

STATE OF MICHIGAN
COURT OF APPEALS

SAULT STE. MARIE TRIBE OF CHIPPEWA
INDIANS,

UNPUBLISHED
November 18, 2008

Plaintiff/Counter-
Defendant/Appellee/Cross-
Appellant/Cross-Appellee,

v

No. 276712
Chippewa Circuit Court
LC No. 04-007606-CC

BERNARD BOUSCHOR,

Defendant/Appellant/Cross-
Appellee,

and

DANIEL T. GREEN, DAVID E. SCOTT, JAMES
M. JANNETTA, and DANIEL J. WEAVER,

Defendants/Counter-
Plaintiffs/Cross-Appellants/Cross-
Appellees,

and

PAUL W. SHAGEN, JOSEPH M. PACZKOWSKI,
JOLENE M. NERTOLI,

Defendants/Counter-Plaintiffs,

and

MILLER CANFIELD, PADDOCK & STONE,
P.L.C.,

Defendant/Cross-Appellant/Cross-
Appellee.

Before: Saad, P.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Defendant Bernard Bouschor appeals as of right the trial court order denying his motion for summary disposition based on governmental immunity, MCR 2.116(C)(7). Defendants Daniel T. Green, David E. Scott, James M. Jannetta, and Daniel J. Weaver, defendant Miller, Canfield, Paddock and Stone, P.L.C., and plaintiff Sault Ste. Marie Tribe of Chippewa Indians all cross-appeal. We affirm, in part, and reverse, in part.

I. Facts and Procedural History

Plaintiff is a sovereign Indian tribe. Defendant Bouschor was plaintiff's tribal chairperson for approximately 17 years. Defendants Green, Scott, Jannetta and Weaver were tribal employees who the parties refer to as "key employees." Defendants Green and Jannetta were employed as attorneys in the Tribe's legal department, defendant Weaver was the Tribe's chief financial officer, and defendant Scott was Director of Human Resources. Defendant Miller Canfield is the law firm that plaintiff Tribe retained in 1996.

The appeals in this case arise from plaintiff's challenge of defendant Bouschor's authority to enter into secret severance agreements with the Tribe's key employees without the Board's approval, when the key employees already had employee agreements with plaintiff Tribe that contained severance provisions. Under the secret severance agreements, key employees of the Tribe, including defendants Green, Scott, Jannetta and Weaver, received severance payments totaling approximately \$2.6 million after their employment with the Tribe ceased.

The facts that gave rise to this controversy arose in 2004, when there was a hotly contested and highly acrimonious election campaign for tribal chairperson. On about May 19, 2004, there was a primary election, and challenger Aaron Payment and incumbent defendant Bouschor were the top vote getters in a field of five candidates. During the campaign, Payment was critical of defendants Bouschor, Green, Scott, Jannetta, Weaver and other key employees of the Tribe for various reasons. In one e-mail, he claimed that defendant Jannetta threatened him during a board meeting. In another e-mail, Payment referred to the key employees who worked in the legal department as "those white pigs in the Legal Department." In other e-mails and in campaign literature, Payment called attention to the fact that certain key employees were not members of the Tribe and did not live on the reservation.¹ Furthermore, in a memo to defendant Scott, Payment accused Scott of engaging in "foolish and politically motivated behaviors." According to defendant Bouschor's affidavit, "each of the Key Employees, both tribal members and non-tribal members, had been singled out for severe, continued personal criticism, scorn and abuse from Mr. Aaron Payment, including groundless accusations of various criminal offenses."

¹ According to defendant Bouschor's affidavit, defendants key employees Green, Scott, Jannetta and Weaver were not tribal members.

Defendant Bouschor asserted in an affidavit that he believed Payment “held personal grudges against each of these Key Employees” and “that Mr. Payment believed that for various reasons, each of the Key Employees should be fired.” Therefore, Bouschor contends, he made the decision to terminate defendants Green, Scott, Jannetta, Weaver and other key employees regardless of the outcome of the election because he “believed that Mr. Payment and his supporters’ attacks on the Key Employees had reduced their ability to carry out their employment duties, and ensnared the Tribe in controversy that was detrimental to its interests, and would continue no matter who won the election.” Bouschor’s idea to enter into severance agreements with defendants Green, Scott, Jannetta and Weaver, notwithstanding the fact that each of them already had an employment agreement with plaintiff Tribe that contained a severance provision, resulted from Bouschor’s fear that Payment would “terminate the employment of the Key Employees, or make their working environments intolerable resulting in a constructive discharge of them, yet he would refuse to pay their severance pay”

On about May 20, 2004, defendant Bouschor contacted defendant Miller Canfield, seeking the law firm’s opinion regarding whether he had the authority to enter into severance agreements with the key employees without the Board’s approval. Defendant Miller Canfield wrote defendant Bouschor a letter dated June 8, 2004, in which the law firm opined that Bouschor did have the authority to enter into severance agreements with key employees without the Board’s approval. Defendant Miller Canfield drafted the severance agreements between the Tribe and the key employees with, according to plaintiff, the assistance of one or more of defendants key employees. Defendants key employees met in the office of attorney Mark Dobias on June 9, 2004, and signed the severance agreements. The severance checks were written in secret on June 14, 2004. Defendant Scott admitted that defendants wanted the checks to be a secret because “if people became aware that those checks were cut, then that could, you know, create quite a volatile situation” and that someone could “[p]otentially” stop payment of the checks. He acknowledged that he asked his assistant, Shelly Shelby, to meet him at work on a Friday evening after normal working hours and that they discussed a means to issue the checks so that nobody would know about them. Scott also acknowledged that they printed the checks and the payroll reports and then purged the information from the computer system. Although the severance checks were written on June 14, 2004, they were not given to defendants key employees at this time. The signed severance agreements also apparently were not given to the Board, and defendants key employees continued to work for plaintiff Tribe until the day after Payment defeated defendant Bouschor in the tribal chairperson election.

The tribal chairperson election was held on about June 24, 2004, and Payment defeated defendant Bouschor.² On the morning of June 25, 2004, defendants key employees met at a restaurant and signed termination forms and received their severance checks. Then, between 9:14 a.m. and 9:20 a.m., defendants key employees cashed their severance checks and had them converted into cashier’s checks. In a Chairman’s Report in the Sault Tribe News on June 29, 2004, defendant Bouschor wrote:

² Payment is no longer the Tribe’s chairperson.

In order to pave the way for a smooth transition [to Payment's chairmanship of the Tribe], I have terminated the employment of seven tribal staff members, each of whom has been attacked and criticized by Mr. Payment in the past. It is difficult to see how these employees could continue with our tribe under the circumstances. I have taken this step to offer Mr. Payment a clear field for the hiring of senior staff and to ensure that the contractual obligations of our tribe to these people are honored. . . .

After defendants Green, Scott, Jannetta and Weaver ceased their employment with plaintiff Tribe and received, collectively, approximately \$2.6 million in severance payments,³ plaintiff filed suit against defendants Bouschor, Green, Scott, Jannetta, Weaver and Miller Canfield. In the Tribe's fifth amended complaint, the Tribe alleged that defendants Bouschor, Green, Scott, Jannetta and Weaver owed the Tribe a fiduciary duty and that they had breached that duty by conspiring with defendant Miller Canfield to act in their personal interest rather than in the Tribe's best interest. According to the Tribe, the severance agreements violated tribal Resolution 1997-63 and a motion passed by the Board on August 20, 2002. The complaint also contained claims of legal malpractice against defendants Green and Jannetta, as well as defendant Miller Canfield, and claims of constructive fraud, breach of contract, tortious interference, conversion, and violation of MCL 600.2919a (statutory conversion). The complaint also sought a declaratory judgment declaring the severance agreements invalid.

