Abrahamson Marine v Battice /LRBOI --- #12031GC

Summary: The Plaintiff brought a lawsuit to the Court for a storage bill of a fishing vessel (The Mercury) that was over $7000.00. Testimony was heard that it had been docket in Ludington after it had sunk 13 feet under water for over a month. The Tribe had pulled the boat out of the water and stored at the Marine. The Tribe put it up for sale and Mr. Battice was awarded the bid. Mr. Battice paid the Tribe $5000. The title was never transferred. Mr. Battice thought the tribe owned the boat because they had been paying the storage bills prior to Mr. Battice purchasing.

Decision and Order: The Mercury was stored at the Marine at the tribe's request. Mr. Battice paid for the boat. Mr. Battice did not receive clear title until December 10, 2012. Mr. Battice will be responsible for the boat and docketing fees after 12/2012. The tribe will be responsible for the fees prior to that date. The accounting will issue a check for $9,000 from the commercial fishing fund payable to Abrahamson Marine.

Detz v LRBOI --- 12083AP

Summary: Whether the trial court erred in denying Defendant's Motion to Dismiss. After a long history, the final ruling remanded the case back to the trial court to proceed with trial. The case history involves arguments regarding the fair Employment Practices Code and the Whistleblowers Code (or lack thereof when the Plaintiff filed the case in 2008.)

Decision and Order: The Trial Court's order regarding Defendant's Motion to Dismiss is upheld and the case was returned to the Tribal Court to proceed with Trial.

The parties eventually settle and Stipulated to a dismissal.

Tribal Ogema v Tribal Council --- #12097AP

Summary: This appeal comes to this Court of Appeals on the sole issue of whether the Trial Court abused its discretionary authority in ordering sanctions for non-compliance of a Court Order.

Decision and Order: The Tribal Court did not abuse its discretion in ordering sanctions against the Defendant-Appellant for failing to submit a proposal for Peacemaking, facilitative mediation, or alternative dispute resolution as ordered.

For the reasons set forth in this Opinion and Order, the Trial Court's Order regarding Defendant's Motion for reconsideration, Motion to Strike and Request for Sanctions is entered.

The Defendant-Appellant is hereby ordered to reimburse Plaintiff Tribal Ogema his attorney fees and cost related to the Plaintiff's filing.

Little River Band of Ottawa Indians
TRIBAL COURT
3031 Domres Road
Manistee Michigan 49660
(231) 398-3406
Fax: (231) 398-3404

ABRAHAMSON MARINE,
PLAINTIFF

V. CASE NUMBER: 12031GC

THOMAS BATTICE,
DEFENDANT

LITTLE RIVER BAND OF OTTAWA INDIANS,
CO-DEFENDANT

Abrahamson Marine
820 First Street
Ludington, MI 49431

Little River Band of Ottawa Indians
Ogema Larry Romanelli
375 River Street
Manistee, MI 49660

Thomas Battice
3774 East 1st Street
Custer, MI 49405

ORDER

At a session of said Court on July 9, 2012
In the Reservation Boundaries of the
Little River Band of Ottawa Indians,
State of Michigan
PRESENT: HON. DANIEL BAILEY

A second pretrial was held. The issues that were originally brought up at the first hearing were not rectified. The Plaintiff, Abrahamson Marine, brought this lawsuit to the court to have a bill for storage of a fishing vessel (the Mercury) paid in the amount (to date: February 15, 2012) of $7,310.00.

Testimony from the hearing indicates that the Mercury was a boat that was docked in Ludington and had sunk in thirteen feet of water. It was underwater for over a month when the Tribe eventually had it lifted from the water and stored at Abrahamson Marine. The Tribe subsequently put it up for sale through a bidding process. Mr. Battice submitted a bid and was awarded the vessel. Mr. Battice paid $5,000.00 to the Tribe for the Mercury.

It appears from documentation presented at the hearing that the Tribe did not have title to the Mercury and therefore Mr. Battice does not have title to the Mercury.

ABRAHAMSON MARINE,
PLAINTIFF

V.

CASE NUMBER: 12031GC

THOMAS BATTICE,
DEFENDANT

Mr. Abrahamson testified he thought the Tribe owned the boat because they had been paying the bills for storage prior to Mr. Battice purchasing the Mercury from the Tribe. He testified that someone from the Tribe called and said not to send the invoices to them anymore because Mr. Battice had purchased the boat.

The Court finds that the Tribe is a necessary party to this lawsuit as their presence in this action is necessary for the court to render complete relief and must be joined as a party. The Tribe has 28 days to submit their answer to this lawsuit.

IT IS ORDERED:

Judge Daniel Bailey

7/19/12
Date

CERTIFICATION OF SERVICE

I certify that a copy of this order was placed in the outgoing Tribal mail to be taken to the Manistee branch of the US Post office today to be sent by regular US mail to Petitioner and Respondent or their attorneys (and any other interested parties) to the addresses on file with the court.

Deborah Miller
Clerk or Administrator

7/19/12
Date

Little River Band of Ottawa Indians
TRIBAL COURT
3031 Domres Road
Manistee Michigan 49660
(231) 398-3406
Fax: (231) 398-3404

ABRAHAMSON MARINE,
PLAINTIFF

V. CASE NUMBER: 12031GC

THOMAS BATTICE,
DEFENDANT

LITTLE RIVER BAND OF OTTAWA INDIANS,
CO-DEFENDANTS

Abrahamson Marine
820 First Street
Ludington, MI 49431

Little River Band of Ottawa In
Susan Aasen – Attny. For Co-
375 River Street
Manistee, MI 49660

Thomas Battice
3774 East 1st Street
Custer, MI 49405

ORDER

At a session of said Court on January 14, 2013
In the Reservation Boundaries of the
Little River Band of Ottawa Indians,
State of Michigan
PRESENT: HON. DANIEL BAILEY

The parties were given additional time for mediation as requested by the co-defer attorney at the last hearing on December 10, 2013. The order from that hearing h scheduled the final hearing for today's date. The Plaintiff's representative, Presid Abrahamson Marine, was in attendance. Both defendant and co-defendant did nc appear.

