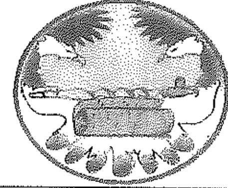
LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS **Tribal Court**	

Court Mailing Address: 7500 Odawa Circle, Harbor Springs, MI 49740 Phone: 231-242-1462

TRIBAL COURT

Case No: FC-233-0812

Northern Anesthesia Providers, Inc.

Petitioner,

vs.

Melissa J. Welles

Respondent.

ORDER FOLLOWING REHEARING DENYING FULL FAITH AND CREDIT TO CHARLEVOIX COUNTY COURT JUDGMENT

Summary

This opinion follows a rehearing of a February 26, 2013 objection hearing. The objection hearing was brought by Melissa J. Wells (Respondent) in response to a request by Northern Anesthesia Providers, Inc. (Petitioner) for the LTBB Tribal Court to grant full faith and credit to a foreign court judgment of the Charlevoix County Court and order that the Respondent's wages be garnished to satisfy the judgment. The Respondent argued that she had already satisfied the debt and therefore objected to any potential writ of garnishment of her wages. Based on the representations made by the Petitioner's attorney, S. Garrett Beck (Attorney), alleging that the Respondent sent her debt payments to the incorrect institution, the Court informed the parties that it would be issuing a written order requiring the Respondent to pay Attorney's court costs of $85.50[1]. Although under the Little Traverse Bay Bands of Odawa Indians (LTBB) Court rules orders of the Court are not official until signed by the presiding judge and filed with the Court Clerk[2], the Respondent chose to immediately pay the Attorney $85.50. Upon the

[1] The Attorney acknowledged payment of the original debt and withdrew the petition for a writ of garnishment during the objection hearing.

[2] See LTBBRCP Rule 8, Section 5.

receipt of new information that contradicted some of the Attorney's original representations to the Court, however, the Court convened a rehearing on the matter on June 13, 2013 in the interest of justice.

Following the rehearing, the receipt of new information, and a review of the entire record, the Court declines to grant full faith and credit to the Charlevoix County Court judgment against the Respondent. The Court finds, in light of the new information, that granting full faith and credit to the Charlevoix County Court would be repugnant to both the public policy and traditional values of the Little Traverse Bay Bands of Odawa Indians. This finding was not caused by any lack of due diligence on behalf of the State court, but instead was caused by the Attorney's wrongdoing that resulted in his procurement of a judgment and order without proper force or effect. Furthermore, the Court finds that, under the Michigan Court Rules, sufficient evidence exists to support a reversal of the Charlevoix County Court judgment against the Respondent. Therefore, the Court denies the Petitioner's request to enforce the Charlevoix County Court judgment against the Respondent and orders the Attorney to reimburse the Respondent costs of $85.50.

Findings of Fact

This case arises out of an uncontested $275.01 debt owed by the Respondent to the Petitioner. The Petitioner hired Professional Collection Service (PCS) to collect the full amount of the Respondent's debt. PCS was unable to collect the debt. Therefore, the Petitioner hired the Attorney to collect the debt. Statements to the Court by both the Attorney and the Respondent substantiate that PCS sent the Respondent a letter on or about April 25, 2012, presumably after the Petitioner had retained the Attorney. However, the letter was not entered into evidence and there exists no evidence as to what the letter contained. As such, the Court is unable to determine when PCS terminated its claim to collection against the Respondent in this matter, or whether PCS explicitly terminated its claim to collection against the Respondent in this matter. After the Petitioner retained the Attorney, he sent an advisory letter of notification to the Respondent.

The letter of notification, written on May 9, 2012 and sent on May 15, 2012 advised the Respondent that the Petitioner's claim for $275.01 had been placed with the Attorney for collection. Direct evidence for when the advisory letter was received by the Respondent does not exist. Therefore, the Court finds that the letter was received two days later, on May 17, 2012, in accordance with commonly accepted mail practices in Petoskey.

On May 20, 2012, the Respondent mailed a $125.00 check (first check), number 2488, to PCS in an effort to pay a portion of the outstanding $275.01 debt that she owed to the Petitioner. On May 28, 2012, the Respondent mailed a $150.00 check (second check), number 2490, to PCS in an effort to pay the remaining portion of the previously outstanding $275.01 debt that she owed to the Petitioner. According to the Respondent's bank statement and the checks, the first check was deposited on May 29, 2012 by the

Attorney into the Attorney's Client Trust Account, account number ending 4650. How the first check came to the Attorney is unclear as the first check makes no reference to the Attorney in any way. According to the statements made by the Attorney at the February 26, 2013, Objection Hearing (Hearing), PCS sent the check along to the Attorney, "which is what they do." (Transcript February 26 p. 20, 11-12.) (Transcript attached.) How PCS knew to forward the checks onto the Attorney was not explained and strikes this Court as telling when both were written payable to the order of PCS and did not reference the Attorney.

The second check, as corroborated by evidence and statements made by the Respondent at the Hearing, was deposited by PCS on June 6, 2012 into a trust account, account number ending 7177. Statements made by the Respondent at the Hearing allege that she had spoken numerous times to Nichole at PCS in an effort to find out what had happened to the second check once PCS had received it. Subsequently, Nichole found that PCS had posted the Respondent's second check to the wrong account. The Respondent alleged that Nichole, upon discovering the error, stated that she would take care of it and that she was sorry for the error. On May 18, 2012, three days after the Attorney sent the letter of notification to the Respondent the Petitioner filed a Summons and Complaint with the Charlevoix County Court, 90th Judicial District of the State of Michigan.

