TURTLE MOUNTAIN TRIBAL COURT
TURTLE MOUNTAIN JURISDICTION

APPELLATE DIVISION
BELCOURT, NORTH DAKOTA

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| Linus Poitra,<br>Plaintiff/Appellant, | ) | CIV. NO. 00-10128<br>TMAC NO. |
| v. | ) | MEMORANDUM OPINION<br>AND ORDER |
| Darrell Gustafson, Glenda Bryant,<br>1 Stop Market and Gustafson Oil and Propane,<br>Defendants/Appellees. | ) | |

The Appellant, Linus Poitra, (hereinafter "Poitra") appeals from an Order for Judgment entered on April 9, 2002 by the Honorable B.J. Jones, finding in favor of Appellees (hereinafter "Gustafson") on several substantive issues in a contract dispute between the parties. The Turtle Mountain Court of Appeals, Justice B.J. Jones, granted review on June 2, 2003, although there is no evidence in the record that Poitra perfected his appeal by following the Rules of Appellate Procedure in the Turtle Mountain Code. On June 23, 2004 the Court set a briefing schedule. Oral arguments were heard on September 10, 2004, and the parties were given until September 24, 2004 to submit their proposed Memoranda and Opinions.

The Appellee's Brief dated August 3, 2002, states that there have been five appeals filed in this action. Our decision in this case is based on the appeal granted on June 2, 2003. If, however, the Appellant failed to give the Appellee notice of the other appeals, as it appears he did in the instant one, the results herein should be dispositive of the others.

**FACTS**

Poitra owns premises of which half he converted to a convenience store. Gustafson, at his own expense, installed fuel tanks and a pumping station for the use of Poitra in return for the exclusive right to supply gasoline to Poitra. Poitra eventually decided not to run the convenience store. On May 12, 1993, Poitra and Gustafson Oil, which is an entity separate and apart from Gustafson himself, executed a written lease under which Gustafson Oil would have the use of Poitra's entire premises for the purpose of running the convenience store. Gustafson Oil then remodeled the other half of the premises.

At the time the lease was signed, Poitra owed $23,000.00 to Gustafson Oil, an entity owned by Gustafson but not part of his partnership with Defendant Glenda Bryant. Poitra and Gustafson agreed to a 2% commission on petroleum products sold by Gustafson as a means of repaying the debt. Gustafson would then be allowed to continue the use of his petroleum storage and dispensing facilities previously built on Poitra's land.

Poitra brought this action in an attempt to terminate the lease, collect amounts allegedly owed by Gustafson and to prevent Gustafson from collecting allegedly usurious interest on Poitra's debt.

## SUBSTANTIVE ISSUES

Appellant Poitra (hereinafter Poitra) has set forth four substantive issues in his Appeal from the trial court order of February 28, 2002. Those issues are as follows:

1. Whether the two contracts were mutually dependent upon each other;

2. Whether Gustafson violated the Tribe's usury ordinance;

3. Whether Poitra was entitled to a jury trial and

4. Whether the oral agreement required a 300,000- gallon threshold on all petroleum products before royalties were to be paid.

Gustafson, et al has responded that the appeal must be dismissed as a matter of law and fairness because notice of the appeal was never served upon the Defendant by the Plaintiff and that it should be dismissed because the Plaintiff has filed a Motion to Vacate Premises, along with a Summons and Complaint, thus invoking the Law of the Case doctrine.

Although this Court is troubled by the possibility that Tribal members are being charged usurious interest rates by Gustafson, and although on the record presented this Court would be inclined to affirm the trial court's decision, Gustafson has asked us to dismiss the appeal on procedural grounds. Because we are deciding the case on procedural grounds, we will not address the substantive issues.

## PROCEDURAL ISSUES

This is apparently Poitra's fifth appeal from this case to the Appellate Court (See App. #1,2,3,4,5). There is nothing in the record to show that he has never provided Gustafson with notice of his appeals and Gustafson did not had opportunity to respond until he received the Honorable B.J. Jones' Order allowing appeal dated June 2, 2003 for Appeal. Gustafson only obtained evidence of previous appeals because he sought the documentation himself from the Tribal Court.

In order for a request for permission to appeal to be adequately and timely filed, it must also be served upon the opposing party pursuant to Rule 2.9 of the Turtle Mountain Rules of Court, and it must have proof of service attached pursuant to Rule 2.3. Failure to

follow these rules, which were provided to ensure due process of law, should be fatal to the appeal.

Providing notice to an adverse party is central to the tribal, state and federal systems of justice. Federal courts have held that "in order to qualify as the equivalent of a notice of appeal, a 'document should accomplish the dual objectives of (1) notifying the court and (2) notifying opposing counsel of the taking of the appeal'" (Citation omitted Fisher v. US Dept. of Justice, 759 F. 2d 461, 464 (5th Cir. 1985). The purpose of notice of appeal is to put the opposing party on notice that an appeal has been filed. 5 Am. Jur. 2d Appellate Review Sec. 325 (citing People v. Bost, 770 P2d 1209 (Colo.1989).

This Court has decried the failure to provide adequate and timely notice to adverse parties in other recent cases. *See* St. Germaine v. PKG Contracting, Inc., TMAC No. 03-005 and Champagne v. Champagne, TMAC 04-012. Prospective appellants should be on notice that requests for appeal will be denied if they are not properly and timely served upon the opposing party.

**CONCLUSION**

For the reasons stated herein, this appeal is dismissed with prejudice.

Dated this 31st day of March, 2005.

(SEAL)

Huma Ahsan

Huma Ahsan
Acting Chief Judge and Justice Christine Jongeling and Justice Gerald Gardner abstaining.

**IN THE TURTLE MOUNTAIN COURT OF APPEAL**
**TURTLE MOUNTAIN BAND OF CHIPPEWA INDIAN RESERVATION**

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| **DANNY DAVIS,** | ) | |
| **Appellant,** | ) | TMAC 03-002 |
| | ) | |
| **v.** | ) | |
| | ) | **OPINION AND ORDER** |
| **PARK PLACE APARTMENTS,** | ) | |
| **Appellee.** | ) | |

Before: Chief Justice HUMA AHSAN and Justices GERALD GARDNER and CHRISTINE JONGELING.

Appearances: Neither party appeared.

By Acting Chief Justice AHSAN for a unanimous Court.

## OPINION

### Procedural Background

On March 11, 2003, appellant, Danny Davis, filed a petition requesting a waiver of appellate court filing fees and an appellate review from a small claims court order entered against him for the amount of $771.79. From a review for the record, the appellee, Park Place Apartments, alleged that this amount was for rent owed and electricity furnished to the appellant by the appellee. The record also indicates that a hearing was held at 9:15 am on February 18, 2003, in front of Judge Victor Delong. It appears from the record that the appellant failed to appear for the hearing and a Default Judgment was entered against him on that date. The appellant claims that he shown up for court at 9:14 am on the date of hearing, but he was told by a clerk that he was too late. He also states that he looked at his watch when he arrived and according to his watch, he was one minute early. Mr. Davis is requesting that the Turtle Mountain Court of Appeals grant his request for a remand to small claims court and for the appellate court to waive the appellate court fee.

On June 9, 2004, the Turtle Mountain Court of Appeals held a status conference hearing to determine if the Court had an accurate administrative record. Both parties were sent notices and orders informing them of this hearing. Neither the appellant nor the appellee appeared.

## DISCUSSION

In reviewing the appellant's request for appellate review, the Court must address two issues: 1) Can the Turtle Mountain Court of Appeals waive its filing fee in civil cases and 2) Can the tribal district court issue a Default Judgment when a party fails to appear.

## I. Does the Turtle Mountain Court of Appeal posses the authority to waive the appellate filing fee?

The appellant has filed a request that the Court of Appeal's $150 filing fee be waived and that question of whether the Turtle Mountain Court of Appeals posses the authority to waive the appellate filing fees is before the Court.

While the Turtle Mountain Code, Constitution, Ethical Codes and Rules of Court give no guidance on this topic, the Court in this circumstance must look to other sources of law in interpreting this matter.

In Anglo-American jurisprudence, it has long been an established practice to waive the filing fees for an indigent individual in criminal cases. In fact, the Ninth Circuit has stated that when a Tribe decides to grant appeals rights, and its appeal procedures are Anglo-American in origin, then "federal constitutional standards are employed in determining whether the challenged procedure violates the {Indian Civil Rights} Act." See Crowe Tribe of Indians v. Bull Tail, 2000 Crow 8 (Crow10-12-2000), citing to Randall v. Yakima Nation Tribal Court, 841 F. 2d. 897, 900 (9th Cir. 1988). "In Randall, the tribal appeals court dismissed a criminal appeal because the $60 filing fee was not paid within 10 days after entry of judgment. Ms. Randall had filed a motion with the Tribal court to waive the fee because she was no longer employed, but the tribal Court failed to act on it within the time allowed for perfecting the appeal. The Ninth Circuit held that the dismissal of Ms. Randall's appeal due to the neglect of the tribal court violated her due process rights under the ICRA, as determined by the federal constitutional standards." See id. at paragraph 20.

In civil actions in North Dakota, an indigent individuals may receive a waiver of filing fees. The North Dakota Century Code § 27-01-07 states that "any filing fees connected with any civil action to be heard in any of the courts of the judicial system . . . may be waived with or without a hearing, at the court's discretion, by the filing of an in forma pauperis petition accompanied by a sworn affidavit of the petitioner relating the pertinent information regarding indigency."

However, in previous cases, we have stated that tribal courts are not courts that mirror the strict formality of Anglo-American jurisprudence. See Mathiason v. Gate City Bank, No. TMAC- 04-2002 (Turtle Mountain 2005)(citing to Christine Zuni, Strengthening What Remains, in Justin B. Richland and Sarah Deer, INTRODUCTION TO TRIBAL LEGAL STUDIES 114, 118 (2004). As such, this Court will endeavor "to infuse the tribal court system with our own concepts justice which more closely reflect our societal beliefs." See id.

Moreover, this Court takes judicial notice of the fact that the Turtle Mountain Indian reservation currently has approximately a 65% unemployment rate. Further, a shortage of adequate family housing exists on the Turtle Mountain Indian Reservation. Some Turtle Mountain families share an apartment or a house with extended family so as not to have family members living in the outdoors. However, there remains in many Turtle Mountain families a common oral tradition of helping others who are in need of help.

Since the present case is a civil action, the Court is not concerned with the federal constitutional standards for criminal appeals. But the court is concerned that the

procedures for obtaining a filing fee waiver, especially in criminal cases, is not spelled out in any Codes or Rules of Court. This is especially troubling since many people in Turtle Mountain cannot afford the $150 appellate filing fee. To some people this fee is a barrier to the appeals process and a barrier to them exercising their due process rights guarantee under the Turtle Mountain Band of Chippewa Indian's Constitution.

Mr. Davis has requested that this Court waive his appellate filing fee, but he has not stated why we should waive his appellate fee. The Court is assuming that he is requesting this waiver because he is indigent. However, Mr. Davis has not provided this Court with any proof of his indigency. Since, the Court is dealing with a large backlog of cases and the need for resolution is great, the Court will grant the waiver of the appellate filing fee. However, the Court will note in the future that a party requesting a waiver of filing fees should attached a formal request and an affidavit illustrating the need for such waiver.

## II. Can the tribal small claims court issue a default judgment when a party fails to appear?

The next issue of whether the tribal District Court can issue a Default Judgment when a party fails to appear is a more complex question.

The Turtle Mountain Tribal Code of 1976, Section 2.0504 is not clear on this issue. Subsection one seems to indicate that the Court is permitted to enter a default judgment when a party fails to appear. The Turtle Mountain Tribal Code, Section 2.0504 (1), states, "In all cases, if the defendant fails to appear at the time specified for appearance or at such time as the Court may have set for the argument of a motion, the plaintiff shall proceed and the Court may give such relief as the evidence warrants."

Subsection two seems to indicate that a party can be granted relief from a default judgment which is enter against him. Under Turtle Mountain Tribal Code of 1976, Section 2.0504(2), states "The Court may, on such terms as may be just and upon payment of the costs by the defendant, relieve a party from a decision by default which was taken against him by his mistake, inadvertence, surprise or excusable neglect. The defendant's application for such relief must be made within thirty (30) days after the entry of the default decision and must be supported by an affidavit showing good cause therefore. If such default is vacated, a new date for trial must be set."

It does appear that in the present case that the appellant is requesting relief from the default judgment enter against him due to mistake. From the record, he states that he "shown up for court at 9:14 am and the Court was over already." See Petition for Review. He further states that he talked to a clerk and she told him that he was a little late. See id. In his petition, he states that "according to his watch that he was one minute early for the hearing scheduled at 9:15 am." See id. However, there is no evidence in the record that the appellant has paid the court cost for the missed hearing. Also, it seems that this provision for relief is only applicable when the aggrieved party is applying for relief directly from the trial court judge, not the appellate court.

