TRIBAL COURT
OF THE
LITTLE RIVER BAND OF OTTAWA INDIANS

JOSEPH HENRY MARTIN,

Plaintiff,

v

Case No. 09-248-GC

LITTLE RIVER BAND OF OTTAWA INDIANS, LRBOI TRIBAL COUNCIL, LRBOI OGEMA LARRY ROMANELLI, HON. ANGELA SHERIGAN,

Hon. Wilson D. Brott

Defendants.

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RENEWED MOTION FOR SUMMARY DISPOSITION

BRIEF ON BEHALF OF HON. ANGELA SHERIGAN IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

PROOF OF SERVICE

March 29, 2010

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RENEWED MOTION FOR SUMMARY DISPOSITION

The January 28, 2010 **Responsive Pleading of the Hon. Angela Sherigan to Verified Complaint for Declaratory and Injunctive Relief** asserts as an affirmative defense at ¶ 38 and corresponding ground for summary disposition at ¶ 45: "This Court lacks jurisdiction of the person of Defendant Tribal Court Judge, due to the doctrine of judicial immunity, *see* MCR 2.116(C)(1) and (D)(1)." Defendant Hon. Angela Sherigan renews this motion and prays for dismissal of the complaint against her on the grounds of absolute judicial immunity.

BRIEF ON BEHALF OF HON. ANGELA SHERIGAN IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

The January 28, 2010 **Responsive Pleading of the Hon. Angela Sherigan to Verified Complaint for Declaratory and Injunctive Relief** ("Responsive Pleading") sets forth Affirmative Defenses (at page 7) and Motion for Summary Disposition Grounds (at page 8). Because the facts of this case (Case No. 09-248-GC) and a separate civil action arising from this case (Case No. 10-016-GC) present compelling reasons for application of the absolute judicial immunity doctrine, this brief will focus on the affirmative defense asserted in the Responsive Pleading at ¶ 38 and corresponding ground for summary disposition asserted at ¶ 45: "This Court lacks jurisdiction of the person of Defendant Tribal Court Judge, due to the doctrine of judicial immunity, *see* MCR 2.116(C)(1) and (D)(1)."

Other affirmative defenses and summary disposition grounds remain applicable. The MCR 2.116(C)(6) & (7) grounds (*see* Responsive Pleading, ¶¶ 47-48, and related affirmative defenses, ¶¶ 35-36) stem from the basic concepts of finality (*res judicata* and prohibition of collateral attacks) and notion "that a litigant gets only 'one bite of the apple.'" Responsive Pleading, ¶ 25. Plaintiff chose not to intervene in the civil action (Case No. 08-093-GC) in which the challenged "Order of July 17, 2009" was issued; none of the parties in that case appealed; therefore the final judgment in Case No. 08-093-GC is *res judicata* and this civil action is an improper collateral attack. Dismissal is thus appropriate pursuant to MCR 2.116(C)(6) and/or (7).

Dismissal likewise is appropriate pursuant to MCR 2.116(C)(8) for the grounds and arguments set forth in the **Tribe's Motion to Dismiss and/or for Summary Disposition and Memorandum of Law in Support** filed January 8, 2010, which Defendant Tribal Court Associate Judge reasserts and incorporates by reference, *see* Responsive Pleading, ¶ 49. As discussed in the brief submitted by the other tribal defendants, Plaintiff has failed to state a claim upon which relief can be granted; and, additionally, if a valid claim had been asserted, it would be barred by tribal sovereign immunity.

Plaintiff filed suit in this case against Tribal Court Associate Judge Angela Sherigan. After being held in contempt during a hearing in this case on December 7, 2009, Plaintiff filed a separate suit against Tribal Court Chief Judge Daniel J. Bailey (Case No. 10-016-GC). Both judges were thus forced to recuse themselves. This disrupted the Tribal Court's schedule, impacted the Tribal Court's budget, and created a climate of "apprehension of personal consequences." *See Bradley v. Fisher*, 13 Wall. 335, 347, 20 L.Ed. 646 (1872).

