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STATE OF WISCONSIN

STOCKBRIDGE-MUNSEE TRIBAL COURT OF APPEALS

STOCKBRIDGE-MUNSEE COMMUNITY,
Petitioner,

-v-

Case No.: 97 AA 003

PHYLLIS VLASAK,
W649 E. Townhall Road
Gresham, Wi 54128

DECISION AND ORDER

Respondent,

Jurisdictional Statement

Petitioner, Stockbridge-Munsee Community, a federally recognized Tribe, appeals from a Stockbridge-Munsee Tribal Court decision on an Administrative Appeal of an Employment Mediation Panel's (EMP) position that they could not reach a decision under Chapter 53, the Tribe's Employee Rights Ordinance

The Stockbridge-Munsee Tribal Court of Appeals has jurisdiction over this review pursuant to Section 1.6L of the Mohican Judiciary Act which states "The Stockbridge-Munsee Tribal Court of Appeals shall have jurisdiction over appeals from the Tribal Court."

Facts

Respondent, Phyllis Vlasak was hired in May of 1978 as a Community Health Representative ("CHR") for the Stockbridge-Munsee Health Clinic.

After a series of wage increases, over the years, by October 1993, Ms. Vlasak was making \$9.89 per hour. On October 31, 1994 she received an increase to \$10.14 per hour. April 2, 1995, the hourly rate of pay for Ms. Vlasak was raised to \$10.59 and then on May 1, 1995, she received an increase to her current rate of \$11.12 per hour.

On March 21, 1995, the Tribal Council implemented a Wage Classification Scale (page 5 regular Tribal Council Meeting minutes 3-21-95) which established a system whereby most positions within Tribal employment were placed into a pay grade with each pay grade describing a range of wages. Ms. Vlasak's position as CHR was placed in Grade 5 and because of her longevity, experience and performance, her hourly rate was set at the maximum level in Grade 5 or \$10.59 per hour.

Shortly after the Wage Classification Scale was enacted, it was discovered that there was no provision for an employee, who had reached the top wage within a particular pay grade, to receive any further increase in pay. Ms. Vlasak fell into this category. To accommodate this "gap", on June 18, 1995, the Tribal Human Resources Department added another step to each pay Grade which increased Ms. Vlasak to her current hourly rate of \$11.12 effective retroactive to May 1, 1995. It is unclear from this record if the added step in each pay grade was approved by the Tribal Council. Respondent's June 18, 1995 Employee Wage Change Notice included a notation "this is the top of the range".

April 4, 1996, at respondent's annual review, no wage change was recommended. Ms. Vlasak asked Tribal officials to address this issue but no action was taken. Ms. Vlasak then began the grievance process which eventually came before the Employee Mediation Panel which reviewed her case. The EMP issued its findings on February 26, 1997 in which it stated "The panel is not able to make a yes or no decision. We feel it is the Tribal Council's responsibility to make a decision on wage increases for people who have reached the end of their pay scale. The new wage scale was implemented on April 2, 1995 which made the minimum wages of the tribe

\$7.00/hr. and readjusted your wages. Currently there is no policy in place to address your situation.” The EMP then made the following recommendations:

- 1) **Your direct supervisor needs to review and update your job description and duties to correspond to the pay scale.**
- 2) **The Tribal Council, Sr. Managers and Human Resources Manager need to make it a priority to address the issue of employees who reach the end of their pay scale.**

The impact of the EMP’s inability to arrive at a yes or no decision was that it did not grant respondent a pay increase. Respondent then appealed to Tribal Court. There does not appear, on the record, any dispute to these facts.

The parties briefed the issues and the Trial Court held an informal hearing on the issues on April 25, 1997. Presiding Judge, Robert Miller Jr., issued a Judgment on Decision on April 25, 1997 stating, “.....The Court further concurs and understands that there is an appearance the respondent (*Stockbridge-Munsee Community*) has shown that there is no place in Tribal Law or policy that has been violated, however, the Court would like to inform the legislative body that although it feels bound to apply the law, it feels the legislature should consider current needs and change an outmoded, obsolete, poorly worded problematic law and policy i.e wage classification schedules, position reclassifications, empowered mediation Panel decision definitions, grievance procedures and steps to Mediation Panel process to resolve complaints.....”

Judge Miller further states “Therefore, the Stockbridge-Munsee Tribal Court finds that violations did occur under the Administrative Appeal Ordinance 6(d), by virtue of their failure to act in a prudent manner, the Court findings represent an abuse of discretion by the administrative entity without recommending a creditable resolution to this problematic process.”

“It is ordered and adjudged that the petitioner (*Phyllis Vlasak*) receive compensation equal to the Cost of Living Index retroactive to May 1, 1996 effective immediately and continue those annualized cost of living increases until such time the Stockbridge-Munsee Community demonstrates to the Court that a suitable remedy to handle potential wage complaint issues has been adopted by the legislature. Further the Court does not affirm the decision of the employee Mediation Panel, again, based on it’s findings under the Administrative Appeals Ordinance 6(D).”

The Stockbridge-Munsee Community now appeals that decision and on June 4, 1997, Chief Judge, David Raasch, of the Stockbridge-Munsee Tribal Court issued an Order for Stay of Judgment pending the outcome of the decision of the Stockbridge-Munsee Court of Appeals..

Scope of Review

Section 23(I) of the Stockbridge-Munsee Tribal Court Rules of Procedure states “The Court may only hear appeals concerning matters of law.” Therefore, the Court is limited to determining if the Trial Court made a material error of law when it ordered the Stockbridge-Munsee Community to give a cost of living increase to Ms. Vlasak.

Issues

The issues center on whether the Trial Court erred, as a matter of law, when it found the Employment Mediation Panel had abused its discretion by not recommending a creditable resolution to this problem and when it ordered that Ms. Vlasak receive an increase in pay equal to the Cost of Living Index. The issue of retroactivity is secondary.

Decision

The Stockbridge-Munsee Tribal Court Code instructs the Court, as a general rule, to exempt the Tribal Code from strict interpretation. (Section 1.3(B).

This case comes before the Appellate Court because of the Trial Court’s finding that the Employment Mediation Panel had not acted in a prudent manner and had an abuse of discretion by not recommending a creditable resolution to this problematic process. The EMP is an organization created by Chapter 53 (Employee Rights Ordinance) of the Stockbridge-Munsee Tribal Code enacted June 28, 1995 by Resolution No. 1505-95. This ordinance gives the EMP “powers to hear complaints appealed to it by employees after other normal steps have not resolved the issues”. Section 53.4 sets forth the APPEAL TO EMP PROCEDURES and Section 53.5 sets forth the “PANEL HEARING PROCESS”.

Section 53.5(2) **DECISION**, states “the panel chairperson will prepare, within two (2) working days following the hearing, a written determination of the panel and deliver the recommendations to the parties.” The Trial Court found an abuse of discretion because the EMP did not recommend a creditable resolution. We can find nothing in the EMP provisions that require the EMP to reach a yes or no answer. It is required to make a determination and make recommendations. We find the EMP did not abuse its discretion by making a determination that

they could not come to a yes or no answer. Further, we find the EMP did act in a prudent manner because it did make the following recommendations:

- 1) Your direct supervisor needs to review and update your job description and duties to correspond to the pay scale.**
- 2) The Tribal Council, Sr. Managers and Human Resource Manager need to make it a priority to address the issue of employees who reach the end of their pay scale.**

Therefore, we believe the Trial Court made an error of law by ruling the EMP had not acted in a prudent manner and had abused its discretion.

Now comes the question of “did the Trial Court err when it ordered Ms. Vlasak to receive a raise in compensation based on the Cost of Living Index”.

First we must look to who has been granted the authority to establish wages and salaries. Article VII, Section 1, Constitution and By-Laws of the Stockbridge-Munsee Community, enumerates the powers of the Tribal Council of the Stockbridge-Munsee Community stating “The Tribal Council of the Stockbridge-Munsee Community shall exercise the following powers, subject to any limitations imposed by the Constitution and laws of the United States and this Constitution and By-laws. Article VII, Section 1 (e) gives the Tribal Council power “To manage all economic affairs and enterprises of the community in accordance with the terms of a charter that may be issued to the Community by the Secretary of Interior;”. Article VII, Section 3, Reserved Powers, states “Any rights and powers heretofore vested in the Stockbridge-Munsee Band of Mohican Indians, but not expressly referred to in the Constitution, shall not be abridged by this Article, but may be exercised by the Community through adoption of appropriate by-laws and constitutional amendments.

We concur with the Trial Judge’s comments that “it feels the legislature should consider current needs and change outmoded, obsolete, poorly worded problematic law and policy i.e wage classification schedules, position classifications.....” We also empathize with Ms. Vlasak. However, we find that establishment of wages and salaries of employees of the Stockbridge-Munsee Tribal Community is an economic affair and the management of economic affairs rests with the Tribal Council under Article VII, Section 1 (e). We can find no by-laws or Constitutional amendments in which that power has been relinquished by or removed from the Tribal Council. Although respondent argued that the Director of Human Resources had added another pay step to each grade (which would indicate that power of managing economic affairs

had extended beyond the Tribal Council), there is nothing in the record to indicate that this was done without Council approval. Therefore, we can not find any expressed relinquishing of the power to manage economic affairs granted to the Tribal Council by the Constitution.

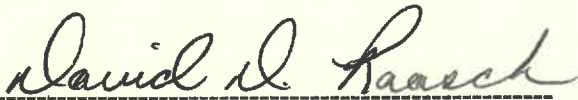
We then look to the Employee Rights Ordinance, Chapter 53 of the Stockbridge-Munsee Tribal Code. The statement of purpose of Chapter 53 indicates that the Stockbridge-Munsee Tribal Council (*emphasis*) seeks to insure, through this ordinance, that employees of the Mohican Nation have the need of protection of their rights. Chapter 53.3, GUARANTEED EMPLOYEE RIGHTS, ordains that all employees, salaried or hourly, are guaranteed basic employment rights. This chapter then lists eighteen employee rights including paid vacation, paid funeral leave, paid medical (sick time) leave, equal pay for men and women, paid jury duty leave and paid voting time. We mention this because it reaffirms the Tribal Council's assertion of its Constitutional Power to manage economic affairs by granting paid leaves. Section 53.3(18) establishes a Personnel Policies and Procedures which will reflect these 18 employee rights. Section 2 of the Personnel Policies and Procedures again suggests that the Mohican Nation (presumption is that Mohican Nation means Tribal Council) retains the Constitutional power to manage economic affairs by establishing certain pay rate schedules for non-exempt hourly paid employees based upon work classifications. It clearly states that "Being employed by the Mohican Nation, for any particular period of time, does not necessarily mean automatic pay increases". Although the record indicates that Respondent, Ms. Vlasak is a valued employee with an excellent work record and many years of service, this provision does not provide for any pay increase once she has reached the top level of her pay grade. This is unfortunate, however there are alternatives such as longevity, costs of living and merit increases that could be considered if the Tribal Council elected to enact such provisions.

Therefore, it is the finding of this Appellate Court that the EMP's determination that it could not come to a yes or no answer was not an abuse of its discretion. We also find that EMP did make recommendations for a creditable solution to this problem. We find the Tribal Council reserves the right to manage economic affairs, which includes the establishing of pay rate schedules for Tribal employees. In this case, barring any discriminatory abuse or application in the administration of the employee wage and classification schedules, we feel the Court cannot interfere with the management of economic affairs, as that right is constitutionally reserved to

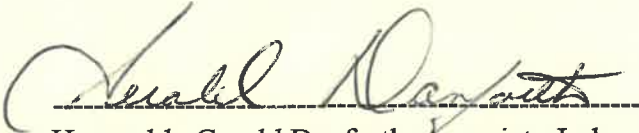
the Tribal Council. Based on these findings, we find the Trial Court made a material error of law in ordering a cost of living increase to Respondent.

Accordingly, we unanimously reverse the decision and stay the judgment of the Trial Court.

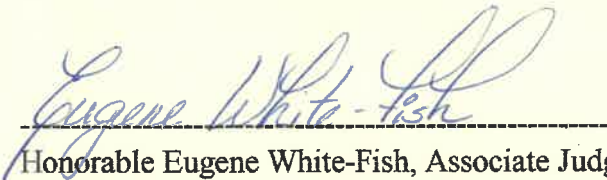
Dated this 20th day of August 1997.



Honorable David D. Raasch, Chief Judge
Stockbridge-Munsee Tribal Court of Appeals



Honorable Gerald Danforth, Associate Judge
Stockbridge-Munsee Tribal Court of Appeals



Honorable Eugene White-Fish, Associate Judge
Stockbridge-Munsee Tribal Court of Appeals

**STOCKBRIDGE-MUNSEE TRIBAL COURT
COURT OF APPEALS**

JOSEPH MILLER,

Plaintiff,

v.

Case No. 99-AA-001

**STOCKBRIDGE - MUNSEE
TRIBAL COURT**

**STOCKBRIDGE-MUNSEE
COMMUNITY,**

DEC 29 2000

Defendant.

COURT CLERK

OPINION AND ORDER

FACTS

Plaintiff is an enrolled member of the Stockbridge-Munsee Tribe and was employed by the Tribe as a deputy. The Tribe terminated his employment on April 14, 1999. Following his termination, the plaintiff filed both a grievance through the administrative grievance procedures and a petition for review of his termination in Tribal Court.

Trial Court Judge, David Raasch, heard the plaintiff's petition on July 30, 1999 and at the conclusion of the hearing in open court dismissed the plaintiff's petition for a review on the grounds that it was untimely filed. Judge Raasch issued his written decision dismissing the plaintiff's petition on August 4, 1999. On September 1, 1999, the plaintiff filed with the Stockbridge-Munsee Tribal Court a Notice of Appeal of the trial court's order dismissing his petition for review.

ISSUE

An appeals panel was appointed to review the plaintiff's appeal. The critical question is whether the petitioner's notice of appeal was timely filed so as to vest the Appeals Court with jurisdiction to hear the merits of the appeal.

DECISION

Appeals in the Stockbridge-Munsee Tribal Court are governed by the Appeals Ordinance. Section 23 (A) of that ordinance requires a "(w)ritten notice of appeal from a decision of the trial court must be filed within 20 days of the announcement of the decision in open court, or within 20 days of receiving notice of the decision." S-M Appeals Ordinance. The trial court's decision in this case was made in open court at the hearing on July 30, 1999. Accordingly, the deadline for filing a notice of appeal of that decision would have been August 19, 1999. Since the notice was filed on September 1, 1999, it was untimely filed and the appeal can not be heard. S-M Community v. Joseph Miller (Stockbridge-Munsee Tribal Court, 97-AA-004, pp.5-6)

Even assuming *auguendo* that the statute of limitations began tolling when the plaintiff received the notice of the written decision dated August 4, 1999, the plaintiff still missed the deadline which would have been August 25, 1999 (without mail time) or August 29, 1999 allowing for a reasonable amount of time for mailing. Regardless of how the statute is tolled, the plaintiff missed the deadline and the court is without jurisdiction to hear the appeal.

Accordingly, the plaintiff's petition for appellate court review is dismissed with prejudice.

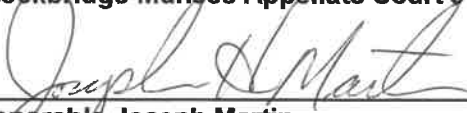
Respectfully submitted this 27 November, 2000.



Honorable Kimberly M. Vele
Stockbridge-Munsee Tribal Court Judge



Honorable Betty Jo Graveen
Stockbridge-Munsee Appellate Court Judge Pro Tem



Honorable Joseph Martin
Stockbridge-Munsee Appellate Court Judge Pro Tem

1
2 Mohican Nation
3 Stockbridge-Munsee Band
4 State of Wisconsin Tribal Court of Appeals County of Shawano

5 LILLIAN WHEELOCK) Case No.: No. 01-AA-001
6 Appellant,)
7 vs.) Memorandum Opinion
8 STOCKBRIDGE-MUNSEE COMMUNITY,)
9 Appellee.)
10)
11)
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STOCKBRIDGE - MUNSEE
TRIBAL COURT
AUG 27 2002
[Signature]
COURT CLERK

Jurisdictional Statement

Appellant, appeals from a Mohican Nation, Stockbridge-Munsee Band Tribal Court decision which upheld her termination from employment with the Stockbridge-Munsee Band of Mohicans Indian Tribe (hereafter called Tribe).

The Mohican Nation, Stockbridge-Munsee Band, Court of Appeals has jurisdiction over this appeal pursuant to Section 1.6(L) of the Mohican Judiciary Act, which states that "The Stockbridge-Munsee Court of Appeals shall have jurisdiction over appeals from the Tribal Court."

Background

After a trial before the Honorable Kimberly Vele, a decision was entered denying relief for the Appellant in the termination of her employment with the Tribe as a Mental Health Counselor with the Stockbridge-Munsee Behavioral Health

1 Department. The *Decision* was entered August 13, 2001 but filed
2 *Nunc Pro Tunc* with the Court on January 25, 2002.

3 The Appellant filed written notice of appeal with the Court
4 on March 07, 2002. Written grounds for the appeal were filed on
5 May 06, 2002.

6 On June 28, 2002, the Mohican Nation, Stockbridge-Munsee
7 Band of Indians, Court of Appeals reviewed the filings in this
8 case and conferred, via telephone conference, on the issues as
9 set forth below.

10 Issues

11 The central issue being considered is the timeliness of the
12 filing of the notice of appeal. Section 23(C) of The
13 Stockbridge-Munsee Tribal Court Rules of Procedure (hereafter
14 called SMB CRT Rules) states: "Written notice of appeal from a
15 decision of the trial Court **must** be filed within 20 days of the
16 announcement of the decision in open Court, or within 20 days of
17 receiving notice of the decision".
18

19 Further, §23(J) of the SMB CRT Rules, states: "An Appellant
20 shall submit a written statement of the grounds for his or her
21 appeal within twenty (20) days of filing the notice of appeal,
22 unless the Court below or the appellate Court shall deem an
23 expedited appeal to be advisable and shall notify the appellant
24 promptly of the reduced time limit".
25

1 Even considering it may have taken one week for the Appellant to
2 receive the *Decision* through the mail, her filing of the written
3 notice of appeal still exceeds the 20 day time frame.
4 Therefore, applying this test, the Appellant has failed to
5 protect her appellate rights, and this Appellate Court lacks
6 jurisdiction to hear her appeal.

7
8 However, this Appellate Court agrees to apply another test
9 that was established by the Stockbridge-Munsee Court of Appeals
10 in *Stockbridge-Munsee Community v. Joseph Miller*, Case No. 97-
11 AA-004. In this case the Stockbridge-Munsee Community appealed
12 the Trial Court's decision to dismiss the appeal as untimely.
13 The Trial Court had denied the appeal of an Employment Mediation
14 Panel's (EMP) decision in an employment rights case involving
15 Mr. Miller. The Director of Tribal Services issued an Inter-
16 Office Memorandum to the Interim Manager of Human Resources
17 requesting an appeal of the EMP's decision. Specifically, the
18 memo referred to the subject as an "Appeal to Tribal Court for
19 Joe Miller Grievance" and further stated "I do not agree with
20 the panels (sic) response. Please foreward (sic) this to the
21 Tribal Court per section V. Panel hearing Process #3, of the
22 *Employee Rights Ordinance*. Thank you".¹

23 This memo was filed with the Tribal Court. The Trial Court
24 determined that the filing of an "inter-office memo" did not
25

¹ *SMC v. Joseph Miller*, Case No. 97-AA-004 Page 2

1 constitute a request for an appeal even though it was filed on
2 time. The Appellate Court in that case set a *bare requirements*
3 standard by concluding that the memo did constitute a Notice of
4 Appeal. The Court, in that case, further stated: "Finally, we
5 note that all petitions for review should include a specific
6 statement of what administrative decision is being appealed and
7 on what grounds it is being appealed. This makes the notice of
8 appeal more detailed and therefore, more meaningful to all
9 interested parties, particularly the Court".²

10
11 In applying this test to the case now before this Appellate
12 Court, this Appellant also fails to provide adequate notice of
13 appeal. The *bare requirements* standard established in
14 *Stockbridge-Munsee Community v. Joseph Miller*, would not allow
15 Notice of Appeal to be filed by a phone call, much less
16 attempted phone calls. Even though the Tribal Court Clerk was
17 on medical leave, had the Appellant provided a written notice of
18 appeal in person, like Sunday Warrington³, or had mailed it to
19 the Court within the 20 day limit, this would be a different
20 case. However, the Appellant, here, has not met the *bare*
21 *requirements* standard, and this Court lacks jurisdiction to
22 review any further issues in this case.

23
24 ² SMC -v- Joseph Miller 97-AA-004 at page 6

25 ³ Sunday R. Warrington -v- Stockbridge-Munsee Tribe, Mohican North Star Casino
and Bingo, and Tammy R. Pecore, Assistant General Manager in her official
capacity Case No. 2002-AA-001

DECISION

Accordingly, the Appellant's appeal is dismissed under SMB CRT Rules §23(B). The *Decision* of this Court of Appeals is final as to all such review as provided under SMB CRT Rules §24(A).

By the
Mohican Nation
Stockbridge-Munsee Band of Indians
Tribal Court of Appeals

This 23rd day of August 2002



Honorable David D. Raasch

DECISION

Accordingly, the Appellant's appeal is dismissed under SMB CRT Rules §23(B). The *Decision* of this Court of Appeals is final as to all such review as provided under SMB CRT Rules §24(A).

By the
Mohican Nation
Stockbridge-Munsee Band of Indians
Tribal Court of Appeals

STOCKBRIDGE - MUNSEE
TRIBAL COURT
SEP 04 2002
[Signature]
COURT CLERK

This 23rd day of August 2002

Concurring

[Signature]
Honorable Joseph Martin

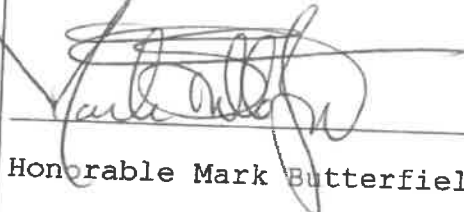
DECISION

Accordingly, the Appellant's appeal is dismissed under SMB CRT Rules §23(B). The *Decision* of this Court of Appeals is final as to all such review as provided under SMB CRT Rules §24(A).

By the
Mohican Nation
Stockbridge-Munsee Band of Indians
Tribal Court of Appeals

This 23rd day of August 2002

Concurring


Honorable Mark Butterfield

STOCKBRIDGE - MUNSEE
TRIBAL COURT
SEP 05 2002
Wm
COURT CLERK

1
2 Mohican Nation
3 Stockbridge-Munsee Band
Tribal Court of Appeals
4 State of Wisconsin County of Shawano

5
6 SUNDAY R. WARRINGTON) Case No.: 02-AA-001
Appellant,)
7 vs.) Memorandum Opinion
8)
9 STOCKBRIDGE-MUNSEE TRIBE,)
MOHICAN NORTH START CASINO AND)
10 BINGO, AND TAMMY PECORE,)
ASSISTANT, IN HER OFFICIAL)
CAPACITY,)
11 Appellees.)

STOCKBRIDGE - MUNSEE
TRIBAL COURT
AUG 27 2002
rjm
COURT CLERK

12
13 Jurisdictional Statement

14 Appellant was an employee of the Stockbridge-Munsee Tribe,
15 a federally recognized Tribe of Indians. She appeals the
16 granting of a motion to dismiss her case against the Appellees,
17 and the denial of the Appellant's motion to that have this
18 matter placed on the Court's docket and to proceed to a judicial
19 hearing under the provisions of Chapter 53 of the Stockbridge-
Munsee Tribal Code.

20 The Mohican Nation, Stockbridge-Munsee Band of Mohicans
21 Court of Appeals has jurisdiction over this appeal pursuant to
22 Section 1.6 (L) of the *Mohican Judiciary Act*, which states that
23 "The Stockbridge-Munsee Court of Appeals shall have jurisdiction
24 over appeals from the Tribal Court."
25

1 Background

2 On October 26, 2001, the Appellant received a letter from
3 Ms. Tammy Pecore stating that she was terminated from her
4 position with the Mohican North Star Casino. That letter also
5 included the Appellant's rights to grieve the termination. The
6 letter included: *In the event you wish to appeal your*
7 *termination, please refer to the Grievance Process on page 42 of*
8 *the Green Handbook, which states, "an employee can file a*
9 *grievance within 5 days of the action being grieved". Also*
10 *refer to Section 53.4 and 53.45 of the Employee Rights*
11 *Ordinance, which states, "an employee may choose to waive the*
12 *internal grievance process and file a claim directly with the*
13 *Tribal Court within 30 calendar days of the event or events that*
14 *gave rise to the employee's claim".*

15 The Appellant proceeded to the Stockbridge-Munsee Tribal
16 Offices on November 26, 2001 and attempted to file a type
17 written letter that was dated on November 15, 2001 along with a
18 copy of her termination letter and copy of a payroll check. The
19 Tribal Court Clerk was not at work that day, so the Appellant
20 sought another employee of the Tribe who was not the Clerk of
21 Court, but who identified herself as "CG" who initialed the
22 documents. These documents were not file stamped with a date
23 and time of filing, but were only initialed by "CG".

24 From here the record becomes unclear as to what happened to
25 these documents between November 26, 2001 and March 26, 2002

1 when the Appellant's motions were filed seeking a Court Order to
2 direct the Clerk of Court to assign a docket number to the
3 statement of claim and to basically get this case on the Court's
4 calendar. This case then began to proceed to a hearing on May
5 03, 2002 at which time the Tribal Court denied the Appellant's
6 Motions and granted the Appellee's *Motion to Dismiss the*
7 *Complaint* without prejudice.

8 This Court of Appeals has reviewed the filings in the case,
9 and has convened, via a teleconference call.

10 Issues

11 The Appellees basic arguments are that the Appellant did
12 not file sufficient notice of her intent to appeal her
13 termination. Appellees argue, even though the Appellant had
14 documents *filed*¹ within the time frame allowed under Chapter 53
15 of the Tribal Code, that those documents were deficient in
16 meeting the requirements of notice of appeal. The Appellees
17 then argue that the motion to have the case proceed through
18 Court was not filed within the time limits established by
19 Chapter 53 of the Tribal Code.

20 The Appellant argues that she did file the required
21 documents in a timely manner and, therefore, should be allowed
22 to proceed to a hearing on her appeal of her termination.

23
24
25

¹ Filed is used in the sense that the appellant had documents initial by a tribal employee on November 26, 2001.

1 Analysis

2 The Appellate Court first looks to the sections of the
3 Tribal Code which the Appellant was told to rely upon in her
4 letter of termination. The letter of termination refers the
5 Appellant to §53.4 and §53.45 which read:

6
7 **Section 53.4 Employee Appeals to Tribal Court**

8 **(A) As a part of the Stockbridge-Munsee Community's commitment to protect the rights of**
9 **its employees and promote a stable working environment, the following appeal process is**
10 **made available to each employee:**

11 **(1) Only violations of those employee rights enumerated in Section 53.3 of this**
12 **Ordinance are appealable to the Tribal Court. All other issues must be handled**
13 **through an internal grievance process as provided for in the Employee Information**
14 **Handbook. The internal grievance process shall be the final recourse for all issues**
15 **not expressly enumerated in Section 53.3.**

16 **(2) The employee must exhaust the internal grievance process before the Tribal**
17 **Court appeal process will be available to him or her.**

18 **(a) In cases of employee terminations, the employee may choose to waive the**
19 **internal grievance process and file a claim directly with the Tribal Court.**

20 **(b) In all other cases, where the employee can demonstrate to the Human**
21 **Resources Director or his or her designee, that exhaustion of the internal**
22 **grievance process would not further the process of resolving the problem, for**
23 **whatever reason, then the requirement may be waived by the Human**
24 **Resource Director and the appeal may be taken directly to Tribal Court.**

25 **Section 53.45 Statute of Limitations**

The employee must initiate the internal grievance process or court action, whichever
applies, within 30 calendar days of the event or events that gave rise to the employee's
claim.

These are the only two sections of Chapter 53 referenced in
the letter of termination. It is clear that the Appellant
elected to proceed under §53.4(2)(a) and to take her dispute
directly to the Tribal Court. The Appellant attempted to

1 initiate the court action under §53.45 by filing documents
2 within 30 calendar days of her termination.

3
4 The Appellees further argue that the Appellant did not
5 follow the proper procedures in filing in Court. Their argument
6 is; ...the Court procedures says the petition filed in Tribal
7 Court under this ordinance, meaning the employee rights
8 ordinance, may be in any written format, but shall, but shall
9 include at least the following information. It list {sic} 4
10 items: name and address of the petitioner, a statement
11 identifying the enumerated right under section 53.3; a
12 description of the facts; then 4th, specific request stating
13 required relief. Out of those shallow requirements, 3 of them
14 were not even close to being met."²

15 This argument would be given more weight if the letter of
16 termination had also referred the Appellant to §53.5 of the
17 Tribal Code which states:

18 **Section 53.5 Court Procedures**

19 **(A) The petition filed in tribal court under this Ordinance may be in any written format,**
20 **but shall include at least the following information:**

21 **(1) The name and address of the petitioner.**

22 **(2) A statement identifying which of the enumerated rights under Section 53.3 has**
23 **been violated.**

24
25 ² Transcript, line 22, page p.4.

1 **(3) A brief description of the facts and events that gave rise to the alleged violation,**
2 **including the names of potential witnesses and the name of the petitioner's**
3 **supervisor, if applicable.**

4 **(4) A specific request stating the required relief. Relief is governed by subsection**
5 **(F) below.**

6 In reviewing what steps the Appellant took in this case,
7 this Court concludes she complied with §53.4 and §53.45, the two
8 sections her letter of termination referenced. However, holding
9 her to the letter of the requirements of §53.5 when she was not
10 referred to that section, may conflict with the general
11 principles of fairness and proper notice.

12 The Tribe's Code, in general, requires a liberal
13 interpretation of its provisions. Tribal Code §1.3(B)
14 specifically states: *"This code is exempted from the rule of*
15 *strict construction. It shall be read and understood in a*
16 *manner that gives full effect to the purposes for which it was*
17 *enacted."*

18 Further, this Court finds under Tribal Code §1.32 that
19 deficient filings do not, as a matter of course, render them
20 invalid.

21 **Section 1.32 Irregularities**

22 **(A) Any violation notice, complaint, summons, warrant, or similar document whose matter**
23 **does not literally conform to the requirements prescribed in this code or Court rules, shall**
24 **not thereby be rendered invalid if the matter contained in the document substantially**
25 **achieves the purposes of the code provisions.**

25 **(B) However, no such document shall be valid unless it contains such signature or**
 signatures as are prescribed by this code.

1 Now we look at the document that the Appellant filed on
2 November 26, 2001. Although the letter, dated November 15,
3 2001, is not signed, the Appellant does identify herself in the
4 body of the letter by stating "I Sunday R. Warrington Here by
5 (sic)give a written statement to the decision that was made by
6 the Manager Mr. Gerald Miller, to suspend me from my current job
7 at the North Star Casino, on October 24, 2001. She further
8 states, in her letter; "The reason for the suspension was, I'm
9 being accused of possible fraud. To the best of my knowledge, I
10 am innocent of this accusation."

11 From the reading of this document, it is reasonable to
12 conclude that the Appellant is disputing her "suspension". In
13 applying the *bare requirements* standard as established by the
14 Stockbridge-Munsee Court of Appeals in *Stockbridge-Munsee*
15 *Community v. Joseph Miller*, Case No. 97-AA-004, we find that the
16 Appellant did meet that standard. The Appellant did file a
17 written notice, within the statute of limitations, which,
18 although not conforming strictly to the rules of procedure, does
19 set forth enough information to create a case or controversy.
20 The Appellant can not be faulted for the absence of the Tribal
21 Court Clerk, and had a reasonable expectation that she had filed
22 the proper documents. Had the Appellant not taken the steps to
23 seek out another Tribal employee, who acknowledged receipt of
24 the documents, the Appellant would fail in her appeal. However,
25 the Appellant did make a good faith effort to appeal her
termination and is entitled to her *day in Court*.

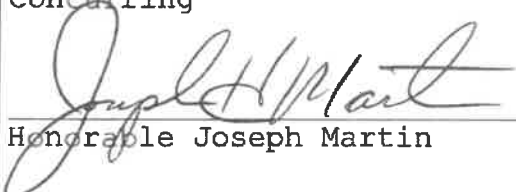
1 DECISION AND ORDER

2 This Stockbridge-Munsee Court of Appeals finds that the
3 trial Court made a material error in applying the *bare*
4 *requirements* standard in denying the Appellant's motions and in
5 granting the Appellees' *Motion to Dismiss*. It is the *Order* of
6 this appellate panel to remand this case back to the Trial Court
7 for further proceedings consistent with these findings.

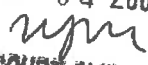
8
9 By the
10 Mohican Nation
11 Stockbridge-Munsee Band of Indians
12 Tribal Court of Appeals

13 This 23rd day of August 2002

14 Concurring

15 
16 Honorable Joseph Martin

STOCKBRIDGE - MUNSEE
TRIBAL COURT

SEP 04 2002

COURT CLERK

1 DECISION AND ORDER

2 This Stockbridge-Munsee Court of Appeals finds that the
3 trial Court made a material error in applying the bare
4 requirements standard in denying the Appellant's motions and in
5 granting the Appellees' Motion to Dismiss. It is the Order of
6 this appellate panel to remand this case back to the Trial Court
7 for further proceedings consistent with these findings.

8
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10 Mohican Nation
11 Stockbridge-Munsee Band of Indians
12 Tribal Court of Appeals

13 This 23rd day of August 2002

14 Concurring

15 
16 Honorable Mark Butterfield

STOCKBRIDGE - MUNSEE
TRIBAL COURT

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Mohican Nation
Stockbridge-Munsee Band
Tribal Court of Appeals

State of Wisconsin

County of Shawano

COURT CLERK

6	Melinda Walsh	)	Case No. : 2000 AA 007
)	
7	Petitioner-Appellee,	)	Appellate Court Opinion
		)	and Order
8	vs.)	
)	
9	Stockbridge-Munsee Community)	
)	
10	Respondent-Appellant)	
)	

Opening Statement

The Stockbridge-Munsee Community (Tribe) appeals the Stockbridge-Munsee Trial Court Decision of February 4, 2003. In that decision, the Trial Court held that the petitioner, Melinda Walsh, did establish, by a preponderance of the evidence, that she was terminated without cause. The Trial Court awarded the petitioner the following relief:

1. Reinstatement to previous position as secretary/receptionist or like position,
2. Back pay from September 15, 2000 to September 15, 2001,
3. Reinstatement of all previous benefits
4. A record of continuity in employment in Plaintiff's personnel file.

1 The Tribe appealed the Trial Court's decision, with oral
2 arguments being heard on August 22, 2003 before Appellate
3 Judges, David Raasch, Joseph Martin and Stanley Webster.

4 **Jurisdiction**

5 This Appellate Court asserts jurisdiction under 1.6(1) of
6 the Stockbridge-Munsee Ordinances (SMT0). That section states,
7 "*The Stockbridge-Munsee Tribal Court of Appeals shall have*
8 *jurisdiction over appeals from the Trial Tribal Court.*"

9 **Scope of Review**

10 The Stockbridge-Munsee Tribal Court Rules of Procedure
11 limit the Appellate Court to hear only appeals concerning
12 matters of law.¹

13 **Issues**

14 By stipulation between the parties on February 23, 2001,
15 the sole legal claim for the Trial Court to decide was "*...whether*
16 *Ms. Walsh's employment was terminated with just cause in*
17 *accordance with Section 53.3(M), SM Ord.*"

18 The sole issue for this Appellate Court to decide is; did
19 the Trial Court err in applying the facts to Section 53.3(M) of
20 the SMT0?²

21
22
23
24

¹ Stockbridge-Munsee Tribal Court - Rules of Procedure §23(I)

25 ² §53.3(M) Employees may not be terminated from employment without just cause.

1 **Findings of Facts**

2 The facts in this case are basically undisputed, although
3 the question remains: *do the facts presented rise to the level*
4 *of 'just cause' to terminate the employment of Ms. Walsh?* The
5 Trial Court found that they did not.

6 On September 07, 2000, Ms. Walsh received a Stockbridge-
7 Munsee Employee Action Notice of a five day disciplinary
8 suspension, without pay, pending termination. On September 15,
9 2000, Ms. Walsh was notified that her employment was terminated
10 effective on that date. The letter signed by Kenneth R. Ninham,
11 gave the following grounds for termination:

- 12 1. "On 09-06-2000, a client called into the office to make an
13 appointment to see a counselor. Melinda, you responded to
14 this client by asking an inappropriate question which is
15 clearly out of your role/duties as a receptionist.
16 Melinda, you further responded to this client by stating to
17 her, "oh co-dependency," and "co-dependency covers a lot of
18 things." Your statement to the client is a clear violation
19 of Section 7 page 39, (B-9). Melinda, you have been warned
20 on several occasions not to be giving clients advise (sic)
21 especially clinical advise (sic). Your action on 09-07-
22 2000, same incident is another direct violation of Section
23 6, "Confidentiality," page 37 and a violation of Section 7
24 (C-1) page 40."
25

1 *"Melinda, on 05-06-2000, and 05-24, 2000, you were*
2 *counseled and given direction in terms of making necessary*
3 *changes, and that improvement in your job performance was*
4 *required. On 06-23-2000, I once again, informed you of the*
5 *necessary changes that needed to take place. I have*
6 *provided you with counseling in order to make the necessary*
7 *changes. You have continued to disregard my directives and*
8 *recommendations for making the necessary changes. Your*
9 *failure to improve you job performance given sufficient*
10 *time/counseling/corrective measure/direction is*
11 *unacceptable.*

12 On October 11, 2000, Ms. Walsh filed a petition for
13 reinstatement in the tribal Trial Court, alleging that she
14 was terminated without just cause. Ms. Walsh alleged that
15 she was not afforded the counseling and corrective actions
16 required pursuant to Section 07-Rules to Help, of the
17 Information Handbook for Employees of the Mohican Nation,
18 effective October 01, 1996.