Further, the appellant has failed to appear before the Court of Appeals on June 9, 2004, the date scheduled for hearing on this matter. In addition, he has not filed any documents since June 9, 2004, stating why he was not able to appear.

The Turtle Mountain Tribal Code of 1976 also states that "when one of the parties does not appear on the day set for trial a default judgment shall be entered against him. Any party not appearing at the trial shall have ten (10) days from the date set for trial to show cause why a default judgment should be entered against him." See Turtle Mountain Code of 1976 Section 2.1308. In Dom Micheal Vann v. Turtle Mountain Tribe, May 8, 1989, (Turtle Mountain 1989), the tribal prosecutor failed to appear to present an argument on the tribe behalf before the Turtle Mountain Court of Appeals. The Court held since the prosecutor and tribe has failed to appear after being given appropriate notice a default judgment can be entered against them. See id.

In the present case, the appellant did not appear for the June 9, 2004, hearing on this matter. Further, he did not file any document with the Court indicating a reason for his failure to appear. The record is clear that notices were sent out informing him of the date of this appellate hearing.

In addition, the Turtle Mountain Rule of Court 4.4 states that Default judgments are permissible when a party against whom a judgement for affirmative relief is sought has failed to plead or otherwise appear. . ." See Turtle Mountain Rules of Court 4.4. This rule also states that a default judgment is appropriate when the "plaintiff's claim against a defendant is for a sum certain or which can by computation be made certain."

In the present case, the appellee argued at trial for the total amount of $771.79. See Statement of Claim. The appellee stated that this amount was for past rent owed and electricity furnished (673.08) plus interest at twelve percent per annum in the amount of $88.79. See id.

It seems clear from the record that the appellant has had every opportunity to get relief from this default judgment, but has failed to do so. At the trial court level, the appellant could have requested relief from the trial court judge, but he failed to do so. At the appellate level, he has failed to appear. In essence, the appellant requested an appeal from a failure to appear and then failed to appear at the appeal of his initial failure to appear.

Upon a proper showing of financial need, this Court would be willing to waive the required appellate filing fee[1] – thereby accepting an appeal from a party unable to pay the required appellate filing fee. In this case, however, the appellant has failed to adequately purse their petition for appeal by failing to appear at the June 9, 2004 status conference, failing to indicate to the Court why he was unable to appeal at that status conference, or failing to pursue the request for appeal in any other way.

**ORDER**

THEREFORE, the Turtle Mountain Court of Appeals denies the appellant's request for an appeal affirms the lower court decision issued on February 18, 2003.

Dated this 31st day of March, 2005.

[1] While I agree whole heartedly with the opinion, I just wanted to note that since this opinion, the Clerk of Court's office has developed a request for filing fee waiver form, which can be utilized in requesting a waiver of the appellate court filing fee.

SEAL

Huma Ahsan

Huma Ahsan
Chief Justice with Justice Gerald Gardner
and Justice Christine Jongeling concurring.

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS
TURTLE MOUNTAIN TRIBAL COURT OF APPEALS

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| Christa Monette, Appellant, | ) | No. TMAC 04-2021 |
| vs. | ) | **OPINION AND ORDER** |
| Janice Schlenvogt, E & J Trailer Court, Appellee. | ) | |

Before: Chief Justice HUMA AHSAN and Justices MATTHEW L.M. FLETCHER and MONIQUE VONDALL.

Appearances: Vance Gillette, for the Appellant; and

Richard G. Frederick Sr., for the Appellee.

By Justice AHSAN for a unanimous Court.

## OPINION

### Procedural History

On June 8, 2004, Janice Schlenvogt (appellee), owner of E & J Trailer Court, filed a petition entitled "Petition for Forcible Eviction and for Back Rent." The appellee alleged that Christa Monette (appellant), mobile home tenant, signed a lease agreement with E & J Trailer Court on October 2, 2001, agreeing to rent lot #15 at a rate of $60.00 per month. The appellee further alleged that no rent has been paid on this mobile home lot since July of 2003. Ms. Schlenvogt requested that the Turtle Mountain Tribal Court schedule a hearing, enter an order of eviction and award Ms. Schlenvogt damages for back rent, attorney fee and court cost in the amount of $1,208.00. Also, enclosed in the record is a hand written affidavit from Richard Dubois attesting that he served Ms. Monette personally with the Summons and Petition for Forcible Eviction and For Back Rent at 8:35 pm on August 16, 2004. See Record.

On September 2, 2004, the Civil Court Clerk, Jacqueline Brien, sent to Ms. Monette a notice that a hearing was going to be held on this matter on September 14, 2004 at 1 pm. This notice also stated that a judgment may result if the defendant failed to appear when duly served. This notice of hearing was mailed to Ms. Monette at Box 123, Belcourt, ND 58316.

On September 14, 2004, at 1 pm a hearing was held on this matter in front of Judge Marcellais. Mrs. Schlenvogt represented by Richard Frederick was present. Ms. Monette was not present. Currently, no tapes exist of this hearing. From the clerk's notes, testimony of Ms. Schlenvogt was taken. From the clerk's notes, it seems that the lease agreement signed by Ms. Monette on 11-5-01, several rent overdue letters and a payment record was introduced into evidence. Since Ms. Monette failed to appear, the trial court issued a default judgment in the amount of $1600.00. The trial court also made a statement on the record that the court was satisfied with the notification sent to the defendant and all requirements of notice have been met. On September 27, 2004, an order granting forcible eviction and for back rent was entered requiring Ms. Monette to remove her mobile home from Lot #15 immediately and to pay a judgment in the amount of $1,600. The court allowed Ms. Monette to repay this obligation within six months, but required the removal of the mobile home immediately. On September 29, 2004, Roland Gourneau personally served a copy of this order on Ms. Monette.

On October 13, 2004, Mr. Frederick filed a motion requesting that Ms. Monette be found in contempt of court for failing to remove the mobile home and repay the $1,600. No proof of service to the defendant was attached to this motion. On October 18, 2004, a warrant to apprehend was issued for Christa Monette for failing to comply with the forcible eviction order and for failing to repay the outstanding rent. Ms. Monette was arrested. On October 27, 2004, Ms. Monette was arraigned on the charge of Contempt of Court. There are no tapes of this hearing. From the criminal arraignment disposition sheet, it states "Ms. Monette pled not guilty." Further notes indicate that the court concluded that this is a civil matter and not a criminal matter and scheduled a show cause hearing.

On December 28, 2004, a show cause hearing was held on this matter in front of Judge Delong regarding whether Ms. Monette was in fact in contempt of court. Both parties were present. From the recording and the clerk's notes, it seems that Ms. Monette stated that she never received the notice for hearing dated September 2, 2004. The record indicates that she was personally served with the order entitled "Order granting forcible eviction and for back rent" but the notice of hearing of hearing was mailed to her at "P.O. Box 123, Belcourt, ND." The tape recording of the hearing indicates that MS. Monette stated on the record that her correct address is "P.O. Box 744, Belcourt, ND." See tape recordings dated 12-28-04. The notes further indicate that she stated to the judge that she was never served with the September 2nd notice of hearing and that is why she was not present at the September 14th hearing because she had no knowledge that the hearing was taking place. She goes on to state that she can make a payment today. However, Ms. Schlenvogt stated that she now owes more than the judgment amount. Ms. Monette requested a continuance. The record indicated that Ms. Schlenvogt stated that they just want her to move. Ms. Schlenvogt stated that she has been on the lot for over a year without a rental payment and that Ms. Schlenvogt has been paying for her water, sewer, and garbage. The court made no findings as to whether Ms. Monette violated the previous order of September 27, 2004.The court issues another order entitled "order granting forcible eviction and for back rent." The court order states that the previous order of September 27, 2004 is to stay in effect, Ms. Monette has 10 days from December 28, 2004 to move the trailer home off of the lot, and if she fails to move within 10 days Ms. Schlenvogt has permission to shut the water off.

On January 7, 2005, Ms. Monette filed an appeal to the Turtle Mountain Court of Appeals requesting a filing fee waiver and a stay of judgment. In her appeal, she states that her due process rights under the Indian Civil Rights Act where violated since she failed to receive notice of the September 14, 2004 hearing. The mailing address Ms. Monette submitted to the Court for her appeal is P.O. Box 744, Belcourt, ND 58316.

The Court of Appeals granted her a filing fee waiver. The Court also heard oral arguments on this matter on January 8, 2005. Both parties were in attendance. Ms. Monette was represented by Vance Gillette and Ms. Schlenvogt was represented by Mr. Frederick. After oral arguments were heard, Attorney Gillette filed a document labeled as "Supplemental Authority" which states that Ms. Monette due process rights under the Indian Civil Rights Act were violated since she never received the notice of the September 14th hearing. He requested that the eviction order of September 27, 2004, be vacated and the case be remanded for a new hearing by a law-trained judge.

## DISCUSSION

The question before the court is whether Ms. Monette's due process rights under the Indian Civil Rights Act were violated because of the lack of notice of the September 14, 2004 hearing and the ultimate use of the criminal process to enforce a civil judgment.

### I. Did the lack of notice violate Ms. Monette's due process rights

In reviewing this case, the Court must first decide whether the lack of notice of the September 14, 2004, hearing violated Ms. Monette's Due Process right as incorporated under the Turtle Mountain Constitution and the Indian Civil Rights Act.

Indian Civil Rights Act (ICRA), 25 U.S.C. 1302, lays out a minimum standard of due process, which every tribal member is guaranteed.[1]

ICRA is incorporated into the Constitution of the Turtle Mountain Band of Chippewa Indians under Article 14 Separation of Powers Section 3a. Article 14, section 3a states " the judicial branch of government of the Turtle Mountain Band of Chippewa Indians shall have jurisdiction . . . to ensure due process, equal protection, and protection of rights arising under the Indian Civil Rights Act of 1968, as amended, for all persons and entities subject to the criminal and civil jurisdiction on the Turtle Mountain Tribe."

A fundamental requirement of Due process is that the parties be given adequate or reasonable notice. "An elementary and fundamental requirement of due process . . . is notice reasonably calculated, under all the circumstance, to apprise interested parties of the pendency of the action . . . The notice must be of such nature as reasonably to convey the required information . . ." Mullane v. Central Hanover Bank & Trust Co., 399 U.S. 306, 314; 70 S.Ct. 652 (1952). Reasonable notice must be given at each new step in the proceedings. Cash v. Cashman, 41 Conn. App. 382, 390 (1996).

As summarized above, reasonable and adequate notice is a necessary and fundamental component of due process. The question here is whether Ms. Monette had adequate notice of the September 14, 2004, hearing. In Mullane v. Central Hanover Bank & Trust Co., the Supreme Court determined that a notice must be "reasonably calculated,

[1] 25 U.S.C. § 1302(8) states that the tribe cannot "deprive any person of liberty or property without due process of law."

under all circumstances, to apprise interested parties of the pendency of the action." Mullane, at 657.

In the present case, Ms. Monette stated at the show cause hearing and at her arraignment that she did not receive the notice of hearing. Under oath, she stated that her address is "P.O Box 744" and the address the September 2, 2004, notice was sent to "P.O. Box 123." She further stated that she is the only person who receives her mail. It is clear from the record that Ms. Monette did not receive the September 2, 2004, notice of hearing.

Turtle Mountain Rule of Court 2.4 sets out the procedure for parties requesting a hearing or oral argument. This rule rests the responsibility in providing the notice of hearing to the other party squarely on the attorney or advocate seeking a hearing. Turtle Mountain Rule of Court 2.4(a) states, " . . .The party requesting oral arguments shall secure a time for the argument and serve notice upon all other parties. . ." In the present case, it is unclear why the Clerk of Court would send out a notice of hearing, when it is the moving parties responsibility. As in this case, Mr. Frederick should have contacted the Clerk's office and obtained a date and time that this matter would be heard. He then should have provided a notice of hearing and served it on the other party. This notice should have indicated the date, time and place for this hearing to take place.

Even though Ms. Monette's appeal may be just a delaying tactic, she did not receive notice of this hearing; therefore, the Court REMANDS this matter for immediate hearing before a law-trained judge on the petition for forcible eviction and for back rent dated June 8, 2004.

**II. Did the ultimate use of the criminal process to enforce a civil judgment violate Ms. Monette's due process rights.**

In the present case, the Court is concerned about the possibly of abuse in the use of criminal contempt of court. For example, a debtor, who has not paid his credit card bill or car loan recently, could be incarcerated. The Turtle Mountain Code makes no distinction between civil contempt of court and criminal contempt of court. The Turtle Mountain Code Section 2.1001 sets out the reasons for contempt of court.

