¶5 | ¶10 | ¶15 | ¶20 | ¶25 | ¶30 | ¶35 | ¶40 | ¶45 | ¶50 | Endnotes

IN THE CROW COURT OF APPEALS

IN AND FOR THE CROW INDIAN RESERVATION
CROW AGENCY, MONTANA

CIV. APP. DOCKET NO. 00-06

MARGARET J. S. EGGERS,
Plaintiff/Appellee,

vs.

RICHARDSTIFF,
Defendant/Appellant

Decided September 13, 2001

Decision entered November 20, 2001

[Cite as 2001 CROW 9]

Before Stewart, J., Gros-Ventre, J. and Watt, J.

OPINION

¶1 This is an appeal by defendant Richard Stiff from the permanent Restraining Order issued by the Tribal Court (Yellowtail, Special Judge) on February 4, 2000, which, among other things, ordered Mr. Stiff not to have any contact with plaintiff Margaret Eggers or her family for a period of one year.

¶2 In this case involving two non-Indians, we hold that the Tribal Court had subject

matter jurisdiction to grant a permanent injunction restraining the defendant's conduct at Little Big Horn College and at the plaintiff's residence. However, as further explained below, this court vacates the Restraining Order because the Tribal Court improperly decided the whole case at a show cause hearing for a preliminary injunction, thus denying Mr. Stiff of his right to a trial or final hearing on disputed factual issues under the Crow Rules of Civil Procedure.

I. Facts and Course of Proceedings

¶3 Defendant Stiff is non-Indian, who at all pertinent times has resided outside the Crow Reservation in Billings. Plaintiff Eggers is also non-Indian who resides within the boundaries of the Reservation with her husband, who is a member of the Crow Tribe. At the time this case was filed, both parties were employed as science instructors at Little Big Horn College ("LBHC") in Crow Agency. LBHC is chartered pursuant to the Tribally Controlled Community College or University Assistance Act of 1978, 25 U.S.C. § 1801, *et seq.* Its main facilities where the parties both worked are located on trust land owned by the Crow Tribe.

¶4 This case grew out of a professional dispute between the parties going back at least to the spring of 1999, and involving matters such as curriculum development, course content and the use of grant funds. The dispute culminated in Mr. Stiff filing a grievance against Ms. Eggers on January 3, 2000, requesting, among other things, that she be reduced to part-time teaching status or discharged from her employment with the College. Mr. Stiff also filed a grievance that same day against department head Donna Wald, complaining of her failure to resolve his disagreements with Ms. Eggers and requesting a letter of apology.

¶5 On January 4, 2000, Ms. Eggers filed a sworn "Complaint/Motion for TRO" in the Crow Tribal Court requesting an injunction and a detailed temporary restraining order ("TRO") against Mr. Stiff having any contact with her or her family. In the space on the form provided by the Court, Ms. Eggers stated that the reason for the injunction was "harassment & stalking," as more particularly described in the exhibit attached to her complaint.[1]

¶6 Based on Ms. Eggers sworn complaint and a finding that she was likely to suffer "immediate and irreparable injury," the Tribal Court (Birdinground, C.J.) issued an *ex parte* "Temporary Restraining Order and Order to Show Cause" the same day, on January 4th. The TRO enjoined the Defendant against entering Ms. Eggers' residence, and restrained both parties against any form of contact, or threatening or harassing each other anywhere. The Order also directed both parties appear at a hearing on January 14 to show cause "why the

foregoing Order shall or shall not remain in effect." The Order warned in all-capital letters that "failure to obey may subject you to mandatory arrest and criminal prosecution, which may result in your incarceration for up to one year for criminal contempt."

¶7 On January 6, 2000, the day the complaint and TRO were served on him, Mr. Stiff filed an affidavit stating that he opposed the TRO and requesting more time to prepare for the hearing. In response, the Tribal Court (Yellowtail, S.J.) issued a new TRO on January 10 with identical terms and rescheduling the show cause hearing to January 21, 2000. On January 18, Ms. Eggers filed an affidavit requesting a further continuance because her husband, a material witness, would be out of town on the rescheduled hearing date. The court apparently did not act on her request before the hearing.

¶8 In the meantime, the record reflects that department head Donna Wald advised Ms. Eggers in a written memo not to come to work on January 10 "to protect you from possible harm from Mr. Stiff." *See* Plaintiff's Hearing Exh. C (hereinafter, "Pl. Exh."). On January 10, Mr. Stiff's former supervisor wrote a memo to Ms. Wald and the LBHC president describing a conversation he had with Mr. Stiff on January 7, and stating that he believed Ms. Eggers to be in "possible physical danger" because Mr. Stiff's statement about Ms. Eggers, "though not vulgar, concerned me because it was expressed with great anger." *See* Pl. Exh. D. The following week, Ms. Pease Pretty-On-Top arranged for Ms. Eggers to teach her classes off the main campus, and provided her with a body guard. Finally, although it is not clear from the hearing testimony when or how it occurred, Mr. Stiff was terminated from his employment at LBHC sometime before the show cause hearing on January 21, 2000.

¶9 At the show cause hearing on January 21, Ms. Eggers was represented by lay counsel, and Mr. Stiff appeared *pro se*. Ms. Eggers testified as to the matters in her complaint (*see* Note 1 above), but the Court initially refused to admit as hearsay Ms. Eggers' recounting of what her husband had told her about Mr. Stiff parking in their driveway. Ms. Eggers also testified that Mr. Stiff was even more of a threat to her since the TRO had been served on him and he had been terminated from his position at LBHC.

