

PROCEDURAL HISTORY

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3 The plaintiff, Helen Harden, initiated the current action by filing a *Complaint* with the Court on
4 September 10, 1999. Consequently, the Court issued a *Summons* accompanied by the above-mentioned
5 *Complaint* and attachments on September 10, 1999, and personally served the documents upon the
6 defendant, Indian Child Welfare/Child & Family Services [hereinafter ICW/CFS]. The *Summons*
7 informed the defendant of the right to file an *Answer* within twenty (20) days of the issuance of the
8 *Summons* pursuant to the *HCN R. Civ. P. 5(B)*. The *Summons* also cautioned the defendant that a
9 *default judgment* could result from failure to file within the prescribed time period.
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11 The defendant, by and through Attorney Leslie Parker Cohan, filed the *Answer* on September 29,
12 1999, serving such documents on the plaintiff via first class mail. The Court subsequently mailed
13 *Notice(s) of Hearing* on October 5, 1999, informing the parties of the date, time and location of the
14 *Scheduling Conference*. Prior to the *Scheduling Conference*, the defendant filed the October 13, 1999
15 *Defendant's Notice and Motion to Dismiss* and *Defendant's Brief in Support of Motion to Dismiss*. The
16 defendant served such documents on the plaintiff via first class mail. The following parties appeared at
17 the October 21, 1999 *Scheduling Conference*: Attorney Leslie Parker Cohan and Helen Harden.
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20 At the *Scheduling Conference*, the Court, with the consent of the defendant, extended the ten
21 (10) day response period under *HCN R. Civ. P. 19 (A)*.¹ The Court required the plaintiff to file a
22 *Response* on or before November 1, 1999. The Court also afforded the plaintiff the ability to argue
23 against the *Motion to Dismiss* at a *Motion Hearing* scheduled for November 8, 1999. *Notice(s) of*
24 *Hearing* mailed on October 21, 1999 reminded the parties of the date, time and location of the *Motion*
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26 ¹ The plaintiff alleged that she had not received the defendant's October 13, 1999 *Defendant's Notice and Motion to*
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1 *Hearing.*

2 The Court filed the *Scheduling Order* on October 22, 1999. The defendant, in compliance with
3 the *Scheduling Order*, filed the *Defendant's Preliminary Witness List* on October 29, 1999. The plaintiff
4 filed an untimely *Response to Motion to Dismiss* and *Witness List* on November 8, 1999. The following
5 parties appeared at the November 8, 1999 *Motion Hearing*: Attorney Leslie Parker Cohan. Helen
6 Harden failed to appear, and did not provide the Court with prior notice explaining her non-attendance.
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8 Due to the plaintiff's failure to appear, the Court, upon the motion of the defendant, dismissed
9 the case in accordance with *HCN R. Civ. P. 44 (C)* for failure to appear at a hearing upon receipt of
10 proper notice: verbal and written. The plaintiff filed a *Motion to Reopen (Post Judgement Motion)* on
11 November 17, 1999. The defendant has not chosen to file a *Response* as permitted by *HCN R. Civ. P. 19*
12 (A), and neither party has requested a hearing on the *Motion to Reopen* pursuant to *HCN R. Civ. P. 20*.
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14 15 **APPLICABLE LAW**

16 17 **HO-CHUNK NATION RULES OF CIVIL PROCEDURE**

18 **Rule 5. Notice of Service of Process**

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20 (B) *Summons*. The *Summons* is the official notice to the party informing him/her that he/she is
21 identified as a party to an action or is being sued, that an *Answer* is due in twenty (20) calendar days
22 (See, *HCN R. Civ. P. 6*) and that a *Default Judgement* may be entered against them if they do not file an
23 *Answer* in the limited time. It shall also include the name and location of the Court, the case number,
and the names of the parties. The *Summons* shall be issued by the Clerk of Court and shall be served
with a copy of the filed *Complaint* attached.

24 **Rule 18. Types of Motions**

25 *Motions* are requests directed to the Court and must be in writing except those made at trial. *Motions*

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27 *Dismiss and Defendant's Brief in Support of Motion to Dismiss.*

1 based on factual matters shall be supported by affidavits, references to other documents, testimony,
2 exhibits or other material already in the Court record. *Motions* based on legal matters shall contain or be
supported by a legal memorandum, which states the issues and legal basis relied on by the moving party.

