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

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

Before Smith, Chief Justice, Bichler and Lochen, Justices

Opinion By Lochen, J.

I. SUMMARY

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

II. BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. ISSUE

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

IV. DISCUSSION

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

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

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

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

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

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

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

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

¹² *Id.* at *3.

¹³ *Id.*

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

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

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

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

V. CONCLUSION

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

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

VI. ORDER

The Court ORDERS:

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

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

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

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

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

Entered this 8 day of January, 2019.



Eric M. Lochen
Associate Justice

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

cc All parties via Clerk of Court