The parties all filed cross-motions for summary disposition. The trial court issued two orders and opinions addressing the parties' motions for summary disposition. The first opinion was issued on August 11, 2005, and the first order was entered on August 29, 2005. The following is a summary of the trial court's relevant ruling in its first opinion and order:

1. The trial court granted summary disposition of defendants key employees non-contractual counterclaims based on sovereign immunity, MCR 2.116(C)(7). According to the trial court, plaintiff's waiver of sovereign immunity was limited to a suit commenced in connection with an employment agreement; thus, defendants key employees' counterclaims that were not made in connection with an employment agreement were barred. The trial court also rejected defendants key employees' argument that their counterclaims were claims for recoupment and therefore not barred by sovereign immunity.

The trial court's second opinion and order were issued on February 8, 2007, and March 5, 2007. The following is a summary of the trial court's relevant rulings in the trial court's second opinion and order:

³ In total, defendant Bouschor entered into severance agreements with seven key defendants. Only four of those key defendants (Green, Scott, Jannetta and Weaver) are parties to this appeal. The total \$2.6 million in severance payments includes payments to the three key employees who are not parties to this appeal.

1. The trial court granted plaintiff's motion for summary disposition of its declaratory judgment claim, finding that defendant Bouschor did not have the inherent or delegated authority to enter into severance agreements with defendants key employees. However, the trial court denied the motion with respect to whether defendant Bouschor had apparent authority to enter into the agreements, finding that whether defendants key employees reasonably believed that Bouschor had the authority to enter the agreements was a question of fact for the jury to decide.

2. The trial court ruled that plaintiff's waiver of sovereign immunity was limited and did not extend to claims arising from the severance agreements. Therefore, the trial court ruled that defendants key employees' counterclaims alleging breach of the severance agreements were barred by the Tribe's sovereign immunity.

3. The trial court denied defendant Bouschor's motion for summary disposition on the basis of executive governmental immunity because Bouschor did not have inherent or delegated authority to enter into the severance agreements.

4. The trial court granted defendants key employees' motion for summary disposition of plaintiff's claims for breach of contract and tortious interference. According to the trial court: "The Key Employees either quit or were fired. Neither situation is a breach of contract."

5. The trial court granted defendants key employees' motion for summary disposition of plaintiff's common law and statutory conversion claims under MCR 2.116(C)(8) and (10).

6. The trial court denied defendant Miller Canfield's motion for summary disposition of plaintiff's legal malpractice claim against it, finding that there were genuine issues of material fact regarding the legal malpractice liability of defendant Miller Canfield. In so doing, the trial court rejected Miller Canfield's argument that it was protected from legal malpractice liability by the attorney judgment rule.

Defendant Bouschor appeals as of right, and plaintiff and the other defendants all cross-appeal.

II. Analysis

A. Governmental Immunity

Defendant Bouschor argues that the trial court erred in concluding that he acted outside the scope of his employment by entering into the severance agreements with defendants key employees and in denying his motion for summary disposition based on absolute executive immunity.⁴ This Court reviews de novo the applicability of governmental immunity. *Bennett v Detroit Police Chief*, 274 Mich App 307, 310-311; 732 NW2d 164 (2006). Similarly, this Court reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7). *DiPonio Constr Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 46; 631 NW2d 59 (2001). In deciding a motion brought pursuant to MCR 2.116(C)(7), a court should consider all affidavits, pleadings, and other documentary evidence submitted by the parties. MCR 2.116(G)(5); *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000). If the pleadings or documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred. *Holmes*, *supra* at 706.

MCL 691.1407(5) provides: "A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority."⁵ Factors to consider in determining whether an individual acted within the scope of his or her authority include "the nature of the specific acts alleged, the position held by the official alleged to have performed the acts, the charter, ordinances, or other local law defining the official's authority, and the structure and allocation of powers in the particular level of government." *American Transmissions, Inc v Attorney General*, 454 Mich 135, 141; 560 NW2d 50 (1997), quoting *Marrocco v Randlett*, 431 Mich 700, 711; 433 NW2d 68 (1988).

The specific act alleged by plaintiff is that Bouschor, as tribal chairperson, secretly and without authority entered into severance agreements with defendants key employees in which the key employees received a total of more than \$2.6 million in severance payments. The question is whether Bouschor's conduct of entering into these severance agreements was within the scope of his executive authority. The structure and allocation of powers within the Tribe is contained in the Tribe's Constitution and Bylaws, although the hierarchy is not entirely clear from those documents. Under the Tribe's Constitution, "[a] chairperson shall be elected at large by the voters of the tribe and shall serve as a member of the board of directors." Constitution of the Sault Ste. Marie Tribe of Chippewa Indians, art IV, § 2. The chairperson is the "chief executive officer" of the Tribe. Bylaws of the Sault Ste. Marie Tribe of Chippewa Indians, art II, § 1. The

⁴ According to Bouschor, if he was not entitled to absolute immunity, his motion for summary disposition should have been granted based on qualified immunity. However, neither the trial court's opinion of February 8, 2007, nor the trial court's March 5, 2007, order address the issue of qualified immunity. Generally, issues not addressed by the trial court are not preserved for appellate review. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Therefore, we do not address Bouschor's qualified immunity argument.

⁵ Our opinion presumes, without deciding, that Michigan's governmental immunity statute applies to Bouschor as chairperson of plaintiff Tribe.

board of directors is the governing body of the Tribe. Constitution of the Sault Ste. Marie Tribe of Chippewa Indians, art IV, § 1. The Constitution contains detailed powers for the Board, but does not contain any powers of the chairperson. The duties of the chairperson are defined in the Tribe's Bylaws, which state: "The chairperson shall preside over all meetings of the board of directors, perform all duties consistent with the office as chief executive officer of the tribe, and exercise any other lawful authority delegated the chairperson by the board of directors." Bylaws of the Sault Ste. Marie Tribe of Chippewa Indians, art II, § 1. No further duties of the chairperson are specified in the Tribe's Constitution or Bylaws. The Tribe's organizational chart places the board of directors at the top and the tribal chairperson just below the board.

The trial court considered the Tribe's Constitution and Bylaws and concluded that defendant Bouschor did not have inherent authority to enter into the severance agreements by virtue of his position as tribal chairperson. Defendants key employees contend that the trial court erred in concluding that defendant Bouschor did not have inherent authority to enter into the severance agreements with defendants key employees based on the structure of tribal government as gleaned from the Tribe's Constitution and Bylaws. According to the key employees, there is a separations of powers in the Tribe's government, and, as the chief executive officer of the Tribe, defendant Bouschor was authorized to hire and fire employees. Defendants key employees further contend that in ruling that the severance agreements were outside defendant Bouschor's inherent authority, the trial court "improperly substituted its interpretation of tribal law for the custom and practices of the Tribe itself." In contrast, plaintiff argues that the Tribe does not have separate branches of government and correctly notes that the Tribe's Constitution and Bylaws do not contain a separation of powers provision. According to plaintiff, the tribal government is comprised of a single governing body in the Board of Directors, which is akin to a corporate structure. Plaintiff further contends that the tribal chairperson is simply one member of the Board and that the chairperson is subservient to the Board.

