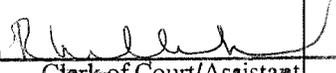


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IN THE
HO-CHUNK NATION TRIAL COURT

Rita A. Gardner,
Plaintiff,

v.

Case No.: CV 10-47

Tracy Littlejohn, Ronald Anwash,
Lawrence Littlegeorge, Jr., Jeremy P.
Rockman, Nettie J. Kingsley, Boye Ladd,
Sr., Steve Radtke,
Defendants.

ORDER
(Determination on Remand)

INTRODUCTION

The Court must determine how to move forward in this matter following a Ho-Chunk Nation Supreme Court (hereinafter Supreme Court) *Decision* partially overturning its prior order. Several inconsistencies arise in determining how this Court can properly comply with the Supreme Court's *Decision*. The Court finds that the best way to comply with the Supreme Court's directive is to return to the Traditional Court, utilizing the procedures set out by the Supreme Court, to obtain a ruling on Ho-Chunk traditions and customs. The Court also dismisses the action against defendants Lawrence Littlegeorge, Boye Ladd, Sr. and Steve Radke based on an agreement by the parties.

PROCEDURAL HISTORY

On May 16, 2011, the Court stayed all proceedings in this matter pending a decision by the Supreme Court regarding an appeal of the Court's April 15, 2011 *Order (Denying Motions)*. *Order (Staying Proceedings)*, CV 10-47 (HCN Tr. Ct., May 16, 2011). The Supreme Court

1 issued its *Decision* on October 5, 2011, reversing this Court's *Order* and remanding the case for
2 further proceedings. *Rita A. Gardner v. Tracy Littlejohn et al.*, SU 11-02 (HCN S. Ct., Oct. 5,
3 2011). Following the Supreme Court's *Decision*, the Court scheduled a *Status Hearing* for
4 December 28, 2011, at 9:00 a.m. CST. Attorney William Gardner appeared at the *Status*
5 *Hearing* on behalf of the plaintiff. Attorney Kenneth Artis appeared on behalf of the defendants.
6

7 **APPLICABLE LAW**

8 **CONSTITUTION OF THE HO-CHUNK NATION**

9 **ARTICLE VII – JUDICIARY**

10 **Section 5. Jurisdiction of the Judiciary.**

11 (a) The Trial Court shall have original jurisdiction over all cases and controversies, both
12 criminal and civil, in law or in equity, arising under the Constitution, laws, customs, and
13 traditions of the Ho-Chunk Nation, including cases in which the Ho-Chunk Nation, or its
14 officials and employees, shall be a party. Any such case or controversy arising within the
15 jurisdiction of the Ho-Chunk Nation shall be filed in the Trial Court before it is filed in any other
16 court. This grant of jurisdiction by the General Council shall not be construed to be a waiver of
17 the Nation's sovereign immunity.

18 (b) The Supreme Court shall have appellate jurisdiction over any case on appeal from the Trial
19 Court.

20 **Section 6. Powers of the Trial Court.**

21 (a) The Trial Court shall have the power to make findings of fact and conclusions of law. The
22 Trial Court shall have the power to issue all remedies in law and equity including injunctive and
23 declaratory relief and all writs including attachment and mandamus.

24 (b) The Trial Court shall have the power to declare the laws of the Ho-Chunk Nation void if
25 such laws are not in agreement with this Constitution.

26 **Section 7. Powers of the Supreme Court.**

27 (a) The Supreme Court shall have the power to interpret the Constitution and laws of the Ho-
28 Chunk Nation and to make conclusions of law. The Supreme Court shall not have the power to
make findings of fact except as provided by enactment of the Legislature.

1 (b) The Supreme Court shall have the power to establish written rules for the Judiciary,
2 including qualifications to practice before the Ho-Chunk courts, provided such rules are
3 consistent with the laws of the Ho-Chunk Nation.

4 (c) Any decision of the Supreme Court shall be final.

5 ARTICLE X – BILL OF RIGHTS

6 Section 1. Bill of Rights.

7 (a) The Ho-Chunk Nation, in exercising its powers of self-government, shall not:

8 (8) deny to any person within its jurisdiction the equal protection of its laws or deny any
9 person of liberty or property without due process of law;

10 HO-CHUNK NATION JUDICIARY ESTABLISHMENT AND ORGANIZATION ACT

11 12. Traditional Dispute Resolution. The Judiciary shall provide for the establishment, operation,
12 and funding of the Nation's Traditional Court to assist the Judiciary whenever possible with the
13 resolution of cases or controversies involving Tribal members

14 *Ho-Chunk Nation Rules of Civil Procedure*

15 Rule 8. Requests to Appear before the Traditional Court.

16 (A) Requests to Transfer Case to Traditional Court. Whenever a party or parties have a right to
17 be heard by the Trial Court, a party may request to appear before the Traditional Court on
18 matters related to custom and tradition of the Ho-Chunk Nation. All parties involved in the
19 dispute must voluntarily consent to appear before the Traditional Court and to be bound by its
20 decision. A party or parties that bring an action before the Trial Court may elect to appear before
21 the Traditional Court at any time.