19 On February 04, 2003, Trial Court judge Robert Miller
20 ruled that the Tribe did not have cause to terminate Ms.
21 Walsh's employment. This decision was received by the
22 parties on or about February 11, 2003. The Tribe appealed
23 the decision of the Trial Court, and this appellate panel
24 now reviews the decision of the Trial Court.

1 **Analysis**

2 The thrust of this appeal is to determine if there was
3 *just cause* to terminate Ms. Walsh's employment. First, we
4 must look for the definition of *just cause*. In review of
5 Chapter 53 of the SMTO governing employee rights, we find
6 no definition of *just cause*. Therefore, we must look at
7 prior tribal court cases where *just cause* was defined.
8 Dauids v. Stockbridge-Munsee Community, 98-AA-013 (1999),
9 sets forth the standard for *just cause*. In *Dauids* the
10 Court said that *just cause* must be fair, impartial and
11 consistent with the Tribe's policies and procedures.

12 In absence of a clear definition of *just cause* within
13 the SMTO, we will proceed under the standards set forth in
14 *Dauids*. In the present case, the Trial Court found that
15 Ms. Walsh was terminated without *just cause*. Inserting the
16 definition of *just cause* in *Dauids*, the Trial Court found
17 that Ms. Walsh's termination was not fair, was not
18 impartial, was not consistent with the Tribe's policies and
19 procedures.

20 The purpose of the SM Employee Rights Ordinance
21 states, in part; *The Stockbridge-Munsee Tribal Council*
22 *further recognizes that employees of the Mohican Nation,*
23 *comprised of all branches of government and business, need*
24 *protection of their rights including a stable working*
25 *environment and the right to file a grievance and seek*

1 *assistance in solving on-the-job problems via the proper,*
2 *established policies and procedures.*³

3 In reviewing the transcript of the trial, the exhibits
4 admitted into the record, and hearing oral arguments this
5 appellate panel agrees with the Trial Court's
6 determinations. If the purpose of §53.1 is to solve on-
7 the-job problems via the proper, established policies and
8 procedures, then the Tribe has failed in the case at hand.
9 We agree with the Trial Court that Ms. Walsh was not given
10 clear direction regarding job duties and responsibilities.
11 Further, we agree with the Trial Court that Ms. Walsh
12 "received mixed messages regarding counseling/corrective
13 measures and direction".⁴

14 The Tribe argues that Ms. Walsh had been specifically
15 told, in writing, on two different occasions that she was
16 not to dispense advice to clients on the phone and not to
17 argue with clients on the phone.⁵ The Trial Court found the
18 memo in Exhibit #3 which stated; "*it is important to never*
19 *argue on the telephone or in person with any client even if*
20 *they are wrong or up-set, and never give any client's*
21

22 ³ Chapter 53, Stockbridge-Munsee Tribal Law-Employee Rights Ordinance §53.1

23 ⁴ Page 4 of the Trial Court's decision.

24 ⁵ Page 6 of Respondent's Written Statement of Grounds for Appeal. Exhibits 2
25 and 3.

1 *advice leave that up to the counselors,"* to be advisory in
2 nature and content. Although the Tribe argues that the
3 memo is specific, it does not provide an adequate threshold
4 to meet the established policies and procedures intention
5 of the purpose of Chapter 53. The Tribe would have been in
6 a stronger position if it had specifically set forth
7 definitions of what constitutes advice. Further, due to
8 the nature of Ms. Walsh's position, specific instructions
9 on how to deal with potential clients could have been part
10 of the training. Based on the facts presented, Ms. Walsh
11 was not given specific guidelines and the Trial Court did
12 not err in making that determination. This Appellate Court
13 also finds that to be true of Exhibit #2, which is merely a
14 list of concerns with no specific direction. Again, the
15 Trial Court did not err in its finding that this document
16 lacked *evidence of counseling, corrective measures and*
17 *suitable direction to meet the standards of progressive*
18 *discipline as outlined in the Green Employee Handbook.*⁶
19 If, in conjunction with these two documents, the Tribe had
20 taken affirmative corrective measures and provided suitable
21 direction to Ms. Walsh, it would have been in a better
22 position to meet the just cause standard.

23
24
25 ⁶ Page 4 of Trial Court decision

1 Other documents support Ms. Walsh's position of lack
2 of *suitable direction*. The Performance Appraisal of Ms.
3 Walsh dated 9/29/99 states in the section **Specific steps**
4 **employee must take to improve performance within specified**
5 **time period:** She has all the skills necessary to do more
6 than is required to do the job. Would encourage to
7 participate in any training which becomes available which
8 would enhance existing skills or help her develop new ones.
9 On June 23, 2000, right after the documents that the Tribe
10 uses to establish performance issues, Ms. Walsh received
11 another Performance Appraisal. We will note that the
12 appraisal rating fell into the Very Good category of
13 performance. We further note that in the section **Specific**
14 **areas of needed improvement**, it states: Confidentiality-
15 telephone skills-dealing with clients experiencing
16 conflict-stress. In the section **Recommendations for**
17 **professional development (seminars, training, schooling,**
18 **etc.)**, it states: Confidentiality laws that apply to
19 AODA/Mental Health. Although these concerns are mentioned,
20 there is nothing in the record to indicate that any of
21 these recommended areas were provided to Ms. Walsh. This
22 would have been the perfect time for the Tribe to establish
23 specific guidelines, establish specific procedures and
24 policies, and to specify training needed to meet the
25 recommendations of the Performance Appraisal.

1 The Trial Court found that the described events of
2 September 6, 2000 and September 7, 2000 did occur. These
3 events are undisputed. However, the Trial Court found that
4 the termination was not fair, impartial or consistent with
5 procedural rules, based on lack of evidence of counseling,
6 corrective measures and suitable direction to meet the
7 standards of progressive discipline as outlined in the
8 Green Employee Handbook. For this Appellate Court to
9 overturn the Trial Court's decision, we must find that
10 there was a material error in the application of the law to
11 the facts of this case. We cannot find any material error
12 concerning the matter of the law.

13 The Tribe argues that the Trial Court's decision is
14 flawed for several reasons. One is that progressive
15 discipline is not required by the Tribe's personnel
16 procedures. We agree. Any requirement of progressive
17 discipline policies would prevent the Tribe from
18 terminating an employee who has committed serious
19 violations that may involve criminal conduct such as theft,
20 fraud, acts of violence or any other actions that would
21 require immediate removal from employment. We also agree
22 with the Tribe's position that it is not an issue as to
23 whether, or not, the Court agrees with the Tribe's
24 management practices. We fully agree with the Tribe's
25 position that *the purpose of the just cause standard is not*

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Order

This case is remanded back to the Trial Court for a hearing to determine damages and reinstatement consistent with the findings of the Stockbridge-Munsee Court of Appeals in Stockbridge-Munsee v Joseph Miller 97-AA-004 and §53.5(F) of the SMTA.

By the Court

This 24th Day of OCTOBER 2003

David Raasch

Honorable David Raasch

Joseph H. Martin

Honorable Joseph Martin

Stanley R. Webster

Honorable Stanley Webster



MAR 22 2006 AM 10:23

Stockbridge-Munsee
Tribal Court of Appeals
State of Wisconsin County of Shawano

[Signature]
TRIBAL COURT CLERK

Jeffery L. Pecore

Appellant,

vs.

) Case: 2003-AA-0001

Stockbridge-Munsee Community
Human Resources Director and Interview
Panel,
Alpha Crepeau
Leah Miller
Lloyd Young

) Appellate Court Opinion

Appellees

Opinion

Before Appellate Justices David D. Raasch, Todd Matha and Stephan Grochowski.

Per Curium

Introduction

This Court must determine whether to uphold the decision of the Stockbridge-Munsee Tribal Trial Court ("Trial Court"). The Stockbridge-Munsee Tribal Court of Appeals ("Court") reviews the underlying decision *de novo* since the appeal presents primarily issues of law. The analysis and holding of the Court follows below.

Procedural History

On January 24, 2003, the Stockbridge-Munsee Tribe ("Tribe") posted an employment position for superintendent of the Tribe's golf course. The Petitioner applied for the position and

20 received an interview,¹ but was not selected for the position that was offered to a non-Indian. On
21 April 15, 2003, the Tribe sent the Petitioner a written notice that he was not selected for the job.
22 On April 23, 2003, the Petitioner filed a request for a tribal court review of that hiring decision.

23 The Tribe moved the Trial Court for a summary judgment. Although a response was
24 filed by the Petitioner in opposition to summary judgment, the Trial Court found that summary
25 judgment was proper because there were no disputed material facts, nor any allegations of new
26 evidence in the case.

27 On February 6, 2005, the Honorable Kimberly Vele issued a memorandum opinion
28 upholding the Tribe's decision not to hire the Petitioner for the position that was posted for
29 superintendent of the Tribe's golf course. On February 23, 2005, the Petitioner filed a notice of
30 appeal of the Trial Court's decision. This case comes before the Court on the Petitioner's appeal
31 of the memorandum opinion. The Court accepted the appeal, has reviewed all of the filings in
32 this case and has exercised its discretion to issue this opinion based on the record.²

33 Jurisdiction

34 Section 23 of the Stockbridge-Munsee Tribal Court Rules of Procedure grants this Court
35 the jurisdiction to review the case at hand. The Court, having been granted jurisdiction to review
36 the final judgment of the Trial Court, now proceeds to review that final judgment and issue its
37 opinion.

38 Scope of Review

39 Section 23 (I) of the Stockbridge-Munsee Tribal Court Rules of Procedure limits the
40 Court's review stating. "The Court may only hear appeals concerning matters of law."

41 Summary of Issues

42 The Appellant raises four issues on appeal.

¹ The tribal preference information form indicates the Petitioner is an enrolled member of the Stockbridge-Munsee Tribe, Enrollment No. 000967.

² Stockbridge-Munsee Tribal Court Rules of Procedure, § 23 (K) states: "At the discretion of the appellate body, to aid it in reaching a wise decision or to avoid injustice to the parties, an oral hearing on the appeal of matters of law may be ordered."

- 43 1. Did Mr. Pecore's Affidavit in Opposition to Motion for Summary Judgment present an
44 issue of material fact that requires a trial in this matter?
45 2. Did the Tribe improperly apply the job description in its decision not to hire the
46 Appellant?
47 3. Did the Tribe base its decision not to hire the Appellant on relevant and established facts?
48 4. Did the Trial Court err when deciding that the Appellant did not meet the qualifications
49 of the posted position?
50

51 **Pertinent Facts**

52 The Trial Court issued a summary judgment decision in this case so the facts found by
53 the Trial Court were determined from the pleadings and not from oral testimony. Therefore, this
54 Court must rely on those same facts found in the pleadings and determine if there was any error
55 concerning the application of law. In the Respondent's Brief and Motion for Summary
56 Judgment filed with the Trial Court on August 28, 2003, the Respondent sets forth the following
57 facts.

- 58 1. Mr. Pecore was previously employed by the Tribe at the Pine Hills Golf
59 Course as the Greens Superintendent from 1994 through 1999.
60 2. The Tribe terminated Mr. Pecore's employment as the Green
61 Superintendent on February 4, 2000.
62 3. Mr. Pecore's termination from employment resulted from Mr. Pecore's
63 gross misconduct that involved Mr. Pecore being convicted of three
64 criminal charges.
65 4. Mr. Pecore did not appeal his termination from employment.
66 5. On January 24, 2003, the Tribe posted for the Superintendent position as
67 the Pine Hills Golf Course.
68 6. The posted Superintendent job description requires that the applicants have
69 maintained a satisfactory work record in all past employment.
70 7. Mr. Pecore's February 14, 2000 employment termination is "not
71 maintaining a satisfactory work record in all past employment."
72

73 Respondent's Br. & Mot. for Summ. J. at page 6 - 7.

74 On September 13, 2003, the Petitioner filed an Affidavit in Opposition to Motion for
75 Summary Judgment. In the Affidavit, Mr. Pecore provides the following information:

- 76 1. Affiant is the petitioner in the above captioned action.
77 2. Attached hereto as Exhibit A is a true and accurate copy of the position
78 announcement for the golf course superintendent. Said exhibit is
79 incorporated herein by reference.

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3. That Affiant meets all of the qualifications listed on the position announcement for the golf court [*sic*] superintendent, attached hereto as Exhibit A.
 4. Affiant submitted an application for an employment position of golf course superintendent, dated December 5, 2002. A true and accurate copy of said of [*sic*] application is attached hereto as Exhibit B and incorporated herein by reference. Attached hereto as Exhibit C is a true and accurate copy of the employee preference compliance report, dated April 9, 2003, for the position of golf course superintendent. Said exhibit is incorporated herein by reference.
 5. That affiant is entitled to an American Indian preference for the job of golf course superintendent.
 6. That Jon Zwirschitz was hired for the position of golf course superintendent. That Jon Zwirschitz is not entitled to any employment preference regarding the position of golf course superintendent.
 7. Pursuant to Section 54.2 of the Employee Preference Policy Ordinance, the affiant, Jeffrey L. Pecore, is entitled to a preference for the position of golf course superintendent. Affiant has the qualifications as stated for the position of golf course superintendent at Pine Hills Golf Course. Affiant meets all qualifications as listed on the superintendent job description. That from October 15, 2001, to January 3, 2002, affiant was hired as a consultant at the Pine Hills Golf Course to restore the greens. Upon information and belief, Jon Zwirschitz also applied for said job. However, the job was offered to the affiant.
 8. That all times that affiant was employed at Pine Hills Golf Course, his work performance was satisfactory.
 9. Attached hereto as Exhibit D and incorporated herein by reference, is a true and accurate copy of a letter of recommendation from Leah J. Miller.
 10. Attached hereto as Exhibit E is a true and accurate copy of a letter dated August 19, 2002, was incorporated herein by reference, outlining Affiant's experience, education, skills and background.
 11. Attached hereto as Exhibit F is a letter of recommendation dated March 12, 2003, from Jack Hietpas. Said exhibit is incorporated herein by reference.
 12. That Affiant makes this affidavit in opposition to defendant's motion for summary judgment.

119 Aff. in Opp'n to Motion for Summ. J. at page 1-2³.

120 The Petitioner included the referenced exhibits with the Affidavit in Opposition to Motion for
121 Summary Judgment.

³ Affidavit in Opposition to Motion for Summary Judgment filed with the Stockbridge-Munsee Tribal Court on September 22, 2003. Two page document with no page numbers.
Case: 2003-AA-0001

122 **DISCUSSION OF THE ISSUES**

123
124 ***1. Did Mr. Pecore's Affidavit in Opposition to Motion for Summary Judgment present an***
125 ***issue of material fact that requires a trial in this matter?***

126 This Court has carefully reviewed the documents filed in this case and finds that the
127 Affidavit in Opposition for Summary Judgment did not contain any new material facts that
128 would have created a disputed issue. The only hint of a new fact was the assertion that Mr.
129 Pecore was hired as a consultant, between October 15, 2001 and January 3, 2002 at the Pine Hills
130 Golf Course, to restore the greens. However, the Appellant does not affirmatively provide any
131 foundation as to how this assertion creates a new material fact that needs to be tried. The Trial
132 Court did not err in making the determination that there were no disputed issues of material fact.
133 Based on this Court's review of the filings, we agree with the Trial Court that the only dispute
134 concerned a matter of law regarding the proper application of the hiring preference policy.
135 Summary judgment was appropriate in this case.

136 ***2. Did the Tribe improperly apply the job description in its decision not to hire Mr.***
137 ***Pecore?***

138 The Trial Court found that the Tribe did not err in its decision to decline hiring the
139 Appellant. This Court agrees with the analysis of the Trial Court in that the qualifications for a
140 job position must be "job related" and that the position applied for as Superintendent would
141 include responsibilities such as supervising and training of staff, budget management, etc., and
142 that "*past management and oversight experience would be essential indicators of future ability to*
143 *perform the supervisory functions required for the position.*" Trial Court Decision at 5 (emphasis
144 added). The Trial Court found that "there seems little doubt that the basic qualifications of the
145 position were reasonably related to the job and not intended to be a barrier to employment." Id.
146 at 5. The Appellant does not dispute the fact that he was criminally convicted and fired for
147 misconduct from this same position previously. Therefore, this Court must agree with the Trial
148 Court's determination that the Tribe did not err when it included prior work history as a
149 qualification for this position.

150 ***3. Did the Tribe base its decision not to hire the Appellant on relevant and established***
151 ***facts?***

152 The Trial Court found, and this Court agrees, that there are no disputed facts in this case.
153 Although the Appellant could have appealed his prior termination for misconduct, he did not.

154 Also, the Appellant could have disputed that his prior termination should not be part of the job
155 qualifications that the Tribe incorporates in its hiring practices, but he did not. Therefore the
156 Tribe did not err, and the Trial Court's findings on this issue are correct.

157 **4. Did the Trial Court err when deciding that the Appellant did not meet the**
158 **qualifications of the posted position?**

159 The Tribe has set forth the purpose for its hiring preference policy as follows:

160 *Purpose: Optimum employment in the Stockbridge-Munsee Community*
161 *for Tribal members, as well as those who live in the Community as*
162 *spouses or direct descendants, is a critical element to building self-*
163 *sufficiency, sovereignty and an economy that combats poverty and social*
164 *ills, and assures that the Stockbridge-Munsee Community receives the*
165 *maximum benefits generated by its entities and enterprises.*
166 *The purpose of this ordinance therefore is to provide maximum*
167 *employment opportunity and preference in hiring and lay-offs, to the*
168 *people of the Stockbridge-Munsee Community.*

169
170 Employee Preference Policy Ordinance, Ch. 54.

171 In reviewing the purpose of the Employee Preference Policy Ordinance, as referenced in
172 the Trial Court's decision, this Court finds that although the main thrust is to provide optimum
173 employment for Tribal Members, it is also intended to assure that the Tribe receives the
174 maximum benefits generated by its entities and enterprises. This would indicate that the Tribe
175 reserves discretion to create job descriptions that assure that the entire community benefits from
176 having qualified employees. Therefore, the Tribe did not improperly act in creating the job
177 description for the position of Superintendent of the Pine Hills Golf Course, which included the
178 qualification that applicants "[m]ust have demonstrated ability to maintain satisfactory working
179 record in any prior or current employment." Position Description Qualifications at 16.
180 Furthermore, the Tribe did not improperly act in considering the Appellant's past work history
181 when making its decision not to hire him for the posted position. There was no error in the Trial
182 Court's decision.

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184

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Conclusion

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This Court affirms the Trial Court's decision issued on February 6, 2005.

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Dated this 15th day of March, 2006

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Stockbridge-Munsee Tribal Court of Appeals

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David D. Raasch

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David D. Raasch

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Todd Matha

Todd Matha

3110106

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201

Stephan M. Grochowski

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Stephan Grochowski

3/3/06

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STATE OF WISCONSIN
STOCKBRIDGE-MUNSEE APPELLATE COURT

STOCKBRIDGE MUNSEE CT.

NOV 27 2006 PM 1:06

[Signature]
TRIBAL COURT CLERK

DARRIN CHURCH,

Appellant,

vs.

Opinion and Order

Case No.: 05-CV- 0024

STOCKBRIDGE-MUNSEE DIVISION OF
COMMUNITY HOUSING, a Division of the
STOCKBRIDGE-MUNSEE COMMUNITY

Respondent.

PROCEDURAL BACKGROUND

This is an appeal from an order of the Stockbridge-Munsee Trial Court dated October 14, 2005. Advocate Wesley Martin submitted a brief on behalf of the Appellant (defendant-tenant), and Attorney Sharon Greene-Gretzinger submitted a brief on behalf of the Respondent (plaintiff-landlord). There were no oral arguments in this appeal.

Appellant appeals from an order of the Stockbridge-Munsee Trial Court, Honorable Robert Miller, Jr., Judge. The trial court issued a judgment evicting the appellant from tribal housing on October 14, 2005. Pursuant to Section 46.6-12 of the Stockbridge-Munsee Housing Ordinance, the appellant appeals the trial court's judgment claiming that the trial court committed an error of law when it refused to grant the appellant a continuance to seek legal counsel.

Because we hold that the trial court properly exercised its discretion in denying the appellant's request for a continuance, *we affirm.*

FACTS

The facts in this case are not disputed. The appellant, Mr. Church, entered into a housing lease agreement with Stockbridge-Munsee Division of Community Housing, the

authorized housing authority for the Stockbridge-Munsee Community, a federally recognized tribe. Mr. Church was late paying his rent numerous times before the Division of Community Housing sought a termination of Mr. Church's lease agreement and the eviction of Mr. Church from the leased premises.

Before the trial court held the eviction hearing, the parties entered into a Stipulation and Order to Stay the proceedings dated and filed with the Court on May 27, 2005. Pursuant to the terms of the Stipulation and Order, the tenant, Mr. Church, waived his right to contest the plaintiff's complaint for eviction in exchange for the stay in the eviction proceedings and a revised monthly payment schedule. The parties further agreed that Mr. Church's compliance with the Stipulation would be reviewed every two months by the trial court, and in the event of any default under the terms of the Stipulation, including late payments, the eviction proceedings would be re-scheduled for a hearing on the merits. Despite this last chance agreement, Mr. Church did default under the payment terms of the Stipulation, and the Division of Community Housing promptly requested the Court to proceed with a hearing on the merits.

The trial court held the eviction hearing on October 11, 2005. During the hearing, Mr. Church indicated that he had a witness who would essentially testify that he was supposed to pay Mr. Church's rent for him, but failed to do so. Because of the unavailability of Mr. Church's witness to be at the hearing, Mr. Church requested the court to postpone the hearing. The court denied Mr. Church's request and proceeded to question him as to why he was late paying his September 2005 rent. Despite Mr. Church's explanation for his late payment, on October 14, 2005, the court rendered a judgment of eviction. In that judgment, the court found that because Mr. Church was continuously and repeatedly late with his monthly payments, he materially breached the terms of his Lease-Purchase Agreement, the housing ordinance, the Admission and

Occupancy Policies for the Low Income Homebuyer Program, and the Stipulation and Order of May 27, 2005. Accordingly, Mr. Church was ordered to move from the premises and pay all arrears and payments due and owing the housing authority, including court costs and fees.

Following the eviction hearing, Mr. Church filed a handwritten Motion to Appeal the trial court's decision along with a request for an injunction to prohibit the trial court from issuing a Writ of Restitution. Mr. Church based his request on the grounds that he was not represented by counsel and unfamiliar with court procedures. On October 19, 2005 and October 21, 2005 Mr. Church filed written notices with the Court requesting reconsideration of the eviction judgment on the grounds that he was current with his payments, with the exception of the September 2005 payment due to alleged honest mistake. Mr. Church's injunction was denied and that decision was not appealed. The only remaining question on appeal is whether the trial court erred in rendering its judgment of eviction.

ARGUMENT AND DECISION

The Tribe argues that the Court of Appeals is without jurisdiction to hear this matter, because the appellant failed to articulate how the trial court erred and failed to file a brief substantiating his arguments. While it is true that the appellant's request for a review of the eviction judgment only marginally stated grounds for a review, because the appellant appeared pro se, we are reluctant to dismiss the request on technical grounds, particularly when the written request was timely filed.

The Tribe's general appellate process governs appeals from eviction orders. Section 46.6-12 of the Tribe's housing ordinance states as follows:

Appeals under this Ordinance shall be handled according to the general tribal appellate provision, with the exception that the party filing the appeal shall have

only five (5) days from the entry of the order of judgment to file a notice of appeal. Ch. 46, S-M Housing Ord.

This shortened statute of limitations contrasts with the Tribe's general appellate process that requires that the notice of appeal be filed within twenty (20) days after the decision or order appealed from. Section 1, S-M Adm. Proc. Act. The trial court entered its written judgment of eviction on October 14, 2005. On October 19, 2005, the appellant filed a written motion to appeal on the grounds that he was not represented by counsel and had little knowledge of court procedures. On October 21, 2005 the second notice of appeal, he alleged that he is disabled and although admittedly late with his payments, they were paid. Because the appellant's first written notice of appeal was filed within five (5) days of the trial court's written judgment of eviction, the appellant's notice of appeal was timely filed.

Once a notice of appeal is timely filed, the appellant has an additional twenty (20) days to file a written statement with the Court of the grounds for the appeal. See §23(J), S-M Tribal Court Rules of Civil Proc. In this case, pursuant to the Court's Scheduling Order, the appellant, through appellant's counsel, filed a brief in support of his appeal. Essentially, the appellant makes the same argument as stated in his Notice of Appeal of October 19, 2005, that is, the trial court erred when refusing to grant the appellant's motion to continue the eviction hearing on the grounds that the appellant was without legal representation, without knowledge of the Court's procedures, and without the ability to subpoena witnesses.

Appellate Court review is limited to appeals concerning matters of law. §23(I), S-M Tribal Court Rules of Civil Proc. Accordingly, the Court of Appeals is without authority to review matters *de novo*, but instead, must reply on the record made at the

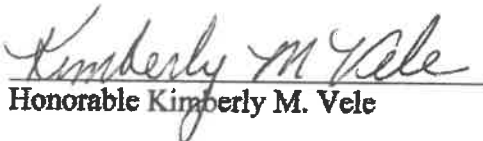
trial court level to determine whether the trial court erred in interpreting or applying the law.

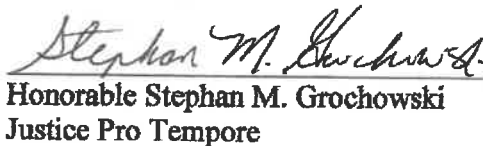
In this case, the trial court held a contested hearing on the Tribe's claim for eviction; however, the contested hearing was held *after* the appellant had already waived his right to dispute his eviction. The May 27, 2005 Stipulation clearly required the appellant to not only waive his right to contest the eviction in the event of a breach of the agreement, but plainly and firmly established that the appellant's failure to make *timely* monthly payments constituted a breach of the agreement. Because the appellant failed to *timely* pay his monthly payment even after entering into the stipulation, he breached the agreement. Although this violation prompted the final hearing, the appellant no longer had the right to dispute the initial grounds for the eviction at that hearing. Because legal assistance at that hearing would have had minimal, if any, impact on the final outcome, the trial court's discretionary decision to deny a continuance was reasonable and the trial court's mandatory decision to issue the eviction was correct.

Because the appellant does not raise or argue that the trial court erred in interpreting or applying any other law in this case, there is nothing further for this appeals court to consider.

The Judgment of the trial court is hereby *Affirmed*.

IT IS SO ORDERED THIS 13th day of November 2006.


Honorable Kimberly M. Vele


Honorable Stephan M. Grochowski
Justice Pro Tempore


Honorable Robert Kitticon
Justice Pro Tempore

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TRIBAL COURT CLERK

**STOCKBRIDGE-MUNSEE COMMUNITY
TRIBAL COURT OF APPEALS**

Murphy Family,

Case No. AP-2006-AA-0001

Plaintiffs, Appellants,

v.

**Stockbridge-Munsee Tribal
Council, Enrollment Committee
Director-Manager,
Defendants-Appellees.**

**DECISION AND ORDER ON
MOTION FOR RECONSIDERATION**

On July 21, 2008, this court dismissed the appeal of the Appellants for failure to file a timely appeal. On August 1, 2008, the Appellants filed a Motion to Reconsider the court's decision.

As a basis for their motion, counsel for the Appellants alleges that he attempted to file the appeal timely but that the clerk of court was not present in his office to accept the appeal. It is strange that the court first hears of this issue on August 1, 2008, the date this Motion was filed. Had there been difficulties experienced in filing the appeal, why didn't counsel bring this to the attention of the court immediately, or at least when the appeal was first filed. In the alternative, counsel could have come back when the clerk was present. Counsel did neither of these things and this argument must fall.

Counsel also claims that he did not know he could have filed for an enlargement of time pursuant to Rule 1.29(C) of the Tribal Court Code. The answer to this is that failure to know the law is no excuse under the law and this argument must fall. It must also be stated that the court looks with disfavor on motions for reconsideration and requests for enlargement of time.

For the reasons stated above, the court **DENIES** Appellants Motion to Reconsider.

So Ordered this 23rd Day of September, 2008.


Marianne Higgins, Stockbridge-Munsee Tribal Judge

Leland Wigg-Ninham, Judge Pro Tem


Robert Kittecon, Judge Pro Tem



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TRIAL COURT CLERK

For the reasons stated above, the court **DENIES** Appellants Motion to Reconsider.

So Ordered this 23rd Day of September, 2008.

Marianne Higgins, Stockbridge-Munsee Tribal Judge

Leland Wigg-Ninham

Leland Wigg-Ninham, Judge Pro Tem

Robert Kitecon

Robert Kitecon, Judge Pro Tem

STOCKBRIDGE-MUNSEE
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TRIAL COURT OF APPEALS
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**STOCKBRIDGE-MUNSEE COMMUNITY
TRIBAL COURT OF APPEALS**

**Robert Little,
Plaintiff, Appellant,**

Case No. 2007-CV-0028

v.

DECISION AND ORDER

**Darrin Church,
Defendant, Appellee.**

This matter is before the Stockbridge-Munsee Tribal Court, Court of Appeals, on appeal from a ruling of dismissal issued by the Honorable Robert Miller based on a finding that the court lacked subject matter jurisdiction to hear this matter.

Procedural History

In October of 2005, the Appellant, Robert Little, made a personal loan to Appellee, Darrin Church, in the amount of \$375.00. In exchange for this loan, Church pledged an eagle feather head stick and an eagle feather visor which Little could hold until the loan was paid in full. Little still holds the eagle visor but returned the eagle stick to Church which Church stated he was going to sell and pay Little the remainder of the debt. Church paid \$50.00 to Little on August 3, 2007 and \$325.00 of the loan is still outstanding. It is unknown if Church has sold the eagle stick.

This matter first came before the trial court on January 25, 2008 upon a filing of an action by Little seeking a judgment for the loan. Church was served with notice of this action but failed to appear to contest it. Because of the non-appearance by Church, the

court initially entered a default judgment against him. Pursuant to Tribal Procedure, when a default is entered, a letter is sent to the defaulting party informing them that they have 10 days to dispute the default judgment. This letter was never sent as the judge was informed by unknown sources that the use of eagle feathers as collateral for loans is illegal. Instead of sending the standard letter, the judge ordered another hearing to determine the legality of the transaction. This hearing was held on February 8, 2008, in which the court ruled that this case involves Federal Law and possible Federal offenses requiring the court to dismiss the case for lack of subject matter jurisdiction.

Analysis

It is well known that American Indians can possess eagle feathers for ceremonial purposes. This is codified in Title 50 of the Code of Federal Regulations and is included in the Lacey Act. Title 50 CFR 22 at section 12, makes it “illegal to sell, purchase, barter, trade, import or export at anytime or in any manner any bald eagle or golden eagle.....parts.....” (Full text omitted). The question in this situation is whether it is illegal to use eagle feathers as collateral for a loan and whether this transaction is actionable when there is a default on the loan.

As stated above, Judge Miller dismissed this case based on lack of jurisdiction. In doing so, he stated that “there is (sic)rules about what you can do with the eagle feather, you just can’t hock it, you can’t sell it, you can’t do any of that.” He also stated: “there was an exchange of dollars.” What Judge Miller was referring to were the Federal Laws governing such transactions.

Appellant Little argues that this transaction doesn't fit into the Federal prohibitions found in Title 50 CFR 22.12 because Church simply put the eagle feathers into his possession to hold, not to hock. We agree with Judge Miller that this reasoning "is a stretch" because when Church defaulted on the transaction, Little could have simply kept the feathers. This becomes a selling and a purchase which is explicitly prohibited by Federal Law. In fact, Appellant Little still holds the eagle visor.

Conclusion

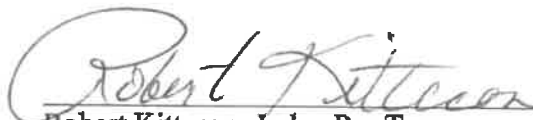
Although this court does not agree with Judge Miller for dismissing this case for lack of jurisdiction, we find he was correct in dismissing the case because the transaction involved was an illegal act which is not actionable in any court.


JUDGMENT AFFIRMED, CASE DISMISSED.

FOR THE COURT UNANIMOUSLY,

DATED THIS 9th DAY OF June, 2008


Maryanne Higgins, Judge


Robert Kittecon, Judge Pro Tem


Leland Ninham, Judge Pro Tem



STOCKBRIDGE-MUNSEE COURT OF APPEALS

Kylee Dodge,
Petitioner-Appellee,

Julie Carroll and S-M Human Resources
Respondent-Appellants.

STOCKBRIDGE MUNSEE CT.

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TRIBAL COURT CLERK

Case No. 10-AP-2008-AA-0003

DECISION AND ORDER

This is an Interlocutory Appeal. The Stockbridge-Munsee Human Resources has asked this court to reverse the decision of the Stockbridge-Munsee Tribal Court the Honorable Robert Miller presiding that denied their motion to dismiss on sovereign immunity and statute of limitation grounds. Because we believe the Tribal Court was correct in denying the motion we affirm the order and remand the case for full merit review.

Initially we would note petitioner Kylee Dodge brought suit against Julie Carroll and the Stockbridge-Munsee Human Resources. We believe the correct respondent/ appellant should be Stockbridge-Munsee Community and will refer to the respondent/ appellant as the Community.

FACTS

Kylee Dodge (Dodge) an employee of the Community was terminated by letter on February 7, 2008. A copy of the letter was sent to Human Resources. Dodge was also notified in the termination letter that he had a right to the internal grievance process outlined in the Information Handbook for Employees of the Mohican Nation, Effective October 1, 1996 or he could go directly to Tribal Court pursuant to the terms of Chapter 53, the Stockbridge-Munsee Employee Rights Ordinance. Dodge was also informed that each appeal option has deadlines

and he needed to be responsible for meeting them. Dodge filed a grievance over his termination with his supervisor and received a timely response denying reinstatement on February 20, 2008. According to the Handbook Dodge's next procedure was to submit a follow-up grievance with his supervisor's supervisor. He did not do so. Rather, Dodge submitted a letter to the Stockbridge-Munsee Human Resource Department. That letter in part read:

...the prior exhaustive internal grievance relief efforts has failed to bring resolution, therefore I am requesting that appeal proceedings be initiated according to the policies available to Tribal employees including,

1. An intermediate meeting with an impartial employment mediation panel or
2. Tribal Council review and consideration.
3. Tribal Court appeal as established in Employee Rights ordinance, Chapter 53.

Dodge received no communication from Human Resources and eventually filed a complaint with the Tribal Court on April 17, 2008.

STATUTE

Section 53.45 Statute of Limitations

The employee must initiate the internal grievance process or court action, whichever applies, within 30 calendar days of the event or events that gave rise to the employee's claim. In cases where the employee initiates the internal grievance process, the employee must initiate the court action within 30 calendar days of receiving the final written communication of the internal grievance process.

The Community believed the filing in Tribal Court occurred 57 days after the date the final written communication of the internal grievance process was given and filed a motion to

dismiss on statute of limitations and sovereign immunity grounds with Tribal Court. That motion was subsequently denied which brought this interlocutory appeal.

ANALYSIS

Initially it appears the tribal court was concerned with the lack of notice given to Dodge and all other employees of the community concerning the removal of the employee mediation panel (EMP). The 1995 Employee Handbook provided for part of the internal grievance process to include an EMP. However the Community's experience with the panel resulted in its removal in 1998. Unfortunately, there was not a removal of the provision from the Handbook such that a review of the Handbook as instructed by the termination letter received by Dodge would continue to advise of the mediation panels viability.

We find Dodge had no notice of the removal of the EMP. Obviously if he had notice he would not have asked for it. We also believe Dodge had a reasonable expectation that Human Resources would provide written communication concerning his request. We hold then that the statute of limitations under Section 53.45 was tolled during the time he waited for this written correspondence. Dodge was required by this section to file within 30 calendar days of receiving the final written communication of the internal grievance process. He never received any formal written communication of this final grievance process such that the subsequent court filing we find was timely filed given the tolling of the time limits caused by Human Resources inaction. In addition we would hold that Dodge's delay in filing an appeal with the trial court meets the definition of excusable neglect such that we would allow the appeal to proceed on its merits.

We do not hold that Human Resources in all instances is required to respond to all filings during the grievance process. We hold only that if employees are told to follow a procedure found in the employee handbook that is no longer available it is incumbent that Human Resources advise the employee of any changes to that grievance procedure.

This finding is based in part on the Community's Employee Rights Ordinance, Chapter 53. The Ordinance in its preamble notes that "the tribal government recognizes the need for creating laws to govern and protect its employees." The Ordinance goes on to note that the Tribal Council further recognizes that employees of the Mohican Nation,... need protection of their rights including the right to file grievances and seek assistance in solving on-the-job problems via the proper, established policies and procedures. Section 53.1

Employees of the Community without legal training or representation are entitled to a fair shake in the grievance process. It is clear Dodge believed Human Resources was a department that dealt with employee problems and discipline. As noted the termination letter went to Human Resources. It is only reasonable to expect Dodge to go to Human Resources with his request. In addition the termination letter directed Dodge to Human Resources and provided their telephone number if he needed documents. As noted during oral arguments had Human Resources advised Dodge that the EMP was no longer available this lengthy appeal would not have been necessary.

We are also mindful that tribal court precedent exists that suggests this court take a strict view of the 30 day statute of limitations imposed by the Community. As stated in Stockbridge-Munsee Community v. Joseph Miller "if the appeal is not timely filed, under no circumstances will it be heard. 'Case No. 97-AA-004, page 6. However, the facts of previous cases are much different than the facts here. In the Joseph Miller case Mr. Miller was specifically told who he needed to file a grievance with and the time limit to do so. Miller acknowledged he did not follow that procedure. Here Dodge was simply advised he needed to follow the Employee Handbook which is what Dodge did in requesting an EMP with Human Services.