¶10 Ms. Wald and Ms. Pease Pretty-On-Top testified on Ms. Eggers' behalf. Based on their backgrounds in counseling, and over objections by Mr. Stiff, both were qualified by the Court to give opinion testimony as expert witnesses on the question of whether Ms. Eggers was in physical danger from Mr. Stiff. Both testified that, in their professional opinions, she was in danger. Ms. Wald testified that her opinion was influenced by her concern over the apparent stalking behavior reported by Ms. Eggers' husband and relayed to her on an

answering machine message from Ms. Eggers. Ms. Pease Pretty-On-Top testified that her own opinion was not in any way based on that report, but instead on the memos and grievances in the LBHC files. Both testified that they advised Ms. Eggers to obtain the TRO against Mr. Stiff in early January. During the presentation of Ms. Eggers' case, the Court twice admonished Mr. Stiff for making gestures and for raising his voice while cross-examining a witness.

¶11 Two witnesses testified on behalf of Mr. Stiff. A friend, Jason Cummings, testified that they rode back and forth to work together from Billings every day, and they had never parked in the Eggers' driveway. LBHC science instructor Mark Waddington testified that Mr. Stiff's criticisms of Ms. Eggers at LBHC were on a professional level, consistent in tone and approach to practices he had seen in other institutions, and did not imply any physical threat. Mr. Waddington said that he had never observed any conflict between the parties outside the faculty meetings. After the Court warned about the risk of presenting character testimony, Mr. Cummings and Mr. Waddington both testified that they did not believe Mr. Stiff was a physical danger to anyone. Following their testimony, the Court allowed Ms. Eggers to testify in rebuttal about her fear for the seriousness of the situation after her husband told her that he had seen Mr. Stiff park in their driveway for several minutes on two occasions.

¶12 At the close of the hearing, the Judge Yellowtail explained that the professional dispute between the parties was only a context for their personal dispute, and that the relevant question in the court proceedings was whether Ms. Eggers was endangered in any way by Mr. Stiff. He recognized the conflicting testimony from the two sets of witnesses, but concluded that the scales of witness credibility were tipped in Ms. Eggers' favor. He also observed from the parties' courtroom behavior that Ms. Eggers was afraid of Mr. Stiff, and that he had difficulty in controlling in volatile temper. Therefore, the Court issued a verbal order from the bench restraining Mr. Stiff from contacting Ms. Eggers or her family, and directed Ms. Eggers' counsel to draft proposed a proposed order.

¶13 The Tribal Court issued its final Restraining Order on February 4, 2000, supported by written Findings of Fact and Conclusions of Law. The Court found that Ms. Eggers "established a factual basis for her fear of the Defendant[;]" that Mr. Stiff's "angry outbursts and hostile behavior toward the Plaintiff during the hearing... substantiated the Plaintiff's fear of the Defendant[;]" that "the Defendant's pattern of behavior toward the Plaintiff has been aggressive and hostile[;]" and that "the actions of the Defendant have been harassing, intimidating and have posed a threat to the personal safety of the Plaintiff and her family[.]"

See Restraining Order at 1-2. The Court concluded that the evidence was "sufficient . . . to establish a reasonable basis that the Defendant does pose a threat to the personal safety of the Plaintiff and Plaintiff's family[,]" and that the Plaintiff "would likely suffer immediate and irreparable injury or harm if the Defendant is not enjoined from any and all contact with the Plaintiff or Plaintiff's family[.]" *Id*. at 2-3.

¶14 The operative terms of the Tribal Court's Restraining Order: (1) prohibited Mr. Stiff from any contact whatsoever with the Ms. Eggers, in any manner or an form; (2) prohibited Mr. Stiff from entering Ms. Eggers' residence, property, place of work, "or any other place that the Plaintiff may frequent[;]" (3) directed Mr. Stiff that if he should encounter Ms. Eggers, he must "retreat, leave or do whatever is necessary to avoid the Plaintiff or the members of her family;" and (4) ordered Mr. Stiff not to verbally threaten, annoy, harass or intimidate the Plaintiff or the Plaintiff's family at any place. The Restraining Order included a Notice in bold, capital letters as follows: "**your failure to obey this order may subject you to mandatory arrest and criminal prosecution, which may result in your incarceration for up to one year for criminal contempt.**" The Restraining Order provided that it would remain in effect for one (1) year from its date. Mr. Stiff timely appealed the Tribal Court's Restraining Order.

II. Subject Matter Jurisdiction

¶15 On appeal, Mr. Stiff has argued that, as a matter of Federal law, the Tribal Court lacked jurisdiction to issue a retraining order against him in this case where neither of the parties are members of the Crow Tribe. Relying on *Strate v. A-1 Contactors*, 520 U.S. 438 (1997), Mr. Stiff argues that because no treaty or Federal statute confers jurisdiction on the Tribal Court, and neither of the exceptions apply, this case is governed by the general rule in *Montana v. United States*, 450 U.S. 544 (1981), that Tribes lack regulatory jurisdiction over nonmembers.

¶16 In response, Ms. Eggers, acting *pro se* in this appeal, argues that the Tribal Court was correct in exercising its territorial jurisdiction under Tribal law because LBHC is part of the Tribal government and the matter arose "on the Crow Reservation, at the college, during working hours, and in connection with a fellow employee." Eggers Brief at 9.[2] Similarly, the Tribe as *amicus curiae* has argued that the fact Mr. Stiff's conduct occurred on the campus of LBHC, which is Tribal trust land, is dispositive, because *Strate* and *Montana* only apply to nonmember conduct on non-Indian fee lands (Tribe's Brief at 5). Ms. Eggers and the Tribe further argue that both *Montana* exceptions are satisfied based on Mr. Stiff's

employment relationship with LBHC, and the impact of Mr. Stiff's conduct on the educational environment at the College. The Tribe has conceded that no treaty or Federal statute specifically provides for or prohibits Tribal Court jurisdiction in this case (Tribe's Brief at 3).

A.

¶17 The Tribal Court based its finding of subject matter jurisdiction in this case solely on Section 3-2-205 of the Tribal Code, which confers jurisdiction as a matter of Tribal law over "all civil causes of action arising within the boundaries of the Crow Indian Reservation[.]" However, the Tribal Code itself and the decisions of the U.S. Supreme Court and this court provide that jurisdiction over non-Tribal members is limited by Federal law. *See Edwards v. Neal,* 1998 CROW 4, ¶ 13.

