STATE OF MICHIGAN
IN THE SUPREME COURT

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,

Plaintiff/Counter-Defendant/Appellant,

v.

BERNARD BOUSCHOR; and **MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.; DANIEL T. GREEN; PAUL W. SHAGEN; JOSEPH M. PACZKOWSKI; DAVID E. SCOTT; JOLENE M. NERTOLI; JAMES M. JANNETTA; DANIEL J. WEAVER**, jointly and severally,

Defendants/Counter-Plaintiffs/Appellees.

S/C Case No.:
C/A Case No.: 276712
L/C Case No.: 04-7606-CC

PLAINTIFF SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS' APPLICATION FOR LEAVE TO APPEAL

WILLIAM H. HORTON (P31567)
ELIZABETH A. FAVARO (P69610)
Attorneys for Plaintiff
GIARMARCO, MULLINS & HORTON, P.C.
Tenth Floor Columbia Center
101 West Big Beaver Road
Troy, Michigan 48084-5280
Φ(248) 457-7000

P. DAVID PALMIERE (P26796)
Attorney for Defendant Bernard Bouschor
MCCONNELL & PALMIERE, P.C.
P. O. Box 980
Bloomfield Hills, Michigan 48304
Φ(248) 225-9952

WILLIAM A. SANKBEIL (P19882)
JOANNE GEHA SWANSON (P33594)
Attorneys for Defendant Miller Canfield
KERR, RUSSELL AND WEBER, PLC
Detroit Center
500 Woodward Avenue, Suite 2500
Detroit, Michigan 48226-3427
Φ(313) 961-0200

MARK L. DOBIAS (P35160)
Co-Counsel for Defendants Daniel T. Green; Daniel T. Green;
David E. Scott; James M. Jannetta; and Jannetta; and
Daniel J. Weaver
903 Ashmun Street

J. TERRANCE DILLON (P23404)
Attorney for Defendants David E. Scott; James M. Daniel J. Weaver
MYERS, NELSON, DILLON & SHIERK,

Sault Ste. Marie, Michigan 49783
Φ(906) 632-8440

PLLC
125 Ottawa Avenue NW, Suite 270
Grand Rapids, Michigan 49503
Φ(616) 233-9640

PLAINTIFF SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS' APPLICATION FOR LEAVE TO APPEAL

TABLE OF CONTENTS

Table of Authorities iv

Statement of Questions Involved vii

Order Appealed from and Relief Sought 1

Standard of Review. 2

Introduction 3

Facts. 7

Argument:

I.

THIS COURT SHOULD GRANT LEAVE TO RESOLVE CONFLICTING APPLICATION OF THE "PAYEE RULE" IN CONVERSION CASES AND PROPERLY APPLY ECHELON HOMES 17

II.

THERE IS NO FACTUAL DISPUTE THAT DEFENDANT BOUSCHOR DID NOT HAVE APPARENT AUTHORITY TO TERMINATE 25

III.

THE TRIAL COURT APPLIED THE INCORRECT PRINCIPLES TO PLAINTIFF'S CLAIM OF CONSTRUCTIVE FRAUD 32

IV.

THE TRIBE SUFFERED AN ACTUAL INJURY BECAUSE OF DEFENDANT MILLER CANFIELD . . 36

Relief Requested 38

TABLE OF AUTHORITIES

CASES:

Alan v Wayne County, 388 Mich 210; 200 NW2d 628 (1972) 33

Alfred Shrimpton & Sons v Culver, 109 Mich 577 (1896) 18

Anderson v Liberty Lobby, Inc, 477 US 242 (1986) 28

Barkey v. Nick, 11 Mich App 381; 161 NW2d 445 (1986) 33

Capital Bank v American Eyewear, Inc, 597 SW2d 17 (Tex App 1980) 27

Cozadd v Healy, 338 Mich 157; 61 NW2d 20 (1953) 19

Cullen v O'Hara, 4 Mich 132 (1856) 17, 21

Davidson v Bugbee, 227 Mich App 264; 575 NW2d 574 (1979) 18, 21

Echelon Homes, LLC v Carter Lumber Co,
472 Mich 192; 694 NW2d 544 (2005) 5, 17, 22, 23

Echelon Homes v Carter Lumber, 261 Mich App 424; 683 NW2d 171 (2004) .18

Entech Personnel Services Inc v. Feliciano Transport Inc,
Court of Appeals Case No. 249003 (December 14, 2004) 19, 20

Goldenberg v Bartell Broadcasting Corp, 262 NYS2d 274 (1965) 27

Har-Bel Coal Co v Asher Coal Mining, 414 SW2d 128 (Ky App 1966) 27

Hickory v United States, 160 US 408 (1896) 30

Houge v Wells, 180 Mich 19; 146 NW 369 (1913) 18, 19

Koenig v City of South Haven, 460 Mich 667; 597 NW2d (1999) 2

Lehaney v New York Life Ins Co, 307 Mich 125; 11 NW2d 830 (1943) 25

Little v Malady, 458 Mich 153; 579 NW2d 906 (1998) 28

Macomb County Prosecutor v Murphy,
464 Mich 149; 627 NW2d 247 (2000) 32

Mayhew v Edward Budd Co, 258 Mich 381; 242 NW 737 (1932) 26, 31

McDonald v Hall, 203 Mich 431; 170 NW 68 (1918) 23

Myers v Post, 256 Mich 156; 239 NW 315 (1931) 33

Navajo Nation v MacDonald, 885 P2d 1104 (Ariz 1994) 33

People v Christenson, 412 Mich 81; 312 NW2d 618 (1981) 17, 18

People v Cotton, 191 Mich App 377; 478 NW2d 681 (1991) 23

People v Tantenella, 212 Mich 614 (1920) 22, 23

People ex rel Plugger v Township Board of Overyssel,

11 Mich 222 (1863) 33

Reinforced Concrete v Boyes, 180 Mich 609; 147 NW 577 (1914) 25

Shaeffer v Burghardt,
Court of Appeals Case No. 267717 (May 15, 2007) 20, 21

Templeton v Nocona Hills Owners Ass'n, Inc, 555 SW2d 534 (Tex App 1977) .27

Thoma v Tracy Motor Sales, Inc, 360 Mich 434; 104 NW2d 360 (1960) . 17, 21

Thomas v Satfield, 363 Mich 111; 108 NW2d 907 (1961) 34

Thrift v Haner, 286 Mich 495; 282 NW 219 (1938) 17

Trail Clinic, PC v Bloch, 114 Mich App 700; 319 NW2d 638 (1982) 18

United States v George, 477 F2d 508 (7th Cir 1973) 34

United States v Silvano, 812 F2d 754 (1st Cir 1987) 34

Waszawa v White Eagle Brewing Co, 20 NE2d 343 (Ill App 1939) 27

Westchester Fire Ins Co v Hanley, 284 F2d 409 (6th Cir 1960) 25

STATUTES AND OTHER AUTHORITY:

MCL 600.2919a 15

MCR 7.202 4

M Civ JI 128.02 34

STATEMENT OF QUESTIONS INVOLVED

I.

DID THE TRIAL COURT AND COURT OF APPEALS ERR IN APPLYING THE "PAYEE RULE" TO PLAINTIFF'S CONVERSION CLAIM AND IN APPLYING ECHELON HOMES TO PLAINTIFF'S STATUTORY CONVERSION CLAIM?