In the Miller case as well the court also noted Miller provided no excusable neglect for his failure. We would also find for the above reasons that relying on the Handbook in requesting an EMP as it provided although no longer in existence is excusable neglect to allow this appeal

to be heard on its merits. 1st Words and Phrases (perm. Ed.), 225 define excusable neglect as neglect which might have been the act of a reasonably prudent person under the same circumstances. That means as well that excusable neglect is not the same as neglect, carelessness, or inattentiveness. It means in essence where a person is unexpectedly placed in a situation to his detriment without fault or negligence of his own and against which ordinary prudence could not have guarded is excusable neglect. Dodge was placed in this predicament through no fault of his own. He followed procedure by requesting an EMP and was not informed the procedure was no longer available to him. Given the Community's stated interest in protecting employees rights it seems logical the tribe would prefer hearing a termination appeal on its merits rather than prohibiting the same on procedural grounds under these facts.

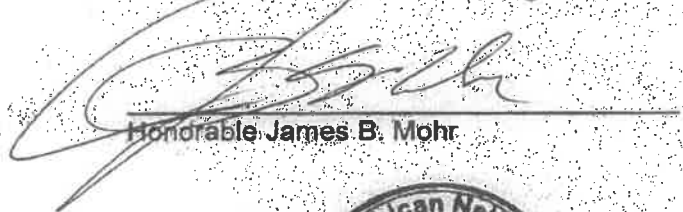
SO ORDERED.

BY THE COURT:

Signed this 9th day of December, 2010


Honorable Candace Des Armo Coury


Honorable Leland Wigg-Ninharn


Honorable James B. Mohr



STOCKBRIDGE-MUNSEE TRIBAL COURT

STOCKBRIDGE-MUNSEE COMMUNITY,
ON BEHALF OF THE DIVISION
OF COMMUNITY HOUSING,

Appellant

v.

BEVERLY JACOBS,

Respondent

Case No. 2008-CV-033

**DECISION ON RESPONDENT'S
MOTION FOR SUMMARY DISMISSAL OF APPEAL**

This is an appeal of an eviction trial that concluded on April 23, 2009. On July 22, 2009, the Honorable Robert Miller Jr. dismissed the eviction action against Beverly Jacobs.

History

On August 10, 2009, Plaintiff/Petitioner, the Division of Community Housing, appealed that decision alleging the Trial Court committed an error of law in interpreting Section 21(I) as applying to the actions of Tribal Police in seeking a search warrant from the Shawano County Court.

On September 1, 2009, Respondent, Beverly Jacobs, filed a Motion for Summary Dismissal of Petitioner's Appeal, asserting Appellant failed to comply with the five (5) day requirement for filing the Notice of Appeal as is mandated by Section 46.6-12 of the Stockbridge-Munsee Housing Code.

Issue

Is Appellant's Appeal timely?

Analysis

The Honorable Robert Miller, Jr., Chief Judge of the Stockbridge-Munsee Tribal Court published case 2008-CV-033 on July 22, 2009 and wrote, "...it is apparent that Tribal Law was disregarded summarily" and ordered the case dismissed with prejudice.

Appellant appealed that decision on August 10, 2009, even if weekends or holidays were not included, appellant's appeal should have been submitted by July 29, 2009.

Appellant's appeal was seventeen (17) calendar days later. According to Stockbridge-Munsee Housing Code, Section 46.6-12, Appellant's appeal is untimely. Section 46.6-12,

Appeals taken under this Ordinance shall be handled according to the general tribal appellate provisions with the exception that the party filing the appeal shall have only five (5) days from the entry of the order of judgment to file a notice of appeal. All orders from the court will remain in effect during the pendency of an appeal under this Ordinance unless other wise ordered by the court. If applicable, a party may utilize appeal procedures of 25.C.F.R. Part 2.

Court procedures are written to ensure fairness. The Court found Respondent's appeal is untimely. Therefore, the Court dismisses Appellant's appeal due to untimely filing.

Decision

The Court dismisses Appellant's appeal.

Dated this 19th day of January 2010

Mary Adams

Pro tempore, Honorable Mary Adams

Robert Christjohn SEE INDICATED
Pro tempore, Honorable Robert Christjohn OPINION

Marianne Higgins

Honorable ~~Mary~~ Higgins

Marianne /MH



CONCURRENT OPINION

The following does not disagree with the majority. The concurrent statement just expands the Appellate Record. Case Number 2009-AP 2008-CV-0033

HISTORICAL BACKGROUND

On or about July 24, 2007 the good citizen, William Terrio, reported suspicious activities at Beverly Jacobs home, N8698 Popular to Officer Hoffman. Officer Hoffman investigated via surveillance of the residence in question. After observing traffic flow, the Officer concluded the house likely was a "drug house" trafficking and/or selling drugs. On two occasions garbage was collected and trace amounts of THC was found. Likewise Officer Hoffman's supervisors and Shawano Circuit Court concluded the warrant less garbage search and related traffic supported the need for a search warrant. After a search using multiple Officers and a K-9 unit, the warrant produced a pipe, various cigarette wrappers and some roaches. The total amount of marijuana (THC) was less than one gram. Of which the total amount Contraband (THC) consisted of some seeds and stem material found in garbage bags. In addition, there was material scrapped from an alleged forty (40) year old pipe and some material were found that was used for medical purposes. This Court will neither support nor condemn medical use of marijuana. The fact is after months of investigation, the final amount of contraband totaled less than three (3) grams. The inventory found it would be hard pressed to conclude there was any drug trafficking taking place.

The Lower Court held a trial April 23, 2009 and offered a final ruling July 22, 2009. The Lower Court and this Appellate Court both concur this case is troubling and difficult case. The issue of Mohican Nation's Sovereignty is an issue this Court does not take lightly. The search warrant matter will be addressed later in this concurrent ruling.

As stated above, Robert Miller, Jr., Chief Judge, Stockbridge-Munsee Tribal Court, ruled, "As a result of the Stockbridge-Munsee Public Service Officers failure to comply with Stockbridge-

Munsee Tribal Rules of Procedure and Law, The Court orders this case be dismissed with prejudice." The Order was signed and dated July 22, 2009.

The Order was appealed via letter August 27, 2009 and hand delivered to the Tribal Court Clerk, Wayne Malone, on August 28, 2009. The above mentioned letter was signed by Howard J. Bichler, Attorney for Stockbridge-Munsee. It is Brian R. Johnson, Attorney for the Respondent and Interested party, argue the appeal failed to meet time lines and should be dismissed.

JURISDICTION

The matter in question is clearly a civil matter and there is no dispute on eviction matters related to the Tribe's Housing Department. However, there is a dispute over criminal and tribal procedures related to a search warrant.

FINDING

On or about July 24, 2007, a citizen reported as many as thirty (30) cars drive up to Beverly Jacobs home on a regular basis. Officer James Hoffman would testify he also observed similar traffic patterns and concluded drug trafficking was taking place. He also enlisted garbage men to collect evidence for activities his training indicated was drug traffic. Testimony in the trial would conclude there was no sinister activity taking place. On the contrary, the traffic was that of community members coming and going to cultural activities such as drumming, community counseling, caring for hungry children, educating community visitors, and feeding tribal elders. Testimony was provided that approximately 400 Mohican people live on the Reservation. It is a mystery to this Court how Peace Officer Hoffman, and his entire chain of command were not aware of the good deeds Mr. Tousey and Ms. Jacobs performed. The Stockbridge community is not that large and the services they provided should have been common knowledge of the entire Police Department. Attorney Johnson did not seem to have trouble finding numerous

character witnesses for Mr. Tousey and Ms. Jacobs. In particular, Mr. Coys (Uncle) requested, "the Court rule on the good side for these two good people".

The underlying issue is what Court should authorize search warrants in or on Mohican Territory? Judge Miller was clear and sound. The Stockbridge-Munsee Court procedure allows for civil and Criminal search warrants. As Public Law 280 should the fruit of such warrants indicate civil or Criminal evidence such matters can be turned over to proper authority.

However, Howard J. Bichler, Attorney for Stockbridge-Munsee demanding the Appellate Court Assume Jurisdiction and reverse Case #1008-CV-0033. It is the position of Petitioner that the following took place:

The Court erred determining that the Stockbridge-Munsee Police sought a search warrant from Shawano County instead of the Tribal Court.

The Court erred by asserting Criminal Law ie search warrant over a non-Indian in violation of *Oliphant v Sequamish Tribe vs. Supreme Court, 435 vs. 191(1978)*.

The Court erred by asserting criminal law on the Reservation contrary to P.L. 280.

The Court erred by asserting contempt sanction of Section 21(1) of the RCP apply to the police who chose to seek a search warrant from Shawano Court instead of the Stockbridge-Munsee Court.

The Court erred the search warrant issue was part of the eviction action.

The Court erred by allowing testimony over the objection of Petitioner as to basis and evidence produced via the warrant.

The Respondent has requested the Appellate Court dismiss the appeal based on timeliness or failure to meet established time frames outlined in 46. 6-12. of the Stockbridge-Munsee Housing Ordinance.

The portion of ordinance reads as follows:

Appeals under the Ordinance shall be handled according to the general tribal Appellate provisions, with the exception that the party filing the appeal shall

[Handwritten Signature]

STOCKBRIDGE-MUNSEE TRIBAL COURT

Mohican Nation

Stockbridge-Munsee Community

Stockbridge-Munsee Community
Petitioner.

Case No. 2009-FA-0021

v.

APPELLATE DECISION (WTJA)

Bert W. Davids
Defendant

The defendant, Bert W. Davids (Davids) was issued an ordinance violation citation pursuant to Section 21.19 of the Stockbridge-Munsee Code which in part prohibits use of motor vehicles ... on logging roads during spring break up. After trial the court issued the following order.

Order

IT IS THEREFORE THE ORDER OF THE STOCKBRIDGE- MUNSEE COURT: That Bert W. Davids is found guilty of violating Section 21.19 of the Stockbridge- Munsee Tribal Ordinances; and a fine of Two Hundred Dollars (\$200.00) is imposed.

IT IS FURTHER ORDERED: That the guilty conviction and the fine are unconditionally stayed.

The Stockbridge-Munsee Community (Community) brings this appeal arguing the trial court does not have the authority to unconditionally stay the finding of guilt. Because we find the Trial Court exceeded its authority to unconditionally stay the finding of guilt we reverse that part of the decision and enter a finding of guilt. Because the Trial Court was within its authority to unconditionally stay the \$200.00 forfeiture that part of the order is affirmed.

Discussion

Although the facts are interesting and certainly filled with mitigation they are not an issue for this court and are not stated here. We are simply faced with the legal issue of the courts ability to unconditionally stay a guilty finding once it is made by the court. We issue no opinion on whether for instance custom and tradition is a defense to the charge at issue. We need not do so since the court did not find Davids not guilty based on that defense. We only address the courts authority to stay a finding of guilt. We agree with the Community a defendant is either guilty or not guilty. No stay can impact that status.

We do feel it important to discuss the legal authority the Court used to stay the guilty finding. The Court first found that Section 1.18(A) grants the authority to stay a guilty finding.

Section 1.18 ALTERNATE SENTENCING

(A) When sentencing the defendant, the court shall have discretion to tailor a disposition that will be the most effective in addressing the defendant's violation, the needs of the community and any harm to the victim, if the violation involved a victim.

Clearly, as the section notes this option for an alternate sentence applies as it states only to sentencing. There is nothing in this language to suggest it was to apply to the determination of guilt. It was clear error to suggest a stay of guilt is an alternate sentence. When one receives a citation a court generally has two responsibilities. First it must determine whether the person is guilty or not guilty. That happens when a person either enters a guilty or not guilty plea to the charge. If the person enters a guilty plea the court then finds the defendant guilty and imposes the appropriate sentence. If the person enters a not guilty plea a trial is held and if found not guilty the citation is dismissed and if found guilty the court again moves to sentencing and imposes the appropriate sentence. This section gives a court no authority to stay the first guilt phase of the proceeding.

The Trial court next suggests authority under Section 1.2 Jurisdiction which proscribes the courts authority to exercise jurisdiction over "such other matters arising under enactments of the Tribal Council or the customs and traditions of the Stockbridge-Munsee Community." Again as the section notes this language only speaks to the jurisdiction of the tribal court to hear different kinds of cases. Again whether this section provides a defense to the charge is not before us as the court found Davids guilty. It does not give authority to stay a finding of guilt.

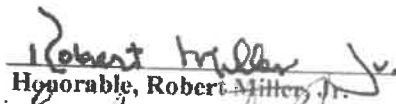
The Trial Court finally relates a whole series of mitigating factors that led to the stay decision. Again, these mitigating factors are appropriate in determining the appropriate sentence to be imposed but play no part in the determination of guilt or whether the finding can be stayed.

Therefore, we find the trial court had no authority granted to it to stay the finding of guilt and reverse that part of the order. The Community does not object to and this court finds adequate mitigation to unconditionally stay the imposition of the \$200.00 forfeiture.

SO ORDERED.

DATED: Friday, December 10, 2010

BY THE COURT


Honorable, Robert Miller, Jr.


Honorable, Leland Ninham


Honorable, James B. Moir



STOCKBRIDGE-MUNSEE APPELLANT COURT

06-30-11 P01:59 IN



**Mohican Nation
Community**

Stockbridge-Munsee

Tammy Pecore,)
Plaintiff/Appellant,)
vs,)
Stockbridge-Munsee Community d.b.a.)
Mohican North Star Gaming and Resort,)
Defendant/Appellee,)
)
)
)

Case No. 10 AP 2010 AA 0004

ORDER

The above-entitled action having been heard by the Stockbridge-Munsee Appellant Court by Pro tempore Honorable Garold Smith, Honorable Candace Des Armo Coury and Pro tempore, Honorable Donald Gurnoe. This Court affirmed the lower courts decision and order by the Stockbridge-Munsee Court in Case No. 2010-AA-0004.

MOTION FOR RECONSIDERATION

The Motion for Reconsideration is now before the Stockbridge-Munsee Appellant Court by Pro tempore, Garold Smith, Pro tempore, Honorable Donald Gurnoe and Honorable Candace Des Armo Coury.

Review of Facts and Findings

Upon review of all facts and documents this Appellate Court finds the following:

1. Stockbridge-Munsee Tribal Law, Chapter 1, Section 1.6.5(C)(7) states that any motion or request by a party after a judgement must be filed within 10 days after entry of judgement. The final judgement of the Stockbridge-Munsee Appellant Court was signed on November 22, 2010. The Motion for Reconsideration was filed on June 14, 2011. The date of filing of the Motion for Reconsideration is well beyond the allowed 10 days.

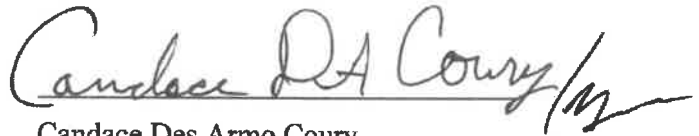
2. Stockbridge-Munsee Tribal Court, Rules of Procedure, Appeals, 24 Exclusive Jurisdiction(A) it states, "The Court of Appeals shall have exclusive jurisdiction to review all decisions of the Tribal Court as provided herein. The decision of the Court of Appeals shall be final as to all such review." Notwithstanding the belated filing of this Motion, the decision of this Appellant Court is final.

DECISION

The Stockbridge-Munsee Appellant Court affirms its November 22, 2010 decision.

Dated: June 23, 2011

BY THE COURT



Candace Des Armo Coury

Stockbridge-Munsee Tribal Judge



Pro tempore, Honorable Garold Smith



Pro tempore, Honorable Donald Gurnoe



On February 16, 2011, the Court of Appeals reviewed the Notice of Intent to Appeal. The Appellant's Notice of Intent acknowledges that: "the defendant, by his counsel, is mindful that pursuant to Rule 23(J) of the Stockbridge-Munsee Tribal Court Rules of Procedure, that he must submit a written statement of the grounds for his appeal within 20 days of filing his notice of appeal unless otherwise expedited by the court"³. The Appellant has failed to submit a written statement asserting any of the principle grounds for appeal, that the trial court made a serious error of fact and or law or that the trial court abused its discretion, in accordance with §1.6 (L) (3)⁴ Chapter 1 Stockbridge-Munsee Tribal Law Tribal Court. The 20 days timeframe lapsed in January 2011.

The Appellant failed to assert any of the principle grounds for appeal within the timeframe, without stating the grounds for appeal this matter is vague⁵. The appeal is hereby, denied.


Stanley R. Webster

Mary Adams


Winnifred Thomas



³ STOCKBRIDGE-MUNSEE TRIBAL COURT RULES OF PROCEDURE § 23 Appeals (J) An appellant shall submit a written statement of the grounds for his or her appeal within twenty (20) days of filing the notice of appeal, unless the Court below or the appellate court shall deem an expedited appeal to be advisable and shall notify the appellant promptly of the reduced time limit.

⁴ CHAPTER 1 STOCKBRIDGE-MUNSEE TRIBAL LAW TRIBAL COURT CODE Section 1.6 The Court (L) (3) . . . The principal grounds for appeal are that the Trial Court made a serious error of fact or law and/or there was an abuse of discretion.

⁵ CHAPTER 1 STOCKBRIDGE-MUNSEE TRIBAL LAW TRIBAL COURT CODE Section 1.6.5 Timeframes for Court Proceedings (C)(3) Denial of Appeal. In the event an appeal is denied, the Court of Appeals shall state the reasons for the denial in a written decision within 30 days of receipt of the Notice of Appeal or Petition for Interlocutory Appeal. Grounds for denial of an appeal include, but are not limited to, finding that the action is frivolous, late, moot, not final (other than for interlocutory appeals), vague, or no basis for appeal.

STOCKBRIDGE-MUNSEE APPELLATE COURT



Mohican Nation

Stockbridge-Munsee Community

Lynne I. Miller,
Petitioner Appellant,

v.

Case No. AP-2010-RO-0008

Hon. Robert Miller,
Respondent-Appellee

DECISION AND ORDER

Tribal Court of Appeals Panel presiding judges: Judge Stanley R. Webster, Oneida Tribal Judicial System, Marian Higgins, Stockbridge-Munsee Tribal Court, and Janice L. McLester, Oneida Tribal Judicial System.

Background

This case originated before the Stockbridge-Munsee Tribal Trial Court with judgment granting divorce to Lynne I. Miller from Charles Loud on September 29, 2000. Post-judgment issues arose requiring further review by Trial Court. In 2010, Petitioner, Lynne I. Miller sought an injunction to restrain Tribal Judge Robert Miller, the judge of record on the case, from presiding over any pending or future litigation, to which she is a party before the Stockbridge-Munsee Tribal Court. Judge Miller, filed a Motion to Dismiss, based on Tribal Judicial Immunity. On December 9, 2010, Judge Candice Des Armo Coury found Judge Miller has Tribal Judicial Immunity and dismissed Lynne I. Miller's petition for injunction. On December 29, 2010, Lynne I. Miller filed a Notice of Intent to appeal the trial court's dismissal of case No. 2010-RO-0008, claiming the court abused its discretion. On or about January 13, 2011, Judge Coury filed a written decision of the December 9, 2010 hearing.

On January 18, 2011, Petitioner-Appellant, Lynne I. Miller, filed the Notice of Appeal of the Tribal Trial Court's December 9, 2010 decision in Case No. 2010-RO-0008, with the Tribal

Court claiming the trial court abused its discretion. Relief Sought: Petitioner/Appellant seeks to have this matter reversed, vacated, and remanded back to Tribal Trial Court.

Judges Empanelled to Court of Appeals

On January 25, 2011, the Stockbridge-Munsee Tribal Court, in accordance with the Tribal Court Code empanelled three Tribal Judges to the Stockbridge-Munsee Tribal Court of Appeals¹: Judge Marianne Higgins, Stockbridge-Munsee Tribal Court, along with two Tribal Judges provided by the Wisconsin Tribal Judges Association, Janice L. McLester and Stanley R. Webster of the Oneida Tribal Judicial System.

Court of Appeals Panel Jurisdiction

On February 3, 2011, the panel held a phone conference to identify a judge to chair the panel,² and determine whether to accept or deny the appeal. The Judges selected Judge Stanley R. Webster to chair the Tribal Court of Appeals panel.

The panel then reviewed the Tribal Court Code to determine jurisdiction, and found that: (1) in accordance with Section 1.6 (L)³ the Tribal Court of Appeals has jurisdiction to review appeals from the Tribal Trial Court; and (2) according to Section 1.6 (L)(3)⁴ Appellant's claim that the Tribal Trial Court abused its discretion, meets the principle grounds for appeal.

The Court notified both parties that the Tribal Court of Appeals accepted Appellant Lynne I. Miller's appeal, including the following briefing schedule: Respondent had 30 days after receipt of Appellant's brief to file a response brief. Appellant had 10 days after receipt of Respondent brief to file a rebuttal brief. However, to date, the only brief filed is the Appellant's brief. Respondent did not file a response brief. The Appellant sent letters addressed to each panel

¹ **CHAPTER 1-TRIBAL COURT CODE Section 1.6 (L) (1)** The Court of Appeals does not have a standing panel of judges. Instead, a new 3-person panel of judges shall be empanelled for each case heard by the Court of Appeals.

² **Section 1.6 (L) (2)** Once the Court of Appeals panel is empanelled, the panel shall identify a judge to serve as the panel chair.

³ **Section 1.6 (L)** The Stockbridge-Munsee Tribal Court of Appeals shall have jurisdiction over appeals from the Tribal Trial Court.

⁴ **Section 1.6 (L) (3)** Parties who have grounds for appeal have the right to file an appeal on judgment or final disposition of the Tribal Trial Court to the Court of Appeals . . . The principal grounds for appeal are that the Tribal Court made a serious error of fact or law and/or there was an abuse of discretion.

member of the Tribal Court of Appeals. Nevertheless, Court of Appeals will move forward with Appellant's brief and the Tribal Trial Court decision.

Issue Presented by Appellant

Appellant claims the Tribal Trial Court abused its discretion, in denying the request for injunction to restrain Judge Miller from presiding over any current or future case, in which she is a party in Tribal Court, and sustained Judge Miller's motion to dismiss based upon Tribal Judicial Immunity.

We affirm the trial court ruling and find that the Tribal Judge has Tribal Judicial Immunity.

Analysis

The litigation involving Ms. Miller originated as a divorce action with the Tribal Trial Court granting Appellant a divorce from her husband Charles Loud on September 29, 2000. On October 5, 2001, Judge Miller held a hearing on Lynne Miller's petition to evict ex-husband Charles Loud. The written decision filed on February 11, 2002 denied eviction. On January 19, 2007, Judge Miller summoned everyone back into court because of confusion in original September 29, 2000 divorce judgment and competing liabilities citing the "duty of the court to dispose of this case finally." According to Appellant Lynne I. Miller, she received notice to appear in court on October 14, 2010 and Show Cause why she should not be held in contempt of Court. On October 14, 2010, Appellant failed to appear for a scheduled hearing claiming her advocate withdrew from her case. Appellant, believing the Tribal Trial Court would reschedule the hearing because her advocate withdrew, did not appear for the October 14, 2010 hearing. Appellant instead filed a petition starting the case before us and sought to restrain Tribal Judge Robert Miller from presiding over any current or future cases to which Ms. Miller is a party before the Tribal Court. On December 7, 2010, Respondent Tribal Judge Robert Miller filed a motion to dismiss Appellant's petition based on Tribal Judicial Immunity. On December 9, 2010, Tribal Judge Candice Des Armo Coury held a hearing on Appellant's petition for injunction against Judge Miller and granted Judge Miller's motion to dismiss.

On January 13, 2011, Judge Coury filed a written decision of the December 9, 2010 hearing before Stockbridge-Munsee Tribal Court on Case No. 2010-RO-0008. Judge Coury refused to re-litigate or re-hear issues from the divorce action since Judge Miller is the Judge of record and is familiar with the facts of the case, and should maintain the file for any post-judgment relief that might be sought. Tribal Judge Coury sustained Tribal Judge Miller's motion to dismiss

Appellant's petition based upon Tribal Judicial Immunity. Appellant appeals the Tribal Court's decision claiming abuse of discretion.

Appellant claims that according to the Indian Civil Rights Act her civil rights were violated. Appellant claims the Tribal Court did not hold a hearing on December 9, 2010. Appellant further claims that, "In the case at bar, Lynne I. Miller claimed a violation of due process law in that the tribal judge did not follow proper procedure in administering justice in her divorce case. He deliberately disregarded material facts in her case. He did not have jurisdiction over the divorce matter because the hearings were not supported by a written motion. A lawful conclusion of the divorce action is being blocked. The judge has displayed partiality. These are violations of due process of law which strip him of immunity." Appellant also claims that the standard of review for summary judgment should be reviewed de novo citing a case decided in the State of Wisconsin and Wisconsin State Statute: *Hocking V. City of Dodgeville*, 2009 WI 70, 318 Wis 2nd 681, 768 N.W. 2nd 552 and Wisconsin State Statute Section 802.08.

We find that the Stockbridge-Munsee Community Band of Mohican Indians established the Stockbridge-Munsee Court of Appeals⁵, not the State of Wisconsin. The Stockbridge-Munsee Community Tribal Council established the Tribal Court for the Stockbridge-Munsee Community and this matter will be reviewed under Stockbridge-Munsee Community Law⁶.

Whether judicial immunity applies is a question of law, not a question of discretion therefore reviewing for an abuse of discretion is not applicable. Discretion arises when the trial court has a range of options such as sentencing a criminal defendant or sharing children's time between their parents. The question is a legal one: Does judicial immunity apply? Because the question is one of law, we will review it de novo, meaning without deference to the conclusion of the trial court.

⁵ Section 1.1 Council Findings (A) Recognizing that tribal self-sufficiency cannot be fully realized without first exerting control over such matters as may be vital to tribal interests, the Stockbridge-Munsee Tribal Council finds: (1) That Article VII, Section 1 (f) of the Stockbridge-Munsee Community Constitution and By-Laws (approved November 18, 1937) that states in part: "To promulgate and enforce ordinances, subject to the approval of the Secretary of the Interior, governing the conduct of members of the Community....and establishing proper agencies for law enforcement of the Community," authorizes the creation of a tribal court system and adoption of a comprehensive code of law;

⁶ Section 1.3 Purpose and Construction (A) DECLARATION OF PURPOSE. This Code shall be interpreted and understood to accomplish the following tribal objectives: (3) To establish a court system for the interpretation of Stockbridge-Munsee Tribal Law and such other law as may properly come before the Court;

Tribal Judge Robert Miller as a member of the Stockbridge-Munsee Tribal Court is a Tribal official. We find that according to the Stockbridge-Munsee Tribal Law, Chapter 1, a Tribal Judge is an official of the Stockbridge-Munsee Community. Stockbridge-Munsee officials acting within the scope of their authority are immune from suit under Sec. 1.11 of the Stockbridge-Munsee Ordinances.⁷

Decision


We affirm the Tribal Trial Court ruling. A Tribal Judge has Tribal Judicial Immunity.

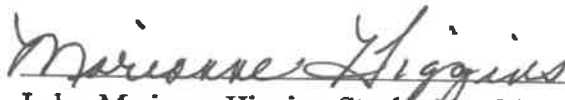
Judicial Officers benefit from judicial immunity, which means that they cannot be held liable for decisions rendered in the course of their duties as a Judicial Officer. This is a broad immunity and may only be disturbed in limited circumstances, such as when an abuse of authority is alleged and substantiated. No such allegation is present. Suit against a judge is only permitted in the extreme circumstance where a court has gone completely outside the law. Appellate review is always available when a party disagrees with the ruling of the Court.


The Appellant merely addresses the content of the decision, arguing that it was improper and contrary to law. An alleged error of judgment is not an abuse of discretion or authority.

⁷ Section 1.11 Sovereign Immunity (B) Any official or employee of the Stockbridge-Munsee Community acting within the scope of their duties shall be immune from suit.

So ordered on this 13th day of May, 2011.


Judge Stanley R. Webster, panel Chair, Court of Appeals


Judge Marianne Higgins, Stockbridge-Munsee Tribal Court


Judge Janice L. McLester, Pro Tem
Oneida Tribal Judicial System



16 **Scope of Review**

17

18 Section 23(1) of the Stockbridge-Munsee Tribal Court Rules of Procedure
19 states that “The Court may only hear appeals concerning matters of law.”
20 Further, §1.6(L) (5) states that “Errors of law will be reviewed de novo with no
21 deference to the Trial Court’s holding. Errors of fact will be reviewed based on
22 whether there is substantial evidence to support the finding. Judicial rulings in
23 discretionary matters are reviewed based on whether there was an abuse of
24 discretion. Errors that are not likely to have had a substantial impact on the
25 decision or on substantial rights are considered ‘harmless errors’ and are not a
26 basis for reversal.” The Appellate Judges reviewed this case on the record and
27 deliberations were held on February 11, 2010. This Court now issues its decision
28 within the established scope of review.

29

30

Facts

31

32 Sometime prior to June 11, 2009, the Petitioner applied for a position as
33 the LP Lead Driver for the Stockbridge-Munsee Community. A letter, dated June
34 11, 2009, from the Stockbridge-Munsee Community’s Human Resources
35 Department (HR) thanked the Petitioner for applying and scheduled an interview
36 for 1:30 p.m. on June 23, 2009. The letter also states; *If you can not (sic) accept*
37 *this position at \$18.64 per hour please let us know ahead of time.* The Petitioner
38 appeared for the interview with the HR Department at the scheduled time.

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A letter from HR, dated June 26, 2009, was mailed to the Petitioner
stating; *I am sorry to inform you that we are not able to offer you the LP Lead*
*Driver position for which you recently interviewed.*¹ In an undated letter from the
Petitioner to the HR Department the Petitioner acknowledges that he received the
letter on June 27, 2009. In his letter he states; *With this letter I am appealing the*
hiring of the LP Lead Driver position, I am aware that past hiring practice has
been that an enrolled Tribal member that can show qualification for hire is shown

¹ Letter was signed by Melissa Welch, HR Specialist

46 *preference of hire over a non-enrolled candidate for hire. Although the*
47 *Petitioner's letter bears no date of its writing, the HR Department acknowledges it*
48 *was received by their office on July 9, 2009.*

49 *There is also reference in the Petitioner's letter that he made; several*
50 *attempts by phone to reach the number provided in the letter of 6/26/09 with no*
51 *answer or call back. The HR Department, in a letter to the Petitioner dated July*
52 *10, 2009, states; I would first like to note that we did make several attempts to*
53 *return your phone calls on June 26th and July 7th.²*

54 *In a letter dated July 20, 2009 from the Petitioner to Tribal Chairman*
55 *Robert Chicks, the Petitioner states; The response I received from Human*
56 *Resource on 7/10/09 to the questioned hiring of a Non-Tribal person over a*
57 *qualified enrolled member would seem in disregard to the established Tribal*
58 *policy specific to Tribal Preference in employment. The statement by HR that the*
59 *hiring process complied with Tribal Law and policy is an unreasonable and*
60 *inadequate explanation, showing improper handling of acceptable hiring*
61 *practice, that enhance enrolled members chances of being hired to Tribal*
62 *employment if job qualifications are met. Tribal Ordinance-Chapter 54 Titled,*
63 *Employee preference policy ordinance – states the purpose of this ordinance is to*
64 *provide maximum employment opportunity and preference in hiring and lay-off to*
65 *the people of the Stockbridge-Munsee Community. See: sub. Sec. 54.2,*
66 *Establishing Preference (enclosed). It appears that the HR dept. has willfully*
67 *violated a good faith effort to reach agreement on an applicant whose selection*
68 *complies with this ordinance³.*

69 *On October 26, 2009 the Petitioner filed a civil complaint with the*
70 *Stockbridge-Munsee Tribal Court asking the Court to hear his complaint against*
71 *HR and Director John Miller regarding his not being hired for the LP Lead Driver*
72 *position.*

73 *The trial court held a hearing on December 30, 2009 and found the*
74 *following:*

² This letter was signed by Beverly Miller, Human Resources Manager

³ The letter is signed by the Petitioner and notes an enclosure CC; Tribal Council

- 75 1. The case was filed on October 26, 2009 by the Plaintiff, pro se, against the
76 Defendants.
- 77 2. The case was filed as employee preference case under Chapter 54 of the
78 Tribal Ordinances.
- 79 3. The Plaintiff was not offered employment by the Stockbridge-Munsee
80 Community in a letter dated June 26, 2009.
- 81 4. The case was not filed within the 5-day Statute of Limitations established
82 in Section 54.8(C) and therefore can not (sic) be heard.
- 83 5. The named Defendants share the Stockbridge-Munsee Community's
84 sovereign immunity as a department and employee of the Tribe.

85 The trial court then dismissed this case with prejudice in an order dated
86 December 30, 2009 and filed with the Court on January 5, 2010. January 20,
87 2010, the Petitioner-Appellant files an appeal of the trial court's decision. We
88 now review the trial court's decision.

89 **Issue**

90 The issue is whether the trial court erred, as a matter of law, when it
91 dismissed the Petitioner's petition on the grounds that the Petitioner failed to
92 timely file his request for review of the HR Department's decision not to hire
93 Petitioner for the LP Lead Driver position.

94

95 **Applicable Law**

96

97 Chapter 54-Employee Preference Policy Ordinance of the Stockbridge-
98 Munsee Tribal Code was established for the purpose of providing optimum
99 employment in the Stockbridge-Munsee Community for Tribal members, as well
100 as those who live in the Community as spouses or direct descendants. It is a
101 critical element to building self-sufficiency, sovereignty and an economy that
102 combats poverty and social ills, and assures that the Stockbridge-Munsee

103 Community receives the maximum benefits generated by its entities and
104 enterprises.

105 If there are violations or non-compliance with this ordinance, the Tribe has
106 provided remedies and a limited waiver of sovereign immunity for purposes of
107 enforcement. Section 54.8 provides the following:

108 (A) In order to enforce the provisions of this ordinance, the
109 Stockbridge-Munsee Community shall be subject to suit in the
110 Stockbridge-Munsee Tribal Courts by employees or applicants in
111 accordance with the limitations of this section.

112 (B) Money damages shall not be available in any suit brought
113 under this ordinance. The sole remedy available to the aggrieved
114 party shall be the appointment to the job, promotion, transfer, or
115 interim appointment that was denied as a result of a violation of
116 this ordinance. The complainant may also be awarded a similar
117 unfilled position if one is available.

118 (C) Any complaint brought under this Ordinance must be filed in
119 Tribal Court within 5 business days of receipt of notice that the
120 complaining applicant did not receive the position. Complaints
121 brought more than 5 days after notification shall not be heard.

122

123 In order to decide the issue of whether the Petitioner timely filed his
124 request for review, this Court looks at Section 54.8(C) in its analysis.

125

126

Analysis

127

128 Section 54.8(C) is very specific. It states that any complaint brought
129 under this Ordinance must be filed in Tribal Court within 5 business days of
130 receipt of notice that the complaining applicant did not receive the position.⁴ This
131 brings into question as to whether or not the undated letter from the Petitioner to
132 the Stockbridge-Munsee Human Resource Department stating; *With this letter I*

⁴ must: : be required by law, custom, or moral conscience to obey the rules - Merriam-Webster

133 *am appealing the hiring of the LP Lead Driver position.....* constitutes a filing
134 under 54.8(C).⁵ In this letter the Petitioner states; *I have made several attempts by*
135 *phone to reach the number provided in the letter of 6/26/09 with no answer or*
136 *call back.* The Petitioner, at the December 30, 2009 hearing, again refers to his
137 attempts to call HR.⁶ Do attempted phone calls to HR constitute notice of appeal?
138 This Court finds that they do not as the applicable law is very specific stating that
139 it must be filed in Tribal Court.

140 In **Stockbridge-Munsee Community -v- Joseph Miller**, the Stockbridge-
141 Munsee Tribal Court of Appeals set a *bare requirements* standard for Notice of
142 Appeal.⁷ In that case the Director of Tribal Services issued an Inter-Office
143 Memorandum to the Interim Manager of Human Resources requesting an appeal
144 of the Employee Mediation Panel's (EMP's) decision. Specifically, the memo
145 referred to the subject as an "*Appeal to Tribal Court for Joe Miller Grievance*"
146 *and further stated "I do not agree with the panels (sic) response. Please*
147 *foreward (sic) this to the Tribal Court.....* The Interim Manager filed the memo
148 with the Tribal Court within the statute of limitations. However the formal
149 Petition for Review was not filed with the Tribal Court until sometime after the
150 statute of limitations had run. The trial court dismissed the case because it was
151 untimely filed. The Stockbridge-Munsee Tribal Court of Appeals disagreed and
152 overturned the trial court stating:

153
154 *We....conclude that the memo does constitute a Notice of Appeal.*
155 *We recognize, however, that the February 18, 1997 memo meets*
156 *the bare requirements for Notice of Appeal. We do so with*
157 *the express finding that the request was timely filed in this case.*

158
159 This Court finds that neither the attempted phone calls to HR or the
160 undated letter to HR with cc: to Tribal Council, Attn: Pres. Bob Chicks meets this

⁵ The Petitioner, in the filing of his civil complaint on October 26, 2009, indicates in the list of relevant documents enclosed that his appeal letter to HR was written on July 8, 2009.

⁶ Trial Court transcript at 119-122.

⁷ Case No. 97-AA-004

161 bare requirement standard. There is no indication of the Court being notified of
162 any appeal in this letter. Even if a copy of the undated letter was filed with the
163 Court it would have been filed beyond the five day statute of limitations based on
164 the Petitioner's acknowledgement that he drafted the letter on July 8, 2009
165 (footnote 4).

166 In his appeal, the Petitioner states; *The petitioner who has no legal*
167 *training attempted to exercise his rights as a Tribal member by filing his*
168 *grievance/appeal with the HR department.* He also states; *The response from HR*
169 *indicated willful disregard of established Tribal policy. The next step follow-up*
170 *was established by written notification of improper hiring to president Chicks, as*
171 *council representative and direct admin. Supervisor of HR.* This Court finds that
172 neither of these actions constitutes an exercise of Petitioner's rights as provided
173 under 54.8(C) in which the Stockbridge-Munsee Tribal Council provided clear
174 and specific provisions for remedies if there were violations of Tribal policy.

