LITTLE RIVER BAND OF OTTAWA INDIANS
TRIBAL COURT OF APPEALS

Jolene Ossignac, Nancy Kelsey, et al.
Appellants

Case No. 09-012-AP

On Appeal from:
v. Case No. 08-195-GC

Janine M. Sam, Candace Chapman, et al.,
Respondents

Opinion and Orders

Orders

The Order after Hearing per Judge Melissa L. Pope and dated February 19, 2009 issuing a Preliminary Injunction is **VACATED** as discussed in the Opinion below. We express no opinion on the remainder of the February Order. We **REMAND** this matter back to the trial court for proceedings consistent with this opinion.

The Motion of the Reporters Committee for Freedom of the Press to File Brief *Amicus Curiae* in Support of Petitioners is **GRANTED**.

Opinion

I. Introduction

The underlying case here involves very complex questions involving the freedom of speech, freedom of the press, and the interpretation of the Protection of Defamation Act of 2006. However, in order to dispose of this interlocutory appeal, we need only answer two questions unrelated to these complex questions. First, we must address the question raised by Respondents whether this Court has jurisdiction to entertain this interlocutory appeal. Second, we must address the question of the standards the trial court must apply before issuing a preliminary injunction, a question that appears to be one of first impression in this Court.

We hold that this Court does have jurisdiction to entertain this interlocutory appeal as it involves the issuance of a preliminary injunction, and especially since the subject matter of the injunction involves what Appellants characterize as a "prior restraint" of free speech.

We also hold that the trial court must engage in a four-part test before issuing an injunction of any kind, and to make the necessary findings of fact and conclusions of law appurtenant to that test in writing.

II. Factual and Procedural Background

The complaint in this matter filed August 1, 2008 apparently is the first claim filed under the Protection against Defamation Act of 2006. LITTLE RIVER BAND OF OTTAWA INDIANS TRIBAL CODE, ch. 400, title 8. The number of plaintiffs varies, but includes at least 30 individuals who are enrolled members of the Little River Band of Ottawa Indians. About half of the plaintiffs (who are respondents in this appeal) are elected officials of the Band or tribal government employees. Respondents allege, in general terms, that Appellants have published statements contesting their eligibility for enrollment with the Band, that these statements are in violation of the Protection Against Defamation Act. *E.g.*, Plaintiff's First Amended Verified Complaint ¶¶ 14, 37.

Pre-trial activities are ongoing before the trial court, including motions for summary disposition and motions relating to discovery. On August 5, 2008, Chief Judge Daniel Bailey issued a temporary restraining order against Appellants barring oral, written, and electronic statements "regarding the legitimacy of the tribal membership" of Respondents. Respondents filed a pleading captioned Plaintiffs Supplemental Brief in Support of Motion for Preliminary Injunction dated January 21, 2009. Over the opposition of Appellants, the trial court issued a preliminary injunction

on February 19, 2009. Appellants filed a Notice of Appeal on January 19, 2009 relating to Chief Judge Bailey's order, and an Amended Notice of Appeal on February 19, 2009 relating to Judge Pope's order. Respondents filed an objection to the appeal on February 25, 2009.[1] Both parties also have filed appellate briefs on the merits.

III. The Interlocutory Appeal

We hold that a party may appeal the issuance of a preliminary injunction under our appellate rules. *See* TRIBAL COURT ORDINANCE § 6.01; TRIBAL COURT RULES § 5.205.

This Court "has jurisdiction over all orders and judgments which are appealable as a matter of right." TRIBAL COURT ORDINANCE § 6.01. "[A]ll appeals to the Court of Appeals from final judgments or decisions of the Tribal Court by this Ordinance shall be a matter of right." *Id*. The Tribal Court Ordinance is silent as to what are "final judgments or decisions" are appealable as "a matter of right."

[1] Defendants/Appellants also filed a Petition for Alternative and Preemptory Writs of Mandamus, Prohibition, and Superintending Control on March 9, 2009. Since we hold that Defendants/Appellants may simply appeal the lower court's preliminary injunction, we need not address this Petition.

The Tribal Court Rules purport to flesh out what the Tribal Court Ordinance means as to what judgments are appealable as a matter of right. Section 5.205 provides in relevant part:

> An appeal is properly brought before the Tribal Court of Appeals if:
>
> (A) The judgment, order or decree of the Tribal Court is final; …
>
> (C) The appeal involves an order affecting a substantial right or claim which disposes of the matter as to that participant.