Moreover, unless a stop is put to this manipulative behavior, future litigants and/or their attorneys will continue "to game" the system. By filing suit against a judge, a disgruntled litigant can unfairly attempt to control the process by eliminating judge(s) selected according to the Constitution of the Little River Band of Ottawa Indians.

If the doctrine of absolute judicial immunity were embraced as part of the evolving common law of the Little River Band of Ottawa Indians, this Court could put an end to such improper manipulation of the judicial system. Once confirmed, the doctrine could be invoked immediately by a judge in response to being sued as justification for not entering a recusal order (or, the judge could conclude under the particular circumstances that recusal is appropriate). Through the appeal process, a litigant suing a judge would have an opportunity for judicial review, in the event that the judge who was sued concluded that the asserted facts did not warrant an exception to the judicial immunity doctrine.

I. FOR A MILLENNIUM THE DOCTRINE OF ABSOLUTE JUDICIAL IMMUNITY HAS BEEN AN INHERENT ASPECT OF THE COMMON LAW.

The doctrine of absolute[1] judicial immunity developed in the common law as a means of requiring disgruntled parties to take their complaints to an appellate court instead of challenging adverse court decisions by suing the judge.[2] Inherent within the doctrine is the imperative of preserving the integrity of the judicial process:

> [I]t is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself.

Bradley v. Fisher, 13 Wall. 335, 347, 20 L.Ed. 646 (1872).

In a 1991 *per curiam* opinion, the United States Supreme Court summarized the applicable common law analysis:

> Like other forms of official immunity, judicial immunity is an immunity from suit, not just from ultimate assessment of damages. *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985). Accordingly, judicial immunity is not overcome by allegations of bad faith or malice, the existence of which ordinarily cannot be resolved without engaging in discovery and eventual trial. *Pierson v. Ray*, 386 U.S., at 554, 87 S.Ct., at 1218 ("[I]mmunity applies even when the judge is accused of acting maliciously and corruptly"). See also *Harlow v. Fitzgerald*, 457 U.S. 800, 815-819, 102 S.Ct. 2727, 2736-2739, 73 L.Ed.2d 396 (1982) (allegations of malice are insufficient to overcome qualified immunity).
>
> Rather, our cases make clear that the immunity is overcome in only two sets of circumstances. First, a judge is not immune from liability for nonjudicial actions, *i.e.*, actions not taken in the judge's judicial capacity. *Forrester v. White*, 484 U.S., at 227-229, 108 S.Ct., at 544-545; *Stump v. Sparkman*, 435 U.S., at 360, 98 S.Ct., at 1106. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction. *Id.*, at 356-357, 98 S.Ct., at 1104-1105; *Bradley v. Fisher*, 13 Wall., at 351.

Mireles v. Waco, 502 U.S. 9, 11-12 (1991).

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[1] The term "absolute" is distinguished from "qualified" immunity which pertains to civil rights claims under 42 U.S.C. § 1983. *See* discussion in *Barrett v. Harrington*, 130 F.3d 246, 253-61 [absolute] and 262-64 [qualified] (1997).

[2] Judicial immunity originated in the Tenth Century "as a device for discouraging collateral attacks and thereby helping to establish appellate procedures as the standard for correcting judicial error." *Forrester v. White*, 484 U.S. 219, 225 (1988).

II. ABSOLUTE JUDICIAL IMMUNITY DOCTRINE APPLIES TO TRIBAL COURTS.

Apparently the question presented by the motion *sub judice* is one of first impression with this Court. However, it is not the first time that a litigant has asserted that the doctrine of judicial immunity should not be applied to a Michigan Tribal Court judge who allegedly committed an egregious violation of a right,[3] *see Sandman v. Dakota*, 816 F. Supp. 448, 452 (W.D. Mich. 1992). In response, the United States District Court concluded:

> There is, however, no support for plaintiff's position in the law. The Supreme Court has held that the doctrine of judicial immunity is applicable in civil rights suits. [*Stump v. Sparkman*] at 356, 98 S.Ct. at 1104. It is thus appropriate to apply it to suits under the Indian Civil Rights Act. It is also appropriate to afford the common law protection of judicial immunity to tribal judges, in light of the rule that Indian tribes generally possess a common law immunity from suit.