Irrespective of how the organizational structure of the Tribe's government is characterized, there is nothing about the tribal government structure and there is no language in either the Constitution or the Bylaws that indicates that the tribal chairperson has inherent authority to enter into severance agreements with tribal employees. As explained above, the Tribe's Constitution and Bylaws do not provide much guidance in this regard. The Constitution and Bylaws define only limited duties for the chairperson. Based on the structure of the government and the definition of the chairman's duties in art II, § 1 of the Tribe's Bylaws, it appears that the Tribe intended for most of the chairperson's authority to be delegated by the Board. Furthermore, the fact that the Tribe's organizational chart places the Board at the top of the hierarchy, and the chairperson below the Board does not suggest any inherent authority for the chairperson to enter into severance agreements with key employees. Therefore, the structure and allocation of powers in the Tribe's government do not suggest any inherent authority for defendant Bouschor to enter into severance agreements.

Furthermore, defendants key employees' argument that the trial court erred in failing to defer to the Tribe's interpretation of tribal law as exhibited by the customs and practices of the Tribe is unavailing. According to defendants, defendant Bouschor had terminated the employment of other employees and entered into severance agreements with those employees in the past. Even if this is true, the fact that Bouschor's authority in this regard is far from clear and

that the Tribe now challenges Bouschor's authority to enter into severance agreements without the Board's approval is evidence that the trial court's interpretation of its own laws, as reflected in its acceptance or challenge of defendant Bouschor's conduct of firing employees and entering into severance agreements with them, is inconsistent at best.

The next factor to consider in deciding whether defendant Bouschor acted within the scope of his authority is other local law defining the official's authority. *American Transmissions, supra* at 141. Under the Tribe's Bylaws, the chairperson's duties include exercising "any other lawful authority delegated the chairperson by the board of directors. . . ." Bylaws of the Sault Ste. Marie Tribe of Chippewa Indians, art II, § 1. In this regard, there are several tribal resolutions and one tribal motion that are relevant to whether defendant Bouschor was acting within the scope of his authority in entering into the severance agreements with the key employees. The first resolution is Resolution 1997-63. This resolution gave the chairperson "authority to make any expenditure that is \$50,000 or less for any Tribal purpose or business" but required that "[a]ny expenditure in excess of \$50,000 shall have the prior or ratified approval of the Board of Directors." The second resolution is Resolution 2001-07. This resolution granted the chairman broad authority to enter into employment agreements with key employees and provides, in relevant part:

Section 2 APPROVALS AND AUTHORIZATION

- 2.1 The Board of Directors specifically authorizes 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. The terms and form of the Employment Agreement is approved with such completion, additions, deletions, and modifications as may be agreed upon by the Chairman
- 2.2 The Chairman is authorized and directed to execute and deliver such other agreements, certificates, documents, or instruments, as may be required or to take any and all such action which may be necessary or convenient to effectuate the foregoing.

Resolution 2001-07 was revoked by Resolution 2004-71. Under Resolution 2004-71, the vote of seven board members was necessary to hire a key employee, and the vote of eight board members was necessary to terminate a key employee. We note, however, that Resolution 2004-71 was passed by the Board on July 6, 2004, after the severance agreement at issue in this case had been drafted, signed, and executed. Resolution 2005-199, which was also passed after the severance agreements were executed, was intended to clarify Resolution 2004-71, and provides: "Resolution 2004-71 was intended to provide the Board of Directors a voice in either the selection or termination of key team members within the Tribe[.]"

In addition to the above-described Board resolutions, a motion passed by the Board at its regular meeting on August 20, 2002, also addresses the chairperson's authority to enter into employment contracts. At the meeting, Mike Lumsden "[m]oved . . . to revoke the Chairman's authority on employment contracts" and to require that "all future employee contracts must be approved by the Board of Directors." The Board passed the motion.

The trial court considered the resolutions passed by the Board, as well as the motion passed by the Board on August 20, 2002, and concluded that defendant Bouschor did not have delegated authority to enter into the severance agreements with defendants key employees without the Board's approval. According to the trial court, Bouschor did not have authority to enter into the severance agreements under Resolution 2001-07 because the severance agreements were not merely modifications of the existing employment agreements between the Tribe and key employees, but new agreements with new obligations. Therefore, the trial court ruled that Bouschor was not authorized to enter into severance agreements pursuant to his authority under Resolution 2001-07 to modify or perform the Tribe's obligations under the employment agreements. The trial court also observed that under Resolution 1997-63, any expense made by the chairperson that exceeded \$50,000 required the Board's approval, and the severance agreements involved payments in excess of \$50,000.

The trial court also addressed the effect of the Board's August 20, 2002, motion, which revoked the chairman's authority regarding employment contracts and required Board approval of all future employee contracts. The trial court ruled that defendant "Bouschor's authority under Resolution 2001-07 was terminated by the motion passed on August 20, 2002" and that "[e]ven if Bouschor's authority under Resolution 2001-07 was not effectively revoked by the August 20, 2002 motion, [Bouschor] is estopped from any claim of continuing authority, by virtue of his September 17, 2002 e-mail."

To decide whether defendant Bouschor was authorized to enter into the severance agreements at issue, we must interpret and attempt to harmonize the relevant tribal resolutions. This is a formidable task given the inconsistencies in these documents. On the one hand, Resolution 2001-07 grants the chairman broad authority to enter into "Employment Agreements with Key Employees." In addition, § 2.2 of Resolution 2001-07 authorized the chairman "to execute and deliver such other agreements, certificates, documents, or instruments, as may be required or to take any and all such action which may be necessary or convenient to effectuate the foregoing [employment agreements.]" It is certainly arguable that the severance agreements themselves constituted employment agreements which the chairperson was authorized to enter into under Resolution 2001-07 or that the severance agreements constituted an "other agreement" that was "required" or "necessary or convenient to effectuate" the employment agreements.

Even if § 2.2 of Resolution 2001-07 is construed as providing authority for the chairperson to enter into the severance agreements, however, defendant Bouschor's conduct of entering into the severance agreements ran afoul of Resolution 1997-63, which clearly and explicitly required the Board's approval for the chairman to commit to an expenditure of more than \$50,000. The severance payments in all of the severance agreements at issue were well over \$50,000. Therefore, under the plain and unambiguous language of Resolution 1997-63, the Board's approval was necessary. Resolution 1997-63 constituted a broad and explicit limit of the chairman's authority to make "[a]ny expenditure" exceeding \$50,000 without the Board's approval. The "[a]ny expenditure" language is broad and clearly encompasses both employment agreements and severance agreements. Bouschor's conduct of entering into the severance agreements without the Board's approval clearly violated this resolution.

Defendant Bouschor contends that his authority to enter into the severance agreements was not affected by the passage of Resolution 1997-63 because Resolution 2001-07 was passed more than three years after Resolution 1997-63, and authorized the chairman to make key

employment agreements with terms deemed suitable by the chairman, including severance payments. Bouschor cannot avoid the limits placed on his authority by Resolution 1997-63, however, because the Board never revoked Resolution 1997-63; its explicit restriction of his authority therefore cannot be ignored. Thus, the two resolutions must be read together and harmonized, if possible. At first glance, the broad authority granted to the tribal chairman under Resolution 2001-07 seems to conflict with the limitation of the chairman's authority to make expenditures over \$50,000 without the Board's approval in Resolution 1997-63. To the extent that the employment contracts that the chairman was authorized to enter into under Resolution 2001-07 were likely to exceed \$50,000, this is true. However, the two resolutions can be harmonized, thus giving effect to both resolutions. Reading the resolutions together and giving effect to both, the chairperson would have authority to enter into key employment agreements without board approval, but only if those contracts did not exceed \$50,000. Any employment agreements exceeding \$50,000 would require the Board's approval.