The Summons and Complaint gave notice to the Respondent that she was being sued by the Petitioner, through the Attorney, in the amount of $275.01, plus interest from and after the date thereof; costs and attorney's fees to be taxed. The Charlevoix County Court filed the Summons and Complaint on May 23, 2012, and the summons in the matter was served to the Respondent on June 6, 2012, by certified mail. On July 6, 2012, the Attorney submitted a Request and Affidavit to the Charlevoix County Court. The Request and Affidavit asked for a default entry against the Respondent for the sum of $260.51. On July 11, 2012, the Charlevoix County Court issued default entry for failure of the Respondent to appear. On July 12, 2012, a Default Judgment was ordered against the Respondent in the amount of $260.51. The total judgment was comprised of damages in the amount of $175.01, costs in the amount of $10.50, and attorney's fees in the amount of $75.00. The judgment also stipulated that the judgment would earn interest at statutory rates, computed from the date of the entry of the judgment, and that, at the time, no judgment interest had accrued.

On August 27, 2012, the LTBB Tribal Court received the following documents from the Attorney:

1. A letter from the Odawa Casino Resort stating that the Respondent was currently an employee,
2. A certification of Records of Foreign Court,
3. A copy of the Charlevoix County Court's July 12, 2012 judgment against the Respondent,
4. An affidavit of the Petitioner,
5. A notice of Registration, and

6. A copy of the Petitioner's filing fee, paid to the LTBB in the amount of $40.00 from the Attorney.

The Attorney's purpose in sending the aforementioned documents was to begin procedures on receiving an Order of Garnishment from the Tribal Court against the Respondent for the $260.51 judgment rendered by the Charlevoix County Court.

On August 28, 2012, the Court processed the Notice of Registration. Copies of the Notice of Registration, Certification of Records and the Affidavit of Petitioner were served on the Respondent, the Petitioner, and the Attorney on that date.

On September 13, 2012, the Court received a motion from the Respondent objecting to the garnishment in the form of a letter. The letter described the first and second checks, when they were mailed and alleged that she had already paid the debt to the Petitioner in full. The Respondent faxed the letter to the Petitioner.

On September 13, 2012, the Court received the following documents from the Respondent:

1. A copy of a fax cover sheet the Respondent had sent to PCS,
2. Copies of the first and second checks,
3. Copies of the Respondent's May 2012 and June 2012 bank statements,
4. A copy of the Notice of Registration she had received from the Court in the matter, and
5. A letter written to the Court addressing the matter from Respondent[3].

On February 26, 2013, the Objection Hearing was held. In attendance were the Respondent pro se and the Attorney. The Honorable Judge Allie Greenleaf Maldonado presided. During the proceedings, the Respondent maintained that she had already paid the debt to the Petitioner in full as of May 28, 2012. The Attorney acknowledged that the Respondent had paid the debt in full and withdrew his request to garnish the full amount of his complaint on the record. However, the Attorney alleged that the second payment was not made until after the Respondent received the Summons and Complaint and that she was therefore liable for the court costs arising out of the resultant Charlevoix County Court case and the subsequent LTBB Tribal Court case totaling $85.50.

The Respondent maintained that she was not liable for the Attorney's resultant court costs because she had paid half the debt on May 23 and it was accepted as a payment and cashed. As evidence, the Respondent entered into the record copies of the first and second checks, as well as her May and June bank statements that showed when the checks had been cashed. The Respondent also stated that she had been in communication on numerous occasions with the office of PCS and the office of the Attorney to discuss the matter and that it was not until she spoke to Nichole at PCS,

[3] The letter to the Court outlined, among other things, correspondence she had previously had with Attorney's office staff and staff of PCS, that the Respondent believed she had already paid the full amount owed to the Petitioner, and that the Respondent was objecting to the Notice of Registration she had received in the matter.

presumably after September 12, 2012, that she was made aware that the second check had not gone through to the Attorney as the first check had. Instead, according to the Respondent's testimony, PCS took responsibility for posting the second check to the wrong account.

The Attorney did not dispute or object to the Petitioner's alleged conversations with PCS. Instead, he alleged that the date at which the second check was sent and what PCS had done with it thereafter was irrelevant because the Respondent had addressed it to PCS as opposed to the Attorney. The Attorney argued that it was this original mistake that led to the debt not being paid on time. Therefore, he felt the Respondent should be liable for the Attorney's resulting court costs. The Respondent entered into evidence the letter of notification the Petitioner had sent to the Respondent on May 15, 2012, advising the Respondent that the Petitioner's claim for $275.01 had been placed with the Attorney for collection.

The Attorney argued that the language of the letter made it unmistakably clear that the Respondent's outstanding debt to the Petitioner must be paid to him directly. He claimed that it was the Respondent's failure to heed these instructions that was the direct cause of the costs incurred by the Attorney at the Charlevoix County Court. The Attorney placed a copy of the Affidavit of Service for the Summons and Complaint submitted to the Charlevoix County Court into evidence presumably to show that the Respondent had been made aware by June 6, 2012 of the Summons and Complaint which the Attorney had sent to the Charlevoix County Court on May 23, 2012.

Early in the proceedings it became clear by her statements that the Respondent believed PCS and the Attorney to be the same entity at the time she sent the first and second checks and that the Respondent still believed it to be true despite the Attorney's clear assertions to the contrary. For example, the Court asked the Respondent, "Why should PCS be able to give the payment to Mr. Beck if the payments are supposed to go to Mr. Beck? . . . Is Mr. Beck affiliated with PCS?" (Tr. Feb. 26 p. 8, 4-8.) The Respondent stated, "It's a family name. I don't know. I can't prove that it is or anything like that. I know they share the same fax number. I do know that." (*Id.*, 8-11.) Another example displaying this belief came when the Respondent stated, "On check number 2488, I don't understand; if he's not affiliated with PCS, then how come it says pay to the order Fifth/Third, the account number, S. Garret Beck, Attorney at Law?" (Tr. Feb. 26 p. 20, 6-9.) Also, later in the proceedings the Respondent stated, "I was just frustrated, and I didn't go to Charlevoix County, because by the that time, I was trying—I was trying to get them to understand the checks were there, and I didn't understand how come they couldn't find them when you got one that's got his deposit on it and one that has PCS." (Tr. Feb. 26 p. 25, 15-20.)

