

JUN 13 1997

J. Pettibone
Clerk of Court/Assistant

IN THE
HO-CHUNK NATION SUPREME COURT

CHLORIS A. LOWE, JR.,
Appellant,

v.

Case No. SU97-01
DECISION

HO-CHUNK NATION,
HO-CHUNK NATION LEGISLATURE and
HO-CHUNK NATION GENERAL COUNCIL,
Appellees.

This matter comes before the full Court based upon an appeal from an Order (Denying Preliminary Injunction) signed by the Honorable Mark Butterfield on March 21, 1997. The Appellant, Chloris A. Lowe, Jr., appealed from the Order asserting that it was "contrary to the Constitution of [sic] Ho-Chunk Nation, specifically Article XII Section 2." Appellant also asserted that "the General Council failed to provide proper notice to the Plaintiff as required by Article XI Section 2 of the Ho-Chunk Constitution." Further, Appellant Lowe asserted that "the Ho-Chunk Legislature violated Article VI Section 3 of the Ho-Chunk Constitution by appointing Byron Thundercloud to the Office of the President when he fails to meet the age requirements." Finally, Appellant Lowe asserted that "the bar of Sovereign Immunity does not apply to this action or to these Defendants when their actions were in direct contradiction to the mandates of the Ho-Chunk Nation Constitution."

This Court will address the last assertion first. Based upon the files and briefs of this matter, we reviewed this matter on the 29th day of May 1997. Based upon our review, we hold that the Order (Denying Preliminary Injunction) is **AFFIRMED**.

Our decision is based upon the application of the doctrine of sovereign immunity.

STATEMENT OF THE CASE

On January 11, 1997, Chloris A. Lowe, Jr., Appellant, was removed from the Office of the President of the Ho-Chunk Nation by a majority vote of the Special General Council. Byron Thundercloud, the Vice-President as elected by the Ho-Chunk Nation Legislature, became the Acting President as a result of the vacancy stemming from the removal. Appellant Lowe filed suit on January 20, 1997. He sought a reinstatement for himself in the Office of the President; that his removal be declared void and that Byron Thundercloud be removed from the position of Acting President. The lawsuit was based upon Mr. Lowe's assertions that he had been given insufficient notice of the removal proceedings and that since the Acting President was younger than age 35, he was not qualified to serve as the Acting President and should be removed. Mr. Lowe sought a temporary injunction which would reinstate him in office pending the outcome of the trial court case.

The Trial Court Judge, the Honorable Mark Butterfield, denied the motion for preliminary injunction and dismissed the case as to all the defendants based upon the doctrine of sovereign immunity.

DECISION

The general rule is that Indian tribes are immune from suit without a tribe's consent or an express waiver of sovereign immunity by either the tribal council or the Congress. Rave v. Reynolds, 23 I.L.R.6150, 6161 (August 1996). In this case, the Ho-Chunk Nation Constitution governs. The Ho-Chunk Nation Constitution states that:

The Ho-Chunk Nation shall be immune from suit except to the extent that the Legislature expressly waives its sovereign immunity, and the officials and employees of the Ho-Chunk Nation acting within the scope of their duties or authority shall be immune from suit.

Ho-Chunk Nation Constitution, Article XII, Section 1.

In the case of the Ho-Chunk Nation, the Ho-Chunk Nation Legislature must expressly waive the sovereign immunity of the Nation before the Nation can be sued. As to the officials of the Ho-Chunk Nation, the officials are immune from suit while they are acting within the scope of their duties or authority.

In this case, Appellant Lowe did not sue any individuals for acting outside of the scope of their authority. Rather, Mr. Lowe filed suit against the Ho-Chunk Nation, the Ho-Chunk Nation Legislature and the Ho-Chunk Nation General Council.¹ We will address each party separately. First, the Ho-Chunk Nation. Nothing in the record evidences that the Ho-Chunk Nation Legislature expressly waived the Nation's sovereign immunity which would allow the suit to proceed against the Ho-Chunk Nation. The Trial Court held that there was "no express waiver of sovereign immunity pointed to in Mr. Lowe's Complaint that gets around the explicit bar to his suit directly against the Nation...Therefore, the Court dismisses the case against the Ho-Chunk Nation as barred by sovereign immunity." Lowe v. Ho-Chunk Nation, et. al., CV 97-12, p. 14 (1996). Upon review, we hold that the Trial Court ruled correctly in dismissing the case against the Nation based upon the doctrine of sovereign immunity. We **AFFIRM** that holding of the lower court.

