

No. SC-CV-42-18

NAVAJO NATION SUPREME COURT

Corporation of the President
of the Church of Jesus Christ
of Latter-Day Saints, a Utah
Corporation; LDS Family Services,
a Utah Corporation,
Petitioners,

v.

Window Rock District Court,
Respondent;

And Concerning;

BN, an individual,
Real Party in Interest.

OPINION

Before JAYNE, J., Chief Justice, SHIRLEY, E., Associate Justice, and PLATERO, W., Associate Justice by Designation.

An original action for writ of prohibition against the Window Rock District Court concerning Cause No. WR-CV-42-16, the Honorable Carol Perry, presiding.

Thomas Lynn Isaacson, Gallup, New Mexico, for the Petitioners; Jordan Hale, Window Rock, Navajo Nation, for Respondent; and David R. Jordan, Gallup, New Mexico for the Real Party in Interest.

Opinion delivered by Jayne, Chief Justice.

This original action seeks to prevent the Window Rock District Court from hearing the matter arising from a children's program. This Court issued an alternative writ pending a hearing and, after the hearing, declined to make this writ permanent.

I

BN, the Real Party in Interest ("RPI"), initiated the action by filing a complaint on May

31, 2016, with the Window Rock District Court. The complaint against the Corporation of the President of the Church of Jesus Christ of Latter-Day Saints, a Utah Corporation; and LDS Family Services, a Utah Corporation (“Petitioners”) alleged eight causes of action: 1) childhood sexual abuse; 2) assault and battery; 3) negligence; 4) negligent supervision/failure to warn; 5) intentional infliction of emotional distress; 6) equitable relief; 7) common law nuisance and request for injunctive relief; and 8) violations of Navajo Common law.

The Petitioners filed a competing action seeking an injunction in the United States District Court for the District of Utah, Central Division. The District Court in Utah declined to issue the injunction citing among other things, the failure of the Petitioners to exhaust tribal remedies and that at this stage in litigation the complaint must be taken as true. Memorandum Decision and Order 2:16-cv-00453-RJS, November 11, 2016.

When the competing action failed, the Petitioners filed a motion to dismiss for lack of jurisdiction under Rule 12(b)(1) of the Navajo Rules of Civil Procedure with the Window Rock District Court. The RPI filed a response. In turn, the Petitioners filed a reply. A hearing on the motion to dismiss was held on April 9, 2018. The Window Rock District Court issued an order denying the Petitioners’ Motion to Dismiss on May 25, 2018.

This Petition for Writ of Prohibition was filed by the Petitioners on September 25, 2018. This Court issued an alternative writ and set a hearing for December 7, 2018.

Counsel for the Petitioners was listed on all pleadings, but a second attorney, not licensed in this jurisdiction, was listed on the petition as “*pro hac vice* forthcoming.” At the hearing, counsel for the Petitioners attempted to have a non-member attorney argue before the Court. There was no filing entering a formal appearance for the Petitioners’ *pro hac vice* attorney. This Court did not recognize the non-admitted attorney to present at the hearing. No oral motion was

made to this Court, and Petitioners' counsel of record presented argument.

II

The threshold issue is whether there is evidence that the district court clearly lacks jurisdiction sufficient to warrant the issuance of a permanent writ of prohibition.

As a secondary issue, this Court clarifies the process by which an attorney licensed in another jurisdiction, but not licensed in the Navajo Nation, may appear *pro hac vice* before a Navajo court.

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III.

A writ is an extraordinary remedy that this Court issues only under rare circumstances. *Yellowhorse, Inc. v. Window Rock District Court*, 5 Nav. R. 85, 86 (Nav. Sup. Ct. 1986). A writ may issue only when a petitioner demonstrates all of the following: 1) the lower court is about act; 2) the action is not authorized by law; 3) the act will result in injury, loss, or damage for which there is no plain, speedy, or adequate remedy at law. *Id.* The Petitioners have burden to establish that "he is entitled to the writ as a matter of right." *Id.*

The first line of inquiry concerns the Court's impending action. In this case—although the Petition is not clear—the action appears to be the Window Rock District Court proceedings and the exercise of jurisdiction over the Petitioners.

