IN THE MUSCOGEE (CREEK) NATION SUPREME COURT

RON GRAHAM, Appellant, v. MUSCOGEE (CREEK) NATION CITIZENSHIP BOARD, Respondent.	)	Case No.: **SC 2020-01** (District Court Case No. CV 2019-138)

Appeal from the Muscogee (Creek) Nation District Court, Okmulgee District, Muscogee (Creek) Nation.

John E. Parris, The Law Office of John Parris, Sand Springs, Oklahoma; for the Appellant.

Roger Wiley, Attorney General, Muscogee (Creek) Nation, Kyle B. Haskins, Assistant Attorney General, Muscogee (Creek) Nation; for the Respondent.

ORDER AND OPINION

MVSKOKVLKE FVTCECKV CUKO HVLWAT VKERRICKV HVYAKAT OKETV YVNKE VHAKV HAKATEN ACAKKAYEN MOMEN ENTENFVTCETV, HVTVM MVSKOKE ETVLWVKE ETEHVLVTKE VHAKV EMPVTAKV.[1]

Before: LERBLANCE, *C.J.*; MCNAC, *V.C.J.*; ADAMS, DEER, SUPERNAW and THOMPSON, *JJ.*

HARJO-WARE, *J*, recused and not participating in the decision.

PER CURIAM.

Order of the District Court AFFIRMED.

[1] "The Muscogee (Creek) Nation Supreme Court, after due deliberation, makes known the following decision based on traditional and modern Mvskoke law."

ADAMS, delivered the opinion of the Court.

Ron Graham (hereinafter, the "Appellant") submits a final order appeal of a January 21, 2020, *Order* issued by the Muscogee (Creek) Nation District Court granting a November 15, 2019, *Motion to Dismiss* filed by the Muscogee (Creek) Nation Citizenship Board (hereinafter, the "Respondent"). The Appellant asserts (1) that a previous *Order* issued on November 2, 2007, by this Supreme Court in SC 2006-03 failed to adequately dispose of all issues presented to the court in that matter as they relate to the Appellant's statutory, Constitutional, and treaty-right qualifications for citizenship in the Muscogee (Creek) Nation, and (2) that a subsequent *Memorandum Opinion* issued on August 30, 2017, by the United States District Court for the District of Columbia in Cherokee Nation v. Nash, et al.[2], requires that this court re-examine its previous decision in SC 2006-03. On the record presented, and for the reasons set forth below, we affirm the January 21, 2020, *Order* of the Muscogee (Creek) Nation District Court.

BACKGROUND

GRAHAM I

In early June of 2002, the Appellant submitted an application for citizenship with the Muscogee (Creek) Nation.[3] Following review of the Appellant's application, a letter was sent on June 11, 2002, by the Respondent advising the Appellant that he "had not provided sufficient evidence to prove his Muscogee (Creek) lineage..."[4] The Appellant requested that the Respondent grant him an opportunity to present new evidence proving his Muscogee (Creek) lineage and he thereafter submitted a new/amended application for citizenship to the Respondent.

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[2] *See* Cherokee Nation v. Nash, et al., 267 F.Supp.3d 86 (2017).
[3] Earlier attempts to obtain citizenship and/or CDIB cards were made by the Appellant in 1991, 1994, and in 1998. *See* Appellant's Brief in SC 2006-03, at Pg. 3-4.
[4] *See*, Defendant's Trial Brief in CV 2003-54, at Pg. 2. (August 24, 2005).

Following a review of the newly submitted application, and with the help of additional research obtained from the Nation's Cultural Preservation Office concerning the Appellant's lineage[5], the Respondent denied the Appellant's citizenship application on January 9, 2003, finding that there "was not sufficient evidence proving that the [Appellant] was Creek by blood."[6]

On December 12, 2003, the Appellant filed his first *Petition* in the Muscogee (Creek) Nation District Court (hereinafter, the "District Court") asserting that the Respondent acted arbitrarily and capriciously in denying his application for citizenship. The action was stayed by the District Court in order for the Appellant to exhaust all administrative remedies.