175 The Petitioner references, what he considers, a disturbing comment made
176 by defense council during the December 30, 2009 hearing that *ignorance of the*
177 *law is no excuse.* Although the Petitioner finds this comment disturbing,
178 ignorance of the law is a legal principle holding that a person who is unaware of a
179 law may not escape liability for violating that law merely because he or she was
180 unaware of its content. The rationale of the doctrine is that if ignorance were an
181 excuse, a person charged with criminal offenses or a subject of a civil lawsuit, as
182 in this present case, could merely claim that he or she is unaware of the law in
183 question to avoid liability, even though the person really knows what the law in
184 question is. The doctrine assumes that the law in question has been properly
185 posted and distributed. It may be printed in a government newspaper, available
186 over the internet or printed and available for sale at affordable prices. In the case
187 at hand, this Court acknowledges that all Stockbridge-Munsee ordinances are
188 available over the internet at Mohican.com.

189 At the December 30, 2009 trial court hearing, Doug Miller, advocating for
190 the Petitioner, states "*I am aware that there have been other parties that have*
191 *used have used (sic) the preference and have filed within the five days limitation*

192 *and I think you know that the fact that the case that I'm aware of is where the*
193 *plaintiff was an attorney with an aunt that was a judge.”*⁸ Although the Petitioner
194 may have become aware of this information during preparation for the December
195 30, 2009 hearing, this Court finds that the Petitioner did have knowledge of and
196 access to the information regarding the Stockbridge-Munsee ordinances that
197 protected his rights to appeal.

198 The Petitioner states, *“You wrote the law, the attorney wrote the law and*
199 *now they hide behind the law.”*⁹ Although it may be true that the attorney wrote
200 the law, it is the Tribal Council who passes and enacts the law. Generally,
201 statutes of limitations are enacted by the legislature as in this case by the Tribal
202 Council. The Tribal Council may either extend or reduce the time limits, subject
203 to certain restrictions, but the court cannot extend the time period unless the
204 statute provides such authority. If the Petitioner feels that the law should be
205 changed to extend the time period, he should approach the Tribal Council on this
206 matter. This Court finds no statutory authority exists for it to extend the statute of
207 limitations.

208 In the Petitioner's Appellate Brief in Support of Appeal Court Action, he
209 states; *It appears that the legal dept. has willfully created laws and conditions*
210 *that restrict and prohibit the protection of Tribal preference laws enacted and*
211 *mandated in Chapter 54.* As stated above, it is the Tribal Council that enacts
212 laws, not the legal department.

213 In stating his grounds for appeal, the Petitioner states; *The Tribal court*
214 *failed to consider, in its order to dismiss, the fundamental issue that guarantees*
215 *the legal fairness of protected rights.* In viewing this statement, this Court finds
216 that the guarantees of the legal fairness of protected rights is a duty of the Court,
217 but also finds that these guarantees apply to all parties of the case, not merely the
218 Petitioner. The Petitioner, on numerous occasions in his motion to appeal and
219 during the December 30, 2009 court hearing, references that HR failed to inform
220 him of a five day period in which he could appeal the denial of his hiring. He

⁸ Trial Court transcript 148-151

⁹ Trial Court transcript 208-209

221 states; *This is a case where HR is not following it's (sic) policies and they're*
222 *hurting their people.*¹⁰ Although such a policy may have merit, this Court can find
223 no current tribal policy requiring HR to provide appellate information when it
224 does not hire a person for employment with the tribe. In his motion to
225 appeal, the Petitioner states; *The court in its decision did not address a critical*
226 *issue of Tribal law that mandates Tribal preference in hiring.*¹¹ This Court
227 agrees. The trial court did not address a critical issue of Tribal law that mandates
228 Tribal preference hiring. However, it is the Petitioner's own lack of action that
229 barred the trial court from addressing that issue as the ordinance states;

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231 *Any complaint brought under this Ordinance must be filed in*
232 *Tribal Court within 5 business days of receipt of notice that the*
233 *complaining applicant did not receive the position. Complaints*
234 *brought more than 5 days after notification shall not be heard.*

235

236 **Conclusion**

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238 In reviewing this case *de novo*, it is the conclusion of this Court that the
239 trial court did not abuse its discretion nor did it not err in dismissing this case
240 because it was not filed within the 5-day statute of limitations.

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¹⁰ Trial Court transcript at 215-216

¹¹ Referring to the trial court's decision

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Decision

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The decision of Stockbridge-Munsee trial court is hereby affirmed. This decision is final.

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Dated this 15th day of March, 2010

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By the Court

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A handwritten signature in cursive script, reading "David D. Raasch", is written over a horizontal line.

261

David D. Raasch, Appellate Judge

262

**IN THE APPELLATE COURT FOR THE
STOCKBRIDGE-MUNSEE TRIBAL COURT**

Lynne Miller,

Case No. AP-2011-02

Plaintiff-Appellant,

Trial Court Case No. 2011-CV-02

v.

Judge Robert Miller Jr.

Defendant-Appellee.

OPINION AND ORDER

INTRODUCTION

This is an appeal of a decision issued by Substitute Judge Wesley Martin who on May 31, 2011, dismissed the complaint of the Appellant wherein she alleged that Judge Robert Miller violated her civil rights by unreasonably and arbitrarily changing the terms of her September, 2000 final divorce.

BACKGROUND

This is the second appeal filed by Lynne Miller concerning Judge Robert Miller's handling of her divorce case. On or about November 9, 2010, she sought an injunction against Judge Miller claiming that Judge Miller was showing bias in favor of the respondent in the divorce action and was violating her civil rights by denying her due process of the law under the Indian Civil Rights Act (ICRA). She was seeking to prevent Judge Miller from presiding over future hearings concerning her case.

On January 12, 2011, the trial court, Judge Coury presiding, dismissed her complaint on the basis of judicial immunity and further found that her civil rights were not violated. Ms. Miller appealed this judgment on January 18, 2011 and on May 13, 2011 the Appellate Court affirmed that decision on both issues. On March 25, 2011, and prior to the decision being rendered in the first appeal, Ms. Miller filed another action which again alleges a violation of her civil rights. Judge Martin summarily dismissed this case stating that the plaintiff has not satisfactorily

demonstrated a truly distinct cause of action for which relief can be granted. The trial court held that the present action presents nothing new when measured against her previous action seeking an injunction.

STANDARD OF REVIEW

Because the trial court did not hear testimony, we review the trial court's order of dismissal as we would a decision granting a motion for summary judgment. Under summary judgment rules, a party is entitled to summary judgment if there are no genuine issues of material fact and that party is entitled to summary judgment as a matter of law. In reviewing the grant or denial of a summary judgment, we apply the same methodology as the trial court, and our review is *de novo*.

ANALYSIS

Judge Martin dismissed the underlying case stating that "the chief problem with the plaintiff's present cause of action is that her civil claims present nothing new when measured against her previous action for an injunction. 'It is as if the plaintiff lifted the relative parts of her injunction petition and merely changed the caption and headings, having first received an adverse decision on her prior petition from a judge within the same court system. These tactics do not suffice to give the plaintiff a truly new cause of action.'" P.3, Trial Court Decision.

In effect, Judge Martin dismissed the action finding that the issues presented for his review, were previously litigated in a prior action. This action by the court falls under the doctrine of claim preclusion, previously called *res judicata*, whereby a final judgment is conclusive in all subsequent actions between the same parties as to all matters which were litigated or which might have been litigated in the former proceedings. The purpose of this doctrine is to prevent repetitive litigation. To this end, the doctrine of claim preclusion seeks "to promote judicial economy and to conserve the resources the parties would expend in repeated and needless litigation of issues that were, or might have been resolved in a single prior action." *Mrozek v. Intra Fin. Corp.*, 281 Wis. 2d 448 (2005).

The elements of claim preclusion are: (1) an identity between the parties in the prior and present suits; (2) an identity between the causes of action in the two suits; and (3) a final judgment on the merits in a court of competent jurisdiction. *Wickenhouser v. Lehtinen*, 2007 WI 82, 302 Wis, 2d 41.

Although Judge Martin did not specifically identify the legal theory under which he dismissed this case, we believe the procedural posture and the stated rationale of the Order were sufficient to apprise this Court of the substance of the decision. Accordingly, we conclude that the question of claims preclusion was placed before this court with sufficient clarity.

In order to prevail under the doctrine of claim preclusion, all three elements of the doctrine must be satisfied. It is obvious that the first element is satisfied as Lynne Miller filed suit against

Judge Robert Miller Jr. in both lower court actions and in her first appeal. Secondly, the causes of action, though phrased in terms of an injunction in the first matter and a civil rights claim in the second matter, both sought the same relief, the removal of Judge Miller from hearing her divorce action. Thus the second element of claims preclusion is satisfied. Thirdly, the courts that heard these matters are courts of competent jurisdiction as recognized by both the Federal and State governments and duly empowered by the Stockbridge-Munsee Tribe to hear matters of this type. Thus the third element of the doctrine is satisfied.

This appeal is the fourth attempt by the Appellant to litigate the same issues that were addressed in Judge Coury's court. Thus, we find that Judge Martin was justified in dismissing the case summarily as this is repetitive litigation of the same issues, involving the same parties, and of which were decided by courts of competent jurisdiction. Based on the above, we **affirm** the decision of the trial court.

Our analysis of this case does not end here. Upon review of the entire history of the case, we find that there were procedural mistakes made that were not addressed in the prior actions. While it is entirely proper for a judge to continue hearing post-judgment matters in a divorce action, it is not proper for a judge, on his or her own initiative, to re-open a case and deal with the substantive issues of the case. This can only be done upon proper motion filed by one of the original parties to the action. A judge can re-open a case upon his own initiative to correct ministerial mistakes, but that power ends there and to do otherwise is an abuse of discretion.

The mistakes made in this case, although an abuse of discretion, do not reach to the level of a violation of Ms. Miller's civil rights and we so rule.

Based on the circumstances of this case and in the best interest of the justice, we take the extraordinary action of highly recommending that Judge Miller recuse himself from hearing any matters involving this case. By our recommendation, we do not find nor imply that there is any evidence of bias or prejudice. We firmly believe that this matter must be put to rest and our decision is meant to achieve that end.

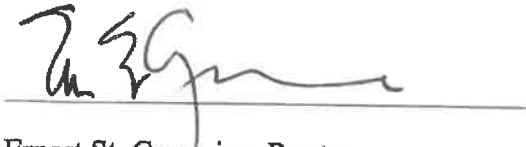
So ordered this 2nd day of November, 2011.

By the court:





Leland Ninham, Pro tem



Ernest St. Germaine, Pro tem



Robert Kittecon, Pro tem



11-02-11 11:41 RCVD

2. Respondent-Appellant Menchaca refrain from having any other person contact the Petitioner, except the party's attorney;

3. Respondent-Appellant refrain from any contact through email, or any other electronic means;

4. A copy of this Injunction is provided to the Stockbridge-Munsee Police Department and Shawano County Sheriff's Department; and finally that the Injunction shall be effective until June 25, 2014.

On July 5, 2012, Attorney Gary Dodge representing Respondent-Appellant Menchaca, filed a Notice of Intent to Appeal and a Motion to Stay the Trial Court's decision pending final outcome of the appeal, citing Rule 23(C) of the Stockbridge-Munsee Tribal Court Rules of Procedure. Respondent-Appellant's Notice of Intent to Appeal asserts the following:

1) That at the June 15, 2012 hearing, Plaintiff-Appellee Holsey was allowed to state her case without being sworn-in and therefore the defendant was unable to cross-examine Plaintiff-Appellee Holsey, which Attorney Dodge stated was a due process error;

2) That the Court ordered the parties into peacemaking while informing the parties if peacemaking did not occur, an injunction would be ordered on June 29, 2012. Attorney Dodge contends that by informing the parties of the Court's intent if peacemaking failed that Plaintiff-Appellee Holsey had no incentive to attempt peacemaking in good faith, which is a violation of Respondent-Appellant's due process;

3) That Jeff Vele, appointed Peacemaker, spoke with Plaintiff-Appellee and decided peacemaking would not work and cancelled peacemaking;

4) That on June 15, 2012, while the hearing was winding down, it became clear to Attorney Dodge for the Respondent-Appellee that the Plaintiff-Appellant is a Stockbridge-Munsee Tribal Council member allegedly having authority over judges, and thus a conflict of interest exists; and

5) That during the June 15, 2012 hearing, Attorney Dodge for the Respondent-Appellant moved to dismiss the action pursuant to Section 1.13(G)(5)(c) which states that "A judge shall hold a hearing regarding issuance of an injunction within 7 days after the temporary restraining order is issued, unless the time is extended upon the written consent of the parties or extended by the Court upon a finding that the respondent has not been served with a copy of the temporary restraining order although the petitioner has exercised due diligence in attempting to serve the respondent."

Respondent-Appellant asserts that since the Tribal Court issued the TRO on June 7, 2012, the June 15, 2012 injunction hearing is one day late and as a result, the Court lost its jurisdiction. The Respondent-Appellant asserts the ordinance was clearly violated and the case should be dismissed. Respondent-Appellant Menchaca furthermore asserts that she did not consent to an extension of time and therefore, Attorney Dodge moved the Tribal Court to dismiss the action. The Court denied the motion.

The Respondent-Appellant sought the following relief:

- 1) Motion to stay the Court's decision pending outcome of appeal; made pursuant to Rule 23(H) of the Stockbridge-Munsee Tribal Court Rules of Procedure;
- 2) Reverse the Trial Court's decision and remand with an Order to Dismiss based upon errors listed above and incorporated for reference herein;
- 3) Dismiss the action based upon a violation of the statute of limitations;
- 4) Or alternatively, reverse the Trial Court decision and remand with an Order to Appoint a judge from outside of the Stockbridge-Munsee Community to hear the case; and
- 5) To award the Respondent-Appellant attorney's fees and other costs for having to defend this action.

The Stockbridge-Munsee Court of Appeals denies Respondent-Appellant's request for appeal.

ANALYSIS

The primary issue before the Court of Appeals goes to the question of lost jurisdiction.

The Respondent-Appellant claims that due to the Tribal Court's due process and conflict of interest errors and, specifically according to Section 1.13(G)(5)(c) that because the hearing was held one day late that this matter should be dismissed since there has been a clear violation of the statute of limitations. It is asserted that the Trial Court decision should be reversed and remanded with an Order to appoint an outside judge, and award attorney fees and other costs for this action.

The Respondent-Appellant claims that a conflict of interest exists because Plaintiff-Appellee Holsey is a member of the Stockbridge-Munsee Tribal Council, which has authority over judges and/or the ability to remove judges. However, the Respondent-Appellant fails to cite which part of the Stockbridge-Munsee Community Law supports the claim that a conflict of interest exists whenever a member of the Stockbridge-Munsee Tribal Council appears before the Stockbridge-Munsee Tribal Court.

The Respondent-Appellant claims that her due process rights were violated when the Plaintiff-Appellee was allowed to state her case in Tribal Court without first being sworn-in and claims that that error prevented the Respondent-Appellant from cross-examination of Plaintiff-Appellee Holsey. However, the Respondent-Appellant fails to specifically cite, which part of Stockbridge-Munsee Community Law requires a Plaintiff appearing before the Tribal Court to be sworn-in.

The Respondent-Appellant claims that her due process rights were violated when the Tribal Court informed the parties that an injunction would be issued, if peacemaking did not occur, and as such, there was no longer an incentive for the Plaintiff-Appellee to

attempt peacemaking. Attorney Dodge asserts that the Tribal Court should have but did not indicate peacemaking would be taken under advisement. However, the Respondent-Appellant fails to show how Respondent-Appellant's due process rights were violated because of the Court's offer to settle in peacemaking, and that if peacemaking did not occur that the Court would then issue an injunction.

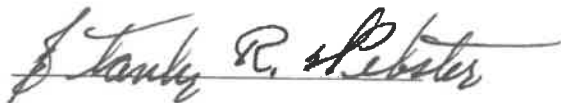
The Respondent-Appellant claims that a violation of the statute of limitations occurred because the Tribal Court held the injunction hearing one day late according to Section 1.13(G)(5)(c) "A judge shall hold a hearing regarding issuance of an injunction within 7 days after the temporary restraining order is issued." Therefore, it asserts that the Tribal Court lost its jurisdiction because the hearing was held on the eighth day. However, the Respondent-Appellant fails to cite the Stockbridge-Munsee Community Law showing that the Tribal Court actually loses jurisdiction because a hearing is held one day late.

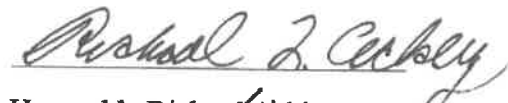
DECISION

The Stockbridge-Munsee Tribal Court of Appeals finds that the Respondent-Appellant's Notice of (Intent to) Appeal does not allege with sufficient clarity any basis for appeal. Therefore, the Court of Appeals denies the Respondent-Appellant's request for appeal in accordance with Chapter 1, Section 1.6 (L) (4).

IT IS SO ORDERED. Dated this 15th day of August, 2012.

BY THE COURT,


Honorable Stanley R. Webster, Chair


Honorable Richard Ackley


Honorable Candace Des Armo Court



STOCKBRIDGE-MUNSEE TRIBAL COURT		
MOHICAN NATION		STOCKBRIDGE-MUNSEE COMMUNITY
)	
KYLEE DODGE)	
Plaintiff-Appellee)	
)	
	)	Case No. AP2008-AA-0003
STOCKBRIDGE-MUNSEE COMMUNITY)	
Respondent-Appellant.)	
)	

DECISION AND ORDER
 (Reversal of Trial Court's Order Clarifying Issue of Paid time Off)

Presiding Stockbridge-Munsee Court of Appeals (hereafter Appellate Court)
 Judges include the Honorable Richard L. Ackley, Panel Chair of the Bad River Tribal
 Court, the Honorable James Mohr of Lac Courte Oreilles Tribal Court and the Honorable
 Candace Des Armo Coury. The Appellate Court judges met in telephonic conference on
 February 22, 2013.

JURISDICTION

Under TRIBAL COURT CODE §1.6 (L) (3), the principal grounds for appeal are
 that the Tribal Trial Court made a serious error of fact or law and/or there was an abuse
 of discretion. This Appellate Court finds that a serious error of law occurred. More
 specifically, the Trial Court held in its Order Clarifying Issue of Paid Time Off (PTO)
 "... the Petitioner is entitled to an accumulation of the PTO that would have been earned,
 during the period of termination, up to, but not to exceed, 320 hours. If the Petitioner
 forfeited PTO hours because they exceeded 320 and because he was unable to use them
 during the period of termination, then the Petitioner is entitled to be paid only for those
 forfeited hours. In addition, if the Petitioner was not paid, upon separation, for the PTO

hours earned up to the point of termination, he must be paid for those hours also.”¹ We disagree and reverse.

QUESTION PRESENTED

The question before the Court of Appeals is whether or not the award of PTO is authorized by the Stockbridge-Munsee Code of Law or does such an award exceed the scope of remedies authorized by tribal law?

BACKGROUND

The Plaintiff-Appellee was terminated from employment as a Computer Support Specialist in February 2008. The Trial Court issued its initial ruling in May 2012 and subsequently issued an Order of Reinstatement in August 2012. In so doing, the Court authorized “(1) Back pay not to exceed one (1) year’s wages... (2) Reinstatement...”² In November 2012, the Stockbridge-Munsee Community (hereafter S-M Community) filed a timely notice of appeal explicitly related to the “monetary remedies”³ resulting from the Court’s November 2016 Order Clarifying Issue of Paid Time Off (PTO). It argues that “The trial court’s order would result in the payment of approximately \$23,000 for forfeited PTO time along with awarding a bank of 320 hours of PTO...”⁴ in contradiction to the Stockbridge-Munsee Code of Law as outlined in §53.5 (F) which “limits the scope of remedies...”⁵

¹ See Dodge v. Stockbridge-Munsee Community, 2008 AA 0003, Order Clarifying Issue of Paid Time Off (PTO) at page 4 (November 16, 2012).

² Id, pages 1-2.

³ See Dodge v. Stockbridge-Munsee Community, AP 2008-AA-0003, Notice of Appeal and Request to Stay at page 1 ((November 29, 2012).

⁴ Id, page 1.

⁵ Id, page 1

ANALYSIS

Plaintiff-Appellee sought relief from the S-M Tribal Court when his employment as a Computer Support Specialist with the S-M Community was terminated back in 2008. Finally in 2012, the Tribal Trial Court determined that the S-M Community wrongfully discharged Plaintiff-Appellee. In accordance with the Employee Rights Ordinance at Chapter 53, the Court ordered certain remedies and issued written clarification of its Order based upon requests from the Plaintiff-Appellee. Pursuant to §53.5 (F) (1-2), the Plaintiff-Appellee was paid one year retroactive pay and he was reinstated to his previous position as a Computer Support Specialist. The third and final remedy that is permitted according to the Stockbridge-Munsee Code of Law is enumerated at §53.5 (F) (3) which states that the Court may order "Any other non-monetary remedy which is narrowly tailored to remedy the violation." Simply stated, one must ask then whether or not an additional payment for unused "PTO" and the banking of three hundred twenty (320) PTO hours is a monetary or a non-monetary benefit.

Chapter 53 is limited to three remedies that may be ordered by the Court, if the Court has credible evidence that an employee was terminated without just cause. In the instant case, there is no question as to whether the Court properly ordered two of the three remedies. Clearly, the Court properly granted the payment of one-year of wages in back pay, as well as ordering the Plaintiff-Appellee's reinstatement. The primary question is whether the Court can under tribal law order the S-M Community to reinstate paid time off (PTO) and calculate a dollar amount that should be paid to the Plaintiff-Appellee because of the S-M Community's action involving the wrongful discharge? To

that, this Appellate Court emphatically answers that the Court may not issue an Order that requires the S-M Community to extend a remedy that is outside its tribal law.

Section 53.5 (F) (3) does not specifically address "paid time off," which is more commonly referred to as PTO. This Appellate Court, however, has considered the question of whether or not three hundred and twenty (320) hours has a monetary benefit. On review, this Appellate Court finds that when the Court granted the bank of 320 PTO hours, that it did effectively issue an Order that includes a monetary benefit which is contrary to §53.5 (F) (3). The Tribal Trial Court did exceed its authority when it issued the Order to bank the PTO hours for the Plaintiff-Appellee, over and above the additional financial payment of approximately twenty-three thousand dollars (\$23,000.00) for unused and or forfeited PTO, which clearly is a monetary benefit that exceeds the retroactive payment of one year's back pay as outlined in §53.5(F) (1). The payment of \$23,000 and a bank of 320 PTO hours is an additional financial burden to the tribe; and it is not permitted under the tribal code.

CONCLUSION

The Appellate Court finds that any such additional payment (the estimate of \$23,000.00 for unused or forfeited PTO) or the banking of PTO hours is a violation of tribal law. The Court does not have the authority to decide what the appropriate remedy/ies will be in cases of unjust termination or wrongful discharge, except in the area of a non-monetary nature. Rather, the issue of appropriate remedies is a matter that is rightfully under the direction of the Stockbridge-Munsee Tribal Council, as the legislative body of the S-M Community. The Tribal Council made the decision to limit

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the remedies to include: one year back pay, reinstatement and “any other non-monetary remedy which is narrowly tailored to remedy the violation.”⁶

ORDER

The advancement of money for unused or forfeited PTO and a bank of 320 PTO hours does represent a monetary benefit, and the Court is not authorized by law to issue such a remedy. We hold that the S-M Tribal Trial Court made a serious error of law, and consequently, this Appellate Court reverses the November 16, 2012 decision.

IT IS SO ORDERED. Dated this 14th day of May, 2013.

BY THE COURT:

Richard L. Ackley
Honorable Richard L. Ackley, Panel Chair

James Mohr / *by Candace*
Honorable James Mohr, Judge Pro Tempore

Candace Des Armo
Honorable Candace Des Armo Court



⁶ Stockbridge-Munsee Tribal Code, Chapter 53, § 53.5 (F) (3).

BACKGROUND

March 6, 2012, the Tribal Council voted against hiring Kimberly M. Vele as Lead Attorney for the Stockbridge-Munsee Community.

March 9, 2012, Ms. Vele filed a motion, seeking a temporary injunction to remove posting of the Lead Attorney job description for the Stockbridge-Munsee Community in Tribal Court, Case No. 2012-CV-0002.

March 23, 2012, the tribal court granted the injunction and ordered Respondents to remove posting of the job description.

March 29, 2012, Vele filed a motion for contempt, alleging the tribe violated the court's order issued on March 23, 2012.

April 9, 2012, the Tribal Court granted Ms. Vele's motion for preliminary injunction, issued a scheduling order, found the tribe in contempt and ordered the tribe to pay Ms. Vele \$700.00.

May 15, 2012, the Tribe filed a motion for summary judgment.

May 21, 2012, Tribal Court denied the motion for summary judgment and conducted hearing on the merits of the petition.

July 25, 2012, the Tribal Court issued its decision in Case No. 2012-CV-0002, "ordered the tribe to appoint Ms. Vele to the position of lead attorney for the Stockbridge-Munsee Community effective immediately, or as soon as Ms. Vele can make the transition. The court also orders the Respondents to pay Petitioner \$700 immediately, for being in contempt of court for their failure to comply with the this court's order dated March 23, 2012".

August 15, 2012, Respondent, Stockbridge-Munsee Community et al., filed its Notice of Appeal, pursuant to Appeals Section 23, of the Stockbridge-Munsee Tribal Court Rules of Civil Procedure alleging that the Tribal Court made five errors of law:

(1) misinterpreted and misapplied Resolution 028-07,

- (2) applied the incorrect legal standard governing a claim alleging an ordinance violation,
 - (3) disregarded the Tribe's law governing review of a hiring decision made by the Tribal Council,
 - (4) misinterpreted and misapplied Section 14 of the R.C.P., and
 - (5) disregarded provisions of the Tribal Constitution that vest the authority to hire legal counsel exclusively in the Tribal Council. and
- Appellants filed a Request for Stay of the tribal trial court's Injunctive Order, and extension of time to file appellate brief.

The Chief Judge, in accordance with the Tribe's Court Code, approved and appointed three tribal judges to serve on the Stockbridge-Munsee Court of Appeals Panel. The Panel after review, denied Appellant's Request for Stay of Injunctive Order, and granted extension of time to file appellate brief. The Appellant-Respondent and Plaintiff-Appellee completed the briefing process.

The Court of Appeals reverses and dismisses the Tribal Court's decision and order in Case No. 12-CV-0002 (7-25-12).

JURISDICTION

As the matter presented for review is constitutional in nature, we review the Tribe's Constitution, including issues of personal, subject matter, and territorial jurisdiction.

A tribal member of the Stockbridge-Munsee Community filed suit in Tribal Court over the Tribal Council's vote, at a meeting on tribal land, located within the boundaries of the Stockbridge-Munsee Community Reservation, established that the Tribal Court had personal and territorial jurisdiction over this case. The tribal member's dispute, deals with a decision of the Tribal Council, was filed with the Tribal Court, satisfies the issue of subject matter as it appears in Chapter 1, Stockbridge-Munsee Court Code, Section

1.2, "Tribal Court shall exercise jurisdiction over all matters . . . including controversies arising out of the Constitution . . . ordinances . . . resolutions" . . .

Jurisdiction for appellate review appears in the Stockbridge-Munsee Tribal Court Rules of Procedure, Section 23 (A) "In all actions before the Court, the defendant may appeal to a Court of Appeals"

On appeal, the Stockbridge-Munsee Community, et al. sufficiently alleges that the Tribal Court made errors of law, violated the separation of power doctrine, by disregarding the Tribe's Constitution expressly vesting authority to hire legal counsel in the Tribal Council, and based on an alleged conflict of interest, invalidated votes of the Tribal Council. The grounds for appeal appear in Chapter 1-Stockbridge-Munsee Tribal Court Code, Section 1.6 (L)(3) . . . "principal grounds for appeal are that the Trial Court made a serious error of fact or law" . . .

STANDARD OF REVIEW

As the matter presented for review is constitutional in nature, we review the Tribal Court's decision de novo. Review of the Tribal Constitution is essential in determining where the authority to hire legal counsel is vested and what, if any, is the scope of judicial authority to review that decision. The Tribal Council is vested with the authority to hire legal counsel by the Tribal Constitution. The issue rests on whether the Tribal Court has jurisdiction to invalidate votes of the Tribal Council.

DISCUSSION AND ANALYSIS

The Stockbridge Munsee Tribal Constitution, Article VII, Section 1(b) vests the authority to hire legal counsel solely in the Tribal Council. When such authority is set aside, disregarded, or changed by Tribal Court, it raises questions concerning jurisdiction of Tribal Court and the powers of government set forth by the Tribe's Constitution.

Article IV, Section 1 of the Constitution, establishes the Tribal Council as the Tribe's governing body, "The governing body of the Stockbridge-Munsee Community shall be the Tribal Council" . . .

Article VII, Section 1 (b) of the Constitution establishes that the Tribal Council hires legal counsel, "To employ legal counsel, the choice of counsel" . . .

The issue in this case involves the constitutionality of a Tribal Council action against the hiring of legal counsel, and the extent of jurisdiction exercised by Tribal Court to nullify votes of the Tribal Council.

Tribal Law shows that the Tribal Court has jurisdiction to review acts of the Tribal Council. For example, if the allegation that the Tribal Council failed to meet procedural requirements such as; convening pursuant to proper notice, or whether quorum requirements were satisfied, the Tribal Court may review such issues. In other words, there have been no allegations that, the Tribal Council in this case, acted without proper authority. The Tribal Council does not have a personal financial interest in the selection of the Tribal attorney; political likes or dislikes do not constitute financial interests, nor do personal bias for or against any applicant require a member of the tribal council to abstain from voting. The Tribal Council was exercising its legislature power when voting against the hiring.

However, the separation of powers of tribal government and its judiciary precludes the Tribal Court from substituting its own judgment in the hiring process for that of the Tribal Council. The Tribal Court in this case substituted its ethical judgment for that of the individual Tribal Council members when it determined that two of them should have recused themselves, and thereby the Tribal Court changed the result of the Council's vote. The Tribal Court can review the Tribal Council's application of the Tribe's own law, but it may not interject its own opinion as to the ethical basis for recusal (which is a subjective, non-statutory matter) and thereby void the votes of individual Council members.

This Panel concludes that the Tribal Court acted beyond its judicial authority over the controversy before it and should properly have dismissed the action with prejudice. This panel need not decide whether an attorney can ever sue a prospective client for the purpose of seeking a Court Order forcing the client to retain the attorney. For the same reason, we do not address the issue of whether the Tribe's Employee Preference Policy Ordinance applied to this applicant.

CONCLUSION

It is the opinion of this Panel that the Tribal Court in this case acted beyond the scope of its judicial authority when it reached in and nullified votes of the Tribal Council, which equates with interfering with the authority expressly vested in the Tribal Council by the Stockbridge-Munsee Community Constitution.

Further, since the Motion for Contempt is intrinsically tied into the core issue that, the Tribal Court acted beyond the scope of its jurisdiction, the Order of Contempt of court entered against the Tribe is hereby vacated. If any sum of money has been paid under the Order, that amount shall be returned to the Tribe.

The Court of Appeals reverses and dismisses the Tribal Court's decision and order in Case No. 12-CV-0002 (7-25-12).

1 **STOCKBRIDGE-MUNSEE TRIBAL COURT OF APPEALS**

2 **MOHICAN NATION**

STOCKBRIDGE-MUNSEE COMMUNITY

3
4 **STOCKBRIDGE-MUNSEE**
5 **COMMUNITY, on behalf of its Division of**
6 **Community Housing,**
7 **Plaintiff/Appellee,**

8 **v.**

Case No.: AP-2012-CV-0061

9 **VINCENT NINHAM,**
10 **Defendant/Appellant.**

11 **JUDGMENT REMANDING &**
12 **STAYING WRIT OF EXECUTION AND RESTITUTION**

13 Under TRIBAL COURT CODE, §1.6(L)(3), the principal grounds for appeal are that the
14 Trial Court made a serious error of fact or law and/or there was an abuse of discretion. The
15 Tribal Court of Appeals (hereinafter the Appellate Court) contends that a serious error of law
16 occurred. Specifically, the Court held a hearing on January 4, 2013, and it dealt with the eviction
17 of the defendant/appellant. The defendant/appellant requested a continuance in order to obtain
18 counsel; however, the Court denied a continuance.

19
20 The defendant/appellant received service of the complaint on December 12, 2012,¹ and
21 the *Civil Summons* indicated that he had twenty (20) days to respond. *Civil Summons*, 2012-CV-
22 0061 (Stockbridge-Munsee Tribal Court, Dec. 11, 2012). The hearing dealt with the matter of
23 the “eviction, and to determine whether the plaintiff was entitled to possession, the order for
24 judgment shall be for the restitution of the premises to the plaintiff and for such other relief that
25 the court orders in accordance with this Ordinance.” STOCKBRIDGE-MUNSEE TRIBAL LAW
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1 HOUSING, § 46.6-10(A)(1). At that time, the Court found in favor of the plaintiff, the plaintiff
2 requested a *Writ of Restitution* and the Court entered its *Writ of Restitution*. *Id.*, § 46.6-10(A)(2),
3 *see also Compl. for Eviction* at 2. The Court was then to “provide the defendant with reasonable
4 notice and opportunity to be heard on the matter of the issuance of a writ.” STOCKBRIDGE-
5 MUNSEE TRIBAL LAW HOUSING, § 46.6-10(A)(3). The Court did not provide the
6 defendant/appellant “with reasonable notice and an opportunity to be heard” regarding the
7 issuance of the writ. Rather, the defendant/appellant had ten (10) days to vacate the premises or
8 law enforcement was authorized to forcibly remove the defendant/appellant, along with his
9 family, as well as all personal property. *Writ of Restitution*, 2012-CV-0061 (Stockbridge-
10 Munsee Tribal Court, Jan. 4, 2013).

13 The law indicates that “[a]ll tenants shall be given fourteen [*sic*] (14) days from the date
14 of service to quit possession of the premises in the case of non payment of rent.” STOCKBRIDGE-
15 MUNSEE TRIBAL LAW HOUSING, § 46.4-2(D). The Appellate Court does not believe that a tenant
16 should be given less time in the instance of an eviction. Rather, the law allows that a *Writ of*
17 *Restitution* may be delivered to law enforcement within thirty (30) days, and in other instances
18 forty-five (45) days. *Id.*, § 46.6-10(A)(2), *but see* § 46.7-10. The Appellate Court believes that
19 an extended timeframe should be given in these instances due to potential safety issues; the
20 defendant/appellant, his mate, and his minor child should be given an opportunity to find
21 alternate housing, particularly during harsh winter months and additionally, the
22 defendant/appellant has added time to obtain counsel.

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28 ¹ The record reflects that Scott Brown served a copy of a *Complaint for Eviction and Civil Summons* on the
defendant/appellant on December 12, 2012. However, the defendant/appellant alleges that he received service on
December 18, 2012. *See Hearing* (Court Recording Program, Jan. 4, 2013, 1:41:13 CST).

1 Given the abbreviated timeframe, coupled with the lack of an opportunity to be heard, the
2 Appellate Court finds that the Tribal Court made a serious error of law. The Appellate Court
3 therefore remands the instant case, in order for the Tribal Court to hold a hearing consistent with
4 the contents of this judgment and furthermore, under STOCKBRIDGE-MUNSEE TRIBAL LAW
5 HOUSING, § 46.6-12, the Appellate Court stays the *Writ of Restitution*, pending the outcome of
6 the aforementioned hearing.
7

8 **IT IS SO ORDERED** this 28th day of January 2013, by the Wisconsin Tribal Judges
9 Association panel composed of pro tempore judges herein serving as the Stockbridge-Munsee
10 Court of Appeals in accordance with §1.6(L) of the Stockbridge-Munsee Code of Law.
11

12 SigPlus1
13 *Amanda L. Rockman*
01/28/2013 02:02:00pm

14 _____
Honorable Amanda L. Rockman, Judge Pro Tempore

15 _____
16 Honorable Richard Ackley, Judge Pro Tempore

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18 Honorable Candace Coury, Judge Pro Tempore
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Given the abbreviated timeframe, coupled with the lack of an opportunity to be heard, the Appellate Court finds that the Tribal Court made a serious error of law. The Appellate Court therefore remands the instant case, in order for the Tribal Court to hold a hearing consistent with the contents of this judgment and furthermore, under STOCKBRIDGE-MUNSEE TRIBAL LAW HOUSING, § 46.6-12, the Appellate Court stays the *Writ of Restitution*, pending the outcome of the aforementioned hearing.

IT IS SO ORDERED this 28th day of January 2013, by the Wisconsin Tribal Judges Association panel composed of pro tempore judges herein serving as the Stockbridge-Munsee Court of Appeals in accordance with §1.6(L) of the Stockbridge-Munsee Code of Law.

sgPlus1
Amanda L. Rockman
01/28/2013 02:02:00 pm

Honorable Amanda L. Rockman, Judge Pro Tempore

Honorable Richard Ackley, Judge Pro Tempore

Candace Coury
Honorable Candace Coury, Judge Pro Tempore



Honorable Richard L. Ackley, Judge Pro Tempore Hon. Richard L. Ackley



STOCKBRIDGE-MUNSEE COURT OF APPEALS

Mohican Nation

Stockbridge-Munsee Community

Robert Chicks President, an Elected Member of the)
Stockbridge-Munsee Tribal Council,)
Plaintiff/Appellee,)
vs.)
Robert Doxtator, Recall Election Board Chairman)
and The Recall Election Board, and Stockbridge-)
Munsee Tribal Council and Stockbridge-Munsee)
Community,)
Respondent/Appellant.)