This Court twice has had occasion to interpret Section 5.205. *See Champagne v. People of the Little River Band of Ottawa Indians*, No. 06-178-AP (Little River Band Court of Appeals, Oct. 26, 2006); *Willis v. Tribal Council*, No. 01-034-APP (Little River Band Court of Appeals 2001). In *Champagne*, we held that the denial of pre-trial motions in a criminal case is not a final judgment, order, or decree under Section 5.205(A), nor is it a matter that affects a "substantial right or claim which disposes of the matter as to that participant," as required under Section 5.205(C). *See Champagne*, *supra*, at 3-5. We held that a "final judgment" is "one which ends the litigation and leaves nothing for the trial court to do but to execute the judgment and which leaves no question open for any judicial action." *Id*. at 3

(quotations omitted). That appeal, like this one, could not be construed as appealing a final judgment. As the parties reminded this Court throughout oral argument, no trial has been held in this matter, little or no discovery has occurred, and summary disposition motions are pending.

If this appeal is sufficient to vest jurisdiction in this Court, it must fulfill Section 5.205(C). We hold that it does.

The language of Section 5.205(C) has no analog in either the Michigan Court Rules or the Federal Rules of Civil or Appellate Procedure.[2] Federal law, for example, specifically allows for the appeal as of right for the "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." 28 U.S.C. § 1292(a)(1). Michigan law allows for the appeal of a preliminary injunction by leave of the lower court, *see* MICH. CT. RULES 7.209(B), a procedure not applicable in Little River Band courts except where the trial court is sitting as an appellate court, *see* TRIBAL COURT ORDINANCE § 6.02.

We hold that the issuance of the preliminary injunction in this matter is of sufficient importance to justify allowing an appeal under Section 5.205(C). Typically, and as in this case, a preliminary injunction is only issued after an evidentiary hearing in which the parties may present

[2] In accordance with Sections 8.01 and 8.02 of the Tribal Court Ordinance, we seek guidance from Michigan and federal law to the extent there is any to be had.

testimonial and documentary evidence and offer written legal arguments. And, once the injunction issues, the lower court case may proceed toward a truly final conclusion such as a permanent injunction or other final judgment. But here, the preliminary injunction involves what the Appellant characterizes with some justification as a "prior restraint" of public speech and of the press. Appellant's alleged rights to speech and to a free press have been circumscribed for over a year now, and likely would continue to be limited for an indefinite period of time. Surely, these orders affect a "substantial right or claim."

Section 5.205(C) does suggest in its plain language that an order may be appealable only if it "disposes of the matter as to that participant." We find that the preliminary injunction in this case, as a practical matter, all but disposes of the matter as to the two named Appellants, who may not engage in any public communication as to this case for the indefinite future.

IV. The Preliminary Injunction

We vacate the preliminary injunction issued by Judge Pope in this matter on the ground that the lower court did not engage in a four-part test adopted by the vast majority of tribal and American courts for determining when a preliminary injunction is appropriate.

We hold that Little River Band courts must engage in this following test, as borrowed from Michigan law, in reaching a judgment about whether a temporary restraining order or a preliminary injunction should issue:

> The trial court must evaluate whether (1) the moving party made the required demonstration of irreparable harm, (2) the harm to the applicant absent such an injunction outweighs the harm it would cause to the adverse party, (3) the moving party showed that it is likely to prevail on the merits, and (4) there will be harm to the public interest if an injunction is issued.

Detroit Fire Fighters Assn., IAFF Local 344 v. City of Detroit, 753 N.W.2d 18, 34 (Mich. 2008). Upon the issuance of a preliminary injunction, the trial court must make written findings of fact and conclusions of law.

Judge Pope's February 19, 2009 Order After Hearing made no findings of fact sufficient to justify the issuance of the preliminary injunction.

We further note, although we do not foreclose the question entirely, that the issuance of a preliminary injunction necessarily involves a finding of "irreparable harm." As a general matter in Anglo-American law, "irreparable harm" is "[a]n injury that cannot be adequately measured or compensated by

money…." BLACK'S LAW DICTIONARY 789 (7th ed. 1999). The Protection against Defamation Act of 2006 made clear that damages are available as a remedy. TRIBAL CODE, ch. 400, title 8, § 4.02. In fact, the statute strongly implies that the *only* remedy for slander and libel is damages. *See id*. ("the plaintiff is entitled to recover *only* for the actual damages which he or she has suffered…") (emphasis added). However, we leave this question for the trial court to consider in the first instance.

IT IS SO ORDERED.

August 2009

Special Chief Justice Matthew L.M. Fletcher	Date
Associate Justice Ronald Douglas	Date
Associate Justice Martha Kase	Date