Plaintiff/Appellant Answers:
"Yes"

Defendants/Appellees Answer:
"No"

The Trial Court Answers:
"No"

The Court of Appeals Answers:
"No"

II.

DID THE TRIAL COURT AND COURT OF APPEALS ERR IN FINDING A FACTUAL DISPUTE THAT DEFENDANT BOUSCHOR DID NOT HAVE APPARENT AUTHORITY TO TERMINATE?

Plaintiff/Appellant Answers:
"Yes"

Defendants/Appellees Answer:
"No"

The Trial Court Answers:
"No"

The Court of Appeals Answers:
"No"

III.

DID THE TRIAL COURT AND COURT OF APPEALS APPLY THE INCORRECT PRINCIPLES TO PLAINTIFF'S CLAIM OF CONSTRUCTIVE FRAUD?

Plaintiff/Appellant Answers:
"Yes"

Defendants/Appellees Answer:
"No"

The Trial Court Answers:
"No"

The Court of Appeals Answers:
"No"

IV.

DID THE COURT OF APPEALS ERR IN HOLDING THAT THE TRIBE DID NOT SUFFER AN ACTUAL INJURY BECAUSE OF DEFENDANT MILLER CANFIELD?

Plaintiff/Appellant Answers:
"Yes"

Defendants/Appellees Answer:
"No"

The Trial Court Answers:
N/A

The Court of Appeals Answers:
"No"

ORDER APPEALED FROM AND RELIEF SOUGHT

1. ORDER APPEALED FROM.

The Court of Appeals issued an opinion dated November 18, 2008. **Exhibit 1**. A copy of the trial court's opinion and order is attached as **Exhibit 2**.

2. RELIEF SOUGHT.

Appellant requests that this Court: (1) reinstate its common law and statutory conversion claims; (2) enter summary disposition in its favor that Defendant Bouschor did not have apparent authority to enter into severance agreements and terminate the Key Defendants; (3) enter summary disposition in the Tribe's favor on its constructive fraud claim; and (4) reinstate its legal malpractice claim against Defendant Miller Canfield.

STANDARD OF REVIEW

This case arrives in this Court following motions for summary disposition by all parties. Rulings on summary disposition motions are reviewed de novo. Koenig v City of South Haven, 460 Mich 667, 674; 597 NW2d (1999).

INTRODUCTION

1. Summary of the Case.

This case involves the breach of the public trust by public officials. Plaintiff/Appellant is the Sault Ste. Marie Tribe of Chippewa Indians. Defendants are Bernard Bouschor, the former Chairman of the Tribe, the seven highest ranking employees of the Tribe and the Tribe's law firm.

In advance of Defendant Bouschor's bid for re-election, Defendants planned and executed a scheme to secretly take approximately $2.6 million in the middle of the night from the Tribe if Defendant Bouschor lost the election. About a month before the election, the Defendants began drafting secret severance agreements that purported to "terminate" the seven employees (Defendant Bouschor's long time allies) and pay them lump-sum "severance compensation." About two weeks before the election, in the evening when everyone was gone, they secretly went into the Tribe's payroll system, fraudulently circumvented the Tribe's financial controls, and wrote themselves massive checks. Then, they waited for the outcome of the election.

Defendant Bouschor lost the election. The next morning, Defendants literally took the money and ran — they passed out the secretly-written checks and were the first customers at the bank when it opened, where they converted the payroll checks into cashier's checks to prevent the Tribe from stopping payment.

2. Summary of Proceedings.

The Tribe immediately filed suit seeking to recover the money. After discovery closed, on cross motions for summary disposition, the trial court held that the severance agreements were invalid, Defendant Bouschor was not immune because he acted outside the scope of his authority, and found factual disputes on a number of other issues. The trial court also dismissed Plaintiff's claims for conversion and statutory conversion, held that whether Defendant Bouschor had apparent authority to enter into the agreements was a question of fact and that he could defend the constructive fraud claim by presenting evidence at trial that what he did benefitted the Tribe.

Since one of the issues was whether Defendant Bouschor was entitled to governmental immunity, he could immediately appeal, MCR 7.202(6)(a)(v), and he did. All other parties where then entitled to appeal and did. In an unpublished opinion, the Court of Appeals affirmed the trial court in all respects, except that it dismissed Plaintiff's claim of legal malpractice against Defendant Miller Canfield. (Miller Canfield remains a party as a co-conspirator on the other counts).

3. <u>Why This Court Should Grant Leave</u>.

This Court should grant leave for four reasons.

<u>First</u>, this Court should reverse the dismissal of Plaintiff's claims of conversion and statutory conversion. The case law is conflicting and, as a result, caused a clearly erroneous decision by the trial court and Court of Appeals. Specifically, the conflict occurs because, on the one hand, case law is clear that a person cannot be held liable in conversion when that person is a payee on the check. On the other

hand, the cases are also clear that a payee is liable for conversion of money in the form of a check when the check was written or cashed without authority. These rules conflict in this case. Here, the recipients of the checks were the payees on them. But the checks were written by them without authority, as confirmed by both the trial court and Court of Appeals. Nonetheless, the conversion count was dismissed because the recipients were the payees on the checks. On information, belief and experience, trial courts struggle with clams of conversion when checks are involved. This Court should resolve the conflict.

As to the statutory conversion count, the trial court dismissed it because the common-law conversion count failed, **Exhibit 2** at 20, but the Court of Appeals affirmed on the basis that there was no evidence that Defendants Bouschor and Miller Canfield had actual knowledge that the money was converted. However, the Court of Appeals clearly erred in applying this Court's holding in Echelon Homes, LLC v Carter Lumber Co, 472 Mich 192; 694 NW2d 544 (2005) by failing to recognize that the circumstantial evidence produced by Plaintiff was evidence of those Defendants' actual knowledge, not constructive knowledge. This Court should use this case to correct the error and provide guidance as to the proper application of its holding in Echelon Homes.

Second, the issue of whether some of the Defendants are entitled to a trial on the question of apparent authority requires clarification of the role of a judge and jury. Here, the trial court essentially employed a subjective standard, stating that what these Defendants believed was a question for the jury. But, the legal question is whether these Defendants could reasonably believe

Defendant Bouschor had authority – an objective standard. Under an objective standard, under the facts of this case, no reasonable person could believe Defendant Bouschor had authority to do what he did and Plaintiff was entitled to summary disposition in its favor.

Third, the trial court and Court of Appeals held that Defendant Bouschor could defend the constructive fraud claim by showing he acted in the best interests of the Tribe. While this may be a defense to the Tribe's breach of fiduciary duty claim, it is not a defense to its constructive (or silent) fraud claim. Rather, the issue is whether the Defendants failed to disclose a material fact that misled the Tribe. It is undisputed that the taking of $2.6 million is material, that it was done in secret and that the Tribe would have stopped it if it had known about it.