The Plaintiff said that there was one conversation with Susan Aasen shortly after hearing in December about a check that needed a second signature. He was nev to re-contact her. He made six more attempts to call her and both her cell phone office phone would not accept messages.

The *Mercury* was stored at Abrahamson's Marine at the Tribe's request. Mr. Batti $5000 on the boat, was awarded the boat, and paid cash on September 14, 2009 boat. He was given an unsigned bill of sale at that time. In the past three years, storage of the boat has accrued a bill of over $9,800. The boat was not legally his was titled in Charles Henriksen's name. Mr. Battice did not receive a clear title ur 10th of December 2012.

ABRAHAMSON MARINE,
PLAINTIFF

V. CASE NUMBER: 12031GC

THOMAS BATTICE,
DEFENDANT

LITTLE RIVER BAND OF OTTAWA INDIANS,
CO-DEFENDANTS

Resolution # 07-0516-259 amended the …"Consent Decrees Commercial Fishing Procedures Land Purchase that allows the funds allocated for the purchase of property to be used to lease dock space on a year by year basis for the benefit of commercial fishing activities provided the total lease payment for all space does not exceed $3,000 per year per commercial fishing vessel." [emphasis added]

The Accounting Department has stated that there is over one million dollars in the Consent Decree Fund. This money is not from the Tribe's gaming revenue. The fund was allocated by the State for commercial fishing ventures.

Mr. Battice will be responsible for the boat and dockage fees from December 10, 2012, when he received clear title. The Tribe will be responsible prior to that date.

The Accounting Department shall issue a check from the commercial fishing (consent decree) fund in the amount of $9,000 payable to Abrahamson Marine within 14 days of receiving this Order.

IT IS ORDERED:

Judge Daniel Bailey — Date: 1/14/13

CERTIFICATION OF SERVICE

I certify that a copy of this order was placed in the outgoing Tribal mail to be taken to the Manistee branch of the US Post office today to be sent by regular US mail to Petitioner and Respondent or their attorneys (and any other interested parties) to the addresses on file with the court. A copy was placed in the inter-office mail to be taken to the Accounting Department for compliance.

Clerk or Administrator — Date: 1/15/13

Little River Band of Ottawa Indians
TRIBAL COURT
3031 Domres Road
Manistee Michigan 49660
(231) 398-3406
Fax: (231) 398-3404

ABRAHAMSON MARINE,
PLAINTIFF

V. CASE NO.: 12031GC

THOMAS BATTICE,
DEFENDANT

LITTLE RIVER BAND OF OTTAWA INDIANS,
CO-DEFENDANT

Abrahamson Marine
820 First Street
Ludington, MI 49431

Little River Band of Ottawa Indians
Susan Aasen – Attny. For Co-Def
375 River Street
Manistee, MI 49660

Thomas Battice
3774 East 1st Street
Custer, MI 49405

ORDER REGARDING MOTION FOR RECONSIDERATION

At a session of said Court on February 7, 2013
In the Reservation Boundaries of the
Little River Band of Ottawa Indians,
State of Michigan
PRESENT: HON. DANIEL BAILEY

A *NOTICE OF MOTION AND MOTION FOR RECONSIDERATION AND MOTION FOR HEARING* was filed by the Co-Defendant on February 4, 2013. The Court provided copies to the Plaintiff and Defendant in today's mail.

The Court denies the motion and will not schedule a hearing based on the following:

ISSUES PRESENTED IN MOTION:

1. "Grant the motion to dismiss the case regarding the Little River Band of Ottawa Indians based upon sovereign immunity.
2. Dismiss the case due to lack of jurisdiction over a non-tribal member and lack of jurisdiction over the territory of Ludington, Michigan, outside of the Tribal court jurisdiction.
3. Conduct a final hearing to resolve the legal issues regarding jurisdiction over the non-tribal member conducting business without a contract outside the territorial jurisdiction of the Tribal Court.
4. Dismiss the case based upon the plaintiff's acceptance in Peacekeeping that the amount of $6000.00 has been paid for boat storage fees. There is no basis for payment of any amount more than what was accepted by plaintiff in Peacekeeping and payment of said amount to plaintiff."

FINDINGS OF THE COURT

1. *Per Michigan Rules of Court - Civil Procedure (which were also cited by the Co-Defendant), MCR 2.119, (F) (3) "Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted." The issue of sovereign immunity has already been decided by an Order signed on January 14, 2013.*
   The fact that the Tribe issued a check for $6000.00 to Abrahamson Marine on the same day as the final hearing is being inferred as an implied waiver of sovereign immunity.

2. *The Tribe's own Constitution gives the Court the power to (Section 8, (1.) To adjudicate all civil and criminal matters arising within the jurisdiction of the Tribe* ***or to which an enrolled member of the Tribe is a party.*** *[emphasis added]*

3. *The Court will not hold another hearing on this matter. The Co-Defendant did not appear at the last and final hearing which was scheduled and held on January 14, 2013.*

4. *The Peacemaking agreement was never presented to the Court; no signed document was entered in the file, nor was anything put on record. The Order from the final hearing has the Tribe paying for three years of storage, which is $9000.00. That Order is the final order of the court on this matter.*

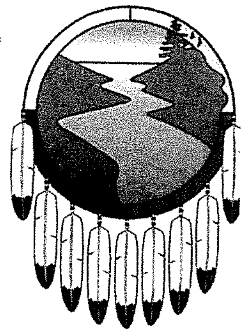
SO ORDERED:

Judge Daniel Bailey — Date 2/4/13

CERTIFICATION OF SERVICE

I certify that a copy of this order was placed in the outgoing Tribal mail to be taken to the Manistee branch of the US Post office today to be sent by regular US mail to Petitioner and Respondent or their attorneys (and any other interested parties) to the addresses on file with the court.

Court Administrator – Deborah Miller — Date 2/8/13



Little River Band of Ottawa Indians
Tribal Court of Appeals
3031 Domres Road
Manistee Michigan 49660
231-398-3406
Fax: 231-398-3404

SHARRON DETZ,
Plaintiff/Appellee

Case Number: 12-083 AP

v.

