362, 533 P.2d 751 (1975); *Halwood v. Cowboy Auto Sales, Inc.*, 124 NM 77, 946 P.2d 1088 (Ct.App. 1997) *cert. denied* 125 NM 654, 964 P.2d 818 (1998). In other words, the ruling by the Ute Mountain Ute Court that American Check was not a secured party, left unchallenged by American Check, was binding on American Check not only on the Ute Mountain Ute reservation but, pursuant to New Mexico law, in New Mexico as well. This court is not aware of any opinions by Colorado's appellate courts regarding whether Colorado extends full faith and credits or comity to tribal court orders. However, the law of conflicts would look to New Mexico law in this situation. Therefore, we find the Ute Mountain Ute Court's unappealed judgment binding on American Check in Colorado as well.

Having ignored the Ute Mountain Ute Court's order, an order it had itself originally sought, American Check left itself subject to a challenge in Ute Mountain Ute Court by Root to enforce the original order. Root's December 23, 1999, filing, captioned as "complaint," was clearly an effort or motion to enforce the court's earlier judgment. Upon trial of that motion, the court entered factual findings and rulings of law, which are the subject of this appeal.

Issue 5. The Propriety of the Tribal Court's October 12, 1999, Ruling Is Not Subject to Review by This Court Now.

The Ute Mountain Ute Court entered an order on October 12, 1999, finding that American Check had not perfected its lien on the title of the vehicle. American Check did not appeal this order. Southwest Intertribal Court of Appeals Rule 10 requires that a notice of appeal be filed with the respective tribal court within thirty days of entry of judgment by that court. In the absence of a contradictory rule in the Ute Mountain Ute Court, this thirty-day limit applies. See *Gould v. Southern Ute Tribe,* 4 SWITCA Rep. 4 (Southern Ute Tribe 1993). Having failed to timely appeal the court's October 12, 1999, ruling, American Check cannot raise issues decided in that order on appeal now. Therefore, the October 12, 1999, ruling of the Ute Mountain Ute Court regarding American Check's failure to perfect an interest in the lien are binding upon the parties in the subsequent action.

CONCLUSION

Therefore, it is the order of this Court that, based on the above analysis, the lower court's decision should be, and hereby is, affirmed.

It is further ordered that, in light of the court's ability to reach a decision on the submitted briefs, American Check's motion for oral arguments should be, and hereby is, denied.

IT IS SO ORDERED.

Dated: June 2, 2000

In the Interests of Minor Children.

SWITCA No. 99-006-SUTC
SUTC Nos. 98-CU-02; 98-CU-03; 98-CU-04; 99-AP

Associate Judge Elizabeth Callard, Judge
Eleanor J. Guerrero, Attorney for Appellant Steve Burch
Blenda O. Burch, Appellee *Pro Se*

Appellate Judge: Melissa L. Koehn (Tatum)

SUMMARY

Appellant, a prisoner, cites numerous violations of due process in this divorce and child custody appeal, claiming that the trial court discovered the pending state divorce action through improper actions of the tribal judges, improper stipuations were made at a hearing, husband was not provided with notice that the divorce action was being transferred to and consolidated with the child custody matters pending in tribal court, and he was not allowed to present evidence regarding the nature and value of his property, all of which are found to be without merit. Affirmed.

OPINION

This matter comes before the Southwest Intertribal Court of Appeals from the Southern Ute Tribal Court, an arises out of a divorce and child custody matter decided by that court. Appellant (the husband) has appealed the lower court's July 20, 1999 divorce decree and property settlement, alleging multiple violations of due process.[1] For the following reasons, this Court concludes that appellant/husband's allegations are without merit. Therefore, this Court affirms the decision of the lower court and lifts the stay of execution of the judgment.

I. Factual Background

This case began when appellant/husband's sister filed a petition with the Southern Ute Tribal Court seeking custody of the three minor children. Apparently in response to that petition, as well as in response to the concerns underlying that petition, appellant/husband filed several motions with the trial court, including a motion seeking to proceed in forma pauperis, a motion to put the children's dividends into a trust account, and several discovery motions. After several continuances, a hearing was finally scheduled for July 14, 1998.

Before that hearing took place, Richard L. Emmett entered an appearance with the court on behalf of appellant/husband. Specifically, Emmett filed his appearance on June 12, 1998. That appearance also purported to be a request for discovery and a response to appellee/wife's motion for a protective order.