In light of the fact that defendant Bouschor's conduct of entering into the severance agreements with defendants key employees clearly violated Resolution 1997-63, which requires the Board's approval if the chairman makes any expenditure exceeding \$50,000, we need not decide whether the board's August 20, 2002, motion was effective to revoke the authority granted to the Tribe's chairperson by Resolution 2001-07, or whether Bouschor is estopped from claiming his conduct was authorized. Because the severance agreements plainly violate Resolution 1997-63, there is no issue of material fact regarding whether Bouschor was authorized to enter into the severance agreements with defendants key employees. Therefore, defendant Bouschor acted outside the scope of his executive authority in entering into the severance agreements and was not entitled to governmental immunity. The trial court properly denied defendant Bouschor's motion for summary disposition based on governmental immunity.

B. Key Employees

Defendants key employees argue that the trial court erred in ruling that there was a genuine issue of material fact regarding whether they voluntarily quit their positions with the Tribe or whether they were terminated from their employment with the Tribe. This Court's review of a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) is as follows:

This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey, supra* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR

2.116(C)(10) “if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law.” *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). [*Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005), remanded in part 477 Mich 1067 (2007).]

The issue whether defendants and other key employees voluntarily quit their employment with the Tribe or whether they were terminated from their employment is significant because under the key employees’ employment agreements, which would presumably be in effect if the severance agreements were deemed invalid, they were entitled to severance pay if their employment was terminated, but not if they voluntarily resigned. The trial court considered the language of the severance agreements, the testimony of defendant Bouschor, tribal employee Kristi Little, Miller Canfield attorney Kevin Moody, and circumstantial evidence and concluded that there was a genuine issue of material fact regarding whether defendants Green, Scott, Jannetta and Wheeler and other key employees were terminated.

The language of the severance agreements themselves is evidence that defendants voluntarily left their employment with the Tribe. First, the severance agreements provide that the employee and the Tribe “hereby terminate their employment relationship on the date when this Severance Agreement and Release becomes effective.” Based on this language, it appears that defendants and the Tribe mutually and voluntarily decided to part ways, not that plaintiff Tribe terminated the key employees’ employment. In addition, the severance agreement also provide that the key employee “executes this Agreement voluntarily and of his own free will.” Finally, the severance agreements provide:

This Agreement shall become effective, enforceable, and irrevocable when (1) signed by the parties AND (2) the revocation period has expired OR [key employee] has accepted the lump sum Severance Payment. [Key employee] and the Sault Tribe understand and agree that this Severance Agreement and Release is revocable at [key employee’s] sole discretion until 6:00 p.m. on July 9, 2004, or by 6:00 p.m. on the seventh day following the resolution of any contest concerning the June 2004 Sault Tribe Tribal Chairperson elections, whichever is later. This agreement may be revoked by [key employee] by a writing sent to the Tribal chairperson by certified mail post-marked no later than 6:00 p.m. on July 9, 2004, or by 6:00 p.m. on the seventh day following the resolution of any contest concerning the June 2004 Sault Tribe Tribal Chairperson elections, whichever is later. . . .

This language is evidence that the key employees had the power to decide whether to enter into the agreement at the outset as well as the “sole discretion” to revoke such agreement within the limits established in the agreements. Furthermore, as the trial court noted, the fact that the revocation deadline was the day after the election or later if the election results were contested suggests that the parties contemplated that the employees might elect to revoke their severance agreements if defendant Bouschor won the chairperson election.

Although the language of the severance agreements tends to indicate that defendants key employees voluntarily quit their employment with the Tribe, there was also evidence that tended to show that defendants were terminated from their employment with the Tribe. First, defendant

Bouschor stated in an affidavit that he decided to terminate each of the key employees regardless of the outcome of the election. Bouschor explained his decision to terminate defendants key employees in his affidavit as follows:

[W]hether Mr. Payment or I won the election, I had made the decision by late May, 2004 that I was terminating the Key Employees. I did so because I believed that Mr. Payment and his supporters' attacks on the Key Employees had reduced their ability to carry out their employment duties, and ensnared the Tribe in controversy that was detrimental to its interests, and would continue no matter who won the election. I also believed that it would reduce controversy and acrimony if the offices held by the non-Tribal members could be filled by Tribal members. Moreover, if Mr. Payment won the election and became the next Chairman, I believed that he would himself terminate the employment of the Key Employees, or make their working environments intolerable resulting in a constructive discharge of them, yet he would refuse to pay their severance pay and there was a significant risk that he would even seek baseless and groundless criminal prosecutions of them as a ground for refusal of severance pay. . . .

In addition, defendants key employees also testified in depositions that Bouschor terminated their employment. Kevin Moody, an attorney for defendant Miller Canfield, also testified that defendant Bouschor told him "that he wanted to terminate several employees"

The evidence was conflicting regarding whether defendants key employees voluntarily quit their employment or whether they were fired or terminated. Although the severance agreements tend to show that defendants key employees voluntarily quit their employment, the testimony of defendants Bouschor, Green, Scott, Jannetta and Weaver, as well as the testimony of Miller Canfield attorney Moody, tend to show that defendants key employees were terminated or fired by Bouschor. As the trial court recognized, "[u]ltimately, the issue of whether the Key Employees quit or were fired turns on the intent of these Employees and Bouschor. . . . Summary disposition is always suspect when issues of motive and intent are involved." The trial court is correct that summary disposition is rarely appropriate in cases involving questions of credibility, intent or state of mind. *In re Handelsman*, 266 Mich App 433, 438; 702 NW2d 641 (2005). Because whether the key employees quit or were fired hinges on the motive, intent and credibility of defendant Bouschor and defendants Green, Scott, Jannetta and Weaver, the trial court properly ruled that whether the key employees quit or were fired was a question of fact for the jury to decide.

C. Sovereign Immunity

Defendants key employees argue that the trial court erred in ruling that their discrimination and tort counterclaims⁶ were barred by the Tribe's sovereign immunity and in

⁶ Defendants key employees' counterclaim against plaintiff Tribe included, among other claims, claims for employment discrimination under the Elliott-Larsen civil rights act, MCL 37.2101 *et seq.*, as well as tort claims, including defamation, intentional infliction of emotional distress, and
(continued...)

dismissing those counterclaims under MCR 2.116(C)(7). According to defendants key employees, the Tribe consented to a broad waiver of sovereign immunity and this broad waiver includes their discrimination and tort counterclaims.

As a matter of federal law, an Indian tribe is subject to suit only if Congress has authorized the suit or if the tribe has waived sovereign immunity. *Kiowa Tribe of Oklahoma v Mfg Technologies, Inc*, 523 US 751, 754; 118 S Ct 1700; 140 L Ed 2d 981 (1998). Suits against federally recognized Indian tribes are barred by sovereign immunity unless there is a clear waiver by the Tribe. *Oklahoma Tax Comm v Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 US 505, 509; 111 S Ct 905; 112 L Ed 2d 1112 (1991). A Tribe only waives its sovereign immunity if the Tribe effectuates the waiver “with the requisite clarity[.]” *C & L Enterprises, Inc v Citizen Band Potawatomi Tribe of Oklahoma*, 532 US 411, 418; 121 S Ct 1589; 149 L Ed 2d 623 (2001). If a tribe waives sovereign immunity, the waiver is strictly construed and applied in accordance with any conditions or limitations on the waiver. *Missouri River Services, Inc v Omaha Tribe of Nebraska*, 267 F3d 848, 852-853 (CA 8, 2001).

