**IN THE SUPREME COURT OF THE MUSCOGEE (CREEK) NATION**

MUSCOGEE (CREEK) NATION
SUPREME COURT
FILED
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CONNIE DEARMAN
DEPUTY COURT CLERK

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| MUSCOGEE (CREEK) NATION,<br><br>Appellee-Plaintiff,<br><br>v.<br><br>MEKKO TYNER, Individually,<br><br>Appellant-Defendant. | ) | Case No. SC-12-01<br>(District Court Case No. CV 2011-81) |

**OPINION AND ORDER DENYING INTERLOCUTORY APPEAL**

Before: SUPERNAW, *C.J.*; DEER, *V.C.J.*; and CHAUDHURI, HARJO-WARE, ADAMS and LERBLANCE, *JJ.*

Supernaw, *C.J.*, delivered the opinion of a unanimous Court.

Appellant-Defendant (Tyner) seeks interlocutory review of the District Court's denial of Tyner's Motion to Dismiss. Appellee-Plaintiff (Muscogee (Creek) Nation or Nation) seeks recovery of monthly stipends and meeting fees paid to Tyner by the Okmulgee Indian Community (OIC) Executive Board for Tyner's service as Sergeant-at-Arms from May 2009 to April 2010. Because we conclude this appeal does not fall within the parameters of Rule 3.A. of our Rules of Appellate Procedure, we deny interlocutory review of this matter.

The Muscogee (Creek) Nation Attorney General, on behalf of the Nation, filed a petition against Tyner in the District Court on June 7, 2011. The Nation also filed a separate petition against the OIC Chairperson (Gee). Tyner moved to dismiss on July 18, asserting the Nation failed to state a claim and that the two-year statute of limitations to bring such a claim had expired. The Nation did not file a response. At hearing, the District Court held Tyner's Motion to Dismiss in abeyance until the Nation provided authority on why an official Attorney General opinion wasn't issued regarding stipend payments to chartered community officers. The Nation

provided no such authority. After Gee's hearing on September 26, the District Court ordered both Tyner's and Gee's cases consolidated.

On December 29, 2011, the District Court denied Tyner's Motion to Dismiss;[1] however, denial was based solely on an argument not raised by Tyner: sovereign immunity. The District Court failed to address any argument actually asserted by Tyner's Motion. After Tyner filed with this Court an Application for Leave to File Interlocutory Appeal, the District Court issued a determination that interlocutory review was proper for Tyner's arguments that went unaddressed in the District Court's initial cursory denial of Tyner's Motion to Dismiss.[2] Without analysis, the District Court deemed Tyner's unaddressed arguments summarily "overruled and properly a subject for request of an interlocutory appeal."[3]

**ANALYSIS**

The posture of this case prevents us from examining whether the District Court was correct in denying Tyner's Motion. First, we must determine whether the appeal is properly before the Court under Appellate Rule 2.A.[4] or Rule 3.A.[5] Appellate Rule 2.A., the "final order rule," generally requires this Court to view an appeal from a civil action as ripe only after the District Court has issued a final ruling, judgment, or order.[6] Finality has been a statutory requirement for civil appeals since our Nation passed its modern Judicial Code in 1982.[7] The finality requirement protects and structures the relationship between the Supreme Court and District Court and allows each to perform its complementary role. The function of the District

[1] The Order denying Tyner's Motion to Dismiss was issued by Judge Patrick E. Moore, whose term as District Court Judge ended on December 31, 2011.
[2] On January 28, 2012, Gregory H. Bigler was confirmed and sworn-in as the new District Court Judge.
[3] Order 2 (Feb. 7, 2012).
[4] M(C)NCA Title 27, App. 2., Rule 2.A. (2010).
[5] M(C)NCA Title 27, App. 2., Rule 3.A. (2010).
[6] *Wilde v. Kelly, et al.*, 4 Mvs. L. Rep. 157, 158 (1997); *Brown & Williamson v. Muscogee (Creek) Nation,* 4 Mvs. L. Rep. 164, 170 (1998).
[7] NCA 82-30, § 270.B.1. (Sept. 13, 1982).

Court is to find facts and apply general principles of law. By accepting civil appeals prematurely, this Court would both undermine judicial economy, as well as increase the likelihood of unnecessary, piecemeal review of District Court decisions. Although finality under Rule 2.A. is the general rule, even before discretionary interlocutory review became available, we "[didn't] deny the possibility that in certain extreme and drastic circumstances this Court may retain the power to hear certain types of interlocutory appeals which are not expressly stated by the [Muscogee (Creek) Nation] Code."[8]

The Judicial Code was amended in 2001 to allow for interlocutory appeals granted by permission.[9] Under Rule 3.A., interlocutory review prior to a final judgment or order of the District Court "*may* be [available] . . . upon leave granted by the Supreme Court, [and] if the original hearing body determines that interlocutory appeal will (or may): (1) [m]aterially advance the termination of the litigation or clarify further proceedings in the litigation; (2) [p]rotect the petitioner from substantial or irreparable injury; or (3) [c]larify an issue of general importance in the administration of justice."[10] Modern Muscogee (Creek) jurisprudence, however, has generally disfavored interlocutory review[11] unless sufficient exigent circumstances exist.[12]

The exigency requirement developed in response to the District Court's longstanding, seemingly categorical determination that *no* application for leave to file interlocutory appeal met one or more of the criteria identified in Rule 3.A. Since 2001, this Court has held that exigent circumstances could, at times, create an exception to the requirement for a District Court