However, the court is concerned about the over-use of contempt of court. Trial court judges should be aware that the Turtle Mountain Code allows defendants to request relief from civil judgment and that at an arraignment this may be the defendant's first opportunity to request such relief. Ms. Monette contends that the use of the criminal process to enforce a civil judgment violated her due process rights. While the court is concerned about the possible misuse of the criminal process, the court must consider the fact that this use may be the only way for the trial court to enforce the orders it issues. Further, it is clear from the record that Ms. Monette is not blameless in this matter and is not a purely innocent victim incarcerated for an act, which she may not have committed.

However, as we stated earlier, Ms. Monette's due process rights were violated because of the lack of adequate notice. The Court cautions against over-use of criminal contempt of court charges.

**ORDER**

Based on the foregoing analysis, the September 27, 2004, trial court's order Granting forcible eviction and back rent and all orders and warrants that stemmed from the September 27, 2004, are hereby **VACATED**. This matter is **REMANDED** for **immediate hearing before a law-trained judge**. Both the plaintiff and defendant's attorneys should receive immediate notice of the hearing. This hearing SHALL be held prior to April 12, 2005.

Dated this 31st day of March, 2005.

SEAL

Huma Ahsan

Chief Justice, Huma Ahsan with Justice Mathew Fletcher and Justice Monique Vondal concurring.

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS
TURTLE MOUNTAIN TRIBAL COURT OF APPEALS

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Tammy Champagne,

PETITIONER/APPELLANT,

vs

Leonard Champagne,

DEFENDANT/APPELLEE.

**ORDER DENYING REVIEW**

TMAC 04-012

**Procedural Background**

On November 3, 2004, the trial court entered a final Findings of Fact, Conclusions of Law and Order for Judgment in the above-captioned matter. During the trial court proceedings Ms. Tammy Champagne was represent by Advocate, Ella Mae LaRocque, and Mr. Leonard Champagne was represented by Attorney Reed Soderestrom. On November 3, Advocate LaRocque filed with the court a document entitled "Answer and response to motion and exparte for return of home; notice of appeal an resignation advocate (Answer)." The document stated "to the Turtle Mountain Appellate Court: Request permission to appeal in the aforementioned case. Enclosed is a check in the amount of $150.00 to cover cost." See Answer. No certificate of service or affidavit of service was attached to this document. On February 15, 2005, Mr. Donald Bruce filed a document entitled "Notice of appearance & appeal, Request for a stay from order dated November 3, 2004 and issues on appeal." In this document, Mr. Bruce makes a notice of appeal and outlines five issues on appeal. On February 15, 2005, Mr. Bruce also files a certificate of service. On February 17, 2005, Attorney Soderstrom files a response stating that the appeal is untimely due to the previous advocate's failure to provide service.

**Discussion**

Section 2.1306 of the Turtle Mountain Code of 1976 states "Permission to appeal. Any party aggrieved by any final judgment or other final order of the Tribal Court, shall within thirty (30) days after the day such judgment or order was rendered, file with the Clerk of the Court of Appeals, a request in writing asking for permission to take an appeal from such judgment or order. . ." This section is further explained by Turtle Mountain Rule of Court 2.3, which states "Proof service **must be** securely attached to the original paper when they are presented to the clerk for filing."

From recent Turtle Mountain Court of Appeals cases, the Court has been placing the burden of process on the practitioner to provide service to opposing counsel. In Decoteau v. Lone Fight, TMAC 02-008 (Turtle Mountain 2003), this court held that if a request for appeal is filed after the 30 days the appeal is deemed to be untimely. In Smith

v. Belcourt School District, No. 02-10155 (Turtle Mountain 2004) this court held that "Because Appellee had not received notice within the statutory time limits, he had a right to believe that no appeal was going to be taken and that his client could put the matter to rest."

In the present case, the advocate, Ms. LaRocque, failed to notify the opposing party of this request for appeal. Thusly, the opposing party had not received notice of the appeal within the mandated 30 day period. Thusly, the advocate LaRocque failed to preserve her appeal by failing to serve a copy of her request on the other party. Because of these reasons, the court finds that this appeal is procedurally defected and can not proceed further.

**ORDER**

NOW, THEREFORE, it is hereby

ORDERED, ADJUDGED, and DECREED that the Petition for Review is DENIED.

Dated this 8th day of March, 2005.

SEAL

Huma Ahsan

Huma Ahsan
Chief Justice with Justice Christine Jongeling concurring.

**IN THE TURTLE MOUNTAIN COURT OF APPEALS**
**TURTLE MOUNTAIN BAND OF CHIPPEWA INDIAN RESERVATION**

| | | |
|---|---|---|
| George St. Germaine,<br><br>Plaintiff,<br><br>v.<br><br>PKG Contracting, Inc.,<br>Darrin Pfingester, President,<br>P.O. Box 2108<br>South University Drive, Suite 101<br>Fargo, North Dakota 58103,<br><br>Defendants. | ) | TMAC NO. 03-005<br><br>**ORDER DENYING REQUEST FOR PERMISSION TO APPEAL** |

PROCEDURAL HISTORY

Plaintiff (St. Germaine) commenced this action with a Complaint filed on August 9, 2001. Defendant (PKG) subsequently brought a Motion for Summary Judgment against St. Germaine, which was granted, and the action was dismissed on June 23, 2003. St. Germaine filed a Motion for a New Trial, which is dated as July 22, 2003 with a court stamp indicating receipt by the Turtle Mountain Tribal Court on July 22, 2003. St. Germaine additionally filed a Notice of Appeal, which is dated July 22, 2003, but with a court stamp indicating receipt by the Turtle Mountain Tribal Court on August 25, 2003. There is no proof of service upon PKG in the court file for either the Motion for a New Trial or the Notice of Appeal.

The Turtle Mountain Court of Appeals held a Status Conference on June 11, 2004. Defendant/Appellee (PKG) filed an Appellee Brief and an extensive Appendix on June 1, 2004. Plaintiff/Appellee (St. Germaine) filed a Brief in Support of Appeal on June 18, 2004.

DECISION

The only issue before this Court is whether St. Germaine filed an adequate and timely appeal in this case.

Section 2.1306 of the Turtle Mountain Tribal Code requires that an individual aggrieved by an Order of the Trial Court shall file a request for permission to appeal within thirty

days of the rendering of the order. The request must set forth the reasons for the appeal.

In this case, Plaintiff/Appellee (St. Germaine) filed both a Motion for a New Trial and a Notice of Appeal. It is undisputed that the Motion for a New Trial filed on July 22, 2003 does not meet the requirements of Section 2.1306 of the Turtle Mountain Tribal Code. Defendant/Appellee (PKG) argues that a Notice of Appeal also does not meet the requirements of Section 2.1306 of the Turtle Mountain Tribal Code since this provision requires that a request for appeal must be entitled a Request for Permission to Appeal rather than a Notice of Appeal.

We need not decide that issue here, however, since the appeal in this case was untimely filed even if St. Germaine had entitled the document as a Request for Permission to Appeal rather than a Notice of Appeal.

Section 2.1306 of the Turtle Mountain Tribal Code requires that a request for permission to appeal must be filed within thirty (30) days of any final judgment or other final order. The Notice of Appeal in this case was filed on August 25, 2003, sixty-three days after the Order for Dismissal was entered. St. Germaine's Notice of Appeal is dated July 22, 2003. The court stamp, however, clearly indicates receipt by the Turtle Mountain Tribal Court on August 25, 2003. St. Germaine has not presented any plausible evidence or explanation for this date discrepancy. In fact, it is quite implausible (and very troubling) for two motions allegedly filed by a party on the same day to have court date stamps more than one month apart. Consequently, this Court must determine that St. Germaine's Notice of Appeal was filed on August 25, 2003 as clearly indicated by the court stamp rather than on July 22, 2003 as indicated by St. Germaine.

This Court is in agreement with the Navajo Nation Court of Appeals, which stated in Sorrel v. Navajo Nation, 3 Nav. R. 23 (1980), and again in Window Rock Mall, Ltd., v. Day, 3 Nav.R.58 (1981) that "The failure to file a notice of appeal within the time limits specified by statute is a jurisdictional defect and requires a dismissal by the Court." Rules of Court are promulgated in order to provide a meaningful forum for the adjudication of disputes in a fair and timely manner. If the rules are not followed, there is no guarantee of fairness. If the timelines are not strictly adhered to, parties to an action can never put their disputes to rest, and the purpose of the judicial process is nullified.

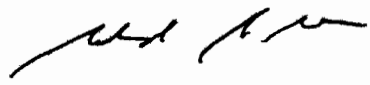
In order for a request for permission to appeal to be timely filed, it also must be served upon the opposing party pursuant to Rule 2.9 of the Turtle Mountain Rules of Court (so that the opposing party receives timely notice and an opportunity to be heard), and Rule 2.3 requires that proof of service be attached to the filed document (so that the court can monitor and ensure compliance with Rule 2.9). In this case, St. Germaine (1) failed to serve PKG with a copy of the Notice of Appeal as required by Rule 2.9 of the Turtle Mountain Rules of Court, and (2) failed to attach a certificate of service to the Notice of Appeal as required by Rule 2.3.

This case clearly demonstrates the necessity of Rules 2.9 and 2.3 of the Turtle Mountain Rules of Court. Here, as a result of St. Germaine's failure to serve PKG with the Notice of Appeal, PKG did not have any indication that any appeal was pending until PKG received this Court's Status Conference Order nearly one full year after the final order (Affidavit of Jason R. Vendsel, Brief of Defendants/Appellee, Appendix, pp. 42-45). Obviously, St. Germaine's failure to notify PKG in a timely manner had a negative impact upon PKG's rights, interests, and ability to appropriately respond.

Article XIV, Section 3(a) of the Turtle Mountain Constitution grants the tribal court "jurisdiction to ensure due process, equal protection and protection of rights arising under the Indian Civil Rights Act of 1968, as amended." The fundamental requirements of procedural due process are notice and the right to be heard. St. Germaine's failure to serve notice of his appeal on PKG. deprived PKG of procedural due process rights in direct contravention of the Turtle Mountain Constitution and the Indian Civil Rights Act and cannot be condoned by this Court.

THEREFORE, this Court finds that an adequate and timely request for permission to appeal was not filed in this case and this Court, therefore, denies permission to appeal.

BY THE COURT:



Justices Christine S. Jongeling, Gerald Gardner, and Stacy Leeds
Acting Chief Justice Huma Ahsan, recused.

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS
TURTLE MOUNTAIN TRIBAL COURT OF APPEALS

| | | |
|---|---|---|
| Brandon & Shirley Mathiason,<br><br>Plaintiff-Appellants,<br><br>vs.<br><br>Gate City Bank,<br><br>Defendant-Appellee. | ) | No. TMAC 04-2002<br><br>**OPINION AND ORDER** |

Before: Chief Justice HUMA AHSAN and Justices MATTHEW L.M. FLETCHER and MONIQUE VONDALL.

Appearances: Richard G. Frederick, Sr., for the Plaintiff-Appellants; and Mandy Maxon, Vogel Law Firm, for the Defendant-Appellee.

By Justice FLETCHER for a unanimous Court.

## OPINION

### Procedural History

An exposition of the procedural history of this matter is necessary to a full understanding of this Opinion and Order.

Plaintiff-Appellants Brandon and Shirley Mathiason brought this action on January 20, 2004 in a pleading styled, "Petition for Lawful Lien." Plaintiff-Appellants alleged that they had entered into loan agreements with Defendant-Appellee Gate City Bank for the purchase of three vehicles: (1) a 1992 Fork pickup; (2) a Yamaha four-wheel all-terrain vehicle; and (3) a 1993 Chevrolet Blazer. Plaintiff-Appellants further

alleged that the bank had threatened to begin repossession of the vehicles in spite of plaintiffs' assertion that they were not in default on the loans.

Defendant-Appellee Gate City Bank answered in a pleading dated February 27, 2004 and asserted a counterclaim against the Mathiasons. Moreover, the bank asserted numerous grounds for a motion to dismiss Plaintiff-Appellants' petition on procedural and jurisdictional bases, including the argument that the petition did not state a claim for which relief could be granted.

On April 22, 2004, Tribal Court Judge MaDonna Marcellais held a show cause hearing at which all parties appeared. Judge Marcellais sought to force the Mathiasons to show cause as to why the bank should not be allowed to immediately repossess the three vehicles in question. At the hearing, Plaintiff-Appellants asserted, apparently without actually providing testimony or entering evidence into the record, that "a portion of the foregoing defaults is attributable to the cost of insurance force-placed by Gate City on the [vehicles]." *Mathiason v. Gate City Bank*, No. 04-2002, Order for Judgment at 2, ¶ 3 (April 30, 2004). Neither Plaintiff-Appellants nor Defendant-Appellee presented witnesses or entered evidence into the record at that hearing. At the conclusion of the hearing, the parties agreed to make "good faith efforts" to determine the actual amount due. *Id.* at 2-3, ¶ 4. The tribal court gave the plaintiffs until June 21, 2004 to cure the "aforesaid defaults." *Id.* at 3. This order apparently represented the intent of the parties to reach settlement and gave a deadline for reaching settlement.