22 (B) Requests for Assistance on Matters of Custom and Tradition. Upon a motion of the Court or
23 by a party, the Trial Court may request assistance from the Traditional Court on matters relating
24 to custom and tradition of the Nation, pursuant to the HO-CHUNK NATION JUDICIARY
25 ESTABLISHMENT AND ORGANIZATION ACT, 1 HCC § 1.12.

26 **FINDINGS OF FACT**

27 1. The plaintiff, Rita Gardner, is an enrolled member of the Ho-Chunk Nation, Tribal ID#
28 439A000346, and maintains a mailing address of P.O. Box 837, Black River Falls, WI 54615.

1 2. The defendant, Tracy Littlejohn, is an enrolled member of the Ho-Chunk Nation, Tribal
2 ID # 439A001490, and resides at **2741 Grand Street, La Crosse, WI 54603.**

3 3. The defendant, Ronald Anwash, is an enrolled member of the Ho-Chunk Nation, Tribal
4 ID# 439A000014, and resides at 703 Monroe Street, Black River Falls, WI 54615.

5 4. The defendant, Jeremy P. Rockman, is an enrolled member of the Ho-Chunk Nation,
6 Tribal ID# 439A001942, and resides at W10127 Levis Creek Road, Black River Falls, WI
7 54615.

8 5. The defendant, Nettie J. Kingsley, is an enrolled member of the Ho-Chunk Nation, Tribal
9 ID# 439A001311, and resides at 3240 C Hemlock Trail, Wisconsin Rapids, WI 54495.

10 6. The parties agreed to dismiss this case against the defendants Lawrence Littlegeorge, Jr.,
11 Boye Ladd, Sr. and Steve Radtke. *Status Hr'g* (LPER at 4, Dec. 28, 2011, 09:08:23 CST).

12 7. Attorney Artis stated that the defendants would like go back to the Traditional Court to
13 receive a definition of defamation under tradition and custom which complies with the
14 procedures articulated by the Supreme Court. LPER at 4, Dec. 28, 2011, 09:07:41 CST.

15 8. Attorney Gardner stated that the plaintiff would like to proceed with the case without
16 returning to the Traditional Court as the definition of defamation was not appealed to the
17 Supreme Court. LPER at 4, Dec. 28, 2011, 09: 08:23 CST.

22 DECISION

23
24 The Supreme Court overturned this Court's adoption of a "veteran's privilege" from a
25 ruling of the Traditional Court due to a violation of plaintiff's due process rights. *Rita A.*
26 *Gardner v. Tracy Littlejohn et al.*, SU 11-02 (HCN Tr. Ct., Oct. 5, 2011) at 6.¹ Under the
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¹Neither the *Ho-Chunk Nation Rules of Civil Procedure* nor the HO-CHUNK NATION JUDICIARY ESTABLISHMENT AND ORGANIZATION ACT provides instruction as to the method in which Trial Court judges should consult with the

1 CONSTITUTION OF THE HO-CHUNK NATION (hereinafter CONSTITUTION or CONST.) the Court
2 must afford all persons due process of law. ART. X, § (1)(a)(8). The Supreme Court held that in
3 order to satisfy the parties' due process rights, this Court should implement the following
4 procedures when certifying a question of tradition and custom to the Traditional Court: (1)
5 consultation with the Traditional Court must be done in open court and on the record; (2) counsel
6 and the parties must have the opportunity to ask questions of the Traditional Court; (3) the
7 questions that the Traditional Court will address must be in writing and provided to the parties
8 prior the hearing; and (4) an interpreter must be provided if the Traditional Court wishes to hold
9 the consultation in Ho-Chunk. *Gardner*, SU 11-02 at 6.²

12 The Supreme Court's procedural requirements regarding questions to the Traditional
13 Court raise due process concerns regarding whether Ho-Chunk tradition and custom recognized
14 defamation. Before the Supreme Court, "[t]he only question presented for review [was] whether,
15 under traditional Ho-Chunk law a veteran's privilege exists that would grant absolute immunity
16 to the veteran or a person acting on the veteran's behalf in an action for defamation." *Id.* at 4.
17 Whether defamation existed under Ho-Chunk tradition and custom was not an issue on appeal.
18 However, the Court utilized the same overturned procedures to determine that a veteran's
19 privilege existed under tradition and custom as it did to determine that defamation existed. *Rita*
20 *A. Gardner v. Tracy Littlejohn et al.*, CV 10-47 (HCN Tr. Ct., Feb. 2, 2011) at 10, 11.