The trial court relied on the waiver language in Resolution 2001-07 in concluding that plaintiff’s waiver of sovereign immunity was limited to actions commenced in connection with an employment agreement. Resolution 2001-07 provides, in relevant part:

Section 3 WAIVER OF SOVEREIGN IMMUNITY AND CONSENT TO JURISDICTION

3.1 The Tribe hereby expressly waives its sovereign immunity from suit should an action be commenced *in connection with an Employment Agreement*:

This waiver:

- 1) shall terminate upon performance by the Tribe of all its obligations in connection with an Employment Agreement;
- 2) is granted solely to the Key Employee, who is party to the Employment Agreement;
- 3) shall extend to, inter alia, any judicial or non-judicial proceeding or action, including, but not limited to, any lawsuit, arbitration, judicial or non-judicial foreclosure proceeding, any judicial or non-judicial action to enforce the rights of the Key Employee, and the assertion of any claim in a court of competent jurisdiction or with any arbitrator or arbitration panel to enforce the obligations of the Tribe in connection with the Employment Agreement;

(...continued)

invasion of privacy.

4) shall be enforceable against all assets and property of the Tribe, to the extent sufficient to satisfy the Tribe's obligations in connection with the Employment Agreement[.] [Resolution 2001-07, § 3.1 (emphasis added).]

There is also waiver language in the key employees' employment contracts and severance agreements. The employment contracts contain the following waiver language:

JURISDICTION AND WAIVER. This Agreement shall be construed in accordance with the laws of the State of Michigan. Any action arising in connection with this Agreement shall be filed and maintained only in the courts of the State of Michigan or a federal court sitting in the State of Michigan. *Employer, through Resolution No. 2001-07, has waived its sovereign immunity from suit and the jurisdiction of the Sault Ste. Marie Chippewa Tribal Court for any action arising in connection with this Agreement, which Resolution is attached hereto and incorporated into this Agreement.* [Emphasis added.]

The severance agreements also contain language referencing the waiver of sovereign immunity in Resolution 2001-07:

The Sault Tribe expressly waives its sovereign immunity from suit should an action be commenced in connection with this Agreement consistent with the terms of Sault Tribe Board of Directors Resolution 2001-07, which is incorporated here by reference. The Sault Tribe expressly waives any right to have any such suit heard in Tribal Court, as stated in the key employee contract. [Emphasis added.]

The waiver contained in Resolution 2001-07, which must be strictly construed according to its limitations, applies to actions "commenced in connection with an Employment Agreement[.]" Similarly, the language used in the employment agreements limits plaintiff's waiver of sovereign immunity to actions "arising in connection with" the employment agreements, and the severance agreements also limits plaintiff's waiver of sovereign immunity to actions "in connection with" the severance agreement.

In addition to counterclaiming for breach of contract, defendants key employees also counterclaimed for employment discrimination, defamation, intentional infliction of emotional distress, and invasion of privacy. Defendants key employees' discrimination and tort claims related to their employment with plaintiff Tribe, but were not commenced in connection with and did not arise in connection with the employment agreements. Rather, they arose from facts and circumstances that were distinct from the employment agreements. Plaintiff's waiver of sovereign immunity must be clear and unambiguous, and it must be strictly construed. In this case, the waiver only clearly waived sovereign immunity to breach of contract claims commenced in connection with or arising in connection with an employment agreement. Plaintiff's waiver did not clearly include a waiver of sovereign immunity as to discrimination and tort claims. Thus, we agree with the trial court that plaintiff's waiver of sovereign immunity was limited and was not broad enough to encompass a waiver of sovereign immunity for discrimination and tort claims. Because the waiver clearly is restricted to disputes commenced in connection with or arising in connection with the employment agreement, the trial court did not err in dismissing defendants key employees' discrimination and tort counterclaims.

Defendants key employees argue that even if the Tribe did not expressly waive its sovereign immunity with respect to their discrimination and tort counterclaims, by filing suit the Tribe has waived its sovereign immunity to defenses and defensive claims in recoupment because sovereign immunity does not bar counterclaims that defeat or reduce and offset against the Tribe's claims, including damages claims. The defense of recoupment is explained in *Mudge v Macomb Co*, 458 Mich 87, 106-107; 580 NW2d 845 (1998):

The defense of recoupment refers to a defendant's right, in the same action, "to cut down the plaintiff's demand, either because the plaintiff has not complied with some cross obligation of the contract on which he or she sues or because the plaintiff has violated some legal duty in the making or performance of that contract." 20 Am Jur 2d, Counterclaim, Recoupment, etc., § 5, p 231. Recoupment is "a doctrine of an intrinsically defensive nature founded upon an equitable reason, inhering in the same transaction, why the plaintiff's claim in equity and good conscience should be reduced." *Pennsylvania R Co v Miller*, 124 F2d 160, 162 (CA 5, 1941).

As explained in *Warner v Sullivan*, 249 Mich 469, 471; 229 NW 484 (1930):

Recoupment is a creature of the common law. It presents to the court an equitable reason why the amount payable to the plaintiff should be reduced

The trial court properly concluded that the doctrine of recoupment did not bar application of sovereign immunity to preclude defendants key employees' counterclaims for discrimination and various torts. As stated before, defendants' counterclaims included claims of discrimination, defamation, intentional infliction of emotional distress, and invasion of privacy. Such claims, while arguably related to the key employees' employment agreements, were separate and distinct claims that were independent of and not arising from the employment agreements. The equities in this case do not support application of the recoupment doctrine because the counterclaims arose out of different facts and circumstances and are based in tort, not contract. Thus, the trial court properly ruled that the recoupment doctrine was inapplicable.

In sum, the trial court properly ruled that plaintiff Tribe's waiver of sovereign immunity was limited and did not include a waiver of immunity from discrimination and tort claims. The trial court also properly ruled that the doctrine of recoupment was inapplicable. Thus, the trial court did not err in dismissing defendants key employees' discrimination and tort counterclaims under MCR 2.116(C)(7).

D. Legal Malpractice of Miller, Canfield, Paddock and Stone, P.L.C.

Defendant Miller Canfield argues that the trial court erred in denying its motion for summary disposition of plaintiff's legal malpractice claim against it. According to Miller Canfield, even if its legal opinion regarding defendant Bouschor's authority to enter into the

severance agreements was incorrect, the firm's opinion cannot be the basis for legal malpractice because of the attorney judgment rule. Miller Canfield also argues that to the extent that plaintiff's legal malpractice claim is based on Miller Canfield's failure to communicate with plaintiff Tribe's Board,⁷ the claim must be dismissed because Miller Canfield had no duty to communicate with the Board under the Michigan Rules of Professional Conduct. Finally, Miller Canfield argues that the proximate cause and injury elements of a legal malpractice claim are not met because even if defendant Bouschor did not have authority to enter into the severance agreements with defendants key employees, the Tribe would have been obligated to make severance payments to the key employees under their employment agreements with the Tribe.

Plaintiff cannot establish the injury element of its legal malpractice claim against defendant Miller Canfield. The elements of a legal malpractice action are: (1) the existence of an attorney-client relationship, (2) negligence in the legal representation of the plaintiff, (3) that the negligence was a proximate cause of an injury, and (4) the fact and extent of the injury alleged. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). "A claim of malpractice . . . requires a showing of actual injury caused by the malpractice" *Colbert v Conybeare Law Office*, 239 Mich App 608, 620; 609 NW2d 208 (2000). In this case, plaintiff Tribe cannot establish that it suffered an actual injury because the payments to the key employees under the severance agreements were actually ten percent less than what plaintiff would have had to pay the key employees under their employment agreements. Furthermore, the severance agreements also contained other provisions of value to plaintiff Tribe, including a release and a six-month non-compete clause, which were not present in the employment agreements. Under these circumstances, plaintiff Tribe failed to establish the existence of an actual injury. The trial court therefore erred in denying Miller Canfield's motion for summary disposition of plaintiff's legal malpractice claim. In light of our conclusion regarding the injury element of plaintiff's legal malpractice claim, we need not determine whether the attorney judgment rule bars plaintiff's legal malpractice claim against defendant Miller Canfield or whether defendant Miller Canfield had a duty to communicate with the Board under the Michigan Rules of Professional Conduct.

