

Tyler v LRBOI Election Board --- #13055GC

Summary: The Plaintiff submitted a Motion for Temporary restraining Order, Preliminary Injunction, Permanent Injunction & Complaint Disputing Election Results and Constitutionality of Election Board's Actions on March 7, 2013.

Decision and Order: The Court finds there was no impropriety by the Election Board when they contracted the Independent hearing officer and then made the determination to abide by the opinion and allow the two candidates on the ballot. It also finds that some of the Regulations of the Election Board are confusing and contradictory which makes it hard for the candidates to adequately follow them.

The Court also finds that the Officers follow the scant protocol laid out for them in the regulations and does not find any behavior that jeopardized the process.

The Court denies the Plaintiff's motions and dismisses Mr. Tyler's Complaint.

Note: Mr. Tyler appealed the decision of the Lower Court.

Tyler v LRBOI Election Board --- #13055GC

Summary: The Court of Appeal remanded this case back to trial level for clarification. The trial court based the decision of the four-part test for a preliminary injunction that has been adopted by the Court of Appeals.

Decision and Order: The Court found that Mr. Tyler failed to demonstrate irreparable harm if the preliminary injunction was not granted.

The Court found that Mr. Tyler failed to show that his harm outweighed the harm to the Election Board. The Court found that Mr. Tyler failed to show that he was likely to prevail on merits. The Court found that there would be harm to the public interest if an injunction was issued.

Therefore, the court denied the Plaintiff's motions and dismissed Mr. Tyler's Complaint.

Chapman v LRBOI Election Board --- 13074EB

Summary: The Plaintiff submitted a Motion for an Ex-parte Temporary Restraining order, Preliminary Injunction, and a Permanent Injunction. Plaintiff states the Election Board certified the candidates on December 10, 2012. Ms. Chapman was certified as a candidate that day. She feels the Election Board failed to follow their own regulations

when it allowed two candidates to be certified and run for election, when they failed to file their campaign finance reports on time.

Decision and Order: The Court denies the Plaintiff's motions and dismisses Ms. Chapman's Complaint based on the finding that there was no impropriety on the part of the Election Board.

Tyler v LRBOI Election Board --- 13079AP

Summary: This case involves the appeal of a denial of a temporary restraining order and preliminary injunction regarding the Little River Band of Ottawa Indians election.

Decision and Order: This case is remanded back to the Trial Court to issue an order that applies the test for a preliminary injunction.

The Tribal Court of Appeals has adopted the following test when determining whether to grant or deny a preliminary injunction:

The trial court must evaluate whether (1) the moving party made the required demonstration of irreparable harm, (2) the harm to the applicant absent such an injunction outweighs the harm it would cause to the adverse party, (3) the moving party showed that it is likely to prevail on merits, and (4) there will be harm to the public interest in an injunction is issued – Sam et al v Ossiginac et al., 09-012-AP- at page 8

Tyler v LRBOI Election Board --- 13079AP

Summary: This case involves the appeal of a denial of a temporary restraining order and preliminary injunction regarding the LRBOI Election.

Decision and Order: The Court of Appeals, having reviewed the record from the pleadings and briefs filed in this appeal, and having engaged in deliberations, hereby, AFFIRMS the Order of the Trial Court denying the temporary restraining order and preliminary injunction and dismissing this case.

In the Matter of Tribal Prosecutor --- 13164GC

Summary: An emergency hearing was held in this matter on the Tribal Council's Motion to Appoint a Special Prosecutor, with the Ogema joining the request. The Council Speaker, and Legislative attorneys, The Ogema and Executive attorney were present.

Decision and Order: It was hereby ordered that The Tribal Court appoint a Special Prosecutor as soon as possible.

Rivers v Cudzilo --- 13206AP

Summary: Plaintiff/Appellant David Rivers appealed a decision on his custody case (Case # 12180DP). Mr. Rivers filed a Motion for Reconsideration.

Decision and Order: An Order and Opinion Regarding Appellant's Motion for Reconsideration was written. There was a dissenting order written by a member of the judiciary and a response made by the majority. An Order and Opinion Regarding Appellant's Motion for Reconsideration / Response to the Dissenting opinion.

Later: The Majority respectfully disagrees with the Dissent and remains firm in its decision to deny the Appellant-Plaintiff's Motion for Reconsideration. The fact that he did not fulfill the responsibilities under the process resulting in a denial of the motion, does not change the fact the he had equitable access to justice.

LRBOI v Hamilton --- 13248TM

Summary: The defendant was charged with Embezzlement and Theft from a Tribal Organization. The Complaint states that Hamilton did, without authorization, take and remove a quantity of tar-base copper wire, knowing the same to be the property of the Tribe.

Decision and Order: The court found that the intent of the Defendant was to convert the tar-base wire, take it to see, and to keep the profits.

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

EDWARD TYLER,
PLAINTIFF

V.

CASE NO.: 13055EB

LITTLE RIVER BAND OF OTTAWA INDIANS
ELECTION BOARD,
DEFENDANT

Edward Tyler
8163 Knight Drive
Newago, MI 49337

Christopher M. Bzdok
Katherine E. Redman
Attorneys for Defendant
420 East Front Street
Traverse City, MI 49686

ORDER AFTER HEARING

At a session of said Court on March 18, 2013
In the Reservation Boundaries of the
Little River Band of Ottawa Indians,
State of Michigan
PRESENT: HON. DANIEL BAILEY

The Plaintiff submitted a *Motion for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction & Complaint Disputing Election Results and Constitutionality of Election Board's Actions* on March 7, 2013.

The ballots are slated to go out to the Membership on March 25, 2013. The Court opted to hear arguments on the TRO prior to making a determination on the motions. The hearing was held on March 18, 2013. The Plaintiff Tyler and Defendant Attorney Bzdok were present.

The Plaintiff filed an Election dispute on February 22, 2013, the last day a dispute could be filed. By his own admission, he was aware that a Certification Dispute was held in the matter of Janine Sam and Jamie Friedl on November 26, 2012.

Mr. Tyler also asserts that a special hearing was held by an independent hearing officer on November 30, 2012. Plaintiff acknowledges that the hearing officer recommended that both candidates be allowed to run for fear the Election Board regulations may be unconstitutional.

The Plaintiff also disputed the actions of the Tribal Police Officers on the day the ballots for the Primary Election were counted. He did not feel they were diligent in their duties or actively observed the counting.

Plaintiff states that the Election Board certified the candidates on December 10, 2012. Mr. Tyler was also certified as a candidate that day.

Christopher Bzdok did not dispute most of the facts in the Plaintiff's Complaint. He explained the Election Board's actions and its decisions. Bzdok said the Election Board did adopt the recommendations of Mr. Alvarado, the Hearing Officer. They did not necessarily agree with the assertion that their regulations may be unconstitutional; they did however feel that the regulation may be excessively harsh.

The Defendant Election Board went on to say that the Police Officers were in attendance during the ballot counting, but were not given any specific guidelines on how and what it means to actively observe. There is no guidance in the regulations for the officers. In "Chapter 4. Section 7. Counting the Ballot" it has an officer meeting a representative of the election services contractor at the post office; they are to observe the tabulating and counting of the ballots; and they are to remain until the process is "complete, certified and announced." They are also there in case someone causes a disturbance.

The Court notes that based on Chapter 3, Section 6." Certifications of Candidates (e.) Consent to Election Boards' jurisdiction. All candidates for office shall be subject to the jurisdiction of the Election Board and these regulations, including but not limited to the Election Board's' jurisdiction over election disputes, election challenges, and investigation. All Candidates for office shall be required to cooperate fully with the Election Board investigations."

When reviewing "Chapter 5, Section 6. Penalties. (a.) Failure to file a campaign finance report.

ii. any person who does not file an accurate campaign finance report within 21 days of election day will be barred from running for elected office in the next election. **No person shall be permitted to run for office in any future election until he or she files an accurate campaign finance report for the principal sponsor, or other person who is required to file a campaign finance report.** [Emphasis added]

The Court finds that the above paragraph is self-contradicting. It has been established that Ms. Sam and Mr. Friedl failed to file their campaign finance report within 21 days of the last election. That part of the regulation would prohibit them from running in a *future election*.

The above regulation (bolded portion) goes on to state that they would not be permitted to run for office in any future election until they filed an accurate campaign finance report.

The Court interprets this, as saying that Ms. Sam and Mr. Friedl did not need to request a hearing before the board; they just needed to file an accurate campaign finance report before they could run for office.

The Court can only have jurisdiction over an election matter by a finding of impropriety. The scope of the Courts review is set forth in "Chapter 7. (c.) Impropriety. Allegations of impropriety against the Election Board must be made to the Tribal Judiciary."

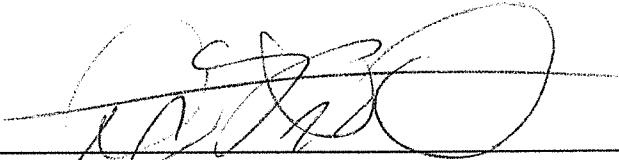
"Chapter 7, Section 6. Decisions (b.) Final Decision. **The Election Board's decision to accept, reject or modify the proposed decision shall be the final decision.** [Emphasis added] The minutes of the meeting where this decision takes place shall be part of the record."

The Court finds that there was no impropriety by the Election Board when they contracted the independent hearing officer and then made the determination to abide by that opinion and allow the two candidates on the ballot. It also finds that some of the Regulations of the Election Board are confusing and contradictory which makes it hard for the candidates to adequately follow them.

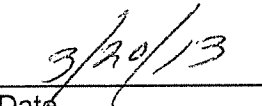
The Court also finds that the Officers followed the scant protocol laid out for them in the Regulations and does not find any behavior that jeopardized the process.

The Court denies the Plaintiff's motions and dismisses Mr. Tyler's Complaint.

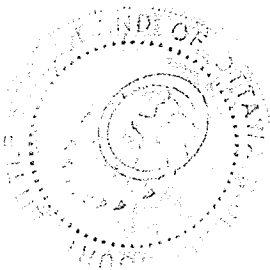
SO ORDERED:

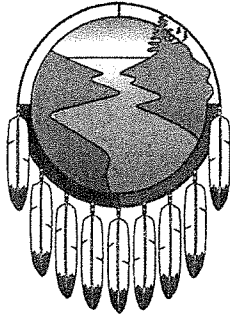


Judge Bailey



Date





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

EDWARD L. TYLER,
Plaintiff/Appellant

Case Number: 13079 AP

v.

**LITTLE RIVER BAND OF OTTAWA
INDIANS ELECTION BOARD,**
Defendant/Appellant

Honorable Melissa Pope
Honorable Stella Gibson
Honorable Anna Guenthardt

Edward L. Tyler
Plaintiff In Pro Per
8163 Knight Drive
Newago, Michigan 49337

Christopher M. Bzdok
Katherine E. Redman
Attorneys for Defendant
420 East Front Street
Traverse City, Michigan 49686

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 3rd day of April 2013

PRESENT: Honorable Melissa L. Pope
Honorable Stella Gibson
Honorable Anna Guenthardt

INTRODUCTION

This case involves the appeal of a denial of a temporary restraining order and preliminary injunction regarding the Little River Band of Ottawa Indians (LRBOI) election, scheduled for April 26, 2013.

JURISDICTION

The 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.
 2. To review ordinances and resolutions of the Tribal Council or General Membership to ensure they are consistent with this Constitution and rule void those ordinances and resolutions deemed inconsistent with this Constitution.

This Court has jurisdiction as the Plaintiff is a Tribal Member, the Defendant is the LRBOI Election Board and the matter involves the election for the LRBOI Tribal Council.

FACTS

The Plaintiff submitted a Motion for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction and Complaint Disputing Election Results and Constitutionality of Election Board's Action on March 7, 2013.

As the ballots were slated to go out to the Tribal Membership on March 25, 2013, the Trial Court ordered a hearing for March 18, 2013. All parties were present.

The Trial Court issued its Order After Hearing on March 20, 2013, denying the Plaintiff's Motions and dismissing the Complaint.

The Plaintiff, now the Plaintiff-Appellant, submitted his filing fee for this Appeal on March 27, 2013, but did not file the actual Notice of Appeal until March 29, 2013 although his Notice of Appeal has the date of March 27, 2013. As such, the actual filing of this appeal was on March 29, 2013.

Associate Justice Martha Kase recused herself from this case due to illness. Associate Justice Berni Carlson recused herself from this case as she is related to a member of the LRBOI Election Board pursuant to 5.105(C) of the Court Rules of Appellate Procedure. The Tribal Court Administrator, after removing the names of individuals either running for the LRBOI Tribal Council or related to either party, randomly selected two Special Appellate Justices from the list of potential Special Appellate Justices.

Due to the Election being only four (4) weeks from the date the Plaintiff-Appellant filed his Notice of Appeal, the Chief Justice called a conference call of the Court of Appeals to determine how to proceed in this case. All three (3) Justices participated in this phone conference. The Court of Appeals unanimously agreed to the issuance of this Order with the Chief Justice issuing this Order on behalf of a unanimous Court.