On March 25, 2004, the Respondent conducted an administrative appeal hearing and, again, concluded "that the evidence presented by the [Appellant] failed to prove that the [Appellant] was a lineal descendant of a Muscogee (Creek) Indian by blood whose name appears on the final rolls as provided by the Act of April 26, 1906."[7] On April 15, 2004, a written letter of denial was issued to the Appellant.

On February 28, 2005, an *Amended Petition* was filed in the District Court advising the court that all administrative appeals had been concluded and, further, asserting that the Appellant now had legal standing to continue his appeal before the Nation's courts.

In August of 2005, a multi-day trial was conducted before the District Court, and on March 17, 2006, an *Order* was issued finding that:

> "By not considering and failing to apply the laws of the Muscogee (Creek) Nation that were in effect when the Plaintiff's Application for Enrollment were *initially presented*, the Muscogee (Creek) Nation Citizenship Board acted contrary to the law and in an arbitrary and capricious manner."[8]

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[5] The Cultural Preservation Department concluded that Rose McGilbray, #1252 Dunn Roll, was not the same person as Rose McGilbray, Creek Nation Creek Roll #673.
[6] *See*, Appellant's Brief in SC 2006-03, at Pg. 2. (May 15, 2006).
[7] *Id.* at 4.
[8] *See*, Order in CV 2003-53, at Pg. 4. (March 17, 2006).

[Emphasis Added]

The District Court remanded the citizenship matter back to the Respondent to apply NCA 81-06 instead of NCA 01-135 when re-examining the Appellant's previous citizenship applications, including the Appellant's 2002 citizenship application.

On April 13, 2006, the Respondent filed a final order appeal with this Supreme Court (case No. SC 2006-03) arguing that the District Court's March 17, 2006, *Order* directed the Respondent to apply the wrong law to the Appellant's 2002 citizenship application, and that the District Court erred in finding the Respondent's actions arbitrary and capricious.

On November 2, 2007, this court issued its single-paragraph *Order* stating that the court conducted *de novo* review of the record on appeal, and found "no evidence that the Citizenship Board acted arbitrarily and capriciously." The District Court's March 17, 2006, *Order* was reversed and the District Court was directed to dismiss the case.

No *Petition for Rehearing*, as authorized by M(C)NCA Title 27, App. 2, Rule 24, or any other *Motion* for re-examination of the case was timely filed by the Appellant following issuance of this court's November 2, 2007, *Order*. The matter sat dormant for over eleven (11) years.

GRAHAM II

On May 30, 2019, the Appellant submitted a new application for citizenship to the Muscogee (Creek) Nation Citizenship Office, "again claiming citizenship based on the Creek Treaty of 1866, Article II."[9] Following initial review, the Respondent denied the Appellant's application and notice was sent to the Appellant on August 23, 2019. The Appellant advised the Respondent that he sought administrative review and subsequently waived his rights to appear

[9] *See* Appellee's Response Brief, in SC 2020-01, at Pg. 10. (June 12, 2020).

before the Respondent for hearing. Following re-examination, the Respondent again denied the Appellant's application on September 26, 2019.

On October 18, 2019, the Appellant filed a new *Petition* before the District Court, which is the subject of this appeal. On November 15, 2019, the Respondent filed its *Motion to Dismiss*, arguing that the Appellant had previously "appealed and fully exhausted his administrative remedies [concerning the Graham I citizenship application], litigated his claims in the District Court, and appealed to the Muscogee (Creek) Nation Supreme Court...[,]" that the Appellant relies on "substantially the same allegations raised...in Graham I" and that "[n]o authority exists at law or equity that would permit an applicant to continually seek appellate review of an issue previously resolved upon appeal by the Nation's highest court."[10]

On January 21, 2020, the District Court issued its *Order* granting the Respondent's *Motion to Dismiss*, finding that:

> "[t]he Muscogee (Creek) Nation Supreme Court had Mr. Graham before them, Mr. Graham raised his issue of membership based upon the 1866 Treaty and the Supreme Court dismissed his case. While the Supreme Court did not articulate its reasoning for its decision, this Court is nonetheless bound by the Supreme Court's order no matter its brevity. The Supreme Court's holding is binding unless or until the Supreme Court reverses it prior ruling."