LITTLE RIVER BAND OF OTTAWA INDIANS,
Defendant/Appellant

Honorable Melissa Pope
Honorable Martha Kase
Honorable Berni Carlson

Daniel P. O'Neil
Attorney for Plaintiff-Appellee
309 E. Front – P.O. Box 429
Traverse City, Michigan 49685

Kaighn Smith
Attorney for Defendant-Appellant
80 Marginal Way
Portland, Maine 04101

OPINION AND ORDER

At a session of said Court held in the Courthouse of the Little River Band of Ottawa Indians on the Little River Band of Ottawa Indians Reservation on the 30th day of August 2012

INTRODUCTION

This case returns to the Little River Band of Ottawa Indians Appellate Court following Oral Arguments in response to the Trial Court's Order Clarifying the March 21, 2012 Order Regarding Defendant's Motion to Dismiss.

JURISDICTION

The Little River Band of Ottawa Indians (LRBOI) Tribal Court has jurisdiction pursuant to the Constitution of the LRBOI with the applicable provisions as follows:

> Article VI, Section 8 – Powers of the Tribal Court
> (a) The judicial powers of the Little River Band shall extend to all cases and matters in law and equity arising under this Constitution, the laws and ordinances of or applicable to the Little River Band including but not limited to:
> 1. To adjudicate all civil and criminal matters arising within the jurisdiction of the Tribe or to which the Tribe or an enrolled member of the Tribe is a party.

This Court has jurisdiction as the Plaintiff has filed this civil action as a result of her employment at the LRBOI.

FACTS

The Plaintiff, by and through her attorney, filed a Complaint and Jury Demand on or about December 11, 2008.

The Defendant, by and through their attorney, filed their Answer and Affirmative Defenses on or about January 8, 2009.

A Pretrial Conference was held on February 5, 2009 with the Court holding that the case had to proceed under the Fair Employment Ordinance.

The Plaintiff filed the appropriate Charge of Discrimination form on or about February 10, 2009.

The Court was advised that there was no budget for an investigation. On its own motion, the Court issued Order Regarding Discrimination Charges on February 19, 2009, returning jurisdiction to the Tribal Court and scheduling a second Pretrial Hearing on April 14, 2009.

A Pretrial Conference was held on April 14, 2009.

The Trial Court issued an Order After Hearing on April 14, 2009 that provided the schedule for the case, including a trial date of December 17, 2009.

The Defendant filed Defendant's Motion to Dismiss on or about June 1, 2009.

The Plaintiff filed the Plaintiff's Response to Defendant's Motion to Dismiss on or about July 16, 2009.

A Hearing on the Defendant's Motion to Dismiss was held on July 24, 2009.

For reasons not known to this Appellate Court, an Order regarding the Defendant's Motion to Dismiss was not issued by the Trial Court. The schedule in the Trial Court's April 14, 2009 Order was not followed, including that the trial was not held on December 17, 2009.

On or about May 4, 2010, the Defendant filed the Motion of the Little River Band of Ottawa Indians to File Supplemental Memorandum in Support of Dismissal and also filed the Supplemental Memorandum of Little River Band of Ottawa Indians in Support of Dismissal.

On September 13, 2010, the Trial Court entered its Order Regarding Defendant's Motion to Dismiss. The Trial Court: granted in part and dismissed in part Defendant's Motion to Dismiss; dismissed Plaintiff's claim under the Government Employment Relations Act; and moved forward the Plaintiff's claim under the Fair Employment Practices Code. For reasons not known to this Appellate Court, no Scheduling Order was entered by the Trial Court. However, based on documents filed with the Court, it appears that the attorneys in this case continued to move forward with such items as holding depositions.

On or about May 9, 2011, the Court scheduled a Status Hearing for June 2, 2011 which was adjourned by stipulation of the parties to June 17, 2011.

A Hearing was held on June 17, 2011.

A Scheduling Order by Stipulation of the Parties was signed by the Trial Court on June 23, 2011.

On or about September 1, 2011, the Court received the Motion of the Little River Band of Ottawa Indians for Summary Disposition with Incorporated Memorandum of Law and the Record in Support of Little River Band of Ottawa Motion for Summary Disposition from the Defendant.

On September 8, 2011, the Trial Court issued a Notice of Hearing, specifying that the Motion of the Little River Band of Ottawa Indians for Summary Disposition would be held on September 29, 2011, pursuant to the Scheduling Order signed on June 23, 2011.

On or about September 22, 2011, the Court received the Plaintiff's Response to Defendant's Motion for Summary Disposition.

The Defendant filed the Motion of the Little River Band of Ottawa Indians to Strike Plaintiff's Response to Defendant's Motion for Summary Judgment on or about September 26, 2011.

A Hearing on the Defendant's Motion for Summary Disposition was held on September 29, 2011.

For reasons not known to this Appellate Court, the Trial Court did not issue an order until March 21, 2012. In its Order Regarding Defendant's Motion to Dismiss, the Trial Court: allowed Exhibit 16 of the Deposition of Sharon Detz; denied Defendant's Motion to Strike; and denied Defendant's Motion for Summary Disposition, ordering Plaintiff's claim under the Fair Employment Practices Code to move forward. The Trial Court set the matter for trial on May 3, 2012.

On or about April 9, 2012, the Defendant filed the Motion for Reconsideration of the Little River Band of Ottawa Indians.

The Defendant, also referred to as the Defendant-Appellant in this Order and Opinion, withdrew their Motion for Reconsideration on April 19, 2012 and filed a Notice of Appeal. The Defendant-Appellant explained during Oral Arguments before this Appellate Court that they thought it best to withdraw the Motion and file a Notice of Appeal in case the Trial Court did not issue a response before the deadline for filing an appeal. Further, they were concerned about the pending trial date.

The Trial Court entered an Order Granting Stay on April 20, 2012.

The Plaintiff, also referred to as the Plaintiff-Appellee in this Order and Opinion, submitted the Plaintiff's Motion to Dismiss Defendant's Notice of Appeal on or about April 24, 2012.

On or about April 26, 2012, the Court received the Opposition of the Little River Band of Ottawa Indians to Plaintiff's Motion to Dismiss Appeal from the Defendant.