CONSOLIDATED
Case No. AP-2013 RO 0005
AP-2013 RO 0006

DISMISSAL ORDER

9-12-13
FILE

This case comes before the Appellate Court, Honorable Mary Adams (Pro tem), Honorable James Mohr (Pro tem), and Honorable Leland Wigg-Ninham (Pro tem) presiding.

Background

On August 1, 2013 Appellants, Robert Doxtator, Chairman of Recall Election Board, and the Recall Election Board appealed the Stockbridge-Munsee Trial Court's decision claiming the Trial Court made an error of law in Cases No. 2013-RO-0005 and 2013-RO-0006.

On August 29, 2013 the Appellants, Robert Doxtator, Chairman of Recall Election Board, and the Recall Election Board filed the motion to withdraw their appeal of the Order issued on July 24, 2013 by the Trial Court in Cases No. 2013-RO-0005 and 2013-RO-0006. The Appellants state that this motion is based on a change in circumstances and the cases are now moot. Namely on August 6, 2013 the Tribal Council removed Robert Chicks as Chairman.

Decision

The Court grants the Appellants' Motion to Dismiss Appeal without prejudice and without costs to any party.

Dated: Monday, September 11, 2013

BY THE APPEAL COURT,

On Behalf of Pro Tem Judges,

Mary Adams dated Sept. 11, 2013

Honorable, Mary Adams, (Pro tem)



STOCKBRIDGE-MUNSEE TRIBAL COURT

Mohican Nation

Stockbridge-Munsee Community

Jason J Hietpas,
Petitioner,

vs.

Stockbridge-Munsee Community,
Respondent,

Case No. AP1-14-2013-AA-0006

DECISION AND ORDER

① 13-11-14 ALM FILE

This case arises out of Appellant's application for employment as the Executive Director of IT offered by the Stockbridge-Munsee Community. Appellant Jason Hietpas alleges the interview panel for the IT Executive Director position failed to apply Chapter 54 of the Stockbridge-Munsee Communities Ordinances.

On February 28, 2014 Appellant submitted a Notice of Voluntary Nonsuit to the Stockbridge-Munsee Tribal Court. Appellant provided an Affidavit of Service showing Respondent received such notice.

The Court finds there are no laws within the Stockbridge-Munsee Community prohibiting the Appellant to withdraw his petition. The Court grants Appellant's Motion of Voluntary Nonsuit.

THE COURT HEREBY DISMISSES THE ABOVE ACTION.

Date: Friday, March 07, 2014

BY THE COURT:

Mary Adams

Honorable Judge Mary Adams
Stockbridge-Munsee Tribal Court Judge

Hon. Richard L. Ackley

Honorable Judge Richard L. Ackley
Stockbridge-Munsee Tribal Court Judge

Leland Nirtham

Honorable Judge Leland Nirtham
Stockbridge-Munsee Tribal Court Judge

STOCKBRIDGE-MUNSEE TRIBAL APPELLATE COURT

**Robert Miller III,
Appellant-Defendant**

v.

Case No. 3-AP-2013-CV-0002

**Bart D. Schultz,
Appellee, Plaintiff**

PRO TEM JUDGES: JERYL L. PERENICH, JEAN M. WEBSTER, AND ALTON SMART.

INTRODUCTION

This case arises out of a simple promissory note given by Appellant, Mr. Miller (hereafter Miller) to Appellee, Mr. Schultz (hereafter Schultz), in the amount of \$30,000. It has turned into a convoluted and winding procedural maze. For the reasons below we affirm the Trial Court's grant of summary judgment in favor of Mr. Schultz.

STATEMENT OF THE CASE

The material facts are not in dispute. On or about August 31, 2007, Miller and Schultz executed the Note under which Schultz agreed to lend Miller \$30,000 and Miller agreed to pay it back over the next several years by paying monthly installments of \$525. Miller paid on the note from October 2007 to March 2010. The balance remaining at that time was nearly \$19,000. Schultz attempted to collect by first dealing directly with Miller. Those efforts were unsuccessful. Schultz then sued Miller for the balance due in Brown County Circuit Court. In June of 2011, Schultz obtained a default judgment in the amount of \$18,888.26 plus costs and interest.

On or about October 5, 2012, Schultz initiated a garnishment action in the Stockbridge-Munsee Tribal Trial Court under Chapter 17 of the Tribe's ordinance. A hearing was eventually held on Schultz's filing and a default order of garnishment was entered on or about January 4, 2013. Miller moved to re-open the judgment based on improper service and on Sec. 17.23 of the Tribe's ordinance which requires that any foreign judgment must be filed within one year from its date of issuance. The garnishment was in place a short time but then on or about February 7, 2013, the Trial Court vacated the earlier garnishment order.

Schultz states that at the hearing on Miller's re-opening the Trial Court gave Schultz a choice: leave the garnishment in place as it was originally a default order or re-file a new action in

Stockbridge-Munsee Tribal Court. Schultz chose the latter and the garnishment action was dismissed.

On or about March 7, 2013, Schultz filed a new action seeking a judgment against Miller on the unpaid balance of the promissory note plus interests and costs, then alleged to be \$22,981.

Schultz served requests for admissions on Miller's attorney. Those requests were never answered. Sec. 1.6.5(B)(4) requires that discovery requests be answered within 25 days. That sections reads: "A party shall respond to discovery requests within 25 days of the date of receiving the request. This time frame shall apply to either a discovery response or a motion in opposition." The state and federal rules of procedure support Schultz's assertion that unanswered requests for admission mean the matter at issue is deemed admitted. Wis. Stat. § 804.11(1)(b); Fed. R. Civ. P. 36.

On or about July 10, 2013, based in large part on Miller's failure to respond to the Requests for Admission, Schultz filed a Motion for Summary Judgment. It does not appear that Miller directly responded to the Summary Judgment but he did file a Motion to Dismiss on August 15, 2013.

After a series of other procedural issues, Judge Mary Adams was assigned pro tem to hear the matter. She held a Pre-Trial Conference on October 10, 2013 and eventually granted Schultz's Motion for Summary Judgment. That ruling is now before us in this appeal.

DISCUSSION

Miller, through counsel, raises several objections to the Trial Court's decision to grant summary judgment in favor of Schultz. We address each in turn.

Jurisdiction

Miller's leading argument is that the Trial Court does not have jurisdiction because all of the events which are the subject of the case occurred in Brown County, Wisconsin, off the Stockbridge-Munsee Reservation. We are not persuaded by this argument. The Stockbridge-Munsee Tribal Court jurisdictional statement is very broad:

The Stockbridge-Munsee Tribal Court shall exercise jurisdiction over all matters within the power and authority of the Stockbridge-Munsee Community including controversies arising out of the Constitution of the Stockbridge-Munsee Community; laws, statutes, ordinances, resolutions and codes enacted by the

Stockbridge-Munsee Tribal Council; and such other matters arising under enactments of the Tribal Council or the customs and traditions of the Stockbridge-Munsee Community. This jurisdiction extends over the Stockbridge-Munsee Community and its territory, persons who enter its territory, its members, and persons who interact with the Tribe or its members wherever found.

Sec. 1.2(A), SM Ord.

In addition, the Rule of Procedure Mission statement includes this statement:

The Stockbridge-Munsee Tribal Court pledges to preserve the sovereignty of the Mohican Nation and to maintain the peace and unity of its people through the administration of justice. The Court endeavors to be the 'cornerstone of the existence of the Mohican Nation.'

Section 17.2(O) defines the Reservation to mean "the exterior boundaries of the Stockbridge-Munsee Reservation as defined by the Treaty of 1856."

Although Chapter 17 contains another more limiting jurisdictional statement, we believe the best policy for tribal court is to read jurisdiction as being broad, where possible, without unduly hurting the Tribe's sovereignty or the role of the legislature. It is clear from Sec. 1.2(A) that the jurisdiction of the Tribal Court is very broad and that it has been established and functions as a court of general jurisdiction.¹

As far as personal jurisdiction, Miller is a tribal member and thus the Tribe's jurisdiction over him is unquestioned. Schultz voluntarily submitted himself to the jurisdiction of the Court.

Due process

Miller next argues that Judge Adams' October 10, 2013 hearing was an "impromptu trial" of which Miller did not have notice. This argument is not supported by what actually happened. The hearing notice announced the court date as a pre-trial conference. A review of the transcript shows that Judge Adams conducted the hearing appropriately. A Motion for Summary Judgment had been pending for three months by the time of the hearing. The Trial Court's decision specifically states that it is granting summary judgment; it is not a decision after a contested trial.

We view the questioning allowed by the Trial Court as a way to make up for Miller's lack of responsive to the discovery. Section 11 of the Stockbridge-Munsee Rules of Civil Procedure permits a party to file pre-trial motions and for the Court to hear argument and make a decision

¹ Although *res judicata* concerns are arguably present, they were not raised or argued by Miller at the trial court and therefore are considered waived. Furthermore, we rule that Schultz shall not be permitted to recover twice even though he now has a state court and tribal court judgment. Payments made by Miller will be in satisfaction of both judgments.

at any time before trial. Considering the October 10, 2013 hearing was noticed as pre-trial conference, it seems fair that Judge Adams would take the opportunity to hear from the parties including questioning of one party under oath.

Statute of limitations

Miller argues that because the garnishment action was dismissed, Sec. 17.23 also bars this action. Sec. 17.23 is inapplicable to the current action because Schultz is not seeking recognition of a foreign order. Rather he has sued anew based on the failure of Miller to follow through with the payments under the 2007 promissory note. At most, the current action would be subject to the three year statute of limitations under Sec. 1.36. It appears possible three years may have elapsed as Miller stopped paying March 2010, the date on which the right of action began accruing. This action was filed on March 7, 2013. However, without specific dates before us we cannot say the three-year limitation was exceeded. In any event, reliance on Sec. 1.36 was waived by Miller as it was not raised in the trial court.

Furthermore, the issue of a new garnishment hearing and the effect of Sec. 17.23 on future garnishment actions are not before us and we are not deciding those issues.

Grant of summary judgment

The Trial Court's grant of summary judgment was appropriate. The material facts were not in dispute. Miller did not answer the requests for admission. Under federal and state discovery rules, a request for admission not answered is considered admitted. Although Stockbridge-Munsee law does not contain an analogous section, what other purpose can there be to the 25-day limit set for response? Requests for Admission would be meaningless if a failure to respond did not have consequences of admission. Therefore, we adopt the state and federal practice and consider those matters not answered as admitted. See Wis. Stat. § 804.11(1)(b); Fed. R. Civ. P. 36. The Tribal Court through rulemaking or the Tribal Council through legislation can change these rules if our interpretation is incorrect.

Schultz provided supporting documents to justify his actions. This was done timely and completely. Miller failed to respond to the Requests for Admission, did not appear in court twice and did not show the Court why he should not pay his debt in full.

CONCLUSION

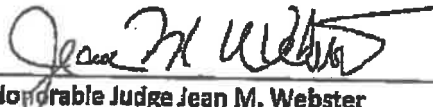
The Trial Court decision and judgment are affirmed.

Dated this _____ April 15th, 2014.

BY THE COURT:



Honorable Judge Alton "Sonny" Smart
Stockbridge-Munsee Tribal Court



Honorable Judge Jean M. Webster
Stockbridge-Munsee Tribal Court



Honorable Judge Jeryl L. Perenich
Stockbridge-Munsee Tribal Court



STOCKBRIDGE-MUNSEE COURT OF APPEALS

Mohican Nation

Stockbridge-Munsee Community

JEFF VELE, SR.

Appellant,

Case No. 2015 AP.2014 CV 0012

v.

JO ANN SCHEDLER,

Respondent.

DECISION

This case has come before the Stockbridge-Munsee Court of Appeals, Appellate Court Judges Chad Hendricks, Stephan Grochowski, and Marianne Higgins presiding.

INTRODUCTION

Jeff Vele appeals an order of the Stockbridge-Munsee Tribal Court (hereinafter "SMTC") finding him guilty of making a libelous statement against Jo Ann Schedler in the Mohican News. *Reversed.*

JURISDICTION

The Court has jurisdiction over this matter per Chapter 1, §1.6(L) of the Stockbridge-Munsee Tribal Court Code which gives the Court of Appeals exclusive jurisdiction to review appeals from the Trial Court.

HISTORICAL BACKGROUND

Appellant Jeff Vele, Sr. (hereinafter "Vele") is editor of the Stockbridge-Munsee Community newspaper, the Mohican News, and ran for the office of Vice-President in the Fall/2013 Tribal Council election. Respondent Jo Ann Schedler (hereinafter "Schedler") ran for office of Tribal President in the same election. Prior to the Fall/2013 election, the Mohican News included a

section entitled *Election Platforms* in its October 1st edition. This section gave candidates running for tribal council the opportunity to express their views on issues they felt were important to members of the community.

In Vele's *Platform*, which is at issue in this appeal, he stated:

I plan to ask a pointed question of Jo Ann Schedler about when she first got on Tribal Council in 2011. I stood listening as Jo Ann said she had to travel to Georgia and was just starting work and did not have any paid time off (PTO). Joe Miller told her to just fill out her time sheet with 40 hours on it because that was one of the perks Tribal Council received as being elected. If anyone else filled out a time sheet with incorrect hours and they did not work they would be fired (and if the rumors are true, some people have been fired from the casino for this very thing)!

Schedler brought this civil libel action against Vele, the Mohican News, and the Stockbridge-Munsee Community (hereinafter "SMC"). Schedler's complaint alleged she had been libeled by Vele's statement published in the October 1, 2013 edition of the Mohican News and the actions of the named defendants have substantially damaged her interests and reputation. Rob Orcutt, SMC attorney, moved to dismiss both the tribe and newspaper as parties contending the SMC has sovereign immunity and that Schedler failed to state a claim upon which relief may be granted. The trial court granted SMC's motion to dismiss.

A trial was conducted with Vele as the only remaining defendant. At trial, Schedler and her husband described the severity of her emotional injuries. No evidence was presented by Schedler to prove the statement made by Vele was in fact false. She also made no effort to prove that she suffered actual pecuniary loss as a result of the alleged libel. There were no expert witnesses that testified Schedler's emotional injuries resulted in depression. Vele did testify there was no malicious intent by his comments and the trial court agreed that his statement in the Mohican News was not a malicious attack.

At the conclusion of the trial, the court ruled Vele's statement was libelous and that he violated three General Policies of the Mohican News. The court ordered Vele to print a retraction in the Mohican News, provide Schedler with a letter of apology, and awarded Schedler court costs and legal fees in the amount of \$900. The court also stated that if Vele appealed the trial court's decision, it would double the award of court costs and legal fees he owes to Schedler to \$1800.

STANDARD OF REVIEW

In reviewing a public figure libel case, the court has a constitutional duty to exercise independent review of the entire record of the trial court to determine if the record establishes actual malice with convincing clarity.

ANALYSIS

The question presented is whether Chapter 2, §2.1(A) of the Stockbridge-Munsee Bill of Rights, 25 U.S.C. § 1302(a)(1) of the Indian Civil Rights Act of 1968 (ICRA), and the First Amendment of the U.S. Constitution shields Vele from tort liability for his speech in this case. Section 2.1(A) of the Stockbridge-Munsee Bill of Rights and 25 U.S.C. § 1302(a)(1) of the ICRA states that the tribe “shall not make or enforce any law abridging the freedom of speech or press.”¹ *Id.*

Congress passed the ICRA “with an intent to protect the individual rights of Indians while fostering tribal self-government and cultural identity.” *Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation*, 507 F.2d 1079, 1082 (8th Cir. 1975). Congress wanted to make clear it would not tolerate acts by tribal governments that ban freedoms of speech. Both §2.1(A) of the Stockbridge-Munsee Bill of Rights and 25 U.S.C. § 1302(a)(1) of the ICRA largely parallels the First Amendment when it comes to an individual’s freedom of speech rights. Thus, the same freedom of speech rights guaranteed by the First Amendment are also guaranteed by §2.1(A) of the Stockbridge-Munsee Bill of Rights and 25 U.S.C. § 1302(a)(1) of the ICRA within the Stockbridge-Munsee Community.

Defamation refers to false statements of fact that harm another’s reputation. Libel refers to written defamation. The essence of a defamation claim is the right to protect one’s good name. However, defamation suits often clash with freedom of speech rights guaranteed by the Stockbridge-Munsee Bill of Rights, the ICRA, and the First Amendment.

Stockbridge-Munsee Tribal Law is silent on the issue of defamation, therefore the Court of Appeals may look to federal case law for guidance; specifically, the seminal case of *New York Times Co. v. Sullivan*, 376 U.S. 254, (1964). In *New York Times*, the United States Supreme Court held that a public figure may not recover for damages for a defamatory falsehood without clear and convincing proof the false “statement was made with ‘actual malice’ – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” *Id.* at 279-80. Whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510-11 (1965).

We must first determine if Schedler is a public figure, and if so, whether Vele acted with actual malice when he published his statement in the October 1, 2013 edition of the Mohican News. The burden is on Schedler to establish Vele acted with actual malice with clear and convincing evidence.

¹ The First Amendment, which applies to the States through the Fourteenth Amendment, also prohibits laws abridging the freedom of speech or of the press.

Whether Schedler is a Public Official/Figure?

While a public official/figure must establish the defendant acted with actual malice in a defamation case, a private individual does not carry this same heavy burden. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). A private individual must simply show the defendant was negligent or at fault. *Id.* This is because public figures have greater access to the media and to a certain extent seek out public acclaim and assume the risk of greater public scrutiny. *See id.* Therefore, the most important legal issue in this case is determining the status of Schedler.

Whether Schedler is a public official/figure is not a difficult question for this Court to answer. The only reason we discuss it here is because the trial court failed to address this issue during trial.

By Schedler's own admission she has "enjoyed a substantial reputation in her home community as an elder, advisor, and former tribal council-woman." Schedler adds that she has "enjoyed an excellent reputation with tribal communities and entities within the State of Wisconsin and the Midwest including, but not limited to, her status as an organizer and advisor to Indian Summer, an annual festival . . . attended by thousands of people who are either tribal members or those interested in the preservation and advancement of Indian Culture." The fact that Schedler has served as a council-woman in the past, ran for tribal president, and is currently a council-woman, by definition makes her a public official.

Whether Vele Acted with "Actual Malice" When He Published the Alleged Defamatory Statement in the October 1, 2013 Issue of the Mohican News?

The First Amendment requires a public official plaintiff to show that in publishing the alleged defamatory statement, the defendant acted with actual malice – that is, "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times* at 279-80. This rule arose out of the concern that punishing individuals who could not guarantee the truth of all his assertions on official conduct would deter protected speech. *Gertz* at 334. It must also be emphasized that the actual malice standard is not satisfied merely through a showing of ill will. *See Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 88 (1967).

We must examine the statements in issue and the circumstances under which they were made to see whether they are protected under the principles of the First Amendment. *New York Times* at 285. Based on our review of the record we do not find there was actual malice in the statements made by Vele.

The burden in this case is entirely on Schedler to prove that the statements made by Vele were false and that he made those statements with knowledge they were false or with a reckless disregard of whether they were false or not. *See id.* at 279-80. Schedler testified that she could

not exactly recall when she traveled to Georgia. She did not provide any proof of the dates she traveled to Georgia and did not provide any proof for the record to show her entries on her time cards during her trip.

After reviewing Vele's statement in the Mohican News, it is difficult to find anything in his statement that can be proved as being false. Vele stated he was going to ask Schedler the question of whether she did in fact take a trip to Georgia and filled out her time sheet with 40 hours on it. He did not affirmatively state that Schedler did take a trip to Georgia and incorrectly filled out her time card or accuse her of doing so. He testified that he did in fact ask her the question and she answered it.

Public discussion of the "qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the *New York Times* rule." *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 300 (1971). Candidates who enter the political arena "must expect that the debate will sometimes be rough and personal and cannot cry foul when an opponent . . . attempts to demonstrate that he or she lacks the sterling integrity trumpeted in campaign literature and speeches." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 687 (1989).

In this instance, both parties were asked to provide briefs addressing the issue of whether Vele acted with actual malice when he published his statement in the Mohican News. Schedler's counsel falls far short of demonstrating that Vele's statement satisfies the actual malice standard. The only bit of proof he provides is that Vele was "in a unique position to know what sound editorial policy [is] and [what] the by-laws regarding this were." He offers no cases on the actual malice issue and cites no evidence that Vele acted with a reckless disregard for the truth. Litigants cannot merely mention arguments and leave it for the court to do counsel's work.

Vele at least points to the fact that he did testify there was no malicious intent by his remarks and the trial court agreed his remarks were not a "malicious attack." While we do review the entire record independently, determinations on credibility "are reviewed under the clearly-erroneous standard because the trier of fact has had the opportunity to observe the demeanor of the witnesses." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499-500 (1984). The trial judge had several opportunities to observe Vele's demeanor and made it clear he did not feel there was a malicious intent behind Vele's comments. Therefore, based on our review of the entire record, there is no evidence to support that Vele acted with actual malice.

Stockbridge-Munsee Tribal Law, Custom, and Tradition

Schedler's counsel suggests in his appellate brief that the court should return to the "Indian way of doing things" rather than simply adopting state or federal laws. However, he provides neither the necessary case law nor reasoned analysis to show what exactly is the "Indian way of doing

things.” As mentioned above, it is not enough for parties to merely mention arguments while leaving the court to do counsel’s work.

Stockbridge-Munsee Tribal Law does state “whenever there is uncertainty or a question as to the interpretation of certain provisions of this code, tribal law or custom shall be controlling and where appropriate may be based on the written or oral testimony of a qualified tribal elder, historian or other representative.” ESTABLISHING THE COURT: JUDGES; COURT PERSONNEL, Chapter 1, §1.3(B) *Purpose and Construction*. However, counsel for Schedler does not back up his assertions by providing the Court with any specific tribal custom, law, or code he is referring to. Furthermore, raising the issue of tribal custom for the first time on appeal, without giving Vele the chance to respond, violates his due process rights guaranteed by the Stockbridge-Munsee Bill of Rights and the ICRA. Due process means that parties should clearly understand what they are accused of doing, what the basis of the accusation is, and have a chance to respond to these accusations in court. Therefore, because counsel for Schedler does not provide the court with any basis of his claim, and since his claim is unaccompanied by developed argument, it must be waived. *See Tejada-Batista v. Morales*, 424 F.3d 97, 103 (1st Cir. 2005).

CONCLUSION

We conclude that Schedler is a public official/figure as defined in *Gertz*. Any person who puts themselves in a position to run for political office in the community is by definition a public official/figure. Furthermore, §2.1(A) of the Stockbridge-Munsee Bill of Rights, 25 U.S.C. § 1302(a)(1) of the ICRA, and the First Amendment requires that we prohibit Schedler from recovering damages for libel relating to her official conduct because she failed to prove that Vele’s statement was made with actual malice or a reckless disregard of the truth. *Judgment reversed.*

Dated this 29th day of June, 2016.

BY ORDER OF THE COURT:



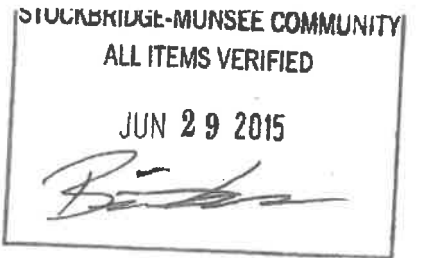
Chad Hendricks, Appellate Court Judge Pro Tempore

Stephan M. Grochowski
Stephan Grochowski, Appellate Court Judge Pro Tempore

Marianne Higgins
Marianne Higgins, Chief Appellate Court Judge



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STOCKBRIDGE-MUNSEE COURT OF APPEALS

Mohican Nation

Stockbridge-Munsee Community

Interlocutory Appeal of:

ROSE NUNEZ,

Petitioner,

Case No. IAP15-2014-AA-0004

vs.

STOCKBRIDGE-MUNSEE COMMUNITY
And Stockbridge-Munsee Health and
Wellness Center.

Respondent.

MEMORANDUM OPINION AND ORDER

Interlocutory Appeal from an order of the Stockbridge-Munsee Tribal Court (SMTC); Honorable Candace Des Armo Coury. *Reversed.*

INTRODUCTION

Stockbridge-Munsee Community and Stockbridge-Munsee Health and Wellness Center (hereinafter "Respondents") petitioned this court for interlocutory appeal following the Trial Court's denial of Respondents' motion to dismiss. The Respondents moved to dismiss Petitioner Nunez's (Nunez) claims asserting her complaint failed to state a claim upon which relief could be granted.¹ We agree and find that Nunez did not meet the statutory requirements of §53.5(A)(3) because she failed to give a brief description of the facts and events that gave rise to the alleged violations of the Respondents. We therefore reverse the Trial Court's decision to dismiss the Respondents' motion to dismiss.

¹ The Respondents also argue they are immune from suit based on the Doctrine of Sovereign Immunity. Because the Respondents are successful in their §53.5(A)(3) claim, the issue of sovereign immunity is not addressed in this opinion.

JURISDICTION

The Court has jurisdiction over this matter per §24 of the Stockbridge-Munsee (hereinafter "SM") Tribal Court's Rules of Procedure, which gives the Court of Appeals exclusive jurisdiction to review all decisions of the Tribal Court.

HISTORICAL BACKGROUND

Nunez was hired as an Assistant Director of the Stockbridge-Munsee Health and Wellness Center (hereinafter "SMHWC") on June 5, 2013 and remained in that position until she was terminated on July 28, 2014. On August 15, 2014, Nunez filed a wrongful termination claim under §53.3(M) of the SM Employee Rights Ordinance after she was terminated from her position as an Assistant Director. In her complaint, Nunez alleges that she was terminated from employment without *just cause* in violation of §53.3(M). Nunez requested: (1) the termination of her employment be reversed, (2) she receive back pay from the time of termination to reinstatement, and (3) she receive any other relief the court deems just and appropriate.

Respondents filed a motion to dismiss arguing Nunez failed to state a claim on which relief could be granted. The Trial Court denied the Respondents' motion to dismiss on December 5, 2015. Subsequently, Respondents filed this interlocutory appeal. The Trial Court granted a stay of the proceedings pending the Appellate Court's decision of Respondents' interlocutory appeal.

STANDARD OF REVIEW

Determining whether a complaint states a claim upon which relief can be granted is a question of law, which we review independently. However, we also benefit from persuasive discussions by the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007) and the Wisconsin Supreme Court in *Data Key Partners v. Permira Advisers LLC*, 356 Wis.2d 665, 849 N.W.2d 693 (2014).

ANALYSIS

We are presented with the question of what Nunez must plead in order to state a claim for relief under §53.3(M) of the SM Tribal Law. Nunez asserts in her complaint that she was terminated from employment without *just cause* in violation of §53.3(M).

Section 53.5(A)(3) of the SM Tribal Law (Employee Rights Ordinance) requires that a complaint filed in tribal court include:

A brief description of the facts and events that gave rise to the alleged violation, including the names of potential witnesses and the name of the petitioner's supervisor, if applicable.

The federal counterpart to §53.5(A)(3) is Rule 8(a)(2) of the Federal Rules of Civil Procedure (FRCP), which requires:

A short and plain statement of the claim showing that the pleader is entitled to relief.

The state counterpart to §53.5(A)(3) and to FRCP 8(a)(2) is Wisconsin Statute 802.02(1)(a), which requires a complaint to include:

A short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief.

In its seminal *Twombly* decision, the United States Supreme Court clarified that a pleading must contain a "short and plain statement of the claim showing the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555. The Court further explained that ". . . to survive a motion to dismiss, a complaint must contain only enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* at 556. Courts will not accept legal conclusions couched as factual allegations. *Id.* at 555.

In *Data Key*, the Wisconsin Supreme Court adopted the plausibility standard of *Twombly*. See *id.*, 356 Wis.2d at 681. The Court went on to explain that "sufficiency of a complaint depends on substantive law that underlies the claim made because it is the substantive law that drives what facts must be pled." *Id.* Furthermore, "plaintiffs must allege facts that plausibly suggest they are entitled to relief." See *id.*

The substantive law that drives what facts must be pled in a SM §53.3(M) claim (termination from employment without *just cause*) was created by the Court in *Sheldon R. Davids v. Mohican North Star Casino, et al.* 98-AA-013 (May 1999). *Davids* provides the framework for analyzing whether an employee was terminated without *just cause* in violation of §53.3(M). The *Davids* test depends on whether "the decision to terminate [was] fair, impartial and consistent with procedural rules set forth by the employer." *Id.* Therefore, to survive a motion to dismiss, plaintiffs must plead facts sufficient to plausibly show that an employer's actions were unfair, partial, and inconsistent with its own procedural rules.

In the case before us, Nunez asserted she was terminated without *just cause* in violation of §53.3(M). To support this contention she simply repeated the legal conclusion set out in §53.3(M). Nunez failed, however, to plead facts supporting this legal conclusion showing she is entitled to relief. Simply restating the cause of action is not enough to make a claim that a right to relief is plausible.

Nunez's complaint is not completely devoid of facts. It contains facts showing that Mr. Mian (Mian) served Nunez with a letter notifying her of his decision to terminate her. It also alleges that Mian failed to communicate with Nunez on a few occasions after Nunez received a written warning from Mian and after she was suspended by Mian pending her termination. However, these allegations fall far short of plausibly showing that Nunez is entitled to relief for being terminated without *just cause*.

Not only did Nunez's pleadings fail to follow the framework provided for by the *Davids* case, she failed to plead any facts alleging her termination was unjust. As stated above, §53.5(A)(3) requires "[a] brief description of the facts and events that gave rise to the alleged violation, including the names of potential witnesses and the name of the petitioner's supervisor, if applicable." None of the facts or events that Nunez provided alleged how her termination was in violation of SM Tribal Law. We do not require that a complaint include detailed factual allegations, but it must contain more than a bare, the defendant unlawfully harmed me accusation. Simply stated, Nunez failed to show how the Respondents have acted improperly.

The Trial Court erred when it found that Nunez complied with the requirements of §53.5(A)(3). While it acknowledged that §53.5(A)(3) requires a brief description of the facts, the Trial Court failed to show how Nunez complied with these requirements. Simply asserting any set of facts is not enough to survive a motion to dismiss. The plaintiff's complaint must describe the facts and events that led to her termination without *just cause* . Nunez's complaint completely fails in this respect.


Furthermore, the Trial Court erred when it found Nunez was not required to plead the elements of *just cause* provided for by the *Davids* case. The Trial Court's suggestion that it will determine whether the elements of the *Davids* case are met in trial places an undue burden on the Respondents. This precedent could lead to a never ending black hole of discovery that would cause an unjustifiable harm to the Respondents. The complaint must provide enough information to create an inference the suit has sufficient merit that allows the defendant to respond to a limited discovery demand. Therefore, since the Trial Court did not require Nunez to plead to the elements of *Davids* or require her to give a brief description of the facts or events that led to her termination, we reverse.

CONCLUSION

Nunez's complaint cannot support the argument that the Respondents terminated Nunez without *just cause* in violation of Ordinance 53.5(M). Accordingly, we reverse the Trial Court's denial of the Respondents' motion to dismiss, and render judgment dismissing all claims against the Respondents.

Dated this 29th day of June, 2015.

BY ORDER OF THE COURT:


Lead Judge Chad Hendricks - Pro Tempore

Richard J. Ackley
Judge Richard Ackley - Pro Tempore

Marianne Higgins
Chief Judge Marianne Higgins

STOCKBRIDGE-MUNSEE COURT OF APPEALS

Mohican Nation

Stockbridge-Munsee Community

Wayne B. Ahlers,
Petitioner/Appellee,

Case No. 2016-AP-2016-AA-001

v.

Stockbridge Munsee Community,
Respondent/Appellant.

11-09-16A03:35 FILE

ORDER DENYING MOTION FOR RECONSIDERATION

This case has come before the Stockbridge-Munsee Court of Appeals Judges Pro Tempore Diane House and Eugene Whitefish, and Chief Judge Marianne Higgins presiding.

PROCEDURAL BACKGROUND

On May 18, 2016, the Stockbridge-Munsee Community (hereinafter "Respondent") petitioned the Appeals Court for an interlocutory appeal following the Tribal Court's remand order mandating casino management to complete an investigation into Wayne B. Ahlers' (hereinafter "Ahlers") termination, and suspending a decision on Respondent's Motion to Dismiss pending the outcome of this investigation. In an October 4, 2016 decision issued as a Memorandum Opinion and Order ("hereinafter Appellate Order"), this Court agreed in part with the Tribal Court and found Ahlers has alleged sufficient facts to meet the statutory requirements of §53.3(M) and §53.5(A) of Chapter 53 of the Stockbridge-Munsee Employee Rights Ordinance. The Appellate Court also found that a harassment suit was barred in this instance under Section §53.35(D). Thus, the interlocutory appeal of Respondent's motion to dismiss alleging 1) failure to state a claim upon which relief can be granted was denied in part; and 2) immunity from suit based upon the doctrine of sovereign immunity was granted in part. In addition, the Appellate Order determined that the Tribal Court's decision to remand this matter back for an investigation to be completed by management was an error of law, and as a result, reversed the Tribal court's remand order and ordered that Ahlers' be entitled to the relief he requested in his original petition to the Tribal Court.

On October 13, 2016, the Respondent filed a Motion for Reconsideration and a request to vacate the Appellate Order. In accordance with Tribal Court Code §1.6.5 (C) (7), *Post-judgment Motions or Relief*, the filing of this motion is considered timely, and as a result, the motion will be considered by this Court. Ahlers has not filed a response to Respondent's Motion for Reconsideration to date.

STANDARD OF REVIEW

There is no clear provision in Stockbridge-Munsee law that provides guidance on how the courts are to review motions for reconsideration. However, this Court will utilize a standard of review for motions for reconsideration based upon substantive law created in *Stockbridge-Munsee Community v. Elton Louis*, 2000-AA-003 (July 2008). In the *Louis* case, the Appellate Court limited itself to correcting manifest errors of law or fact in its review of a motion for reconsideration. *Id* at 4. This application is based on *Wis. Stat.* §809.24 as interpreted in *Keene Corp. v. Int'l Fidelity Ins. Co.*, 561 F. Supp. 656, (ND.Ill.1982), *aff'd*, 736 F.2d 388 (7th Cir. 1984), which held that "motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence" *Id* at 665.

Denial of Trial on the Merits of the Case

The Respondent's main argument in its Motion for Reconsideration to the Appellate Court is that this matter, which originated as an Interlocutory Appeal of the Tribal Court's suspension of a decision on Respondent's Motion to Dismiss, "never proceeded to a trial on the merits of the case with witnesses, testimony and exhibits being presented and both parties being afforded a cross-examination" (Respondent's Brief page 4). As a result, Respondent argues that proper procedure was not followed and it was error on the part of the Appellate Court to order the remedies provided for in Chapter 53.5(F) of the Stockbridge-Munsee Employee Rights Ordinance.

At the trial level, after oral arguments were heard from both parties on the Respondent's Motion to Dismiss, and Ahlers' Motion to Deny Respondent's Motion to Dismiss, the Tribal Court made certain undisputed findings within an Order entitled "Ruling on Motions (suspended) (hereinafter

“Tribal Order”) which was issued on May 6, 2016. After the Appellate Court’s review of the record and the Tribal Order, the Appellate Court concluded that:

It is undisputed that Ahlers filed a grievance with casino management on December 14, 2015. It is also undisputed that casino management failed to provide any response to Ahlers’ grievance in the required time frame. The Tribal Court was correct when it determined that the failure of management to respond in the required time frame “goes against the SM Community’s own written policy of invalidating a corrective action, Ahlers’ discharge, when no one responded to his December 2015 grievance” (Tribal Court Order, pg. 6). The Tribal Court also determined that by filing his grievance with casino management, Ahlers attempted to exhaust all administrative remedies, but was hindered by management by their non-compliance in following procedure. With his December 14, 2015 filing, Ahlers had a right to have his grievance reviewed, but was denied this right by a failure in the administrative process. As a matter of law, this non-compliance, or the failure to respond to the grievance within the required time frame, mandates that the corrective action be invalidated in accordance with the following section of the Mohican North Star Casino Employee Handbook’s grievance process:

“If a supervisor at any level does not respond to the grievance within the required timeframe and the triggering event was a corrective action, that corrective action should be invalidated.” (emphasis added).

Because of this finding of a clear violation of policy by casino management, it was an error to remand this matter back through the administrative process as the administrative process was already exhausted. It would also be unfair to require Ahlers to go through an administrative process that had already failed to provide him his due process on his grievance.

Both the Tribal and Appellate court acknowledged that Stockbridge-Munsee law requires that the plaintiff attempt to exhaust administrative remedies before coming to the Tribal Court for relief. In this case, Ahlers initially attempted to go through the administrative process for his grievance, but was denied this access. As was Ahlers’ right under §53.4 (A) (1) and (2) of the Stockbridge-Munsee Employee Rights Ordinance, he can then choose to petition the Tribal Court for relief if he can sufficiently allege a violation of the employee rights enumerated in Section 53.3 occurred and that exhaustion of the internal dispute resolution process would not further the process of resolving the problem. Based upon the review of the findings of the Tribal Court, Ahlers met his burden in this respect, and as a result, is entitled to pursue his remedies in the court system as opposed to being redirected again toward an administrative remedy.

Respondent takes issue in its Motion for Reconsideration that a hearing never occurred under Section 53.5 of the Employee Rights Ordinance. In the court procedures enumerated under Section 53.5, it is important to understand that a contested case hearing is mainly an evidentiary hearing, whose purpose is to develop a record to decide factual disputes. In the court procedures, the petition begins the process which initially requires a recitation of the factual issues that gave rise to the alleged violation of the employees' rights (§53.5 (A) and (B)). The requirements for a pre-hearing conference also focuses mainly on evidentiary issues (§53.5 (C)). The hearing is then conducted as an evidentiary hearing, after which the Tribal judge is required to prepare findings of fact based upon the evidence presented to the court (§53.5 (D), (E), and (F)).