On June 30, 1998 (also before the hearing occurred), the trial court filed an order which sparked the chain of events underlying this appeal. In that order, the trial judge informed the parties that she had been told that appellee/wife had filed a divorce petition in La Plata County Court. The trial judge contacted the state court to confirm this information, obtained the case number of the state proceeding, and discovered that the state case had been assigned to Judge Greg Lyman. In her order, the trial judge expressed concern about the possibility of duplicative proceedings regarding custody matters, and also about potential jurisdictional problems. Accordingly, the trial judge changed the nature of the scheduled July 14 hearing and ordered the parties to address the jurisdictional issues. The record reflects that this order was served on Emmett as attorney for appellant/husband (lower court record, document 31). In addition, a review of the tape recording of the proceeding

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[1]The husband also attempted to appeal the lower court's custody decision, but for reasons articulated in this Court's jurisdictional order, those issues are not properly before the Court. Accordingly, this Cou has disregarded the portions of appellant/husband's brief alleging erro as to the custody proceeding, except when those allegations also impacted the divorce proceeding.

shows that Emmett appeared at the July 14 hearing and was an active participant in that hearing.

On July 14, 1998, appellee/wife filed two motions, one to recuse the tribal trial judge and one to dismiss the pending petition for custody, arguing that custody issues were properly decided as part of the state court divorce proceeding. At the July 14 hearing, the trial judge denied the motion to recuse herself and deferred ruling on the motion to dismiss until she first determined whether she had jurisdiction in the case. The parties also stipulated to a number of factual matters regarding residence and enrollment status of various people involved in the case. Finally, the court indicated that it would keep Judge Lyman informed of the status of the proceedings so that the two judges could confer on procedure in the event there turned out to be concurrent jurisdiction. The court also issued a written order on July 14 reaffirming and supplementing these rulings and stipulations. Due to time constraints, the court continued the matter for an evidentiary hearing on the jurisdictional issues. That continued hearing was scheduled for August 26, 1998.

The evidentiary hearing was held as scheduled, with Emmett appearing on behalf of appellant/husband. Emmett participated in the hearing, including examining witnesses. At the conclusion of the hearing, the court set a briefing schedule for the filing of simultaneous closing briefs. All parties agreed to proceed through briefs rather than oral closing arguments. On September 18, 1998, Emmett filed his closing brief, which stated that he had read the arguments submitted by the petitioner (appellant/husband's sister) and by appellee/wife, and that he concurred in the arguments made by the petitioner, and finally that he had no additional arguments to make on the subject of jurisdiction. Among petitioner Redbird's arguments was the contention that the state court lacked jurisdiction over the divorce proceeding.

On December 18, 1998, the trial court issued a brief order finding that it had jurisdiction over the case and that it would exercise its jurisdiction. The court also stated that a more complete order containing a full recitation of the facts and legal conclusions supporting its jurisdictional decision would be issued at a later date.

On January 8, 1999, the trial court issued an order scheduling a case management conference for January 14, 1999. Although notice of that conference was sent to Emmett, he did not appear at the hearing. Appellee/wife was present, as was petitioner Redbird and her attorney. By this point in the case, appellee/wife's attorney had withdrawn and she was proceeding *pro se*. The court raised the possibility of consolidating the divorce and custody proceedings, but appellee/wife opted not to do so at that time. She did, however, request that the court consider all custody matters, including those between appellee/wife and appellant/husband, as well as those between appellee/wife and petitioner Redbird. The court agreed to do so and set a hearing for April 6, 1999. The court reduced these agreements to writing in its order of February 13, 1999, which also included notice of the April 6 hearing. A copy of this order was sent to Emmett.

On February 12, 1999, the trial court entered its full written decision regarding jurisdiction. In that decision, the trial court held that it had both personal jurisdiction over the parties and subject matter jurisdiction over the custody dispute. The court also determined that it should exercise that jurisdiction and not defer to the La Plata County Court on custody issues. It is clear from the court's decision that the divorce matter was not yet before the trial court. A copy of this decision was served on Emmett.

On April 20, 1999, appellee/wife sent a letter to the tribal court that appeared to ask the tribal court to hear her divorce petition. On April 26, 1999, the trial court issued an order agreeing to hear the divorce petition and scheduling a hearing on that petition for June 8, 1999. The April 26 order also set forth the process for going forward with the divorce petition and property settlement, and also allowed for the possibility of appellant/husband attending the hearing via telephone. A copy of this order was hand delivered to Emmett by the court on April 27, 1999 (the tape recording of the June 8, 1999 hearing states that the document was given to Emmett at the counter by one of the court clerks when he came to court for another matter). On May 3, 1999, appellee/wife filed a list of marital property with the court, and a copy was mailed to Emmett on May 5.

At the June 8 hearing, Emmett appeared and explained to the court that he had not known about the hearing until that morning. Apparently he was at the courthouse on another matter when he noticed the hearing on the court schedule. Emmett claimed not to have any recollection of the documents relating to the divorce petition, including the original letter petition by appellee/wife, the trial court's April 26 order, and the list of marital property. He objected to the entry of any decree, contending that appellant/husband had not received proper notice. Appellee/wife objected to any delay, as she was the sole financial support for herself and her three kids. Every time she was required to come to court, she had to take time off without pay.