The Appellate Court sent notice on April 30, 2012 of a Hearing to Establish Scheduling and Hear Motion to Dismiss Appeal, to be held on May 18, 2012.

The Hearing on Plaintiff-Appellee's Motion to Dismiss Appeal was held on May 18, 2012. Both parties appeared and presented Oral Arguments before the Appellate Court.

On May 25, 2012, the Appellate Court issued an Order to the Trial Court requesting the Trial Court to "clarify as to the grounds for denying the Motion to Dismiss, specifically the reasoning around the application of Article XII of the Fair Employment Practices Code versus the basis for the Complaint, Article IV of that Code, with particular attention paid to how the

basis for the denial relates to sovereign immunity." The Appellate Court also granted a stay for the trial.

On May 29, 2012, the Trial Court issued an Order Clarifying the March 21, 2012 Order Regarding Defendant's Motion to Dismiss.

On June 12, 2012, the Appellate Court issued an Order granting the appeal that included a Scheduling Order that had been agreed upon by the parties at the May 18, 2012 Hearing.

The Defendant submitted the Brief of the Little River Band of Ottawa Indians on or about July 13, 2012.

The Plaintiff submitted the Plaintiff-Appellee Sharon Detz's Brief on August 10, 2012.

The Court received the Reply Brief of the Little River Band of Ottawa Indians on or about August 23, 2012.

Oral Arguments were held on August 31, 2012 with Chief Justice Melissa L. Pope appearing by phone and Justice Berni Carlson and the parties appearing in person. Justice Martha Kase did not attend the Oral Arguments. Both parties appeared and made oral arguments. As LRBOI employment regulations call for closed trial court proceedings and the Plaintiff referenced information about other LRBOI employees in her Brief, the Chief Justice closed the court room.

The Appellate Court received a Joint Motion to Stay Proceedings Pending Mediation on October 9, 2012. This Motion was submitted by both the Plaintiff-Appellee and the Defendant-Appellant and asked the Appellate Court to not issue an Order and Opinion in this case as they were trying to reach a resolution.

In response to this joint party request, the Court issued the Order on the Parties' Joint Motion to Stay Proceedings Pending Mediation on October 17, 2012.

The parties did not contact the Court after the Order on the Parties' Joint Motion to Stay Proceedings Pending Mediation was entered.

On December 6, 2012, the Chief Justice asked the Tribal Court Administrator to contact the attorneys in this case for an update.

The Tribal Court Administrator left voicemails for the attorneys. Defendant-Appellant's attorney replied via e-mail on December 6, 2012 and indicated that the mediation had failed. Attorney Smith wrote: "However, there have been a few lingering conversations post-mediation. I think that's the best way to describe the status, and I'm sure Dan will add his

thoughts if he has them." It does not appear that Plaintiff-Appellee responded to the Court. The attorneys for the parties did not request the Stay to be lifted or for the Order and Opinion to be issued.

On January 11, 2013, the Chief Justice contacted the Tribal Court Administrator to inquire as to whether there had been any communication from the parties. The Tribal Court Administrator stated that there had not been any communications from the parties or their attorneys since the December 6, 2012 email from Attorney Smith.

On January 14, 2013, the Chief Appellate Justice asked the Tribal Court Administrator to once again contact the Attorneys for an update on the status of the case.

On January 16, 2013, the Tribal Court Administrator contacted Plaintiff-Appellee's Attorney, with permission from the Defendant-Appellant's Attorney, and requested information on the status of the case. Mr. O'Neil replied via email: "Thanks for your note. At this point we have not reached a settlement and there are no ongoing negotiations. Unfortunately it appears we have reached an impasse."

With the Stay still in effect and the parties having not submitted a joint motion to lift the Stay, the Chief Justice issued an Order for Status, requiring the parties to submit a stipulated order requiring that the Stay be lifted and the Order and Opinion be issued.

The parties submitted their Joint Stipulation and Order on February 6, 2013. The Chief Justice signed the Order on February 6, 2013.

This Appellate Court now issues this Order and Opinion. Justice Martha Kase did not take part in this Order and Opinion. The remaining Justices, however, were in unanimous agreement as to this Order and Opinion which constitutes a majority of this three-Justice Appellate Court.

OPINION

The Appellate Court has painstakingly reviewed this case in an effort to understand why, after almost four (4) years, this case has not yet been resolved. This effort was made, in part, to determine what would best facilitate justice in this matter within the laws of the LRBOI.

The subject of this appeal is the Trial Court's denial of Defendant's Motion to Dismiss and order to proceed to trial. While both parties agree that the Plaintiff-Appellee's claim has and continues to be based solely on Article IV of the Fair Employment Practices Code ("FEP Code"),

the parties have different interpretations of the FEP Code. The Defendant-Appellant argues that the Plaintiff could not meet the burden of proving a prima facie case under Article IV of the FEP Code. The Defendant-Appellant further argues that the only basis for the Trial Court to deny their Motion for Summary Judgment and order the case to go to trial was under the Whistle Blower Act, a law that was not in effect at the time of the Plaintiff-Appellee's employment. They argue that a plaintiff must prove all of the elements in both 4.01(a) and (b) in order to bring a cause of action:

> Article IV. *Unlawful Employment Discrimination*
> 4.01. *Unlawful Discrimination: General Rule.* Except when based on a bona fide occupational qualification or in furtherance of the provision of employment preferences to members of the Band or other Indians pursuant to the law, rules or policies of the Band or pursuant to policies or actions giving preferences to Indians under 42 U.S.C. § 2000-2(i), it shall be unlawful employment discrimination, in violation of the Code:
>
> > a. For any employer to fail or refuse to hire or otherwise discriminate against any applicant for employment because of sex, race, color, national origin, religion, age, disability, veteran, marital status, or sexual orientation; or, because of these reasons, to discharge an employee or discriminate with respect to hire, tenure, promotion, transfer, compensation, terms, conditions or privileges of employment or any other matter directly or indirectly related to employment; or, in recruiting of individuals for employment or in hiring them, to utilize any employment agency that the employer knows or has reasonable cause to know discriminates against individuals because of their sex, race, color, national origin, religion, age or disability; or
> >
> > b. For an employer to discriminate in any manner against individuals because they have opposed a practice that would be a violation of this Code or because they have made a charge, testified or assisted in any investigation, proceeding or hearing under this Code.