In response to the Respondent's belief that the Petitioner and PCS were the same entity, the Court asked numerous questions to clarify the matter throughout the Hearing. For instance, the Court asked the Attorney, "Do you have any interest in Professional Collection Service?" The Attorney responded, "None." (Tr. Feb. 26, p. 12, 8-10.) The Court also asked the Attorney, "So are you technically employed by Professional

Collection Services?" (Tr. Feb. 26 p. 16, 16-17.) The Attorney responded, "Absolutely not." (*Id.*, 18.) A few moments later the Court asked the Attorney, "You are an agent of whom?" (*Id.*, 21.) The Attorney responded, "Plaintiff. I am Plaintiff's Attorney . . . I answer only to Plaintiff." (*Id.*, 22-25.) As a result of the answers to the aforementioned questions, the evidence presented, the consideration of the Attorney's duty of candor to the Court and the statements made by both the Respondent and the Attorney throughout the hearing the Court made the parties aware from the bench how it intended to rule. From the bench, the Court gave the parties notice that it would be finding the following:

1. The initial debt to the Petitioner was paid in full,
2. The Respondent had erred by addressing her payments to PCS instead of the Attorney,
3. The error was unreasonable and inexcusable,
4. That the Attorney's letter of notification to the Respondent made it clear that all payments in the matter of the debt the Respondent owed to the Petitioner were to be paid to the Attorney from that point forward,
5. That the Respondent's error was the direct cause of the costs the Attorney had incurred in the Charlevoix and Tribal Court, and
6. As such, the Court would be ruling that the Respondent must pay the Attorney the amount of $85.50 for is court costs.

Once the Court was adjourned, but while still in the Court Room, the Respondent paid the Attorney the full amount of $85.50 in cash. The Attorney then immediately presented the Respondent with a handwritten receipt for the $85.50. However, the Court was not made aware of this receipt until the Respondent faxed it to the Court on March 1, 2013. As such, shortly after the Hearing, the Court asked the Court Administrator to go to the office of the Attorney and obtain a receipt from him in order to allow the Court to write an order closing the case.

Upon arriving at the office of the Attorney, the Court Administrator noticed information that called into question key statements made by the Attorney at the Hearing. Primarily, the visit lent doubt to the validity of the Attorney's answers to the Court's questions, "Do you have any interest in Professional Collection Service," (Tr. Feb. 26 p. 12, 8-9,) "So you are technically employed by Professional Collection Services," (Tr. Feb. 26 p. 16, 16-17,) and "You are an agent of whom?" (*Id.*, 21.) The Court Administrator observed that PCS and the Attorney's offices were located at the same address and had office space adjacent to each other. Compo Aff., line 2. As a result of this new information, the Court on its own initiative in the interest of justice, reviewed the public business records of PCS in order to ascertain whether the Attorney had a relationship with PCS and if so, the nature of the relationship.

By conducting a simple Michigan Corporation Division Business Entity search online, the Court was able to discover that the Attorney had listed his title as Member, or owner, of PCS on PCS's 2005, 2006, 2007, and 2008 Annual Statements. The Attorney had also listed his title as Authorized Agent on PCS's 2011, 2012 and 2013 Annual Statements. Furthermore, the Court found that SGB LTD was listed as the Resident Agent of PCS since its incorporation and similar research of SGB LTD yielded that the

Attorney had listed his title as President of SGB LTD. *See* PKB 1 LLC, Annual Statements (2001-2013); PKB 1 LLC, Certificates of Renewal of Assumed Name (2000, 2005, 2010); PKB 1 LLC, Articles of Organization (Jan. 12, 1999); S.G.B. LTD., Profit Corporation Information Updates (1998-2013); S.G.B. LTD., Articles of Incorporation (Jan. 4, 1994).

On June 13, 2013, in light of the observations of the Court Administrator and the Court's subsequent online records search, the Court convened a rehearing of the February 26, 2013 Objection Hearing in the interest of justice. At the rehearing, the Attorney restated his position to the Court that he was neither an agent of PCS nor did he have an interest in PCS. (Transcript June 13, p. 6-7, 18-19.) (Transcript Attached.) When presented with organization and incorporation documents for SGB LTD and PCS going back several years that showed that he is listed as a registered agent of PCS, the Attorney posited that it is SGB LTD, of which the Attorney is a majority shareholder and is or was President that is the registered agent of PCS, not him. (Tr. June 13, p. 13, 15-16.); S.G.B. LTD., Profit Corporation Information Updates. The Attorney contended that he as an individual is not a registered agent of PCS and does not have an interest in PCS. (Tr. June 13, p. 6-7, 12-13, 18-19.)

When asked by the Court about the extent of the relationship between SGB LTD and PCS, the Attorney admitted that in addition to SGB LTD serving as the registered agent of PCS, both PCS and SGB LTD share an address, bathroom, photocopier, fax machine, internet service, and common utilities. (Tr. June 13, p. 31-33). The Attorney followed, however, that he does not make purchases on behalf of PCS, insinuated that he cannot make deposits on behalf of PCS—although the Attorney admitted to carrying deposits for PCS to the bank as a courtesy—and is not otherwise involved with PCS. (Tr. June 13, p. 33-36). According to the Attorney, he is not an agent of or otherwise associated with PCS, and SGB LTD and PCS are as "separate and distinct as is possible." (Tr. June 13, p. 6, 36.)