¶18 Accordingly, this court has consistently held that "it is error for the Tribal Court not to analyze its jurisdiction under federal law in any case involving claims against a non-Tribal member." *Id*., ¶ 14, *citing Crow Tribe v. Gregori,* 1998 CROW 2, ¶ 52. Subject matter jurisdiction may be raised any time, even on appeal, and cannot be waived by the parties. *Edwards*, 1998 CROW 4, ¶ 12. Thus, even when the parties fail to raise it as an issue, the Tribal court is obliged to satisfy itself that it has subject matter jurisdiction as a matter of Federal law in every case involving a defendant or respondent who is not an enrolled member of the Crow Tribe. Since the jurisdictional facts are undisputed in this case, this court will perform the Federal-law jurisdictional analysis in this case rather than remanding to the Tribal Court.

¶19 We begin our analysis with *Strate*, in which the Supreme Court concluded that the Tribal court lacked jurisdiction over a negligence claim by a non-Indian widow of a Tribal member against another non-Indian for injuries she suffered in an automobile accident on a State highway within the reservation. *Strate v. A-1 Contractors,* 520 U.S. 438 (1997). One of the principal holdings in *Strate* was that a Tribe's adjudicatory jurisdiction over nonmembers does not exceed its legislative jurisdiction to regulate nonmembers' conduct. *Id*. at 455. This holding is particularly relevant to the present case in which the injunctive relief issued by the Tribal Court directly regulated the future conduct of the nonmember defendant in a manner similar to the Tribal Council enacting a Tribal regulatory program.

¶20 Another principal holding of *Strate* was that the highway right-of-way where the accident occurred was the equivalent of alienated non-Indian fee land, so that the *Montana*

decision governed the jurisdictional analysis. *Id*. at 456. The *Strate* Court did not address the issue of jurisdiction over nonmember conduct on Indian-owned lands within the Reservation, other than to state that it could "'readily agree,' in accord with *Montana*, 450 U. S., at 557, that tribes retain considerable control over nonmember conduct on tribal land." *Strate*, 520 U.S. at 454 (footnote omitted). Following this guidance, Crow Court of Appeals has previously held that jurisdiction would presumably lie in the Tribal Court if the nonmember conduct being regulated occurred on trust land. *See Edwards v. Neal*, 1998 CROW 4, ¶ 16 (in livestock collision case on state highway, conduct being regulated by holding livestock owner liable for damages was failure to maintain fence). However, the Supreme Court has recently clarified that ownership status of the land on which the case arose is "only one factor to consider" in determining jurisdiction to regulate nonmember conduct. *Nevada v. Hicks*, 533 U.S. ___, 121 S. Ct. 2304, 2310 (2001). Thus, contrary to the Tribe's argument in this case based on our precedent, "the existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers." *Id*.; *see also, Atkinson Trading Co., Inc., v. Shirley*, 532 U.S. ___, 121 S. Ct. 1825, 1835 (Souter, J., concurring)(*Montana* principles should apply regardless ownership status of the land).

¶21 In the present case, the main locus of the dispute was on Tribal trust land, *i.e*., the LBHC campus, and the injunction restrained Mr. Stiff from entering Ms. Eggers' place of employment. Also, the alleged stalking in this case occurred when Mr. Stiff parked his pickup in the Eggers' driveway, and the injunction restrained Mr. Stiff from entering Ms. Eggers' residence where she lived with her Tribal-member spouse. However, the injunction issued by the Tribal Court also purported to restrain Mr. Stiff's conduct at all other places, regardless of the land ownership status, and both on and off the Reservation. For example, if Mr. Stiff were to have accidentally encountered Ms. Eggers in a store where she was shopping – whether it be located on fee land within the Reservation or off the Reservation in Billings – he would have been obliged by the Restraining Order to "retreat, leave or do whatever is necessary to avoid the Plaintiff[.]"

¶22 In view of the Order's scope and the most recent guidance from the Supreme Court, we conclude that in order for the Tribal Court to have jurisdiction in the present case, it will be necessary to satisfy one of two exceptions to *Montana's* main rule barring Tribal regulatory jurisdiction over nonmembers.

B.

¶23 Under the first exception to the main *Montana* rule, Tribes may exercise civil

jurisdiction over non-members if they "enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana v. United States*, 450 U.S. 544, 565 (1981)(Crow Tribe lacked jurisdiction to regulate nonmember hunting and fishing on fee lands within the Reservation). The Court in *Strate* held that even though A-1 Contractors had a contractual consensual relationship with the Tribes, it did not fit the first *Montana* exception because the plaintiff "was not a party to the subcontract, and the [T]ribes were strangers to the accident." *Strate*, 520 U.S. at 457 (quoting the Eighth Circuit's opinion, 76 F.3d at 940). More recently, the Supreme Court has clarified that "*Montana's* consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself." *Atkinson Trading,* 121 S. Ct. at 1834. Thus, in *Atkinson*, the nonmember's receipt of generalized Tribal government services, including police, fire, and medical services, did not "create the requisite connection." *Id*. at 1833.

¶24 In the present case, Ms. Eggers and the Tribe argue that Mr. Stiff's employment with LBHC was a qualifying "consensual relationship" within the first *Montana* exception. As a Tribal community college, LBHC is an arm of the Tribal government and entitled to invoke the Tribe's sovereign immunity. *See Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1043 (8th Cir. 2000). The dispute between the parties arose directly as a result of their employment at LBHC. Essentially all of Mr. Stiff's complained-of conduct occurred directly in connection with the parties' teaching jobs at LBHC. The Restraining Order enjoined Mr. Stiff against entering LBHC (Ms. Eggers' place of employment) and from harassing her at work.[3] It is true that Ms. Eggers was not a party to Mr. Stiff's employment contract. However, as distinguished from *Strate*, it cannot be said that the Tribe was a "stranger" to the dispute between the parties, or that the dispute was "distinctly non-Tribal in nature." *Strate*, 520 U.S. at 457. Under these circumstances, there would appear to be a clear and specific "nexus" or connection between Mr. Stiff's "consensual relationship" with the Tribe[4] and the "regulation" imposed by the Tribal Court. Therefore, the first *Montana* exception is satisfied, at least to the extent that the injunctive relief was directed toward Mr. Stiff's conduct at the Tribal community college.