Consistent with this purpose, it seems reasonable that the court is not required to proceed to trial or has the discretion to deny contested case hearings for issues that do not involve factual disputes. Requiring a hearing to resolve what are purely uncontested facts would not be in the interest of justice. It would also impose a step in the process that serves no other function but to elongate said process. In addition, it burdens all parties to the action: the person challenging the action giving rise to the dispute, other interested parties, and the courts with additional and unnecessary expenses. For these reasons, this Court has determined that because there was no dispute to the fact that casino management failed to provide **any** response to Ahlers' grievance filed on December 14, 2015, this matter did not need any further development of an evidentiary record to prove that management failed to investigate his grievance. As a result, it was determined that because of the error or failure to apply the law correctly in reaching a decision i.e. failure to provide Ahlers the remedy he requested and was entitled to: the actual invalidation of the termination, this was an abuse of the Tribal Court judge's discretion subject to reversal.

Similar to the procedural rule articulate in *Louis*, this Court approaches a Motion to Reconsider with great reluctance and is limiting itself to correcting only manifest errors of law and fact in this instance. After review of the record and the Appellate Order, this Court finds no manifest errors of law or fact occurred. There still is no dispute as to the main facts that give rise to Ahlers' right to his remedy: Ahlers filed a timely grievance of his termination and casino management failed to provide any response to this grievance. As a matter of law, his termination is to be invalidated. Because he petitioned for this remedy in the court system, the court system

has the discretion to provide this remedy to him if violations of his employee rights occurred. As a result, the Appellate Court corrected the error made by the Tribal Court judge when she found that a violation of Ahlers' rights had occurred, but did not follow through and provide the correct remedy as a matter of law.

Timelines Taken by the Courts

The Respondent also takes issue with the alleged delays in issuing the Tribal Court Order on April 24, 2016, and the Appellate Order on October 4, 2016 respectively. Regarding the Appellate Order, on August 9, 2016, the parties were notified by the Tribal Clerk that the Appellate panel had met and reached a decision on August 5, 2016; and that an order on this decision will be issued within 60 days. The Appellate Order was issued on October 4, 2016-this is within the 60-day timeframe noticed to all parties on August 9, 2016.

The Respondent also takes issue with the delay in the issuance date of the Tribal Court Order which occurred on May 6, 2016, two days past the extension of time granted by the Honorable Judge Coury on April 24, 2016. The Court acknowledges this two-day delay in issuing the order occurred, and apologizes on behalf of the Tribal Court for this two-day delay. As a result, the remedy granted to Ahlers will be adjusted to take into account this two-day delay taken by the Tribal Court.

CONCLUSION

After review of the record and the Appellate Order, this Court has again determined that because there was no dispute to the fact that casino management failed to provide any response to Ahlers' grievance filed on December 14, 2015, this matter did not need any further development of an evidentiary record to prove that management failed to investigate his grievance. Based upon the above, this Court finds no manifest errors of law or fact occurred by its action of not remanding this matter back for a trial on its merits. As a result, the Motion for Reconsideration is denied in part. However, the Court has determined that the Tribal Court decision was issued two days after the extension deadline and as a result, the remedy provided by the Appellate Order issued on October 4, 2016, is amended in part as follows:

- 1) The termination of Ahlers is to be invalidated and removed from his employment record;
- 2) Ahlers is to be reinstated to his former position as a Slot Attendant;
- 3) Ahlers is to be awarded back pay from the date of his termination until the date of his reinstatement, **minus the amount of wages equal to two days back pay**; and
- 4) Ahlers is to be provided the PTO that would have been accrued during the time period between his termination and reinstatement.

IT IS SO ORDERED.

Dated this 9th day of November, 2016.

BY THE COURT OF APPEALS:

Diane House

Diane House, Lead Appellate Court Judge Pro Tempore

Eugene Whitefish

Eugene Whitefish, Appellate Court Judge Pro Tempore

Marianne Higgins

Marianne Higgins, Chief Appellate Court Judge



STOCKBRIDGE-MUNSEE COURT OF APPEALS

Mohican Nation

Stockbridge-Munsee Community

Interlocutory Appeal of:

Wayne B. Ahlers,
Petitioner/Appellee,

Case No. 2016-AP-2016-AA-001

v.

Stockbridge Munsee Community,
Respondent/Appellant.

MEMORANDUM OPINION AND ORDER

This case has come before the Stockbridge-Munsee Court of Appeals Judges Pro Tempore Diane House and Eugene Whitefish, and Chief Judge Marianne Higgins presiding.

INTRODUCTION

The Stockbridge-Munsee Community (hereinafter "Respondent") petitioned this Court for an interlocutory appeal following the Trial Court's remand mandating casino management to complete an investigation into Ahlers' termination, and suspending a decision on Respondent's Motion to Dismiss pending the outcome of this investigation. We agree with the Tribal Court and find Ahlers has alleged sufficient facts to meet the statutory requirements of §53.3(M) and §53.5(A) of Chapter 53 of the Stockbridge-Munsee Employee Rights Ordinance. We also find that a harassment suit is barred in this instance under Section §53.35(D). As a result, the interlocutory appeal of Respondent's motion to dismiss alleging 1) failure to state a claim upon which relief can be granted is *denied in part*; and 2) immunity from suit based upon the doctrine of sovereign immunity is *granted in part*.

In accordance with the Mohican North Star Casino Employee Handbook's grievance process, the failure of management to respond to the grievance within the required time frame mandates that the corrective action or termination be invalidated. As a result, the decision to remand this matter back for an investigation is an error and is *reversed*.

10-03-16 P04:1A FILE

JURISDICTION

The court has jurisdiction over this matter per Chapter 1, §1.6 (L) and (L) (3) of the Stockbridge-Munsee Tribal Court Code which gives the Court of Appeals the jurisdiction to hear appeals from the Trial Tribal Court and interlocutory appeals of issues that do not terminate the litigation, but are sufficiently important and collateral to the merits of the litigation as to be treated as final and appealable, including sovereign immunity.

BACKGROUND OF CASE

On December 14, 2015, Wayne B. Ahlers (hereinafter “Ahlers”) submitted a North Star Mohican Casino Resort Grievance Review Form to HRD and casino management, with said filing intended to commence the grievance process for appealing his recent termination from the slot department. Receiving no response from management within the required timeframe, Ahlers filed the appeal of his suspension pending termination/termination with the Tribal Court on January 11, 2016. On February 1, 2016, Respondent filed a motion to dismiss, presenting arguments on both sovereign immunity and failure to state a claim upon which relief can be granted as reasons to dismiss Ahlers’ appeal. On May 6, 2016, after hearing oral arguments from both parties, the Tribal Court Judge issued an order which remanded this case back to the Mohican North Star Casino management to conduct an investigation into the December 14, 2015 grievance filed by Ahlers. This order also suspended any decision on Respondent’s motion to dismiss pending the results of the investigation. On June 7, 2016, the Respondent filed a petition for an interlocutory appeal of Judge Coury’s order, alleging an error of fact and law in her decision to 1) allow this appeal to move forward, and 2) suspend a decision on the motion to dismiss pending the outcome of an investigation to be completed by casino management.

ISSUES PRESENTED

Did Ahlers plead sufficient facts to meet the statutory requirements of §53.3(M) and §53.5 of Chapter 53 of the Stockbridge-Munsee Employee Rights Ordinance?

Did the Tribal Court err when it remanded this matter to back to management to complete an investigation into Ahlers’ grievance?

ANALYSIS

The threshold issue that is presented to this Court is whether Ahlers plead sufficient facts to meet the statutory requirements of §53.3(M) and §53.5(A) of Chapter 53 of the Stockbridge-Munsee Employee Rights Ordinance. As this is question of law that involves the whether a complaint meets the statutory requirement in an existing law or statute, this Court will review this matter de novo (Stockbridge-Munsee Tribal Court Code, Section 1.6 (5)). This standard of review allows the Appeals Court to review this matter with no deference to the Trial Court's holding in order to determine whether the lower court or in this case, the Tribal Court, acted correctly.

Respondent filed a motion to dismiss arguing in one instance that Ahlers' petition for relief should be dismissed as it failed to state a claim upon which relief can be granted. Respondent cites Nunez v. Stockbridge-Munsee Community as controlling in this instance as it lays out the statutory requirement of what must be plead in order to survive a motion to dismiss for failure to state a claim upon which relief can be granted (Case No. IAP15-2014-AA-004). Respondent further argues that Ahlers also failed to meet the Davids test, and as a result, Respondent's motion to dismiss should have been granted by the Tribal Court. We disagree.

One of the issue presented involves the interpretation of what is required to successfully plead that a termination from employment without just cause occurred under §53.3 (M) of the Stockbridge-Munsee Employee Rights Ordinance. As tribal law is silent, Sheldon R. Davids' v. Mohican North Star Casino, et al. (Case No. 98-AA-013, May 3, 1999), provides the framework from substantive law of what constitutes termination for just cause. Pursuant to Davids , when determining whether "just cause" for termination exists, the Court must determine whether "the decision to terminate [was] fair, impartial and consistent with the procedural rules set forth by the employer" *Id.* at 4.

In this instance, the Tribal Court applied the holdings articulated in Nunez and Davids , and found that Ahlers met his burden of persuasion when he alleged facts, sufficient to show that casino management, by not conducting an investigation into his grievance filed on December 14, 2015, failed to follow existing procedures. When Ahlers was terminated with no investigation into his grievance, the Tribal Court determined that this was "effectively, a discharge without just cause"

because there exists an administrative policy that invalidates any corrective action taken if timelines are not adhered to (Tribal Court Order, Pg. 5). We agree with the Tribal Court in its assessment that Ahlers met his burden of persuasion in pleading that a termination from employment without just cause occurred under §53.3 (M) of the Stockbridge-Munsee Employee Rights Ordinance.

As articulated in *Nunez*, Court Procedures Section §53.5(A)(3) of the Stockbridge-Munsee Employee Rights Ordinance also require that a petition for relief include “a brief description of the facts and events that gave rise to the alleged violation, including the names of potential witnesses and the name of the petitioner’s supervisor, if applicable.” The Tribal Court found that Ahlers set forth enough facts to allege a specific violation of the following section of the Mohican North Star Casino Employee Handbook’s grievance process:

“If a supervisor at any level does not respond to the grievance within the required time frame and the triggering event was a corrective action, that corrective action should be invalidated.”

The Tribal Court found this failure to investigate or act as “inherently unfair and an abuse of discretionary authority by an administrative agency” (see Tribal Court Order, p. 5). By finding that Ahlers set forth facts sufficient enough to allege the decision to terminate Ahlers was partial, biased, and inconsistent with existing policies, the Tribal Court determined that Ahlers’ cause of action must stand. We agree with the Tribal Court in its determination of the sufficiency of Ahlers’ pleadings in this aspect. As a result of this finding, the motion to dismiss for failure to state a claim upon which relief can be granted is denied.

In the alternative, Respondent also presents an argument that Ahlers’ claim of harassment under Section §53.35(D), is barred from proceeding as the tribe is immune from suit due to its inherent sovereign immunity. We agree with Respondent’s arguments on this issue that a harassment suit is barred in this instance under Section §53.35(D). However, framing this appeal solely as a harassment action, and not an appeal of termination action is unpersuasive. Although Ahlers alleges a violation of §53.35 (D) by management, Ahlers appears only to bring forward harassment as an affirmative defense in his grievance filed on December 14, 2015. To support,

Ahlers makes allegations of selective enforcement of rules by management as support for his claim of being treated unfairly or singled out for corrective action. Based upon what was presented in the filings and at the hearing, the Tribal Court correctly determined that this is an appeal of a termination from employment action. However, the Tribal Court did not address Respondent's claim of harassment which is barred under Section §53.35 (D). Furthermore, the Tribal Court found Ahlers has alleged sufficient facts to meet the statutory requirements of §53.3(M) and §53.5 (A) of Chapter 53 of the Stockbridge-Munsee Employee Rights Ordinance. We agree with the Tribal Court in its determination of the sufficiency of Ahlers' pleadings in this aspect. As a result, Ahlers appeal of his termination to the Tribal Court is appropriate. In addition, the laws regarding the waiver of Respondent's sovereign immunity for a harassment claim under §53.5 (D) do not apply to Ahlers' claim of wrongful termination in this instance.¹ As a result of these findings, the Respondent's motion to dismiss the harassment claim based upon sovereign immunity is granted in part; and the Respondent's motion to dismiss for failure to state a claim upon which relief can be granted is denied in part.

Did the Tribal Court err when it remanded this matter to back to management to complete an investigation into Ahlers' grievance?

Another issue presented to this Court is whether the Tribal Court erred when it suspended a decision on Respondent's motion to dismiss pending the outcome of a court-directed investigation. After the complaint was allowed to move forward, the Tribal Court ordered that the case be remanded back to Casino management in order to conduct an investigation into the December 14, 2015 grievance filed by Ahlers. When the Tribal Court judge directed an investigation into the grievance filed by Ahlers, this was an act of judicial discretion. As a result, one of the questions on appeal is whether the trial judge committed legal error in exercising her discretion with the action taken in this instance.

Stockbridge-Munsee Tribal Law §1.6(L) (5) states that judicial rulings in discretionary matters

¹ Because Ahlers is successful in his §53.5 (A) claim, this issue of sovereign immunity of the tribe is only addressed in part with regard to his claim of harassment.

are reviewed on the basis of whether there was an abuse of discretion. We look for guidance in determining how to review judicial rulings in discretionary matters. In *Koon v. United States*, the Supreme Court determined that a district or lower court by “definition abuses its discretion when it makes an error of law”. 518 U.S. 81, 100 (1996). This leaves the Court with the understanding that the failure to apply the law correctly in reaching a decision is an abuse of discretion. Based upon this standard of review, we essentially review for legal error under a de novo standard. This means we independently determine whether the correct standard of law was applied, but uphold the trial court’s findings of fact unless they are clearly erroneous (Stockbridge-Munsee Tribal Law §1.6(L) (5)).

The Tribal Court made certain undisputed findings. It is undisputed that Ahlers filed a grievance with casino management on December 14, 2015. It is also undisputed that casino management failed to provide any response to Ahlers’ grievance in the required time frame. The Tribal Court was correct when it determined that the failure of management to respond in the required time frame “goes against the SM Community’s own written policy of invalidating a corrective action, Ahlers’ discharge, when no one responded to his December 2015 grievance” (Tribal Court Order, pg. 6). The Tribal Court also determined that by filing his grievance with casino management, Ahlers attempted to exhaust all administrative remedies, but was hindered by management by their non-compliance in following procedure. With his December 14, 2015 filing, Ahlers had a right to have his grievance reviewed, but was denied this right by a failure in the administrative process. As a matter of law, this non-compliance, or the failure to respond to the grievance within the required time frame, mandates that the corrective action be invalidated in accordance with the following section of the Mohican North Star Casino Employee Handbook’s grievance process:

“If a supervisor at any level does not respond to the grievance within the required time frame and the triggering event was a corrective action, **that corrective action should be invalidated.**”(emphasis added).

Because of this finding of a clear violation of policy by casino management, it was an error to remand this matter back through the administrative process as the administrative process was already exhausted. It would also be unfair to require Ahlers to go through an administrative process that had already failed to provide him his due process on his grievance. It is time to make Ahlers whole. As a result, due to the violation of policy, there should be a just remedy made available to Ahlers.

ORDER

We conclude that the Tribal Court applied the correct legal standard when it determined that Ahlers plead sufficient facts to meet the statutory requirements of §53.3(M) and §53.5 of Chapter 53 of the Stockbridge-Munsee Employee Rights Ordinance. We also find that a harassment suit is barred in this instance under Section §53.35(D). As a result, the interlocutory appeal of Respondent's motion to dismiss alleging 1) failure to state a claim upon which relief can be granted is denied in part; and 2) the doctrine of sovereign immunity is granted in part.

As a matter of law, the failure to respond to the grievance within the required time frame mandates that the corrective action or termination be invalidated. As a result, the decision to remand this matter back for an investigation is an error and must be reversed. In accordance with the remedies provided for in Chapter 53.5(F) of the Stockbridge-Munsee Employee Rights Ordinance, this Court hereby orders the following:

- 1) The termination of Ahlers is to be invalidated and removed from his employment record;
- 2) Ahlers is to be reinstated to his former position as a Slot Attendant;
- 3) Ahlers is to be awarded back pay from the date of his termination until the date of his reinstatement; and
- 4) Ahlers is to be provided the PTO that would have been accrued during the time period between his termination and reinstatement.

IT IS SO ORDERED.

Dated this 30th day of September, 2016.

BY THE COURT OF APPEALS:

Diane House

Diane House, Lead Appellate Court Judge Pro Tempore

Eugene Whitefish

Eugene Whitefish, Appellate Court Judge Pro Tempore

Marianne Higgins

Marianne Higgins, Chief Appellate Court Judge



STOCKBRIDGE-MUNSEE COURT OF APPEALS

Mohican Nation

Stockbridge-Munsee Community

**Jolene Bowman and
Joseph Miller,
Petitioners/Appellees,**

v.

Case No: 16-AP 2016-RO-0007

**Stockbridge Munsee Community Election Board,
Respondents/Appellants.**

TH, FEB 23 '17 PM 12:02

DECISION

This case has come before the Stockbridge-Munsee Court of Appeals Judges Pro Tempore Diane House and Steven Bouley, and Chief Judge Marianne Higgins presiding.

INTRODUCTION

The Stockbridge Munsee Community Election Board (hereinafter "Election Board") appeals the Stockbridge-Munsee Tribal Court's (hereinafter "Tribal Court") November 18, 2016 order vacating the Election Board's October 14th, 2016 order and its issuance of a permanent injunction against holding a new annual election. *Affirmed.*

JURISDICTION

The court has jurisdiction over this matter per Chapter 1, §1.6 (L) of the Stockbridge-Munsee Tribal Court Code which gives the Court of Appeals the jurisdiction to hear appeals from the Tribal Court.

PROCEDURAL BACKGROUND

On October 8, 2016, the Stockbridge-Munsee Community held its annual election for its Vice-President, four council seats, and two education board member positions. After certifying the election results, the Election Board received two letters from enrolled tribal members Joe Miller (hereinafter "Miller") (Miller is also one of the Petitioners/Appellees in this matter; and Councilmember-elect), and Wayne Murphy (hereinafter "Murphy"), asserting election challenges due to the denial of several recently-enrolled tribal members' right to vote said

election. On October 14, 2016, the Election Board issued its decision and determined that due to this denial of tribal members' right to vote, this constituted a violation of the Election Ordinance. Based upon this violation, the Election Board ordered a new election to take place on November 12, 2016. On October 18, 2016, both Miller and Murphy withdrew their challenges on the October 8 election, and requested reconsideration and vacation of the October 14th Election Board decision that ordered a new election to take place on November 12, 2016. On October 24, 2016, the Election Board issued its decision and denied these requests for reconsideration and vacation of its October 14th order.

On October 19, 2016, Vice-President-elect Jolene Bowman (hereinafter "Bowman") petitioned the Tribal Court for injunctive relief to void the Election Board's October 14th decision that ordered a new election to be held on November 12, 2016; and to authenticate the October 8, 2016 election results. On October 20, 2016, Councilmember-elect Miller also filed a petition for injunctive relief to cancel the upcoming November 12, 2016 election and to set aside the October 14th Election Board decision and order (Bowman and Miller's cases were later consolidated as one). On November 3, 2016, the Tribal Court issued a Preliminary Injunctive order that indefinitely suspended all activity relating to holding a new 2016 election, pending a final decision. On November 18, 2016, the Tribal Court issued its final decision and ordered the October 14, 2016 Election Board decision to be vacated in its entirety. In addition, the Tribal Court issued a permanent injunction commanding the Election Board to refrain from any further effort at rescheduling a new 2016 tribal election and ordered the certified election winners to be sworn in without further delay. On November 21, the Election Board filed a Notice of Appeal of the Tribal Court's November 18th decision and a Motion to Stay the implementation of the swearing in of the newly elected officials until the appeal process is exhausted.

STANDARD OF REVIEW

Stockbridge-Munsee Tribal Law §1.6(L)(5) states that judicial rulings in discretionary matters are reviewed based on whether there was an abuse of discretion. We independently determine whether the correct standard of law was applied as a de novo review, but uphold the trial court's findings of fact unless they are clearly erroneous. *Id.* Furthermore, errors that are not likely to have had a substantial impact on the decision or on substantial rights are considered "harmless

errors” and are not a basis for reversal. *Id.* This standard of review is heavily weighted in support of an original hearing body’s findings.

ISSUES PRESENTED

Did the Tribal Court commit an error of law with its application of Chapter 49 and the *Chicks*¹ decision to the undisputed facts in this case? Did the Tribal Court abuse its discretion by granting the permanent injunction?

ANALYSIS

This action was initiated by Bowman and Miller, both who were certified as two of the winning candidates in the election, as requests for injunctive relief. The Tribal Court determined that “this case is more accurately identified as an Administrative Appeal (Chapter 5) involving a tribal election dispute, that is, more specifically governed by Chapter 49”². The Tribal Court also found Chapter 49 silent with respect to injunctive relief, and properly looked for guidance under Chapter 1 of the Stockbridge-Munsee Tribal Court Code.³

One of the Election Board’s main arguments in this matter is that Miller and Murphy should not be allowed to “unilaterally dismiss an action after a decision has been issued”.⁴ The Election Board also argues that it is not required to abrogate its decision after receiving the reconsideration requests from Miller and Murphy⁵. The Election Board is correct in both of these assertions. Miller and Murphy had no rights to a dismissal after the Election Board made its decision to order a new election. In this instance, Miller and Murphy both filed requests for the Election Board to reconsider the October 14th decision. The Election Board was the decision-maker in this instance. They were not required to abrogate its decision; and chose not to do so.

¹Decision and Order, *Chicks v. Stockbridge-Munsee Community, et al.*, 2011-TRO-0005 (October 24, 2011).

²Decision and Order at 7, *Bowman & Miller v. Stockbridge-Munsee Community Election Board*, 2016-RO-0007 (November 18, 2016).

³*Id.*

⁴Respondent/Appellant’s Brief at 10, *Bowman & Miller v. Stockbridge-Munsee Community Election Board*, 16-AP 2016-RO-0007 (December 9, 2016).

⁵*Id.*

The Election Board was charged with the decision to reconsider their order and chose to stand by it. It is this decision that the Tribal Court examined for errors of law and for potential abuses of discretion. Our charge is then to review how the Tribal Court came to its conclusion 1) to vacate the October 14th Election Board order; 2) to issue a permanent injunction prohibiting the Election Board from taking any further action at rescheduling a new 2016 tribal election; and 3) to order the certified election winners to be sworn in without further delay.

Stockbridge-Munsee Tribal Law §1.6(L)(5) allows us de novo review to initially determine whether the correct standard of law was applied. For guidance, we look to other jurisdictions that have set forth a functional inquiry for determining whether de novo review is appropriate. For example, the Ninth Circuit proposed in *United States v. McConney*, 728 F2d 1195 (9th Cir. 1984), that if application of the rule of law to the facts requires an inquiry that is “essentially factual,” then it should be reviewed under the clearly erroneous standard. *Id.* If, on the other hand, if the question requires the court to consider legal concepts and to exercise judgment about the “values that animate legal principles,” then the question should be reviewed de novo. *Id.* at 120.⁶ As a result, it would be appropriate to reverse the Tribal Court’s decision only if it was based upon a clear mistake of law or upon clearly erroneous findings.

We find no errors law with the Court’s finding that the provisions in Chapter 49 and the Chicks decision are applicable to this matter before us. The Tribal Court considered whether the Election Board failed to follow its own precedent in Chicks and committed an error of law by not conducting a hearing as requested by Miller. It found that because §49.12 (A) requires such things as notice of any disputes to be provided to all candidates, this ordinance not only anticipates and authorizes the Election Board to provide a hearing, but actually requires it to do so.⁷ It is undisputed that notice was not given to all of the other candidates about the October 11th and October 18th filings by candidate Miller. Furthermore, by not holding a hearing, the Tribal

⁶ See Georgetown Writing Center’s “Identifying and Understanding Standards of Review” at 2 (The Writing Center at GULC, 2013).

⁷ Decision and Order at 22, *Bowman & Miller v. Stockbridge-Munsee Community Election Board*, 2016-RO-0007 (November 18, 2016).

Court determined that an error of law occurred due to violations of the precedent set in *Chicks* which interpreted both §49.12 and §49.12 (B)(3).⁸ We agree with Tribal Court's conclusions of law on this issue. If the Tribal Court determined some principles of the election law was violated by the Election Board in its review, then it is appropriate in this instance for the Tribal Court to provide equitable relief to Bowman and Miller, especially given there are more limited remedies available in the Election Ordinance.

Stockbridge-Munsee Tribal Law §1.6(L) (5) states that judicial rulings in discretionary matters are reviewed based on whether there was an abuse of discretion. In this matter, a decision to provide a remedy such as the granting of injunctive relief is an act of equitable discretion by the Tribal Court, review on appeal for abuse of discretion.

The Stockbridge-Munsee Tribal Court Code Section 1.13(D) *Injunctions*, states the following:

The Stockbridge-Munsee Tribal Court shall only grant an injunction after considering the following factors:

- (1) the significance of the threat of irreparable harm to plaintiff if the injunction is not granted;
- (2) the balance between this harm and the injury that granting the injunction would inflict on the defendant; and
- (3) the public interest.

The Tribal Court was charged with balancing these factors, and to make a decision whether to grant injunctive relief to Bowman and Miller based on this balancing test. *eBay Inc. and Half.com. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).⁹

⁸Decision and Order at 27, *Bowman & Miller v. Stockbridge-Munsee Community Election Board*, 2016-RO-0007 (November 18, 2016).

⁹ In *e-Bay*, the Supreme Court laid out four factors that must be met in order to obtain injunctive relief. The Stockbridge-Munsee Court has three of these same four factors to consider—the difference is the Tribal omission of the additional factor of “a reasonable likelihood of success on the merits” to consider in the balancing of factors. This additional factor, however, is of no consequence to this decision—consider that it is met when the preliminary and permanent injunctions are issued. In addition, when the initial granting of the preliminary injunction is issued, the court in effect already decided that the balance of harms weighs in the moving party's favor. While courts should still consider the issue of the balancing of harms before issuing a permanent injunction, it is the existence of irreparable harm and the impact on the public interest that will typically weigh more heavily in the final decision.

Did the Tribal Court abuse its discretion by granting the permanent injunction? It was evident that the following factors were considered in its Preliminary Injunction Order issued on November 3rd, and in the November 18th decision to vacate the Election Board's order and issue the permanent injunction. With regard to Bowman, the Tribal Court determined that she rightfully won the election and could potentially suffer irreparable harm if the election results were voided.¹⁰ Miller as a winning candidate could also be irreparably harmed if the election results were voided.¹¹ The Tribal Court further determined that Miller could suffer additional harm by having his due process rights being violated when a hearing was not conducted in accordance with Chapter 49 and the *Chicks* decision.¹² The Tribal Court also gave weight to the fact that Miller, as one of the initial complainants/injured parties to this matter, voluntarily withdrew his request.¹³ The Tribal Court also considered the "great cost, time, controversy and chaos for the community members" since the October 8th election was held.¹⁴

§49.12.5(A) of the Stockbridge-Munsee Election Ordinance states that the Tribal Court shall have authority to function as an appellate court in relation to decisions by the Election Board when a candidate has asserted the Election Board made an error of law or fact or has abused its discretion. The Election Board earnestly took up its initial charge to review the matter. This matter was then properly before the Tribal Court when Bowman and Miller filed for relief from the Election Board's order in the Tribal Court. The Tribal Court then determined that error of law occurred and in its discretion, provided a remedy that it believed was more equitable i.e. vacating the order to hold a new annual election and the issuance of a permanent injunction.

Our standard of review for lower court decisions involving injunctions is very limited and

¹⁰Preliminary Injunction Order at 2, *Bowman & Miller v. Stockbridge-Munsee Community Election Board*, 2016-RO-0007 (November 3, 2016).

¹¹ *Id.*

¹² "...In review, sections 49.2 and 49.12 state the Election Board shall the authority and or sole authority to resolve disputes, subject to appeal in the Tribal Court...The Court finds that these particular sections of the Code serve as a mandate to the Election Board that when a challenge is brought, that is shall (not that it may or might, but it shall) have a hearing and consider the challenge". Decision and Order at 5, *Chicks v. Stockbridge-Munsee Community et al.*, 2011-TRO-0005 (October 24, 2011).

¹³Decision and Order at 27, *Bowman & Miller v. Stockbridge-Munsee Community Election Board*, 2016-RO-0007 (November 18, 2016).

¹⁴ *Id.*

narrow. If there is more than one plausible interpretation of the factors before the Tribal Court, the Tribal Court's acceptance of any particular interpretation of those factors cannot be an abuse of that discretion. The Tribal Court considered the additional expense of holding another election. The Tribal Court also gave consideration to Miller's withdrawal of his election challenge. More importantly, the Tribal Court gave great weight to the impact to rights of all of the winning candidates to be duly sworn in to hold the offices that they were elected in by the voting membership. It also gave great weight to the fact that the public interest would best be served by allowing the October 8th election results to stand. The Tribal Court considered many factors and determined this remedy was just and equitable. Because there were no errors of law or clearly erroneous findings, we must be deferential to the Tribal Court's balancing of these factors. We find that the Tribal Court did not abuse its discretion in its determination to provide equitable relief to Bowman and Miller by vacating the Election Board's October 14th Order and by issuing a permanent injunction against holding a new election.

CONCLUSION

We conclude that the Tribal Court did not commit an error of law with its application of Chapter 49 and the *Chicks* decision to the facts in this matter. We also conclude that the Tribal Court did not abuse its discretion in its determination to vacate the October 14th Election Board order, which also granted the permanent injunction. The Motion to Stay the implementation of the swearing in of the newly elected officials is denied. The November 18, 2016 Tribal Court Decision and Order is *Affirmed*.

Dated this 23rd day of February, 2017.

BY ORDER OF THE COURT OF APPEALS:

Diane House
Diane House, Lead Appellate Court Judge Pro Tempore

Steven Boulley
Steven Boulley, Appellate Court Judge Pro Tempore

Marianne Higgins
Marianne Higgins, Stockbridge-Munsee Community Chief
Judge



STOCKBRIDGE-MUNSEE COURT OF APPEALS

Mohican Nation

Stockbridge-Munsee Community

Scott Vele,
Petitioner/Appellant,

Case No: 16-AP 2016-RO-0007

In the matter of:
Jolene Bowman and Joseph Miller,
Petitioners/Appellees

v.

Stockbridge Munsee Community Election Board,
Respondents/Appellants.

WE, MAR 17 11:03

DECISION AND ORDER OF DISMISSAL

This case has come before the Stockbridge-Munsee Court of Appeals Judges Pro Tempore Diane House and Eugene White-Fish, and Chief Judge Marianne Higgins presiding.

INTRODUCTION

Scott Vele, enrolled Stockbridge-Munsee Community tribal member (hereinafter "Vele"), appeals the Stockbridge-Munsee Tribal Court's (hereinafter "Tribal Court") November 3, 2016 Preliminary Injunctive Order that suspended the Election Board's October 14th, 2016 order to hold a new annual election. Vele's appeal is *dismissed with prejudice*.

JURISDICTION

The court has jurisdiction over this matter per Chapter 1, §1.6 (L) of the Stockbridge-Munsee Tribal Court Code which gives the Court of Appeals the jurisdiction to hear appeals from the Trial Tribal Court.

PROCEDURAL BACKGROUND

On October 25, 2016, Mr. Vele filed a Request with the Stockbridge-Munsee Tribal Court (hereinafter "Tribal Court") to file as an Amicus Curiae and for a substitution of the judge in the matter of *Jolene Bowman and Joseph Miller, v. the Stockbridge-Munsee Election Board* (hereinafter "Bowman and Miller case"), Case No. 2016-RO-007. On November 3, 2016, the Tribal Court issued a Preliminary Injunction Order that indefinitely suspended any and all action relating to holding a new annual 2016 election. On November 4, 2016, Mr. Vele filed an appeal of this November 3rd Preliminary injunctive order with the Court of Appeals. On November 18,

2016, the Tribal Court issued a permanent injunction in the Decision and Order in the Bowman and Miller case.

ANALYSIS

The first matter before this Court is to acknowledge the delay in getting this matter before an Appellate panel for review. These were delays in the judicial selection/appointment process beyond this Appellate panel's control. This Court extends its sincere apologies to Mr. Vele and all other interested parties that were affected by these delays.

The second matter before this Court is an initial review of the different court filings by Mr. Vele. On October 25th, Mr. Vele's filed a request to the Tribal Court to file as an Amicus Curiae and for a substitution of the judge in the Bowman and Miller case. On November 4th, Mr. Vele also filed an appeal of the Tribal Court's November 3rd Preliminary injunctive order in the Bowman and Miller case with the Court of Appeals.

Since Mr. Vele's October 25th filing with the Tribal Court to file as an Amicus Curiae and for a substitution of the judge in the Bowman and Miller case, the Tribal Court, in its Decision and Order issued on November 18th, 2016:

- 1) overruled Mr. Vele's request on the Amicus Curiae request and the request for the substitution of judges¹; and
- 2) elevated the November 3rd Preliminary Injunctive order to a permanent injunction².

As these matters stand as of the date of this decision, Mr. Vele's October 25th requests have been answered in the November 18th Decision and Order issued by the Tribal Court in Bowman and Miller case. In addition, the November 3rd Tribal Court preliminary injunctive order has since become a permanent injunctive order in that same Decision and Order issued by the Tribal Court on November 18th.

Mr. Vele, although not a party in the Bowman and Miller case, has filed initial requests in the

¹Decision and Order at 8-10, *Bowman & Miller v. Stockbridge-Munsee Community Election Board*, 2016-RO-0007 (November 18, 2016).

²Id at 34.

Tribal Court and Appellate Court that have since 1) been overruled; and 2) been elevated to another level in the injunctive process. The Tribal Court made these determinations in its November 18th Decision and Order. Although there were delays in getting Mr. Vele's November 4th appeal of the November 3rd Tribal Court Order before an appellate panel, Mr. Vele has not filed any appeals of November 18th Tribal Court Decision and Order that has since 1) overruled his original Amicus Curiae filing of October 25th; and 2) elevated the Preliminary Injunctive Order issued on November 3rd. In the November 18th Decision and Order, the Tribal Court overruled his requests to file an Amicus Curiae and for substitution of the judge as he was not a party in the Bowman and Miller case.

Mr. Vele has not filed an appeal of this November 18th Tribal Court Decision and Order. Mr. Vele had the opportunity to amend his pleadings, or file an appeal of this November 18th Decision and Order, but has not done so. Based upon the foregoing, this Court hereby dismisses this matter with prejudice as it pertains to Mr. Vele's appeal in the Bowman and Miller case.

CONCLUSION

Regarding Mr. Vele's appeal pending in the Bowman and Miller case, this matter is dismissed with prejudice.

Dated this 28th day of February, 2017.

BY ORDER OF THE COURT OF APPEALS:

Diane House

Diane House, Lead Appellate Court Judge Pro Tempore

Eugene S. White-Fish

Eugene White-Fish, Appellate Court Judge Pro Tempore

Marianne Higgins

Marianne Higgins, Stockbridge-Munsee Community Chief Judge



STOCKBRIDGE-MUNSEE COURT OF APPEALS

Mohican Nation

Stockbridge-Munsee Community

Doug Huck, et al.,
Appellants/Petitioner,

v.

Case No: AP 2016-RO-0009

SM Recall Election Committee,
Appellees/Respondents.

FR: DEC 21 16:01:29

MEMORANDUM DECISION AND ORDER

This case has come before the Stockbridge-Munsee Court of Appeals Judges Pro Tempore Layatalati Hill, Diane House, and John Powless III presiding.

Background

A petition was filed with the Stockbridge-Munsee Tribal Trial Court (hereinafter the "SMTC") requesting permanent injunctive relief, and the cancellation of the scheduled Recall Election for December 3, 2016. On November 23, 2016, The SMTC denied the petitioner's request for permanent injunctive relief and further ordered the Recall Election move forward as scheduled. On November 28, 2016, Appellants/Petitioners ("Appellants") filed a Notice of Appeal of the SMTC's decision that denied their request for injunctive relief. On December 1, 2016, the Respondents/Appellees ("Appellees") filed motion to dismiss this appeal.

Jurisdiction

The court has jurisdiction over this matter per Chapter 1, §1.6 (L) of the Stockbridge-Munsee Tribal Court Code which gives the Court of Appeals the jurisdiction to hear appeals from the Trial Tribal Court.

Issues Presented

Was formal notice provided to the Appellants in accordance with Chicks v. Doxtator and Recall Election Board, Case nos. 2013RO005 (*Chicks I*, April 25, 2013) and 2013RO006 (*Chicks II*, July 24, 2013)? Yes. The Court finds reasonable due process was met when the Recall Election Notification of November 9th, 2016 was served by Tribal police on the Appellants. In addition, notice was provided to the membership when the Recall Board provided public notice in the newspaper and mailed postcards to the members.

Was the Recall Election procedure properly followed? Yes. The Constitution and By-Laws of the Stockbridge-Munsee Community Article 5 Sect 2 a-c provides the procedure as follows:

- a) *The petitioners shall form an election board consisting of five members to oversee and conduct the recall election process;*
- b) *Upon receipt of a petition signed by at least one-third of the number of those voting in the last general election, it shall be the duty of the recall election board to certify the validity of the signatures on the recall petitions, and to call for an election to be held not more than thirty days from the submission of the recall petition;*
- c) *Individual petitions shall be circulated for each Council member who is subject to recall.*

The Appellants in this case do not claim this procedure was not followed. The Appellants claim it was not granted access to a full certified petition of the recall petition(s) that were presented to Tribal membership, certified copies of the signed petition(s), information on who and how the petitions were certified, all copies of petition/postings that were posted anywhere, including social media, as well as an explanation of any member changes to the Recall Election Board and the Board's meeting minutes. The Appellees ("Appellees") do not dispute the above requests by the Appellants were denied, but claim the Appellants have no entitlement to those documents. We agree. According to the subsection (b) above, it is the duty of the recall election board to certify the validity of the signatures on the recall petitions, which was done. The Appellants state that information would be available in other jurisdictions, but fail to point out where, based on Stockbridge-Munsee Tribal Law or Constitution, they would be entitled to access those documents and information.