In light of the Attorney's statements and the newly found evidence, the Court found enough reason to reverse its prior findings and held the following on the record:

1. The Attorney withheld information regarding his relationship to PCS during both the February 26, 2013 and June 13, 2013 hearings that was material to the Court's previous decision ordering the Respondent to pay costs of $85.50 to the Attorney,
2. Had the Court possessed information that the Attorney was the registered agent for SGB LTD, which is the registered agent for PCS, the Court would have held otherwise following the February 26, 2013 Objection Hearing,
3. The Respondent's sending of payment to PCS was, in light of the Attorney's relationship with PCS, harmless error on the part of the Respondent, and
4. The finding of harmless error is further supported by the fact that that PCS and SGB LTD share the same building, bathroom, fax, internet and utilities in common and the fact that the Attorney was able to twice cash checks from the Respondent made out to PCS.

Following the hearing, at the request of the Court, LTBB Tribal Court legal intern Stephen Anstey contacted Fifth Third Bank, PCS's bank, on June 17, 2013. Mr. Anstey stated in a sworn affidavit, dated June 19, 2013 that he spoke to Fifth Third Bank employee Tonia Timmerman reading the following script: "Hello. My name is Stephen Anstey and I work at the LTBB Court. If I have a check from [PCS], can I accept a Mr. S. Garret Beck's signature on it? The account number is . . ." Anstey Aff. line 4. Before he could finish speaking, Ms. Timmerman, apparently familiar with the PCS account, responded "yes" to Mr. Anstey's question. *Id.* line 4. Mr. Anstey then asked, "So he's an authorized signatory of PCS?" *Id.* line 4. Ms. Timmerman responded, "Yes he is." *Id.* line 5.

Jurisdiction

The Court has jurisdiction to hear this case through LTBB Court Rule 4.201, June 16, 1999, "Recognition of Foreign Judgment," Chapter 4, Recognition and Enforcement of Foreign Court Judgments. In the matter of garnishments only the Tribe has the power to enforce the garnishment of the wages of its employees as granted by the LTBB's inherent sovereignty within the reservation boundaries. The LTBB Constitution, Art. IV, "TERRITORY , JURISDICTION, LANGUAGE & SERVICE AREA"; 75 Fed. Reg. 60810-01[4].

Analysis

I.

Full Faith and Credit

A.

As an initial matter, the law applicable to this Court's determination of whether to give full faith and credit to a foreign court judgment is found in the LTBB Court Rules. Specifically, while there is a presumption in favor of valid foreign judgments, such presumption may be overcome when recognizing a foreign judgment would be "repugnant to the public policy" and cultural principles of the LTBB Tribe. LTBB Ct. R. 4.201(C)(2)(c). Tribal case law also holds that the Court is permitted to consider traditional Odawa values of fairness and justice when deciding issues involving the Tribe's public policy. *See Carey v. Victories Casino*, No. A-005-0507 (Little Traverse Bay Bands of Odawa Indians Ct. App. May 5, 2008); *see also Harrington v. Little Traverse Bay Bands of Odawa Indians Election Board*, No. A-019-1011 (Little Traverse Bay Bands of Odawa Indians Ct. App. Feb. 16, 2012) (adopting the traditional Odawa

[4] Federal law substantiates that only a tribe has the authority to enforce the garnishment of wages located within an Indian Reservation. As such, a state may only assume jurisdiction in such matters where the state has sought such jurisdiction and an Indian nation has consented to grant it, or, by an unequivocal act of Congress. 25 U.S.C.A § 1322(a); Fed. R. Civ. Pro. 69(a); 28 U.S.C.A.; *Miner Elec. Inc., v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009-10 (10th Cir. 2007); *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1293 (10th Cir. 2008).

understanding of what constitutes a "calendar year" over the Gregorian understanding of the term.).

Under traditional Odawa and cultural values, the preservation of justice has always been at the very center of Odawa culture beliefs. The fundamental nature of justice in Odawa native culture is personified in Chief Blackbird's recitation of the 21 moral commandments. He wrote, "Thou shalt not commit any crime, either by night or by day, or in a covered place: for the Great Spirit is looking upon thee always, and thy crime shall be manifested in time, though knowest not when, which shall be to thy disgrace and shame." Andrew J. Blackbird, History of the Ottawa and Chippewa Indians of Michigan 103 (1887). This commandment demonstrates the commitment of the Odawa to preserving justice by banning crimes and speaking of the disgrace and shame brought upon those who would commit crimes that would harm the Tribe.

Inversely, the Odawa strongly believe that in order to maintain justice, it would be repugnant to punish a person for a crime they did not commit. This belief is revealed in the absolute dedication to respect of the Odawa, where respect for one's self and others is a central tenant of the culture. As the first of the seven grandfather teachings, Minwaadendamowin or "respect" in English, teaches us G'minwaadenmaag g'wiijibimaadiziig or to "respect your fellow living beings." The Gifts of the Seven Grandfathers, Noongwa e-Anishinaabemjig (last updated 2013), *available at* http://www.umich.edu/~ojibwe/lessons/semester-two/seven-grandfathers/. As logic dictates, however, one cannot show respect for another unless one treats them honestly, respectfully and fairly. Accordingly, it would be inherently disrespectful to hold a person liable for harms resulting from another's improper actions.

