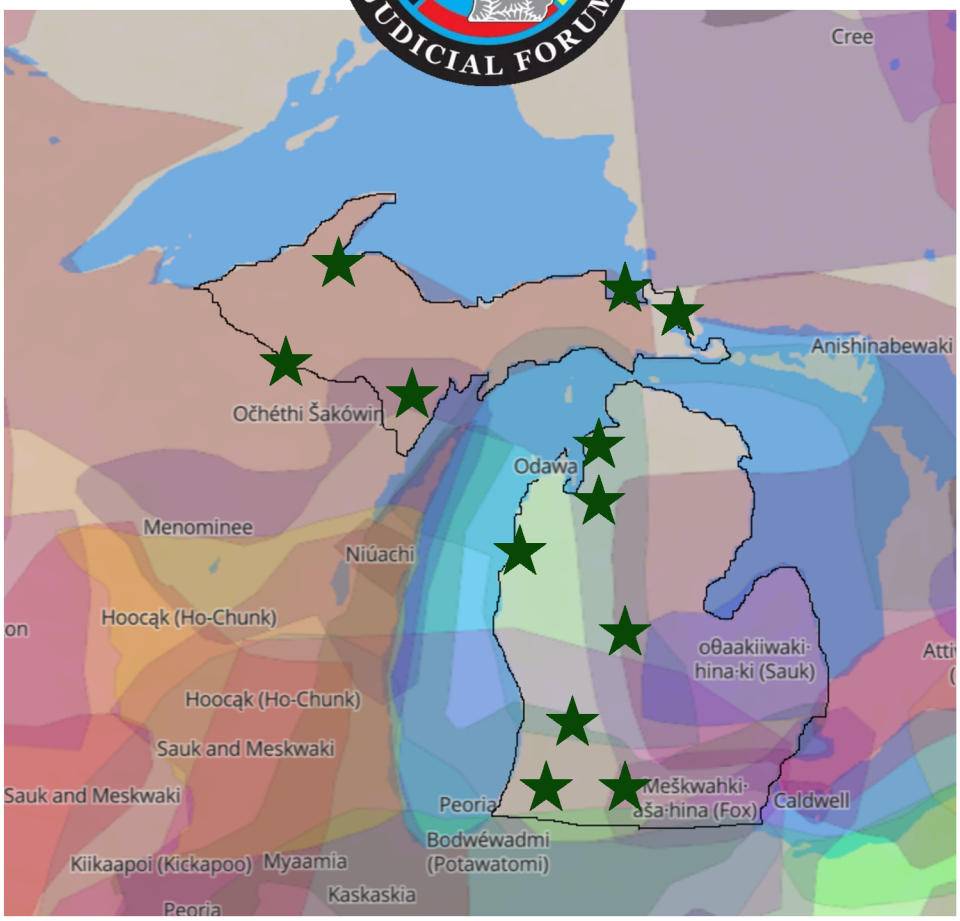


ANISHINAABE LAW

A TRIBAL LAW HANDBOOK FOR MICHIGAN LEGAL PRACTIONERS

Boozhoo!

Tribal State Federal Judicial Forum

Welcome and congratulations on starting your legal journey in Michigan! Whether you are a 1L student or a newly appointed judge, we, the Tribal State Federal Judicial Forum are glad that you are here. Established in 2014, the Forum is a collective of Michigan-based tribal, state, and federal judges and officers dedicated to collaborating on legal issues. We welcome you to the ancestral and contemporary lands of the Anishinaabeg: Three Fires Confederacy of Ojibwe, Odawa, and Potawatomi.

There are twelve federally recognized tribes in Michigan, each with their own governments, laws, and precedent. They are:

- Bay Mills Indian Community
- Grand Traverse Band of Ottawa and Chippewa Indians
- Hannahville Indian Community
- Keweenaw Bay Indian Community
- Lac Vieux Desert Band of Lake Superior Chippewa Indians
- Little River Band of Ottawa Indians
- Little Traverse Bay Bands of Odawa Indians
- Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (Gun Lake)
- Nottawaseppi Huron Band of the Potawatomi
- Pokagon Band of Potawatomi
- Saginaw Chippewa Indian Tribe of Michigan
- Sault Ste. Marie Tribe of Chippewa Indians

As a Michigan-based student or legal practitioner, we legal educators and practitioners believe that your legal education in Michigan is incomplete without some exposure to local tribes' laws. This introductory handbook provides an overview of Michigan tribes and key caselaw examples that correspond with 1L courses. We hope this introduction brings you awareness of and interest in tribal law.

-Tribal State Federal Judicial Forum, '24

Table of Contents

A Case For This Casebook:

As a student or legal practitioner in Michigan, there are several reasons why incorporating Anishinaabe tribal law into your education is important. First, Michigan is home to 12 federally recognized tribes and over 50,000 Indigenous people according to the 2020 U.S. census. For anyone currently practicing or aspiring to practice law in Michigan, the chances are high that you will work with a Native person, tribe, business, or court.

Second, tribal law is a distinct body of law that intertwines with state and federal law. Understanding basic procedural issues like which court has proper jurisdiction is foundational information for Michigan legal practitioners. Furthermore, any interaction with tribal courts requires deference to a different body of laws, precedent, and court proceedings. You will need to know how to write for, advocate in, and communicate with tribal courts. Furthermore, each tribe is a unique, distinctive sovereign. There is no "one size fits all" approach to tribal law and tribal communities.

Third, the state of Michigan has several agreements with the 12 tribes. For example, the *2000 Great Lakes Consent Decree* governs fishing rights and relations between the tribes and the state. The *2002 Government to Government Accord* is an agreement among the sovereigns to recognize, respect, and support their citizens. Governor Whitmer extended this accord in *Executive Directive 2019* wherein the state reaffirmed its commitment to recognizing the sovereignty and self-governance of Michigan's federally recognized tribes. The directive also requires each state department and agency to adhere to these principles. Moreover, in 2013, Michigan codified the federal Indian Child Welfare Act (ICWA) into state law under the Michigan Indian Family Preservation Act (MIFPA), 2012 Public Act 565.

Finally, as legal practitioners, current and future, you have a professional responsibility to be knowledgeable about tribes' jurisdictions and be respectful of sovereign, legal authorities. As co-inhabitants of this land we call Michigami/Michigan, it is a professional sign of respect to learn more about Anishinaabe tribal law.

What follows is an educational resource that offers histories of tribal lands and communities, key concepts in tribal law, and pedagogical strategies for teaching and learning this material. Also included are Anishinaabe tribal cases that correspond with standard 1L courses. By creating this handbook, you do not need to be an expert or Native to learn or teach these cases. We hope that this tool helps you become more a knowledgeable, responsible legal practitioner in Michigan.

A Case For This Casebook: Testimony from Stacey Rock

Stacey Rock
Pokagon Band of Potawatomi

My introduction to law school began with those seminal cases like *Johnson v. M'Intosh* that irreversibly shaped the indigenous relationship with the western legal system. Like many indigenous law students, my native identity invited professors to publicly elicit my perspective while reviewing these cases. As my tenure in academia continued, the recurring expectation to be "the voice" for all native people went from uncomfortable to tolerable and then finally welcomed. Eventually I even used my naturally outspoken disposition to engage others in difficult conversations concerning indigenous law issues and topics outside of native-specific subject matter. In fact, I used my voice to effectuate change in courses that seemed unrelated to native themes. One of my last law classes was Advanced Legal Research-Michigan Legal Research. Despite my overall positive experience, I recommended that the course include a short segment regarding how people can access the laws of the twelve federally recognized tribes within the exterior boundaries of the State of Michigan. The professor accepted my recommendation and had our class review the information. Shortly after that, the professor notified me that it was officially a permanent module in the course. Moving forward, every student in this rudimentary course will be exposed to the twelve Michigan nations with their distinct and sovereign laws. This groundbreaking experience led to future discussions and the creation of this project.

After graduation I had the honor of being a panelist alongside Judge Maldonado for a community conversation hosted by WMU Cooley Law School. During our preparatory sessions we explored the work already completed, our experiences as Native law students, and a multitude of other indigenous issues. We discussed my persistence to ensure professors incorporated tribal law issues in course discussions, which led to the new legal research module. I shared both my strong advocacy for indigenous law programs and clinics in law schools and my conviction that it is not enough to offer some electives to those who are interested; Indian law must be taught to all law students, not only in the State of Michigan but across the country.

With everyone subscribing to this concept, Judge Maldonado mentioned that she planned to prepare some cases appropriate for first year courses. All meeting participants, especially me, were very excited to see this project come to fruition. As an indigenous woman, I dreamt of seeing law schools require standard Indian law courses since the first day that I stepped into law school, maybe even before. We are sovereign, we still exist, we are not going anywhere. Future lawyers need to know about our nations and our legal structures since many will have at least one encounter with an Indian law issue.

I am thankful to Judge Maldonado and Taylor Mills for their incredible dedication to make this area of law, a core piece of the 1L experience. Together we will persevere. United we will educate the world around us.

Stacey Rock

Pokagon Band of Potawatomi

Acknowledgements: About the Forum

Naakonigewin (Charter):

History

Under the guidance of Michigan Supreme Court Justice Michael F. Cavanagh and Pokagon Band of Potawatomi Indians Chief Judge Michael D. Petoskey, Michigan enjoys a history of collaboration between state and tribal courts dating back prior to the first Tribal State Court Forum in 1992. Significantly, most of the recommendations from the 1992 forum were implemented. They included the creating of the "Enforcement of Tribal Judgements" court rule, MCR 2.615, and, most recently, the passage of the Michigan Indian Family Preservation Act of 2012 (MIFPA). The idea of re-convening an ongoing Michigan Tribal State Federal Judicial Forum has grown out of the MIFPA and the desire to create a venue for improving working relations and communication among the jurisdictions and to continue to produce better outcomes for Indian children and families.

Initially, seats for all of the 12 currently federally recognized tribes in Michigan will be designated for the chief tribal judge or the designee. An equal number of seats for state court judges are designated. The Forum will strive to embody the Seven Grandfather Teachings: Truth, Honesty, Humility, Wisdom, Love, Respect, and Bravery.

Purpose

The purpose of the Michigan Tribal State Federal Judicial Forum is to create an ongoing dialogue and respond to joint and cross jurisdictional issues among state, tribal, and federal judiciaries regarding working relationships and the interaction of state, tribal, and federal court jurisdiction in Michigan. The Forum shall make recommendations and implement philosophies, practices, and procedures to enhance our common responsibility to our children, our families and our community of sovereign nations.

Charge

The charge of the Michigan Tribal State Federal Judicial Forum is:

1. to foster mutual understanding, rapport, and acceptance by state, tribal, and federal judges of the similarities and differences among each other's courts and legal systems;
2. to generate dialogue, achieve consensus on, and implement approaches to improving consistency of judicial practice in Indian Child Welfare Act (ICWA) and MIFPA cases throughout the state;
3. to identify opportunities for judicial collaboration across various subject matter areas among the jurisdictions;
4. to identify and work to eliminate barriers to the exchange of court information, records, and other data;
5. to make recommendations for systems improvement, including proposals for changes to legislation, court rules, and standard forms;
6. to promote improvement in the quality of justice delivered through judicial court staff, and attorney education, professional court administration, and the sharing of personnel, facilities, and programs, in addition to funding, as appropriate;
7. to generate dialogue, achieve consensus on, and implement approaches to improving consistency of judicial practice in IV-D, child support cases; and
8. to perform any other duties deemed by a majority of the Forum members to be in the best interests of state, tribal, and federal courts and of the justice system serving the children and families, and communities of our sovereign nations.

For more information about the Forum, visit https://www.courts.michigan.gov/courts/tribal-courts/michigan-tribal-state-federal-judicial-forum/.

Acknowledgements: About the Editor

Special thanks to the lead author and editor of this handbook, Taylor Elyse Mills. At the time of this handbook's creation, Mills was a dual degree JD & PhD in Philosophy student at Michigan State University. She has since graduated from both programs and is an attorney in Michigan. She is passionate about American Indian and Tribal Law, Immigration Law, and intersectional issues of race, gender, and sexuality.

Dr. Taylor Elyse Mills
Michigan State University

Since her 1L summer, Mills has been enthusiastically worked for Michigan's various judiciaries. For her 1L summer, she worked for Justice Clement at the Michigan Supreme Court and for Judge Swartzle at the Michigan Court of Appeals. During her 2L summer she had the pleasure of clerking for the Little Traverse Bay Bands of Odawa Indians' general council and for Chief Judge Maldonado at the tribal court.

In 2024-2025, Mills served as a research attorney for the Michigan Court of Appeals. Next year she will be clerking for Federal District Court Judge DeClercq in the Eastern District of Michigan.

Mills is also a passionate educator. She holds graduate certification in College Teaching, has several publications that focus on pedagogy, and has nearly a decade of experience teaching undergraduate students. Mills believes in the power of education and is grateful for the support of the Forum, Justice Cavanagh, Judge Maldonado, and her first educators, parents David and Rebecca Mills.

For more information about Mills and methods of contact, visit taylorelysemills.org.

Acknowledging Land in Legal Education

Dr. Gordon Henry Jr.

White Earth Nation

Teachers, scholars and researchers . . . must in some way address land loss as they approach the various disciplines and subjects relevant to that broader field of study. In fact, one could argue that tribal land loss should be the first topic, subject, or even semester long course, that students might learn more about before they move onto other disciplines and subjects . . . By engaging in studies of tribal land, students might better understand how the very lands they inhabit, their homes, their communities, and the sites of their education, while at college, are situated on what was once, and in many ways still is, "Indian" land. Further, they would gain a better sense of unjust and violent processes of tribal land loss and the attendant, legal, political, economic, and cultural motives and conditions driving the takeover of Native homelands and communities. No doubt such study would be complex, often rooted to particulars of place and indigenous people's ongoing ties to place.

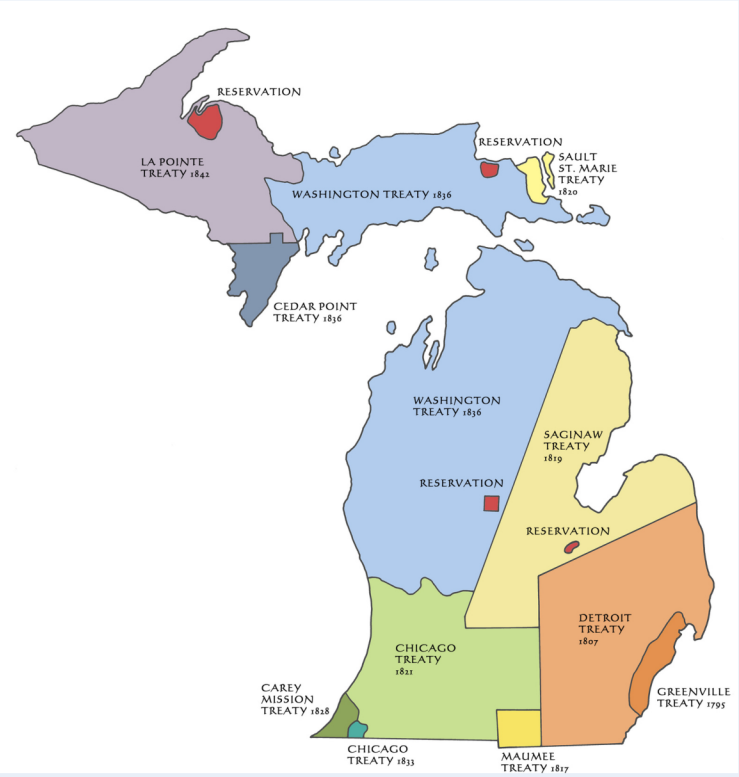
~Dr. Gordon Henry Jr.

Land Acknowledgement

All five law schools in Michigan and Michigan's courts occupy the ancestral, traditional, and contemporary Lands of the Anishinaabeg – the Three Fires Confederacy of Ojibwe, Odawa, and Potawatomi. The Michigan Hall of Justice, the Thomas M. Cooley Law School, and Michigan State University College of Law reside on land ceded in the 1819 Treaty of Saginaw. Settler and Indigenous signatories understood the terms of the treaties in starkly different terms; these cessations were coerced.

As one of the first Land Grant colleges, Michigan State University is a beneficiary of land allotted through the passing of the Morrill Act in 1862. The University finds pride in calling itself "The Nation's Pioneer Land Grant College," a problematic term and that should be retired. The Morrill Act, which enabled the Land Grant system, was passed in the same year as the Homestead Act, granting 160 acres to individual settlers who "improved" and farmed land in the West.

Detroit Mercy College of Law, the University of Michigan Law School, and Wayne State University Law School reside on lands acquired from the Anishinaabeg Confederacy and Wyandot Nation through a series of treaties, including the 1795 Treaty of Greenville, the 1807 Treaty of Detroit, and the 1817 Treaty of Fort Meigs.



We must acknowledge the real ways that the State of Michigan, its academic institutions, and residents of this land have benefitted from the forced removal of Anishinaabeg and other Indigenous peoples from Michigan. Likewise, we must recognize that parts of what is now Michigan includes land within the traditional Homelands of the Miami, Meskwaki, Sauk, Kickapoo, Menominee, and other Indigenous nations.

We must collectively understand that offering Land Acknowledgements or Land Recognitions do not absolve settler-colonial privilege or diminish colonial structures of violence, at either the individual or institutional level. Land Acknowledgements must be preceded and followed with ongoing and unwavering commitments to American Indian and Indigenous communities in Michigan, as well as throughout Turtle Island, and across the globe. We recognize, support, and advocate for the sovereignty of Michigan's twelve federally-recognized Indian nations, for historic Indigenous communities in Michigan, for Indigenous individuals and communities who live here now, and for those who were forcibly removed from their Homelands. We affirm Indigenous sovereignty and hold Michigan institutions accountable to the needs of American Indian and Indigenous peoples.

* * *

Miigwech to the Michigan State University American Indian and Indigenous Studies Department for crafting much of the above language, developed in Binaakwe-giizis / / Leaves Falling Moon – October 2018. This is a living document that will be further developed and revised in conversation with communities.

Meet the Tribes

Bay Mills Indian Community

https://www.baymills.org/

12140 W. Lakeshore Dr., Brimley, MI 49715

The Bay Mills Indian Community is located twenty-five miles west of Sault Ste. Marie in Brimley, Michigan, within the boundaries of Chippewa County. Bay Mills people are Ojibwa or Chippewa who have lived for hundreds of years around the Whitefish Bay, the falls of the St. Mary River and the bluffs overlooking Tahquamenon Bay, all on Lake Superior, most of which still encompass their present day homeland. The Bay Mills Indian Community was officially established by an Act of Congress on June 19, 1860. In 1936, Bay Mills enacted a constitution, declaring:

We, the members of the Sault Ste. Marie Band of Chippewa Indians residing on the Bay Mills Reservation, Michigan, in order to establish a tribal organization, to conserve our common property, to develop our common resources, promote the welfare of ourselves and our descendants, do ordain and establish this constitution and by-laws for our Community.

The tribe's service area services its 2,258 members on the reservation and adjacent lands within Chippewa County. In 1966, Bay Mills became one of the four founding federal tribes that established the Inter-Tribal Council of Michigan, Incorporated.

Sources: https://itcmi.org/home/tribes/bay-mills-indian-community/; http://www.baymills.org

Grand Traverse Band of Ottawa and Chippewa Indians

2605 N. West Bay Shore Dr.
Peshawbestown, MI 49682

http://www.gtbindians.org/

Our oral history traces us back to the Eastern Coast of Turtle Island where our spiritual leaders told us that we should travel to the west until we found the food growing on the water. Our people traveled until we found wild rice growing on the water and we knew we were home. We were traders and established trade routes as far east as the Atlantic Ocean, as far west as the Rocky Mountains, as far North as Northern Canada, and as far South as the Gulf of Mexico. We were a wealthy nation respected by all our neighboring Nations. When the French arrived in our land we established trade with them and when the English came to our land they also sought us out as trading partners.

A great war broke out between France and England on our lands and the right to trade with our nation. Some of the people remained neutral in the war and some of the people sided with the French and fought against the Native Nations who sided with the English. The English won the war and the French moved north. The people continued to trade with the French to the north and the English on our lands.

A second war occurred on our lands when the Americans fought the English. When the war ended, our people found a new government interested in our lands. This new United States government brought us a treaty to sign in 1836, and in 1837 the State of Michigan was established from lands ceded in this treaty. Two thirds of the land that is now the State of Michigan was ceded in that treaty. The people reserved lands for their own use and the use of the ceded lands. The people reserved their hunting, fishing, and gathering rights in this Treaty.

In 1855, the United States government brought another treaty to our people and asked that the remaining third of what is now Michigan be ceded to the United States Government. When this treaty was signed a reserve was established that included most of Leelanau County and a large tract of land in Antrim County. Almost all of this land was illegally taken from the people and had to be re-purchased.

The two treaties with the people were broken many times by the federal government. Services promised were not received and the people went without any federal or state assistance from a time period shortly after the treaty of 1855 until 1980 as the Bureau of Indian Affairs determined incorrectly that the Tribe had been terminated by signing the treaty. The Tribe applied for federal recognition under the Indian Reorganization Act under the leadership of Ben Peshaba in 1934. The Tribe was denied. The Tribe applied for federal recognition in 1943 under the leadership of Casper Ance. The Tribe was denied. The Tribe applied for federal recognition in 1978 under the leadership of Dodie Harris Chambers. On May 27, 1980, the Tribe was re-recognized by the federal government as the Grand Traverse Band of Ottawa and Chippewa Indians. The Tribe drafted a Constitution and formed a government.

Under the Indian Reorganization Act, the Tribe developed Tribal programs to serve the membership and in 1983 established an Economic Development Corporation and began to establish businesses for the Tribe. The Tribe has been very successful in business and today is able to provide many forms of assistance to the members of the Tribe. The Tribe, in the tradition of the people, honors our elders and gives respect and encouragement to our youth for they are our future.

Source: http://gtbindians.org/history.asp

Hannahville Indian Community

http://www.hannahville.net/

N14911 Hannahville B-1 Rd. Wilson, MI 49896

The Hannahville Indian Reservation is a Potawatomi Reservation and according to records the current location was found in 1884 under the direction of Methodist Missionary, Peter Marksman. Little information is available through the Missionary records as the presiding elders or missionary failed to keep detailed records of the Mission. The original settlement is thought to have been along the mouth of the Big Cedar River on Lake Michigan.

The people of Hannahville are descendants of those who refused to leave Michigan in 1834 during the great Indian Removal. They lived with the Menominee in Northern Wisconsin, and the Ojibway and Ottawa people in Canada. In 1853, some of these people began returning to Michigan. It was at this time that they settled along the Big Cedar River.

Church records report that Marksman was sent to the area as an assistant, rather than the presiding Missionary. During this time he has been credited with finding a parcel of land and moving the Potawatomi people to the current location. According to church records, the people were very fond of Marksman's wife, Hannah and named their community after her.

In 1913, Congress acknowledged the Hannahville Potawatomi. They purchased 3.4 acres of land in scattered parcels and added another 39 acres in 1942. The people of Hannahville have been federally recognized since 1936.

Source: http://www.hannahville.net/hannahville-history

Keweenaw Bay Indian Community

16429 Beartown Rd.
Baraga, MI 49908

https://www.kbic-nsn.gov/

The Keweenaw Bay Indian Community of the Lake Superior Band of Chippewa Indians is located approximately 65 miles north of Marquette, Michigan in the L'Anse/Baraga Michigan area and has dual land bases on both sides of the Keweenaw Bay Peninsula in Baraga County. Their service area includes within the boundaries of the reservation in Baraga County, as well as members Ontonagon, Gogebic, Marquette, Houghton and Keweenaw Counties. The L'Anse Reservation is both the oldest and the largest reservation in Michigan. It was established under the treaty of 1854. Keweenaw Bay is one of the four original member tribes in Michigan that founded the Inter-Tribal Council of Michigan, Inc. in 1966 and remains a most vital member ever since. Their constitution, by-laws and corporate charter were adopted on November 7, 1836, pursuant to the terms of the 1934 Indian Reorganization Act that established tribal governments as we know them today.

We grow food on our own land, harvest fish from our waters, and hunt in our own forests. We value and are grateful for what nature gives us to consume. Everything here belongs to every member of the community. Members choose to live here because each other's well-being. KBIC values its freedom and independence from the non-tribal, outside world. We strive to be as self-supporting as possible. We embrace non-tribal, outside-world partnerships and collaboration that infuse strength into our community. We always work to make the right decisions for every family and every business, knowing that our actions today will benefit our children's, children's children. Keweenaw Bay Indian Community citizens share our heritage and future together as one community. Tribal members share their time, support, goods and services for the benefit of other members. Our community welcomes visitors to experience our tribal culture and share our passion for our lands, waters and people.

Sources: https://itcmi.org/home/tribes/keweenaw-bay-indian-community/ ; https://www.kbic-nsn.gov/who-we-are/

Lac Vieux Desert Band of Lake Superior Chippewa Indians

https://lvd-nsn.gov/

N4698 US HWY 45, P.O. Box 249, Watersmeet, MI 49969

As the Ojibwe Nation divided into two and expanded westward from the Sault Ste. Marie region, the southern branch of Ojibwe came to the area now known as Lac Vieux Desert. The Lake Superior Band of Chippewa Indians included twelve bands in historic times. This lake, known as Gete-gitigaani-zaaga'igan ("Lake of the old garden") in the Anishinaabe language, is located near several major watershed boundaries. Chiefs of the Lac Vieux Desert Band signed the Treaty of St. Peters of 1837, Treaty of La Pointe of 1842, and Treaty of La Pointe of 1854, by which they ceded tribal communal land in Michigan to the United States. The second La Pointe Treaty of 1854, added to include a band newly included in US territory because of international boundary changes, established the Lac Vieux Desert Reservation. It is known as Gete-gitigaaning in the Anishinaabe language. Under the federal Indian Reorganization Act of 1934, which otherwise encouraged tribes to re-established self-government, the Lac Vieux Desert Band lost their independent federal recognition. Together with the formerly independent L'Anse and Ontonagon bands, they were classified as members of the newly named Keweenaw Bay Indian Community. But they continued to reside separately in the Watersmeet area. Indian activism was on the rise in the 1960s, as tribes organized to assert their rights and sovereignty. Beginning then and for nearly 20 years, the Band worked to regain independent federal recognition as a self-governing group.

They had had an independent, historic relationship with the federal government, as documented by their many treaties and their separate reservation. The band finally achieved recognition through a Congressional bill: on September 8, 1988, President Ronald Reagan signed the "Lac Vieux Desert Band of Lake Superior Chippewa Indians Act" (H.R. 3697) that officially recognized the Band as a separate and distinct tribe apart from the Keweenaw Bay Indian Community. The Lac Vieux Desert Band independently joined the Inter-Tribal Council of Michigan, Inc. in 1988.

The tribe owns and operates the Northern Waters Casino Resort on its reservation in Watersmeet, Michigan. The resort includes the Dancing Eagles Hotel and the Lac Vieux Desert golf course. In August 2015, the Lac Vieux Desert community opened a state-of-the-art medical complex, Lac Vieux Desert Health Center, which is available to the entire population of the Western Upper Peninsula. The medical complex offers care for the entire family, is open to the public, and accepts all insurance. In 2015 the tribe was awarded a historic preservation grant from the National Park Service to survey the ancient Lac Vieux Desert to L'Anse Trail, a more than 80-mile path long used by the Ojibwe before the 17th century between this area and L'Anse. The Ojibwe continued to use this trail into the 1940s. As part of management plan of the Ottawa National Forest, which occupies land near them, the tribe wants to identify and preserve the historically significant trail. It passes through Baraga, Houghton, Iron and Gogebic counties. The tribe has established an online, short-term installment loans business to serve underbanked Americans. The business has brought new employment opportunities and had generated financial support for other tribal business ventures and social programs for the reservation. The tribe established Big Picture Loans in late 2016, which is based on the reservation in Watersmeet.

Source: https://lvd-nsn.gov/Content/History.cfm

Little River Band of Ottawa Indians

https://lrboi-nsn.gov/

2608 Government Center Dr., Manistee, MI 49660

The Little River Band of Ottawa Indians (LRBOI), a Native Sovereign Nation, is based in Manistee. LRBOI is the political successor to nine of the nineteen historic bands of the Grand River Ottawa people. The permanent villages of the Grand River Bands from which the Little River Ottawa descend were originally located on the Thornapple River, Grand River, White River, Pere Marquette River and the Big and Little Manistee Rivers.

Those southern bands shared hunting and trapping territory along the Pere Marquette and Manistee River systems and had close kinship ties to the northern Grand River Bands at Pere Marquette. The Little River Band Ottawa moved to the western shore of Michigan, ranging from the Manistee River in the north to the Grand River in the south. In these village sites, approximately nineteen in all, the Tribe lived for many years.

The tribes' 1836 Reservation was located on the Manistee River, in large part, to provide the Bands with a permanent home and give them access to important hunting and trapping territories on the Manistee River system. Following the 1855 treaty, the nine Bands from whom the Little River Ottawa descend, established a major settlement known as "Indian Town" on the Pere Marquette, near present day Custer in Mason County, Eden Township.

Source: https://lrboi-nsn.gov/a-brief-history/

Little Traverse Bay Bands of Odawa Indians

https://ltbbodawa-nsn.gov/

7500 Odawa Circle
Harbor Springs,
MI 49740

On Sept. 21, 1994, the Little Traverse Bay Bands of Odawa Indians (LTBB) was federally reaffirmed with the signing of Public Law 103-324. The Tribe is governed by a nine member Tribal Council who serve staggered terms. The Tribe has over 4,000 members with a large number living within Charlevoix and Emmet Counties. The Little Traverse Bay Bands of Odawa Indians presently employs over 100 full and part-time employees. The historically delineated reservation area, located in the north-western part of Michigan's Lower Peninsula, encompasses approximately 336 square miles of land within the two counties. The largest communities within the reservation boundaries are Petoskey, Harbor Springs, and Charlevoix.

LTBB Mission Statement:

Being Odawa is all about freedom. The Freedom to be a part of a people who, with integrity and pride, still have and speak our own language. The freedom to share in common with all other Odawak the customs, culture, and spirituality of our ancestors. The freedom we have today we will bring to the future through unity, education, justice, communication, and planning. We will reach out to the next seven generations by holding to cultural values of Wisdom, Love, Respect, Bravery, Honesty, Humility and Truth. We will utilize our Tribal assets to provide the necessary tools to become successful, hard-working community members who proudly represent our culture. With these values we will move the Tribe forward.

Source: https://ltbbodawa-nsn.gov/; for more information, https://ltbbodawa-nsn.gov/wp-content/uploads/2021/01/Our-Land-and-Culture-for-web.pdf

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (Gun Lake)

https://gunlaketribe-nsn.gov/

2880 Mission Dr.
Shelbyville, MI 49344

The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (Gun Lake Tribe) is part of the historic Three Fires Confederacy, an alliance of the Pottawatomi (Bodewadmi), Ottawa (Odawa) and Chippewa (Ojibwe). Tribal Nations in the Great Lakes region are also known as the Neshnibek, or original people. The Three Fires Confederacy, under the command of Chief Match-E-Be-Nash-She-Wish, signed the Treaty of Greenville in 1795 with the United States government. At the turn of the 19th century, the Chief's Band inhabited the Kalamazoo River Valley. The Band's primary village was located at the head of the Kalamazoo River.

Chief Match-E-Be-Nash-She-Wish signed the Treaty of Chicago in 1821, which was the first land cession to the U.S. government that directly affected his Band. Under the terms of the 1821 Treaty, the Tribe retained a three-square-mile reservation located at present day downtown Kalamazoo. The U.S. and the Pottawatomi Tribes signed the Treaty of St. Joseph in 1827. Under its terms the Chief ceded rights to the Kalamazoo reserve granted under the 1821 treaty. Neither payment nor land was ever provided to the Chief's Band and instead this began a period of constant movement north in an effort to avoid forced removal out west. The Band briefly settled in Cooper, Plainwell and Martin before finding a permanent settlement in Bradley, circa 1838, near Gun Lake.

The Bradley Settlement was first known as the Griswold Mission. This was an effort of the Episcopal Church under the direction of Reverend James Selkirk to Christianize the Indians. Later known as the Bradley Indian Mission, Chief Match-E-Be-Nash-She-Wish's Band remained an Indian community and persevered as a Tribal Government into present times.

The political leadership of the Band since European contact is well documented. First, Match-E-Be-Nash-She-Wish followed by his son Penassee, followed by his first son Shu-be-quo-ung (a.k.a. Moses Foster) and then Moses's brother, known by his Anglicized name - David K. (D.K.) Foster. Charles Foster, D.K.'s son, was later elected Chief in 1911. Under the leadership of Selkirk Sprague, the "Bradley Indians" attempted to organize under the 1934 Indian Reorganization Act. Before doing so, however, the Bureau of Indian Affairs decided to withhold recognition of Lower Peninsula Michigan Indian Tribes.

During the 1980s the Band prepared for federal recognition under the new federal acknowledgement procedures of 1978. In the early 1990s, the Tribe filed for federal acknowledgement by the U.S. Department of the Interior's Branch of Acknowledgement and Research. Federal recognition of Chief Match-E-Be-Nash-She-Wish's Band of Pottawatomi Indians became effective on August 23, 1999. The Tribe's constitution was adopted in 2000 and continues to guide the Tribal Government. The seven-member, popularly elected Tribal Council has authority over all affairs of the Tribe and its subsidiaries. The Tribe's five-county service area includes Allegan, Barry, Kalamazoo, Kent and Ottawa counties.

In 2001, the Tribe began an arduous process to re-establish reservation lands to pursue economic development under the federal Indian Gaming Regulatory Act. The federal process did not conclude until 2005 when the first of several frivolous legal challenges delayed the Tribe's gaming project for nearly four years. In 2003, the Tribe hired Station Casinos to manage its gaming project. After years of struggle and hardship the Tribe is beginning to see the possibilities of a brighter future.

Source: https://gunlaketribe-nsn.gov/about/our-heritage/

Nottawaseppi Huron Band of the Potawatomi

https://nhbp-nsn.gov/

1485 Mno-Bmadzewen Way Fulton, MI, 49052

The Potawatomi Nation encompassed lands along the Southeastern shoreline of Lake Michigan, from Detroit to Grand Rivers, and southward into Northern Indiana, Ohio and Illinois. Tribal Members were later forced to cede the remainder of their “reserved lands” contained within the “Notawasepe Reserve” and were relocated to lands west of the Mississippi River.

During this removal, referred to as the Trail of Death, a group of Tribal Members escaped and returned to their native lands in Michigan. Now the Nottawaseppi Huron Band of the Potawatomi Tribe (NHBP) resides on Pine Creek Indian Reservation in Fulton, Michigan.

NHBP began seeking federal recognition before 1935, but the Bureau of Indian Affairs decided not to further extend services in Michigan’s Lower Peninsula in the 1940s. It was not until the United States government re-established a federal recognition process in the 1970s that NHBP could apply to be federally recognized. After years of research and documentation, NHBP was federally recognized on December 19, 1995. This emotional, yet necessary, process has given NHBP the ability to continue to better the lives of NHBP Tribal Members and Community members around NHBP.

The Bodewéwadmik (Potawatomi) people were generally Great Lakes area inhabitants who chose to live near waterways. Being near water, the communities were able to use the water for fishing, harvesting and spiritual purposes. It has been our tradition to respect the Earth and strive to cultivate its resources carefully, while also providing a harvest for our families.

It is in the spirit of Native tradition to listen to Elders and respect their knowledge, while also celebrating the precious lives of the children who will become future leaders. The responsibility of motherhood and fatherhood are sacred and given by the Creator. NHBP culture continues to be shaped by these values.

Our culture includes traditional Dances, Drumming, songs, Medicines and teachings. Historically, Native families passed down teachings and ways of life orally, from generation to generation. NHBP still teaches in the ways of oral tradition, but also utilizes technology to preserve our culture.

Sources: https://nhbp-nsn.gov/history/; https://nhbp-nsn.gov/culture/

Pokagon Band of Potawatomi

https://www.pokagonband-nsn.gov/

58620 Sink Rd.
Box 180
Dowagiac, MI 49047

Each Indigenous nation has its own creation story. Some stories tell that the Potawatomi have always been here. Other stories tell of migration from the Eastern seaboard with the Ojibwe and Odawa Nations. The three tribes loosely organized as the Three Fires Confederacy, with each serving an important role. The Ojibwe were said to be the Keepers of Tradition. The Odawa were known as the Keepers of the Trade. The Potawatomi were known as the Keepers of the Fire. Later, the Potawatomi migrated from north of Lakes Huron and Superior to the shores of the mshigmé or Great Lake. This location—in what is now Wisconsin, southern Michigan, northern Indiana, and northern Illinois—is where European explorers in the early 17th century first came upon the Potawatomi; they called themselves Neshnabék, meaning the original or true people.

