

DOCKET NO.: X07 HHD-CV-16-6072009-S : SUPERIOR COURT  
 SCHAGHTICOKE TRIBAL NATION :  
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 : JUDICIAL DISTRICT OF  
 v. : HARTFORD  
 :  
 STATE OF CONNECTICUT : SEPTEMBER 19, 2017

## Memorandum of Decision Denying Motion to Dismiss For Lack of Standing

This lawsuit has been brought in the name of the Schaghticoke Tribal Nation. The lawsuit is against the state for breaching various duties imposed by statute, constitution and common law.

The state says the Schaghticoke Tribal Nation doesn't have the right to sue for claims belonging to the Schaghticoke tribe the state recognized under General Statutes §47-59a (b). According to the state, there is a leadership dispute within the Schaghticoke tribe. It says the courts have noted the dispute in at least three cases:

- By the Supreme Court in 2003 in *Schaghticoke Tribal Nation v. Harrison* when it noted the defendant saying that the tribe "is divided into two factions."<sup>1</sup>

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<sup>1</sup> 264 Conn. 829, 831 (2003).

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- By the Supreme Court in 2003 in *State v. Velky* when it noted “the tribe currently has two rival factions.”<sup>2</sup>
- By the Appellate Court in 2012 in *Schaghticoke Tribal Nation v. Rost* as “ongoing and hotly contested.”<sup>3</sup>

The state particularly relies on *Schaghticoke Tribal Nation v. Rost* where the plaintiff was joined by its alleged rival the Schaghticoke Indian Tribe. The Appellate Court said “the plaintiffs who initiated this action before the Superior Court collectively represent the Schaghticoke Indians.”<sup>4</sup> The state says that, when the Appellate Court held that the two alleged factions “collectively represent” the Schaghticoke Indians, that by logical implication it held that the Schaghticoke Tribal Nation cannot represent the Schaghticoke Indians on its own.

But that implication is wrong. It is like concluding that the court has picked a winner in this lawsuit because it can safely say that the winner was in court when this motion was argued. Since one of the two sides has to win, it’s undoubtedly true, but it means nothing about the status of either of the parties. All that the court’s conclusion meant in *Rost* was that the Appellate Court didn’t have to decide what either group could do on its own. With the only two factions in front of it, it was safe to conclude that the two of them were bound collectively

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<sup>2</sup> 263 Conn. 602, 606 (2003).

<sup>3</sup> 138 Conn. App. 204, 217.

<sup>4</sup> *Id.* at 213.

to include a legitimate representative. It was a way of avoiding the question, not a way of saying the Schaghticoke Tribal Nation was an illegitimate individual representative.

In any case, the state doesn't claim the Schaghticoke Tribal Nation isn't a group of Schaghticoke Indians. Indeed, it relies on the cases that call this group a faction of Schaghticoke Indians. It doesn't contest that Richard Velky, the man the Schaghticoke Tribal Nation calls its chief, has been allowed to sit on the state board of Indian affairs as the Schaghticoke representative. So why can't this court like the *Rost* court carefully avoid opining on any claim of dispute by concluding that — tribe or not — the Schaghticoke Tribal Nation is at least an association of Schaghticoke Indians who have a right to bring this suit?

As the Supreme Court held in 2014 in *Kortner v. Martise*, a party has a right to sue so long as it has “in an individual or representative capacity, some real interest in the cause of action . . . .”<sup>5</sup> That is to say it must have: “a colorable claim of direct injury . . . in an individual or representative capacity.”<sup>6</sup>

A party like the Schaghticoke Tribal Nation can bring suit in a representative capacity, so long as it meets the rules that determine whether an association may sue. In 1986 in *Connecticut Assn. of Health Care Facilities, Inc.*

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<sup>5</sup> 312 Conn. 1, 10.

<sup>6</sup> *Id.*

*v. Worrell*, the Court held that an organization or association can have standing to sue on behalf of its members if it meets three tests:

- (a) its members would otherwise have standing to sue in their own right;
- (b) the interests it seeks to protect are germane to the organization's purpose; and
- (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.<sup>7</sup>

From the face of the pleadings and the parties' submissions, the court finds this test satisfied. While the state says the rights of Schaghticoke Indians are solely tribal and never individual, the General Statutes say otherwise. This suit is about the benefits Schaghticoke lost when reservation lands held in trust were allegedly sold off by the state in breach of its duties.