Id., 816 F.Supp. at 452 (citation omitted).

Absolute immunity for judicial actions of Tribal Court judges likewise was recognized by the United States Court of Appeals for the Eighth Circuit in *Penn v. United States, et al.*, 335 F.3d 786, 789-90 (8th Cir. 2003). In *Penn* the relevant issue was whether federal officials carrying out a Tribal Court order were entitled to "absolute quasi-judicial immunity" rather than the qualified immunity normally available for civil rights claims. The Eighth Circuit rejected the contention "that tribal judges have no absolute judicial immunity and thus that no absolute quasi-judicial immunity can attach to the service or execution of tribal court orders."

> We have recognized "the long-standing federal policy supporting the development of tribal courts" for the purpose of encouraging tribal self-government and self-determination. *Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 850 (8th Cir. 2003). Accordingly, a tribal court judge is entitled to the same absolute judicial immunity that shields state and federal court judges.

Id., 335 F.3d at 789 (citation omitted).

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[3] *Compare* the "egregious" assertion (*see* 816 F.Supp. at 452) with Plaintiff Martin's assertions in paragraphs 21 and 27-31 of the Verified Complaint for Declaratory and Injunctive Relief; and note the assertion in paragraph 30 that "the actions of Defendants are particularly egregious...."

III. FACTS ALLEGED IN COMPLAINT DO NOT ESTABLISH CIRCUMSTANCE WARRANTING EXCEPTION TO JUDICIAL IMMUNITY DOCTRINE.

Under the common law, judicial immunity is overcome in only two sets of circumstances: "non-judicial actions, *i.e.*, actions not taken in the judge's judicial capacity [and] for actions, though judicial in nature, taken in the complete absence of all jurisdiction." *Mireles v. Waco, supra*, 502 U.S. at 288.

A. Tribal Court Judge Was Acting in Judicial Capacity

At issue in this civil action is a Tribal Court order ("Order of July 17, 2009" attached to Complaint as Exhibit C), *see* paragraphs 22-23 and 33 of the Verified Complaint for Declaratory and Injunctive Relief ("Complaint"). Regardless whether one disagrees with its validity, clearly this order was issued "in the judge's judicial capacity." *Mireles v. Waco, id.*, 502 U.S. at 288.

B. The Contested Action (July 17, 2009 Order) was Within Scope of Court's Jurisdiction

The second prong of the judicial immunity test requires the judge asserting immunity to show that in a broad sense the challenged action was within the court's jurisdiction. The July 17, 2009 order was issued in a case over which the Tribal Court clearly had jurisdiction.

In effect Plaintiff contends that the July 17, 2009 order was in excess of the Tribal Court's jurisdiction, by alleging in paragraph 33 of the Complaint that it "is violative of the ICRA and TCO Section 7.02, and unconstitutional both facially and as applied to Plaintiff." However, "[a] judge does not lose immunity for all judicial acts taken in excess of jurisdiction." *Penn v. United States, supra*, 335 F.3d at 789 (noting that if "that were the case, every appellate invalidation of an order based upon lack of jurisdiction would expose the tribal judge to a suit for damages."). The United States Supreme Court's decision in *Stump v. Sparkman,* 435 U.S. 349 (1978), requires "a clear absence of all jurisdiction," noting that "the scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge." *Id.*, 435 U.S. at 356-57.

IV. PURPOSES/POLICIES SUPPORTING JUDICIAL IMMUNITY WOULD BE SERVED BY APPLICATION OF DOCTRINE TO FACTS OF THIS CASE.

"The principle...which exempts judges...from liability in a civil action for acts done by them in the exercise of their judicial functions...has been the settled doctrine of the [common law] for many centuries, and has never been denied...in the courts of this country." *Bradley v. Fisher, supra,* 80 U.S. at 347. "Judicial immunity apparently originated, in medieval times, as a device for discouraging collateral attacks and thereby helping to establish appellate procedures as the standard system of correcting judicial error." *Forrester v. White*, 484 U.S. 219, 225 (1988).