ANALYSIS

It appears from the Notice of Appeal and the March 20, 2013 Order After Hearing that the Plaintiff-Appellant is attempting to change the ballot for the election of the LRBOI Tribal Council scheduled for April 26, 2013. The standard procedure for an appeal is to hold a scheduling conference to determine the due dates of the parties' briefs and oral arguments with the parties usually have at least four (4) weeks each to submit their briefs and then the Appellant having the opportunity to submit a reply brief. However, with the Plaintiff-Appellant filing this Notice of Appeal only four weeks prior to the scheduled election, this Court of Appeals must act quickly. After reviewing and discussing the Notice of Appeal and the Order After Hearing, this Court of Appeals is remanding the case to the Trial Court to issue an order that addresses the four-part test for a preliminary injunction. This Court of Appeals cannot review the merits of the case until this test is applied.

The Tribal Court of Appeals has adopted the following test when determining whether to grant or deny a preliminary injunction:

The trial court must evaluate whether (1) the moving party made the required demonstration of irreparable harm, (2) the harm to the applicant absent such an injunction outweighs the harm it would cause to the adverse party, (3) the moving party showed that it is likely to prevail on the merits, and (4) there will be harm to the public interest if an injunction is issued.

Sam et al. v. Ossiginac et al., 09-012-AP at page 8.

While the Court of Appeals used Michigan case law as persuasive authority, the above referenced case is binding precedent for this Nation. As such, it is the law that applies.

The Trial Court provided substantial reasoning for the decision it made. However, the Trial Court is required to apply the above referenced test. With the election being scheduled in less than four weeks and with the Trial Court appearing to have sufficient information to apply the test to the facts of the case, the Trial Court may issue its Order without an additional hearing. As such, this Court of Appeals is requiring that the Trial Court issue its order no later than Wednesday, April 10, 2013.

The Plaintiff-Appellant will then have the choice of whether to continue the appeal. If he so chooses, this Court of Appeals will expedite the appeal so that a final order can be issued prior to the date of the scheduled election. If the Plaintiff-Appellant chooses to continue with the appeal, he should be prepared to make oral arguments in a very short period of time. The Plaintiff stated in his Notice of Appeal that, "The Lower Court erred when it entertained the facts

and merits of the complaint without allowing for proper due process {failed to allow Petitioner to file exhibits, witness list, or time to properly prepare for a hearing on the complaint versus hearing on the motion}.” Notice of Appeal at page 3. While not reaching a conclusion on the merits of this allegation, this Court of Appeals notes that the Plaintiff-Appellant has requested a temporary restraining order and preliminary injunction. The very nature of this request requires that the Plaintiff-Appellant prove whether he is likely to prevail on the merits. Further, the Plaintiff-Appellant is requesting a temporary restraining order and preliminary injunction regarding an election scheduled for April 26, 2013. It is the responsibility of the Plaintiff-Appellant to be prepared to engage in the expedited process he has requested. This Court of Appeals notes for the record that the Trial Court properly held the hearing in this case before the ballots were mailed.

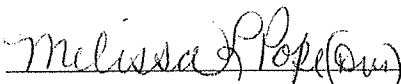
Taking all of these facts into consideration, if the Plaintiff-Appellant wishes to proceed with an appeal after the Trial Court issues its Order after remand, the Plaintiff-Appellant must notify the Court of Appeals in writing that he wants to continue the appeal within two (2) days of the Trial Court issues its Order after remand. To be clear, if the Trial Court issues its Order on the date required by the Court of Appeals, April 10, 2013, the Plaintiff-Appellant must submit his notice of continuing appeal by the end of day on Friday, April 12, 2013. However, if the Trial Court issues its Order before the due date, the Plaintiff-Appellant must file his notice of continuing appeal within two days. The Court of Appeals will then contact the parties as to how we will proceed with the expectation being that it will be an expedited process.

ORDER

This case is REMANDED to the Trial Court to issue an Order that applies the test for a preliminary injunction as adopted by the LRBOI Court of Appeals. This Order must be issued no later than Wednesday, April 10, 2013, but may be issued earlier.

If the Plaintiff-Appellant decides that he wishes to continue with this appeal after the Trial Court issues its Order, he must submit his notice of continuing appeal in writing to the Court within two (2) days of the Trial Court’s Order.

ON BEHALF OF A UNANIMOUS COURT, IT SO ORDERED:



Honorable Melissa L. Pope, Chief Justice

4-3-13
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.

Deborah Miller
Court Administrator Deb Miller

4-4-13
Date

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

EDWARD TYLER,
PLAINTIFF

V.

CASE NO.: 13055EB

LITTLE RIVER BAND OF OTTAWA INDIANS
ELECTION BOARD,
DEFENDANT

Edward Tyler
8163 Knight Drive
Newago, MI 49337

Christopher M. Bzdok
Katherine E. Redman
Attorneys for Defendant
420 East Front Street
Traverse City, MI 49686

ORDER AFTER REMAND

At a session of said Court on April 4, 2013
In the Reservation Boundaries of the
Little River Band of Ottawa Indians,
State of Michigan
PRESENT: HON. DANIEL BAILEY

The Appellate Panel held a conference on April 2, 2013 in regard to Mr. Tyler's appeal. He is appealing the Tribal Court decision to deny his request for a Temporary Restraining Order and Preliminary Injunction. Mr. Tyler submitted his appeal on March 29, 2013. Because of the expedited time-frame, the Court of Appeals made a decision to remand the issues back to the Tribal Court for clarification.

While the Court discussed the factors of the four-part test for preliminary injunction in general terms in its Order After hearing dated 3/20/2013, it did not, as pointed out by the Court of Appeals, individually address each factor.

The Court finds as follows on each factor of the four-part test for a preliminary injunction that has been adopted by the Court of Appeals.

(1)

- A. Police Officers
- B. Janine Sam and Jamie Friedl on ballot

- A. As more fully discussed in the March 20th Order, Mr. Tyler was not harmed by the actions/inactions of the Tribal Police Officers assigned to oversee the ballot counting process. They performed their duties in as far as the Election Board Regulations dictated.

B. Mr. Tyler alleged that the election results were "skewed" because votes for Janine Sam and Jamie Friedl took away votes for other candidates. Mr. Tyler's harm would have been greater if this case had been brought before the primary election rather than after, as there is no way to predict if the results of the primary election would have produced different candidates to move forward in the election. Mr. Tyler failed to show that any votes for Janine or Jamie would have been for him and he would have moved forward in the election.

The Court finds that Mr. Tyler failed to demonstrate irreparable harm if the preliminary injunction is not granted.

(2) Had Mr. Tyler requested his hearing with the Election Board (and pending the outcome; with the court) after the November 20, 2012 decision to allow Ms. Sam and Mr. Friedl to run and prior to the primary election, the harm would have been minimal to both as there would have been time to remove Janine and Jamie from the primary ballots. The Plaintiff's chance of prevailing would have been elevated. Mr. Tyler cannot say he would have been placed on the final election roster, nor can he claim he would have won if he were on the ballot for the final election. The harm to the Tribe/Election Board was definitely greater after the Primary Election was held.

The Court finds that Mr. Tyler failed to show that his harm outweighs the harm to the Election Board.

(3) Mr. Tyler did not show that he would have prevailed on the merits by the elimination of Sam and Friedl from the primary election. He stated that "every ballot cast for Sam and Friedl take away from another potential candidate(s)..." He could not state with any certainty that he or any other candidate that was eliminated in the primary election would have been on the ballot, if not for the votes for Sam and Friedl.

The Court finds that Mr. Tyler failed to show that he was likely to prevail on the merits.

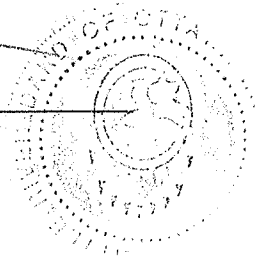
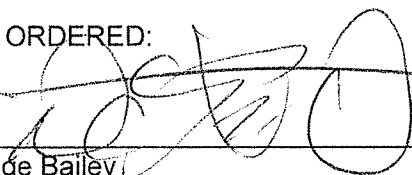
(4) The Court has deference for the Election Board and their decisions. They followed their regulation and recommendation by the independent hearing officer. The expense to run another primary and the delay of the final election were factors taken into account when the Court made its decision. As previously stated, Mr. Tyler may or may not have been placed on the final ballot if he was issued an injunction and the primary election was repeated without Sam and Friedl, but the public interest would have been harmed by the expense and delay.

The Court finds that there would be harm to the public interest if an injunction is issued.

The court denies the Plaintiff's motions and dismisses Mr. Tyler's Complaint.

SO ORDERED:

Judge Bailey



Date

4/5/13

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

CANDACE CHAPMAN,
PLAINTIFF

V.

CASE NO.: 13074EB

LITTLE RIVER BAND OF OTTAWA INDIANS
ELECTION BOARD,
DEFENDANT

Candace Chapman
In Pro Per
3376 Black Creek Road
Muskegon, MI 49444

Christopher M. Bzdok
Katherine E. Redman
Attorneys for Defendant
420 East Front Street
Traverse City, MI 49686

ORDER AFTER HEARING

At a session of said Court on March 25, 2013
In the Reservation Boundaries of the
Little River Band of Ottawa Indians,
State of Michigan
PRESENT: HON. DANIEL BAILEY

The Plaintiff submitted a *Motion for an Ex-Parte Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction* on March 21, 2013. In an effort to hear the motion prior to election ballots being mailed today; the Court scheduled this hearing. The exchange of written documentation was electronically accepted and e-mailed to each party due to time constraints. The Plaintiff, Candace Chapman and Defendant Attorney Redman were present.

Plaintiff states that the Election Board certified the candidates on December 10, 2012. Ms. Chapman was also certified as a candidate that day. She feels the Election Board failed to follow their own regulations when it allowed two candidates to be certified and run for election, when they failed to file their campaign finance reports on time.

Katherine Redman, Defendants attorney, testified that Ms. Chapman was also procedurally late in filing an election dispute.

The Plaintiff argued that hers was not an election dispute/challenge, but was a question of the Election Board's improper actions, (impropriety) which may be brought before the Judiciary without a review by the Election Board.

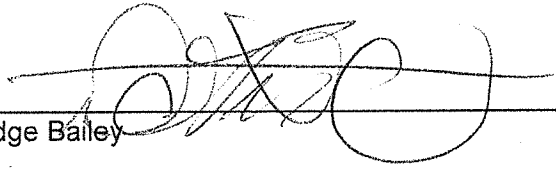
Ms. Chapman argues that the integrity of the process was compromised by allowing the two candidates to file late and be added to the roster for the next election. The Court understands the frustration of those candidates that followed the regulations and submitted all of their documentation in a timely fashion. Ms. Chapman made many excellent points in her testimony and her brief.

The Court found that the Election Board also had valid arguments explaining their interpretations of their own regulations. The Election Board contracted the independent hearing officer (Chapter 7 of the Election Board Regulations) and made the determination to abide by that officer's opinion. That was also a part of their regulations.

The Court did not find impropriety in the Election Board's actions; instead it finds that the regulations are confusing and contradictory. (See Tyler v. Election Board, 13055EB) The Court highly recommends the Election Board look at each rule and regulation and re-writes them so they are straight forward and self-explanatory. If there was only one interpretation, then there wouldn't be a need for any disputes, challenges, or court cases.

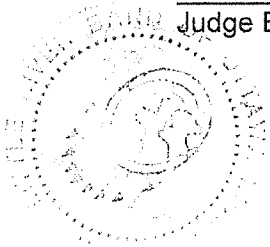
The Court denies the Plaintiff's motions and dismisses Ms. Chapman's Complaint based on the finding that there was no impropriety on the part of the Election Board.

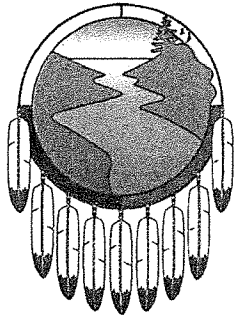
SO ORDERED:



Judge Bailey

3/26/13
Date





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

EDWARD L. TYLER,
Plaintiff/Appellant

Case Number: 13-079 AP

v.

**LITTLE RIVER BAND OF OTTAWA
INDIANS ELECTION BOARD,**
Defendant/Appellant

Honorable Melissa Pope
Honorable Stella Gibson
Honorable Anna Guenthardt

Edward L. Tyler
Plaintiff In Pro Per
8163 Knight Drive
Newago, Michigan 49337

Christopher M. Bzdok
Katherine E. Redman
Attorneys for Defendant
420 East Front Street
Traverse City, Michigan 49686

OPINION AFTER 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 2nd day of May 2013

PRESENT: Honorable Melissa L. Pope
Honorable Stella Gibson
Honorable Anna Guenthardt

INTRODUCTION

This case involves the appeal of a denial of a temporary restraining order and preliminary injunction regarding the Little River Band of Ottawa Indians (LRBOI) election that was held on April 26, 2013.