3 Rule 19. Filing and Responding to Motions

4 (A) Motion. *Motions* may be filed by a party with any pleading or at any time after their first pleading
5 has been filed. A copy of all written *Motions* shall be delivered or mailed to other parties at least five (5)
6 calendar days before the time specified for a hearing on the *Motion*. A *Response* to a written *Motion*
7 must be filed at least one day before the hearing. If no hearing is scheduled, the *Response* must be filed
with the Court and served on the other parties within ten (10) calendar days of the date the *Motion* was
8 filed. The party filing the *Motion* must file any *Reply* within three (3) calendar days.

9 Rule 20. Hearings on Motions

10 A hearing on a *Motion* may be held in the discretion of the Court. A party requesting a hearing must (a)
11 schedule the hearing with the Court and (b) deliver or mail notice of the hearing to other parties at least
12 five (5) calendar days prior to the hearing. If the trial is scheduled to begin within the time allowed for a
13 hearing, all responses shall be made by the time scheduled for commencement of the trial. *Motions*
made within fourteen (14) calendar days of trial may be dismissed and costs and fees assessed against
14 the moving party if the Court finds no good exists for failing to file the *Motion* more than fourteen (14)
15 calendar days in advance of trial.

16 Rule 44. Presence of Parties and Witnesses

17 (C) Failure to Appear. If any party fails to appear at a hearing or trial for which they received proper
18 notice, the case may be postponed or dismissed, a judgement may be entered against the absent party, or
19 the Court may proceed to hold the hearing or trial.

20 Rule 58. Amendment to or Relief from Judgement or Order

21 (A) Relief from Judgement. A *Motion to Amend* or for relief from judgement, including a request for a
22 new trial shall be made within ten (10) calendar days of the filing of judgement. The *Motion* must be
23 based on an error or irregularity which prevented a party from receiving a fair trial or a substantial legal
24 error which affected the outcome of the action.

25 (B) Motion for Reconsideration. Upon motion of the Court or by motion of a party made not later than
26 ten (10) calendar days after entry of judgement, the Court may amend its findings or conclusions or
27 make additional findings or conclusions, amending the judgement accordingly. The motion may be
made with a motion for a new trial. If the Court amends the judgement, the time for initiating an appeal
commences upon entry of the amended judgement. If the Court denies a motion filed under this rule, the
time for initiating an appeal from the judgement commences when the Court denies the motion on the
record or when an order denying the motion is entered, whichever occurs first. If within thirty (30) days
after the entry of judgement, the Court does not decide a motion under this Rule or the judge does not

1 sign an order denying the motion, the motion is considered denied. The time for initiating an appeal
from judgement commences in accordance with the Rules of Appellate Procedure.

2 (C) Erratum Order or Reissuance of Judgement. Clerical errors in a court record, including the
3 *Judgement* or *Order*, may be corrected by the Court at any time.

4 (D) Grounds for Relief. The Court may grant relief from judgements or orders on motion of a party
5 made within a reasonable time for the following reasons: (1) newly discovered evidence which could not
6 reasonably have been discovered in time to request a new trial; or (2) fraud, misrepresentation or serious
7 misconduct of another party to the action; or (3) good cause if the requesting party was not personally
8 served in accordance with Rule 5(c)(1)(a) or (b); did not have proper service and did not appear in the
judgement earlier in time.