Next, we address the suit against the Ho-Chunk Nation Legislature. Again, the action is barred by the doctrine of sovereign immunity. As plead, the Ho-Chunk Nation Legislature is the same as the Ho-Chunk Nation for purposes of Article XII, Section 1 of the Ho-Chunk Nation Constitution. The Legislature is one of the four branches of government of the Ho-Chunk Nation. Article III, Section 1, Ho-Chunk Nation Constitution. The same holds true for the final

¹The Ho-Chunk Nation Rules of Civil Procedure, Rule 27 (B) requires that where "the Nation is named as a party, the *Complaint* should identify the unit of government, enterprise or name of the official or employee involved. The *Complaint*, in the case of an official or employee being sued, should indicate whether the official or employee is being sued in his or her individual or official capacity." The record is clear that the Complaint filed in this section did not comply with the requirements of HCN R. Civ. P. Rule 27 (B). Compliance with the Ho-Chunk Nation Rules of Civil Procedure would have benefited all of the parties in this litigation as well as defraying the expenses of extensive litigation.

party sued in this matter, the Ho-Chunk Nation General Council, which is another branch of the Ho-Chunk Nation government. Article III, Section 1, Ho-Chunk Nation Constitution. Since the Legislature and the General Council are the Ho-Chunk Nation. The suit against these branches of government are also barred by the doctrine of sovereign immunity. Therefore, we **AFFIRM** the lower court's ruling that those parties are barred from suit based upon the doctrine of sovereign immunity.

The other matter which was raised by this appeal was whether or not the suit could continue against the individuals within the named parties based upon Article, XII, Section 2.² However, the Appellant's failure to name individuals in the initial suit prevents a decision on that basis. It is necessary for the courts to know which individuals are being sued so that the trier of fact may assess whether or not that specific individual has acted outside the scope of their authority or not. Suits based upon the legal argument that someone has acted outside of their authority specifically name the individual(s). See Coalition for Fair Government II, et. al. v. Lowe and Whitcrabbit, et. al., CV 96-22 and 96-24 (HCN Tr. Ct. Jan. 3, 1997); Whitetail v. Chaske, 20 Indian L. Rep. 6056 (N. Plns. Intertr. Ct. App. 1992); Raye, et. al. v. Reynolds, et. al., 23 Indian L. Rep. 6150 (Winnebago Sup. Ct. 1996). Since the matter is not before us as to the individuals, we are not ruling on the actions of any individual or the application of Article XII, Section 2 of the Ho-Chunk Nation Constitution.

Since we affirm that this action is barred by the doctrine of sovereign immunity, we do not reach the merits of the case which were discussed in the trial court opinion. Rather, we simply **AFFIRM** the lower court's decision to dismiss the matter based upon the doctrine of sovereign immunity.

IT IS SO ORDERED. EGI HESHKEKJENET. Dated this 12th day of June 1997.

²The trial court refers to a suit against officials of the Ho-Chunk Nation under this section of the Ho-Chunk Nation Constitution as an "exception to the sovereign immunity bar; however, this section may actually refer to the official immunity of public officials and employees rather than sovereign immunity. See Raye v. Reynolds, supra.

Debra C. Greengrass
Debra C. Greengrass, Associate Justice

Forrest Whiterabbit
Forrest Whiterabbit, Associate Justice

Mary Jo Brooks Hunter
Mary Jo Brooks Hunter, Chief Justice

IN THE DISTRICT COURT OF THE STATE OF WISCONSIN
JUN 13 1997
T. Pettibone
Clerk Assistant

CERTIFICATE OF SERVICE

I, Tari Pettibone, Clerk of the Ho-Chunk Nation Supreme Court of the Ho-Chunk Nation, do hereby certify that on the date set forth below I served a true and correct copy of the attached paper filed in Case No. SU-97-01 (CV-97-12), by the United States Postal Service, upon all persons listed below:

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