No such "cure" or settlement was forthcoming and on June 22, 2004, counsel for Gate City Bank wrote a letter to the Tribal Court informing the court of the plaintiffs' failure to "cure" the "defaults." *See* Letter from Michael T. Andrews, Vogel Law Firm, to

Jacqueline V. Brien, Clerk of Court (June 22, 2004). Gate City's counsel included a proposed order for judgment that Judge Marcellais promptly executed. *See Mathiason v. Gate City Bank*, No. 04-2002, Judgment (August 11, 2004).

Plaintiff-Appellants filed a notice of appeal on September 3, 2004, a notice that their counsel apparently did not serve on the defendant until September 27, 2004. Defendant-Appellee responded to the notice of appeal with a request that the appeal be "summarily denied." *See* Response to Notice of Appeal and Request for Stay of Judgment at 1 (October 1, 2004).

On October 26, 2004, this Court set a briefing schedule and a date for oral arguments and denied Defendant-Appellee's motion to dismiss the appeal for failure to properly serve the bank.

Counsel for plaintiffs failed to file a brief and the bank filed a motion to dismiss for failure to file a brief in a pleading dated November 29, 2004. Defendant-Appellee also filed a short brief re-summarizing the bank's position.

On January 7, 2004, this Court held a hearing with all parties present.

## Discussion

### I. Motion to Dismiss Appeal for Plaintiff-Appellant's Procedural Flaws

Defendant-Appellee has filed a motion with this Court seeking dismissal of the Plaintiffs' appeal for failure to file an appellate brief and for failure to comply with the proof of service rule. Defendant-Appellee's motion to dismiss the appeal is denied.

At the outset, this Court acknowledges that the strict compliance with the Turtle Mountain Tribal Code and the Turtle Mountain Rules of Court may serve to

fundamentally restrict access to the courts of the Turtle Mountain Band of Chippewa Indians. Tribal courts are not courts where the strict formality of Anglo-American jurisprudence is necessarily encouraged. To the contrary, as Professor Christine Zuni wrote, "Native and non-native societies operate from two different world views." Christine Zuni, *Strengthening What Remains*, *in* JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 114, 118 (2004). As such, this Court will endeavor "to infuse the tribal [court] system with our own concepts of justice which more closely reflect our societal beliefs." Zuni, *supra* at 119. Based on this policy, this Court strongly supports a policy of providing access to the courts. And, in many instances, Indian litigants do not have the resources to retain lawyers experienced in complex litigation experience and legal aid societies that could provide free legal advice to indigent litigants are usually lacking in Indian Country. As such, this Court finds that in the case where Indian litigants cannot afford an experienced lawyer and must proceed pro forma or by retaining a non-law trained legal advocate, we may construe the rules of procedure broadly to ensure that litigants have access to the courts absent a strong showing of bad faith.

However, this Court also acknowledges that a too-lax enforcement of the court rules threatens to waste the court system's limited resources. Complex litigation prosecuted by pro se litigants and non-lawyer advocates may burden tribal judges, who must "sift through issues" and make sense of them. *See Smith v. Belcourt School District #7*, No. 02-10155 at 2 (Turtle Mountain App., November 30, 2004). Moreover, opposing parties require an equal and fair chance to respond.

With these principles in mind, we turn to the two areas in which Plaintiff-Appellants have failed to comply with the rules of this Court and whether their non-compliance compels this Court to dismiss their appeal.

**A. Tribal Court Rule 2.4(b) – Failure to File a Brief**

This Court's rule on the failure of an appellant to file a brief states, "Failure to file a brief by the moving party *may* be deemed an admission, that in the opinion of party or counsel, the motion is without merit. ..." TURTLE MOUNTAIN RULES OF COURT 2.4(b) (emphasis added). The rule allows this Court the discretion to determine whether an appeal should be dismissed. The relevant provision in the rule is couched in terms of the ethical responsibility of the counsel for the appellant to bring forth only meritorious claims and contentions. *Cf.* RULES OF PROFESSIONAL CONDUCT FOR THE "PRACTICE OF LAW" BEFORE THE TURTLE MOUNTAIN TRIBAL COURT 3.1 ("An advocate shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous...."). In accordance with this rule, motions to dismiss an appeal for failure to file an appellate brief will be granted if the Court determines that the appeal is, in actuality, without merit.

However, since this standard is relatively easy to meet, this determination of merit does not necessarily end our inquiry. Other factors may counsel this Court to dismiss an otherwise meritorious appeal. As such, this Court will take into consideration the prejudice to the opposing party, whether the appellant acted in bad faith, whether the appellant should be punished for the actions of counsel, the need for hearing the case on the merits, and other compelling factors brought to its attention. Previously, this Court dismissed an appeal where the appellant waited four years to prosecute the appeal. *See*

*LaRoque v. Allard* at 4 (Turtle Mountain Band App., September 11, 1990). Courts in other jurisdictions, such as North Dakota, have chosen not to dismiss an appeal for failure to file a brief where the appellant made a sufficient showing that she made a reasonable effort to prosecute the appeal. *E.g.*, *Gerhardt v. Fleck*, 251 N.W.2d 764, 766-67 (N.D. 1977) (noting cases where case not dismissed for failure to file a brief).

First, we note that in our judgment the Plaintiff-Appellants' Notice of Appeal and Request for Stay of Judgment meets the minimal burden of showing a degree of merit to the appeal. This Court, in one relevant example, has granted permission to appeal where the appellant alleged "insufficiency of evidence to justify the verdict." *Vann v. Turtle Mountain Tribe* at 2 (Turtle Mountain Band App., May 8, 1989) (*citing* TURTLE MOUNTAIN TRIBAL CODE 2.1306(g)). It is apparent from the Notice of Appeal that the Plaintiff-Appellants did allege a Tribal Court error that could result in reversal—that Plaintiff-Appellants had no opportunity to respond to the allegations made by the Defendant-Appellee. *See* Notice of Appeal and Request for Stay of Judgment at 1 (September 3, 2004). And, during oral argument, the Plaintiff-Appellees' notice states that the lower court did not hold a proper hearing to take evidence and testimony, an allegation sufficient to meet the requirement that the appeal contain a degree of merit.

Second, we find that Defendant-Appellee has not shown that the Plaintiff-Appellants' failure to file an appellate brief has caused them prejudice sufficient to justify dismissing the appeal. Even given the policy of this Court to promote greater access to the courts, this emphasis has limits. This Court is aware of the acute problems created in this case by the failure of the Plaintiff-Appellants to file an initial brief. Neither the Court nor the Defendant-Appellee had adequate notice of the specifics of what the Plaintiff-

Appellants would argue on appeal. The Court had no choice but to use much of Plaintiffs' oral argument time on determining the Plaintiff-Appellants' position on appeal.

Moreover, this Court in *Smith*, No. 02-10155, *supra*, has recently instructed appellants to strictly adhere to some critical court rules, particularly Section 2.1306. This provision provides, "Any party aggrieved by any final judgment or other final order of the Tribal Court, *shall*, within thirty (30) days after the such judgment or order was rendered, file with the Clerk of the Court of Appeals, a request in writing asking for permission to take an appeal from such judgment or order...." TURTLE MOUNTAIN TRIBAL CODE § 2.1306 (emphasis added). Unlike Rule 2.4(b), section 2.1306 contains language that makes compliance with this rule mandatory. It reads, "The importance of filing a request for permission to appeal, commonly referred to a "Notice of Appeal," is manifest. This Court noted:

> [One] purpose of requiring permission to take an appeal is to ensure that timelines are followed and that all parties are given procedural due process, i.e., adequate notice and opportunity to be heard. Rule 2.1306 requires the Clerk of the Court of Appeals to give notice to all parties of the pending appeal ..., giving both parties adequate and timely notice.

*Smith*, No. 02-10155 at 2. This Court dismissed the appeal in *Smith* due to the appellant's failure to seek permission to appeal. However, *Smith* is distinguishable from this matter.

The purpose of requiring more strict compliance with the rule requiring a notice of appeal goes more to the question of fairness to opposing parties than does the rule giving this Court discretion to decide that the failure to file an appellate brief is an admission that the appeal is meritless. For example, in *Smith*, the appellant failed to seek

permission to appeal, denying the Clerk of the Court of Appeals to serve notice on the appellee. *See id.* at 1-2. In this case, by contrast, Plaintiff-Appellant did file a notice of appeal, eventually resulting in actual notice to Defendant-Appellee.

Applying the Rule 2.4(b) factors, we conclude that the appeal should not be dismissed on this ground. First, the appeal does meet the minimum standard of merit. Second, Defendant-Appellee offers no showing of prejudice or any other factors resulting from the Plaintiff-Appellants' failure to file a brief. Defendant-Appellee's counsel was able to respond to the notice of appeal in two separate pleadings and performed well during oral argument. Reviewing the record, this Court finds no evidence of bad faith on the part of the Plaintiff-Appellants or significant prejudice to the Defendant-Appellee. Defendant-Appellee's motion to dismiss is denied. Finally, we conclude that strict compliance with Rule 2.4(b) is not necessary to efficiently adjudicate this matter.

**B. Tribal Court Rule 2.3 – Proof of Service**

Whether this appeal should be dismissed for Plaintiff-Appellants' violation of Rule 2.3 is a much closer question. This Court, nevertheless, will allow the appeal to proceed.

Rule 2.3 provides, "Proof of service must be securely attached to the original papers when they are presented to the clerk for filing." Unlike Rule 2.4(b), this rule is mandatory—appellants *must* attach proof of service to papers when they are filed. It is clear from the record that Plaintiff-Appellants' counsel did not file proof of service with the Clerk of the Court of Appeals. Given the mandatory language in Rule 2.3, this would seem to end the inquiry. However, such a result does not comport with justice.

Once the Chief Justice of this Court issued a notice reminding Turtle Mountain Band Tribal Court practitioners to prove the Tribal Court with correct proof of service, *see* Letter from Chief Justice Huma Ahsan at 1 (September 23, 2004), counsel for Plaintiff-Appellants immediately cured his error by serving the Defendant-Appellee. Given the fact that counsel for Plaintiff-Appellants is not a lawyer and given that this Court emphasizes a policy of open access to the courts, we find that counsel's late proof of service is adequate under *these specific and limited circumstances*.

And, as noted above, the Defendant-Appellee has suffered no significant prejudice. This Court acknowledges that it appears that neither Plaintiff-Appellants nor the Clerk of the Court of Appeals served notice on Defendant-Appellee of the notice of appeal until more than 30 days after the lower court issued its judgment. But because Defendant-Appellee did receive notice in time to adequately prepare a response, *see* Response to Notice of Appeal and Request for Stay of Judgment (October 1, 2004), that Defendant-Appellee's due process rights were not implicated. Conversely, in *Smith*, the appellant filed a brief first, depriving the Court of the opportunity to determine if on the face of the request for permission the appeal was meritless. *See Smith*, No. 02-10155 at 2 ("One purpose of requiring permission to take an appeal is to prevent the judicial system from squandering its time on frivolous appeals."). Moreover, the appellee's "first notice that ... the Tribal Court opinion was being appealed was when he was served with a copy of Appellant's brief...." *Smith*, No. 02-10155 at 2. Defendant-Appellee has not suffered the same disadvantage.

As such, this Court declines to dismiss the appeal for Plaintiff-Appellants' failure to comply with Rule 2.3.

## II. Due Process of Law – Failure to Provide a Hearing

This Court holds that the Tribal Court failed to provide due process of law to the Plaintiff-Appellants and reluctantly finds no other choice but to vacate the Tribal Court's orders of judgment issued April 30, 2004 and August 11, 2004.

Failure of the Tribal Court to take evidence and hear testimony from both sides is a violation of the due process rights of the Plaintiff-Appellants. This Court learned during oral argument on this matter that the Tribal Court did not hold a hearing in which either side presented witnesses or entered evidence into the record. The basic tenants of due process of law are notice and an opportunity to be heard. *See Smith v. Belcourt School District #7*, No. 02-10155 at 2 (Turtle Mountain Band App., November 30, 2004); *Synowski v. Confederated Tribes of Grand Ronde*, 31 Indian L. Rptr. 6117, 6118 (Grand Ronde App. 2003); *Hoopa Valley Indian Housing Authority v. Gerstner*, 22 Indian L. Rptr. 6002, 6005 (Hoopa Valley Tribe App. 1993). This due process maxim is put into practice when the Tribal Court convenes to allow each side to present their position and put forth arguments and evidence in support. *See McCloud v. Turtle Mountain Band of Chippewa Indians* at 9 (Turtle Mountain Band App., October 16, 1989) (The Tribal Court's "function is to hear disputes and render a decision, and to allow all parties [to] present their arguments in a manner following procedures and to allow due process to all parties."). During a trial or a show cause hearing such as the one held by the lower court, due process requires the trial court to allow each side to present evidence and testimony and to allow each side to cross-examine the other's witnesses. *See Blevins v. Desjarlais* at 6 (Turtle Mountain Band App., June 28, 1990) (noting right to testify and present

witnesses); *Turtle Mountain Band of Chippewa Indians v. Pariesien*, 1 Tribal Court Rptr. A95, A98-A99 (Turtle Mountain Band App., March 6, 1979) (noting right to cross-examine accuser). In a case, as here, where the record on appeal is "void as to the rationale used by the Court..., we find ... a clear abuse of discretion by the trial court." *Laducer v. Laducer* at 5 (Turtle Mountain Band App., September 11, 1990).