The second prong of the analysis requires the Petitioners to show that the Window Rock District Court action is not authorized by law. *Id.* In this case, the Petitioners assert that the lack of subject matter jurisdiction makes the Court proceedings unauthorized, however, the Window Rock District Court proceedings are supported by statute and by case law.

When involving jurisdiction, a writ of prohibition will issue when the lower court clearly has no jurisdiction, and the petitioner has no other remedy available. *Kang v. Chinle Family*

Court, No. SC-CV-37-18, slip op. at 4 (Nav. Sup. Ct. September 21, 2018).

Jurisdiction is a fact specific inquiry. *Manygoats v. Cameron Trading Post*, 8 Nav. R. 3 (Nav. Sup. Ct. 2000). District Courts have responsibility to protect sovereignty of the Navajo Nation, and not surrender authority unnecessarily. *Neptune Leasing Inc. v. Mountain States Petroleum Corp.*, slip op. SC-CV-24-10 (Nav. Sup. Ct. May 13, 2010). The District Court must make factual findings and legal conclusions on subject matter jurisdiction. *Clark v. Allen*, 7 Nav. R. 422 (Nav. Sup. Ct. 1999). In the present case, that there are not sufficient facts to determine that the District Court clearly lacks the jurisdiction to hear and decide this case.

A 12(b)(1) motion challenges the Court's subject matter jurisdiction by attacking the complaint as lacking facts necessary to establish jurisdiction or disputes factual allegations by presenting contradictory evidence. *Dale Nicholson Trust v. Chavez*, 8 Nav. R. 417, 424 (Nav. Sup. Ct. 2004). The complaint is then reviewed by the Court to determine whether the allegations, if taken as true, provide the basis for jurisdiction. This is precisely the same process the United States District Court went through in arriving at the same conclusion we reach here. Based solely on the RPI's complaint, there is reason to believe that at least some of the allegations fall within the Window Rock District Court's subject matter jurisdiction.

The third prong of the analysis appears to fail as well. The Petitioners have failed to articulate an injury that would be suffered if this case proceeds that uniquely effects this case. The Petitioners at oral argument stated that litigation costs are the damage they are likely to suffer, and that they anticipate a lengthy case. This is not the basis for the granting of a writ. Every litigant in any court faces the potential cost of litigation. This is neither a rare nor extraordinary circumstance, and does not warrant the issuance of extraordinary writ. Neither is this a loss for which there is no plain, speedy, or adequate remedy at law. Navajo Courts have

the discretionary power to award costs and fees as justice requires which provides the Petitioners a clear means at law to address this particular hypothetical injury.

Therefore, this Court finds that the Petitioners have failed to meet the burden to have the writ made permanent. Currently, the parties have not conducted discovery. The Petitioners have yet to file an answer. At this point, this Court lacks the facts necessary to make a dispositive assessment and must permit the trial court to proceed on the allegations in the complaint. To issue the writ prior to discovery, and without facts is to surrender sovereignty of the Navajo Nation.

IV

We take this opportunity to clarify the law on *pro hac vice* appearance. The purpose of this discussion is not to reprimand, but rather to clarify this process for future hearings.

The practice of law in the Navajo Nation is controlled by the Navajo Nation Supreme Court. The Supreme Court has delegated some regulatory and administrative matters to the Navajo Nation Bar Association (“NNBA”). The NNBA does not have the authority to regulate proceedings, nor does it have the power to admit attorneys. The NNBA is a professional organization that petitions the Court for admittance of members, it does not have the authority to declare that counsel may appear in court.