Fourth, Plaintiff presented facts sufficient for a trial on the legal malpractice claim. The trial court did not dismiss the claim, but the Court of Appeals held that there was no legal injury. The Court of Appeals held that the Tribe got a better deal on the severance amounts than if they had fired the Defendants – sheer speculation. The testimony of the new Chairman was that while he certainly did not like some of the Defendants, he would not have fired them without cause. Holding that there was no legal injury because the Tribe paid less than what it would have been required to pay if the Tribe fired them in a manner which triggered the severance provisions of the employment agreements assumes – without evidence – that they would have been fired.

FACTS

1. The 2004 Tribe Election.

The Sault Ste. Marie Tribe of Chippewa Indians is a federally recognized, sovereign Indian tribe. The Tribe is governed by a Board of Directors, which includes a Tribal Chairperson. The Directors and the Chairperson are elected by the members of the Tribe every four years.

The Tribe held an election in 2004. The race for the position of Chairperson was hotly contested. The incumbent, Defendant Bernard Bouschor, had been the Chairperson for 17 years. During that time, he had placed his supporters in the highest positions in the Tribe, including Defendants Green (General Counsel), Scott (Director of Human Resources), Jannetta (Deputy General Counsel), Weaver (Chief Financial Officer), Shagen (Director and Assistant General Counsel), Nertoli (Executive Director of the Tribe), and Paczkowski (Special Assistant to the Chairperson). These Defendants are referred to as the "Key Employees."[1]

Defendant Bouschor's challenger, Aaron Payment, was a member of the Board of Directors. Mr. Payment and others had taken issue with Chairperson Bouschor's policies and accused various high-ranking Tribal officials of working in the best interests of Chairperson Bouschor, rather than the Tribe. On the night of June 24, 2004, the election results showed that Mr. Payment had defeated Defendant Bouschor.

---

[1] The Tribe has settled with Nertoli, Paczkowski, and Shagen and they are not parties to this appeal.

2. The Scheme.

In anticipation of Mr. Payment's potential victory, Defendant Bouschor and the Key Employees devised and implemented a secret scheme to allegedly "terminate" the Key Employees and pay them severance pay under their employment agreements if Defendant Bouschor lost.

The plan began on May 19, 2004, when the Tribe held a primary election to reduce the number of candidates running for the position of Tribal Chairman from five to two. The two candidates receiving the most votes were Defendant Bouschor and Aaron Payment. Mr. Payment came in first, beating Defendant Bouschor. On the morning after the primary election results became final, May 26, 2004, Defendants Bouschor, Green and Jannetta – sensing a potential defeat — called Defendant Miller Canfield (the Tribe's law firm) and asked it to start drafting new employment contracts, which would say that the Tribe fired the seven, paid them "severance pay" and released them from liability. They provided a sample for Miller Canfield to use as a template. **Exhibit 3**, May 26, 2004 Facsimile and June 1, 2004 E-Mail to Miller Canfield. They also asked Miller Canfield to draft an opinion letter that said that Defendant Bouschor had the authority to do this without the knowledge or approval of the Tribal Board.

Defendant Miller Canfield went to work with two of the Tribe's lawyers – General Counsel Defendant Green and his chief assistant, Defendant Jannetta. Over the course of the next two weeks, they

drafted, redrafted, edited, reviewed, e-mailed and revised severance agreements. A sample of some of those documents is attached as **Exhibit 4**. They even drafted a so-called opinion letter that said the Chairperson could do this without the Board's approval. **Exhibit 5**, June 8, 2004 Opinion Letter.[2]

On June 9, 2004, Defendant Miller Canfield e-mailed final versions of the Severance Agreements to Defendant Green's personal e-mail. They all met at an attorney's office in Sault Ste. Marie and signed the Severance Agreements. **Exhibit 6**, Severance Agreements. The Severance Agreements contain numerous provisions not included in the Employment Agreements. Among other things, the Severance Agreements allow the allegedly terminated employee to revoke them depending on the election results. Id. at ¶8(b).

Just before they signed the Severance Agreements, Defendant David Scott — the Director of Human Resources who ran the payroll system — cut the checks in secret and deleted any record from the Tribe's computer system. On June 8, 2004, Defendant Scott prepared and had Defendant Bouschor sign an "authorization" purportedly allowing the money to be withdrawn. **Exhibit 7**. Then, Defendant Scott asked one of his payroll clerks to meet him in the payroll office after hours. Since these checks were not written in the normal course of business, the Tribe's financial controls required an entry to be made in the "handcut check register." Defendant Scott had his assistant forge

[2]The opinion letter is a sham. Even the cases they cite in the letter do not stand for the proposition they allege (See **Exhibit 2**, Trial Court Opinion at 25) and the letter was drafted after they drafted the Severance Agreements.

the entry in the register, making it appear that a check was written to one of the dentists at the health care center for vacation pay. A copy of the Register and the actual payment to the dentist is attached as **Exhibit 8**. Then they caused the computer to print the checks. **Exhibit 9**, copies of the checks. Once they caused the computer to write the checks, they deleted the transaction from the computer system so it could not be detected. That ledger has since been found. **Exhibit 10**.

None of this is disputed. Defendant Scott admitted that he met with his assistant, Shelly Shelleby, after normal work hours to ensure that no one would discover the scheme:

> A. I recall having a discussion with Shelly and saying, "This information needs to be kept confidential. How can we achieve that?"
>
> And she said, "Well, if it's on the system, people have access to it, so in order to keep it confidential, the records can be run and items can be printed and then I can remove it from the system."
>
> And I said, "Let's do it. Then we need to do that."
>
> Q. And you -- was this meeting after normal work hours?
>
> A. It was Friday evening after the employees had left because, again, you're in a very small room with no confidentiality and there would be no way to discuss it because people sit right across from one another without there being nobody else but Shelly there.

Exhibit 11, David E. Scott Dep. at 68-70.

Defendant Weaver, the Tribe's CFO, testified about how Defendant Scott reported back to him and Defendant Green that this part of the plan had been executed:

> Q. That's what I wanted to ask you, when you did get back together, who met?
>
> A. Dan [Green], Dave [Scott] and I.
>
> Q. And what was the conversation?
>
> A. Regarding that he had talked to Shelley. In order to keep this confidential, this was the recommendation of putting the stuff on the system and then taking it back off the system to process the checks and they would keep the checks and Dave would keep the checks and the paperwork because of the -- they couldn't keep them in Shelley's location because of the security issues. . . and they couldn't provide the security that was needed in order to keep this -- everything confidential.

Exhibit 12, Daniel T. Weaver Dep. at 63-64.

They admit they planned and executed the scheme in secret. For example, Defendant Jannetta stated:

> Q. By the way, did -- when you were talking with Mr. Green or anyone else related to this transaction before the general election on the, I think it was on June 24th, did anybody say to you, you know, hey, Jim, you remember we got to keep this under our hat, meaning obviously that to keep it secret?
>
> A. Again, I don't recall a specific conversation, but it was common

understanding and certainly my understanding that we would -- we did not want this to become public or known.

Exhibit 13, James M. Jannetta Dep. at 126.

Defendant Weaver stated:

Q. Did Dave [Defendant Scott] explain to you at this meeting when the three of you got together, why the methodology of cutting the checks was as we talked about, put them on, cut the checks, take them off.

A. They felt it was the best way to keep it secure.

Q. And when you say secure, you mean keep it secret?

A. Keep it secure from the employees and whatnot knowing about it, that's correct.

Exhibit 12, Weaver Dep. at 66-67.