10 DECISION

11 A motion is simply a request directed to the Court. *HCN R. Civ. P. 18*. The *Ho-Chunk Nation*
12 *Rules of Civil Procedure* specifically identify twenty-five (25) such motions/requests. *See HCN R. Civ.*
13 *P. 4 (B), 5 (I), 8, 16 (B), 19 (B), 28 (B), 37, 38, 42, 44, 45, 55, 56 (B), 58 (A), 58 (B), 58 (D), 59 (B), 62,*
14 *68 and 71*. Additionally, the Court has recognized the implied necessity of some otherwise
15 unenumerated motions. For example, although *HCN R. Civ. P. 19 (A)* does not permit filing a motion
16 prior to receipt of a responsive pleading (e.g. *Answer*), *see Fitzpatrick v. Ho-Chunk Nation*, CV 99-31
17 *Order (Denial of Motion)* (HCN Tr. Ct., June 7, 1999), the Court has created an exception for the earlier
18 filing of a *Motion for a More Definite Statement*. *See Id., Order (Denial of Motion for More Definite*
19 *Statement)* (HCN Tr. Ct., June 25, 1999). The Court reasoned that a defendant/respondent could not
20 properly answer a complaint which failed to satisfy the minimal requirements of *HCN R. Civ. P. 3 (A)*.
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22 The Court also has entertained other motions related to the deficiency of a complaint. *HCN R.*
23 *Civ. P. 6* explicitly directs the defendant/respondent to “state any defenses to the *Complaint*” in the
24 *Answer*. Based upon this directive, the Court has reviewed *Motion(s) to Dismiss for Failure to State a*
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1 *Claim upon which Relief Can Be Granted, Motion(s) to Dismiss for Lack of Subject Matter Jurisdiction*
2 and other motions related to legal and factual defenses. See *Karen Raines v. Ho-Chunk Nation*, CV 99-
3 32 Order (*Motion to Dismiss: Granting in Part, Denying in Part and Remanding in Part*) (HCN Tr. Ct.,
4 Aug. 4, 1999).

5 The plaintiff's *Motion to Reopen (Post Judgement Motion)*, unlike the above-discussed motions,
6 does not have an implicit or explicit basis in the *Ho-Chunk Nation Rules of Civil Procedure*. While the
7 plaintiff identifies the *Motion* as a *HCN R. Civ. P. 58 Post Judgement Motion*, this rule does not discuss
8 *Motion(s) to Reopen*. However, the Court has a general policy of encouraging *pro se* representation, and
9 will not deny the *Motion* on its face based upon semantics and inappropriate designation. The Court,
10 therefore, will assess the plaintiff's *Motion to Reopen* as a *Rule 58 Post Judgment Motion*.
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12 *HCN R. Civ. P. 44 (C)* clearly provides the Court with the authority to dismiss an action based
13 upon non-attendance of a plaintiff at a scheduled hearing. Rule 44 (C) reads in relevant part: "If any
14 party fails to appear at a hearing...for which they received proper notice, the case may be...dismissed."
15 The plaintiff received verbal notice of the November 8, 1999 *Motion Hearing* at the October 21, 1999
16 *Scheduling Conference*. In fact, the plaintiff and defendant mutually agreed upon the date and time of
17 the *Motion Hearing*. The Court also mailed *Notice(s) of Hearing* to the parties on October 21, 1999, as
18 a reminder of the date and time of the *Motion Hearing*.
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20 The plaintiff does not dispute receipt of proper notice in her one (1) page *Motion to Reopen (Post*
21 *Judgement Motion)*. The plaintiff rather explains her failure to appear as follows: "My catalogue case
22 (where all my grievance papers reside) was mistakenly removed from my vehicle in IL and I was unable
23 to retrieve it until Wed. Nov. 10 in the evening." The plaintiff, however, does not indicate the date
24 upon which the catalogue case was removed from her possession. If the plaintiff earlier realized the
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1 disappearance of her court documents, she should have contacted either the Court or defendant's
2 counsel. The plaintiff did not follow this reasonable and prudent course of action, but instead seemingly
3 relied upon her recollection of the October 21, 1999 *Scheduling Hearing*.

4 Parties to an action have a vested interest in preserving and protecting their claims and/or
5 defenses and must act accordingly. The plaintiff as a *pro se* litigant is, or should be, well aware of the
6 importance of Court ordered appearances and deadlines. The plaintiff has had numerous interactions
7 with the Court as a result of her employment as a Child & Family Services Social Worker and former
8 Clerk of Court. In any event, the Court cannot adopt a policy of accepting excuses for inaction.

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10 The Court will now examine the plaintiff's request to reopen the case by authority of *HCN R.*
11 *Civ. P. 58*. The plaintiff filed the *Motion to Reopen (Post Judgement Motion)* within ten (10) days of
12 November 10, 1999 *Order (Dismissal with Prejudice)*, rendering such request timely under Rule 58.
13 The Rule enumerates four (4) post judgment motions: *Motion to Amend, Motion for a New Trial, Motion*
14 *for Relief from Judgment* and *Motion for Reconsideration*. The Court will deal with each motion in turn.