In addition to promoting the orderly administration of justice by requiring litigants to utilize appellate procedures, the doctrine of absolute judicial immunity is supported by policy reasons that are applicable to the facts presented in this case. In the 1872 *Bradley* decision, the United States Supreme Court reviewed centuries of the common law in concluding that "the protection essential to judicial independence would be entirely swept away" if civil actions could be maintained against judges by the losing parties. *Bradley v. Fisher, supra*, 80 U.S. at 348. More than a century later, the Court summarized the *Bradley* ruling: "judicial immunity also protected judicial independence by insulating judges from vexatious actions prosecuted by disgruntled litigants." *Forrester v. White, supra*, 484 U.S. at 225. *See also Barrett v. Harrington,* 130 F.3d 246, 254 (1997).

In *Diehl v. Danuloff*, 242 Mich. App. 120, 133, 618 N.W. 2d 83, 90 (2000), the Michigan Court of Appeals noted additional policy reasons supporting the absolute immunity doctrine, including the need to save judicial time[4] in defending suits and the need for finality[5] in the resolution of disputes. All of these policy reasons are relevant to civil actions seeking equitable relief (declaratory judgment and/or injunction) as well as actions "at law" seeking monetary damages.

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[4] *See also* 46 Am.Jur.2d, Judges § 62, at pp. 191-92 and fn.6 (2006).

[5] *Id.*, at p. 191 and fn.4.

A. Discourage Collateral Attacks/Encourage Resolution Through Appellate Procedures

In effect this litigation (Case No. 09-248-GC) is a collateral attack on a final judgment in Case No. 08-093-GC, *see* paragraph 2 of the Complaint. Plaintiff chose not to intervene or otherwise participate in Case No. 08-093-GC. Had he participated, Plaintiff could have challenged and/or appealed the judicial action challenged in this case (*see* paragraphs 21-23 of the Complaint).

Finality is a cornerstone of the Anglo-American judicial system that has been incorporated into the jurisprudence of many tribal courts. The Complaint acknowledges that the parties involved in Case No. 08-093-GC did not appeal, *see* paragraphs 19 and 30. It would be inconsistent with the fundamental purpose of the judicial immunity doctrine to allow this lawsuit to continue against the Tribal Court Associate Judge.[6]

B. Vexatious Actions Prosecuted by Disgruntled Litigants

This litigation could serve as a textbook example of vexatious actions against judges. First, ignoring the common law absolute judicial immunity, Plaintiff named the Tribal Court Associate Judge as a party-defendant in this civil litigation, necessitating her recusal from other pending cases and disqualifying her from hearing this case. Second, in response to and rather than appealing from a contempt citation during a motion hearing in this case on December 7, 2009, Plaintiff filed a separate civil action against the Tribal Court Chief Judge, necessitating his recusal from this case.

C. Judicial Economy: Saving Time and Conserving Resources

Tribal Court resources have been redirected in response to Plaintiff's frivolous and vexatious claims brought against the Tribal Court Associate Judge and Chief Judge. Presumably the Tribal Court's ability to address other matters on the docket has been impacted, and a portion of its limited budget has been consumed by having to retain a visiting judge. Both the Associate Judge and Chief Judge were forced to retain counsel to defend Plaintiff's claims. This litigation also involves the Tribal Council and Ogema as parties-defendant, distracting these officials from important

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[6] *Id.*, at p. 191 and fns.5&6.

governmental business. Enough is enough. Such disruption in the orderly administration of justice would be avoided if the common law absolute judicial immunity were confirmed as a doctrine within the common law of the Little River Band of Ottawa Indians.

V. JUDICIAL IMMUNITY DOCTRINE NOT LIMITED TO ACTIONS FOR DAMAGES.

During the status conference held February 3, 2010, in response to undersigned counsel's mentioning the affirmative defense of absolute judicial immunity, Plaintiff boldly asserted that judicial immunity applies only to actions at law for monetary damages but not to equitable actions for declaratory and/or injunctive relief. This is not correct; the common law prescribes no such hard and fast rule.