According to the Defendant-Appellant's interpretation of the FEP Code, for an action to be brought under 4.01, there must be discrimination based on sex, race, color, national origin, religion, age, disability, veteran, marital status, or sexual orientation. Since the Plaintiff-

Appellee has not demonstrated nor argued any discrimination based on these factors, the Defendant-Appellant argues that it is impossible for the Plaintiff-Appellee to meet the burden of proving a prima facie case. In their pleadings, the Defendant-Appellant went on to argue that the facts of this case were more like that of a Whistle Blower action. The Defendant-Appellant correctly argued that, since the LRBOI Whistle Blower Act was adopted after the Plaintiff-Appellee was employed as the LRBOI Human Resources Director, the Whistle Blower Act cannot be applied to this case. As such, the Defendant-Appellant has argued that the Trial Court should have granted their Motion for Summary Judgment.

In the March 21, 2012 Order Regarding Defendant's Motion to Dismiss, the Trial Court stated the following:

> Defendant also argues that Plaintiff's allegations are more akin to whistle-blower and that the Whistle-blower Act was not if effect at the time of Plaintiff's employment, and thus it cannot be applied retroactively. The Court agrees on the retroactivity, but also notes that Article XII of the Fair Employment Practices Code at 12.01, and 12.03 gives employees protections against retaliation for whistleblower claims. Specifically, 12.01 states: The purposed (sic.) of this article is to protect employees who report violations of law from employment discrimination.

The Defendant-Appellant argued that this excerpt, as well as the Defendant-Appellant's pleadings, proved that the Trial Court was permitting the case to go forward under the Whistle Blower Act in violation of the laws of the LRBOI. They further argued that they held sovereign immunity to the retroactive application of the Whistle Blower Act. The Defendant-Appellant did not raise sovereign immunity at the Trial Court level.

The Plaintiff-Appellee, on the other hand, has consistently argued that there is a different interpretation of Article IV, Section 4.01 and that it is this interpretation that the Trial Court used to deny the Defendant's Motion to Dismiss and order that the case proceed to trial.

This Appellate Court asked the Trial Court to clarify its opinion which it did in its Order Clarifying the March 21, 2012 Order Regarding Defendant's Motion to Dismiss ("Clarifying Order"). Each party contended that the Clarifying Order supported their argument. Before issuing the Order and Opinion in this case, the parties submitted a joint request to stay the issuance of an Appellate Court Order and Opinion while they attempted to resolve the issue in

mediation. This Appellate Court was therefore prohibited from issuing an Order and Opinion until it received a joint request from the parties indicating that there was no possibility of resolution and requesting the Stay to be lifted.

After requesting the Tribal Court Administrator to contact the parties on two separate occasions, the Court finally received the Joint Stipulation and Order from the parties on February 6, 2013 which the Chief Justice signed that same day. This Appellate Court can now issue this Order and Opinion.

As noted by the Trial Court in its Clarifying Order, the Little River Band of Ottawa Indians Court Rules state: "The Tribal Court of Appeals will not consider issues that were not raised before the Tribal Court unless a miscarriage of justice would result." (LRCR) at Section 5.402 A. Therefore, the issue that should be considered by the Appellate Court is whether the Trial Court erred in denying Defendant's Motion to Dismiss. We hold that it did not. Reaching this conclusion requires an analysis of Section 4.01 of Article IV of the FEP Code which this Court finds necessary to issue an opinion on whether the Trial Court erred. As we find that this analysis is required to determine the underlying reasoning for denying the Defendant's Motion to Dismiss, we hold that this analysis is within the issues raised before the Tribal Court.

As stated previously, the Defendant-Appellant's argument that the Plaintiff-Appellee has not made out a prima facie case for unlawful discrimination under 4.01 of the FEP Code is significantly rooted in the Plaintiff not having demonstrated discrimination based on sex, race, color, national origin, religion, age, disability, veteran, marital status or sexual orientation, as required by Article IV, Section 4.01(a). However, Article IV, Section 4.01(b) can be read independently of Article 4.01(a) because there is an "or" between the two sections. Under this interpretation, it reads as follows:

> Article IV. *Unlawful Employment Discrimination*
> 4.01. *Unlawful Discrimination: General Rule.* Except when based on a bona fide occupational qualification or in furtherance of the provision of employment preferences to members of the Band or other Indians pursuant to the law, rules or policies of the Band or pursuant to policies or actions giving preferences to Indians under 42 U.S.C. § 2000-2(i), it shall be unlawful employment discrimination, in violation of the Code:

> b. For an employer to discriminate in any manner against individuals because they have opposed a practice that would be a violation of this Code or because they have made a charge, testified or assisted in any investigation, proceeding or hearing under this Code.

With this interpretation, there is no requirement that the unlawful discrimination be based on sex, race, color, national origin, religion, age, disability, veteran, marital status or sexual orientation. Instead, the unlawful discrimination can be based on actions against an employee because they have opposed practices that they believe are violations of the Code.

There is further support for this interpretation through a plain reading of 4.01(a). There are several types of situations related to employment, ranging from the initial application process through the discharge of an employee, where it is unlawful to discriminate based on sex, race, color, national origin, religion, age, disability, veteran, marital status or sexual orientation. The reference to sex, race, color, national origin, religion, age, disability, veteran, marital status or sexual orientation is used with regard to each situation. With the explicit language throughout 4.01(a), it logically follows that this would also be the case in 4.01(b) if it was a requirement that the unlawful discrimination described in 4.01(b) include one of these categories. This is not the case. The fact that 4.01(b) makes no reference to sex, race, color, national origin, religion, age, disability, veteran, marital status or sexual orientation, as well as the fact that each situation in 4.01(a) is separated by the word "or" and includes the categories of "sex, race, color, national origin, religion, age, disability, veteran, marital status or sexual orientation" for each situation makes it clear to this Appellate Court that section 4.01(b) does not require that the unlawful discrimination include sex, race, color, national origin, religion, age, disability, veteran, marital status or sexual orientation.