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[8] *Roberts, Sanders, & Kamp v. Skaggs*, 4 Mvs. L. R. 161, 163 (July 1, 1998).
[9] NCA 01-088, § 1 (May 25, 2001).
[10] Muscogee (Creek) Nation Code Annotated (MCNCA) Title 27, App.2, Rule 3.A. (2010) (emphasis added).
[11] *See* SC 09-02, *Ellis v. Checotah Muscogee Indian Community*; SC 09-03, *Ellis v. Duck Creek, Holdenville, & Okemah Indian Communities*; SC 09-04, *Ellis v. Eufaula Indian Community*; SC 09-05, *Ellis v. Bristow, Checotah, Duck Creek, Eufaula, Holdenville, and Okemah Indian Communities*; SC 09-07, *Thlopthlocco Tribal Town v. Anderson*, and SC 11-11, *Anderson v. Burden.*
[12] *See Bevenue v. Enlow*, 4 Mvs. L. R. 127 (Oct. 13, 1994); SC 07-01, *Thlopthlocco Tribal Town v. Anderson*; and SC 08-01, *Thlopthlocco Tribal Town v. Anderson.*

determination affirming interlocutory merit. We have both granted[13] and denied[14] interlocutory review of District Court denials of motions to dismiss brought by federally-recognized tribal town claims asserting sovereign immunity as an affirmative defense. We have also denied interlocutory review of a District Court grant of preliminary injunctive relief prohibiting chartered communities from interfering with actions of the Nation's executive branch authorized under multiple executive orders related to control of gaming facilities and revenues.[15] Each of these appeals were similar, in that the District Court held that all failed to meet any of the three criteria for interlocutory review identified in Rule 3.A.

The instant appeal presents procedural circumstances opposite those under which interlocutory appeals have typically been filed with this Court. Rather than categorically deny interlocutory determination, the District Court found interlocutory merit without first analyzing whether Tyner's Motion to Dismiss should have been granted.[16] We need not consider whether exigent circumstances are present here because District Court findings of fact and conclusions of law are absent. Exigency may offer an exception to Rule 3.A.'s requirement for District Court determination of interlocutory merit; however, exigency cannot create a pathway for litigants to seek a declaratory judgment cloaked as an interlocutory appeal on matters not yet properly considered by the District Court. Here, granting interlocutory review would require an overly

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[13] SC 07-01, *Thlopthlocco Tribal Town v. Anderson.*

[14] SC 09-07, *Thlopthlocco Tribal Town v. Anderson*, and SC 11-11, *Anderson v. Burden.*

[15] SC 09-02, *Ellis v. Checotah Muscogee Indian Community*; SC 09-03, *Ellis v. Duck Creek, Holdenville, & Okemah Indian Communities*; SC 09-04, *Ellis v. Eufaula Indian Community*; SC 09-05, *Ellis v. Bristow, Checotah, Duck Creek, Eufaula, Holdenville, and Okemah Indian Communities.*

[16] We base our conclusion solely on Mvskoke law. The Court did, however, also consider U.S. procedural rules to potentially inform our reading of Rules 2.A. and 3.A. Although federal appellate courts may, at times, allow for interlocutory review under the "collateral order" exception to 28 U.S.C. § 1291, such an exception is not instructive here. Any potentially collateral issue raised by Tyner was either already addressed by the District Court or too rudimentary to review *de novo* in the absence of District Court analysis. Alternatively, we note that Rule 3.B. incorporates language similar to 28 U.S.C. § 1292(b), which allows federal district courts to certify orders for interlocutory appeal by stating in the order that the matter "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation[.]" § 1292(b) also fails to be instructive here because Tyner's Application for Leave to File Interlocutory Appeal was filed before the District Court's analytically void determination.

broad reading of Rule 3.B. Such a broad reading would affectively encroach on Rule 2.A. and neutralize the procedural protections granted to both courts by the final order rule. Interlocutory review under these circumstances would exceed the parameters of Rule 3.B. Therefore, we decline the invitation to review the substantive arguments presented by Tyner's Motion to Dismiss and unanimously hold that the instant appeal is not properly before this Court.

**IT IS HEREBY ORDERED** that Appellant-Defendant's Application for Leave to File Interlocutory Appeal is unanimously **DENIED**.

**IT IS FURTHER ORDERED** that this matter is **REMANDED** to the District Court and the previously granted stay of proceedings in this matter is **LIFTED**. The District Court is directed to hear and rule on Appellant-Defendant's Motion to Dismiss and, if necessary, hear and rule on the merits of the underlying case.

**DELIVERED AND FILED:** May 22, 2012.

Kathleen R. Supernaw

Kathleen R. Supernaw
Chief Justice

## CERTIFICATE OF MAILING/DELIVERY

I, Connie Dearman, Court Administrator for the Muscogee (Creek) Nation Supreme Court, do hereby certify that on this 22nd day of May, 2012, I faxed and mailed a true and correct copy of the foregoing Supreme Court's **Opinion and Order Denying Interlocutory Appeal** with proper postage prepaid to the following:

Mekko J. Tyner
1026 North Taft
Okmulgee, OK 74447

K. Nicole Aquino
Muscogee (Creek) Nation
Department of Justice
P.O. Box 580
Okmulgee, OK 74447
Fax: (918) 756-2445

A true and correct copy of the foregoing Supreme Court's **Opinion and Order Denying Interlocutory Appeal** was also hand-delivered on this 22nd day of May 2012 to: Donna Beaver, Clerk of the Muscogee (Creek) Nation District Court.

Connie Dearman
Connie Dearman, Court Administrator