The trial court resolved this dilemma by striking a compromise. The court agreed to continue with the scheduled June 8 hearing and take evidence from the wife. The court also set June 22 as a day for additional testimony, with two requirements. First, the husband was to notify the court by June 18 if he wished to take part in the hearing by telephone (including providing testimony). This would allow the court sufficient time to make arrangements. Second, the husband was to deposit $51.36 in cash or money order with the court by June 18. This money was to cover the one-half day's salary the wife

would lose by coming to court again. Once the court established that procedure, the hearing continued. The wife presented her evidence regarding the divorce and division of marital property, and the record reveals that Emmett was present throughout the hearing.

On June 17, 1999, appellant/husband filed a motion with the trial court seeking a continuance of the June 22 hearing. In the motion, the husband stated that he had a previously scheduled obligation involving a pre-release program that would prohibit him from appearing at the hearing either in person or via telephone. The motion also alleged that the husband was unable to post the required money with the court,[2] that the husband had no prior knowledge of the divorce hearing, and that service of a letter upon the husband's attorney in a custody matter did not constitute proper notice. Finally, the husband stated that he had instructed his attorney not to participate in or attend any hearing regarding the divorce.

That same day, Emmett also filed a motion with the court seeking to withdraw as the husband's attorney. The court granted the motion on June 22, 1999. Also on June 22, one of the husband's relatives filed a written request for a copy of the divorce documents, so that the documents could be given to another attorney on the husband's behalf. The court approved the request that same day.

On June 24, 1999 (*nunc pro tunc* to June 22), the trial court entered its order denying the husband's motion to continue. In that order, the court also vacated the June 22 hearing and found that scheduling another hearing would serve no purpose, as the husband had declared his intention to refuse to appear unless personally served with a divorce petition. The court found that service of the wife's petition upon the husband's attorney was sufficient notice. Finally, the court explicitly found that "[i]t appears to the Court that the [husband's] request for a continuance on the issue of divorce is more for the purpose of delay and harassment of the [wife] than for a legitimate purpose in this litigation . . . ." Lower court record, document 101.

The same day the court issued its order, Eleanor J. Guerrero filed her appearance on the husband's behalf, reaffirmed the motion to continue, and argued that the court had improperly expanded a custody proceeding into a divorce action. The court denied this motion on July 2, 1999. In the July 2 order, the court reaffirmed that it was correct in consolidating the divorce and custody actions, and that the court had informed the parties as early as January 14, 1999, that it would permit the wife to join the divorce action upon her request. The wife chose not to do so at that time, but the court left the option open to her. Although appellant/husband and his attorney chose not to participate in the January 14 hearing, they were given notice of that hearing, and they were also given notice of what transpired at that hearing through the court's February 13, 1999 order.

On July 20, 1999, the trial court issued its order dissolving the marriage and dividing the marital property.

II. Legal Analysis

The Indian Civil Rights Act requires tribal courts to follow the dictates of due process. 25 U.S.C. §1302. In his appeal, appellant/husband alleges that the lower court committed several violations of due process throughout its handling of the divorce action and property settlement. Specifically, appellant/husband alleges:

1) The tribal court found out about the pending state court divorce action through improper actions on the part of both the Chief Judge of the Southern Ute Tribal Court and the trial judge assigned to this matter;

2) Improper stipulations were made at the July 14, 1998 hearing;

3) The husband was not provided with the required notice that the divorce action was being transferred to tribal court and consolidated with the child custody matters; and

4) The husband was not allowed to present evidence regarding the nature and value of his property.

This Court will address each of these allegations in turn.

A. Discovery of State Divorce Action

Appellant/husband alleges that the trial judge acted in a biased and improper manner, particularly as to how she discovered that appellee/wife had filed a divorce petition in La Plata County Court. The exact nature and factual basis for these allegations is not entirely clear, but appellant/husband seems to allege the trial judge was a former La Plata County judge and that she should have disclosed that fact, as well as her prior connections with Judge Lyman. Appellant/husband alleges that these actions violated both judicial canons of conduct and due process, and as a result, the trial judge should have recused herself.

The record contains no hint of impropriety. The trial judge made no attempt to hide this information or the fact that she had learned of the pending state court action. Instead, she notified all the parties that she had discovered this information and scheduled a hearing to discuss it. The record reflects that the trial judge was properly concerned about problems with jurisdiction and with the possibility of the two courts issuing inconsistent orders. It

[2]Despite the husband's personal inability to pay this money, the record reflects that the money was deposited with the court by one of the husband's relatives. The record also shows that this money was refunded when the June 22 hearing was canceled. Thus, the husband's inability to pay is not an issue in this appeal.

was to everyone's benefit to have this issue brought out into the open and resolved early. Accordingly, this Court finds that the trial judge's conduct was proper and does not provide any grounds for reversing her decision.