JURISDICTION

The 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.
 2. To review ordinances and resolutions of the Tribal Council or General Membership to ensure they are consistent with this Constitution and rule void those ordinances and resolutions deemed inconsistent with this Constitution.

This Court has jurisdiction as the Plaintiff-Appellant is a Tribal Member, the Defendant-Appellee is the LRBOI Election Board and the matter involves the election for the LRBOI Tribal Council.

FACTS

In the fall of 2012, Ms. Janine Sam and Mr. Jamie Friedel filed documents to run in the primary election for the LRBOI Tribal Council in the Nine-County District. The LRBOI Election Board denied issuing a Candidate Package on the grounds that Ms. Sam and Mr. Friedel failed to timely file a campaign finance report in a previous election as required by Chapter 5, Section 5(a) of the LRBOI Election Board Regulation which provides:

Section 5. Reporting Requirements.

- a. Campaign finance report requirement.
 - i. Each candidate whose name appears upon the official ballot in any election;

- ii. each principal sponsor or group of principal sponsors in a recall, referendum or initiative effort;
- iii. each elected official who is the target of a recall attempt;
- iv. and each person or group who spends money for or against an initiative or referendum question

shall file a campaign finance report with the Election Board not more than 5 calendar days after the election. The campaign finance report shall be on a form approved by the Election Board, and shall require the person filing it to sign an oath or affirmation that the information in the report is true.

The LRBOI Election Board found that Ms. Sam and Mr. Friedel filed their required Campaign Finance Reports in November of 2012, but denied issuing the Candidate Packages pursuant to Chapter 5, Section 6 (a) which states:

Section 6. Penalties.

a. Failure to file a campaign finance report

- i. The candidate receiving the greatest number of votes in any election shall not receive a certification of election, and shall not be eligible to take office, until he or she files an accurate campaign finance report and the Election Board verifies that the candidate complied with all the requirements of this chapter.
- ii. any person who does not file an accurate campaign finance report within 21 days of election day will be barred from running for elected office in the next election. No person shall be permitted to run for office in any future election until he or she files an accurate campaign finance report for the last election in which he or she was a candidate, principal sponsor, or other person who is required to file a campaign finance report.

Both candidates filed an election dispute as provided for in Chapter 6, Section 1 of the LRBOI Election Board Regulations. The LRBOI Election Board granted a Hearing before an independent Hearing Officer pursuant to Chapter 7 of the LRBOI Election Board Regulations.

The Hearing was held on November 26, 2012. The independent Hearing Officer made factual findings that both candidates had not submitted their campaign finance reports within the timeframe required by the LRBOI Election Board Regulations. He also stated that the penalty in Chapter 6 that banned an individual from running for office for failure to file a timely campaign finance report may be unconstitutional, as well as that the penalties as applied to these two candidates were harsh.

The LRBOI Election Board held a special meeting on November 30, 2012 where they adopted the recommendations of the independent Hearing Officer and voted to issue the Candidate Packets to Ms. Sam and Mr. Friedel and place them on the Primary Election Ballot if they filed the required information by the due date. "The Election Board accepted the Hearing Officer's factual findings but not necessarily its legal conclusion that the Election Board Regulation may violate the Constitution." (Defendant-Appellee Brief Opposing Plaintiff's Appeal of the Tribal Court's Order Denying Plaintiff's Motion for a Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction, and Dismissing Plaintiff's Complaint, hereinafter "Defendant-Appellee Brief" at 3) The LRBOI Election Board stated in their November 30, 2012 written letters to the candidates:

The Election Board is making this decision as a matter of prudence, and a need to strike a balance between the interest of an individual Tribal citizen to run for office and the interests of all Tribal Members in having elections conducted in a manner that is fair, enforceable, and free of undue influence.
Defendant-Appellee Trial Court Brief Opposing Plaintiff's Motion for a Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction, Exhibits 9 and 11

The Plaintiff was a certified candidate for the Nine-County Seat in the Primary Election, but did not challenge this decision of the LRBOI Election Board before the Primary Election.

The ballots for the Primary Election were mailed on January 11, 2013. They were tabulated and reported on February 15, 2013. Ms. Sam and Mr. Friedel received enough votes to advance to the General Election. The Plaintiff did not.

The Plaintiff filed a challenge to the Primary Election on February 22, 2013. A Hearing was held on March 6, 2013. The Defendant stated in the Defendant-Appellee's Brief that the Plaintiff agreed his disputes were based on the following:

(1) whether the two Police Officers present diligently observed the vote counting and tabulation, and whether the candidates had sufficient opportunity to observe the vote counting and tabulation process.

(2) whether Janine Same and Jamie Friedel were authorized to receive candidate packets and run in the primary election after their election disputes were granted by the Election Board on November 30, 2012. These two candidates received sufficient votes to succeed from the primary election.
Defendant-Appellee's Brief at 4

The LRBOI Election Board decided not to take any action regarding the Plaintiff's dispute, but did commit to reviewing and revising its procedures to address some of the issues raised by the Plaintiff.

The Plaintiff submitted a Motion for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction and Complaint Disputing Election Results and Constitutionality of Election Board's Action on March 7, 2013.

As the ballots were slated to go out to the Tribal Membership on March 25, 2013, the Trial Court ordered a hearing for March 18, 2013. All parties were present.

The Trial Court issued its Order After Hearing on March 20, 2013, denying the Plaintiff's Motions and dismissing the Complaint.

The Plaintiff, now the Plaintiff-Appellant, submitted his filing fee for this Appeal on March 27, 2013, but did not file the actual Notice of Appeal until March 29, 2013 although his Notice of Appeal has the date of March 27, 2013. As such, the actual filing of this appeal was on March 29, 2013.

Associate Justice Berni Carlson recused herself pursuant to 5.105(C) of the Court Rules of Appellate Procedure as she is related to a member of the LRBOI Election Board. Associate Justice Martha Kase recused herself from this case due to illness.

The Tribal Court Administrator, after removing the names of individuals either running for the LRBOI Tribal Council or related to either party, randomly selected two Special Appellate Justices from the list of potential Special Appellate Justices.

Due to the Election being only four (4) weeks from the date the Plaintiff-Appellant filed his Notice of Appeal, the Chief Justice called a conference call of the Court of Appeals to

determine how to proceed in this case. All three Justices participated in this phone conference on April 3, 2013. Due to the significant time constraints, this Court of Appeals unanimously agreed to issue an Order remanding the case to the Trial Court to apply the four-part test for a preliminary injunction adopted by the LRBOI Court of Appeal in *Sam et al. v. Ossiginac et al.*, 09-012-AP. The Order requested that the Trial Court issue its Order After Remand by April 10, 2013. The Order also specified that the Plaintiff-Appellant would have two (2) days from the date the Order After Remand was entered to notify the Court if he wished to continue the appeal. The Chief Justice issued this Order on behalf of a unanimous Court on April 3, 2013.

On April 5, 2013, significantly before the date requested by this Court of Appeals, the Honorable Daniel Bailey issued the Order After Remand.

On April 9, 2013, the Plaintiff-Appellant, pursuant to the requirements of the Court of Appeals April 3, 2013 Order, submitted to the Court via email that he wanted to continue this Appeal, as well as submitted a revised Notice of Appeal.

The Chief Justice ordered that a Scheduling Conference be held at 9:00 a.m. on April 11, 2013.

All parties appeared at the Scheduling Conference with the Attorney for the Defendant-Appellee and the Chief Justice appearing by phone. The Plaintiff-Appellant stated that he was not requesting Oral Arguments. The Plaintiff-Appellant also stated that he did not wish to file any additional documents, but rather, rely on the revised Notice of Appeal submitted on April 9, 2013. The Defendant-Appellee requested that this Court of Appeals either review the Trial Court briefs submitted and hold Oral Arguments or that the decision be made on the Trial Court record and that the Defendant-Appellee be given an opportunity to submit a brief in reply to the Trial Court's Order After Remand and the Plaintiff-Appellant's revised Notice of Appeal. Upon consultation with the parties, the Chief Justice set the due date for the Defendant-Appellee's Reply Brief for Wednesday, April 17, 2013 without objection. The Chief Justice indicated that she would consult with the other Special Appellate Justices and would notify the parties in a written Order as to whether Oral Arguments would be held. The Chief Justice advised on the record at the Scheduling Conference that this Court of Appeals may issue an immediate Order with the Opinion to follow due to the urgency of this matter.

The Chief Justice consulted with Justices Gibson and Guenthardt on April 17, 2013. The Chief Justice issued a Scheduling Order that same day on behalf of a unanimous Court that Oral

Arguments would not be held and that the Defendant-Appellee's Brief was due by 3:00 p.m. on April 17, 2013. The Chief Justice advised in the Order that this Court of Appeals may issue an immediate Order with the Opinion to follow due to the urgency of this matter.

The Defendant-Appellee submitted a timely Brief.

This Court of Appeals held deliberations by phone regarding the present case on April 19, 2013. Before deliberations began, Special Appellate Justice Anna Guenthardt recused herself from this case as she is related to one of the candidates for the LRBOI Tribal Council who did not file their campaign finance report in a timely manner and was permitted by the LRBOI Election Board to remain on the ballot. Although the relationship is not so close as to influence her judgment and the candidates permitted to remain on the ballot are not a party to the case, she recused herself in order to avoid the appearance of impropriety. As such, Justice Guenthardt did not participate in this decision. However, the two remaining Justices are unanimous in their decision which constitutes the majority of the Court.

With the General Election scheduled for April 26, 2013, the Court issued an Order affirming the decision of the Trial Court with the Opinion to follow. The Court of Appeals now issues this Opinion After Order to provide its reasoning.

REASONING

The LRBOI Tribal Court of Appeals has jurisdiction to hear appeals from the Tribal Court under Article VI, Section 8 of the LRBOI Tribal Constitution, as well as from Section 5.200, Jurisdiction of the Tribal Court of Appeals, of the LRBOI Court Rules of Appellate Procedure. An appeal of a decision that involves a conclusion of law is reviewed de novo pursuant to Chapter 5, Section 5.401(E) of the LRBOI Court Rules. When a matter is within the discretion of the Trial Court, the Court of Appeals reviews the decision to the extent the Trial Court properly exercised its discretionary authority and applied the appropriate legal standard to the facts per Chapter 5, Section 5.400(H).

In *Cramptom v. Sam*, the Court defined several terms to help clarify the jurisdiction of the LRBOI Election Board, as well as the jurisdiction of the Tribal Court in election matters. Pertinent to the present case is the following:

An "*election challenge*" is a direct challenge to the results or outcome of an election itself. The object of the challenge is to

affect the outcome of an election. Election challenges are resolved by the Election Board under the authority delegated to it by the Tribal Constitution.

An “*election dispute*” is any election dispute other than that which challenges the outcome of an election. The object of an election dispute is to affect how a tribal election is conducted as the election process moves forward. Elections disputes (sic.) must be raised in a timely manner so that adjustments may be made by the Election Board prior to the actual balloting and posting of election results. The Election Board must have an opportunity to rectify any mistakes it has made. Disputes not timely raised may be deemed to be waived. Election disputes are also resolved by the Election Board under the authority delegated to it by the Tribal Constitution.

“*Impropriety*” means something other than mere disagreement with the decisions of the Election Board. It is conduct or behavior which violates standards of ethics. This distinction is significant because allegations of impropriety by the Election Board are resolved by the Tribal Judiciary. Although this term is not expressly defined, it is given meaning by the Ethical Standards provision of the First Election Ordinance (Ordinance 98-22-02. See *Section 3.09*. Perhaps clearly linking this provision with the provisions regarding impropriety will avoid future confusion. *Cramptom v. Sam*, Case Number 98/200-02-01, 000846 at 4-5. (Italics in original Order)

The case law regarding election matters has continued to develop over the years. In *Beccaria v. LRBOI Election Board*, the Court affirmed *Cramptom v. Sam* by stating, “[t]he principle that the judicial system has no role in tribal election challenges and election disputes is clearly established precedent.” *Beccaria v. Election Board*, 05-094-AP, at 3. The Court also affirmed that “the Constitution provides that allegations of propriety be settled by the Tribal Judiciary.” *Id* at 3. The Court further developed the area of Tribal Court jurisdiction in election matters as follows:

However, the argument of the Election Board goes too far in its assertion that there is no role for the Tribal courts when the Election Board adopts regulations which are not in conformity with the Constitution. There must be redress for procedures and standards that are unconstitutional. A good system of governmental checks and balances requires judicial review. Unconstitutional laws, procedures or standards must not be allowed to stand.

It is clear that the people in their delegation of powers intended that the Tribal courts have broad powers, including the power of judicial review. The judicial power extends ‘to all cases and matters in law and equity arising under this Constitution.’ See Constitution, Article VI, Section 8 (a). Furthermore, the concern regarding the constitutionality of tribal enactments and resolutions is evident by the express delegation of review power to the Tribal Court. See Constitution, Article VI, Section 8 (a) 2. (Emphasis and cites in original Opinion)
Id at 4-5.

