

IN THE SUPREME COURT OF THE CHEROKEE NATION

FRANCIS UNGER

Appellant,

v.

CHEROKEE NATION COMPREHENSIVE
CARE AGENCY

Appellee.

Case No. SC 2015-07

2019 JAN 14 AM 8:11
CHEROKEE NATION
SUPREME COURT
GENERAL CLERK

FILED

**APPELLANT'S OBJECTION TO APPELLEE'S MOTION TO DISMISS APPEAL FOR
FAILURE TO COMPLY WITH THIS COURT'S OCTOBER 28, 2018 ORDER
AND IN THE ALTERNATIVE MOTION FOR LEAVE TO FILE BRIEF-IN-CHIEF**

COMES NOW, Appellant Francis Unger ("Unger") and objects to Appellee Cherokee Nation Comprehensive Care Agency's ("Agency") Motion to Dismiss Appeal ("Motion") based on allegations that Unger failed to timely file her Brief-in-Chief ("Motion").

Proposition One: The Agency has not filed a Response to Unger's Petition in Error to trigger the requirement for Unger to file her Brief-in-Chief.

The Agency's Motion is based on the fundamental flaw that it has complied with AD-13-01 Supreme Court Rule 51 which requires the Agency to file a *Response* to Unger's Petition in Error within thirty (30) days; therefore the duty of Unger to file her Brief-in-Chief was not triggered.

The Agency has not filed a response to Unger's Petition in Error or filed a Counter Designation of Record. On October 25, 2018, the Agency filed a Motion to Dismiss Appellant's Second Petition in Error based on allegations of lack of jurisdiction. Unger's October 25, 2018 does not resemble or provide the information required by a Response to a Petition in Error. The Agency's Motion to Dismiss was not identified in its heading as a "Response", did not provide the requisite Trial Court History, Timeliness of Appeal or Related of Prior Appeal, did not state

if the Agency was willing to participate in a Settlement Conference, did not provide a summary of the case or issues raised on appeal. This appeal is the second in this case. In the first appeal brought by Unger, the Agency did file Response to her Petition in Error on August 17, 2015. *See* Exhibit A- Agency's Response. It is evident the Agency knows the difference between a Motion to Dismiss and a response to a Petition in Error. The Agency's Motion to Dismiss has no resemblance to a Response nor is the purpose of a Motion to Dismiss (challenging jurisdiction) the same as a Response to Petition in Error (addressing the merits of the appeal).

Because the Agency chose to file a Motion to Dismiss rather than respond to the Petition in Error, Unger is not required to file her Brief in Chief as required by Rule 60 until the Agency files its response.

Proposition Two: This Court has by custom stayed the appellate briefing schedule pending disposition of jurisdictional motions to dismiss.

As evidenced by this Court's Order in *CNB v Swinney*, Case No SC-17-06, this Court decided the Appellee's Motion to Dismiss on jurisdictional grounds and afterward ordered Appellant to file its Brief-in-Chief on a date certain and that the briefing schedule continue thereafter. *See* Exhibit "B", *Swinney* August 2, 2017 Minute Order. In this case, the Court has not decided the Agency's Motion to Dismiss on jurisdiction grounds and Unger may reasonably rely on this Court's precedence to wait to file her Brief-in-Chief until the Court has ruled on the Agency's Motion to Dismiss to challenge jurisdiction.

In its October 29, 2018 Order, this Court held, "The Appellant (Unger) will be allowed to refile the document as a Brief in Chief as defined in the CNSC court rules." Because Rule 60 requires Unger to file her Brief-in-Chief within 60 days after the Agency files its response to her Petition in Error, the time for her to file has not begun to run. By custom of this Court, the time for Unger to file her Brief-in-Chief would be begin after it decided the Agency's Motion to

Dismiss on jurisdictional grounds; it makes sense for judicial economy not to brief a case on the merits if it is dismissed on jurisdictional grounds.

As Unger argued in her November 2, 2018 Objection to Motion to Dismiss, this Court should deny the Agency's Motion to Dismiss and order it to comply with the briefing schedule required by Rule 60.

Proposition Three: In the alternative, the Court should grant Unger leave to refile her Opening Brief styled according to Rule 60 as a Brief in Chief.

The Agency has suffered no prejudice because it has had Unger's Brief-in-Chief (Opening Brief) since September 27, 2018. Unger is entitled to rely on the fact that the Agency has not filed a response to the Petition in Error required by Rule 51 but instead filed a motion to dismiss authorized under Rule 43 which is not a response. Therefore, this Court should grant Unger leave to file her Brief in Chief filed hereto as Exhibit "C".

Conclusion

The Court should dismiss the Agency's Motion to Dismiss and grant Unger leave to file her Brief-in-Chief.

Respectfully submitted this 14 th day of January 2019.

_____/ss/_____
Chadwick Smith
CNBA # 08
22902 S. 494 Road
Tahlequah, OK 74464
chad@chadsmith.com
918 453 1707

Certificate of Delivery

I, Chadwick Smith, do hereby certify that on this 14th day January 2019, I emailed a true and complete copy of the foregoing Motion to the persons listed below:

_____/ss/_____
Chadwick Smith

John C. Young, CNBA # 474
Assistant Attorney General
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FILED

IN THE SUPREME COURT OF THE CHEROKEE NATION

2015 AUG 17 PM 3: 56

FRANCIS UNGER,
Plaintiff,

vs.

CHEROKEE NATION COMPREHENSIVE
CARE AGENCY,
Defendant.