Defendant Scott and others admit that the reason it was done in secret was so that the Tribe could not stop them:

Q. Would you agree that at least in part, one of the reasons why this was kept confidential was that so nobody could stop the payments from being made? Would you agree with that statement?

A. No. Nobody could stop the payment from being made.

THE WITNESS: I would say there would be a concern that if people became aware

that those checks were cut, then that could, you know, create quite a volatile situation.

Q. And stop the payment of those checks, correct?

A. Potentially.

Q. And it's true, isn't it, that you assisted in devising a means of getting these checks cut so that no one would know that they were cut, correct?

A. Correct.

Exhibit 11, Scott Dep. at 61-62.

After the Defendants signed the secret new agreements and wrote the checks, they went to work for the next 16 days, just like usual. In fact, they even collected their regular pay checks the next week.

3. Defendants Take the Money and Run.

The morning after the election, after learning that Aaron Payment had defeated Defendant Bouschor, the seven Key Employees met at a restaurant in Sault Ste. Marie, handed out the checks and ran to the bank to cash them. The bank records show that they started cashing them at 9:07 a.m., right after the bank opened. **Exhibit 14**. They did not just cash the checks — they had them converted into cashier's checks. **Exhibit 15**. They have admitted that they converted the money into cashier's checks so the Tribe could not stop payment. **Exhibit 16**, Jolene M. Nertoli Dep. at 79 (they "wanted to make sure they got the money and nobody could stop them"). Then, they deposited the money in different banks all around the Upper Peninsula and in Petoskey.

At about 10:30 a.m., Defendant Bouschor announced that he had terminated the seven Key Employees because he wanted to "clear the way for Mr. Payment." He did not mention that they had been paid "severance pay." About three hours later, at 1:30 p.m., someone went back into the Tribe's computer and entered the ledgers they had deleted on June 8.

Defendants do not deny these facts. Instead, they claim (among other things) that Defendant Bouschor was authorized to enter into the severance agreements vis-a-vis a 2001 resolution passed by the Tribal Board. Resolution No. 2001-07, attached as **Exhibit 17**, authorized "the Tribe, through its Chairman to enter into Employment Agreements with Key Employees, on such conditions and terms as he deems appropriate, and to perform its obligations thereunder." Id.

But shortly after this resolution was passed, a problem arose because Defendant Bouschor refused to inform the Board to whom he was giving the contracts or even how many he had executed – potentially creating a huge liability for the Tribe. As a result, about 18 months after the Tribal Board authorized the contracts, it voted to revoke the Chairperson's authority "on employment contracts" and required that "all future employee contracts must be approved by the Board of Directors." A copy of the minutes showing that action is attached as **Exhibit 18.**

After this Resolution was revoked, Defendant Bouschor acknowledged that the Board had taken away his authority and he accepted that decision. In fact, he sent out an e-mail to Tribal members which stated:

> At the Board meeting in Munising the next day, August 20, [Director] Mike [Lumsden] spearheaded an effort to strip me of my authority to enter into "key employee" contracts – a type of contract Mike himself has. The Board had previously authorized employee contracts as a measure to ensure structural stability irrespective of the political process. He took this action in my absence, without my knowledge, and without informing the Board of what I believe were his true motives. Apparently, Mike believed that taking this action would prevent me from hiring a chief of staff. The Board voted to rescind my authority.
>
> Let me make something perfectly clear: I have no quarrel with the action the Board took. The Board adopted the resolution that gave me authority to enter into key employee contracts, and the Board can take that authority away. They did so and I accept and respect their action.

Exhibit 19, September 17, 2002 E-Mail at 2 (emphasis added).

It is important to note that the Tribal Board of Directors had previously enacted a resolution which limited the Chairperson from spending more than $50,000 unless specifically authorized by the Board. **Exhibit 20**, Resolution No. 1997-63.

4. The Proceedings Below.

At the end of discovery, all parties filed motions for summary disposition. In its opinion, attached as **Exhibit 2**, the trial court held that Defendant Bouschor did not have authority to execute the severance agreements, dismissed the Tribe's common-law and statutory conversion claims, breach of contract and tortious interference claims.

It also held that the remainder of the claims were factually disputed and, therefore, the court could not rule.

The Court of Appeals affirmed, except that it also dismissed the Tribe's legal malpractice claim against Miller Canfield. While the trial court broadly analyzed Defendant Bouschor's lack of authority, the Court of Appeals concluded that Resolution 1997-63 restricted the Chairperson from spending more than $50,000 without Board approval, making his expenditures unauthorized. **Exhibit 1** at 10. With respect to the Tribe's common-law conversion claim, the court held that dismissal was proper for two reasons. First, it held that, because "the checks were written to defendants key employees and were therefore the property of defendants key employees, and not the Tribe . . . there was no conversion in this case." **Exhibit 1** at 20. Second, it held that "the Tribe would not be entitled to the specific or identical moneys paid to defendants key employees under the severance agreements regardless of defendant Bouschor's authority to enter into the severance agreements . . . ." Id. at 21.

With respect to the statutory conversion claim against Defendants Bouschor and Miller Canfield, the court explained that MCL 600.2919a requires a showing that a defendant had actual knowledge that the property was converted, which the court held the Tribe did not show:

> Therefore, even if defendants Bouschor and Miller Canfield should have known that the severance payments were converted because defendant Bouschor did not have authority to enter into the severance agreements without the Board's approval, such constructive knowledge is not enough to

> impose liability under the statute. Plaintiff Tribe has not shown that defendant Bouschor or defendant Miller Canfield had actual knowledge that defendants key employees were not entitled to severance pay.

Id.

As for Defendant Bouschor's apparent authority to enter into the severance agreements, the Court of Appeals held that issues of material fact existed. In its reasoning, the court stated that:

> Plaintiff concedes that defendant Bouschor had fired four employees before firing and entering into severance agreements with the key employees and that Bouschor had made severance payments to at least some of those employees. However, plaintiff contends that in each case, if severance was paid, it was paid with the approval or knowledge of the Board or was for a small amount of money. Defendants key employees would not necessarily know if these severance agreements had been entered into by defendant Bouschor with or without the approval or knowledge of the Board, but the fact that the Board apparently did not object to or fight these terminations could lead the key employees to reasonably believe that defendant Bouschor had the authority to terminate employees and make severance arrangements with them.

Id. at 18. The Court of Appeals also pointed to "the questions regarding the effect of the motion of August 20, 2002, and the legal opinion of defendant Miller Canfield regarding defendant Bouschor's authority to enter into the severance agreements." Id.

As to the claim of constructive fraud, the Court of Appeals affirmed the trial court's ruling that while Defendant Bouschor could

not defend on the basis that he acted in good faith, he could defend on the basis that he believed he was acting in the best interests of the Tribe. Id. at 22-23.

While the Court of Appeals affirmed the trial court on all other issues, it reversed the trial court on the legal malpractice claim against Miller Canfield. The Court of Appeals held that the Tribe did not suffer a legal injury because the severance payments were 10% less than what the Tribe would have been required to pay under the employment agreements if the Key Defendants had suffered a qualifying termination. Id. at 16.

ARGUMENT

I.