As the United States frontier border moved west, boundary arguments and land cessions became a way of life for Native Americans. In 1830, the U.S. Congress passed the Indian Removal Act and directed that all American Indians be relocated to lands west of the Mississippi River, leaving the Great Lakes region open to further non-Indian development. The 1833 Treaty of Chicago established the conditions for the removal of the Potawatomi from the Great Lakes area. When Michigan became a state in 1837, more pressure was put on the Potawatomi to move west. The hazardous trip killed one out of every ten people of the approximately 500 Potawatomi involved. As news of the terrible trip spread, some bands, consisting of small groups of families, fled to northern Michigan and Canada. Some also tried to hide in the forests and swamps of southwestern Michigan. The U.S. government sent soldiers to round up the Potawatomi they could find and move them at gunpoint to reservations in the west. This forced removal is now called the Potawatomi Trail of Death, similar to the more familiar Cherokee Trail of Tears. However, a small group of Neshnabék, with Leopold Pokagon as one of their leaders, earned the right to remain in their homeland, in part because they had demonstrated a strong attachment to Catholicism. It is the descendants of this small group who constitute the Pokagon Band of Potawatomi Indians.

In 1836, the Treaty of Washington was struck between the Odawa and Ojibwe and ceded much of the lands in the north. Essentially, Leopold and his group were told there would be no room for them to move there. Upon returning to southwest Michigan, Leopold purchased land in Silver Creek Township using annuity monies accrued through several previous treaty negotiations, including the Treaty of 1833. It was in this time that Pokagon and several other groups moved collectively to Silver Creek Township, near present day Dowagiac, Michigan. Not long after, Brigadier General Hugh Brady threatened to force Pokagon's Band out of Michigan. Pokagon, who by then was an old man in failing health, traveled to Detroit to get a written judgment from the Michigan Supreme Court to remain on their land.

Nearly one hundred years later, the federal government passed the Wheeler-Howard Act, also known as the Indian Reorganization Act of 1934, which would provide tribes with resources to reestablish tribal governments. Although the Pokagon Band applied for recognition, the Bureau of Indian Affairs had limited funding and personnel to fully implement the Act, so it decided to recognize only one Indian tribe in the lower peninsula of Michigan. It wasn't until September 21, 1994 that the federally-recognized status of the Pokagon Band of Potawatomi was reaffirmed by an act of Congress.

Source: https://www.pokagonband-nsn.gov/our-culture/history

Saginaw Chippewa Indian Tribe of Michigan

7500 Soaring Eagle Blvd
Mount Pleasant, MI
48858

http://www.sagchip.org

The Saginaw-Chippewa Indian Tribe is headquartered on the Isabella Reservation, adjacent to the city of Mt. Pleasant in Isabella County. The reservation is just off the U.S. 27 South about 65 miles north of Lansing, Michigan (State Capital) and within two hours' drive of Michigan's major populations' hubs including Detroit, Flint, Saginaw, Bay City and Grand Rapids. The Tribe's Isabella Indian Reservation was established by the Treaties of 1855 and 1864. The Saginaw-Chippewa was the last of the four original founding tribal groups that led to the establishment of the Inter-Tribal Council of Michigan in 1966. The tribe's service area includes six townships in Isabella County, and Bay and Arenac Counties.

The Saginaw-Chippewa Indian Tribe proudly offers cultural programs such as the Elijah Elk Cultural Center Seventh Generation Program, which aims to enrich the lives of the tribal community and neighbors by promoting and perpetuating the Seventh Generation philosophy through ceremonies, cultural knowledge, wisdom and the tribe's relationship to the environment.

Similarly, the Ziibiwing Center is a distinctive treasure created to provide an enriched, diversified and culturally relevant educational experience. This promotes the society's belief that the culture, diversity, and spirit of the Saginaw Chippewa Indian Tribe of Michigan and other Great Lakes Anishinabek must be recognized, perpetuated, communicated and supported.

Sources: https://itcmi.org/home/tribes/saginaw-chippewa-indian-tribe/; http://www.sagchip.org/ziibiwing/index.htm

Sault Ste. Marie Tribe of Chippewa Indians

https://www.saulttribe.com

523 Ashmun St.
Sault Ste. Marie,
MI 49783

The Anishinaabeg (which can mean “Original People” or “Spontaneous Beings”) have lived in the Great Lakes area for millenia. Some of the oldest legends recall the ice packs breaking on Lake Nipissing and archeologists have found Anishinaabeg sites from 3000 B.C. Legends speak of immigrations to and from the Great Lakes over the centuries. Sault Tribe’s ancestors were Anishinaabeg fishing tribes whose settlements dotted the upper Great Lakes around Lake Superior, Lake Michigan and Lake Huron, throughout the St. Marys River system and the Straits of Mackinac. Anishinaabeg gathered for the summers in places like Bahweting (Sault Ste. Marie) and broke up into family units for the winter.

The roots of today’s Sault Tribe go back to the 1940s, when a group of Sugar Island residents gathered to talk about their common history. Discussions turned into action plans and meetings grew larger and more formal. These Sugar Island residents were descendants of Anishinaabeg who greeted the French from Montreal to the Sault to obtain beaver pelts for the emerging fur trade. When French sovereignty ended in 1763, the English took over the wealthy fur trade. By 1820, the British had been replaced by Americans. In the 1820 Treaty of Sault Ste. Marie, the Anishinaabeg at Sault Ste. Marie ceded 16 square miles of land along the St. Marys River to the United States to build Fort Brady. A second treaty, the 1836 Treaty of Washington, ceded northern lower Michigan and the eastern portion of the Upper Peninsula to the United States. In return, the Anishinaabeg of the Sault received cash payments and ownership to about 250,000 acres of land. But, over the next 20 years, they watched as white settlers moving into northern Michigan violated terms of the treaty. So in 1855, the chiefs signed another treaty; the 1855 Treaty with the Ottawa and Chippewa with the Americans allotted lands to Michigan Indian families.

On Dec. 24, 1953, the residents became the “Original Bands of Chippewa Indians and Their Heirs.” At that time, Sault Ste. Marie and Sugar Island contained no lands for their people and the federal government considered them members of the Bay Mills Indian Community. The descendants did not feel part of the Bay Mills Indian Community, located 30 miles south of Sugar Island. As a result, the Sugar Island group pushed for recognition as a separate tribe. The passage of the Indian Reorganization Act ended an era of Indian removal and assimilation policies by creating laws to encourage tribes to reorganize their traditional economies and communities into self-governing nations. Federal recognition took more than 20 years to complete. In the early 1970s, the leaders of the Original Bands of Chippewa Indians traveled to Washington and successfully submitted their historical findings and legal argument to the Secretary of the Interior, who granted the tribe federal status in 1972. Once recognized, the Original Bands became the Sault Ste. Marie Tribe of Chippewa Indians. Land was taken into trust in March 1974 and Sault Tribe members adopted the tribe’s constitution in fall 1975.

Today (2017) the Sault Tribe is 44,000 strong. The tribe’s seven-county service area is made up of the easternmost seven counties of Michigan’s eastern Upper Peninsula—roughly the area east of Marquette to Escanaba.

Source: https://www.saulttribe.com/history-a-culture/story-of-our-people

Key Concepts

I. "Indian"

Who may be treated as an Indian under the law can be complex. Tribes have the authority to determine their own citizenship criteria. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Nonetheless, the federal government has regularly set blood quantum requirements in treaties, and the Indian Reorganization Act limits recognition to a specific set of qualifications. According to the Indian Reorganization Act:

> The term “Indian” as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. 25 U.S.C. § 5129.

Other sources that define "Indian" include the Major Crimes Act, 18 U.S.C. § 1153, and the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301.

II. Sovereignty

The Supreme Court has declared that tribes have inherent sovereignty, *Worcester v. Georgia*, 31 U.S. 515 (1832); *Williams v. Lee*, 358 U.S. 217 (1959); but the extent to which their sovereignty persists has been contentious. Cases like *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) and *Montana v. United States*, 450 U.S. 544 (1981) have chipped away at tribal sovereignty over criminal matters, rendering tribes like the "domestic dependent nations" or "wards to the U.S. guardian" that Chief Justice Marshall opined in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). That said, the Supreme Court has continued to uphold tribes' sovereign immunity from suit. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998). Determining and preserving tribal sovereignty is paramount in tribal law.

CIVIL PROCEDURE

The following two cases address key concepts in Civil Procedure. In *Chivis et al. v. Notawaseppi Huron Band of the Potawatomi Tribal Council*, No. 12-192-CR (NHBP S. Ct. May 10, 2013), the Supreme Court for the Nottawaseppi Huron Band of Potawatomi addresses a Rule 12 Motion to Strike and a Rule 21 Writ for Mandamus. The NHBP Supreme Court exercises its sovereign authority to draw both from tribal law and state law to assess these procedural issues.

In *LaCroix v. Snyder*, No. C-200-0914 (Little Traverse Bay Bands Tribal Ct. Oct. 2, 2014), the Little Traverse Bay Bands Appellate Court provides an analysis of how to establish the court's personal and subject matter jurisdiction over the case. The court considers the tribe's laws and federal laws of civil procedure.

Huron Potawatomi Tribal Court
The Nottawaseppi Huron Band of the Potawatomi
2221 1-1/2 Mile Road • Fulton, Michigan 49052
Phone: (269) 729-5151 • Fax: (269) 729-4826

CASE NO: 12-192-CR		
Russell Chivis, Jon Douglas, Eric Foerster, Melissa Foerster, Tom Foerster, Jim Mackety, Mike Mandoka, Mike Mandoka, Jr., Dawn Reve' Rawlings Neymeiyer, & Chad Stuck, Tribal Members	**v.**	**Nottawaseppi Huron Band of the Potawatomi Tribal Council: Homer A. Mandoka, Tribal Chair, Jamie P. Stuck, Vice Chair, RoAnn Beebe, Tribal Secretary, & Dorie Rios, Treasurer**
PAULA M. FISHER (P60959) Paula M. Fisher, Attorney At Law, PC Attorney for Appellant/Petitioners The Ronan Building 201 So. University Avenue Mt. Pleasant, MI 48858 (989) 773-5978 phone		**WILLIAM J. BROOKS (P43041) Nottawaseppi Huron Band of Potawatomi Attorney for Appellee/Respondents 2221 1 ½ Mile Road Fulton, MI 49052 (269) 729-5151**

OPINION OF THE SUPREME COURT FOR THE NOTTAWASEPPI HURON BAND OF POTAWATOMI

Hon. John Wabaunsee, Chief Justice, Presiding
Hon. Matthew L.M. Fletcher, Associate Justice
Hon. Holly K. Thompson, Associate Justice

Appearances:

Appellant/Petitioners, Paula M. Fisher
Appellee/Respondents, William J. Brooks

Opinion by Thompson, J.

Introduction

Appellants, a group of tribal members of the Nottawaseppi Huron Band of Potawatomi (*hereinafter* "NHBP"), filed a petition with this court seeking a writ of mandamus against Appellees, NHBP Tribal Council. Through the petition, Appellants are asking the court to compel Appellees to perform certain tasks related to the NHBP Constitution provisions regarding tribal membership enrollment. In addition, the parties filed cross-motions to strike with regard to claims made or evidence sought to be admitted since the trial record was closed. With the greatest respect for the people of NHBP whom we serve, we tender our service and opinion in this matter.

Procedural History

This matter came to us on appeal from the trial court's Opinion and Order issued on September 26, 2012. The trial court's order followed a hearing on Appellant's Petition for Writ of Mandamus that alleged that Appellees, NHBP Tribal Council, failed to perform their duties pursuant to Article III, Sec. 6 of the NHBP Constitution and were seeking to have specific duties enforced. Appellees filed a Motion to Dismiss their petition. After a hearing, held on August 28, 2012, the trial court found that Appellant failed to meet the burden of proof necessary to grant mandamus relief, and denied/dismissed their petition. Appellants filed their appeal on October 25, 2012. A briefing schedule was issued and after submission of the parties' briefs, arguments were heard by the Supreme Court on March 7, 2013. In addition, on February 15, 2013, and March 1, 2013, respectively, the parties filed cross-motions to strike evidence/submissions made in addition to or after the closing of the trial court record. Having reviewed the record of the trial court, the submissions of the parties, and following oral argument, we affirm the decision of the trial court in this matter. In addition, we grant the cross-motions to strike. Our reasons for our decision are below.

Factual Background

Eight NHBP tribal members, Appellants, allege a long-standing disagreement with the tribe over a specified group of individuals they feel are erroneously enrolled as tribal members. Appellants contend that they have attempted on many occasions throughout an eleven-year period to have their concerns addressed by approaching various members of the NHBP Enrollment Committee and Tribal Council, to no avail. Appellants filed a petition seeking a writ of mandamus with the tribal court, asking that the Tribal Council be required to do the following:

"1. That this Tribal Court acknowledge that [it] has Mandamus Authority over the Tribal Council and the Enrollment Committee.
2. Court Order Tribal Council to release the detailed findings of Dr. James McClurken, including the genealogy report to the Tribal Membership, including the Petitioners;
3. That this Court Order that an independent audit be performed by someone who has been certified as a genealogist, upon which the parties agree.
4. That results of the independent audit be turned over by this Court and the parties and the general membership.

5. **That in the event that the audit results in in a finding that one or more members are wrongfully enrolled, that said members be ordered to issue a notice of eligibility review by Tribal Council and that in the event that any member cannot provide proof of their membership eligibility, that disenrollment proceedings be commenced against said member.**
6. **That in the event that the independent audit shows that members of the Enrollment Committee and/or Council are not qualified for membership, that they be recused from taking any action on a membership file. ..."**

Petition for Writ of Mandamus, *Chivis v Nottawaseppi Huron Band of Potawatomi*, 12-068-CV (2012).

Appellants infer that the contents of McClurken's genealogical report are invalid because it was produced via the enrollment standards required under the 2006 NHBP Constitutional amendment. It should be noted that the NHBP Constitution was further amended in 2012 by a vote of the membership, creating a more stringent enrollment standard.

Appellees, current members of the NHBP Tribal Council, deny that they have ignored or refused to address Appellant's concerns regarding enrollment. They state that they have directed Appellants toward the procedures then in place to deal with questions concerning enrollment. They argue that they cannot release the full results of the genealogical audits to the membership as they contain information that is confidential and protected by code. In addition, they claim that when a new version of the NHBP Enrollment Code was submitted to the general membership for comment, after several years of work by Tribal Council and the Enrollment Committee, none of the Appellants participated in the process or returned comments regarding same during the comment period. Further, in January 2013, the Tribal Council signed into law the NHBP Enrollment Code, containing procedures which allow for tribal members to request an investigation and review of the enrollment of any member they feel is wrongfully enrolled. *See* Nottawaseppi Huron Band of Potawatomi Enrollment Code, Title II, Article IV.

As stated above, a hearing was held in the trial court on August 28, 2012 on Appellant's Petition for Writ of Mandamus and Appellee's Motion to Dismiss Petition for Writ of Mandamus. Following that, Chief Judge Melissa L. Pope issued an order denying the Petition and granting the Motion to Dismiss.

This appeal followed.

Discussion

I. Jurisdiction of the Supreme Court

Aricle XI § 3(c) of the Constitution of the Nottawaseppi Huron Band of Potawatomi provides:

> **"c. Appellate Jurisdiction. The Tribal Supreme Court shall have jurisdiction to review a final judgment, order or decree of the Tribal Court as provided in**

appellate rules adopted by the Tribal Judiciary or as prescribed by applicable Tribal law."

Huron Potawatomi Tribal Constitution, Article XI § 3(c). *See also* 9 NHBPCR § 3(a).

The trial court having given a final order on Appellant's Petition for Writ of Mandamus and Appellee's Motion to Dismiss Petition for Writ of Mandamus, and per NHBP Constitution, Article XI § 3(c), we have jurisdiction over this appeal of the trial court's decision.

II. Motions to Strike

As a matter of efficiency, we will first address the parties' cross-motions to strike. In their motions, both parties allege that the other has submitted statements and/or allegations in their appellate briefs not submitted in the trial record below. Both have asked that the other parties' briefs be stricken as nonconforming, or, that the Appellee's initial motion to strike be denied.

Currently, NHBP Appellate Court Rules do not contain a provision regarding prohibitions on the content of briefs filed with the Supreme Court. 9 NHBPCR § 12 (A) and (B). Rather, the court rules contain generalized provisions regarding the form and content of appellate briefs. *Id.* In addition, NHBP Appellate Court Rules contains a provision describing the content of the record on appeal. 9 NHBPCR § 7.210. However, in the absence of law, it is the practice of the Court to look to other jurisdictions to see how they treat specific questions of law to determine how best to interpret a legal matter before us.

We look now to Michigan Court Rules which contain similar provisions to those of NHBP relating to the content of the record on appeal as well as the briefs submitted. *See* MCR 7.210 (A)(1), MCR 7.302(H)(3) and MCR 7.212. Michigan Court Rules also allows for the striking of briefs which do not conform to the court rules. MCR 7.211 (E)(2)(c) and MCR 7.212 (I). When looking at evidence or statements not already submitted in the trial record in the matter subject to appeal, the Michigan Appellate Court has clearly established that parties cannot add to the record on appeal anything not already considered by the trial below. Lorland Civic Ass'n v DiMatteo, 10 Mich.App. 129, 137-138, 157 N.W.2d 1 (1968). *Also see* Isagholian v Transamerica Ins. Corp. 208 Mich.App. 9, 18, 527 N.W.2d 1 (1994). This includes affidavits, depositions, exhibits, allegations, etc. that would enlarge the record on appeal. Lorland and Isagholian at *Id. Also see* Dora v Lesinski, 351 Mich. 579, 581, 88 N.W.2d 592 (1958). Further, the Michigan Appellate Court has allowed for actual and punitive damages where appellate briefs were filed in repeated nonconformance with Michigan Court Rules, causing hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determine on appeal. Coburn v Coburn, 230 Mich.App.118, 120, 583 N.W.2d 490 (1998).

Like the Michigan Court Rules, NHBP contains a provision outlining the content of the trial record and limiting it to the submissions in the trial court below. We adopt the interpretation of the Michigan Appellate Court in finding that our review of any appeal shall consist only of the statements, allegations, and evidence submitted in the trial court below. Therefore, any statements, allegations, evidence, exhibits, affidavits, depositions, etc. not

submitted in the trial court record and subsequently, in the record on appeal pursuant to 9 NHBP § 7.210 or in briefs conforming to same, will not be considered by us in our review. Thus, we grant the motions to strike, generally and without specificity, by disregarding any parts of the briefs filed in this matter or any arguments pertaining thereto, that are in addition to or would enlarge upon the trial court record.

III. Petition for Writ of Mandamus

This case presents a matter of first impression for this Court as to whether a writ of mandamus can be obtained under the Court's jurisdiction, by tribal members seeking to compel their governing body, the Tribal Council, to perform a specific duty or task. We will first start by examining the definitions of a writ of mandamus; determine the authority of this Court to issue same; discuss the appropriate test for obtaining a writ of mandamus; and finally, apply the test to the facts of this case.

a. Definition of a Writ of Mandamus

A writ of mandamus is generally defined as a command issuing from a court of law requiring an inferior court, board, corporation, governmental body, or person to perform a specific duty, that duty arising by the parties' office or by operation of law. Brian W. Blaesser & Alan C. Weinstein, Federal Land Use Law & Litigation § 11:31 (2012). Further, the remedy of mandamus is allowable as a peremptory writ or an alternative writ. A peremptory writ is appropriate where "the right to require performance of the act is clear, and it is apparent that no valid excuse for nonperformance can be given.." Kaibel v Mun. Bldg. Commn., 829 F. Supp.2d 779, 783 (D. Minn. 2011). An alternative writ requires a party to do a particular act or show cause as to why the performance of the act is not required. *Id.* In most cases, a writ of mandamus shall not be imposed where there is a "plain, speedy, and adequate remedy in the ordinary course of law." *Id.* at 784.

Several tribes have codified the remedy of writ of mandamus in their codes and constitutions. The Snoqualmie Indian Tribe, Grand Traverse Band of Ottawa and Chippewa Indians, Ponca Tribe of Nebraska, Shawnee Tribe of Indians of Oklahoma, and the Confederated Salish and Kootenai Tribes all provide for the specific remedy of mandamus by law. In addition, many tribal courts have utilized mandamus powers following the lead of American state courts. (*See* Eriacho v Ramah Dist. Ct., 6 Am. Tribal Law 624 (Navajo 2005); Decker v Thorne, 3 Am. Tribal Law 24 (Salish-Kootenai C.A. 2001); and Chapman v Little River Band of Ottawa Indians, No. 07-164-CC, No. 08-034-AP, 2008 WL 6928160 (Little River C.A.) (Little River Band of Ottawa Indians Tribal Court, August 5, 2008)). In all cases, mandamus is recognized as an extraordinary remedy to be used only in circumstances where there is no other means for equitable relief. *Quayle v. Cantu*, No. 08-CA-1028, *1 (Saginaw Chippewa Indian Tribe of Michigan Court of Appeals Sept. 12, 2008).

b. The Authority of the Court to Issue a Writ of Mandamus

The NHBP Constitution, Article XI §3 provides the following judicial authority:

"a) The judicial power of the Nottawaseppi Huron Band of the Potawatomi shall be in the Tribal Court system. The judicial power shall extend to all civil and criminal cases arising under this Constitution, all legislative enactments of the Band, including codes, statutes, ordinances, regulations, all resolutions, agreements, and contracts to which the Band or any of its entities is a party, and the judicial decisions of the Tribal Court system.

b) The judicial power of the Tribal Court system may be exercised to the fullest extent consistent with self-determination and the sovereign powers of the Band, and, as exercised, shall govern all persons and entities subject to the jurisdiction of the Band under Article II of this Constitution."

Constitution of the Nottawaseppi Huron Band of the Potawatomi, Article XI §3.

There is no specific language in the Constitution or laws of NHBP that address whether the Court has the authority to issue writs of mandamus. However, there is nothing precluding the Court from providing mandamus relief where appropriate. Thus, given the broad authority of the Court over matters subject to their jurisdiction, it is clear that the Court may issue a writ of mandamus where it is determined that such relief is warranted. The parties in this case both agree that the Court has such authority, but disagree as to its application. We will explore this topic further below.

c. The Burden of Proof for Obtaining a Writ of Mandamus

For the first time, this Court sets forth the standards that determine whether a party may be granted mandamus relief. To obtain a writ of mandamus, the petitioner must establish the following: 1) the petitioner must have a clear legal right established by the Constitution and laws of the NHBP to the performance of a specific duty; 2) the respondent must have a clear legal duty established by the Constitution and laws of the NHBP; 3) the specific duty sought to be performed can only be in the form of injunctive relief, rather than retroactive or monetary relief; and 4) the petitioner must have no other adequate legal or equitable remedy.

d. Analysis: Does Appellant Meet the Burden of Proof for Obtaining a Writ of Mandamus?

Under the four-part test given above, we now examine whether or not the Appellant meets the burden of proof for the remedy of mandamus. First, it must be determined whether the Appellants have standing through a clear legal right established by the Constitution and laws of NHBP to the performance of a specific duty. Appellants argue that Article III, Section 6(a)(1) of the NHBP Constitution mandates a clear legal duty on behalf of the Tribal Council to disenroll tribal members who do not possess the blood quantum required under that 2012 Constitutional amendment. Their argument extends to requiring the Tribal Council to release Dr. McClurken's genealogy report, perform an independent audit by a genealogist that they themselves agree upon with the results of same being released to the membership, and then begin disenrollment proceedings against any "wrongfully enrolled" members identified as a result of said audit.

Appellants rely on Snowden & Hinmon v. Saginaw Chippewa Indian Tribe of Michigan, No. 04-CA-1017 (Saginaw Chippewa Indian Tribe of Michigan Court of Appeals Jan. 5, 2005) as means of supporting their standing argument. However, in *Snowden*, the Enrollment Department at Saginaw Chippewa Indian Tribe attempted to disenroll two deceased tribal members and their descendants for reasons other than those listed in their Constitution. There, the Court looked at the "implied power of disenrollment" where disenrollment occurred outside of the given procedural and Constitutional mandates, which were very limited. NHBP, on the other hand, has an enrollment code which provides a more detailed set of definitions and procedures when it comes to enrollment. It would be improper for this Court to create an "implied power" of disenrollment, thus creating an affirmative, mandatory duty, where the laws of the NHBP are clear in this regard. Therefore, Appellants reliance on *Snowden* is not persuasive in the context of this case.

Appellants also rely on Quayle v. Cantu, No. 08-CA-1028 (Saginaw Chippewa Indian Tribe of Michigan Court of Appeals, Sept. 12, 2008) to support their argument that mandamus relief is necessary to enforce the Tribe's enrollment ordinance. In *Quayle*, the Court determined that enrollment certifiers had a legal duty to provide membership applicants with answers regarding their applications after having waited for several years. However, the Court declined to provide mandamus relief as to when the certifiers must respond to applicants where the enrollment code did not specify a time limit, even though the applicants had been waiting for five to ten years. The Appellant's reliance on *Quayle* is misplaced. In this case, the appellants claim to have waited for several years for the Tribal Council to satisfy their concerns regarding persons they felt were wrongfully enrolled. However, like the Tribe's Constitution in *Quayle*, the NHBP Constitution does not mandate a time period for the Tribal Council's response to member requests regarding enrollment issues. Like the Court in *Quayle*, this Court declines to impose a time period over the Tribal Council in this case where the Constitution has not clearly mandated one. To do so would be an impermissible and overbroad reach of the Court's power to interpret the laws of NHBP.

As tribal members, Appellants have a right to be concerned about the state of membership in NHBP. They have a right to be involved in the legislative, judicial, and procedural process of NHBP, per the privileges defined in the Constitution, codes and ordinances of NHBP. Appellants also have a right to have their Tribal Council, as their governing body, to perform according to laws of NHBP. However, Appellants have failed to show that the Tribal Council owes them a clear legal duty to perform the actions they are requesting. There is nothing in the Constitution, codes, or ordinances that requires the Tribal Council to release Dr. McClurken's genealogy report, perform an independent audit by a genealogist that they themselves agree upon, release the results of same to the membership, and then begin disenrollment proceedings against any members identified by that audit as "wrongfully enrolled."

Appellant fails to meet the burden of proof for the first part of the test to obtain mandamus relief, where there is no evidence of a breach of a clear legal duty by the Tribal Council. Therefore, we decline to further address the remaining requirements of the test where standing is not found.

The Court would like to note, however, that since this case was filed, Tribal Council signed into law a new ordinance that would allow parties to challenge the membership of tribal members. The action by the Tribal Council in enacting these new procedures is persuasive to show that the Council has provided an alternate remedy to mandamus relief.

Conclusion

We grant the motions to strike, without specificity, and rule that no evidence not submitted in the trial record will be considered by the Court on appeal. In addition, we affirm the Trial Court's denial of the Petition for Writ of Mandamus.

IT IS SO ORDERED.

Signed:

9 May 2013
Date

Hon. John Wabaunsee, Chief Justice

May 10, 2013
Date

Hon. Matthew L.M. Fletcher, Associate Justice

5/7/13
Date

Hon. Holly K. Thompson, Associate Justice

RECIEVED

MAY 1 0 2013

NHBP TRIBAL COURT

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS

Tribal Court

Court Mailing Address: 7500 Odawa Circle, Harbor Springs, MI 49740

Phone: 231-242-1462

TRIBAL COURT

Case No: C-200-0914

Timothy LaCroix, *et al.*

Petitioners,

vs.

Rick Snyder, Governor Michigan, *et al.*

Respondents.

ORDER OF DISMISSAL FOR LACK OF SUBJECT MATTER JURISDICTION

A. Factual Summary

On September 23, 2014, the Petitioners filed a Complaint seeking immediate injunctive relief against the named Respondents in this case. The Petitioners' Complaint alleged that the Respondents had authorized or were "poised to immediately issue," fresh water withdrawal permits for fracking activities that threatened to affect areas within the ceded waters of the 1836 Treaty of Washington[1], in violation of LTBB and State law, and the Intergovernmental Water Accord of 2004, which Petitioners maintain prohibit certain fracking activity. Petitioner's Complaint, pp. 2-3 (citing LTBB Protection of Great Lakes Code, LTBB Natural Resource Protection Code, Michigan Natural Resources and Environmental Protection Act, Great Lakes—St. Lawrence River Basin Sustainable Water Resources Agreement, and the Intergovernmental Water Accord of 2004). Pursuant to LTBB Rules of Civil Procedure (LTBBRCP), R. IX, the Petitioners request an immediate injunction enjoining the Respondents from authorizing the complained-of fracking activity.

[1] Of note for a case regarding the legality of proposed fresh-water fracking, the 1836 Treaty of Washington reserves fishing rights within areas of the Great Lakes for the Odawa and Chippewa bands (and their successors in interest) that were signatories to the Treaty. *See* Treaty with the Ottawa, Mar. 28, 1836, 7 Stat. 491.

B. Discussion

As a threshold matter, the Court notes that it must possess both personal jurisdiction over the parties to a case and subject matter jurisdiction in order to rule on the merits of a case. *See* LTBBRCP, R. XVI. With respect to subject matter jurisdiction in particular, a decision issued by a court on the merits while lacking subject matter jurisdiction leaves the decision void *ab initio*. *Dillon v. Dillon*, 187 P 27 (Cal. App. 1919); *In Re Application of Wyatt*, 300 P. 132 (Cal. App. 1931). That is to say that, when a court is not granted the authority, either by statute or other means, to hear a dispute but does so anyway, the ruling is without effect and unenforceable. *Id.* On the other hand, decisions made by courts while lacking personal jurisdiction over a party are voidable upon the motion of the harmed party. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988). Thus, a finding by the Court that it lacks subject matter jurisdiction to hear a case presents a fatal blow to a petitioning party's complaint, such that the Court need not determine whether it has personal jurisdiction over the parties before dismissing the case.

The LTBBRCP are silent on whether the Court may, on its own accord, dismiss a complaint for lack of subject matter jurisdiction. *See generally* LTBBRCP, *available at* http://www.ltbbodawa-nsn.gov/Tribal%20Court/civilrules%20%28addition%20of%204-21-11%29.pdf. Accordingly, the Court turns to the Federal Rules of Civil Procedure (FRCP) for guidance on the matter; the Court is required to utilize the FRCP where the LTBBRCP are silent, though federal and state case law interpreting the FRCP are not binding on the Court and "should not be assumed to apply." *Id.* at R. I, Section 2(b)(c); *Northern Anesthesia Provides, Inc. v. Welles*, No. FC-233-0812 (Little Traverse Bay Bands of Odawa Indians Tribal Ct. Aug. 6, 2013).

The FRCP that addresses this issue is Rule 12(h)(3), which requires the Court to dismiss a complaint if it determines, "at any time," that it lacks subject matter jurisdiction to hear the complaint. FRCP, R. 12(h)(3) (emphasis added). Such decisions may be made by the Court *sua sponte*. *See, eg, Any Depina, et al. v. Richardson, et al.*, No. 11-11552 (D. Mass. 2013).

Turning to the Petitioners' Complaint, the Court notes that the Petitioners are barred by both LTBB and State law from maintaining a private cause of action against the Respondents to enforce the LTBB and State laws, treaty rights, and compacts cited in the Complaint. More specifically, by their plain and explicit language:

(1) WOTC 4.604(B) authorizes only the Tribe, and not individual Tribal Citizens or Tribal corporations, to bring suit to enjoin parties from engaging in "drilling" or "diversion" activities with the potential to impact the waters ceded by the 1836 Treaty of Washington in violation of Tribal or Federal law;

(2) WOTC 4.1110 authorizes only LTBB officers, and other tribal, state, or federal law enforcement agencies, as approved by Tribal Council, to bring suit to enforce the LTBB Natural Resource Protection Code (individuals and corporations are not

authorized to bring suit to enforce the provisions of the Code);

(3) MCL 324.32713 authorizes only the Attorney General of Michigan, and not private parties, to enforce the Michigan Natural Resources and Environmental Protection Act;

(4) Section 600(4) of the Great Lakes—St. Lawrence River Basin Sustainable Water Resources Agreement of 2005 authorizes only parties to the Agreement to seek enforcement of the Agreement; and

(5) The Intergovernmental Water Accord of 2004 is merely a pledge between the State of Michigan and the several federally-recognized tribes in Michigan to take certain actions and does not create a private right of action to enforce a failure to faithfully adhere to the pledge.

As is clear from a plain reading of the aforementioned texts, the Petitioners do not have, and therefore cannot maintain, a private right of action against the Respondents in this matter.[2] Because the above-mentioned texts are inapplicable to the Petitioners, they have offered no statutory or other legitimate basis to support a motion for immediate injunctive relief against the named Respondents. Accordingly, the Court must dismiss the Motion for a lack of subject matter jurisdiction.

C. Conclusion

In light of the above findings, the Court DISMISSES the Petitioners' Complaint.

IT IS SO ORDERED

10/2/2014
Date

Allie Greenleaf Maldonado, LTBB Chief Judge

[2] The Court additionally notes that the 1836 Treaty of Washington, as an agreement between the governments of the U.S. and the Odawa and Chippewa nations, does not grant the Petitioners in this case a private right of action under these circumstances. Indeed, with the exception of some grants made to individual members of the Odawa and Chippewa nations, which are not at issue here, the Treaty is an agreement between sovereigns, not private parties; for the purposes of this action, the Treaty places obligations on governments, which private parties may not enforce absent explicit language otherwise. *See* Treaty with the Ottawa, Mar. 28, 1836, 7 Stat. 491; *U.S. v. Michigan*, No. M26-73 C.A. (W.D. Mich. 1979) (nothing that the fishing rights "reserved by the [Odawa and Chippewa Indians] in 1836 . . . is the communal property of the tribes . . . it does not belong to individual tribal members"). The Court, thus, cannot create an implied private right of action for the Petitioners under the Treaty—and the Treaty does not create an explicit right of action—for an agreement made between sovereigns, though such a right of action undoubtedly exists with the successors in interest to the Odawa and Chippewa nations that were signatories to the Treaty.

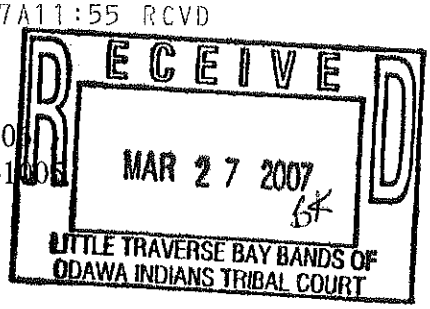
CONSTITUTIONAL LAW

The following three cases address key concepts in Constitutional Law. In the first two cases, the Little Traverse Bay Bands Appellate Court establishes a four-part test for assessing claims brought under the Due Process Clause of the tribe's constitution. The test is presented first in an excerpt from *Carey v. Victories Casino*, No. A-004-0605, 2007 WL 6918017 (Little Traverse C.A. Mar. 27, 2007), and clarified in *McFall v. Victories Casino*, No. A-002-1102, 2003 WL 25865584 (Little Traverse C.A. June 9, 2003).

The third case analyzes sovereign immunity from suit for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (Gun Lake Tribe). *Bailey et al. v. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians*, No. Civ-2011-027 (Gun Lake Tribal Ct., Mar. 17, 2012).

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS
APPELLATE COURT

03-27-07A11:55 RCVD



Albert Carey,
Plaintiff-Appellant,

v.

Victories Casino,
John Espinosa, and Harlan Eckholm
Defendants-Appellees

Appellate Case #A-004-060
Tribal Court Case #C-062-1
CJ Shepard, J Singel

DECISION DISMISSING THE APPEAL AGAINST THE CASINO AND REMANDING THE APPEAL AGAINST APPELLEES ECKHOLM AND ESPINOSA

I. Summary of the Appeal

Appellant Carey appeals the Tribal Court's dismissal of his claim against Victories Casino and the individuals Eckholm and Espinosa. For the reasons discussed below, the Appellate Court dismisses Carey's appeal against the Casino and it remands his appeal against the individuals Eckholm and Espinosa to allow Carey to recommence his suit by properly serving them with a summons and complaint in accordance with the service of process requirements described in this Decision.

A. Factual Summary

This case involves a wrongful termination claim brought by the Appellant Albert Carey in the Tribal Court. Appellant Carey was an employee with the Appellee Victories Casino, a subordinate entity of the Little Traverse Bay Bands of Odawa Indians. On September 21, 2005, he was informed by Harlan Eckholm that he was terminated from his employment for sexual harassment, insubordination, violation of employee

procedures, slander of upper management, and release of in-house confidential information.

Carey believes that he was terminated because he reported to a Tribal Council member that casino management was losing revenue by paying out too much money in its rewards program as a result of its failure to adequately test the program system.

According to the Victories Casino Employee Handbook, Carey had the right to request a hearing before an Employee Review Board (ERB) if he met the requirements of the Handbook's grievance policy.