CHEROKEE NATION
SUPREME COURT
KENDALL BIRD, COURT CLERK

Case No. SC-2015-07

CHEROKEE NATION COMPREHENSIVE CARE AGENCY'S
RESPONSE TO PETITION IN ERROR

X RESPONSE TO PETITION IN ERROR

I. TRIAL COURT HISTORY

COURT/ COMMISSION: Cherokee Nation District Court

CASE NO.: CV-2014-94

JUDGE/ HEARING OFFICER: Honorable John T. Cripps

NATURE OF CASE: Employment

NAME OF PARTY(IES) FILING THIS RESPONSE TO PETITION IN ERROR:
Cherokee Nation Comprehensive Care Agency through the Office of the Attorney General

THE APPEAL IS BROUGHT FROM: (check one)

<u> </u>	Judgment, Decree or Final order of the District Court
<u> X </u>	Appeal from order granting summary judgment or motion to dismiss
<u> </u>	Final Order of Other Tribunal, Commission, or Hearing Board
<u> </u>	Interlocutory Order Appealable by right
<u> </u>	Other

II. TIMELINESS OF APPEAL

1. Date judgment, decree, or order appealed was filed: June 26, 2015

2. Does the judgment or order on appeal dispose of *all* claims by and against *all* parties? No. Appellant's first cause of action was answered by the Cherokee Nation Comprehensive Care Agency and that matter has not yet been tried. Appellee's motion to dismiss was granted by the District Court, and Appellant's motion for summary judgment was denied in its entirety.
3. Were any post-trial motions filed? No
4. This Response to Petition is filed by: Delivery to Clerk

III. RELATED OR PRIOR APPEALS

None

IV. SETTLEMENT CONFERENCE

Is the appellee willing to participate in a Settlement Conference? YES

V. RECORD ON APPEAL

X No Transcript will be ordered.

VI. SUMMARY OF CASE -- Exhibit "A"

Cherokee Nation elects to file its own statement attached as Exhibit "A".

VII. NAME OF COUNSEL OR PARTY, IF PRO SE

ATTORNEY FOR APPELLANT

Name: Mr. Chad Smith
CNBA: 08
22902 S. 494 Road
Tahlequah, OK 74464
chad@chadsmith.com
918-453-1707

ATTORNEY FOR APPELLEE

Name: Sara Hill
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Firm: Office of Attorney General, Cherokee Nation
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Verified by:



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918-453-5000, Ext. 7170
918-458-6142 (fax)
robert-garcia@cherokee.org

VIII. CERTIFICATE OF MAILING TO ALL PARTIES AND COURT CLERK

I hereby certify that a true and correct copy of the Response to Petition in Error was mailed and/or emailed this 17th day of August, 2015 to the following:

Chad Smith
22902 S. 494 Road
Tahlequah, OK 74464
chad@chadsmith.com

I further certify that a copy of the Response to Petition in Error was mailed to, or filed in, the office of the Court Clerk of the Cherokee Nation Supreme Court on the 17th day of August, 2015.



Sara Hill

EXHIBIT A – Response to Appellant’s Statement of the Case

On January 8, 2014 the Appellant was terminated from her position at the Cherokee Nation Comprehensive Care Agency (“CNCA”). She did not appeal her termination with the Employee Appeals Board under 51 C.N.C.A. §1000, *et seq.*, but instead filed an appeal with the District Court of the Cherokee Nation. In that appeal, the Appellant brought multiple causes of action, including one count alleging that the Appellant was terminated without due process. The CNCA answered that cause of action, but moved to dismiss the remaining causes of action on sovereign immunity grounds. The Appellant then filed a motion for summary judgment. The District Court granted the CNCA’s motion to dismiss, and denied Appellant’s motion for summary judgment.

The District Court also determined in its order of June 26, 2015 that the CNCA was a specialized entity created by the legislature and further determined that the Employee Administrative Procedures Act did not apply to CNCA employees. The CNCA was created by the Tribal Council under 63 C.N.C.A. §101, *et seq.* and the CNCA Board has statutory authorization to maintain independent management and separate personnel policies from the rest of the Cherokee Nation. The Employee Administrative Procedures Act excludes “employees of specialized authorities and entities created by the legislature...” from the definition of employee found at 51 C.N.C.A. §1003(7). Because the Employee Administrative Procedures Act excludes these individuals from the definition of “employee”, these employment claims are brought under the Constitution and not under Title 51.

IN THE SUPREME COURT OF THE CHEROKEE NATION

CHEROKEE NATION BUSINESSES, LLC.,)
Appellant,)

v.)

CECIL SWINNEY,)
Appellee.)

CASE NO.: SC-17-06

2017 AUG - 1 PM 3:24

FILED

CHEROKEE NATION
SUPREME COURT
KENDALL BIRD, COURT CLERK

MINUTE ORDER

The Appellee's Motion to Dismiss Appeal is denied.

The Appellant's Brief in Chief will be due October 2, 2017. All pleadings following will resume the appellant briefing schedule.

Entered on this 1st day of August, 2017.

John C. Garrett, Chief Justice

By: KBird

Certificate of Mailing

I, Kendall Bird, certify that on the 1st day of August, 2017, I mailed, emailed and/or faxed a true copy of the above and foregoing to the following:

Chad Smith, chad@chadsmith.com
Tim K. Baker, tim.baker@cn-bus.com,
Tralynna Scott, tralynna.scott@cn-bus.com

KBird
Kendall Bird, Court Clerk