¶25 The same is true for the second *Montana* exception, which recognizes Tribal jurisdiction over nonmembers when their conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. In later decisions, the Court has limited its interpretation of the exception to "'what is necessary to protect tribal self-government or to control internal relations.'" *Atkinson Trading,* 121 S. Ct. at 1835, *quoting Strate,* 520 U.S. at 459 (*quoting Montana*, 450

U.S. at 564). But as distinguished from the nonmembers' conduct being regulated in those cases, the Restraining Order in this case was in response to a particularized threat to the educational programs of a Tribal institution. Much of the nonmember prohibited by the Restraining Order in the present case would have had a direct and immediate impact on the learning environment at LBHC. In such circumstances, when the bounds of acceptable conduct may only be determined by reference to the Tribal laws governing the administration of a Tribal program or institution, the Montana Supreme Court has held that State courts lack jurisdiction because it would infringe on the Tribes' political integrity. *See General Contractors, Inc., v. Chewculator, Inc.*, ___ P.3d ___, 2001 MT 54 (claims against Montana corporation and non-Indian shareholder depended on reversal of Tribes' conclusion that corporation was "Indian-owned" for purpose of bidder preference on Tribal construction project). We conclude that to the extent the Restraining Order regulated Mr. Stiff's conduct at LBHC, it protected the Crow Tribe's political integrity by preventing a specific threat to the welfare of Tribal-member students at the Tribe's community college, thus satisfying the second *Montana* exception.

C.

¶26 Mr. Stiff argues, however, that rather than involving the parties' employment at LBHC, this matter was a simply a personal dispute between two non-Tribal members, and that "an isolated incident of stalking or harassment of a nonmember, if true, cannot affect any Tribal interest." Stiff Brief at 9-10. Mr. Stiff's characterization of the case is supported by the Tribal Court's explanation at the close of the show cause hearing, that the parties' professional dispute only provided a context for the "personal dispute" on which the case was really based.

¶27 As discussed above, the Tribal Court had jurisdiction under the *Montana* exceptions to the extent the dispute, however it is characterized, spilled over to affect the Tribal educational activities at LBHC and the Restraining Order regulated Mr. Stiff's conduct there. However, the Restraining Order also expressly regulated all of Mr. Stiff's other activities regardless of location during its one-year duration, by, for example, prohibiting him from entering Ms. Eggers' residence, or "any other place that the Plaintiff may frequent," and requiring him to retreat whenever or wherever he might encounter Ms. Eggers. The Restraining Order thus purports to regulate Mr. Stiff's conduct on fee as well as Tribal lands, both on and off the Reservation. While it is generally accepted that "[a] court having jurisdiction of the parties may . . . require the party enjoined to do or refrain from doing anything beyond its territorial jurisdiction which it could require that party to do or refrain

from doing within the jurisdiction," 42 AmJur2d, *Injunctions* § 235 (2000), that rule only begs the question in an analysis of Tribal Court's subject matter jurisdiction under current Federal decisional law.

¶28 To the extent that the nonmember conduct being enjoined in this case did not involve activities at LBHC, it would appear that there was not a sufficient "nexus" or connection between the "regulation" and Mr. Stiff's "consensual relationship" with the Tribe, as required by the first *Montana* exception. Also, these broader Restraining Order provisions were not directed at protecting the learning environment at LBHC, so the above rationale for jurisdiction under the second *Montana* exception also disappears. In fact, except as further explained below with respect to the parties' residence, it does not appear that Mr. Stiff's conduct toward Ms. Eggers' at any of these other places posed a sufficiently direct threat to the Tribal interests to fall within the second exception.

¶29 The prohibition against entering Ms. Eggers' residence, where her Tribal-member husband also lived, is a separate issue.[5] Considering the location of the conduct being regulated as "one factor" in the jurisdictional calculus, this portion of the Restraining Order is distinguishable from *Wilson v. Marchington*, 127 F.3d 805, 815 (1997), *cert. denied* 523 U. S. 1074 (1998) and *Burlington Northern Railroad Co. v. Red Wolf,* 196 F.3d 1059 (9th Cir. 2000), *cert. denied,* 529 U.S. 1110, because the injuries to the Tribal members in those cases occurred on rights-of-way deemed to be the equivalent of non-Indian fee land. Thus, even under a narrow interpretation, we believe that restraining the harassment of the spouse of a Tribal member at the Tribal member's own residence on the Reservation involves a threat to Tribal health, welfare and political integrity sufficient to satisfy the second *Montana* exception.

D.

¶30 This court holds that the Tribal Court had jurisdiction in this case to regulate, through its Restraining Order, Mr. Stiff's conduct toward Ms. Eggers at LBHC and at the Eggers' residence. however, it appears that the Tribal Court lacked jurisdiction as a matter of Federal law to enjoin Mr. Stiff's conduct at any other location.

III. Procedural Error

¶31 Jurisdiction was the main issue briefed by the parties on appeal, and the only issue raised in Mr. Stiff's opening brief. However, following Mr. Stiff's plea for us to review the

merits of the case, and after careful examination of the record, this court has formed a firm conviction we must go beyond the jurisdictional issue in order to correct the injustice caused by a serious procedural error. As further explained below, this court vacates the Restraining Order because the Tribal Court erred by issuing a final injunction against Mr. Stiff after a show cause hearing on a TRO, without a full trial or any the other procedural rights guaranteed by the Crow Rules of Civil Procedure.