Also, failure of the Tribal Court to provide written findings of fact and conclusions of law is cause for vacating the judgment below. As this Court wrote over a decade ago, "The burden of making sure that the findings are clear and specific are not on this Court but on the trial court and counsel below." *Laducer* at 5 (quotation omitted). Absent written findings of fact, this Court has no adequate record for reviewing the Tribal Court's judgment. *See Security State Bank v. Parisien* at 6 (Turtle Mountain Band App., September 11, 1990) ("[W]ithout findings of fact [and] conclusions of law..., the primary issues brought to this Court on appeal are impossible to address.").

Moreover, the Tribal Court's orders first presumed judgment against the Plaintiff-Appellants and then slanted the final disposition against the Plaintiff-Appellants. Without making findings of fact or conclusions of law and without taking testimony and evidence from either side, the Tribal Court ordered the Plaintiff-Appellants to cure its default – a default that had never been proven to exist. At no time did the Defendant-Appellee prove that such a default existed at the April 22, 2004 hearing; nor could it, as the court did not take testimony or evidence. The Tribal Court compounded its error by placing the onus on the Plaintiff-Appellants to cure the "default." By the order's very terms, the Defendant-Appellee could easily have stonewalled the Plaintiff-Appellants attempts to "cure" the "default," a possibility the Plaintiff-Appellants raised in both their Notice of

Appeal and during oral argument and which the Defendant-Appellee denies. Regardless, the Tribal Court inadvertently set up the Plaintiff-Appellants to fail by first presuming their liability. The mistake is understandable – at the show cause hearing, it appeared that the parties had agreed to reach a settlement and dispose of the matter and the Tribal Court rightfully imposed a deadline on those negotiations in accordance with its discretion. However, after the parties failed to reach settlement, counsel for the Defendant-Appellee imposed a proposed judgment before the Court. What the Court should have done at the second hearing was take evidence as a trier of fact. Instead, the Court executed the proposed judgment against the Plaintiff-Appellant. The judgment must not stand.

As such, for all the above reasons, the orders of judgment are invalid.

## III. Defendant's Motions to Dismiss Plaintiff's Petition

Upon review of the record after oral argument, this Court discovered that the Defendant-Appellee made a motion to dismiss the Plaintiff-Appellants' petition in its Answer and Counterclaim for failure to state a claim. This Court reviews these arguments on its own motion and hereby dismisses Plaintiff-Appellants' Petition for Lawful Lien for the following reasons. However, Defendant-Appellee's counterclaim remains extant.

The pleading that originated this matter is styled, "Petition for Lawful Lien." The pleading makes factual allegations and then seeks relief as follows: (1) "That a lawful lien be placed on all … vehicles, pending a show cause hearing in Tribal Court;" and (2) "That a hearing be scheduled as soon as possible."

Plaintiff-Appellants' request that "a lawful lien be placed on all … vehicles …" is not relief that the Tribal Court has authority to grant. *See generally* TURTLE MOUNTAIN

TRIBAL CODE §§ 4.0301 *et seq.* ("Replevin"). Defendant-Appellee correctly argued in that pleading that "no 'lien' can arise in favor of Plaintiff-Appellants by virtue of their making contractually-required payments to Defendant, or their failure to make such payments, or by virtue of their mere possession of the subject collateral." Answer and Counterclaim at 3 (February 27, 2004). If Plaintiff-Appellants wanted to correctly initiate an action, they could have filed an action seeking a declaratory judgment and a request for an injunction or other equitable relief against Defendant-Appellee. Other actions might have been possible as well.

Nevertheless, Defendant-Appellee correctly brought this action to the jurisdiction of the Turtle Mountain Band Tribal Court in its counterclaim against Plaintiff-Appellants, *see Winer v. Penny*, 674 N.W.2d 9 (N.D. 2004), and that is where this matter will be resolved.

**ORDER**

For reasons stated in the opinion above, this matter is REMANDED to the Tribal Court for proceedings consistent with this Opinion and Order. The Tribal Court's April 30, 2004 and August 11, 2004 orders of judgment are hereby VACATED. As such, this Court orders the following:

1. The Plaintiff-Appellants to this matter must file an Answer to the Defendant-Appellee's counterclaim within thirty (30) days of service of this Opinion and Order; and
2. Upon the filing of an Answer by the Plaintiff-Appellants, the Tribal Court must schedule and hold a trial on the merits of Defendant's counterclaim in which both

sides are allowed to present witnesses and enter evidence into the record, after which the Tribal Court must make written findings of fact and conclusions of law.

Matthew L.M. Fletcher,
Appellate Justice

2/1/05
Date

We join this opinion.

Huma Ahsan,
Chief Appellate Justice

2/1/05
Date

Monique Vondall,
Appellate Justice

2/1/05
Date

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS
TURTLE MOUNTAIN TRIBAL COURT OF APPEALS

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Brian Marion,

APPELLANT,

vs

Turtle Mountain Band of Chippewa Indians,

APPELLEE.

**OPINION AND ORDER GRANTING NEW TRIAL**

TMAC A11-02-92

Before: Chief Justice HUMA AHSAN, and Justices GERALD GARDNER and STACEY LEEDS.

Appearances: Richard G. Frederick, Sr., for the Appellant; and William Marcellais, for the Appellee, not present.

By Chief Justice AHSAN for a unanimous Court

## OPINION

### PROCEDURAL HISTORY

On December 13, 2002, appellant, Brian Marion, was arrested on the charges of driving without liability insurance, driving without a license, possession of marijuana, possession of narcotics and dangerous drugs. He was arraigned on the same day and pled not guilty on all charges. On December 16, 2002, a bond hearing was held and Mr. Marion posted bond on that same day and was released. A pre-trial conference was held on November 12, 2003, and no plea agreement was reached. The tribal court then scheduled Mr. Marion for trial.

Approximately fifteen minutes before the scheduled trial on January 23, 2004, Mr. Frederick, Mr. Marion's Legal Advocate, filed a hand-written motion for the presiding judge, Madonna Marcellais, to disqualify herself. The appellant argued that since Mr. William Marcellais, the prosecutor, and Judge Madonna Marcellais were first cousins that Judge Marcellais should disqualify herself from hearing this case. From the recordings of the trial, the prosecutor, Mr. William Marcellais, did admit that he was related to the judge in the first degree. Mr. Marcellais did also admit that he was related to Mr. Frederick as well. The degree related was not mentioned. The Honorable Marcellais denied the motion because it was not timely filed and continued on with the trial.

On January 23, 2003, Mr. Marion was found guilty of all charges: Driving without liability Insurance, Driving without license, Possession of marijuana, Possession of narcotic and dangerous drugs. Mr. Marion was sentenced to six months in jail, a $2,100 fine, probation and an evaluation.

The appellant filed a notice of appeal and request for stay of judgment on February 4, 2004. The request for a stay of judgment was denied, but the request for appeal was granted. On June 9, 2004, the court of appeals held a status conference to determine if the court had a correct administrative record. On September 9, 2004, the court held oral arguments. Present was Advocate Frederick and Mr. Marion; however, the prosecutor, Mr. William Marcellais failed to appear and argue on behave of the tribe.

At the oral arguments, Mr. Frederick argued that irregularities in the trial proceedings occurred which prevented his client from obtaining a fair trial. He specifically argued that Judge Marcellais should have recused herself from this case since she is related to the prosecutor in the first degree. The appellant specifically argues that both the Turtle Mountain Tribal Code Section 1.0511(3) and the Code of Judicial Conduct of the Turtle Mountain Band of Chippewa Cannon 3, Subsection E (1)(d)(i) support his argument that Judge Marcellais should have recused herself from this case. Neither the prosecutor nor any representative of the Tribe was present at the oral arguments. The prosecutor's brief suggests that the ruling denying the motion was correct. The prosecutor's argument relies on the argument that Mr. Marion's motion for disqualification was not timely filed. In the prosecution's brief, he refers to Turtle Mountain Code Section 1.1107, which states that an affidavit of prejudice shall be filed 10 days prior to the trial date.

## DISCUSSION

The questions before the court are (1) Should a judge recuse or disqualify herself when a Motion for Recusal is timely filed based upon the judge and the prosecutor being first cousins? and (2) Was the Motion for Recusal timely filed in this case?

### I. Should a Judge recuse or disqualify herself when a Motion for Recusal is timely filed based upon the judge and the prosecutor being first cousins?

The question of disqualification or recusal of a judge is before the court, and a party to a suit has a right to have his or her legal action heard before a fair and impartial judge, and a disinterested tribunal. As the Turtle Mountain Constitution has stated under Article XIV, Judiciary, the purpose of the court system is "to provide for a separate branch of government free from political interference and conflicts of interest for the development and enhancement of the fair administration of justice." See Constitution and Bylaws of the Turtle Mountain Band of Chippewa Indians, Article XIV- Separation of Powers, Judiciary, Section 1. Cannon 3 of the Code of Judicial Conduct of the Turtle Mountain Band of Chippewa Indians further explains that "a judge shall perform the duties of judicial office impartially and diligently."

This right to a fair and impartial trial free of conflicts of interest is rooted in sound public policy and statutes designed to protect litigant's right to constitutional due process. By allowing a party to disqualify a judge when the appearance of impropriety is present, not only are the parties protected, but the purity and impartiality of the court is maintained. This preserves the confidence of the community in its court and in the court's decisions. See Martin v. the Hopi Tribe and et. all, AP-004-95, (Hopi 3-29-1996).

The Turtle Mountain Band of Chippewa Indians has recognized the right of parties to an impartial judge. The Turtle Mountain Tribal Code of 1976, section 1.0511 states that "any judge shall be

disqualified to act as such in any case: 1 ) in which he or she has an interest, 2) in which he or she is or has been a material witness, (or) (3) in which he or she is related to any party or their attorney by marriage or blood in the first or second degree. A judge may be disqualified on his or her own motion or by the filing of an affidavit of prejudice by either party to action." This recognition is also expressed in the Code of Judicial Conduct, which states "a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: . . . (d) the judge or judge's spouse, or person within the third degree of relationship to either of them, or the spouse of such a person . . .(:ii) is acting as a lawyer or advocate in the proceeding;" See Conduct of Judicial Conduct of Turtle Mountain Band of Chippewa Indians, Canon 3, E. Disqualification.

In the present situation, we must consider the family relationships that are commonly known about the Turtle Mountain Reservation. For example, it is commonly known that most Turtle Mountain members are related to each other in some form or fashion. This Court takes judicial notice of the fact that in the previous generations of Turtle Mountain people, it was not uncommon for families to consist of at least ten children. Needless to say, large families have been very common to Turtle Mountain people. In fact, there are some Turtle Mountain people who have so large families that they do not know all their first cousins. Most people at Turtle Mountain are related to each other in one form or another. Indeed, it should be noted that in this case the prosecutor has also admitted that he was related to defense counsel as well as the judge although the degree related was not mentioned.

The Court understands the unusual dilemma that this code language places on the people of Turtle Mountain. The Court recognizes the possible illogical result of this code language, which could lead to elected judges recusing themselves from any case, which has a Turtle Mountain member as an advocate or attorney.

However, in the present case, we are asked to interpret the intent of the Turtle Mountain people. And in interpreting code language, we must look to see if the intent is clear from the two different codes language. It appears that both code languages where adopted by governmental bodies of the Turtle Mountain people: one by the tribal council and one by the Judicial Board. These government units represent the will of the Turtle Mountain people. And from these codes, the language is clear that judges should recuse themselves if they are related within the 3rd degree to an attorney or advocate in the case before them. It is not our responsibility as appellate court justices to serve as a law-making body. Instead, law making is the role of the Tribal Council. Whenever a party requests recusal in a timely manner based upon section 1.0511 of the Turtle Mountain Tribal Code of 1976, we must apply this code provision until and unless this code provision is changed by the Turtle Mountain Tribal Council.

Consequently, we hold that Judge Madonna Marcellais should have disqualified or recused herself from deciding this case because she is related to the prosecutor, William Marcellais within the first-degree so long as a request for disqualification or recusal was filed in a timely manner.

