IN THE HO-CHUNK NATION SUPREME COURT

FILED
IN THE HO-CHUNK NATION
[redacted]L/SUPREME COURT

FEB 27 1998

Willa Red Cloud
Clerk of Court/[redacted]

IN RE RICK MCARTHUR,
Appellant.

DECISION
Case No. SU97-07

This matter came before the Ho-Chunk Nation Supreme Court on an appeal of a Contempt Order signed by the Honorable Joan Greendeer-Lee on November 26, 1997. The underlying case is a child custody proceeding, In the Interest of K.E.F., JV97-02, wherein Mr. McArthur, as a Lay Advocate, represented the child's paternal grandfather.

The Appellant, Mr. McArthur filed an appeal of Judge Greendeer-Lee's Order on December 27, 1997. An oral argument was requested. Prior to the oral arguments, Mr. William A. Boulware, Jr., of the Ho-Chunk Nation Department of Justice, filed a Notice of Appearance, Motion for Recusal and Motion to Dismiss which were all dated December 31, 1997.[1]

On January 8, 1998, the Supreme Court issued a Scheduling Order which stated the agreement of the parties that the motions filed by Mr. Boulware on behalf of the Trial Court would be heard on January 17, 1998 prior to the arguments on the merits of the case.

On January 17, 1998, the matter came before the full Court for oral argument. Mr. Rick McArthur appeared on his own behalf and Mr. William A. Boulware, Jr., of the Ho-Chunk Nation Department of Justice, appeared on behalf of the Ho-Chunk Nation Trial Court. At the request of the Ho-Chunk Nation Supreme Court, two representatives of the Ho-Chunk Nation

[1]The Notice of Appearance filed by Mr. Boulware stated that he was to "appear in limited capacity for (sic) Ho-Chunk Nation Trial Court, as appellee in this action..." The Notice further stated, "The Department of Justice's representation of the Trial Court in this matter is limited to the public policy concerns, protection of the inherent and constitutional powers of the judiciary, and the need for the Trial Court to have a voice in this appeal, which without the action would constitute an *ex parte* proceeding." Once again, this Court expresses a concern with the lack of special prosecutors or independent counsel to represent the Nation in pursuing contempt matters. As we stated in In Re Diane Lonetree, SU 96-16 (HCN Sup. Ct. March 14, 1997), we hope that the Ho-Chunk Nation Legislature drafts legislation which would accommodate the necessity of independent counsel rather than possibly compromising the Department of Justice.

Traditional Court were present. Mr. Orville Greendeer and Mr. Eli Young Thunder appeared for the Traditional Court.

The full Court has considered the arguments made on January 17, 1998 as well as the briefs, motions and the record from the trial court on this matter. Based upon the aforementioned, the Motion for Recusal is **denied**, the Motion to Dismiss is **denied**, and the Contempt Order signed by the Honorable Joan Greendeer-Lee on November 26, 1997 is **reversed.**

THE MOTION FOR RECUSAL

The Appellee filed a Motion for Recusal of Associate Justice Rita A. Cleveland. The motion was made based upon the relationship of the Associate Justice to the Appellant, Rick McArthur, who is Justice Cleveland's brother-in-law. The Appellee sought a recusal based upon the Ho-Chunk Nation Rules of Appellate Procedure which Appellee argued allows for discretionary recusals.[2] The applicable rule is Rule 4 of the Ho-Chunk Nation Rules of Appellate Procedure, which states:

> "A Justice may recuse him/herself or a party may request recusal of a Justice by Motion to the Chief Justice of the Supreme Court with Notice given to all parties. Notice shall also be given to the Legislature of any vacancy due to recusal along with a request to appoint a Justice pro tempore to fill such vacancy."

Based upon this rule, Appellee sought to have Associate Justice Rita A. Cleveland recuse herself from this matter.

The Supreme Court has grappled with this issue in other cases and the Justices have on occasion recused themselves for various reasons under this rule. See In Re Diane Lonetree,

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[2]Counsel for Appellee expressly stated that the Motion for Recusal was not based upon the Ho-Chunk Nation Constitution, Article VII, Section 13 which requires recusal where there is a direct or personal interest in the underlying matter.

SU96-16; Karena Day v. Berna Big Thunder, et. al. and Dave Abangan, (HCN Sup. Ct. 1997). In the previous cases, individual Justices have concluded that due to various reasons which would not require recusal under the Ho-Chunk Nation Constitution, Article VII, Section 13 as to a direct personal or financial reason, individual Justices have utilized Rule 4 for a discretionary recusal. In the underlying case on this matter and another related matter, Justice Cleveland had previously recused herself.