Similarly, the preservation of fairness is of "paramount importance" to the LTBB and such notions are reflected in the "heritage, cultural values, and modern governmental and business functions of the Tribe." *Blanz v. Little Traverse Bay Bands of Odawa Indians and Odawa Casino Resort*, No. C-136-1011, P. 4 (Little Traverse Bay Bands of Odawa Indians Tribal Ct. Aug. 2, 2012). In traditional LTBB legal disputes, "kin groups of the parties involved would come together to determine who was at fault" and strive to provide "fair compensation and just outcomes for all aggrieved parties." *Id.* Such traditional notions of fairness persevere throughout the LTBB, as "demonstrated in the modern governmental functions and business practices of the Tribe." *Id.*

Applying LTBB law to the facts at hand, the Court finds that granting full faith and credit to the Charlevoix County Court judgment would be, by any reasonable or objective standard, repugnant to the public policy of the Tribe and run counter to traditional Odawa values of fairness and justice in general. In reaching its decision, the Court considered the newly discovered evidence in conjunction with unreasonable and unfair actions taken by the Attorney. Specifically, the Court finds that it would be unfair under traditional Odawa values to force the Respondent to pay costs to the Attorney after the Respondent paid and had her debt checks cashed by the Attorney, despite the checks not being written out to the Attorney. The record reflects that despite the Attorney informing the Court that he is not an agent of PCS and insinuating that he cannot deposit

through PCS checks written out to PCS, the opposite is true. Indeed, Fifth Third Bank acknowledged that the Attorney is a signatory on the PCS account and is able to deposit checks on behalf of PCS into the PCS account. This point was clear to the Respondent as shown by her February 26, 2013 testimony to the Court, when it became clear that her checks written to PCS were deposited by the Attorney. The fact that the Attorney was able to cash checks written out to a company to which he claims he has no depository access is enough for this Court to find that the Respondent's actions were reasonable and understandable. Under these limited and highly unusual circumstances, the Court finds that efforts by the Attorney to collect his Court costs after receiving the Respondent's payment to the Petitioner go against traditional Odawa values by showing disrespect to both the Respondent's understandable, reasonable and good faith efforts to satisfy the debt and to this Court. Had the Attorney shown greater candor toward the Court during the February 26, 2013 hearing, the knowledge that the Attorney was a signatory on the PCS account would have kept the Court from even considering awarding costs. With all of the facts in hand, under these limited and specific circumstances, the Court finds that the Respondent's actions were harmless error. Therefore, the Court finds that the Attorney's actions in this instance are enough to deny recognition of the Charlevoix County judgment and the Attorney's motion for costs.

The Attorney's failure to reasonably adhere to the conditions of his guarantees also run afoul of traditional Odawa values of fairness and justice and therefore it would be repugnant to the Tribe's public policy to recognize the Charlevoix County judgment and subsequently to charge the Respondent costs. The record reflects that the Attorney's letter to the Respondent contained several guarantees. In his letter, dated May 15, 2012, the Attorney informed the Respondent that if "no reasonable agreements for payment can be made with [the Respondent]," he would "take steps to enforce this obligation." *See* Plaintiff's Ex. 1. The Attorney also suggested that the Respondent forward "full payment . . . or communicate with [him]," with failure to "comply" similarly resulting in "steps to enforce this obligation." *Id.* While guaranteeing to only take further action to "enforce this obligation" if the Respondent failed to "comply" with the terms of his letter, the Attorney filed a Summons and Complaint merely five days after the Attorney should have reasonably expected the Respondent to have received the letter. First Class Mail generally takes up to three days to reach its destination. Therefore, the Attorney should have assumed that the Respondent did not receive his letter before May 17 or 18, 2012. *See* Summons and Complaint, *filed by* S. Garrett Beck on May 23, 2012; *see also* First-Class Mail, *available at* https://www.usps.com/ship/first-class.htm. Because the Attorney sent a letter to Odawa Casino and Resort requesting verification of the Respondent's employment via USPS First Class Mail, the Court finds it reasonable to assume that the Attorney generally sends business mail via USPS First Class Mail. *See* Envelope Sent By S. Garrett Beck to Odawa Casino, *received by LTBB Tribal Court on* Aug. 27, 2012. Assuming that the Respondent sent a response back on the same day that she received the Attorney's letter and the response was processed by the USPS on that same day, the Attorney should reasonably have waited at least six days before serving the Summons and Complaint. The Attorney's actions before then are not reasonable as they did not provide the Respondent with enough time to either comply with the demand for

payment or to work out a "reasonable" payment schedule as outlined in the letter.[5] This point is especially relevant to the Court's finding as the record reflects that the Respondent took steps to comply with the terms of the Attorney's letter by sending payment to satisfy her debt not long after the Attorney rushed to file summons against the Respondent. *See* Summons and Complaint, ***filed by*** S. Garrett Beck on May 23, 2012. By waiting such a short period of time before filing the Summons and Complaint for which the Attorney seeks payment of costs, the Attorney violated the terms outlined in his letter to the Respondent. This shows a lack of respect inconsistent with the seven grandfather teachings. To hold the Respondent responsible for the Attorney's costs in light of the Attorney's disrespectful behavior of filing a summons so quickly after sending the letter to the Respondent would be akin to holding a person responsible for harms resulting from another's improper actions. The Attorney's rushed actions in filing a summons against the Respondent, despite the language in the letter providing the Respondent with a reasonable time to pay or arrange to pay off her debts, is disrespectful and improper under the Tribe's traditional values. Accordingly, in light of the Court's role as a guardian of the Tribe's legal system and values, the Court holds that it would be repugnant to the Tribe's public policy to recognize the Charlevoix County judgment and subsequently to charge the Respondent costs.

Additionally, the Attorney's "necessary actions" were improper under traditional Odawa values because he failed to confirm if the Respondent objected to the debt or any portion thereof as stipulated in the letter of notification. The Consumer Notice at the end of Attorney's letter of notification states:

> "This is an attempt to collect a debt and any information obtained will be used for that purpose. Unless you notify me in writing within ***thirty days*** from your receipt of this letter that you dispute the validity of the debt, or any portion thereof, I will assume that the debt is valid. If you notify me in writing within the above ***30-day period***, I will either obtain verification of the debt or obtain a copy of the judgment or other instrument upon which it is based and mail it to you. This communication is from a debt collector." (Emphasis added).