Carey requested a hearing before the ERB, and when he appeared for it, he was asked to sign a confidentiality form and agree to certain limitations regarding the use of witnesses and legal representatives. Concerned that the confidentiality form and the restrictions on the use of witnesses and a legal representative would deprive him of his civil rights, Carey refused to participate in the ERB hearing. As a result, Carey alleges that he was never informed of the nature of any evidence that the Casino had in support of its reasons for terminating his employment. Shortly after Carey's refusal to participate in the ERB hearing, he commenced this suit in the Tribal Court by filing a Notice of Appeal of the Casino's decision to terminate his employment against the Casino.

B. Procedural History

Carey filed suit against the Casino in the Tribal Court on October 5, 2005. His original petition constituted an appeal from the administrative decision to terminate his employment from Victories Casino. Carey's suit included a claim that he was wrongfully terminated because he was not provided with any verbal or written warnings and he was never shown any written documentation to support the Casino's reasons for terminating

The Appellate Court also notes that in this case, the insufficient service of process is not solely the fault of Appellant Carey. In fact, service of Carey's lawsuit on Eckholm and Espinosa was attempted by the Clerk of the Court. (See Notice of Appeal and Certificate of Service, dated March 1, 2006). Although it is generally the plaintiff's responsibility to ensure that all formal requirements relating to the summons and complaint are fulfilled, here the Appellate Court also notes that the Clerk of the Court bears at least partial responsibility for failing to properly serve Eckholm and Espinosa. As a result, the Appellate Court is persuaded that Appellant Carey should not be unduly penalized for the Clerk of the Court's actions by a dismissal as provided in MCR 2.102(E)(1). The Appellate Court therefore determines that the appeal should be remanded to the Tribal Court rather than dismissed, with instructions that Appellant Carey shall have a second chance to properly initiate his suit by effecting appropriate service of process on Eckholm and Espinosa. On remand, Appellant Carey shall have fourteen days from entry of this Decision to file a complaint. Furthermore, the Tribal Court's Ruling on Defendant's Motion for Summary Judgment and Dismissal shall not have a preclusive effect on the claim or claims that Appellant Carey may bring in accordance with this Decision.

For the reasons stated above, the Appellate Court hereby REMANDS the appeal against Eckholm and Espinosa to the Tribal Court for further proceedings in accordance with this Decision.

IV. Review of Issues under the Tribe's New Constitution

Although the Appellate Court is remanding Appellant Carey's lawsuit against Eckholm and Espinosa for further proceedings without reaching the merits of whether

Carey was deprived of due process, it wishes to provide some direction for the parties and the Tribal Court on this subject. First, the Appellate Court notes that none of the Appellate cases decided prior to the adoption of the Tribal Constitution on March 18, 2005 have precedential value on questions of constitutional interpretation. Cases decided prior to this date in 2005 were not subject the Tribe's new Constitution, and they therefore provide little to no insight into interpretation of this document. Second, the Appellate Court notes that the Constitution's protection of an individual's right to due process requires that certain elements be established by a plaintiff. For a constitutional individual rights claim to proceed, a person must assert that their case meets the specific parameters of the constitutional right in question. In the case of an allegation of a denial of due process of law, where the Tribal Constitution provides that the Tribe shall not "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law," a plaintiff must establish that they are within the tribe's jurisdiction, that they are a person, that they have been deprived of either a liberty or property interest, and that they have been denied due process of law in connection with that deprivation.

The Appellate Court also recognizes that without the benefit of earlier precedents interpreting the meaning of the Tribal Constitution's due process guarantee, the Tribal Court has very little guidance. Although the opinions of other jurisdictions are not binding on questions involving the interpretation of the Tribe's Constitution, such opinions are often helpful guideposts that may provide examples of effective methods for resolving legal questions that arise under the Tribe's Constitution. For example, the federal courts have interpreted the pre-termination due process rights of a public

employee with a property interest in their employment. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 546 (1988) ("The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."). In the Loudermill case, the Supreme Court found that a tenured public employee's due process rights were protected if they received a pre-termination hearing and had the opportunity to pursue a more extensive hearing after termination. The Supreme Court's opinion in Loudermill is not binding on the Tribal Court, but opinions like it may occasionally serve as useful examples of how other jurisdictions have resolved issues that our legal system must address. The Appellate Court cannot predict the scope of a tribal employee's due process rights without the benefit of actually reviewing the merits of a case presenting this issue, and it cannot predict whether a standard like that articulated in the Loudermill case would be appropriate to adopt, but the Tribal Court may consider the Tribal Constitution's due process guarantee within the context of the broad considerations articulated here.

March 27, 2007

Decided and Approved by a Unanimous Court

Chief Appellate Justice
Rita Shepard

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS

APPELLATE COURT

CARTER MCFALL,
Appellant,

File No. A-002-1102
Trial Court file No.: C-025-0101

v.

06-09-03P01:51 FILE

VICTORIES CASINO,
LITTLE TRAVERSE BAY BANDS
OF ODAWA INDIANS
Appellee.

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History of the Case:

The Appellant was terminated from his position as Facility Manager at Victories Casino on September 8, 2000. During the time of his termination, the Appellant attempted to file for a hearing with the Grievance Panel, but the panel had been terminated by the Tribal Council's motion dated August 20, 2000, "*Motion by Councilor Shananaquet and Supported by Councilor Shomin to direct Gaming Administration to eliminate the Victories Casino Grievance Panel and direct those responsibilities to the Human Resources Department.*" The action of the Tribal Council delegated the authority of the Grievance Panel to the Human Resource function of the Gaming Administration.

Prior to the termination of the Appellant, another Casino employee Lonchar was terminated from employment at Victories Casino. At the time of Lonchar's termination, a grievance process was in place, the "Grievance Panel," and Lonchar availed that administrative process. Lonchar received an undesirable decision from the Grievance Panel and filed suit in tribal court. The Tribal Court dismissed the Lonchar case in a Motion for Summary Judgment based on the grounds of sovereign immunity.

Similarly the trial level court dismissed the case at hand, McFall v. Victories Casino, LTBB of Odawa Indians, on a *Motion for Summary Judgment and Dismissal* and based its decision on the precedents set in the Lonchar case.

Differentiating McFall from the Lonchar case:

The trial level court determined that the case at hand was similar to the Lonchar case, as stated:

> *"The instant case is substantially similar to Lonchar. This Court's analysis in that case regarding: tribal sovereign immunity under federal law, immunity of subordinate enterprises of the Tribe, effect of the Indian Civil Rights Act, and tribal sovereign immunity under tribal law applies to this case. The analysis, reasoning and holding of Lonchar are precedent for this case."* Ruling on Defendant's Motion for Summary Judgment, McFall v. Victories Casino, October 22, 2002.

One difference between the Lonchar case and the McFall case raised by the Appellant and noted by the Appellate Court was the available use of the administrative process to address employees' grievances:

> *"The Court finds that the assertion of the defense of sovereign immunity by the Tribe in this case has been an absolute bar to Plaintiff's petition for redress. The Plaintiff did avail herself to her right to petition through the administrative process that was provided all employees at that time. The Plaintiff conceded at the Motion Hearing that she did go through the administrative process but that her termination was upheld. The Plaintiff simply did not get the result she desired."* Ruling on Defendant's Motion for Summary Judgment and Dismissal, Lonchar v. Victories Casino, February 11, 2002.

The Appellant argued that Lonchar had an administrative remedy to address due process. This leaves the question to the Appellate Court in the case at hand whether Appellant McFall was absolutely barred from petitioning for redress thus not affording him due process.

Noncompeting interests: Due Process v. Sovereign Immunity

In the Lonchar case, due process and sovereign immunity were noncompeting interests. Lonchar was able to bring her grievance through an administrative process and have a determination by an impartial authority, thus providing for due process. After receiving an undesirable decision from the Grievance Panel, Lonchar filed suit against the tribe, where sovereign immunity of the tribe was recognized and the case was dismissed.

In McFall, both issues of due process and sovereign immunity were presented to the Tribal Court within the same preceding. Thus, in order to allow for due process, the issue of sovereign immunity became competing. It appears from the lower court proceeding, a hearing was held to determine whether Appellant McFall was wrongfully terminated, but before the decision was rendered, the Respondent raised sovereign immunity and the case was dismissed. The dismissal did not allow for the same due process that was afforded in the Lonchar case.

Appellant McFall raises an important question in his Appellant Brief *"I would ask the Court that if the Casino couldn't give redress and the Tribal Court assumes it is not it's jurisdiction, then whose jurisdiction is it to ensure the due process pledged in the Employee Handbook?"*

This Court looks not to the Employee Handbook as argued by the Appellant, but instead looks to the Little Traverse Bay Bands Tribal Constitution for guidance. The *Tribal Constitution of the Little Traverse Bay Bands of Odawa Indians* is a carefully balanced document. It is designed to provide for a sufficiently strong tribal government and yet sufficiently limited and just to protect the guaranteed rights of its tribal members. The Constitution permits a balance between the tribe's need for order and the members' right to freedom.

The Constitution is the voice of the people and the tribal government derives its authority from the Constitution.

According to Little Traverse Bay Bands of Odawa Indians Constitution, Article VIII - BILL OF RIGHTS:

> *"All members of the Little Traverse Bay Bands of Odawa Indians, Inc. shall be* accorded . . . due process of law."

The Little Traverse Bay Bands Constitution guarantees that the government cannot take away a person's basic right of due process of law. Due process is best defined in one word - *fairness.* Due process provides the standards for fair treatment of citizens by governments. When a person is treated unfairly by the government, including the courts, he is said to have been deprived of or denied due process.

The Tribe must consider the Little Traverse Bay Bands Tribal Constitution is a superior, paramount law, unchangeable by ordinary means. This ensures that ordinary legislative acts, and like other acts cannot alter the meaning and intent of the Constitution. The Tribal Council may eliminate the Grievance Panel, but cannot legislate to eliminate a person's right to due process.

To satisfy the Constitutional requirement of due process, this can be accomplished in many various forms. As long as the basic elements of due process are provided for: fairness and right to be heard.

> *"What due process of law means in the procedural context depends on the circumstances. It varies with the subject matter and the necessities of the situation. Due process of law is a process which, following the forms of law, is appropriate to the case and just to the parties affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained; and whenever necessary to the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. Any legal proceeding enforced by public authority, whether sanctioned by age or custom or newly devised in the discretion of the legislative power, which regards and preserves these principles of liberty and justice, must be held to be due process of law."* Hagar v. Reclamation Dist., 111 U.S. 701, 708 (1884); Hurtado v. California, 110 U.S. 516, 537 (1884).

As noted, due process can be legislated or delegated and may appear in many forms: *"sanctioned by age or custom or newly devised in the discretion of the legislative power"*.

Delegation of Authority to Ensure Due Process

On September 5, 1997, the Tribal Council delegated its authority on Human Resource and Personnel Management issues to the Gaming Administration through its General Manager as stated in the Memorandum entitled "Roles of Gaming Administration and Gaming Regulatory Commission." Under Section IV: Duties and Function of Gaming Administration:

> *"A. Duties*
> *The Gaming Administration shall have the authority and responsibility for developing, reviewing and approving policies and procedures for the orderly and efficient operation, management and maintenance of the Enterprise, including the following:*
> *1. Human resources and personnel management; . . ."*

Further, the Tribal Council mandated the following:

> *"C. Implementation*
> *"1. The policies and procedures developed by the Gaming Administration will be implemented through a general manager employed by the Tribe . . ."*

On August 20, 2000, Tribal Council eliminated the procedure set by the Gaming Administration to handle employee grievances, i.e., the Grievance Committee, and further delegated this authority to the Human Resource Department. In the case at hand, the Appellant attempted to avail himself with the process set forth through the Human Resource department and received the following response through the Gaming Administration's agent, Ronnie R. Olson, General Manager.

> *"If you still believe that this termination is unjustified you have the right to appeal to the Tribal Courts. Therefore, I am requesting your cooperation in ceasing further questions regarding your employment status."* A letter by Ronnie R. Olson, General Manager, October 5, 2002.

It is the conclusion of this Court, that the Gaming Administration, through its agent, to ensure adequate due process protections, delegated its authority to the Tribal Court.

The Tribal Court correctly administered a venue to afford McFall his right to due process. As found in the Lonchar case, the action of allowing for due process does not intrude on the Tribe's sovereign immunity as argued by the Respondent. I t was not until Lonchar disagreed with the decision of the panel and pursued the issue further did sovereign immunity become an issue. In the McFall case a decision was not made for him to agree or disagree with, thus the argument of sovereign immunity did not yet need to be addressed until the avenue for due process was fulfilled. With the elimination of the Grievance Panel and the delegation to the Tribal Court, the Tribal Court attempted to protect the right of due process, but did not accomplish this when the case was dismissed without a decision.

The Appellate Court agrees with the trial level court's decision as argued by the Respondent that sovereign immunity cannot be waived through the delegation to an agent or subordinate enterprises. This is clearly analyzed and set forth in the lower court's decision.

> *"This Court finds that federal law recognizes the inherent immunity of tribal governments and its subordinate enterprises and that there has not been any express abrogation of that immunity by Congress"* Ruling on Defendant's Motion for Summary Judgment and Dismissal, Lonchar v. Victories Casino, February 11, 2002.

Although sovereign immunity cannot be abrogated through an agent without express consent by the tribe, due process can be delegated as was in the case at hand.

Remand to Trial Level Court with Remedies and Alternatives:

The Grievance Committee had the following responsibilities and authority:

> *"1016.03 Responsibilities of the Grievance Hearing Committee*
>
> *The Grievance Hearing Committee shall determine:*
> *A) whether there has been a violation of the employee's rights under the Employee Handbook's Policies and Procedures Manual, and*
> *B) whether the violation substantively affected the employee's ability to receive fair consideration of his or her claim*
> *C) make recommendation to the General manager of a fair and equitable settlement."*
>
> *"1017.03 Report of the Grievance Hearing Committee*
>
> *The report of the Grievance Hearing Committee shall include the findings of fact on each issue presented and make recommendations regarding appropriate action(s) to be taken. The Chair of the Grievance Committee shall forward the Report of the hearing to the General Manager of the Human Resources manager within three (3) working days . . . "*

The delegation of authority to the Tribal Court was limited to the original delegation to the Grievance Committee, as outlined above. Based on the record, the Appellant was not afforded due

process through any administrative means provided by the Gaming Administration except through its limited delegation to the Tribal Court. The Tribal Court had a duty and responsibility to exercise that authority by providing the Appellant a forum for due process. Alternatively, if the Tribal Court does determine on remand that the Appellant did indeed receive due process through the Gaming Administration, then the Tribal Court has no further responsibility in seeing that due process was afforded.

THEREFORE, the Appellate Court remands this case to the Tribal Court to make a determination on the employee's finding of fact of each issue presented and make recommendations regarding appropriate actions to be taken based on the limited responsibility and authority as delegated, or to make a determination that due process was afforded through the Gaming Administration. **Furthermore,** pursuant to the theory of delegation of authority, the decision of the lower court shall be final. "*Grievance Committee Policies and Procedures 1019.00 Cessation of the Grievance Process . . . the decision rendered by the grievance process is final*".

Further, the Appellate Court recognizes the length of time involved in this case, and requests that the Trial Level Court use due diligence in deciding this case on remand, thus affording both parties an expedient resolution.

This is a unanimous decision of the Appellate Court.

06-09-03
Date

Doris Adams, Chief Justice Appellate

06-09-03P01:52 FILE

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS
TRIBAL COURT

ALYSSA BAILEY, *et al.*,

Plaintiffs,

Case No. Civ-2011-027

Michael Petoskey, Chief Judge

v.

MATCH-E-BE-NASH-SHE-WISH BAND
OF POTTWATOMI INDIANS, *et al.*,

Defendants.
_____/

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DECISION ON DEFENDANTS' MOTION TO DISMISS

This matter arises upon a motion filed by Defendants to dismiss a civil complaint filed by Plaintiffs based upon sovereign immunity of both the Tribe and its officials. Plaintiffs complain that they have been denied equal protection of the law in violation of both federal and tribal law. They allege that they were denied an opportunity afforded to some others to apply for tribal

membership. Plaintiffs' Complaint avers that the tribal officials were acting within the scope of their official duties. Both parties have filed written arguments in this matter and this Court conducted oral argument on the motion on February 13, 2012. Thus, the Court, being fully informed and apprised, renders its decision on the Defendants' motion as follows.

ISSUE PRESENTED:

Whether this Court has jurisdiction (the authority) to adjudicate an equal protection of the law complaint against the Tribe and two of its officials, who were acting in their official capacities, by non-Tribal member Plaintiffs?

DECISION DISCUSSION AND REASONING:

A. This Court begins its analysis and discussion with the *Indian Civil Rights Act* (ICRA). See 25 USC 1301 *et. seq.* It is a federal statute that was passed in 1968 during the birth of a race civil rights consciousness in this country. It was enacted because the Bill of Rights contained in the Constitution of the United States does not apply to Indian tribes and nowhere else in the law were there protections for people against an overly-intrusive tribal government. See *Talton v. Mayes*, 163 U.S. 376 (1896).

The seminal case in the federal common law regarding the ICRA and its guarantees is *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The opinion in that case stands for the general proposition that the only federal cause of action based upon the ICRA is conditioned upon a writ of habeas corpus. The *Martinez* court found that the United States Congress did not broadly waive the sovereign immunity of Indian tribes when it enacted the ICRA. That case involved the tribally-sensitive issue of tribal membership. The federal court opined that issues regarding tribal membership should be decided in the tribal courts, not federal ones. That court held that suit in federal courts by Martinez was barred by tribal sovereign immunity. The dicta

in the opinion that membership cases should be heard in tribal forums is a challenge to tribes to provide such forums. It is merely a challenge because the *Martinez* opinion does not hold that tribal immunity is waived for such suits.

B. If tribal immunity from suit has not been waived by the United States Congress, the question turns to whether the Tribe's immunity from suit has been waived by the Tribe itself **because the black letter law is that Indian tribes, its officers and subordinate entities have sovereign immunity unless it has expressly and unequivocally been waived by Congress or the tribe itself.** See *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751 at 754-756 (1998) and *Santa Clara Pueblo*, at 58-59.

1. Tribal Constitution. Article III of the Tribal Constitution provides a Bill of Rights for tribal members. The Constitution is the organic governing document of the Tribe. It is a delegation of power from people to government and the consent of the people to be governed. It is the foundation for government and framework for all that follows. That which does indeed follow is secondary to that foundation and framework.

This Article of guarantees provides that *"[t]he judicial process of the MBPI shall be open to every member of the Tribe."* See *The Constitution of the Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan*, Article III. This waiver of immunity by the people is limited. It is limited to tribal members. Plaintiffs are not tribal members. **Thus, the limited waiver provided by the people themselves does not apply to this suit filed by Plaintiffs.**

This Court finds no other waiver of tribal sovereign immunity in the Tribal Constitution. There is not even a separate article on sovereign immunity like many Michigan Indian tribal constitutions have. The Tribal Constitution is completely devoid of any waiver of sovereign immunity provisions.

2. Tribal Legislation.

a. Judicial Ordinance. In addition to the limited waiver of sovereign immunity and grant of jurisdiction to the courts of the Tribe by the people of the Tribe to hear suits by Tribal members regarding the Bill of Rights contained in the Tribal Constitution, the *Judicial Ordinance* provides the primary contours of judicial jurisdiction. Such is the grant of authority by the Tribal Council. It expressly provides that *"[n]othing ... in this Judicial Ordinance shall be construed as a waiver of the sovereign immunity of the Tribe or its officers..."*. See *Judicial Ordinance*, Chapter II, Section 1, (e) (2). It is unmistakably clear that there is no waiver of tribal immunity by the *Judicial Ordinance* itself. However, the *Ordinance* provides a mechanism for waivers of immunity by formal resolutions when such waivers are deemed wise by the Tribe.

b. Tribal Enrollment Ordinance. The *Tribal Enrollment Ordinance* does not provide any cause of action in the courts of the Tribe. There is no waiver of the immunity of the Tribe anywhere in the plain text of the *Ordinance*.

WHEREFORE, BASED UPON ALL OF THE FOREGOING THE DEFENDANTS' MOTION TO DISMISS IS GRANTED.

FURTHERMORE, IT IS ORDERED THAT PLAINTIFFS' COMPLAINT AGAINST ALL DEFENDANTS IS HEREBY DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

03/17/12
Date

Michael Petoskey
Chief Judge

CONTRACTS

The following two cases address key concepts in Contract Law. In *Fletcher v. Grand Traverse Band Tribal Council*, 2004 WL 5714967 (Grand Traverse Tribal Ct. 2004), the Grand Traverse Band of Ottawa and Chippewa Indians Tribal Court addresses the Parole Evidence Rule and guiding law for employee contract interpretation.

The second case, *Grand Traverse Band of Ottawa & Chippewa Indians v. C.H. Smith Co.*, 2002 WL 34487861 (Grand Traverse Tribal Ct. 2002), concerns a breach of contract action and how the tribe interprets arbitration provisions in the event of a breach.

Not Reported in Am. Tribal Law, 2004
WL 5714967 (Grand Traverse Tribal Ct.)
Only the Westlaw citation is currently available.
Grand Traverse Band of Ottawa and
Chippewa Indians Tribal Court.

June Mamagona FLETCHER, Plaintiff,
v.
GRAND TRAVERSE BAND TRIBAL COUNCIL, Robert Kewaygoshkum, John Concannon, and Thurlow McClellan, in their individual capacities, Defendants.

No. 03–05–448–CV.
|
Jan. 8, 2004.

Synopsis

Background: Former tribal manager brought action against tribal council and its individual members challenging her termination. Defendants' moved for summary disposition.

Holdings: The Tribal Court, Wilson D. Brott, J., held that:

[1] provision in management services agreement did not limit or waive tribal member's right to sue tribe;

[2] tribe's personnel policy manual did not create legitimate expectation of just cause employment;

[3] member failed to allege any specific tribal law that individual tribal council members' violated; and

[4] complaint against individual tribal council members for alleged violations of the personnel policy were barred by sovereign immunity.

Motion granted in part.

West Headnotes (14)

[1] **Indians** Jurisdiction and Venue

Indians Summary Judgment

The plaintiff bears the burden of establishing jurisdiction over a defendant, but need only make a prima facie showing of jurisdiction to defeat a motion for summary disposition. MCR 2.116(C)(1).

[2] **Indians** Summary Judgment

On a motion for summary disposition for a claim that is legally barred, the contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. MCR 2.116(C)(7).

1 Cases that cite this headnote

[3] **Indians** Summary Judgment

On a motion for summary disposition for failure to state a claim, all well-pleaded factual allegations are accepted as true and construed in a light most favorable to the non-movant; the motion may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. MCR 2.116(C)(8).

1 Cases that cite this headnote

[4] **Indians** Summary Judgment

On a motion for summary disposition, the affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, must be considered by the court; where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10).

1 Cases that cite this headnote

[5] **Indians** Liability of Tribes, Tribal Officers and Agents; Immunity

It is federal law which provides the parameters for tribal sovereign immunity.

[6] **Indians** Tribal Constitution and Bylaws
Indians Particular Cases
Indians Decisions Reviewable; Jurisdiction

Provision in management services agreement, which stated that nothing in contract waived tribe's sovereign immunity, did not limit or waive tribal member's constitutional right to sue tribe to enforce her rights after Administrative Appeals Board (AAB) found she was not improperly discharged from tribal employment. GTB Const. Art. 13, § 2.

[7] **Contracts** Construction as a Whole

It is a fundamental rule of contract construction that the entire contract, and each and all of its parts and provisions must be given meaning, and force and effect, if that can consistently and reasonably be done.

[8] **Indians** Employees of Tribe

Tribe's personnel policy manual did not create legitimate expectation of just cause employment, where it contained disclaimer that manual did not create a contract between employer and employee and disclaimer clearly communicated that employer did not intend to be bound by policies stated in the manual.

[9] **Indians** Judicial Review

Promises made to employee prior to entering into employment contract with tribe were inadmissible under the parol evidence rule in employee's action challenging her termination;.

[10] **Indians** Admissibility of Evidence

The parol evidence rule provides that, when two parties have made a contract and have expressed it in a writing which they both have agreed to as being a complete and accurate integration of that contract, extrinsic evidence of antecedent and contemporaneous understandings and negotiations is inadmissible for the purpose of varying or contradicting the writing.

[11] **Indians** Admissibility of Evidence

Parol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous.

[12] **Civil Rights** Good Faith and Reasonableness; Knowledge and Clarity of Law; Motive and Intent, in General
Public Employment Qualified Immunity

Under the doctrine of official immunity, government officials performing discretionary functions within their authority generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

1 Cases that cite this headnote

[13] **Indians** Particular Cases

Tribe member failed to allege any specific tribal law that individual tribal council members' violated, as required to support action against tribal council members seeking civil damages for their alleged violations of tribal law and actions purported to be outside the scope of their authority. GTB Const. Art. 13, § 2; 6 GTBC § 104(a).

[14] **Indians** Particular Cases

Tribe member's complaint against individual tribal council members for alleged violations of the personnel policy and violation of contract between member and tribe were essentially against the tribe itself, and thus the claims were barred by sovereign immunity; personnel policy did not rise to level of tribal ordinance or tribal law. GTB Const. Art. 13, §§ 1, 2.

Attorneys and Law Firms

Myriam Jaidi, New York, NY, for Plaintiff.

Tobin H. Dust, Lippert, Humphreys, Campbell, Dust & Humphrey, P.C., Saginaw, MI, for Defendant GTB Tribal Council.

William Rastetter, Olson, Bzdok & Howard, P.C., Traverse City, MI, for Individual Defendants, Co–Counsel for Defendant Tribal Council.

ORDER REGARDING DEFENDANTS' MOTIONS FOR SUMMARY DISPOSITION

WILSON D. BROTT, Associate Judge.

***1** THIS COURT has reviewed the Defendant Grand Traverse Band Tribal Council's Motion for Summary Disposition, Individual Defendants' Motion for Summary Disposition, and Plaintiff's Motions in Opposition to both summary disposition motions; this Court has also heard the oral arguments of the parties on September 18, 2003; and finally this Court has reviewed the supplemental briefs submitted by the parties related to the aforementioned issues raised in said motions.

FACTS

The Plaintiff, June Mamagona Fletcher, filed the instant action against Defendants Grand Traverse Band Tribal Council (hereinafter "Tribal Council") and Robert Kewaygoshkum, John Concannon, And Thurlow McClellan, in their individual capacities (hereinafter collectively referred to as "Individual Defendants"). It is undisputed that Ms. Fletcher is a member of the Grand Traverse Band of Ottawa and Chippewa Indians. On June 13, 2002, Ms. Fletcher entered into a Management Services Agreement (hereinafter "MSA") with the Grand Traverse Band of Ottawa & Chippewa Indians to be the Tribal Manager. Said agreement is attached as Exhibit 1 to Plaintiff's complaint. The MSA incorporated by reference a position description and duties (attached as Exhibit 2 to Plaintiff's complaint), and the Tribe's Personnel Policies and Procedures (hereinafter "Personnel Policy"), which were adopted on July 1, 1999. On March 19, 2003, Ms. Fletcher received a letter from the Robert Kewaygoshkum, Tribal Chairman, indicating that the Tribal Council formally decided to terminate the MSA pursuant to paragraph 5.F. of that agreement. Said letter is attached as Exhibit 4 to Plaintiff's complaint. Ms. Fletcher filed an appeal of the termination decision with the Grand Traverse Band Administrative Appeals Board (hereinafter "AAB") pursuant to Section 606.01 of the Personnel Policy. The AAB issued a written opinion dated April 22, 2003, which is attached as Exhibit 6 to Plaintiff's Complaint, in which three of the five members found that there was not clear and convincing evidence that Ms. Fletcher was improperly discharged, while two other board members dissented. Ms. Fletcher then filed the instant action with this Court alleging the following Counts:

- Count I—Appeal of Discharge: Tribal Council Violated Its Own Personnel Policies by Discharging Plaintiff Fletcher Without Cause
- Count II—Wrongful Discharge in Violation of Public Policy—Protests to Employer Regarding Tribal Council Member Impropriety (Against Individual Defendants)
- Count III—Wrongful Discharge in Violation of Public Policy—Refusal to Follow Order of Supervisors That Violate Tribal Law or Public Policy (Against Individual Defendants)
- Count IV—Deprivation of Property Interest in Public Employment in Violation of the Due Process Clause of the Grand Traverse Band Constitution and the Indian Civil Rights Act (Against Individual Defendants)
- Count V—Substantive Due Process in Violation of the Grand Traverse Band Constitution and the Indian Civil Rights Act (Against Individual Defendants)

***2** The prayer for relief of Plaintiff's Complaint requests that the Court find the AAB's decision to be outside the scope of its' authority, arbitrary and capricious, and in violation of applicable law; that the Court reinstate Ms. Fletcher to her position as Tribal Manager pursuant to the Personnel Policy; that the Court award back pay and benefits to Ms. Fletcher pursuant to the Personnel Policy; that the Court award compensatory and punitive damages to Ms. Fletcher against the Individual Council Members, and that the Court award attorney fees and costs to Ms. Fletcher pursuant to Article XIII of the Grand Traverse Band Constitution and in general against the Individual Council Members.

DECISION AND ORDER

I. Standard for Summary Disposition Motions

Defendants brought their motions for summary disposition pursuant to Michigan Court Rules 2.116(C)(1), (7), (8) and (10). The Tribal Court has elected to follow the Michigan Court Rules, in the absence of any specific Tribal Court Rule to the contrary. The Tribal Court has not specifically adopted any court rules concerning the standards for motions for summary disposition. Therefore, the standards contained in MCR 2.116 would apply to this case.

A. MCR 2.116(C)(1)—Lack of Jurisdiction

[1] MCR 2.116(C)(1) states as a basis for summary disposition that: "The court lacks jurisdiction over the person or property." MCR 2.116(G)(5) states that "The affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, must be considered by the court when the motion is based on subrule (C)(1)-(7) or (10). Only the pleadings may be considered when the motion is based on subrule (C)(8) or (9)." The plaintiff bears the burden of establishing jurisdiction over a defendant, but need only make a prima facie showing of jurisdiction to defeat a motion for summary disposition. *W.H. Froh, Inc. v. Domanski,* 252 Mich.App. 220, 226, 651 N.W.2d 470 (2002).; *Oberlies v. Searchmont Resort, Inc.,* 246 Mich.App. 424, 427, 633 N.W.2d 408 (2001).

B. MCR 2.116(C)(7)—Claim is legally barred

[2] MCR 2.116(C)(7) states a basis for summary disposition that: "The claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action." Pursuant to MCR 2.116(G)(5), "The affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, must be considered by the court." Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. *Maiden v. Rozwood,* 461 Mich. 109, 119, 597 N.W.2d 817 (1999).

C. MCR 2.116(C)(8)—Failure to State a Claim

***3** **[3]** MCR 2.116(C)(8) states as a basis for summary disposition that: "The opposing party has failed to state a claim on which relief can be granted." Pursuant to MCR 2.116(G)(5), "only the pleadings may be considered when the motion is based on subrule (C)(8)." A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the non-movant. *Wade v. Dep't of Corrections,* 439 Mich. 158, 162, 483 N.W.2d 26 (1992). A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* at 163, 483 N.W.2d 26.

D. MCR 2.116(C)(10)—No Issue of Material Fact.

[4] MCR 2.116(C)(10) states as a basis for summary disposition that: "Except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. MCR 2.116(G)(4) further states:

> A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material

> fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

Pursuant to MCR 2.116(G)(5), "The affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, must be considered by the court." Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Maiden, supra,* at 120, 597 N.W.2d 817.

II. Claims as to Defendant Tribal Council

This case raises issues of the scope of sovereign immunity, not only as applied to the Defendant Grand Traverse Band Tribal Council, but also as to the individual Defendants who are each Tribal Council Members.

[5] As a general rule, the Tribe is immune from suit except where specifically waived. The inherent sovereign immunity of Indian tribes is well-established and has been long recognized in the law. *Bonacci v. Tribal Council,* —— Am. Tribal Law ——, ——, 2003 WL 25836561 (2003), citing *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) and *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991). The United States Supreme Court has consistently held that Indian tribal governments have sovereign immunity unless such immunity has been **expressly waived** by either Congress or the particular tribal government. *Santa Clara Pueblo,* at 58, 98 S.Ct. 1670. It is federal law which provides the parameters for tribal sovereign immunity. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.,* 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). This Court concluded in *Bonacci* that "this Court finds that federal law recognizes the inherent immunity of tribal governments and that there has not been any express waiver of that immunity by Congress." *Bonacci, supra,* at ——.

***4** The issue then becomes whether the Tribe has waived its sovereign immunity. Prior decisions have interpreted the Tribal Constitution's provision in Article XIII, Section 2(a), to allow suit against Tribe to enforce rights afforded under the Constitution, ordinances and resolutions of the Tribe. As succinctly stated by this Court in *Bonacci*:

> The Grand Traverse Band of Ottawa and Chippewa Indians Tribal Constitution contains a **general prohibition** against waivers of immunity by the Tribal Council **except** as provided by the Constitution itself in Article XIII. *See The Grand Traverse Band of Ottawa and Chippewa Indians Tribal Constitution,* Article XIII, Section 1. There are two exceptions expressly provided in Article XIII. One is for suits against the Grand Traverse Band in Tribal Court by tribal members. This waiver is for the **limited purpose** of enforcing rights and duties established by tribal law in suits by tribal members against tribal officials in their official capacities. *See Id.,* Article XIII, Section 2(a). Furthermore, the relief available for enforcement does not include damages. *See Id.,* Article XIII, Section 2(b). The second exception provided is for the furtherance of tribal business enterprises. *See Id.,* Article XIII, Section 1. This exception requires a resolution approved by an affirmative vote of five of the seven members of the Tribal Council.

Bonacci, supra, p. ——.

The question first presented in this case is whether tribal immunity applies to the appeal of a decision of the Administrative Appeals Board (AAB). Plaintiff claims immunity does not apply due to the Constitutional provision, specifically Article XIII, Section 2, which provides that a tribal member can sue to enforce constitutional rights and rights created by tribal law. Plaintiff argues that she has a right to review or appeal from the decision of the AAB, and claims improprieties by the AAB in their decision making process and an apparent conflict of interest because of the AAB's reliance on an opinion from attorney Brian Upton, who at the time was legal counsel for the Grand Traverse Band. Defendant Tribal Council claims that the tribe is immune under all circumstances of this case, that there is no specific waiver for employment rights under tribal law, that this Court's decision in *Linda Stewart v. Grand Traverse Band,* —— Am. Tribal Law ——, 2002 WL 34487862, Ruling on Plaintiff's Motion for *De Novo* Review, (October 21, 2002) is bad law, and that paragraph 5.E. of the Management Services Agreement, which states that "Nothing in this contract shall be interpreted to extinguish or diminish any authority of the Tribal Council, nor shall any part of this contract be interpreted to waive the Tribe's sovereign immunity."

In *Stewart*, in which the Plaintiff tribal member sought review of an Administrative Appeals Board decision, this Court held that review of an AAB decision pursuant to the Tribe's Personnel Policy did fall within one of the express Constitutional exceptions to the general prohibition against sovereign immunity contained in the Tribal Constitution, Article XIII, Section 2(a), but noted that the Plaintiff's remedies did not include damages under Article XIII, Section 2(b). *Stewart, supra,* at —— – ——. The *Stewart* decision is contrasted by this Court's opinion in *Roxanne Fall v. Grand Traverse Band,* —— Am. Tribal Law ——, 2003 WL 25836853, Ruling on Defendant's Motion to Dismiss (June 26, 2003), in which this Court held that the Tribe had sovereign immunity from review of the AAB board decision under the Tribe's Personnel Policy. However, the Court in *Fall* found that it did not have jurisdiction in that case because the Plaintiff in that case was not a tribal member, and therefore the sovereign immunity waiver provisions of Article XIII, Section 2 of the Tribal Constitution did not apply. *Id.,* p. ——. (Compare to the Court's dicta in *Sliger v. Stalmack,* Case —— Am. Tribal Law ——, —— – ——, 1999 WL 34986345 (1999),, suggesting that the Indian Civil Rights Act, 25 U.S.C., §§ 1301–1303, the Tribal Constitution, and the doctrine of equal protection would allow review by all persons, including non-tribal members and even non-Indians). This Court has also confirmed the Tribe's right to appeal an AAB decision under principles of fundamental fairness in *Grand Traverse Band v. Robert Comer,* —— Am. Tribal Law ——, 2003 WL 25836854, Ruling on Plaintiff's Motion to Dismiss, (February 25, 2003).