Appellee argued that the "impetus for the initial motion for recusal" was based upon Justice Cleveland's prior recusal in the underlying child custody case and a related matter. In the Interest of K.E.E., SU97-03. Appellee based the recusal request upon Justice Cleveland's relationship to Mr. Rick McArthur who is Justice Cleveland's brother-in-law.[3]

Since the issue of relationships is one which plagues many tribal court systems, this Court requested the presence of a representative from the Ho-Chunk Nation Traditional Court. Based upon the Ho-Chunk Nation Judiciary Act of 1995, the Supreme Court may seek assistance and guidance from the Ho-Chunk Nation Traditional Court. HCN Judiciary Act of 1995, Section 11. The parties agreed to the presence of the tribal elders.[4] The Traditional Court representative, Mr. Eli Youngthunder, addressed the Court in the Ho-Chunk language and Mr. Greendeer translated for purposes of those present.

The translation offered by Mr. Greendeer as to Associate Justice Cleveland's recusal due to Mr. McArthur being her brother-in-law was that "Judge Cleveland, being in the position that she is in, should be able to judge fairly and not set her mind to back her brother-in-law up in any

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[3]At oral argument, the relationship of Justice Cleveland to Judge Joan Greendeer-Lee was raised by the parties. Justice Cleveland's mother and Judge Greendeer-Lee's father are siblings which in non-Ho-Chunk society would classify them as first cousins. Within Ho-Chunk society, the relationship would be considered to be that of sisters.

[4]Counsel for the Appellee objected to Mr. Orville Greendeer providing information based upon the fact that Mr. Greendeer is the father of Judge Joan Greendeer-Lee who rendered the decision in the trial court on the matter on appeal.

matter." (Transcript of Oral Argument, January 17, 1998, page 18) The assessment by the tribal elder was that Justice Cleveland would be able to conduct herself in a fair manner despite Mr. McArthur's status as her brother-in-law.[5]

The Court has considered the Motion for Recusal. Based upon the past cases of this Court, the decision to deny the motion was made solely by Justice Cleveland.[6] Based upon the guidance of the Traditional Elder as well as the discretionary nature of the motion, Justice Cleveland does not believe that there is any basis for her to recuse herself from this matter. It is the belief of Justice Cleveland that she is able to consider this appeal in a fair and neutral manner.[7] Therefore, the Motion for Recusal is **DENIED.**

MOTION TO DISMISS

The Appellee also filed a Motion to Dismiss based upon the Ho-Chunk Nation Rules of Appellate Procedure, Rule 13. Appellee argued that the appeal had to be dismissed because there were no facts and no record. Since there were no facts and no records, Appellee argued, the Supreme Court lacks jurisdiction to review. Appellee offered no supporting law or cases for this novel argument. Black's Law Dictionary defines "jurisdiction" as, "the power of the court to

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[5]The Traditional Court representative also addressed the relationship of Justice Cleveland to Judge Greendeer-Lee as being a close relationship; however, the Elder Youngthunder concluded, both women realize their responsibility to the Ho-Chunk people as well as their roles. Therefore, Mr. Youngthunder did not believe that it would be a problem for each of them to fulfill their respective roles and duties.

[6]In fact, the decision to recuse herself previously was solely her decision and was made for reasons which are not pertinent to this discussion as the decision was not based upon the relationships with Mr. McArthur or Judge Greendeer-Lee: Justice Cleveland's prior recusal was considered a mandatory recusal under the Ho-Chunk Nation Constitution rather than a discretionary recusal under the Rules of Appellate Procedure which is being raised in this case.

[7]Since "relationships" with Justice Cleveland have been raised as to both the Appellant and the Appellee, one could view the "relationships" on each side as somewhat cancelling both sides out or being equally relative.

decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties." Black's Law Dictionary, Abridged Sixth Edition, West Publishing Company (1991).

The Ho-Chunk Nation Constitution provides the following:

> "Any party to a civil action...who is dissatisfied with the judgment or verdict may appeal to the Supreme Court." HCN Constitution, Article VII, Section 14.

In the instant case, the Appellant was dissatisfied with the lower court decision and followed the directive of Judge Greendeer-Lee's decision which directed the appeal to the Supreme Court. Appellant appealed within the requirements of the Ho-Chunk Nation Rules of Appellate Procedure. This Court may hear the case whether or not a record below has been made which is replete with exhibits and transcripts of hearings. The matter came before the Court in a manner required by the Rules. Therefore, this Court has the authority to hear this appeal. Based upon the foregoing, the Motion to Dismiss is **DENIED.**

ARGUMENTS

I. Whether or not the Ho-Chunk Nation Trial Court failed to provide the Appellant with due process?

Appellee, in the Reply Brief, argued that "There has yet to be a finding of contempt." However, at oral arguments, both the Appellee and the Appellant referred to an exact assessment of charges which had accrued at a rate of $5.00 per day based upon the lower court's decision.

The decision below states that "The Court [referring to the trial court] therefore finds advocate Rick McArthur in contempt for failure to provide the Court with his client's appropriate test results." This language is from the introductory paragraph of the Contempt Order filed on November 26, 1997 and signed by the Honorable Joan Greendeer-Lee. The trial court issued the

Contempt Order because Mr. McArthur's client allegedly failed to provide the results of previously ordered urinalysis tests.