Appellant/husband has also made allegations that the Chief Judge of the Southern Ute Tribal Court acted improperly. These allegations seem to fall into two categories: first, that the Chief Judge was the one who told the trial judge about the pending state divorce petition, and second, that the Chief Judge acted improperly in sending this Court a letter regarding one of appellant/husband's motions.

The record does not reflect how the Chief Judge learned of the pending state divorce petition, and in light of the way the trial judge handled the matter, this court finds that the Chief Judge's actions do not amount to reversible error. As stated above, the trial judge made sure that the all parties were aware that the lower court had learned of this information, and the trial judge took steps to resolve any possible jurisdictional problems early and expeditiously. Accordingly, these actions do not provide a basis for overturning the lower court's decision.

As for the letter sent by the Chief Judge to SWITCA, this Court also finds no improprieties or evidence of bias. Appellant/husband filed a motion with this Court regarding difficulties obtaining copies of and listening to the tapes of the hearings in this matter. The Chief Judge's letter simply informed this Court of the Southern Ute Tribal Court's policies and rules regarding access to the tapes. The trial court's policies regarding access to hearing tapes are essentially tribal court rules. As such, they were highly relevant to the pending motion. Thus, the Chief Judge's letter simply related the content of applicable law that was important in resolving appellant/husband's motions. There is nothing improper about the lower court making sure that this Court has access to the content of the lower court's relevant rules and policies.

In addition, the Chief Judge sent a copy of this letter to appellant/husband's attorney. Nothing was done behind appellant/husband's back and no attempt was made to sabotage his case with this letter. Accordingly, the letter provides no basis for disturbing the lower court's rulings.

B. Stipulations

Appellant/husband has also alleged that the trial court erred in accepting stipulations at the July 14, 1998 proceeding, as appellant/husband was not present and was not represented by counsel.

While it is clear from the record that appellant/husband was not present at the July 14 hearing, and indeed was unable to be present due to the fact that he was incarcerated, the record does clearly reflect that appellant/husband was represented by counsel. Specifically, attorney Richard Emmett appeared on appellant/husband's behalf and was an active participant in the hearing. Emmett answered questions posed to him by the trial judge, including an affirmative statement that he was willing to proceed by stipulation as to whatever facts the parties could agree. Emmett did not hesitate in participating in the stipulation process, answering the questions he was able to and indicating when he did not have sufficient evidence to enter into a stipulation.

These stipulations were not limited to the custody proceeding; indeed, Emmett agreed to stipulate that appellant/husband was served with notice of the state court divorce proceeding on June 26, 1998. Emmett also asked for a continuance before the evidentiary hearing, stating that he planned to petition to dismiss the state court divorce proceeding so that it could be filed in tribal court.

Clearly, appellant/husband cannot complain that he was not represented by counsel. The fundamental elements of due process are notice and a chance to be heard. *In the Matter of a Minor Child*, 8 SWITCA Rep. 4, 9 (Ft. Mohave Tribe 1997); *Holmes v. Holmes*, 8 SWITCA Rep. 10, 11 (Ft. Mojave Tribe 1997). Appellant/husband was provided with both of those -- he received notice of the hearing and, while he was not heard in person, he was heard through his counsel. Appellant/husband cannot argue that Emmett was not his attorney. Emmett entered an appearance on his behalf, showed up at the jurisdictional hearing, actively participated in the hearing, and filed a closing statement on this subject. At no point did Emmett indicate to the trial court that his representation was limited to the custody issues. Indeed, everything he said and did clearly led the court to believe that he was acting on appellant/husband's behalf. The court was entitled to rest on that belief. Accordingly, the July 14, 1998 stipulations in no way violated appellant/husband's due process rights.

C. Notice of Transfer and Consolidation

Appellant/husband alleges that he never received proper notice of the divorce petition and argues that a separate complaint should have been served on him. In addition, he complains that the court improperly consolidated the divorce action with the custody action and that the trial court lacked personal jurisdiction over him.

The trial court specifically addressed these allegations. In the lower court's June 24, 1999 order denying appellant/husband's motion to continue, the court stated:

> The [husband] argues that the Court lacks personal jurisdiction over him with respect to the request for dissolution of marriage. His argument is based on his assertion that he was not personally served with a petition for

> dissolution of marriage and that service of a petition on counsel is insufficient to establish personal jurisdiction on this issue. That argument is flawed. This Court has already found that it has personal jurisdiction over the [husband] in this case based on his participation in earlier proceedings. He was notified during a very early stage in the custody proceedings that the [wife] would be permitted to join her claim for divorce in this case, and did not object to the Court's ruling in that respect. The Court has now joined the issue of divorce in this case. Service on counsel for a party is the equivalent of service on that party. The fact that counsel may have misplaced the items served or failed to discuss them with his client does not defeat the fact of service. It may justify a reasonable continuance, but it does not defeat service.