A *Notice of Appeal* was filed by the Appellant with the Supreme Court on January 24, 2020.

[10] *See*, Motion to Dismiss, in CV 2019-138JP, at Pg. 2. (November 15, 2019).

JURISDICTION, SCOPE, AND STANDARD OF REVIEW

Appellate jurisdiction is proper under M(C)NCA Title 27, § 1-101 (C).[11] This Court will review issues of law *de novo* and issues of fact for clear error.[12] Each respective question will be addressed based on its applicable standard of review.

ISSUES PRESENTED

1. Has the Appellant timely submitted a justiciable case or controversy before the courts of the Muscogee (Creek) Nation?
2. What is the impact of persuasive (non-binding) federal case-law authority on the courts of the Muscogee (Creek) Nation?

DISCUSSION

PART 1: JUSTICIABILITY

The constitutionally created courts of the Muscogee (Creek) Nation hold "general civil jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the Muscogee (Creek) Nation[.]"[13] Once a civil action is filed with the Nation's courts, the case will proceed (absent voluntary dismissal, settlement by the parties, or other action(s) that might remove the matter from the District Court's docket) to a final judicial determination by the District Court. Following issuance of the District Court's final *Order*, a party to a civil action has the right to appeal the matter to the Nation's Supreme Court, who, following briefing and any necessary oral

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[11] M(C)NCA Title 27, § 1-101 (C), vests this court with exclusive jurisdiction to review final orders of the Muscogee (Creek) Nation District Court.

[12] *See* A.D. Ellis v. Checotah Muscogee Creek Indian Community, et al., SC 10-01 at 3, ___ Mvs. L.R. ___ (May 22, 2013); In the Matter of J.S. v. Muscogee (Creek) Nation, SC 93-02, 4 Mvs. L.R. 124 (October 13, 1994); McIntosh v. Muscogee (Creek) Nation, SC 86-01, 4 Mvs. L.R. 28 (January 24, 1987); Lisa K. Deere v. Joyce C. Deere, SC 17-02 at 5, ___ Mvs. L.R. ___ (May 17, 2018); Muscogee (Creek) Nation v. Bim Stephen Bruner, SC 18-03 at 5, ___ Mvs. ___ (September 6, 2018); Derek Huddleston v. Muscogee (Creek) Nation, SC 18-02 at 3, ____ Mvs. ___ (October 4, 2018); Bim Stephen Bruner v. Muscogee (Creek) Nation, SC 18-04 at 4, ___ Mvs. ___ (May 13, 2019).

[13] *See*, M(C)NCA Title 27, § 1-102 (B).

argument, will issue a decision in writing.[14] This decision (generally titled an "*Opinion*" or an "*Order*" by the court) represents the court's final action on any legal claims or issues presented by the parties.[15] Finality is an essential aspect of the Nation's judicial system, and is key to establishing reliable judicial precedent.[16]

Recognizing that courts are not infallible, the Nation's appellate procedures craft a ten (10) day window following issuance of any final Supreme Court *Opinion* in which a party may petition the court for a rehearing on the grounds "[t]hat some facts, material to the decision, or some question decisive of the case submitted by counsel, was overlooked by the court," or "that the decision is in conflict with an express statute or controlling decision to which the attention of the court was not directed."[17] The Appellant has asserted as his primary argument that the court's November 2, 2007, *Order* in SC 2006-03 failed to address certain claims presented on appeal in that case. However, no action was taken by the Appellant within the allotted ten (10) day window (or in any reasonable time thereafter) to address these concerns and avoid finality of the court's 2007 decision.

