

STOCKBRIDGE-MUNSEE COURT OF APPEALS

Mohican Nation

Stockbridge-Munsee Community

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

Case No. AP-2016-RO-0006

v.

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

MEMORANDUM OPINION AND ORDER

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

INTRODUCTION

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

JURISDICTION

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

PROCEDURAL BACKGROUND

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

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

ISSUES PRESENTED

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

STANDARD OF REVIEW

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

ANALYSIS

Lack of Standing to Sue

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

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

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

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

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

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

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

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

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

Failure to Recuse

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

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

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

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

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

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

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

CONCLUSION

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

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

IT IS SO ORDERED.

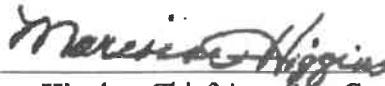
Dated this 1st day of December, 2016.

BY THE COURT OF APPEALS:



Diane House, Lead Appellate Court Judge Pro Tempore

Jeryl L. Perenich, Appellate Court Judge Pro Tempore



Marianne Higgins, Chief Appellate Court Judge



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Judge Perenich, Concurring in part and dissenting in part.

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

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

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

Dated this 1st day of December, 2016


Hon. Jerry L. Perenich
Judge Pro Tem

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