Lower court record, document 101.

The lower court addressed these allegations again in its July 20, 1999 order dissolving the marriage. Because of the importance of this issue, I will quote at length from that order:

> The Father has taken the position in motions filed with the Court that the Court lacks personal jurisdiction over him with respect to the issue of divorce. The Father's contention is without merit.
>
> The Father asserts that he submitted to the jurisdiction of the Court for the limited purpose of supporting his sister, the Petitioner . . ., in her attempt to obtain custody of the children and that the Court lacks the power to determine any issue beyond that as a consequence. The Father is not simply a supporter of the Petitioner, however. The Father is a named party, whose procedural status was adverse to the Petitioner and whose declared position was adverse to the Mother. The substantive rights of the Father were at risk from the time the litigation was initiated. In the early stages of the case the Father filed motions on his own behalf pertaining to the children's per capita and other issues.
>
> The Father is mistaken in his belief that he can pick and choose the issues that the Court may consider by declaring himself subject to the jurisdiction of the Court on a limited basis at this time. The Father, both personally and through his counsel Richard Emmett, entered a general appearance without claiming that the Court's personal jurisdiction over the Father should be limited in any way. Regardless of where or how the Father was served, the Father submitted himself to the general jurisdiction of the Court through his participation in this case when he sought relief from the Court by filing motions and participating as a party in the case. The fact that the Father disagrees with the Court's ruling on the consolidation of the divorce and custody claims has no effect on the jurisdiction of the Court or the binding effect of that ruling on the Father.
>
> Consolidation of claims is always a possibility in civil litigation. Although it is true that the issues in the case have been enlarged by the consolidation of claims, the Father has been afforded due process through proper notice of and opportunity to be heard on all pending claims. The Court's personal jurisdiction over the Father, which has existed since the Father first entered his appearance and sought relief from the Court on his motions, is unaffected by the Court's ruling on the consolidation of claims.

Lower court record, document 109.

This Court affirms the ruling of the lower court. Appellant/husband was served with notice of the divorce petition, as service of the petition upon his attorney is the same as service on appellant/husband himself. Once an attorney/client relationship has been established, and the attorney has entered a notice of appearance with the court, it is customary for the court to send documents directly to the attorney. The court is also entitled to rely upon the attorney to keep his or her client fully informed. It does appear that a breakdown in communication occurred between Emmett and his client, but that does not erase the fact that notice was given. Once Emmett notified the court at the June 8 hearing that he had misplaced both the set of papers served upon him April 27 and the list of marital property sent to him on May 5, the court established a procedure to ensure that appellant/husband had an opportunity to present evidence on his behalf.[3] The failure of appellant/husband to take advantage of that process will be discussed below in connection with the presentation of evidence issue.

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[3]Indeed, as is discussed below, the lower court did more than due process required. Problems regarding the way in which appellant/husband's attorney handled the documents served upon him are not issues for due process. The lower court's obligations to provide due process were satisfied by providing Emmett with copies of the documents relating to the divorce and by scheduling and holding the June 8 hearing. Any problems appellant/husband may have with Emmett's actions are just that – matters between an attorney and his client, not issues of whether the lower court properly handled the issues before it.

Appellant/husband has also alleged that no divorce petition was filed with the trial court. This is patently untrue. On April 20, 1999, appellee/wife sent a letter to the trial court requesting that the court hear her divorce petition. The court construed this letter as a petition, which it was entitled to do for two reasons. First, the substance of the document is the important part, not its form. This is particularly true in dealing with *pro se* parties. The substance of the letter is plainly a request for a divorce, thus serving the function of a formal petition. Second, the lower court had explicitly discussed the possibility of consolidating the divorce petition pending in state court with the custody matter pending in tribal court. Although appellee/wife initially declined consolidation, the court left the possibility open. The April 20 letter makes it clear that appellee/wife was accepting the court's offer of consolidation. Consolidation certainly makes sense given the relationship between the custody and divorce matters and given the possible jurisdiction problems in state court. Indeed, appellant/husband had argued (through his attorney) that the state court lacked jurisdiction over the divorce petition. As this Court has stated,

> Due Process is a fancy term for fair play . . . . While this term also must be defined in light of tribal custom and law, at a minimum, due process requires notice and the opportunity to be heard. . . . Notice must be reasonably calculated, under all the circumstances, to inform the respondent or defendant of the nature of the action filed against them.

In the Matter of a Minor Child, 8 SWITCA Rep. 4, 9 (Ft. Mojave Tribe 1997). The contents of appellee/wife's letter, especially when coupled with the lower court's April 26 order, clearly provided sufficient notice to appellant/husband that the tribal court action had been expanded to cover the divorce petition as well as the custody matters. Thus, due process was not violated.