***5** **[6]** Assuming that the matter was properly before the Administrative Appeals Board, under *Stewart*, the claim of Plaintiff, a tribal member, seeking review or appeal of the decision of the Administrative Appeals Board are not barred by sovereign immunity due to the express waiver provision of the Tribal Constitution, Article XIII, Section 2(a), subject to the limitations of Article XIII, Section 2(b). This Court holds that the contract provision of paragraph 5.E. of the MSA does not act to limit or waive Plaintiff's rights under Article XIII, Section 2, only to preserve the sovereign immunity the Tribe is entitled to. Therefore, this Court hereby concludes that this Court has jurisdiction over the matter of Plaintiff's claim of review concerning her appeal of the decision of the AAB. Defendant's motion for summary disposition pursuant to MCR 2.116(C)(1) and (C)(7), based upon lack of jurisdiction and immunity, are therefore denied.

The analysis does not stop there, however. The Defendant has raised as an affirmative defense that the Plaintiff is not entitled to review by the AAB due to paragraph 5.F. of the MSA with Plaintiff, which provides that:

> This Agreement can only be changed with the written consent of both parties. However, either party can unilaterally terminate this Agreement upon at least 30 days written notice to the other party.

Defendants argue that the Court should give meaning to this provision of the MSA, and that if the Court were to allow the AAB to review the termination, it would give no meaning to the 30–day clause. The issue is further complicated by paragraph 5.C. of the MSA, which states that: "The Tribe's

Personnel Policies and Procedures are herein incorporated by reference and shall apply to the position of Tribal Manager."

The question then becomes one of whether contract remedies are barred by tribal immunity, and whether Plaintiff has contracted away or released her right to review by the AAB via paragraph 5.F., and thus her right to appeal the AAB's decision. The parties have also raised the issue of whether Plaintiff's employment was just cause or at will employment. Paragraph 5.F. of the MSA suggests at will employment. The Tribe's Personnel Policy, specifically, Section 101.0, which states in part that "it is the Band's policy to discharge that employee only upon cause," suggests just cause employment. Plaintiff further argues that oral promises were made to Plaintiff prior to her entering into the contract in order to induce her into signing it; that the provisions of the MSA and the meaning of paragraphs 5.C. and 5.F., taken together are ambiguous; and that the contract should be interpreted as a just cause contact. Defendants reply that evidence of prior promises or statements in negotiations are inadmissible under the parol evidence rule, that the contract is unambiguous, and that the contract was an at will contract terminated according to its terms under paragraph 5.F.

[7] A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together. Restatement (Second) of Contracts, § 202(2). Therefore, the Court must take into account both the writings contained in the MSA and in the Personnel Policy Manual. The Restatement (Second) of Contracts, Section 203 states standards of preference for interpretation of contracts and their terms:

> ***6** In the interpretation of a promise or agreement or a term thereof, the following standards of preference are generally applicable:
>
> (a) an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect;
>
> (b) express terms are given greater weight than course of performance, course of dealing, and usage of trade, course of performance is given greater weight than course of dealing or usage of trade, and course of dealing is given greater weight than usage of trade;
>
> (c) specific terms and exact terms are given greater weight than general language;
>
> (d) separately negotiated or added terms are given greater weight than standardized terms or other terms not separately negotiated.

"It is a fundamental rule of contract construction that the entire contract, and each and all of its parts and provisions ... must be given meaning, and force and effect, if that can consistently and reasonably be done." 17A Am.Jur.2d § 386, at p. 411 (footnotes omitted).

Taking these contract construction principles into account, this Court must attempt to reconcile and give meaning to both Paragraph 5.F. of the MSA, and Paragraph 5.C, which incorporates by reference all of the terms of the Personnel Policy. In essence, the Court must give meaning to both the 30–day termination language of paragraph 5.F., and the "discharge only upon cause" language of Section 101.0 of the Personnel Policy.

Michigan courts have held that where a written contract for a definite duration contains unambiguous terms that allow either the employer or the employee to terminate the employment relationship after thirty days notice, "the mutual right to terminate the employment relationship following such notice is incompatible with a just cause employment relationship." *Kocenda v. Archdiocese of Detroit,* 204 Mich.App. 659, 666, 516 N.W.2d 132 (1994); *Jontig v. Bay Metro Trans. Auth.,* 178 Mich.App. 499, 444 N.W.2d 178 (1989). It is clear then that paragraph 5.F. of the MSA, taken alone, under *Kocenda* and *Jontig*, establishes an at will employment relationship between the Plaintiff and her employer. The question then becomes whether the Tribe's Personnel Policy is inconsistent with paragraph 5.F., and whether the Personnel Policy takes precedent over the at will employment created by paragraph 5.F.

Defendant relies upon Section 100.0 of the Tribal Government Personnel Policy which states in part:

> **NEITHER THIS EMPLOYEE MANUAL NOR ANY OF ITS PROVISIONS IMPLIES OR ESTABLISHES A CONTRACT BETWEEN THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS AND YOU AS AN**

> **EMPLOYEE.** The information, expressed or implied, in the employee manual summarizes current Tribal policies and programs and is intended to be for informational purposes only. The Grand Traverse Band of Ottawa and Chippewa Indians, therefore, reserves the right to revise, interpret, supplement, or rescind in whole or in part any of the published or unpublished policies or practices of the Grand Traverse Band of Ottawa and Chippewa Indians.

***7** (Emphasis in original).

Plaintiff argues the Personnel Policy does take precedence over paragraph 5.F. of the MSA, and that contract should be interpreted in favor of Plaintiff due to the Tribe's "position of power" over Plaintiff, citing *Lewis Adams v. Grand Traverse Band EDC,* Case No. 89–03–001–CV, Decision on Defendants' Motion to Dismiss Based Upon Sovereign Immunity, June 18, 1992, p. 6. The Defendants, cite *Lytle v. Malady,* 458 Mich. 153, 579 N.W.2d 906 (1998), and *Highstone v. Westin Eng'g, Inc.,* 187 F.3d 548, 552 (6th Cir., 1999), for the proposition that a policy manual cannot create a legitimate expectation of just cause employment where it contains a disclaimer, that the manual did not create a contract between employer and employee, and the disclaimer clearly communicated that the employer did not intend to be bound by the policies stated in the handbook. The Court finds these cases to be instructive.

In *Lytle,* the Court summarized the law concerning at will versus just cause employment:

> Generally, and under Michigan law by presumption, employment relationships are terminable at the will of either party. *Lynas v. Maxwell Farms,* 279 Mich. 684, 687, 273 N.W. 315 (1937). However, the presumption of employment at will can be rebutted so that contractual obligations and limitations are imposed on an employer's right to terminate employment. *Toussaint v. Blue Cross & Blue Shield of Michigan,* 408 Mich. 579, 292 N.W.2d 880 (1980). See also *Edwards v. Whirlpool Corp.,* 678 F.Supp. 1284, 1291 (W.D.Mich., 1987). The presumption of employment at will is overcome with proof of either a contract provision for a definite term of employment, or one that forbids discharge absent just cause. *Rood v. General Dynamics Corp.,* 444 Mich. 107, 117, 507 N.W.2d 591 (1993). Courts have recognized the following three ways by which a plaintiff can prove such contractual terms: (1) proof of "a contractual provision for a definite term of employment or a provision forbidding discharge absent just cause;" (2) an express agreement, either written or oral, regarding job security that is clear and unequivocal; or (3) a contractual provision, implied at law, where an employer's policies and procedures instill a "legitimate expectation" of job security in the employee.
>
> * * *
>
> We have recognized a two-step inquiry to evaluate legitimate—expectations claims. The first step is to decide "what, if anything, the employer has promised," and the second requires a determination of whether that promise is "reasonably capable of instilling a legitimate expectation of just-cause employment ..." 444 Mich. at 138–139, 507 N.W.2d 591.
>
> > Not all policy statements will constitute a "promise," which we have recognized as a "manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." [*Id.* at 138–139, 507 N.W.2d 591, quoting the Second Restatement of Contracts, § 2(1).]
>
> * * *
>
> ***8** A lack of specificity of policy terms or provisions, or a policy to act in a particular manner as long as the employer so chooses, is grounds to defeat any claim that a recognizable promise in fact has been made. 444 Mich. at 139 [507 N.W.2d 591].

Lytle, at 163–165, 579 N.W.2d 906 (footnotes omitted). The Court found that the company's personnel policy in that case was insufficient to overcome the strong presumption of employment at will, citing language which was nearly identical to the language in bold of Section 100.0 of the Tribe's Personnel Policy. The *Lytle* Court concluded that this contractual disclaimer clearly communicated to employees that the employer did not intend to be bound by the policies stated in the handbook, and that at the very least, the disclaimer rendered the "without cause" statement too vague and indefinite to constitute a promise.

Id., at 166, 579 N.W.2d 906. Therefore, this Court similarly holds that the "without just cause" provision of Section 101.0 on which Plaintiff relies did not constitute a promise that could form the basis of a legitimate-expectation claim.

[8] Just as the Court must interpret the Management Services Agreement in question as a whole and give meaning to each of its terms, so must the Court interpret the Personnel Policy as a whole and give meaning to each of its terms. This Court finds that the policy manual, and specifically Section 101.0, does not create a contractual expectation of just cause termination, but merely states the policy of the Tribe with respect to an employee. To interpret otherwise would require the Court to ignore the plain meaning and language of Section 100.0 of the Personnel Policy.

[9] **[10]** **[11]** This Court holds that it cannot consider evidence relating to promises made to the Plaintiff prior to her entering into the MSA as such evidence is inadmissible under the parol evidence rule. The parol evidence rule provides that, when two parties have made a contract and have expressed it in a writing which they both have agreed to as being a complete and accurate integration of that contract, extrinsic evidence of antecedent and contemporaneous understandings and negotiations is inadmissible for the purpose of varying or contradicting the writing. *Van Pembrook v. Zero Mfg. Co.*, 146 Mich.App. 87, 97–98, 380 N.W.2d 60 (1985). Parol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous. *Central Transport, Inc. v. Fruehauf Corp.*, 139 Mich.App. 536, 362 N.W.2d 823 (1984).

This Court holds that paragraph 5.F. of the MSA controls and is applicable to the Plaintiff's employment relationship with the Tribe. Therefore, as there is no dispute that Plaintiff was given 30 days notice of her termination pursuant to paragraph 5.F. of the MSA, Plaintiff's claims based on a just cause employment relationship must fail. The Defendants' motion for summary disposition is hereby granted pursuant to MCR 2.116(C)(8) and (C)(10) to the extent that Plaintiff's claims are based upon just cause employment.

***9** This does not mean that the Personnel Policy, as incorporated by paragraph 5.C. of the MSA, is without meaning within the Plaintiff's contract. The Personnel Policy, specifically, Sections 606.01, et al, provide an employee with the right to request an administrative hearing before the Administrative Appeals Board. This Court finds that Plaintiff's right to seek redress through the AAB, including review by this Court pursuant to Section 606.06 under the standard of review set forth in Section 606.07, are consistent with both the MSA and the Personnel Policy. This is also consistent with the parties practice as the Plaintiff was afforded an opportunity to participate in an AAB hearing. Furthermore, for the reasons stated in the opinion above, Plaintiff's claims for review of the AAB's decision are not barred by Defendant's claims of sovereign immunity. In summary, Defendant's motion for summary disposition is denied as to Plaintiff's claim for review of the AAB Board's decision, but is granted with respect to Plaintiff's claims for damages based upon theories of wrongful just cause employment. This Court will hear Plaintiff's claim for review of the AAB's decision, which is essentially in the nature of an appeal from that decision.

III. Claims as to Individual Defendants

Plaintiff argues individual council members committed illegal acts as alleged in Complaint, and that those acts factored into the council and individual council member's decision to terminate Plaintiff. The Individual Defendants argue that the officers acted within the scope of their authority, and that the Court should not allow suits based upon mere allegations of impropriety of illegal acts due to the harmful effects on Tribal government. Individual Defendants also argue that the relief sought is essentially one seeking redress from the Tribe itself (i.e. reinstatement and damages), therefore the Defendant tribal council members should not be named individually.

The Plaintiff alleges that the individual tribal members were acting outside of their scope of authority and that they were thus not protected by "official immunity." The doctrines of tribal sovereign immunity and official immunity were discussed extensively in the case of *Rave v. Reynolds,* 23 ILR 6150 (Winnebago Tribe of Nebraska Supreme Court, 1996). In *Rave,* the court considered whether under tribal law the defense of tribal sovereign immunity extended to suits against tribal officials and employees. *Id.* The *Rave* court summarized extensively the federal law as well as tribal court rulings on

the doctrines of sovereign immunity and official immunity in the context of suits against tribal officials and employees individually:

> Under federal common law, tribal sovereign immunity clearly does not extend to suits against tribal officials and employees, even when sued in their official capacity and when acting in the scope of their delegated tribal authority.

In *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 [98 S.Ct. 1670, 56 L.Ed.2d 106] (1978), for example, the United States Supreme Court held that even though federal common law doctrines of tribal sovereign immunity barred a suit against the Santa Clara Pueblo in a case brought by a tribal member on behalf of her nonenrolled child to contest the legality of the tribal enrollment ordinance under the Indian Civil Rights Act, the same suit seeking injunctive and declaratory relief was *not* barred by the doctrine of sovereign immunity when brought against the Governor of Pueblo when sued in his official capacity. Under federal immunity doctrines, notions of *official immunity* generally are distinguished from doctrines of sovereign immunity. Sovereign immunity only bars suits for damages or injunctive relief against the government or its agencies. *E.g., Seminole Tribe v. Florida,* 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996); *Blatchford v. Native Village of Noatak,* 501 U.S. 775, 111 S.Ct. 2578, 2581, 115 L.Ed.2d 686 (1991). As the United States Supreme Court held in *Martinez,* generally injunctive, declaratory relief, and most damage suits can be filed under federal immunity doctrines against public officials without any bar of sovereign immunity. *See also Ex Parte Young,* 209 U.S. 123 [28 S.Ct. 441, 52 L.Ed. 714] (1908); *Burlington Northern R.R. Co. v. Blackfeet Tribe,* 924 F.2d 899, 901 (9th Cir.1991), *cert. denied,* 505 U.S. 1212 [112 S.Ct. 3013, 120 L.Ed.2d 887] (1992); *Tenneco Oil Co. v. Sac and Fox Tribe,* 725 F.2d 572 (10th Cir.1984); *Chemehuevi Indian Tribe v. California St. Bd. of Equalization,* 757 F.2d 1047, 1050–1051 (9th Cir.1985), *rev'd in part on other grounds,* 474 U.S. 9 [106 S.Ct. 289, 88 L.Ed.2d 9] (1985); *Imperial Granite Co. v. Pala Band of Mission Indians,* 940 F.2d 1269 (9th Cir.1991); *Babbitt Ford, Inc. v. Navajo Indian Tribe,* 519 F.Supp. 418, 425 (D.Ariz.1981), *aff'd in part, rev'd in part,* 710 F.2d 587 (9th Cir.1989[1983]), *cert. denied,* 466 U.S. 926 [104 S.Ct. 1707, 80 L.Ed.2d 180] (1984). Federal law, however, generally provides such officials with official immunity affirmative defenses which are nonjurisdictional affirmative defenses that generally do not bar injunctive or declaratory relief but prevent or limit damage recoveries against such officials. These official immunity defenses sometimes provide absolute immunity, such as the immunity afforded the President of the United States for official actions, *see Nixon v. Fitzgerald,* 457 U.S. 731 [102 S.Ct. 2690, 73 L.Ed.2d 349] (1982), or the immunity afforded judges, *see, Mireles v. Waco,* 502 U.S. 9 [112 S.Ct. 286, 116 L.Ed.2d 9] (1991); *Pierson v. Ray,* 386 U.S. 547[, 87 S.Ct. 1213, 386 U.S. 547] (1967); *Bradley v. Fisher,* 80 U.S. (Wall.) 335[, 20 L.Ed. 646] (1871). More commonly, however, federal law affords government officials and employees only qualified immunity, limiting their damage exposure to those cases in which they acted in violation of a legal rule which they knew or had reason to know. *E.g. Harlow v. Fitzgerald,* 457 U.S. 800 [102 S.Ct. 2727, 73 L.Ed.2d 396] (1982): *compare Butz v. Economu [Economou],* 438 U.S. 478 [98 S.Ct. 2894, 57 L.Ed.2d 895] (1978); *Wood v. Strickland,* 420 U.S. 308, 322 [95 S.Ct. 992, 43 L.Ed.2d 214] (1975) (setting forth the earlier test containing subjective elements). Federal immunity law therefore generally draws a clear distinction between the sovereign immunity of governments and governmental agencies and the official immunity of public officials and employees. While animated by similar policies, the two doctrines are distinct. Nevertheless, under federal law exceptional circumstances exist where the doctrines of sovereign immunity, as opposed to official immunity, bars certain suits brought against named governmental officials. This situation most commonly arises where the suit, while nominally brought against a named governmental official, really was brought to secure payment of damages or other monetary awards from the public treasury (as opposed to the personal liability of the official, whether or not voluntarily indemnified by the governmental employer), *see e.g., Edelman v. Jordan,* 415 U.S. 651 [94 S.Ct. 1347, 39 L.Ed.2d 662] (1974) (compensatory damages of "equitable restitution" suit seeking payment of back

welfare funds from the public treasury were barred by eleventh amendment sovereign immunity even though the suit was only filed against a public official), or to adjudicate or compel performance of a contractual or other obligation of the government, *e.g.,* *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 [69 S.Ct. 1457, 93 L.Ed. 1628] (1949), or to adjudicate title to a property claimed by the government, *e.g.,* *Land v. Dollar,* 330 U.S. 731 [67 S.Ct. 1009, 91 L.Ed. 1209] (1947); *United States v. Lee,* 106 U.S. 196 [1 S.Ct. 240, 27 L.Ed. 171] (1882). In these cases, the courts employ the doctrine of sovereign immunity, rather than official immunity, to assure that the property or contractual rights and obligations of the government are not reached through a suit against a public official.

* * *

***10** Federal law therefore classically draws a relatively bright line between suits against governments or governmental agencies, which generally are barred by sovereign immunity, and suits against officials, which, if controlled by any immunity at all, usually involve official, rather than sovereign, immunity. The decisions of other tribes on this matter under tribal law, however, sometimes have been less clear on this point. Indian tribes generally are found to be immune from suit without their consent or an express waiver under tribal law. *E.g., Colville Confederated Tribes of the Colville Reservation v. Stock West,* 21 I.L.R. 6075 (Colv. Tr. Ct.1994). While tribal agencies are generally held immune from suit under tribal sovereign immunity, at least one tribal court recently ruled as a matter of tribal law that tribal sovereign immunity did not extend to injunctive and declaratory relief actions filed against a tribal agency not involving tribal land, property or contractual obligations. *Thompson v. Cheyenne River Sioux Tribe Board of Police Commissioners,* 23 I.L.R. 6045 (Chy. R. Sx. Tr. Ct.App.1996). The tribal courts, however, appear more divided on the scope of tribal sovereign immunity, if any, for suits brought against tribal officials.

> Most of the recent tribal court decisions considering the application of tribal sovereign immunity to suits against tribal officials, including members of a tribal council, have determined that tribal officials cannot assert tribal sovereign immunity as an absolute jurisdictional defense to suit.

Id., 23 ILR at 6161–6162. (Emphasis in original). The *Rave* Court went on to discuss further examples of tribal courts who have ruled consistent and somewhat inconsistently with the federal law on the issue, and suggested that courts should clearly demarcate and separate the legal question of tribal sovereign immunity from the issue of tribal official immunity. *Id.,* 23 ILR at 6162.

[12] Under some circumstances, it is appropriate to apply the doctrine of sovereign immunity, as this Court has done on many previous occasions, to cases involving suits against the Grand Traverse Band and its agents, including Tribal Councilors. This Court holds that under the doctrine of "official immunity," government officials performing discretionary functions within their authority generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). As the Court in *Harlow* explained:

> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors. By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct.

> The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences." *Pierson v. Ray*, 386 U.S. 547, 554, 87 S.Ct. 1213, 1217, 18 L.Ed.2d 288 (1967).

***11** *Id.*, at 818–820, 102 S.Ct. 2727.

[13] In the instant case, the Tribal Constitution of the Grand Traverse Band of Ottawa and Chippewa Indians provides in Article XIII, Section 2, that:

> (a) The Grand Traverse Band and **Tribal Council members, in their official capacities,** shall be subject to suit in the tribal court system by tribal members for the purpose of enforcing rights and duties established by this Constitution and by the ordinances and resolutions of the Tribe.
>
> (b) Tribal members shall not be entitled to an award of damages, as a form of relief, against the Grand Traverse **Band or its Tribal Council members in their official capacities;** provided that the Tribal Council may by ordinance waive the right of the Grand Traverse Band to be immune from damages in such suits only in specified instances when such waiver would promote the best interests of justice.
>
> (c) If the tribal member bringing a suit prevails on the merits in the Tribal Judiciary, the costs of bringing the suit may be charged to the Band, if so ordered by the Tribal Judiciary.
>
> (d) The Band, however, by this Article, does not waive or limit any rights which it may have to be immune from suit in the courts of the United States or of any state.

(Emphasis added).

The Tribe also has a Sovereign Immunity Waiver Ordinance, 6 GTBC § 101 et seq. Specifically, 6 GTBC § 104(a) states that: "The sovereign immunity of the Tribe shall continue except to the extent that it is expressly waived by this ordinance. **Members of the Tribal Council remain immune from suit for actions taken during the course and within the scope of their duties as members of the Tribal Council.**" (Emphasis added).

The question to be decided is whether the Plaintiff has alleged facts as to the actions of the individual Defendants that would place said Defendants outside the scope of either sovereign or official immunity. The Plaintiff's complaint against the individual Defendants alleges the following acts as being either outside the scope of their authority, in violation of tribal law, or both:

- Violation of Section 412 of the Personnel Policy for failing to complete performance evaluations in a timely manner. (Complaint, paragraph 11).
- Violation of tribal law by failing to act upon the complaint of Helen Cook. (Complaint, paragraph 30)
- Defendant McClellan using his position of authority to demand that Ms. Inman sell land at a lower price, outside the scope of his authority (Complaint, paragraph 32.)
- Retaliation against Plaintiff by Individual Defendants due to Plaintiff bringing forward Ms. Inman's complaint, outside the scope of their authority (Complaint, paragraph 34.)
- Defendant McClellan using his position of authority to verbally harass, intimidate, and threaten Plaintiff and the AAB Board while testifying before the AAB Board, and testifying against the interest of the Grand Traverse Band membership in violation of Tribal law and outside the scope of his authority. (Complaint, paragraphs 35 and 36).

***12** • Defendant Kewaygoshkum failed to act on Plaintiff's complaints of McClellan's behavior as above, in violation of Tribal law and outside the scope of his authority. (Complaint, paragraph 39.)

- The individual Defendants prepared a performance appraisal which was in retaliation for protected activities and to harass Plaintiff, and as a pretext for later

discharging Plaintiff, outside the scope of their authority. (Complaint, paragraphs 41 and 42).

- Individual Defendants discharged Plaintiff in retaliation for protected activities, outside the scope of their authority, in violation of law and policy. (Complaint, paragraphs 43, 60, 82).

- Individual Defendants directed Plaintiff to produce copies of personnel files in violation of the Personnel Policy. (Complaint, paragraph 53)

- On two occasions, Individual Defendants directed Plaintiff to discharge an employee without cause in violation of the Personnel Policy (Complaint, paragraph 54).

- Individual Defendants directed Plaintiff to demote an employee without cause in violation of the Personnel Policy (Complaint, paragraph 55).

- Individuals Defendants directed Plaintiff to hire an employee without posting the job or preparing a job description in violation of the Personnel Policy. (Complaint, paragraph 56).

- Individual Defendants directed Plaintiff to discipline an employee that had not violated the Personnel Policy or tribal law. (Complaint, paragraph 57.)

- Individual Defendants directed Plaintiff to post a position for hire without Tribal Council approval or a budget plan in violation of a valid Tribal Council directive. (Complaint, paragraph 58).

- Defendant Kewaygoshkum retaliated against Plaintiff for protected activities by giving her a negative evaluation, outside the scope of his authority, in violation of tribal law. (Complaint, paragraph 59).

- Individual Defendants cause attorney Brian Upton to argue that Plaintiff could be discharged without cause, outside the scope of their authority, in violation of tribal law. (Complaint, paragraph 71).

The allegations against the Individual Defendants referenced above allege violations of tribal law and allege actions purported to be outside the scope of the Defendants' authority. However, the Court must also take into account that the counts alleged against the Individual Defendants do not seek injunctive or declaratory relief as to the Individual Defendants, rather they seek compensatory and punitive damages and attorney fees against from the Individual Defendants.

[14] As indicated above, this Court must determine whether the individuals conduct violated clearly established law of which a reasonable person would have known. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but also whether that law was clearly established at the time an action occurred. *Harlow, supra.* Unfortunately, while the Plaintiff's complaint states several times that the actions of the Individual Defendants amounted to violations of tribal law, the Plaintiff fails to cite ***any*** specific tribal laws that the individual Defendants are alleged to have violated. The mere statement of a conclusion that the Individual Defendant's actions were in violation of tribal law, without further reference to any specific tribal law that the Individual Defendants are alleged to have violated, is not sufficient to sustain the Plaintiff's Complaint. Furthermore, Plaintiff's Complaint does not seek to undo the alleged illegal actions of the individual Defendants (save for her discharge, which is essentially a claim against the Tribal Council), and does not seek injunctive or declaratory relief as to the Individual Defendants. Rather, Plaintiff's claims sound in contract and tort claims, and seek civil damages against the Individual Defendants. To the extent that the Plaintiff's Complaint alleges violations of the Personnel Policy and violation of the contract between Plaintiff and the Tribe, the Court holds that such claims are essentially against the Tribe itself, and thus as to such claims the Individual Defendants are protected by sovereign immunity, *as the Personnel Policy does not rise to the level of a Tribal ordinance or tribal law.* For these reasons, pursuant to MCR 2.116(C)(8) the Court finds that Plaintiff has failed to adequately state a claim upon which relief can be granted as to the Individual Defendants, and the Individual Defendant's motion for summary disposition is hereby granted.

IV. Conclusion

***13** Consistent with the above, Count I of the Plaintiff's complaint will be treated by this Court as an appeal by the Plaintiff of the decision of the AAB Board. Plaintiff is ordered to file with this Court a transcript of the proceedings before the AAB, as well as any other record and/or documents

considered by the AAB in connection with it's determination as to Plaintiff within 60 days of the date of this opinion. Briefs shall be submitted to the Court by Plaintiff within 90 days of this opinion, and response briefs shall be submitted by all Defendants within 120 days of this brief. Oral arguments will be scheduled following receipt of the briefs. To the extent that Count I of Plaintiff's Complaint states claims other than an appeal of the AAB decision, such claims are dismissed with prejudice.

Also consistent with the Court's opinion above, Counts II, III, IV and V of the Plaintiff's Complaint, are hereby dismissed with prejudice.

IT IS SO ORDERED.

All Citations

Not Reported in Am. Tribal Law, 2004 WL 5714967

Not Reported in Am. Tribal Law, 2002
WL 34487861 (Grand Traverse Tribal Ct.)
Only the Westlaw citation is currently available.
Grand Traverse Band of Ottawa and
Chippewa Indians Tribal Court.

GRAND TRAVERSE BAND OF OTTAWA & CHIPPEWA INDIANS, Plaintiff,

v.

C.H. SMITH COMPANY, INC., a corporation and Steve Smith, an individual, Defendants.

No. 00–07–355–CV.
|
March 15, 2002.

Synopsis

Background: Tribe filed breach of contract action against construction corporation and its president in his individual capacity. Defendants counterclaimed for breach of contract, and moved for partial summary disposition and to compel arbitration and stay proceedings.

Holdings: The Tribal Court, Michael Petoskey, J., held that:

[1] tribe failed to state breach of contract claim against president in his individual capacity, and

[2] parties were required to arbitrate claims.

Motions granted in part and denied in part.

West Headnotes (4)

[1] **Indians** Pleading

Tribe's complaint against president of construction corporation, which failed to include allegations against president in capacity outside of corporate activity, failed to state breach of contract claim against president in his individual capacity.

[2] **Alternative Dispute Resolution** Building Contracts Disputes

Under arbitration provision in construction contract, tribe and construction corporation were required to arbitrate contract claims, although tribe argued that contract had been terminated, where parties' breach of contract claims and counterclaims all related to contract.

[3] **Contracts** Agreement to Rescind

Rescission requires a mutual agreement by the parties to an existing contract to discharge and terminate their duties under it.

[4] **Contracts** Operation and Effect

The rights of the parties to a contract with respect to performances rendered or breaches committed before the termination became operative still depend upon the provisions of the discharged contract.

Ruling on Defendant's Motion For Summary Disposition AND Defendants' Motion To Compel Arbitration and Stay Proceedings

MICHAEL PETOSKEY, Tribal Judge.

***1** This proceeding is based upon breach of contract claims filed by Plaintiff, Grand Traverse Band of Ottawa & Chippewa Indians, against a construction corporation and its President in his capacity as an individual. Defendant argues that partial summary disposition is appropriate in the instant matter because of the allegations contained in Plaintiff's complaint relate to C.H. Smith corporation, not to Steve Smith as an individual. Plaintiff argues that Defendant has not cited any law in support of the Motion.

[1] The Court has carefully listened to the tape recording of the oral argument in this matter, as well as conducted a careful review of the briefs and pleadings filed in this matter. The *Complaint* makes no allegations against Steve Smith in any capacity outside of the corporate activity of C.H. Smith. However, argument was made to the Court that Steve Smith began work on the project for some time before a contract was signed by the parties and that some liabilities might result from that earlier involvement. There is no mention of potential liabilities based upon this early involvement in the *Complaint* itself, which contains two (2) counts-both of which only allege breach of contract with C.H. Smith, the corporation.

Wherefore, this Court grants *Defendants' Motion For Partial Summary Disposition* as to Defendant Steve Smith, as an individual.

RULING ON DEFENDANTS' MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS

Defendants argue that the contract entered into between Plaintiff and Defendants expressly provide for arbitration in the event that disputes arose regarding the agreement. Defendants further argue that Plaintiff engaged in events to arrange for the arbitration in accordance with the parties' agreement, but Plaintiff withdrew from such activity and declared that it was cancelling arbitration and that the contract between the parties was terminated. Plaintiff subsequently filed the present suit in this Court. Defendants ask this Court to and compel arbitration and stay proceedings in this Court.

On the other hand, Plaintiff argues the arbitration provision in the agreement did not survive the termination of the agreement by Plaintiff. Plaintiff further argues that the agreement was terminated when it became apparent that the project would not be completed and ready for use before the autumn of 2000, which date is asserted to be one full year after the project should have been completed by Defendants. Thus, Plaintiff asks this Court to deny the *Motion To Compel Arbitration and Stay Proceedings.* Instead, Plaintiff asks for judicial resolution of the claims between the parties.

Both parties argue breach of contract as justification for their claims and actions. The Complaint alleges two (2) breach of contract claims and the counterclaim involves breach of contract claims.

ANALYSIS AND REASONING:

The issue before this Court is whether the arbitration agreement between the parties still valid and enforceable. The arguments of the parties have been summarized above.

***2** [2] It is clear that the contract entered into between the parties contains a provision to arbitrate "*[A]ll claims, disputes, and other matters in question between OWNER and CONTRACTOR arising out of or relating to the Contract Documents or the breach thereof ...". See EXHIBIT GC–A to General Conditions of the Agreement Between OWNER and CONTRACTOR.* This provision clearly and expressly relates to ***all* claims, disputes and others matters in question which relate to the contract between the parties.** The *Complaint* and Counterclaim solely and only allege claims that relate to the contract between Plaintiff and Defendant. Both parties allege breach of contract.

Plaintiff argues that the contract was terminated, thus the agreement to arbitrate is void. Defendant characterizes Plaintiff's argument as "creative" argument designed have the claims resolved in a forum that might be more favorable to Plaintiff.

[3] [4] The issue is whether Plaintiff can unilaterally void the contract and thus avoid the agreement to arbitrate. "Without doubt a considerable amount of injustice has been done by reason and confusion in the use of the term 'rescission'. When one party repudiates the contract or otherwise commits a very material breach, this fact may in itself discharge the other party from further duty under the contract. This is not 'rescission' or even an offer of a rescission; yet is it often said that such breach privileges the other party to 'rescind' the contract. This usage has caused serious difficulty; it should not be hopeless to try to eliminate it." *See Corbin on Contracts,* One Volume Edition (1952), Section 1237 at pages 991–992. Rescission requires a mutual agreement by the parties to an existing contract to discharge and terminate their duties under it. *See Id.* Section 1236 at page 989. "... [T]he rights of the parties with respect to performances rendered or breaches committed before the ..." termination "... became operative still depend upon the provisions of the 'discharged' contract". *See Id.* Section 1229 at page 980.

The parties have argued the distinction made in Michigan case law regarding statutory arbitration, contractual arbitration and common-law arbitration with the point being different requirements for voiding the arbitration provision. Defendant argues that this Court is not bound by Michigan case law.

In spite of all the foregoing, **the specific pleadings made by the parties are determinative in this matter.** All of the various arguments made by the parties are in support of their specific pleadings. Both the *Complaint* and *Counterclaims* allege breach of contract. It is clear that all of claims made by Plaintiff relate to the contract. Similarly, it is clear that all of the counterclaims made by Defendant relate to the contract. Furthermore, it is clear that the parties agreed to resolve all such claims by arbitration.

FOR ALL OF THE FOREGOING, THIS COURT GRANTS DEFENDANTS' *MOTION FOR PARTIAL SUMMARY DISPOSITION* AND GRANTS DEFENDANTS' *MOTION TO COMPEL ARBITRATION* THE COURT, HOWEVER, DENIES DEFENDANTS' *MOTION TO STAY PROCEEDINGS* BECAUSE THE COURT HAS NOT ADDRESSED THE THRESHOLD ISSUE OF TRIBAL SOVEREIGN IMMUNITY. The Court will set a Status Conference to schedule further proceedings in this matter.

All Citations

Not Reported in Am. Tribal Law, 2002 WL 34487861

CRIMINAL LAW

The following three cases address key concepts in Criminal Law. In *Champagne v. The People of the Little River Band of Ottawa Indians*, No. 06-178-AP, 2007 WL 6900484 (Little River C.A. June 6, 2007), the Little River Band of Ottawa Indians Court of Appeals dissect the elements of attempted fraud according to the tribe's statutes. Noteworthy is the tribe's incorporation of customary law; the opening tale about Nanabozho is not a mere anecdote but is instructive for the tribe.

The next two cases involve criminal jurisdiction and the Violence Against Women Act.* The Supreme Court for the Nottawaseppi Huron Band of the Potawatomi rendered a decision against Joy Spurr in *Spurr v. Spurr*, No. 17-287-APP (NHBP S. Ct. 2018). Spurr then tried to initiate a case against the tribe's Chief Judge, but the federal district court dismissed the case and upheld the NHBP Supreme Court's jurisdiction. *Spurr v. Pope*, 2018 WL 10075919 (W.D. Mich. Sept. 27, 2018).

**there are no details of domestic or sexual violence; the primary VAWA violation is stalking*

LITTLE RIVER BAND OF OTTAWA INDIANS
TRIBAL COURT OF APPEALS

Ryan L. Champagne,
Appellant

Case No. 06-178-AP

On Appeal from:
v. Case No. 06-131-TM

The People of the Little River Band
of Ottawa Indians,
Respondent

Opinion and Order

Order

The Opinion and Judgment per Judge Brenda Jones Quick and dated December 1, 2006 convicting Hon. Ryan L. Champagne of the crime of attempted fraud is **AFFIRMED** in its entirety.

Opinion

I. Introduction

There are many trickster tales told by the Anishinaabek involving the godlike character Nanabozho. One story relevant to the present matter is a story that is sometimes referred to as "The Duck Dinner." *See, e.g.*, JOHN BORROWS, RECOVERING CANADA: THE RESURGENCE OF INDIGENOUS LAW 47-49 (2002); Charles Kawbawgam, *Nanabozho in a Time of Famine, in* OJIBWA NARRATIVES OF CHARLES AND CHARLOTTE KAWBAWGAM AND JACQUES LEPIQUE, 1893-1895, at 33 (Arthur P. Bourgeios, ed. 1994); Beatrice Blackwood, *Tales of the Chippewa Indians*, 40 FOLKLORE 315, 337-38 (1929). There are many, many versions of this story, but in most versions, Nanabozho is hungry, as usual. After a series of failures in convincing (tricking) the woodpecker and muskrat spirits into being meals, Nanabozho convinces (tricks) several ducks and kills them by decapitating them. He eats his fill, saves the rest for later, and takes a nap. He orders his buttocks to wake him if anyone comes along threatening to steal the rest of his duck dinner. During the night, men approach. Nanabozho's buttocks warn him twice: "Wake up, Nanabozho. Men are coming." KAWBAWGAM, *supra*, at 35. Nanabozho ignores his buttocks and continues to sleep. When he awakens to find the remainder of his food stolen, he is angry. But he does

not blame himself. Instead, he builds up his fire and burns his buttocks as punishment for their failure to warn him. To some extent, the trick has come back to haunt Nanabozho – and in the end, with his short-sightedness, he burns his own body.