Although many cases without analysis recite the principle that judicial immunity does not bar actions for declaratory and/or injunctive relief, most of these decisions are based upon a principle ("the strong tradition of superior court oversight of inferior courts," *Page v. Grady*, 788 F.Supp. 1207, at 1211 (N.D.Ga. 1992), citing *Pulliam v. Allen*, 466 U.S. 522, at 532-33 (1984)) that is not applicable to the facts presented in this civil action. In fact, a thorough analysis reveals a common law "tradition of judicial immunity from suits seeking equitable relief," *Page v. Grady, id.*, 788 F.Supp. at 1211, except in situations involving "superior court oversight of inferior courts." *Id.* This is consistent with the origin of the absolute judicial immunity doctrine a millennium ago as a means of "discouraging collateral attacks and thereby helping to establish appellate procedures as the standard for correcting judicial error." *Forrester v. White, supra*, 448 U.S. at 225.

In addition to orders of appellate courts directed against lower courts, "English law developed limited exceptions to the common law doctrine of absolute judicial immunity, most of which involved prerogative writs, such as mandamus and prohibition, to allow superior courts to oversee inferior courts to control the proper exercise of jurisdiction, ..." 46 Am.Jur.2d, Judges, § 65, at p. 194 (2006). Currently under Michigan law these "extraordinary writs" are governed by procedures prescribed at MCR 3.301, *et seq.*, and MCR 7.206; with respect to oversight by a "superior" court over an "inferior" court, the writ of superintending control is the prescribed remedy, *see* MCR 3.302

and MCR 7.206(B).[7] But these all involve "the superintending control power of a court over lower courts or tribunals." MCR 3.302(A). That is not the situation presented in this case.

Here, Plaintiff brought suit in the same court against the same judge. It is similar to (yet more egregious than) the situation in the *Page* case, where one federal court in effect was requested to overrule a co-equal federal court:

> If judicial immunity was not a bar to injunctive relief against federal judges, the end result would be a state of affairs in which one federal court would be required, at the request of a disgruntled litigant, to review the actions or practices of a co-equal federal court.

Page v. Grady, supra, 788 F.Supp. at 1212 (footnote omitted).

Other federal court decisions note a distinction between equitable claims that are retrospective in nature and claims seeking prospective declaratory relief and/or to enjoin ongoing violations of law. *See MacPherson v. Town of Southhampton*, 664 F. Supp.2d 203, at 210-11 (E.D.N.Y. 2009) (at p. 211: "Thus, to the extent Plaintiffs' declaratory claims are retrospective in nature in that they seek a declaration that the Justices' past enforcement of the Town's rental law has violated the Constitution, they are barred by the doctrine of absolute immunity."); and *BDS v. Southold Union Free School District*, (slip copy) 2009 WL 1875942 (E.D. N.Y. 2009) (at p. 20: "plaintiff's claims for judgment declaring that Kelly's past conduct violated federal law are retroactive in nature and, thus, are barred by the doctrine of absolute immunity."). (Citations omitted.) Plaintiff's Complaint falls within the category (claims retrospective in nature) that are barred by the doctrine of absolute judicial immunity, *see* Prayer for Relief.

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[7] In Michigan, "[t]he writ of superintending control supersedes the writs of certiorari, mandamus, and prohibition, and provides one simplified procedure for reviewing or supervising a lower court or tribunal's actions. MCR 3.302(C). The filing of a complaint for superintending control is not an appeal, but, rather, is an original civil action designed to order a lower court to perform a legal duty." *Shepherd Montessori Center Milan v. Ann Arbor Charter Township*, 259 Mich.App. 315, at 346-47 (2003) (citation omitted).

A. Tribe's Sovereign Immunity Includes Judicial Immunity Doctrine

Because issues of tribal sovereign immunity are distinct from similar principles under federal and state law, the Little River Band of Ottawa Indians should determine for itself the appropriate parameters of the absolute judicial immunity doctrine.