THIS COURT SHOULD GRANT LEAVE TO RESOLVE CONFLICTING APPLICATION OF THE "PAYEE RULE" IN CONVERSION CASES AND PROPERLY APPLY ECHELON HOMES

This Court should grant leave to resolve the conflict between the "payee rule" and the rule that conversion occurs when the writing or cashing of a check is unauthorized. In addition, it should reverse the dismissal of the statutory conversion claim and provide guidance as to the application of this Court's ruling in Echelon Homes v Carter Lumber, 472 Mich 192; 694 NW2d 544 (2005), which has created confusion as to the difference among "actual knowledge," "constructive knowledge" and "circumstantial evidence."

A. COMMON LAW CONVERSION.

Conversion is a tort. Thrift v Haner, 286 Mich 495, 497; 282 NW 219 (1938) ("An action of assumpsit is an action which lies to recover damages for the nonperformance of a contract, while an action of trover or for conversion is an action of tort."). It is a tort against possession. People v Christenson, 412 Mich 81, 87; 312 NW2d 618 (1981) ("larceny by conversion is a crime against possession..."); Cullen v O'Hara, 4 Mich 132, 137 (1856) ("the plaintiff must allege and prove that the goods for which he brings suit are his...").

In most cases, such as the taking of tangible things like gold coins, Cullen, supra, a car, Thoma v Tracy Motor Sales, Inc, 360 Mich 434; 104 NW2d 360 (1960), or farm equipment, Davidson v Bugbee, 227 Mich App 264; 575 NW2d 574 (1979), application is fairly simple. However, in cases involving money represented by checks, the conflict in the case law becomes apparent.

On the one hand, "checks are considered the property of the designated payee." Trail Clinic, PC v Bloch, 114 Mich App 700, 705; 319 NW2d 638 (1982). Thus, the payee of a check is not liable for conversion because, "One cannot convert his own funds." People v Christenson, 412 Mich 81; 312 NW2d 618 (1981). E.g., Alfred Shrimpton & Sons v Culver, 109 Mich 577 (1896) ("There was no wrong in converting the check into money when the plaintiff expressly authorized it."); Echelon Homes v Carter Lumber, 261 Mich App 424, 437; 683 NW2d 171 (2004), rev'd on other grounds, 472 Mich 192; 694 NW2d 544 (2005) ("But in the instant case, American Title made the checks payable to Carter. Thus, they constitute Carter's personal property. Because the checks do not belong to Echelon, their conversion does not amount to the invasion of one of Echelon's legally protected interests."). This is the "payee rule."

On the other hand, conversion occurs when a person is not authorized to possess or cash the check in the first place. For example,

in Houge v Wells, 180 Mich 19; 146 NW 369 (1913), the plaintiff was owed money under a promissory note. She left the note with the defendant bank employee with instructions to collect the money and to place it in her account. When the maker of the note, who also owed the defendant money, gave the defendant a check payable to him for both debts, the defendant kept all the money. Under the payee rule, the defendant could not be liable. However, this Court used the defendant's lack of authority to conclude that the defendant had converted the money because:

> This fund never came to his hands as his money. He never had any right to its possession except for a certain purpose. His relations in this matter to plaintiff were fiduciary. His retention of this fund was therefore an unlawful conversion, and like conduct is defined and punished in this State as statutory larceny. To hold that such wrongful conversion cannot be made the basis of an action in trover would seem to be a stultification of judicial conscience.

Id. at 24 (emphasis added).

It appears that this Court and the Court of Appeals has concluded that the lack of authority trumps the fact that the check is made payable to the defendant. As further example, in Cozadd v Healy, 338 Mich 157; 61 NW2d 20 (1953), the plaintiffs gave the defendant $3,000 for payment to the IRS, but the defendant kept the money for himself, contending that they owed him the money. In

affirming the trial court's ruling in favor of the plaintiffs, this Court explained that the defendant was liable because –

> the $3000 never came into defendant's possession as his money. He never had any right to any part of it except for a certain purpose. His retention of the fund was an unlawful conversion.

Id. at 160.

Two recent Court of Appeals decisions reach similar conclusions. In Entech Personnel Services Inc v. Feliciano Transport Inc, Court of Appeals Case No. 249003 (December 14, 2004) (**Exhibit 21**), the plaintiff had outsourced some of its labor needs to the defendant and allowed defendant to pay those employees from plaintiff's accounts. Plaintiff later learned that the defendant had written checks to themselves and to employees who endorsed the checks back to defendants. Id. at 3. The trial court dismissed the claim of conversion, stating that "there can be no conversion of money unless there was an obligation on the part of defendant to deliver specific money to plaintiff." Id. at 7.

The Court of Appeals reversed. The Court held that the fraudulent manner by which the defendant came to possess the checks, i.e., lack of authority, stated a claim:

> Entech's complaint alleged that defendants obtained Entech's funds by misrepresenting their payroll and the person listed as payees on the payroll, and that the payees either endorsed the checks to defendants Feliciano and Transport or had their endorsements forged. Entech alleged that over $450,000 of the payroll payments were diverted to Mack and Falcon alone, and that Lee and Nicole

> Yesh received "unknown sums of money. . ." and that they therefore received checks and the proceeds thereof, to which they had no right.

Id. at 7.

Likewise, in Shaeffer v Burghardt, Court of Appeals Case No. 267717 (May 15, 2007) (**Exhibit 22**), the decedent had given the defendant authority to use her checking account for the purpose of paying her monthly bills. In addition to paying bills, the defendant wrote checks to herself. The conversion claim went to a jury, which found the defendant liable. The defendant appealed and the Court of Appeals affirmed, based upon the defendant's unauthorized use of the decedent's money:

> Notably, the decedent retained control of the checkbooks and banks statements during her lifetime. The decedent directed defendant regarding which checks to write or what bills to pay from the accounts. . . . However, defendant withdrew money from the accounts and used it for her own purposes.

Id. at 3-4.

The conflict of the two rules is apparent in this case. On the one hand, the trial court and Court of Appeals concluded that Defendant Bouschor lacked authority to enter into the severance agreements and to write the checks. **Exhibit 1** at 10; **Exhibit 2** at 6-12, 14. However, both courts then concluded that since the Key Employees were the payees on the checks, they were entitled to possession of them and Plaintiff could not support a conversion claim. **Exhibit 1** at 19-21; **Exhibit 2** at 20.

The trial court and Court of Appeals erred because of difficult-to-understand case law relating to the intangible nature of money represented by a check. It is clear that the taking of a tangible thing without authorization is conversion. E.g., Thoma v Tracy Motor Sales, Inc, 360 Mich 434; 104 NW2d 360 (1960) (automobile); Davidson v Bugbee, 227 Mich App 264; 575 NW2d 574 (1979) (farm equipment). When a person sneaks into the home of the decedent and takes his gold coins, the money has been converted. Cullen v O'Hara, 4 Mich 132 (1856).

If the Defendants had broken into the Tribe's vault and taken cash, conversion would have clearly occurred. Instead, the Defendants broke into the computer system which controls the money and caused secret checks to be written. The Court of Appeals stated that "the checks were written to defendants key employees and were therefore the property of defendants key employees, not the Tribe." **Exhibit 1** at 20. But this ignores the fact that Defendants stole the Tribe's checkbook and wrote the checks to themselves. The payee rule is only applicable if the check was written with authority. If the check is written without authority, the payee is liable in conversion. The taking of the money it represents constitutes conversion no less than if the defendant had taken a pile of $100 bills sitting on a table.