Despite the thirty-day period outlined in the consumer notice, the Attorney filed the Summons and Complaint five days after sending the letter of notification to the Respondent. Assuming that the Respondent read the notice in its entirety, it was reasonable for her to assume that she had at least thirty days to object to the debt before "necessary actions" would be taken against her. By taking legal action before then the Attorney's actions failed to comport with the traditional value of fairness held paramount

[5] While certainly more reasonable than sending a notification merely two to three days after the Respondent should have been expected to have received the Attorney's letter, the Court questions, but does not decide in this instance, whether serving a Summons and Complaint even six days after sending the letter to the Respondent would comport with traditional Odawa values of fairness and justice.

by the LTBB. Therefore, the Court cannot grant full faith and credit to the Charlevoix Court County judgment.

II.

Relief from judgment under Michigan law

A.

While not binding on this Court, Michigan rules and law regarding the process for granting relief from state court judgments are persuasive to this Court's opinion and provide further legal justification for the Court's actions. Specifically, the Michigan Court Rules indicate that a court "may relieve a party . . . from a final judgment, order or proceeding" if there is "[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial." Mich. Ct. R. 2.612(C)(1)(b). In applying Rule 2.612(C)(1)(b), a Michigan court must first show that "new" evidence could not have been discovered by the court within a 21-day window set forth in MCR 2.611(B). This is especially true where the Attorney has an enhanced duty as an officer of the court to honestly and diligently bring issues before the court separate and distinct from the duty of the Respondent. In light of the Attorney's actions and the discovery of new evidence, the Court finds that there are sufficient grounds to relieve the Respondent from the Charlevoix County Court Judgment by adopting Michigan Court Rules in this instance. The newly discovered evidence shows why a Michigan court would also discard the Charlevoix County Court's judgment against the Respondent. Before addressing the effect of Mich. Ct. R. 2.612(C)(1)(b) on this case in light of the newly discovered evidence, the Court finds it important to note that the Charlevoix County Court's ruling is not incorrect due to any lack of diligence or proper action on its part. On the contrary, the Court believes that if the Charlevoix County Court had the evidence now available at the time of its ruling the Charlevoix County Court would have been in agreement with this Court. Moving forward, the new evidence supports that:

1. The Attorney's failure to live up to the language of his letter was unfair and unjust,

2. It was reasonable for the Respondent to believe that the Attorney was an ostensible agent of PCS, that PCS was the cause of this belief and that the Respondent acted reasonably under that assumption, and

2. Under the doctrine of estoppel by latches, the Attorney's delay in enforcing his right to collect payment made out to him alone resulted in a corresponding change of material condition that resulted in prejudice to the Respondent.

Any one of these assertions is, when applying the newly discovered evidence to the relevant law in the case, enough to set aside the Charlevoix County Court judgment against the Respondent.

B.

Ostensible Agency

The Court determines that the newly discovered evidence justifies granting the Respondent relief from the Charlevoix County Court judgment against her under the doctrine of ostensible agency. Under Michigan law, an agency is ostensible when "the principal intentionally or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." *Grewe v. Mt. Clemens Gen. Hosp.*, 273 N.W. 2d 429, 434 (1978) (citing *Weintraub v. Weingart*, 98 Cal.App. 690, 277 P. 752 (1929)). In this connection, the following must be proved: "[First, t]he person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; [second] such belief must be generated by some act or neglect of the principal sought to be charged; and [third] the third person relying on the agent's apparent authority must not be guilty of negligence." *Id.*

Since the matter arises out of a civil trial which under Waganakising Odawak Statute does not require a jury it is up the Court to determine whether an ostensible agency relationship existed. The power of a court to determine whether an ostensible agency relationship existed is also in accordance with the Michigan Appellate Court ruling in *Aero Taxi-Rockford v. Gen. Motors Corp*, where the Appellate Court held that:

> "[T]he issue of agency is not always for the jury to decide, but rather, if there is no testimony or evidence sufficient to create a factual issue regarding agency, the court may decide the issue. But this Court has also stated that "where the relationship of the parties has been defined by written agreement, it is the province of the trial judge to determine the relationship." 259565, 2006 WL 1479915 (Mich. Ct. App. May 30, 2006) (citing *Birou v. Thompson-Brown Co.*, 241 NW2d 265 (Mich. Ct. App. 1976)).

As such, the Court may determine whether an ostensible agent relationship existed between the Attorney and PCS in the matter at hand.

In order to determine if the Attorney appeared to have the authority as an ostensible agent to act on behalf of PCS the Court will apply the three-pronged test from *Grewe*, as reproduced above. The first prong of the *Grewe* test requires that, "the person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one." *Grewe* at 434. The Respondent's actions and communications throughout the matter revealed that she believed the Attorney was an agent of PCS. At the Hearing, the Respondent made numerous statements that displayed her belief the Attorney was an agent of PCS. For example, when the Court asked, "Is Mr. Beck affiliated with PCS?," (Tr. Feb. 26 p. 8), the Respondent replied, "It's a family name. I

don't know. I can't prove that it is or anything like that. I know they share the same fax number. I do know that."(*Id.*, 9-11.) This statement illustrated the Respondent's belief that the Attorney was an ostensible agent of PCS. As such, although the Respondent could not prove the Attorney was an agent of PCS, she believed that this was indeed the case and such a belief was reasonable because both the Attorney and PCS have the same fax number and both have the same physical address with no separate office number or designation. Also, in the latter part of the Hearing the Respondent asked the Court, "On check number 2488 (the first check), I don't understand; if he's not affiliated with PCS, then how come it says pay to the Order Fifth/Third, the account number, S. Garret Beck, Attorney at Law?" (Tr. Feb. 26 p. 20, 6-9.) This statement illustrates Respondent's confusion on how the Attorney was able to cash a check allegedly passed on to him by PCS that was payable to the order of PCS. The Respondent's confusion was more than reasonable as the occurrence begs the question if PCS and the Attorney are not somehow affiliated, how did PCS know to pass the check on to the Attorney as the check did not reference to him? Also, how was the Attorney able to cash either check, as both were listed payable to the order of PCS? These statements are just some examples of communications made by the Respondent throughout the matter that illustrate her reasonable belief that the Attorney was an Agent of PCS. Furthermore the Court, based on the Respondent's demeanor throughout the hearing, understood the Respondent reasonably believed the Attorney to be an agent of PCS. Therefore, the Court determines as a finding of fact, that the Respondent believed the Attorney to be an agent of PCS and that such a belief was reasonable.