Were the Appellants entitled to a hearing at the trial level? No. Simply filing a petition with the court does not guarantee a person a hearing. A filing must comply with the requirements of such filing. According the law, for permanent injunctions, a hearing is only required if a permanent injunction was issued (Stockbridge-Munsee Tribal Law Chapter I -Tribal Court Code Section 1.13 (D)). The SMTC did not begin the injunctive process by issuing a temporary injunction, but rather denied the request. Had the SMTC issued a temporary injunction, then the SMTC would then be obligated to hold a hearing to consider a permanent injunction on the merits. The SMTC

considered and reviewed the Stockbridge-Munsee Tribal Law Chapter I -Tribal Court Code, Jurisdiction – Section 1.2, Section 1.13 (A)(1), (B)(1)-(7), and (D)(1)-(3) and determined that an injunction was not appropriate in this situation based on the lack of provisions in the constitution or Tribal laws for such an injunction. We agree. In any case, we find that although the harm that may be suffered by the Appellants is greater than the harm that may be suffered by the Appellees, the harm to the Tribal Constitutional powers of members of the Stockbridge-Munsee Community to have the authority and ability to petition for removal of their council members through a recall election outweighs the harm that may be suffered by the individuals of this case.

Does the 2016 election render the Recall Election moot? No. The Constitution and By-Laws of the Stockbridge-Munsee Community Article V Section 3 states:

No Council member recalled or removed shall be eligible to run or hold office for four (4) years from the date of removal from office.

If recalled in the previous election cycle, in this case 2015, those recalled cannot run or hold office for four years from the date of removal from office. Although a new Tribal Council election was held in 2016, the recall process was started during the 2015 term and the Recall Process laid out in the Constitution was properly followed and must be completed. The fact that two of the Appellants did not run for reelection in 2016 and are therefore, not currently on the Council does not relieve them of the 2015 Recall Election. If any of the Appellants are removed based on the December 3, 2016 Recall Election, the four (4) year ban on running or holding office would begin dating back to 2015. If those currently sitting on the Council are removed based on the December 3, 2016 Recall Election, they would be ineligible to run and hold office for four (4) years beginning in 2015. Therefore, they would not be eligible for office for 2016 and must be removed from office leaving a vacancy to be filled. The court does not make a determination on whether or not a Recall Election can be made going further back than the previous year.

Order

The Court denies the Appellee's motion to dismiss and affirms the SMTC's decision denying the Appellant/Petitioner's request for permanent injunctive relief and further orders the Recall Election move forward as scheduled for December 3, 2016.

IT IS SO ORDERED.

Dated this 2nd day of December, 2016.

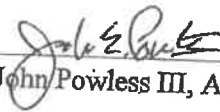
BY THE COURT OF APPEALS:



Layatalati Hill, Lead Appellate Court Judge Pro Tempore



Diane House, Appellate Court Judge Pro Tempore



John Powless III, Appellate Court Judge Pro Tempore



STOCKBRIDGE-MUNSEE COURT OF APPEALS

Mohican Nation

Stockbridge-Munsee Community

Scott Vele, Enrolled Stockbridge-Munsee member
and unnamed Stockbridge-Munsee Community members,
Plaintiffs/Appellants,

Case No. AP-2016-RO-0006

v.

Shannon Holsey, Stockbridge Munsee Tribal
President, Joseph Miller, Council Member, Jeremy
Mohawk, Council Member, and JoAnn Schedler,
Council Member,
Respondents/Appellees.

FR, DEC 2 '16 10:16 AM

MEMORANDUM OPINION AND ORDER

This case has come before the Stockbridge-Munsee Court of Appeals Judges Pro Tempore Diane House and Jeryl L. Perenich, and Chief Judge Marianne Higgins presiding.

INTRODUCTION

Scott R. Vele appeals an order of the Stockbridge-Munsee Tribal Court (hereinafter "SMTC") that denied his motions for an emergency injunction and a substitution of judges; and dismissed his cause of action. *Affirmed.*

JURISDICTION

The court has jurisdiction over this matter per Chapter 1, §1.6 (L) of the Stockbridge-Munsee Tribal Court Code which gives the Court of Appeals the jurisdiction to hear appeals from the Tribal Court.

PROCEDURAL BACKGROUND

On September 27, 2016, Appellant Scott R. Vele (hereinafter "Vele") commenced an action in SMTC against certain members of the Tribal Council, including President Shannon Holsey, and Council Members Joseph Miller, Jeremy Mohawk, and JoAnn Schedler. The petition and motion filed by Vele sought an emergency injunction to stay or prevent any administrative actions to be

taken which would result in the enrollment of certain individuals. On September 30, 2016, the appointed Tribal Court judge, the Honorable Candace Coury held oral arguments on this petition and motion, along with consideration of another motion filed at this hearing that requested a substitution of the tribal court judge. In a ruling issued on October 3, 2016, the Tribal Court judge 1) denied Vele's motion for a temporary restraining order; 2) denied the motion for substitution of judge; and 3) issued an order dismissing this action against the Stockbridge-Munsee Community, the Tribal Council, and each of its members named herein, individually or collectively. On October 4, 2016, Vele filed this appeal of the SMTC's rulings and order for dismissal of this matter.

ISSUES PRESENTED

Did the Tribal Court err when it dismissed this matter based upon its finding that Vele lacked standing to challenge this tribal council enrollment action? Did the Tribal Court Judge commit reversible error by her failure to recuse herself in this matter?

STANDARD OF REVIEW

This appeal will be reviewed in accordance with Stockbridge-Munsee Tribal Law §1.6(L)(5) which states that the Court of Appeals shall review de novo or independently determine whether the correct standard of law was applied, but uphold the trial court's findings of fact unless they are clearly erroneous. Judicial rulings in discretionary matters are reviewed based on whether there was an abuse of discretion. *Id.* Furthermore, errors that are not likely to have had a substantial impact on the decision or on substantial rights are considered "harmless errors" and are not a basis for reversal. *Id.*

ANALYSIS

Lack of Standing to Sue

This case arose from an enrollment decision taken by a majority of Council members present at a regular Tribal Council meeting held on September 20, 2016. On September 12, 2016, the Stockbridge-Munsee Membership Committee held a special enrollment meeting to consider the membership application of six members of the Murphy family. The main action taken at this meeting was to deny the six Murphy enrollment applications due to these applicants not meeting the requirements in the Membership Ordinance. Despite being provided with this recommendation to deny the Murphy enrollment applications from the Membership Committee, three members of the Council (who are also the named Respondents, along with the President

who presided over the meeting), which comprised a majority, voted to approve the six Murphy enrollments at the September 20, 2016 regular Tribal Council meeting. Vele objected and immediately filed a motion seeking an emergency injunction in the SMTC to stay any administrative actions implementing this enrollment decision.

The threshold question that was considered by the SMTC was whether it had jurisdiction involving this enrollment decision. Oral arguments were held on this matter, along with consideration of another motion filed by Vele on September 30, 2016. On October 3, 2016, the Tribal Court judge issued a ruling denying Vele's motion for an injunction and dismissed this matter as she determined that Vele lacked standing to sue the other members of the Tribal Council based upon Section 50.14 (D) of Chapter 50 of the Stockbridge-Munsee Tribal Law Procedures Ordinance. As this is question of law that involves a determination of what is the controlling law or statute, and whether it was applied correctly, this Court will review this matter de novo (Stockbridge-Munsee Tribal Court Code, Section 1.6 (L) (5)). This standard of review allows the Appeals Court to review this matter with no deference to the Trial Court's holding in order to determine whether the lower court or in this case, the Tribal Court, acted correctly.

In her ruling issued on October 3, 2016, the Tribal Court judge agreed with the Respondent and determined that Section 50.14 (D), *Council and Individual Council Member Authority*, is the controlling law in this matter. Section 50.14 (D), states the following:

All Council members shall respect, abide by and comply with valid Council actions. An individual Council member shall have the right to challenge a Council action in a meeting, but once an official action is taken by the Council, regardless of the dissent, a Council member shall abide by the action.

We agree with the Tribal Court in its determination that Section 50.14 (D) is the controlling law on this issue. This section clearly states what recourse is available to Council members in challenging official actions of the Tribal Council at their duly called meetings.

The next issue to review is whether the Council members act within the scope of their duties, thereby making them immune from suit? The Tribal Court determined that “Clearly, the act of Council were in compliance with the law, specifically at sections 50.2 [*Open Meetings*], 50.4 [*Voting*], 50.9 [*Regular Council Meetings*] of the Procedures Ordinance” (*Vele v Holsey*, Case No. 2016-RO-0006, October 3, 2016, pg. 4). We agree with this finding that the action taken at the regular Tribal Council meeting held on September 20, 2016 ,was a valid action taken in compliance with Sections 50.2, 50.4, and 50.9 of the Procedures Ordinance (*Vele v Holsey*, Case No. 2016-RO-0006, October 3, 2016, Finding 1, pg. 5). As a result, the Tribal Court judge correctly determined that the named Respondents/Council members acted within the scope of their authority to approve the enrollment of its members, even if the decision was contrary to the Membership Committee’s recommendation to deny these enrollment applications.

The next issue to review is did the Tribal Court apply the correct legal standard in dismissing this matter? In her ruling issued on October 3, 2016, the Tribal Court judge agreed with the Respondent and determined that Section 44.6, of Chapter 44 of the Stockbridge-Munsee Tribal Law Membership Ordinance is controlling on this issue. Respondent argued that application of Section 44.6 would require a dismissal of this action as enrollment actions taken by the Tribal Council are not subject to judicial review.

Section 44.6 (E) clearly states the following: “Tribal Council is the final forum to determine Tribal Member eligibility”. We agree with the Tribal Court in its ruling that the “final forum to determine eligibility and enrollment rests with the Tribal Council and to that end, this matter is not subject to judicial review” (*Vele v Holsey*, Case No. 2016-RO-0006, October 3, 2016, Finding 5, pg. 5). As a result, we find the dismissal action taken by the Tribal Court was not in error as the Tribal Court was correct in its determination that that Section 44.6, of Chapter 44 of the Stockbridge-Munsee Tribal Law Membership Ordinance is controlling on this issue. Based upon this finding, the enrollment actions taken by the Tribal Council are not subject to judicial review. Consideration of this finding, taken together with the prohibition against Tribal Council members acting as advocates in tribal court (Stockbridge-Munsee Tribal Court Code §1.33 (F)), we have to agree with SMTC and find that Vele lacked standing to challenge this tribal council action.

Failure to Recuse

The next issue to review is did the Tribal Court Judge commit reversible error by not recusing herself in this matter? At the hearing held on September 30, 2016, the appointed Tribal Court judge, the Honorable Candace Coury held oral arguments on Vele's motion for an emergency injunction, along with consideration of another motion filed at this hearing where Vele requested a substitution of the appointed tribal court judge. This motion was denied by the SMTC judge in the order issued on October 3, 2016. Her reasoning for the denial of this motion was "that this matter involved a matter of public issue rather than a personal or private interest" and that this "matter is made moot with the SMTC's issuance of this Order of Dismissal" (*Vele v Holsey*, Case No. 2016-RO-0006, October 3, 2016, Orders numbered 5 and 6 respectively, pg. 5).

In the Guardianship Matter of Elda Dickie (Case No. 2015 (2) AP-2015-GU-0005, April 27, 2016), the Stockbridge-Munsee Court of Appeals provided a framework for judges to consider when faced with a recusal or substitution request. Citing *State v. Asfoor*, 75 Wis.2d 411, 436 (1977), this *Dickie* case lays out the two tests that have been established for judicial recusal. The subjective test is based on the judge's own determination of her impartiality; and an objective test is based on whether impartiality can reasonably be questioned. *Id.* at 4. Judge Coury determined that she could remain impartial during the hearing. As a result, the subjective test has been satisfied. The objective test remains for our consideration. Under this test, Judge Coury should have recused herself if her impartiality could reasonably be questioned.

Vele argues that case *In the Guardianship Matter of Elda Dickie*, Case No. 2015-GU-0005, should support his claim of judicial bias. In this *Dickie* case, Judge Coury admitted to a bias against Vele when she stated for the record that if this matter "directly involved Mr. Vele, his daughter, or any of his family members, that this Judicial Officer would have no problem with a substitution request." *Id.* at pg. 4.

Judge Coury indicated that due to this enrollment matter involving a "public interest," and not one involving a matter where Vele has a personal or private interest, she felt she had the ability to preside impartially at trial. We disagree with Judge Coury's attempt to distinguish a separate "public" versus "personal" interest as it pertains to her assessment of when judicial recusal is

required. An admitted bias is a bias-pure and simple. Her bias toward Vele is evident by the statements made on the record in the *Dickie* case cited above. In addition, the record shows a somewhat contentious relationship between Judge Coury and Vele, one in which Judge Coury felt she had to order “courtesy reminders” to Vele against filing frivolous actions and contemptuous conduct in order to maintain control of her courtroom.

Based on Vele’s allegations of bias in this case, we find that Judge Coury’s impartiality toward Vele can reasonably be questioned. We find that Judge Coury’s prior statements made in *Dickie*, that had the proceedings directly involved Vele himself or any member of his family, she would have no problem recusing herself, created the appearance that the court allowed its relationship with Vele to affect its impartiality toward Vele. As a result, we find that Judge Coury’s failure to recuse herself was error. In addition, it was error on Judge Coury’s part to consider the motion for an emergency injunction before making a determination on the issue of bias. Even the appearance of partiality erodes public confidence in the integrity of this judicial system. Vele should have been afforded a hearing before an impartial judge as is his right.

We now have to determine whether Vele’s right to due process was violated by Judge Coury’s failure to recuse herself. In reviewing the order issued on October 3, 2016, we find that Judge Coury’s error in failing to recuse herself was harmless in that it did not have a substantial impact on this decision nor on any of the party’s substantial rights (Stockbridge-Munsee Tribal Law §1.6(L)(5)). “Even errors of a constitutional dimension may be subject to the rule of harmless error.” *State v. Zellner*, 100 Wis.2d 136, 150 (1981). Vele has not presented anything in the record that shows Judge Coury committed any errors in making her decision on whether Vele has standing. There is also no evidence showing that Judge Coury’s relationship with Vele caused her to error in making the decision to dismiss this action. Therefore, Judge Coury’s decision not to recuse herself was harmless error.

CONCLUSION

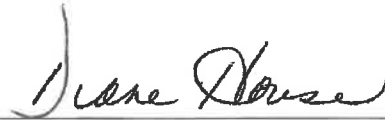
We conclude that Judge Coury’s failure to recuse herself was harmless error. The error was non-prejudicial in that it had no effect on the outcome of this proceeding. The SMTC also followed the correct legal standard in dismissing this action when it determined that Section 44.6 of

Chapter 44 of the Stockbridge-Munsee Tribal Law Membership Ordinance is controlling on this issue, and as a result, Vele lacked standing to challenge the enrollment decision taken by the Tribal Council. *Judgment affirmed.*

IT IS SO ORDERED.

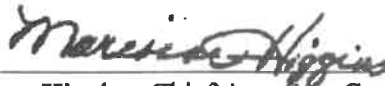
Dated this 1st day of December, 2016.

BY THE COURT OF APPEALS:



Diane House, Lead Appellate Court Judge Pro Tempore

Jeryl L. Perenich, Appellate Court Judge Pro Tempore



Marianne Higgins, Chief Appellate Court Judge



Vele, et al. v. Holsey, et al, Case No. AP-2016-RO-0006

Judge Perenich, Concurring in part and dissenting in part.

I write separately to share my point of view on the case. I concur in the outcome on the merits. The trial court's decision to dismiss is correct and should be affirmed.

I respectfully dissent from the majority's conclusion that Judge Coury should have recused herself. The majority has identified the correct 2-part test. My review of the record leads me to believe there is not sufficient evidence to conclude that Judge Coury's impartiality can be reasonably questioned. The quotation from the *Dickie* case is not conclusive. It does not objectively establish impartiality. She simply stated she would have no problem with a substitution request. This does not conclusively establish bias. It is an ambiguous statement and subject to different interpretations.

Furthermore, after listening to the audio recording of the hearing before Judge Coury in this case, I conclude that Mr. Vele repeatedly antagonized and provoked Judge Coury. Nothing in her behavior or statements suggested that Judge Coury was impartial toward Mr. Vele. Simply because the two have sparred in the courtroom in the past does not establish bias.

Dated this 1st day of December, 2016



Hon. Jerry L. Perenich
Judge Pro Tem

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**IN THE COURT OF APPEALS
FOR THE STOCKBRIDGE-MUNSEE COMMUNITY BAND
OF MOHICAN INDIANS
AT BOWLER, WISCONSIN**

MICHAEL G. MILLER,	)	Appeal No.: 2018-AA-0002
Plaintiff/Respondent,	)	Trial No.: 2017-AA-0004
	)	Tribal Judge Coury
vs.)	
)	
STOCKBRIDGE-MUNSEE COMMUNITY,	)	<u>OPINION</u>
Defendant/Petitioner)	

Before Smith, Chief Justice, Bichler and Lochen, Justices

Opinion By Lochen, J.

I. SUMMARY

Defendant/Petitioner Stockbridge-Munsee Community (“Tribe”), through its Counsel, filed an Interlocutory Appeal challenging the Trial Court’s denial of the Tribe’s Motion for Recusal. The Tribe moves this Court to reverse the Denial of Recusal, ordering the recusal of the presiding Trial Court judge, appointing a substitute Trial Court judge, and clarifying that the Trial Court proceedings should resume in the same posture as the moment this Court granted a stay of the Trial Court proceedings on September 24, 2018.

II. BACKGROUND

On October 13, 2017, Plaintiff Michael G. Miller filed a complaint in this matter in the Stockbridge-Munsee Trial Court, alleging his wrongful termination from the Tribe on several grounds, including under *Stockbridge-Munsee Tribal Code* Chapter 53.3(L), (M), and (N),

Chapter 53.35(A), (C), and (D), and Chapter 55.¹ After the case proceeded through its initial phases, the Tribe filed a motion for judicial recusal of the presiding judge, Hon. Candace Des Armo Coury,² on June 22, 2018. On June 29, 2018, the Plaintiff filed a response to the motion.³ That same day, on June 29, 2018, the Trial Court issued an omnibus ruling on outstanding motions and issues, but did not rule on the motion for recusal.⁴ On July 6, 2018, the Tribe petitioned this Court for interlocutory appeal.⁵ On August 13, 2018, this Court issued an Order remanding the matter to the Trial Court with instructions to rule on the Tribe's motion to recuse on or before August 23, 2018.⁶ On August 23, 2018, the Trial Court issued an order denying the motion for recusal.⁷

On September 4, 2018, the Tribe filed an interlocutory appeal with this Court.⁸ This Court granted review on September 14, 2018, issuing an Administrative Scheduling Order.⁹ In accordance with the Scheduling Order, this Court received the Tribe's brief on October 3, 2018, Plaintiff's Response Brief on November 2, 2018, and the Tribe's Reply Brief on November 16, 2018.¹⁰

¹ Complaint, *Miller v. Stockbridge-Munsee Community*, Case No. 2017-AA-0004 (October 13, 2017).

² Tribe's Motion for Recusal of Judge Coury, *Miller v. Stockbridge-Munsee Community*, Case No. 2017-AA-0004 (June 22, 2018).

³ Plaintiff's Response to Motion for Recusal of Judge Coury, *Miller v. Stockbridge-Munsee Community*, Case No. 2017-AA-0004 (June 29, 2018).

⁴ Rulings on Motions (Post Oral Argument), *Miller v. Stockbridge-Munsee Community*, Case No. 2017-AA-0004 (June 29, 2018).

⁵ Tribe's Petition for Interlocutory Appeal and Stay of Trial Court Proceedings, *Miller v. Stockbridge-Munsee Community*, Appeal No. 2018-AA-0002 (July 6, 2018).

⁶ Order Regarding Petition for Interlocutory Appeal, *Miller v. Stockbridge-Munsee Community*, Appeal No. 2018-AA-0002 (July 6, 2018).

⁷ Recusal Motion (Denial of), *Miller v. Stockbridge-Munsee Community*, Case No. 2017-AA-0004 (August 23, 2018).

⁸ Tribe's Notice of Interlocutory Appeal and Stay of Trial Court Proceedings, *Miller v. Stockbridge-Munsee Community*, Appeal No. 2018-AA-0002 (September 4, 2018).

⁹ Administrative Scheduling Order Granting Interlocutory Appeal, *Miller v. Stockbridge-Munsee Community*, Appeal No. 2018-AA-0002 (September 14, 2018).

¹⁰ Defendant/Petitioner's Brief Appealing Trial Court Order Denying Recusal, *Miller v. Stockbridge-Munsee Community*, Appeal No. 2018-AA-0002 (October 3, 2018); Plaintiff/Respondent's Brief in Opposition to Defendant/Petitioner's Brief Appealing Trial Court's Order Denying Recusal, *Miller v. Stockbridge-Munsee*

On December 7, 2018, the parties appeared for Oral Argument before this Court, Chief Justice Gregory D. Smith presiding. Present on behalf of the Tribe were Attorneys Andrew Adams III, and Dennis Puzs, Jr. Present on behalf of the Plaintiff were Attorney Keith Ellison, and Plaintiff Michael G. Miller.

III. ISSUE

Does the appearance of a conflict of interest in this case mandate a judicial recusal or disqualification of the Trial Court judge from hearing a wage/compensation dispute against the Tribe when the Trial Court judge hearing the matter has an on-going wage/compensation dispute with the Tribe?

IV. DISCUSSION

Stockbridge-Munsee Tribal Code § 1.10(A)(1) requires the tribal judges of the Stockbridge-Munsee Tribal Court System to “Hear and decide all matters fairly and promptly.”

The U.S. Supreme Court, in a judicial disqualification case, declared “*A fair tribunal is a basic requirement of due process.*” In Re: Murchison, 349 U.S. 133, 136 (1955). The Court explained this concept saying, “*Justice must satisfy the appearance of justice.*” Id. (quoting Offutt v. U.S., 348 U.S. 11, 14 (1954)). One of our sister tribal supreme courts, has declared, “*Good government will require even the appearance of a conflict-of-interest be avoided.*” In

Community, Appeal No. 2018-AA-0002 (November 2, 2018); Defendant/Petitioner’s Reply Brief Appealing Trial Court Order Denying Recusal, *Miller v. Stockbridge-Munsee Community*, Appeal No. 2018-AA-0002 (November 16, 2018);

RE: Referral of McSauby, Appeal No. 97-02-001-CV-JR (Grand Traverse Band Ct. App. 7/29/1997).

This Court does not question the Tribal Court's belief that it can be impartial. It is the perception of a conflict of interest that is the issue at hand. Fostering the public's perception that courts play no favorites is essential to the ongoing function of a viable judiciary. Seg, In Re: Di Leo, 83 A.3d 11, 24 (N.J. 2014).

In *Hoffman v. Stockbridge-Munsee Community*, the Tribe moved for a dismissal of the presiding judge on the basis of the Stockbridge-Munsee Tribal Code's Ethical Rules for Tribal Court System Judges. In that matter, the Tribe argued that because Judge Coury was in a dispute with the Tribal Council over payments for mileage, it created the appearance of impropriety for her to preside over a wage-related dispute where the Tribal Council was the defendant.¹¹ In her order granting the Tribe's recusal motion, Judge Coury explained that while she did not see herself as having any actual bias, she did acknowledge that the issue required her to determine whether she should recuse herself because "her impartiality had been called into question."¹² In recusing herself in *Hoffman*, Judge Coury concluded that "it is in the best interest of justice" that she recuse herself.¹³

In her order denying the Tribe's motion for recusal in the present matter, Judge Coury distinguished the two cases, submitting that the conflict present in *Hoffman* had been resolved, and that the two cases are too dissimilar for the same recusal reasons to apply.¹⁴

¹¹ Ruling (Joint Respondent's Recusal Motion), *Hoffman v. Stockbridge-Munsee Community*, Case No. 2017-AA-0001, at *2-3 (June 7, 2018).

¹² *Id.* at *3.

¹³ *Id.*

¹⁴ Recusal Motion (Denial of), *Miller v. Stockbridge-Munsee Community*, Case No. 2017-AA-0004 (August 23, 2018), at *2.

However, the Court notes, and agrees with the Tribe, that the fact that Judge Coury was actively engaged in a “dispute” with the Tribal Council about payment for mileage as part of her employment as a judge for the Tribe at the time the Plaintiff filed his suit against the Tribe in October 2017 raises the question of whether an appearance of impropriety exists in this matter, such that Judge Coury’s impartiality could reasonably be questioned.

Thus, the question of whether recusal is required here under Stockbridge-Munsee Tribal Code Chapter 1, Section 1.14(E)(9), is before this Court.

Section 1.14(E)(9) provides that “Any judge in the Tribal Court System shall recuse himself/herself in a proceeding in which his/her impartiality might reasonably be questioned.” This Court finds that a plain language reading of the provision mandates recusal where a judge’s impartiality might reasonably be questioned. Here, the Tribe submitted facts that Judge Coury engaged in activity pertaining to her own benefits dispute with the Tribe that cause this Court to reach the narrow conclusion that Judge Coury’s impartiality might reasonably be questioned, and, therefore, recusal is proper for this particular matter alone.

V. CONCLUSION

The Court finds that the issues addressed in this matter are narrow and fact-specific, tied to the timing of the filing of the instant case and Judge Coury’s own benefits-related inquiry with the Tribe. This Court does not render this opinion with the understanding or intent that it should stand for the position that future employment law matters, if filed, should rely upon this Order to raise similar issues, as the central issue here is appearance of impartiality, which may shift with time.

The Court also notes that Judge Coury does not have an interest in the matter that could be substantially affected by the proceedings,¹⁵ nor is this case about Judge Coury's objectivity. In short, this Court renders this Opinion in a narrow context to address the reasonable questioning of impartiality.

VI. ORDER

The Court ORDERS:

1. The Trial Court's denial of its motion for recusal is REVERSED.
2. The Stay of the Trial Court proceedings shall be LIFTED and resume to the posture as the moment the stay was granted on September 24, 2018, upon appointment of a substitute judge.¹⁶

¹⁵ Stockbridge-Munsee Tribal Court Code Chapter 1, Sect. 1.14(E)(9)

¹⁶ Notably, on November 27, 2018, this Court received e-mail communication from the Stockbridge-Munsee Tribal Court's Chief Judge Travis Miller, which included the Tribe's President in the e-mail chain (and not the Plaintiff), providing *sua sponte* Memorandum on the "Appellate Trial of Michael G. Miller," to express concerns about this matter because, in his opinion, "it is outside the Tribe's best interest to highlight the Appellate Court on this immediate controversy," in response to this Court's standard notice to local media of this Appellate Court's first hearing. Upon arrival for the hearing on December 7, 2018, the Appellate Panel observed signs closing the hearing to the media.

This Court notes that the Community's Bill of Rights, which provides in part that the Tribe, in exercising its powers of self-government, shall not abridge the freedom of the press, is equally binding upon these proceedings as is the Tribe's Ethical Rules, at issue here.

Chief Judge Miller, in his memo, also notes that he is "fully aware that [his] position as Chief Judge has no authority upon Appellate Panel operations." This Court agrees. Chief Judge Miller's actions, absent a waiver by the parties, likely mandates recusal of Chief Judge Miller in this matter.

Entered this 8 day of January, 2019.



Eric M. Lochen
Associate Justice

Smith, C.J. and Bichler, J. concur

cc All parties via Clerk of Court



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IN THE COURT OF APPEALS
FOR THE STOCKBRIDGE-MUNSEE COMMUNITY BAND
OF MOHICAN INDIANS
AT BOWLER, WISCONSIN

MICHAEL G. MILLER,	)	Appeal No.:	_____
Plaintiff/Respondent,	)	Trial No. 2017-AA-0004	
	)	Tribal Judge Coury	
vs.)		
)		
STOCKBRIDGE-MUNSEE COMMUNITY)		
Defendant/Petitioner)		

ADMINISTRATIVE SCHEDULING ORDER
GRANTING INTERLOCUTORY APPEAL

This matter came before the Honorable Gregory D. Smith, Chief Justice of the Stockbridge-Munsee Court of Appeals, on the 14th day of September, 2018, upon the Community’s petition to seek an interlocutory appeal challenging the Tribal Court’s denial of a motion to recuse. Although interlocutory appeals are disfavored, due to under-developed records and piecemeal litigation, this matter is significant and delay could cause needless litigation. The petition to review the recusal ruling is well-founded.¹ Further, since this is a significant issue that will impact multiple other cases, the matter shall be heard *en banc* by this Court pursuant to S-M Tribal Code § 1.9(G)(2)(a). Oral arguments are ordered pursuant to S-M Tribal Code § 5.22 (C) and shall be conducted by Skype or similar visual social media for out-of-town justices. The litigants shall present arguments live and physically present at the Stockbridge-Munsee Courthouse. Oral arguments shall be limited to fifteen (15) minutes per side and this time shall be strictly enforced. **Wherefore, premises considered;**

¹ This Court is deeming the Community’s notice of appeal as a petition requesting interlocutory review. This Court finds, pursuant to S-M Tribal Code § 1.9(G)(3), that it could have refused to hear this matter until a final judgment on the case is rendered. [See, S-M Tribe Code § 5.22(A).]

IT IS ORDERED that the Community's petition for an interlocutory appeal is granted. The interlocutory appeal shall solely address the Tribal Court's recusal order. The record of appeal is limited to the following:

- A)** The Tribal Court's August 23, 2018 order denying recusal;
- B)** Any order where this same Tribal Court recused in the last twelve (12) months in a Chapter 53 case involving similar grounds for recusal;
- C)** Any transcript or recording of arguments relating solely to the motion for recusal. Since This Court is not addressing the merits of this case, transcripts are limited to the sole issue of recusal;
- D)** The motion for recusal filed by the Community; and
- E)** Any reply to the motion for recusal filed by Plaintiff.

The Community's brief shall be filed on or before October 3, 2018. The Plaintiff's brief, if one is to be filed, is due on or before November 2, 2018. Any reply brief filed by the Community is due by November 16, 2018. Oral Arguments are limited to parties that file a brief and are set for Friday, December 7, 2018 at 3:00 p.m. Central Time. Each side shall have fifteen (15) minutes for oral arguments. If the Community wishes to reserve any of their time for rebuttal, they shall announce said request at the beginning of oral arguments.

Entered this 14th day of September, 2018.


Gregory D. Smith
Chief Justice

Cc: Justices, Tribal Court and Parties

**IN THE COURT OF APPEALS
FOR THE STOCKBRIDGE-MUNSEE COMMUNITY BAND
OF MOHICAN INDIANS
AT BOWLER, WISCONSIN**

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**ADAM HOFFMAN and
BEAU MILLER**
Appellants

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**Appeal No.: 2018-AP-0003
Trial Court No.: 2017- AA-0001
Tribal Court Layatlati Hill**

**STOCKBRIDGE-MUNSEE HUMAN
RESOURCES DEPARTMENT and
STOCKBRIDGE-MUNSEE COMMUNITY
TRIBAL COUNCIL**
Appellees

OPINION

Before Smith, Chief Justice, Lochen and Bichler, Justices

Opinion By Bichler, J.

I. SUMMARY

This is a direct appeal of the Trial Judge’s dismissal of Appellant’s lawsuit over an employee wage dispute with the Community. The order at issue was issued by the Tribal Court on August 17th, 2018. Appellants filed their brief with this Honorable Court on November 5th, 2018 and the Community filed an Appellee’s brief on December 4th, 2018. The matter was argued before the three member Stockbridge-Munsee Court of Appeals on February 8th, 2018.

II. FACTS ON APPEAL

In their February 6th, 2017 petition in the Tribal Court, Appellants alleged that they received notice from the Community that their wages would be frozen pursuant to a new wage scale adopted by the Community. As a result, Appellant Hoffman’s employment wages from the Community were frozen until 2022¹ and Appellant Miller’s employment wages were frozen until 2024.²

Appellants requested remedies available under §55.15 of the Stockbridge –Munsee Tribal Fair Labor Standards Ordinance including back-pay, actual damages, punitive damages and legal fees.³

On March 6, 2018, the Community reconsidered the wage freeze and by motion unfroze the employee wages.⁴ Subsequent to the Community’s action, the Tribal HR department paid the amount of back wages owed the Appellees.⁵ The HR determination was that Appellants would receive back-pay based on the difference between what Appellants would have received without the wage freeze and what they actually were paid. Appellant Hoffman received back- pay in the amount of \$2963.45 and Appellant Miller received back-pay in the amount of \$1439.90.⁶

Pursuant to the award of back-pay to each of the Appellants, the Tribal Community filed a Motion to Dismiss in this case arguing that since the back-pay rewards had been awarded, there no longer was a case or controversy. Subsequent to the Motion to Dismiss the Tribal Judge recused herself from the case.⁶

On August 20th, 2018 *Pro Tem* Judge Layatlali Hill issued a decision on the Motion to Dismiss. In granting the Motion to Dismiss, the Court ruled that the only available relief, back-pay, was granted and no further case or controversy existed.⁹

III. STANDARD OF REVIEW

Stockbridge-Munsee Community Tribal Code Chapter 1 §1.9(G)(4) establishes the Standard of Review

Section 1.9(G)(4)

Errors of law will be reviewed de novo with no deference to the Trial Court’s holding. Errors of fact will be reviewed based on whether there is substantial evidence to support the finding. Judicial rulings in discretionary matter are reviewed based on whether there was an abuse of discretion. Errors that are not likely to have a substantial impact on the decision or on substantial rights are considered “harmless errors” and are not the bases for reversal.

For purposes of this case, errors of law will be reviewed “*de novo*” and those of fact on “whether there is substantial evidence to support the finding”.

IV. ISSUES ON APPEAL

Pursuant to an earlier administrative order of the Court,¹⁰ the general issues were stated as follows:

- A. *Does tribal sovereign immunity yield to due process in this case, allowing the matter to proceed after the Community paid actual damages, but not collateral damages such as stress or retaliation harassment?*
- B. *If the case proceeds past a sovereign immunity claim, did the Tribal Court err in finding the litigation rendered moot by the Community lifting the promotion/wage freeze and paying back-wages for salary increases that should have occurred.*

V. THE COMMUNITY POSSESSES SOVEREIGN IMMUNITY WHICH CAN BE WAIVED ONLY BY THE COMMUNITY OR THE UNITED STATES

Federal Case law has on many occasions affirmed the doctrine of sovereign immunity in Tribes, (e.g., Santa Clara Pueblo v. Martinez).¹¹ Only when that immunity is waived by clear language of the United States, or the Tribe itself, is a valid waiver in place¹²

- A. Section 29.3 of the Community's Court Code contains a clear statement of the Community's immunity and circumstances by which a waiver is effective:

29.3 Sovereign Immunity

(A) The Stockbridge-Munsee Community is immune from suit except to the extent that the Tribal Council expressly waives sovereign immunity by resolution or by an enactment of an ordinance.

Thus, a clear waiver containing express language detailing the Tribe's waiver must be provided within a resolution or ordinance, adopted by the Tribe in accordance with Tribal law.

- B. For the purposes of employment disputes a valid limited waiver of sovereign immunity was enacted by the Community.

The Stockbridge-Munsee Community enacted §53.5 (F) to provide the available remedies for employment cases under the limited waiver. Those remedies are:

(F) Upon a credible finding by the court based upon credible evidence that a violation has occurred, the Court may order any of the following remedies:

(1) Back-pay not to exceed one (1) years wages

(2) Reinstatement

(3) Any of the non-monetary remedies which are narrowly tailored to remedy the violation

The Community then in §53.5 (G) provides a limited waiver of sovereign immunity to grant the remedies listed above stating:

(G) Only for claims filed within the Statute of limitations, the Stockbridge-Munsee Community provides a limited waiver of sovereign immunity for the purpose of permitting claims arising under Section 53.5 and allowing only those remedies identified in subsection (F) above.

Of those remedies available under 53.5 (F) only one provides monetary relief and is limited to back-pay not to exceed one year's wages.

C. Stockbridge-Munsee Precedent and Statutory law limit Appellant's monetary remedies to back-pay not to exceed one year.

Two decisions of the Stockbridge-Munsee Appellate Court affirm that the only monetary remedy available in Community employment cases is "Back-pay not to exceed one (1) years wages"

In Stockbridge –Munsee Community v. Miller,¹³ the Court reinstated the employee with "all back-pay, allowance and benefits less any compensation or money gained by employment or unemployment benefits since the date of termination." Only damages related to lost pay were allowable and then limited to one years' back-pay.

In Dodge v. Stockbridge-Munsee Community, No. AP 2008-AA-0003,¹⁴ the Court found that the Trial Court's award of 320 hours of PTO was a monetary award, and therefore, the award of PTO was not authorized by section 53.5 (F)(3) of the Tribal Code.

D. Appellants' Claims for Relief are limited to back-pay, reinstatement, or a narrowly tailored non-monetary remedy.

The Stockbridge-Munsee Tribal Code is narrowly written to provide a single monetary remedy-back-pay. Here appellants have been awarded sums that represent the difference between what they earned and what they would have earned but-for the freeze on wages. Due to the Community's limited waiver of sovereign immunity, Appellants cannot receive payments for allegations of involuntary servitude, deprivation liberty of prosperity without due process of law, harassment and violations of the Indian Civil Rights Act (25 U.S.C. §§ 1301-1304), as the Court is foreclosed from hearing such claims.

VI. CONCLUSION

This Court finds that Appellants are limited to a single monetary remedy – back-pay. Any other monetary request is precluded by the limited waiver language of Stockbridge-Munsee Tribal Code §53.5 (F). Action by the Stockbridge-Munsee Tribal Counsel in reversing the wage freeze and awarding “back-pay” was the appropriate monetary remedy.