Further, the Nation's appellate procedures recognize that there may be limited procedural circumstances that are not adequately addressed by the Nation's laws. In these circumstances, the Supreme Court is to address the deficient procedures "in accordance with reasonable justice, as determined by the rules of procedure for other Tribes, or the United State may be used as a guide..."[18] Even in the event the court were to consider its rehearing provisions insufficient and

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[14] *See*, M(C)NCA Title 27, App. 2, Rule 2 (A) and Rule 23 (B).
[15] *See* Article 7, Section 5 of the Muscogee (Creek) Nation Constitution. "The decision of the Supreme Court shall be in writing and shall be final."
[16] Also known as stare decisis, "[t]he doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation." (Black's Law Dictionary, 11th ed. 2019).
[17] *See* M(C)NCA Title 27, App. 2, Rule 24 (B).
[18] *See* M(C)NCA Title 27, App. 2, Rule 1 (F).

look to other jurisdictions as a guide in accordance with reasonable justice, the Appellant's current action presents the same flaw; too much time has passed since this court's 2007 *Order* to justify disturbing the finality of that decision.[19]

Over eleven and a half years have elapsed between the November 2, 2007, *Order* and the Appellant's subsequent May 30, 2019, application for citizenship that initiated the current action before the court.[20] While the above-styled matter stems from a separate 2019 application for citizenship, and not a formal pleading requesting re-examination in the previous appeal; the issues presented in both cases are identical, and, with the exception of the Appellant's citation to non-binding federal case-law, no new arguments have been presented to the court. To allow the Appellant to proceed with the new action absent due consideration being paid to the appellate rules of procedure in the former action would allow litigants, such as the Appellant, to execute an impermissible end-run around neglected or intentionally waived appellate deadlines. This court has previously denied appeals solely due to a party's failure to timely submit its claims before the court, finding that such delinquent filings are fatally flawed.[21] The Appellant's decision, or negligence, in failing to request clarification of the court's previous 2007 *Order* within the time allotted by the appellate rules of procedure creates a similar, fatal flaw.

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[19] Rule 60 of the Federal Rules of Civil Procedure provides that "the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:... (6) any other reason that justifies relief." However, Rule 60 (C)(1) further requires that a Rule 60 Motion "be made within a reasonable time..." The court is of the opinion that, even if it were to adopt a similar rule, the Appellant would not be able to satisfy the "reasonable time" element of a Rule 60 analysis.

[20] Additionally, over one (1) year and nine (9) months passed between the issuance of the *Memorandum Opinion* in Cherokee Nation v. Nash, et al., 267 F.Supp 3d 86, 140 (August 30, 2017), and when the Appellant submitted his new citizenship application to the Nation on May 30, 2019.

[21] *See* Anderson v. Moore, SC 2011-11, at 2, ___ Mvs. ___ (January 19, 2012). The Appellant in Anderson failed to file a Notice of Appeal with the court within the allotted five (5) day period following issuance of the intermediate District Court order in question. This "fatal flaw" was the sole deciding factor for the court's denial of the Appellant's interlocutory appeal.

The court views the current action in terms of its justiciability.[22] In 2006, the Appellant presented this court with a matter ripe for review. The case was briefed and an *Order* was issued. Pursuant to statute, the Appellant was then authorized to request a re-hearing pursuant to M(C)NCA Title 27, App. 2, Rule 24, within ten (10) days of the court's *Order*. No request was filed. The Appellant now brings a second suit concerning identical legal considerations. In order for a matter to be justiciable it must present an active case or controversy capable of a judicial determination.[23] Controversies that are theoretical in nature, or that have not developed sufficiently as to make them capable of a judicial determination, are not ripe for judicial review.[24] Likewise, controversies that may have existed at one time, but no longer exist, are moot.[25] The Appellant, in the previous appeal, failed to timely request clarification of the court's 2007 *Order*. The *Order* was the final decision of the court. Any active controversy that existed at that time with respect to the Appellant's various citizenship applications was resolved by the court's *Order*. The Appellant's current action fails to present the court with an active controversy and is therefore not justiciable.

PART II. IMPACT OF NON-BINDING FEDERAL CASE-LAW

The Appellant has relied significantly on federal case-law in the current action before the court. As such, the court deems it necessary to briefly discuss the precedential value of non-jurisdictional, statutory and/or case-law authority on the Nation's courts.

