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The Agency is confused. It must make its arguments on the issues and merits heard before a District Court in its Answer or Response Brief on appeal. A Motion to Dismiss may be appropriate where the jurisdiction of the Court is in question, such as whether the Appellant timely filed her appeal or if the District Court had issued a final appealable judgment. At best, in its Motion to Dismiss, the Agency makes arguments regarding the District Court's decision, its merits, and why Unger is in error on appeal. At worst, its Motion is a diatribe lacking authority, cohesion, and logical organization. Regardless, the Agency's arguments on the merits belong in its Response Brief and this Court should deny its Motion to Dismiss.

Unger does not respond to, but reserves the right to respond to the Agency's arguments regarding the District Court's final orders because those are properly made in appellate briefs.

I. ARGUMENT

Proposition One: This Court has subject matter jurisdiction over a District Court appeal.

Subject matter jurisdiction to review District Court decisions is conferred by the Cherokee Nation Constitution Article VIII,¹ Cherokee Nation Statutes, 24 CNCA 52,² and this Court's SC Rule 50 A.³ Unger timely filed her Second Petition in Error and contrary to the Agency's arguments, this Court has subject matter jurisdiction. The Agency's argument that this Court has no subject matter jurisdiction is *completely* without merit.

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¹ Article VIII, Judicial Section 4. "The original jurisdiction of the Supreme Court shall extend to a general supervisory control over all lower courts. . ."

² 20 CNCA § 52. Superintendence over courts of inferior jurisdiction.

The Supreme Court shall have authority within the limits of its judicial action as prescribed by law, to exercise a general superintendence over courts of inferior jurisdiction, through and by means of decisions made and declared by the Supreme Court upon questions of law, evidence, and practice, submitted to them in the course of the trial or examination of all causes of which they shall be allowed cognizance by law.

³ Rule 50, Who May Appeal. A. any party significantly and adversely affected by a decision of the District Court of the Cherokee Nation in a civil case may appeal.

Proposition Two: The Agency's Motion to Dismiss is premature.

On October 29, 2018, this Court issued a Minute Order striking Unger's Opening Brief apparently because she filed her Opening Brief contemporaneously with her Petition in Error and not after the Agency answered the appeal or counter appealed pursuant to Court Rules.⁴ Therefore, the Agency's Motion to Dismiss is premature because all of its arguments are in response to Unger's Opening Brief, which dealt with the merits and substance of the District Court's decision. The Agency's Motion does not deal with appellate procedure. Therefore, the Agency's Motion cannot challenge Unger's arguments in her Opening Brief because they are no longer of record. This Court should deny the Agency's Motion to Dismiss as premature.

Proposition Three: The Agency's arguments address current issues considered by the District Court after remand and were appealed by Unger; therefore, its Motion to Dismiss is improper.

The Agency uses its Motion to Dismiss as a prologue or a Response Brief to Unger's Opening Brief. Its Motion arguments belong in its appellate brief pursuant to Rule 60. The Agency must argue the merits of the appeal in its Response brief- not in a preemptive Motion to Dismiss, flashing the clichés of "no subject matter." None of the Agency's vague, undeveloped, and summary arguments are grounds for a Motion to Dismiss. It is lost on the Agency that a dispute about the reasoning by the District Court and the merits of its decision is resolved on appeal and that Unger is entitled to make her arguments on appeal. The Agency's effort and desire to deny Unger an appeal before this Court is reflective of its history in this case - it did all it could to deny her an appeal when she was wrongfully terminated. Therefore, the Agency's Motion violates this Court's appellate procedure and should be denied.

⁴ SC AD 2013-01 Rule 60 A. provides the Appellant should file her Opening Brief (Brief in Chief) within sixty (60) days after Appellee files its response to the Petition in Error.

Proposition Four: A number of the Agency's assertions are not true.

The Agency made a number of assertions and offered speculations as to Unger's arguments which are not true, and that is why an orderly briefing schedule provided by SC AD Rule 60 is required. For example, the Agency argues this Court has previously ruled on the issues on appeal. *That is false.*

In her Petition in Error, Unger identified the following issues:

1. Dismissing Unger's Complaint and Court 1 holding that the District Court does not have jurisdiction over Article XII constitutional claims for denial of pretermination due process because she did not following EAPA procedures.
2. Dismissing attendant claims for Article XII redress including reinstatement, back wages less mitigation and attorney fees.
3. Denial of due process by the District Court *sua sponte* dismissing Count 1 without notice to Unger.

See Second Petition in Error, Exhibit C.

After this Court's remand of the first appeal in this case, the District Court addressed the above-listed issues and they have not been before this Court. Therefore, the Agency's Motion should be denied because the issues on appeal have not been previously decided by this Court.