Here, Defendant Bouschor did not have authority to write a check for more than $50,000 without approval from the Tribal Board of Directors, **Exhibit 20**, he did not have authority from the Tribal Board and the checks were for more than $50,000. Plaintiff's common law conversion claim should be reinstated and summary disposition should be entered in favor of the Tribe on that count or remanded for trial.

B. STATUTORY CONVERSION.

The trial court dismissed the Tribe's statutory conversion claims against Defendants Bouschor and Miller Canfield apparently because it held that the Tribe had not stated a claim for common law conversion. **Exhibit 2** at 20. The Court of Appeals affirmed on the basis that the Tribe did not show "that defendant Bouschor or defendant Miller Canfield had actual knowledge that defendants key employees were not entitled to severance pay." **Exhibit 1** at 21.

The Court of Appeals erred because it confused Plaintiff's circumstantial evidence with evidence of constructive knowledge. This Court should correct the error of the Court of Appeals and use this case as an opportunity to clarify application of its opinion in Echelon Homes v Carter Lumber, 472 Mich 192; 694 NW2d 544 (2005).

Echelon Homes made clear that statutory conversion requires actual knowledge: "constructive knowledge is not sufficient; a defendant must know that the property was stolen, embezzled or converted." 472 Mich at 200. However, this Court carefully and repeatedly made the distinction between constructive knowledge and circumstantial evidence, holding that circumstantial evidence of actual knowledge satisfies the statute:

> But consistent with the actual holding in [People v] Tantenella, [212 Mich 614 (1920)], a defendant's knowledge that the property was stolen, embezzled, or converted can be established by circumstantial evidence.

Id.

> Although the Tantenella Court characterized its analysis of these facts as examining the defendant's constructive knowledge, the

> Court was, in fact, determining that the defendant had knowledge, proven by circumstantial evidence, that the car was stolen.

Id. at 199.

> The Tantenella Court's holding regarding "constructive knowledge" has correctly been interpreted by subsequent courts to mean actual knowledge proven by circumstantial evidence.

Id. at 200.

The reason that circumstantial evidence is sufficient is common sense. There was no direct evidence in Tantenella that the defendant said "I've got a stolen car." Likewise, in this case, there will be no evidence that Defendants Bouschor and Miller Canfield said "let's create a sham agreement." The law recognizes that evidence of guilt will come from acts, not words. E.g., People v Cotton, 191 Mich App 377, 393; 478 NW2d 681 (1991) ("A conspiracy may be proven by circumstantial evidence or may be based on inference."); McDonald v Hall, 203 Mich 431, 438-39; 170 NW 68 (1918) ("Evidence in proof of a conspiracy is generally circumstantial....").

The Court of Appeals opinion improperly decided questions of fact. The Court of Appeals pointed to facts which a jury could conclude are evidence of the lack of actual knowledge. **Exhibit 1** at 21. However, the Tribe presented facts by which a jury could conclude is evidence of actual knowledge: the secret agreements, the backwards revocation clause (that the employees, not the Tribe, could revoke, depending on the outcome of the election), the circumvention of the Tribe's financial controls, the fraudulent entry in

the "handcut check ledger," the race to the bank to convert the Tribe's checks into bank cashier's checks, the huge amounts of money, the creation of severance agreements before the opinion letter, the failure to address the resolution limiting expenditures to $50,000, the citation to cases in the opinion letter that were inapplicable. This is an issue for a jury, not the court.

II.

THERE IS NO FACTUAL DISPUTE THAT DEFENDANT BOUSCHOR DID NOT HAVE APPARENT AUTHORITY TO TERMINATE

This issue requires a clarification of the role of the court and the jury. Where the standard is an objective one – whether a reasonable person would know if the Chairman had authority to pay huge amounts of money to others in secret based on losing an election – the trial court can and should make the call if the only facts to the contrary are merely colorable or not significantly probative. In this case, no reasonable person could conclude that Defendant Bouchor had authority to terminate the Key Defendants under the circumstances of this case. As a result, the trial court should have granted summary disposition in the Tribe's favor.[3]

The scope of an agent's authority is to be determined by the acts of the principal, not by the acts of the agent. Reinforced Concrete v Boyes, 180 Mich 609, 614; 147 NW 577 (1914). For apparent authority to exist, either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that the conduct is likely to create such belief. Westchester Fire Ins Co v Hanley, 284 F2d 409, 417 (6th Cir 1960)

[3] This issue contrasts with the statutory conversion issue. Actual knowledge is subjective; reasonable belief is objective.

(applying Michigan law). Accord: Lehaney v New York Life Ins Co, 307 Mich 125; 11 NW2d 830 (1943) (JNOV affirmed in favor of defendant on the issue of authority because "the record [did] not contain any testimony that shows defendant company's actions misled the plaintiff in anyway or led her to believe that [the agent] was authorized to make the claimed statements.").

Although an agent's apparent authority usually presents a question of fact, where, as here, the undisputed facts could lead to no other conclusion, summary disposition is proper. Mayhew v Edward Budd Co, 258 Mich 381; 242 NW 737 (1932). Mayhew is analogous to this case: the plaintiff claimed that even though he had been paid about $8,500 a year by defendant, he had made a secret agreement with the president of the company to be paid $30,000 a year. He sued for the balance. The defendant contended that the president was without authority to make such an extraordinary agreement without board approval. A trial was held and the jury returned a verdict for the plaintiff. The defendant appealed and this Court reversed and dismissed the case, stating that:

> Budd had no power as president to enter into them [the "secret agreements"] on behalf of the corporation. Budd was not the corporation. It had a board of directors, which had not abdicated. Budd, it appears, could bind the corporation on employment contracts made in due and usual course of business, but the contracts here asserted were

> most extraordinary. If Budd could agree secretly to pay $30,000 per year, he could as well agree to pay a larger sum. If he could bind the corporation on one secret agreement, he might bind it on a greater number. The corporation might be committed to demands producing insolvency without knowledge of its managing directors. That Budd had no authority, express, inferred, or implied, to enter into such contracts, plaintiff, from the very nature of them, must have known.

Id. at 383 (emphasis added).

Mayhew is not an aberration. Rather, it is the law throughout America. E.g., Waszawa v White Eagle Brewing Co, 20 NE2d 343 (Ill App 1939) (finding that the president of a company lacked apparent authority to enter into a contract that the court characterized as "secret and unusual and therefore unenforceable" because "the law will not permit the making of such contracts"); Goldenberg v Bartell Broadcasting Corp, 262 NYS2d 274 (1965) (finding that the president of a company lacked apparent authority with respect to an employment agreement signed without the board's knowledge, since the person dealing with the corporation must determine the exact extent of the officer's authority); Capital Bank v American Eyewear, Inc, 597 SW2d 17 (Tex App 1980) (In holding a long term building lease unenforceable, stated: "The president has no inherent powers by virtue of his office to bind the corporation except as to routine matters arising in the

ordinary course of business."); Templeton v Nocona Hills Owners Association, Inc, 555 SW2d 534 (Tex App 1977) ("The execution of an employment contract binding the corporation to employ a person in a managerial position for a period of one year could not be considered a matter in the ordinary and usual course of appellee's business."); Har-Bel Coal Co v Asher Coal Mining, 414 SW2d 128 (Ky App 1966) ("Robert Asher [the president] had no authority, real or apparent, to bind the Asher Company" to a real estate lease).