Finally, appellant/husband alleges that the trial court improperly expanded the contract between him and his attorney. This allegation is not supported by the record. First, as the trial court pointed out, Emmett entered a general appearance on appellant/husband's behalf. Second, Emmett participated fully in the hearings the trial court held on the issue of jurisdiction, including filing a written closing statement. Throughout that participation, it was clear that Emmett had knowledge of the state divorce petition, and his representations to the court made it clear that he was acting on appellant/husband's behalf. Finally, Emmett appeared at the June 8 hearing regarding the divorce and property matters. While Emmett objected to the hearing based on notice issues, he never alleged that he was hired only for the custody matters. Those allegations were not presented to the court until the June 17 pleadings were filed, and by that time they were too late.

In summary, this Court finds no due process violations in the way the trial court handled the consolidation of the custody and divorce matters.

D. Presentation of Evidence

Finally, appellant/husband argues that he was not allowed to present evidence on the issue of marital property. While it is true that appellant/husband did not present evidence on this issue, that failure must be laid squarely at his own feet and is not the result of any due process violations by the trial court.

The trial court served appellant/husband's attorney with notice of appellee/wife's letter petition and the court's order agreeing to hear the petition and scheduling a hearing. Through a separate process, and on a separate date, the court also sent appellant/husband's attorney a copy of the list of marital property filed with the court by appellee/wife. Somehow, appellant/husband's attorney misplaced both sets of documents. Despite these failures, however, appellant/husband's attorney did find out about the June 8 hearing and appear on his behalf.

At the hearing, the trial court recognized that appellant/husband's attorney was unprepared and set forth a procedure for a second hearing at which appellant/husband could appear by telephone and present evidence. Appellant/husband failed to take advantage of this opportunity, instead filing a motion for a continuance "until such time as he is properly served with a Petition for Dissolution of Marriage and is available to testify, either personally or by telephone." Lower court record, document 94.

Appellant/husband's continued refusal to accept that he had been properly served put him and the court at an impasse. Thus, as the trial court stated, granting a second continuance and scheduling another hearing would have been fruitless, as appellant/husband would refuse to appear based on his allegation that he had no proper notice. Appellant/husband's decision left the trial court with no choice but to enter a property settlement order based solely on appellee/wife's evidence, particularly in light of the lower court's finding that appellant/husband's position was motivated by a desire to harass appellee/wife.

As discussed above, due process requires notice and an opportunity to be heard. The trial court gave appellant/husband proper notice and two opportunities to be heard (June 8 and June 22). Appellant/husband chose not to take advantage of them and set unrealistic conditions for any additional hearing. That does not constitute a violation of due process.

III. Conclusion

For the foregoing reasons, this court finds that none of the errors, either singly or taken together, constitute a violation of due process. Accordingly, this Court affirms the judgment of the lower court and vacates the order staying execution of that judgment.

IT IS SO ORDERED.

Dated: March 7, 2000

MICHELLE TRUJILLO, Plaintiff-Appellee,
v.
CAROL ROMERO, Defendant-Appellant.

SWITCA No. 99-008-SJP
SJP No. 99-08-CR-0017

Chief Judge Stanley A. Bird, Judge
Gov. Joseph Moquino, for Appellee San Juan Pueblo
Carol J. Romero, Appellant *Pro Se*

Appellate Judge: Neil T. Flores, Sr.

SUMMARY

Appellant was found negligent in the operation of her vehicle by the tribal court when the parties were involved in an automobile accident within the boundaries of the San Juan Pueblo's reservation in which appellant's vehicle emerged from a private driveway and struck appellee's vehicle being driven by appellee's son on a right-of-way; the decision of the trial court is supported by the evidence and not clearly erroneous. Affirmed.

JUDGEMENT AND ORDER

This matter comes before the Southwest Intertribal Court of Appeals by resolution 90-98 of the San Juan Pueblo Council adopted July 12, 1990, appointing the Southwest Intertribal Court of Appeals (SWITCA) as the intermediate appellate court for the San Juan Pueblo and referred to SWITCA by a letter received on November 29, 1999, from the Governor of the Pueblo, the Honorable Joseph Moquino This matter is governed primarily by the appellate laws and rules of the San Juan Pueblo and those of the Southwest Intertribal Court of Appeals, hereafter referred to as "SWITCA," when the San Juan laws and rules require supplementation.

Judgment for the plaintiff-appellee was entered by the tribal court on October 14, 1999. Appellant filed her notice of appeal on October 22, 1999. The San Juan Pueblo Code requires that appeals from the tribal court be filed within 10 days after the judgment is rendered. San Juan Law and Order Code, Chapter I, section 9. Appellant has complied with this requirement.