Proposition Five: Authority that the Agency cites for its arguments has no merit.

The need for full briefing on the issues on appeal is seen by the Agency's citation of questionable authority. First, the Nation cites "*Remedies in a Nutshell*" for precedential or persuasive authority. *See* Motion at page 3. Hardly a study aid is legal authority. Further, the Agency relies on "*Remedies in a Nutshell*" for the proposition that "[n]ot every right supports all possible remedies," which is in direct contravention to the constitutional mandate of Article XII that "*Provided, the right of such employee to seek redress in the Cherokee Nation courts shall not be abridged*". (Emphasis added)

Second, the Agency cites Cherokee Nation case law that was superseded by the Cherokee Nation Constitution and statutes. The Agency cites the Judicial Appeal Tribunal Opinion (“JAT”) in *Watkins v. Cherokee Nation*, JAT -02-01 (2004) decided July 30, 2004 for the proposition that the JAT has addressed and issued an Opinion regarding damages for Article XII violations. However, *Watkins* was decided under the authority of the 1975 Constitution. The JAT decided the effective date of the 2003 Constitution on June 7, 2006 - two years after the *Watkins* decision.⁵ Thereafter, the JAT became the Supreme Court.

The 1975 Constitution Article XII was dramatically changed and superseded by the 2003 Constitution Article XII which constitutionally mandated redress or damages.⁶ The 1975 Article XII had no mandate for constitutional damages.⁷ Therefore, *Watkins* is no longer good law on the issue of Article XII damages.

In 2010, six years after the *Watkins* decision and four years before the Agency wrongfully terminated Unger, the Council enacted the “Back Pay Act”.⁸ The Back Pay Act specifically expanded remedies to employees of Cherokee Nation instrumentalities who were excluded from the definition of an employee under the Employment Appeals Procedure Act, 51 CNCA 1001 et seq. (“EAPA”). They could not bring their wrongful discharge actions to the Employees Appeal Board under the EAPA. The Back Pay Act extended its *remedies* to an

⁵ Decided June 7, 2006 *In Re: Status of 1999 Constitution of Cherokee Nation*, JAT 05-04, 2003.

⁶ 2003 Article XII. Employee Rights

No employee, who having served in a position at least one (1) year, shall be removed from the employment of the Cherokee Nation except for cause, and only after being afforded pre-termination due process. *Provided, the right of such employee to seek redress in the Cherokee Nation courts shall not be abridged.* (Emphasis added.)

⁷ 1975 Constitution Article XII. Employee Rights

No employee, who having served in a position at least one (1) year, shall be removed from the employment of the Cherokee Nation except for cause. The employee shall be afforded a hearing by the Judicial Appeals Tribunal under such rules and procedures as may be prescribed by the Council. These rules and procedures, however, must follow, as nearly as practicable, the provisions of the Oklahoma Administrative Procedures Act, Title 75 Oklahoma Statutes § 301 et seq.

⁸ “An Act Relating to Employees of the Cherokee Nation or its Wholly Owned Corporations; Termination (sic) Appeals Procedures and Employee Back Pay Act of .2005; Providing For Severability And Declaring An Emergency,” LA-03-10, January 10, 2010.

employee “[w]ho has been directly employed by the *Cherokee Nation or its entities* and corporations on a regular full-time basis for at least one continuous year immediately prior to termination of employment. . . .”⁹ The Back Pay Act legislatively superseded *Watkins* and expanded statutory remedies to Unger.

Therefore, the Agency’s case cited for authority for Article XII has been superseded by the Cherokee Nation’s Constitution and statutes, and shows why its arguments should be addressed in the Rule 60 Briefing Schedule -not in an ad hoc Motion to Dismiss.

II. CONCLUSION

This Court has subject matter jurisdiction over Unger’s timely filed appeal of the final District Court Order issued on September 13, 2018

A Motion to Dismiss is not the place for the Agency to make its appellate arguments-its Answer or Response Brief is.

Unfortunately, the Agency’s haphazard, convoluted, and misplaced Motion to Dismiss only confuses the issues on appeal, illustrating the importance of a proper briefing schedule.

This Court should deny the Agency’s Motion to Dismiss and order it to comply with the briefing schedule required by Rule 60.

Respectfully submitted this 2nd day of November 2018.

_____/ss/
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Certificate of Delivery

⁹ Section 4, Definitions, subsection A.

I, Chadwick Smith, do hereby certify that on this 2nd day of November 2018, I emailed a true and complete copy of the foregoing Motion to the persons listed below:

_____/ss/
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