

SEP 01 2021

BRITTANY A KROENING  
DEPUTY CLERK OF COURT

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

GREGORY MILLER and SCOTT R. VELE,	)	Appeal No. 2021-AP-0001
Plaintiffs/Appellants,	)	Tribal Judge Gwendolyn M.S. Topping
	)	
vs.	)	
	)	
STOCKBRIDGE-MUNSEE COMMUNITY,	)	Trial Nos. 2021-CV-0009
<u>et al.</u> ,	)	2021-CV-0011
	)	
Respondent/Appellee.	)	ORDER REMANDING CASE

*Before: Smith, Chief Justice; Bichler & Lochen, Justices*

*Order by: Smith, C.J.*

**RELEVANT FACTS**

Appellants, Gregory Miller and Scott R. Vele, sued the Stockbridge-Munsee Community, (“Community”), on March 29, 2021 over tribal membership issues in Case Number 2021-CV-0009. On April 19, 2021, the Community filed a motion to dismiss this case on the grounds of lack of subject matter jurisdiction and tribal sovereign immunity. No response to this motion appears in the appellate record.

On April 28, 2021 a hearing of some sort was scheduled before the Honorable Gwendolyn M.S. Topping, the President of the Wisconsin Tribal Judges Association, (“WTJA”),<sup>1</sup> sitting *pro tem* as a special judge due to a recusal of the Stockbridge-Munsee tribal court judge.<sup>2</sup> Neither Appellants, nor their counsel, appeared for the April 28, 2021 hearing. The *Pro Tem* Judge dismissed the case with prejudice pursuant to S-M Tribal Code § TCT.02.06(b)(2). While an extreme result, the tribal code clearly offers this option for the

<sup>1</sup> The Honorable Gwendolyn M.S. Topping is the Associate Judge of the Red Cliff Band Tribal Court. Said court is based in Bayfield, WI, approximately 225 miles from Bowler, WI.

<sup>2</sup> As a courtesy to facilitate tribal justice, the WTSA will provide substitute judges to hear conflict cases for other tribal courts. This Honorable Court appreciates the WTSA for offering this vital service to both this Court, the Community, and other tribal courts throughout Wisconsin.

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failure to prosecute a case. Instead of filing a motion to alter or amend or a motion to reconsider the dismissal, Appellant's counsel refiled the original complaint in a near verbatim form on April 28, 2021, (approximately thirty-five {35} minutes after the first case was dismissed), as case number 2021-CV-0011. The Pro Tem Judge dismissed this case on May 3, 2021.

Without belaboring the point, Appellant's arguments in their brief range from: A) Relevant (improper notice of the argument on the motion to dismiss); to B) Illogical (the judge of the Red Cliff Band Tribal Court acting as a "rubberstamp" for the Stockbridge-Munsee Tribal Council);<sup>3</sup> to C) Absurd (implying that it is the court clerk's fault that Appellants did not check time zones for court).

For the purposes of this order, the dispositive facts are as follows:

- I. S-M Tribal Code § TCT.02.08(b) and (c) guarantees litigants ten (10) days to respond to a motion to dismiss for lack of subject matter jurisdiction.
- II. The Community filed its motion to dismiss on April 19, 2021 and gave no notice of when the motion would be argued;
- III. The motion to dismiss was argued on April 28, 2021 and neither Appellants, nor their counsel, were present through Appellants' own mistake; and
- IV. Tribal Enrollment cases are amongst the most emotionally charged lawsuits in Indian Country.<sup>4</sup>

### ANALYSIS

Appellants argue that the Tribal Court lacks the power to dismiss a lawsuit for Appellants not appearing in court to argue a case that Appellants filed. Appellants are wrong. See, S-M Tribal Court Rules of Procedure 12(B)(2). As an alternative argument, Appellants assert that

<sup>3</sup> See note 1 that Judge Topping presides 225 miles away from Bowler, WI.

<sup>4</sup> See generally, William R. Norman, Jr., Kirke Kickingbird, and Adam P. Bradley, *Tribal Disenrollment Demands a Tribal Answer*, 43 Human Rights 12, 14 (2017).