In their Motion for Summary Judgment, because they believed that sex, race, color, national origin, religion, age, disability, veteran, marital status or sexual orientation was a necessary element for a 4.01 FEP Code claim, they compared the present case to a whistle blower action. The Trial Court acknowledged the similarities in its March 21, 2012 Order Regarding Defendant's Motion to Dismiss which caused confusion to the extent that this Appellate Court requested clarification from the Trial Court to ensure that the proper law was being applied to the case. While not articulated in the same manner by the Plaintiff-Appellee or the Trial Court, it is clear to this Appellate Court that it is the interpretation of 4.01(b) of the FEP

Code in this Order and Opinion that is being applied in the present case. One source of this holding is that the Trial Court specifically acknowledged in its March 21, 2012 Order Regarding Defendant's Motion to Dismiss that the Whistle Blower Act could not be applied retroactively. There is no doubt that the Defendant-Appellant strongly disagrees with this interpretation and contends that 4.01(b) requires discrimination based on sex, race, color, national origin, religion, age, disability, veteran, marital status or sexual orientation. However, it is the holding of this Appellate Court that the correct interpretation of 4.01 is that 4.01(b) of Article IV of the FEP Code is independent of 4.01(a), thus there is no requirement that the alleged discrimination be based on sex, race, color, national origin, religion, age, disability, veteran, marital status or sexual orientation. The fact that this interpretation is similar to the Whistle Blower Act is irrelevant as this interpretation is based solely on Article IV, Section 4.01(b) of the FEP Code.

To be clear, this case is not going forward under Article XII of the FEP Code. It is going forward under Article IV, Section 4.01(b) of the Fair Employment Practices Code under the following interpretation that "it shall be unlawful employment discrimination, in violation of the Code (f)or an employer to discriminate in any manner against individuals because they have opposed a practice that would be a violation of this Code or because they have made a charge, testified or assisted in any investigation, proceeding or hearing under this Code."

In returning to the March 21, 2012 Order Regarding Defendant's Motion to Dismiss, the Trial Court listed several facts that were in dispute. The Trial Court went on to state:

> In this instant case, Plaintiff was the director of the Human Resources department, and charged with following the law in hiring of employees. In viewing this in a light most favorable to the Plaintiff, it is possible that a trier of fact could come to the conclusion that this was may have been (sic.) retaliation for her complaints about unfair practices and that she was treated differently.

The Trial Court held that "Plaintiff has narrowly shown that she may have been retaliated against in the form of disciplinary actions for her complaints about unfair practices." With the interpretation of 4.01(b) articulated in this Order and Opinion applied to this holding and the findings as determined by and listed in the Trial Court's Order denying the Defendant-

Appellant's Motion to Dismiss, there is no evidence under any standard of review that supports disturbing this decision of the Trial Court.

This Appellate Court agrees with the statement in the Trial Court's Order Clarifying the March 21, 2012 Order Regarding Defendant's Motion to Dismiss:

> The Little River Band of Ottawa Indians Court Rules (LRCR) at Section 5.402 A. Issues Omitted, states "The Tribal Court of Appeals will not consider issues that were not raised before the Tribal Court unless a miscarriage of justice would result." The issue of sovereign immunity was not raised and should not be allowed to be heard as part of the appeal.

As the theory of the claim is now clear, the Appellate Court does not anticipate an appeal based on sovereign immunity since Section 2.06 of the FEP Code contains an explicit waiver of sovereign immunity.

As stated at the beginning of this Opinion, this Appellate Court has painstakingly reviewed this case in an effort to understand why, after almost four (4) years, this case has not yet been resolved. The incredibly long history of this case, provided in this Order and Opinion, indicates numerous actions, some delayed, to finally be at this point where the case is going forward on a clear and concise theory. The parties and the Court should make every effort to go forward to trial and resolve this case without delay.

ORDER

The Trial Court's Order Regarding Defendant's Motion to Dismiss is UPHELD and the case is returned to the Trial Court to proceed to trial.

IT SO ORDERED:

Melissa L. Pope — 2·8·2013

Honorable Melissa L. Pope, Chief Justice — Date

Honorable Berni Carlson, Associate Justice

2/8/13
Date

Honorable Martha Kase, Associate Justice

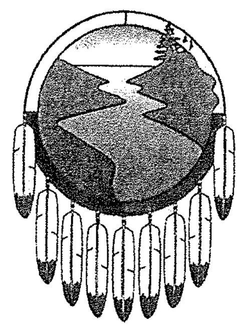
Date

CERTIFICATION OF SERVICE

I certify that I placed a copy of this order in the Tribal mail system to have adequate postage attached and taken to the Manistee Post Office on this date for mailing to the parties and/or the attorneys for the parties as listed.

Court Administrator Deb Miller

2/8/13
Date



Little River Band of Ottawa Indians
Tribal Court of Appeals
3031 Domres Road
Manistee Michigan 49660
231-398-3406
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TRIBAL OGEMA,
Plaintiff/Appellee

Case Number: 12097AP

v.

TRIBAL COUNCIL,
Defendant/Appellant

Honorable Melissa Pope
Honorable Martha Kase
Honorable Berni Carlson

Susan Aasen
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375 River Street
Manistee, Michigan 49660

OPINION AND ORDER

At a session of said Court held in the Courthouse of the Little River Band of Ottawa Indians on the Little River Band of Ottawa Indians Reservation on the 8TH day of February 2013

INTRODUCTION

This appeal comes to this Court of Appeals on the sole issue of whether the Trial Court abused its discretionary authority in ordering sanctions for non-compliance of a Court Order.

JURISDICTION

The Little River Band of Ottawa Indians (LRBOI) Tribal Court has jurisdiction pursuant to the Constitution of the LRBOI with the applicable provisions as follows:

> Article VI, Section 8 – Powers of the Tribal Court
>
> (a) The judicial powers of the Little River Band shall extend to all cases and matters in law and equity arising under this Constitution, the laws and ordinances of or applicable to the Little River Band including but not limited to:
>
> 1. To adjudicate all civil and criminal matters arising within the jurisdiction of the Tribe or to which the Tribe or an enrolled member of the Tribe is a party.