With regard to the issue of Ms. Sam and Mr. Friedel being authorized to receive candidate packets and permitted to run in the Primary Election, the Plaintiff-Appellant alleged in his revised Notice of Appeal that the LRBOI Election Board: exceeded their authority by determining that Chapter 5, Section 6 (a) was unconstitutional; violated the Election Board Regulations and acted outside the scope of their authority by issuing Ms. Sam and Mr. Friedel candidate packets and permitting them to be on the ballot for the Primary Election in violation of Chapter 5, Section 6 (a); acted outside the scope of their authority; failed to amend Chapter 5, Section 6 (a); infringed on the authority of the Tribal Court by finding Chapter 5, Section 6 (a) unconstitutional; violated the integrity of the election process; did not properly instruct the Tribal Law Enforcement Officers observing the counting of the ballots during the Primary Election; and violated Chapter 7, Section 1 (c) by engaging in conduct involving impropriety.

All of the allegations regarding the LRBOI Election Board engaging in unconstitutional behavior by declaring that Chapter 5, Section (6) (a) is unconstitutional fail for the simple reason that the LRBOI Election Board did not declare that Chapter 5, Section (6) (a) is unconstitutional. In the letters to Ms. Sam and Mr. Friedel that advised they would be issued Candidate Packets and be certified as candidates if they turned in their completed packets by the due date, the LRBOI Election Board specifically stated that they were not declaring that this provision is unconstitutional:

The Election Board does not necessarily adopt the Hearing Officer’s legal conclusion that imposing a penalty that affects the ability of a Tribal citizen to run for office exceeds the Election Board’s authority under the Tribal Constitution.

Defendant-Appellee Trial Court Brief Opposing Plaintiff's Motion
for a Temporary Restraining Order, Preliminary Injunction, and
Permanent Injunction, Exhibits 9 and 11

With the LRBOI Election Board specifically stating that they did not find that the provision in question is unconstitutional, this Court does not need to discuss this issue further.

The Plaintiff-Appellant's allegation that the LRBOI Election Board acted outside the scope of its authority also must fail as this Court has repeatedly affirmed that the LRBOI Election Board has the authority as provided by the LRBOI Tribal Constitution to resolve election disputes and election challenges. The Court has jurisdiction when there are allegations of impropriety and to provide "redress for procedures and standards that are unconstitutional." (*Beccaria* at 3). With already having addressed the latter, we now turn to the Plaintiff-Appellant's allegations of impropriety.

The Plaintiff-Appellant states in his revised Notice of Appeal:

Election Board violated Chapter 7 section 1(c) 'Impropriety. Allegations of impropriety against the Election Board must be made to the Tribal Judiciary", when the Election Board decided on allegations of impropriety against such Board.
Plaintiff-Appellant April 9, 2013 Notice of Appeal at 3.

The LRBOI Election Board Regulations defines impropriety in Chapter 1, Section 2 (r) as "a violation of the ethical standards in these rules." The Trial Court held:

The Court finds that there was no impropriety by the Election Board when they contracted the independent hearing officer and then made the determination to abide by that opinion and allow the two candidates on the ballot. It also finds that some of the Regulations of the Election Board are confusing and contradictory which makes it hard for the candidates to adequately follow them.

The Court also finds that the Officers followed the scant protocol laid out for them in the Regulations and does not find any behavior that jeopardized the process.

There is no evidence in the Trial Court record or in the evidence and arguments presented by the Plaintiff-Appellant to disturb this holding of the Trial Court. Further support for this holding was provided in the Order After Remand in the Trial Court's application of the facts of this case to the four-part test for an injunction.

The next issue to address is whether the Trial Court erred in denying the Plaintiff-Appellant's request for an injunction. The Plaintiff-Appellant properly argued in his initial Notice of Appeal that the Trial Court needed to apply the four-part test for an injunction adopted by the LRBOI Court of Appeals, although the Plaintiff-Appellant incorrectly cited Michigan law instead of this Nation's law which is binding precedent. The four-part test adopted by the LRBOI Court of Appeals as to whether to grant or deny a preliminary injunction is as follows:

The trial court must evaluate whether (1) the moving party made the required demonstration of irreparable harm, (2) the harm to the applicant absent such an injunction outweighs the harm it would cause to the adverse party, (3) the moving party showed that it is likely to prevail on the merits, and (4) there will be harm to the public interest if an injunction is issued.

Sam et al. v. Ossiginac et al., 09-012-AP at page 8.

While the Trial Court's Order After Hearing contained significant information as to why the Trial Court had denied the injunction, it had not applied the facts specifically to the four-part test. With this matter being urgent, we remanded this case to the Trial Court to apply the test. The Trial Court responded in an expedited manner, issuing the Order After Remand two days after this Court's request.

To determine whether the Trial Court properly applied the law, we return to *Cramptom v. LRBOI Election Board* for guidance. In that case, the Petitioner requested an injunction in an election, claiming that the procedures used were unconstitutional. The Trial Court denied the injunction because the Petitioner failed to present any evidence of impropriety by the LRBOI Election Board. The Trial Court also held that the Petitioner failed to demonstrate that the procedures in question were unconstitutional.

While the Court of Appeals remanded the case to provide the legal analysis regarding the allegation that the procedures in question were unconstitutional, the Court stated the following with regard to the request for an injunction:

It was sufficient for the Court to find that the Petitioner failed to demonstrate that there was a substantial likelihood that she would prevail on the merits. The Petitioner merely, from the Court's perspective, failed to carry her burden of proof for receiving the injunction she desired.

Crampton v. LRBOI Election Board, Case Number 05-111-AP at 3

In the Order After Remand, the Trial Court stated that it denied the injunction with regard to the allegation that the law enforcement officers did not properly supervise the counting of the ballots at the Primary Election because the Plaintiff-Appellant was not harmed and the officers performed their duties as dictated by the LRBOI Election Board Regulations.

The Trial Court went on to provide significant reasoning with regard to the Plaintiff-Appellant's allegations surrounding the LRBOI Election Board permitting Ms. Sam and Mr. Friedel onto the ballot, stating it denied the injunction because: the Plaintiff-Appellant could not demonstrate irreparable harm as there was "no way to predict if the results of the primary election would have produced different candidates to move forward in the election," specifically the Plaintiff-Appellant "failed to show that any votes for Janine or Jamie would have been for him and he would have moved forward in the election;" the Plaintiff-Appellant failed to show that any harm to him would have been outweighed by the harm to the LRBOI Election Board, noting that the harm to the LRBOI Election Board would have been "minimal" as compared to the harm to the Plaintiff-Appellant if the Plaintiff-Appellant had appealed the November 20, 2012 (sic.; the correct date is November 30, 2013) decision prior to the Primary Election; the Plaintiff-Appellant failed to show that he was likely to prevail on the merits since he "could not state with any certainty that he or any other candidate that was eliminated in the primary election would have been on the ballot, if not for the votes for Sam and Friedl (sic.);" and that there would be a harm to the public interest if the injunction was issued due to the cost and delay of holding another primary, taking into consideration that "[t]he Court has deference for the Election Board and their decisions." This analysis provides clear and explicit reasoning as to why the injunction was denied with those reasons being rooted in the Plaintiff-Appellant's failure to prove the circumstances required for an injunction following the Primary Election, as well as the Plaintiff-Appellant failing to prove his allegations of impropriety as noted in the Order After Hearing. Upon review of the record of the Trial Court, including the transcript from the Hearing, and the pleadings from the Plaintiff-Appellant and the Defendant-Appellee, this Court of Appeals finds that the Trial Court applied the appropriate law to the facts of the case and that the Trial Court properly held that the Plaintiff-Appellant failed to meet his burden of proof for the reasons specified by the Trial Court in the Order After Hearing and the Order After Remand.

ORDER

This Court of Appeals, having reviewed the record from the Trial Court and the pleadings and briefs filed in this appeal, and having engaged in deliberations, hereby **AFFIRMS** the Order of the Trial Court denying the temporary restraining order and preliminary injunction and dismissing the case.

IT IS SO ORDERED:

Melissa L. Pope
Honorable Melissa L. Pope, Chief Justice

5-2-2013
Date

Stella Gibson
Honorable Stella Gibson, Special Appellate Justice

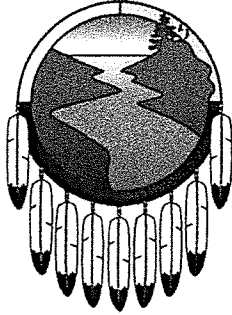
5/6/13
Date

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.

Deborah Miller
Deb Miller, Court Administrator

5-6-2013
Date



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

In the Matter of: Tribal Prosecutor

CASE NUMBER: 13164GC
HON. ANGELA SHERIGAN

Chief Legislative Counsel Kimberly McGrath
Little River Band of Ottawa Indians Tribal Council
375 River Street
Manistee, Michigan 49660

General Counsel Damian Fisher
Little River Band Tribal Ogema
375 River Street
Manistee, Michigan 49660

Associate Legislative Counsel Sean Cahill
Little River Band of Ottawa Indians Tribal Council
375 River Street
Manistee, Michigan 49660

ORDER AFTER HEARING

At a session of said Court on August 2, 2013
In the Reservation Boundaries of the
Little River Band of Ottawa Indians,
State of Michigan
PRESENT: HON. ANGELA SHERIGAN

An emergency hearing was held in this matter on the Tribal Council's Motion to Appoint a Special Prosecutor, with the Ogema joining in the request. The Council Speaker, and Legislative attorneys, the Ogema and Executive attorney were present.

After discussion between the parties and with the court, including discussion of the urgency of this matter (the Prosecutors office being vacant at 12:01 a.m. on August 3, 2013), and finding authority under the Tribal Prosecutor Ordinance, as well as supporting documentation presented at the hearing,


IT IS HEREBY ORDERED:

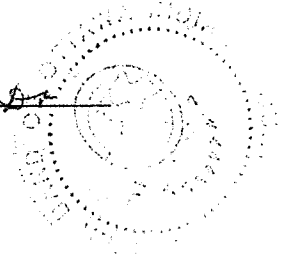
1. The Tribal Court will appoint a Special Prosecutor as soon as possible;

SERVING KENT, LAKE, MANISTEE, MASON, MUSKEGON, NEWAYGO,
OCEANA, OTTAWA, AND WEXFORD COUNTIES
FAX 231-398-3404

2. This special appointment will be for 90 days or until the position of Prosecutor is filled, whichever comes first;
3. The Special Prosecutor shall meet the qualifications of Prosecutor as required by the Office of Prosecutor Ordinance #11-400-09;
4. The Special Prosecutor is a special appointment, and compensation shall not exceed the compensation of the current prosecutor position, and is not subject to employee benefits;
5. Funding shall come from the Tribal Prosecutor's budget.

Dated: August 2, 2013


Hon. Angela Sherigan





**Little River Band of Ottawa Indians
Tribal Court**

3031 Domres Road
Manistee Michigan 49660
231-398-3406
Fax: 231-398-3404

In the Matter of: Tribal Prosecutor

CASE NUMBER: 13164GC
HON. ANGELA SHERIGAN

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Little River Band of Ottawa Indians Tribal Council
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General Counsel Damian Fisher
Little River Band Tribal Ogema
375 River Street
Manistee, Michigan 49660

Associate Legislative Counsel Sean Cahill
Little River Band of Ottawa Indians Tribal Council
375 River Street
Manistee, Michigan 49660

ORDER APPOINTING SPECIAL PROSECUTOR

Attorney, Dennis Swain, is hereby appointed "Special Prosecutor", effective August 6, 2013. Mr. Swain has 16 years of experience as a prosecutor in Manistee County and has practiced in the Tribal Court for many years now. The Court finds that he is qualified for the appointment and that the prior experience allows for an exception, in this limited circumstance, for Section 10.03 of the Office of the Prosecutor Ordinance, #11-400-09.

Mr. Swain shall have full powers of the office of prosecutor as stated in the Office of Prosecutor Ordinance.

As this is a special appointment through the Court, the following provisions of the Office of Prosecutor Ordinance do not apply: Sections 7.02, 7.03, 7.04, 9.02; and Articles IX and XI.

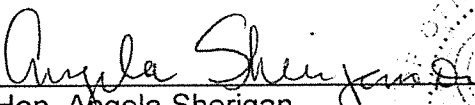
The term of this appointment is for 90 days, or until the Prosecutor position is filled, whichever occurs first.

Mr. Swain is shall be compensated at the rate of \$1500.00 (One-thousand, five-hundred dollars) per week, which shall be funded by the Prosecutor's budget.

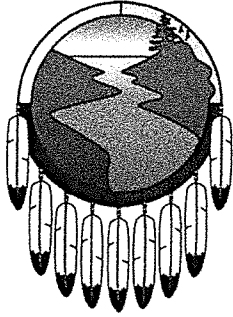
Mr. Swain shall be provided with an identification card, a key card for entry to the prosecutor's office, and email access.

SO ORDERED.