At this time, Appellants' only course of action to receive additional compensation or for other claims exceeding the limited waiver provided in §53.5 (F) would be to petition the Stockbridge-Munsee Government to recognize additional compensation or amend Tribal law to allow that compensation.

VII. ORDER

The Court ORDERS

1. The opinion of the Stockbridge-Munsee Tribal Court is *AFFIRMED*

Entered this 3rd day of April, 2019


Howard J. Bichter
Associate Justice

Smith C.J. and Lochen J., Concur

cc. All Parties via Clerk of Court



Endnotes:

¹ Joint Appeal Petition of Decision Dated February 6, 2017.

² *Id.* at 2.

³ *Id.* at 17-18.

⁴ Respondents' and Joint Respondents' Motion to Dismiss at 2.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *See* Ruling (Joint Respondents' Recusal Motion (June 7, 2018)).

⁹ Final Decision (August 20, 2018).

¹⁰ First Administrative Order of Court of Appeals (Dec 26, 2018), Appeal No: 2018-AP-000.

¹¹ *Santa Clara Pueblo v. Martinez*, 436 US 49 (1978).

¹² *Id.*

¹³ *Stockbridge-Munsee Community v. Joseph Miller*, Case No. 97AA4.

¹⁴ *Kylee Dodge v. Stockbridge-Munsee Community*, Case No. AP 2008-AA-0003.

**IN THE COURT OF APPEALS
FOR THE STOCKBRIDGE-MUNSEE COMMUNITY BAND
OF MOHICAN INDIANS
AT BOWLER, WISCONSIN**

MAR 2 '20 AM 8:36

STOCKBRIDGE MUNSEE COMMUNITY,	)	Appeal No. 2020-AA-0001
Plaintiff/Appellee	)	Trial No. 2019-FA-0005
	)	Tribal Judge Miller
vs.)	
)	
JAMES T. MADOSH	)	<u>OPINION</u>
Defendant/Appellant)	

Before: Honorable Eric M. Lochen, Chief Justice

Opinion By Lochen, CJ.

I. SUMMARY

Defendant/Appellant James T. Madosh (“Defendant/Appellant”), *pro se*, filed a Notice of Appeal with this Court on December 9, 2019, concerning a Default Judgment ordered by the Stockbridge Munsee Trial Court, Hon. Travis Miller presiding, on November 25, 2019, against Appellant and in favor of Plaintiff/Appellee Stockbridge Munsee Community (“Appellee”).

BACKGROUND

On November 21, 2019, an initial hearing was scheduled and held by the Trial Court regarding the above-captioned case, wherein Defendant/Appellant was charged with the following violations:

1. 21.28(b) Trespass on tribal property
2. 22.25 (B) and 22.9 (B) Party to Harvesting wild ginseng without a permit
3. 22.27 (A) and 22.9 (B) (3) Wild ginseng not reported/verified by the SMC Forestry Department
4. 22.27 (A) and 22.9 (B) Party to selling wild ginseng/not for personal use (October 7, 2019)

MAR 2 '20 AM 8:36

5. 22.27 (A) and 22.9 (B) Party to selling wild ginseng/not for personal use (October 1, 2019)

Appellant was provided notice of the hearing and failed to appear.¹ On November 25, 2019, the Trial Court issued an Order for Default Judgment, finding the Defendant/Appellant guilty of the above charges, and imposing penalties.

Defendant/Appellant completed a Notice of Appeal on the Trial Court's Order for Default Judgment on December 9, 2019, which was stamped by the Court and forwarded to the attention of the Justices on February 6, 2020. Thus, it is not clear, and a question remains as to whether proper service was effectuated upon Plaintiff/Appellee, the Notice of Appeal was timely filed with the Court, and whether either party has elected to brief on this Appeal. Given the nature of the Appeal, however, this Court will now render a decision in such a fashion that will resolve the aforementioned questions and the issue at hand in accordance with Tribal law.

II. ISSUE

Where Defendant/Appellant was provided notice of the Trial Court's scheduled initial hearing, and Defendant/Appellant failed to appear, should this Court of Appeals reverse the Trial Court's Order for Default Judgment?

III. SHORT ANSWER

No.

IV. DISCUSSION

This Court reviews this matter *de novo*, and finds that the Trial Court acted within its discretion to issue an Order for Default Judgment. Defendant/Appellant raises no argument to dispute the Trial Court's action. In fact, upon review of the record, this Court notes that a phone

¹ Tribal Court Order for Default Judgment, November 25, 2019.

MAR 2 '20 AM 8:36

call was received by the Clerk's office, whereby Ms. Krista Malone² stated that neither she nor Defendant/Appellant in this matter would be appearing for the initial hearing due to the fact that they were in Milwaukee at the time.

This Court finds the record sufficient to conclude that Defendant/Appellant made the decision not to appear at the initial hearing and the Trial Court acted within its discretion. The Trial Court could have rescheduled the initial hearing as a one-time gesture of grace or good will, but, not being charged with assessing the full set of circumstances of this matter at the Trial Court level, far be it from this Court to step into the shoes of the Trial Court where the actions of the Trial Court are clearly within its discretion.

Further, Defendant/Appellant fails to provide briefing on the issues and provides no appealable issue in the Notice of Appeal. Therefore, this Court will not assume the posture of the Trial Court and reconsider the Trial Court's decision without grounds to do so.

V. ORDER

The Court ORDERS:

1. The Trial Court's Order for Default Judgment is UPHELD.
2. In accordance with the Stockbridge Munsee Appellate Procedure Ordinance, Chapter 5-A of Stockbridge-Munsee Tribal Law, this Decision is rendered by the Chief Justice and not by way of *en banc* review by the three-member panel of justices of the Stockbridge Munsee Court of Appeals. Any party dissatisfied with the decision of a single justice may petition the Court for *en banc* review.³


² Defendant/Appellant in companion case Appeal No. 2020-AA-0002.
³ 5-A.4(C)

MAR 2 '20 AM 8:55

- 3. Petitions for *en banc* review may be filed within ten (10) days of a decision by a single justice being rendered. ⁴
- 4. If no petition for *en banc* review is filed within ten (10) days of this Decision, in accordance with Tribal law, the Trial Court's Order for Default Judgment shall resume to the posture as of the moment the Default Judgment was ordered on November 25, 2019.

IT IS SO ORDERED.

Entered this 1 day of MARCH, 2020.



 Eric M. Lochen
 Chief Justice

cc All parties via Clerk of Court



⁴ 5-A.B(3)

**IN THE COURT OF APPEALS
FOR THE STOCKBRIDGE-MUNSEE COMMUNITY BAND
OF MOHICAN INDIANS
AT BOWLER, WISCONSIN**

MAR 2 '20 AM 8:36

STOCKBRIDGE MUNSEE COMMUNITY,	)	Appeal No. 2020-AA-0002
Plaintiff/Appellee	)	Trial No. 2019-FA-0004
	)	Tribal Judge Miller
vs.)	
)	
KRISTA MALONE	)	<u>OPINION</u>
Defendant/Appellant)	

Before: Honorable Eric M. Lochen, Chief Justice

Opinion By Lochen, CJ.

I. SUMMARY

Defendant/Appellant Krysta Malone (“Defendant/Appellant”), *pro se*, filed a Notice of Appeal with this Court on December 9, 2019, concerning a Default Judgment ordered by the Stockbridge Munsee Trial Court, Hon. Travis Miller presiding, on November 25, 2019, against Appellant and in favor of Plaintiff/Appellee Stockbridge Munsee Community (“Appellee”).

BACKGROUND

On November 21, 2019, an initial hearing was scheduled and held by the Trial Court regarding the above-captioned case, wherein Defendant/Appellant was charged with the following violations:

1. 21.28(b) Trespass on tribal property
2. 22.25 (B) and 22.9 (B) Party to Harvesting wild ginseng without a permit
3. 22.27 (A) and 22.9 (B) (3) Wild ginseng not reported/verified by the SMC Forestry Department
4. 22.27 (A) and 22.9 (B) Party to selling wild ginseng/not for personal use (October 7, 2019)

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5. 22.27 (A) and 22.9 (B) Party to selling wild ginseng/not for personal use (October 1, 2019)

Appellant was provided notice of the hearing and failed to appear.¹ On November 25, 2019, the Trial Court issued an Order for Default Judgment, finding the Defendant/Appellant guilty of the above charges, and imposing penalties.

Defendant/Appellant completed a Notice of Appeal on the Trial Court's Order for Default Judgment on December 9, 2019, which was stamped by the Court and forwarded to the attention of the Justices on February 6, 2020. Thus, it is not clear, and a question remains as to whether proper service was effectuated upon Plaintiff/Appellee, the Notice of Appeal was timely filed with the Court, and whether either party has elected to brief on this Appeal. Given the nature of the Appeal, however, this Court will now render a decision in such a fashion that will resolve the aforementioned questions and the issue at hand in accordance with Tribal law.

II. ISSUE

Where Defendant/Appellant was provided notice of the Trial Court's scheduled initial hearing, and Defendant/Appellant failed to appear, should this Court of Appeals reverse the Trial Court's Order for Default Judgment?

III. SHORT ANSWER

No.

IV. DISCUSSION

This Court reviews this matter *de novo*, and finds that the Trial Court acted within its discretion to issue an Order for Default Judgment. Defendant/Appellant raises no argument to dispute the Trial Court's action. In fact, upon review of the record, this Court notes that a phone

¹ Tribal Court Order for Default Judgment, November 25, 2019.

MAR 2 20 AM 8:36

call was received by the Clerk's office, whereby Defendant/Appellant stated that neither she nor James Madosh² in this matter would be appearing for the initial hearing due to the fact that they were in Milwaukee at the time.

This Court finds the record sufficient to conclude that Defendant/Appellant made the decision not to appear at the initial hearing and the Trial Court acted within its discretion. The Trial Court could have rescheduled the initial hearing as a one-time gesture of grace or good will, but, not being charged with assessing the full set of circumstances of this matter at the Trial Court level, far be it from this Court to step into the shoes of the Trial Court where the actions of the Trial Court are clearly within its discretion.

Further, Defendant/Appellant fails to provide briefing on the issues and provides no appealable issue in the Notice of Appeal. Therefore, this Court will not assume the posture of the Trial Court and reconsider the Trial Court's decision without grounds to do so.

V. ORDER

The Court ORDERS:

1. The Trial Court's Order for Default Judgment is UPHeld.
2. In accordance with the Stockbridge Munsee Appellate Procedure Ordinance, Chapter 5-A of Stockbridge-Munsee Tribal Law, this Decision is rendered by the Chief Justice and not by way of *en banc* review by the three-member panel of justices of the Stockbridge Munsee Court of Appeals. Any party dissatisfied with the decision of a single justice may petition the Court for *en banc* review.³

² Defendant/Appellant in companion case Appeal No. 2020-AA-0001.
³ 5-A.4(C)

MAR 2 '20 AM 8:36

- 3. Petitions for *en banc* review may be filed within ten (10) days of a decision by a single justice being rendered.⁴
- 4. If no petition for *en banc* review is filed within ten (10) days of this Decision, in accordance with Tribal law, the Trial Court's Order for Default Judgment shall resume to the posture as of the moment the Default Judgment was ordered on November 25, 2019.

IT IS SO ORDERED.

Entered this 1 day of MARCH, 2020.



 Eric M. Lochen
 Chief Justice

cc All parties via Clerk of Court



⁴ 5-A.B(3)

JUL 21 2021

**IN THE COURT OF APPEALS
FOR THE STOCKBRIDGE-MUNSEE COMMUNITY BAND
OF MOHICAN INDIANS
AT BOWLER, WISCONSIN**

BRITTANY A KROENING
DEPUTY CLERK OF COURT

MICHAEL G. MILLER,)	
Plaintiff/Appellant,	)	Appeal No. 2017-AA-0001
	)	Tribal Judge Robert J. Collins, II
vs.)	
)	
STOCKBRIDGE-MUNSEE COMMUNITY,	)	OPINION
Respondent/Appellee.)	

This action was heard by the Stockbridge-Munsee Tribal Court, the Honorable Robert Collins II, presiding, who determined that the Stockbridge-Munsee Community was entitled to summary judgment in this wrongful termination case. Plaintiff Michael G. Miller appeals this decision. *We affirm.*

OPINION

Before the Honorable Gregory Smith, Chief Justice, the Honorable Eric M. Lochen, Justice and the Honorable Ronald R. Hofer, Special Justice pro tem.¹

HOFER, S. J. Michael G. Miller (Miller) appeals from a decision and order of the tribal trial court granting summary judgment to the Stockbridge-Munsee Community (Tribe) in Miller's wrongful termination case. On appeal, Miller raises three broad challenges to the summary judgment, none of which persuades this court. We affirm the decision and order of the tribal trial court.

BACKGROUND

The Tribe employed Miller as its Talent Manager in the NorthStar Casino's Human Resources Department. On August 2, 2017, after an event at work prompted Miller to involve the Tribe's police, Miller sent an email to various individuals and attached a written statement that the Tribe later determined to have breached the confidentiality of two employees. On August 7, the Executive Director of Human Resources, Evan Mills, emailed Miller and gently cautioned him about employee relations, but the email did not mention confidentiality breaches. The next day, however, Mills emailed Miller and, among other things, included the following paragraph:

¹ The Honorable Howard J. Bichler recused himself from this case due to a potential conflict of interest. The Honorable Ronald R. Hofer, the "NJC Distinguished Professor" for the National Judicial College, was appointed on a *pro tem* basis for this case.

IMPORTANT NOTE: Confidential employee interactions/materials are only shared with those with a legitimate business reason to know. Within written statements, there is indication that....confidentiality extended beyond need-to-know. If additional clarity is needed on this point, always consult with the Exec HR [Mills] first. Breaches are not, and will not, be tolerated. [Emphasis ours].

About one week later, at a meeting with other Casino employees, Miller again revealed confidential and not-yet-public information regarding his deliberation process on three separate applicants for a host position at the Casino, including their preference status and full names. Mills then investigated Miller's actions by asking for written statements from shift managers present. One, Karla Delabrue, [now, Karla Kroening] said "*I wonder why [Miller] was discussing this with us and I think that is what the other 2 were thinking too. Wouldn't that be confidential? We all were in awe and did not answer him.*"

On August 30, in a letter to Miller, Beverly Miller, then acting HR supervisor, informed him that she would be conducting an investigation into his conduct and performance. She also included a Tribe Employee Action form stating that Miller had breached confidentiality and that he would get a five-day suspension pending investigation.

On September 8, Ms. Miller provided Miller with another Employee Action form that specified Mills' August 8 memo as a previous action. It also specified that "*On 8/16/17 open discussion of HR matters regarding hiring of specific individuals, their preference status and preference hiring without a legitimate need to know. Signed Confidentiality Statement. Serious nature of Confidentiality in Human Resource has been breached.*"

On September 15, Miller received a formal termination of his employment which set out with particularity the events of August 2 and 16 and their severity. Miller brought suit against the Tribe, which moved successfully for summary judgment, and this appeal ensued.

Miller first argues that the trial court erred in determining "*as a fact that there was a breach of confidentiality.*" We cannot agree. Section 5.16(D) of the Stockbridge-Munsee Tribal Court Rules of Procedure states that "*summary judgment....shall be granted by the Trial Court if it appears there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.*" We cannot agree that the tribal court found any fact; rather, it made conclusions from the evidence.

Mills' August 8 email cautions Miller about breaches of confidentiality. The Employee Action of August 30, suspended Miller for six days for "Breach of Confidentiality". The action of September 8 suspended him for five days pending termination for the following reasons: "*On 8/16/17 open discussion of HR matters regarding hiring of specific individuals, their preference status and preference hiring without a legitimate need to know. Signed Confidentiality Statement. Serious nature of Confidentiality in Human Resource has been breached.*" Finally, Miller's September 15 Notice of Termination of Employment detailed the breaches. Therefore, we conclude that the record conclusively establishes breaches of confidentiality.

FILED

STOCKBRIDGE-MUNSEE TRIBAL COURTS
STOCKBRIDGE-MUNSEE INDIAN RESERVATION

Appeal No. 2017-AA-001 Page 2 of 4

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BRITTANY A KROENING
DEPUTY CLERK OF COURT

Next, Miller argues that "[t]he trial court erred in giving short shrift to the allegations of the plaintiff..." Primarily, his argument refers to his averment that his superiors directed him to do what he did. We cannot agree.

We take persuasive guidance from our neighboring jurisdiction of Wisconsin.² We review summary judgments *de novo*, employing the same methodology as the trial court. Green Spring Farms v. Kersten, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Having read the nearly four hundred pages of appendices, we conclude as did the trial court: no genuine issue of material fact is created by Miller's averment in an affidavit that his superiors "directed" him to do what he did. Miller's averment creates no genuine issue of fact because he failed to corroborate his claim in the totality of the record.

Miller's averment refers to two superiors: Evan Mills and Michael Bonakdar. Miller apparently did not depose Mills. Further, considering that Mills, on August 8, warned Miller of his confidentiality problem of August 2, we conclude that nothing of record supports Miller's claim that the confidentiality breach was occasioned by Mills.

Miller did depose Bonakdar, but to no real avail. Miller hangs his argument on one hypothetical question asking Bonakdar if, in the course of filling casino employment positions, one might "actually talk[] to...the supervisors of a potential applicant." He replied, "I can't recall him doing anything like that, but I guess it could be a possibility, yeah." The realm of the merely possible in no way bolsters Miller's bare affidavit averment.

On this point, Miller argues from Matsushita Elec. Ind. Co. v. Zenith Radio, 475 U.S. 574 (1986) which employs the F.R.C.P. Rule 56, the federal summary judgment rule. But that case, at page 587, states "In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.' Fed. Rule Civ. Proc. 56(e)." Miller has here failed to show a genuine issue because nothing in the substantial record supports or corroborates his mere averment that his superiors 'directed' his actions.

Finally, Miller argues that "There was no showing that a methodology was employed which is necessary under a just cause determination." Again, we cannot agree. Much of his argument relies on Vidmar v. Milwaukee City Bd. of Fire Police Comm'rs, 372 Wis. 2d 701, 892 N.W.2d 740 (Wis. Ct. App. 2016). However, that case was a *certiorari* review; this case is not. *Id.* at 712. Moreover, while Miller argues that the Tribe's review should have followed a rigorous methodology like that in the Vidmar case, the Tribe, nonetheless, has its own methodology set forth in the Stockbridge-Munsee Employment Manual.

Expectably, Miller next argues that the Tribe failed to follow that methodology. Again, we cannot agree. The Manual sets out the methodology in the section entitled "Types of Corrective Action," which sets out a three-step process. While Miller correctly argues that the Tribe did not follow this exactly, we conclude that the Tribe was not required to do so.

² This Honorable Court is not bound by decision of state courts because the Stockbridge-Munsee Community is a sovereign Native American nation. Accord, Manygoats v. GMAC, 4 Nav. R. 94 (Nav. Ct. App. 1983), at *7 and Matos v. Mashantucket Pequot Gaming Enter., 2 Mash. 130 (Mash. Pequot Ct. App. 1997), at *4].

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BRITTANY A KROENING
DEPUTY CLERK OF COURT

The third of these steps, Suspension Corrective Action, "may also be the first level of corrective action depending on the severity of the incident(s)." Hence, any of Miller's criticisms about failures of the first two steps are effectively mooted. Miller does not argue that the Tribe failed to place anything in his personnel file, as required by the Manual. He does, however, contend that his superiors "failed to actually talk with him as required under the ...Manual." Assuming, *arguendo*, his contention is accurate, we are nevertheless unpersuaded that this failure constitutes reversible error. The language of the Manual requires the Tribe to "make[] an effort to discuss the action with the employee." [Emphasis ours]. Such language is advisory and not mandatory.

Miller also contends that the Tribe failed to meet various time limits set out in the Manual. Again, assuming, *arguendo*, this is accurate, we conclude that Miller nowhere shows how an action made a few days past a time limit somehow prejudiced or otherwise injured him. If anything, this failure would mean that his termination should have taken place a few days earlier. We deem this point *de minimus*.

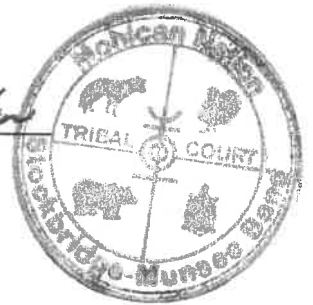
Correlatively, Miller contends that the Tribe and the tribal court failed to determine that he was fired for "just cause." While that may be the standard for a person of Miller's status, we are unconvinced that the Tribe had to use the very words, just cause. Various documents, especially his termination letter, set forth the incidents and the severity of the breaches; such is enough for a just cause determination.

By the Court--Decision and Order **AFFIRMED**.

This is the 21st day of July, 2021.

Ronald R. Hofer

**Honorable Ronald R. Hofer
Special Justice**



Smith, C.J. and Lochen, J. concur

FILED
STOCKBRIDGE-MUNSEE TRIBAL COURTS
STOCKBRIDGE-MUNSEE INDIAN RESERVATION

JUL 21 2021

BRITTANY A KROENING
DEPUTY CLERK OF COURT

IN THE COURT OF APPEALS
FOR THE STOCKBRIDGE-MUNSEE COMMUNITY BAND
OF MOHICAN INDIANS
AT BOWLER, WISCONSIN

AARON MILLER,
Petitioner/Appellee,)
vs.)
THOMAS GARDNER,)
Defendant/Appellant)

Appeal No.: 2020-CV-0014
Judge Garold Smith

FILED
STOCKBRIDGE-MUNSEE TRIBAL COURTS
STOCKBRIDGE-MUNSEE INDIAN RESERVATION

JUL 21 2021

BRITTANY A KROENING
DEPUTY CLERK OF COURT

ORDER DISMISSING APPEAL

This matter came before the Court upon a *pro se* notice from Defendant/Appellant, Thomas Gardner, to the Associate Clerk of this Court, seeing to withdraw his appeal. The document included multiple profanities, but clearly indicated an intent by Appellant to abandon this appeal. The Court acknowledges that litigation is emotion-filled, but sending a cursing rant to the Court Clerk is not the most effective way to endear oneself to the Court. *See, U.S. v. Dial*, 694 Fed. Appx. 368, 370 (6th Cir. 2017). Future acts, such as the April 9, 2021 at 10:23 a.m. email to the Clerk of this Court, may result in contempt. **WHEREFORE, PREMISES CONSIDERED;**

IT IS ORDERED that this appeal is dismissed with prejudice and court cost associated with this appeal, if any, are assessed against Defendant/Appellant, Thomas Gardner, for which execution may immediately issue.

Entered this 21st day of July, 2021.


Gregory D. Smith
Chief Justice

Cc: All parties



SEP 01 2021

BRITTANY A KROENING
DEPUTY CLERK OF COURT

IN THE COURT OF APPEALS
FOR THE STOCKBRIDGE-MUNSEE COMMUNITY BAND
OF MOHICAN INDIANS
AT BOWLER, WISCONSIN

GREGORY MILLER and SCOTT R. VELE, Plaintiffs/Appellants,	)	Appeal No. 2021-AP-0001
	)	Tribal Judge Gwendolyn M.S. Topping
vs.)	
	)	Trial Nos. 2021-CV-0009
STOCKBRIDGE-MUNSEE COMMUNITY, <i>et al.</i>,	)	2021-CV-0011
Respondent/Appellee.	)	ORDER REMANDING CASE

Before: Smith, Chief Justice; Bichler & Lochen, Justices

Order by: Smith, C.J.

RELEVANT FACTS

Appellants, Gregory Miller and Scott R. Vele, sued the Stockbridge-Munsee Community, (“Community”), on March 29, 2021 over tribal membership issues in Case Number 2021-CV-0009. On April 19, 2021, the Community filed a motion to dismiss this case on the grounds of lack of subject matter jurisdiction and tribal sovereign immunity. No response to this motion appears in the appellate record.

On April 28, 2021 a hearing of some sort was scheduled before the Honorable Gwendolyn M.S. Topping, the President of the Wisconsin Tribal Judges Association, (“WTJA”),¹ sitting *pro tem* as a special judge due to a recusal of the Stockbridge-Munsee tribal court judge.² Neither Appellants, nor their counsel, appeared for the April 28, 2021 hearing. The *Pro Tem* Judge dismissed the case with prejudice pursuant to S-M Tribal Code § TCT.02.06(b)(2). While an extreme result, the tribal code clearly offers this option for the

¹ The Honorable Gwendolyn M.S. Topping is the Associate Judge of the Red Cliff Band Tribal Court. Said court is based in Bayfield, WI, approximately 225 miles from Bowler, WI.

² As a courtesy to facilitate tribal justice, the WTSA will provide substitute judges to hear conflict cases for other tribal courts. This Honorable Court appreciates the WTSA for offering this vital service to both this Court, the Community, and other tribal courts throughout Wisconsin.

SEP 01 2021

BRITTANY A KROENING
DEPUTY CLERK OF COURT

failure to prosecute a case. Instead of filing a motion to alter or amend or a motion to reconsider the dismissal, Appellant's counsel refiled the original complaint in a near verbatim form on April 28, 2021, (approximately thirty-five {35} minutes after the first case was dismissed), as case number 2021-CV-0011. The Pro Tem Judge dismissed this case on May 3, 2021.

Without belaboring the point, Appellant's arguments in their brief range from: A) Relevant (improper notice of the argument on the motion to dismiss); to B) Illogical (the judge of the Red Cliff Band Tribal Court acting as a "rubberstamp" for the Stockbridge-Munsee Tribal Council);³ to C) Absurd (implying that it is the court clerk's fault that Appellants did not check time zones for court).

For the purposes of this order, the dispositive facts are as follows:

- I. S-M Tribal Code § TCT.02.08(b) and (c) guarantees litigants ten (10) days to respond to a motion to dismiss for lack of subject matter jurisdiction.
- II. The Community filed its motion to dismiss on April 19, 2021 and gave no notice of when the motion would be argued;
- III. The motion to dismiss was argued on April 28, 2021 and neither Appellants, nor their counsel, were present through Appellants' own mistake; and
- IV. Tribal Enrollment cases are amongst the most emotionally charged lawsuits in Indian Country.⁴

ANALYSIS

Appellants argue that the Tribal Court lacks the power to dismiss a lawsuit for Appellants not appearing in court to argue a case that Appellants filed. Appellants are wrong. See, S-M Tribal Court Rules of Procedure 12(B)(2). As an alternative argument, Appellants assert that

³ See note 1 that Judge Topping presides 225 miles away from Bowler, WI.

⁴ See generally, William R. Norman, Jr., Kirke Kickingbird, and Adam P. Bradley, *Tribal Disenrollment Demands a Tribal Answer*, 43 Human Rights 12, 14 (2017).

SEP 01 2021

BRITTANY A KROENING
DEPUTY CLERK OF COURT

since Appellants' counsel, who practices and resides in New Mexico, is in a different time zone and unfamiliar with Stockbridge-Munsee court cases, ordinances and rules; then the Court Clerk has a duty to shepherd Appellants' case through the litigation process. Again, Appellants are wrong. The Court staff have no duty to act as law clerk for any litigant or attorney, local or out-of-town. *See generally*, Gutierrez v. Deming Pub. Schools, 1996 U.S. App. Lexis 15808 (10th Cir. 6/28/1996), at *5-*6 and Young Bok Song v. Gipson, 423 Fed. Appx. 506, 510 (6th Cir. 2011). Actually, a duty of neutrality demands that neither the Court, nor court staff, actively help law-trained counsel for either a plaintiff or defendant to research, prepare or prosecute their case against an opposing party. *See*, Pankratz Farm, Inc. v. Pankratz, 95 P.3d 671, 685 (Mont. 2004) and M.W. v. State, 263 So.3d 214, 215 (Fla. App. 2019). "*Like any defendant, the Tribe is entitled to a fair trial before a neutral and impartial judge.*" Three Affiliated Tribes v. Country, 1997 Northern Plains App. Lexis 16 (N. Plains Inter. App. 5/31/1997), at *5.

The Community, on the other hand, argues that even without a proper notice of a hearing on the motion to dismiss, an adversarial process such as litigation demands that parties be prepared for all contingencies -- irrespective of the circumstances. The Community is wrong in this "all or nothing" view. The *Pro Tem* Judge must follow the law, irrespective of whether a third-party observer might consider a decision either harsh or totally justified. "*The Government wins its points when justice is done in its courts.*" Brady v. Maryland, 373 U.S. 83, 87 n. 2 (1963).

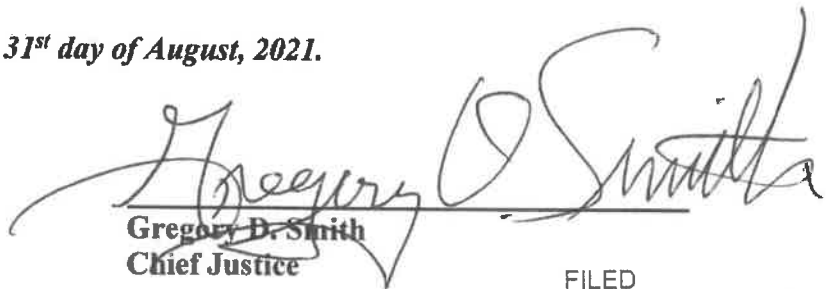
Neither party correctly cited the rule set out in S-M Tribal Code § TCT.02.08(b) and (c), which guaranteed Appellants ten (10) days to answer the Community's motion to dismiss. The lower court ruled on the pending motion after a mere nine (9) days. This is an error of law. As stated by the United States Supreme Court, "*justice must satisfy the appearance of justice.*"

Offutt v. U.S., 348 U.S. 11, 14 (1954). Ruling on a motion prior to the response time concluding does not meet the mandate of “appearing just.” Counsel for both parties should take notice that this case is being remanded solely for the lower court, whomever that judge may be, to timely rule on the motion to dismiss. After the motion to dismiss is decided, the case shall proceed accordingly. It shall be the Appellants’ responsibility to ensure that the motion to dismiss is timely heard according to the timeline set forth by this Court since the case is brought by Appellants. This Court takes no position on this matter except that the rulings to dismiss in April/May 2021 were made prematurely. **WHEREFORE, PREMISES CONSIDERED;**

This matter is remanded to the Tribal Court for the Stockbridge-Munsee Community for consideration of the Community’s motion to dismiss. This ruling shall be made within forty-five {45} days of this decision. Since the Chief Judge of the lower court has recused himself, a pro tem special judge will be needed to hear the matter, which may include the Pro Tem Judge that originally ruled on this matter. If no pro tem judge is readily available, this Court shall use its inherent powers to appoint a pro tem judge to hear the matter out of necessity.

IT IS ORDERED.

Entered this 31st day of August, 2021.



Gregory D. Smith
Chief Justice

FILED
STOCKBRIDGE-MUNSEE TRIBAL COURTS
STOCKBRIDGE-MUNSEE INDIAN RESERVATION

Justices Bichler & Lochen concur

cc: All parties

SEP 01 2021

BRITTANY A KROENING
DEPUTY CLERK OF COURT

**IN THE COURT OF APPEALS
FOR THE STOCKBRIDGE-MUNSEE COMMUNITY BAND
OF MOHICAN INDIANS
AT BOWLER, WISCONSIN**

**STOCKBRIDGE-MUNSEE COMMUNITY,
o/b/o EDUCATION DEPARTMENT,
Plaintiff/Appellee,**

vs.

**KAMILLE DAVIDS,
Defendant/Appellant**

) **Appeal No.: 2021-AP-0002**

) **Trial No.: 2019-CV-0018**

) **Tribal Chief Judge Travis Miller**

)

)

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ORDER

FILED
STOCKBRIDGE-MUNSEE TRIBAL COURTS
STOCKBRIDGE-MUNSEE INDIAN RESERVATION

Before: Smith, Chief Justice; Bichler and Lochen, Justices

JUL 26 2021

Opinion by: Smith, C.J.

BRITTANY A KROENING
DEPUTY CLERK OF COURT

ORDER DISMISSING APPEAL

On April 20, 2021, the Stockbridge-Munsee Tribal Court, speaking through the Honorable Chief Judge Travis Miller, entered a “Decision and Order for Money Judgment” in favor of the Plaintiff/Appellee and against Defendant/Appellant. For the following reasons, this appeal must be dismissed.

RELEVANT FACTS

A final judgment was entered against Defendant/Appellant, Kamille Davids, (“Appellant”), and in favor of Plaintiff/Appellee, the Stockbridge-Munsee Community, o/b/o Education Department, (“Community”), for reimbursement to the Community for funds paid for college tuition for Appellant. This ruling was entered on April 20, 2021 and constitutes a final judgment for appeal purposes pursuant to TCT.03.03(a)(1). On May 20, 2021, Appellant, through her Lay Advocate,¹ emailed a notice of appeal to the Clerk of this Court on May 20, 2021, at 3:27 p.m., but filing fees did not accompany this lodged filing. The filing fee was eventually, (*but untimely*), paid by Appellant, and the appeal was finally deemed filed with the Court, on June 9, 2021.²

The Stockbridge-Munsee Tribal Court, in response to COVID-19 Pandemic, established Civil Procedure Rules for e-filing pleadings effective June 15, 2020. These rules are found on the home webpage of the Stockbridge-Munsee Tribal Court. *S-M e-Filing Rule 6(a)*, in relevant part, states the following:

¹ Appellant’s Lay Advocate is Mr. Steven J. Davids.

² The Stockbridge-Munsee Tribal Court webpage has a credit card payment option.

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If a party fails to pay the applicable filing fee, the matter will be deemed *not filed* and no further action taken. BRITTANY A KROENING
DEPUTY CLERK OF COURT

[Italics in original text]. On June 9, 2021, Appellant paid the filing fee for the lodged notice of appeal. On July 21, 2021, the Community moved to dismiss the Appellant's late-filed notice of appeal.

ISSUES

- I. Are Lay Advocates held to the same standard of rule compliance as is required for licensed attorneys in the Stockbridge-Munsee Tribal Court System?
- II. Does this Honorable Court have the jurisdictional authority to waive condition-precedent mandates to subject matter jurisdiction?

DISCUSSION – LAY ADVOCATES

Lay advocates may represent clients in the courts of the Stockbridge-Munsee Tribal Court System pursuant to TCT.01.10(b)(4). A Lay Advocate must be licensed by the Community and approved by the Chief Judge of the Stockbridge-Munsee Tribal Court pursuant to TCT.01.11(c). It does not appear disputed that Appellant's Lay Advocate met the above-cited conditions to act as representative for Appellant.

Tribal courts acknowledge that the same general rules that apply to attorneys practicing in the tribal court system must be followed by Law Advocates. *See e.g., In Re: Sekayumptewa*, 1997 Hopi App. Lexis 2 (Hopi Ct. App. 8/29/1997), at *26 to *27; *Lonetree v. Hoist*, 1999 Ho-Chunk Supreme Lexis 15 (Ho-Chunk Sup. Ct. 4/28/1999), at *14; *Cleland v. Ft. Peck Tribal Court*, 1987 ML 5 (Ft. Peck Ct. App. 1/6/1987), at *5; and *Oneida Bingo & Casino v. Palm*, 2002 Oneida App. Lexis 49 (Oneida App. Comm. 9/9/2002), at *2. This Court adopts a rule that Lay Advocates must comply with statutory mandates when representing clients in the Stockbridge-Munsee Tribal Court System, just as licensed attorneys must meet said mandates on jurisdictional matters such as filing deadlines, statutes of limitations, ethics requirements and ordinance adherence.

DISCUSSION – SUBJECT MATTER JURISDICTION³

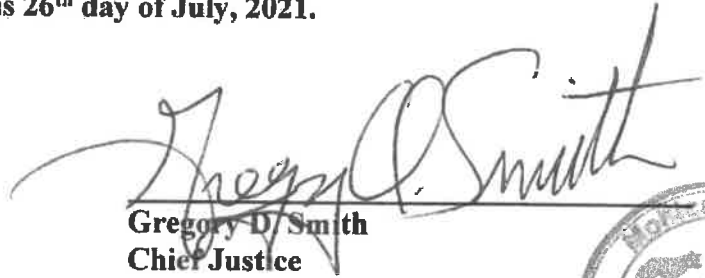
Subject matter jurisdiction is a condition-precedent to a court having the power to consider a case. *See e.g., W.J. Lazynski, Inc. v. Dept. of Indus., Labor & Human Rels.*, 332 N.W.2d 313 (Wis. App. 1983) (table) and *Sieber-Benson v. Conf. Tribes of Coos*, 2008 Coos Confederated Trib. Lexis 2 (Conf. Coos Ct. App. 7/10/2008), at *2. The timely filing of a notice of appeal is jurisdictional and non-waivable by this Court according to TCT.03.06(a) and

³ Since rules discussed in this opinion are foundational, the matter is being decided by a three (3) judge panel and is therefore binding precedent for future cases under TCT.03.04(c)(1).

TCT.03.04(a)(1).⁴ Pursuant to Rule 6(a) of the *S-M e-Filing Rule*, Appellant's notice of appeal was not timely filed because the filing fee was not timely paid. Therefore, this Court is without subject matter jurisdiction to consider this appeal because all conditions-precident to the appeal being timely filed were not met by Appellant and the Tribal Court did not allow the matter to proceed *in forma pauperis*. Therefore, this appeal is **DISMISSED**.

IT IS ORDERED that the above-cited appeal is dismissed with prejudice because this Honorable Court lacks subject matter jurisdiction to hear said appeal.

Entered this 26th day of July, 2021.


Gregory D. Smith
Chief Justice



Bichler & Lochen, Justices, concur

cc: All parties

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⁴ *Accord*, *Stacks v. Marks*, 127 S.W.3d 483, 485 (Ark. 2003); *State v. Hunter*, 904 N.E.2d 371, 373 (Ind. App. 2009); and *State v. Tully*, 2002 Ohio App. Lexis 1373 (Ohio App. 3/18/2002), at *7. While these cases are not binding on this Court, their logic is persuasive and useful as this Court considers the case at hand.