

STATE OF MICHIGAN
COURT OF APPEALS

SAULT STE. MARIE TRIBE OF CHIPPEWA
INDIANS,

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

v

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.

UNPUBLISHED
November 18, 2008

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

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

SAAD, C.J. (*concurring in part and dissenting in part*).

I concur in the majority's holding that the trial court erred when it denied Miller Canfield's motion for summary disposition on plaintiff's legal malpractice claim. I also agree that the Tribe did not waive its sovereign immunity with regard to the employees' discrimination and tort claims. The majority also correctly ruled that the trial court properly dismissed the Tribe's common law and statutory conversion claims.

However, I disagree with the majority's holding that the trial court correctly ruled that Bouschor acted outside the scope of his authority when he entered into severance agreements with the key employees. The record reflects that Bouschor regularly hired and terminated key employees and executed severance agreements without board approval. Not only was this consistent with the office of chief executive officer of the Tribe, this authority was specifically delegated to Bouschor through Resolution 2001-07. Resolution 2001-07 provides that the chairman may "enter into Employment Agreements with Key Employees, on such conditions and terms as he deems appropriate, and to perform its obligations thereunder." The resolution further states that, in order to enter into such agreements or to perform obligations under employment agreements, the chairman may "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"

It is undisputed that the employees were working under valid employment agreements and that those agreements contain a provision for severance payments if the employee is terminated. Under the plain language of Resolution 2001-07, Bouschor had the authority to perform that severance obligation and to enter into the severance agreements to do so. Whether viewed as a new agreement to effectuate the Tribe's obligations under the employment agreements or a modification of the terms of the employment agreements, Bouschor acted within his authority to perform the commitments already undertaken by the Tribe. Indeed, in doing so, Bouschor actually executed severance agreements with better terms than were already promised to the key employees. Under the employment agreements, the Tribe would have had to pay roughly \$3 million to the terminated employees. Bouschor reduced those payments to \$2.6 million and provided further protection to the Tribe by adding a release and a non-compete clause to each agreement.

I disagree with the majority's conclusion that Bouschor acted outside of his authority on the basis of Resolution 1997-63, which states that board approval is required for the chairman to commit to the expenditure of more than \$50,000 on a single item. While Resolution 1997-63 may have remained valid for other expenditures, Resolution 2001-07 was passed three years after Resolution 1997-63 and Resolution 2001-07 gave Bouschor the unequivocal authority to enter into employment agreements and to perform obligations under those agreements, without a dollar limitation. To that extent, and for its stated purpose, Resolution 2001-07 superseded Resolution 1997-63. Regardless, the board had already approved the expenditure of severance pay as set forth in the pre-existing employment agreements. The contractual obligation to make severance payments was already undertaken by the Tribe, so this was not a new expenditure. Indeed, it would make little sense to require the approval of an expenditure after it was already placed in a binding contract. In any case, Bouschor entered into numerous other employment

and severance agreements that exceeded \$50,000 without any allegation of impropriety from the board. Moreover, all of the defendant key employees earned a great deal more than \$50,000. It would defy logic to grant Bouschor the specific authority to enter into and to fulfill long-term employment agreements under Resolution 2001-07, but then, through the application of a prior general resolution, to require him to obtain board approval of nearly all of them. To do so would defeat both the language and the purpose of Resolution 2001-07.¹

Though the majority declines to address the issue, I would hold that the trial court erred when it ruled that a motion passed by the board at a meeting on August 20, 2002, affects the applicability of Resolution 2001-07 because nothing in the Tribe's constitution nor its bylaws indicates that a mere motion can revoke a resolution duly passed by the board. Indeed, the bylaws provide that duties are *defined by resolutions* passed by the board, not by motions of the board.² In any case, the August 20, 2002 motion had nothing to do with existing employment agreements or whether Bouschor had the authority to perform the obligations under those agreements. The August 20, 2002 motion was introduced to require board approval of all future employment contracts. Bouschor's performance under the existing employment contracts and his modification of the severance provisions was not only explicitly authorized by Resolution 2001-07, he negotiated terms more favorable to the Tribe.³