We should note that we are not holding that Judge Madonna Marcellais should recuse herself in all cases that involve the prosecutor, William Marcellais, since she is related to him within the first-degree. The parties to an action can certainly agree implicitly (such as by failing to raise the issue) or explicitly (such as through consent of the parties) to allow Judge Madonna Marcellais to handle cases in which the prosecutor is related to her within the first-degree. Instead, we are only holding that Judge Madonna Marcellais should disqualified or recused herself from deciding cases in which a request for disqualification or recusal is filed in a timely manner.

**II. Was the Motion for Disqualification or Recusal timely filed in this case ?**

The next question before this Court is was this Motion for disqualification timely filed. The prosecutor argues through his brief that the Appellant's motion was untimely filed because it was filed only fifteen minutes before the trial was to begin. The prosecution relies on the Turtle Mountain Tribal Code, Section 1.1107, which states, "Motion for a change of judge; procedure. If the defendant shall, prior to the tenth day preceding the trial date, make affidavit of prejudice, that he cannot have an impartial trial by reason of the bias or prejudice of the presiding judge of the Tribal Court, the judge may call some other judge of the Tribal Court to preside at said trial. . . . If the judge honors the affidavit of prejudice, the defendant shall be entitled to such change of judge but once."

The prosecution argues in his brief – without further explanation - that Mr. Frederick "could have" found out which judge was going to be hearing the trial at the pre-trial hearing held on November 12, 2003. The prosecutor does not, however, argue that Mr. Frederick actually did find out on November 12, 2003 (or at any other time prior to January 23, 2004) that Judge Marcellais was going to be hearing the trial.

Mr., Frederick contended at oral argument that he did not know that Judge Marcellais was going to be hearing the trial on this case until she appeared on the bench just before the trial began. Mr. Marcellais did not appear at oral argument to challenge Mr. Frederick's contention in any way.

The Court recognizes the procedural pitfalls with regard to the filing of motions for recusals or disqualifications. The Court, however, views a fair and impartial trial must be deemed supreme. This Court recognizes that tribal court advocates frequently may not discover who the judge will be until they enter the room on the day of trial. This Court should not cut off a tribal member's right to a fair and impartial trial just because he or his advocate was not informed as to who the judge will be. It is up to the presiding judge to avoid these types of conflicts that would deem him or her impartial.

In this case, Mr. Frederick contends that he filed the motion in a timely manner since he did not discover that Judge Marcellais would be the judge until she entered the room on the day of trial. The prosecutor failed to provide any evidence to challenge Mr. Frederick's contention. The prosecutor only contends that Mr. Frederick "could have" found out prior to January 23, 2004 – not that Mr. Frederick in fact did find out. Moreover, the prosecutor failed to show for oral argument thereby leaving Mr. Frederick's contention essentially unchallenged by the prosecution.

We are deeply troubled by the fact that Mr. William Marcellais, the prosecuting attorney or advocate for the Turtle Mountain Band of Chippewa Indians, did not appear for oral arguments in this case. As a prosecutor, it is his duty to represent his client, the tribe, and put forth all legal arguments. If the prosecutor had shown up, he could have also put forth other arguments, which may have lead to a different result in this case. However, the prosecution did not appear to represent his client, the tribe. Since he failed to show up and represent his client, the tribe, during the oral arguments, the tribe was basically left unrepresented.

Consequently, we must presume that Mr. Frederick's contention is true – and that the Motion for Disqualification or Recusal timely filed in this case

**ORDER**

THEREFORE **IT IS HEREBY ORDERED** that the verdict of the judge-trial for the appellant is vacated, and the case is remanded to that Court with directions to grant a new trial on these charges only by a judge who is not related to any of the attorneys or advocates as prescribed by the Turtle Mountain Code of 1976 and the Code of Judicial Conduct of Turtle Mountain Band of Chippewa Indians.

Dated this 4th day of February 2005.

Huma Ahsan

Huma Ahsan
Acting Chief Justice
with Appellate Court Justices
Stacey Leeds and Gerald
Gardner concurring.

SEAL

**IN THE TURTLE MOUNTAIN COURT OF APPEAL**
**TURTLE MOUNTAIN BAND OF CHIPPEWA INDIAN RESERVATION**

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| **Vince Gillette, attorney, and on Behalf of his clients, Petitioner,** | ) | **TMAC: 04-010** |
| **v.** | ) | **ORDER DENYING SUPERVISORY WRIT** |
| **Beverly May, as "interim judge", Madonna Marcellais, Chief Judge, Respondents.** | ) | |

## PROCEDURAL BACKGROUND

On April 19, 2004, Attorney Vance Gillette filed a petition for mandamus in Strickland v. Decoteau and Mathiason v. Decoteau, Wheeler Wolf and Turtle Mountain Gaming Commission), requesting that this Court issue a Writ requiring the trial court, and specifically Judges May and Marcellais, to issue rulings assigning Mathiason to a judge and have a hearing scheduled, and to process Strickland. This Court denied the Petition on October 14, 2004 and ordered that the Judges Cain and May issue orders in both cases within 60 days. Both orders were timely issued.

Attorney Gillette filed an "Amended Petition for Supervisory Writ and Brief" on or about October 18, 2004, requesting the same relief that was requested in the original Petition for Writ of Mandamus, but that the relief be granted in the form of a Supervisory Writ. Attorney Gillette cited N.D. Const. Art VI, §2 and N.D.C.C. § 27-02-04 as authority for this Court to issue such a Writ.

## DECISION

North Dakota has defined a "supervisory writ" to be a "discretionary authority we exercise on a case-by-case basis, rarely and cautiously, and only to rectify errors and prevent injustice in extraordinary cases in which there is no alternative remedy." State v. Haskell, 2001 ND 14, 621 NW 2d 358. Tribal courts have utilized the same strict analysis for determining the appropriateness of extraordinary writs. The Navaho Nation Supreme Court is given authority in its writs statute jurisdiction "to prevent or remedy any act of any court which is beyond such Court's jurisdiction, or to cause a Court to act where such Court unlawfully fails or refuses to act within its jurisdiction." Pino v. Bedonie, No.A-CV-09-92 (Navaho 12/061992).

Strickland v. Decoteau and Mathiason v. Decoteau, et al are not extraordinary

cases, nor has the trial court refused to act within its jurisdiction. All issues complained of in Petitioner's Motion have been decided by this Court in its Order Denying Writ of Mandamus. The fact that some issues were not decided in favor of the Petitioners does not constitute "errors" or "injustice" as contemplated by drafters of statutes regarding extraordinary writs.

THEREFORE, Petitioner's Petition for Supervisory Writ is therefore denied.

Dated this 7th day of December, 2004.

(SEAL)

Huma Ahsan

Huma Ahsan
Acting Chief Judge and Justice Christine Jongeling concurring.

**TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS**
**TURTLE MOUNTAIN TRIBAL COURT OF APPEALS**

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| Keith Gourneau and Brenda Delonais Great Walker, APPELLANT, | ) | |
| vs | ) | TMAC –02-011 |
| Turtle Mountain Chippewa Tribe, APPELLEE. | ) | |

**ORDER**

On the 9th day of September, 2004, this matter came before the Court on appeal of the District Court's Order of Dismissal With Prejudice. District Court Judge Richard Frederick, Sr. dismissed this cause of action on the grounds that tribe is immune from suit and has not waived sovereign immunity.

Appellants argue that the decision of the District Court was premature in that Appellants were not permitted time adequate for discovery to respond to Appellee's sovereign immunity defense. In particular, Appellants argue that they were not given the opportunity to argue that the Tribe waived sovereign immunity by virtue of the applicable insurance policy or in documents surrounding the transfer of relevant property from the state of North Dakota to the Turtle Mountain Band of Chippewa Indians.

It is well-established, as a matter of Turtle Mountain law and as a matter of federal law, that the tribe enjoys sovereign immunity from suit. However, sovereign immunity may be waived if done so expressly and unequivocally.

In St. Claire v. Turtle Mountain Chippewa Casino, TMAC-97-013 (1998), this Court permitted a suit to move forward where an insurance policy was mandated by

applicable law. St. Claire did not however, change the rule of sovereign immunity to suggest that the mere existence of an insurance policy serves to waive governmental immunities.

After review of the insurance policy, this Court notes that there is a "governmental immunity endorsement." This endorsement does not independently waive the sovereign immunity of the tribe. However, further discovery should be permitted on the sole issue of whether the policy itself was mandated by any applicable law in light of St. Claire.

This Court hereby remands this matter to the District Court. The District Court is ordered to permit limited discovery and to entertain supplemental briefs at the close of discovery. The District Court shall then submit its findings of fact and conclusions of law to the Court of Appeals.

IT IS ORDERED this 30th day of November, 2004.

SEAL

Huma Ahsan

Huma Ahsan
Acting Chief Justice with Justice Gerald Gardner and Stacey Leeds concurring.

**IN THE TURTLE MOUNTAIN COURT OF APPEAL**
**TURTLE MOUNTAIN BAND OF CHIPPEWA INDIAN RESERVATION**

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| **Eric Smith,** | ) | **Civ. No. 02-10155** |
| **Plaintiff/Appellant,** | ) | |
| | ) | **ORDER DENYING** |
| **v.** | ) | |
| | ) | **REVIEW** |
| **Belcourt School District #7,** | ) | |
| **Respondent/Appellee.** | ) | |
| | ) | |

## PROCEDURAL BACKGROUND

With a Petition dated August 23, 2002, Eric Smith (Smith) petitioned the Tribal Court to issue a Writ of Mandamus ordering the Respondent Belcourt School District #7 (District) to hire Smith as a teacher for the 2002-2003 school year. On September 11, 2002, District filed a response to the Petition arguing that: 1) the Tribal Court lacked jurisdiction to hear this case, 2) Tribal Resolution #3458-05-87 had been superceded and did not provide an employment preference to Smith, and 3) Smith was not entitled to a Write of Mandamus because he had an adequate remedy at law and no clear legal right to the relief requested. On October 4, 2002, District served a Motion to Dismiss the Petition for Writ.

On September 27, 2002, the Court issued a Notice to Appear for Hearing and scheduled a hearing for October 24, 2002. Just prior to the hearing, Smith sought to modify his petition to assert a claim for money damages, court costs, and attorney fees. At the hearing, Smith withdrew his request for mandamus relief, and the other issues were argued based on the modified petition. The Court ruled that Smith's Petition for Writ of Mandamus must be dismissed because 1) he had withdrawn it and 2) he was not entitled to a Writ in any case. Judgment was entered on November 7, 2002 and Notice of Entry of Judgment was served on the parties on November 14, 2002.

There is in the court file Petitioner's Notice of Appeal dated November 22, 2002. There is no indication that the Notice was served at any time on the District, and there is no court filing date stamped on the document. On January 7, 2003, Smith served and filed an Appellant's Brief alleging to appeal the November 7, 2002 judgment. The Appellee's Brief was served and filed on February 6, 2003, and argued that the appeal should be dismissed because Smith did not file the appeal in a timely manner or in accordance with the requirements of the Turtle Mountain Tribal Code. Oral arguments

were heard by the Turtle Mountain Court of Appeals on September 10, 2004.

## DECISION

This Court's decision is limited to the narrow issue of whether review of a tribal court judgment should be granted when the appellant fails to follow the rules of procedure for appeals set out in the Turtle Mountain Code.

Rule 2.1306 of the Code requires an appellant to file a request for permission to take an appeal within thirty days of the date that the order or judgment is entered. This request must include the reason(s) for the appeal. The request is forwarded to the presiding judge, who decides whether the request contains just cause for review. If it does, permission to appeal is granted. If it does not, the presiding judge must state his reasons for refusal and order that the Trial Court judgment be carried out.

One purpose of requiring permission to take an appeal is to prevent the judicial system from squandering its time on frivolous appeals. This is particularly important in a court system in which much of the legal work is done by pro se litigants, as is so in most tribal courts nationwide. Grounds for appeal constitute a quagmire of legal terminology and concepts which are sometimes difficult for experienced advocates, much less pro se litigants. The presiding judge of the court will of necessity have the legal knowledge and experience to be able to sift through issues and make determinations of their suitability for appeal.

An attempt to bypass Rule 2.1306 and proceed directly to submission of an appellate brief is tantamount to replacing the presiding judge's judgment with that of the appellant, and that certainly was not contemplated by the Code drafters.

Another purpose of requiring permission to take an appeal is to ensure that timelines are followed and that all parties are given procedural due process, i.e. adequate. notice and opportunity to be heard. Rule 2.1306 requires the Clerk of the Court of Appeals to give notice to all parties of the pending appeal and the date of trial within five days after the trial date has been set, giving both parties adequate and timely notice.