After reviewing the record of this matter, this Court finds that oral argument is not necessary.

FACTS

Appellant was backing out of her parents' driveway when the rear of her vehicle hit the side of appellee's car being driven by her son on a public right of way. No police report was made and no tapes of the hearing in tribal court were made. Notes of the proceedings apparently made by the court clerk indicated that testimony was taken from witnesses Tony Montoya and from Margie Montoya who stated that she saw the accident. Mrs. Montoya's actual testimony is not available. Carol J. Romero, in a signed written statement, apparently in an answer to the petition filed with the tribal court, states that the "tailend of my vehicle might have been out, ..." She further states that the driver was driving "his mom's car just a little to [*sic*] close to the curb and we collided."

LAW GOVERNING THIS CASE

San Juan Pueblo adopted the Motor Vehicle Code of the state of New Mexico, including future amendments, as the law of the Pueblo, by ordinance 101-263 adopted on December 11, 1984. Therefore, the law of the Pueblo which governs the facts is the New Mexico Motor Vehicle Code, 1978 Statute as amended (1998). Several section of that code are applicable to this matter. They are:

> **§66-7-308. Drive on right side of roadway; exceptions.**
>
> A. Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, and were practicable entirely to the right of the center thereof, ...
>
> **§66-7-331. Vehicle entering highway from private road or driveway.**
>
> The driver of a vehicle about to enter of [or] cross a highway from a private road or driveway shall yield the right-of-way to all vehicles approaching on said highway.
>
> **§66-7-346. Stop before emerging from alley or private driveway.**
>
> The driver of a vehicle . . . emerging from an alley, driveway . . . shall stop such vehicle immediately prior to driving onto a sidewalk or the sidewalk area extending across any . . . driveway, . . . and upon entering the roadway shall yield the right-of-way to all vehicles approaching on said roadway.
>
> **§66-7-354. Limitation on backing.**
>
> The driver of a vehicle shall not back it:

A. unless the movement can be made with reasonable safety and without interfering with other traffic; or . . . .

DECISION

While the record is sparse, certain facts are clear from the existing record: the driver was on the right of way and the back of appellant's car hit his car. Does the fact that the driver might have been close to the curb while still operating his car on the right of way relieve appellant of her obligation to enter the right of way carefully? The answer is no. The intent of the law from the above quoted statutes is clear:

1. The driver on the road has the right of way;

2. The driver on the driveway must give way to the road driver's right of way;

3. The driver on the driveway must use caution when entering the road.

Using caution when entering a road from a driveway includes looking for traffic approaching on the road and making certain that the entering vehicle in no way obstructs the road for oncoming traffic. The New Mexico statutes dedicate the entire road to the use of vehicles traveling on it unless it has been formally marked for other use. No proof was made that the area of the road close to the curb had been reserved for bicycle traffic or for any other traffic besides motorized vehicles. Therefore, there is no other conclusion except that appellant was negligent in the operation of her vehicle.

The trial court did not find that the actions of the appellee contributed to the accident or were negligent and this Court will not substitute its opinion for that of the trial court if the evidence substantially supports the decision of the lower court. *Hualapai Nation v. D.N.*, 9 SWITCA Rep. 2 (Hualapai Nation, 1998); *In the Matter of R.W.*, 9 SWITCA Rep. 12 (Hualapai Nation, 1998); *Archuleta v. Archuleta,* 9 SWITCA Rep. 28 (San Juan Pueblo, 1998).

Appellant claims that the other driver did not stop immediately, but traveled for a few hundred feet and that this should be used to absolve her of her negligence. However, this issue, whether the road driver was a hit and run driver, is a separate issue which has nothing to do with appellant's negligence and it is up to the trial court to determine whether the circumstances warrant a separate criminal charge. That issue is not before this Court.

The decision of the San Juan Pueblo trial court is hereby affirmed.

IT IS SO ORDERED.

Dated: January 27, 2000

ELLEN R. HEART, Petitioner-Appellee,
v.
MANUEL HEART, Respondent-Appellant,

SWITCA No. 00-006-UMUTC
UMUTC IND. OFF. No. DR94-0002

Chief Judge William McCulley, Judge
Ellen R. Gurule (formerly Heart), Appellee *Pro Se*
Manuel Heart, Appellant *Pro Se*

Appellate Panel - Rodgers, Abeita, Barnhouse

SUMMARY

The Code of Federal Regulations applies the Federal Rules of Civil Procedure in the absence of a tribal rule or ordinance to the contrary and the Rules allow post-hearing motions to be heard in a manner determined by judicial discretion and it is proper for the court to use teleconference calls for hearing on the motion; an issue of fact is determined by a trial court and an appellate court may not make such a determination if the trial court does not act. Affirmed.