Dated: August 6, 2013


Hon. Angela Sherigan





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

In the Matter of: Tribal Prosecutor

CASE NUMBER: 13164GC
HON. ANGELA SHERIGAN

Chief Legislative Counsel Kimberly McGrath
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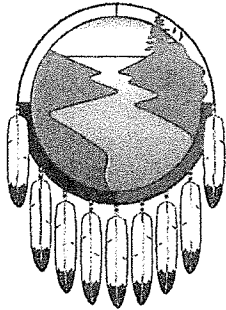
ACCEPTANCE OF APPOINTMENT AS SPECIAL PROSECUTOR

I, Dennis Swain, hereby accept the appointment of "Special Prosecutor", from the Tribal Court in accordance with the Order Appointing Special Prosecutor, dated August 6, 2013, and signed by Judge Angela Sherigan.

I also understand that should there be any change in law license, or any other change making me ineligible for this appointment, I will notify the Tribal Court immediately.

Dated: 8/7/2013


Dennis Swain



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

DAVID RIVERS,
Appellant-Plaintiff,

v.

EDYTA CUDZILO,
Appellee-Defendant,

Appellate Case Number: 13206AP

Chief Justice Melissa L. Pope
Justice Berni Carlson
Justice Cynthia Champagne

Fred Ongcapin
Lay Advocate for Appellant-Plaintiff
11411 East Jefferson, Room 246
Detroit, Michigan 48214

Edyta Cudzilo
Appellee-Defendant In Pro Per
No Address on File with the Court

ORDER AND OPINION REGARDING APPELLANT'S MOTION FOR RECONSIDERATION

Opinion by the Honorable Melissa L. Pope on behalf of the Majority Court

STATEMENT OF FACTS

On October 18, 2013, a Scheduling Conference was held in the above referenced case. The Justices and Appellant-Plaintiff's Attorney appeared by phone. The Appellee-Defendant did not appear. A Scheduling Order was entered that same day. The Briefs were scheduled as follows:

Appellant-Plaintiff Brief due at 4:00 p.m. on Friday, November 15, 2013
Appellee-Defendant Brief due at 4:00 p.m. on Friday, December 13, 2013
Appellant-Plaintiff Reply due at 4:00 p.m. on Friday, January 3, 2014

At the request of the Appellant-Plaintiff, two dates were provided for Oral Arguments with the date dependent upon whether the Appellee-Defendant submitted a Brief. If the Appellee-Defendant did submit a Brief, the Appellant-Plaintiff would have the opportunity to submit a Reply Brief by January 3, 2014 with Oral Arguments at 11:00 a.m. on Friday, January 17, 2014. If the Appellee-Defendant did not submit a Brief, the Appellant-Plaintiff would not submit a Reply Brief and Oral Arguments would be held at 11:00 a.m. on Friday, January 3, 2014.

The Appellant-Plaintiff did not submit a Brief on or before the due date of November 15, 2013. The Appellant-Plaintiff also did not submit a request for an extension on or before the due date of November 15, 2013.

On November 20, 2013, the Appellant-Plaintiff submitted an email to the Tribal Court Administrator in which he requested an extension for submission of the Appellant-Plaintiff's Brief. This email was the sole communication to the Court. The Appellant-Plaintiff did not include a motion to the Appellate Court.

On December 3, 2013, this Appellate Court issued an Order Dismissing Appeal. A summary of the reasons for dismissing the appeal were as follows: 1) the Appellant-Plaintiff, by and through his advocate, did not submit his Brief or a request for an extension by the date the Brief was due, choosing instead to submit an email to the Tribal Court Administrator five (5) days after the Brief was due; 2) the Appellant-Plaintiff did not submit a written Motion to the Court pursuant to Chapter Five of the Little River Band of Ottawa Indians (LRBOI) Court Rules; 3) the Appellant-Plaintiff failed to demonstrate good cause for why an extension was justified and why the request for an extension was not submitted prior to the date in a written Motion as required by the LRBOI Court Rules; and 4) the Appellant-Plaintiff did not include recommendations for a new scheduling order. This Appellate Court went on to note that the LRBOI Court Rules does permit motions for reconsideration.

On December 6, 2013, the Appellant-Plaintiff submitted notice that he would be submitting a Motion for Reconsideration within the fourteen (14) day period as permitted by LRBOI Court Rule 5.906.

On December 13, 2013, the Appellant-Plaintiff submitted Motion for Reconsideration – Regarding Dismissing Appeal.

On January 2, 2014, the Court received Motion for Reconsideration – Termination of Personal Protection Order (PPO) from the Appellant-Plaintiff.

For the reasons set forth in this Order and Opinion, this Appellate Court hereby **DENIES** the Motion for Reconsideration.

ANALYSIS

On December 3, 2013, this Court of Appeals issued its Order Dismissing Appeal in response to the Appellant-Plaintiff's failure to follow several of the Little River Band of Ottawa Indians (LRBOI) Tribal Court Rules. The Court noted that 5.906 of the LRBOI Court Rules permit the filing of a Motion for Reconsideration, quoting the text of the Rule. In addition, the Court stated that, "[a]ny such motion for reconsideration would need to, at minimum, address the numerous problems identified throughout this Order". Order Dismissing Appeal at 4.

The Appellant-Plaintiff, by and through his attorney, submitted his Motion for Reconsideration – Regarding Dismissing Appeal ("Motion for Reconsideration") within the fourteen (14) day time period. The content of the Appellant-Plaintiff's Motion, however, fails to meet the minimum requirements for granting a motion for reconsideration.

In his Motion for Reconsideration, the Appellant-Plaintiff gave the following explanation for not submitting his Brief or a request for an extension by the date it was due:

During the week of November 15, 2013, Appellant' legal representative experienced several unforeseen family emergencies which necessitated immediate response. Appellant's legal representative underwent great personal hardship in order to attend to these unforeseen family emergencies. Due to these unforeseen circumstances, Appellant's legal representative was unable to submit a thorough and timely response to the Tribal Appellate Court by November 15, 2013.

This Court of Appeals reviews motions for reconsideration on a case-by-case basis. However, in so doing, the moving party must meet the minimum requirements of the Court Rules governing motions for reconsideration. In the present case, the Appellant-Plaintiff needed to provide sufficient information to establish good cause for failing to follow the Court Rules in several instances. In his Motion for Reconsideration, the Appellant-Plaintiff states that the Appellant-Plaintiff's legal representative experienced "several unforeseen family emergencies which necessitated immediate response," resulting in the Appellant-Plaintiff's legal representative being "unable to submit a thorough and timely response to the Tribal Court by November 15, 2013".

The reference to "several unforeseen family emergencies" is too vague to establish good cause to excuse the many failures of the Appellant-Plaintiff. The Appellant-Plaintiff goes on to state that these "unforeseen family emergencies" made the Appellant-Plaintiff's legal representative "unable to submit a thorough and timely response to the Tribal Court by November 15, 2013". While this Appellate Court does not wish to delve deeply into family emergencies, there must be sufficient detail to explain what the "unforeseen family emergencies" were and how they prevented the party from following the LRBOI Court Rules.

Further, the reference to submitting a "response" to the Tribal Court does not accurately reflect the circumstances of the present case. The use of the word "response" implies that the Court of Appeals requested something from the Appellant-Plaintiff. That is not the case. The Appellant-Plaintiff did not have a response due to the Tribal Appellate Court. The Appellant-Plaintiff had a Brief due, the deadline for which he had notice both at the Scheduling Conference which he participated in, as well as in writing through the Scheduling Order that followed the Scheduling Conference. Had the Appellant-Plaintiff desired an extension of the deadline, the proper procedure would have been to submit a written motion to the Appellate Court. A motion is not a response to the Court; it is a request to the Court. Even presuming that the Appellant-Plaintiff had meant that the "several unforeseen family emergencies" made him unable to submit a thorough and timely motion to the Court, the Appellant-Plaintiff failed to explain what these "emergencies" were and how they prohibited him from contacting the Court prior to the date the Brief was due.

In addition to failing to establish good cause for missing the date the Brief was due, the Appellant-Plaintiff fails to provide good cause for why he contacted the Tribal Court Administrator via email instead of filing a motion pursuant to the LRBOI Court Rules. The Legal Representative admits in his Motion for Reconsideration that contacting the Tribal Court Administrator by email instead of submitting a written motion for an extension violated the LRBOI Court Rules. He apologizes for his conduct, but then states that, "the Tribal Appellate Court should not penalize the Appellant by denying 'Due Process' rights to his children solely on the errors made by this Legal Representative".

The Appellant-Plaintiff goes on to state the following later in his Motion for Reconsideration:

During the week of November 15, 2013, Appellant's legal representative underwent great personal hardship connected with family members. This hardship rendered Legal Representative

unable to meeting his responsibilities as a retained representative of Appellant at that time. Since then, Legal Representative's personal situation has already stabilized. This situation was fully explained to Appellant. He understood my personal hardship situation at that time and accepts it. Appellant is ready to move forward and continue having Legal Representative represent him during his Appellate Case. Appellant and his Legal Representative respectfully request that these personal hardship circumstances be deemed "Good Cause".

The Appellant-Plaintiff made a decision regarding who would represent him in the LRBOI judicial system. It appears from this excerpt that the Appellant-Plaintiff has been advised that his Legal Representative did not follow the LRBOI Court Rules with a consequence of his appeal being dismissed. Again, who represents him in Court is a decision that rests solely in the hands of the Appellant-Plaintiff.

Before continuing to discuss the issues with the Motion for Reconsideration, the Court notes that the LRBOI Tribal Court has adopted Court Rules that govern the obligations of individuals who represent parties within the LRBOI judicial system. The Code of Ethics for Lawyers and Lay Advocates, Section 2.300, specifically states the responsibilities of attorneys and lay advocates in representing individuals with the LRBOI Tribal Court. The Court Rules also provide avenues for redress when a representative fails to perform their duties. These avenues can be found in Section 2.400, entitled Enforcement of Ethical Codes.

We now return to the arguments in the Motion for Reconsideration. The Legal Representative states that the Appellant-Plaintiff "understood" his "personal hardship situation at that time and accepts it." He goes on to state that, "Appellant is ready to move forward and continue having Legal Representative represent him during his Appellate Case. Appellant and his Legal Representative respectfully request that these personal hardship circumstances be deemed 'Good Cause'". He also states that, "the Tribal Appellate Court should not penalize the Appellant by denying 'Due Process' rights to his children solely on the errors made by this Legal Representative". This Court is not persuaded by this argument.

To begin, as stated previously, the explanations provided by the Appellant-Plaintiff are too vague to establish good cause. The Appellant-Plaintiff refers to the situations that prevented his compliance with the LRBOI Court Rules only as "unforeseen family emergencies", "personal hardship situation" and "personal hardship circumstances". These phrases do not

give any indication as to why the Legal Representative could not contact the Court until five days after the Brief was due or, of equal importance, why he did not submit his request for an extension in the form of a written motion to the Appellate Court as required by the LRBOI Court Rules.

The Legal Representative notes that the Appellant-Plaintiff has been advised of the "personal hardship situation" he encountered and that he "is ready to move forward and continue having Legal Representative represent him during his Appellate Case." Whether the Appellant-Plaintiff is satisfied with the explanation of the Legal Representative and wants to "move forward and continue having Legal Representative represent him during his Appellate Case" does not bridge the gap to make the vague explanations in his Motion for Reconsideration sufficient to establish good cause for why the Appellant-Plaintiff failed to follow the LRBOI Court Rules in several instances. As such, it has no bearing on this Motion for Reconsideration.

The above analysis means that the Appellant-Plaintiff has not made any valid arguments to establish good cause in the present case. However, as the Appellant-Plaintiff went on to imply that the Court will be denying the Appellant-Plaintiff his "due process" if the appeal is dismissed because of the failures of the Legal Representative, this Court must also discuss the failure of the Appellant-Plaintiff in drafting the Motion for Reconsideration pursuant to the LRBOI Court Rules.

LRBOI Court Rule 5.906(A)(1) clearly defines what a motion for reconsideration must contain:

(1) Content. A petition for reconsideration and supporting memorandum shall be directed solely to the discussion of those specific points or matters of law in which it is claimed the Tribal Court of Appeals erred. The request must identify the exact element of the decision which is to be reconsidered, the reasons for the request, and any authority upon which the party relies.

The Court made the point of quoting this Court Rule in its Order Dismissing Appeal. Despite clearly outlining what a motion for reconsideration would need to contain, the Appellant-Plaintiff fails to argue that the Court of Appeals erred in dismissing the appeal. In addition, he fails to include any authorities supporting his argument that mere references to "unforeseen family emergencies", coupled with a client's desire to continue with the same legal representative following the dismissal of an appeal due to not following court rules, is sufficient to establish good cause.

