

Delaware Tribal Court

601 High Street
Caney, Kansas 67333

The Delaware Tribe of Indians,
Plaintiff

Case No. CIV-15-001

v.

Jenifer Pechonick,
Defendant.

(Corrected) Opinion and Order after Trial

Delaware Tribe of Indians, pro se
170 NE Barbara
Bartlesville OK 74006
918.337.6527

Jenifer Pechonick, pro se
321 Hamilton
Dewey, OK 74029

The Delaware Tribe of Indians (Tribe), through their elected officials, filed this case against Jenifer Pechonick on March 9, 2015 regarding a computer the Tribe purchased in May/June of 2014. The Tribe asserts that although Ms. Pechonick was allowed to use the computer while she served on Tribal Council, it continued to be tribal property and she was required to return it when she no longer held that position. Ms. Pechonick's position is that the Tribe simply purchased the computer for her and that it is her property. The question presented by this case is whether the Tribe converted the computers from being tribal property into personal property for individual members of the Tribal Council. The Tribe has asked for an order requiring Ms. Pechonick to return the computer or, in the alternative, enter an order for restitution.

This court issued a scheduling order on April 29, 2015 and it was properly served on both parties to the addresses listed above. The scheduling order set out time lines for exhibit and witness lists, all motions, and hearing dates and times. The copy mailed to Defendant was returned to the tribal court because no one signed for it. Three attempts to deliver the scheduling order to the Defendant were made by the post office. When the court received the returned mail,

a new copy was sent to the Defendant immediately that did not require a signature. A copy of the returned envelope is in the court file. Per the Defendant, she received a notice of the certified mailing but did not pick it up because it did not list who had sent it. In addition, on May 30, the Court issued a Notice of Intent extending the deadline for witness and exhibit lists and mailed copies to both parties the same day. Other than the first mailing that was sent certified mail, no other mail sent to the Defendant was returned to the court.

On April 7, the Defendant filed a Motion to Dismiss on 6 grounds. The Tribe filed an answer on May 22 contesting every ground. After hearing argument on May 30th, this Court denied the Defendant's request to dismiss the suit and allowed the case to continue to trial.

On July 10, the day before the scheduled trial and well after the close of the time for motions to be filed, the Defendant submitted a motion to amend her answer, a cross-complaint, a witness list, and an exhibit list. Because the defendant did not pay the filing fee, the court did not consider the cross-complaint to be properly filed and thus will not address the issues raised in it within this case. The tribe objected to the entry of Defendant's exhibits because she failed to comply with the requirements of the scheduling order. Because Defendant did not request any of her proposed exhibits to be entered into evidence, the Court did not rule on the Tribe's motion.

A trial was held on July 11. The Court heard testimony from former Councilwoman Jenifer Pechonick, Assistant Chief Bonnie Jo Griffith, Councilwoman Dr. Nicky Michael, and former Councilwoman Janifer Brown.

In May and June of 2014, the Tribe purchased several computers (Surface Pros and at least one Apple MacBook) and computer accessories via Amazon.com for the use of Tribal Council members. The then Chief Paula Pechonick and the then Tribal Manager Curtis Zunigha signed the purchase order. Former Councilwoman Janifer Brown opened a line of credit with Amazon for the purchases. The computer purchased for Ms. Pechonick cost \$1192.99. Assistance Chief Bonnie Jo Griffith reviewed all approved minutes and video records of the Council meeting during this timeframe and there was no resolution or motion authorizing the purchase of the computers or of the transfer of ownership to individual Council members. According to the testimony of Janifer Brown and Jenifer Pechonick, the purchase and transfer was discussed at a special meeting of the Tribal Council. Although there was dispute between the parties as to the cap under the Tribe's financial policies, it does appear to the Court that the

Tribal Manager had the properly delegated authority by the Council to purchase the individual computers for the Tribe.

It was clear from the testimony that the purpose of the purchase was to assist Council members in fulfilling the obligations of their offices. There is little question that computers and computer access are necessary to do business in our world today. It was mentioned that at least one of the lap tops purchased had recording capability so that minutes of tribal council meetings could be better produced. Reduction of paperwork and helping Council members keep information organized were also mentioned as reasons for the purchases. One of the Council member's personal computers had died around that time and they were not able to perform the obligations of their office without computer access. The purchasing of tribal computers for the Council members to use for governmental purposes is a legitimate expense.