As this Court has recognized, the function of the court on a motion for summary disposition is to determine whether "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Little v Malady, 458 Mich 153, 175; 579 NW2d 906 (1998) (quoting Anderson v Liberty Lobby, Inc, 477 US 242 (1986)). Here, there was not sufficient evidence to allow the Key Employees to go to trial on the issue of apparent authority and to have the jury return a verdict in their favor. This case fits squarely within the Mayhew framework.

There is no genuine issue of material fact that Defendant Bouschor did not have apparent authority to terminate the Key Employees and make the huge, secret, lump-sum payments. Such action was extraordinary and not within the ordinary course of business.

The Tribe is structured like a corporation. Its constitution creates a Board of Directors as the governing body of the Tribe. **Exhibit 23**, Constitution and Bylaws of the Sault Ste. Marie Tribe of Chippewa Indians, Article IV**.** The Chairperson is subservient to the Board. **Exhibit 24**, Organizational Chart.

The Chairperson of the Tribe clearly has the authority to hire and fire employees in the ordinary course of business. No one would suggest that the Chairperson is required to seek Board authorization for the ordinary hiring or firing of a secretary, a card dealer in a casino, or a case worker for the Tribe's social services division.

But the Employment Agreements were extraordinary. Prior to the adoption of Resolution 2001-07, the Tribe never hired anyone under the extraordinary terms of the Employment Agreements. The Employment Agreements included a four-year term, a waiver of sovereign immunity, a severance provision which would pay a multiple of that person's annual salary if termination occurred for any reason other than death, voluntary resignation or conviction of a felony, and an evergreen provision that automatically extended the term of the agreement each year unless the employee received less than a satisfactory rating at their annual review. **Exhibit 25**, Employment Agreements, Sections 3, 5, 6, and 9.

Because the Employment Agreements were extraordinary, their creation could only be accomplished by Board action which, in fact, occurred. The Board action was limited and specific. The Employment Agreements were only for "key employees" whose "services are deemed to be particularly valuable to the Tribe" in order "to secure such services on an ongoing basis." **Exhibit 17**, Resolution No: 2001-07, Section 1.2. As Defendant Bouschor recognized, the Employment Agreements were intended to "ensure structural stability irrespective of the political process." **Exhibit 19**, September 17, 2002 E-Mail at 2.

There were only five instances of an employee with an Employment Agreement being allegedly terminated before the events in this case. No action was taken in one case. In the other four, either the severance was paid with Board approval or knowledge, was litigated, or payment was for an amount of less than $50,000.

> **Allard Teeple.** In 2001, Allard Teeple was terminated. He was given a severance package of approximately $220,000, in installments over about a year. The Board approved the severance package. **Exhibit 26**.
>
> **Mike Lumsden.** Mike Lumsden was both a Board member and the Tribe's Executive Director. In September 2002, he was placed on leave from his employment by Defendant Bouschor, eventually terminated, and was separately removed from the Board following a removal trial. The Board was well aware of his termination, having been the subject of months of contentious proceedings, and the fact that Mr. Lumsden was placed on leave with pay under the terms of his Employment Agreement was expressly discussed in the Bouschor e-mail of September 17, 2002, **Exhibit 19** at page 3. Mr. Lumsden did not

receive a severance agreement, but continued to receive a regular paycheck over the course of three years pursuant to his Employment Agreement. Id. The Board's knowledge and silence constituted ratification. E.g., Sullivan v. Bennett, 261 Mich 232, 237-39 (1933).

Marta Diaz. Mr. Lumsden's long-time partner, Marta Diaz, believed she had been fired at the same time Mr. Lumsden was placed on leave, but Defendant Bouschor contended she quit. Ms. Diaz filed a lawsuit, which was subsequently settled with Board approval. **Exhibit 27**, Complaint for Declaratory Judgment, Marta Diaz v Sault Tribe, Chippewa Circuit Court Case No. 04-7386-CZ.

Aaron Payment. In February 2003, Aaron Payment contended he was terminated as the Deputy Executive Director, but the Tribe disputed it. **Exhibit 28**, February 5, 2003 Correspondence. No severance payments were ever made.

John Hatch. In 2005, Mr. Hatch was terminated, paid $25,000 and received regular payments over the course of three years. **Exhibit 29**, Hatch Severance Agreement and Release. The Board had knowledge of the termination, the amount at issue was less than $50,000, and the Board could have stopped the payments at any time. But the Board did not do so.

Based on the above, it is perhaps arguable as to whether the Chairperson had apparent authority to terminate a single person with an Employment Agreement without Board approval.

But here, the plan was to secretly terminate the seven highest ranking employees of the Tribe and pay them a total of $2.6 million in secret. When they received the checks, they ran for the bank. Secrecy and flight are the hallmarks of the guilty mind. "[T]he wicked flee when no man pursueth. . . ." Hickory v United States, 160 US 408,

416 (1896). When the Board learned of Defendants' actions, it immediately repudiated them by clarifying the law and authorizing the filing of this lawsuit. **Exhibit 30**, Resolution No: 2004-71.

While Defendant Bouschor had stated the purpose of the Employment Agreements was to provide stability in Tribal government in case of a political leadership change, he alleged the "terminations" were necessary because of a political leadership change. The alleged terminations were not with one person for a modest amount of money, but were with the entire top layer of the Tribal administration for more than $2.6 million — vastly exceeding any amount paid in the past. The payments were not in installments, as with others, but rather were in lump sums so payment could not be stopped. **Exhibit 16**, Nertoli Dep. at 79-80. The checks were not cut in the ordinary course of business, but instead fraudulently evaded the Tribe's financial controls so that the checks could be cashed before the Tribe even knew they were written.

Defendant Bouschor did not have authority to create and execute this plot and the other Defendants either knew, or should have known, he did not. "That [Defendant Bouschor] had no authority, express, inferred, or implied, to enter into such contracts, [the Key Employees], from the very nature of them, must have known." Mayhew, 258 Mich at 383.

III.

THE TRIAL COURT APPLIED THE INCORRECT PRINCIPLES TO PLAINTIFF'S CLAIM OF CONSTRUCTIVE FRAUD

The trial court incorrectly held that whether Defendant Bouschor constructively defrauded the Tribe is a question of fact and depends on whether Defendant Bouschor can prove the payments were made for the benefit of the Tribe. **Exhibit 2** at 17. Contrary to the opinion of the trial court and the Court of Appeals, **Exhibit 1** at 22-24, the issue is whether Defendants knew of this transaction and failed to disclose it to the Tribe. The undisputed facts show that they knew and failed to disclose. Summary disposition should have been granted to the Tribe.