A.

¶32 We first examine the Court of Appeals' authority to consider an issue involving fundamental due process when the appellant has not timely or specifically argued it in his briefs. Ms. Eggers has already objected to our consideration of any issue in this appeal except the issue of subject matter jurisdiction as raised in Mr. Stiff's opening brief. *See* Eggers' Memorandum in Support of Motion for Reconsideration and to Modify Scheduling Order, filed April 13, 2000. To allow Mr. Stiff to argue the merits of the case in a supplemental brief, Ms. Eggers argued, would violate her rights to due process and equal protection, as well as both the Crow and the Federal Rules of Appellate Procedure. *Id*. Ms. Eggers' objection was previously denied as moot, but must now be addressed.

¶33 The only issue on appeal raised in the opening brief filed by Mr. Stiff's attorney was his challenge to the Tribal Court's subject matter jurisdiction under Federal law. Before Ms. Eggers' response brief was filed, and over her objection as noted above, this court provided Mr. Stiff with the opportunity to also brief the merits of the case, but no supplemental brief was filed. Ms. Eggers' response brief filed May 4, 2000, and focused mainly on the issue of subject matter jurisdiction. However, Ms. Eggers' response brief also specifically argued that the Restraining Order was supported by the allegations in the complaint and evidence from the hearing, and was issued in compliance with Rule 22(a) of the Crow Rules of Civil Procedure (Eggers Brief at 1-2). More than a year later, on May 31, 2001, Mr. Stiff filed a Notice informing this court that he was now representing himself again. In an accompanying document captioned as a "Brief to the Court," Mr. Stiff renewed his objection to the Tribal Court's jurisdiction while stating that he participated in its proceedings out of respect, argued that there was not sufficient evidence for the Tribal Court to have issued the Restraining Order, and otherwise threw himself "at the mercy of the court."

¶34 The Crow Rules of Appellate Procedure do not specifically address the question of when or how an issue must be raised on appeal. It is noteworthy that the rule only allows the appellant, as a matter of right, to file one brief or statement in support of his appeal, and

filing a "reply" to the appellee's response brief, as well as the opportunity for oral argument, are only permitted with leave or permission from the court. *Id.; see also*, Crow R. App. P. 12. Thus, although it is clear from the structure of the Tribal appellate that any issues an appellant wishes to be considered on appeal should be raised in his or her opening brief, this does not resolve the question of whether this court may exercise discretion in deciding a case to look beyond those issues. We thus look for guidance to the practice in the U.S. Courts of Appeals under the similar Federal appellate rules. *See Estate of Red Wolf v. Burlington Northern Railroad Co.*, 1996 CROW 3 (looking to Federal rules for guidance on appellate review of surety bond).

¶35 With respect to a pure issue of law that is reviewed under a *de novo* standard on appeal, failure to raise an issue at the trial court level "would not, standing alone, constitute a waiver of the issue." *Martinez v. Ylst,* 951 F.2d 1153, 1156 (9th Cir. 1991). As a general rule, though, when the issue is not raised in the opening brief, "waiver is appropriate unless there are circumstances suggesting that it will work a substantial inequity." *Id*. at 1157 (waiver "necessary in order to *prevent* inequity" to appellee when appellee's circumstances had changed)(emphasis by court).

¶36 On the other hand, the Ninth Circuit has reviewed issues not properly raised in the opening brief in a variety of circumstances. For example, applying the "substantial inequity" exception to the waiver rule, the court reversed a conviction based on a plainly erroneous jury instruction on entrapment when the issue was raised for the first time in a letter of supplemental authorities filed pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure (*i.e.*, after all briefing was completed). *United States v. Sterner*, 23 F.3d 250, 252 n.3 (9th Cir. 1994). In another criminal case, the court considered a misjoinder issue first raised in the reply brief, explaining that it was appropriate "because the government has fully briefed the issue." *United States v. Duran,* 189 F.3d 1071, 1081 n.4 (9th Cir. 1999) (variance between indictment and government's proof at trial held to be harmless error).

¶37 In a civil context, the court in a federal civil rights case involving wrongful employment discharge claims held that the affirmative defense of "issue preclusion" was not waived even though it was not raised until one appellant's reply brief and the other did not raise it at all. *Clements v. Airport Authority of Washoe County*, 69 F.3d 321, 330 (9th Cir. 1995). The court in *Clements* based it decision to review the issue on the public interest in avoiding inconsistent results that would "tend to undermine confidence in the judicial process." *Id*. As noted above, subject matter jurisdiction is another exception to the waiver rule, and can be raised at any time by the parties or by the court on its own motion. *See also*, *Estate of*

Red Wolf v. Burlington Northern Railroad Co., 1998 CROW 3, ¶ 8, *citing Cripps v. Life Insurance Co. of North America*, 980 F.2d 1261, 1264 (9th Cir. 1992).

¶38 In a more recent case arising on the Blackfeet Reservation, the Ninth Circuit refused to recognize the Tribal court's judgment under principles of comity because the non-member defendant's due process rights were violated by plaintiff's counsel's "inflammatory appeal to racial bias" made to the Tribal jury during closing argument. *Bird v. Glacier Electric Coop., Inc.*, 255 F.3d 1136 (9th Cir. 2001). However, defendant's counsel did not object to the statements during trial, and did not specifically raise the issue on appeal until its reply brief. In explaining its rationale for reviewing this issue and basing its decision on it, the court stated:

> We will not ordinarily consider an issue in the reply not argued in the opening brief. However, we have discretion to consider issues not raised by a party when the issue is one concerning jurisdiction, federalism, or comity that the court could raise sua sponte. These considerations, and the importance of the issue for fundamental fairness, lead us to consider whether [the] closing argument violated due process.

Id., 255 F.3d at 1144, n.4 (citations omitted)(the footnote mistakenly referred to "Glacier Electric's closing argument").