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[22] *See* Muscogee (Creek) Nation National Council v. A.D. Ellis, SC 2011-06, footnote 29, ___ Mvs. ___ (February 14, 2014), where the court defined "Justiciability" as "a group of legal concepts used as criteria to assess whether adjudication may adequately resolve any given cause of action. These judicially-imposed criteria include ripeness, mootness, standing, and a general restriction against judicial intervention in purely political questions or requests for advisory opinions."

[23] *See* Muscogee (Creek) Nation National Council v. A.D. Ellis, SC 2011-06, ___ Mvs.___ (February 14, 2014).

[24] *See* Ripeness, Black's Law Dictionary (11th ed. 2019).

[25] *See* Doctrine of Mootness, Black's Law Dictionary (11th ed. 2019).

The courts of the Muscogee (Creek) Nation are required by statute to apply the laws of the Nation in all cases presented for legal determinations.[26] In addition to the laws of the Nation, the court also consistently looks to its own, binding case-law precedent in an effort to resolve similar matters in a consistent fashion. In the event the Nation's laws are silent on a given topic, and the Nation's courts have not previously resolved a similar matter, the courts may, at times, look to non-jurisdictional sources as persuasive authority, solely to guide the court to its own ultimate determination.[27] The courts of the Nation are never bound by these non-jurisdictional authorities to rule in the same manner.

On August 30, 2017, the United States District Court for the District of Columbia issued a *Memorandum Opinion* in Cherokee Nation v. Nash granting the Cherokee Nation Freedmen's *Motion for Partial Summary Judgment*, and concluding that, under the 1866 Treaty between the Cherokee Nation and the United States, "the Cherokee Freedmen have a present right to citizenship in the Cherokee Nation that is coextensive with the rights of native Cherokees."[28] The Appellant asserts that this federal court analysis requires that the Mvskoke courts re-examine their previous decisions concerning the Appellant's citizenship applications and apply the same analysis to his case. The court reiterates that non-jurisdictional sources, at best, provide only persuasive value to the Nation's courts. It is fundamental that the Nation's courts first look to their own law before giving consideration to non-jurisdictional sources. As such, the decision in Nash represents only persuasive authority which the court may elect to consider absent controlling authority. However, the Appellant has failed to present a justiciable case (as previously described) and thus it is not

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[26] *See* M(C)NCA Title 27, § 1-103 (A).

[27] *See*, most recently, the court's decision in Bim Stephen Bruner v. Muscogee (Creek) Nation, SC 2018-04, at Pg. 8, footnote 26, where the court considered persuasive authority from the United States Supreme Court concerning judicial recusal.

[28] *See* Cherokee Nation v. Nash, et al., 267 F.Supp 3d 86, 140 (August 30, 2017).

necessary for the court to reach a determination on the precedential value of the Nash decision at this time. As always, the courts of the Muscogee (Creek) Nation remain open to all parties presenting justiciable claims. The court's decision in this matter should not be read to limit citizenship disputes, or any other valid disputes brought before the Nation's courts, to any extent other than that a party must present an active, justiciable claim.

IT IS HEREBY ORDERED that the District Court's January 21, 2020, *Order* is **AFFIRMED**.

FILED AND ENTERED: September 17, 2020

Richard Lerblance
Chief Justice

Amos McNac
Vice-Chief Justice

Andrew Adams III
Associate Justice

Montie Deer
Associate Justice

Kathleen Supernaw
Associate Justice

George Thompson, Jr.
Associate Justice

CERTIFICATE OF MAILING

I hereby certify that on September 17, 2020, I mailed a true and correct copy of the foregoing Order and Opinion with proper postage prepaid to each of the following: John E. Parris, P.O. Box 1021, Sand Springs, Oklahoma 74063; Ron Graham, 5500 NW 65th Street, Warr Acres, Oklahoma 73132; Roger Wiley, Office of the Attorney General, Muscogee (Creek) Nation, P.O. Box 580, Okmulgee, Oklahoma 74447. A true and correct copy was also hand-delivered to: Donna Beaver, Clerk of the Muscogee (Creek) Nation District Court.

Connie Dearman

Connie Dearman, Court Clerk