Defendant Bouschor and the Key Employees were in a fiduciary relationship with the Tribe. Defendant Bouschor admits that he was the "highest executive officer of the Sault Tribe." **Exhibit 31**, Bouschor Answer at ¶2. Regardless of his admission, the law imposes such a duty on all of them:

> Public officers and employees owe a duty of loyalty to the public. "All public officers are agents, and their official powers are fiduciary."

Macomb County Prosecutor v Murphy, 464 Mich 149, 164; 627 NW2d 247 (2000) (citations omitted).

> All public officers are agents, and their official powers are fiduciary. They are trusted with public functions for the good of the public; to protect, advance and promote its interests, and not their own . . . . The law will not permit

> him to reap a personal advantage from an official act performed in favor of himself.

People ex rel Plugger v Township Board of Overyssel, 11 Mich 222, 226 (1863) (cited with approval in Macomb County Prosecutor). Accord:

Myers v Post, 256 Mich 156, 158; 239 NW 315 (1931) ("The board [of Kent County] has a fiduciary relationship to the entire county and not to the city [of Grand Rapids] alone...."); Alan v Wayne County, 388 Mich 210; 200 NW2d 628 (1972);Barkey v. Nick, 11 Mich App 381; 161 NW2d 445 (1986). Public officials of Indian tribes are also fiduciaries. Navajo Nation v MacDonald, 885 P2d 1104, 1109 (Ariz 1994) ("MacDonald Sr. [the tribal chairman] owed both contractual and fiduciary duties to the Tribe as its chief elected official and its employee. . . .").[4]

Public officials must make full disclosure of all material transactions in which they are involved:

> So careful is the law in guarding against the abuse of fiduciary relations, that it will not permit an agent to act for himself and his principal in the same transaction, as to buy of himself, as agent, the property of his principal, or the like. All such transactions are void, as it respects his principal, unless ratified by him with a full knowledge of all the circumstances. To repudiate them he need not show himself damnified. Whether he has been or not is immaterial. Actual injury is not the principle the law proceeds on in holding such transactions void. Fidelity in the agent is what is aimed at, and as a means of securing it, the law will not permit the agent to place himself

[4] Navajo Nation tells a tale of deception and fraud by a tribal chairman similar to this case. A copy of Navajo Nation is attached as **Exhibit 32**.

> in a situation in which he may be tempted by his own private interest to disregard that of his principal.

People ex rel Plugger, 11 Mich at 225-26 (emphasis added).

Fiduciaries have an affirmative duty of disclosure:

> We need not decide whether this record shows a deliberate concealment of material facts because the affirmative duty to disclose material information arises out of a government official's fiduciary relationship to his or her employer, whether as a public or as a private employee.
>
> * * *
>
> Where a person occupies a fiduciary relationship to the City. . . and is aware of material information pertaining to the expenditure of large sums of the City's monies on an unnecessary project, or one which will secretly enrich another at the expense of the City, that person has an affirmative duty to disclose the information.

United States v Silvano, 812 F2d 754, 759 (1st Cir 1987). See also United States v George, 477 F2d 508, 514 (7th Cir 1973) (in affirming conviction for mail fraud, the Court observed: "Why would the transaction be so shrouded in secrecy and spuriousness if Yonan could legitimately make and hide from Zenith an enormous profit from his employment position or curry Greenspan's favor? It would take a man of incredible naivete to play George's role in this scheme and not understand that Yonan was giving less than full measure of loyalty and honesty to Zenith.").

Silence regarding material transactions amounts to constructive fraud for those with fiduciary obligations. Thomas v Satfield, 363 Mich 111, 115; 108 NW2d 907 (1961) (In holding that the defendants constructively defrauded the company, the Court held the defendants "had a fiduciary relationship which required them to disclose the relevant facts on this subject to Star Lanes, Inc., and that they breached their duty by failing to do so."); M Civ JI 128.02 (Fraud Based on Failure to Disclose Facts). The Tribe pleaded exactly what the jury instruction requires:

> 30. Defendants were in a fiduciary relationship with the Tribe. As such they had a duty to disclose any material transactions between them and the Tribe.
>
> 31. Defendants, in conspiracy with one another, including Defendant Miller Canfield, breached that duty by failing to disclose to the Tribe their plan to pay themselves severance compensation if Defendant Bouschor lost the election for Chairperson. Such failure to disclose this material information is a constructive fraud on the Tribe.
>
> 32. Defendants received and retained the unmerited benefits of their acts.
>
> 33. As a proximate result of that failure to disclose, the Tribe has been damaged in an amount in excess of the $2.6 million.

Exhibit 33, Fifth Amended Complaint.

Here, it is undisputed that none of the Defendants – all directors or officers of the Tribe and its attorneys – disclosed to the Board the

transaction they were contemplating. Exactly to the contrary, secrecy was their goal. Good faith – "benefit of the Tribe" – is not a factor. The facts are undisputed and the Tribe is entitled to judgment.

IV.

THE TRIBE SUFFERED AN ACTUAL INJURY BECAUSE OF DEFENDANT MILLER CANFIELD

The Tribe suffered an actual injury because of Defendant Miller Canfield's actions. The Court of Appeals improperly speculated that the new Tribal Chairman would terminate the Key Employees and, therefore, by obtaining a 10% reduction in the amount due if they were terminated, the Court of Appeals reasoned that the Tribe did not suffer a legal injury.

The Court of Appeals appears to have improperly segmented the severance agreements from the employment agreements. In other words, it appears that the Court of Appeals made the distinction that Defendant Miller Canfield was only involved in the severance agreements, but not the terminations. Since the severance agreements saved the Tribe 10% over any amounts due on the employment agreements, the Court reasoned that the Tribe was not injured.

However, the facts indicate the severance agreements and the terminations were inextricably intertwined. As the trial court recited, the severance agreements – drafted by Defendant Miller Canfield – contain mutual agreements that the Key Employees will leave the employment of the Tribe – a non-qualifying event for

severance pay. **Exhibit 2** at 3. The trial court reviewed the facts and concluded that the conflicting testimony as to whether the Key Employees quit or were fired was a question for the jury. Id. at 3-6. Defendant Miller Canfield is alleged to be a co-conspirator on each of these issues. **Exhibit 33**, Fifth Amended Complaint at ¶¶ 8-10, 18, 23, 27, 31, 52-54. The severance agreements cannot be separated from the employments agreements and the issue of whether the Key Employees quit or were fired. As a result, the issue of whether the Tribe suffered an actual injury as a result of Defendant Miller Canfield's participation is a question for the jury.

RELIEF REQUESTED

For the reasons stated above, Appellant requests that this Court grant leave to appeal to resolve conflicting application of the "payee rule" in conversion cases, to properly apply Echelon Homes, and reinstate its common law and statutory conversion claims. Additionally, Appellant requests that this Court enter summary disposition in its favor that Defendant Bouschor did not have apparent authority to enter into severance agreements and terminate the Key Defendants, enter summary disposition in the Tribe's favor on its constructive fraud claim, and reinstate its legal malpractice claim against Defendant Miller Canfield.

GIARMARCO, MULLINS & HORTON, P.C.

By: _____
WILLIAM H. HORTON (P31567)
ELIZABETH A. FAVARO (P69610)
Tenth Floor Columbia Center

101 W. Big Beaver Road
Troy, Michigan 48084-5280
Φ(248) 457-7000

Dated: January 2, 2009