Instead of providing the information required, he argues that the Appellant will be denied "due process as to the best interests of the children" if the case is not heard. He goes on to make assertions about where the Appellee-Defendant is living, present discussion on the best interests of the children and make a demand for full custody of the minor children. Most recently, the Appellant-Plaintiff submitted a Motion for Reconsideration – Termination of Personal Protection Order which attempts to introduce new information to this Appellate Court. These matters are not subjects of this appeal. The sole matter that would have been before this Court of Appeals was whether the Trial Court erred in denying the Appellant-Plaintiff's Amended Motion for Reconsideration. Pursuant to the LRBOI Court Rules, the Court of Appeals would not have considered any other issues.

This Tribal Court of Appeals must take into consideration the precedent it is establishing with every order it issues. In deciding the present case, the Court must consider the future impact of missed deadlines on the progress of appellate cases. "A motion for an extension of a due date impacts the entire schedule for an appellate case, including the due dates for any remaining briefs and the date for oral arguments." Order Dismissing Appeal at 3. While this Court of Appeals is open to considering requests for extensions, the party requesting an extension must follow the LRBOI Court Rules and properly submit a written motion that establishes good cause in order for the motion to be considered. For clarification, the Court may also grant extensions if the parties file a stipulated motion. However, that does not apply to the present case.

The legal representative for the Appellant-Plaintiff admits that he did not follow the LRBOI Court Rules in this appeal. As a reminder, the Appellant-Plaintiff violated the LRBOI Court Rules multiple times: he did not submit the Appellant-Plaintiff's Brief by the due date; he did not submit a written motion to the Court for an extension of the deadline prior to the date the Brief was due; he waited five days after the missed due date to contact the Court; and he sent an email requesting an extension to the Tribal Court Administrator instead of submitting a written motion to the Court that included sufficient detail for missing the due date and failing to request an extension prior to the due date to establish good cause to grant the extension and modify the Scheduling Order. The Appellant-Plaintiff has now gone on to fail to provide the information required pursuant to the Court Rule on Motions for Reconsideration.

The Appellant-Plaintiff submitted a Motion for Reconsideration that fails to provide sufficient detail for why he did not follow the LRBOI Court Rules. The vague references to "unforeseen family emergencies", a "personal hardship situation" and/or "personal hardship circumstances" and noting that the Appellant-Plaintiff accepted the explanation of the Legal

Representative as to why he did not follow the LRBOI Court Rules does not establish good cause to excuse these violations. The failure to properly follow the LRBOI Court Rules has continued with the Appellant-Plaintiff submitting a Motion for Reconsideration that does not adequately address the issues identified in the Order Dismissing Appeal or include the content required in LRBOI Court Rule 5.906(A)(1). Finally, the Appellant-Plaintiff violated the LRBOI Court Rules both in his Motion for Reconsideration and his Motion for Reconsideration – Termination of Personal Protection Order (PPO) in attempting to introduce information outside the scope of this appeal.

CONCLUSION

A request for an extension for a due date for a brief must be submitted in the form of a written motion pursuant to 5.801 of the LRBOI Court Rules. In the motion, the moving party must establish good cause for requesting the extension. If submitted after the brief is due, the motion must also include reasons sufficient to establish good cause for not submitting the motion prior to the due date.

Although the Appellate Court does not wish to delve deeply into personal matters, the Court requires sufficient detail to determine whether the circumstances establish good cause for the extension and/or missed due date. Vague references to “unforeseen family emergencies”, a “personal hardship situation” and/or “personal hardship circumstances” do not establish good cause for failing to follow LRBOI Court Rules.

ORDER

For the reasons set forth in this Order and Opinion Regarding Appellant's Motion for Reconsideration, the Appellant-Plaintiff's Motion for Reconsideration is **DENIED** and the case is **DISMISSED**.

IT IS SO ORDERED:

Melissa L. Pope
Honorable Melissa L. Pope, Chief Justice

1-27-2014
Date

Honorable Berni Carlson, Associate Justice

Date

Representative as to why he did not follow the LRBOI Court Rules does not establish good cause to excuse these violations. The failure to properly follow the LRBOI Court Rules has continued with the Appellant-Plaintiff submitting a Motion for Reconsideration that does not adequately address the issues identified in the Order Dismissing Appeal or include the content required in LRBOI Court Rule 5.906(A)(1). Finally, the Appellant-Plaintiff violated the LRBOI Court Rules both in his Motion for Reconsideration and his Motion for Reconsideration – Termination of Personal Protection Order (PPO) in attempting to introduce information outside the scope of this appeal.

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Although the Appellate Court does not wish to delve deeply into personal matters, the Court requires sufficient detail to determine whether the circumstances establish good cause for the extension and/or missed due date. Vague references to "unforeseen family emergencies", a "personal hardship situation" and/or "personal hardship circumstances" do not establish good cause for failing to follow LRBOI Court Rules.

ORDER

For the reasons set forth in this Order and Opinion Regarding Appellant's Motion for Reconsideration, the Appellant-Plaintiff's Motion for Reconsideration is **DENIED** and the case is **DISMISSED**.

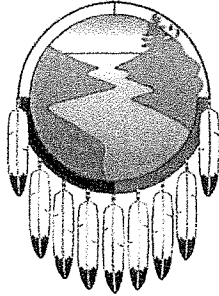
IT IS SO ORDERED:

Melissa L. Pope
Honorable Melissa L. Pope, Chief Justice

1-27-2014
Date

Berni Carlson
Honorable Berni Carlson, Associate Justice

1/27/2014
Date



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

DAVID RIVERS,
Appellant-Plaintiff,

Appellate Case Number: 13206AP

v.

Chief Justice Melissa L. Pope
Justice Berni Carlson
Elder Justice Cynthia Champagne

EDYTA CUDZILO,
Appellee-Defendant,

Fred Ongcapin
Lay Advocate for Appellant-Plaintiff
11411 East Jefferson, Room 246
Detroit, Michigan 48214

Edyta Cudzilo
Appellee-Defendant In Pro Per
No Address on File with the Court

ORDER AND OPINION REGARDING APPELLANT'S MOTION FOR RECONSIDERATION

ELDER JUSTICE CYNTHIA CHAMPAGNE, dissenting.

The majority errors in their meager analysis of Appellant's Motion for Reconsideration on a multitude of facets. While the majority was correct in their limited analysis that *lay advocate* representing the Appellant failed to (1) follow the LRBOI Court Rules in this appeal; (2) sent an email requesting an extension to the Tribal Court Administrator versus a motion for such extension; (3) and failed to demonstrate detailed good cause explanation, the majority grossly failed to recognize the correct recourse in action for the pursuit of justice. It is the obligation of all the judiciary to ensure fair and impartial pursuit of justice; the majority is blinded by failures of a *lay advocate* and the restrictive legalese court rules when rendering their narrowly restrictive opinion.

In accordance with 2.301 Applicability of this Code of Ethics for Lawyers and Lay Advocates "This Code of Ethics is primarily based on the Michigan Rules of

Professional Conduct." Michigan Rules of Professional Conduct state:

Rule: 1.1 Competence

A lawyer shall provide competent representation to a client. A lawyer shall not:

- (a) handle a legal matter which the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it;
- (b) handle a legal matter without preparation adequate in the circumstances; or
- (c) neglect a legal matter entrusted to the lawyer.

Further the rules continue to affirm the responsibility for the legal representative to:

THOROUGHNESS AND PREPARATION

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

Both the Michigan Rules of Professional Conduct and LRBOI Tribal Court Rules - The Code of Ethics for Lawyers and Lay Advocates, Section 2.300 affirm the fiduciary responsibility of legal representation. The majority neglected to consider these guidelines when contemplating their order. The lay advocate under his own will and testimony admitted to violations as referenced above. In the pursuit of justice, this Honorable Court should not fail to consider these factual findings when issuing their decision.

Under 2.303(k) Tribal Court Rules, "'Reasonably should know" when used in reference to a lawyer, denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question." Clearly this matter before the Court deals with whether the attorney/lay advocate reasonably should have known the standards and practices of LRBOI Tribal Court. The lay advocate states "the Tribal Appellate Court should not penalize the Appellant by denying 'Due Process' rights to his children solely on the errors made by this Legal Representative." Thus, this dissention concludes that the lay advocate did in fact understand the obligations of the tribal court rules, but failed to abide by such standing. The matter before the court on the motion for reconsideration should not be tainted due to inadequate legal

representation. The matter deals with the lay advocates failure to (a) handle a legal matter which the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it; (b) handle a legal matter without preparation adequate in the circumstances; and (c) neglect a legal matter entrusted to the lawyer.

Precedence has been set in *Boruff v. U.S.*, (5 Cir., 1962), 310 F.2d 918. See *Lyles v. U.S.*, (5th Cir., 1965) 341 F.2d 917 when appointed counsel failed to file a timely appeal due to competence of legal representation. In these matters the court had no difficulty in remedying this defect by permitting a late filing. In the current matter the attorney, due to no fault of the appellant, has failed to file a timely appeal due to competence of legal representation.

Conclusion

A request for an extension for a due date for a brief must be submitted in the form of a written motion pursuant to 5.801 of the LRBOI Court Rules. In the motion, the moving party must establish good cause for requesting the extension. If submitted after the brief is due, the motion must also include reasons sufficient to establish good cause for not submitting the motion prior to the due date. When there is question of competence of legal representation, as in the case in point, this Court should follow the precedence established by the federal court ruling as set in *Boruff v. U.S.*, (5 Cir., 1962), 310 F.2d 918. See *Lyles v. U.S.*, (5th Cir., 1965) 341 F.2d 917.

The majority argues "although the Appellate Court does not wish to delve deeply into personal matters" as to why the untimely filing; they negligently ignore the pink elephant in the corner. The majority blatantly overlooks the pink elephant in the corner by zealously denying the motion for reconsideration. While the majority may feel that the integrity of the Court is the principal matter at hand, they misguidedly overlook the rights of the appellant. In the pursuit of justice and equity, this court should examine the factual evidence before this body and determine upon its own accord whether the pursuit for justice would be hindered by granting such motion for reconsideration. The integrity of the judicial system extends past limiting court rules, and needs encompass the overall system. The appellant should not be penalized for the actions of a lay advocate whose legal competence is in question.

In closing, the majority not only fails to follow federal precedence but fails to take into account the cultural norms and customs of our community. As our grandfathers and grandmothers before us instilled the belief of justice and equity under Anishinaabeg beliefs, the majority appear to have an overreliance on the outsiders' rules and procedures. I could not agree or concur with the majority as their opinion denies basic equity and fails to provide for the pursuit of justice. I think back of how the outsiders rules where used against our people for their own gain, and I refuse to escape to the same tactic. If I were to do so, I would be overlooking the basic Anishinaabeg principals of truth, love, and respect. Thus, I would be denying our people to the same access to equity and justice as was the practice done upon our communities. I cannot and will not rationalize that preserving the integrity of the court rules is inconsequential to that of justice and due process for the appellant.

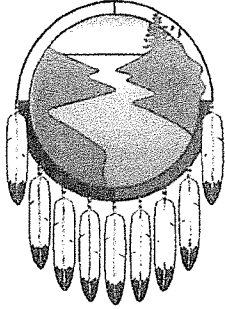
Cynthia A. Champagne

ELDER JUSTICE CYNTHIA CHAMPAGNE,

Dissenting

1-27-2014

Date



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

DAVID RIVERS,
Appellant-Plaintiff,

v.

EDYTA CUDZILO,
Appellee-Defendant,

Appellate Case Number: 13206AP

Chief Justice Melissa L. Pope
Justice Berni Carlson
Justice Cynthia Champagne

Fred Ongcapin
Lay Advocate for Appellant-Plaintiff
11411 East Jefferson, Room 246
Detroit, Michigan 48214

Edyta Cudzilo
Appellee-Defendant In Pro Per
No Address on File with the Court

ORDER AND OPINION REGARDING APPELLANT'S MOTION FOR RECONSIDERATION
RESPONSE TO THE DISSIDENTING OPINION

Response to the Dissenting Opinion by the Honorable Melissa L. Pope on behalf of the Majority Court

The Dissenting Opinion was written in response to the first draft of the Majority Opinion. While appellate courts frequently respond directly to a dissent in the body of the majority opinion, doing so would make points in the Dissenting Opinion less clear. In the spirit of respect and professional courtesy, the Majority has chosen to enter the first draft of the Majority Opinion, with non-substantive errors corrected, and draft this separate section to address the issues in the Dissenting Opinion with which it respectfully disagrees.

This Appellate Court honors the cultural beliefs and values intertwined in the Little River Band of Ottawa Indians judicial system, both in its Order Dismissing Appeal

and this Majority Opinion, in the pursuit of equity and justice for the parties appearing before it in this case, and for all those who will appear before this Court in the future.