This Court has jurisdiction as this appeal relates to an action addressing the constitutional powers of the Executive and Legislative branches of government pursuant to the LRBOI Constitution.

FACTS

This case has a long history. For the purposes of this appeal, the facts are limited to the issue on appeal.

At a Status Conference Hearing between the parties on January 24, 2012, the Trial Court ordered that the parties submit to the Court by February 17, 2012 their client's proposal as to their client's preferred method(s) of Peacemaking, facilitative mediation, or alternative dispute resolution, and shall communicate any proposals concerning the same to the opposing counsel/party. A written order, Order Following Second Status Conference, was entered on January 25, 2012.

The Ogema, the Plaintiff in the trial court case, complied with the request before the deadline set by the Court.

The Tribal Council, the Defendant in the trial court case, did not file its preferred method of alternative dispute resolution, but rather filed a Motion for Reconsideration and Brief in Support of Motion for Reconsideration on or about February 8, 2013. The Defendant did not file a motion to stay the Order.

The Court issued the Order Regarding Defendant's Motion for Reconsideration, Motion to Strike and Request for Sanctions with it being signed on April 6, 2012 and entered on April 9, 2012. For the purposes of this Opinion and Order, this Tribal Court of Appeals shall use the April 6, 2012 date.

Tribal Council, hereinafter "Defendant-Appellant," submitted its Notice of Appeal on May 2, 2012.

At the time this Notice of Appeal was filed, there was more than one case involving Tribal Council and the Ogema. The parties, by and through their attorneys, indicated to this Court of Appeals that they were attempting to resolve the issues at a Hearing on May 18, 2012. The Scheduling Conference was set for June 12, 2012.

The parties appeared on June 12, 2012 with the Chief Justice appearing by phone. The parties requested an adjournment of the Scheduling Conference to August 30, 2012 to continue to try to resolve the matter.

The parties submitted a Notice of Second Adjourned Scheduling Conference on or about September 24, 2012, requesting that the August 30, 2012 Scheduling Conference be adjourned to October 19, 2012.

The underlying case was resolved with the Trial Court issuing its Opinion and Order Regarding Motions to Dismiss and for Summary Disposition on October 9, 2012. This Order was not appealed.

Prior to the October 19, 2012 Scheduling Conference, the parties submitted a Stipulation and Order for Adjournment of the October 19, 2012 Scheduling Conference and Adoption of a Briefing Schedule.

All Briefs were submitted according to the Stipulated Briefing Schedule.

Both parties appeared on February 8, 2013 and made oral arguments before this Court of Appeals.

OPINION

At a Status Conference Hearing between the parties on January 24, 2012, followed by a written order on April 6, 2012, the Trial Court ordered in pertinent part:

> Counsel for the parties shall confer with their respective clients and shall report back to the Court no later than Friday, February 17, 2012, as to their client's preferred method(s) of Peacemaking, facilitative mediation, or alternative dispute resolution, and shall communicate any proposals concerning the same to the opposing counsel/party. The parties are encouraged to try to reach agreement as to the form of Peacemaking, facilitative mediation, or alternative dispute resolution prior to that date.
> Order Following Second Status Conference at page 2 (January 25, 2012)

The Plaintiff-Appellee complied with the Order. The Defendant-Appellant filed Defendant's Motion for Reconsideration and Brief in Support of Motion for Reconsideration on or about February 8, 2012. The Defendant-Appellants did not submit their client's preferred method(s) of Peacemaking, facilitative mediation, or alternative dispute resolution as ordered nor did they file a motion to stay the order.

The Trial Court issued its Order Regarding Defendant's Motion for Reconsideration, Motion to Strike and Request for Sanctions on April 6, 2012 Order. With regard to the issue on appeal, the Trial Court stated:

> As noted above, Defendant Tribal Council has failed to comply with the Court's order dated January 25, 2012, as it filed no proposal related to Peacemaking, facilitative mediation, or alternative dispute resolution. Defendant only filed a motion of reconsideration and did not file a motion to stay the order. Defendant's motion for reconsideration did not relieve Defendant of its obligation to follow the terms of the Order, and does not by itself operate to stay the Court's order. Therefore the Defendant Tribal Council is ordered to reimburse Plaintiff Tribal Ogema its attorney fees and costs related to the Plaintiff's filings in compliance with said Order. Plaintiff's counsel shall submit a Bill of Costs with the Court relative to the same, and shall serve a copy upon Defendant's counsel.
> Order Regarding Defendant's Motion for Reconsideration, Motion to Strike and Request for Sanction at pages 4-5 (April 6, 2012)

Sanctions are a matter within the discretion of the Tribal Court. Pursuant to Chapter 5, Appellate Procedure, "a matter which is determined to be within the Tribal Court's discretion shall be sustained if it is apparent from the record that the Tribal Court exercised its discretionary authority and applied the appropriate legal standard to the facts." 5.401(H).

The Defendant-Appellant argues that the Tribal Court abused its discretion in ordering sanctions sua sponte without providing Tribal Council an opportunity to comply with or appeal the January 25, 2012 Order after the reconsideration was denied. They refer to the Michigan Rules of Civil Procedure governing alternative dispute resolution (MCR 2.410) which specifically addresses an objection to being ordered into alternative dispute resolution:

> (E) Objections to ADR. Within 14 days after entry of an order referring a case to an ADR process, a party may move to set aside or modify the order. A timely motion must be decided before the case is submitted to the ADR process.

While this Court of Appeals is not holding that this Michigan Court Rule applies, even if it did, it fails to address the situation presented in this case. This Rule addresses an objection to being ordered into the ADR process. In the present case, the Trial Court ordered the parties to submit their preferred method(s) of Peacemaking, facilitative mediation, or alternative dispute resolution – it did not actually order the parties into that process. The proper time for the Defendant-Appellant's motion would have been after the Trial Court had determined what the method of alternative dispute resolution was going to be and ordered them to enter

into that process. Here, the parties only needed to submit proposals. The Defendant-Appellant did not. Instead, they filed a Motion for Reconsideration. Of equal importance is that the Defendant-Appellant did not submit a motion to stay the Order.