The Court, based on the Respondent's apparent confusion also originally believed that the Attorney and PCS were affiliated. To clarify this issue the Court asked numerous questions throughout the hearing. For instance, in response a question on how the Attorney was able to cash a check labeled payable to the order of PCS the Attorney responded, "And the answer to the question, your Honor, is they sent the check along to us, which is what they do. They don't have the account to post the payment directly." (*Id.*, 10-13.) After the hearing, the Court contacted Fifth/Third Bank and discovered that the Attorney is an authorized signatory for PCS's account. Because PCS knew to forward the checks to the Attorney, the Attorney was able to cash both checks and the Respondent learned this information through her dealings with both companies. Thus, based on the above analysis, the Court finds that the Respondent's belief that the Attorney was an ostensible agent of PCS was reasonable.[6]

The second prong of the *Grewe* test requires that "such belief must be generated by some act or neglect of the principal sought to be charged." *Grewe*, *supra* at 434. As noted above, PCS passing the check on to the Attorney without any knowledge that it was meant for him or any writing on the check that would lead PCS to make such a

[6] As an aside, the Court was able to ascertain after the Hearing, from public documents, that Attorney was a Member and owner under LLC law of PCS from 2005-2008, and presumably still retains such a position at PCS. The Court understands that this knowledge was beyond the Respondent at the time, but it shows her confusion was justified. Also, the Court was able to determine that the Attorney was able to cash the check of PCS because he is an authorized signatory on the PCS bank account. This information is of course hindsight, but lends further credibility to the reasonableness of Respondent's belief.

conclusion was an action taken by PCS which helped to generate the Respondent's belief. Furthermore, PCS granting the Attorney the ability to cash checks that were signed "pay to the order of PCS" also helped generate the Respondent's belief. Other evidence that substantiates action or neglect on the part of PCS that would generate the Respondent's belief that the Attorney was an ostensible agent of PCS includes the following:

1. Both the Attorney and PCS have the same fax machine and fax number,
2. Both the Attorney and PCS have the same physical address, with no separate office number or designation,
3. Both the Attorney and PCS share the same bathroom, photocopier, internet, and common utilities, and
4. Public record shows that the Attorney is a Member in PCS and the company's Resident Agent.

As the Attorney is a member of PCS, the Court assumes that he is, by extension, an actor in PCS's business. As such, since the Attorney is a member of PCS and his law practice operates from the same building, it is logical to assume he knew that both his practice and PCS list the same fax number and are listed at the same address. Therefore, the Attorney should have expected or foreseen that a reasonable person would assume his law practice and PCS are connected, not least of all because the Attorney also partakes in debt collection. These facts lead the Court to determine that PCS, by delivering the checks to the Attorney, by allowing the Attorney to cash checks that are labeled payable to the order of PCS into his attorney trust account and declining to make substantial efforts to differentiate its business activities from the separate business activities of one of its owners lead to the Respondent's reasonable belief that the Attorney was an agent of PCS.

The third prong of the *Grewe* test requires that "the third person relying on the agent's apparent authority must not be guilty of negligence." *Id.* Respondent's belief that Attorney was an ostensible agent of PCS was reasonable for the following reasons:

1. The Attorney was able to cash both checks despite the fact that both checks were made payable to the order of PCS and neither referenced the Attorney in any way,
2. PCS knew to pass the first check on to the Attorney despite the fact that the check did not reference to him,
3. Both the Attorney and PCS have the same fax number, and
4. Both the Attorney and PCS have the same physical address, with no separate office number or designation.

As such, the Court finds that the Respondent did not act negligently by sending the checks to PCS because her belief that the Attorney was an ostensible agent of PCS was reasonable. Additionally, because the costs in the matter arose out of the Attorney's alleged failure to receive the second check in a timely manner, the fact that the Attorney was able to receive and cash the first check without incident further strengthens the reasonableness of the Respondent's beliefs. This action shows that it was not negligent for the Respondent to mail the second check to PCS while under the belief that the Attorney was their ostensible agent as he was able to receive and cash the first check.

Based on the above reasoning, the Court determines that the Respondent's actions and beliefs satisfy the *Grewe* test. First, because it was reasonable for the Respondent to believe that the Attorney was an ostensible agent of PCS. Second, because PCS generated the Respondent's belief that the Attorney was their agent through both action and neglect. Third, the Respondent's actions were not negligent. Therefore, the Court determines that the Attorney was an ostensible agent of PCS.

Because the Attorney was an ostensible agent of PCS, the Court determines that it would be gravely unfair and unjust to find the Respondent liable for the costs that arose out of the Attorney's actions, as they were caused by the appearance of an ostensible agency relationship between the Attorney and PCS. To hold the Respondent liable for costs arising in the matter for taking reasonable actions in reliance on her reasonable belief that the Attorney was an agent of PCS would be unacceptable under Michigan law. Therefore, the Court finds enough evidence to grant the Respondent relief from the Charlevoix County Court judgment against her.

C.

Estoppel by Laches

In light of the newly discovered evidence the doctrine of estoppel by laches is informative to the decision to grant the Respondent relief from the Charlevoix County Court judgment against her. The LTBB is a Nation that values fairness in all of its functions and practices. The laws of the Tribe reflect this preference. The doctrine of estoppel by laches is not currently codified as law within the LTBB Code. However, laches is a doctrine of fairness at its core and, therefore, the Court accepts and applies the doctrine as common law here because it comports with the traditional values of the Tribe. Accordingly, under the doctrine of estoppel by latches, the Attorney's delay in enforcing his right to collect payment made out to him alone resulted in a corresponding change of a material condition that resulted in prejudice to the Respondent.