E. Civil Conspiracy

Defendant Miller Canfield argues that in addition to dismissing plaintiff's independent civil cause of action for conspiracy based on MCR 2.116(C)(8), the trial court also should have dismissed plaintiff's allegations that Miller Canfield conspired with other defendants to commit other offenses because plaintiff cannot establish the preconceived agreement element of conspiracy. Miller Canfield acknowledges that the trial court did not address whether there was an issue of fact regarding whether the agreement element of a conspiracy had been established. Generally, issues that are not raised before and addressed by the trial court are not preserved for review. *Fast Air, Inc, supra* at 549. Therefore, we decline to address this issue.

F. Apparent Authority

⁷ In Count III, ¶ 27.A. of plaintiff's fifth amended complaint, plaintiff alleges that defendant Miller Canfield "[f]ail[ed] to communicate with Plaintiff's Board of Directors regarding the other Defendants' intentions, conduct, and inaction[.]"

Plaintiff argues that the trial court erred in concluding that there was an issue of fact regarding whether defendant Bouschor had apparent authority to enter into the severance agreements with defendants key employees. Plaintiff also argues that the trial court erred in failing to determine that Bouschor did not have authority to terminate the employment of the key employees and make severance payments to them under the employment agreements.

Although the trial court ruled that defendant Bouschor did not have delegated or inherent authority to enter into severance agreements with key employees, it ruled that there was an issue of fact for the jury regarding whether defendant Bouschor had apparent authority to enter into the severance agreements with the key employees. In so doing, the trial court compared Bouschor to a president of a corporation and noted that a corporate president has the power to do any act or make any contract in the ordinary transaction of corporate business. According to the trial court:

The jury will need to decide if the pre-election “firing” of seven Key Employees, coupled with secret severance payments in large lump sums, carried out by checks written outside of ordinary accounting methods, are the ordinary transactions of the Tribe’s business and a circumstance where an ordinarily prudent person would have assumed that Bouschor was acting within his authority.

Therefore, the trial court concluded that “[w]here there are controverted fact issues as to the scope of authority, they must be decided by the trier of fact” and “that the question of Bouschor’s apparent authority to fire the Key Employees and to make the Severance Agreements is a fact question for trial.”

An agency relationship may arise when there is a manifestation by the principal that the agent may act on his account. *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992). The authority of an agent to bind a principal may be either actual or apparent. *Id.* at 698. Apparent authority may arise when acts and appearances lead a third person reasonably to believe that an agency relationship exists. *Id.* at 698-699. Apparent authority must be traceable to the principal and cannot be established by the acts and conduct of the agent. *Id.* at 699. In determining whether an agent possesses apparent authority to perform a particular act, the court must look to all surrounding facts and circumstances. *Id.* The question is whether an ordinarily prudent person would be justified in assuming that the agent had the authority to do the act. *Id.* When a principal has placed an agent in a situation in which a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in assuming that such agent was authorized to perform on behalf of the principal the particular act, and the act has been performed, the principal is estopped from denying the agent’s authority to perform it. *Id.* at 699-700.

The trial court was correct in concluding that there was an issue of material fact regarding whether defendant Bouschor had apparent authority to enter into the severance agreements with defendants key employees. 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. Therefore, there is an issue of fact regarding whether the Tribe's conduct of not challenging Bouschor's firings of previous employees could have given defendants key employees a reasonable belief that Bouschor was authorized to fire them and enter into severance agreements with them. Furthermore, given the conflicting resolutions made by the Board, specifically Resolution 1997-63 and Resolution 2001-07, and 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, there was also an issue of fact regarding whether defendants key employees would have been justified in assuming that defendant Bouschor had the authority to enter into the severance agreements with them. Generally, whether an agent has apparent authority presents an issue of fact. See *Moore v St Clair Co*, 120 Mich App 335, 339; 328 NW2d 47 (1982). This case is no exception. Therefore, the trial court did not err in ruling that there was an issue of fact regarding whether defendant Bouschor had apparent authority to terminate their employment and enter into severance agreements with them.

Plaintiff next argues that the trial court erred in failing to determine that defendant Bouschor did not have the authority to terminate the key employees and pay them severance under their employment contracts. This argument presumes that the severance agreements that defendant Bouschor entered into with defendants key employees were invalid. If they were invalid, then the employment agreements that existed between plaintiff Tribe and the key employees would be in effect and the terms of the employment agreements would govern the terms under which any severance payments might be payable to the key employees. Under the employment agreements, the key employees would not be entitled to severance pay if they voluntarily quit their employment. Plaintiff Tribe acknowledges that the trial court did not reach this question. Generally, an issue not raised before or addressed by the trial court is not preserved for appeal. *Fast Air, Inc, supra* at 549. Although this Court may address an unpreserved issue if it involves a question of law and the facts necessary for its resolution have been presented, *Sutton v Oak Park*, 251 Mich App 345, 349; 650 NW2d 404 (2002), we decline to address this issue because it may not be necessary to reach the issue at all if the trier of fact determines that the key employees voluntarily terminated their employment. The trial court ruled that whether defendants key employees were terminated or fired was a question for the trier of fact to decide. If the trier of fact decides that defendants key employees voluntarily left their employment, they would not be entitled to severance pay under their employment agreements anyway. Therefore, it would be premature to decide this issue before the trier of fact makes a determination regarding whether defendants key employees were terminated from their employment or voluntarily quit. The trial court did not err in not deciding this issue.

G. Conversion

Plaintiff argues that the trial court erred in granting summary disposition of its common law and statutory conversion claims under MCR 2.116(C)(8) and (10). "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim on the basis of the pleadings alone to determine whether the plaintiff has stated a claim upon which relief can be granted." *Morden v Grand Traverse Co*, 275 Mich App 325, 331; 738 NW2d 278 (2007). This Court must accept the plaintiff's well-pleaded factual allegations as true and construe them in a

light most favorable to the nonmoving party. *Id.* “The motion should be granted if no factual development could possibly justify recovery.” *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001).

Plaintiff’s fifth amended complaint contained a common law conversion claim, which alleged:

43. Plaintiff incorporates the above paragraphs by reference.

44. The Employee Defendants wrongfully exerted dominion over Plaintiff’s funds in denial of or inconsistent with Plaintiff’s rights to such funds. Defendants Bouschor and Miller Canfield conspired with the Employee Defendants.

45. The Employee Defendants obtained such funds without Plaintiff’s consent and these Defendants have an obligation to return such funds because they were not entitled to them.

46. The Employee Defendants have not returned the funds.

47. As a result, Plaintiff has been damaged in an amount in excess of the \$2.6 million.

Plaintiff’s fifth amended complaint also contained a claim of statutory conversion, MCL 600.2919a, which alleged:

48. Plaintiff incorporates the above paragraphs by reference.

49. The Employee Defendants concealed, embezzled or converted Plaintiff’s property and money for their own use.

50. Defendants Bouschor and Miller Canfield concealed or aided in the concealment of the embezzlement or conversion with knowledge that such money was embezzled or converted, in violation of MCLA 600.2919. The Employee Defendants conspired with Defendants Bouschor and Miller Canfield.

51. As a result, Plaintiff has been damaged in an amount in excess of \$2.6 million. Plaintiff is entitled to treble damages under MCLA 600.2919.