I would also hold that the trial court erred when it concluded that there is an issue of fact about whether the key employees were terminated because all relevant evidence established that the key employees were, indeed, terminated. Bouschor and each employee testified to this fact and Resolution 2004-107, signed by Mr. Payment, explicitly acknowledges that Bouschor terminated the key employees. The Tribe presented no evidence that contradicts or undermines this evidence. Rather, the evidence tended to support a finding that the employees were

¹ The majority characterizes the severance agreements as "secret," implying that their confidential nature somehow relates to wrongful conduct by Bouschor and the key employees. However, the agreements were made during a highly acrimonious election in which the successor chairman, Aaron Payment, referred to non-tribal employees as "white pigs." Payment also made abundantly clear his intent to unceremoniously terminate several employees who were not members of the Tribe and accused key employees of engaging in unethical and even criminal activity. Under the circumstances, Bouschor's decision to handle the matter confidentially was not only justified, it was crucial to ensure that the Tribe complied with the obligations set forth in the employment agreements.

² The trial court also erred when it ruled that Bouschor is equitably estopped from claiming that he had authority to enter into the severance agreements because of an e-mail he wrote on September 17, 2002. Not only did the trial court fail to analyze the elements applicable to an estoppel claim, see *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 399; 729 NW2d 277 (2006), the doctrine does not apply when Resolution 2001-07 unequivocally gave Bouschor the authority to enter into the severance agreements.

³ Because Bouschor clearly acted within his authority in performing the obligations under the employment agreements, the trial court should have dismissed the Tribe's breach of fiduciary duty and fraud claims. Neither Bouschor nor the employees should be held liable under those theories.

terminated. Regardless whether Bouschor renegotiated their severance packages to benefit the Tribe, the Tribe would have owed severance payments to the employees under the terms of their employment agreements.⁴ I also do not agree that the language of the severance agreements in any way contradicts the un rebutted evidence that the employees were terminated. The severance agreements state that the employees' employment relationship with the Tribe is terminated and that the employees "voluntarily" signed the severance agreements. This language merely indicates that, when faced with certain termination—either immediately or after a transition period—the employees agreed to the terms of their departures as already defined by their existing contracts. In sum, the Tribe failed to establish the existence of an issue of material fact with regard to whether the employees were terminated.

Because Bouschor had the authority to terminate the key employees and enter into the severance agreements, the trial court erred when it granted summary disposition to the Tribe and when it denied Bouschor's motion for summary disposition. Bouschor was protected by absolute executive immunity for entering into the severance agreements and the severance agreements are valid as a matter of law.⁵ Also, because Bouschor had actual authority to enter into the agreements, there is no need for a jury to determine whether Bouschor had the apparent authority to do so.⁶ For the above reasons, I would reverse the trial court's orders as outlined above and would remand for further proceedings.

/s/ Henry William Saad

⁴ For these reasons, I reject any suggestion that Miller Canfield could have taken part in an alleged conspiracy to make it "superficially appear" that the employees were terminated. The evidence showed that the employees were, in fact, terminated.

⁵ Were I to agree that Bouscher had no inherent or delegated authority to enter into the severance agreements, I believe the majority should have also considered Bouscher's argument that he is entitled to qualified immunity under MCL 691.1407(2). Though the majority declines to consider the issue because the trial court did not address it, we often decide issues of law if they were "raised below and the facts necessary for resolution have been presented." *Village of Hickory Pointe Homeowners Ass'n v Smyk*, 262 Mich App 512, 516; 686 NW2d 506 (2004). The record reflects that Bouscher obtained the advice of legal counsel before he took any action on the severance agreements and no evidence suggests he acted in bad faith or against the law. Accordingly, while I believe Bouschor acted within the scope of his authority, he would also be immune from civil liability under the qualified immunity doctrine.

⁶ In light of these conclusions, I would remand for reconsideration of defendants' breach of contract and tortious interference claims.