It is undisputed that tribal funds were used to purchase the computers and accessories, specifically funds generated by Section 106 consultations were used. Section 106 of the National Historic Preservation Act requires tribal consultation when a federal agency undertaking may affect historic properties that are either (1) located on tribal lands, or (2) when any Indian tribe or Native Hawaiian organization attaches religious or cultural significance to the historic property, regardless of the property's location. The funds used by the Tribe to purchase the computers were generated by fees imposed by the Tribe for their consultation on construction projects, most commonly cell towers and paid by companies such as AT&T. The Court has not been asked to determine whether this was an appropriate use of this particular source of tribal moneys. The Court did examine the source of the moneys, primarily to determine whether there were any grant or contractual requirements placed upon the funds that would have created prohibitions upon how they might be spent. It does not appear to the court that these funds had those sorts of limitations, even if there might be programmatic reasons to uses those funds for NAGPRA and cultural preservation related projects.

In November of 2014 the Tribe held an election. Ms. Pechonick did not retain her seat. The other outgoing members of Council (Verna Crawford, Paula Pechonick, and Janifer Brown) returned the computers issued to them. Verna Crawford had requested the ability to retain hers as she continued to sit on the Trust Board but was denied as it was issued by the Council rather than the Trust Board. Janifer Brown returned hers under protest and submitted an official objection to the Tribal Manager. We also heard testimony current Tribal Council members were

now using these or other computers. (It was reported to the Court that Councilman Young purchased his own computer that one that he uses.)

The Constitution establishes two branches of government, the Tribal Council and the Judiciary. The Constitution vests the Council with a lot of authority; however, the Article IV of the By-laws mandate that Tribal Council action may only be taken upon a majority vote. Where the Council has officially delegated a substantial amount of authority for procurement and management of assets, it has not delegated the authority to divest the Tribe of its assets. As a result, although the purchase of the computers as tribal assets was above board, any conversion of them into private property needed tribal council action. The approved minutes of the Tribal Council meetings show that did not occur. This fact was not contested.

At the time of purchase, no official action (resolution or motion) had been taken to convert the tribal funds to the purchase of private property. Accordingly, the computers were tribal property at the time of purchase. In order for the computers to have been legally transferred from the ownership of the Tribe to the ownership of individual members, it would have had to have been done in a manner consistent with the authority the membership has given to tribal council. Article V of the Tribe's Constitution gives the Council the ability to convert tribal property into personal property in at least two ways. The Council has the ability to administer charity (such as scholarships) and the ability to set the salaries of subordinate committees, commissions, boards, tribal officials and employees. There was no testimony given that would suggest that this was in any way a charitable program. Although both Jenifer Pechonick and Janifer Brown testified that it was their belief that the computers were purchased for them as individuals, neither believed it was part of a compensation package. In fact, the Article V of the Tribe's Code of Conduct states that tribal elected officials may only be compensated in accordance with the approved stipend policy. All parties agreed that the stipend policy was not amended to allow for the computers to be transferred to individual ownership. Also, the Tribe did not issue tax statements that included the computers as compensation and a tribal employee had requested the serial numbers of the computers for the purposes of inventory for an upcoming audit.

As a result, we conclude that the Surface Pro currently in Ms. Pechonick's possession is the property of the Tribe and must be returned. She testified that it continued to be in good working order and did not have any known viruses. She also testified that she had a lot of

personal items and applications she purchased on it. For this reason, we want to give Ms. Pechonick the opportunity to purchase the computer from the Tribe. The Court also received conflicting information as to the value of the computer; the Assistant Chief testified that, based on her research it would cost roughly \$600 to buy a refurbished computer as a replacement. Janifer Brown testified that a replacement would cost under \$200. Because Councilwoman Griffith testified concerning the research she did, including reviewing computers with the same specific specifications, we believe that the figure that Councilwoman Griffith provided is the more accurate number.

Order: Ms. Pechonick is hereby ORDERED to either return the Surface Pro computer in good working condition to the Tribe at the Bartlesville office by noon of July 31, 2015 or pay the Tribe \$600 by that date and time. If Ms. Pechonick fails to return the computer in good working condition or pay \$600 to the Tribe by that date, the Tribe may file a notice and a draft judgment in the amount of \$600 with the court for the court to sign. The Tribe shall be entitled to interest on the judgment for as long as the judgment balance remains unpaid and we would ask the Tribe to submit appropriate language incorporating Oklahoma's statutory interest rate for outstanding judgments for the proposed order.

Dated: July 29, 2015



Judge Charles Randall
on behalf of a three judge panel consisting of
Judge Cameron Ann Fraser
Judge Rick Barnes