The relevance of this timeless story to the present matter is apparent. The trial court, per Judge Brenda Jones Quick, tried and convicted the defendant and appellant, Hon. Ryan L. Champagne, a tribal member, an appellate justice, and a member of this Court, of the crime of attempted fraud. Justice Champagne's primary job during the relevant period in this case was with the Little River Band of Ottawa Indians. Part of his job responsibilities included leaving the tribal place of business in his personal vehicle to visit clients. While on one of these trips, Justice Champagne took a personal detour and was involved in an accident. The Band and later the trial judge concluded that his claim for reimbursement from the Band was fraudulent. Judge Quick found that Justice Champagne "attempted to obtain money by seeking reimbursement from the Tribe for the loss of his vehicle by intentionally making a false assertion that he was on his way to a client's home at the time of the accident." *People v. Champagne*, Opinion and Judgment at 6, No. 06-131-TM (Little River Band Tribal Court, Dec. 1,

2006) (*Champagne III*). Justice Champagne was neither heading toward the tribal offices nor toward a client's home.

Like Nanabozho, Justice Champagne perpetrated a trick upon the Little River Ottawa community – a trick that has come back to haunt him. It would seem to be a small thing involving a relatively small sum of money, but because the Little River Ottawa people have designated this particular "trick" a criminal act, Justice Champagne has burned himself.

Among the many legal arguments made before this Court at oral argument that will be addressed later in this Opinion and Order, Justice Champagne argues that the tribal customs and traditions of the Ottawa people do not recognize the crime of "attempt." Justice Champagne further appears to argue more generally that the Little River Band statute adopting relevant Michigan state criminal is inconsistent with Anishinaabek traditional tribal law and therefore this Court should not apply it to him. *Cf. LaPorte v. Fletcher*, No. 04142AP, at 9-10 (Little River Band Tribal Court of Appeals 2006) (Champagne, J.) ("It is the custom of the Little River Band of Ottawa Indians to believe that society must be mended to make whole again."). These are laudable and compelling arguments relating to the seeming contradiction between tribal goals to develop a modern and sophisticated legal system based on Anglo-American legal models while

attempting to preserve the cultural distinctiveness of Ottawa culture through the development of tribal law and the preservation of tribal customs and traditions. *See generally* Michael D. Petoskey, *Tribal Courts*, 67 MICHIGAN BAR JOURNAL, May 1988, at 366, 366-69; FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 66-67 (1995). As such, we take these arguments seriously. In other factual and legal circumstances, we *might* be compelled to consider such an argument as dispositive, but this matter does not oblige us to question current tribal law. As Justice Champagne all but admitted at trial and at oral argument, he attempted to procure money that was not owed him by the Little River Band for his own purposes. It is not obvious to this Court that Justice Champagne's failure in his attempt should excuse him from liability. More importantly, Justice Champagne does not and cannot identify an Ottawa custom or tradition that would excuse him for his actions. In fact, it would be a sad day for this community to acknowledge that an action reflecting an intention of an individual to fraudulently procure money from the Band is excused because the word "attempt" does not exist in Anishinaabemowin, as Justice Champagne alleged at oral argument.

As the remainder of this Opinion and Order shows, we have no choice but to AFFIRM the judgment below.

II. Scope of Review

This Court's review of the judgment of the trial judge over matters of fact is extremely limited. Section 5.401(A) of the appellate court rules provides that "[a] finding of fact by a judge shall be sustained unless clearly erroneous." Other than one minor factual question raised at oral argument and discussed below, Justice Champagne has not challenged the findings of fact made by Judge Quick. *See* People's Response to Appellant's Failure to Submit Brief on Appeal (March 11, 2007). As such, this Court's review is limited to the legal arguments made by Justice Champagne at various times during the litigation. We review the trial court's conclusions of law *de novo* in accordance with Section 5.401(E).

III. Discussion

Justice Champagne offered several legal challenges to the complaint filed against him by the Little River Band. Justice Champagne's challenges derive from his pre-trial motions that, respectively, asserted that the complaint should be dismissed for (1) lack of a criminal statute; (2) lack of probable cause; and (3) lack of jurisdiction. On August 21, 2006, the trial court denied the motions to dismiss and filed an Opinion and Order. *See*

People v. Champagne, Opinion and Order, No. 06-131-TM (Little River Band Tribal Court Aug. 21, 2006) (*Champagne I*). Justice Champagne sought review of these motions to dismiss from this Court. We declined to address the merits of the motions at that time. *See Champagne v. People*, Opinion and Order, No. 06-178-AP (Little River Band Tribal Court of Appeals, Oct. 24, 2006) (*Champagne II*). Justice Champagne raised additional legal arguments in his notice of appeal and at oral argument on May 4, 2007.

We address each of these legal arguments in turn.

A. Jurisdiction

As always, we must begin our analysis with jurisdiction, for this Court has no authority without jurisdiction. *See generally* CONST. art. VI, § 8. Justice Champagne asserts that the Little River Band does not have territorial jurisdiction over this matter. We disagree.

The Constitution of the Little River Band of Ottawa Indians provides that "[t]he territory of the Little River Band of Ottawa Indians shall encompass all lands which are now or hereinafter owned or reserved for the Tribe … and all lands which are now or at a later date owned by the Tribe or held in trust for the Tribe or any member of the Tribe by the United States of

America." CONST. art. I, § 1. The Tribal Council has defined the criminal jurisdiction of this Court to include the territory of the Band and all American Indians. *See* Law and Order – Criminal Offenses – Ordinance §§ 4.02 – 4.03, Ordinance #03-400-03 (last amended July 19, 2006); Criminal Procedures Ordinance § 8.08, Ordinance #03-300-03 (effective Oct. 10, 2003). In other words, this Court has jurisdiction over all crimes committed on both reservation lands and trust lands of the Little River Band. Such lands include the lands upon which the Little River Band's governmental and commercial entities rest.

The Constitution provides that the Band must exercise jurisdiction over the Band's territory, subject to three limitations. Specifically, the Constitution provides that "[t]he Tribe's jurisdiction over its members and territory shall be exercised to the fullest extent consistent with this Constitution, the sovereign powers of the Tribe, and federal law." CONST. art. I, § 2. As to the first limitation, the Constitution mandates that this Court take jurisdiction over criminal matters arising within the territory of the Band that involve tribal members. The Constitution provides that this Court must "adjudicate all … criminal matters arising within the jurisdiction of the Tribe or to which the Tribe or an enrolled member of the Tribe is a party." CONST. art. VI, § 8(a)(1). *See also* Tribal Court Ordinance § 4.01, Ordinance

#97-300-01 (Aug. 4, 1997). As the trial court correctly concluded, the locus of the crime was the territory of the Little River Band, not the accident location or Justice Champagne's residence. *See People v. Champagne*, Opinion and Order, No. 06-131-TM, at 5-6 (Little River Band Tribal Court Aug. 21, 2006) (*Champagne I*). The act of attempted fraud against the tribal government committed by a tribal member such as Justice Champagne is within this definition of the Band's jurisdiction.

As to the second limitation, the Constitution authorizes the Tribal Council "to govern the conduct of members of the Little River Band and other persons within its jurisdiction" through the enactment of ordinances and resolutions. CONST. art. IV, § 7(a)(1). The Little River Band is a sovereign nation capable of exercising the inherent governmental powers that every sovereign retains in accordance with its governing, organic documents. In this instance, the Constitution authorizes the government to exercise criminal jurisdiction over its members. The Tribal Council has adopted a criminal code and authorized a prosecutor to exercise the sovereign powers of the Band to prosecute the criminal code. *See* Tribal Court Ordinance § 8.02, Ordinance #97-300-01 (Aug. 4, 1997). *See also* Law and Order – Criminal Offenses – Ordinance §§ 4.02 – 4.03, Ordinance #03-400.03 (last amended July 19, 2006). As such, the sovereign powers of

the Band as defined by the Constitution and the ordinances of the Tribal Council authorize the prosecution of this matter.

As to the third limitation, federal law, nothing in federal law prohibits the prosecution of Justice Champagne for this crime. Congress reaffirmed the federal recognition of the Little River Band in 1994. *See* Pub. L. 103-324; 25 U.S.C. § 1300k-2(a). In that statute, Congress expressly reaffirmed "[a]ll rights and privileges" of the Band. 25 U.S.C. § 1300k-3(a). Federal law has long recognized the rights and authority of federally recognized Indian tribes to exercise criminal jurisdiction over American Indians for crimes committed within Indian Country. *See, e.g.*, 25 U.S.C. § 1301(2) (recognizing tribal authority "to exercise criminal jurisdiction over all Indians"); *United States v. Lara*, 541 U.S. 193 (2004); *United States v. Wheeler*, 435 U.S. 313 (1978); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 9.04 (Nell Jessup Newton et al. eds. 2005). In short, the Band possesses ample authority recognized under federal law to prosecute Justice Champagne.

In his pre-trial motion, Justice Champagne argued that the State of Michigan should have exclusive jurisdiction in this matter. At oral argument, Justice Champagne asserted that the federal government should have

exclusive jurisdiction. Justice Champagne is incorrect on both counts. As Judge Quick pointed out:

> Defendant is a member of the Tribe. The allegation against Defendant is that he engaged in criminal conduct against the Tribe. To assume a sovereign other than the Little River Band of Ottawa Indians has jurisdiction over this matter would be tantamount to determining that the Tribe has no power to govern its own affairs. Certainly, the Tribe's right of governance is unquestionable. The Little River Band of Ottawa Indians, through its inherent power to rule itself, does have jurisdiction over this matter.

Champagne I, *supra*, at 6. Regardless of whether either the State of Michigan or the United States has jurisdiction over this matter,[1] this Court is obligated by the Constitution of the Little River Band and by the ordinances of the Tribal Council to assert jurisdiction.

[1] It is unlikely either the State of Michigan or the United States would exercise jurisdiction over this matter. Judge Quick noted that Michigan state law requires "that a criminal matter that involves fraudulent misrepresentations must be tried where the victim of the crime resides, and not where the defendant made the misrepresentations." *Champagne I*, *supra*, at 6 (citing Schiff Co. v. Perk Drug Stores, 270 N.W. 738 (Mich. 1936)). *See also* MICH. COMP. L. ANN. §§ 762.2 – 762.3 (noting jurisdiction and venue in criminal cases based on where the criminal act(s) occurred, not the residence of the defendant). Moreover, it unlikely that the federal government would have jurisdiction in this matter as the amount of money involved is insufficient (or barely sufficient) to reach federal requirements – $5,000. *See* 18 U.S.C. § 666(a)(1). *E.g.*, *United States v. Heddon*, 2001 WL 406430 (6th Cir., April 3, 2001).

B. Right to Jury Trial

Justice Champagne was tried by the trial court below without a jury on the basis that the tribal prosecutor declined to seek jail time in this matter. Justice Champagne now asserts that he had the right to be tried by a jury of his peers under the Indian Civil Rights Act (ICRA). Justice Champagne is mistaken.

Persons subject to the criminal jurisdiction of the Band and charged with "an offense punishable by imprisonment" have the right to a six-person jury trial in accordance with tribal law. CONST. art. III, § 1(j) ("The Little River Band in exercising the powers of self-government shall not … [d]eny to any person accused of an offense *punishable by imprisonment* the right, upon request, to a trial by jury of not less than six (6) persons.") (emphasis added). Assuming without deciding that ICRA applies to the Little River Band, the Constitutional provision here mirrors the provision contained in the Act. *See* 25 U.S.C. § 1302(10) ("No Indian tribe in exercising powers of self-government shall … deny to any person accused of an offense *punishable by imprisonment* the right, upon request, to a trial by jury of not less than six persons.") (emphasis added). The Tribal Council has determined that where the tribal prosecutor informs the Court and criminal defendants before trial that the People will not seek jail time, no right to a

jury trial attaches. *See* Criminal Procedures Ordinance § 8.02, Ordinance #03-300-03 (effective Oct. 10, 2003). We concur in this assessment about the right to a jury trial. *See* CONST. art. VI, § 8(a)(2). As such, no right to a jury trial ever attached in this matter.

C. Lack of a Criminal Statute

The Little River Band's Tribal Council has both adopted an indigenous criminal code and incorporated provisions of the Michigan state criminal law statutes as a means of exercising its constitutional authority "to govern the conduct of members of the Little River Band…." CONST. art. IV, § 7(a)(1). The Band charged Justice Champagne with attempted fraud in accordance with the Law and Order – Criminal Offenses – Ordinance § 11.02, Ordinance #03-400-03 (last amended July 19, 2006) (criminalizing and defining "fraud") and the Tribal Court Ordinance § 8.02, Ordinance #97-300-01 (Aug. 4, 1997) ("Any matters not covered by the laws or regulations of the Little River Band of Ottawa … may be decided by the Courts according to the laws of the State of Michigan."). Through the state law incorporation statute, Section 8.02, the Band asserted that Michigan Compiled Laws Section 750.92 also applies to Justice Champagne. Section 750.92 is the State's "attempt" statute and provides, "Any person who shall

attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same, when no express provision is made by law for the punishment of such attempt, shall be punished…." The Little River Band's criminal law statute has no parallel provision criminalizing "attempt." Justice Champagne, who attempted to defraud the Band but failed, was charged under this collection of statutes.

Justice Champagne forcefully argues that the lack of an indigenous "attempt" statute excuses his actions. His argument rests on the basis that the Little River Band's choice to incorporate elements of Michigan's criminal code is an abrogation of tribal sovereignty and a violation of tribal customs and traditions. This appears to be a facial attack on the validity of Section 8.02. As Judge Quick noted, however, "It does not diminish a sovereign's power to enact, by incorporation, laws as set forth by another jurisdiction, particularly when it is a matter of convenience. … Certainly, when the Tribal Council enacted specific laws, it could have done away with Ordinance #97-300-01, Section 8.02. This, it did not do. There, the Ordinance is binding on Defendant." *Champagne I*, *supra*, at 2. Regardless, whether or not the Tribal Council's decision to adopt state law was wise is

irrelevant – the statutes apply to Justice Champagne as a member of the Band. We are bound to apply the law of the Little River Band. *See* Tribal Court Ordinance § 8.01, Ordinance #97-300-01 (Aug. 4, 1997).

At oral argument, Justice Champagne referred this Court to his separate opinion in our 2006 decision in *LaPorte v. Fletcher*, No. 04-142-AP (Little River Band Tribal Court of Appeals 2006) (Champagne, J.). Justice Champagne represented the opinion to mean that the tribal courts should refrain from applying state law, especially where it is inconsistent with tribal customs and traditions. That opinion, the reasoning of which both of the other justices deciding that matter explicitly rejected, has no precedential value to this Court. Moreover, the subject of the separate opinion – whether the losing party to a closely contested civil suit should receive an award of attorney fees – is all but irrelevant to this matter. Finally, the separate opinion – arguing on a general level that tribal law should be used to bring the parties together to make the parties whole – tends to support a view that does not favor Justice Champagne's position in this matter. As noted in the introduction to this opinion, it does no justice to the tribal community to excuse the actions of a presiding appellate justice in attempting (and failing) to defraud the Little River Band.

D. Demand for Traditional Judges

Justice Champagne argues that the trial court incorrectly denied him a trial before "traditional judges." At oral argument, Justice Champagne suggested that his case should have been heard before the Peacemaker's Court or perhaps through a sentencing circle. However, Justice Champagne offers nothing in either the Constitution nor tribal statute or regulation that creates an *entitlement* to be tried before "traditional judges." Without an entitlement guaranteed by tribal law, there is no right. *E.g.*, *Pineiro v. Office of the Director of Regulation*, 1999.NAMG.0000001, at ¶ 19 (Mohegan Gaming Disputes Tribal Court of Appeals 1999), *available at* http://www.tribal-institute.org/opinions/1999.NAMG.0000001.htm ("A person has a legitimate claim of entitlement to a benefit and is entitled to due process protections, if there are rules or mutually explicit understandings that support a claim of entitlement to the benefit."); *Delorge v. Mashantucket Pequot Gaming Commission*, 1997.NAMP.0000038,at ¶ 34 (Mashantucket Pequot Tribal Court 1997), *available at* http://www.tribal-institute.org/opinions/1997.NAMP.0000038.htm ("The entitlement to compensation is based on a finding of a violation of a legal right."). Justice Champagne's claim to a right to a trial before "traditional judges" must fail.

E. Witness Irregularities

The tribal court offers a small stipend to witnesses subpoenaed to appear before the court for trial testimony. In this case, the tribal prosecutor allegedly offered twenty dollars cash to a witness – a man who purchased Justice Champagne's vehicle after the accident – for lunch. Justice Champagne argues that the cash offered to this witness constitutes a bribe. However, Justice Champagne offers no evidence or argument that he has been prejudiced by this action, even assuming it was somehow invalid. This Court finds that the error – if any (and it is doubtful) – is harmless. As one tribal court noted, "Harmless error is error which is trivial, formal, or academic." *In re Welfare of A.S.*, 1996.NACC.000017, at ¶ 26 n. 2 (Colville Confederated Tribes Court of Appeals 1996), *available at* http://www.tribal-institute.org/opinions/1996.NACC.0000017.htm. *See also Fort Peck Assiniboine and Sioux Tribes v. Bull Chief*, 1989.NAFP.0000006, at ¶ 66 (Fort Peck Court of Appeals. 1989), *available at* http://www.tribal-institute.org/opinions/1989.NAFP.0000006.htm (holding that "harmless error" signifies that the defendant's criminal procedure rights were not violated by the error); *Dorchester v. Fort McDowell Yavapai Nation*, 2003.NAFM.0000001, at ¶ 20 (Fort McDowell Yavapai Nation Supreme Court 2003), *available at* http://www.tribal-

institute.org/opinions/2003.NAFM.0000001.htm (holding that appeals based on "harmless error" are insufficient to merit reversal of a criminal conviction).

F. Challenges to the Trial Court's Findings of Fact

Justice Champagne offers no argument in any briefs filed before this Court that the findings of fact made by Judge Quick at trial were clearly erroneous. At oral argument, however, Justice Champagne argues that the Little River Band made an admission on an insurance form that he was, in fact, on company time when he was involved in the accident. Justice Champagne further asserts that his accident was caused by his sleepiness, which in turn derived from his "sleep apnea" condition. We are reluctant to address these arguments, given that the tribal prosecutor could not have prepared a response to these arguments in anticipation of oral argument as they were not briefed. But given that these arguments amount to an attempt to offer additional or supplementary testimony to that which was given at trial, we can dispose of these arguments easily.

In short, Justice Champagne's attempt to reargue the question of fault and causation is fundamentally irrelevant. The trial court did not rely upon the pre-trial statements or the trial testimony about who was at fault in the

accident. Judge Quick wrote, "I believe the prosecution proved Defendant lied about his responsibility for causing the accident; however, *I gave this fact no weight in determining whether or not Defendant was guilty of the charges against him*." *Champagne III*, *supra*, at 3 (emphasis added). Instead, the trial court relied upon the fact that Justice Champagne misrepresented to his employer about his destination to hold that he was guilty of attempted fraud. *See id*. at 3-6. Judge Quick concluded:

> Cumulatively, I found the testimony of these three witnesses and the accompanying exhibits to overwhelmingly prove, beyond any reasonable doubt, that Defendant was traveling west through the intersection at the time he broadsided Ms. Joseph's vehicle, and was *not* making a wide right turn onto Maple as he claimed.
>
> …
>
> Since I was convinced, beyond a reasonable doubt, that Defendant was heading due west at the time of the accident rather than attempting to turn north as he claimed, and that traveling in that direction actually took him away from the home where he claimed he was headed, I found that he was not

being truthful when he made the assertion that he was going to a client's home at the time of the accident.

Id. at 5-6 (emphasis in original). As noted by the tribal prosecutor at oral argument and by Judge Quick at trial, Justice Champagne's claims about "sleep apnea" do not support his defense to the claim that he attempted to deceive his employer about his destination at the time of the accident. *See id*. at 6. In short, nothing compels this Court to find that Judge Quick's findings of fact were clearly erroneous.

Conclusion

This Court is aware of the gravity of a criminal case involving a sitting appellate justice as a defendant. It is a sad day for the Little River Band Ottawa community and to this Court to be forced to sit in judgment of one of its own, but we are obligated to do so. At oral argument, Justice Champagne raised the possibility that his prosecution was "political." We have no doubt that Justice Champagne's assertion is true, but not in the way he means it. As one of the leaders of the community – *ogemuk* – Justice Champagne was held – and should be held – to a higher standard of conduct. *See generally* CONST. art. VI, § 2(a); art. VI, §§ 6(b)(1)-(2). As to Justice Champagne's claim that he was singled out by other leaders of this

community, we have no competence or authority to make judgments as to the sound discretion of the tribal prosecutor to initiate a criminal proceeding.

For the above reasons, we AFFIRM the judgment of the trial court.

IT IS SO ORDERED.

June 2007

Justice Rosemary Edmondson	Date
Justice Matthew L.M. Fletcher	Date
Justice Kathryn Kraus	Date

NHBP TRIBAL COURT
NOTTAWASEPPI HURON BAND OF THE POTAWATOMI
22211 ½ MILE RD. • FULTON, MI 49052
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SUPREME COURT CASE NO. 17-287-APP		TRIBAL COURT CASE NO. 17-046-PPO/ND
PETITIONER/APPELLEE		RESPONDENT/APPELLANT
NATHANIEL WESLEY SPURR Angela Sherigan Attorney for the Petitioner/Appellee 56804 Mound Road Shelby Township, MI 48316	v.	JOY LYNN SPURR A/K/A JOY JUDGE Stephen Spurr Attorney for the Respondent/Appellant 1114 Beaconsfield Avenue Grosse Pointe Park, MI 48230

OPINION OF THE SUPREME COURT FOR THE NOTTAWASEPPI HURON BAND OF THE POTAWATOMI

Before:

Hon. Gregory D. Smith, Chief Justice, Presiding

Hon. Matthew L.M. Fletcher, Associate Justice

Hon. Holly T. Bird, Associate Justice

Opinion by Fletcher, J.

Introduction

We are called here today to determine whether the law of the Nottawaseppi Huron Band of the Potawatomi provides authority for the tribal court to issue personal protection orders involving the defendant and appellant in this matter, Joy Spurr, a non-Indian who resides outside of the boundaries of Nottawaseppi Huron Band Indian country.

We hold that the law of the Nottawaseppi Huron Band of the Potawatomi does provide that authorization.[1]

We are further asked to determine whether the trial judge abused her discretion in both finding a factual basis for a personal protection order against Joy Spurr and in crafting the scope of the order itself. We hold that the trial judge did not abuse her discretion.

The orders are AFFIRMED.

Facts and Procedural History

The appellant and defendant Joy Spurr is a nonmember of the Band who resides in the Detroit area, outside of the boundaries of the Band's Indian country.

The appellee and plaintiff Nathaniel Spurr is a tribal member. Joy Spurr is Nathaniel's step-mother. During the period at issue, Nathaniel resided at least part of the time within the boundaries of the Pine Creek Reservation, part of the Indian country of the Band.

[1] We thank Clarissa Grimes for her work in preparing a helpful bench brief under the supervision of the Indian Law Clinic of the Michigan State University College of Law.

In February 2017, Nathaniel Spurr sought a personal protection order from the Nottawaseppi Huron Band tribal court. He alleged that Joy Spurr had appeared at his grandmother's house, located on trust land within the reservation, and hand-delivered a harassing letter to Nathaniel. He further alleged that Joy Spurr had initiated "roughly 200-300" contacts with Nathaniel (and others involved with Nathaniel) since approximately November and December of 2012. Joy Spurr allegedly initiated many of these contacts electronically, and on a few occasions, interfered with Nathaniel's financial arrangements with third parties. The tribal court found that delivery of the letter and the other allegations constituted stalking and harassment as defined by the tribal code.

In a series of orders, the tribal court barred Joy Spurr from initiating unwanted communications with Nathaniel Spurr on and off the reservation, and with third parties involved with Nathaniel. The court initially issued a temporary Personal Protection Order on February 3, 2017, set to expire on February 17, 2017 ("February 3, 2017 Order"). The trial court scheduled a hearing for February 16, 2017 in accordance with NHBP Code § 7.4-15, which required the court to hold

a "full hearing" within 14 days of the issuance of a temporary protection order. The defendant Joy Spurr asked for a stay, which the court denied on February 14, 2017, citing § 7.4-15. Joy Spurr appeared by phone at the hearing on February 16, 2017, though she left before the conclusion of the hearing. The trial court issued a permanent (one year) civil protection order favoring Nathaniel Spurr against Joy Spurr on February 17, 2017 ("February 17, 2017 Order").

In March and April 2017, Joy Spurr faxed several documents and addenda that constituted a motion for reconsideration of the permanent order. During much of this period, Joy Spurr did not provide a working email address or fax machine number to the court for purposes of providing expedited service of court documents. Meanwhile, she inundated the court with dozens, even hundreds, of pages of documents. The incredible amount of time and effort the staff of the tribal court took to communicate with Joy Spurr and her counsel, to provide service of court documents to Joy Spurr and her counsel, and to receive, manage, and file the voluminous material Joy Spurr filed — much of which did not comply with the court's rules for filing and service — is worth noting. The appellate court applauds this effort to ensure Joy

Spurr received the process due her in this matter from the inception of the case until now, and perhaps going forward as the case continues. The trial court's procedural order of March 27, 2017 and the order of July 21, 2017 details these efforts. Both orders informed Joy Spurr that since she was represented by counsel, only her counsel could submit documents to the court. She nevertheless continued to submit documents not signed by her attorney. The court staff is to be commended for its professionalism and for performing above and beyond their job duties.

On July 21, 2017, after wading through this incredible morass of paper, Chief Judge Melissa L. Pope denied the motion for reconsideration. Opinion and Order After Hearing on Respondent's Motion for Reconsideration or Modification of Court Order ("July 21, 2017 Order"). In a carefully constructed 36-page opinion, the trial court waded through dozens of exhibits, most of which was introduced into the record by Joy Spurr, to conclude, "The evidence shows that Respondent Joy Spurr has gone far outside the realm of what could be considered a communication in the spirit of family responsibilities to cross the line into harassment for a significant period of time." July 21,

2017 Order at 30. The Order detailed several incidents and communications as examples of harassment, including without limitation communications from Joy Spurr to Nathaniel Spurr accusing him without grounding of criminal perjury, unemployment fraud, and other attacks on the character of Nathaniel Spurr. Id. at 29-30.

This appeal followed. Appellant Joy Spurr immediately asked the appellate court to order a stay on the permanent order issued by the trial court in February 2017. We denied that motion on July 28, 2017.

The parties submitted merits briefs, and we held oral argument on January 15, 2018.[2]

Discussion

We begin our discussion with reference to the principles that guide the Nottawaseppi Huron Band of the Potawatomi in addressing difficult matters such as those before us. The Band has directed all parties and entities involved in these matters to follow Noeg

[2] To the extent that this opinion does not directly address legal arguments made by the Appellant, those arguments are rejected as either not preserved for appeal below or not developed adequately to require analysis by this court.

Meshomsenanek Kenomagewenen, the Seven Grandfather Teachings. NHBP Code § 7.4-6:

> In carrying out the powers of self-government in a manner that promotes and preserves our Bode'wadmi values and traditions, the Tribe strives to be guided by the Seven Grandfather Teachings in its deliberations and decisions. The rights and limitations contained in this code are intended to reflect the values in the Seven Grandfather Teachings to ensure that persons within the jurisdiction of the Tribe will be guided by the Seven Grandfather Teachings:
>
> Bwakawen — Wisdom
>
> Debanawen — Love
>
> Kejitwawenindowen — Respect
>
> Wedasewen — Bravery
>
> Gwekwadzewen — Honesty
>
> Edbesendowen — Humility
>
> Debwewin — Truth

Id. *See also Spurr v. Tribal Council*, No. 12-005APP, at 4-6 (2012).

This court deeply respects these teachings and endeavors to act in accordance with them. Nothing good can come of bitterness and retribution. We are guided by the principles laid out before us by the Nottawaseppi Huron Band and its People. We are saddened that interpersonal conflict can rise to the level requiring judicial intervention at the request of one of the parties. We must perform this duty, but do so with the greatest respect for all the persons involved.

I. The Tribal Court Possesses Jurisdiction to Issue Personal Protection Orders Involving Joy Spurr under These Facts.

Joy Spurr argues that the Nottawaseppi Huron Band tribal court lacks jurisdiction over her activities on several grounds: that she is not a tribal member, that she is not an Indian, and that the activities complained about largely different not occur in the tribe's Indian country. We reject each of these contentions.

A. Federal Law Background

In Section 905 of the Violence Against Women Reauthorization Act of 2013, Congress authorized Indian tribes to issue and enforce

personal protection orders "involving any person . . . within the authority of [an] Indian tribe." 18 U.S.C. § 2265(e), Pub. L. 113-4, Title IX, § 905, Mar. 7, 2013, 127 Stat. 124. Congress further provided "A protection order issued by a . . . tribal . . . court is consistent with this subsection if . . . (1) such court has jurisdiction over the parties and matter under the law of such . . . Indian tribe . . . ." 18 U.S.C. § 2265(a). Section 2265, also known to the parties as Section 905 of the Public Law from which it derives, makes two critical matters clear. First, the use of the phrase "any person" renders tribal membership or Indian status irrelevant to the authority of Indian tribes to issue personal protection orders, so long as that person is "within the authority" of an Indian tribe. Second, whether a person is within the authority of an Indian tribe depends on "the laws of such . . . Indian tribe."

The goal of section 2265 is the make the protection of victims of violence, stalking, and other illegal acts uniform across all American jurisdictions, federal, state, and tribal. *Cf., e.g.*, *Tulalip Tribes v. Morris*, 11 Am. Tribal Law 462, 465 (Tulalip Tribal Court of Appeals 2014) (interpreting new section 2265 and noting that "Section 2265 [was intended to] ensur[e] that 'victims of domestic violence are able to move

across State and Tribal boundaries without losing [sic] ability to enforce protection orders they have previously obtained to increase their safety.'"). Until the most recent modification of section 2265, offenders and perpetrators who were non-Indian or non-tribal members could reach from beyond Indian country to harm reservation Indian victims without fear of retribution. The old section 2265 did not directly authorize Indian tribes to issue personal protection orders involving offenders and perpetrators who were non-Indians or non-tribal members. *E.g.*, *Honanie v. Acothley*, 11 Am. Tribal Law 4, 8 (Hopi Court of Appeals 2011) (interpreting old section 2265: "While other jurisdictions may be required to honor Hopi protection orders under the express requirements of the full faith and credit provisions of the Violence Against Women Act, 18 U.S.C. Section 2265, the Hopi Tribal Court has no power to enter a protection order that directly purports to reach conduct outside of the territorial jurisdiction of the Hopi Tribe."). Where the offender or perpetrator resided within Indian country, or the illegal act took place in Indian country, federal Indian law required tribes to show that the tribal court had authority to issue personal protection order through the so-called *Montana* test. *See Montana v.*

United States, 450 U.S. 544, 565-66 (1981). Under that test, the United States Supreme Court holds that tribal governments generally do not possess jurisdiction over nonmembers unless the nonmembers consent or unless the nonmember conduct affects the political integrity, economic security, and health and welfare of the tribe and its members. While one would think that nonmember stalking and harassment, which has wreaked terrible harms on the health and welfare of Indian people and ability of tribal governments to respond to those harms, would easily meet the second part of this test, the Supreme Court has never held, in its limited universe of cases, that nonmember conduct was egregious enough to meet the second part of the test. *E.g. Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (rejecting tribal court jurisdiction over tort claims arising from automobile accident allegedly perpetrated by nonmember driver in Indian country); *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316 (2008) (rejecting tribal court jurisdiction over bank that tribal jury found to have discriminated on the basis of race against tribal member owned ranch); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) (rejecting tribal authority to impose tax on nonmember business that received public safety services

from the tribe). *Contra Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 136 S.Ct. 2159 (2016) (dividing 4-4 over whether tribal member minor's civil claim of sexual molestation against store located on tribal trust lands could proceed in tribal court). To be sure, the Supreme Court has never agreed to review a case involving nonmember stalking and harassment against Indian people living within Indian country. In short, the authority of Indian tribes to issue personal protection orders involving nonmembers was uncertain at best.

Congress eventually became aware of these problems and initiated a fix. As amended in 2013, section 2265 now works to guarantee that offenders and perpetrators can no longer play games with jurisdictional boundaries in order to avoid repercussions for stalking or harassing Indian people in Indian country. Congress has finally seen fit to acknowledge tribal power over nonmember offenders and perpetrators, likely rendering federal Indian law doctrines such as the *Montana* line of cases irrelevant in this context. *See* Violence Against Women Reauthorization Act of 2012, H. Rep. 112-480 pt. 1, at 245 (May 15, 2012) (dissenting views) ("Another important tool in reducing violence on tribal land is the use of protection orders. Section 905 of the Senate-

passed bill and the Moore bill clarifies Congress' intent to recognize that tribal courts have full civil jurisdiction to issue and enforce protection orders involving any person, Indian or non-Indian.").

In light of the new jurisdictional regime available to Indian tribes, the Nottawaseppi Huron Band of the Potawatomi has adopted positive tribal law to implement the authority now recognized by Congress under section 2265. As required by section 2265, we now review relevant tribal law governing jurisdictional questions in this matter.

B. Personal Jurisdiction

We now turn to whether the relevant tribal code authorizes the tribal court issue a personal protection order in this matter involving a non-Indian person who does not reside in the Band's Indian country. We hold that the tribal court possesses jurisdiction over Joy Spurr sufficient to impose a civil protection order on her conduct.

As we must, we begin with the Constitution of the Nottawaseppi Huron Band of the Potawatomi. Article II, Section 2(a) provides that the jurisdiction of the tribe extends to all persons within the territorial

boundaries of the tribe's lands, which include at a minimum reservation and trust lands. In relevant part:

> The jurisdiction and sovereign powers of the Band shall, consistent with applicable federal law, extend and be exercised to the fullest extent consistent with tribal self-determination, including without limitation, to all of the Band's territory as set forth in Section 1 of this Article, to all natural resources located within the Band's territory, to any and all persons within the Band's territory and to all activities and matters within the Band's territory.

The Constitution also provides that the jurisdiction of the tribe may extend beyond the tribe's lands where authorized by the exercise of tribal treaty rights, federal statute or regulation, or intergovernmental agreement. In this context, Article II, Section 2(a) provides in relevant part:

> The Band's jurisdiction shall also extend beyond its territory whenever the Band is acting pursuant to jurisdiction that is created or affirmed by rights reserved or created by treaty, statutes adopted by the Tribal Council in the exercise of the

> Band's inherent sovereignty, Federal statute, regulation or other federal authorization, or a compact or other agreement entered into with a state or local government under applicable law.

The conclusion we reach from these two key provisions of the tribe's constitution is that inherent tribal powers extend generally to the tribe's lands and to tribal members, wherever they may be. The tribal constitution also appears to provide that the tribe can exercise other powers authorized under federal law or other agreement, presumably including federal statutes such as section 2265.

The tribal domestic violence code defines "Indian country" for the purposes of the code. The first three sub parts of that definition track 18 U.S.C. § 1151. The fourth sub part provides:

> The territory of the Band shall encompass the Band's historical land base known as the Pine Creek Reservation in Athens Township, Michigan, and all lands now held or hereafter acquired by or for the Band, or held in trust for the Band by the United States, including lands in which rights have been reserved or never ceded by the Nottawaseppi

> Huron Band of the Potawatomi in previous treaties, or as may otherwise be provided under federal law. This includes lands upon which FireKeepers Casino and Hotel is located.

It is undisputed that the Pine Creek Reservation is within the Indian country of the Nottawaseppi Huron Band of the Potawatomi.

The record shows that at the time of the issuance of the civil protection order, the complaining victim, Nathaniel Spurr, resided on the Band's lands within the Pine Creek Reservation with his grandmother. He acted at that time as her guardian. She has since walked on. Nathaniel Spurr complained to the trial court, and Joy Spurr did not deny, that Ms. Spurr came onto tribal lands to engage Nathaniel Spurr directly. The trial court made specific findings confirming those allegations, again not directly challenged by Joy Spurr.

The record also shows that Joy Spurr initiated unwanted contacts with Nathaniel Spurr before he resided on the reservation as well. The record further shows that Joy Spurr initiated contacts with tribal governmental officials and employees both on and off the reservation. Testimony from a tribal employee at the February 15, 2017 hearing

confirms these contacts. The trial court found that Joy Spurr had engaged in numerous unwanted and improper contacts with Nathaniel Spurr and interfered with Nathaniel's personal business both within and without the Band's Indian country. We agree with the trial court that these contacts constitute a pattern and practice of harassing and stalking Nathaniel Spurr wherever he may be.