The first notice that the Appellee herein had that the Tribal Court opinion was being appealed was when he was served with a copy of the Appellant's Brief on January 7, 2003, two months after the judgment was entered.. Because Appellee had not received notice within the statutory time limits, he had a right to believe that no appeal was going to be taken and that his client could put the matter to rest.

Because the procedural issue is dispositive in this case, the Court makes no holding regarding the substantive issues addressed by the parties, and

NOW, THEREFORE, it is hereby

ORDERED, ADJUDGED and DECREED that Appellant's petition for review is denied.

It is so ordered this 30th day of November, 2004.

SEAL

Huma Ahsan

Acting Chief Justice Huma Ahsan and
Justice Gerald Gardner and Justice
Christine Jongeling, concurring

**IN THE TURTLE MOUNTAIN COURT OF APPEAL**
**TURTLE MOUNTAIN BAND OF CHIPPEWA INDIAN RESERVATION**

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| Mallorie C. Herrera,<br>Plaintiff, | ) | |
| | ) | TMAC NO. 03-004 |
| | ) | |
| | ) | **ORDER DENYING** |
| v. | ) | **REQUEST FOR PERMISSION** |
| | ) | **TO APPEAL** |
| Josh Decoteau and Edward LaVallie,<br>Defendants. | ) | |

The Turtle Mountain Appellate Court denies a Request for Permission to Appeal in an automobile negligence action finding that Defendant/Appellant Decoteau lacked standing to appeal because the stipulated settlement between the two other parties (Plaintiff Herrera and Defendant LaVallie) provided no injury to Defendant/Appellant Decoteau.

## PROCEDURAL HISTORY

Mallorie C. Herrera brought suit against Josh Decoteau and Edward LaVallie concerning a car accident that allegedly occurred on May 17, 2001. Defendant Decoteau filed a Cross Claim against Defendant LaVallie on August 13, 2002. In his September 6, 2002 Reply to Decoteau's Cross Claim, LaVallie requested a dismissal of Decoteau's Cross Claim. On June 12, 2003, a stipulation for dismissal with prejudice was entered after an out of court settlement between Herrera and LaVallie was reached. On June 18, 2003, the trial court entered an order stating "all claims between them (Herrera and LaVallie) as set forth in the pleadings...are hereby dismissed with prejudice." Decoteau then filed a Request for Permission to Appeal on July 18, 2003, alleging that this June 18, 2003 trial court order should be reversed since it was entered ex parte.

The Court notes that there is no certificate of service attached to the July 18, 2003 Request for Permission to Appeal. We need not reach this issue, however, since we are denying the Request for Permission to Appeal on other grounds.

LaVallie filed a formal Motion to Dismiss Defendant Decoteau's Cross Claim (and Brief in Support of Motion to Dismiss) on June 18, 2004. LaVallie alleges that Decoteau's Cross Claim fails to state a claim upon which relief can be granted. The parties and the record indicate – likely due to the 2003 court house fire – that neither Decoteau's Cross Claim nor LaVallie's Motion to Dismiss that Cross Claim have been heard at the trial court level.

LaVallie filed a Response to Request for Permission to Appeal on December 16, 2003. LaVallie contends that the June 18, 2003 judgment did not affect Decoteau's claims whatsoever and that DeCoteau has no standing to request an appeal from a consensual judgment between two parties. We agree.

## STANDING

The question before the court is whether the petitioner has standing. "Standing" means that the party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy. Sierra Club v. Morton, 405 U.S. 727 (1972). The general rule on standing is that a plaintiff must meet three requirements in order to have standing to sue: (1) they must have suffered injury in fact; (2) there has to be a causal connection between injury and the conduct complained of; and (3) it must be likely that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). In Lujan, "injury in fact" is an invasion of a legally protected interest, which is concrete and particularized. Id at 560. The "causal connection" has to be fairly traceable to the challenged action of the independent action of the defendant. *Id* at 560. In Lujan, environmental groups challenged a rule developed by the Secretary of Interior, which interpreted the Endangered Species Act in a way that made it only applicable to the US and the seas. Id at 557-558. The United States Supreme Court held that the environmental groups did not have standing to bring their claim.

The issue of standing has been embraced by other tribal courts such as Mashantucket Pequot Tribal Nation and the Hopi Tribe. In Mashantucket Pequot Tribal Nation v. Kenneth Castellucci & Assoc., Inc., No. MPTC-CV-2001-163, at p. 20 (Mashantucket Pequot Tribal Ct., Sept. 12, 2002), the tribal court discussed the issue of standing:

> "When the issue of standing is raised, the Court does not look into the merits of the case. Rather, the court merely determines whether a plaintiff has made allegations of a 'colorable claim of injury' and 'a plaintiff ordinarily establishes his standing by allegations of injury.' Presidential Capital Corp. v. Reale, 231 Conn. 500, 505 (1994). 'Similarly, standing exists to attempt to vindicate "arguably" protected interests.' Id. (citing Ducharme v. Putnam, 161 Conn. 135, 139 (1971); see also Assn. Of Data Processing Serv. Orgs v. Camp, 397 U.S. 15 (1970)." Id.

In Village of Mishongnovi v. Bernita Humeyestewa, No. 96AP000008, p. 52 (Hopi Tribe Appellate Ct. March 20, 1998), the Hopi Appellate Court concluded a modified version of Federal Standing doctrine was consistent with Hopi Custom and Tradition. The Court announced the proper of Standing in Hopi Tribal Court is whether the plaintiff asserts some actual or threatened injury that is logically related to the legal claim it seeks to present to the tribal court. Id. at p. 53.

In the present case, the appellant, Decoteau, is requesting permission to appeal the dismissal of his Cross Claim against LaVallie. Decoteau has not proven an injury in fact as a result of LaVallie's actions. The trial court motion to dismiss Decoteau's Cross Claim has never been ruled on. Because Decoteau cannot prove injury in fact and because his Cross Claim was not ruled on at trial, he does not have standing to appeal the dismissal.

**ORDER**

THEREFORE, based on the foregoing reasons, this Court finds that Decoteau does not have standing at this time and denies his Request for Permission to Appeal. This Court hereby remands Mr. Decoteau's Cross Claim and Mr. Lavallie's Motion to Dismiss to the trial court for an expedited hearing on the issue.

Ordered this 30th day of November, 2004.

Huma Ahsan

[seal]

Huma Ahsan
Acting Chief Justice with Justice Gerald Gardner and Chris Jongeling concurring.

IN THE TURTLE MOUNTAIN COURT OF APPEAL
TURTLE MOUNTAIN BAND OF CHIPPEWA INDIAN RESERVATION

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| **In the Matter of Petitioner Seeking Writ of Mandamus on Judges May and Marcellais** | ) | **TMAC: 04-004** |
| | ) | **ORDER DENYING PETITION FOR MANDAMUS** |

## PROCEDURAL BACKGROUND

On April 19, 2004, Attorney Vance Gillette filed a petition for mandamus. The petitioner alleges that his two cases (Strickland v. Decoteau and Mathiason v. Decoteau, Wheeler Wolf and Turtle Mountain Gaming Commission) have experienced considerable delays. Petitioner claims that such inaction violates the Indian Civil Rights Act (ICRA), 25 U.S.C. Section 1302, which requires due process. In the Strickland case, the petitioner alleges that the trial court has not made a ruling on the injunction and contempt issues. In the Mathiason case, the petitioner alleges that a hearing date needs to be set. Petitioner also request a writ to require the court to develop court rules for timely processing of cases and to disseminate such rules and require the use of law trained judges to eliminate the backlog and delay.

On June 9, 2004, the Turtle Mountain Appellate Court held a status conference hearing on this matter. Present at the hearing were attorneys both for parties as well as Judges Madonna Marcellais and Judge Beverly May. At the hearing, Judge May did state that she working on a written order on the Strickland case, but that the final draft has not yet been completed. After reviewing the case files for these cases, it appears that two hearings were held on the Strickland matter. The last hearing was held on February 4, 2004. Currently, no written order has been filed in the Strickland case. In the Mathiason case, the last hearing was held on May 20, 2004 in front of Judge Shirley Cain and currently there is no written order in the file.

The issues before the court are 1) whether the petition for Mandamus has become moot and 2) whether the long delays in the parties receiving final written order violates the parties right to due process under the Indian Civil Rights Act.

### I. Whether the petition for Mandamus has become moot.

Mandamus is defined as "a writ issued by a superior court to compel a lower court . . . to perform mandatory or purely ministerial duties correctly." See Black's Law Dictionary, deluxe seventh edition, p.973.

Currently the Turtle Mountain Code of 1976 gives little clarity to this topic. Under Turtle Mountain code, Chapter 2.1303 gives the Court of Appeals jurisdiction over writs specifically stating "the jurisdiction of the tribal court is coextensive with that of the Tribal Court . . . The Court of Appeals shall have the power to issue any writs or orders necessary and proper to the complete exercise of it jurisdiction." From this section, the Turtle Mountain Court of Appeals would be deemed to have jurisdiction of writs.

However, Turtle Mountain Code chapter 2.1304 seems to limit jurisdiction to only writs that have been reviewed by the trial court below and is a "final judgment, writ or order". See Turtle Mountain Code of 1976 chapter 2.1304. These code sections seems to confuse Writs issued at the trial level and those it the appellate level.

Under US jurisprudence, a writ of mandamus maybe used in both the trial level and the appellate level. At the trial level, writ of mandamus are usually directed against a specific person or entity who is failing to abide by the petitioner's already established rights, mandamus actions at the appellate level are directed at the district court or district judge. See Youvella v. Dallas, No. 96-AP-00002, line 50 (Hopi 11/23/98)(citing Burns v. Superior Court of Pima County, 97 Ariz. 112, 397 P. 2d 448 (1965). The writ of mandamus was developed to provide a bypass to lengthy judicial process at the trial level. See id. A writ of mandamus is an extraordinary remedy developed to expedite matters where an applicant has an immediate and complete right to the thing demanded. See id.

At the appellate level, the courts employ mandamus to confine a lower court to its prescribed jurisdiction or to compel a lower court to exercise its lawful authority. See Maryellen Fullerton "Exploring the Far Reaches of Mandamus," 49 Brook. Law Rev. 1131, 1143 (Summer 1983). The Appellate court may only issue a writ against the district court if the judge 1) has acted beyond his jurisdiction 2) has refused to exercise his jurisdiction when he has no authority to refuse; 3) has usurped judicial power or clearly abused his discretion; 4) has persistently disregarded federal procedural rules; or 5) has been faced with a significant question of first impression concerning the power of the district courts under the federal rules of procedure. See id.

Further, under North Dakota Law, a petitioner seeking a writ of mandamus must show no plain, speedy and adequate remedy in the ordinary course of law and a clear legal right to performance of the act sought to compelled. See Opdahl v. Zeeland Public School District No.4, 512 N.W. 2d 444, 445 (N.D. 1994), citing N.D.C.C.§ 32-34-01; 32-34-02; Wenman v. Center Board of Valley City Multi-Dist. Vocational Center, 471 N.W. 2d 461 (N.D. 1991).

Other Native American tribes have established similar standards. The Hopi trial and appellate courts may grant an extraordinary writ when 1) no other plain speedy and adequate remedy exists and 2) one of four other acceptable grounds are met. See Hopi Indian Rules of Civil and Criminal Procedure Rule 35(a). Before a writ of mandamus is issued compelling the lower court to perform existing duties, the Navajo Nation requires the petition to show 1) that the petitioner has a legal right to have the particular act performed, 2) that the respondent judge has a legal duty to perform that act, and 3) the respondent judge failed or neglected to perform the act. See Yellowhorse, v. The Window Rock District Court, line 18, A-CV-15-86 (Navajo Nation).

In the present case, the petitioner seems to be requesting a writ of Mandamus against the trial court judges themselves for failure to set hearings in these matters. After reviewing the case files, a writ of mandamus is not needed because no justiciable controversy currently exists. In the Mathiason case, the petitioner's requested for a law-trained judge to hear the case was granted. The case was transferred to Judge Cain, a law trained judge, and two hearings were held with a final order is being drafted. Also in the Stricklin case, the trial court judge indicated at the status conference hearings held on June 9, 2004, that she was working on drafting the final order. Since there is no longer a

justiciable controversy in either of these two cases, the petition of a writ of mandamus on Judge Marcellais and Judge May is rendered moot. Plaintiff's petition for a writ of Mandamus is denied.

**II. Whether the long delays in the parties receiving a final written order violates their rights of due process under the Indian Civil Rights Act.**

However, the Court is concern about the constitutional question of whether these lengthy delays in the parties receiving a final written order violates their rights to due process under the Indians Civil Rights Act. Currently all trial court hearings have been held in both cases. In the Stricklin case, the last hearing was held February 4, 2004, almost 7 months ago. In the Mathiason case, the last hearing was held on May 20, 2004, approximately 4 months ago.