¶39 The foregoing guidance leads us to conclude that in a case such as this, when a *pro se* appellant has thrown himself on the mercy of the court, the issue is a pure question of law in which the Tribal Court does not have any discretion, it has been briefed by the appellee or is so obvious as to not require briefing, and review is necessary to prevent substantial inequity to the appellant, this court has discretion to review an issue not timely or specifically raised by the appellant. Although the issue was not specifically raised by Mr. Stiff, it is "antecedent to…and ultimately dispositive of" the issues raised in Mr. Stiff's last "Brief." *See USNB of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 447 (1993)(issue not raised by parties or argued in supplemental briefs requested by court of appeals). We therefore exercise our discretion to review the procedure used by the Tribal Court in granting the Restraining Order in this case.[6]

B.

¶40 The procedure for issuing the so-called "equitable relief" of restraining orders and injunctions is governed by Rule 22 of the Crow Rules of Civil Procedure. Rule 22(a) provides:

> A permanent injunction shall issue in cases where irreparable injury, loss, or damage may otherwise result to the applicant, or in cases specifically provided by law. During the pendency of an action for permanent injunction the court may grant a temporary restraining order, a preliminary injunction, or both.

The definition of a permanent injunction is "[a]n injunction granted after a final hearing on the merits. Despite its name, a permanent injunction does not necessarily last forever." *Black's Law Dictionary* 768 (7th ed. 1999)(emphasis added). [7] The Restraining Order in the present case, although limited in duration to one year, was a "permanent" or final injunction because it concluded the action, and no further hearings or proceedings were contemplated by the Tribal Court or the plaintiff after the issuance of the Restraining Order. Thus, as Ms. Eggers has properly recognized in her brief, the Restraining Order was a permanent injunction governed by Crow R. Civ. P. 22(a).

¶41 The requirement in Rule 22(a) for "irreparable injury, loss, or damage" is the universally accepted criterion to be eligible for the "equitable" remedy of an injunction, as opposed to the usual common-law remedy of money damages in civil cases. The necessity for irreparable harm reflects the traditional distinction between "law" and "equity" in the English legal system, by requiring a person seeking an injunction to demonstrate that money damages, *e.g.*, for the "tort" of assault that may be committed in the future, will be not be adequate to protect her interests. See, e.g., 1 Dobbs, Dan B., *Law of Remedies* § 2.1 (1) (West, 2d ed. 1993)("*Dobbs on Remedies*"). Thus, an injunction is considered to be an extraordinary remedy: "Even in an action between private individuals, it has long been held that an injunction is 'to be used sparingly, and only in a clear and plain case.'" *Rizzo v. Goode*, 423 U.S. 362, 378 (1976), *quoting Irwin v. Dixion*, 9 How. 10, 33 (1850); see also, 42 Am. Jur. 2d *Injunctions* § 15. Although this court's research has not turned up many examples of cases (other than domestic relations cases) permanently enjoining a private party from committing future tortious acts against another private party, courts have recognized that it is appropriate to grant injunctive relief in such cases involving repeated assaults or batteries. 42 Am. Jur. 2d *Injunctions* § 94 (2000); *see also, Webber v. Gray*, S. W.2d 80 (Ark. 1957)("almost incessant harassment" of ex-husband and family by former spouse).

¶42 Rule 22(a) also refers to the availability of a temporary restraining order and/or a preliminary injunction "during the pendency of the action" for the permanent injunction. The procedures for these forms of temporary injunctive relief are provided in Rule 22(b) – (d) of the Crow Rules of Civil Procedure, and that is where the confusion arises in this case.

¶43 A temporary restraining order ("TRO") is, by definition, issued without notice to the defendant based on a showing that "*immediate* and irreparable injury, loss, damage or harm will result to the applicant before the adverse party or his legal representative can be heard." Crow R. Civ. P. 22(b)(i). Because it is issued before the defendant has had a chance to appear and defend, a TRO is limited in duration to 10 days "unless extended by the court for good cause shown." Crow R. Civ. P. 22(b)(iii). By the time the TRO expires, the Code authorizes the Tribal Court to hold a hearing on whether or not to continue the injunctive relief in the form of a "preliminary injunction." It is standard practice for the Tribal and other courts to notify the defendant of the hearing as part of the TRO, by ordering the defendant to appear and "show cause" why the temporary injunctive relief should not be continued. After providing the defendant the opportunity to appear at an expedited hearing, the Tribal Court may grant a preliminary injunction "when it appears that irreparable harm or injury will result before trial of the petition for permanent injunction if the motion is not granted." Crow R. Civ. P. 22(c)(emphasis added).

¶44 The purpose for granting such temporary injunctive relief is usually to preserve the *status quo*, and prevent the possibility of violent confrontations, until the court proceedings are concluded and the parties' rights are finally determined. In these types of expedited, preliminary proceedings, besides showing the potential for immediate irreparable harm, the plaintiff's burden of proof is to show a "likelihood" of success on the merits. *See Dobbs on Remedies*, §§ 2.11(1) - (2). Because of this lowered standard of proof for TRO's and preliminary injunctions, the Code seeks to protect the defendant from the possible results of hasty but erroneous action by requiring that the plaintiff post "security" in the form of cash or a surety bond "for the payment of such costs and damages as may be incurred or suffered by the party who is found to have been wrongfully restrained or enjoined." Crow R. Civ. P. 22(d); *Goes Ahead v. Nomee*, 2000 CROW 3, ¶ 21 (TRO removing Tribal chairperson invalid, *inter alia*, for failure to require the posting of security), *citing Estate of Red Wolf v. Burlington Northern Railroad Co.*, 1996 CROW 3, ¶ 23 (bond for stay of judgment on appeal under Crow R. Civ. P. 18(b)); *see also, Dobbs on Remedies* § 2.11(3).