OPINION AND ORDER

This matter comes before the Court on its own motion, pursuant to Rule 12 of the Southwest Intertribal Court of Appeals Rules of Appellate Procedure. Rule 12 allows this Court to dismiss an appeal where it is undisputable that it would not have authority to hear an appeal and allows the Court to rule summarily where there can be no genuine dispute on an issue over which the court has jurisdiction. The authority of the Court of Appeals to make this determination as to the existence of such authority, or "jurisdiction", is an inherent power of any court. Federal Rule of Civil Procedure 12(h)(3). *United States v. United Mine Workers of American*, 330 U.S. 258, 292 n. 57; 67 S.Ct. 667, 695 n. 57; 91 L.Ed. 884 (1947); *Land v. Dollar*, 330 U.S. 731, 739; 67 S.Ct. 1009, 1013, 91 L.Ed. 1209 (1947); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376; 60 S.Ct. 317, 319, 84 L.Ed. 329 (1940).

The notice of appeal states two issues for appeal: (1) whether a hearing can be held by telephone conference call, and (2) whether the court below considered all evidence in deciding to revise its order setting out the amount of child support due to petitioner-appellee for various periods. The Court, having reviewed the notice of appeal and the record below, concludes that the first issue raises a question of law which the Court is able to resolve summarily. As to the second issue, the Court concludes that subject matter jurisdiction does not exist.

As to the first question, 25 C.F.R. §11.503 states that, absent inconsistency with the tribal rules of

procedure, or an order of the Court of Indian Offenses, the Federal Rules of Civil Procedure must be applied by a Court of Indian Offenses such as the Ute Mountain Ute Tribal Court. The Federal Rules of Civil Procedure do not require that all hearings be held in person, or that all motions be decided after a hearing. Here, the trial court was hearing a post-trial motion to reconsider a previous order. These types of motions can be considered without a hearing, much less a hearing in person. Federal Rule of Civil Procedure 78. This is an issue left up to a court's discretion. This Court holds that it was proper for the trial court to hold the hearing at issue by telephone conference call and, therefore, affirms the trial court on this issue.

The second question does not raise a legal issue, but asks the appellate court to make factual determinations where the trial court did not act. The jurisdiction of this Court is set out in the Code of Federal Regulations:

> The jurisdiction of the appellate division shall extend to all appeals from final orders and judgments of the trial division, by an party except the prosecution in a criminal case where there has been a jury verdict. The appellate division shall review all issues of law presented to it which arose in the case, but shall not reverse the trial division decision unless the legal error committed affected a substantial right of a party or the outcome of the case.

Here, there is no issue of law for this Court to review. If appellant wants further modification to his child support payments, he must apply to the trial court in the first instance, not this Court.

Therefore, it is the order of this Court that the ruling of the trial court is affirmed.

IT IS SO ORDERED.

Dated: October 4, 2000

ZEBULYN ZENDA, et al., Appellant
v.
COLORADO RIVER INDIAN TRIBES, et al., Appellees.

SWITCA NO. 00-014-CRTC
CRTC No. AP-96-0015

Chief Judge Neil T. Flores, Sr., Judge
Elizabeth S. Fitch and George Vlassis, Attorneys for Appellee Colorado River Indian Tribes
John Rollie Wightman, Attorney for Appellant Zebulyn Zenda

Appellate Panel: Rodgers, Lomavitu, Toledo

ORDER ADOPTING STIPULATION OF PARTIES IN PART

This matter is before the Court on the parties' stipulation to dismiss with prejudice and to vacate and expunge the opinion of the previous panel of the Tribes' Court of Appeals. The parties ask the Court to approve and accept into the record the stipulation. This stipulation was presented to this Court on November 6, 2000, after the Court ordered that the petition for rehearing should be granted.

The Court having reviewed the procedural facts of this case, particularly, the proposed settlement of this case, and the applicable law, and the parties not objecting, accepts the stipulation in part and rejects it in part. To the extent that the stipulation is entered into pursuant to a proposed settlement and states that the parties stipulate to dismiss with prejudice the above captioned matter, and that each party is to bear its own costs and attorneys fees, the stipulation should be, and hereby is adopted.

The parties also attempt to stipulate the vacation and expungement of the Court's prior opinion dated November 23, 1999. This is not an issue amendable to stipulation of the parties; however, it will be treated as a motion to vacate and expunge the Court's prior opinion dated November 23, 1999. Since the Court has granted appellee's petition for rehearing and has set aside the prior opinion of the Court, to the extent that the stipulation is requesting this Court to withdraw or expunge the prior opinion dated November 23, 1999, the matter is moot, and the parties' request should be and hereby is denied. That portion of the stipulation shall be and hereby is struck from the stipulation as adopted by the Court. This Court shall retain jurisdiction until the parties provide notice of satisfaction of judgment.

IT IS SO ORDERED.

Dated: November 14, 1999