Joy Spurr argues on appeal that as a nonmember who resides off the reservation the tribal court has no jurisdiction over her. Joy Spurr also argues implicitly that many of the contacts involved off-reservation incidents, and therefore cannot be enjoined by the tribal court. We disagree. The purpose of the Section 2265 is to avoid piecemeal personal protection orders that could allow offenders and perpetrators to exploit jurisdictional gaps. Appellant here is asking the appellate court for license to continue the harassment and stalking of Nathaniel Spurr from afar. This we will not do.

C. Subject Matter Jurisdiction

We now turn with the subject matter jurisdiction of the tribal court. Tribal law allows the tribal court to match personal protection

orders to the facts presented, including the type and severity of the offender or perpetrator's conduct, and the types of remedies sought and required. Not all victims and offenders are the same, nor is all conduct the same. The code effectively allows for unique facts and remedies, and provides great discretion to the trial court to craft orders that fulfill the requirements of a given case. We hold that the tribal code authorized the trial judge to issue the protection orders in this case.

The Code provides for three types of protection orders: 1) a Civil Protection Order, designed for victims of "domestic violence, family violence, dating violence, or stalking" (NHBP Code §§ 7.4-49-57); 2) a Harassment Protection Order (NHBP Code §§ 7.4-71-78); and 3) a Sexual Assault Protection Order (NHBP Code §§ 7.4-79-87). The Civil Protection Order falls under the "Civil Protection Order" section of the Code, while the Harassment Protection Order and the Sexual Assault Protection Order are found in the "Criminal Protection Orders" section of the Code. In a given case, it appears that "Civil Protection Orders" are civil in character, and "Sexual Assault Prevention Orders" are likely criminal in character. "Harassment Protection Orders," we shall see, can be either civil or criminal.

The trial court has discretion to choose from this menu of potential orders depending on the improper or illegal actions complained about. For our purposes today, the trial court has identified stalking and harassment as the core factual bases for the protection orders it issued. The tribal code authorizes the tribal court to issue civil personal protection orders for anyone claiming to be the victim of stalking, whether or not that stalking was a crime or was reported as a crime: "A petition to obtain a protection order under this section may be filed by . . . [a]ny person claiming to be the victim of domestic violence, family violence, dating violence or *stalking* . . . ." NHBP Code § 7.4-50(A) (emphasis added). The tribal code also authorizes the tribal court to issue personal protection orders for anyone claiming to be the victim of harassment: "The NHBP finds that the prevention of harassment is important to the health, safety and general welfare of the tribal community. This article is intended to provide victims with a speedy and inexpensive method of obtaining *civil harassment protection orders* preventing all further unwanted contact between the victim and the perpetrator." NHBP Code § 7.4-71 (emphasis added). In general, the act of "stalking" is treated as a crime in the tribal code, and harassment is

treated as a civil offense. However, the definition of the crime of "stalking" includes acts of harassment:

> A person commits the crime of stalking if, without lawful authority:
>
> (1) He or she intentionally and repeatedly *harasses* or repeatedly follows another person; and
>
> (2) The person being *harassed* or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The fear must be one that a reasonable person would experience under the same circumstances; and
>
> (3) The stalker either:
>
> > (a) Intends to frighten, intimidate, or *harass* the person; or
> >
> > (b) Knows or reasonably should know that the person is afraid, intimidated, or *harassed* even if the stalker did not intend to place the person in fear or intimidate or *harass* the person.

NHBP Code § 7.4-42(A) (emphasis added). Under the tribal code provision, harassment is an act or series of acts that can constitute criminal stalking. One also can conceive of acts of stalking that do not rise to the level of criminal conduct in the discretion of the trial judge, which could therefore justify the issuance of a civil protection order.

While the tribal code perhaps could be made clearer (though we suspect the drafting of the Domestic Violence Code has already been a heroic and difficult task), we hold that the tribal code authorizes the court to issue civil personal protection orders for "stalking" or "harassment." Article X of the tribal code, labeled Civil Protection Orders, specifically mentions "stalking" as a basis for the issuance of a civil protection order. NHBP Code § 7.4-50(A). Article XII of the tribal code, labeled Criminal Protection Orders, specifically mentions "harassment" as a basis for the issuance of a civil protection order. NHBP Code § 7.4-71. The code also provides definitions of "stalking" and "harassment" in various places in the code, most notably in NHBP Code § 7.4-42(A), which defines "stalking" in part as "harassment."

Appellant argues formalistically that because the term "stalking" is referenced in one or more of the trial court's personal protection

orders, and because "stalking" is defined as a crime in the code, the personal protection orders must be criminal orders barred by *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). We disagree. Even a strict textualist would have to agree, perhaps grudgingly, that the tribal code allows the tribal court to issue a civil protection order for either stalking or harassment, or both. We take the trial court at its word that these are civil personal protection orders, not criminal. As such, the trial court had subject matter jurisdiction over the Appellant's actions.

II. We Find No Clear Error by the Trial Court in Its Fact-finding Duties, Nor Did the Trial Court Abuse Its Discretion in the Issuance of Civil Protection Orders Involving Joy Spurr.

Appellant Joy Spurr argues that her contacts with Nathaniel Spurr and others did not rise to the level of harassment or stalking, and otherwise do not justify the issuance of the protective orders. We disagree.

Trial judges are afforded great deference by appellate judges reviewing certain aspects of their work. In matters where the trial

judge is the finder of fact, or performs any fact finding function, trial judges are present in the courtroom when witnesses testify. As such, trial judges can assess way witnesses speak, the tenor of their voice, their body language, and perhaps even their credibility. Appellate judges reviewing a cold transcript of trial level hearings may misinterpret speakers' intent when discerning the meaning of the words spoken, just as anyone who has misinterpreted a text message or email or had one of their texts or emails misinterpreted.

Structurally, it is the function of the trial court to perform this fact finding duty (absent the empaneling of a jury). The tribal judiciary is structured similar to the structure of federal and state courts, with separate trial and appellate courts. The People of the Nottawaseppi Huron Band chose to largely replicate this structure rather than a structure where there is no appellate court, or where the appellate court exercises broad review of the trial judge, essentially recreating the work of the trial judge.

The trial and appellate functions are separate here. In these court systems, the standard practice is for the appellate court to extend considerable deference to the separate work of trial level judges, most

notably the findings of fact. Anishinaabe tribal courts uniformly have adopted a clear error standard of review of a trial court's findings of fact. *E.g.*, *Harrington v. Little Traverse Bay Bands of Odawa Indians Election Board*, 13 Am. Tribal Law 123, 126 (Little Traverse Bay Bands of Odawa Indians Appellate Court 2012); *De Young v. Southbird*, No. 99-11-568-CV-SC, 2001 WL 36194388, at *2 (Grand Traverse Band Court of Appeals, March 6, 2001). *Cf. Morgan v. Blakely*, 2008 WL 8565282, at *1 (Leech Lake Band of Ojibwe Appellate Court 2008) ("abuse of discretion"). Much like the work of the trial court in serving as fact finder, trial courts are also entitled to deference in review by appellate courts in crafting remedies for injunctive relief, including personal protection orders. "The standard of review of a [trial court]'s exercise of equity is abuse of discretion; an abuse of discretion is shown if the Court disregarded the facts or applicable principles of equity." *United States ex rel. Auginaush v. Medure*, 8 Am. Tribal Law 304, 325 (White Earth Band of Chippewa Tribal Court 2009).

Even a cursory review of the record shows that the findings of fact made in the two February 2017 and the July 2017 orders filed by the trial court are amply supported by evidence in the record. Nathaniel

Spurr's original submission detailed in writing how Joy Spurr appeared uninvited and unwanted at his grandmother's home on the Pine Creek Reservation, leaving a harassing letter in the mailbox after she was asked to leave. Nathaniel had been serving as guardian for his grandmother by virtue of a tribal court order and was residing at her home on the reservation at the time. Nathaniel also alleged Joy Spurr had contacted numerous third parties at the hospital, with hospice, state social services, tribal police, and even the tribal chairman to object to Nathaniel's service as guardian. In that original submission, Nathaniel detailed other disturbing actions by Joy Spurr over the previous four and a half years. In one incident, Joy allegedly misrepresented herself as Nathaniel to his automobile insurance carrier. In another incident, Joy allegedly obtained a police report Nathaniel filed when his car was stolen in Grosse Pointe Park, Michigan, and mailed harassing letters to Nathaniel about the report. In another incident, Joy allegedly opened Nathaniel's mail and disclosed Nathaniel's private financial information to tribal citizens. In yet another incident, Nathaniel alleged Joy misrepresented herself as Nathaniel by stealing confidential financial and personal information

about him in an ultimately failed attempt to acquire Nathaniel's credit score. Finally, in the original petition for a protective order, Nathaniel alleged that over the past several years, Joy had made hundreds of unwanted contacts with him.

At the initial hearing on February 15, 2017, Nathaniel confirmed these allegations under oath. Three witnesses confirmed various aspects of these allegations, again under oath. On February 17, 2017, the trial court issued an order finding that Joy Spurr had "committed the following acts of willful, unconsented contact: Appearing at residence uninvited; Delivering documents to residence; Interference with hospital visitation; Interference with Petitioner's financial matters; Other unwanted contact."

As noted in the preliminary facts section of this opinion, Joy Spurr asked for reconsideration of the trial court's decision to enter a permanent order. The court held a hearing that included more testimony from the parties. During the entire period of the litigation, Joy Spurr also had inundated the court with numerous documents and written submissions. In large part, Joy Spurr's own writings and document submissions confirm Nathaniel Spurr's allegations of

unwanted contacts. For example, Joy conceded she appeared at Nathaniel's grandmother's home and left a harassing letter, which she admitted was titled "Nathaniel Spurr: A Dose of the Truth," and which she herself characterized as a document alleging "lies, abuse, thefts, and assaults Nathaniel had been perpetrating." 3 Record on Appeal 076. The letter itself is reprinted at 3 Record on Appeal 142-145. Additionally, Joy Spurr submitted as evidence exhibits dozens of copies of Nathaniel's personal financial and other records, supporting Nathaniel's allegations that Joy has improperly obtained his financial records. There is much, much more in the record. The relationship of Nathaniel Spurr and Joy Spurr is deeply fractured and troubled, but a reasonable observer could conclude that Joy Spurr was the primary perpetrator of the worst parts of the relationship. Joy's admissions that she engaged in the acts that Nathaniel alleged and the trial court concluded constituted stalking and harassment more than adequately support the trial court's findings of fact.

Conclusion

At bottom, at least from the point of view of Joy Spurr, the contacts and communications she initiates with Nathaniel Spurr and

others involved with Nathaniel are intended to serve as guidance by a parental figure to a child, no different than any other familial relationship.

Some Anishinaabe people are familiar with the story of Blue Garter. *E.g.*, Hannah Askew & Lindsay Borrows, Summary of Anishinabek Legal Principles: Examples of Some Legal Principles Applied to Harms and Conflicts between Individuals within a Group at 25 (2012); 2 Ojibwa Texts 23 (American Ethnological Society 1917). A young Anishinaabe man travels from his home village to an isolated lodge where he meets Blue Garter, a young woman. They fall in love, but Blue Garter's parents oppose the marriage. Blue Garter's father imposes a series of virtually impossible tasks for the young man to complete before he will approve of the marriage, believing the tasks could not be completed and hoping the young man would eventually go away. However, Blue Garter secretly helps the young man complete the tasks, one after the other. One day, Blue Garter's parents grudgingly approve of the marriage. Once married, however, Blue Garter and her young husband flee her parents. Her parents give chase day after day. Ultimately, in order to escape her parents, Blue Garter transforms

herself and her partner into ducks and escape across the water. For all of Blue Garter's good intentions, their negative actions drive away their daughter and her husband. Instead of gaining a new family member, Blue Garter's parents lose their daughter.

We draw from this story the principle that a parent-child or mentor-mentee relationship can go terribly wrong. Persons with greater experience and wisdom can and should guide and assist younger, more inexperienced persons. But older persons must also be guided by the Noeg Meshomsenanek Kenomagewenen.

With respect due the parties and the trial court judge, we AFFIRM the February 17, 2017 Order.

Signed:

January 25, 2018
Date

Hon. Gregory D. Smith, Chief Justice with permission HLC

January 25, 2018
Date

Hon. Matthew L.M. Fletcher, Associate Justice

January 25, 2018
Date

Hon. Holly T. Bird, Associate Justice with permission HLC

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United States District Court, W.D.
Michigan, Southern Division.

Joy SPURR, Plaintiff,
v.
Melissa L. POPE, et al., Defendants.

Case No. 1:17-cv-1083
|
Signed 09/27/2018

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OPINION AND ORDER

JANET T. NEFF, United States District Judge

***1** Plaintiff Joy Spurr, represented by her husband, Stephen Spurr, initiated this case against Melissa L. Pope, identified as the Chief Judge of Tribal Court of Nottawaseppi Huron Band of the Potawatomi; the Supreme Court for the Nottawaseppi Huron Band of Potawatomi; and the Nottawaseppi Huron Band of Potawatomi Indians (ECF No. 1). The matter is before the Court on Defendants' Joint Motion to Dismiss (ECF No. 29), seeking dismissal of Plaintiff's Complaint for lack of subject-matter jurisdiction and failure to state a claim on which relief can be granted. *See* FED. R. CIV. P. 12(b)(1), (6). Having considered the parties' submissions, the Court concludes that oral argument is unnecessary to resolve the issues presented. *See* W.D. Mich. LCivR 7.2(d). For the reasons that follow, the Court grants Defendants' motion.

I. BACKGROUND

Neither Plaintiff nor Stephen Spurr is a member of the Nottawaseppi Huron Band of Potawatomi Indians ("the Tribe") (ECF No. 1-1 at PageID.7-9). They do not live on the reservation (ECF No. 1-4 at PageID.34). However, Stephen Spurr was previously married to a Tribe member, Laura Spurr (ECF No. 1-1 at PageID.7-9). Stephen Spurr has an adult son, Nathaniel Spurr, who lives on the reservation (ECF No. 1-4 at PageID.32, 34). This case arises from the February 17, 2017 issuance of a Non-Domestic Personal Protection Order (PPO) by the Nottawaseppi Huron Band of Potawatomi (NHBP) Tribal Court ("the Tribal Court") against Plaintiff as respondent in NHBP Case No. 17-046-PPO/ND (ECF No. 1-3). The PPO prohibited Plaintiff from "stalking" Nathaniel Spurr, the petitioner (*id.*). Plaintiff moved for reversal by the Supreme Court for the Nottawaseppi Huron Band of Potawatomi, which was denied on December 6, 2017 (ECF No. 1-10 at PageID.101).

On December 11, 2017, Plaintiff filed a four-page "Complaint for Declaratory Judgment and Injunctive Relief" (ECF No. 1) in this Court, as well as a 26-page "Brief in Support" (ECF Nos. 1-1 & 1-2). Plaintiff's Complaint does not delineate any counts, but her brief includes a "Statement of the Legal Issues," as follows:

A. Did the Evidence Before the Trial Court Support the Court's Findings that the Plaintiff was engaged in "Stalking" as defined under the NHBP Domestic Violence Code?

B. Putting Aside the Issue of Jurisdiction, Should the Trial Court Have Issued a Permanent Personal Protection Order Against the Plaintiff Based on the Evidence Before the Court?

C. If a Permanent Protection Order Against "Stalking" is considered a Criminal Sanction, Did the Trial Court have Jurisdiction to Issue It Against the Plaintiff Under NHBP Tribal Law or United States Law?

D. If a Permanent Protection Order Against "Stalking" is considered a Civil Sanction, Did the Trial Court have Jurisdiction to Issue It Against the Plaintiff Under NHBP Tribal Law or United States Law?

E. If the Trial Court did not Have Jurisdiction to Issue its Permanent Protection Order Against the Plaintiff, Was

the Trial Court Justified in Submitting its Order to the Michigan Law Enforcement Information Network?

***2** F. Would the Plaintiff suffer a Continuing, Irreparable Harm in the Absence of Preliminary Injunctive Relief?

G. Has the Plaintiff Exhausted Her Remedies, by Challenging the Tribal Court's Jurisdiction in Federal Court?

(ECF No. 1-1 at PageID.11-12).

Plaintiff also included an "Appendix" with three more "Related Procedural Issues," as follows:

H. Was it Appropriate for the Trial Court to Suggest to the Petitioner that his Personal Protection Order could be renewed annually, unless the Plaintiff could prove she had not harassed him?

I. What are Other Consequences of Entering a Permanent Protection Order into the Michigan Law Enforcement Information Network?

J. Should the Trial Court Have Granted the Plaintiff's Request to Postpone the Hearing to a Date Later than February 16, 2017?

(ECF No. 1-2 at PageID.26-29).

Plaintiff seeks a declaratory judgment "that (1) the Defendants do not have personal or subject matter jurisdiction to issue against the Plaintiff the temporary and permanent personal protection orders that have been issued by the Defendant ... Judge Pope; and (2) the Defendants are legally required to withdraw the permanent protection order from the Michigan Law Enforcement Information Network [LEIN]" (ECF No. 1 at PageID.3). Plaintiff also seeks preliminary injunctive relief in the form of an injunction "to prevent the Defendants from unlawfully pursuing proceedings against the Plaintiff based on the permanent Personal Protection order, and from maintaining the Order on the Michigan Law Enforcement Information Network" (*id.*). Last, although not included in its title, Plaintiff's "Complaint for Declaratory Judgment and Injunctive Relief" seeks "damages against the Defendants, jointly and severally" (*id.*).

On January 25, 2018, Defendants jointly moved for a Pre-Motion Conference, proposing to file a motion to dismiss (ECF No. 13). On January 30, 2018, the Court noticed a Pre-Motion Conference for March 12, 2018 (ECF No. 18). On January 31, 2018, Plaintiff filed in this Court an "Emergency Motion for a Temporary Restraining Order and for Scheduling a Hearing on a Preliminary Injunction" (ECF No. 19). This Court denied Plaintiff's request for a TRO and indicated that the Court would address the topic of preliminary injunctive relief at the scheduled proceeding on March 12, 2018 (Order, ECF No. 20).

Following the combined Pre-Motion Conference and Motion Hearing on March 12, 2018, this Court issued an Order denying Plaintiff's request for a Preliminary Injunction for the reasons stated on the record and setting forth a briefing schedule on Defendants' proposed motion to dismiss (Order, ECF No. 26). In May 2018, Defendants filed their Motion to Dismiss (ECF No. 29). Plaintiff filed a response in opposition (ECF No. 31), and Defendants filed a Reply (ECF No. 32).

II. ANALYSIS

A. Motion Standards

Defendants move to dismiss this case under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Rule 12(b)(1) permits dismissal for a lack of subject-matter jurisdiction. FED. R. CIV. P. 12(b)(1). "When the defendant challenges subject matter jurisdiction through a motion to dismiss, the plaintiff bears the burden of establishing jurisdiction." *Angel v. Kentucky*, 314 F.3d 262, 264 (6th Cir. 2002) (quoting *Hedgepeth v. Tennessee*, 215 F.3d 608, 611 (6th Cir. 2000)). *See also Moir v. Greater Cleveland Regional Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990). Motions to dismiss for lack of subject-matter jurisdiction take one of two forms: (1) facial attacks and (2) factual attacks. *United States v. A.D. Roe Co., Inc.*, 186 F.3d 717, 721-22 (6th Cir. 1999). If the jurisdictional attack is facial, then the court must accept the allegations in the complaint as true and construe them in a light most favorable to the non-moving party. *Id.* If the attack is factual, however, then the court may look to material outside the pleadings and make factual findings. *Id. See also Nichols v. Muskingum Coll.*, 318 F.3d 674, 677 (6th Cir. 2003) ("In reviewing a 12(b)(1) motion, the court may consider evidence outside the pleadings to resolve

factual disputes concerning jurisdiction, and both parties are free to supplement the record by affidavits."); *Ohio Nat'l Life Ins. Co. v. U.S.*, 922 F.2d 320, 325 (6th Cir. 1990) ("The court has wide discretion to consider material outside the complaint in assessing the validity of its jurisdiction.").

***3** Federal Rule of Civil Procedure 12(b)(6) authorizes the court to dismiss a complaint if it "fail[s] to state a claim upon which relief can be granted[.]" FED. R. CIV. P. 12(b)(6). In deciding a motion to dismiss for failure to state a claim, the court must construe the complaint in the light most favorable to the plaintiff and accept all well-pleaded factual allegations in the complaint as true. *Thompson v. Bank of Am., N.A.*, 773 F.3d 741, 750 (6th Cir. 2014). To survive a motion to dismiss, the complaint must present "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557, 570 (2007). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). *See also* *Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 335-36 (6th Cir. 2007) ("When a document is referred to in the pleadings and is integral to the claims, it may be considered without converting a motion to dismiss into one for summary judgment.").

B. Discussion

"Federal courts are courts of limited jurisdiction." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 7 Wall. 506, 514; 19 L.Ed. 264 (1868)). Indeed, the Court has an obligation to dismiss an action "at any time" it decides that "it lacks subject-matter jurisdiction." FED. R. CIV. P. 12(h)(3).

Plaintiff alleges this Court has jurisdiction over the subject matter of her Complaint pursuant to the Indian Civil Rights Act, 25 U.S.C. § 1302; the Declaratory Judgment Act, 28 U.S.C. § 2201; and the federal-question statute, 28 U.S.C. § 1331 (ECF No. 1 at PageID.2). The Court will consider the parties' arguments under each of these three alleged jurisdictional bases, in turn. [1]

1. **The Indian Civil Rights Act**

Defendants argue that the Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301–1303, does not provide this Court with subject matter jurisdiction over Plaintiff's Complaint (ECF No. 30 at PageID.360-361). Despite including the ICRA in the jurisdictional statement of her Complaint, Plaintiff does not address its applicability in her response to Defendants' motion to dismiss.

Defendants' argument has merit.

With the passage of the ICRA, Congress imposed "certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57 (1978). "[Section] 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers." *Id.* at 72. "In 25 U.S.C. § 1303, the only remedial provision expressly supplied by Congress, the 'privilege of the writ of habeas corpus' is made 'available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.' " *Id.* at 58. *See also* *LaBeau v. Dakota*, 815 F. Supp. 1074, 1076 (W.D. Mich. 1993) ("Congress did not provide a private right of action in the Indian Civil Rights Act..."). Therefore, even assuming arguendo that Plaintiff has not waived this claimed basis for jurisdiction, the Court agrees with Defendants that the ICRA does not provide the Court with subject matter jurisdiction in this case.

2. **The Declaratory Judgment Act**

***4** Defendants argue that the Declaratory Judgment Act, 8 U.S.C. § 2201, likewise fails to confer this Court with

subject matter jurisdiction in this case (ECF No. 30 at PageID.361-362). Again, despite including the Declaratory Judgment Act in the jurisdictional statement of her Complaint, Plaintiff does not address its applicability in her response to Defendants' motion to dismiss.

Defendants' argument has merit.

"[T]he operation of the Declaratory Judgment Act is procedural only." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950) (citation omitted). "Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction." *Id.* Hence, "[t]he plaintiff's claim itself must present a federal question." *Id.* Therefore, assuming arguendo that Plaintiff has not also waived this claimed basis for jurisdiction, the Court agrees with Defendants that the Declaratory Judgment Act does not provide the Court with subject matter jurisdiction.

3. **The Federal-Question Statute**

Similarly, the federal-question statute, 28 U.S.C. § 1331, does not, in and of itself, supply a substantive basis for federal jurisdiction. Section 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. In other words, § 1331 merely gives the federal district court jurisdiction when a federal question arises based on other federal law. *See* *Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936) ("To bring a case within [§ 1331], a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action.").

As noted *supra*, Plaintiff did not state her claims in her Complaint as required by Federal Rule of Civil Procedure 10(b), but this Court will consider the ten issues Plaintiff presented in her accompanying brief and appendix to determine if she has identified a federal question for review. Plaintiff's Issues A and B address the sufficiency of the evidence under the NHBP statutory definition of stalking in support the Tribal Court's issuance of the PPO against her (ECF No. 1-1 at PageID.12-18). Plaintiff's Issues C and D concern the Tribal Court's jurisdiction to issue the PPO against her, a non-tribal member, as either a criminal or civil sanction (*id.* at PageID.17-21). In Issue E, Plaintiff challenges the propriety of submitting the PPO on Michigan's LEIN system (*id.* at PageID.21). This Court has already resolved Issue F, Plaintiff's request for a preliminary injunction (*id.* at PageID.21-23). Issue G concerns whether Plaintiff exhausted her remedies in the Tribal system (*id.* at PageID.23-24). And Issues H, I and J are "related procedural issues" concerning how the Tribal Court entered the PPO (ECF No. 1-2 at PageID.26-29).

a. *Tribal-Law Claims*

Defendants argue that with the exception of Plaintiff's challenge to the Tribal Court's jurisdiction, Plaintiff's claims are grounded solely in the asserted requirements of tribal law, not federal law (ECF No. 30 at PageID.359). Defendants conclude that this Court is not empowered to speak on these questions (*id.*).

In her response to Defendants' motion to dismiss, Plaintiff does not dispute that her claims in Issues A, B, E, G, H, I and J do not "aris[e] under the Constitution, laws, or treaties of the United States" for purposes of federal-question jurisdiction under § 1331.

***5** Defendants' argument has merit.

The Court determines it lacks jurisdiction over the subject matter of Plaintiff's tribal-law claims. *See, e.g.,* *Talton v. Mayes*, 163 U.S. 376, 385 (1896) ("[T]he determination of what was the existing law of the Cherokee nation ... [was] solely [a] matter[ ] within the jurisdiction of the courts of that nation, and the decision of such a question in itself necessarily involves no infraction of the Constitution of the United States"); *Shelifoe v. Dakota*, 966 F.2d 1454, at *1 (6th Cir. 1992) ("[T]he district court lacks jurisdiction to review a challenge to the propriety or wisdom of a tribal court's decision."); *Lesperance v. Sault Ste. Marie Tribe of Chippewa Indians*, 259 F. Supp. 3d 713, 722 (W.D. Mich. 2017) ("Whether the Tribe correctly interpreted and applied its own ordinance does not present a federal question."). Hence, Plaintiff has not borne her burden of demonstrating any jurisdictional basis for this Court to review her tribal-law claims, and the tribal-law claims are properly dismissed under FED. R. CIV. P. 12(b)(1).

b. *Jurisdictional Claim*

Defendants concede that unlike Plaintiff's tribal-law claims, federal-question jurisdiction lies over her claim that the Tribal Court lacked jurisdiction to issue the PPO as a matter of federal law (ECF No. 30 at PageID.362), i.e., Plaintiff's remaining Issues C and D. Although they concede subject matter jurisdiction exists over the jurisdictional claim, Defendants request that this Court dismiss the claim "against all Defendants under Rule 12(b)(6) because the claim is squarely foreclosed by Congress' unambiguous recognition of tribal jurisdiction in 18 U.S.C. § 2265(e)" (ECF No. 30 at PageID.362). According to Defendants, the jurisdictional claim turns on a pure question of law and is "not plausible on its face" (*id.*).

In her response, which incorporates some of her earlier briefing on the topic, Plaintiff "agree[s] with the Defendants' statement that Joy Spurr's claim is suitable for disposition without further briefing, apart from the issues of damages, costs and attorney fees" (ECF No. 31 at PageID.374). However, contrary to Defendants' reliance on 18 U.S.C. § 2265(e), Plaintiff contends that 25 U.S.C. § 1304 instead indicates Congress' clear intent to *not* authorize tribal courts to issue PPOs against non-tribal members over crimes of domestic violence (*id.* at PageID.374-375). Plaintiff asserts that § 2265 "is about 'full faith and credit given to protection orders,' not jurisdiction" (ECF No. 23 at PageID.307). According to Plaintiff, if this Court looks to § 1304, then the Court will conclude that the Tribal Court lacked jurisdiction to issue the PPO in this case because Plaintiff "does not fit within any of the designated categories" delineated in § 1304(b)(4)(B) for exercising jurisdiction against a defendant who "lacks ties to the Indian tribe" (*id.* at PageID.306). Plaintiff reiterates her request that the Court issue a declaratory judgment that "the NHBP courts lacked jurisdiction to grant the personal protection order against her, and issue a corresponding permanent injunction against the Defendants, in view of the unambiguous language of 25 U.S.C. 1304" (ECF No. 31 at PageID.375).

***6** In reply, Defendants argue that "the parties' briefing to date demonstrates that Plaintiff has no viable argument to evade Congress's clear mandate in 18 U.S.C. § 2265(e)" (ECF No. 32 at PageID.380).

Defendants' argument has merit.

Although this Court lacks jurisdiction to review a challenge to the "propriety or wisdom" of a tribal court's decision, a remedy may be available to challenge the jurisdiction of the tribal court. *See Shelifoe,* 966 F.2d at *1 (citing *DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510, 513 (8th Cir. 1989) ("The question of whether an Indian tribe has the power to compel a non-Indian to submit to the civil jurisdiction of a tribal court is a federal question under 28 U.S.C. § 1331.")).

Specifically, in *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985), where the petitioners contended that the tribal court had no power to enter a judgment against them, i.e., that "federal law has curtailed the powers of the tribe," the United States Supreme Court decided that "[t]he question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under § 1331." The Supreme Court pointed out that because the petitioners contended that federal law divested the tribe of this aspect of sovereignty, "it is federal law on which they rely as a basis for the asserted right of freedom from Tribal Court interference," and "[t]hey have, therefore, filed an action 'arising under' federal law within the meaning of § 1331. *Id.* at 853. The Supreme Court held that the district court correctly concluded that a federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction. *Id. See also Kelsey v. Pope*, 809 F.3d 849, 854 (6th Cir. 2016) (deciding, as a federal question under § 1331, whether the Little River Band of Ottawa Indians properly asserted extraterritorial criminal jurisdiction).

Here, too, the Court determines that it has federal-question jurisdiction under § 1331 to determine whether the Tribal Court exceeded the lawful limits of its jurisdiction in issuing the PPO in this case. Accordingly, the Court turns to the merits of Defendants' argument under Rule 12(b)(6) that Plaintiff has not stated a plausible jurisdictional challenge.

In general, 18 U.S.C. § 2265 provides for "full faith and credit" for protection orders issued by the courts of any "State, Indian tribe, or territory." Defendants correctly rely on

subsection (e) in this case, which provides more specifically the following:

> (e) **Tribal court jurisdiction.**—For purposes of this section, a court of an Indian tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe (as defined in section 1151) or otherwise within the authority of the Indian tribe.

18 U.S.C. § 2265(e). On its face, the "Personal Protection Order (Non-Domestic) (Stalking)" (ECF No. 1-3) was filed under 18 U.S.C. § 2265, and the plain text of subsection (e) clearly establishes the Tribal Court's "full civil jurisdiction" under federal law to issue the order in this case for the benefit of Nathaniel Spurr.

***7** Plaintiff argues that if this Court instead looks to 25 U.S.C. § 1304 to determine if the Tribal Court exceeded the lawful limits of its jurisdiction, then a different conclusion is compelled. However, Plaintiff's reliance on § 1304 misplaced. Section 1304 provides a participating tribe with "special domestic violence criminal jurisdiction over a defendant for criminal conduct that falls into one or more of the following categories: (1) Domestic violence and dating violence [and] (2) Violations of protection orders." 25 U.S.C. § 1304(c) ("Criminal conduct"). Section 1304 sets forth the limits of a participating tribe's "special domestic violence criminal jurisdiction," whereas § 2265(e) establishes the tribe's "full civil jurisdiction to issue and enforce protection orders involving any person." The two statutes govern two different subject areas. In short, Plaintiff's jurisdictional challenge is not plausible and is properly dismissed under FED. R. CIV. P. 12(b)(6).

III. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that Defendants' Joint Motion to Dismiss (ECF No. 29) is GRANTED, and Plaintiff's Complaint (ECF No. 1) is DISMISSED.

Because this Opinion and Order resolves all pending claims in this matter, a corresponding Judgment will also enter. *See* FED. R. CIV. P. 58.

All Citations

Not Reported in Fed. Supp., 2018 WL 10075919

Footnotes

1 Given its conclusions herein, the Court does not reach Defendants' alternative argument that this Court should dismiss the claims against Defendants NHBP and the NHBP on the basis of sovereign immunity.

PROPERTY

The following cases address key concepts in Property Law. The first is a brief overview of three early U.S. Supreme Court cases known as the *Marshall Trilogy*. The focus of this handbook is to introduce tribal law; however, these federal cases are foundational to the modern constraints many tribes face in developing their own property laws. What follows are three short summaries of these cases and their impact on tribes. The *Marshall Trilogy* contains racist and offensive language about Native people. Consider the preceding "Note on Trauma-Informed Pedagogy" for strategies about teaching this content.

In the second resource, the Sault Ste. Marie Tribe of Chippewa Indians Court of Appeals addresses a landlord's duty to mitigate and the tribe's statutory definitions of abandonment and estoppel. *Bouschor v. Sault Tribe Facilities Management*, APP-12-05 (Sault Ste. Marie Tribe of Chippewa Indians Ct. App., May 16, 2013).

A Note on Trauma-Informed Pedagogy

What Is Trauma?

Trauma is an umbrella term that refers to lasting physical, mental, and/or emotional responses due to experiencing a distressing event or events. Trauma can harm a person's sense of safety, sense of self, ability to focus, ability to regulate emotions, and ability to navigate relationships. Responses can include issues with memory, emotional regulation, neurochemistry, trust, and physical responses.

Intergenerational trauma refers to the lasting effects of trauma that are passed down generationally even if the newer generations did not directly experience the trauma. The American Psychology Association notes that trauma can alter DNA. Traumatized ancestors can pass on altered genetics, and issues with memory, emotional regulation, and patterns of thinking and behavior.

Re-traumatization can occur when a person who experienced trauma (directly or intergenerationally) encounters a situation that reminds them of the traumatic event. Re-traumatization can occur from images, specific content, environments, touch, gestures, tone, or words, and event smells.

What is Trauma-Informed Pedagogy?

Trauma-informed pedagogy (TIP) is an approach to teaching that recognizes, understands, and seeks to mitigate trauma's effects on learning

TIP is:

- Creating a safe learning environment;
- Communicating empathy;
- Building trust;
- Offering warnings and choice;
- Working to prevent re-traumatization

TIP is *not:*

- Lowering standards or inflating grades;
- Avoiding difficult conversations;
- Overlooking poor performance;
- Taking on the role of a therapist

How Does TIP Apply to Legal Education?

The history of the United States involves many kinds of trauma for numerous groups of people. Slavery, the Trail of Tears/Death, and Japanese internment are just some of the traumatic events that continue impacting present generations through intergenerational trauma and ongoing, present discrimination. The legal system is not immune to these legacies of trauma. When law students encounter caselaw that recount these legacies this can re-traumatize. For example, if a student has experienced sexual violence, that student could be re-traumatized by having to read a case about sexual violence. The same is true for Native students encountering racist, prejudicial language and treatment of their ancestors or present tribal communities. For these reasons, law educators should integrate TIP to support their students and foster safe, effective learning environments.

What Do TIP Strategies Look Like?

The goals of TIP are to create safety, trustworthiness, choice, collaboration, and empowerment. The following are specific TIP strategies educators can implement in their learning spaces when teaching difficult (potentially re-traumatizing) content:

1. Safety-Provide content warnings for material that may be re-traumatizing; make sure all classroom exits are accessible or consider holding class online that day.
2. Trustworthiness-create discussion space for intellectual and emotional processing about difficult content; communicate why difficult content is assigned, and what the learning goals are; be receptive to feedback.
3. Choice-make difficult readings or content optional; *do not cold call on difficult content*; let students leave the room as needed.
4. Collaboration-check-in with how students are feeling; encourage dialogue; invite student feedback.
5. Empowerment-normalize and validate reactions that come from experiencing trauma; acknowledge that the content is in fact difficult and important; ask, listen, and respond to students' needs.

Further Reading and Resources on TIP:

- Isaac R. Galatzer-Levy et al., *Coping Flexibility, Potentially Traumatic Life Events, and Resilience: A Prospective Study of College Student Adjustment, 31* J. SOC. & CLINICAL PSYCH., 542–67 (2012).

- Janice Carello & Lisa D. Butler, *Practicing What We Teach: Trauma-Informed Educational Practice*, 35 J. TEACHING SOC. WORK, 262-78 (2015).

- NEW DIRECTIONS FOR MENTAL HEALTH SERVICES: USING TRAUMA THEORY TO DESIGN SERVICE SYSTEMS (Maxine Harris & Roger D. Fallot eds., 2001).

- Tom Brunzell et al., Shifting Teacher Practice in Trauma-Affected Classrooms: Practice Pedagogy Strategies Within a Trauma-Informed Positive Education Model, 11 SCH. MENTAL HEALTH. 600–14 (2019).