> It has long been established that federally-recognized Indian tribes are immune from suit, unless that inherent immunity has been expressly and unequivocally waived by the United States Congress, or by the individual tribe itself. It is federal law which provides the parameters for tribal sovereign immunity. Within those parameters are the following basic principles:
>
> (1) The inherent sovereign immunity of Indian tribes is well-established and has been long recognized in the law. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978), and *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991);
>
> (2) **Tribal sovereign immunity is distinct from the governmental immunity enjoyed by the Federal Government and that of the various state governments.** Indian tribes have a "... peculiar 'quasi-sovereign' status ..." and governmental immunity which is not congruent with that of the Federal Government, or that of the States. *See Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998); and
>
> (3) The United States Supreme Court has consistently held that Indian tribal governments have sovereign immunity unless such immunity has been expressly waived by either Congress or the particular tribal government. *See Santa Clara, supra*, at 58, 98 S.Ct. 1670.

Turner v. Leelanau Sands Casino, 2000 WL 35749806 (Grand Traverse Tribal Court), at p. 2 (emphasis added).

Thus the starting point for this Court's analysis is the Indian Tribe's over-arching sovereign immunity, which itself is a barrier to Plaintiff's suit except to the extent waived by the Tribe. When coupled with the common law doctrine of absolute judicial immunity, a very strong presumption arises that suits against Tribal Court judges are "barred because of ... immunity granted by law."

MCR 2.116(C)(7).[8] By filing this civil action against the Tribal Court Associate Judge, in effect Plaintiff is asserting that an exception exists.

B. Burden is on Plaintiff to Establish Exception to Judicial Immunity Doctrine

It does not suffice for Plaintiff merely to assert that the judicial immunity doctrine does not bar actions for declaratory and injunctive relief. In federal and state case law, such holdings coincide with situations in which either a "superior" court is exercising supervisory authority over an "inferior" tribunal, or prospective equitable relief is sought. But that is not the factual situation in this case, where "Plaintiff[']s declaratory claims are retrospective in nature ... [and] are barred by the doctrine of absolute immunity." *MacPherson v. Town of Southhampton, supra*, 664 F. Supp.2d at 211 (citation omitted).

Moreover, "Indian tribes have a '*...peculiar "quasi-sovereign" status...*' and governmental immunity which is not congruent with that of the Federal Government, or that of the States." *Turner v. Leelanau Sands Casino, supra*, (2000 WL 35749806), at p. 2, quoting *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 118 S.Ct. 1700 (1988). Thus the Little River Band of Ottawa Indians should determine what exceptions, if any, exist to the absolute judicial immunity doctrine.

Since courts generally refrain from deciding matters not directly presented by the facts under review, it is not necessarily this Court's role to enunciate a standard. Common law develops over time based upon the doctrine of *stare decisis*. For purposes of this motion to dismiss, the narrow questions to be resolved are: (1) is the doctrine of absolute judicial immunity part of this Tribe's common law; and, if so, (2) does Plaintiff's Complaint set forth an exception to this doctrine?

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[8] Federal courts have noted a distinction between lack of immunity for 42 U.S.C. § 1983 equitable claims against state court judges and "*Bivens*" tort claims against federal judges that are precluded by judicial immunity. *See Bolin v. Story*, 225 F.3d 1234 (11th Cir. 2000) (at p.1240: "Most of these courts have held that the doctrine of absolute judicial immunity serves to protect federal judges from injunctive relief as well as money damages."). The rationale for this distinction is a federal statute (42 U.S.C. § 1983) interpreted to waive the common law immunity of state court judges. But this statute does not "expressly and unequivocally" waive the common law immunity of tribal court judges as is required by tribal and federal cases following *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). *See Penn v. United States, et al.*, 335 F.3d 786, 789 (8th Cir. 2003); and *Sandman v. Dakota*, 816 F.Supp. 448, 452 (W.D. Mich. 1992).