¶45 With this background, we review the procedure followed by the Tribal Court in the present case. The Chief Judge issued a TRO on the same day Ms. Eggers filed her

complaint. Upon his assignment to the case, Special Judge Yellowtail extended the TRO to a total of 17 days. There was no "good cause shown" for the extension, but it was issued in response to Mr. Stiff's request to postpone the hearing. The TRO did not require the posting of any security, but an exception to this requirement may have been appropriate when the TRO enjoined both parties against contacting, threatening or harassing each other. Also, the warning to the parties that violations of the TRO would be subject to "criminal prosecution" for "criminal contempt" was obviously erroneous because violations in this case could only be punished by civil contempt. *See Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978)(Tribes lack criminal jurisdiction over non-Indians). However, these flaws in the TRO process did not substantially prejudice the parties' rights, and we will not second-guess the Tribal Court's discretion to issue the TRO based on the verified allegations in the complaint.

¶46 With regard to the notice for the hearing, the TRO ordered both parties to "Show Cause. . . why the foregoing Order shall or shall not remain in effect." The hearing on January 21, 2000 was held only 15 days after Mr. Stiff received service of process, the same day that Mr. Stiff's Answer was due to be filed in the absence of any preemptory motions (Crow R. Civ. P. 6(b)). At that stage of the proceedings, the only relief that the Tribal Court was authorized to grant, after the hearing, was a preliminary injunction until the "trial of the petition for permanent injunction." Crow R. Civ. P. 22(c). However, as determined above, instead of granting further temporary relief during the pendency of the case, the Restraining Order issued by the Tribal Court on February 4, 2000 granted a permanent or final 1-year injunction in favor of Ms. Eggers that finally determining the rights of the parties and concluded the case.

¶47 Under the Crow Rules of Civil Procedure, which apply to permanent injunction cases in the same manner as other civil cases, Mr. Stiff was entitled to the opportunity to assert preemptory motions such as lack of jurisdiction, file an Answer and assert counterclaims, participate in a pre-trial conference, conduct discovery into witnesses and documents, and have a full trial or final hearing before the Tribal Court made a final determination on the merits of the permanent injunction.[8] *See* Crow R. Civ. P. 6, 7, 8, 10, 11, 13, and 14. "An application for a permanent injunction is determined on the merits only after a full evidentiary trial." 42 Am. Jur. 2d, *Injunctions* § 264; *see also, Dobbs on Remedies* § 2.11(1). By short-circuiting these procedures and granting a permanent injunction after the show cause hearing, the Tribal Court denied Mr. Stiff the fundamental right to a full trial of the claims against him, with adequate opportunity to investigate and prepare to defend against them.

¶48 This type of error is not peculiar to the Tribal Court. The Montana Supreme Court has repeatedly reversed the District Courts for "anticipating the ultimate issues to be resolved at trial and by disposing of the case on the merits" in preliminary injunction proceedings. *Lurie v. Gallatin County Sheriff*, 284 Mont. 207, 215, 944 P.2d 205 (1997). The court has explained:

> When granting temporary relief by injunction, it is not the province of the district court to determine matters that may arise during a trial on the merits. . . . Both parties presented substantial testimony, witnesses, and exhibits without the benefit of full discovery and without the benefit of responsive pleading to appellants' complaint. During a show cause hearing on a preliminary injunction, the district court should restrict itself to determining whether the applicant has made a sufficient case to warrant preserving a right in status quo until a trial on the merits can be had.

Knudson v. McDunn, 271 Mont. 61, 65, 894 P.2d 295 (1995)(district court improperly reached merits in its denial of preliminary injunction), *citing Porter v. K&S Partnership*, 192 Mont. 175, 181, 627 P.2d 836, 839 (1981).

¶49 To be sure, injunction cases often demand a more immediate decision that lengthy pre-trial proceedings might entail. Recognizing this need, the Federal rules provide a procedure for the trial court to order that the trial on the merits be advanced and consolidated with the hearing on the preliminary injunction. *See* Fed. R. Civ. P. 65(a)(2); *see also*, 42 Am. Jur. 2d *Injunctions* § 263. The same rule provides that even when the hearings are not consolidated, admissible evidence from the preliminary injunction hearing "becomes part of the record on the trial and need not be repeated upon the trial." *Id*. These procedures are not specifically provided for in the Crow Rules of Civil Procedure, but would not be prohibited in the proper case. *See, e.g., Smith v. Eckhart*, 2000 CROW 6 (evidence from preliminary injunction hearing used as basis for permanent injunction, when defendants did not offer any evidence at final hearing after three months and two continuances). However, it is a violation of procedural due process not to give sufficient notice of the consolidation so that the parties have a chance to present testimony of absent witnesses and their right to a full hearing on the merits is otherwise protected. *Los Lunas Consolidated School Dist. No. 1 v. Zbur*, 553 P.2d 1261, 1262-63 (N. Mex. 1976)(dissolving permanent injunction against parent attending school board meetings or harassing school board officials). In the present case,

nothing in the TRO indicated that the hearing was anything but a show cause hearing on a preliminary injunction, and in any event, a final hearing would have been premature at that time.

¶50 This court has other concerns with the hearing and the Restraining Order, some of which were argued in Mr. Stiff's last brief. A question arises as to whether it was appropriate for the court to certify Ms. Wald and Ms. Pease Pretty-On-Top as expert witnesses, especially when they both had a direct interest in the outcome of the case because they were in the immediate "chain of command" responsible for resolving the workplace dispute. None of the testimony as to the alleged stalking (including Ms. Wald's testimony on the basis for her opinion) was admissible for proving the truth of the allegation, because the only person who observed the incidents, Ms. Eggers' spouse, was not present at the hearing to testify on his identification of Mr. Stiff and be subjected to cross-examination. These evidentiary questions may well have been avoided in a later, final hearing when all the witnesses were available and after Mr. Stiff had a further opportunity to obtain counsel. In view of our reversal on procedural grounds, this court declines to express an opinion on whether the admissible evidence at the hearing was sufficient to support a preliminary injunction, considering also Mr. Stiff's agitated behavior while he was attempting to act as his own lawyer. We also decline to decide whether the extremely broad scope of the Restraining Order, and its erroneous warning to Mr. Stiff about being subject to criminal penalties for a violation, were fatal to the entire order.