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16 First, a *Motion to Amend* "must be based on an error or irregularity which prevented a party from
17 receiving a fair trial or a substantial legal error which affected the outcome of the action." *HCN R. Civ.*
18 *P. 58 (A)* (emphasis added). The Rule further directs that a request for a new trial may accompany a
19 *Motion to Amend*. The first identified basis presumes the occurrence of a trial and identification of
20 errors or irregularities which directly impacted or affected that proceeding. In the instant case, the
21 action never proceeded to trial, and, therefore, the first identified basis does not prove relevant. The
22 second identified basis requires the occurrence of a substantial legal error. The Rule does not designate
23 when the legal error must occur, but the plaintiff's *Motion to Reopen* presents no such an allegation.

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26 Second, a party may submit a *Motion for Relief from Judgment* on the following grounds:
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1 (1) newly discovered evidence which could not reasonably have been
2 discovered in time to request a new trial; or (2) fraud,
3 misrepresentation or serious misconduct of another party to the
4 action; or (3) good cause if the requesting party was not personally
5 served in accordance with Rule 5 (c)(1)(a) or (b); did not have proper
service and did not appear in the action; or (4) the judgement has
been satisfied, released, discharged or is without effect due to a
judgement earlier in time.

6 *HCNR. Civ. P. 58 (D)*. The Court shall refrain from a detailed discussion concerning the application of
7 this Rule to the plaintiff's *Motion to Reopen*. The four (4) enumerated grounds are wholly and clearly
8 inapplicable in the given context.

9 Third, *HCNR. Civ. P. 58 (B)* describes a *Motion for Reconsideration*, but does not set forth the
10 bases upon which a party may bring such a motion. The Rule, however, again directs that a request for a
11 new trial may accompany the motion. The Court previously established the standards for a *Motion for*
12 *Reconsideration*, requiring the movant to establish that the Court:

- 14 1). Overlooked, misapplied or failed to consider a statute,
15 decision or principle controlling; or
- 16 2). Overlooked or misconceived some material fact or
17 proposition of law; or
- 18 3). Overlooked or misconceived a material question in the case;
19 or
- 20 4). The law applied in the ruling has been substantially changed
21 by court decision or statute. (*sic*)

22 *Babcock v. Ho-Chunk Gaming Commission*, CV 95-08 *Motion to Reconsider (granted)* (HCN Tr. Ct.,
23 March 14, 1996) p. 1. See also *Day, et al. v. HCN Personnel Dept.*, CV 96-15 *Order (Motion to*
24 *Reconsider and Decision)* (HCN Tr. Ct., Feb. 27, 1997) and *Stephan, et al. v. Ho-Chunk Nation*, CV 97-
25 141 *Order (Motion for Reconsideration Denied)* (HCN Tr. Ct., Jan. 28, 1999). Similar to the *Motion for*
26 *Relief from Judgment*, the four (4) enumerated grounds of a *Motion for Reconsideration* are wholly and
27 clearly inapplicable in the given context.

1 The Court cannot grant the plaintiff's *Motion to Reopen (Post Judgement Motion)* by analogy to
2 *HCNR. Civ. P. 58*. The Court can conceive of instances where a party may have an excusable absence
3 due to reasons beyond the individual's control (e.g. grave illness or death in the family), but that type of
4 instance is not present here. Therefore, based upon the foregoing, the Court upholds its decision to
5 dismiss with prejudice based on principles of fairness and finality.
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7 All parties have the right to appeal a final judgement or order of the Trial Court. If either party is
8 dissatisfied with the decision of this Court, they may file a *Notice of Appeal* with the Ho-Chunk
9 Supreme Court within thirty (30) calendar days from the date this Court renders such final judgment or
10 order. The *Notice of Appeal* must show service was made upon the opposing party prior to its
11 acceptance for filing by the Clerk of Court. The *Notice of Appeal* must explain the reason the party
12 appealing believes the decision appealed from is in error. All appellate pleadings to the Ho-Chunk
13 Supreme Court must conform with the requirements established by the Ho-Chunk Supreme Court as
14 stated in the Ho-Chunk Nation.
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16 **IT IS SO ORDERED** this January 4, 2000 at the Ho-Chunk Nation Trial Court in Black River
17 Falls, Wisconsin from within the sovereign lands of the Ho-Chunk Nation.
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19 Hon. Todd R. Matha,
20 HCN Associate Trial Judge
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