In dismissing plaintiff’s common law conversion claim, the trial court stated:

The checks in this case were drawn on the account of the Tribe. “[T]he drawer of the check may not maintain an action for conversion, because the check represents an obligation of the drawer rather than property of the drawer.” *Pamar Enterprises, Inc. v Huntington Banks*, 228 Mich App 727, 735; 580 NW2d 11 (1998)[.] Therefore, an action for conversion will not lie against the Key Employees for them having taken the checks of the Tribe, because these checks represent an obligation of the Tribe rather than property of the Tribe.

As to the money obtained by the Key Employees when they cashed the checks, it is recognized that: “There can be no conversion of money, unless there is an obligation on the part of defendant to deliver specific money to plaintiff.” *Garras v Bekiares*, 315 Mich 141, 148; 23 NW2d 239 (1946) and *Citizens*, *supra* at p 575. [Opinion 2/8/07, p 20.]

The trial court also granted summary disposition of plaintiff’s statutory conversion claim, citing *Marshall Lasser, PC v George*, 252 Mich App 104, 112; 651 NW2d 158 (2002) and stating: “MCL 600.2919a does not ‘provide a remedy against a person who has actually stolen, embezzled or converted property.’”

Plaintiff argues that the trial court erred in dismissing its common law conversion claim. Common law conversion consists of “any distinct act of dominion wrongfully exerted over another person’s personal property.” *Pamar Enterprises, Inc v Huntington Banks of Michigan*, 228 Mich App 727, 734; 580 NW2d 11 (1998). “A check is considered the personal property of the designated payee.” *Id.* In *Echelon Homes, LLC v Carter Lumber Co*, 261 Mich App 424, 436-437; 693 NW2d 171 (2004), *rev’d* on other grounds 472 Mich 192 (2005), this Court upheld the trial court’s dismissal of a conversion claim under similar circumstances. In *Echelon*, the plaintiff builder’s employee opened a credit account in the builder’s name with the defendant building materials supplier and charged over \$20,000 in materials for personal use. *Id.* at 427-428. The plaintiff builder sued the defendant supplier and alleged, among other claims, that the defendant supplier aided and abetted the plaintiff’s employee in converting the plaintiff’s assets. *Id.* at 428. This Court ruled that the plaintiff could not sustain a claim for aiding and abetting conversion because there was no underlying conversion because the checks at issue were made payable to the defendant supplier, and a check is the property of the designated payee. *Id.* at 436-437. Similarly, in this case, the checks were written to defendants key employees and were therefore the property of defendants key employees, and not the Tribe. Thus, like in *Echelon Homes*, there was no conversion in this case. The trial court properly dismissed plaintiff’s claim of common law conversion.

The trial court also properly concluded that summary disposition of plaintiff’s common law conversion claim was appropriate because even if defendant Bouschor was not authorized to enter into the severance agreements with defendants key employees and defendants key employees were not entitled to receive the severance payments under the severance agreements, the key employees were under no obligation to return the specific funds paid under the severance agreements. “To support an action for conversion of money, the defendant must have an obligation to return the specific money entrusted to his care.” *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111; 593 NW2d 595 (1999). This Court observed in *Echelon*, *supra*:

In *Garras v Bekiares*, 315 Mich 141, 147; 23 NW2d 239 (1946), the plaintiff brought an action alleging conversion based on a dispute over a consignment agreement. The Michigan Supreme Court held that because the “plaintiff was not entitled to the specific or identical moneys collected by defendant from his customers, he was not entitled to a judgment in tort for conversion.” [*Echelon*, *supra* at 437-438,]

Similarly, because plaintiff 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, the trial court properly dismissed plaintiff's common law conversion claim.

Plaintiff also argues that the trial court erred in dismissing its statutory conversion claim. MCL 600.2912a provides a statutory cause of action against those who aid in the conversion of property. MCL 600.2919a provides, in relevant part:

(1) A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees:

* * *

(b) Another person's buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted.

MCL 600.2919a only provides a remedy against the accomplice, not against the person who actually stole, embezzled, or converted the property: "[T]he statute is not designed to provide a remedy against the individual who has actually . . . converted the property. Indeed, the statute carefully compartmentalizes the actions of those assisting and the actions of the principal." *Marshall Lasser, PC, supra* at 112. Therefore, MCL 600.2919a does not provide a remedy against defendants key employees, and summary disposition with respect to defendants key employees was appropriate for this reason.

Summary disposition was also appropriate with respect to defendants Bouschor and defendants Miller Canfield, although for a different reason. In *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 194; 694 NW2d 544 (2005), the Supreme Court held that MCL 600.2912a requires a showing that a defendant had actual knowledge that the property was converted. That the person should have known is not sufficient to impose liability under the statute. *Id.* at 197. 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. Defendant Bouschor was unsure whether he had authority to enter into the severance agreements that resulted in defendants key employees receiving severance pay; therefore, he requested and received a legal opinion from defendant Miller Canfield, the law firm that represented plaintiff Tribe. Defendant Miller Canfield's letter opined that Bouschor had authority to enter into the severance agreements with defendants key employees. Similarly, although defendant Miller Canfield's letter opining that defendant Bouschor did possess such authority omitted at least one resolution which tended to show that Bouschor did not have such authority, the Tribe's resolutions were inconsistent and conflicting, and Bouschor's authority or lack thereof to enter into the severance agreement at issue was not

clear or settled. Defendant Miller Canfield's letter opining that Bouschor had authority to enter into the severance agreements is evidence that Miller Canfield lacked actual knowledge that any property was converted. Therefore, because defendants Bouschor and Miller Canfield lacked actual knowledge that any property was converted, the trial court did not err in dismissing plaintiff's claim for statutory conversion under MCR 2.116(C)(10).

The trial court did err in dismissing plaintiff's statutory conversion claim under MCR 2.116(C)(8), however, because plaintiff sufficiently pleaded a claim for conversion under MCL 600.2919a. This Court ordinarily affirms the decisions of a trial court if it reaches the right result for the wrong reasons. *Wickings v Arctic Enterprises, Inc.*, 244 Mich App 125, 150; 624 NW2d 197 (2000). Therefore, we affirm the trial court's granting of summary disposition of plaintiff's statutory conversion claim.

H. Breach of Fiduciary Duty and Fraud

Plaintiff argues that the trial court erred in focusing on whether defendant Bouschor's conduct benefited the Tribe in determining whether there was an issue of fact regarding whether Bouschor breached a fiduciary duty to the Tribe. Plaintiff also argues that defendants key employees are liable for Bouschor's breach of fiduciary duty because the undisputed facts show that they knowingly participated in a scheme in which Bouschor breached his fiduciary duty.

Regarding plaintiff's claim that defendant Bouschor breached a fiduciary duty to the Tribe, the trial court held:

As Chairperson of the Tribe, Bouschor clearly was a fiduciary. Thus he was obliged to act for the benefit of the Tribe regarding matters within the scope of his relationship. If the jury finds that he conspired with the Key Employees to permit them to quit while being paid the large lump sum payments involved in this case, this clearly constitutes a breach of Bouschor's fiduciary duties, rendering him liable to Plaintiff.

If Bouschor fired the Key Employees, the question of his liability for fiduciary duty will turn on his intent in doing this.

* * *

Even though Bouschor received no money from the payments made to the Key Employees, he still may be liable for a breach of his fiduciary duty if the jury finds that payments made were for his benefit in the sense that he desired to take care of his supporters instead of these payments being for the benefit of the Tribe to assure a smooth transition, avoid future controversy, etc., as Bouschor claims. . .