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since Appellants' counsel, who practices and resides in New Mexico, is in a different time zone and unfamiliar with Stockbridge-Munsee court cases, ordinances and rules; then the Court Clerk has a duty to shepherd Appellants' case through the litigation process. Again, Appellants are wrong. The Court staff have no duty to act as law clerk for any litigant or attorney, local or out-of-town. *See generally*, Gutierrez v. Deming Pub. Schools, 1996 U.S. App. Lexis 15808 (10<sup>th</sup> Cir. 6/28/1996), at \*5-\*6 and Young Bok Song v. Gipson, 423 Fed. Appx. 506, 510 (6<sup>th</sup> Cir. 2011). Actually, a duty of neutrality demands that neither the Court, nor court staff, actively help law-trained counsel for either a plaintiff or defendant to research, prepare or prosecute their case against an opposing party. *See*, Pankratz Farm, Inc. v. Pankratz, 95 P.3d 671, 685 (Mont. 2004) and M.W. v. State, 263 So.3d 214, 215 (Fla. App. 2019). "*Like any defendant, the Tribe is entitled to a fair trial before a neutral and impartial judge.*" Three Affiliated Tribes v. Country, 1997 Northern Plains App. Lexis 16 (N. Plains Inter. App. 5/31/1997), at \*5.

The Community, on the other hand, argues that even without a proper notice of a hearing on the motion to dismiss, an adversarial process such as litigation demands that parties be prepared for all contingencies -- irrespective of the circumstances. The Community is wrong in this "all or nothing" view. The *Pro Tem* Judge must follow the law, irrespective of whether a third-party observer might consider a decision either harsh or totally justified. "*The Government wins its points when justice is done in its courts.*" Brady v. Maryland, 373 U.S. 83, 87 n. 2 (1963).

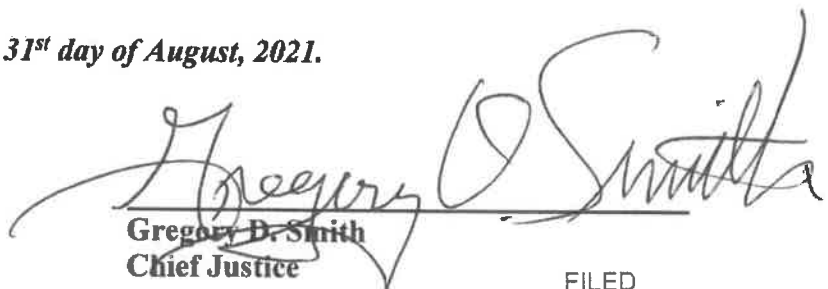
Neither party correctly cited the rule set out in S-M Tribal Code § TCT.02.08(b) and (c), which guaranteed Appellants ten (10) days to answer the Community's motion to dismiss. The lower court ruled on the pending motion after a mere nine (9) days. This is an error of law. As stated by the United States Supreme Court, "*justice must satisfy the appearance of justice.*"

Offutt v. U.S., 348 U.S. 11, 14 (1954). Ruling on a motion prior to the response time concluding does not meet the mandate of “appearing just.” Counsel for both parties should take notice that this case is being remanded solely for the lower court, whomever that judge may be, to timely rule on the motion to dismiss. After the motion to dismiss is decided, the case shall proceed accordingly. It shall be the Appellants’ responsibility to ensure that the motion to dismiss is timely heard according to the timeline set forth by this Court since the case is brought by Appellants. This Court takes no position on this matter except that the rulings to dismiss in April/May 2021 were made prematurely. **WHEREFORE, PREMISES CONSIDERED;**

This matter is remanded to the Tribal Court for the Stockbridge-Munsee Community for consideration of the Community’s motion to dismiss. This ruling shall be made within forty-five {45} days of this decision. Since the Chief Judge of the lower court has recused himself, a pro tem special judge will be needed to hear the matter, which may include the Pro Tem Judge that originally ruled on this matter. If no pro tem judge is readily available, this Court shall use its inherent powers to appoint a pro tem judge to hear the matter out of necessity.

**IT IS ORDERED.**

***Entered this 31<sup>st</sup> day of August, 2021.***

  
Gregory D. Smith  
Chief Justice

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***Justices Bichler & Lochen concur***

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cc: All parties

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