The Supreme Court of the Navajo Nation has inherent authority to regulate court processes and conduct of attorneys. *In re Seanez*, 9 Nav. R. 416, 416 (Nav. Sup. Ct. 2010), *Eriacho v. Ramah Dist. Ct.*, 8 Nav. R. 598 (Nav. Sup. Ct. 2004); *Navajo Nation v. MacDonald*, 6 Nav. R. 222 (Nav. Sup. Ct. 1990); *Boos v. Yazzie*, 6 Nav. R. 211 (Nav. Sup. Ct. 1990); *In re Practice of Law by Avalos*, 6 Nav. R. 191 (Nav. Sup. Ct. 1990); *In re Practice of Law in the Courts of the Navajo Nation*, 4 Nav. R. 75 (Nav. Ct. App. 1983); *In re Battles*, 3 Nav. R. 92

(Nav. Ct. App. 1982). Admission to practice law before the Courts of the Navajo Nation is a privilege not a right. *In re Admission of Wilson*, 4 Nav. R. 137 (Nav. Ct. App. 1983); *Boos v. Yazzie*, 6 Nav. R. 211 (Nav. Sup. Ct. 1990) (an individual does not have an absolute right to practice law within Navajo jurisdiction).

The *pro hac vice* appearance requires leave of the court to appear. *See Navajo Nation v. MacDonald*, 6 Nav. R. 222, 224 (Nav. Sup. Ct. 1990). The practice is for a member of the NNBA to sponsor the non-member attorney, advising them of the Navajo law including the rules of the court, and as counsel of record, certifying that their conduct of the case is in compliance with Navajo law. *See. id.*

In making an appearance before the courts of the Navajo Nation, attorneys who are not licensed to practice in this jurisdiction, but who are active members in good standing of the bar of any state, must first comply with the NNBA's conditions for appearance for *pro hac vice* admission. *See* Bylaws of the Navajo Nation Bar Association, Inc. ("Bylaws"), Section II (effective, as amended, May 15, 2015). After all necessary documents have been submitted to the NNBA and conditions met, the Chair of the Admission Committee will promptly issue a certificate of compliance. Bylaws, II(A)4(e).

After receiving the certificate of compliance, the sponsoring member must then seek leave of the court by motion with supporting documentation and obtain permission from the court prior to visiting attorney's appearance. Simply placing the name of the visiting attorney on the pleading with notations that "*pro hac vice* admission forthcoming" is insufficient to seek leave of the court to appear in this jurisdiction.

In the present case, the non-admitted attorney was not recognized by the Court because he was not associated with counsel of record in the underlying case and he did not motion this Court

prior to the hearing for *pro hac vice* appearance. Although he was associated with an admitted attorney, counsel of record failed to motion the Court prior to the hearing, and failed to provide the court with the requisite documentation. Associated counsel is responsible for ensuring that the *pro hac vice* attorney is familiar with the Navajo laws and court rules. At minimum, this requires knowledge of the procedures by which counsel appears for the first time in a Navajo Court. Inattention to rules or the inability to follow the rules is an inauspicious start to appearances before the Navajo Courts.

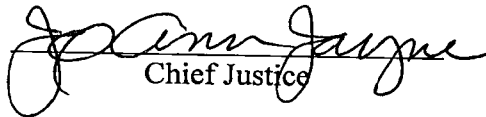
Every court has the inherent ability to control the proceedings before it. A practitioner that is not otherwise the counsel of record in an action, particularly those not otherwise authorized to practice law in this jurisdiction, must obtain permission from the court by motion to be able to appear. The motion must be supported with the appropriate documentation, particularly the certificate of compliance. To date, this Court has not received any such motion from the counsel of record for the Petitioners.

V

For the forgoing reasons, we decline to make this writ permanent. The Petitioners failed to satisfy the burden to make this writ permanent. A writ may issue where the District Court clearly lacks jurisdiction over all of the causes of action. In the present case, the Petitioners failed to carry the burden to show that the Court clearly lacks jurisdiction.

At this time, the Court lacks the facts necessary to support the Petitioners' application for writ. Therefore, we vacate the alternative writ, and deny the issuance of a permanent writ.

Dated this 28th day of December, 2018.


Chief Justice

Elmer S. [Signature]

Associate Justice

[Signature]

Associate Justice