Accordingly, the Court finds if the jury determines that Bouschor fired the Key Employees, his liability as a fiduciary will rest on the further jury determination of whether he carries his burden of showing that the payments were made for the Tribe's benefit.

The trial court also held that there was an issue of fact regarding whether defendants key employees were liable if defendant Bouschor breached his fiduciary duty to the Tribe:

If the jury finds that the Key Employees were fired, and if they did nothing more than negotiate on their own behalf the terms of their severance, no basis for fiduciary liability is apparent.

However, a third party, such as the Key Employees, can be liable for a fiduciary's breach under certain circumstances.

* * *

By virtue of the secrecy, the timing and execution of the transactions in this case, the involvement of some of the Key Employees in communications with Miller Canfield, etc., the jury could find that some or all of the Key Employees participated knowingly in Bouschor's breach of his fiduciary duty. Plaintiff's claim of breach of fiduciary duty against Key Employees presents issues of fact for the jury.

According to plaintiff, the trial court erred in focusing on whether defendant Bouschor's actions benefited the Tribe in determining whether there was a question of fact regarding whether Bouschor breached a fiduciary duty to the Tribe because whether defendant Bouschor's actions benefited the Tribe is essentially a good faith defense, which is not a defense if the fiduciary acts outside the scope of his authority. It is true that good faith is not a defense where a fiduciary disregards the limits placed upon his power by law. *Thiel v Cruikshank*, 96 Mich App 7, 13; 292 NW2d 150 (1980). The trial court stated that defendant Bouschor "was obliged to act for the benefit of the Tribe regarding matters within the scope of his relationship[.]" that Bouschor "may be liable for a breach of his fiduciary duty if the jury finds that payments made were for his benefit . . . instead of these payments being for the benefit of the Tribe[.]" and that Bouschor's "liability as a fiduciary will rest on the further jury determination of whether he carries his burden of showing that the payments were made for the Tribe's benefit." The trial court's statements were not improper statements regarding Bouschor's fiduciary duty to the Tribe and were not tantamount to a conclusion that defendant acted in good faith if his conduct benefited the Tribe. A fiduciary owes a duty of good faith to his principal and is not permitted to act for himself at his principal's expense during the course of the agency relationship. *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 49; 698 NW2d 900 (2005). The converse of this is that a fiduciary is obligated to act for the benefit of the principal. The trial court's statements regarding defendant Bouschor's obligation to act for the benefit of the Tribe were an accurate statement of a fiduciary's duty. Therefore, plaintiff's argument that the trial court applied the wrong legal standard in making its determination regarding whether defendant Bouschor breached his fiduciary duty to the Tribe is without merit.

Plaintiff next argues that the trial court erred in ruling that there was an issue of fact regarding whether defendants key employees could be liable if defendant Bouschor breached a fiduciary duty to the Tribe. "Third parties that profit from a fiduciary's breach can be liable under certain circumstances" *In re Goldman Estate*, 236 Mich App 517, 521; 601 NW2d 126 (1999). "Where a person in a fiduciary relation to another violates his duty as fiduciary, a third person who participates in the violation of duty is liable to the beneficiary. If the third

person makes a profit through such participation, he is chargeable as constructive trustee of the profit so made.’” *L A Young Spring & Wire Corp v Falls*, 307 Mich 69, 106; 11 NW2d 329 (1943), quoting 3 Scott on Trusts, p 2429, § 506.

The trial court properly ruled that there was an issue of fact regarding whether defendants key employees were liable if defendant Bouschor breached a fiduciary duty to the Tribe. Defendant Bouschor did not inform the Board or seek the Board’s approval in entering into the severance agreements with the key employees. Furthermore, according to the testimony of Miller Canfield attorney Moody, defendant Green sent him information to assist him in preparing the severance agreements, and Miller Canfield sent defendants Green and Jannetta drafts of the severance agreements as well as Miller Canfield’s letter regarding defendant Bouschor’s authority to enter into the severance agreements so that defendants Green and Jannetta could review them. Therefore, at least some of the key employees assisted defendant Miller Canfield in drafting the severance agreements. Furthermore, all of the key employees signed the secret severance agreements on June 9, 2004, but continued to work for plaintiff. The severance checks were written on June 14, 2004, and kept secret. Defendant Scott and his assistant met after work hours to write the severance checks so that the checks were a secret, and Scott acknowledged that he and his assistant printed the checks and the payroll reports and then purged the information from the computer system so that nobody would discover the checks. Then, between 9:14 a.m. and 9:20 a.m., on the day after the election defendants key employees quickly cashed their severance checks and had them converted into cashier’s checks. According to Jolene Nertoli, a key employee who received a severance check under the severance agreements at issue and is not a defendant in this case, she converted her severance check to a cashier’s check “[b]ecause I wanted to ensure that there was no stop payment on the check.” All this evidence permits the inference that defendants key employees participated in a plan to enter into severance agreements which defendant Bouschor was not authorized to enter and to receive severance payments pursuant to these agreements that they would not have been entitled to under their employment contracts if they voluntarily quit their employment. Furthermore, clearly, defendants key employees profited from the participation in that they received severance payments.

Given the secrecy surrounding the severance agreements, defendants key employees’ participation in the creation of the secret severance agreements and the secret writing of the severance checks, and the fact that defendants key employees profited financially from the severance agreements, the trial court did not err in concluding that there was an issue of fact regarding whether, if defendant Bouschor did violate a fiduciary duty to the Tribe, defendants key employees were third parties who participated in and profited from the breach.

I. Breach of Contract and Tortious Interference

Plaintiff argues that the trial court erred in dismissing its claims for breach of contract and tortious interference.

The trial court granted summary disposition of plaintiff’s tortious interference claim with respect to defendant Bouschor under MCR 2.116(C)(8) and (10). The trial court also granted summary disposition of plaintiff’s breach of contract claim against defendant Bouschor, but did not articulate on which basis under MCR 2.116(C) summary disposition was proper.

The elements of a breach of contract cause of action are that a contract existed between the parties and that a breach of one or more of the contractual terms occurred. See *Pawlak v Redox Corp*, 182 Mich App 758, 765; 453 NW2d 304 (1990). It is true that under defendants key employees' employment agreements, the terms of the contract provide that the key employees were not entitled to severance pay if they voluntarily resigned their employment. However, the trial court ruled that whether defendants key employees quit or were terminated was an issue of fact for the jury. Furthermore, defendants key employees received severance payment checks under their severance agreements, not under the employment agreements, and the severance agreements specifically "terminated" and "void[ed]" "[a]ll employment and other agreements[.]" Even if the severance agreements were ultimately determined to be invalid due to defendant Bouscher's lack of authority to enter into them on behalf of plaintiff Tribe, this fact would not render the severance payments to defendants key employees under the severance agreement a breach of defendants key employees' employee agreements. Thus, the trial court properly dismissed plaintiff's breach of contract claim.

The trial court also did not err in dismissing plaintiff's tortious interference with a contract claim. The elements of tortious interference with a contract are: (1) the existence of a contract; (2) a breach of the contract; and (3) an unjustified instigation of the breach by the defendant. *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 89-90; 706 NW2d 843 (2005). Because the trial court properly dismissed plaintiff's breach of contract claim, and a breach of contract is an element of a tortious interference of a contract claim, the trial court properly dismissed plaintiff's tortious interference claim as well.

III. Conclusion

In sum, we reverse the trial court's denial of Miller Canfield's motion for summary disposition of plaintiff's legal malpractice claim. However, we affirm the rulings of the trial court in all other respects.

Affirmed, in part, and reversed, in part.

/s/ Karen M. Fort Hood

/s/ Stephen L. Borrello