¶51 Consistent with the foregoing, this court holds that the Tribal Court committed reversible legal error by issuing the permanent Restraining Order disposing of the entire case after the show cause hearing. We must therefore vacate the Restraining Order without considering its merits. Because proceedings in the underlying case have been concluded, we remand with instructions to dismiss the case. However, considering the possibility of a revival of the parties' dispute (see Note 6 above), the dismissal will be without prejudice to its re-filing should the need arise.

IV. Conclusion

¶52 The Tribal Court had jurisdiction to enjoin Mr. Stiff against harassing Ms. Eggers at Little Big Horn College and the Eggers' residence, and its decision to take jurisdiction of this case is **AFFIRMED** to that extent.

¶53 In all other respects, the Tribal Court's Restraining Order issued on February 4, 2000

is **REVERSED**. The Restraining Order is hereby **VACATED**, and this case is **REMANDED** to the Tribal Court with instructions to **DISMISS** the complaint without prejudice. No costs.

¶5	¶10	¶15	¶20	¶25	¶30	¶35	¶40	¶45	¶50	Endnotes

[Back] [Home]

Endnotes

[1] The papers attached to Ms. Eggers complaint stated the specific grounds for injunctive relief as: (1) Mr. Stiff's harassment of her at work at LBHC "by memo and e-mail" beginning in June 1999; (2) Mr. Stiff's "false, misleading and unfounded accusations" against her to the college administration; (3) a recent discussion of the harassment with department head Donna Wald, who advised Ms. Eggers' that her "personal safety is at risk"; (4) Mr. Stiff's description to Ms. Eggers of his "physically abusive behavior towards women" which she considered "threatening and intimidating"; (5) Mr. Stiff having parked in the driveway of the Eggers' residence on two occasions during December 1999, as reportedly observed by her husband and described in an unsigned letter to the LBHC President dated January 3, 2000; and (6) an incident at the LBHC faculty retreat on December 10 when Mr. Stiff "aggressively took over the presentation" from Ms. Eggers about her program of study. *See* Exhibit 1 to Complaint.

[2] In related arguments, Ms. Eggers contends that it was most appropriate for her to proceed in Tribal Court because the State courts lack jurisdiction of criminal matters between Indians and non-Indians on the Reservation, and Tribal law enforcement is better able to provide protection to Ms. Eggers due to their proximity to her residence (Eggers Brief at 5-6 and 11-13). These arguments have no bearing on the issue of civil jurisdiction in this case, and in any event do not support Ms. Eggers' position. Indian Tribes completely lack criminal jurisdiction over non-Indians such as Mr. Stiff, *Oliphant v. Suquamish Tribe*, 435 U. S. 191 (1978), and the State courts have exclusive jurisdiction over Reservation crimes committed by non-Indians against other non-Indians. *See Draper v. United States*, 164 U.S. 240 (1896)(Federal courts lacked jurisdiction of murder involving two African-Americans on Crow Reservation).

[3] The Restraining Order also contained two findings of fact to the effect that the evidence in this case supported LBHC's administrative actions and decisions to protect Ms. Eggers' personal safety. Since LBHC was not a party to the case, we decline to review what would amount to declaratory relief in favor of the College. We also express no opinion on whether LBHC's administrative remedies were exhausted so as to provide the Tribal Court with jurisdiction, under Tribal law, to review any disciplinary actions against Mr. Stiff.

[4] We assume that the Court's requirement for a "*private consensual* relationship" in *Nevada v. Hicks,* 121 S. Ct. at 2310 n.3 (emphasis by the Court) includes a private individual's employment relationship with the Tribe, as the plain language of the first *Montana* exception indicates.

[5] Ms. Eggers has argued that since she also sought protection for her Tribal-member spouse, she had no choice but to proceed in Tribal Court, and the case could just as well have been initiated by her member-spouse (Eggers Brief at 6, 13). However, considering that Ms. Eggers' spouse was not named as a party in the action, we decline to consider his status as a Tribal member with respect to jurisdiction in this case, except as it relates to his ownership or occupancy of the parties' residence.

[6] There may be an argument that this case is moot because the 1-year duration of the Restraining Order has expired. Clearly, it is not moot so far as Mr. Stiff is concerned, and the fact that a final injunction was issued against him for harassing and threatening the physical safety of a co-worker is undoubtedly a serious matter on his personal and professional record, with a continuing effect on his substantial rights. Also, from Ms. Eggers' standpoint, there is the possibility of the harassment occurring in the future. Without deciding whether this court's jurisdiction is subject to a mootness doctrine similar to that defined by the Federal courts under the "case or controversy" requirement in Article III of the U.S. Constitution, it would appear that certain exceptions would apply in this case, including the exception for disputes that are "capable of repetition, yet evading review." *See, e.g., Sample v. Johnson*, 771 F.2d 1335 (9th Cir. 1985), and cases cited therein.

[7] In analyzing this injunction case, this court will also refer to general equitable principles employed by the American courts, as authorized by Crow Tribal Code § 3-1-104(3):

> Wherever the issue in controversy shall not be resolved by federal law or by the laws of

the Crow Tribe, the judge may seek authority in the custom, usage, and jurisprudence of the Crow Tribe, traditional or modern, and in common law jurisprudence both in law and equity.

[8] Reflecting the historical separation between the English courts of law and equity, there is no right to a jury trial in an "equitable" action for an injunction. *See* Crow R. Civ. P. 12(a)(3); *Dobbs on Remedies* § 2.1(1).

¶5 ¶10 ¶15 ¶20 ¶25 ¶30 ¶35 ¶40 ¶45 ¶50 Endnotes