While the fact that the Defendant-Appellant failed to submit the required proposal as ordered or a motion to stay the order with their Motion for Reconsideration, there are other factors that contribute to upholding this order of sanctions, all found in the Trial Court's April 6, 2012 Order. In the opening paragraph of the Order, the Trial Court notes that the Defendant-Appellant did not object at the Hearing to the Court's order for the parties to submit their preferred method(s) of Peacemaking, facilitative mediation, or alternative dispute resolution. The Counsel for the Defendant indicated at Oral Arguments that he needed to consult with his clients after the Hearing to determine what course of action they wanted to take. This leads us to another part of the April 6, 2012 Order that may have contributed to this order of sanctions. The Trial Court states:

> The Court ordered mediation because it sees a strong need for the respective parties to sit down in a setting which is less adversarial than a court proceeding in an attempt to resolve some or all of the issues in this case, as well as improve communication which would make it easier for them to resolve their differences in other matters. The citizens of the Little River Band of Ottawa Indians deserve as much from their elected officials. However, it is apparent that not all parties wish to pursue that process. Defendant Tribal Council has failed to comply with the January 25, 2012 order as it has not submitted any proposal related to Peacemaking, facilitative mediation, or alternative dispute resolution. Disappointingly, the Defendant Tribal Council has chosen to file a motion attacking the Tribal Ogema, claiming that the Ogema's stated intent to pursue mediation was disingenuous.
> Order Regarding Defendant's Motion for Reconsideration, Motion to Strike and Request for Sanctions at page 2 (April 6, 2012)

While the paragraph continues, there is a footnote at the end of the last sentence listed above which states as follows:

> Specifically, in their Brief in Support of Motion for Reconsideration, page 5, Defendant Tribal Council states: 'For the reasons stated below, Tribal Council objects to this Court's order which will result in alternative dispute resolution on these two issues, and believes that the Ogema's request that the parties engage in some sort of meditative process is disingenuous at best, but at minimum the Ogema's oral statements made during the January 24th status conference were clearly intended to, and successfully did, mislead the Court into believing that the Ogema wishes to pursue a better relationship with Tribal Council, and that some sort of mediation process would help the Tribe by

> forging closer communications amongst and between the two branches of Government.'
> Order Regarding Defendant's Motion for Reconsideration, Motion to Strike and Request for Sanctions at page 2 (April 6, 2012)

Returning to the paragraph, the Trial Court states:

> This sort of response by Tribal Council is *exactly* why the Court felt some form of Peacemaking, mediation or ADR was advisable for the betterment of the Tribe. That two previous voluntary attempts on the part of only two of the Tribal Council members to meet with Plaintif Ogema were not successful in resolving all their issues does not persuade the Court that a mediation process involving the parties as a whole would be fruitless. (Italics in original Order)
> Order Regarding Defendant's Motion for Reconsideration, Motion to Strike and Request for Sanctions at page 2 (April 6, 2012)

The failure of the Defendant-Appellant to object at the Hearing to the Trial Court's Order, to submit a proposal regarding Peacemaking, facilitative mediation, or alternative dispute resolution as ordered or, in the alternative, to submit a motion to stay the Order, as well as the tone of the Motion for Reconsideration and Brief in Support of Motion for Reconsideration all support the Trial Court's order for sanctions. As such, this Court of Appeals finds that the Trial Court did not abuse its discretion in sanctioning the Defendant-Appellant.

The Defendant-Appellant also argues that the Order to reimburse Plaintiff-Appellee its attorney fees and costs related to the Plaintiff's filings in compliance with the Order is problematic because it was the office of the Ogema, not an individual, which incurred costs. The Defendant-Appellant notes that the Defendant-Appellant, Tribal Council, provides the appropriations to the office of the Ogema. The Defendant-Appellant describes the situation of the Defendant-Appellant being ordered to pay the Plaintiff-Appellee for attorney fees and costs as "akin to taking money from one pocket to put into another pocket of the same pair of pants." (Defendant-Appellant's Brief at page 11). This line of reasoning is in direct conflict with the inherent authority of the Court to impose sanctions which the Defendant-Appellant recognized in their Brief. "It is beyond dispute that common law recognizes the inherent power of courts to impose sanctions." (Defendant-Appellant's Brief at page 8; citing 5A Wright & Miller, Federal Practice and Procedure, §1336, at pages 624-18). Failure to uphold sanctions in the present case for this reason would essentially establish that sanctions could never be ordered against Tribal Council in situations when the Ogema is the opposing party because it

receives appropriations from Tribal Council. This Tribal Court of Appeals does not find merit in this argument.

CONCLUSION

The Trial Court did not abuse its discretion in ordering sanctions against the Defendant-Appellant for failing to submit a proposal for Peacemaking, facilitative mediation, or alternative dispute resolution as ordered.

ORDER

For the reasons set forth in this Opinion and Order, the Trial Court's Order Regarding Defendant's Motion for Reconsideration, Motion to Strike and Request for Sanctions with it being signed on April 6, 2012 and entered on April 9, 2012, is **UPHELD**. The Defendant-Appellant is hereby ordered to reimburse Plaintiff Tribal Ogema its attorney fees and costs related to the Plaintiff's filings in compliance with said Order pursuant to the Bill of Costs submitted by the Plaintiff-Appellee.

IT SO ORDERED:

Melissa L. Pope (Dm) — 4-1-13
Melissa L. Pope, Chief Justice — Date

Martha Kase (Dm) — 4-2-13
Martha Kase, Associate Justice — Date

Berni Carlson (Dm) — 4-1-13
Berni Carlson, Associate Justice — Date

* All by Permission, Dm

CERTIFICATION OF SERVICE

I certify that I placed a copy of this order in the Tribal mail system to have adequate postage attached and taken to the Manistee Post Office on this date for mailing to the parties and/or the attorneys for the parties as listed.

Deborah Miller — 4-3-13
Court Administrator Deb Miller — Date