C. Plaintiff's Complaint Fails To Satisfy Burden

As previously discussed in Section IV, *supra* at pages 6-8, the fundamental purpose and policies supporting judicial immunity are applicable to the facts of this case. Plaintiff could have intervened in the underlying civil action; had he done so, Plaintiff could have followed "appellate procedures as the standard system of correcting judicial error." *Forrester v. White, supra*, 484 U.S. at 225. Rather than requesting this Court to act in a supervisory capacity over an inferior tribunal, Plaintiff's Complaint is a collateral attack on a final judgment that was not appealed by any of the parties, *see id.* The absolute judicial immunity doctrine "is necessary to protect the finality of judgments, ..." 46 Am.Jur.2d, *supra*, § 62 at p. 191. Other policy reasons also support applying the doctrine to the facts of this case, including saving judicial time and Tribal Court financial resources, as well as promoting judicial independence by insulating judges from vexatious actions by disgruntled litigants. *Forrester v. White, supra*, 484 U.S. at 225; and *Page v. Grady, supra*, 788 F.Supp. at 1212.

Plaintiff's Complaint does not assert a basis for carving out an exception to the absolute judicial immunity doctrine. *See* subsections (1), (2) and (3) of the Prayer for Relief, which only request retrospective declaratory and injunctive relief regarding "Judge Sherigan's Order of July 17, 2009." Because it does not establish an exception to common law absolute judicial immunity, Plaintiff's Complaint against Judge Sherigan should be dismissed.

CONCLUSION

At common law, judicial immunity was absolute. Over time, courts in other jurisdictions have recognized exceptions to the doctrine, but none of those exceptions is pertinent to the facts asserted in Plaintiff's Complaint.

A. Complaint Does Not Request Supervisory Control Over Inferior Tribunal

This case does not involve a prerogative writ (or request for superintending control) over an inferior judicial tribunal. Instead, the Complaint requests a co-equal Tribal Court judge to declare invalid an order previously issued by another Tribal Court judge.

B. Neither Tribal Law Nor the Indian Civil Rights Act Waives Judicial Immunity

Tribal law preserves the inherent sovereign immunity of the Tribe and its officials, including the Tribal Judiciary, *see* Article XI, Section 1 of the Constitution. The limited waiver in Article XI, Section 2 authorizing suits in Tribal Courts against "Tribal officials ... for declaratory or injunctive relief ... for the purpose of enforcing rights and duties established [by Tribal law]" must be interpreted within the context of the common law. Nothing in this provision purports to override the doctrine of absolute judicial immunity. "English law developed limited exceptions to the common law doctrine of absolute judicial immunity, [including] granting either prospective injunctive relief or declaratory relief against judicial officers acting in their judicial capacities or from adjudicating the merits of a claim attacking the prospective application and constitutionality of a statute or rule, where the judge is a nominal defendant and no other relief is being requested." 46 Am.Jur.2d, Judges, *supra*, § 65, at pp. 194-95 (footnotes omitted and emphasis added).

Nor does Plaintiff's invocation of the Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301, *et seq.*, suffice to overcome judicial immunity.

> The United States Supreme Court has consistently held that Indian tribal governments have sovereign immunity unless such immunity has been expressly waived by either Congress or the particular tribal government. *See Santa Clara, supra*, p. 58, 98 S.Ct. 1670. It is federal law which provides the parameters for tribal sovereign immunity. Also, *see Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998).
>
> Effect of the Indian Civil Rights Act
>
> Congress enacted the Indian Civil Rights Act (ICRA) in 1968. This Court has previously considered the effect of the ICRA. *See Sliger v. Stalmack, et. al.*, 2000 WL 35750181. It has been argued by some that this federal law provision, which granted persons certain rights vis-a-vis an overly-intrusive tribal government, is in effect a Congressional waiver of tribal sovereign immunity. However, others

> argue that, while the ICRA created rights, its remedies are limited. The United States Supreme Court in *Santa Clara* decided that Congress only intended habeas corpus relief because that was the only relief expressly created. Tribal courts must provide a consistent interpretation of that federal statute. "It would be [a] contradiction of *Santa Clara* to hold on the one hand that the Indian Civil Rights Act is ineffective to waive tribal sovereign immunity by implication in the federal courts and on the other hand to hold that the same legislative enactment is effective to waive the sovereign immunity by implication in tribal courts." *McCormick v. Election Committee of the Sac & Fox Tribe*, 1 Okla. Trib. 8, 20; 1980 WL 128844 (Sac & Fox CIO 1980). This Court is persuaded by the Tribal Court's reasoning in *McCormick* that the ICRA does not waive tribal sovereign immunity.