23 Traditional Court.

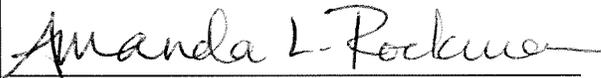
24 ²The Court agrees with the Supreme Court's due process concerns. However, the Court chose to consult the
25 Traditional Court in accordance with past precedent. *See Ho-Chunk Nation v. Ross Olson*, CV 99-81 (HCN Tr. Ct.,
26 Sept. 18, 2000) (Judge Mark Butterfield consulted the Traditional Court on whether Ho-Chunk tradition and custom
27 recognized agreements analogous to a modern contract); *Maureen Arnett v. Ho-Chunk Nation Department of*
28 *Administration*, CV 00-60 (HCN Tr. Ct., Jan. 8, 2001) (Judge Todd Matha consulted the Traditional Court on
whether Ho-Chunk tradition and custom recognized a concept similar to promissory estoppel); *In the Interest of*
Choice A. Decorah, CV 98-38 (HCN Tr. Ct., Apr. 15, 2002) (Judge William Bossman consulted Traditional Court
member Dennis Funmaker regarding how an incompetent tribal member would have been cared for traditionally).
Moreover, nothing in the appellate record indicates that parties had the opportunity to participate in the Supreme
Court's adoption of the traditional concept of *woigixate*. *Daniel Topping v. Ho-Chunk Nation Grievance Review*
Board, SU 09-08 (HCN S. Ct., July 1, 2010).

1 The overturned procedures used to recognize defamation as a cause of action established
2 the Court's subject matter jurisdiction in this case. The Court has subject matter jurisdiction
3 "over all cases and controversies, both criminal and civil, in law or in equity, arising under the
4 Constitution, laws, customs, and traditions of the Ho-Chunk Nation." CONST., ART. VII, § 5(a).
5 The Court relied on the existence of defamation under Ho-Chunk tradition and custom as its
6 source of subject matter jurisdiction. *Order (Ruling on Dispositive Motions)*, CV 10-47 (HCN
7 Tr. Ct., Feb. 2, 2011) at 9-11. However, the procedures the Court used to establish this subject
8 matter jurisdiction clearly violate the parties' due process rights under the rationale articulated by
9 the Supreme Court. *Gardner*, SU 11-02 at 6. Although the Supreme Court never addressed the
10 issue of defamation, its mandate on how the Court must certify questions of tradition and custom
11 to the Traditional Court is binding. CONST., ART. VII, § 7(c).

14 The defendants did not challenge the Court's subject matter jurisdiction over defamation
15 actions until recently. However, the United States Supreme Court has consistently held that
16 challenges to subject matter jurisdiction may be brought at any point in litigation. *Freytag v.*
17 *Commissioner of Internal Revenue*, 501 U.S. 868, 896 (1991) (Scalia, J. concurring) *citing e.g.*,
18 *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18, (1951); *Mansfield, C. & L. M. R. Co.*
19 *v. Swan*, 111 U.S. 379, 382 (1884); *Capron v. Van Noorden*, 6 U.S. 126, 127 (1804). Although
20 this precedent is not binding on this Court, the reasoning behind the holding is persuasive.
21 Allowing challenges to subject matter jurisdiction at any point in litigation prevents unlawful
22 action from the Court itself. *Freytag*, 501 U.S. at 896-897 (Scalia, J. concurring). Furthermore,
23 this Court has previously held that parties "should fully expect the Court will independently
24 assess whether it may exercise subject matter jurisdiction over a proceeding" to avoid acting
25 outside of its constitutional authority. *HCN v. B&K Builders, Inc. and Ruka & Associates*, CV
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1 00-91 (HCN Tr. Ct., June 20, 2001) at 18. The Court's subject matter jurisdiction over this
2 defamation cause of action currently rests on procedures overturned by the Supreme Court.
3 Therefore, the Court will re-consult with the Traditional Court utilizing procedures approved by
4 the Supreme Court. Prior to a hearing, the Court will discuss the logistics of holding the
5 consultation on the record with the Traditional Court. The Court will then schedule the
6 consultation and provide the parties with the questions it will certify to the Traditional Court.
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8 **IT IS SO ORDERED** this 26th day of March, 2012, by the Ho-Chunk Nation Trial
9 Court located in Black River Falls, Wisconsin within the sovereign lands of the Ho-Chunk
10 Nation.
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14 Honorable Amanda L. Rockman
15 Associate Trial Court Judge
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26 A true and correct copy of the foregoing was
27 sent to the following parties of record this
28 26th day of March, 2012.

Kenneth Dotis
William Gardner

Asst./Clerk R. [Signature]