The Court does recognize that the Trial court is severely understaffed and under funded. Currently, this justice system serves approximately 19,000 people. In 2003, the Turtle Mountain Tribal court system handled approximately 3,800 civil and criminal cases. See BIA Tribal Budget Advisory Council Survey, submitted by Judge Shirley Cain, 9/14/04. This is equivalent to a caseload of a much larger community. However, the total amount funded by the BIA is $326,000. See id. The total amount that this court system is underfunded by the BIA for 2004 is estimated at $331,000. See id.

But since this matter has been brought to the attention of the Court, the Court must consider the effect of continued delays to the parties in receiving final written orders.

Therefore, it is ordered that Judge Cain and Judge May shall issue final written orders in the Mathiason and Stricklin cases within 60 days of this date. It is further ordered that in the future, the trial court shall issue written orders on all final decisions within 90 days after the last hearing.

Dated this 14th day of October, 2004.

[seal]

Huma Ahsan

Huma Ahsan
Acting Chief Justice and Justice Gerald Gardner and Justice Christine Jongeling concurring.

**IN THE TURTLE MOUNTAIN COURT OF APPEAL**
**TURTLE MOUNTAIN BAND OF CHIPPEWA INDIAN RESERVATION**

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| Vance Gillette, Attorney, and on behalf of his clients, Petitioners, v. William Marcellais, Victor Delong, Madonna Marcellias, Andrew DeCoteau, Respondents | TMAC NO. 04-006 **ORDER DENYING PETITIONS FOR HABEAS CORPUS, SUPERVISORY WRIT, REQUEST TO SHOW CAUSE, and STAY** |

On June 16, 2004, Attorney Vance Gillette filed a petition for Habeas Corpus and Supervisory Writ in Turtle Mountain Court of Appeals concerning his June 10, 2004 arrest for alleged violation of Turtle Mountain Code section 26.1119 (Protection of Tribal officials and employees of the Turtle Mountain Band of Chippewa Indians). On July 1, 2004, Mr. Gillette supplemented his initial petition with a Request for Stay and Order to Show Cause. Mr. Gillette is asking this court to bar prosecution of him under section 26.1119 of the Turtle Mountain Code.

The issue before this court is whether the petitioner, Mr. Gillette, has exhausted all available remedies in the trial court below. The two leading federal cases on exhaustion of remedies are *National Farmers Union Insurance Co. v. Crow Tribe of Indians* 471 U.S. 845 (1985) and *Iowa Mutual Insurance Co v. LaPlante* 480 U.S. 9 (1987).

In *National Farmers*, the United States Supreme Court held "the petitioners had a duty to exhaust their tribal court remedies before invoking the jurisdiction of a federal court." *Id* at 849. The federal court promotes tribal self-government and self-determination by deferring to tribal courts in the first instance. Finally, the Court made their point clear when they said that "the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the tribal court before either the merits or any question concerning appropriate relief is addressed." *Id* at 856.

In *Iowa Mutual Insurance v. LaPlante*, 480 U.S. 9 (1987), an Iowa insurance company brought suit in federal district court against certain members of the Blackfeet Indian Tribe of Montana based on diversity of citizenship. The Court held that the Blackfeet Tribal Court must first be given the opportunity to determine its own jurisdiction. *Id* at 13. They also held that the federal district court could only hear this case if the Blackfeet Tribe decides not to "exercise exclusive jurisdiction. The Court explained that promotion of tribal self-government and self-determination required that the tribal court have "the first opportunity to evaluate the factual and legal bases for the challenge" to its jurisdiction. *Id* at 15. It is important for the tribal courts to have the "full opportunity" to hear issues and "rectify any errors" before that issue moves on to another forum. "At a

minimum, exhaustion of available remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts." *Id* at 17.

The Court of Appeals for the Eighth Circuit in *Gaming World International, Ltd. V. White Earth Band of Chippewa Indians* held that the federal district court erred by not deferring to tribal court. 317 F.3d. 840. This dispute arose out of the construction and management of a casino in Minnesota. "The Tribal exhaustion doctrine...favors exhaustion of available remedies before a collateral or parallel federal court action may proceed." *Id* at 849. Further, "federal court restraint is especially appropriate where the issues between the parties grow out of tribal governmental activity involving a project located within the borders of the reservation." *Bruce H. Lien Co.*, 93 F.3d at 1420.

Like federal courts, tribal appellate courts routinely require exhaustion of remedies. In *Bowman v. Bowman* a petition for relief from a default judgment was filed in the Appellate Court of the Hopi Tribe. The court held that exhaustion of lower court remedies was required, before the court of appeals could review substantive claims. No. 99AP000004 (Hopi Tribe Court of Appeals, 1999). *See also Hoover v. Colville Confederated Tribes*, 3 Colville Tribal Court Reporter 43 (Colville Confederated Tribes Court of Appeals, 2002) (http://www.tribalresourcecenter.org/opinions/opfolder/2002.NACC.0000004.htm) (resulting from federal order to exhaust remedies).

In this case, since Mr. Gillette has not yet exhausted his remedies in the Turtle Mountain Trial Court since his case has not yet been heard in the trial court. If Mr. Gillette were to be convicted on this charge in the trial court, then the issues he is raising would be ripe for an appeal to this court.

**The Court hereby DENIES** Mr. Gillette's request for a Writ of Habeas Corpus, Supervisory Writ, Request to Show Cause, and Stay. If Mr. Gillette were to be convicted on this charge, this court would then consider any motions for Stay or Writ of Habeas Corpus in an expedited manner.

Dated this 16th day of July, 2004.

Huma Ahsan

[seal]

Huma Ahsan
Acting Chief Justice with Justices Gerald Gardner and Rion Ramirez concurring.

Turtle Mountain Appellate Court

| | | |
|---|---|---|
| Tribal Mountain Jurisdiction<br>Belcourt, ND | | Civil Division |
| Jacqueline Solberg,<br>Appellant<br><br>vs.<br><br>Alan Wilkie,<br>Appellee. | ) | **OPINION**<br><br>TMAC-04-002 |

With JUSTICE VONDALL writing the Opinion, the Appellate Justice panel included Chief Justice AHSAN, Justice FLETCHER and Justice VONDALL.

Appellant Jacqueline Solberg appeals from the findings of the trial court for the tribe on January 27, 2004, judge Beverly Mae residing. After hearing testimony and examining the evidence involved in this custody case, Judge Mae found in favor of the Appellee and awarded him custody of three minor children born from the marriage/relationship between the parties. Appellant Solberg appeals on the grounds that:

> A. The court made no finding concerning the best interestes of the children. Despite no best interest finding, the Court awarded custody to the petitioner "based on the respondent's alcohol usage." Neither the Findings for the Judgmet explain any details of the respondent's alcohol usage and how that usage adversely impacts the children.
>
> B. Visitation: In the event the custody decision is not reversed we ask the Court to give extended summer visitation of 3 months rather than the 2 two week periods as ordered by the Court.

(Appellant's Request for Permission to Appeal at 1).

## FACTS

The parties were married September 8, 2000 in Devils Lake, North Dakota and have parented three (3) children: Callista Wilkie (DOB: 7/20/2002), Wolfgang Wilkie (DOB: 7/20/2002) and Elizabeth Wilkie (DOB: 10-1-1998). The parties were separated in January

2002, at which time the children resided with their father, Appellee in the above-captioned matter. Subsequently, the court awarded the couple a divorce and outlined the Terms for Judgment in its Opinion on January 27, 2004, wherein the Court awarded physical custody of the three children to their father. The Opinion also outlined "reasonable and liberal visitation with the minor children" to their mother. (Opinion of 1/27/2004 at 4). Appellant's Request for Permission to Appeal was filed February 26, 2004 with this Court.

**ISSUES**

1. What standard of review to use in custody appeals with the Turtle Mountain Band of Chippewa tribal court system.
2. Whether the evidence submitted was sufficient to justify the verdict.
3. Whether visitation should be reconsidered on remand to the tribal court.

**ANALYSIS**

This Court met on January 7, 2005 to discuss the issues in this matter. Present during the Oral Arguments were Appellant's attorney, Mr. Arne F. Boyum. Appellee Wilkie and his attorney, Robert (Bob) Ackre. Appellant, as Mr. Boyum explained, was unable to attend the Oral Arguments, nor was she required to be present.

Prior to hearing Oral Arguments, the panel of justices reviewed the tapes of the trial court hearing that took place on January 27, 2004.

A. Standard of Review

Before proceeding to the issues outlined in the Appellant's Request for Permission to Appeal, the Justices asked the attorneys a single question: "What standard of review should this court apply to child custody cases on review?" Both attorneys agreed that the same should be applied to this Court as does in most other jurisdictions with similar judicial systems, that a clearly erroneous standard should apply. The Court noted that an opinion on the Standard of Review in child custody appeals cases will address this issue in *Keplin v. Keplin.* Without that order, this Court agreed with the attorneys in the current matter, which is that a clearly erroneous standard be the basis of review on matters of child custody.

This Court, in addition, briefly discussed the standard of review issue similar to this situation in *Laducer v. Laducer*, which was decided on September 11, 1990: "A basic principle defining the proper role of an appellate court is that it should disturb a trial court judgment *only* when the proceeding, taken as a whole, can be said to have resulted in a denial of substantial justice or involved a serious departure from established procedure." Therefore, a clearly erroneous standard should be applied to similar cases and, more importantly, to the case at hand.

B. Best Interest Factors, TM Code §9.0902

The Tribal Code of the Turtle Mountain Band of Chippewa, §9.0902, lists five best interest factors to consider when determining custody of children. They are:

(1) The wishes of the child's parent or parents as to his custody;

(2) The wishes of the child as to his custodian;

(3) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;

(4) The child's adjustment to his home, school, and community; and

(5) The mental and physical health of all individuals involved.

These factors are the very guiding principles that the Appellant alleges the trial court failed to fully consider in this matter. Although the trial court opinion did not contain language that shows how a reflective and considerate trial court opinion was reached, this Court finds that the trial court did, indeed research its findings before signing the Opinion.

During his oral argument, Attorney for Appellee admitted to drafting the Court Opinion and admitted that he should have been more detailed about how the trial court discussed its findings of fact with respect to each of the five best interest factors. This Court did, indeed, listen to the taped recording of the January 27, 2004 hearing, in which considerable testimony and discussion on the lives of all the parties involved in this matter were discussed. The testimony at trial discussed the extent of alcohol use by the Appellant. During one period of time when the Defendant was on bed rest due to a leg injury, in fact, Social Services had been called to the home after a complaint was made. Upon arrival of the social service worker, Defendant

testified at trial, Appellant was suppose to be caring for the children but was intoxicated. Appellant does not deny that she, in fact has a drinking problem and only denies the extent at which she can care for her children. Defendant, on the other hand, testifies that he has been sober for a number of years primarily so that he can provide his children with a somewhat normal lifestyle. Based upon review of the trial court tapes and confirmation of his testimony at this trial, the Court of appeals finds that the trial court findings were based on clear evidence and testimony.

A similar opinion was reached in *Gustafson v. Gustafson* on June 28, 1990. (*Id.* at 3). The Appellant in this matter appealed the lower court's decision based upon, for one, the claim that the evidence submitted was insufficient to justify the verdict. Justice Sayers, writing for the Court, found that "while Judge Morin should have reflected his findings in memorandum opinion; nevertheless, the finding and order is proper."

In addition, in *Laducer v. Laducer,* this Court also reviewed the transcript of the court proceedings regarding custody of minor children in that matter and decided that the trial court's findings were proper. This Court in this matter decides likewise.

C. Visitation Schedule

Appellant has requested that, should the Court find that the trial court did not err in its judgment, that it reconsider the visitation schedule. This Court is not the proper determinant for making decisions on amending the visitation schedule for the children with Appellant Selburg.

In *Laducer v. Laducer*, this Court states: "the Appellate Court may not substitute its judgment nor impose its findings upon the trial court absent a clear abuse of discretion." (*Laducer* at 5). The guidelines of ruling in the Turtle Mountain Court of Appeals are clear. The Court must also apply the clearly erroneous standard in reviewing the decision to limit supervision to the mother of the children in this matter. Again relying on the trial court tapes and hearing the testimony of both parties at trial, this Court finds that the trial court appears to have fully taken into consideration the factors outlined in T.M. §9.0902 on review of the trial court's findings with regard to the visitation schedule.

**DECISION**

This Court, therefore, finds that the trial court did not err in its visitation schedule, nor did it err in its determination to award the father, Appellee, in this matter with physical custody of the three minor children.

Judgement of the Trial Court of the Turtle Mountain Band of Chippewa in this matter is AFFIRMED.

Dated this _____ day of _____, 2005.

FOR THE COURT:

_____ _____

Justice Monique L. Vondall Justice Matthew Fletcher

Concurring: Chief Justice Huma Ahsan