The trial court cited Rule 38 of the Ho-Chunk Nation Rules of Civil Procedure which states:

> "If a party fails to appear or respond as requested under these rules, a party may request or the Court may issue an Order requiring a response and imposing costs, attorney's fees, and sanctions as justice requires in order to secure compliance." (emphasis added)

That rule provides for a method for the court to respond to issues involving non-compliance of a party.

At oral argument, attorney for the Appellee informed this Court that possible method for the courts to utilize in addressing non-compliance would be to utilize a three step method. That three step method, according to counsel for the trial court, should consist of (1) the issuance of a valid contempt order; (2) a notice of the civil contempt and (3) finally, the finding of actual non-compliance. This Court applied the three step method to this case to detemine if that method was utilized by the trial court. This Court concludes that such a method was not utilized in this instance.

Upon review of the November 26, 1997 Contempt Order, the lower court was attempting to issue an Order to direct compliance as required under Rule 38. The Order goes beyond ordering compliance and actually jumps to step three and holds that Mr. McArthur is in contempt. Curiously, the step which allows for Mr. McArthur and other litigants to receive their right of due process, step two, is overlooked by the trial court.

Step two, as defined by Mr. Boulware, is the step which provides notice of civil contempt. That notice is to inform a party of the potential consequences of non-compliance if the contempt continues. A notice would have informed Mr. McArthur of what he needed to do in order to be in compliance with the Court's Order. Or, the notice could have provided a time and place for a hearing at which Mr. McArthur could have provided proof of compliance. Further, the notice

could have stated that if Mr. McArthur did prove compliance at the hearing, the consequence, at that point, would have been step three, the issuance of an Order which established that Mr. McArthur was in contempt and the imposition of the $5.00 per day sanction.

Unfortunately, the case below did not occur in the three steps outlined by Mr. Boulware. Rather, the lower court issued an Order dated October 26, 1997 which was step one of the process. On November 26, 1997, the Court issued another order which found Mr. McArthur in contempt and ordered sanctions for non-compliance. The omission of the second step deprived Mr. McArthur of his due process rights as required by the Ho-Chunk Nation Constitution, Article X, Section 1, subsection (a) (8). The lack of due process afforded Mr. McArthur is a violation of his constitutional rights and requires this Court to **REVERSE** the lower court's decision.

In future matters arising from a circumstance which could result in a contempt order, we hold that the lower courts apply the three step process suggested by the attorney for the Appellee. That is, the lower court should, first, issue a valid contempt order. That order would indicate the basis for a finding of contempt if certain conditions are not met by a certain date. Second, upon the passage of the date, the lower court will issue a notice of the civil contempt along with a notice to appear at a specific place at a specific date and time to address the notice of a non-compliance hearing. Third, the lower court will hold a hearing to determine whether or not an actual finding of actual non-compliance has occurred. Thus, the actual finding of non-compliance and the imposition of fines, etc. will occur at the third step; however, each of the previous steps must occur to afford the party their rights under the Ho-Chunk Nation Constitution.

II. Whether or not the Appellant has control over the actions of his client?

This issue was raised by the Appellant in his Notice of Appeal. However, this question is one which would have been better addressed by the trial court at a hearing to determine if, Mr. McArthur, was accountable for his client and, therefore, in contempt. Since the trial court did not hold a hearing to determine whether or not Mr. McArthur was in contempt, it is not a

question that is before the Court on this appeal. Since we are reversing on other grounds which are stated above, it is not necessary for this Court to address this issue.

III. Whether or not the Appellant has information to establish his client's compliance with the court order?

This argument is also beyond the scope of this appeal in that the lower court did not address this matter prior to the commencement of the appeal. Again, this issue is one which should have been addressed by the lower court at a hearing to determine if the party had complied or not with the contempt order.

IV. Whether or not the trial court omitted relevant facts in the Order of Contempt?

Appellant argues that the trial court failed to indicate that his client had never failed a drug test. Again, the issue of which facts should or should not be included in the Order are not before the Court since the record was incomplete for purposes of the appeal. The lack of a transcript, exhibits, records and documents occurred due to the lower court's inaction as to holding a hearing on this matter. Since this matter has been reversed on other grounds which were stated above, the Court will not address this issue.

CONCLUSION

Based upon the discussion above, the Motion for Recusal is denied, the Motion to Dismiss is denied, and the Contempt Order signed by the Honorable Joan Greendeer-Lee on November 26, 1997 is reversed.

EGI HESHKEKJENET. Dated this 26th day of February 1998.

Debra C. Greengrass
Hon. Debra C. Greengrass
Associate Justice

Rita A. Cleveland
Hon. Rita A. Cleveland
Associate Justice

Mary Jo B. Hunter
Hon. Mary Jo B. Hunter, Chief Justice