Because the Attorney cashed the first check written to "PCS," the doctrine of estoppel by laches applies in this case. The Supreme Court of Michigan defined the doctrine in *Public Health Department v. Rivergate Manor*, stating that the doctrine is a "tool of equity that may remedy the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert. 550 N.W. 2d 515, 520 (1996) (quotations and citations omitted). "[The doctrine of laches] is applicable in cases in which there is an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party." *Id.* The Supreme Court held that the defendants did not show "sufficient prejudice" and therefore the defendant's were not entitled to relief under the doctrine. *Id.* In *Schmude Oil Company v. Omar Operating Company*, the Michigan Court of Appeals further defined the doctrine as the "failure to do something which should be done under the circumstances or the failure to claim or enforce a right at a proper time." 458 N.W. 2d 659, 664 (Mich. Ct. App. 1990) (*citing Bartnicki v. Wayne Co. Drain Comm'r*, 170 N.W.2d 856 (Mich Ct. App. 1969)). The court further stated that in order to successfully assert laches as an affirmative defense, a defendant must "demonstrate prejudice

occasioned by the delay." *Schmude* at 664 (*citing Lothian v. Detroit*, 414 Mich. 160, 168 (1982)). In applying the doctrine as defined, the court found that the defendants failed to show that they suffered any prejudice by the plaintiff's delay and therefore the defense was denied. Turning to the facts of this case, because the Attorney's delay in asserting his right to receive payment addressed only to him caused him to incur the filing fees, Respondent should not have been responsible for payment of these fees.

The Attorney's delay in enforcing his right to collect payment made out to him alone resulted in a corresponding change of material condition that resulted in prejudice to the Respondent. First, at the time the Attorney was forwarded the first check from the Respondent written to PCS it was within his rights to refuse the payment and demand payment written to him. However, he did not refuse to cash the check and then return it to the Respondent. Nor did he cash the check and communicate with the Respondent that future payments must be written to him. Instead, the Attorney deposited the check to his account with no objection or communication to the Respondent. Applying the doctrine as explained in *Rivergate Manor* and *Schmude*, the Attorney's failure to refuse the payment was an "unexcused or unexplained delay" in asserting his rights at the "proper time." The Attorney attempted to assert his right for payment when he commenced legal action. By this time the Respondent had reasonably relied on his earlier inaction and sent the remaining money due in a check written to PCS. Additionally, to establish laches the court in *Schmude* held that the right must be practicable to assert. In this instance it would have taken very little time and effort to assert the right to receive payment written payable to the Attorney. Therefore, because of the Attorney's delay in asserting his rights the Attorney caused a change of material condition that caused the Respondent to suffer prejudice.

The Respondent suffered substantial prejudice due to the Attorney's failure to assert his right of payment addressed solely to him. Had the Attorney asserted his right in a timely manner, the Respondent would have been able to forward the Attorney full payment in time to stop him from taking legal action. The Attorney premised his right to collect the $85.50 for fees on the fact that the Respondent sent the checks to the wrong business and therefore he had not received timely payment. However, it was the Attorney's failure to object to the payment method and assert his right to receive the payment made out directly to him that caused him to incur filing fees. Unlike *Shmude* and *Rivergate Manor* where the parties could not show they had experienced sufficient prejudice to assert laches, the Attorney's failure to assert his right caused the Respondent to experience substantial prejudice. The Respondent had a judgment entered against her in Charlevoix County Court for money that she had already paid. In addition, she paid the Attorney's court costs. Therefore, the Court finds that the Respondent experienced sufficient prejudice as a result of the Attorney's failure to assert his right in a timely fashion to apply the doctrine of estoppel by laches. Therefore the Court grants the Respondent relief from the Charlevoix County Judgment against her.

Conclusion

The Court refuses to give full faith and credit to the Charlevoix County Court's judgment because it would be repugnant to the public policy and traditional values of the LTBB. The Court again recognizes that this finding was not caused by a lack of due diligence by the Charlevoix County Court, but instead was caused by the Attorney's wrongdoing leading to a judgment and order without proper force or effect. The Court has determined that it would be unjust to hold the Respondent liable for costs incurred for adjudicatory action taken by the Attorney against the Respondent in Charlevoix County Court for the following reasons:

1. First, granting full faith and credit to the Charlevoix County Court order in this matter would be repugnant to the public policy of the LTBB Tribe when applying the legal standards and cultural principles of the LTBB;

2. Second, under Michigan law which LTBB adopts in this instance it was reasonable for the Respondent to believe that the Attorney was an ostensible agent of PCS, that PCS was the cause of this belief and that Respondent acted reasonably under that assumption, and

3. Finally, under the doctrine of estoppel by laches, the Attorney's delay in enforcing his right to collect payment made out to him alone resulted in a corresponding change of material condition that resulted in substantial prejudice to the Respondent.

Accordingly, the Court cannot grant full faith and credit to the Charlevoix County Court judgment and grants the Respondent relief from that Court's judgment.

Additionally, the following is ORDERED:

1. The Attorney shall pay the Respondent $85.50 on July 25, 2013. The payment may be postmarked no later than 5pm on July 25. If the award is not paid, the Attorney will be held in contempt of Court and fined $50.00 for each business day the judgment remains unpaid.

IT IS SO ORDERED

7/23/13
Date

Allie Greenleaf Maldonado, LTBB Chief Judge

CERTIFICATE OF MAILING

I certify that on this date copies of this *Order* were served to the parties by First-Class Mail or hand delivered.

7-23-13
Date

Tribal Court Officer