- The Institute on Trauma and Trauma Informed Care: https://socialwork.buffalo.edu/social-research/institutes-centers/institute-on-trauma-and-trauma-informed-care/what-is-trauma-informed-care.html

The Marshall Trilogy

The *Marshal Trilogy* refer to a series of three cases opined by Chief Justice John Marshall in 1823-1832. These cases are foundational to American Indian law and property law for many reasons, not least of which for legalizing the Doctrine of Discovery that divested Indigenous peoples of their lands. Justice Marshall also clarified the legal status of Indigenous peoples using problematic, offensive, and potentially re-traumatizing language. What follows is a brief synopsis of each case. Educators should take care with these cases. Refer to the Trauma-Informed Pedagogy strategies in this Handbook to present the information in a careful and responsible way.

Johnson v. M'Intosh, 21 U.S. 543 (1823).

Factual Background: In 1773, the Illinois Indians and Piankeshaw Indians transferred their original title to a tract of land east of the Mississippi River to private U.S. citizens, William Murray and company. The deed to the land was descendible and claimed by heirs, Joshua Johnson and Thomas Graham. Private U.S. citizen, William M'Intosh, also claimed title to the same land. Because the United States government claimed to have received the title by transfer from the Indians after the American Revolution in 1776 and then lawfully sold it to M'Intosh in 1818, M'Intosh argued that his claim superseded Johnson and Graham's claim.

Rules and Reasoning: Even though Johnson and Graham's title predated federal claims to the land, the Supreme Court relied on the Doctrine of Discovery to invalidate their claim. The Doctrine of Discovery originated with papal bulls, issued in the 1450s and granting Catholic nations sovereignty over any "discovered" lands (*terra nullius*). Relatedly, the "right of conquest" extinguished original title of the conquered and transfers it to the conqueror. Here, because the Americas were "discovered" and conquered by the British, who then passed their exclusive right to Native lands to the independent United States, the Court reasoned that the Illinois and Piankeshaw Indians had effectively transferred their rights to the federal government and could not transfer to private citizens like Murray.

Key Holdings: (1) Private citizens could not purchase lands from Indigenous people; Indigenous people could only sell their land to the federal government. (2) The United States has supremacy in American Indian affairs over the states and individuals.

Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

Factual Background: In the 1830s, the state of Georgia sought to remove the Cherokee Nation from Cherokee homeland on which Georgia sought to preside by legislatively divesting the Cherokee Nation of its political status. The Cherokee Nation brought an injunction against the Georgia legislature.

Rules and Reasoning: The Court denied the injunction motion for lack of jurisdiction, but the dicta of the case began to clarify the relationship among tribes, states, and the federal government. Specifically, the Court had to determine the political status of the Cherokee Nation to find whether the state had legislative authority over the Cherokee Nation. The law of conquest meant that tribes could not be foreign nations, but the treaties between tribes and the federal government meant that tribes were not like states either. Justice Marshall opined that they were domestic dependent nations or "wards to their guardians" where the guardian was the federal government.

Key Holdings: (1) Indian Tribes and Nations are domestic dependent nations as distinct from foreign nations and from states. (2) The United States has supremacy in American Indian affairs over the states and individuals.

Worcester v. Georgia, 30 U.S. 1 (1831).

Factual Background: After *Cherokee Nation v. Georgia*, Georgia continued encroaching on Cherokee lands and issuing legislation that impacted the Cherokee Nation. One such law criminalized any white person who entered Cherokee territory without state permission. White missionary Samuel Austin Worcester was convicted under the law; he appealed his conviction by arguing that Georgia's law was unconstitutional.

Rules and Reasoning: The Court upheld the distinctive sovereignty of Indian Nations and Tribes and found that Georgia laws could not infringe on this sovereignty. Under the Supremacy Clause and the treaties between the Cherokee Nation and the United States, state laws had no effect in Indian country. The Court relied on what are considered the Indian Canons of Statutory Construction. These state that (1) ambiguous expressions must be resolved in favor of the Indian parties concerned; (2) Indian treaties must be interpreted as the Indians themselves would have understood them; and (3) Indian treaties must be liberally construed in favor of Indians.

Key Holdings: (1) State laws have no force within Indian Nation or Tribal lands. (2) Treaties with Indians must be interpreted with the Indian Canons.

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS

COURT OF APPEALS

Lloyd Bouschor v. Sault Tribe Facilities Management

APP-12-05

Decided May 16, 2013

BEFORE: FINCH, HARPER, KRONK, JUMP, and MCKERCHIE Appellate Judges.

OPINION AND ORDER

Kronk, Appellate Judge, who is joined by Appellate Judges Finch, Harper, Jump and McKerchie.

As explained more fully in the discussion below, this Court remands the matter to the Tribal Court for reconsideration consistent with this opinion.

Factual and Procedure Background

On July 1, 1996, the Appellant and Appellee entered into a rental agreement for a family residence located at 2293 Shunk Rd. The rental agreement between Appellant and Appellee provided that Appellant would pay Appellee $400 per month in rent. Based on the transcript of the Landlord Tenant Hearing held on November 19, 2012, it appears that Appellant failed to pay all of the rent due in 2011, as $107 of outstanding rent payments remained from 2011. Moreover, Appellant failed to make rent payments the first eight months of 2012. On October 15, 2012, Appellee discovered that the rented premises in question were vacant. Also on October 15, 2012, Appellee filed a complaint with the Tribal Court alleging that Appellant "had abandoned the premises and owed outstanding money damages in the amount of $3,337.00." *Sault Tribe Facilities Management v. Lloyd Bouschor*, File No. LT-12-133, Transcript of Landlord Tenant Hearing, 3 (Nov. 19, 2013). Appellee determined that Appellant owed a total of $3,337.00 in outstanding rent. Moreover, Appellee also sought to recover $898.82 for maintenance costs related to cleaning up the property following Appellant's abandonment. Accordingly, Appellee sought to recover $4205.82 from Appellant. On November 19, 2012, the Tribal Court held a hearing on the matter. On the same day, the Tribal Court entered a money judgment against Appellant for $4205.82.

Appellant appeals from the Tribal Court's money judgment entered against him. Specifically, Appellant cites to Tribal Code Section 82.114(c) and (d) as the basis of his appeal. Tribal Code Section 82.114(c) allows for an appeal when "[a]ny ruling, order, decision or abuse of discretion which prevented a fair hearing or trial." Tribal Code Section 82.114(d) allows for an appeal where there is "[i]nsufficient evidence to support the verdict, decision, order or judgment of the jury or Tribal Court." Considering the Appellant's appeal in totality, Appellant alleges that the Tribal Court did not possess the necessary facts to justify its decision. Also, Appellant would like permission to remove an out building that remained on the property following his abandonment.

Given neither party requested oral argument, this Court did not hear oral argument in the matter and therefore decides the matter based on the record provided this Court.

Jurisdiction and Standard of Review

This Court has exclusive jurisdiction in this matter, as it is reviewing the decision of the Tribal Court. Tribal Code Section 82.109.

In matters involving a finding of fact by the Tribal Court, this Court will review to determine whether the Tribal Court's determination was "clearly erroneous." Tribal Code Section 82.124(1). "In applying the clearly erroneous standard of review, the Court will determine whether it is left with a 'definite and firm conviction' that the trial court made an error in its findings of fact." *Rex Smith v. Sault Ste. Marie Tribe of Chippewa Indians*, APP-08-02, 3 (August 4, 2008). According to Tribal Code Section 82.124(5) "[a] conclusion of law shall be reviewed by the Court of Appeals without deference to the Tribal Court's determination, i.e., review is *de novo*." Given the Tribal Court's judgment in this matter does not appear to include any factual findings, the Tribal Court's judgment was a conclusion of law (i.e. the remedy assessed) and this Court will apply the *de novo* standard of review.

It is also important to note that this Court may consider issues not raised before the Tribal Court if such consideration is necessary to avoid a "miscarriage of justice". Tribal Code Section 82.125(1).

DISCUSSION

The record in this matter is scant. Based on a review of the transcript from the November 19, 2012 hearing, it appears that the Tribal Court focused on the damages requested. Also, some consideration was given to the Appellant's desire to obtain his out building that was left at the property when he abandoned the premises. Notably, at two points during the November 19, 2012 hearing, Appellant indicated that he did not contest the damages sought by Appellee. *Sault Tribe Facilities Management v. Lloyd Bouschor*, File No. LT-12-133, Transcript of Landlord Tenant Hearing, 11 (Nov. 19, 2013).

Accordingly, this Court must consider whether the Tribal Court's conclusions of law were supported by the record in front of it. In resolving this question, the Court first considers the law on abandonment and estoppel. Second, because Appellant failed to contest the amount of damages requested by Appellee at the November 19, 2012 hearing, no arguments were preserved on appeal to this Court. Therefore, this Court must decide whether a miscarriage of justice would occur should it fail to consider the above mentioned arguments. Tribal Code Section 82.125(1).

Abandonment

The facts in this case are troublesome. Based on the transcript of the November 19, 2012 hearing in this matter, it would appear that the Appellee allowed the Appellant to persist in nonpayment of rent for over 8 months (the $107 of non-paid rent in 2011 in addition to the 8 months of non-paid rent in 2012). Yet, despite clear notification and eviction procedures spelled out in both the rental agreement between Appellant and Appellee and Tribal Code Section 83, Appellee failed to take any steps to mitigate its damages until it filed a complaint in the Tribal Court on October 15, 2012. This seems like an exceptionally long period of time to allow damages to accrue.

Tribal Code Section 83.303(5) provides that nonpayment of rent is evidence of abandonment. Given Appellant failed to pay rent for such a long period of time, the question arises as to when the Appellant abandoned the property. Second, a question arises as to when the Appellee should have been aware of the abandonment. The rental agreement between the parties stipulates that Appellee may bring eviction proceedings within one month of nonpayment of rent. It may therefore be that Appellee should have been aware of Appellant's abandonment after one month of nonpayment. In some jurisdictions, a landlord has the duty to mitigate damages once a tenant abandons the property.

Based on a cursory review of Tribal Code Section 83, it appears that tribal law does not directly speak to whether landlords have a duty to mitigate following abandonment. Tribal Code Section 83.104 does allow for the consideration of foreign law when tribal law or the rental agreement in question does not specifically speak to the issue in question.

Accordingly, it is appropriate to look at the laws of other jurisdictions. Given leasehold law is generally governed by the states, this Court looks to state law for some guidance on the duty to mitigate following abandonment. In Michigan, abandonment does not exonerate a tenant from paying rent, as "[a] tenant at will, until the tenancy is legally terminated by notice, is bound to pay for the use and occupation, and the mere vacating of the premises during the term or while the tenancy exists will not exonerate him from such payment." *Huntington v. Parkhurst*, 87 Mich. 38, 49 N.W. 597 (1891). However, it appears that many jurisdictions now place a duty to mitigate damages on the landlord once abandonment has occurred. In *Sommer v. Kridel*, 378 A.2d 767 (1977), the Supreme Court of New Jersey considered whether landlords must mitigate damages following abandonment. In concluding that landlords did have a duty to mitigate, the court explained that there was an upward trend in jurisdictions requiring a duty to mitigate, that such mitigation was consistent with the duty to mitigate under contracts law and that such a duty to mitigate was consistent with modern notions of equity and fairness.

Appellee allowed for damages to accrue for an excessive period of time (over 8 months). Based on the record in this matter, it appears that Appellee did not take any steps to mitigate Appellant's damages. Accordingly, several questions remain. First, did Appellee have a duty to mitigate following Appellant's abandonment? Resolution of this question requires consideration of the governing tribal law as well as state and federal law which may be persuasive on this

question. Second, if Appellee did have a duty to mitigate, when was Appellee reasonably made aware of Appellant's abandonment? Notably, if Appellee did have a duty to mitigate damages, such mitigation would likely not apply to the maintenance costs requested by Appellee.

Estoppel

In addition to the potential duty to mitigate damages following abandonment, this case also raises equitable concerns related to estoppel. Estoppel is an equitable doctrine that arises in a wide variety of contexts. Generally speaking, estoppel prevents an actor from succeeding on a claim against another when his or her actions contributed to the problem of which the actor complains. Black's Law Dictionary (revised 4th ed.) explains that "[a]n 'estoppel by acts and declarations' is such as arises from the acts and declarations of a person by which he designedly induces another to alter his position injuriously to himself."

As previously discussed and as mentioned in Appellant's notice of appeal, Tribal Code Section 83 and the rental agreement between the Appellant and Appellee provide detailed guidance on the steps to be followed by Appellee when the Appellant failed to pay rent. Specifically, the rental agreement at page five provides that "[o]n the 25th day of your payment period if your rent has not been paid a court date will be set seeking you [sic] lawful eviction and judgment for arrearage and court cost." Rather than following the procedures established in the rental agreement between Appellant and Appellee, Appellee allowed Appellant to persist in his nonpayment of rent for over 8 months. Accordingly, the question arises as to whether Appellee's failure to follow the established eviction procedures outlined in the rental agreement induced Appellant to alter his position (i.e. continue to not pay rent) in a way that was injurious to himself.

Abandoned Property

In his appeal, Appellant requests permission to recover the "out building" that was left at the property when he abandoned the property. The rental agreement between the Appellee and Appellant provides that "[t]enant [Appellant] agrees that if, upon vacating the premises, he leaves any personal property in or about the premises without the written permission of landlord, said personal property shall be deemed abandoned to the landlord and shall be disposed of by the landlord as landlord sees fit, and tenant here by releases landlord of any liability therefore." Sault Ste. Marie Tribe of Chippewa Indians Rental Agreement, 4 (July 1, 1996). Accordingly, on the basis of the rental agreement, Appellant forfeited his ownership in the out building when he abandoned it on the property. However, the Tribal Court asked that the parties cooperate, if possible, to ensure that Appellant receive the out building. Assuming the out building is still viable, the parties are encouraged to effectuate the Tribal Court's request. *Sault Tribe Facilities Management v. Lloyd Bouschor*, File No. LT-12-133, Transcript of Landlord Tenant Hearing, 12 (Nov. 19, 2013).

Miscarriage of Justice

Generally, appellate courts avoid consideration of issues that are not raised below and preserved for appeal. In the present matter, Appellant did not raise any of the arguments discussed above during the November 19, 2012 hearing. In fact, he did quite the opposite. As previously discussed, Appellant did not contest the amount of damages requested at oral argument. *Sault Tribe Facilities Management v. Lloyd Bouschor*, File No. LT-12-133, Transcript of Landlord Tenant Hearing, 11 (Nov. 19, 2013). Accordingly, based on the principle that appellate courts should avoid considering arguments that were not raised below and the fact that Appellant did not contest the requested damages, it would be easy to affirm the Tribal Court's decision in this matter.

However, Tribal Code Section 82.125(1) provides that "unless a miscarriage of justice would result the Court of Appeals will not consider issues that were not raised before the Tribal Court." This Court may therefore depart from the general rule regarding issues preserved for appeal where a "miscarriage of justice" would otherwise occur. It seems that this may be such a case. Given Appellant appears *in pro per* and the damage award against him is substantial, appellate review of relevant legal arguments is appropriate to ensure that a "miscarriage of justice" does not occur.

ORDER

For the reasons explained above, this matter is remanded to the Tribal Court for a determination consistent with the issues raised above. First, the Tribal Court should determine at what point Appellee reasonably should have been aware of Appellant's abandonment. Second, the Tribal Court should determine whether Appellee had a duty to mitigate following Appellant's abandonment. Third, the Tribal Court should determine whether the doctrine of estoppel precludes Appellee from collecting damages in this case.

It is SO ORDERED.

TORTS

The following three cases address key concepts in Tort Law. In *Duynslager v. Little Traverse Bay Bands of Odawa Indians*, No. C-210-0815 (Little Traverse Bay Bands Tribal Ct. 2016), the Little Traverse Bay Bands of Odawa Indians Tribal Court analyzes a negligence claim according to the tribe's tort law, the Naawchigedaa Statute.

In the second and third cases, both the Little Traverse Bay Bands Tribal Court and the Pokagon Band of Potawatomi Indians Court of Appeals assess the Open and Obvious Doctrine within its tort laws and whether Michigan tort laws on tolling and this doctrine apply to the tribes. *O'Donnell v. Pokagon Gaming Authority*, No. 20-001-AP (Pokagon Band of Potawatomi Indians Ct. App., 2021); *Blanz v. Odawa Casino Resort*, No. C-136-1011 (Little Traverse Bay Bands Tribal Ct. Aug. 2, 2012).

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS

Tribal Court
Civil Division

Court Mailing Address: **7500 Odawa Circle, Harbor Springs, MI 49740** Phone: 231-242-1462

JESSICA J. DUYNSLAGER,

PLAINTIFF,

v.

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS D/B/A ODAWA CASINO RESORT

DEFENDANT.

Case No.: C-210-0815

ORDER GRANTING MOTION FOR SUMMARY DISPOSITION

The Little Traverse Bay Bands of Odawa Indians, d/b/a Odawa Casino Resort ("Defendant"), filed a motion for summary disposition regarding the negligence claims filed against it by Jessica Duynslager ("Plaintiff"). Defendant argues that Plaintiff's negligence claims related to breach of duty are untrue. Defendant further contends that even if the allegations are true, Defendant has an affirmative defense of comparative negligence that bars the claims. Finally, the Defendant posits that the Plaintiff's claims are barred by the fact that the Plaintiff had knowledge and was aware of the condition of which she complains and/or it's open and obvious nature and is therefore subject to summary disposition.

This Court finds that there is no interpretation of the evidence presented that would support the Plaintiff's claims. Therefore, Defendant's motion for summary disposition is granted.

JURISDICTION

The Court's jurisdiction to hear this case comes from the Constitution and Waganakising Odawak Statute, Naawchigedaa Statute, Tort Claims 2014 – 012, section 3 ("Tort Statute"). The Constitution provides Tribal Court jurisdiction for any and all people or activities within the Tribe's reservation as defined by the Constitution. *LTBB Constitution, Article IV (B)*. The Tort Statute reads, "The Tribe's jurisdiction extends to persons who are Indians, tribal citizens, or who live or work within the territorial jurisdiction of LTBB and who commit a tort or are injured by the tortious acts of another within the territorial jurisdiction of the Little Traverse Bay Bands of Odawa Indians..." The Defendant is domiciled upon Tribal lands within Emmet County. Emmet County is within LTBB's 1855 treaty boundaries and therein this Court has proper jurisdiction over all parties.

FACTS

The facts are stated in conformity with the briefs submitted by the respective parties. Inconsistencies are noted.

Plaintiff's complaint alleges premises liability for an injury she sustained as a result of a slip and fall caused by a spilled beverage on the dance floor of the Ozone, a business owned entirely by the Defendant. Plaintiff was a business invitee the night she fell. Plaintiff alleges and evidence supports that she fell on a spilled beverage. Plaintiff alleges she warned the bartender, an agent of the Defendant, of broken glass on the floor before her fall. The Plaintiff alleges that the fall resulted in the intra-articular fracture of her right wrist. She further alleges that she would not have fallen but for the negligence of the Defendant. Plaintiff alleges that LTBB failed to maintain the premises in a reasonably safe condition and failed to protect the Plaintiff from known dangers. Although both parties agree that the Plaintiff was aware of broken glass in the area wherein she fell, in dispute is whether the Plaintiff was aware of the spill. At deposition, the Plaintiff acknowledged she was aware of the general area in which she found broken pieces of the bottle, picked up the pieces of the bottle and gave them to the staff. [Deposition transcript of Plaintiff, pp.92-94.] She also testified that she believed the broken glass in and of itself could be a hazard. [Deposition transcript of Plaintiff, pp. 94.] Within two minutes of the male patron dropping the bottle on the dance floor and a minute and one half of the Plaintiff taking a piece of glass to the bartender, the club maintenance employee arrived at the scene and cleaned the area. See Exhibit A and Exhibit B, affidavit of Dana Stafford. The Plaintiff filed this suit seeking damages for her injuries.

STANDARD OF REVIEW

The LTBB Rule of Civil Procedure ("LTBBOICR") applies to these proceedings. A motion under LTBBOICR XVI(b)(6) provides for summary disposition if it appears that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The Defendant filed a motion for summary disposition in this case. Therefore, survival of the Plaintiff's complaint is contingent upon whether a genuine issue of material fact exists.

ANALYSIS

Plaintiff argues that the Defendant was negligent, grossly negligent, or engaged in willful and wanton misconduct because the Defendant allegedly breached its duty to the Plaintiff by one or more of the following:

1. Failing to maintain the premises in a reasonably safe condition,
2. Failing to adequately inspect and/or assess the premises for hazards, including the presence of spills,
3. Failing to protect the Plaintiff from known dangers,
4. Failing to make necessary repairs after having actual and or constructive knowledge of the existence of the hazard and the need to take necessary remedial measures,

5. Undertaking some remedial action of the premises, but doing so in a negligent or careless manner thereby increasing the hazard.

Furthermore, the Plaintiff argues that one or more of the Defendant's negligent acts or omissions was the legal and proximate cause of the Plaintiff's injuries. The Plaintiff further alleges that as a result of the Defendant's negligence, Plaintiff has and will suffer injury. The Plaintiff requests that this Court enter a judgment in her favor against the Defendant in an amount in excess of $25,000, plus interest, costs, and attorney's fees.

The Defendant counters the following:

1. Plaintiff 's allegations related to breach of duty are untrue,
2. The Plaintiff has an affirmative defense of comparative negligence,
3. The Plaintiff's claims are barred by the fact that the Plaintiff had knowledge and was aware of the condition of which she complains and/or its open and obvious nature,
4. The Plaintiff's claims may be barred in whole or in part by virtue of her failure to mitigate her claim of damages,
5. The Plaintiff's claims are barred by a lack of jurisdiction due to sovereign immunity,
6. The Plaintiff's claims are barred in whole or in part by virtue of the fact that at all times pertinent to the allegations made in Plaintiff's complaint the Defendant acted reasonably, and
7. Finally, the Defendant states the Plaintiff's claims may be barred in whole or in part by the payment of alleged expenses or damages by collateral sources.

SOVEREIGN IMMUNITY

The Court's analysis must start with the Tribe's sovereign immunity. Without a clear and unequivocal waiver of sovereign immunity, this Court lacks jurisdiction to hear a case. LTBB Tribal Council Resolution 112303-02, November 23, 2003 states the following:

> "Whereas LTBB, its officials, agents and subordinate entities possess sovereign immunity from civil suits, including actions brought in Tribal Court, unless the Tribal Council expressly waive such immunity;
>
> Whereas LTBB carries liability insurance to protect LTBB and promote fairness and justice to all persons on insured properties;
>
> Whereas waiving LTBB's immunity to suit in Tribal Court for personal injury actions on insured properties serves to protect LTBB sovereignty, jurisdiction, business interests and members of the Tribe and general public;…

> Therefore be it resolved that the Little Traverse Bay Bands of Odawa Indians waives its sovereign immunity only in LTBB Tribal Court for personal injury actions arising on LTBB properties for which it carries liability insurance."

The Court finds that LTBB Tribal Council Resolution 112303-02 clearly and unequivocally waives the Tribe's sovereign immunity for the personal injury action at hand.

NEGLIGENCE

Waganakising Odawak Statute, Naawchigedaa Statute, Tort Claims 2014 – 012 ("Statute") governs this action. To persist under a negligence claim, the Plaintiff must prove that the Defendant owed the Plaintiff the duty, the Defendant breached that duty, and the Defendant's breach was the actual and proximate cause of the Plaintiff's injury. See WOS 2014-12 VI (F)(1). Under the Statute, the Plaintiff was an invitee and therefore the Defendant owed her a duty of care. The issue is whether the Plaintiff could convince the Court that there is a genuine issue for trial regarding whether the Plaintiff's injuries were caused by the Defendant's negligence. The Court viewed the casino surveillance videotape numerous times to carefully and fully consider the characterizations and arguments of both parties. The Court also carefully read the transcripts of the deposition and reviewed all other evidence presented. It is clear from viewing the surveillance tape and reviewing the evidence that no reasonable trier of fact could find the Defendant negligent. From the time the male patron dropped the bottle and caused the spill to the time when the Ozone staff cleaned the spill was less than five minutes. The Plaintiff failed to produce evidence successfully calling into question the evidence provided by the Defendant. Therefore, the Court finds that there is no interpretation of the casino surveillance videotape or the other evidence presented that would support the Plaintiff's claims. Therefore, based on the evidence in the record, the Court finds that there is no genuine dispute that the Defendant's response to the spill was reasonable and no reasonable trier of fact could find the Defendant negligent and return a verdict for the Plaintiff.

The Defendant relying on this Court's decision in *Blatz v. Odawa Casino Resort*, makes the argument if the Plaintiff did fall due to a hazard of which she was aware, a fact intensive analysis must be conducted to assess the relative fault of the parties and Plaintiff's recovery. However, the Defendant is not arguing that the Plaintiff's claims are barred by the open and obviousness of the spill. The Defendant is arguing that there is no genuine issue for trial as to whether a hazardous condition was hidden to the Plaintiff within the meaning of the Tort Statute. Therefore, the Court finds that the casino surveillance videotape unmistakably shows that not only did the Plaintiff know exactly where the spill was located, she engaged in negligent behavior by repeatedly sweeping her foot over the area of the spill. Furthermore, while the spill may not have been open and obvious to other patrons of the Ozone, the casino surveillance videotape and other evidence leaves the Court with no doubt that the spill was open and obvious to the Plaintiff. As such, there is no cognizable claim for negligence against the Defendant, and the claim is dismissed.

WHEREFORE, THE COURT FINDS:

1. The LTBB Tribal Council Resolution 112303-02 clearly and unequivocally waives the Tribe's sovereign immunity for personal injury,
2. Based on the evidence in the record, there is no genuine dispute that the Defendant's response to the spill was reasonable and no reasonable trier of fact could return a verdict for the Plaintiff,
3. There is no interpretation of the casino surveillance videotape or the other evidence presented that would support the Plaintiff's claims, and
4. The casino surveillance videotape unmistakably shows that not only did the Plaintiff know exactly where the spill was located, she engaged in negligent behavior by repeatedly sweeping her foot over the area of the spill making her own negligence the proximate cause of her injuries.

THEREFORE,

1. The Court grants the Defendant's motion for summary judgment;
2. Dismisses the Plaintiff's claims with prejudice; and
3. Orders this case closed.

IT IS SO ORDERED.

May 10, 2016
Date

Hon. Allie Greenleaf Maldonado, Chief Judge

Pokagon Band of Potawatomi Indians
Court of Appeals

8620 Sink Road, P.O. Box 355
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CASE NO. 20-001-AP

Appellant:	**v.**	**Appellee:**
MARY O'DONNELL		POKAGON GAMING AUTHORITY d/b/a FOUR WINDS CASINO RESORT
Attorney for Appellant: Theodore Leonas III, Leonas Law Offices, 101 W.2nd Street, Michigan City, IN, (219) 872-2726		**Attorney for Appellee:** Tobin H. Dust, O'Neil, Wallace, Doyle, P.C., 300 St. Andrews Road, Ste. 302, Saginaw, MI 48638, (989) 709-0960

OPINION

TOMPKINS, JJ.

Petitioner-Appellant, Mary O'Donnell appeals from the decision of the Pokagon Band Tribal Court granting the Respondent-Appellee, Pokagon Band Gaming Authority d/b/a Four Winds Casino Resort's (hereinafter "Four Winds") motion for summary disposition dismissing her claim for premises liability. Petitioner alleged that a slippery snow and ice-covered sidewalk near the Respondent's casino, on which she fell, was a dangerous condition and that the Respondent breached its duty of reasonable care by failing to take steps to remedy the condition. For the reasons stated below, the decision of the Tribal Court is reversed and remanded for additional proceedings.

I. BACKGROUND

A. Facts

The record supports the following facts. On January 26, 2019, petitioner and her sister went to the Four Winds Casino and arrived around 3:00 or 4:00 p.m. They parked in row B of the main parking lot just outside of the casino's main entrance. Petitioner observed clear weather at that time and did not remember seeing or hearing a weather forecast for that day. If she had known it was going to snow, she would have parked in the casino parking garage or used the valet service.

After about three hours at the casino, petitioner and her sister exited the casino through the main entrance as it was the closest to their parked vehicle. Petitioner observed that the sidewalks were covered in snow but did not observe any plowing or salting on the premises. Given that Petitioner did not see a snowless path to her vehicle, she and her sister began to walk on the sidewalk toward her car walking arm in arm. Not far after emerging from under the covered canopy area in front of the main entranceway, and about fifty yards away from her parked vehicle, petitioner fell on the sidewalk sustaining serious injuries.

B. Proceedings Below

On July 23, 2019, petitioner filed suit alleging that the snow-covered icy sidewalk was a dangerous condition and that respondent had breached its duty of reasonable care by failing to take reasonable steps to remedy the condition. Petitioner's deposition was taken on or about November 15, 2019. Respondent filed a motion for summary disposition on December 9, 2019, based on the argument that liability is barred as a matter of law because snow-covered ice is generally considered an open and obvious condition under State of Michigan law. Petitioner opposed the motion arguing that the condition may have been open and obvious, but it fell under Michigan's "unavoidable condition" exception to the open and obvious doctrine. The trial court applying the open

and obvious doctrine, granted the motion for summary disposition finding that there existed no genuine issue as to any material fact because petitioner had a choice whether to confront the hazard, and it was not effectively unavoidable.

C. Issues on Appeal

The petitioner frames the central issue raised in this appeal as to whether the lower court erred in granting the motion for summary disposition in finding no genuine issue of material fact as to whether the "unavoidable condition" exception to the open and obvious rule applied in the case. Respondent provides a counterstatement of the question involved as being whether the trial court correctly granted the motion for summary disposition where the record does not create a genuine issue of material fact as to whether the petitioner was required or compelled to confront the complained of condition. This Court, however, finds the issue to be whether it was appropriate for the lower court to apply Michigan's "open and obvious" doctrine in ruling on respondent's motion for summary disposition.

II. DISCUSSION

A. Standard of Review

Although neither the Pokagon Tribal Court Code nor the Pokagon Rules of Appellate Procedure prescribe a standard of appellate review, this Court has previously ruled that, "A trial court's ruling on a motion for summary disposition is subject to de novo review." *Lois Lucille Dyer v. Pokagon Gaming Authority*, Case No. 14-003-AP (Pokagon Ct. of App., Feb. 4, 2015) at 5, citing *Estate of Rodney Holmes v. Pokagon Gaming Authority*, Case No. 12-001-AP (Pokagon Ct. of App., Mar. 27, 2013) at 5, citing *Maskery v. Univ. of Michigan Bd. of Regents*, 664 N.W.2d

165, 1677 (2003), *Kreiner v. Fischer*, 683 N.W.2d 611, 623 (2004). In *Estate of Rodney Holmes v. Pokagon Gaming Authority*, this Court explained that under the de novo standard,

> . . . [W]e are free to affirm or reverse the trial court after conducting an independent review of the pleadings, affidavits, depositions, admissions, and other admissible evidence submitted by the parties. The evidence must be viewed in the light most favorable to the non-moving party . . . If the admissible evidence does not establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law if the undisputed facts could not support a finding of liability under applicable law.
>
> The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules.

Id. at 4, *citing Maiden v. Rozwood*, 461 Mich. 109, 120, 597 N.W.2d 817 (1999).

This matter is governed by the Pokagon Band of Potawatomi Indians Tort Claims Act (2014). The sovereign immunity of the Pokagon Band and Pokagon Band instrumentalities is waived by the Act to allow for recovery for, *inter alia:*

> (1). An injury proximately caused by the condition of any Reservation land or any structures of other improvements on Reservation land, the rights to and possession of which were held by the Pokagon Band or a Pokagon Band Instrumentality at the time of the Injury, provided the claimant establishes that the Reservation land or structures or other improvements on Reservation land were in a Dangerous Condition.

Section 2.01(c)(2).

The term "Dangerous Condition" is defined by the Code as:

> a physical aspect of any Reservation land, a facility located thereon, or the use of such Reservation land or facility that constitutes an unreasonable risk to human health or safety, which risk is known to exist or which in the exercise of reasonable care should have been known to exist, and which condition is proximately caused by the

> negligent or wrongful act or omission of the Pokagon Band or Pokagon Band Instrumentality, including negligent or wrongful acts or omissions in maintaining such Reservation land or constructing, operating or maintaining such facility. For the purposes of this subsection, a Dangerous Condition should have been known to exist if it is established that the condition had existed for such a period of time and was of such a nature that, in the exercise of reasonable care, such condition and its dangerous character should have been discovered. A Dangerous Condition shall not exist solely because the design of any facility is inadequate nor due to the mere existence of wind, water, ice or temperature by itself, or by the mere existence of a natural physical condition. *Nothing in this Section shall preclude an accumulation of water, snow, or ice from being found to constitute a Dangerous Condition when the Pokagon Band or Pokagon Band Instrumentality fails to use existing means available to it for the removal of such accumulation and when the Pokagon Band or Pokagon Band Instrumentality had notice of such accumulation and reasonable time to act.*

Section 1.02(e)(Emphasis supplied.)

In her Complaint, the petitioner made the following factual allegations:

> Plaintiff was present on the premises of the Defendant's Four Winds Casino Resort in New Buffalo, Michigan on 1/26/2019, having arrived at approximately 4:30 p.m. She parked in a remote lot and walked to the Casino entrance with no adverse weather conditions including snow or ice having been present in the path that she followed. After having gambled for 3 hours she decided to leave the casino. Upon exiting the building, she discovered adverse weather conditions which had caused an accumulation of snow which, at the circle area of her path, she encountered snow covering ice which caused her to fall and incur serious bodily injury. Her fall was captured on video according to Defendant. The dangerous condition, per the cited sections, was allowed to remain present when agents and/or employees of the Defendant had both actual and constructive knowledge . . . of the dangerous condition, but failed to act. The cited Sections of the Tribal Tort Claim Act allow for damages to be awarded as compensation to the Plaintiff.

(Compl. ¶ 9.)

When considering a motion for summary disposition brought pursuant to MCR 2.116(C), the Tribal Court must accept as true the contents of the complaint and construe all well-pleaded

factual allegations in the light most favorable to the non-moving party.[1] *Dyer* at 4, *citing Halford v. Four Winds Casino, et al.,* No. 14-2709-CV at 3-4 (Pokagon Tr. Ct. Oct. 23, 2014) *citing DMI Design & Manufacturing, Inc. v. ADAC Plastics, Inc.*, 418 N.W.2d 386, 388 (Mich.App.1987).

B. Inapplicability of the Open and Obvious Doctrine

Respondent's Motion for Summary Disposition argued that the respondent was entitled to judgment as a matter of law based on the trial court's previous 2012 decision, *Borzych v. Four Winds Casino Resort, et al.,* Case No. 11-1328-CV (2012), which applied the "open and obvious" doctrine utilized in Michigan case law.[2] Whether Michigan's "open and obvious" doctrine applies to matters governed by the Pokagon Band Tort Claims Act has not yet been considered by this Court. The Tort Claims Act was amended by the Pokagon Band in 2014. Currently, Section 6.01, "Application of State Law" provides that:

> Any Claim brought under this Act shall be determined by the Tribal Court in accordance with the law of the Pokagon Band and, *to the extent not inconsistent with any provision of this Act* or other laws of the Pokagon Band, *may* also be determined by the Tribal Court in accordance with the state law applicable at the time of Injury to similar claims made in the state where the Reservation land on which the Injury occurred is located.

Tort Claims Act, § 6.01.

When read together, Sections 1.02(e) and 2.01 of the Tort Claims Act establish that a cognizable claim may be brought in the Tribal Court for an injury proximately caused by the condition of any Reservation land that was in a dangerous condition created by the accumulation of snow or

---

[1] Since the Pokagon Band Court of Appeals has not yet promulgated tribal-specific rules of civil procedure, the Court must look to Michigan Rules of Civil Procedure. Pokagon Tribal Court Code, Sections 7(B).

[2] At the time *Borzych* was decided, the Court was mandated under the previous Tort Claims Ordinance, Section 11 to apply Michigan law, "Any Claim brought under this Ordinance *shall* be determined by the Tribal Court in accordance with the law of the Band *and* the principles of law applicable in similar claims arising under the laws of the State of Michigan if not inconsistent with any express provision of the Ordinance or other laws of the Band." (Emphasis supplied.)

ice when the Pokagon Band or Pokagon Band Instrumentality failed to use existing means available to it for the removal of the accumulation when the Band or Instrumentality had notice of the accumulation and reasonable time to act. In the face of such clarity, there was no need for the Tribal Court to seek guidance from outside state law. Section 6.01 states that the Tribal Court may, but is not required to, apply state law from where the Reservation land is located.

This Court in *Dyer* rejected the application of Michigan's tolling statute, MCL 600.5856, finding to do so would be inconsistent with the express language of the Tort Claims Ordinance, requiring the filing of a tort claim within 180 days of the date the claim accrued. The *Dyer* court explained that "The rule of tribal sovereign immunity with respect to the Pokagon Band is that the Band cannot be sued without the consent of the Pokagon Band Tribal Council. A 'necessary corollary is that when the Tribal Council attaches conditions to legislation waiving the sovereign immunity of the Band, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied.'" *Dyer* at 8, citing *Block v. North Dakota*, 456 U.S. 273, 287 (1983)(internal citations omitted.) Michigan's "open and obvious" doctrine in premises liability cases establishes that,

> In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. However, this duty does not generally encompass removal of open and obvious dangers: Where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee.