At the heart of those alleged losses is the right of individual Schaghticoke to ask for direct financial aid from the commissioner of the department of energy and environmental protection. The complaint is aimed at the loss of the land and the money the plaintiff says the state should be holding in trust. If it were holding the land in trust, General Statutes § 47-65 (c) says that an individual Schaghticoke living there "without sufficient means to support himself" may be granted "an amount necessary to maintain a standard of living in the home compatible with the well-being of the resident." If it were holding the funds

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<sup>7</sup> 199 Conn. 609, 616.

allegedly missing, General Statutes § 47-66 says those funds might be spent to provide homes and incomes as needed for tribe members.

If the plaintiff is correct that the state wrongly took the Schaghticoke's land and its right to enjoy residences and ask for direct money payments, then these individual Schaghticoke have suffered direct harm. Having wrongly lost—at least allegedly—the right to direct money payments, individual members of the Schaghticoke Tribal Nation would have rights far different from those like the purely derivative rights of corporate stockholders in cases like the Appellate Court's 1992 decision in *Delio v. Earth Garden Florist, Inc.*<sup>8</sup> Thus, individual members of the Schaghticoke Tribal Nation have standing to sue in their own right.

While the state may contest the individual right of a Schaghticoke to sue, it could hardly say this lawsuit doesn't seek to advance interests germane to the organization's purpose. The court may infer that gaining for its members the benefit of millions of dollars of state money would advance the organization's purpose no matter what it was. Knowing that this group represents a number of

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<sup>8</sup> 28 Conn. App. 73, 78-79.

Schaghticoke Indians makes it even simpler because forcing the state to set aside millions for their benefit would undoubtedly advance their interests.

Neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. The claim would restore a trust to benefit tribe members. The money would be held by the state for the tribe members' benefit. The tribe members wouldn't have to do anything to carry out the remedy. They would just have money in a trust where there isn't one now.

The state suggests it would challenge the Schaghticoke Tribal Nation's status on the grounds that it hasn't proved its members are real members — members having an adequate say in the organization. But the court has before it evidence that the man who calls himself the chief of the tribe is a member of the group calling itself the Schaghticoke Tribal Nation and was elected by its members to serve as its undisputed leader. It also has before it that the council of the Schaghticoke Tribal Nation voted to bring this lawsuit. Indeed, there is no evidence of any dispute among members of the Schaghticoke Tribal Nation. The dispute is alleged to be between the Schaghticoke Tribal Nation and the organization calling itself the Schaghticoke Indian Tribe. Any claim that individual members of the Schaghticoke Tribal Nation aren't real members in the voting and serving sense is contradicted by the evidence in front of the court.

The Schaghticoke Tribal Nation has associational standing to bring this lawsuit.

That means something. But this is not the end. This is not the beginning of the end. Nor is it even the end of the beginning. To be clear, this decision doesn't say the Schaghticoke Tribal Nation is the lawful representative of the Schaghticoke tribe. It says the Schaghticoke Tribal Nation is a group composed of Schaghticoke Indians who could have brought this lawsuit on their own but chose to do it as a group. Nothing here prevents the state from saying the other group purporting to represent the Schaghticoke tribe (which in fact has moved to intervene) or even the tribe members themselves are necessary parties to fairly resolving this litigation. Nothing here sheds any light whatsoever on the many other weighty questions of the case, including whether the state ever wronged the Schaghticoke and whether it is too late to do anything about any wrongs the state might have committed. It also doesn't decide the state's claim that it may not be sued without its permission and hasn't given it— its claim of sovereign immunity.

In the meantime, while it isn't necessary to support this ruling, the plaintiff may amend its complaint to include additional facts to support a claim of associational standing. It need not remove its claims to speak for the recognized

tribe, but if it adds alternative allegations in sync with the parties' submissions it will clean up the record and remove any doubt about the state of the pleadings.

The motion to dismiss for lack of standing is denied.

BY THE COURT

A handwritten signature in black ink, appearing to read 'J. Moukawsher', written over a horizontal line.

Moukawsher, J.