One of the purposes for court rules is, to provide all of the information a party needs to file and respond to the many aspects of any court case. Court rules provide the details for documents filed with the court including, but not limited to, the content that is required, the format and timelines. They provide the processes for taking actions. Court rules also provide significant information regarding the responsibilities of parties, attorneys, advocates and the court. A primary purpose for court rules is to ensure that all people appearing before a court are treated equal and have the same information. The Little River Band of Ottawa Indians Tribal Court Rules are posted on the website and available at the Court. Every person appearing before the LRBOI Tribal Court has the same information regarding their responsibilities, the responsibilities of the other party, the processes they are required to follow, the information they have to submit, the timelines and the standard the Court uses to decide the matters before the Court. The LRBOI Court Rules ensure that all parties have equal access to justice within the LRBOI Tribal Court. Court rules also may leave room for a court to use its discretion to decide a matter or address a mistake. In order to ensure that this discretion is exercised in a way that is fair in the case it is considering and all future cases, there must be clearly defined parameters when a court exercises discretion.

This Appellate Court had the responsibility of dismissing this appeal when the Appellant-Plaintiff failed to fulfill his responsibilities of filing a Brief by the due date or filing a written motion to the Court requesting an extension prior to or after the due date, choosing instead to only submit an email to the Tribal Court Administrator after the Brief was due. However, in honor of the cultural beliefs and values intertwined within the Little River Band of Ottawa Indians judicial system, the Court went beyond its duties and provided guidance in its unanimous Order Dismissing Appeal on how the Appellant-Plaintiff could remedy his mistakes. It detailed the process by which the Appellant-Plaintiff could file a motion for reconsideration. It specifically stated that the LRBOI Court Rules provide an avenue for reconsideration of an Appellate Court decision, provided the proper citation for the Court Rule and quoted the Court Rule, providing the

burden on the Appellant-Plaintiff. It also painstakingly detailed the issues that led to the dismissal of the appeal. It provided significant guidance to the Appellant-Plaintiff on what he would have to address in a motion for reconsideration, including that he would have to establish good cause for the multiple times he did not follow the LRBOI Court Rules. The Court highlighted the requirements by stating that “[a]ny such motion for reconsideration would need to, at minimum, address the numerous problems identified throughout this Order”. An appellate court providing guidance on the process by which to appeal a ruling and the information required to meet the burden is not common practice. It is not the responsibility of an appellate court to provide this information; it is the responsibility of the party or their representative to know the court rules and file any appropriate pleadings. However, in the spirit of equity and justice, this Court went beyond its duties and provided significant guidance to the Appellant-Plaintiff on his burden. For the reasons set forth in the Majority Opinion, the Appellant-Plaintiff not only failed to meet the burden of establishing good cause for his failures in not submitting his Brief by the due date, or a written motion requesting an extension before or after the Brief was due, but also failed to meet the burden of fulfilling the requirements for a motion for reconsideration.

As noted by the Dissent, the Appellant-Plaintiff admitted these failures with regard to his actions prior to submitting his Motion for Reconsideration. Contrary to the assertions in the Dissenting Opinion that the Court should not ignore this fact when rendering its decision, a primary consideration for the Majority in rendering its decision was that the legal representative of the Appellant-Plaintiff admitted he knew the Court Rules, but did not follow them. In his Motion for Reconsideration, he went on to commit to fulfilling all of his responsibilities in the future stating:

It is on this Legal Representative's professional reputation and ethics to make sure of complete compliance with LRBOI Court Rules from this point forward. Motion for Reconsideration at 2.

From this point forward, Legal Representative will make sure to adhere to LRBOI Court Rules. Motion for Reconsideration at 2.

Despite the recognition of previous violations and assertions that he would "make sure of complete compliance with all LRBOI Court Rules from this point forward," he still failed to fulfill the requirements of a motion for reconsideration as provided in LRBOI Court Rule 5.906. This Court Rule requires that the moving party identify errors the Appellate Court made, identify the elements of the decision the moving party wants reconsidered, provide the reasons for the requested reconsideration and provide any authorities that support the request for reconsideration. The Appellant-Plaintiff should have identified an error or, at minimum, presented authorities for the argument that mere references to "unforeseen family emergencies" constituted "good cause". The Appellant-Plaintiff could have made an alternative argument, such as "legal incompetence" as illustrated in the Dissenting Opinion. The Appellant-Plaintiff, however, did not identify any errors made by the Appellate Court or present any authorities relating to the substance of the Motion for Reconsideration, thereby failing to fulfill the requirements of a motion for reconsideration.

The Dissent fails to discuss or even identify that the legal representative – the title used by the Appellant-Plaintiff in all pleadings submitted to this Appellate Court throughout these proceedings – made a commitment to follow the LRBOI Court Rules while, once again, failing to follow the requirements of the Court Rule on Motions for Reconsideration.

Had the Appellant-Plaintiff met his burden as required in the Court Rule on Motions for Reconsideration and the unanimously issued Order Dismissing Appeal, some of the arguments in the Dissenting Opinion may have applied. This Majority uses "may" in this context for several reasons. The first is that the LRBOI Court has the requirement that a party must establish good cause when requesting an action outside of the Court Rules. What the Majority held, is that vague references to "unforeseen family emergencies", did not suffice as good cause for the many failures of the Appellant-Plaintiff. When a standard is not established, or an attorney or party is advocating for adopting a change or modification of a standard, then they can present case law, court rules and legal reasoning from other jurisdictions for consideration by the LRBOI Trial or Appellate Courts. This is often referred to as persuasive authority. The Dissenting Opinion states that "[p]recedence has been set in *Boruff v. U.S.*".

However, this is persuasive, not binding as it is federal case law. Further, there is a preference among many Tribal courts to first look to other Tribal courts for guidance when faced with adopting or changing a standard as it is more likely that another Tribal court will hold similar beliefs and values than that of a state or federal court. In general, it is the responsibility of a party to make these arguments. Courts tend not to engage in significant additional research as there is a danger of crossing the line from serving as an impartial judiciary to that of an advocate. That being said, courts may engage in such conduct in the interests of justice, but should be careful in this endeavor, including making this outside research as narrow as possible and stating in detail why and how this research was done. To do otherwise, is to put at risk the sovereignty Native Nations have fought to retain since the founding of the United States.

In the present case, the Dissent went outside of the arguments presented by the Appellant-Plaintiff. Instead of applying the facts of the case to the standard of whether the party established good cause for his failures, the Dissent made factual conclusions without there being an admission or argument for those factual conclusions by the Appellant-Plaintiff. It is of concern to the Majority that the Dissent made this factual conclusion without the Appellant-Plaintiff ever making claims of legal incompetence.

The Majority further notes that it is difficult to reconcile the Dissent's advocacy for adopting Michigan Court Rules and federal case law with the conclusion in the Dissenting Opinion. The Dissent recognizes in the conclusion that outside laws have been used to harm Native people. Despite recognizing this fact, the Dissent argues for the adoption of court rules and case law from outside of the LRBOI Tribal Court to create a standard that harms the Appellee-Defendant in this case and future parties appearing before the LRBOI Court.

The harm in the approach advocated for by the Dissent, is that there would be a blanket exception of "legal incompetence" when a person admits that they knew the LRBOI Court Rules, but failed to follow them. In essence, it rewards the deliberate disregard for the standards by which the Court considers and decides the cases before it. It has the potential for abuse for using it as a tactic to change strategies in order to get a different outcome. The party would have the opportunity to review the reasoning of the Court in making a decision unfavorable to them. They could then claim "legal

incompetence” and change their pleadings to include new legal arguments or facts in response to what the Court identified as problematic in its original decision.

One could argue that, if the Court changes its opinion based on additional legal reasoning or the presentation of additional or different evidence, then it is the decision that the Court should have reached. Even if this is true, and there is nothing to say that it absolutely is true, the Court reaching the same conclusion harms the party that has had to fight to obtain the relief awarded. The obvious problem is that this party will incur additional costs in having to re-litigate a matter that was resolved, possibly even no longer being able to afford legal representation. Such an outcome is hypothetical. However, what is not hypothetical is that the party that was awarded relief, whether in whole or in part, would be denied that relief while the Court reconsidered the issues, because the opposing party deliberately ignored their responsibilities, and then claimed legal incompetence. This illustrates the often quoted words of William Gladstone, “justice delayed is justice denied”.

It is the duty of this Appellate Court to protect the rights of both parties. The Dissent minimizes the Majority Opinion by stating that the Majority is sacrificing the rights of the Appellant-Plaintiff to protect the Court Rules. This is not the case. For the reasons articulated in the Majority Opinion and this Response, the Court protected the rights of the Appellee-Defendant by dismissing this appeal. In that same Order Dismissing Appeal, the Court went beyond its duties and provided detailed guidance on the responsibilities of the Appellant-Plaintiff for remedying his mistakes. The Appellate Court would fail to fulfill its responsibilities, thereby putting the integrity of the Court into question, if it did not require that the Appellant-Plaintiff meet his duties as stated in the LRBOI Court Rules, and as stated by this Appellate Court in its Order Dismissing Appeal.

As stated at the beginning of this Response, one primary way that the Court strives for equal access to justice is by implementing Court Rules that provide the same information to every person. In holding that parties must fulfill the responsibilities as stated in the Court Rules and in Court opinions, the Majority protects the rights of every person appearing before the LRBOI Court in the future as they will all know their responsibilities, as well as the duties owed to them by the other party and the Court.

Affirming the responsibilities in the Court Rules also serves to ensure that individuals who represent a party understand the duties they owe to their clients, the other party and the Court. It appears that the Dissent asserts that an attorney or advocate who admits that they knew and understood their duties, but failed to fulfill them, should be excused. The Majority is concerned that this approach would harm parties as it establishes a low standard for competence for individuals to serve as advocates in the LRBOI Tribal Court and has the potential to allow any excuse for the failure to follow the Court Rules to be acceptable to the Court. The citizens of the Little River Band of Ottawa Indians deserve better representation than the approach advocated for by the Dissent.

For all of these reasons, the Majority respectfully disagrees with the Dissent and remains firm in its decision to deny the Appellant-Plaintiff's Motion for Reconsideration. The Order Dismissing Appeal protected the Appellant-Plaintiff's right to due process by providing the process for filing a motion for reconsideration, and detailing the burden of the Appellant-Plaintiff for filing such a motion. The fact that he did not fulfill the responsibilities under this process resulting in a denial of the motion, does not change the fact that he had equitable access to justice. Further, this Majority notes that the Appellant-Plaintiff has submitted a termination of the PPO referenced in the Notice of Appeal. While this would be new information outside the scope of this Appellate Court's authority in determining whether the Trial Court erred in denying the Appellant-Plaintiff's Amended Motion for Reconsideration, it is new information that can properly be brought in the form of a motion to the Trial Court. The Majority Order and Opinion Regarding Appellant's Motion for Reconsideration protects the rights of the Appellee-Defendant while affirming the responsibilities of and duties owed by parties, advocates, attorneys and the Court so that all people appearing before the Little River Band of Ottawa Indians Tribal Court have the same access to justice.

Melissa L. Pope
Honorable Melissa L. Pope, Chief Justice

1-27-2014
Date

Honorable Berni Carlson, Associate Justice

Date

Affirming the responsibilities in the Court Rules also serves to ensure that individuals who represent a party understand the duties they owe to their clients, the other party and the Court. It appears that the Dissent asserts that an attorney or advocate who admits that they knew and understood their duties, but failed to fulfill them, should be excused. The Majority is concerned that this approach would harm parties as it establishes a low standard for competence for individuals to serve as advocates in the LRBOI Tribal Court and has the potential to allow any excuse for the failure to follow the Court Rules to be acceptable to the Court. The citizens of the Little River Band of Ottawa Indians deserve better representation than the approach advocated for by the Dissent.

For all of these reasons, the Majority respectfully disagrees with the Dissent and remains firm in its decision to deny the Appellant-Plaintiff's Motion for Reconsideration. The Order Dismissing Appeal protected the Appellant-Plaintiff's right to due process by providing the process for filing a motion for reconsideration, and detailing the burden of the Appellant-Plaintiff for filing such a motion. The fact that he did not fulfill the responsibilities under this process resulting in a denial of the motion, does not change the fact that he had equitable access to justice. Further, this Majority notes that the Appellant-Plaintiff has submitted a termination of the PPO referenced in the Notice of Appeal. While this would be new information outside the scope of this Appellate Court's authority in determining whether the Trial Court erred in denying the Appellant-Plaintiff's Amended Motion for Reconsideration, it is new information that can properly be brought in the form of a motion to the Trial Court. The Majority Order and Opinion Regarding Appellant's Motion for Reconsideration protects the rights of the Appellee-Defendant while affirming the responsibilities of and duties owed by parties, advocates, attorneys and the Court so that all people appearing before the Little River Band of Ottawa Indians Tribal Court have the same access to justice.

Melissa L. Pope
 Honorable Melissa L. Pope, Chief Justice

1-27-2014
 Date

Berni Carlson
 Honorable Berni Carlson, Associate Justice

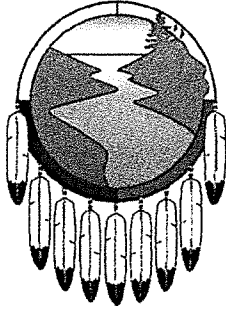
1/27/2014
 Date

CERTIFICATION OF SERVICE

I do hereby certify that a copy of the above Order and Opinion Regarding Appellant's Motion for Reconsideration, Dissenting Opinion and Response to the Dissenting Opinion was placed in the Tribe's mail system for attachment of proper postage and subsequent delivery to the Manistee Branch of the U.S. Postal Service today. The envelopes were addressed to the appellate justices and the attorneys/and or the parties as listed above.