Lugo v. Ameritech Corp,. Inc., 463 Mich. 512, 516 (2001).

The application of the open and obvious doctrine would bar claims for the very type of harm contemplated by the Tort Claims Act, namely injuries caused by an accumulation of ice or

snow, of which the Pokagon Instrumentality had actual or constructive notice. Just as this Court cannot expand the Band's waiver of sovereign immunity, it cannot contract it beyond the plain language of the Code. The application of Michigan's open and obvious doctrine is not only unwarranted but is inconsistent with the express language of Sections 1.02(e) and 2.01 of the Tort Claims Act.

In Respondent's Brief in Support of Its Motion for Summary Disposition, respondent quoted from petitioner's November 15, 2010 deposition regarding the condition of the sidewalk when she slipped and fell as follows:

> Q. When you entered the casino on the day of your accident, was there snow on the ground?
>
> A. It was clear. The sidewalks were clear.
>
> Q. You said that when you got out and you started walking exterior to the casino you could see that it was snowing hard and that there was snow that was staying on the ground; right?
>
> A. When we walked across the canopy after we got there we seen before we walked across the road that it was snowing. I didn't realize how much snow was on the ground until I was on the ground. I was being careful because I assumed it would be slick.
>
> Q. Because you know with your experience with Michigan winters that snow-covered surfaces, walkways pose a risk with slipperiness, right?
>
> A. Yes.
>
> Q. How much snow do you think was in the area where your [sic] fall?
>
> A. A couple of inches.

Resp. Br. Summ. Disp. 4.

The question to be answered by the trial court is, if adhering to the plain language of the Tort Claims Act and not applying Michigan's open and obvious doctrine, whether there is any

genuine issue as to any material fact, and if the respondent is entitled to judgment or partial judgment as a matter of law. MCR 2.116(C)(10). In deciding the respondent's motion for summary disposition, the moving party must "identify the issues as to which the moving party believes that there is no genuine issue as to any material fact. " *Id.* If the respondent meets the required burden, then the burden shifts to the petitioner to provide "specific facts" that show there is "a genuine issue of disputed fact." *Quinto v. Cross & Peters Co.*, 451 Mich. 358, 362; 547 NW2d. 314 , 317 (1996). The trial court is to evaluate all the evidence "in the light most favorable to the party opposing the motion." *Id.*

III. CONCLUSION

Where the language of the Pokagon Band Tort Claims Act is clear and unequivocal, there is no authorization to apply state law to claims before the Tribal Court. The trial court erred in applying Michigan's "open and obvious" doctrine in deciding the respondent's motion for summary disposition. The decision of the Tribal Court is reversed. This matter is remanded for additional proceedings consistent with this Opinion.

ANDERSON, C.J. AND FLETCHER, J.J., concur.

Filed January 25, 2021

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS

Tribal Court

Court Address: 7500 Odawa Circle, Harbor Springs, MI 49740 Phone: 231-242-1462

TRIBAL COURT

Case No: C-136-1011

Ethel Blanz

Plaintiff,

vs.

Odawa Casino Resort

Defendant.

ORDER GRANTING MOTION FOR FAILURE TO STATE A CLAIM AND DENYING MOTION FOR SUMMARY DISPOSITION

Defendant, Little Traverse Bay Bands of Odawa Indians, d/b/a Odawa Casino Resort, filed a motion for summary disposition regarding the negligence and nuisance claims filed against it by Plaintiff, Ethel Blanz. Defendant argues that Plaintiff's claim of nuisance fails to state a claim on which relief may be granted; further, Defendant argues that Plaintiff's Negligence Claim is barred by application of the "Open and Obvious" doctrine, and is therefore subject to summary disposition.

This Court finds that Plaintiff's claim of nuisance fails to state a claim upon which relief may be granted, and as such is hereby dismissed. Defendant's motion arguing the application of the "open and obvious" doctrine, which would result in summary disposition, is denied, as this Court does not recognize this Michigan state court doctrine.

I.

The facts are stated in conformity with the briefs submitted by the respective parties. Inconsistencies are noted.

On December 5, 2010, Plaintiff, Ethel Blanz, fell and injured herself while purchasing lunch at the property of Defendant, Little Traverse Bay Band of Odawa

Indians, d/b/a Odawa Casino Resort. According to the deposition of Plaintiff, she was in the deli area of the casino when the fall occurred. As she approached the counter to speak with the attendant, she walked past two stanchions connected by a cordon. In her deposition, Plaintiff states that she did not see the stanchions as she approached, despite surveillance footage showing her walking within a few feet of the objects. She claims to have been distracted by her engagement with the attendant at the counter, with whom which she has a passing acquaintance. Plaintiff states in her deposition that she had never noticed the stanchions in one of her numerous prior visits to the deli area of the casino.

There is a factual dispute regarding whether the stanchions had been in place for a period of six months, as submitted by Defendant by means of an affidavit of the Associate Hospitality Director, Hank Rowland, or if they were placed there for an event the prior evening, as proffered by Plaintiff by way of a conversation between Plaintiff and Keith Ellison, casino security guard. In any event, Plaintiff was the only person in the customer area. After finishing her transaction with the attendant at the counter, Plaintiff turned, and as she did so, either stepped on top of or caught her foot on one of the stanchions, after which she fell to the ground. Plaintiff claims injuries to both her hip and wrist as a result of the fall.

II.

A.

A motion under LTBBITCR XVI(b)(6) provides for summary disposition if the claim is so clearly unenforceable that no proofs could justify a right to recovery. If the claim fails to state a claim upon which relief can be granted, dismissal is appropriate.

In the instant case, Plaintiff sets forth a claim for "nuisance." There are two species of nuisance claims, private and public. Although Plaintiff does not specify whether her claim is for public or private nuisance, it is clear that the only cognizable claim under the circumstances is an action for public nuisance, as a private nuisance claim only lies where there is an interference with someone's right to the private use and enjoyment of real property. Generally speaking, a "public nuisance is an unreasonable interference with a right common to the general public." It does not arise "because a large number of people are affected; rather, it arises only when a public right has been affected." *Kramer v Angel's Path*, 174 Ohio App. 3d 359 (2007).

Public nuisance law has been defined in Michigan as an "unreasonable interference with a common right enjoyed by the general public." *Cloverleaf Car Co. v Phillips Petroleum Co.*, 213 Mich.App. 186, 190 (1995). The term "unreasonable interference" includes conduct that (1) significantly interferes with the public's health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of a continuing nature that produces a permanent or long-lasting, significant effect on these rights. A private citizen may file an action for a public nuisance against an actor where the individual can show he suffered a type of harm different from that of the general public. *Id.*

Plaintiff alleges that the improper placement of the stanchion interfered with her right of way and travel, causing her injuries, and therefore constitutes a nuisance. This count fails to state a claim upon which relief may be granted. Primarily, the placement of the stanchions has not "significantly interfere[ed] with the public's health, safety, peace, comfort, or convenience." *Id.*

A short cordon of several feet suspended between two stanchions in the middle of an open floor space cannot be said to have "significantly interfered" with a public interest. A nuisance claim must be predicated on the continuance of a condition on the land that significantly affects the public in a general way. *See Fuga v Comerica Bank-Detroit*, 202 Mich App 380, 383 (1993). The devices in question constitute a nominal obstruction, one that under no circumstances rises to the level of a *significant* interference with a *right* common to the public. This obstruction is neither significant, nor can the public be said to have a right to walk a perfectly straight line without having to make minor adjustments in order to continue upon its right of way.

Plaintiff has produced no evidence demonstrating that the public has been adversely affected. Only the private claim of Plaintiff has been presented. Further, Plaintiff provides no evidence that she suffered a type of harm different from that of the general public. A private citizen may file an action for a public nuisance against an actor where the individual can show he suffered a type of harm different from that of the general public. *See Cloverleaf* at 190. An obstruction in the middle of a customer area presents the danger of tripping and falling. This is what happened to Plaintiff, and there is no suggestion that the general public would face a different type of danger. As such, there is no cognizable claim for public nuisance, and the claim is dismissed.

B.

In evaluating Defendant's motion for summary disposition regarding the premises liability claim, the Court must address the application of the Michigan common law open and obvious doctrine upon which the motion relies. Since this Court determines that the doctrine, as applied in Michigan, is not a part of LTBB Tribal Law, the motion for summary disposition must be denied. Plaintiff has set forth facts that, when viewed in a light most favorable to the Defendant, establish *slightly* more than a "mere scintilla" of evidence, necessitating the continuance of this proceeding.

Typically, land possessors owe a duty to invitees to discover unreasonably dangerous conditions on the land and to either correct them or warn of them. *Lugo v Ameritech Corp., Inc.*, 464 Mich 512, 516. But, as applied in Michigan and other jurisdictions, the open and obvious doctrine obviates a land possessor's duty where an invitee is injured by an open and obvious danger. Restatement (First) of Torts § 340 (1934). The Michigan standard for determining whether a danger is open and obvious is whether "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Slaughter v Blarney Castle Oil Co.*, 281 Mich App 474, 478, quoting *Novotney v Burger King Corp.*, (on remand), 198 Mich App 470, 475 (1993).

Recent developments in the law have moved towards abandonment of the doctrine. The transformation has been predicated on the understanding that underlying issue is one of fact, and as such should be determined by the jury on a comparative negligence basis, as opposed to being a matter of law to be disposed with by summary judgment. Where the constraints of the doctrine have been loosened, open and obvious dangers only demonstrate that an invitee is to some extent at fault for failing to avoid injury. The degree of fault to be placed on the invitee and how much, if any, should be placed on the land possessor is a factual issue to be determined by the fact finder.

In deciding how to address open and obvious dangers in this Court, the Tribe's heritage and cultural values are of paramount importance. "[T]he laws set forth within the [LTBB] Constitution are set forth 'in the ways of our ancestors' and 'in accordance with our Anishinaabe Heritage.'" *Harrington v Little Traverse Bay Bands of Odawa Indians Election Board*, LTBB Appellate Case A-019-1011, p. 10 (February 16, 2012) (quoting *LTBB Constitution*, Preamble). Under the Tribal Constitution, this Court is mandated to "follow the Anishinaabe Traditions, Heritage, and Cultural Values." *LTBB Constitution*, Preamble. In doing so, the Court "shall preserve our Heritage while adapting to the present world around us." *Id.* Therefore, this Court must look the Tribe's traditional sense of justice and apply it in a manner that is adapted to our modern judicial system.

Traditionally, when an individual was harmed through the fault of another, the extended kin groups of the parties involved would come together and determine who was at fault and what the appropriate compensation would be. In such cases, the forum would be a public council where all the parties would come to a final determination. There was not an individual vested with the ability to make unilateral decisions; all decisions rested with the people, who sought to determine fair compensation and just outcome for all aggrieved parties. See, e.g., Manassas Hickey, *Collections: report of the Pioneer Society of the State of Michigan*, Volume 4, 550-56 (1882). This Court places heavy weight on the historical notions of fairness espoused by the ancestry of the Tribe.

These traditional notions of fairness are demonstrated in the modern governmental functions and business practices of the Tribe. This is evidenced by the Tribe's waiver of sovereign immunity to suit for personal injury arising on insured properties. LTBB Tribal Council Resolution 112303-02, November 23, 2003. The resolution states that the resolution is enacted to "promote fairness and justice to all persons on insured properties." *Id.*

In determining whether the application of the open and obvious doctrine conflicts with Tribal notions of fairness and justice, the Court also takes into account the evolution of loss allocation in tort law. As a historical matter, the open and obvious doctrine arose in the era of contributory negligence. Under the doctrine of contributory negligence, regardless of the level of negligence of a defendant, any negligence on the part of the plaintiff completely barred recovery. Courts would sometimes explain the open and obvious doctrine in terms of contributory negligence. *See generally* Page Keeton, *Personal Injuries Resulting from Open and Obvious Conditions*, 100 U. Pa. L.Rev. 629 (1952). A defendant's encounter with an open and obvious danger was an immediate indication that the injured party had been in some way negligent. *Id.* However, almost all

states now have adopted comparative fault in favor of contributory negligence. *See e.g., Lamp v Reynolds*, 249 Mich App 591, 605 (2002); *Laier v Kitchen*, 266 Mich App 482, 496 (2005); *Harrison v Taylor*, 768 P.2d 1321, 1325 (Idaho 1989). Under comparative negligence, a court reduces the award of damages by the percentage of comparative fault of the plaintiff instead of completely barring recovery. *See e.g.,* MCL 600.2959.

Jurisdictions that maintain both the open and obvious doctrine and comparative negligence tend to define the doctrine in terms of duty rather than deferring to the contributory negligence foundation. In Michigan, the Supreme Court held that a possessor of land has no duty to protect an invitee from an open and obvious danger. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 94 (1992). By framing the doctrine in terms of duty, a court can summarily dispose of a claim since one of the necessary elements of a tort action does not exist.

This Court believes that such an interpretation is inappropriate. Many jurisdictions agree with this conclusion. "The manifest trend of the courts in this country is away from the traditional rule absolving, ipso facto, owners and occupiers of land from liability for injuries resulting from known or obvious conditions." *Ward v K-Mart*, 554 N.E.2d 223, 231 (Ill.1990). Instead, these courts allow the trier of fact to evaluate the comparative fault of the parties.

This trend is supported by the Restatement (Second) of Torts, which states:

> A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, *unless the possessor should anticipate the harm despite such knowledge or obviousness*. [Restatement (Second) of Torts § 343A(1) (1965)(emphasis added).]

The comments to this section elaborate further:

> There are . . . cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger.
>
> Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. In such cases the fact

> that the danger is known, or is obvious . . . is not . . . conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances. [*Id.* cmt. f.]

The Restatement places an emphasis on foreseeability in its analysis of whether a defendant has a duty. That fact that harm from an open and obvious danger can sometimes be foreseeable suggests that there should be some remaining duty on the land possessor.

Many states other than Michigan have adopted this analysis, looking to a number of factors beyond the open and obvious nature of the danger:

> Whether the danger was known and appreciated by the plaintiff, whether the risk was obvious to a person exercising reasonable perception, intelligence, and judgment, and whether there was some other reason for the defendant to foresee the harm, are all relevant considerations that provide more balance and insight to the analysis than merely labeling a particular risk "open and obvious." In sum, the analysis recognizes that a risk of harm may be foreseeable and unreasonable, thereby imposing a duty on the defendant, despite its potentially open and obvious nature. [*Coln v City of Savannah*, 966 S.W.2d 34, 42 (Term.1998).]

It is important to note, however, that despite the removal of an absolute bar to recovery, there are many situations where the open and obvious doctrine would have traditionally applied that under the modern conception the land possessor would nevertheless be free from liability. If a danger is clearly observable and a land possessor has no reason to anticipate a reasonable person injuring themselves due to its existence, he would not be liable. However, under particular circumstances a land possessor has "reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it." Restatement (Second) of Torts § 343A(1) cmt. f. In these situations, the injury is still foreseeable. *Id.*

The modern approach harmonizes better with the rule of comparative fault, which this Tribe adopts. Where a danger is open and obvious, an invitee would ordinarily be negligent for falling victim to it; but, this does not necessarily mean that the land possessor should not be responsible for failing to fix an unreasonable danger in the first place. Under comparative fault, a defendant should be held responsible for his own negligence. Allowing open and obvious conditions to uniformly absolve land possessors from liability "would be to resurrect contributory negligence." *Harrison*, 768 P.2d at 1325.

Moreover, Tribal "Traditions, Heritage, and Cultural Values" are not honored under the strict application of the open and obvious doctrine. *LTBB Constitution*, Preamble. Where an injured party is denied compensation for a harm based on the application of an indiscriminate doctrine that fails to look to particulars of a circumstance, there is more than the mere specter of injustice. Prior to the creation of a formal judicial forum, the Odawa looked to the substance of a dispute, bringing together the parties and determining whether a wrong had been committed. There was no preference for procedural "safeguards" to prevent the members of the Tribe from hearing each side's story and coming to a decision.

Fairness has also been the basis of many state court decisions to modify their conception of the open and obvious doctrine:

> It is anomalous to find that a defendant has a duty to provide reasonably safe premises and at the same time deny a plaintiff recovery from a breach of that same duty. The party in the best position to eliminate a dangerous condition should be burdened with that responsibility. If a dangerous condition is obvious to the plaintiff, then surely it is obvious to the defendant as well. The defendant, accordingly, should alleviate the danger. [*Tharp v. Bunge Corp.*, 641 So.2d 20, 25 (Miss.1994).]

This Court has determined that the open and obvious doctrine does not act as a complete bar to recovery in actions for damages based on a theory of premises liability. Strict application of the doctrine is contrary to both the traditions and cultural values of the Tribe, as well as the modern development of tort law in state court jurisdictions.

With this in mind, the Court turns to the instant motion. A motion under LTBBITCR XVII provides for summary disposition if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Defendant's motion was based on the application of the open and obvious doctrine, which this Court has declined to adopt as a complete bar to recovery. Consequently, this motion must be denied.

Despite the Court decision to not apply the open and obvious doctrine, the fact that the stanchions were clearly visible will be given significant weight in the absence of contrary evidence at trial. These factors will have great bearing on the final outcome of the case, and as such, should be given similar weight in further settlement discussions.

WHEREFORE, IT IS SO ORDERED:

1. that Defendant's motion for dismissal for failure to state a claim of nuisance is granted;

2. that Defendant's motion for summary disposition of the negligence action based on the open and obvious doctrine is denied;

3. the Parties are ordered to engage in settlement negotiations within 30 days;

4. the Parties must make a report on the status of settlement negotiations to the Court within 60 days; and

5. if settlement negotiations fail after 60 days, proceedings may move forward to trial.

8/2/12
Date

[redacted]
Allie Greenleaf Maldonado, LTBB Chief Judge

CERTIFICATE OF MAILING

I certify that on this date copies of this *Order* were served to the parties by First-Class Mail.

8-2-12
Date

[redacted]
Tribal Court Officer

WRITING, RESEARCH, AND ADVOCACY

While the fundamental legal writing, research, and advocacy skills learned in law school apply to American Indian law contexts, there are additional considerations to keep in mind. First, the only mandatory precedent for tribes are the tribes' own laws and any federal law about tribes. When researching, start with the tribe's codes, constitution, and caselaw. Also note that tribal courts are generally ones of equity. Advocacy is less adversarial, so pursue resolutions over "victories" when possible.

Furthermore, tribes have the authority to incorporate customary law. When researching and writing, explore the tribe's customs, traditions, and language. Similarly, most Indigenous languages were unwritten, so spelling varies among tribes with shared language; always respect each tribe's spelling. Keeping varied spellings is respectful, not inconsistent. The following opinion in *Little Traverse Bay Bands of Odawa Indians v. Harrington* demonstrates the tribe's customary laws and pursuits of equity. *Little Traverse Bay Bands of Odawa Indians v. Harrington*, No. A-019-1011 (Little Traverse Bay Bands Ct. App. Feb. 16, 2012).

IN THE LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS

APPELLATE COURT

Kenneth Jay Harrington,

Appellant

CASE NO: A-019-1011

(C-129-0811)

Little Traverse Bay Bands of Odawa Indians Election Board,

Appellee

CJ James Genia
Hon. George Anthony
Hon. Wenona Singel

PER CURIAM

DECISION AND ORDER

This case is an election law appeal brought by Ken Harrington, former Chairman of the Little Traverse Bay Bands of Odawa Indians, against the Election Board of the Little Traverse Bay Bands of Odawa Indians (Election Board). Mr. Harrington challenges the legality of a recall election held on August 8, 2011, the results of which were certified by the Election Board on August 22, 2011. The principal contention of Mr. Harrington's challenge is that the timing of the recall election violated the requirement, found both within the Tribal Constitution and the Elections Statute, that "[e]ach elected official may be subject to no more than one (1) recall election per calendar year." The Election Board contends that the recall election's timing did not violate this timing requirement. The Election Board also contends that Mr. Harrington's challenge was untimely and therefore deprived the Tribal Court of jurisdiction. After reviewing the record and decision of the Tribal Court, the appellate briefs submitted by the parties, and the

18

oral argument of the parties, the Appellate Court concludes that Mr. Harrington's recall election challenge was in fact untimely. The Appellate Court also finds that, even if it were timely, the timing of the recall election in 2011 did not violate LTBB constitutional or statutory law. The Appellate Court therefore affirms the decision of the Tribal Court.

Factual Background

The decision of the Tribal Court stated that the parties had agreed to the facts of the case, although, with one minor exception addressed below, it did not identify those facts in the body of its decision. The Appellate Court notes that Rule XXII of the LTBB Rules of Civil Procedure requires that all Tribal Court opinions must include findings of fact before discussing conclusions of law and issuing the final order and judgment. In the absence of such findings, the Appellate Court draws upon the record to ascertain the facts that were stipulated to by the parties.

The minor exception referred to above is the Tribal Court's statement in its footnote 1 that "the Plaintiff stated that he was subject to a recall election on May 18, 2010, and was not recalled, and again on August 8, 2011, at which time he was recalled." The Appellate Court finds that the date identified by the Tribal Court for the first recall election is clearly erroneous, since both Mr. Harrington's Protest of Recall Election Results and Verified Complaint for Preliminary and Permanent Injunction and the Election Board's Response indicate that the parties agree that the first recall election took place on May 28, 2010. Therefore, in accordance with LTBB Appellate Procedures Rule 7.501(A), the Appellate Court sets aside the Tribal Court's factual finding as to the date of the first recall election.

Based on our review of the record, it appears that the parties agreed upon the following facts:

On May 28, 2010, the Election Board conducted a recall election to remove or retain then-Tribal Chairman Mr. Harrington. As a result of that recall election, Mr. Harrington was retained. Then, on February 8, 2011, the Election Board issued new recall petitions for the office of Tribal Chairman upon the request of registered voters. The petitions were submitted to the Election Board with signatures, and on May 15, 2011, the Election Board verified that the required signatures had been obtained and certified the recall petition for Chairman Harrington.

On August 8, 2011, the Election Board held a recall election to remove or retain Mr. Harrington from office. On August 22 at 5:30 pm, the Election Board certified the results of the recall election, verifying that 402 votes were cast to remove Mr. Harrington and 326 votes were cast to retain him. That same day, on August 22 at about 4:00 pm, Mr. Harrington filed a Protest of Recall Election Results and Verified Complaint for Preliminary and Permanent Injunction (Protest of Election Results and Request for an Injunction). On August 23, 2011, the former Vice Chairman Dexter McNamara took the oath of office of Tribal Chairman before the Tribal Council and immediately assumed office.

Procedural Background

Tribal Court review of this case began when Mr. Harrington filed his Protest of Election Results and Request for an Injunction on August 22, 2011. On that same day, Mr. Harrington also filed a Verified Ex Parte Emergency Motion to Stay Certification of Recall Election Results (Motion to Stay). The Tribal Court held a hearing in the matter on September 6, 2011, and on September 9, 2011, both parties filed briefs with the Tribal Court. On that same day, September

9, 2011, the Tribal Court issued an Order Following Election Challenge Hearing (Decision). In its Decision, the Tribal Court denied Mr. Harrington's Motion to Stay in accordance with Rule XI, section (f) of the LTBB Rules of Civil Procedure ("Injunctions"). On the merits of the arguments presented in support of Mr. Harrington's claim, the Tribal Court found that "[Mr. Harrington's] constitutional rights have not been violated, because he was not subjected to a recall election more than once in a calendar year." The Tribal Court found that this is true, "regardless of how calendar year is defined." In addition, the Tribal Court held that Mr. Harrington's election challenge was untimely, since it concluded that it was not filed "within ten days as required by the [LTBB] Constitution." The Tribal Court concluded that it therefore did not have subject matter jurisdiction in the case. Upon issuing these conclusions of law, the Tribal Court ordered dismissal of the case.

On October 4, 2011, Mr. Harrington filed a timely Notice of Appeal with the Appellate Court. In the Notice of Appeal, Mr. Harrington appeals the Tribal Court's conclusions of law. His appeal contests the Tribal Court's ruling that he had not been subjected to more than one recall election within a calendar year in violation of the law, and his appeal contests the Tribal Court's ruling that his challenge was untimely. The Appellate Court held a scheduling conference on October 27, 2011, and issued an order requiring briefs from the parties and scheduling oral argument for December 9, 2011. Due to an unanticipated change in circumstances, the Appellate Court rescheduled oral argument for January 13, 2011. On that date, the Appellate Court received oral arguments from the parties.

ANALYSIS

A. Standard of Review

The Appellate Court reviews the Tribal Court Order in accordance with the standard of review required by Rule 7.501 of the Rules of Appellate Procedures. Legal conclusions are reviewed *de novo* and factual findings are reviewed for clear error. In this case, where the facts have been agreed to by the parties, the Appellate Court will focus on a *de novo* review of the Tribal Court's legal conclusions.

B. Arguments of the Parties

The parties briefed three legal issues for the Appellate Court. A fourth legal issue was also raised by Mr. Harrington, but the Appellate Court declines to review it because it is the subject of a separate case that was filed in the Tribal Court. That fourth issue is whether the certification of the recall election results was improper due to the alleged fact that a valid challenge of the results was pending. The remaining three issues are summarized as follows:

1) Whether Mr. Harrington filed his Protest of Election Results in an untimely manner;
2) Whether the term "calendar year" in the LTBB Constitution refers to a period from January 1 to December 31, or whether it refers to a period of time starting on any date and extending for 365 days; and
3) Whether Mr. Harrington was unlawfully subjected to more than one recall election in a calendar year.

1. Untimeliness

We begin with the first issue relating to whether Mr. Harrington's Protest of Election Results was filed in an untimely manner. The relevant source of law for this issue is Article XII (F) of the LTBB Constitution. That section states that "[a]ny registered voter of the Little Traverse Bay Bands of Odawa Indians may challenge for cause the results of any election by filing a written challenge with the Tribal Court within (10) ten days after the election." LTBB

Constitution, Article XII(F). The Elections Statute, enacted on December 20, 2010, has a similar but not identical provision. *See*, Waganakising Odawak Statute 2010-019, Tribal Elections and Election Board. Section IX(D) of the Elections Statute states that, "[a]ny registered Tribal voter may protest the results of an election by filing a written protest with the Tribal Court within ten (10) *calendar* days after the *preliminary results are posted*." Section IX(D), Waganakising Odawak Statute 2010-019, Tribal Elections and Election Board (emphasis added). Thus, whereas the LTBB Constitution simply imposes a "ten day" limitation on filing election protests, the Elections Statute imposes a "ten calendar day" limitation. Also, whereas the LTBB Constitution sets a deadline in relation to ten days "after the election," the Elections Statute sets the same deadline in relation to ten calendar days "after the preliminary results are posted."

The Appellate Court concludes that there is no meaningful difference between "ten days" and "ten calendar days," and both refer to ten consecutive days, without regard for weekends, holidays or days when tribal administrative offices are open or closed. A "calendar day" is not specially defined by the Elections Statute, unlike a "Business Day," which is explicitly defined in the elections Statute as "[a]ny day of the week that the Tribal Administrative Offices are open." Section IV(A), Waganakising Odawak Statute 2010-019, Tribal Elections and Election Board.

The Appellate Court notes, however, that the LTBB Constitution and the Elections Statute do differ in a material respect with respect to how they identify the starting point for counting the ten days. In general, when there is a conflict between a provision in the LTBB Constitution and a statute enacted by the Tribe, the constitutional provision prevails. This is because the Supremacy Clause in the LTBB Constitution requires that we resolve conflicts between constitutional law and statutory law in favor of the LTBB Constitution. Article VI(E), LTBB Constitution. Thus, we find that the time frame for filing an election protest is "within ten

(10) days *after the election*" in accordance with Article XII, without regard for weekends, holidays or days when tribal administrative offices are open or closed.

In this case, the recall election was held on August 8, 2011 and Mr. Harrington filed his protest of the election results fourteen days later, on August 22, 2011. Because the protest was filed fourteen days after the recall election was held, Mr. Harrington's protest does not comport with the ten day deadline imposed by Section XII(F) of the LTBB Constitution and is therefore untimely.

Mr. Harrington argues that his untimeliness should be excused because he relied to his detriment on a statement made by the Chairperson of the Election Board. He claims that the Election Board Chairperson told him that he had ten business days to file a protest of the recall election results, rather than ten days. If ten business days were in fact the rule, then Mr. Harrington's protest, filed on August 22, 2011, would be deemed timely.

If the Appellate Court were to conclude that Mr. Harrington's reliance was reasonable and that he should have ten business days before filing his recall election protest, then we would create a precedent that the misstatements of government officers can effectively change the law. Such a conclusion would be extremely dangerous, because it would allow the parameters and substance of constitutional rights and duties to be altered by the negligent, inaccurate comments of a single government agent. For this reason, we conclude that if the Election Board Chairperson did indeed provide an incorrect description of the law, it cannot be relied upon by Mr. Harrington as the basis for an expanded constitutional right to file a recall election protest at a later date than the deadline actually imposed by the Constitution.

The Appellate Court notes that this result can seem harsh, particularly where an individual has reasonably relied on the statements of a government official to their detriment. In

Mr. Harrington's case, his reliance does not appear to be reasonable. The LTBB Constitution clearly described the time that Mr. Harrington had available to file his protest. Unfamiliarity with the law is not an excuse for missing the filing deadline, particularly where the law is clearly outlined in the LTBB Constitution. The Appellate Court also notes that during this period, Mr. Harrington was represented by a licensed attorney. Considering his use of legal counsel, Mr. Harrington's argument that he reasonably relied upon the words of the Election Board Chairperson is unconvincing. In the future, if an individual detrimentally relies upon the incorrect statements of a government officer, the Tribal Court will need to look at the complete context and determine whether the reliance was reasonable. Even if reasonable, the Tribal Court will need to determine the appropriate remedy, which may or may not include giving effect to the statement made by the government officer.

The Appellate Court also notes that Mr. Harrington never argued that he relied upon the Elections Statute rather than the LTBB Constitution. Such an argument may have bolstered his claim that he reasonably believed that he had more time to file his protest, because the statute requires that election protests be filed within ten calendar days of the posting of the preliminary results. In this case, the record does not conclusively indicate when the preliminary results were posted. The Election Board's certification of election results is included in the record and includes the date of August 8, 2011. The reference to August 8, 2011 might simply refer to the date of the recall election, or it might refer to the date that the preliminary results were posted. If the preliminary results were actually posted on August 8, then the deadline for filing an election protest under the statute would be August 18. But if the preliminary results were not posted until the election was certified on August 22, Mr. Harrington might have had a stronger argument that

he reasonably believed that he had ten days from August 22, or until September 1, 2011 to file a protest.

In conclusion, the Appellate Court finds that Mr. Harrington submitted an untimely protest of the election results, in violation of Section XII(F) of the LTBB Constitution. Furthermore, Mr. Harrington did not reasonably rely upon the alleged misstatement of the Election Board Chairperson, given the clear description of the deadline in the LTBB Constitution and given his use of a licensed attorney.

2. The meaning of "calendar year"

The next issue that we address is the meaning of "calendar year." The LTBB Constitution states that "[e]ach elected official may be subject to no more than one (1) recall election per *calendar year*. Article XIII(A)(2) of the LTBB Constitution (emphasis added). The Elections Statute has an identical provision. Section VII(E)(2) of Waganakising Odawak Statute 2010-019, Tribal Elections and Election Board. Neither the LTBB Constitution nor the Elections Statute defines the term "calendar year."

The Election Board argues that the term "calendar year" should mean the Gregorian calendar, which begins on January 1 and ends on December 31. Mr. Harrington argues that the term "calendar year" means a period beginning on any date and extending for 365 days. He argues that this definition is consistent with Odawa custom and with the public policy of the tribe. According to Mr. Harrington, the drafters of the Constitution did not intend to force a rigid adherence to the Gregorian calendar when they used the term "calendar year" in the Constitution. Instead, Mr. Harrington argues that "calendar year" simply includes a period of twelve moons. The Appellate Court finds that this argument is persuasive. In Odawa and Anishinaabe custom,

time is understood as a continuous cycle. There is no single starting and ending point that marks the beginning and end of a year. Therefore, when the LTBB Constitution states that an event can happen only once in a calendar year, we believe that the intent of the drafters of the Constitution was to ensure that the event did not reoccur for another 365 days from the date of the event itself. This conclusion is also consistent with the Preamble to the LTBB Constitution, which states that the laws set forth within the Constitution are set forth "in the ways of our ancestors" and "in accordance with our Anishinaabe Heritage." Preamble to the LTBB Constitution.

The definition of "calendar year" that we adopt is also consistent with the tribe's public policy. The LTBB Constitution demonstrates a commitment to balancing the right of the membership to recall elected officials with the need of the government to effectively function. This is evidenced by Article XIII(A)(1)(e), which states that, "[t]o provide for continuity of governance no more than four (4) Tribal Council members shall be subject to a recall election at any one time." Similarly, the requirement that no elected official may be subject to more than one recall election per calendar year ensures continuity of governance for the tribe. If individuals could be subject to back-to-back recall elections within a few months' time, as would be possible under the Gregorian calendar year definition, then the elected official would be incapable of fulfilling the duties of office because their time would be filled with responding to recall election efforts.

3. Whether Mr. Harrington was unlawfully subjected to more than one recall election in a calendar year

The Appellate Court next reviews whether Mr. Harrington was unlawfully subjected to more than one recall election in a calendar year. The source of the relevant law is Section

XIII(A)(2) of the LTBB Constitution, which states that "[e]ach elected official may be subject to no more than one (1) recall election per calendar year." The Elections Statute includes an identical provision. Section VII(E)(2) of the Waganakising Odawak Statute 2010-019, Tribal Elections and Election Board.

The Election Board argues that Mr. Harrington was not subjected to more than one recall election per calendar year. It claims that Mr. Harrington's first recall election occurred on May 28, 2010, and his second occurred on August 8, 2011. Mr. Harrington argues that a recall election is a process that includes the signing of the initial petition all the way through to the verification of the election results.

The Appellate Court concludes that although a recall effort is indeed a process that includes multiple steps, a "recall election" is itself a more specific event within that process. This interpretation is supported by the language of the LTBB Constitution, which refers to a "recall election" in a very specific way. In the "Recall" section of the LTBB Constitution, the steps for a recall effort are described in subparagraphs (a) – (d) of Article XIII(A)(1). In these subparagraphs, there is only one use of the term "recall election," and that is where the Constitution states that "[a] recall election shall be scheduled by the Election Board within ninety (90) days upon verification of the petition and its signatures." Article XIII(A)(1)(c) of the LTBB Constitution. In other words, a "recall election" is the date when ballots are officially collected.

In this case, ballots were officially collected on May 28, 2010 and again on August 8, 2011. These dates are therefore the dates when the recall elections took place. Since these dates are more than a calendar year apart, they do not violate Section XIII(A)(2)'s prohibition of subjecting an elected official to more than one recall election per year.

CONCLUSION

In conclusion, the Appellate Court affirms those portions of the opinion of the Tribal Court that concluded (a) that Mr. Harrington's recall election protest was untimely and (b) that Mr. Harrington was not unlawfully subjected to more than one recall election in a single calendar year. Our conclusion that a "calendar year" refers to 365 days from the date of one event to the next does not change the outcome of the case.

DECIDED AND APPROVED BY A UNANIMOUS APPELLATE COURT.

2-16-12
Date

Chief Justice James Genia

Resources

If you are interested in learning more about Federal Indian Law or Tribal Law, check out some of these resources:

Textbooks:

- CASES AND MATERIALS ON FEDERAL INDIAN LAW (7th ed., 2017).
- COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Newton & Matson, eds., 2012).
- MATTHEW L.M. FLETCHER, AMERICAN INDIAN EDUCATION: COUNTERNARRATIVES IN RACISM, STRUGGLE, AND THE LAW (2008).
- MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW (2d ed., 2020).

Books:

- ROBERT NICHOLS, THEFT IS PROPERTY!: DISPOSSESSION AND CRITICAL THEORY (2019).
- ROBIN WALL KIMMERER, BRAIDING SWEETGRASS: INDIGENOUS WISDOM, SCIENTIFIC KNOWLEDGE, AND THE TEACHINGS OF PLANTS, (2013).
- THE INDIAN CIVIL RIGHTS ACT AT FORTY (Kristen A. Carpenter et al., eds., 2012).
- VINE DELORIA JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO (2d ed., 1988).

Online Resources:

- Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, AM. BAR ASS. (Oct. 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol--40--no--1--tribal-sovereignty/short_history_of_indian_law/.
- *National Indian Law Library*, NATIVE AM. RIGHTS FUND, https://narf.org/nill/resources/indian_law.html.
- *Turtle Talk,* MICHIGAN STATE UNIVERSITY, https://turtletalk.blog/.