Bonacci v. Tribal Council of Grand Traverse Band of Ottawa & Chippewa Indians, 2003 WL 25836561 (Grand Traverse Tribal Court), at p.3. *See also Yannett v. Grand Traverse Band of Ottawa & Chippewa Indians,* 2004 WL 5715387 (Grand Traverse Tribal Court), at p. 3; *Fall v. Grand Traverse Band of Ottawa & Chippewa Indians*, 2003 WL 25836853 (Grand Traverse Tribal Court), at p. 2; and *Sliger v. Stalmack*, 2000 WL 35750181 (Grand Traverse Tribal Court), at p. 3.

With respect to Plaintiff's claims presented in this case, the judicial immunity doctrine provides a barrier in addition to the tribal sovereign immunity doctrine. Just as the ICRA does not impact the latter, it has no effect upon this Court's analysis of the judicial immunity doctrine.

C. Retrospective Relief Is Requested Rather Than Prospective Equitable Relief

The Prayer for Relief in the Complaint requests this Court to (1) declare invalid the Order of July 17, 2009, (2) render it null and void, and (3) enjoin it's enforcement. With respect to the latter, there is nothing to enjoin. The parties to that litigation reached an amicable understanding as to the underlying factual dispute, none appealed the July 17, 2009 order or previous ruling, and there is no case or controversy regarding a continuing violation of law requiring a prospective injunction.

> Moreover, plaintiff's claims for judgment declaring that Kelly's past conduct violated federal law are retroactive in nature and, thus, are barred by the doctrine of absolute immunity. *See, e.g. Boyland v. Wing*, 487 F.Supp.2d 161, 180 (E.D.N.Y.2007) (holding that absent a continuing violation of federal law, claims for injunctive, compensatory or declaratory relief against state officials are barred by the Eleventh Amendment); *Rothenberg v. Stone*, 234 F.Supp.2d 217, 221-222 (E.D.N.Y.2002) (dismissing the plaintiff's Section 1983

> claims on the basis, *inter alia*, that the plaintiff sought only retrospective declaratory relief, *i.e.*, that the defendant's past conduct violated federal law).

BDS v. Southold Union Free School District, supra, (slip copy) 2009 WL 1875942 (E.D. N.Y. 2009).

D. Judge Sherigan Is Entitled To Judgment of Dismissal As Matter of Law

The question to be resolved by this Court is whether justification exists to find an exception to the common law absolute judicial immunity doctrine. The Complaint's Prayer for Relief seeks only retrospective declaratory and injunctive relief against a co-equal judge of the same court. The facts presented in this case do not warrant any such exception. Therefore Plaintiff's Complaint against the Hon. Angela Sherigan should be dismissed pursuant to MCR 2.116(C)(7) & MCR 2.116(I)(1).

Respectfully submitted,

Date: March 29, 2010

OLSON, BZDOK & HOWARD, P.C.
Attorneys for the Hon. Angela Sherigan

By: William Rastetter
William Rastetter (P26170)
Of Counsel

PROOF OF SERVICE

On the date below, I sent by first class mail a copy of this **Renewed Motion for Summary Disposition and Brief on Behalf of Hon. Angela Sherigan in Support of Motion for Summary Disposition** to the Plaintiff and to the counsel of record for other party Defendants, at their business address(es) as set forth in the caption and disclosed by the pleadings filed in this matter.

The statements above are true to the best of my knowledge, information and belief.

OLSON, BZDOK & HOWARD, P.C.

Date: March 29, 2010

By: Ruth Ann Liebziet
Ruth Ann Liebziet, Legal Assistant

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