Deborah Miller
Court Clerk

1-29-14
Date



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

DAVID RIVERS,
Appellant-Plaintiff,

v.

EDYTA CUDZILO,
Appellee-Defendant,

Appellate Case Number: 13206AP

Chief Justice Melissa L. Pope
Justice Berni Carlson
Justice Cynthia Champagne

Fred Ongcapin
Lay Advocate for Appellant-Plaintiff
11411 East Jefferson, Room 246
Detroit, Michigan 48214

Edyta Cudzilo
Appellee-Defendant In Pro Per
No Address on File with the Court

ORDER DISMISSING APPEAL

On October 18, 2013, a Scheduling Conference was held in the above referenced case. The Justices and Appellant's Attorney appeared by phone. The Appellee did not appear. A Scheduling Order was entered that same day. The Briefs were scheduled as follows:

Appellant-Plaintiff Brief due at 4:00 p.m. on Friday, November 15, 2013

Appellee-Defendant Brief due at 4:00 p.m. on Friday, December 13, 2013

Appellant-Plaintiff Reply due at 4:00 p.m. on Friday, January 3, 2014

At the request of the Appellant, two dates were provided for Oral Arguments with the date dependent upon whether the Appellee submitted a Brief. If the Appellee did submit a Brief, the Appellant would have the opportunity to submit a Reply Brief by January 3, 2014 with Oral Arguments at 11:00 a.m. on Friday, January 17, 2014. If the Appellee did not submit a Brief, the

Appellant would not submit a Reply Brief and Oral Arguments would be held at 11:00 a.m. on Friday, January 3, 2014.

The Appellant did not submit a Brief on or before the due date of November 15, 2013. The Appellant also did not submit a request for an extension on or before the due date of November 15, 2013.

On November 20, 2013, the Appellant submitted an email to the Tribal Court Administrator in which he requested an extension for submission of the Appellant's Brief. This email was the sole communication to the Court. The Appellant did not include a motion to the Appellate Court.

There are multiple problems with how the Appellant requested an extension for filing the Appellant's Brief. The first is that the Appellant did not make a timely request. Any requests for an extension should have been brought before the Appellate Court prior to the due date. The Appellant was aware of the due dates as he participated in the Scheduling Conference. In addition, the Court issued a Scheduling Order that specified the due dates for all Briefs and Oral Arguments following the Scheduling Conference. In the present case, the Appellant's Brief was due on November 15, 2013. The Appellant sent the email requesting an extension on November 20, 2013, five days after the due date. This is a fairly considerable period of time, even taking into consideration that the due date was on a Friday. While an email to the Tribal Court Administrator is not sufficient, the failure of the Appellant to make even this contact prior to the due date is significant.

The second problem is that the request was not submitted in the form of a written motion to the Appellate Court. Chapter Five of the Little River Band of Ottawa Indians Court Rules governs proceedings before the Appellate Court, including the proper method for parties to make any requests to the Appellate Court:

5.801 Motions.

(A) Content of Motions. A request for an order or other relief shall be made by filing a written motion and shall:

- (1) Contain or be accompanied by any matter required by a specific provision of these rules governing such a motion;
- (2) Specifically state the grounds on which it is based;
and
- (3) Set forth the order or relief sought.

A request for an extension is a request for relief. In addition, granting an extension would require that an Amended Scheduling Order be issued, a matter to be discussed later in this Order Dismissing Appeal. As such, the Appellant was required to submit the request in the form of a written motion to the Appellate Court. Instead of following the LRBOI Court Rules, the Appellant submitted an email to the Tribal Court Administrator. This is not sufficient.

The third problem involves the content required in a motion for an extension. An extension can be granted for good cause. With failing to submit a motion, the Appellant failed to provide any explanation for why an extension was needed. While an email to the Tribal Court Administrator would not be sufficient, it is significant that the Appellant failed to give any reason for why the extension was needed in his email. It should be noted that the Appellant would also need to provide an explanation for why the request was not submitted prior to the date the Brief was due. In the present case, the Appellant failed to provide the information required for the Appellate Court to determine whether good cause existed for an extension of the date the Appellant's Brief was due.

The final problem with the manner in which the Appellant addressed this issue is that he did not include recommendations for a new scheduling order. A motion for an extension of a due date impacts the entire schedule for an appellate case, including the due dates for any remaining briefs and the date for oral arguments. The schedule is of particular importance in the present case. The Appellant stated both in his pleadings and during the Scheduling Conference that time was of the essence. The Appellant requested that an alternate schedule be entered in the event that the Appellee did not submit a Brief. Specifically, the Appellant requested that the Appellant's Reply Brief be waived and the date for Oral Arguments be set for two weeks after the Appellee's Brief due date if the Appellee did not submit a Brief. The Appellate Court granted this request as reflected in the Scheduling Order. As such, the Motion should have included a recommendation for a new briefing schedule, including proposed dates for Oral Arguments.

If the Appellant had followed the proper procedure as provided in the LRBOI Court Rules, the Appellate Court could have determined whether good cause existed for extending the deadline for filing the Appellant's Brief and entered an Amended Scheduling Order if such good cause was shown. Instead, the Appellate Court is strictly faced with the Appellant's failure to submit his Brief as required pursuant to the Scheduling Conference and Scheduling Order. As such, the Appellate Court dismisses this appeal.

The Appellate Court notes for the record that a party may submit a motion for reconsideration of an Appellate Order. The LRBOI Court Rules provide in pertinent part:

5.906 Reconsideration of Decision.

(A) Request for Reconsideration of Decision. A request for reconsideration may be filed with the Clerk within fourteen (14) days of the decision's filing with the Clerk. A copy of the request must be served upon all other parties and on the Tribal Court.

(1) Content. A petition for reconsideration and supporting memorandum shall be directed solely to the discussion of those specific points or matters of law in which it is claimed the Tribal Court of Appeals erred. The request must identify the exact element of the decision which is to be reconsidered, the reasons for the request, and any authority upon which the party relies.

Any such motion for reconsideration would need to, at minimum, address the numerous problems identified throughout this Order.

For the reasons set forth in this Order Dismissing Appeal, this case is hereby **DISMISSED**.

IT IS SO ORDERED:

Melissa L. Pope
Melissa L. Pope, Chief Justice
On Behalf of a Unanimous Court

12-3-2013
Date

CERTIFICATION OF SERVICE

I do hereby certify that a copy of the above Order Dismissing Appeal was placed in the Tribe's mail system for attachment of proper postage and subsequent delivery to the Manistee Branch of the U.S. Postal Service today. The envelopes were addressed to the appellate justices and the attorneys/and or the parties as listed above.

Deborah Mills
Court Clerk

12-3-13
Date

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

PEOPLE OF THE LITTLE RIVER BAND
OF OTTAWA INDIANS,

CASE NO.: 13248TM
HON. DANIEL BAILEY

V.

BENJAMIN HAMILTON

William Gregory
LRBOI Tribal Prosecutor
3031 Domres Road
Manistee, MI 49660

Douglass McIntyre
Attorney for Defendant
814 S. Garfield Ave., Ste. A
Traverse City, MI 49684

ORDER AFTER BENCH TRIAL

At a session of said Court on January 20, 2014
In the Reservation Boundaries of the
Little River Band of Ottawa Indians,
State of Michigan
PRESENT: HON. DANIEL BAILEY

The Defendant, Benjamin Hamilton, (herein after "Defendant") was charged with *Embezzlement and Theft from a Tribal Organization*. The Complaint states: "BENJAMIN MARK HAMILTON did, without authorization, take and remove a quantity of tar-base copper wire, knowing the same to be the property of the Little River Band of Ottawa Indians, and did steal or convert the same to Padnos Pere Marquette Division as scrap metal for the sum of \$294.00. The property was taken from a building owned by the LRBOI located at 375 River Street. Manistee, Michigan." The warrant was issued on September 24, 2013.

JURISDICTION

Tribal Court has jurisdiction over the Defendant based on his membership with the Little River Band of Ottawa Indians. His Tribal identification number is: 3631. This jurisdiction is proper and is membership-based and territorial based. (Ord. #03-300-03, § 3.04 and 3.05)

SUBMISSIONS AND TESTIMONY

Seven (7) exhibits were entered by the prosecution with no objections from the defense. Three of those exhibits were copies of photographs of the Defendant weighing the copper wire and using the "ATM" at Padnos Recycling Center in Ludington on

September 4, 2013. [Exhibits 1, 2, and 4] Exhibit 3 was a receipt enumerating the items and the total amount paid to the Defendant. The Defense presented one Exhibit (A) which was the *ID Card Register* form which had a copy of Mr. Hamilton's driver's license and the total amount of the transaction from Padnos that day. (\$350.80.)

Prosecution called Mark Hilyard as a witness. Mr. Hilyard is an employee of Padnos and has personal knowledge of practices and protocol used by his employer when scrap is brought in for sale. The witness testified that if the customer is representing a business, it is customary to issue a check to the business. If a new business customer comes in and their information is not in the system, Padnos requires identifying information for that entity. If the customer is an individual they require much of the same identifying information but ask for a driver's license and instead of a check they give them a bar code to access their "ATM" machine to get cash.

Brian Gibson, Maintenance Supervisor, said he was the one that reported the wire as missing on the 16th of September. He reported it to his supervisor, Jessica Berger. Mr. Gibson explained that the Tribe has an account at Padnos through the Casino. If they had scrap to be sold it went under the Casino's account and they were issued a check. He testified it been at least a few years since they had recycled scrap materials at Padnos.

Officer Patrick Gilles testified that he questioned the Defendant because he was someone who had access to the bank building. When questioned, the Defendant denied any knowledge of the missing wire. Defendant and the Officer met later in the afternoon on 16th of September where Defendant admitted that he and his co-worker took the wire. Defendant provided Officer Gilles with a copy of the receipt from Padnos.

The Defense subpoenaed Dale Magoon, Tribal Accountant, to testify about receiving and receipting the \$294.00 cash from Defendant on September 17, 2014.

The Attorney for the Defendant questioned his client about what transpired on September 4, 2013. Defendant said he was in the bank building getting furniture for a Tribal Council Member and gathering cardboard and paper. He noticed that the wire had been cut. He assumed that someone was going to steal it, so before that happened, he and his co-worker took the wire, along with a few items that belonged to his co-worker and sold it at Padnos in Ludington.

CONCLUSIONS OF LAW

The Court finds the testimony of the witnesses that were subpoenaed as completely credible. They were helpful in establishing timelines, past practices, policy, and a description of what transpired from September 4, 2013 until September 17, 2013.

The Court finds that the intent of the Defendant was to convert the tar-base wire, take it to sell, and keep the profits.

One: This assertion is based on his signature on the print-out from Padnos wherein he signed the form and underneath his signature it states: *By signing here I am stating that I am the owner of this material or have authorized by the owner to sell this material*

and that I am without criminal convictions involving the theft, conversion, or sale of nonferrous materials.

Two: The Court also finds the Defendant did not reveal the fact that he worked for the Little River Band when he was completing the transaction, even though he testified in Court that the Tribe always takes their scrap and recyclables to Padnos. He did not present his Tribal ID. He gave them his personal driver's license as identification. Had he told them it was for the Tribe, a check for the \$294 would have been issued in the Tribe's name.

Three: He never told anyone (besides his co-worker) that he took the wire or received any monies until after the investigation of the theft was started. He received the cash for the wire on September 4, 2013 and did not reveal his involvement or his intentions until September 16, 2013, after being questioned by Tribal Police.

Four: When initially questioned about the theft, he denied any knowledge of the tar-based wire or of who took it.

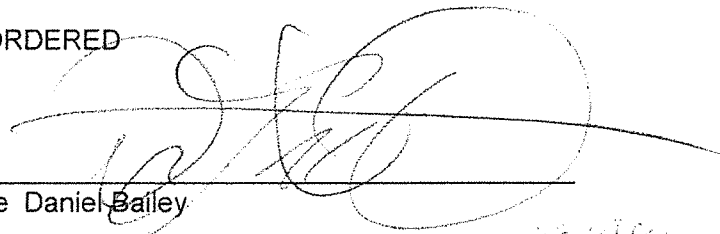
Five: The Defendant was evasive on the witness stand and did not answer his attorney's questions as to how often he sold scrap to Padnos and what the process was. Defendant admitted he couldn't remember the last time he went to Padnos prior to September 4th.

Six: The money that he received on September 4th for the sale of the tar-base wire was not turned into the Accounting Department until September 17, 2013.

The Court finds that the Defendant lacks veracity and credibility based on the above.

The Court finds beyond a reasonable doubt that the Defendant is guilty of the crime of *Embezzlement and Theft from Tribal Organization*.

SO ORDERED



Judge Daniel Bailey



Date

